

# **NATIONAL CONSULTATION ON MEDIA LAWS**

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**LAW COMMISSION OF INDIA**

**&**

**NATIONAL LAW UNIVERSITY, DELHI**

## **OVERVIEW OF RESPONSES**

## **INTRODUCTION**

This document is intended to offer readers a brief overview of the suggestions that the Law Commission of India has received in response to its Consultation Paper on Media Laws. It attempts to capture the different, often contradictory perspectives that were offered by different respondents. No part of this document is intended to reflect the Law Commissions' own views on the subject.

The Law Commission is grateful to all the respondents who have been forthcoming with their inputs. Every possible effort has been made to account for and accommodate responses, including those received after the lapse of notified deadlines.

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# METHODS OF REGULATION

## *Regulatory Approaches*

Responses were divided into suggestions advocating for self-regulation, co-regulation, meta-regulation and state-led regulation for the media. The reasoning offered to support each of these approaches is summarized below.

### 1. State –Led Regulation

Many responses opposed all state intervention in media regulation for a range of reasons including the fact that it would compromise the independence of the media and affect its watchdog function, and that decisions about media content should be made by the judiciary because it implicates the right to freedom of expression as well as other constitutional rights.

However, some proposals saw statutory regulation as a more effective alternative than self-regulation for the media. Even among these, one respondent suggested imposing a positive legal duty on the government to protect the freedom of the press.

The following benefits of state-led regulation were detailed by respondents:

- Statutory regulation would hold media entities publicly accountable.
- Legislation to control media in public interest would have popular mandate.
- An effective government regulator would increase the level of compliance in the media.
- While no specific regulation is needed for the print media beyond the general prohibitions against defamation and invasion of privacy, the broadcast media requires additional regulation.

Recommendations relating to statutory regulation included the following:

- Replacing the News Broadcasting Authority (NBA) with a statutory body along the lines of the UK's Ofcom.
- Establishing a regulatory body on the lines of the Telecom Regulatory Authority of India (TRAI) to deal specifically with broadcast media. It must provide a basic set of guidelines based on which a content code can be developed by media entities for self-regulation.

- Establishing a regulator operating in a manner similar to the Advertising Standards Council of India (ASCI).
- Establishing a broadcasting regulator that serves as the single point of contact for uplinking and downlinking licenses having objective rules for allocation of the licenses, provided that all content regulation is left to self-regulation.
- Limiting state-led regulation to structural issues such as media ownership, advertising and other economic or architectural issues. No additional regulations would be necessary as a number of laws already regulate content, and accord the courts with the function of administering them.

Some respondents considered the specific design of the regulator. The following principles emerged on the point of the regulator's composition:

- There must be adequate representation for persons having special knowledge of and professional experience in, the fields of television, radio, cinema, advertising, fine arts, journalism and the law. In addition, competence in literature, social sciences, finance, commerce, auditing and accountancy could also be relevant.
- Smaller media houses as well as regional media should be adequately represented.
- The body must not be dominated by commercial interests.
- Measures must be put in place to ensure independence from the government interference.

## 2. Self-Regulation

- The fundamental need for self-regulation of the media is for the media to be accountable only to the public. Both statutory and co-regulation cannot guarantee this need. The media's watchdog function to hold the government accountable would be hampered by government regulation, which would affect the independence of the media.
- Ensuring government non-interference can help preserve editorial freedom and media credibility.
- Government regulations may be rigid and may discourage innovation. They may also discourage new competition since they establish norms that address only current market participants.

- Self-regulatory regimes are more efficient and more flexible than top-down regulation. They increase incentives for compliance and regulate costs for the media. Media entities already use their terms of service and other methods to embed community standards in their operation.
- Self-regulation would involve standards which are set by a body readily equipped with a clear understanding of the media environment and its concerns. These standards would have been evolved through consensus rather than governmental imposition.
- Self-regulatory institutions such as the BCCC and the NBSA have proven capable of effective enforcement of their standards.
- Self-regulatory institutions are more approachable than governmental institutions. They are capable of delivering a transparent and consistent regulator which will be able to promote both accountability and investment, and create jobs in the sector.
- Self-regulation entails a system of peer review, which can serve as an effective check on the industry's operation as a whole.

### *Manner of Strengthening Self-Regulatory Mechanisms*

Respondents identified a number of considerations that would factor into strengthening media self-regulation. These include:

- Adopting a Code of Conduct on the basis of Articles 19(1)(a) and 21, providing for effective complaint redressal, enforcement and provisions for appeal to courts, applicable across all media forums.
- Ensuring a decentralized and non-bureaucratic regulatory framework.
- Expanding the coverage of self-regulatory institutions. Some argued for full industry coverage. It was pointed out for example, that the NBA has a membership of approximately 28 entities out of roughly 365 news channels in India. Compulsory enrollment with self-regulatory bodies was advocated in this regard, failing which the self-regulator should be accorded government recognition to make industry-wide decisions
- Empowering self-regulatory bodies such as the Broadcasting Content Complaints Council (BCCC) to act *suo motu*.

- Ensuring effective enforcement of decisions taken by self-regulatory authorities. This could take the form of severe penalties where necessary, such as higher fines and revocation of licenses.
- A complete overhaul of the PCI in terms of its mandate and coverage, composition, powers (including those required for effective enforcement) and jurisdiction.
- Improving awareness about present methods of regulation, so that audiences and citizens are able to exercise their rights.
- Acknowledging the corporatized, competitive nature of the media market and ensuring that working journalists' interests are accounted for in self-regulation rationales.
- Encouraging feedback from audiences.

### 3. Meta-Regulation

One respondent used the language of “meta-regulation” to describe a regulatory approach that could adjust the self-regulatory model to account for citizens’ interests. The approach would involve creating a body that would have oversight of sectoral regulators such as the BCCC and the NBSA. They envisioned an independent body covering all media entities, registered and licensed, with powers that include the following:

- The power to draft broadly applicable guidelines.
- The power to sit in appeal over decisions from self-regulatory bodies.
- The power to levy penalties.

### 4. Co-Regulation

Some respondents saw the need for a regulatory framework that supplements the self-regulator’s guidelines with governmental support. This would take the form of making registration with a self-regulatory organization mandatory or strengthening enforcement mechanisms, for example, while leaving substantive regulation, such as standard-setting and administration, to the self-regulator.

More specific suggestions included the proposal to amend the Cable TV Act so that from time to time the new self-regulatory guidelines could be codified into law.

### *Need for Medium Specific Regulation*

Many respondents argued in favour of medium specific, rather than universal, regulators. The reasons supplied included the following:

- The fact that the considerations involved in the regulation of each medium would differ. For example, media are accessible to different degrees and are intended for different purposes, so while broadcasting is intended for mass public consumption, communications on social media can be intended as private.
- The need for decentralization in media regulation. One respondent identified a need for decentralization specifically within the Ministry of Information and Broadcasting, such that each of its wings operates in a decentralized fashion and is made subject to a composite reporting and review authority in the Ministry.
- The degree of regulation must be subject to a given medium's reach. Content broadcast on free to air television, which has the widest reach, should have the most conservative constraints. Media with lesser reach and greater level of control of access does not justify a similar degree of external intervention.

Some respondents favoured a universal regulator. Other respondents, including the Press Council of India (PCI), in particular, favoured the creation of a Media Council for this purpose. Proposals were made for the body to take the form of a constitutional authority empowered to regulate the print, electronic and digital media and to make and enforce decisions, subject to review by the Supreme Court alone.



## PAID NEWS

### *Need for & Form of Regulation*

On the question of whether to include paid news as an offence under the Representation of People Act, 1951 ('RoPA'), all respondents but four out of fifteen agreed that it should be made an offence.

Opinions varied on the type of offence, with a majority favouring an electoral offence under RoPA, while a few respondents argued for a general offence. One response argued for two channels of prosecution for paid news to be made available: the first as a corrupt practice under Section 123 of RoPA and the second as an electoral offence under Chapter IXA of the Indian Penal Code in order to allow longer timelines for investigation and more effective penalties.

One respondent argued that by including it under the ROPA, it would penalize candidates alone, while not placing media companies indulging in paid news to great disadvantage. Furthermore, an election petition under the Representation of the People Act, 1951 would be available only to challenge an election. In other words, only the winning candidates could see consequences. If those who lost elections also paid for news coverage, the Election Commission would not be able to address their practices.

One respondent was not in favour of making it a criminal offence, as this would raise the standard of proof, which may prove counter-productive to weeding out the practice.

Of those arguing for a RoPA offence, one recommendation was for the addition of a separate section for paid news covering contesting candidates and media houses under Part VII, Section III of RoPA.

There were several suggestions offered about how the offence might be defined. These include:

- "Paid news" shall mean and include news (whether political news, business news, sports news, entertainment news or news relating to any other field) reported or omitted to be reported (whether by way of news bulletins, current affairs programmes or any other programmes by whatever name called), in consideration of, or as quid pro quo for any financial benefit or reward whatsoever.

- Paid news shall mean “any news of analysis in the form of reports, photographs, interviews, and dedicated columns appearing in any media for a price in cash or kind as consideration without any disclosure that it has been paid for.”
- “Any communication appearing in any form of media regarding a political party or an individual for consideration, monetary or non-monetary, either directly or indirectly.”
- Extension of the definition to non-financial benefits given for paid news, and to pamphlets and posters as well as advertisements and paid news features within official recognized news and media in relation to elections.

### *Enforcement*

There was also a range of recommendations regarding the enforcement mechanisms that should be put in place to monitor and restrict the proliferation of paid news. These are captured below:

- Media houses should disclose who paid for favourable coverage and how much. The disclosure should also be of revenues, linkages with other industries and corporate, and shareholding in other media.
- Political advertising must be banned completely.
- Free political advertising should be made available to candidates on a transparent and equal footing.
- Paid news should be treated as a head of candidates’ expenditure and it should be made compulsory for candidates to disclose the amount they spent.
- Such practices should be immediately proscribed through orders of the PCI or through statutory regulations.
- The Media Monitoring and Certification Committee’s (MCMC) certification requirements should be extended to advertisements and paid news features in order to legitimize the role of MCMC within the framework of the law. Where the show cause proceedings do not prove satisfactory to the MCMC, it should be able to file a police complaint so that criminal proceedings may be instituted. In general, the MCMC’s powers should be expanded.
- The Election Commission should appoint media monitoring agents who can lodge public complaints against candidates, or should in the alternate, use

existing institutions, such as the Central Vigilance Commission for monitoring and investigating instances of paid news.

- The Directorate of Advertising and Visual Publicity can act as a regulating body for Government news channels.
- An enforceable code of ethics and a conscience clause should be adopted.
- In order to strengthen the existing framework, and restrict the proliferation of this malaise the NBA guidelines on paid news, which deal not only with paid news in relation to election affairs but also in relation to business news, must be adopted and treated as the model guidelines for this purpose.
- A self-regulatory mechanism might be implemented, but the same would have to be supported by a statutory authority or regulatory, at least in the initial stages of its implementation. It was suggested that the Press Council of India Act should be amended to make its recommendations binding, and to bring electronic media under its purview. Such a regulator should be empowered to take *sue moto* cognizance, in addition to the complaints relating to paid news, and should be empowered to penalize and enforce the decisions.
- Conferences, workshops, seminars and awareness-generating campaigns should be organized involving, among others, the Ministry of Information & Broadcasting, the Press Council of India, the Election Commission of India, representatives of editors, journalists associations and unions and political parties to deliberate on the issue and arrive at workable solutions to curb corruption in the media in general and the paid news phenomenon in particular.
- Academic bodies, independent research agencies, and civil society groups should be encouraged to monitor media contents and articulate their views from time to time.
- The media should be brought under the Right to Information Act so that some accountability comes into media operations and managements.

## OPINION POLLS

Two respondents felt that a section on opinion polls analogous to Section 126A of the Representation of People Act, 1951, which bans exit polls, is not necessary. However several other respondents took a different view.

The following reasons were offered for seeking regulations on opinion polls:

- Many respondents, including the PCI in its 1996 opinion on polls, pointed out that allowing such polls to continue unregulated allows media companies to be exploited by interested individuals who wish to mislead and influence voters.
- One respondent pointed out that polls are prone to inaccuracies at various levels, including question choice and wording, sample size and choice, survey timings, etc.

On the question of whether such regulations would be constitutionally valid, the responses were as follows:

- Some said that regulation of opinion polls would be constitutional, as they would be reasonable restrictions on the freedom of speech and expression. One respondent, for example, stated that since they had not recommended a complete ban, only the imposition of regulations would be constitutional.
- Other respondents stated that any ban on opinion polls would not be constitutional.
- One respondent said that banning opinion polls from the date of notification to the end of the election would not be reasonable, and that the possibility of affecting the voting decision of other individuals is not a sufficient basis for restricting one's right to publish the results of such polls or conducting them.

All but one respondent believed that regulation was required for opinion polls. The range of regulations that they recommended are given below:

- Some respondents directly addressed the amount of time they would or would not ban opinion polls for. For example, one respondent recommended that publication should be prohibited from the date of notification of elections until the end of elections. Another has said that they should be allowed until 48 hours before the election.
- The Press Council of India has referred the Law Commission to its guidelines on opinion polls drawn up in 1996 which recommends that media houses

should take care to preface any opinion poll with information on the institutions which have carried such surveys, the individuals and organizations which have commissioned the surveys, the size and nature of the sample selected, the method of selection for the findings and the possible margin error in the findings.

- There should also be disclosure on the linkages between these agencies conducting the polls and the media houses or other individuals.
- Opinion polls should be conducted as scientifically as possible. The person conducting them must be trained and if any funding has been given to a broadcaster by any organization for conducting this poll, a full disclosure to that effect must be made.
- Broadcasting of previously conducted opinion polls during the election should be prohibited.
- There should be an independent authority to investigate opinion polls, such as the PCI. In case of dispute, the organization should be required to open the raw data file for examination.
- Sanctions should be placed on those violate these rules.
- Where there are concerns about the neutrality of the polls, polling should be undertaken by academic organizations or by verifiably neutral third parties.

## CROSS MEDIA OWNERSHIP

### *Need for Controls*

Respondents who addressed this question were overwhelmingly in favour of regulations governing cross ownership. The following justifications were offered:

- Plurality in media due to diverse ownership is an essential component of the right to freedom of speech and expression under Article 19(1)(a), as recognised by the Supreme Court in *Secretary, Ministry of I&B v. Cricket Association of Bengal*<sup>1</sup>.
- The Court also noted that it is the obligation of the State under Art. 19(1)(a) to ensure that the media is not monopolized.
- An unregulated media presents the danger of an oligopolized market, in which a small number of large media houses are able to drown out other voices and leave behind a cacophony of similar voices.
- The provisions of the Competition Act, 2002 are inadequate to deal with the issue of cross media ownership.
- Intervention is necessary to address the problem of corporate entities becoming increasingly able to leverage media entities to direct public opinion and influence policymaking.

However, corporate media houses responding to the issue largely disagreed, and were of the opinion that cross ownership restrictions were not warranted. Their reasons included the following:

- Indian media markets are already competitive and posed no dangers with regards to market dominance by any single player.
- There is already a large volume of entities operating in media markets.
- Ensuring plurality and diversity of content is a function that should be left to the public broadcaster.

### *Areas and issues to note while regulating cross-ownership*

- The potential for conflicts in jurisdiction among the concerned regulators (CCI, SEBI, TRAI and so on) would need to be curbed.
- Restrictions must limit:

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<sup>1</sup> 1995 SC (2) 161.

- The extent of shareholding of one person / entity across media entities.
- The number of media entities owned in a geographical market by the same person / entity.
- The number of media entities owned on the basis of turnover of a person or company.
- Restrictions must cover vertical as well as horizontal integration.
- The Competition Act could be suitably amended, and the CCI could be made the appropriate authority. Amendments treating the media industry separately under the Act were recommended. These included the following:
  - The concept of “relevant market” specifically for media entities needs to be defined in a way that it covers anti-competitive practices in “relevant geographical markets” across different media.
  - The concept of collective abuse of dominance by a group of entities needs to be read into Section 4(2) of the Competition Act, 2002. The use of the word “group” therein can be clarified to extend its scope to any conglomerate of entities, with or without a legal relationship between them.
- The TRAI position of August 2014 on the application of competition law to media ownership was either endorsed or echoed by some respondents who offered specific suggestions. The key recommendations were as follows:
  - Television and print should be considered as the relevant segments in the product market. Print should be understood to be composed of daily newspapers, including business and financial newspapers. Once private radio channels are allowed to air news generated on their own and become significant in the relevant market, a review of cross-media ownership rules should be undertaken.
  - The relevant geographic market should be defined in terms of the language and the State(s) in which that language is commonly spoken.
  - A combination of reach and volume of consumption metrics should be used for computing market shares for the television segment. For the print segment, using only the reach metric is sufficient.

- For calculating market shares, in the relevant market for the television segment, the gross rating point (GRP) of a channel should be compared with the sum of the GRP rating of all the channels in the relevant market and the market share of an entity would be the sum of the market shares of all the channels controlled by it.
  - The cross-media ownership rules must be reviewed three years after the announcement of the rules by the licensor and once every three years thereafter. The existing entities in the media sector which are in breach of the rules should be given a maximum period of one year to comply with the rules.
  - Restrictions must be geared towards upholding public interest in the terms that TRAI has proposed.
- There is a need for restrictions on the total number of licenses held by a single entity across different spectrum.
  - Good governance practices need to be built into media functioning so that it remains transparent and consultative (of all stakeholder groups), and is able respond easily to any impediments to its effective functioning.

### *Need for Norms Governing Mergers & Acquisitions*

Respondents argued largely in favour of specific guidelines on the subject, pointing out that the existing framework under the Competition Act is inadequate.

Specific suggestions include:

- Employing a diversity test in assessing a given merger or acquisition.
- Employing a public interest test to be conducted by TRAI.
- Formulating guidelines in consultation with the Press Council of India.
- Tasking the Competition Commission with merger and acquisition control of media entities.
- The following types of restrictions must be considered:



- Restrictions based on combined dominance/ turnover.
- Restrictions based on total number of entities.

Some respondents, including some large media houses responding to this issue, did not see any need for further norms on the grounds that existing norms were adequate.

### *Disclosures*

Some respondents including large media houses saw no need for regulations mandating disclosure. They saw the existing framework under the Competition Act as adequate.

However, most respondents agreed that disclosure norms were necessary. Their reasons included the following:

- Disclosure norms are made necessary because the media industry's business activities directly affect the fundamental right of freedom of speech and expression.
- Consumers should be able to identify the affiliations of the media groups.
- With the introduction of the Companies Act, 2013, disclosure norms for private companies have been vastly enhanced. Data on media companies is often too unreliable, limited and disparate for effective implementation of regulations against media concentration. Thus, to bring the national policy on media law in line with what is statutorily required, disclosure norms need to be made mandatory.

Suggestions as to the areas in which disclosures are necessary include the following:

- Viewership/Readership details
- Subscription and Advertisement Revenues
- Market share
- Equity structure
- Shareholding pattern
- Foreign direct investment pattern
- Interests in other entities/companies engaged in the media sector
- Interests of entities/companies having shareholding beyond a specified threshold in the entity under consideration, in other media entities

- Shareholders Agreements
- Details concerning key executives and the Board of Directors

*Restrictions on Entry into the Broadcasting Sector*

Respondents generally agreed on the need for restrictions on entry into broadcasting. A range of justifications for this position were provided:

- *Secretary, Ministry of I&B v. Cricket Association of Bengal* made clear that a lack of restrictions on who can enter into broadcasting can lead to the creation of oligarchies, which would detrimentally affect Article 19(1)(a) by placing the power to inform public debate and shape public opinion in the hands of a select few.
- The lack of restrictions on entry into broadcasting could potentially lead to powerful media empires becoming able to control or direct state activities by leveraging their sway over public opinion.
- Provisions restricting certain entities from entering into the broadcasting activities are important to ensure freedom and independence of the press.

Respondents generally agreed that the following entities, most of which were first identified by TRAI, should be disqualified from entering broadcasting services:

- Political bodies or persons engaged in activities having wholly political objects
- Religious bodies.
- Urban and local bodies.
- Panchayat Raj bodies.
- Publically funded bodies.
- Central/ State government departments, their joint ventures, private sector and entities funded by these governments.
- Advertising and Public Relations agencies.

One respondent argued that broadcasting activities funded by NGOs need to be examined closely.

## MEDIA AND INDIVIDUAL PRIVACY

### *Need for amendment*

There were some respondents who took the view that amendment of the existing framework to include specific guidelines governing disclosure of private information by the press is **not necessary**. Their reasons for taking this position are:

- Existing law and norms such as the Contempt of Courts Act, court reporting guidelines arising from judicial decisions on reporting, and the Press Council of India's guidelines are sufficient. The Press Council of India, in its response, also pointed out that its own guidelines were adequate to address this issue.
- The international trend is towards self-regulation.
- Administrative difficulties of setting up a statutory body.
- Specific guidelines governing disclosure of private information by the press would deter those who conduct *bona fide* sting operations.

However, several other respondents were of the opinion that it is **necessary to amend** the existing framework of laws to include specific guidelines governing disclosure of private information by the press. Their reasons for pressing for amendment were:

- The competing fundamental rights to privacy and free speech have to be balanced in the context of publication of personal information. Law must offer citizens a way to assert their right of privacy.
- Markers to a person's identity or private information should not be published without express consent.
- The media routinely violates the privacy of accused parties, and of vulnerable groups like sex workers without consent.
- Specific guidelines are needed address the nature and extent of permissible disclosure of private information by the media.

## *Inputs for Amendment and Enforcement of Privacy Law*

Of those who underlined the need for amendment, many offered suggestions about what form such amendment might take.

Suggestions for the nature of change required included:

- Approval and implementation of the long-pending Right to Privacy Bill.
- A separate privacy statute with guidelines which lays down norms for press disclosure of private information, whilst addressing exceptions like information that may be in public interest.
- Mechanisms to deter media intrusion in private space, and subsequent publication of private information.
- A process through which individuals can seek redressal against the media accountable when their privacy is violated.
- Accountability measures that hold journalists personally responsible for intrusions into individuals' privacy, and for inaccurate reporting.
- Creation of public awareness of existing law that may be used when citizens' privacy is violated.
- Ensuring that subsequent remedies and not prior restraint of speech are used in cases of violation of privacy.
- Permitting disclosures where there is a clear and overriding public interest such as for people holding public office
- Exceptions for public figures and in public interest, where disclosure of otherwise private information is permitted. For example information about people holding public office or other positions of power and those closely affiliated to them, or otherwise privately held information which is of public significance.

## *Regulating False Sting Operations*

Several stakeholders argued that amending the law to regulate of sting operations is **unnecessary**. Their reasons were:

- No special law for false sting operations is needed, since the civil and criminal law for defamation and malicious prosecution already offers remedies to anyone affected by a false string operations.
- It is the prerogative of the judiciary, not a statutory body, to determine whether particular cases of sting operations are false, since this question affects fundamental rights.
- The Press Council of India stated that its own detailed norms on Investigative Reporting are sufficient to address this issue.
- A special statutory body to regulate or adjudicate false sting operations would only act as a deterrent of genuine sting operations.
- Prevailing self-regulatory mechanisms contain sufficient remedies to address this issue.
- Media audiences can easily discern whether a sting operation is genuine.

Those who felt it **necessary to amend the law** to regulate sting operations offered the following reasons:

- Strict measures are needed to disincentivise false sting operations and offer remedies for the resulting injury to privacy and reputation.
- Manipulated sting operations, especially those targeting marginalized sections of society may need special attention. Groups like sex workers, transgender and MSM communities are targeted for sensational news stories and suffer heinous forms of invasion of privacy.

Specific suggestions for legal reform to regulate sting operations included:

- Ensuring that these issues are brought within the purview of the Press Council of India, and that its rulings are made enforceable with criminalisation where necessary.
- A statutory regulator can adjudicate cases to ascertain whether they are false sting operations, amounting to professional misconduct. Some respondents have suggested that this body could address all aspects of media regulation, and not just sting operations.
- Public awareness strategies should be used to make it clear when the violation of a woman's privacy amounts to the criminal offence of voyeurism.

- Regulation of sting operations should extend its scope beyond traditional investigative journalism practices, and should cover breaches of individual privacy and personal data by other means and technologies.
- Payment of damages to victims of false sting operations should be provided for.

### *Regulating Reporting of Sub-Judice Matters*

One set of stakeholders argued that the prevailing law is sufficient to check the reporting of *sub judice* matter. Their reasons were:

- The Supreme Court chose not to create media reporting guidelines in *Sahara India Real Estate Corporation v. SEBI*<sup>2</sup> because it felt that the decision to restrict of reportage on particular cases should be made on a case-by-case basis, depending on the facts and circumstances of each case.
- The Press Council of India was of the opinion that its guidelines on such reporting are sufficient. Others also argued that the PCI guidelines, in combination with the Contempt of Courts Act and judicial decisions are adequate.
- Self-regulation is sufficient, and the media should be encouraged to develop its own guidelines.

Another set of stakeholders were of the opinion that it is necessary to amend the law to regulate reporting of *sub-judice* matters. They suggested that the amendment should be of the following nature:

- The norms should ensure that the media reports an objective sequence of the events or incidents implicated in cases decided by the judiciary, and should prohibit character-related speculation about parties to the case.
- All constitutionally tenable media restriction in this context should extended to the social media and digital media.

**[Detailed suggestions on this subject are listed in the section on ‘Trial by Media’]**

### *Changing the Definition of Identifiable Public Interest*

Some stakeholders felt that the definition of “identifiable larger public interest”, in its inclusive form, was adequate.

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<sup>2</sup> (2012) 10 SCC 603.

Others were of the view that the definition is not comprehensive and it requires change.

The changes recommended were as follows:

- The word “exceptional” should be added to the current definition of “identifiable larger public interest” under the Cable TV Networks (Regulation) Act, 1995.
- The current definition of “identifiable larger public” should be expanded to include privacy norms and should detail when privacy will override public interest.
- Boundaries must be defined for identifiable larger public interest.
- The phrase “disreputable behaviour” should be removed from the definition.

## TRIAL BY MEDIA

Several respondents argued that there must be no regulation to restrict the media from reporting on court proceedings. The reasons offered included:

- Any such restriction would be at odds with the spirit of Article 19(1)(a) of the Indian Constitution.
- Judicial proceedings should be reported freely. Another respondent added a dimension to this: the public's right to know should not be impeded for the great length of time that it takes for a case to be decided in India.
- Self-regulation is the best mechanism to regulate the media, given Article 19(1)(a) of the Indian Constitution.
- The 200<sup>th</sup> Law Commission Report and the *Sahara v. SEBI* offer an adequate basis for issuing postponement orders.
- All-encompassing guidelines on reporting court proceedings cannot be framed.
- The Supreme Court chose not to create media reporting guidelines in the *Sahara India Real Estate Corporation v. SEBI* case because it felt that the decision to restrict the reportage of particular cases should be made on a case-by-case basis.

However, many others were of the opinion that there must be regulations in place to restrict media reporting of *sub judice* matters when it is absolutely necessary. The reasons offered for this were:

- Enforceable standards of measuring fairness in the reporting of an ongoing legal proceedings are necessary.
- Careless or unfair reporting could impact the right to fair trial of the accused.

Suggestions for the form that regulation might take:

- Statutory regulation, including increased regulation through amendment of the Contempt of Courts Act.
- Guidelines based on the News Broadcasters Association's guidelines, and Supreme Court's guidelines in *Sahara v. SEBI*.
- A consultative process involving legal and media bodies should be used to develop the reporting guidelines.



- Reporting of court proceedings should be addressed by facilitative standards rather than by sanctions alone.
- Journalists should be given training on the proper reporting of court proceedings.
- The High Court should appoint a media liaison officer.
- Strict interpretation of the law on contempt of court, regardless of intention, wherever there is a link between publication and apparent prejudice.
- Postponement of reporting should be the norm whenever live reporting of a case has any chance of adversely affecting the outcome of a trial.
- Effective strengthening and enforcement of existing law, including preventive injunction orders, making truth a defense and a code of ethics.

Suggestions concerning the minutiae of the proposed regulatory framework included:

- The guidelines should require the media to avoid speculation about innocence or guilt.
- The guidelines should require the media to clarify when only one version is being offered instead of an objective perspective. The media should also be required to disclose its sources in this context.
- Media restrictions (before completion of a trial) should extend to publication of confession statements, interviews with witnesses, photographs of all involved parties, activities of the police and publication of evidence.
- Restrictions on reporting should apply from the date of arrest.
- Penal sanctions and damages should apply for violation of the right to a fair trial.
- Clear factual summaries of the events that transpired in public interest cases at the Supreme Court and High Court should be made available to the media.

Some responses addressed the issue of narrowing the application of postponement orders. The range of suggestions offered in this context was:

- The law should ensure that postponement orders created by the judiciary through cases like *Sahara India Real Estate Corporation v. Sahara* case do not apply in cases involving public figures or persons holding public office, where the reportage is in public interest.

- Postponement orders should only be passed if necessary to prevent real and substantial risk to the fairness of trial, and if reasonable alternate methods would not suffice. Alternatives explored should include change of venue or postponement of trial.
- Postponement orders should apply to both civil and criminal proceedings, and need not be narrowed.
- Postponement orders should have a limited duration.

## DEFAMATION

Respondents overwhelmingly expressed dissatisfaction with the present state of defamation law. All but 3 respondents saw the need for modifications to the law of defamation.

Respondents cited the following reasons for their dissatisfaction with the present state of the law:

- Criminal defamation laws violate international norms on the freedom of speech. The UN Human Rights Committee (which administers the ICCPR) stated that defamation laws must be crafted with care to ensure that they do not serve, in practice, to stifle the freedom of expression.
- Even when defamation is handled as a civil matter, as it should be, civil penalties must not block freedom of expression and should be designed to restore the reputation harmed.
- The penalty of incarceration, essentially a deprivation of personal liberty, for up to two years is clearly disproportionate.
- Criminalising criticism in this disproportionate fashion will have a chilling effect on speech.
- The law lends itself to abuse in the form of SLAPP suits (Strategic Lawsuits Against Public Participation).

Respondents made a number of suggestions for reform. The range of suggestions made is captured below:

- Repeal of Sections 499 and 500 of the IPC.
- Amendment of Sections 499 and 500, such that the main rights concerns, such as imprisonment for speech, are addressed.
- Codification of civil defamation provisions. This proposal is often made in tandem with the proposal for repeal of criminal provisions.
- Institution of measures to address the abuse of defamation law to harass and intimidate, both through the threat of imprisonment as well as through prayers for a large quantum of damages. In particular, measures such as requiring plaintiffs to demonstrate actual and serious harm resulting from the

publication of allegedly defamatory content, instituting sanctions for frivolous litigation, capping damages and amending the CPC were suggested.

- Introduction of non-pecuniary remedies, such as a visible retraction of defamatory content and the provision of rights to reply.
- Introduction of measures by which claims brought by companies, other entities or individuals of high net worth or by public figures against private individuals are treated with special care. One respondent argued that companies and persons holding public office should be made ineligible to sue for defamation.
- Introduction of measures, such as immunity for carriage intermediaries online and a single publication rule, by which publishers' and intermediaries' liability is limited.
- Evolution of legal understandings of the terms public figures and public officials, and imposition of a requirement for these classes to satisfy higher standards than ordinarily required to sue for defamation.

A very small number argued for the retention of criminal provisions for defamation, as a fair balance between the right to reputation and speech.

## **PUBLICATIONS AND CONTEMPT OF COURT**

Many of the respondents were of the opinion that the clause on “scandalizing the Court” should be removed from the Act altogether. Apart from those in favour of repealing it, some respondents were in favour of modifying it in the following ways:

- Two of the respondents agreed that the definition of ‘scandalizing the Court’ should be amended in order to objectively define the term “scandalizing” and draw a boundary for the exercise of discretion of the judge. Some specifically noted the ambiguity in the term “tending to scandalize”.
- One suggested that the definition could be made clear by applying the ‘real and present danger’ test.
- Another suggested that there should be a requirement of intention to undermine the public confidence in the administration of justice in the offence.
- The power for courts to summarily try cases of scandalizing should be abolished.

Apart from this, the range of recommendations made for further legislative or Constitutional amendments necessary to the law on contempt of court were as follows:

- Due diligence on the part of the media should be an essential element when claiming the truth as a defence.
- There should be a demarcation between coverage of routine case matters and cases that are sub judice.
- The term ‘judicial capacity’ can be interpreted in a wide manner, which gives discretionary powers to judges to adjudicate upon the manner in a broader sense. Thus it is necessary to narrow the powers and circumscribe the same.
- There is no further explanation on what constitutes “reasonable grounds” for believing that the proceeding was pending before the court, which leaves a wide scope for overlooking any due diligence that media persons may have to exercise before wrongly or misleadingly reporting any judicial proceedings that may be going on at the time of reporting.

- The use of the phrase “tends to” in Section 2 and 13(1) should be removed in entirety in order to prevent arbitrary initiation of contempt proceedings and narrow liability to what interferes in the administration of justice.
- The word “may” in Section 13(2) should be deleted so that Courts will treat the truth as an absolute defence.
- The truth should also be made a defence independent of proof that the comments were bona fide and in public interest, since courts have been criticized for adjudication on what constitutes ‘public interest’ and ‘bona fide’.
- It was recommended that the suggestions made by the Supreme Court and various High Courts in cases such as *Perspective Publications v. State of Maharashtra*<sup>3</sup>, *In Re S. Mulgaonkar*<sup>4</sup> and *Leo Roy Fry v. R. Prasad*<sup>5</sup> should be implemented.
- One such suggestion was that a distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of court.
- The definition of ‘publication’ as including publication in print and electronic media, radio broadcast, cable television and the World Wide Web under Section 2 of the Contempt of Courts Act, 1971 should be amended to be in consonance with the Supreme Court judgment in *A.K. Gopalan v. Noordeen*<sup>6</sup>, wherein the Court held that publications made after the arrest of a person could be criminal contempt, if such publications prejudice the trial of such person. A trial must be held to be pending under the Contempt of Courts Act, 1971 from the time the arrest is made.
- One respondent recommended that the PCI should be given the power to impose severe penalties on newspapers that mischievously manufacture false reports about judges.

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<sup>3</sup> 1971 AIR SC 221.

<sup>4</sup> AIR 1978 SC 727.

<sup>5</sup> AIR 1958 P&H 377.

<sup>6</sup> 1970 SCR (2) 410.

## REGULATIONS SURROUNDING GOVERNMENT OWNED MEDIA

Respondents generally agreed on the need for independence of the public broadcaster. One respondent, however, saw no necessity to engage with the question of independence, arguing instead that Prasar Bharti must be wound up as it disseminates one-sided news.

A number of recommendations were made:

### *Structural Considerations*

- Structural changes to model Prasar Bharti after effective state broadcasters such as the British Broadcasting Corporation and Japan's NHK.
- Public sector broadcasting entities must be made subject to parliamentary oversight.
- There is a need for a separation between funding streams and programming, in order to ensure editorial independence. This could be achieved in several ways including:
  - By the division of powers between an Executive Board, which would deliver media services, and a Trust, which would be a separate wing required to follow a policy of non-interference with the affairs Executive Board. This would require modifications to Chapter II of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990.
  - By bringing content-related matters under the Purview of a Media Council.
- Decision making processes must not require Central Government approval.
- The Prasar Bharti (Broadcasting Corporation of India) Act, 1990 should be reconciled with planned legislation covering private broadcasters.
- The government must ensure that it is fully divested from public sector broadcasting entities.
- Section 12(6), which provides that no civil liability will arise as a result of Prasar Bharti failing to meet its obligations under clauses 1 to 5, should be amended to enable civil liability under an ombudsman who is empowered to check for corruption as well as any other illegalities.

- The Nomination Committee tasked with appointing members must consist of members from the judiciary, the press and the Chairman of the Competition Commission. Its structure should be similar to a Lok Ayukta.
- Prasar Bharati must switch from terrestrial viewership to satellite viewing mode.

### *Content Related Considerations*

- Political advertising of any kind ought to be prohibited.
- Section 12(1)(b) which requires that Prasar Bharti meet the object of informing citizens in a fair and balanced manner of issues of public interest, should include a mandatory provision to disclose the sponsor, author, or creator of the content to ensure distinction between opinion of the broadcaster and that of the advertising authority.
- Section 23(2) must be mandatory instead of optional, so that government mandated broadcasts are presented as such to audiences.
- Prasar Bharti must broadcast a greater amount of social-cause oriented programming.

### *Financial Considerations*

- All commercial relationships and sources of funding and advertising must be disclosed.
- Prasar Bharti must be brought under control of the Comptroller and Auditor General by the insertion of a section to this effect in the Prasar Bharti (Broadcasting Corporation of India) Act, 1990.
- A cap must be placed on the proportion of funding that Prasar Bharti may receive from the government.
- Prasar Bharati's outstanding arrears must be waived off by the Central Government.
- Funding channels must be diversified.
- Assets of Akashwani and Doordarshan should be transferred to Prasar Bharati in the terms provided for under Section 16.



- Individual ministries at the Centre and at State governments can earmark a percentage of their annual budget for telecasting of programmes related to their objectives on radio and television.
- Through public-private partnerships, pre-determined tax incentives could be offered to private media houses to enter into partnerships under the ambit of Section 22 of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990.
- Wholly owned spectrum must be opened to private media players for commercial purpose.

### *Human Resource Considerations*

At a general level, the need for familial, political or any other bias in the working of Prasar Bharti was identified by one respondent. More specific suggestions include the following:

- Prasar Bharati Recruitment Board, as given in Section 10 should be brought into force.
- All recruitments of full time and part time employees may be made through Union Public Service Commission.
- Decisions relating to the number of vacancies, the manner of appointment and removal of employees and so on must be made in a transparent manner, with details provided for on the official website.
- Reappointment of the Chairman and other members of the Board should be on the basis of performance-based appraisal.
- For personnel purposes, a distinction between the identity of Prasar Bharati as a public service broadcaster and the State Broadcasting set-up must be made.
- Section 32(1) of Prasar Bharati (Broadcasting Regulation of India) Act, 1990 should be amended to give complete authority to Prasar Bharati to handle its human resource and personnel issues.

## SOCIAL MEDIA

### *Need for Statutory Regulator*

The majority of responses saw no need for further regulation of social media. A number of responses argued for self-regulation of social media to continue. It was also pointed out that statutory regimes already regulate the legality of content.

Some respondents presented more specific detail as to the manner of self-regulation. Recommendations included the following:

- The continued reliance on community standards and devices such as terms of services to regulate online behavior.
- The institution of self-regulatory institutions similar to those being applied to other media, and to broadcasting in particular.

A few responses saw the need for a statutory regulator to govern social media.

### *Reform of s. 66A of the Information Technology Act*

#### Deficiencies of the law as it stands

Respondents were in agreement that Section 66A of the Information Technology Act, 2000 was unsatisfactory in its present form. A range of reasons were offered:

- Section 66A is inconsistent with the fundamental right to free speech as it prohibits speech far in excess of the grounds covered in Article 19(2).
- Section 66A is inconsistent with Article 14 on two grounds:
  - It treats the same speech differently across different media, without apparent justification or any intelligible differentia.
  - Its language is vague and subjective. As a result, the provision has proven capable of arbitrary exercise.
- Section 66A is inconsistent with international human rights norms, such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR). In particular, it has been pointed out that imprisonment can never be justified as a proportionate measure.

- The threat of imprisonment under Section 66A, in addition to being a disproportionate punishment, has the practical effect of chilling legitimate expression.
- Section 66A is a cognizable offence, meaning that police authorities are empowered to arrest without warrant. As a result, it is the police rather than a judicial authority assessing the permissibility of speech, and potentially interfering with Article 19(1)(a).
- Laws criminalizing problematic speech already exist under a number of laws such as the Indian Penal Code, 1860.
- The overbroad, imprecise wording of the provision is inconsistent with the general rule that criminal laws must be narrowly tailored and specific.
- The overbroad, imprecise wording of the provision has opened Section 66A to a great deal of abuse by the government, which has used the provision to stifle legitimate, but unpopular speech and to intimidate the media.
- The government’s advisory concerning the implementation of Section 66A<sup>7</sup> does not clear up the fundamental ambiguities in the provision’s wording.

One respondent argued that Section 66A could be employed usefully as a tool in the enforcement of intellectual property rights.

### Proposals for Reform

Of those advocating reform of Section 66A, some recommended a complete repeal of the problem. Others saw the need for substantive amendments to the law to address the deficiencies listed above. Specific proposals for amendment included the following:

- The deletion of ambiguous phrases such as “objectionable content”, “menacing character”, “grossly offensive” and so on, on the rationale that they are incapable of precise definition.
- The definition of the ambiguous phrases, in terms compatible with Article 19(2) of the Constitution.
- The re-classification of the offence as non-cognizable.

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<sup>7</sup> Advisory on implementation of Section 66A of the Information Technology Act, 2000, No. 11(6)/2012-CLFE, Government of India, Department of Electronics and Information Technology, January 9, 2013.

- The amendment of Section 66A clause (c), to expand the types of spam messaging covered.

### *Reform of Intermediary Liability Provisions*

Some respondents identified the law governing online intermediaries as an area of immediate concern. All of those engaging with the issue argued for reform of the law.

A number of reasons were provided:

- Online intermediaries can become an important part of India's Internet economy and their GDP contribution may increase to more than 1.3 per cent by 2015 if a conducive environment for their operation is provided.
- The range of content which can be made subject to a takedown notice is extremely wide, given the vague language employed in Rule 3.
- The regime governing intermediaries is unconstitutional as it is inconsistent with the fundamental right to freedom of speech and has proven capable of arbitrary application.
- The process for takedown is susceptible to misuse.
- Section 79(3)(b) and the rules framed under it have the effect of requiring summary takedowns of content by intermediaries, even where there appears to be no defensible basis for the takedown, since the alternative is foregoing immunity for user generated content.
- No appeals to judicial authorities are provided for where content is taken down.
- It is costly for intermediaries to have legal resources to determine the legality of takedown notices and handle legal risk.
- The rules governing intermediary liability exceed the mandate of their parent provision.
- Rule 3(7) allows the government an unlimited degree of power to request that personal information or communications content be turned over to it. This provision is also incompatible with existing law, such as the Criminal Procedure Code.

Specific recommendations for reform included the following:

- Amendment of the term “intermediary” under Section 2, such that intermediaries are classified by function and can be made subject to liability on the basis of their functions.
- Introduction of requirement for takedown requests to be accompanied by court orders, and for immunity to be made contingent on intermediaries’ compliance with them.
- Introduction of a requirement for public disclosure about takedown notices received and the action taken by intermediaries.
- Deletion of Rule 3(3).
- Introduction of putback and counternotice provisions.

### *Blocking of Content*

Concerns with rules under the Information Technology Act, 2000 dealing with blocking were also raised. In particular, the following were mentioned:

- There is a need to ensure that the rules governing blocking are made subject to adequate procedural safeguards and to due process.
- There is a need to ensure transparency. Specifically, provisions such as the confidentiality mandate under Rule 16 need to be reconsidered.
- There is a need for greater clarity in the law governing blocking during an “emergency”. Specifically, Rule 9 needs to be amended so that the scope of the term is made clear and opportunity is provided for *ex post* review of emergency orders.

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