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INFORMATION AND DEMOCRACY IN INDIA

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I Light and Shade: Shady Politics, the Black Economy and Mal-Governance

EVERYTHING IS known; and, yet not known. It is written down, but not revealed. If revealed, restricted. If not restricted, distorted. There is a right to be informed; but not of too much. There is a right to know, but no right to make known. Democracy abjures ignorance, but revels in it. There is sunshine, but also lightness, shade and darkness. A democracy that knows not, and knows not that it knows not adds folly to its ignorance to subvert its purposes. This kind of light and shade encourages shady politics and the black economy.

Imperial British rule in India scripted its own history with volumes of documentation. Pages upon pages came to be written. Those in England wrote to those in India who wrote to each other and those in England. Files, letters and memoirs built themselves into governance. In a sense, they kept a check on what was going on – but only amongst the elite and for the purposes that suited them. In Britain, the populace was kept alive on propaganda even though the larceny of information was developing as a threat; and the press and its readership was acquiring a taste for what was forbidden. However, following the Marvin (1878) and Anderson (1889) incidents which revealed that there was no offence known to the law which covered instances where the information in a document or the document itself was simply borrowed, the British enacted the Official Secrets Act, 1889 for Britain; and replicated it for India in the same year to apply to the British territories and princely states and "all native Indian subjects of Her Majesty without and beyond British India". Although the major interest of the day was military information and foreign affairs, the Indian Act was wider; and strengthened in 1904. After the British Parliament re-enacted their Official Secrets Act, 1911 in one day as an emergency measure, the Indian Official Secrets Act, 1923 followed suit but not without being heavily criticised in the Indian Legislative Assembly for 'slavish imitation' after the

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treasury benches had itself admitted its "exceptional and drastic character"[1]. Laws supplemented 'administrative directions' from, at least 1843 to continue beyond to the famous Resolution of 1878 which sought "to remind all officers of the government that information received by them in their official capacity, whether from official sources or otherwise, which is not from its nature obviously intended to be made public, cannot be treated as if it were at their personal disposal."[2]

Confidentiality remains a condition of service in the Indian Administrative Services – violation of which attracts a penalty including dismissal. While courts may now insist that files be shown to them or even made public in the interest of the administration of justice, this was not so during the Empire. It only emerged in India with greater vigour after the British courts adopted such a rule in England in 1968; and, that too, more especially and more strongly after the advent of public interest litigation in the aftermath of the Emergency (1975-77).[3] Be that as it may, the policy of official secrecy was faithfully defended saying that the Official Secrets Act was designed to safeguard national security and not to prohibit access to official documents.[4]

The various committees and commissions which examined the need for reform have had no impact.[5] The Indian Law Institute wrote a brief but powerful recommendation that the Official Secrets Act of 1923 be scrapped - to be widely received.[6] The Second Press Commission of

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1. See generally the debate at III *LAD* (Legislative Assembly Debates) 2244-75 (1925) and specifically the intervention of Dr. A.S.Gour at 2245 and K.B.L.Agnihotri at 2247. In fact there was a motion to re-commit the Bill which failed and provoked Rai Bahadur T.Rangachariar to remark, in defence of the Official Secrets Act, 1923, "I am not ashamed of slavishly following the English of the Englishmen".

2. See the comment by S. Maheshwari "Secrecy in Government in India", 25 *Indian Journal of Public Administration* 1101 at 1103 (1979); see also R Dhavan, *Only the Good News: On the Law of Press in India,* 251 (Manohar, New Delhi, 1987); see further the Central Civil Service Rules, 1964.

3. On the relaxation of the 'Crown Privilege' permitting disclosure of documents to courts see *Conway* v. *Rimmer*, (1968) 1 All ER 874 which overruled *Duncan* v. *CammelLaird and Co. Ltd.*, (1942) 1 All ER 587 (The *Thetis* case) thus liberating the law of Crown Privilege from its historic shackles .

4. See 17 L.S.D. (Lok Sabha Debates) (Sixth Series) No 30 Cols. 3294-5. Also see Press Institute in India, *The Press in the Law*, (New Delhi, Press Institute, 1968). *supra* notes 2 and 3.

5. See *Report of the Press Laws Enquiry Committee*, paras 44 and 64 (Government of India, Delhi, 1951) and *Report of the First Press Commission*, paras 1044-48 (Government of India, Delhi, 1954).

6. S.N.Jain, *Official Secrecy and the Freedom of the Press*, (N.M.Tripathi, Bombay, 1981). The press has responded to S.N. Jain's report favourably, see A.G.Noorani, "Secrets Act: An anachronism" *Indian Express* (10 June, 1981) and S. Sahay, "A Close Look: Official Secrecy and the Press" *Statesman* (16 June, 1981).

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1982 (whose Chairman Justice K.K. Mathew was partial to a right to know) pleaded the case for open democracy and for a repeal of the wide ranging section which made any and all revelations of official secrecy an offence, but failed at the finishing post by equivocally suggesting new legislation "suited to meet the paramount need to national security and other vital interests of the State as well as the right of the people to know the affairs of the State affecting them". This was supported by a half hearted plea for a freedom of information statute. One part of this report partly followed what the British Franks Committee recommended for England in 1972, whilst the second part dealing with freedom of information also followed a similar pattern by suggesting that "… in respect of the right to public documents, we also think that the provisions of the British Information Bill can be studied with profit and our legislation modelled on that part with appropriate changes".[7] Slavish imitation, perhaps? Or Westminster rule in spirit? At any rate, the impetus for a change of the Official Secrets Act died quietly. That statute remains intact. But, as we shall see later, a new campaign for a freedom of information statute began in 1990s which resulted in the Freedom of Information Act, 2002 to eclipse aspects of the official secrets legislation to that extent. But, in all other respects, the Indian Official Secrets Act, 1923 is alive and well; and rigorously enforced in practice without too much recourse to the law courts.

In the meanwhile, there has been a sea change in the reasons for and against official secrecy. The original statutes were enacted largely to deal with matters relating to espionage, security issues and foreign affairs. Such laws were intensified during the world wars and continued largely to prevent the working of democratic government from exposure. But, the wars themselves gave rise to governmental patronage in the matter of supplies and contracts to invite corruption. This led the Indian government to pass the Prevention of Corruption Act, 1947 which remained in force till the enactment of Prevention of Corruption Act, 1988. Between these years, India fell prey to corruption in governance on a scale that burgeoned exponentially with its increasing population and the vastly expanding regulatory and welfare state. Each aspect of

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See also the Editorial *Hindustan Times* (10 July, 1981). The item was widely reported in the press, see *Financial Express* (8 July, 1981); *Patriot* (8 July, 1981); *National Herald* (9 July, 1981); *Times of India* (8 July, 1981); *The Times* (8 July, 1981); *Indian Express* (8 July, 1981); *Hindu* (8 July, 1981); *Hindustan Times* (8 July, 1981); *Statesman* (8 July, 1981); *Financial Express* (24 July, 1981); *Times of India* (24 July, 1981); for a comparable even if official English Report see *Report of the Franks Committee on Section 2 of the Official Secrets Act, 1911*, HMSO, London, Cmnd. 5104, 1972).

7. *Report of the Second Press Commission*, 42 (Government of India, Delhi, 1982).

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the 'licence' *raj* invited black money to grease palms and change hands. Each part of the expenditure of the welfare state invited the corrupt to whet their appetites. Signs of a creeping corruption were self evident from Kriplani Report on Railways in 1953. Reports of commissions indicted the Finance Minister, T. T. Krishnamachari in 1958 and Pratap Singh Kairon, the Chief Minister of Punjab in 1962. There were defence scandals on the purchase of jeeps for the army.[8] By the time, the Santhanam Committee reported in 1964, there was a sinister feeling of widespread petty corruption and, perhaps, to a lesser extent in high places.[9]

The provisions to deal with corruption were weak and vacillating. The prevention of corruption statutes – as, indeed, the Indian Penal Code – required the sanction of the government before a case of corruption could be prosecuted.[10] The administrators went further to create the single directive so that even investigations could not be initiated against higher administrative officers without permission from the government. Even though the Supreme Court struck the single directive down, it has been restored under dubious circumstances.[11] By 1967, the British had enacted some kind of ombudsman to deal with maladministration. India tried to follow suit; but lacked the will to do so. Various attempts were made (in 1968, 1971, 1978, 1991, 1998) to introduce such an ombudsman (called the *Lokpal* for the union and *Lokayukta* for the states). The *Lokpal* and its variants was to receive information and investigate and expose maladministration. But each effort fell flat in its face. There were enormous disputes as to whether legislators and the Prime Minister should come within the ambit of the Bill.[12] Various state governments introduced *Lokayuktas* for their respective states, but with indifferent results. In some instances, the government

8. J. B. Kriplani, *Report of the Railway Corruption Inquiry Committee*, Delhi, 1955; S. R. Das, *Commission of Inquiry against Pratap Singh Khairon*, Delhi, 1963-64; A.G.Noorani, *Minister's Misconduct*, (Vikas Publishing House, Delhi, 1973).

9. K. Santhanam, *Committee on Prevention of Corruption*, (Government of India, Delhi, 1964).

10. S. 19 of the Prevention of Corruption Act, 1988 which is similar to s. 6 of the Prevention of Corruption Act, 1947 and s. 197 of the Code of Criminal Procedure, 1973.

11. See *Vineet Narain* v. *Union of India*, (1996) 2 SCC 199 where the single directive was struck down. However, the civil service steadfastly refused to implement the Supreme Court's decision when the Central Vigilance Commission (CVC) Ordinance was drafted in 1998 through Ordinance No. 15 of 1998. This resistance continues successfully in the legislative proposals being considered in 2003-04.

12. See for details *Minutes of Dissent to the Report of the Joint Committee on the Lok Pal Bill, 1977* in the Gazette of India, 749, 751 (Government of India, New Delhi, 1978).

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simply refused to accept the investigations of the ombudsman, sometimes humiliating the ex-judge *lokayukta* to a point that, on occasion, judges were reluctant to accept such a thankless job![13] The working of a *lokpal* depends on the politics of shame. After a *lokpal* 'recommendation', the government is expected to be shamed into acting if the person indicted does not. But, the politics of shame is undermined hopelessly when people in public places feel no shame for what they do, have done or failed to do with no soul to damn and no need to hide their shame.

When major cases of corruption or misgovernance arose, the usual strategy was to appoint a commission of inquiry. In some cases – as that of Sardar Kairon and Krishnamachari – the report of the commission was enough indictment for the person concerned to resign. Even if they were not to blame, ministers like Lal Bahadur Shastri resigned from his post of railway minister in 1956 when a major railway accident occurred even though he was not personally responsible for the accident. Krishna Menon resigned after the debacle in the Indo-Chinese War of 1962. What eventually killed faith in using commissions of inquiry to expose corruption or misgovernance through commissions of inquiry and committees of Parliament with consequential resignatory effects, was that such commissions were skewed in their approach, took an inordinately long time and proved to be ineffective as their reports remained contested.

Our concern is not just with issues of corruption, but extends further into questions of mal-governance. One particular area in which investigative inquiries were made through commissions was in respect of inter-religious conflicts and communal violence. The main reason for appointing commissions was to quell social tempers and restore law and order. But, the recommendations of most commissions were never ever really followed in any great measure. It was always assumed that by the time the commissions reported, the songs of hate had given way to the songs of love. This did not happen. People did not forget. Memory forcibly tried to eclipse what the wounds of the heart could not unburden. Some excellent reports such as those of the Srikrishna Commission on the Bombay riots (1993) were drawn into the political arena by the fundamentalists who were blamed by the report. The report on the Delhi Riots of 1984 in which various innocent Sikhs were murdered left much to be desired. Some commissions did not pursue matters to a fine edge – such as the Wadhwa Commission (1998) on the murder of Reverend Staines in 1998. Some commissions – like the Liberhan Commission on the destruction of the Babri Masjid have not reported even after 10

13. For an early account of the ombudsman in India and its deficiencies, see M.P. Jain & S.N.Jain, *Principles of Administrative Law*, 936-63 and specifically at 945-49 (N.M.Tripathi, Bombay, 1986).

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years. As such, the credibility of commissions as a democratic weapon for exposure and information seems to have waned.[14]

Many of the issues that require transparency in India go to the root of governance. They go beyond issues of corruption and communal violence. Since the 1950s, year after year, the constitutionally designated Commissioner for Scheduled Caste and Tribes (and after 1992 his successor commissioners) have pointed out untold violence and atrocity against untouchable dalits and tribals – called Scheduled Castes and Secheduled Tribes (SC and ST) in India's constitutional parlance. But, beyond enacting proactive legislation in 1955, 1976 and 1989, nothing has been done by follow up action or exposure. But today violence is not limited to SC and ST. It extends across the board. To 'state atrocities' may be added 'social atrocities' like rape of women and children etc. on a massive scale. All these – grievous in themselves – do not take place outside the political system, but, in many instances, grows out of it. In 1995, the Vohra Committee surfaced to show that at every level of governance, public power was being usurped, terrorised or taken over by private interests.[15] Such take overs could not have taken place without the intervention of politics. India's political machines are designed on medieval grounds. The cadres that bring political parties into power conjure their own reward to extract favours and patronage from the administration they help to usher in.

Frank statements on the problems of Indian governance should not be torn out of context or enlarged into hyperbole. With a population of over a billion and a social and economic diversity which is unparalleled anywhere in the world, India has its share of problems. But, by and large, there is much in Indian governance that makes the experiment of Indian democracy and governance the most interesting, unique and challenging in human history. But, however, optimistic we may be about Indian democracy (and there is much to be sanguine about), India cannot paper the cracks to avoid the most rigorous scrutiny that such subversion of governance requires – still less so if what is taking place undermines the very basis of governance.

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14. Justice D.P.Wadhwa, *Commission of Inquiry Report*, (Government of India, New Delhi, 1999); Justice Srikrishna, *The Report of the Srikrishna Commission appointed for Inquiry into Riots at Mumbai during December 1992 and January 1993*, (Government of Maharashtra, Mumbai, 1998); Justice R. Mishra, *Report of Justice Ranganathan Mishra Commission of Inquiry*, (Government of India, New Delhi, 1985).

15. Horrible stories abound of the cruelty that society inflicts on its members. An ideology of punishment and perforce cruelty dominates our thinking. See R.Dhavan, "Kill them for their Bad Verses: On Criminal Law and Punishment in India" in Rani D Shankardass (ed.), *Punishment and the Prison: Indian and International Perspectives* 264, 330, (Sage Publications, New Delhi, 1999).

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The British law of official secrecy is still in place for all the wrong reasons. Corruption undermines Indian governance. The spoils of the 'licence raj' and the opportunities of development have not just encouraged corruption but also increased state and social atrocities. Fuelled by politics, governments in India are weak and vacillate in their efforts to check corruption. Earlier, commissions of inquiry were effective and resulted in resignations of those culpable. This is no longer the case. When asked to leave investigations over recent allegations of corruption and defections in 2003 to a parliament joint committee, the Prime Minister of India seemed to suggest that those days were over and the correct way was to proceed to criminal investigation rather than use the expository mechanisms of commissions and committees.[16] Such investigations are not always reliable. India has refused to install strong ombudsman in the states and any such mechanism in the union. The Supreme Court's suggestion for a central vigilance commission has not been followed in letter or spirit. But, if all these methods of exposure and information are to be treated as imperfect; (and, more importantly, ineffective), Indian democracy needs to turn to itself for answers so that the right to know and be known is recognized and implemented in fact and in law to keep Indian democracy on its toes even if not to cleanse it.

For our purposes, what is relevant is that the flow of information was disturbed by partial or full censorship which not only distorted news but created an apparatus to propagate and regulate the manufactured of half and non-truths.

But, if censorship destroys truth, propaganda machines distort and create falsities. For the British the answer lay in creating a media which the government owned, controlled, sponsored and directly manipulated. In 1780, Governor General Hastings created the India Gazette to be followed by the *Calcutta Gazette* (1784), *Madras Courier* (1785) and *Bombay Gazette* (1791). Years later, the *Pioneer* from Allahabad in 1869 and the *Civil and Military Gazette* from Lahore in 1874 were "important sources of government information".[17] The link with government was hesitantly admitted. In 1877, Lethbridge, the Press Commissioner admitted that the *Pioneer* reflected the views of the Viceroy who could, however, not enforce his views! If the government developed its own media so did the 'nationalist' movement. Many political persons and parties developed their own media voices –

16. See Vajpayees's response in 'Vajpayee rejects demand for JPC Probe into Judeo Episode', *The Hindu* (12 Dec, 2003). "I have been a member of many such committees. I know what happens. It will have to rely on the same agency to collect information."

17. See *S. Natarajan, History of the Press in India* 94 (1962).

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including Gandhi, Nehru through the *National Herald*, Lala Lajpat Rai through the *Punjabee*, Madan Mohan Malviya through the *Leader* and so on. But, it was the government's press publicity and propaganda machines that were systematically evolved over time. Buckland and Lethbridge were the first press commissioners from 1877-91. From the First World War, this department both became a spy, and for the dissemination of information to cover "topics in which the public is interested… (and) matters in connection with which the action of the government is criticised". In time, the Bureau of Press Information became a significant information machine. The First Press Commission (1952-54) remonstrated against the "continued expansion" of the government's press information and public relations organizations; and, more fundamentally, at the "excessive tendency to consider the press as a means of publicity for certain selected activities of the state or for certain individuals (rather than) as reporter or interpreter acting for the people".

The First Press Commission's view was that the government could publicize its activities and achievements but "not (be) utilized for political propaganda".[18] But, why should such propaganda machines exist at all? The truth was that many of these government enterprises were dead boring, ineffective and ran at a loss. But, as the Second Press Commission (1982) noted that the government media seemed to convey that they were "mouthpieces of the party and of persons for the time being in power".[19] The extent of the government media has since expanded by leaps and bounds.

No doubt, a creative judgment of the Supreme Court tried to build a right to reply in government publications – but in a guarded sort of way.[20] To these publications, the government had – till recently – an almost complete control over the radio and television. In the initial stages, the attempt made by the Chanda Committee (1964-6) and Verghese Committee (1980) to autonomize the working of these instruments were not carried through. Later, some attempts of autonomy have been made by legislation from 1990 to result in giving some measure of statutory autonomy to government broadcasting companies. But, the governmental control still prevails. What has upset the balance and taken broadcasting to a new dimension is the invasion from the skies. The global media barons have taken over—with state radio and television trying its best to compete. The very fact that India has a 'Ministry of Information and Broadcasting' reflects the past from which it has

18. *Report of the First Press Commission*, 101 (Govt. of India, Delhi, 1954).
19. *Report of the Second Press Commission*, *supra* note 7 at 102.
20. *Life Insurance Corporation* v. *Manubai Shah*, (1992) 3 SCC 637.

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emerged, the awkwardness of the present and intimations of what such institutions can do in the future.

The question of 'when government speaks' is an important question in relation to the battle for and over information.[21] There is a tremendous unevenness in the manner, form and effect of the government media. Government newspapers have not been very effective. The huge bulk of in-house produced magazines are boring. They are a strain on resources. But, each public sector company or important department feels the need for a magazine in and through which they can project themselves. This is in addition to the technical information on the trends of the economy. Just as there are certain kinds of media over which the government has enjoyed a monopoly, there are certain kinds of information and data over which the government has control. It is not always easy to access the primary data or have access to it. Each government has to have some democratic information policy. Such an information policy must make certain kinds of information known and accessible on a regular basis. Apart from primary data on the social and political economy the second kind of information available that needs to be made available is on the internal working of the government. At present, there is some kind of 30 year rule, the details of which are secret. Mrs. Thatcher in England toyed with an information policy of past information which became more and more restrictive. Here we are not considering what is accessible through the parliamentary process or the Freedom of Information Acts, but with the kind of primary and secondary data that should be made available as a matter of course by government without asking for it. But, while the government's information machines are massive, its information flow is weak – high on unimpressive propaganda and low on information. This is not to suggest that primary data about the economy is not available. There is a great deal of information on economic indicators but less so on social information and indicators; and still less so about the actual working of government. It is difficult to say that government should not speak. There is much that government knows that needs to be made known as part of the general knowledge of the governance and condition of the country which its people are entitled to know. Beyond general knowledge and data, specific information is also needed. The villagers of Rajasthan rightly say that if information about development funds is made known to them, they can wreak public and financial accountability in respect of the programmatic and other funds meant for them which are hijacked by administrators, politicians

21. On the ill-effects of government dominating speech and the marketplace of ideas, see generally M Yudorf: *When Government Speaks: Politics, Law and Government Expression in America*, (University of California, Berkeley, 1983).

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and those acting with or for them.[22] Government speaks in India, but not always with the responsibility it owes to people in putting democratic governance together.

II When Monopolies and Advertisements Speak

Pre-independent India was obsessed by the issue of the monopolism of the press. This was an English debate which was imported into India. A monopolistic press means monopolistic voices. Likewise, oligopolies diversify voices but within a tight circle. This makes it possible for the press to control information and public opinion. But, the working of the media – and especially the press — is not as simple as that. There is no doubt that a large part of the media was personally controlled by press barons; and, to some extent continues to remain so. The English media press was essentially in the controlling hands of the English. An Indian press was created as a counter blast – of which *The Hindu* excels as a continuing example. India's vernacular press mushroomed with devastating effect during the Raj – only to be suppressed by being specifically targetted by British Indian legislation. After 1950, India's vernacular press has grown in size and influence; and is firmly controlled by its proprietors.

After independence, having a go at the press for its monopolism was something of a fashion – influenced greatly by similar allegations in America and, more significantly England. Nehru appointed the First Press Commission (1952-54) to examine both this issue and the threat of yellow journalism which was, and remains, an important feature of, at least, local journalism. The First Press Commission was clear that proprietors maintain a significant control. Non-press managing editors and general editors were appointed for chains of newspapers. Attempts were made to please advertisers. Proprietors forced editors out of their jobs to create job insecurity. But, there is a danger in over-stating this kind of pressure. It cannot be said that Indian editors were – or are – totally supine. Thus, the First Press Commission 1952-54 rightly observed:[23]

22. See generally on the campaign of the Mazdoor Kisan Shakthi Sangathan (MKSS), 'Rural Realities in Rajasthan', *Frontline*, (4 March, 2000); Sukumar Murlidharan, 'A Forceful Assertion', *Frontline* (11 May, 2001); Aruna Roy, 'Chasing a Right', *Frontline* (31 March 2001); Amulya Radhakrishnan, 'Under Public Scrutiny', *Frontline* (18 January 2003); Bunker Roy, "Villages as a Positive Force for Good Governance", 37 *United Nations Chronicle*, (2000) on the website visited on 21 December 2003.

23. *Report of the First Press Commission*, *supra* note 5 at 267.

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> There are some papers which have managed to retain their traditions irrespective of changes in the form of ownership. Unfortunately, these are not numerous enough to provide a solid base for the future expansion of the press in this country. There have been instances where traditions of general objectivity and of a high standard of journalism (whatever the political policy might have been) were, after a change of ownership, no longer maintained at the same level.

The issue of monopolism continued to dominate Indian thinking. Mrs. Gandhi's return to power gave more spirit to the Second Press Commission (1982) which, despite being headed by a distinguished retired Supreme Court judge, faltered into supporting regime ideas.[24] Anxious to prove all charges of monopolism, the Indian Institute of Public Administration (IIPA) was invited to build up the case. Once again, the details of the distribution of control and circulation amongst newspapers were such that no overt monopolistic control could, in fact, be made out. But, the IIPA study confirmed the existence of "national monopoly houses" which the minority to the Second Press Commission rightly criticised to be a finding without significance.[25]

No doubt, powerful business houses enter the financial fray of the newspaper houses. Otherwise they do not survive. The 'left wing' *Patriot* organized through a collective finally collapsed in the 1980s. But, India sports a distinction between control by press barons who also have other interests; and control by business barons who also run newspapers and magazines. There is still a number of significant press enterprises that are not directly linked with general corporate business. Therefore – and especially after the Monopolies Commission cleared one chain of newspapers as did the government another one —, the Second Press Commission's conclusion that "a very significant part of the press in the country in general and a major proportion of all the important daily press in particular is controlled by persons having strong links with other business industry" needs revision.[26] It is an overtly ideological conclusion even if the broad point that the press argues for democracy without itself being financially democratic may remain even if the general monopoly argument may have to be gracefully abandoned.

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24. See generally the "Abstract of Recommendations" in the *Report of the Second Press Commission*, *supra* note 7 at 187-223.

25. S.K. Goyal and Challapathi Rao, "Ownership and Control Structure of the Indian Press" reprinted in *Report of the Second Press Commission*, *id.*, at 227-317, 233 Volume II, Appendix X.2.

26. For an analysis of the *Report of the Second Press Commission*, see generally R Dhavan, "Legitimating Government Rhetoric: Reflections on some aspects of the Report of the Second Press Commission", 26 *JILI* 391 (1984).

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But, at the same time, the insidious effect of proprietor control and outside influences distorting news and opinion cannot be overlooked. The IIPA study was surely right when it observed: "The changing character in ownership and control structures of the Indian press has far-reaching socio-economic implications. It is of common knowledge that press reporters and senior staff of many of the newspapers are also employed to promote non-newspaper interests of their managements. Inspired news stories are timed and planted to influence decision making in government. While use of press for promotion of House interests is known, it is not very often realised that newspaper managements exercise their choice to ignore or build up public images of chosen public personalities."[27]

To this may be added the issue of advertising; and, of course government advertising. Continuing the insights of the First Press Commission, the Second Press Commission examined this issue with some tenacity. In one sample of 1979-80, it was shown that out of Rs.16.48 crores earned by advertising agencies, 6 earned more than 1 crore each – suggesting a concentration of advertising power.[28] No doubt, a good advertising agency will be influenced by circulation, but some agencies admitted that they were influenced by non-commercial considerations. Advertising is a powerful influence but not always distortionary in its influence and effect. Such a subdued verdict cannot be made of the effect and influence of government advertising which is the financial life line of some newspapers especially the smaller ones. The Second Press Commission, noted that in 1980-81 such government advertising represented about 30% of the total advertising. The number of beneficiaries increased, with this beneficence increasing to smaller papers. At least two governments (Bihar and Kashmir) indicated that support for government policies was a factor in giving advertisements. Out of 392 respondents 332 claimed that the government's advertising policy was unfair. Differential rates were given to different newspapers. Some rates were too low. The Second Press Commission rightly observed that 'fluctuations' in advertising policy were not limited to the time of the emergency. But, after all this, the commission approved an Andhra Pradesh High Court judgment permitting refusal of advertisements on a large number of grounds "including abusive and slanderous attacks on governments and its functionaries".[29] This policy has continued.

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27. *Supra* note 25.

28. *Report on the Fact-Finding Committee on Newspaper Economics*, 121 (New Delhi, 1977).

29. *Report of the Second Press Commission*, *supra* note 7 at 99. The Andhra Pradesh judgment in W.P.No.7763/1979 was decided on 10 October 1980.

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The Press Council is littered with complaints by the press against government policy – though not necessarily always about advertisements.[30] Whatever the range of the facts, it is abundantly clear that those who have to beg the government for advertisements and feel vulnerable when the financial support that flows from such advertisements is taken away cannot have a free voice or voice entirely free opinions.

The media is a complex area of activity vulnerable to, and part of, the many influences that compose society – at times from government or the powers that be. Yet, the media is referred to as the fourth estate; and regarded as a critical part of governance. Indeed, at times, it has been argued that Indian governance – no less governance in other parts of the world - has been kept in check because of the judiciary, the media and peoples' activism. The judiciary is the custodian of the rule of law which ensures that those in power (including those who claim a democratic peoples' source to their empowerment) stay within the discipline of the law. Peoples' activism is a reminder that there are always people in society who are willing to interrogate power and its exercise. The media joins in this interrogatory exercise in a variety of ways. But, none of these actors are necessarily *sui generis*. The judiciary is as much a part of society and its influences as people's activism or the media. But, this is no reason to attribute a lack of integrity to these processes. Like the judiciary, the media has developed an ideology of independence. In this complex ideology many things are written; a sense of honesty and integrity; the procedure to be followed; the duty to verify sources and give affected people a chance to be heard; a sense of spirit and a spirit of honest adventure. Despite – and perhaps, because of – the various influences that seek to influence them, journalists acquire a sense of professionalism. 'Professionalism' is an ideology which is brought together and tacked down_by the interplay of many influences, processes, institutions, rules and laws.[31] This yellow journalism is confronted by the law of defamation even if such a remedy may not be that effective in India. The Press Council's limited jurisdiction may

30. See Press Council of India, *Press Council of India and it's Functioning*, 7-8 (Press Council of India, New Delhi, 2002) which gives information on the press' complaints against the government and others showing that between 1998 and 2001, 1165 complaints of 3617 were filed by (and not against) the press. Of these 794 out of 2567 were dismissed at a preliminary stage.

31. There are many theories of professionalism – too complicated to explore. For our present purposes, professionalism is an ideology which brings together and reiterates the practices of a professional group in a way that creates an insularity and solidarity within the group to exclude others and represents a promise of conduct explicated for those dealing with the professional group.

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have a limited influence. In-house procedures are not easily obviated and provide tension points which act as a check.

After having stock of a somewhat mournful situation in which the government speaks through its own powerful media and seeks to control the voices of others, the fact that corporate interests own and influence the media and after noting the demonstrable vulnerability of the press and the media in India, it is necessary to redress the balance by viewing the media as being not just as a monolithic entity at the beck and call of those in a position to control or influence it. The media has also to be understood in its own terms as manned by people with a dedication to do what they do and bound by a professional ideology which circumscribes their working practices. So even though there are all kinds of influences that interfere with the right to know and make know, the fourth estate with all its diversity both competes within itself and confronts its own ideology to produce a credible market place of ideas. This market place, too, is not without its angularities. But within all their limitations, editors and journalists deserve something of our trust as custodians of the right to know and make known. The media is a situs of struggle and, despite its limitations, more than an adjunct to democracy.

III The World of Slapps, Restraints and Censorship: Interfering with the Right to Make Known

There is little merit in the right to know if it does not carry the right to make known, or to have the right to think, but not to give expression to one's views or having declared one's views not to disseminate them further. Undermining the guarantee of free speech and expression and of thought and belief are the various direct and indirect intrusions of the law which, in turn, become a powerful weapon in the hands of those who wish to stifle speech if not thought. This is the world of censorship, restraint and the SLAPP suit. These empowerments are not limited to government but extend beyond government to political and civil society. Powerful interests in society are not just wary free speech but seek to control its voice and silence it.

The term 'SLAPP' is a typical American acronym. It was invented by two professors in Denver, to put together a sample of one hundred cases in which suits were filed to silence the voices of protest and public opinion. A large number of such cases arose in the field of environment and zoning laws around which powerful building and other interests acculturate. De-coded the term SLAPP means the Strategic Lawsuit Against Public Participation. Inventing acronyms are always great fun; and, no doubt, our inventing professors had a great deal of

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fun in conjuring this one.[32] But, it is not as if the wheel was reinvented even if the term 'slapp' nicely describes an increasing tendency by those in power to somehow silence public opinion and enfeeble or bankrupt protestors by bringing them on their knees. The purpose of 'slapps' is more than simply getting a 'gagging' writ. It is a strategy to put people on notice, ensnare them in the legal process, put them to expense, bother and trouble and make them give up their cause if not silence them. This strategy is evolved by the rich and powerful who have the institutional capability to use the law to advantage. Such persons are what have been called 'repeat players'. They can play the system to ensure that "the 'Haves' come out ahead". These cases are not just fought for present gains but also to reinforce a legal regime that recognises, enables and sustains the 'slapp'.[33]

No doubt in America, 'slapp' suits have been going on for a long time as part of the common law tradition. In England both the common law and its statutory progeny devised many ways to silence voices and protest. Concepts of 'breach of peace' and 'unlawful assembly' were woven into magisterial procedure. In this area an enormous transformation of the law took place in the late nineteenth century, the troubled inter-war years and the sixties. Although these laws were general, they were targetted against particular classes of people and protests. But, more especially, law of torts afforded many causes of action to silence voices including the law of defamation, trespass, malicious falsehood, confidentiality and, above all, various actions in conspiracy and interference which were used to intimidate and harass the trade union movement. The labour movement were aghast to find itself against actions for conspiracies that interfere with business. All trade union activity interferes with business. So laws were enacted in 1906 and as late as 1965 to work past decisions which would have stifled and throttled the trade union movement.[34] But immunity for trade unions did not, in fact, preserve other social and public voices. Defamation and other cases sported what came to be called the 'gagging'

32. The term first appeared in two articles jointly written by Professors G W Pring and P Canan: "Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches", 22 *Law and Society Review* 385 (1988); *ibid:* "Strategic Lawsuits against Public Participation", 35 *Social Problems* 506 (1988).

33. M Galanter, "Why the Haves come out Ahead: Speculations on the Limits of Social Change", 9 *Law and Society Review* 95 (1974).

34. Thus the tort of conspiracy was expanded (see *Derry* v. *Peek*, 1889 AC 337) to give rise to potential 'slapp' suits against trade unions. To obviate this Parliament by law enacted the Trade Unions Act, 1906 and later (reacting to *Rookes* v. *Barnard*, 1964 AC 1129) the Trade Unions Act, 1965. Had this not been done, the unions would have been 'slapped' out of existence by law suits.

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writ. The best rule should have been not to injunct publication, but to let the complainant seek a remedy in damages at the end of the case. But, this best rule was not always followed. And, in any case, the problems created by any suit remained. Those entrapped in litigation had to go through it, pay for it and suffer its consequences. If they were defiant before the litigation started, such defiance wore off in prolonged and expensive proceedings which, if lost, would result not only in damages but also costs to the victor. The penalties for filing suits was always less intimidatory than the dividends to be obtained from a successful 'slapp'. Thus, the common law as it spread to various jurisdictions was a fertile basis for giving birth to slapps.

As distinct strategies, 'slapps' became more consciously recognised and understood with the advent of new forms of public interest activity in the United States. The growth of groups like those of Ralph Nader and those concerned with the environment and social causes has changed the landscape of American democracy. People like Martin Luther King paid for their protest with their lives. But, such activism invariably hurts powerful interests and corrupt activity. If only to prove every action has some kind of equal and opposite reaction of 'slapp' was invented, as a counter reaction the 'slapp' was reinforced to pick on activist groups especially those who are vulnerable. Property developers, automobile companies, anti environmentalists and others sought out their social adversaries. 'Slapp' suits increased by such leaps and bounds that various states sought to enact laws and procedures to diminish their effect; and, above all, defend the right to free speech and the right to petition the legislature with peoples' concerns and causes. 'Slapp' suits spread to other jurisdictions as, indeed, they were expected to. After all, 'slapp' suits are the creation of multi-national corporations and conglomerates who want to silence those who attack them. Like the multi-nationals themselves such strategies do not suffer transnational limitations. Thus, in England, Macdonalds successfully sued protesting pamphleteers but did not enforce the claim. Likewise, an attempt was made to silence Greenpeace's concerns about North Sea oil, but the case resulted in a compromise. In Canada, big conflicts arose which resulted in 'slapp' suits by powerful 'lumber' companies taking over lands belonging to the 'native' Canadians. In Australia, the leading 'slapp' cases have been over the environment. There is a growing literature on this phenomenon.[35]

India should logically be the home of 'slapp' suits since Indian social and political life is replete with buy-offs and intimidation. The

35. See generally on the growing literature on SLAPPS, J A Wells, "Exporting SLAPPS: International use of the US 'SLAPP' to Suppress Dissent and Critical Speech", 12 *Temp. Int'l and Comp. Law Journal* 457 (1998).

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'buy offs' are a regular feature of India's vast mal-investment in 'corruption'. Intimidation rules in more ways than one – sometimes with the help of the government's machinery and sometimes without. When Sundarlal Bahuguna was protesting the building of the Tehri dam, a joint operation between the government and the goons of the contractors building the dam resulted in his being brought down to Delhi from the mountains to remove him from the scene of protest – ostensibly because he was trying to commit suicide which, at that time, was not an offence. When activist Medha Patkar went to Tehri the next day, she was arrested for disturbing the peace the moment she got off the bus and before she got the opportunity to disturb anyone or anything. Countless stories of intimidation exist—most hidden from the public eye by money and muscle power. Indian corporates are slowly learning the use of the 'slapp' suit even if Indian society prefers to 'slap' rather than slapp. Based on English law, Indian law enables obtaining (perhaps, where the legal process is corrupt, procuring) injuncting orders from courts to prevent any or all kinds of adverse activity. When Reliance industries was confronted with a newspaper campaign concerning its share issue in 1989, the Supreme Court silenced the *Indian Express* from continuing its reporting and comment on this issue during the duration of the share issue. The target of some of the suits has been the press.[36] Earlier, in 1984, Campa Cola managed to get a 'gagging' order on the popular magazine *India Today*. This case grew out of a defamation suit which is increasingly becoming a fertile ground for obtaining 'gagging orders'.[37] In 1982 the Madhya Pradesh High Court injuncted the *Weekly Gwalior Reporter* from publishing defamatory and insulting material.[38] In 1987, the Karnataka High Court injuncted the publication of novel 'Avasthe' and its being converted into a film on the ground that the contents were not very plattering to somebody.[39] In 1988, the Delhi High Court injuncted advertisements about the sale of 'Garden' sarees as hurting the business interests of the manufacturer.[40] In 1991, the powerful Supreme Court Bar got an order against the publication of journalist Kuldip Nayar's book *India House* over some remarks made concerning the death of Chief Justice Mukerjea in England when Nayar was High Commissioner. Under the eye of the Delhi High Court, the matter was compromised, the offending passages withdrawn and the

36. *Reliance Petrochemicals* v. *Proprietors of Indian Express*, (1988) 4 SCC 592. For a critique of the judgment see R Dhavan, "Censorship by Courts: Silencing Public Opinion" 30 *JILI* 88 (1988).

37. *S.Charanjit Singh* v. *Arun Purie*, (1983) 4 DRJ 86.

38. *Hari Shankar* v. *Kailash Narayan*, AIR 1982 MP 47.

39. *Sonakka Gopalagowda* v. *U.R.Anantha Murthy*, AIR 1988 Kant 255.

40. *Garden Silk Mills Ltd*. v. *Vasdev Motwani*, AIR 1989 Del 46.

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book published in its modified form. In 1997 Maneka Gandhi a 'politician' and the wife of the late Sanjay Gandhi successfully prevented the publication of the journalist and litterateur Khushwant Singh's memoirs. A few years later this judgment was reversed. Meanwhile, the publication of the book was stopped.[41] In 2001-02, the Jayalalitha Government have filed innumerable criminal defamation suits through the state machinery against *The Hindu* and other publications.[42]

But, there have also been attempts to stifle the initiative and work of social activists and others. After the Emergency, Jagmohan filed a defamation case against journalist Javed Laik over reportage on the demolition of buildings during the Emergency. Jagmohan won his case in a ruling that does scant justice to free speech to raise many questions as to whether politicians and public persons should file such cases to 'save' their reputation in respect of their official or public actions.[43] In 1992, Cadbury's took out a defamation suit against a research laboratory and group in Lucknow over the latter's findings on the nickel content in the former's chocolates. Eventually, a transfer petition was filed in the Supreme Court to transfer the case from far-away Bombay which was favourable as a litigation location to Cadburys. One of the conditions of transfer insisted upon by Cadburys was that they would not have to pay the large 'ad valorem' court fee required for such cases in Lucknow but continue to pay the lesser sum required by Bombay courts – the 'Lucknow' rate of court fees being much higher than the 'Bombay' rate. Eventually, it seems the case has fizzled out; but not without the desired effect for Cadbury's. The nickel-in-the-chocolate debate lost its edge.[44] In 1997, the activist writer and journalist, Madhu Kishwar, began an examination of Dr. Prabha Manchanda's clinic in respect of certain gynaecological operations. Dr. Manchanda filed suit in respect of future publications. This was a case of 'anticipatory defamation'. The trial court granted an injunction. So, if a journalist or activist seeks to investigate someone, they may well be caught up in the vortex of an

41. *Maneka Gandhi* v. *Khushwant Singh*, Civil Suit No. 2899/1995. See also the judgment of Justice K. Ramamoorthy in *Maneka Gandhi* v. *Khushwant Singh*, I.A. NO's 12567/1995, 646/1996. 647/1996 in Suit No. 2899/1995.

42. Around twenty-odd cases of criminal defamation were filed by Chief Minister J.Jayalalithaa and the Tamil Nadu government against *The Hindu* and others. These cases are now before the Supreme Court so that both these actions and the criminal defamation law on which they are based are tested for their constitutionality; see further "Yet another Defamation Case against the Hindu" *The Hindu* (11 November, 2003).

43. *Jagmohan* v. *Mulgaokar*, O.S. No. 168/2 of 1979 decided on 20/07/1992.

44. The initial cases were *Cadburys India Limited* v. *Dr. M.C.Saxena* (Bombay High Court); *Mandhata Singh* v. *Union of India* (Lucknow Bench of the Allahabad High Court) which were subsequently transferred to be heard together by the Supreme Court.

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anticipatory defamation case, prevented from further investigation by being silenced in the process.[45] The *Narmada Bachao Andolan* (NBA or Andolan) has been protesting the building of the Narmada and its ancillary dams. The dams have had, and will have, a devastating social and ecological effect. The Supreme Court found in favour of the dam – with a powerful dissent on the question of prior rehabilitation and settling of the dam and related oustees.[46] Whilst the Supreme Court case was going on, the Narmada activists had approached various suppliers to persuade them not to be involved in the dam process. Under pressure from the Supreme Court, they had to give an undertaking not to indulge in such secondary pressure. The court itself issued notices in contempt and warned the Andolan not to make comments about the court;[47] and, eventually, sentenced the writer-activist Arundhati Roy for contempt in an unfortunate and related proceeding.[48] But, there was also a 'slapp' in the offing. The NBA has grown into a formidable body with a large following and an 'across-the-board' expertise on matters concerning dam construction. It got involved in discovering the truth about the construction of the Mahabaleshwar dam by a well known corporate – S. Kumar. The more the Andolan probed into the matter, the more it found. Important questions were raised about investment and use of public monies. When the Andolan in Bombay raised these questions, a silencing 'slapp' suit was filed which succeeded initially, set at naught by a courageous judge which was unfortunately reversed in the Bombay High Court. The case will perhaps, go to the Supreme Court.[49] The cases and cross cases filed by the government and corporates in the Balco aluminium company take over are yet another example of enmeshing public controversy in law cases to hijack the controversy from the public domain.[50] In 2003, the Centre for Science and Environment (CSE) raised campaigns about 'bottled water' and, later, the pesticide content in soft drinks – especially those of Pepsi Cola and Coca Cola. Pepsi filed a case in the Delhi High Court which was essentially to silence CSE. At the first hearing, Pepsi withdrew some of its allegations against CSE. When CSE, which remained a defendant in the case, tried to strategize

45. *Dr. Prabha Manchandha* v. *Samira Kohli and Madhu Kishwar*, Civil Suit No. 233/1997.

46. *Narmada Bachao Andolan* v. *Union of India*, (2000) 10 SCC 664.

47. *Narmada Bachao Andolan* v. *Union of India*, (1999) 8 SCC 308.

48. *In Re Arundhati Roy*, (2002) 3 SCC 343.

49. See *Shree Maheshwar Hydel Power Corporation* v. *Chitraroopa Palit*, Bombay City Civil Court Suit No. 5560/2001. Note the Interim Order No. 400/2003 by Judge Roshan Dalvi on March 29, 2003 reversed on appeal on July 25, 2003 by the Bombay High Court.

50. See the various petitions discussed by the common judgment in *Balco Employees Union* v. *Union of India*, (2002) 2 SCC 333.

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the case in a particular public interest direction, Pepsi withdrew the case since the matter had already been hi-jacked into the parliamentary process. Coca Cola tried to file a case in the Supreme Court without adding the CSE as a party. But, it was clear that it was the CSE report that was the target. The Supreme Court did not entertain the case, but the multi-nationals' campaign continues.

Indian law clearly took a wrong turn when it more or less accepted that pre-emptive injunctive relief would be granted in defamation and such cases which should normally go to trial to result in damages awards for 'slappers'. No doubt, at the end of the day, the 'slapped' may not be able to pay. The 'slappers' would have their moral day in court but not enforce the decree. This was the strategy eventually adopted by Macdonald in their case in England to be contrasted by Murdoch's litigation against *Private Eye* in England – with *Private Eye* being killed off as a publication having been murdered by litigation.[51] But, India has a bill of rights with a specific guarantee of freedom of speech and expression. Just because this right can be reasonably restricted in the interests of defamation does not mean that pre-emptive restraints on publication and speech are always justified. Indian courts have not balanced in the priority to free speech in these cases. This seems surprising because the Indian Supreme Court has put a valiant effort in stopping the government's efforts to control the press through price and page legislation and newsprint control.[52] In many of the censorship cases, the court spoke of the priority of the free speech right and the need to protect free speech in a democratic society.[53] But, oddly enough

51. See generally on the 'Private Eye' case, J Jackson, *Malice in Wonderland: Robert Maxwell* v. *Private Eye*, (Macdonald, London, 1986).

52. *Bennett Coleman* v. *Union of India*, AIR 1973 SC 106; *Sakal Papers* v. *Union of India*, AIR 1962 SC 305; *Indian Express* v. *Union of India*, (1985) 1 SCC 641; see further R Dhavan, "The Press and the Constitutional Guarantee of Free Speech and Expression" 28 *JILI*, 299-335 (1986).

53. For the long line of cases on the need to protect free speech from censorship see *Romesh Thapar* v. *State of Madras*, 1950 SCR 514; *State of Madras* v. *Brij Bhushan*, (1950) SCR 605; K.A.Abbas v. Union of India, (1970) 2 SCC 780 (concerning a film 'A Tale of Four Cities'); *Ramesh* v. *Union of India*, (1988) 1 SCC 668 (concerning the film 'Tamas'); *Odyssey Communications* v. *Lokvidhyan Sangathana*, (1988) 3 SCC 410 (concerning the serial 'Honi-Anhoni'); *S.Rangarajan* v. *P.Jagjivan Ram*, (1989) 2 SCC 574 (concerning the social film 'Ore Oru Gramathiley'); *LIC* v. *Manubhai Shah*, (1992) 3 SCC 637 (concerning Tapan Bose's film on Bhopal); *Bobby Arts International* v. *Om Pal Singh*, (1996) 4 SCC 1 (concerning the film 'Bandit Queen') but *cf Union of India* v. *Motion Picture Association*, (1999) 6 SCC 150 which seems to have ignored the earlier jurisprudence. For an informal comment on censorship, see generally Girja Kumar, *Censorship in India*, (Vikas, New Delhi, 1990); Girja Kumar, *Book on Trial: Fundamentalism and Censorship in India* (Har-Anand, New Delhi, 1997).

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in civil defamation cases the courts have not taken due care to give a priority lexical emphasis to free speech over its pre-emptive ban. A small beginning was made in the *Auto-Shanker* case[54] where government officials tried to restrain the publication of the account of a criminal by seeking to protect their (that is the official's) reputation. The Supreme Court opined that public officials stand in a class of their own and cannot hide behind such litigative ventures. In this, it relied upon a recent English decision;[55] and the famous *New York Times* decision[56] from America which increases the dimensions of free speech in respect of public persons. But, even after the *Auto-Shanker* decision, Indian courts have not followed suit in defamation cases.[57] The Indian law in pre-emptive defamation cases is biased in favour of the 'slapper' even if it shows greater resilience in other areas of free speech.[58]

Multi-national corporates have become an insistent part of contemporary governance. Direct and financial intimidation and inducements are a part of multi-national strategy. The famous 'Enron' power plant in Dabhol cloaked many sins which were ignored even by the law courts that generally tend to favour multinational investment in India as a good thing which will wake up Indian industry and take the nation into the mainstream. It is this kind of bias that lay at the root of the court's non-interference in the Enron affair and interference in the *Balco* case.[59] The judicial message seems to be to let the nation get on with it without being deterred by activists who stand in the way of progress. But, are the activists always wrong? And, who is the nation? A country which taught non-violence *satyagraha* (protest) to the world seems to be faltering in evolving a jurisprudence to deal with multi-

54. *Rajagopal* v. *State of Tamil Nadu*, (1994) 6 SCC 632. [hereafter *Auto Shankar* case]

55. *Derbyshire County Council* v. *Times Newspapers*, (1993) 1 All ER 1011.

56. *New York Times* v. *Sullivan*, (1964) 376 US 254.

57. Note the judgment of K Ramaswamy J. in *Maneka Gandhi* v. *Kushwant Singh*, Civil Suit No. 2899/1995. where he relies on the right to privacy aspect of the *Auto Shankar* case (*supra* note 54) but not the other aspects protecting free speech in respect of public persons.

58. The Constitution of India has specifically recognized the freedom of speech and expression in article 19(1) (a) but unfortunately while dealing with defamation the courts have not given the right the freedom it deserves. While in England there is a tradition favouring imposition of damages over grant of an injunction to restrain prior to publication, in India this tradition has not been duplicated.

59. See *Balco Employees Union* v. *Union of India*, (2002) 2 SCC 333; note also the *Enron* case and judgment of B.P. Seraf and M.S. Rane JJ in *Center for Indian Trade Unions and Others* v. *Union of India and others*, (CWP 2456 of 1996) dismissing the challenge made to the controversial Power Purchase Agreement by Enron.

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national corporate governance. India needs to deal with 'slapp' strategies devised by these corporates. If it does not do so, it risks the viability of its social activists' movements which are an essential ingredient of its strengthening democracy. America – the home of corporates and the new 'slapp' strategies - has tried to strike some kind of balance to resist such strategies from becoming over-bearing. The American approach takes a somewhat narrower view of 'slapp' suits as being more those kinds of suits which were designed to silence and intimidate without any substantive merit. Some of these 'slapp' suits may have merit. They may even eventually succeed – as they did in the *Macdonald* case in England. It is not the legal merits and de-merits of a case that is significant. What is significant is the 'chilling purpose' behind the suits, their effect on free speech and on social activism on which the real strength of a democracy rests. Recognising this, various American jurisdictions have tried to discipline 'slapp' suits. The basis for which restraints draw in America from the 'free speech' and 'right to petition' clauses of the Constitution.[60] A similar drawing of inspiration has been suggested by Canada 'slapp' suit academic experts and Australian reactions which also point to the right to free communication.[61] In England, the Defamation Act, 1996, in fact, makes 'slapp' suits easier for the 'slapper' by providing for a fast track procedure. However, in 1991, new procedures have been created permitting the 'slapped' to plead that his words do not have the meaning attributed to them.[62] But, this begs the issue of 'free speech' even if wrong. Britain now pays adherence to the European Convention on Human Rights including the free speech clause in article 10 under whose aegis Britain's long standing 'defamation' laws suffer scrutiny – no less in the hands of British courts who have taken the view that they have to take the Convention into account. On this basis, in the *Derbyshire* case[63], the courts relied on the Convention to deny public corporations the right to sue for libel. There are several other English cases on journalistic sources and the *Macdonald* case which are before the European court. In *Auto Shankar* the Indian Supreme Court followed the *Derbyshire* case as, indeed, aspects of the

60. C E McCarthy, "Case Comment: Citizens cannot be SLAPPed for exercising First Amendment Right to petition the Government – Hometown Properties", 31 *Suffolk University Law Review* 759 (1998).

61. See C Tollefson, "Strategic Lawsuits against Public Participation: Developing a Canadian Response", 73 *Canadian Bar Review* 200 (1994).

62. J A Wells, "Exporting SLAPPS: International use of the US 'SLAPP' to Suppress Dissent and Critical Speech", *supra* note 35 at 498 and specifically footnotes 392-403.

63. *Derbyshire County Council* v. *Times Newspapers*, (1993) 1 All ER 1011.

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New York Times case.[64] But matters need to be taken further. In America there have been legislative responses to 'slapp' suits in the States of New York, Washington and California, Marlyland, Virginia and New Jersey. Various techniques are being evolved such as the requirement that it be shown that the 'slapped' had actual malice, to adjust burdens of proof, to provide preliminary assessments with a bias in favour of speech and increasing this bias in particular classes of cases and petitions.[65]

Indian laws response has been imitative and evasive. Influenced greatly by inherited common law traditions, India's high courts have chosen to follow these traditions in ways that injure the activist or journalistic voice. A lot of this kind of judicial decision making is based on nineteenth century ideas to ignore the fundamental concern that people should not be pre-censored by the courts by 'gagging' writs before the trial has even begun. Indian courts are very busy; and most of these decisions get buried in the quirky facts of a case without doing justice to the overall picture. It is only when matters reach the Supreme Court that a broader perspective is sometimes discovered to yield some incomplete insights. Indian courts are justly famous for their approach to activist litigation; but, a broader and richer sense of the role and requirements of speech and the activists voice to India's democracy have eluded systematic judicial exposition.

India's publications and media suffer all kinds of restraints including those arising from other than unofficial censorship in civil society and official censorship by government. Civil society has innumerous ways of putting on the brake on free speech and expression. Likewise, the British handed over to Indian governance many empowerments to deal with various varieties of speech including defamation, seditious statements and 'hate speech'. These arrangements continue giving rise to criminal liability.[66] But, they also contain the power to impose bans

64. See *Auto Shankar* case, (*supra* note 54); *Derbyshire County Council* v. *Times Newspapers*, (*supra* note 55); *New York Times* v. *Sullivan*, *supra* note 56.

65. See generally J E. Sills, "SLAPPS (Strategic Lawsuits against Public Participation) How can the Legal System eliminate their Appeal?" 25 *Connecticut Law Review* 547 (1993).

66. S. 153-A of the Indian Penal Code, 1860 prohibits promotion of enmity between different groups on grounds of religion and carries a punishment of three years or fine. S. 153-B criminalizes imputation and expressions which are against national integration and causing ill-will among the community. This is punishable with imprisonment upto five years or fine. Section 295-A criminalizes the insult of religion with a punishment of three years and fine. Section 296 prohibits the disturbing of religious assembly and section 298 specifically criminalizes the uttering of words with intent to wound religious feelings with a punishment of one year or fine.

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in the form of pre-publication censorship especially to deal with communal speech. Many of such attempts have been blocked by the courts; some have not. No less insidious is the power of the government to impose customs bans which have extended from the nineteen twenties to books like Mayo's *Mother India* to Salman Rushdie's *Satanic Verses.*[67]

IV Information Rights, Whistles and Stings: Advancing the Rights to Finding Out and Making Known

Like any where else – but, perhaps, more so in India – the information regime of Indian governance leaks. Some leaks are inspired by the government itself; some are stolen. This is also so with information by and about corporates. 'Leaked' information is always more reliable than information derived from the vast amount of published data which is further camouflaged by its vastness. The 'leak' is pin-pointed and precise. Such information often finds its way to courts which are not always happy to find 'notings' from government files reproduced – or even photocopied – in the pleadings. As we have seen, the law of official secrecy is open ended and catch-all. Leaked information is not on general release but only leaked by some to some. Formally, there is a 15 (and in some cases) 30 year rule. Documents themselves are classified into 'Top Secret', 'Secret', 'Confidential' 'Classified' and 'De-classified' Some are intended to remain where they are; and some released years later.[68]

A democracy founded on frank exchanges between the ruler and the ruled cannot survive on a diet of 'leaks'. Without information, there can be no meaningful discourse in a democratic society. No doubt, some embargo has to be put in areas which are the subject of 'active' decision making; and those relating to security and the public interest. But, hitherto, the 'public interest' has been much for broadly defined to swallow up all or any access to all but routine information. In other jurisdictions, schemes were sought to be evolved for selective disclosure; but were not very successful. Under the scheme evolved in 1999 in India any one could approach the ministry for any file, inspect it and see what was written after making allowances for those files actually in circulation. This was a courageous declaration for virtually 'open',

67. See s. 11 of the Customs Act, 1962 under which the ban on the book was imposed on 5 October 1988 by the Finance Ministry.

68. See S.N. Jain (*supra* note 6) where he notes that the 'thirty year rule' is stated in the *Archives Policy Resolution* of 11 December 1972; see also "Permanent Secrets", *Times of India* (7 March, 1986).

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government by the Ministry of Rural Development. It was an invitation to everyday eyes of democracy to redeem it. But no sooner was the scheme declared, the Prime Minister's Office (PMO), the Cabinet Secretariat and the, amorphous but nevertheless real, wall of bureaucracy fell on the scheme like a ton of bricks. The scheme was reversed. The debate for free information belonged to the courts, parliament and, of course, journalists.

Law courts have the right to call for information relevant to the disposition of the case, but not necessarily get it. Following a stringent common law tradition, before 1968, governments in England pleaded 'crown' privilege seeking a blanket exemption from making the documents available. Such a rule derived from a long history of war and espionage and was enshrined in 1942 in the *Thetis Submarine* case where discovery was denied to deceased victims' families to prove their case. This 'wartime' disaster decision was itself a disaster in them the governments' claims to secrecy not even yield to the requirements of justice. Before 1942, there used to be limited disclosures to courts. But now a complete blanket was created wherever the government willed it so. In 1968, this decision was overruled by the English courts to pave the way for an imitative legal common law tradition to follow suit. But, the new opening did not have immediate effect in India. In 1982, a journalist was given access to convicted prisoners; but years later in the *India Today* case, the Supreme Court did not accept this to be a general right that inheres to journalists or journalism.[69] In the same year, in the *Pune Environment* case,[70] the court spoke of the importance of people's participation and upheld their right to know. In the *Life Insurance* case[71] some kind of link was sought to be established between free speech and the right to know to make the latter a part of the former. In the *Auto-Shankar* case, the Supreme Court injuncted officials from free speech, but did not really take the right to know aspects of free speech too much further. In the *Cricket Broadcasting* case[72] due recognition that the

69. See *Prabha Dutt* v. *Union of India*, (1982) 1 SCC 1. See also *State* v. *Charulatha Joshi*, (1999) 4 SCC 65 where the Supreme Court circumscribed the right to interview convicts within parameters including the consent of the convict and abiding by the rules and regulations prescribed in the Jail Manuals and other rules and legislations.

70. *Bombay Environmental Action Group* v. *Pune Cantonment Board*, SLP (Civil) 11291/1986 (13 October, 1986) unreported but reproduced in A.Rosencranz (*et al* ed.), *Environmental Law and Policy in India, Cases, Materials and Statutes* 149 (N. M. Tripathi, Bombay, 1991).

71. *Life Insurance Corporation* v. *Manubai Shah*, (1992) 3 SCC 637.

72. *Secretary, Ministry of Information and Broadcasting* v. *Cricket Association of Bengal*, (1995) 2 SCC 161.

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right to free speech included the right to communication and circulate and broad-cast one's views was given. This case was on access to broadcasting and was more concerned with giving greater access to the electronic media and its distribution to various companies and persons. It laid the foundation for accessing the free speech provisions of the Constitution for broader catchments of rights. The *Vohra Committee* case concerned a committee that had hinted at vast levels of corruption at all levels throughout India. The court spoke of the right to know but no less eloquently of the effect of too much knowledge in paralysing the administrative system.[73] Over the years, a case had been made out for (a) giving the courts a right to know; (b) connecting the right to know with the constitutionally guaranteed right of free speech and expression; and (c) broadening access to various kinds of media. But, the right to know had not specifically been made the basis of an independent demand. The right to know was brought to the fore in two significant *Electoral Reform* cases[74] in which the petitioners concerned with electoral reform demanded that they had a right to know the educational, financial and criminal antecedents of those who stood for elections. A brave decision of the Delhi High Court paved the way for a Supreme Court decision of 2002 in which the court decreed that this information has to be made available – directing the Election Commission to implement this right into reality. Troubled politicians sought to curtail this right through a conspiratorial consensus by which the directions of the Supreme Court were whittled down. When these legislative denials came for judicial scrutiny before the Supreme Court in 2003, the court ensured that the requisite information was made available to the voter. Indeed, the elections to various states in 2003 took place on the basis of such disclosures. So, the right to know has not only now been assimilated as a constitutional guarantee but also been given effect to in various material particulars. But, this does not necessarily mean that a person will be able to file cases demanding a right to know particular or general information about the administration. However, it may well be the case that causes of action will arise when people may successfully demand access to information about themselves and various decisions and programmes concerning them.[75]

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73. *Dinesh Trivedi* v. *Union of India*, (1997) 4 SCC 306.

74. See *Union of India* v. *Association for Democratic Reforms*, (2002) 5 SCC 294 and *People's Union for Civil Liberties* v. *Union of India*, (2003) 4 SCC 399.

75. The electoral reform cases have not established a general right to know but are firmly located in the voters specific electoral right to know about the candidate. It is doubtful if these cases will create a cause of action to obtain general or specific information from the government.

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One reason for the denial of a general right to information through courts is due to the union and various state governments enacting Freedom of Information statutes. Courts will be fully entitled to take the stance that pleas for specific information now belong to the realm of these statutes and subject to the limitations and procedures contained in them. But looking for information in government files without a hitch-hiker's' guide to their galaxies is like looking for the proverbial needle in a haystack. And, haystack may be the right word in the light of how government documents are filed, archived and preserved without a public records policy. Some attempt to make people responsible for public records was enacted through the Public Records Act, 1993, but its dispensation eludes proper implementation.[76] The case for a Freedom of Information Act was placed as a priority part of its political agenda by the then prime minister. It was years before it was accepted even though various states (including Tamil Nadu, Goa, Madhya Pradesh and Rajasthan) instrumented various legislations and policies in this regard. The Shourie Committee of 1997 examined a Freedom of Information Bill which was scrutinized and transformed into yet another draft measure by the Press Council of India in 1998. Later, a bill was tabled before Parliament in 2000. Finally, the Union enacted a Freedom of Information Act, 2002, which has been both welcomed and criticised. Now it has given way to the Right to Information Act, 2005.

Despite all these the basic problem of providing information to Indian democracy remains. A large part of this task has been reposed in the Indian Parliament and media. Parliament is a source of much information as requests are made for information. Some corruption stories in the fifties and sixties were broken in Parliament through revelations in the press. Minister Krishnamachari's dealings with Goenka broke through in the fifties in this way. A recent book on India's 'Big' stories[77] deals with startling revelations.

Since 1950, the politics of 'exposure' has shifted. During the Nehru era, exposure was directed towards good governance. The *modus operandi* was to expose, secure the appointment of a commission and seek a political solution without taking matters to their conclusion. Thus, as we have seen the Kriplani Report on Railway Corruption (1954), the Das Report on Kairon (1962), the Chagla Report on the Mundhra Scandal (1959) and the revelation of the Jeeps purchase scandal led to the

76. See the Public Records Act, 1993. See generally R Dhavan, 'The Public Records Act: A Critique', (PILSARC, New Delhi, 2000 *mimeo*).

77. B.G.Verghese (ed.), *Breaking the Big Story: Great Moments in Indian Journalism,* (Viking, New Delhi, 2003) collects essays by the journalists who broke what he calls the 'big story' and represent investigative journalism at its best and most difficult.

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resignation of prominent ministers. Corruption was pervasive as evidenced by the Santhanam Report of 1964. But, the then governments dealt with it in-house administratively or through political resignations. After the Emergency, this 'in-house' and 'political action' strategy was abandoned. The post-Emergency Shah Commission (1978) had failed to be effective. After Mrs.Gandhi's triumphant return in 1980, no question arose of 'in-house' or 'political' action. Using commissions and committees proved to be meaningless. Parliament's Joint Committee on Bofors (1987) was an eye wash. Few were embarrassed by corruption or government atrocities. Confidence in commissions waned even though they were appointed from time to time - some good, some bad.

The new view was not to go through the charade of inquiries and commissions but to prosecute for corruption directly. But, who would investigate whom? Policing was a state subject, state police covered up for their political masters; and were vindictive to former chief ministers and others. The *Hawala* case hearing in the Supreme Court[78] suggested the CBI itself required discipline. The CBI is stretched to its limits. The politics of regime: revenge and exposure – sometimes unfounded - continues. Cases were filed in Bofors against Rajiv Gandhi, over financial transactions against V.P. Singh and against Narasimha Rao over accepting bribes and in another case bribing MPs (to yield a strange decision from the Supreme Court immunizing bribe accepting legislators).[79] Invariably, these cases create party political capital and get caught in their own web.

But, 'exposure' is not just a game to be played by politicians against each other, but a peoples' public concern. It is in this context that 'whistle blowing' and 'stings' are important. The most famous of 'whistle blowing' stories is Daniel Ellsburg's revelation of the Pentagon Papers in 1971 which was crucial to stopping America's Vietnam War. Equally Serpico's revelations shook the New York police and consecrated in an Al Pacino film. In India, an increasing number of civil servants have blown the 'whistle' on corruption including Khairnar in Bombay, Aphons in Delhi and now Dubey in Bihar. Each whistle blower pays his price. In 2003 Dubey was allegedly killed by the mafia he exposed.[80] Whistle blowing is a democratic activity. In America, Australia and New Zealand laws have been enacted to protect whistle blowers.[81] In India, civil

78. *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226.

79. *P.V. Narasimha Rao* v. *State*, (1998) 4 SCC 626.

80. See Generally R Dhavan, "Whistles, Stings and Slapps", *The Hindu* (12 December, 2003).

81. See the Queensland Whistleblowers Protection Act, 1994, enacted to counter the massive corruption in the Queensland bureaucracy, which was used as the model for the Australian Public Service Bill, 1999. See also the Australian Public Interest Act, 1994. The United States enacted the Whistleblower Protection Act, 1989 to

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service rules forbid whistle blowing, but, Justice Jeewan Reddy's 179th Law Commission Report (2001) on "Public Interest Disclosure and Protection of Informers" projects the importance of protecting whistle blowers to prevent corrupt governance from further corruption, but does not go far enough.[82]

To 'whistle blowing' can be added 'investigative journalism' and its latest weapon: the sting. Although the 'Watergate' affair has given rise to many exposures being renamed some 'gate' or the other, India has a remarkable record of investigative stories. In India, the sting is now associated with Tarun Tejpal's Tehelka exposure on defence. It is the 'tehelka' sting that has acquired popular notoriety. But, Tehelka paid its price by being bankrupted and harassed by a commission which concentrated on its sting rather than the corruption it portrayed. 'Entrapment' is a well-known police technique. But, after the 'Judeo' and 'Jogi' affairs, when politicians ensnared each other with stings on video tape, this media technique has been converted into a political – even electoral-weapon.

But, where does all this leave Indian governance? Indian democracy is too corrupt, too hidden and too vicious to be left to its own devices. It needs both 'whistle blowing' and 'stings'; but, not as party-political dramas but as a genuine contribution to governance. India's Freedom of Information Act, 2002 and those of various states can never replace an active democracy getting to know. The Supreme Court recognizes the Indian peoples' right to know what their rulers do with public power, resources and money. Rajasthan's groups have shown how local welfare development benefits have been hijacked and can be campaigned against. There are going to be some invasions of privacy and confidentiality. But, they are outweighed by the public interest. Britain's Calcutt Committee and Press Council makes room for public interest exposure over privacy.[83] In the *Auto-Shankar* case, the Supreme Court of India invoked American free speech doctrine that those who hold public office cannot shut out the transparency of *bona fide* exposure. The Law Commission rightly welcomes 'whistle blowers' and prescribes protection

extend protection to employees of government corporations and to employees in the Veterans Administration. The United Kingdom has passed the Public Interest Disclosure Act, 1998 for the protection of whistleblowers. But while the American approach is to permit whistleblowing to the media, the commonwealth initiative and proposals mandate disclosure to a designated authority.

82. Law Commission of India, *One-Hundred and Seventy Ninth Report on the Public Interest Disclosure and Protection of Informers*, (Government of India, New Delhi, 2001).

83. See generally the *Report of the Calcutt Committee on Privacy*, (HMSO, London, Cmnd. 5104 (1990).

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for them. However, it limits the scope of whistle blowing to approaching a statutory body rather than making the information available to the media and the public – choosing to practice Commonwealth rather than American practise.[84] To create another offical institution to expose official secrecy may end up chasing a shadow rather than a cause. The more open system of public disclosure should be aimed at. Pro-whistle blower laws need to be enacted. India needs to go beyond 'freedom of information' statutes. 'Slapp' suits are an affront to the rule of law. 'Stings' prevent the public interest from wandering into private pockets – even if serious evidentiary problems may surface in cases of tampering. Whistle blowers are conscientious objectors. Political games entrapping Judeo and Jogi contain a warning for all politicians lest these games return to plague their inventors. Clearly, the right to know and make known has moved on.

V Chasing a Crooked Shadow

Carrying the baggage of an imperial past, India has slowly come to recognize the importance of information to its democratic processes and future. It inherited an apparatus of laws and governance from the British which congealed a lot of information in voluminous files, protected it with savage wide ranging official secrecy laws and evolved huge propaganda machines to take over the information giving processes. For a long time, the press was at the receiving end of much criticism because it was allegedly monopolistic. In time, the history of this indictment of the press had to be re-written. But, in the course of time, Indian governance itself changed. Riddled with corruption and stories of greed and atrocity, it was an imperative for Indian democracy to keep Indian governance on its toes. As governance has become more and more shameless, the expedient of discovering the truth through commissions of inquiry ceased to be effective – if it ever was. In course of time, it has been the press and social activism that have devised methods to uncover what hides below state and corporate governance. The law has lagged behind. It still revels in the old official secrecy approach even though legislation on public records and freedom of information have been enacted. Meanwhile, real life has moved on. India will have to depend greatly on activism, investigative journalism, whistle blowers and stings to find the truth that makes democracy viable. In this, there is still a great deal to be sorted out so that the information surfaces in the public, powerful corporates and governments do not use 'slapp' suits to

84. See, Law Commission of India, *supra* note 82.

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silence voices, journalists are not victimised or asked to reveal their sources, whistle blowers are protected and 'sting' operations not persecuted into submission. The right to know is by itself a docile right. What is important to Indian democracy is the right to know and make known. The subtitle of a popular detective story of the 1930's by Peter Cheney inscribes the legend. 'There are no shadows in a dark street'. Crooked streets produce crooked shadows. A little bit of light helps to straighten them out.

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