

# Right to Protect Journalistic Sources

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*The preamble of the Indian Constitution explicitly provides for the liberty of thought, expression, faith, belief, and worship. In present times, media is a significant disseminating device as it spreads various information to the public. Had there been no media and technology, many could not have known even the term 'Globalisation'. In India, Freedom of Speech and Expression does not seem to have served the purpose in entirety so far as the journalists are concerned. The shield law is an immunity granted to the reporters to maintain the anonymity of their sources. In addition to dealing with the evolution of media in India, the author discusses the recognition given to shield law in the prominent democratic nations such as the United States and the United Kingdom and the necessity for such law in India through a comparative analysis made between the three democratic nations. The author emphasizes the necessity to grant immunity to the journalists in respect of maintaining the anonymity of their sources of information.*

## Introduction

In the beginning, millions of people waited for informative news with intense desire and curiosity, and the news could be disseminated only through radios. Nevertheless, in the current times, with the aid and advancement of various technologies, many prominent devices have emerged to disseminate the information among the citizens of our nation. News, entertainment, education, data, and promotional messages are sent worldwide through this type of communication channels. Every broadcasting and narrowcasting media, like newspapers, magazines, TV, radio, billboards, direct mail, telephone, fax, and internet are part of what media is depending on the sense intended, media can take a plural or singular verb as media is the plural of medium.

Nonetheless, the lawmakers have not specifically defined the term 'media' in the Indian legal arena. A retrospective view helps us understand the fact that the media highlights the performance of the members in power, especially in a democratic nation.

However, so far as the rights of journalists are concerned, the change in the legal atmosphere of other democracies has less influence on our democratic set-

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up. Right to maintain the confidentiality of a journalist's information sources is highly essential. A shield law generally aims to provide standard protection to the journalists against the force that requires them to divulge their sources of information. As a consequence, the shield law pulls reporters into a privileged section of society by granting immunity to them to such an extent that they cannot be forced by subpoena or any other court's order to divulge their sources of information.<sup>12</sup> Therefore, the legislature should bring an enactment for this purpose, with reasonable restrictions in pursuance of Article 19(2). Before shedding light on the comparative analysis of shield law among United States of America, United Kingdom, and India, it is necessary to understand the historical background and growth of media laws in India.

### **The Growth of Media Laws in India**

The pronouncements engraved on rocks, during the reign of Emperor Ashoka between c.273 – 326 BC, were rules and regulations framed by him. The emperor used this means for communicating all-over his empire. Nevertheless, no evidence could be gathered in respect of the restrictions imposed on such communication. During the Chandragupta reign, professing false rumors and news were made an offense punishable in accordance with the laws in *Arthashastra* authored by *Kautilya*.<sup>3</sup>

During the period of colonization, licensing was a weapon in the hands of the British to control the press. It originated in Bengal in 1823 and was subsequently replaced by Metcalfe Act. The applicability of this act extended to the entire domain of the East India Company. The provisions of this act provided for mandatory declaration of the locality of every publication by every printer and publisher.<sup>4</sup> Lord Canning pushed the licensing weapon into actuality again to secure compliance from all types of publications.

Press Registration of Books Act, 1867, which is still in force with appropriate amendments from time to time, was enacted with an object to bring the printing press and other journals within a regulatory framework; there were also rules

<sup>1</sup> Media, Black's Law Dictionary, 2<sup>nd</sup> Edition, 19 October 2012, available at <https://thelawdictionary.org/media/>, accessed on 6 April 2018.

<sup>2</sup> Hailey Elitzer, 'Media and Society Chapter 14', *Quizlet Official Website* available at <https://quizlet.com/79613807/media-and-society-chapter-14-flash-cards/>, accessed on 06 April 2018.

<sup>3</sup> 'Media Laws in Bangladesh Historical Perspective', 17 November 2013, available at <http://www.assignmentpoint.com/arts/law/media-laws-bangladesh.html>, accessed on 5 April 2018.

<sup>4</sup> J.Ramanjaneulu & T.Sita Kumari, 'Role of The Media In Protecting Human Rights In India A Socio Legal Dimension', *Shodganga*, 07 June 2014 available at <http://hdl.handle.net/10603/118626>, accessed on 05 April 2018

drafted for the purpose of protecting the copies and registration of books.<sup>5</sup> The act comprised rules related to penalties, delivery of newspapers. Additionally, it bestowed powers upon the government to frame rules and certain books or newspapers from the application of provisions of this act. Subsequently, the rules were made regarding the appointment of the registrar of newspapers.<sup>6</sup>

Indian Penal Code, 1860 was enacted to deter offenses relating to defamation and obscenity which any author or publisher must avoid.<sup>7</sup> An amendment was made in the Indian Penal Code by adding a section that made sedition a punishable offense. Section 124-A of the Indian Penal Code, 1860 provides that whoever excites or attempts to excite a feeling of disaffection to the government established by law in British India shall be punishable for the offense of sedition.<sup>8</sup> Dramatic Performances Act, 1976 was enacted to prevent provocative ideas that would incite the people against the government.<sup>9</sup>

The evolution of Indian language press gave birth to the Vernacular Press Act, 1878. Every printer and publisher of a newspaper had to forfeit their rights to publish certain kind of information, and demand security through an agreement. The authority was conferred upon every magistrate of a district court, and the commissioner of police in presidency towns to deal with that matter. The terms of the bond were such that the presses can be forfeited, and printed matter, if it deemed objectionable, can be confiscated. Every printer or publisher against whom the action was taken had no option to reach the court of law.<sup>10</sup>

The opposition of the government rose up to a new height in the fields of press and public due to *swadeshi* movement and partition of Bengal. This led to the enactment of Newspaper (Incitement to Offences) Act, which was framed for the purpose of preventing the publication of matters expected to incite rebellion. Subsequently, Press Act, 1910 enabled the government to demand security from any newspaper. The provisions of the Indian Copyright Act, 1914 were similar to the copyright act enacted by the British parliament in 1911. Later Copyright Act, 1914 was replaced by a more comprehensive legislation “Copyright Act, 1957”.

Circumstances caused by the civil disobedience movement in 1930 had the

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<sup>5</sup> The Press and Registration of Books Act, 1867.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> ‘What is Section 124-A under which one is charged with sedition?’, *The Indian Express*, 16 February 2016 available at <http://indianexpress.com/article/india/india-news-india/what-is-section-124-a-under-which-one-is-charged-with-sedition/>, accessed on 5 April 2018.

<sup>9</sup> J.Ramanjaneulu & T.Sita Kumari (n 4).

<sup>10</sup> Rajkumar S, ‘Media Laws in India’, Tax Guru available at [https://taxguru.in/wp-content/uploads/2012/10/media\\_laws.pdf](https://taxguru.in/wp-content/uploads/2012/10/media_laws.pdf), accessed on 05 April 2018.

government promulgate the Indian Press ordinance to subject the press to greater control of the government. The provisions of the repealed Press Act, 1910 were brought back in this ordinance. Some newspapers had to deposit securities, the default of which led to the suspension of publications. The publication of statements that were likely to hamper the friendly relationship between the British and certain other nations was curbed with the help of Foreign Relations Act, 1932.<sup>11</sup>

Just before the Independence, the Press Laws Enquiry Committee was set up in March 1947 to scrutinize press laws. After securing independence and partitioning India, the report submitted by the committee on 22<sup>nd</sup> April 1948 brought into force the Press (objectionable matter) Act, 1951. Unfortunately, the new act too faced its termination in 1957.<sup>12</sup> Censorship introduced at the time of emergency in 1975 became a huge impediment to the freedom of the press in India. The emergency contributed to the loss of the then ruling political party in the 1977 National elections.<sup>13</sup> This precedent could not be followed by any other government to date. Additionally, the advice of the press council to not impose constraints on the press in chaotic domains such as Jammu and Kashmir had to be taken into consideration by the government.<sup>14</sup>

Later, the rise and reinforcement of liberal philosophy post-1977 affected broadcasting. An independent corporation – “*Prasar Bharti*” embraced the All India Radio and *Doordarshan* in pursuance of the notification of the *Prasar Bharti Act*. India found its place in the list of most liberal countries with respect to the freedom of media. The enactment of the Right to Information Act, 2005 which provides for transparency and accountability in government sector further expanded the freedom of media in India.<sup>15</sup>

The recent statistics related to the media growth in India are presented below:

- According to the IRS Report 2017, in the last 3 years, the percentage of newspaper readers rose from 31% in 2014 to 39% in 2017.<sup>16</sup>
- Indian Media and Entertainment industry witnessed a CAGR (Compound Annual Growth Rate) of 18.55% from 2011-2017 and is projected to

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<sup>11</sup> Ibid.

<sup>12</sup> J.Ramanjaneulu & T.Sita Kumari (n 4).

<sup>13</sup> Ibid.

<sup>14</sup> Rajkumar S (n 10).

<sup>15</sup> Deoul Pathak, ‘Exemptions from disclosure of information under RTI’. Legal Service India Official Website available at <http://www.legalserviceindia.com/article/1345-Exemptions-from-disclosure-of-information-under-RTI-.html>, accessed on 06 April 2018.

<sup>16</sup> Dibyajyoti Sarma, ‘39% of Indians read newspapers: IRS 2017 Report’, 19 January 2018, available at <http://www.printweek.in/articledetail/articleid/27836>, accessed on 19 July 2018.

grow at a CAGR of 13.9% to meet US\$ 37.55 billion by 2021 from US\$ 22.75 billion in 2017.<sup>17</sup>

- TV penetration in the country jumped to 64% in 2017 compared to 54% in 2013. The Television viewing universe stood at 780 million in 2017 compared to 675 million in 2013.<sup>18</sup>
- The percentage of households with TV stood at 183 million in 2017. Among the figure aforementioned, 99 million households are in rural domain compared to 84 million households in urban localities. Therefore, rural India TV ownership is 17% higher than Urban India.<sup>19</sup>
- In terms of industry size (INR billion), TV is projected to reach 1165.6 billion in 2021 from 588.3 in 2016, thereby causing an upsurge by 14.70 percentage; Print media is projected to touch 431.1 billion in 2021 from 303.3 billion in 2016, thereby an increase by 7.3 percent; Radio is expected increase by 16.1% i.e. from 22.7 billion in 2016 to 47.8 billion in 2021.<sup>20</sup>
- From April 2000 to December 2017, FDI Inflows in Information and Broadcasting (including print media) sector reached US\$ 7,071.63 million.<sup>21</sup>

Despite such expansion of freedom of media in India, the maintenance of confidentiality, between broadcaster of information and the sources of information, remains a matter of great concern as it hinders the persistent growth of the media domain.

### **Comparative Analysis of Regulatory Framework for the Press in the USA, UK, and India**

Media regulation is the control exercised and guidance provided by government bodies in relation to mass media. The regulations may assume the form of laws or rules or procedures for the purpose of achieving various intended goals which include, but not limited to, intervention by the state to protect the public interest,

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<sup>17</sup> 'Media and Entertainment Industry', April 2018, *Indian Brand Equity Foundation Official Website* available at <https://www.ibef.org/archives/detail/b3ZlcnZpZXcmMzc5NTMmOTI=>, accessed on 19 July 2018.

<sup>18</sup> Arpit Srivastava, 'TV viewership in India – March 2017 – BARC Broadcast India Survey', 06 May 2018, *Marketing Lessons Official Website* available at <https://marketinglessons.in/tv-viewership-india-barc-2017/>, accessed on 19 July 2018

<sup>19</sup> Ibid.

<sup>20</sup> Ankita Pandey, 'Growth trends in the Indian print media', 10 May 2017, available at <http://www.thehoot.org/media-watch/media-business/growth-trends-in-the-indian-print-media-10083>, accessed on 20 July 2018.

<sup>21</sup> 'Media and Entertainment Industry' (n 12).

boosting competition and bring an effective media market, and setting common technical standards.<sup>22</sup>

The 4<sup>th</sup> Asian Broadcasting Conference implemented a broadcasting code listing some key principles to be shown compliance by the media entities, and the same is highly significant considering the governing broadcast instruments. Below are the key principles which are adhered to by all broadcasting and Television organization:<sup>23</sup>

- Explicit presentation of news in a fair manner without prejudice
- Encouraging education and culture
- Setting high standards of etiquette in all programmes
- Imparting the principles of good citizenship in youth
- Having a balanced eye on controversial public matters
- Upholding human rights and dignity

Coincidentally, Article 19 of the Indian Constitution is found to be similar to Article 19 of the International Covenant on Civil and Political Rights as they both stress on the same right to freedom of expression. Article 19 of the ICCPR states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.” Collecting information is the prime duty of a reporter and he must be bestowed upon legal cover to veil his sources of information for the purpose of upholding the public interest. However, it causes dejection when one becomes aware of the fact that there is no legal protection granted to the reporters in India. The existence of the protection shield granted to the journalists in the United States of America (USA) is explained below with appropriate case instances.

### **Shield Law in the United States of America**

A law which confers protection upon journalists from being coerced to disclose confidential information or sources in the court is termed as “Shield law”.<sup>24</sup>

The press was protected in order to divulge the secrets of government to society.<sup>25</sup>A

<sup>22</sup> ‘Media regulation’, available at [https://en.wikipedia.org/wiki/Media\\_regulation](https://en.wikipedia.org/wiki/Media_regulation), accessed on 05 April 2018.

<sup>23</sup> Chitranjali Negi, ‘Broadcast Law in India’, 23 March 2012 available at <http://www.legalsl.com/en/broadcast-law-in-india.htm>, accessed on 06 April 2018.

<sup>24</sup> Jonathan Peters, ‘Shield laws and journalist’s privilege: The basics every reporter should know’, 22 August 2016 available at [https://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php), accessed on 6 April 2018.

<sup>25</sup> *New York Times Co. v. United States*, US, vol. 403, p.713 (SC 1971).



law cannot be in contravention of the first amendment of the Constitution of the United States. Minnesota and all other states are ineffective in restricting the publishers and spreading of malicious, outrageous, derogatory articles. The court gave unprecedented recognition to freedom of the press and its scope by construing ‘liberty’ in the due process clause of the 14<sup>th</sup> amendment of the constitution of the United States to impose a federal restriction on the states.<sup>26</sup> Nonetheless, this decision was reversed by the US Supreme Court by stating that the publication must be in concurrence with the interests of the public.<sup>27</sup>

There is no explicit and stringent federal legislation for protecting the journalists by allowing them to have their sources of information confidential. However, the question regards the protection of journal sources came up before the US Supreme Court. The court ruled against an unqualified reporter’s privilege stating it could not be invoked in all circumstances. On understanding the weight of the issue, Justice White held that the government must indicate a substantial relation between the information pursued and a matter of dominant state interest. Justice Powell concurred and emphasized that striking of balance must be on a case to case basis.<sup>28</sup>

Since the Branzburg case, there has been no federal legislation dealing with journalists’ source protection. Despite the fact that a number of states have, however, passed “shield laws”, with broad national security exceptions, there is no federal shield law and state shield laws vary in scope.

The privilege conferred upon the reporters can be waived by them. The reporter and the newspaper claimed protection under the cover of the shield law for having been sued for the publication of defamatory statements about the plaintiff. Subsequently, it was discovered that the reporter had spoken about the source to a municipal attorney. A reporter is deemed to have abandoned his privilege if he discloses or discusses his sources of information in those fields unconnected to the process of securing that information. The Venezia court also stated

that the reporter cannot take the privilege for granted or immune himself with the shield law in accordance to his own whims and fancies by disclosing his sources to those who are not connected to the information, and by protecting such sources when he is ordered by the court. As a consequence, the plaintiff’s request for evidence was to be given effect with the disclosure by the reporter.<sup>29</sup>

Freedom of the press is depicted as a fundamental personal right by the Supreme

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<sup>26</sup> Near v. Minnesota, U.S., vol. 283, p.697, (SC 1931).

<sup>27</sup> Ibid.

<sup>28</sup> Branzburg v. Hayes, U.S., vol. 408, p.665, (SC 1972).

<sup>29</sup> Re Michael G Venezia, 2007, vol. 191 N.J. p.259.

Court of New Hampshire. The court held that such a right cannot be restricted to newspapers and other publications exclusively. With this rationale, the definition of media can be extended to even blogs and website curators.<sup>30</sup>

The consequence of the struggle for journalists' rights led to the drafting of a bill "Free Flow of Information Bill".<sup>31</sup> The bill varied the degree of protection offered to the reporters based on the kind of case. Nevertheless, as per the provisions of the bill, the highest protection would be granted to reporters engaged in civil suits, thereby the possibility of litigants to coerce the reporters to turn witness against themselves or to spill the beans explicitly for securing the information is curbed. The litigants are required to show the necessity to secure information and must show that the requirement of information outweighs the public interest.<sup>32</sup> The same happens in the criminal cases except for the onus of proof which would lie on the reporter intending to avoid the subpoena by showing a substantially convincing standard that the public interest in respect of the information must not be contravened by the fulfillment of needs of law enforcement.<sup>33</sup>

The protection granted to the reporters was not absolute in nature. If the facts are put before the court by the prosecutors with a rational justification that securing of information kept in confidentiality might assist in the prevention of national security threats, the immunity of the journalists disappears. This might even bring a thought to the legislature that the news organizations would be ahead in getting notified about the call logs sought from a telephone carrier by the government, and such advancement by news organizations in gaining knowledge related to the affairs of the state prior to the government would allow them to fight the subpoena in court.<sup>34</sup> This bill failed to come into existence due to certain cons in itself.

New legislation called "Privacy Protection Act" was enacted by Congress restricting the law enforcement officials from searching or seizing documentary materials, or any such information, or work product of a journalist. The legislation required subpoena in lieu of search warrant and this marked the advantageous difference to the reporters because a search warrant can be challenged only post its execution, whereas a subpoena can be challenged well in advance.<sup>35</sup> If the acts or utterances or information are likely to dethrone the organized government unconstitutionally or unlawfully, the tolerating attribute must not exist on the

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<sup>30</sup> *The Mortgage Specialists Inc. v. Implode- Explode Heavy Industries Inc.*, 2007, vol. 160 N.H., p.227.

<sup>31</sup> Free Flow of Information Act, 2007.

<sup>32</sup> Ibid.

<sup>33</sup> Charlie Savage, 'Criticized on Seizure of Records, White House Pushes News Media Shield Law', *The New York Times*, (15 May 2013).

<sup>34</sup> Free Flow of Information Act (n 31).

<sup>35</sup> Jonathan Peters (n 24).



part of the state.<sup>36</sup>

### Shield Law in the United Kingdom

Having the sources of information confidential is a necessary moral obligation on the part of journalists.<sup>37</sup> Lord Salmon elucidates that the press can enjoy immunity from being subpoenaed except in circumstances which pose threat to the national security or to the public policy. Therefore, it is incorrect to push this immunity out of the domain of constitutionality as the very freedom of the press relies on this immunity. Taking away of this immunity would lead to the disappearance of sources wherefrom the information is secured, which in turn would lead to non-disclosure of such information in the interest of the public.<sup>38</sup>

“No court may require a person to disclose, nor is any person guilty of contempt of court from refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that it is necessary for the interests of justice or national security or for the prevention of disorder or crime.”<sup>39</sup> The word “necessary” was given a liberal interpretation by a few judges.<sup>40</sup>

The emphasis on confidentiality of medical records is high when Ashworth recruits a new member of the staff department. One of the clauses in the contract of employment bars the employee from unveiling any kind of information relating to the authority’s business or the patients. He cannot prepare any abstracts or documentary material while he is being employed or post the termination of his employment to any unauthorized person.<sup>41</sup>

Prior to Brexit, in a case appealed before the European Court of Human rights by a journalist who lost the case in the UK Court, it was held that one of the fundamental conditions for press freedom is to grant protection for the source of journalists, and the necessity for such condition is demarcated in the laws and other codes of conduct in a number of participating states. This is even affirmed in some global instruments framed for the purpose of journalistic freedoms.

<sup>36</sup> Apurva Rathee, ‘Article 19 (2): Reasonable Restrictions on Article 19 (1) (a)’, 13 April 2017, available at <https://lawschoolnotes.wordpress.com/2017/04/13/article-19-2-reasonable-restrictions-on-article-19-1-a/>, accessed on 6 April 2018.

<sup>37</sup> ‘Independent Press Standards Organisation - Editors’ Code of Practice’, available at <https://www.ipso.co.uk/editors-code-of-practice/>, accessed on 06 April 2018.

<sup>38</sup> Brice Dickson, *Human Rights, and the United Kingdom Supreme Court*, Oxford University Press, Oxford, September 2013.

<sup>39</sup> *Contempt of Courts Act*, 1981 (UK), s.10.

<sup>40</sup> A.G. Noorani, ‘Media Sources’, 24 December 2016 available at <https://www.dawn.com/news/1304072>, accessed on 07 April 2018.

<sup>41</sup> *Ashworth Security Hospital v. MGN Ltd.* [2002] UKHL, p.29.

Sources may not be of any assistance in exposing the truth or other ideal matters which would shake the nation if the immunity is not granted. Consequently, the monitoring strength of the press begins to weaken and this would reflect the inability of the press to provide reliable information with utmost accuracy. In a democratic society, the absence of immunity provision cannot be said to be in concurrence with article 10 of the convention, unless it is proven that there is a requirement to obtain the sources of information to prevent contravention of public policy.<sup>42</sup>

Article 10 of the European Convention on Human Rights (ECHR):

- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Since the article is a part of the UK's native law, a similar approach can be adopted for the interpretation of section 10 of the contempt of courts act, 1981.

### **Shield Law in India**

Article 19 of the Indian constitution is in tune with Article 10 of the European Convention on Human Rights (ECHR). Had there been no article 19(1) in the Indian Constitution, right to freedom of speech and expression would have been an illusory fundamental right. Our Constitution, subject to reasonable restrictions which may be imposed by the state, provides the right to express one's perceptions through any mode of communication under article 19(1). The state, prior to levying of restrictions with reasonableness under article 19(2) of the Indian constitution, must look deeply into the constitutional validity of such restrictions by subjecting them to the dual test. The dual test includes reasonableness of the restrictions and the purposes mentioned in article 19(1). The reasonableness of the restrictions can be determined based on the rational nexus between the

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<sup>42</sup> *Goodwin v. United Kingdom* [1996] EHRR, p.123.

restrictions intended to be imposed and the purposes which shall be achieved to preserve the friendly relations with foreign states, to protect sovereignty, integrity, and security of the nation. This fundamental right conferred under part III of the Indian constitution has opened the doors for the press to reveal the people in respect of matters from various domains.<sup>43</sup> The terms freedom of “Speech and expression” must be construed broadly to encapsulate the circulation of one’s opinions by word of mouth or through writing/audio-visual technology or any such technological means.<sup>44</sup> In such a case, the term is inclusive of the right to profess one’s thoughts and notions via radio or television.

Every citizen of this democratic nation has the right to express his thoughts and opinions through various modes of communication by subjecting himself to the restrictions imposed under article 19(2) of the Indian Constitution. The printing presses, news channels and other forms of publications play a pivotal role in preserving the balance of power thereby contributing to the strength of our democracy. Any attempt to curb this right in entirety would mean a deadly blow to the democratic institution as freedom of speech and expression is the helping hand of every democratic nation.<sup>45</sup> Society has an equal entitlement to regulate freedom of speech and expression as free speech is the foundation for the healthy functioning of democracy.<sup>46</sup>

From 1992 to 2017, 41 journalists in India have been murdered.<sup>47</sup> As per the published reports, India dropped from 133<sup>rd</sup> position to 136<sup>th</sup> position in the World Freedom Index.<sup>48</sup> Protection for the journalists against revealing their information sources is provided by section 15(2) of the Press Council of India Act. Unfortunately, this does not extend to judicial institutions except the Press Council. This empowers the judicial organ to compel the journalists to divulge their sources of information.<sup>49</sup>

Absolute protection to the journalists is absent due to which the reporters have to mandatorily disclose their sources whenever they are subpoenaed. The direction

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<sup>43</sup> J N Pandey, *Constitutional law of India*, 54<sup>th</sup> edition, Central law agency, 2017.

<sup>44</sup> *Life Insurance Corporation of India and Union of India and Ors v. Prof. Manubhai D. Shah and Cinemart Foundation*, AIR, 1993, SC, p.171.

<sup>45</sup> *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, SCC, 1995, SC, p.161.

<sup>46</sup> *Dr.D.C. Saxena v. Hon’ble the Chief Justice of India*, SCC, 1996, SC, p.216.

<sup>47</sup> Amanat Khullar, ‘For some more than others, Being a journalist in India comes at a High Price’, *The Wire*, (08 September 2017) available at <https://thewire.in/media/others-journalist-india-comes-high-price>, accessed on 7 April 2018.

<sup>48</sup> ‘India ranks 136 on World Press Freedom Index, slips 3 places’, *Rediff* (27 April 2017) available at <http://www.rediff.com/news/report/india-ranks-136-on-world-press-freedom-index-slips-3-places/20170427.htm>, accessed on 6 April 2018.

<sup>49</sup> ‘Protection of Sources’, (September 17 2012) available at <http://www.thehoot.org/resources/press-laws-guide/protection-of-sources-6295>, accessed on 7 April 2018.

of the court to this effect can be given only upon satisfaction that it is essential in the nature of justice and is not opposed to public policy or interest. The necessity of subpoena shall rely on the nature of the case and the subject-matter published by the newspaper or channels.<sup>50</sup> When both the United States and Europe have recognized the importance of source-protection and the simple fact that some degree of source protection is essential for the press to perform its monitoring function effectively and efficiently, India continues to remain on the opposite side.<sup>51</sup>

The Supreme Court has accepted the democracy-based justification for free speech, as well as the individual right to receive information. Both these arguments necessarily make the role of the press crucial, and such a role is dependent on maintaining the confidentiality of information sources. Thus, there has to be a right that journalists can invoke against compelled disclosure. In the absence of any such law, Article 19(1) (a) could play a direct role in the matter.<sup>52</sup>

A good system of free speech lies on the presumption that the distribution of information to a greater extent from various prominent sources is significant on taking social welfare into consideration. Therefore, a free press is one of the characteristic traits of a free society.<sup>53</sup>

Fortunately, legislation has been enacted chiefly for the purpose of protecting journalists in the state of Maharashtra. This act named as “The Maharashtra Media Persons and Media Institutions (Prevention of Violence and Damage or Loss to Property) Act, 2017.” The International Federation of Journalists (IFJ) along with the National Union of Journalists, India (NUJI) showed its welcome sign to this legislation. They also required this legislation to be put in force effectively not only in the state of Maharashtra but also in the other states of India.<sup>54</sup>

Resorting to violence against media persons or causing any such damage or loss to the property of media persons or media institutions invited punishment within the territory of Maharashtra. Any person who commits or attempts to commit any act or create any sort of provocation that is likely to materialize any act of offense constituting violence against media persons would be punished

<sup>50</sup> *Jai Parkash Aggarwal v. Vishambhar Dutt Sharma*, DLT, 1986, SC, p.21.

<sup>51</sup> Gautam Bhatia, ‘Free Speech and Source Protection for Journalists’, available at <https://cis-india.org/internet-governance/blog/free-speech-and-source-protection-for-journalists>, accessed on 7 April 2018.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> International Federation of Journalists, ‘Maharashtra passes landmark journalist protection law’, *International Federation of Journalists Official Website* available at <http://www.ifj.org/nc/news-single-view/category/news-4/article/maharashtra-passes-landmark-journalist-protection-law/>, accessed on 8 April 2018.

with imprisonment extending up to three years and with fine which may extend to Rs.50,000 or both. Besides, offenders shall be liable to pay compensation for damage or loss of the property as well as be liable to reimburse medical expenditure incurred by the victim journalist. As per the provisions of the act, the authority is given to high-ranking police officers exclusively to conduct inquiries and investigations in respect of violence against journalists or media institutions, and this offense is cognizable and non-bailable. The application of the act extends to reporters, editors (Chief, Senior and Sub-editor), prominent writers, proof-readers, plagiarism testers, cartoonists and photojournalists from all registered newspapers. Media establishments online and offline are also covered under this act.<sup>55</sup>

### Right to Maintain Confidentiality

The compulsion of legal force causes a contravention with the ethics of journalism. The ethical code for journalists does not permit them to unveil the identity of their information sources. Nevertheless, the circumstances hinder the reporters due to the stringent interpretation of Article 19(1) (a) by judges which allows the court to issue a subpoena to the journalists to disclose their sources of information in spite of them being kept confidential. This not only drives the journalists to find various loopholes within the legal framework to maintain confidentiality but also causes them to perform certain tasks that are not permitted by the law of the land. A person campaigning for a public interest drive has to always keep in mind the national security and national interest since it is above the right to information of citizens.<sup>56</sup> Freedom of the press is a part of freedom of speech and expression and as such a fundamental right and it is regarded as “the matter of all other liberties in a democratic society”<sup>57</sup>

The attorney-client privilege protects the confidential information bestowed upon the attorney by the client and excludes that attorney from becoming a testimony against his own client. The relationship between a doctor and a patient, religious advisors and advisee, and spouses is privileged and the matters discussed between them are allowed to be kept confidential. This emerges from the belief that the existence of public interest justifies the exemption of certain persons against others.<sup>58</sup>

<sup>55</sup> International Federation of Journalists, ‘Maharashtra passes landmark journalist protection law’, *International Federation of Journalists Official Website* available at <http://www.ifj.org/nc/news-single-view/category/news-4/article/maharashtra-passes-landmark-journalist-protection-law/>, accessed on 8 April 2018.

<sup>56</sup> *S.P. Anand v. Union of India*, AIR, 2000, MP, p.47.

<sup>57</sup> *Bennett Coleman and co. v. Union of India*, AIR, 1973, SC, p.106.

<sup>58</sup> Jonathan Peters (n 24).

Similarly, an argument is being made by the journalists that there should be a privilege between the journalists and their confidential sources of information. Reliance on such sources assists the reporters in professing news in the interests of the public. Nevertheless, those sources do not disclose sensitive or critical information if they are not made anonymous. This is due to the fear on the part of such sources that they would be punished for making such disclosure. Therefore, privileges protecting the journalists and their sources of information are highly necessitated due to the presence of public interest with respect to the matters intended to be divulged to the society.<sup>59</sup> Restrictions imposed in pursuance of article 19(2) on freedom of speech and expression cannot be brought within the ambit of reasonableness even if they are in the interest of public but are contributing to the destabilization of the security of the state.<sup>60</sup>

Security of the state alludes to the absence of life-threatening and exasperated situation caused by the public disorder. Expressions of opinions or ideologies by an individual inciting to or provoking the commission of violent crimes such as murder do fall inside the box which undermines the security of the state.<sup>61</sup> Minor and usual breaches of public safety are not taken into consideration while defining the term “Security of the state” unless they produce any sort of jeopardy to the state per se.<sup>62</sup>

Therefore, only violence prevailing in a state with an intent to overthrow the government, or to promote war and rebellion against the government, or to cause external aggression jeopardizes the security of the state. A relatively marginal level of violence that may disturb public order such as unlawful assembly, riot, affray, rash driving, promotion of enmity between classes and other such cases do not bring any threat to the security of the state.<sup>63</sup> In the event of a provision capable of being given two contradicting interpretations, one of which makes it constitutional and the other makes it unconstitutional, the interpretation which upholds the provision as constitutional should be preferred.<sup>64</sup>

## Conclusion

Certain successful business entities, which earn revenue from advertising, subscriptions, and sale of copyrighted material, exercise control over the media

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<sup>59</sup> Ibid.

<sup>60</sup> *State of Bihar v. Shailabala*, AIR, 1952, p.329.

<sup>61</sup> ‘Freedom of Speech and Expression’, available at <https://www.lawteacher.net/free-law-essays/constitutional-law/freedom-of-speech-and-expression-constitutional-law-essay.php?vref=1>, accessed on 04 April 2018.

<sup>62</sup> Ibid.

<sup>63</sup> ‘Examining the Freedom of Speech and Expression’, available at <http://racolblegal.com/examining-the-freedom-of-speech-and-expression/>, accessed on 04 April 2018.

<sup>64</sup> *Kedar Nath v. State of Bihar*, AIR, 1962, SC, p. 955.



domain. India consists of 70000 newspaper publications and over 100 million copies of newspapers are sold every day by reason of which India is the biggest newspaper market in the world.<sup>65</sup>

The strength of the law is bound to decrease if the very purpose of that law is not fulfilled completely. In other words, the right to freedom of expression and speech is guaranteed without adequate legal protection to the journalists in our nation. Abundant information, in the interest of the public, which should be disclosed, would continue to remain within the ambit of confidentiality if there is no protection bestowed upon the journalists. The relationship between a journalist and his source of information, which is anonymous to others, must be the same as that between an attorney and client, or a doctor and patient. The confidentiality must be maintained due to the weight and significance of the relationship between them as well as the information being in the interest of the public.

Hence, right to refuse to disclose the source of information must be brought within article 19(1)(a) as a fundamental right and the reasonable restrictions must include, but not be limited to, mandatory disclosure by journalists if the information has pertinence to national security or if the information collected, upon dissemination, would cause chaos among the public. The onus of proof must be on the journalist to prove that the information so collected is not of such nature that would cause a disturbance in the public order or harm to the national security. Right to privacy - A fundamental right as declared by the Supreme Court of India recently must be taken into consideration for the purpose of bringing legislation in favor of journalists' right to maintain the anonymity of their sources of information.

Conclusively, there is no stringent legislation that gives legal effect to the maintenance of confidentiality or protection of sources of information by journalists unlike other democratic nations and the same is necessitated in the present era to ensure the strength of freedom of the press guaranteed under our constitution.

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<sup>65</sup> Soutik Biswas, 'Why are India's media under fire', BBC, (12 January 2012) available at <http://www.bbc.com/news/world-asia-india-16524711>, accessed on 8 April 2018.