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HUMAN RIGHTS WATCH

Stifling Dissent

The Criminalization of Peaceful Expression in India

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Stifling Dissent

The Criminalization of Peaceful Expression in India

Summary

> When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.
>
> —Supreme Court of India, *Shreya Singhal v. Union of India,* March 24, 2015.

Freedom of expression is protected under the Indian constitution and international treaties to which India is a party. Politicians, pundits, activists, and the general public engage in vigorous debate through newspapers, television, and the Internet, including social media. Successive governments have made commitments to protect freedom of expression.

"Our democracy will not sustain if we can't guarantee freedom of speech and expression," Prime Minister Narendra Modi said in June 2014, after a month in office. Indeed, free speech is so ingrained that Amartya Sen's 2005 book, *The Argumentative Indian*, remains as relevant today as ever.

Yet Indian governments at both the national and state level do not always share these values, passing laws and taking harsh actions to criminalize peaceful expression. The government uses draconian laws such as the sedition provisions of the penal code, the criminal defamation law, and laws dealing with hate speech to silence dissent. These laws are vaguely worded, overly broad, and prone to misuse, and have been repeatedly used for political purposes against critics at the national and state level.

While some prosecutions, in the end, have been dismissed or abandoned, many people who have engaged in nothing more than peaceful speech have been arrested, held in pre-trial detention, and subjected to expensive criminal trials. Fear of such actions, combined with uncertainty as to how the statutes will be applied, leads others to engage in self-censorship.

In many cases, successive Indian governments have failed to prevent local officials and private actors from abusing laws criminalizing expression to harass individuals expressing minority views, or to protect such speakers against violent attacks by extremist groups. Too often, it has instead given in to interest groups who, for politically motivated reasons, say they are offended by a certain book, film, or work of art. The authorities then justify

restrictions on expression as necessary to protect public order, citing risks of violent protests and communal violence. While there are circumstances in which speech can cross the line into inciting violence and should result in legal action, too often the authorities, particularly at the state level, misuse or allow the misuse of criminal laws as a way to silence critical or minority voices.

This report details how the criminal law is used to limit peaceful expression in India. It documents examples of the ways in which vague or overbroad laws are used to stifle political dissent, harass journalists, restrict activities by nongovernmental organizations, arbitrarily block Internet sites or take down content, and target religious minorities and marginalized communities, such as Dalits.

The report identifies laws that should be repealed or amended to bring them into line with international law and India's treaty commitments. These laws have been misused, in many cases in defiance of Supreme Court rulings or advisories clarifying their scope. For example, in 1962, the Supreme Court ruled that speech or action constitutes sedition only if it incites or tends to incite disorder or violence. Yet various state governments continue to charge people with sedition even when that standard is not met.

While India's courts have generally protected freedom of expression, their record is uneven. Some lower courts continue to issue poorly reasoned, speech-limiting decisions, and the Supreme Court, while often a forceful defender of freedom of expression, has at times been inconsistent, leaving lower courts to choose which precedent to emphasize. This lack of consistency has contributed to an inconsistent terrain of free speech rights and left the door open to continued use of the law by local officials and interest groups to harass and intimidate unpopular and dissenting opinions.

The problem in India is not that the constitution does not guarantee free speech, but that it is easy to silence free speech because of a combination of overbroad laws, an inefficient criminal justice system, and the aforementioned lack of jurisprudential consistency. India's legal system is infamous for being clogged and overwhelmed, leading to long and expensive delays that can discourage even the innocent from fighting for their right to free speech.

The Sedition Law

The sedition law, section 124A of the Indian Penal Code (IPC), is a colonial-era law that was once used against political leaders seeking independence from British rule. Unfortunately, it is still often used against dissenters, human rights activists, and those critical of the government.

The law allows a maximum punishment of life in prison. It prohibits any signs, visible representations, or words, spoken or written, that can cause "hatred or contempt, or excite or attempt to excite disaffection" toward the government. This language is vague and overbroad and violates India's obligations under international law, which prohibit restrictions on freedom of expression on national security grounds unless they are strictly construed, and necessary and proportionate to address a legitimate threat. India's Supreme Court has imposed limits on the use of the sedition law, making incitement to violence a necessary element, but police continue to file sedition charges even in cases where this requirement is not met.

Convictions for sedition are rare, but this apparently has not deterred the authorities from booking and arresting people for it. According to the government's National Crime Records Bureau, which started collecting specific information on sedition in 2014, that same year 47 cases were registered across the country, 58 people were arrested, and one person was convicted. The official 2015 data is not yet available, but media watchdog website *The Hoot* reported a significant increase in arrests in the first quarter of 2016. 11 cases were booked against 19 people in the first three months of 2016, compared to none during the same period in the previous two years.

In February 2016, police in Delhi arrested Kanhaiya Kumar, a student union leader at the Jawaharlal Nehru University, after members of the student wing of the ruling Bharatiya Janata Party (BJP) accused him of making anti-national speeches during a meeting organized on campus. The public meeting was held on February 9 to protest the 2013 hanging of Mohammad Afzal Guru, who was convicted for his role in a December 2001 attack on parliament that killed nine people. Afzal Guru's execution remains a matter of intense debate in the country. The Delhi police admitted to the court that Kumar had "not been seen" raising any anti-national slogans in the video footage available. The Delhi High

Court granted him bail in March. Five more students were booked in the case; two, Umar Khalid and Anirban Bhattacharya, were also arrested and later released on bail.

However, despite the police's admission that they had no evidence of anti-national sloganeering by Kumar, and certainly no evidence of incitement to violence, the government has yet to admit that the arrests were wrong. Kumar's arrest thus reveals how divided the country remains over the meaning of tolerance and the imperative of legal protection of peaceful, if disfavored, expression.

There are many other prominent examples of use of the sedition provision to silence political speech. In May 2012, for example, police in Tamil Nadu filed sedition complaints against thousands of people who had peacefully protested the construction of a nuclear power plant in Kudankulam. According to S.P. Udaykumar, founder of the People's Movement Against Nuclear Energy, which led the struggle against the project, 8,956 people face allegations of sedition in 21 cases. A public hearing organized by activists belonging to the Chennai Solidarity Group in May 2012, which included a former chief justice of the Madras and Delhi High Courts, found that the state had denied the protesters both freedom of speech and freedom of assembly.

A report by a different fact-finding team in September 2012 alleged that state authorities had used "unjustified" force against peaceful protesters to silence dissent. As that report concluded:

> If people who have resisted and protested peacefully for a year can be charged with sedition and waging war against the nation in such a cavalier way as has been done here, what is the future of free speech and protest in India?

In September 2012, the authorities in Mumbai arrested political cartoonist Aseem Trivedi on sedition charges after a complaint that his cartoons mocked the Indian constitution and national emblem. The charges were dropped a month later following public protests and furor on social media.

In March 2014, authorities in Uttar Pradesh charged over 60 Kashmiri students with sedition for cheering for Pakistan in a cricket match against India. The Uttar Pradesh government dropped the charges only after seeking a legal opinion from the law ministry. In August 2014, the authorities in Kerala charged seven youth, including students, with sedition, acting on a complaint that they refused to stand up during the national anthem inside a movie theater.

In October 2015, authorities in Tamil Nadu state arrested folk singer S. Kovan under the sedition law for two songs that criticized the state government for allegedly profiting from state-run liquor shops at the expense of the poor.

Criminal Defamation

Human Rights Watch believes that criminal defamation laws should be abolished, as criminal penalties infringe on peaceful expression and are always disproportionate punishments for reputational harm. Criminal defamation laws are open to easy abuse, resulting in very harsh consequences, including imprisonment. As the repeal of criminal defamation laws in an increasing number of countries shows, such laws are not necessary for the purpose of protecting reputations.

The frequent use of criminal defamation charges by the Tamil Nadu state government, led by Chief Minister Jayalalithaa, against journalists, media outlets, and rival politicians is illustrative of how the law can be used to criminalize critics of the government. The Tamil Nadu government reportedly filed nearly 200 cases of criminal defamation between 2011 and 2016. The Tamil-language magazines *Ananda Vikatan* and *Junior Vikatan*, both published by the Vikatan group, face charges in 34 criminal defamation cases, including for a series of articles assessing the performance of each cabinet minister.

In November 2015, while staying a criminal defamation case by the Tamil Nadu state government against a politician from an opposition party, the Supreme Court questioned the large number of such cases coming from the state. The judges said:

> These criticisms are with reference to the conceptual governance of the state and not individualistic. Why should the state file a case for individuals? Defamation case is not meant for this.

In recent years corporations and businesses have also used criminal defamation laws to suppress critical speech and harass journalists and writers. The Indian Institute of Planning and Management, a business school with its headquarters in New Delhi, filed several criminal (and civil) defamation lawsuits to prevent the publication of content critical of the institute. For example, in 2009, IIPM filed a criminal defamation complaint against Maheshwer Peri, publisher of the *Outlook* and *Careers360* magazines, for an article on private educational institutions that were allegedly deceiving students. The article mentioned IIPM and was the first in a series of investigative articles questioning the authenticity of claims made by IIPM. The suits were often filed in remote parts of the country such as Silchar, Assam, where neither IIPM nor the defendant were based nor had any presence.

By January 2016, after the courts quashed a couple of criminal defamation cases against Peri, IIPM had withdrawn all legal cases against him. Peri told Human Rights Watch: "Criminal defamation is used to threaten and bully rather than to seek justice, and should be done away with."

In May 2016, a two-justice bench of the Supreme Court, upheld the constitutionality of India's criminal defamation law, saying: "A person's right to freedom of speech has to be balanced with the other person's right to reputation." The court did not explain how it concluded that the law does not violate international human rights norms, which do not allow imprisonment for criminal defamation, or offer a clear or compelling rationale why civil remedies are insufficient for defamation in a democracy with a functioning legal system.

Laws Regulating the Internet

Indian authorities appear to be unnerved by the explosion of the Internet, and have stumbled in their efforts to regulate it.

Laws to regulate social media, such as India's Information Technology Act, can and do easily become tools to criminalize speech, often to protect powerful political figures. Section 66A of that act, which criminalizes a broad range of speech, has been repeatedly used to arrest those who criticize the authorities and to censor content.

For example, in May 2014, five students were temporarily detained in Bangalore for allegedly sharing a message on the mobile application "WhatsApp" that was critical of newly elected Prime Minister Narendra Modi. In April 2012, Ambikesh Mahapatra, a professor of chemistry at Jadavpur University in the eastern state of West Bengal, was arrested under section 66A for forwarding an email featuring a spoof of the state's chief minister, Mamata Bannerjee. A month later, police in Puducherry arrested a businessman for posting messages on Twitter questioning the wealth amassed by the son of the country's then-finance minister.

Section 66A was declared unconstitutional by the Indian Supreme Court in March 2015. The government has said that it is examining the Supreme Court judgment and may enact an amended version of section 66A to bring it into line with constitutional requirements. The Supreme Court judgment lays down important safeguards for the future of Internet freedom in India. While aspects of the judgment relating to the blocking of Internet content raise concerns (detailed later in this report), any new laws should be consistent with the safeguards set forth in the court's ruling and with international human rights standards.

Counterterrorism Laws

Counterterrorism laws such as the Unlawful Activities (Prevention) Act (UAPA) have also been used to criminalize peaceful expression. In India, counterterrorism laws have been used disproportionately against religious minorities and marginalized groups such as Dalits. Between 2011 and 2013, the authorities in Maharashtra arrested six members of Kabir Kala Manch, a cultural group, under counterterrorism laws, claiming that they were secretly members of the Communist Party of India (Maoist), a banned organization. The authorities produced no evidence of such membership, however, and the members dismiss the claim as entirely unfounded. The Pune-based group of singers, poets, and artists consists largely of Dalit youth and uses music, poetry, and street plays to raise awareness about issues such as oppression of Dalits and tribal groups, social inequality, corruption, and Hindu-Muslim relations.

Those charged with violating the counterterrorism laws are considered "anti-national," so simply being charged can have a severe impact on the lives of the accused and their families, even if they are ultimately judged innocent. Mumbai-based lawyer Vijay Hiremath, who has worked on counterterrorism-related cases, told Human Rights Watch:

> They will be under surveillance and police will keep a watch on them. It will be difficult for them to lead normal lives even after acquittal because whatever they do will be looked at with a lot of suspicion.

The Process is the Punishment

Going through the legal process in India can often be a punishment in itself. Defendants in the country's criminal justice system often face lengthy, drawn-out proceedings. In some cases, judges also appear to be poorly trained in issues of freedom of expression and fail to heed Supreme Court guidance when it comes to imposing limits on peaceful expression.

While the higher courts, and particularly the Supreme Court, often end up dismissing cases brought under laws criminalizing peaceful expression, the dismissals are often too late to protect those arrested or charged from serious consequences. Some offenses under these laws can be non-bailable and the accused may be taken into pre-trial custody. Laws dealing with sedition, terrorism, and national security extract a heavy price from the accused during the trial process. Legal proceedings can take a heavy toll on the financial resources of the accused.

For instance, the Official Secrets Act, a law that criminalizes the disclosure, possession, or receipt of a wide range of documents or information without requiring proof that such acts threaten national security or public order, fosters a culture of secrecy that runs counter to the public's interest in access to information about government activity. Journalists covering defense or intelligence matters are particularly at risk of being charged under the law. The penalty for "spying" under the law allows for imprisonment of up to 14 years. While some of the cases filed under the Official Secrets Act are ultimately dismissed by the higher courts, the dismissal does not obviate the harm suffered by those charged.

While the Official Secrets Act is not as frequently used as some other laws discussed in this report, such as sedition or criminal defamation, it has a serious chilling effect. The accused can end up spending months, or even years, in jail without being granted bail. One of the most prominent cases of misuse of this law is that of journalist Iftikhar Gilani. His 2002 arrest also illustrates the toll the process takes on the accused. Gilani was accused of possessing a classified document even though the document was available

both on the Internet and in public libraries in Delhi. He was acquitted in January 2003, but spent seven months in jail without bail while the case was pending. Gilani said it took four months for him to even get a hearing for bail, and then his application was rejected. Those accused under the OSA are considered serious enemies of the state, which makes obtaining bail extremely difficult.

"By the time you prove that the material you have is not a secret, you may have been in jail for many years. That's the kind of bias judges have when someone is charged with OSA," said Trideep Pais, a lawyer who has dealt with Official Secrets Act cases in Delhi.

Other laws which criminalize peaceful expression can be quite punishing, too. For instance, criminal defamation cases filed by Tamil Nadu state have been dragging on for years and require the accused, many of whom are journalists and editors, to appear in court every couple of weeks. At most hearings, the case is simply adjourned and the date for a new hearing is set. This costs both time and money, as the editor of *Junior Vikatan* magazine, P. Thirumavelan, who faces several cases himself, said.

> The government is not interested in pursuing a case. The intention of the government is only to create a fear psychosis among journalists and newspapers. Because if the government were really serious, they would counter with evidence in a court of law.

According to media lawyer Gautam Bhatia, criminal cases restrict speech to a far greater extent than civil cases, by placing onerous burdens upon the accused. In an article on the news website *Scroll.in*, Bhatia wrote:

> The threat of arrest at any moment, and the possibility of eventual imprisonment exercise a deep and pervasive chilling effect upon would-be speakers; the requirement that the accused must be present at the place of hearing, coupled with the fact that there is no limit to the number of cases that can be filed, is an open invitation to harassment. And even if the accused has a good defence, he is only allowed to bring up his defence after the trial commences. Consequently, in even the most frivolous of

> cases, the accused must face the legal process throughout the long pre-trial stage, which itself has the potential to drag on for months, if not years.

As a result, those faced with even unfounded criminal charges often withdraw the "offending" words rather than endure the often prolonged legal, financial, and personal impact of those charges. On the other hand, there is little consequence for the complainant if the case is found to be frivolous.

The Heckler's Veto

Several Indian laws prohibit "hate speech," such as speech that causes enmity between different groups of people, or speech that insults religion. While the goal of preventing inter-communal strife is an important one in a country as diverse as India, that goal should be pursued through prompt and vigorous prosecution of perpetrators of violent acts and incitement to violence, not through broadly worded laws limiting expression.

India's hate speech laws are so broad in scope that they infringe on peaceful speech and fail to meet international standards. Intended to protect minorities and the powerless, these laws are often used at the behest of powerful individuals or groups, who claim that they have been offended, to silence speech they do not like. The state too often pursues such complaints, thereby leaving members of minority groups, writers, artists, and scholars facing threats of violence and legal action.

The example of Maqbool Fida Husain, among India's best-known artists, is an emblematic case of public intolerance. Husain was forced into exile after Hindu right-wing groups targeted him, accusing him of painting nude pictures of Hindu gods and goddesses, and thus offending their sentiments. Hardline Hindu groups attacked Husain's house and art galleries which exhibited his works, but the governments in Gujarat, Maharashtra, and Delhi states failed to protect him or his work. Instead, Bal Thackeray, a senior leader from the ruling Shiv Sena party in Maharashtra state, endorsed the attack on Husain's home in Mumbai in 1998, saying, "If Husain can enter Hindustan [India]…why can't we enter his house?" Private individuals filed cases against him in different cities across the country under criminal hate speech and obscenity laws, forcing him to travel around the country to answer the complaints.

The Delhi High Court in 2008 upheld Husain's right to free speech and dismissed charges of obscenity and of hurting religious feelings against him in a case related to the "Bharat Mata" painting. The court said:

> There should be freedom for the thought we hate…It must be realised that intolerance has a chilling, inhibiting effect on freedom of thought and discussion. The consequence is that dissent dries up. And when that happens democracy loses its essence.

Despite a ruling by the Indian Supreme Court that freedom of expression cannot be suppressed on account of threats of violence because "that would be tantamount to negation of the rule of law and a surrender to black mail and intimidation," the police routinely arrest individuals based on the reactions to their speech. For instance, in November 2012, Shaheen Dhada and Rinu Srinivasan, both 21 years old, were arrested in Maharashtra for a Facebook post questioning the shutdown of Mumbai following the death of a powerful political leader. The police acted after the politician's supporters complained and mobs engaged in violent attacks.

Similarly, Shirin Dalvi, editor of an Urdu newspaper in Mumbai, was charged by police with "outraging religious feelings" with "malicious intent" in January 2015 after numerous First Information Reports (FIRs, or criminal complaints) were filed by individuals and Muslim groups offended by her reprinting of a cartoon originally published by the controversial French magazine *Charlie Hebdo*. Dalvi said she had to go into hiding and temporarily move away from her house after her release on bail to escape the constant harassment and threats on the phone. The cases against her are pending at time of writing.

In January 2015, local caste groups in Namakkal village in Tamil Nadu protested against a book by resident Tamil author Perumal Murugan. They burned copies of his book, shut down shops, and asked the police to take action against him. Police and district administration officials, instead of protecting Murugan from angry mobs, asked him to tender an unconditional apology. As a result of the harassment, Murugan decided to give up his writing career and withdraw all his works from publication.

LAW	DEFINITION
SEDITION Section 124A of the Indian Penal Code	Prohibits any words, spoken or written, or any signs or visible representation that can disaffection," toward the government.
CRIMINAL DEFAMATION Sections 499 and 500 of the IPC	Defined defamation as any words, spoken or written, or any signs or visible representa harm, or knowing or having reason to believe that such imputation will harm, the repu
HURTING RELIGIOUS SENTIMENTS Section 298 of the IPC	Criminalizes expression of any kind that is "deliberately intended to wound the religio
HURTING RELIGIOUS SENTIMENTS Section 295A of the IPC	Criminalizes language that "with deliberate and malicious intention of outraging the re Union … insults or attempts to insult the religion or the religious beliefs of that class."
HATE SPEECH Section 153A of the IPC	Criminalizes words, either spoken or written, or signs or visible representations or oth religion, race, place of birth, residence, language, caste or community or any other gro ill-will between different religious, racial, language or regional groups or castes or com
HATE SPEECH Section 505(2) of the IPC	Criminalizes the publication or circulation of statements or reports "containing rumou is likely to create or promote, on grounds or religion, race, place of birth, residence, la er, feelings of enmity, hatred or ill-will between different religions, racial, language or
HATE SPEECH 505 (1)(c) of the IPC	Imposes criminal penalties on anyone who "makes, publishes or circulates any statem to incite any class or community of persons to commit any offence against any other cl
CRIMINAL INTIMIDATION Section 503 of the IPC	"Whoever threatens another with injury to his person, reputation or property, or to the ested, with intent to cause alarm to that person, or to cause that person to do any act which that person is legally entitled to do, as the means of avoiding the execution of s
PUBLIC TRANQUILITY Section 505(1)(b) of the IPC	Anyone who "makes, publishes or circulates any statement, rumour or report … with in public, or to any section of the public whereby any person may be induced to commit ar
OFFICIAL SECRETS ACT	Section 5(1) and 5(2): Penalizes receiving or disseminating a broad range of documents ar
	Section 3: Defines the offense of "spying" extremely broadly to include making, receivin "might be," or is "intended to be" "directly or indirectly useful to a foreign country."
CONTEMPT OF COURTS ACT Subsection (2)(i)	Criminalizes speech that "scandalises or tends to scandalise, or lowers or tends to low
INFORMATION TECHNOLOGY ACT AND "BLOCKING RULES" Section 69A	Authorizes blocking of Internet content "in the interest of sovereignty and integrity of tions with foreign states or public order" or for preventing incitement to the commissio Rules empower the central government to direct any agency or intermediary to block a expedient. Anyone can submit a website for consideration to be blocked. Intermediari
THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) AMENDMENT ACT Section 3 (1)	Bans any expression that "promotes or attempts to promote feelings of enmity, hatrec Scheduled Tribes" and also any expression that "disrespects any late person held in h Scheduled Tribes."

* **Cognizable offence**: the police can arrest without warrant, and start investigation into the case without taking any orders from the court.

** **Non-cognizable offence**: the police require the permission of the court to investigate, and the accused cannot be arrested without a warrant.

*** **Bailable offence**: it is the right of the accused to be released on bail.

**** **Non-bailable offence**: the accused must apply to the court for bail, and it is at the discretion of the court to grant or refuse the bail.

***** **Compoundable offence**: the charges can be dropped if the complainant and the accused enter into a compromise, even without the permission of the

	MAXIMUM PUNISHMENT	TYPE OF OFFENCE
cause “hatred or contempt, or excites or attempts to excite	Life imprisonment and fine	Cognizable*, non-bailable****
ation, or any imputation concerning a person “intending to tation of such person.”	2 years in prison and fine	Bailable***, non-cognizable**, compoundable*****
us feelings of any person.”	1 year in prison and fine	Non-cognizable, bailable, and compoundable. (Cognizable offence in Andhra Pradesh)
eligious feelings of any class of persons resident in the	3 years in prison and fine	Cognizable, non-bailable
erwise, that promotes or attempts to promote, on grounds of ound whatsoever, disharmony or feelings of enmity, hatred or mmunities.	3 years in prison and fine	Cognizable, non-bailable
r or alarming news with intent to create or promote, or which nguage, caste, or community or any other ground whatsoev- regional groups or castes or communities.”	3 years in prison and fine	Cognizable and non-bailable
ment, rumour or report … with intent to incite or which is likely ass or community of persons.”	3 years in prison and fine	Cognizable, non-bailable
person or reputation of anyone in whom the person is inter- which he is not legally bound to do, or to omit to do any act uch threat, commits criminal intimidation.”	2 years in prison and fine	Non-cognizable, bailable
ntent to cause, or which is likely to cause, fear or alarm to the n offence against the State or against the public tranquility.”	3 years in prison and fine	Non-cognizable, non-bailable
nd information, particularly government documents.	3 years in prison	Cognizable, non-bailable
g, or communicating any document that is “calculated to be,”	Life imprisonment	Cognizable, non-bailable
ver the authority of any court.”	Six months in prison and fine	Non-cognizable, bailable
India, defense of India, security of the State, friendly rela- on of offenses that threaten those interests. The Blocking ccess to information when satisfied that it is necessary or es who fail to comply with blocking orders are punishable.	7 years in prison and fine	Cognizable, non-bailable
d or ill-will against members of the Scheduled Castes or the igh esteem by members of the Scheduled Castes or the	5 years in prison, and fine	Cognizable, non-bailable

e court.

International Law

In 1979, India ratified the International Covenant on Civil and Political Rights, which sets forth internationally recognized standards for the protection of freedom of expression. Yet, as detailed here, a series of Indian legal provisions, some of them used by prosecutors and litigants on a regular basis, continue to restrict speech in ways inconsistent with that covenant. In some cases, the Indian Supreme Court has properly issued rulings narrowing the scope of the laws, but they continued to be misused, making clear that the laws themselves need to be amended or repealed if India is to comply with its international obligations.

Importantly, the consequences of violations go beyond improper limits on speech. As former UN Special Rapporteur on freedom of expression Frank La Rue has stated, freedom of expression is not only a fundamental right but also an "enabler" of other rights, "including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly…. [A]rbitrary use of criminal law to sanction legitimate expression constitutes one of the gravest forms of restriction to the right, as it not only creates a 'chilling effect,' but also leads to other human rights violations."

Key Recommendations

Indian laws and practices that criminalize peaceful expression are inconsistent with its international legal obligations, undermine rather than strengthen efforts to combat communal violence, and, because freedom of expression is an enabler of other rights, threaten to erode human rights protections more generally.

Human Rights Watch recommends that India:

- Develop a clear plan and timetable for the repeal or amendment of laws that criminalize peaceful expression as detailed at the end of this report and, where legislation is to be amended, consult thoroughly with civil society groups in a transparent and public way.
- Drop all prosecutions and close all investigations into cases where the underlying behavior involved peaceful expression or assembly.

- Train the police to ensure inappropriate cases are not filed with courts. Train judges, particularly in the lower courts, on peaceful expression standards so that they dismiss cases that infringe on protected speech.

Methodology

This report was researched and written between May 2014 and January 2016. It is based on interviews with lawyers, victims of laws criminalizing free speech including journalists and rights activists, members of civil society organizations, and academics and experts on free speech. The report draws from existing literature on laws criminalizing expression in India and news reports of criminal proceedings in cases related to free speech. We also reviewed international and Indian case law and jurisprudence.

An international lawyer provided a comparative analysis of relevant Indian and international laws and of the compliance of Indian laws with international human rights standards. Two Indian lawyers also provided analysis of the Indian laws and of how Indian courts have interpreted constitutional guarantees for freedom of expression.

The report is not meant to be a comprehensive list of all laws that criminalize free speech in India. It analyzes laws that have been most prone to misuse and abuse, some of which carry a punishment of as much as life imprisonment.

On April 4, 2016, we wrote letters to the Indian government and to the Tamil Nadu state government seeking data and further information on some of the laws and cases addressed in this report. On the same day, we also wrote a letter to Bloomsbury Publishing India Private Limited seeking their view on a criminal defamation case involving the company addressed in this report. We had not received replies at the time of writing.

I. International and Domestic Legal Standards

The International Covenant on Civil and Political Rights ("ICCPR"),[1] which India ratified in 1979, provides that:

> A. Everyone shall have the right to hold opinions without interference.
>
> B. 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, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> C. The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The ICCPR is an outgrowth of the Universal Declaration of Human Rights ("UDHR"), adopted by the United Nations General Assembly in 1948,[2] which provides in article 19 that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[3]

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[1] International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976 (except art. 41, which entered into force March 28, 1979), 999 U.N.T.S. 171, reprinted in 6 ILM 368 (1967), http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf and http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx (accessed September 1, 2014).

[2] Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A (III), 3 UN GAOR, UN Doc. A/810, p. 71 (1948), http://www.un.org/e/documents/udhr/ (accessed September 1, 2014).

[3] The right to freedom of expression is also protected in regional human rights treaties, including the European Convention on Human Rights (art.10), the African Charter on Human and Peoples' Rights (art. 9), and the American Convention on Human Rights (art. 13), all of which draw upon the Universal Declaration of Human Rights (UDHR). These treaties and the court judgments deriving from them demonstrate the global acceptance of the rights guaranteed by the UDHR, and provide useful perspectives on the appropriate interpretation of those rights.

The UN Human Rights Committee (HRC), the treaty body of independent experts that provides an authoritative interpretation of the ICCPR, has stressed the importance of freedom of expression in a democracy:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.... [C]itizens, in particular through media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[4]

The guarantee of freedom of expression applies to all forms of expression, not only those that fit with majority viewpoints and perspectives, as noted by the European Court of Human Rights in the seminal Handyside case:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man... [I]t is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[5]

Under international law, the right to freedom of expression is not absolute. Given its paramount importance in any democratic society, however, the UN Human Rights

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[4] UN Human Rights Committee, *Gauthier v. Canada*, Communication No. 633/1995, UN Doc. CCPR/C/ 65/D/633/1995, May 5, 1999, para. 13.4.

[5] European Court of Human Rights, *Handyside v. United Kingdom*, (5493/72) [1976] ECHR 5, December 7, 1976, para.49. See also R. v. Central Independent Television plc, [1994] 3 All ER 641: "Freedom of [speech] means the right to [say] things which the government and judges, however well-motivated, think should not be [said]. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible"; UN Human Rights Committee, General Comment No. 34, Article 19, Freedoms of opinion and expression (102nd session, 2011), UN Doc. CCPR/C/GC/34/2011, para. 11: "The scope of article 19(2) of the ICCPR embraces even expression that may be regarded as deeply offensive."

Committee has held that any restriction on the exercise of this right must meet a strict three-part test. Such a restriction must: (1) be "provided by law"; (2) be imposed for the purpose of safeguarding respect for the rights or reputations of others, or the protection of national security or of public order (*ordre public*), or of public health or morals; and (3) be necessary to achieve that goal.[6]

To be "provided by law," a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[7]

> He must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail.[8]

Measures that seek to protect a legitimate interest must be "necessary" to achieve that purpose. This is a strict test:

> [The adjective 'necessary'] is not synonymous with "indispensable," neither has it the flexibility of such expressions as "admissible," "ordinary," "useful," "reasonable," or "desirable". [It] implies the existence of a "pressing social need."[9]

Finally, any restrictions must be proportional to the aim they are designed to achieve, and restrict freedom of expression as little as possible.[10] As articulated by the UN Human Rights Committee:

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[6] UN Human Rights Committee, General Comment No. 34, Article 19, Freedoms of opinion and expression (102nd session, 2011), UN Doc. CCPR/C/GC/34/2011, para. 22 ("General Comment No. 34"). The same three-part test has been applied by, among others, the European Court of Human Rights to cases under art. 10 of the ECHR, see, e.g., Goodwin v. United Kingdom, [GC] No. 17488/90, 22 EHRR 123 (1996), para. 28-37, and the Canadian Supreme Court to cases under the Canadian Charter of Rights and Freedoms, see, e.g., R. v. Oakes, [1986] 1 SCR 103, 138-139.

[7] UN Human Rights Committee, General Comment No. 34, para.25.

[8] European Court of Human Rights, *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A, no. 30, www.coe.echr.int, ECHR 1, para.49.

[9] ECHR, *Sunday Times v. United Kingdom*, para. 59.

[10] UN Human Rights Committee, *Ballantyne et al. v. Canada, Communications* Nos. 359/1989 and 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993) (finding restriction on advertising in English not necessary to achieve the stated aim of protecting the francophone population of Canada).

> [R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.[11]

Broadly defined provisions, while they may meet the requirement of being "provided by law," are thus unacceptable if they go beyond what is required to protect a legitimate interest.

While generally protecting the right to freedom of expression, the ICCPR requires signatories to prohibit certain types of expression in article 20:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

According to principle 12 of the Camden Principles on Freedom of Expression and Equality ("Camden Principles"),[12] prepared in 2009 and repeatedly cited with approval by the Special Rapporteur on freedom of expression Frank La Rue:

1. The terms "hatred" and "hostility" refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
2. The term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group.
3. The term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

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[11] UN Human Rights Committee, General Comment No. 34, para.34.

[12] Article 19, "Camden Principles on Freedom of Expression and Equality ("Camden Principles"), 2009, http://www.article19.org/advocacy/campaigns/camden-principles. The Camden Principles were prepared by Article 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23-24 February 2009. The principles represent a progressive interpretation of international law and standards, accepted state practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognized by the community of nations.

Any restriction of expression based on article 20 must also comply with the limitations of article 19(3).[13]

When analyzed pursuant to these standards, a number of the laws currently in effect in India impose limitations on expression that go beyond the restrictions that are permitted by international law and, in some cases, appear to conflict with the Indian constitution. While, with respect to some of those laws, the Indian Supreme Court has issued opinions narrowing the scope of laws that are facially in conflict with international standards, the continued application of those laws in ways that are inconsistent with international standards of freedom of expression makes clear that the laws themselves need to be amended or repealed.

As much as the right to freedom of expression is a fundamental right, it is also an "enabler" of other rights, "including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly."[14] Special Rapporteur on freedom of expression La Rue, therefore, stated that "arbitrary use of criminal law to sanction legitimate expression constitutes one of the gravest forms of restriction to the right, as it not only creates a "chilling effect," but also leads to other human rights violations."[15]

The Indian Constitution

The Indian constitution expressly protects freedom of expression in article 19(1)(a), which provides that "all citizens shall have the right to freedom of speech and expression."[16] The Indian Supreme Court has held that freedom of expression under article 19(1)(a) includes the right to seek and receive information, including information held by public bodies.[17]

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[13] UN Human Rights Committee, General Comment No. 34, para.50.

[14] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, May 2011, A/HRC/17/27/2011.

[15] Ibid.

[16] Article 19 states that "All citizens shall have the right (a) to freedom of speech and expression."

[17] While writing the constitution in the late 1940s, violence from the bloody partition of the country at the time of independence weighed heavily on the minds of political leaders. While establishing a democracy that enshrined freedom of expression, some were, as lawyer Rajeev Dhawan said, "very wary of giving too much room to free speech, civil liberties, due process and religious freedom." See Rajeev Dhavan, *Publish and Be Damned: Censorship and Intolerance in India* (New Delhi: Tulika Books, 2008).

The constitutional right to freedom of expression is limited, however, by article 19(2), which permits "reasonable restrictions… in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense."

In this sense, the Indian constitution is less protective of peaceful expression than the ICCPR, which permits only restrictions that are "necessary" "for respect of the rights or reputation of others, for protection of national security or of public order (*ordre public*) or of public health or morals."[18]

The Indian Supreme Court has made clear, however, that only restrictions in the interest of one of the eight specified interests can pass constitutional muster:[19] in March 2015, in striking down section 66A of the Information Technology Act, the court ruled that "any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject matters set out in Article 19(2)."[20]

Interpreting the Constitution

In interpreting section 19(2), the Supreme Court has generally been protective of the right to freedom of speech. For instance, in 1988, in *Ramesh v. Union of India,* a case concerning whether the television show *Tamas* should be pulled because it could incite violence and disrupt public order, the Supreme Court held that:

> The effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.[21]

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[18] ICCPR, sec. 19(2).

[19] Supreme Court of India, *Shreya Singhal v. Union of India*, March 24, 2015, para. 17: a law restricting speech "cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject matters set out under art. 19(2). If it does not, and is outside the pale of 19(2), Indian courts will strike down such law." (available at http://supremecourtofindia.nic.in/FileServer/2015-03-24_1427183283.pdf) (last accessed November 10, 2015).

[20] Supreme Court of India, *Shreya Singal v. Union of India*, March 24, 2015, http://supremecourtofindia.nic.in/FileServer/2015-03-24_1427183283.pdf (last accessed November 10, 2015).

[21] *Ramesh v. Union of India and Ors.*, 1988 SCR (2)1011, February 16, 1988, http://indiankanoon.org/doc/679521/. The judge quoted from the ruling in Bhagvati Charan Shukla v. Provincial Government, AIR 1947 Nagpur 1. This standard has been cited in several cases dealing with freedom of expression since then.

The Supreme Court has also ruled that advocacy of unpopular causes is protected by the constitution as long as it does not rise to the level of incitement,[22] as is criticism of government action.[23]

The scope and extent of protection of free speech in India is largely determined by the interpretation of the terms "reasonable restrictions" and "in the interests of," and of the various grounds listed in article 19(2). The Supreme Court jurisprudence on some of these issues has, however, been inconsistent.

For example, the court has interpreted the phrase "in the interests of" in section 19(2) broadly, holding that speech that has "a tendency" to cause public disorder may be restricted even if there is no real risk of it doing so.[24] As the court explained:

> If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction 'in the interests of public order' although in some cases those activities may not actually lead to a breach of public order.[25]

The court has further clarified, however, that:

> The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up

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[22] Supreme Court of India, *Shreya Singal v. Union of India*, March 24, 2015, http://supremecourtofindia.nic.in/FileServer/2015-03-24_1427183283.pdf: "Mere discussion or even advocacy of a particular cause, howsoever unpopular, is at the heart of article 19(1)(a)."

[23] Supreme Court of India, *Kedar Nath v. State of Bihar*, SCR Supl. (2) 769, 808 (1962): "[C]riticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression". See also Supreme Court of India, S. Rangarajan v. P. J. Ram, [1989] SCR (2) 204, 231: "Open criticism of government policies is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself."

[24] Supreme Court of India, *Ramji Lal Modi v. The State of Uttar Pradesh*, 1957 SCR 860, http://indiankanoon.org/doc/553290 (upholding constitutionality of section 295A of the Indian Penal Code).

[25] *Ramji Lal Modi v. The State of Uttar Pradesh*, 1957 SCR 860.

> with the action contemplated like the equivalent of a "spark in a powder keg."[26]

Where certain groups in Tamil Nadu state threatened violence if a film was allowed to be shown as the film hurt their sentiments, the Supreme Court famously held that freedom of expression cannot be suppressed on the basis of threats of violence, as "that would tantamount to negation of the rule of law and a surrender to blackmail and intimidation."[27] It added:

> What good is the protection of freedom of expression if the State does not take care to protect it? …The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression."[28]

However, in 2007, the Supreme Court upheld the Karnataka state's ban of the award-winning Kannada novel *Dharmakaarana*, which was demanded by people who said the novel was inflammatory and hurt and insulted their sentiments. The court said freedom of speech and expression "must be available to all and no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. It cannot be ignored that India is country with vast disparities in language, culture, and religion and unwarranted and malicious criticism or interference in the faith of others cannot be accepted."[29]

While the protection of "decency and morality" is a permissible basis for restriction of speech under the Indian constitution, the court has stated:

> We must lay stress on the need to tolerate unpopular views in the socio-cultural space. The framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is

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[26] *Supreme Court of India*, S. Rangarajan Etc. v. P. Jagijivan Ram, 1989 SCR (2) 204, 226.

[27] *S. Rangarajan v. P. J. Ram*, 1989 SCR (2) 204, 226.

[28] Ibid.

[29] Supreme Court of India, Sri Baragur Ramachandrappa v. State of Karnataka, 2007, 3 SCC 11.

> essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes.[30]

The court found, however, that a greater degree of caution must be applied when dealing with "historically respected personalities" such as Mahatma Gandhi.[31]

One significant question on which the court has issued conflicting opinions is the one this section opens with: whether the effect of the words should be judged from the perspective of a "reasonable, strong-minded, firm, and courageous" individual, or from the perspective of whoever happens to feel aggrieved by a particular idea or viewpoint. The question is particularly acute when it comes to cases involving purported threats to public order. According to lawyer Gautam Bhatia, two main questions remain in such cases:

> To what extent are the courts willing to treat citizens as autonomous, morally responsible agents, who can be trusted to listen to whatever speech or expression that they wish to, and trusted to make up their own minds about the content of what they hear? And to what extent are the courts willing to close of channels of communication because of the harm that it fears individuals might cause if they are allowed to hear, unrestricted, any speech that comes their way.[32]

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[30] Supreme Court of India, *S. Khushboo v. Kanniammal & Anr*, 28 April, 2010, [2010] 5 SCC 600, para. 29, http://indiankanoon.org/doc/1327342/: "If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the freedom of speech and expression."

[31] Supreme Court of India, *Devidas Ramachandra Tuljapurkar v. State Of Maharashtra*, May 14, 2015, http://indiankanoon.org/doc/69910146/ (accessed July 20, 2015).

[32] Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution* (New Delhi): Oxford University Press India, December 2015, http://www.amazon.in/Offend-Shock-Disturb-Speech-Constitution/dp/0199460876.

II. Laws Criminalizing Peaceful Expression and Illustrative Cases

The Indian authorities are using a range of broad and vaguely worded laws to investigate, arrest, and prosecute individuals for peaceful expression. This report assesses those laws against international standards governing the protection of freedom of expression, identifying critical shortcomings and looking at how such laws too often are being used, in practice, to criminalize the peaceful exercise of that right. While some of the cases have been dismissed by courts as unfounded in the end, the existence of such vague and overly broad laws continues to have a far-reaching chilling effect on those holding minority views or expressing criticism of the government.

The Sedition Law

The sedition law, section 124A of the Indian Penal Code (IPC), was introduced by the British in 1870. The British used the law as a tool of repression to maintain colonial control, including against Indian freedom fighters such as Bal Gangadhar Tilak, who was charged with sedition twice,[33] and Mahatma Gandhi, who was jailed for six years on sedition charges.[34]

India's first prime minister, Jawaharlal Nehru, criticized the law during a parliamentary debate on free speech in 1951, in which he said: "Now so far as I am concerned that particular section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better."[35]

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33 Bombay High Court, *Emperor v. Bal Gangadhar Tilak*, July 22, 1908, http://indiankanoon.org/doc/1430706/ (accessed March 13, 2014). See also transcript of Tilak's second trial, http://bombayhighcourt.nic.in/libweb/historicalcases/cases/Second_Tilak_Trial_-1909.html (accessed March 13, 2014).

34 Transcript of Mahatma Gandhi trial, http://bombayhighcourt.nic.in/libweb/historicalcases/cases/TRIAL_OF__MAHATMA_GANDHI-1922.html (accessed March 13, 2014).

35 Manoj Mitta, "Jawaharlal Nehru wanted sedition law out as early as 1951," *Times of India*, September 11, 2012, http://timesofindia.indiatimes.com/city/mumbai/Jawaharlal-Nehru-wanted-sedition-law-out-as-early-as-1951/articleshow/16343758.cms (accessed March 13, 2014).

Yet 65 years later, the law remains on the books. Many dissenters, human rights activists, and those critical of the government have been charged under it, including in recent years.[36]

Although convictions for sedition are rare, a significant number of people continue to be charged with sedition and that number may actually be increasing. According to the government's National Crime Records Bureau, which started collecting specific information on sedition in 2014, 47 cases were registered across the country, 58 people were arrested, and one person was convicted that year.[37] Although 2015 data is not yet available, media watchdog website *The Hoot* reported that 11 cases were booked against 19 people in the first three months of 2016, compared to none during the same period in the previous two years.[38]

Sedition laws have generally been interpreted in the Commonwealth to require "an intention to incite the people to violence against constituted authority or to create a public disturbance or disorder against such authority."[39] Section 124A, however, is not so limited, providing that:

> Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.[40]

On its face, there is no requirement that the speech in question is likely to, or even intended to, incite violence or public disorder against the government. Rather, speech that

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[36] Nivedita Menon, "Kitne aadmi the? We are all seditious now," *Kafila.org*, December 2, 2010, http://kafila.org/2010/12/02/kitne-aadmi-the-we-are-all-seditious-now/ (accessed March 13, 2014).

[37] "Crime in India, 2014," National Crime Records Bureau, Ministry of Home Affairs, Government of India, http://ncrb.gov.in/StatPublications/CII/CII2014/Compendium%202014.pdf (accessed April 8, 2016).

[38] Nandita Jha, "Free speech: a dire three months," *The Hoot.org*, April 5, 2016, http://www.thehoot.org/research/special-reports/free-speech-a-dire-three-months-9272 (accessed April 8, 2016).

[39] See, e.g., Supreme Court of Canada, *Boucher v. The King,* [1951] S.C.R. 265, 288,1.

[40] Indian Penal Code, sec. 124(a), http://indiankanoon.org/doc/1641007/ (accessed April 15, 2014).

is intended only to excite "disaffection against" the government may lead to criminal charges.[41] In 1962, however, the Indian Supreme Court recognized that:

> If we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2).[42]

The court thus held that the statute must be construed to apply only to "acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence."[43] The court stated:

> [C]riticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc., which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order.[44]

While the decision helps to narrow the breadth of the law, by permitting restrictions only on speech that has a "tendency" to create public disorder regardless of the speaker's intention, it still gives local authorities too much room for abusive application[45] and fails to provide sufficient guidance to citizens to enable them to know what is and is not a crime.[46] The authorities can claim that almost any speech critical of government actions or policies

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[41] The statute specifies that "disaffection includes disloyalty and all feelings of enmity." Indian Penal Code, sec. 124A, Explanation 1.

[42] *Kedar Nath v. State of Bihar*, SCR Supl. (2) 769, 808, 1962. See also Boucher p. 288: "There is no modern authority which holds that the mere effect of tending to create discontent or disaffection, but not tending to issue in illegal conduct, constitutes the crime (of sedition)."

[43] *Kedar Nath v. State of Bihar*, p. 809.

[44] Ibid.

[45] *Supreme Court of the United States*, Papachristou v. City of Jacksonville, 405 U.S. 156, p. 170 (1972).

[46] ECHR, Sunday Times v. UK, para. 49.

has a "tendency" to create public disorder because it arouses dissatisfaction among the populace and use the law to silence critics and stifle dissent.

An examination of recent cases makes clear that section 124A continues to be used against peaceful critics of the government and those who are viewed as somehow showing disrespect for India or its national symbols.

In December 2015, M.P. Shashi Tharoor introduced a private member's bill in the parliament to amend section 124A to ensure that the law complies with Supreme Court guidance on what constitutes sedition and "to prevent the possibility of undue harassment of citizens who simply disagree with the Government." The bill, as drafted, says sedition would only apply when speech "directly results in incitement of violence and commission of an offence punishable with imprisonment for life."[47]

Students at Jawaharlal Nehru University

Kanhaiya Kumar, a student union leader at the Jawaharlal Nehru University (JNU), was arrested on February 12, 2016, by Delhi police after members of the student wing of the ruling Bharatiya Janata Party accused him of making anti-national speeches during a meeting organized on campus. The public meeting was held on February 9 to protest the 2013 hanging of Mohammad Afzal Guru, who was executed for his role in a deadly December 2001 attack on parliament.

Afzal Guru had been convicted of providing logistical support to those involved in the 2012 attack, in which five heavily-armed gunmen entered the parliament complex and opened fire indiscriminately, killing nine, including six security personnel, two parliament guards, and a gardener. All five attackers, later identified as Pakistani nationals, were killed. Afzal Guru's conviction, in which the Supreme Court upheld his death sentence, and his secret execution by the government continue to fuel much debate in India.[48] Many Indian activists and lawyers claim that Azfal Guru did not receive proper legal representation. He did not

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[47] Private Member's Bill, Bill no. 234 of 2015, December 18, 2015, http://www.shashitharoor.in/in-parliament-details.php?id=379 (accessed December 22, 2015).

[48] "What Supreme Court said when it upheld death for Afzal Guru," *Indian Express*, February 26, 2016, http://indianexpress.com/article/explained/parliament-attack-2001-what-sc-said-when-it-upheld-death-for-afzal-guru/ (accessed April 14, 2016).

have a lawyer from the time of his arrest until he confessed in police custody. Azfal Guru himself claimed that he had been tortured into making his confession, which he later retracted. Several Indian activists and senior lawyers have said that he did not have effective assistance of counsel.[49]

At the JNU campus meeting on February 9, Kumar allegedly had celebrated Afzal Guru as a martyr and spoke of "freedom from India," allegations that were proven false when media outlets published the video and full text of Kumar's speech, which contained no such remarks.[50] The evidentiary value of other video footage seeming to show Kumar shouting anti-India slogans, which was broadcast by various television news channels, was undercut when a forensic examination revealed that some of the video clips had been doctored.[51] While some anti-India slogans had been voiced at the event, witnesses say it is unclear whether they were made by students or by outsiders trying to cause trouble.[52] After the Delhi police admitted in court that Kumar had "not been seen" voicing anti-national slogans in the video footage available, the Delhi High Court granted him interim bail for six months on March 2.

Two other JNU students, Umar Khalid and Anirban Bhattacharya, were also arrested for sedition for the same incident. The two surrendered to the police on February 24 and were granted bail on March 18. Police had booked three other students, Ashutosh Kumar, Anant Prakash, and Rama Naga, for sedition in relation to the same incident. In April, following the recommendations of an internal inquiry committee, the university administration punished several students for their role in the February 9 meeting on campus. Penalties ranged from suspension to fines to leaving the hostel; Umar Khalid and Anirban Bhattacharya were suspended, and fines were imposed on Kanhaiya Kumar and Rama Naga. Khalid and Bhattacharya have filed pleas in the Delhi High Court to challenge their

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[49] "India: Secret Hanging a Major Step Back," Human Rights Watch news release, February 9, 2013, https://www.hrw.org/news/2013/02/09/india-secret-hanging-major-step-back.

[50] "We are of this country and love the soil of India: Full text of Kanhaiya Kumar's speech," *Indian Express*, February 18, 2016, http://indianexpress.com/article/opinion/columns/kanhaiya-kumar-speech-jnu-row-is-this-sedition/ (accessed April 14, 2016).

[51] Mayura Janwalkar, "Three out of seven JNU clips 'doctored,'" *Indian Express*, March 2, 2016, http://indianexpress.com/article/india/india-news-india/three-out-of-seven-jnu-clips-doctored/ (accessed April 14, 2016).

[52] Uma Sudhir, "'Hate' Words Inserted In JNU Videos, No 'Pakistan Zindabad': Probe," NDTV.com, March 2, 2016, http://www.ndtv.com/india-news/2-videos-of-jnu-event-manipulated-finds-forensic-probe-sources-1283105 (accessed April 14, 2016).

suspensions and over a dozen students were on an indefinite hunger strike to protest the administration's decision at the time of writing.[53]

Kanhaiya Kumar and his supporters were also attacked on two separate occasions by men wearing lawyers' black coats when Kumar was produced in court for bail hearings. Among those caught on camera apparently assaulting Kumar's supporters during the first attack on February 15 was a member of the Delhi state legislature from the Bharatiya Janata Party, Om Prakash Sharma.

The second attack on Kumar occurred on February 17 despite the Supreme Court's having decided to restrict the number of people inside the courtroom for Kumar's hearing and having asked the police chief to ensure his safety. On the second occasion, Kumar was slapped, kicked, and punched by men appearing to be lawyers as he was being escorted inside the courtroom, according to media reports.[54] Several journalists also said they were threatened and attacked.[55] The Supreme Court rushed a delegation of senior lawyers to assess the situation, which confirmed that Kumar was assaulted and that the police had failed to ensure his safety.[56]

S.A.R. Geelani

Former Delhi University professor S.A.R. Geelani was arrested by Delhi police on February 16, 2016, for allegedly having organized a February 10 event at the Press Club in Delhi, also to protest the 2013 hanging of Afzal Guru.

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[53] "JNU panel to discuss issues of striking students, teachers," *Indian Express*, May 10, 2016, http://indianexpress.com/article/india/india-news-india/jnu-hunger-strike-jnu-students-hunger-strike-2792576/, (accessed May 10, 2016).

[54] "Lawyers turn violent again, SC steps in to ensure Kanhaiya's safety," *Hindustan Times*, February 17, 2016, http://www.hindustantimes.com/india/jnu-row-lawyers-turn-violent-again-sc-steps-in-to-ensure-kanhaiya-s-safety/story-6XyXNn1EBXO4dSB5OjQB6H.html (accessed April 8, 2016).

[55] "They called us terrorists: Journalists share first-person account of the Patiala House incident," *Indian Express*, February 16, 2016, http://indianexpress.com/article/india/india-news-india/they-called-us-terrorists-journalists-share-first-person-account-of-the-patiala-house-incident/ (accessed April 8, 2016).

[56] In 2006, the Supreme Court, in a landmark decision, *Prakash Singh v. Union of India*, issued six binding directives to the central and state governments to kick-start police reforms. One directive was for the state governments to constitute state security commissions to ensure that the state authorities do not exercise unwarranted influence or pressure on the police. However, there has been little progress to date in implementing the directive.

The police claim that anti-national slogans were made at the event, including calls for the independence of Kashmir state. The police said they filed a complaint taking cognizance of the offence on their own, based on news coverage of the event.

Geelani was arrested mainly because, according to the police, he organized the event. "The request for booking a hall for the event at the Press Club was done through Mr Geelani's e-mail and it was proposed to be a public meeting, which did not turn out to be so," a police officer told media.[57] Geelani is the vice-president of the Committee for the Release of Political Prisoners, which reportedly organized the meeting.[58] In opposing Geelani's bail, the public prosecutor argued in court that Geelani put up a poster glorifying Afzal Guru.[59] A Muslim from Kashmir, Geelani had been Afzal Guru's co-accused in the 2001 parliament attack case and himself had initially been sentenced to death by a lower court before the Delhi High Court acquitted him of all charges in 2003, a decision later upheld by the Supreme Court.[60] After his acquittal, Geelani had campaigned against the death penalty imposed on Afzal Guru and has long called for self-determination for Kashmir. His supporters say he is being targeted because of this history.

Geelani received bail on the sedition charges on March 19.[61]

S. Kovan

On October 30, 2015, police in Tamil Nadu state arrested 52-year-old folk singer S. Kovan under the sedition law for two songs that criticized the state government for allegedly profiting from state-run liquor shops at the expense of the poor.[62] Kovan, a resident of

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[57] "SAR Geelani: Former India professor held for sedition," *BBC*, February 16, 2016, http://www.bbc.com/news/world-asia-india-35584974 (accessed April 14, 2016).

[58] Saba Naqvi, "Guilt by association: The lonely battle of SAR Geelani," *Scroll.in*, March 16, 2016, http://scroll.in/article/805155/guilt-by-association-the-lonely-battle-of-sar-geelani (accessed April 14, 2016).

[59] "JNU row: DU ex-professor SAR Geelani's bail plea rejected," *Hindustan Times*, February 19, 2016, http://www.hindustantimes.com/india/jnu-row-order-reserved-on-sar-geelani-s-bail-plea/story-hOGOTuEEQqdh2qNIH3uqqO.html (accessed April 14, 2016).

[60] Muzamil Jaleel, "The other sedition arrest – SAR Geelani," *Indian Express*, February 29, 2016, http://indianexpress.com/article/india/india-news-india/the-other-sedition-arrest-s-a-r-geelani/ (accessed April 8, 2016).

[61] Kaunain Sheriff M, "DU professor Geelani gets bail: 'Keeping him in Tihar has no fruitful purpose,'" *Indian Express*, March 20, 2016, http://indianexpress.com/article/india/india-news-india/sar-geelani-bail-sedition-delhi-university-afzal-guru-event/ (accessed April 8, 2016).

[62] "India: Folk Singer Jailed for Sedition," Human Rights Watch news release, November 3, 2015, https://www.hrw.org/news/2015/11/03/india-folk-singer-jailed-sedition.

Tiruchirappalli district, was also booked under Indian Penal Code section 153 for provocation with intent to cause riot and sections 505(1), (b), and (c) for making statements that could cause public mischief.[63]

Kovan is a member of the Makkal Kalai Ilakkiya Kazhagam, or People's Art and Literary Association, which has long used art, music, and theater to educate members of marginalized communities and raise issues such as corruption, women's rights, and discrimination against Dalits (formerly known as "untouchables"). In the controversial songs, he blamed the government for choosing revenue from liquor sales over people's welfare.[64]

Kovan's family alleges that plainclothes police officers, who refused to show identification, came in the middle of the night to arrest Kovan. Kovan's lawyer told Human Rights Watch that the police officers violated legal procedures, refusing to tell the family where they were taking him.[65] To find out about Kovan's whereabouts, his lawyer filed a habeas corpus petition in the Madras High Court, after which the court told the police to follow legal guidelines. Kovan was then produced before a magistrate on October 31 as per procedure and was remanded in judicial custody for 15 days. The police also reportedly tried to arrest the owner of the website, vinavu.com, on which the songs were first uploaded.

Meanwhile, on November 6, the chief metropolitan magistrate in Chennai ordered Kovan to be remanded in police custody for two days. The police said they needed to interrogate Kovan, claiming that he "habitually indulged in offences against the state" and that he and the People's Art and Literary Association allegedly had links with Naxal groups, which were outlawed. Kovan appealed and the Madras High Court sent Kovan back to judicial custody, saying the state had failed to produce any evidence to prove the allegations regarding

[63] Human Rights Watch telephone interview with Jim Milton, Kovan's lawyer, November 2, 2015.

[64] "Watch the two songs that got Tamil singer Kovan arrested for sedition," *Scroll.in*, October 30, 2015, http://video.scroll.in/1217/watch-the-two-songs-that-got-tamil-singer-kovan-arrested-for-sedition (accessed November 9, 2015).

[65] Human Rights Watch telephone interview with Jim Milton, Kovan's lawyer, November 2, 2015.

Naxal links. On November 30, the Supreme Court dismissed the Tamil Nadu government's plea challenging the High Court order.[66] Kovan was released on bail on November 16.

On March 26, 2016, the police in Trichy booked six other activists under the sedition law for criticizing the state's policy of earning revenue through sale of liquor, controlled by the state-owned Tamil Nadu State Marketing Corporation (TASMAC), and for calling for prohibition. The accused were booked a month after they had organized and addressed a public meeting on February 14 in which Kovan also participated. The six are Anandiammal and David Raj; C Raju and Kaliyappan of Makkal Adhigaaram or People's Power group; Vanchinathan, coordinator of the Manitha Urimai Pathukappu Maiyam or People's Right Protection Centre; and Dhanasekharan, general secretary of the TASMAC Employees Union. The police have also accused them of causing intentional insult with intent to provoke breach of peace, and making statements amounting to public mischief with intent to cause, or which is likely to cause, fear or alarm to the public.[67]

Students in Kerala

In August 2014, authorities in Kerala charged seven youth, including students, with sedition because they refused to stand up during the national anthem at a state-owned movie theater in Thiruvananthapuram. According to one of the accused, Salman M., he and his friends Shiyas S., Rajesh Paul, Harihara Sharma, Deepak A. G., Thampatty Madhusood, and Sini S. S. were verbally abused by other movie-goers when they did not stand up for the national anthem. The police charged all seven with sedition based on a complaint by one of those other movie-goers.

Salman, who was 25 years old and a student at the time, was arrested at his home on August 19. He also faces charges under the Prevention of Insults to National Honour Act and section 66A of the Information Technology Act (though the provision was struck down by the Supreme Court in March 2015) for comments he made on Facebook on August 15, India's Independence Day. The other six received anticipatory bail.

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[66] "SC dismisses TN govt's plea for police custody of Kovan," *The Hindu*, November 30, 2015, http://www.thehindu.com/news/national/sc-dismisses-tn-govts-plea-for-police-custody-of-kovan/article7932967.ece (accessed December 7, 2015).

[67] Anand Kumar, "Brook no criticism in Amma Land: TN police bow to Jayalalithaa's will, slap six more sedition cases," *Firstpost.com*, April 4, 2016, http://www.firstpost.com/politics/brook-no-criticism-in-amma-land-tn-police-bow-to-jayalalithaas-will-slap-six-more-sedition-cases-2710436.html (accessed April 8, 2016).

Salman told Human Rights Watch he was targeted by the police because he is a Muslim and was a regular participant in demonstrations against the state, including protests against counterterrorism laws and against a civil nuclear power plant at Kudankulam. "During interrogation, the special branch police told me that they had already been keeping an eye on me because of my Facebook status on Independence Day," he said.[68]

Salman was finally granted bail by the Kerala High Court on September 22, after being denied bail by lower courts.[69] At the time of writing, the police had not filed a charge sheet in the case. Meanwhile, Salman had to submit his passport to the court and visit the police station twice a week for six months as conditions of his bail.

Students from Jammu and Kashmir

In March 2014, authorities in Uttar Pradesh charged over 60 Kashmiri students with sedition for cheering for Pakistan in a cricket match against India. While the First Information Report did not name any students, the students were also booked under section 153 of the Indian Penal Code, which deals with spreading hatred between castes and communities, and under section 427 for causing damage to property. The students from Kashmir, studying at a private university in Meerut city, were watching the match with other students in the university hostel. The Kashmiri students alleged they were attacked by other students after the match ended with Pakistan beating India.

Kashmiri student Ghulzar Ahmad told Reuters: "As soon as the match ended, the Indian students chased us. We hid in our rooms. They abused us and threw stones at our rooms and broke our laptops. They said Kashmiris and Pakistanis should leave."[70] The university management ordered an inquiry and temporarily suspended all Kashmiri students residing in the hostel as a "precautionary measure."[71] "The college never heard our side of the story. Some us were crying as we had no money," one of the students who had returned to

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[68] Human Rights Watch telephone interview with Salman M, December 9, 2015.

[69] "High Court bail to youth facing sedition," *Times of India*, September 23, 2014, http://timesofindia.indiatimes.com/city/kochi/High-court-bail-to-youth-held-for-sedition/articleshow/43189878.cms (accessed February 13, 2015).

[70] Sanjeev Miglani, "Kashmir students in Meerut in trouble after cheering Pakistani cricketers," Reuters, March 6, 2014, http://in.reuters.com/article/india-pakistan-cricket-kashmir-idINDEEA250DN20140306 (accessed December 7, 2015).

[71] "India drops sedition charge for Kashmiri students in cricket row," *BBC.com*, March 6, 2014, http://www.bbc.com/news/world-asia-india-26463140 (accessed December 7, 2015).

his home in Kashmir told a reporter.[72] Three days later, the university decided to revoke the suspension.[73]

The sedition charges prompted condemnation from civil society as well as from both the chief minister and opposition party leaders in Jammu and Kashmir state.[74] The Uttar Pradesh state government dropped the sedition charge after seeking a legal opinion from the law ministry.

Aseem Trivedi

On September 8, 2012, political cartoonist Aseem Trivedi was arrested after a member of a political party complained that his cartoons mocked the Indian parliament and the national emblem.[75] He was charged with sedition and with violating section 2 of the Prevention of Insults to National Honour Act, 1971, which criminalizes insults to the national flag and the constitution, and section 66A of the Information Technology Act, which criminalizes posting "information that is grossly offensive or has menacing character." The authorities had previously suspended his website, Cartoons Against Corruption, after a complaint by a local politician alleging that it showcased inappropriate content.[76]

Trivedi's arrest prompted widespread condemnation among civil society and in media. Three days after he was arrested, on September 11, 2012, the Bombay High Court granted him bail. On September 14, while hearing a petition filed by a lawyer claiming Trivedi's arrest was illegal, the High Court slammed the Mumbai police for arresting Trivedi on "frivolous" grounds and called it a breach of his freedom of expression. The court also observed that parameters for application of the sedition law must be established or "there

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[72] Sedition charges against Kashmiri students, who cheered for Pak in cricket match, dropped," *NDTV.com*, March 6, 2014, http://www.ndtv.com/india-news/sedition-charges-against-kashmiri-students-who-cheered-for-pak-in-cricket-match-dropped-553084 (accessed December 7, 2015).

[73] "67 Kashmiri students, suspended for cheering for Pakistan, to return to UP college," *NDTV.com*, March 10, 2014, http://www.ndtv.com/meerut-news/67-kashmiri-students-suspended-for-cheering-for-pakistan-to-return-to-up-college-553431 (accessed December 7, 2015).

[74] Sandeep Rai, "Kashmiri students charged with sedition, freed after controversy erupts," *Times of India*, March 6, 2014, (accessed September 23, 2014).

[75] "India: Drop Sedition Charges Against Cartoonist," Human Rights Watch news release, October 12, 2012, http://www.hrw.org/news/2012/10/12/india-drop-sedition-charges-against-cartoonist.

[76] Aseem Trivedi, Cartoons Against Corruption, http://www.cartoonsagainstcorruption.blogspot.in/p/ban-on-website.html (accessed August 10, 2014).

will be serious encroachment of a person's liberties guaranteed to him in a civil society." Reprimanding both the state government and the police, the judges asked:

> What is the government's stand now? Does it intend to drop the charge? Someone has to take political responsibility for this. Why did the police not apply its mind before arresting him on sedition charges?[77]

In October 2012, police dropped the sedition charges against Trivedi after a legal opinion of the state advocate general.[78] Although the Supreme Court struck down section 66A of the Information Technology Act in March 2015, Trivedi still faces charges under the Prevention of Insults to National Honour Act. In its March 2015 ruling that Trivedi should not have been charged with sedition, the Bombay High Court reiterated that every citizen has the right to criticize the government and its policies and that there must be actual incitement of violence for sedition charges to stand.[79]

In its ruling, the court also accepted a set of proposed guidelines for police that had been submitted by the Maharashtra government. The government said it would issue a circular to the police clarifying that sedition charges should be brought only for incitement of violence or acts that have the intention or tendency to create public disorder. The guidelines also stipulate that the police obtain a legal opinion in writing, along with reasons, from the law officer of the district and from the state's public prosecutor before filing sedition charges.[80]

In August 2015, the state government issued new guidelines to the police. However, the government circular, apparently in a mistranslation from English to the Marathi language,

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[77] "High Court slams Mumbai Police for arresting cartoonist Aseem Trivedi for sedition," Press Trust of India, September 14, 2012, http://articles.economictimes.indiatimes.com/2012-09-14/news/33844355_1_sedition-charges-sedition-law-arrest (accessed August 10, 2014).

[78] "Maharashtra government drops sedition charges against cartoonist Aseem Trivedi," CNN-IBN Online, October 12, 2012, http://ibnlive.in.com/news/maharashtra-government-drops-sedition-charges-against-cartoonist-aseem-trivedi/300053-37-64.html (accessed April 1, 2015).

[79] Saurabh Gupta, "Aseem Trivedi's Cartoons Didn't Incite Violence, Says Bombay High Court on Sedition Charges," *NDTV.com*, March 18, 2015, http://www.ndtv.com/india-news/aseem-trivedis-cartoons-didnt-incite-violence-says-bombay-high-court-on-sedition-charges-747471 (accessed April 1, 2015).

[80] *Sanskar Marathe v. State of Maharashtra and Anr.*, Cri. PIL No. 3 of 2015, High Court of Bombay, March 17, 2015, http://indiankanoon.org/doc/57916643/ (last accessed January 22, 2015).

was missing the crucial caveat regarding incitement of violence, permitting police to charge individuals with sedition for merely criticizing the government.[81] The government was forced to withdraw the guidelines in October, following protests by civil society organizations and a high court order directing it to withdraw the circular or issue a new one.[82]

Protesters at Kudankulam Nuclear Plant

In 2012, local authorities in the southern Indian state of Tamil Nadu filed sedition complaints against thousands of protesters campaigning against the construction of a nuclear power plant.[83] Those protesting the Kudankulam nuclear plant included ordinary villagers, many belonging to fishing communities, who were concerned about the plant's potential adverse effects on their health and livelihoods. Many had experienced the 2004 Indian Ocean tsunami firsthand and worried about a possible catastrophe like the meltdown which occurred at the Fukushima nuclear plant in Japan after a 2011 tsunami.

Instead of allaying their concerns, authorities in Tamil Nadu filed criminal cases against thousands of people on charges including sedition, waging or abetting war against the state, disrupting harmony, and unlawful assembly.[84] S.P. Udaykumar, founder of the People's Movement Against Nuclear Energy (PMANE), told Human Rights Watch that as of 2013, 8,956 individuals had been booked for sedition.[85]

According to Usha Ramanathan, a legal scholar, the state's motive in charging protesters with provisions such as sedition is to silence dissent.

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[81] "Criticising government can be sedition in Maharashtra now," *Economic Times*, September 5, 2015, http://articles.economictimes.indiatimes.com/2015-09-05/news/66241363_1_sedition-aseem-trivedi-maharashtra-government (accessed December 7, 2015).

[82] Saurabh Gupta, "Controversial Sedition Circular Withdrawn by Maharashtra Government," *NDTV.com*, October 27, 2015, http://www.ndtv.com/india-news/controversial-sedition-circular-withdrawn-by-maharashtra-government-1237100 (accessed December 7, 2015).

[83] "India: End Intimidation of Peaceful Protesters at Nuclear Site," Human Rights Watch news release, May 19, 2012, http://www.hrw.org/news/2012/05/11/india-end-intimidation-peaceful-protesters-nuclear-site.

[84] Chennai Solidarity Group for Koodankulum Struggle, "Fact Finding Report on the Suppression of Democratic Dissent in Anti-Nuclear Protests by Government of Tamil Nadu," April 2012, http://www.dianuke.org/wp-content/uploads/2012/04/Fact_Finding_Report_Sam_Rajappa_English.pdf (accessed August 10, 2014).

[85] Human Rights Watch telephone interview with S. P. Udaykumar, September 18, 2014.

> They know even if all the cases fall at the end of the day it doesn't matter, because they've had their purpose served. You can beat people up, you can put them away. It's a total abuse of a power that actually doesn't exist, but which they have managed to cultivate for themselves.[86]

A report on a public hearing organized by activists in the Chennai Solidarity Group in May 2012—participants in the hearing committee included A. P. Shah, former chief justice of the Madras and Delhi High Courts—found that the state government had denied both freedom of speech and freedom of assembly to the villagers. It also found that the state had denied other rights to the villagers such as freedom of movement, and the rights to food, education, livelihood, and access to health services.[87]

Another report, in September 2012, by an independent fact-finding team made up of former judge of the Bombay High Court B. G. Kolse Patil, journalist Kalpana Sharma, and writer R. N. Joe D'Cruz, alleged that police used "unjustified" force against peaceful protesters. According to the report, the police hit protesters with *lathis* (batons) and shot tear gas shells into the crowd to disburse it and as a result, several men and women suffered injuries and burn marks. The report noted:

> If people who have resisted and protested peacefully for a year can be charged with sedition and waging war against the nation in such a cavalier way as has been done here, what is the future of free speech and protest in India?[88]

Arundhati Roy and Ali Shah Geelani

In 2010, author and activist Arundhati Roy and Kashmiri separatist leader Syed Ali Shah Geelani were threatened with sedition charges for publicly speaking in favor of Kashmiri secession. In New Delhi, a magistrate directed the police to investigate allegations of

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[86] "En masse sedition in Koodankulam," *TheHoot.org*, April 26, 2012, http://www.thehoot.org/web/En-masse-sedition-in-Koodankulam/5891-1-1-5-true.html (accessed August 8, 2014).

[87] Chennai Solidarity Group for Koodankulum Struggle, "Report of the Jury on the Public Hearing on Koodankulam and State Suppression of Democratic Rights," June 2012, http://www.thehindu.com/multimedia/archive/01111/Report_of_the_Jury_1111389a.pdf (accessed August 10, 2014).

[88] "Report of the Fact-Finding team's visit to Idinthakarai and other villages on September 20-21, 2012," September 26, 2012, http://www.countercurrents.org/koodankulam260912.pdf (accessed August 10, 2014).

sedition against them based on private complaints, rejecting the police status report which stated that "essential ingredients" for a sedition case were missing since there was no evidence of inciting violence.[89] The police proceeded with the investigation but there have been no further developments in the case.[90] When informed of a possible sedition case against her, Roy said:

> Pity the nation that has to silence its writers for speaking their minds. Pity the nation that needs to jail those who ask for justice, while communal killers, mass murderers, corporate scamsters, looters, rapists, and those who prey on the poorest of the poor, roam free.[91]

Binayak Sen

On December 24, 2010, a court sentenced Dr. Binayak Sen, a vocal critic of the Chhattisgarh state government's counterinsurgency policies against violent Maoist rebels, to life in prison for sedition.[92] Sen, a medical doctor and activist with the People's Union for Civil Liberties in Chhattisgarh state, was detained on May 14, 2007, under the Chhattisgarh Special Public Security Act. Sen was eventually charged with sedition, anti-national activities, treason, criminal conspiracy, and waging war against the state, among other crimes.

Sen was among the most vocal critics of the government-backed vigilante group Salwa Judum, which attacked, killed, and forcibly displaced tens of thousands of people in armed operations against Maoist rebels after its creation in 2005. Sudha Bharadwaj, a lawyer and activist with People's Union for Civil Liberties in Chhattisgarh, argued that the government wanted to use Sen's example to deter others from speaking out against Salwa Judum abuses.

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[89] Manoj Mitta, "Judge ignores key ruling in Roy sedition case," *Times of India*, December 5, 2010, http://timesofindia.indiatimes.com/india/Judge-ignores-key-ruling-in-Roy-sedition-case/articleshow/7045710.cms (accessed March 1, 2015).

[90] "Anti-India speech case against Roy, Geelani given to Crime Branch," Press Trust of India, July 6, 2012, http://www.firstpost.com/india/anti-india-speech-case-against-roy-geelani-given-to-crime-branch-370222.html (accessed July 25, 2015).

[91] "Arundhati Roy's statement on possible sedition case," *NDTV.com*, October 26, 2010, http://www.ndtv.com/india-news/arundhati-roys-statement-on-possible-sedition-case-437396 (accessed July 25, 2015).

[92] "India: Repeal Sedition Law," Human Rights Watch news release, January 5, 2011, http://www.hrw.org/news/2011/01/05/india-repeal-sedition-law.

> This is actually, I would say, a very politically motivated case, because he was—as the general secretary of Chhattisgarh PUCL, he did expose and he actually was instrumental in getting together a team of human rights activists, who for the first time investigated a phenomenon called Salwa Judum, which was claimed to be a spontaneous peaceful movement against Naxalites in the Bastar region, but they found that it was not so. It was very much a state-sponsored campaign… He was a thorn in the side of the government, and they just wanted to not only end—they wanted to send a message, you know, to silence dissent, to silence this kind of activity.[93]

Sen's imprisonment, trial, and the Supreme Court judgment which granted him bail pending appeal all highlight how the process can be the punishment in these cases.

Sen's application for bail was rejected by the Chhattisgarh High Court. He then spent two years in jail before the Supreme Court granted him bail. A year later, on December 24, 2010, a court in Raipur convicted him of sedition and sentenced him to life imprisonment, despite finding no evidence that he was a member of any outlawed Maoist group or that he was involved in violence against the state. Immediately after the verdict, Sen's bail was revoked and he was arrested again.[94]

Sen's application for bail pending the hearing of his appeal was rejected by the Chhattisgarh High Court and he remained in jail until April 2011, when the Supreme Court again granted him bail. Supreme Court Justices H.S. Bedi and C.K. Prasad said:

> We are a democratic country. He may be a sympathizer. That does not make him guilty of sedition… No case of sedition is made out on the basis of

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93 Anjali Kamat, "Democracy on Trial: The Imprisonment of Indian Human Rights Activist Dr. Binayak Sen," DemocracyNow, January 28, 2011, http://www.democracynow.org/blog/2011/1/28/democracy_on_trial_the_imprisonment_of_indian_human_rights_activist_dr_binayak_sen (accessed August 2, 2014).

94 "Dr Binayak Sen found guilty of sedition, gets life imprisonment," Press Trust of India, December 24, 2010, http://timesofindia.indiatimes.com/india/Dr-Binayak-Sen-found-guilty-of-sedition-gets-life-imprisonment/articleshow/7156208.cms (accessed August 3, 2014).

> materials in possession unless you show that he was actively helping or harboring them [Maoists].[95]

Sen's appeal is still pending. Had he not been granted bail, he would now have spent nine years in jail. As lawyer Vijay Hiremath noted,

> For anyone to go to jail, it's traumatic. It can break you mentally and if one spends too much time in jail, it can really harm them mentally, physically, and emotionally. In the case of Binayak Sen, he was unwell for a long time because of the time he spent in jail.[96]

The above cases are but a few examples of the way in which the sedition law continues to be used by state and local authorities to harass writers, journalists, students, human rights activists, and those critical of the government.
A 2011 report by the Alternative Law Forum and the Centre for the Study of Social Exclusion and Inclusive Policy at the National Law School of India University, Bangalore, looked at a number of cases brought pursuant to section 124A. It found a divide between higher and lower courts in how the law was applied, and identified several cases in which the High Court granted bail or acquitted the accused of sedition charges.[97]

Charges under the sedition provision raise particular concerns because the speech at issue usually involves discussion of the government or judicial policy or actions.[98] A critical aspect of the right to freedom of expression is the right of individuals to criticize or

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[95] J. Venkatesan, "Binayak Sen gets bail in Supreme Court," *The Hindu*, April 15, 2011, http://www.thehindu.com/news/national/binayak-sen-gets-bail-in-supreme-court/article1698939.ece (accessed August 3, 2014).

[96] Human Rights Watch telephone interview with Vijay Hiremath, lawyer, August 11, 2014.

[97] Centre for the Study of Social Exclusion and Inclusive Policy, National Law School of India University, Bangalore and Alternative Law Forum, Bangalore, "Sedition Laws and the Death of Free Speech in India," February 2011.

[98] UN Human Rights Committee, General Comment No. 34, para. 38: "(I)n circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the (ICCPR) on uninhibited expression is particularly high"; ECHR, Nilsen and Johnson v. Norway, no. 23118/93, § 46, ECHR 1999-VIII: "(T)here is little scope under Article 10 § 2 of the (ECHR) for restrictions on debate on questions of public interest."; S. Rangarajan v. P. Jagivan Ram, SCR (2) 204, 231, 1989: "Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself."

openly and publicly evaluate their governments without fear of interference or punishment.[99]

As the New Zealand Law Commission stated in recommending the abolition of New Zealand's sedition laws:

> The heart of the case against sedition lies in the protection of freedom of expression, particularly of political expression, and its place in our democracy. People may hold and express strong dissenting views. These may be both unpopular and unreasonable. But such expressions should not be branded as criminal simply because they involve dissent and political opposition to the government and authority.[100]

New Zealand and the United Kingdom are among the countries that have abolished their sedition laws in recent years.[101] India should follow their lead.[102]

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[99] UN Human Rights Committee, *Marques de Morais v. Angola*, Communication No. 1128/2002 UN Doc. CCPR/C/83/D/1128/2002, 2005 (finding a breach of art. 19 where author was imprisoned for articles he wrote criticizing the President of Angola). See also European Court of Human Rights, Incal v. Turkey, 1998-IV ECHR 48, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58197 (finding breach of ECHR art. 10 when defendant imprisoned for strong criticism of governmental actions against the Kurdish population).

[100] Law Commission Reforming the Law of Sedition: Consultation Draft (October 2006), http://www.lawcom.govt.nz/sites/default/files/press-releases/2006/10/Publication_128_343_SEDITION%20CONSULTATION%20DRAFT.pdf, para. 18.

[101] *The Crimes (Repeal of Seditions Offense) Amendment Act of 2007*, http://www.legislation.govt.nz/act/public/2007/0096/latest/whole.html (accessed August 2, 2014) and The Coroners and Justice Act 2009, chapter 25, sec. 73, www.legislation.gov.uk/ukpga/2009/25/section73 (accessed August 2, 2014).

[102] Numerous courts have recognized that suppression of discussion of critical issues not only is not required to protect public order, but may well be counter-productive. See, e.g., *Free Press of Namibia (Pty) Ltd. v. Cabinet for the Interim Government of South West Africa*, 1987(1) SA 614 (SWA), p. 624: "Because people may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. To stifle just criticism could as likely lead to these undesirable situations."; State v. Ivory Trumpet Publishing Company Limited, 5 NCLR 736, 1984, p. 748: "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the… rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion…" See also UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/67/357, September 2012, para. 36: "(F)reedom of expression is essential to creating an environment conducive to critical discussions of religious and racial issues and also to promoting understanding and tolerance by deconstructing negative stereotypes."; UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ("Siracusa Principles"), UN Doc. E/CN.4/1985/4, Annex (1985), para.32: "The systematic violation of human rights undermines true national security and may jeopardize international peace and security."

Criminal Defamation

In India, defamation is both a civil and criminal offense. Section 499 of the Indian Penal Code sets out the definition of defamation,[103] and section 500 provides for up to two years in prison and a fine. Criminal defamation is not used as often as civil defamation, nor does it generally result in convictions, but, as with the sedition provision, the threat of criminal action has a chilling effect on free speech.

Criminal defamation is a bailable, non-cognizable, and compoundable offence in India. This means that the police require the permission of the court to register or investigate a case. The accused cannot be arrested without a warrant. The Code of Criminal Procedure states that the complaint has to be made by the "person aggrieved."[104] The charges can be dropped if the complainant and the accused enter into a compromise, even without the permission of the court.

Criminal defamation, by virtue of the disproportionate penalty it imposes on speech, chills freedom of expression as guaranteed under international law. The UN special rapporteur on freedom of expression has recommended that criminal defamation laws be abolished,[105] as have the special mandates of the United Nations, the Organization for Security and Cooperation in Europe, and the Organization for American States, which have stated that "criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[106] The United Kingdom and New Zealand, among other countries, have already done so.[107]

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[103] Indian Penal Code (IPC), 1860, sec. 499, http://indiankanoon.org/doc/1041742/ (accessed June 10, 2014).

[104] Code of Criminal Procedure, sec. 199. http://www.advocatekhoj.com/library/bareacts/codeofcriminalprocedure/199.php?Title=Code%20of%20Criminal%20Procedure%20Act&STitle=Prosecution%20for%20defamation (accessed April 7, 2016).

[105] Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, UN Doc. A/HRC/20/17, June 2012.

[106] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of Media, and the OAS Special Rapporteur on Freedom of Expression, 2002, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1 (accessed June 11, 2014). Similarly, the African Court on Human and Peoples' Rights has held that imposing a custodial sentence for defamation violates both art. 9 of the African Charter on Human and Peoples' Rights and the ICCPR. African Court on Human and Peoples' Rights, *Lohe Issa Konate v. Burkina Faso*, Application no. 004/2013, December 5, 2014, https://www.african-court.org/en/images/documents/Judgment/Konate%20Judgment%20Engl.pdf (accessed June 17, 2015).

[107] Coroners and Justice Act 2009, ch. 25, sec. 73, (repealing UK criminal libel laws), www.legislation.gov.uk/ukpga/2009/25/section73 (accessed June 11, 2014). See also Defamation Act 1992, sec. 56(2),

As then-Special Rapporteur on freedom of expression Frank La Rue noted in 2012:

> The problem with defamation cases is that they frequently mask the determination of political and economic powers to retaliate against criticisms of mismanagement or corruption, and to exert undue pressure on media.[108]

Criminal defamation cases involving government officials or public persons are particularly problematic. While government officials and those involved in public affairs are entitled to protection of their reputation, including protection against defamation, as individuals who have sought to play a role in public affairs they should tolerate a greater degree of scrutiny and criticism than ordinary citizens. This distinction serves the public interest by making it harder for those in positions of power to use the law to deter or penalize those who seek to expose official wrongdoing, and it facilitates public debate about issues of governance and common concern.[109]

Human Rights Watch believes that criminal defamation laws should be abolished, as criminal penalties are always disproportionate punishments for reputational harm and so unacceptably burden peaceful expression. Criminal defamation laws are open to easy abuse, resulting in very harsh consequences, including imprisonment. As repeal of criminal defamation laws in an increasing number of countries shows, such laws are not necessary for the purpose of protecting reputations.

(repealing New Zealand criminal libel laws), http://www.legislation.govt.nz/act/public/1992/0105/latest/whole.html (accessed June 11, 2014).

[108] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/20/17, June 2012, para. 83.

[109] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue ("La Rue Report), UN Doc. A/HRC/14/23, April 2010, para. 82: The protection of reputation of others "must not be used to protect the State and its officials from public opinion or criticism … (N)o criminal or civil action for defamation should be admissible in respect of a civil servant or the performance of his or her duties"; Siracusa Principles, para. 37: "A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism."; Criminal Code of Canada, sec. 310, http://yourlaws.ca/criminal-code-canada/321: "it is not defamatory libel to publish "fair comments on the public conduct of a person who takes part in public affairs."

While defamation should be handled as a civil matter, "civil penalties for defamation should not be so heavy as to block freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant," recommended the UN special rapporteur on the right to freedom of expression. In particular, "pecuniary awards should be strictly proportionate to the actual harm caused, and the law should give preference to the use of non-pecuniary remedies, including, for example, apology, rectification and clarification."[110]

In recent years, criminal and civil defamation laws have increasingly been used by corporations and business houses to harass journalists and bloggers and to suppress critical speech.[111]

Subramanian Swamy v. Union of India

In late 2014, Subramanian Swamy of the Bharatiya Janata Party filed a petition with the Indian Supreme Court challenging the constitutionality of criminal defamation laws for violating the right to freedom of speech and expression. Swamy faces defamation charges for allegedly making comments against Tamil Nadu's chief minister on Twitter. The comments discuss allegations of corruption, among other things.[112]

In addition to Swamy's petition, 24 other petitions were filed seeking the striking down of criminal defamation provisions, including those of Delhi Chief Minister Arvind Kejriwal and Congress Vice President Rahul Gandhi. The Court began hearing the cases as a group in July 2015.[113]

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[110] UN Human Rights Council, La Rue Report, A/HRC/14/23, April 2010.

[111] The law lends itself to abuse in the form of SLAPP "Strategic Litigation Against Public Participation," lawsuits that prevent the public from knowing about, or participating in, important affairs. As PEN International notes in its 2015 report on India, SLAPP suits are often initiated for the sole purpose of intimidating under-resourced defendants into silence, and socio-economic status is often the decisive factor in a SLAPP suit's success because its aim is to inflict costly legal fees on the weaker party. PEN Canada, PEN International, and the International Human Rights Program (IHRP) at the University of Toronto, Imposing Silence: The use of India's Laws to Suppress Free Speech, 2015, http://www.pen-international.org/the-india-report-imposing-silence/ (last accessed May 9, 2016).

[112] "Jayalalithaa files two more defamation cases against BJP leader Subramanian Swamy," Press Trust of India, September 23, 2014, http://www.dnaindia.com/india/report-jayalalithaa-files-two-more-defamation-cases-against-bjp-leader-subramanian-swamy-2020910 (accessed September 10, 2015).

[113] *Subramanian Swamy v. Union of India*, W.P. (Crl) 184 of 2014, Software Freedom Law Centre, July 8, 2015, http://sflc.in/subramaniam-swamy-v-union-of-india-w-p-crl-184-of-2014/ (accessed August 2, 2015).

The central government argued for the retention of the criminal defamation provision, saying it had stood the test of time and that monetary compensation through civil lawsuits is not a sufficient remedy for damage to a person's reputation. "A person's reputation is an inseparable element of an individual's personality and it cannot be allowed to be tarnished in the name of right to freedom of speech and expression because right to free speech does not mean right to offend," the attorney general said in his submission to the Supreme Court.[114]

The petitioners argued that the threat of criminal prosecution leads to self-censorship, chilling the exercise of the right to free expression. They also emphasized that the arduous process of a criminal trial and its disproportionate impact in comparison with that of a civil suit— the "process as punishment" point made above—causes undue harassment and fear, and stifles free speech.[115]
In May 2016, however, the Supreme Court upheld the constitutionality of the law saying: Right to free speech cannot mean that a citizen can defame the other. Protection of reputation is a fundamental right. It is also a human right. Cumulatively it serves the social interest.[116]

The court concluded that the criminal defamation law "determines a limit which is not impermissible within the criterion of reasonable restriction" as conceived by the constitution.[117] At the same time, the court set out restrictions on using the law, saying that when issuing summons in defamation complaints made by private individuals, it is the duty of the magistrates to apply caution and find whether the concerned accused should be legally responsible for the offence charged for.[118]

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[114] Supreme Court of India, *Subramanian Swamy v. Union of India*, W.P. (Crl) 184 of 2014, May 13, 2016, http://supremecourtofindia.nic.in/FileServer/2016-05-13_1463126071.pdf (accessed May 13, 2016).

[115] Vrinda Bhandari, "Subramaniam Swamy v Union of India: Redefining the Countours of Free Speech" post to "Oxford Human Rights Hub" (Blog), August 20, 2015, http://ohrh.law.ox.ac.uk/subramaniam-swamy-v-union-of-india-redefining-the-countours-of-free-speech (accessed December 10, 2015).

[116] Supreme Court of India, *Subramanian Swamy v. Union of India*, W.P. (Crl) 184 of 2014, May 13, 2016, http://supremecourtofindia.nic.in/FileServer/2016-05-13_1463126071.pdf (accessed May 13, 2016).

[117] Supreme Court of India, *Subramanian Swamy v. Union of India*, W.P. (Crl) 184 of 2014, May 13, 2016, http://supremecourtofindia.nic.in/FileServer/2016-05-13_1463126071.pdf (accessed May 13, 2016).

[118] Ibid.

The judgment was widely criticized because it will have a chilling effect on free speech and violates international standards.[119] N Ram, former editor of *The Hindu*, said "The chilling effect will continue." Referring to the court's direction to magistrates to apply caution, Ram added, "[B]ut that's up to the Gods, as they say. It's up to luck and how the magistrate is." Sucheta Dalal, managing editor of *MoneyLife.com* said: "Criminal defamation cases had slowed down because of this case pending at the SC, but now we are going to face the heat again."[120]

The court did not explain how it concluded that the law does not violate international human rights and legal standards, or offer a clear and compelling rationale why civil remedies are insufficient in a democracy with a functioning legal system. It made no reference to the decision of the UN Human Rights Committee, the body entrusted with interpretation of the ICCPR (and chaired for many years by Justice Prafullachandra Natwarlal Bhagwati), which stated in 2011 that, "States parties should consider the decriminalization of defamation[121] and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[122]

At the time of writing the petitioners had not announced whether they would file a review petition asking the Supreme Court to reconsider its verdict.[123]

Tamil Nadu Government and Ananda Vikatan Publisher Pvt. Ltd

The government of Tamil Nadu, led by Chief Minister J. Jayalalithaa, filed 34 cases of criminal defamation against the popular Tamil magazine *Ananda Vikatan* and the political magazine *Junior Vikatan*, both published by the Vikatan group, between 2012 and February

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[119] Satya Prakash, "If truth is justice, SC needs to reconsider criminal defamation verdict," *Hindustan Times*, May 14, 2016, http://www.hindustantimes.com/analysis/if-truth-is-justice-sc-needs-to-reconsider-criminal-defamation-verdict/story-6OB8a9h9UvA3RfF2pE3HkJ.html (accessed May 14, 2016).

[120] "SC Verdict on criminal defamation: scary, chilling effect on journalism, say editors," *The Newsminute.com*, May 13, 2016, http://www.thenewsminute.com/article/sc-verdict-criminal-defamation-scary-chilling-effect-journalism-say-editors-43171 (accessed May 13, 2016).

[121] Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

[122] UN Human Rights Committee, General Comment No. 34, para.47.

[123] In a review petition, the same judges who deliberated on and adopted the decision that the review petition challenges, assess whether their decision disclosed any "errors apparent on the face of the record."

2016. In May 2015, *Ananda Vikatan* started running a series of articles assessing the performance of the chief minister and several cabinet ministers. The chief minister and 14 other ministers named in the articles each filed a criminal defamation case.

The Vikatan group is not alone in facing criminal defamation charges for publishing critical stories about public officials. The state government has reportedly filed nearly 200 criminal defamation cases since it came to power in 2011 against journalists, media outlets, and opposition politicians.[124] Some of the accused include the national newspapers *Hindu* and the *Times of India*, the English language magazine *India Today,* the Tamil language daily *Dinamalar*, and news television channels Times Now and CNN-IBN, among others.[125]

"I have 211 cases against me," Nakkeeran Gopal of the Tamil bi-weekly *Nakkeeran* told a news website in May 2015. 15 of those were filed by the current state government.[126] Gopal joined petitioners challenging the constitutionality of criminal defamation in the Supreme Court and is seeking to have the court strike down section 199(2) of the Code of Criminal Procedure, allowing special prosecution for defaming civil servants.[127]

Successive governments in Tamil Nadu have used criminal defamation as a political tool. From 1991-95, the first term of the government led by J. Jayalalithaa, the state filed criminal defamation cases against several media outlets, including 100 cases against Nakkeeran. In its second term, the Jayalalithaa-led government filed more criminal defamation cases, including several against the *Hindu* newspaper. In September 2004, the government withdrew all 125 criminal defamation cases against media.[128] When a new government

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[124] Sudipto Mondal, "Reporting under shadow of defamation gun in flood-ravaged Chennai," *Hindustan Times*, December 7, 2015, http://www.hindustantimes.com/india/reporting-under-shadow-of-defamation-gun-in-flood-ravaged-chennai/story-UczbzYmkN7RuOWhdZb4z1I.html (accessed December 8, 2015).

[125] "As apex court weighs idea of criminal defamation, Jaya files yet another case against media," *Scroll.in*, July 15, 2015, http://scroll.in/article/741016/as-apex-court-weighs-idea-of-criminal-defamation-jaya-files-yet-another-case-against-media (accessed December 6, 2015).

[126] "'I have 211 cases against me' - Nakkeeran Gopal on his battle with criminal defamation," *NewsMinute.com*, May 20, 2015, http://www.thenewsminute.com/article/i-have-211-cases-against-me-nakkeeran-gopal-his-battle-criminal-defamation (accessed December 9, 2015).

[127] Code of Criminal Procedure sections 199 (2)-(5) deal with cases where the offence is alleged to have been committed against civil servants, and require that they be prosecuted at the sessions court, at the state's expense, by the public prosecutor after obtaining state sanction. For other cases of criminal defamation, Criminal Procedure Code sec. 199 only allows complaints to be made directly in the magistrate's court.

[128] J. Venkatesan, "Tamil Nadu files affidavit to withdraw 125 defamation cases against media," *The Hindu*, September 18, 2004, http://www.thehindu.com/2004/09/18/stories/2004091803051300.htm (accessed December 11, 2015).

came to power in 2006 led by the main opposition Dravida Munnetra Kazhagam (DMK) party, it filed 52 criminal defamation cases against media.

Journalists and editors say the number of criminal defamation cases filed by the current Tamil Nadu state government, once again led by Jayalalithaa, is staggering and has had a chilling effect on investigative reporting as media executives weigh the costs of running stories that may be critical of the chief minister. The state government has even appointed a special public prosecutor dedicated to dealing with defamation cases. According to G. C. Shekhar, associate editor of the newspaper Telegraph:

> The idea behind the defamation cases is to intimidate others from writing against Jayalalithaa and the state government. Here Jayalalithaa and the state is the same.[129]

Trials have yet to begin in any of the criminal defamation cases filed by the state. Instead, the cases have been dragging on for years, requiring the accused to return to court every few weeks for a hearing.

In November 2015, in a decision granting a stay of proceedings in a criminal defamation case filed by the Tamil Nadu state government against opposition politician Vijayakanth Naidu from the Desiya Murpokku Dravida Kazhagam party, India's Supreme Court questioned the large number of criminal defamation cases coming from Tamil Nadu. The judges asked the state government's counsel:

> We find that most of these defamation cases are coming from Tamil Nadu. These criticisms are with reference to the conceptual governance of the state and not individualistic. Why should the state file a case for individuals? Defamation case is not meant for this.[130]

[129] Human Rights Watch telephone interview with G. C. Shekhar, December 10, 2015.

[130] G. C. Shekhar, "Go south for capital of defamation suits," *Telegraph*, December 14, 2015, http://www.telegraphindia.com/1151214/jsp/nation/story_58349.jsp#.Vm5beriGSko (accessed December 14, 2015).

Jitender Bhargava and The Descent of Air India

In January 2014, Bloomsbury India, facing a criminal defamation suit, decided to withdraw copies of the book *The Descent of Air India*, written by Jitender Bhargava, a former executive director of the airline. The book documented problems within the troubled state-owned airline, arguing that government interference and bad decisions had led to its decline. Former aviation minister Praful Patel, blamed in the book for the airline's downfall, filed a criminal defamation case against Bhargava and Rajeev Beri, managing director of Bloomsbury India Pvt. Ltd. in November 2013, a month after the book's release, in a Mumbai metropolitan magistrate's court. Bloomsbury made an out-of-court settlement with Patel, agreed to pulp all remaining books in its stock, and even published an apology to Patel in leading newspapers.[131]

Bhargava said Bloomsbury had taken the decision unilaterally.

> After first talking with my lawyers on a common approach to take on the legal case, Bloomsbury backtracked and informed me on the eve of the first court hearing that they had arrived at an understanding with Patel, that is, they will withdraw the books, destroy the stock and offer an apology. The least an author would have expected in such circumstances was to have been taken into confidence. No such luck for me![132]

Bhargava also alleged that Patel had used his position and clout as a minister to obstruct the distribution of the book. "Besides ensuring that the books were not sold at airport book stores," Bhargava said Patel also had TV channels drop scheduled programs relating to the book, including "after the interview had been recorded" in one case.

Bhargava self-published the book online in March 2014.[133]

IIPM and Maheshwer Peri

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[131] "Bloomsbury withdraws book on Air India, apologises to Praful Patel," *Hindu Business Line*, January 15, 2014, http://www.thehindubusinessline.com/economy/bloomsbury-withdraws-book-on-air-india-apologises-to-praful-patel/article5579288.ece (accessed March 23, 2014).

[132] Nihil Pahwa, "Author Plans to Release Controversial Book as E-Book After Publisher Withdraws It," Medianama.com.

[133] Bhargava's 'Descent of Air India' pulped, reappears as E-book, *CNN-IBN Online*, March 14, 2014, http://www.ibnlive.com/news/books/bhargavas-descent-of-air-india-pulped-reappears-as-e-book-673569.html (accessed August 1, 2015).

The Indian Institute of Planning and Management (IIPM), a business school with its headquarters in New Delhi, has filed several criminal and civil defamation lawsuits to prevent the publication of content critical of the institute.[134] The suits have often been filed in remote parts of the country such as Silchar or Kamrup in Assam, where neither IIPM nor the defendant is based, and where neither party has any presence.[135]

In 2009, IIPM filed a criminal defamation complaint in Delhi against Maheshwer Peri, the publisher of *Outlook* and *Careers360* magazines, and against *Outlook* for articles Peri wrote in 2008 alleging that IIPM was making false claims and deceiving students.[136]

The criminal complaint was filed after IIPM received an email from Peri seeking the Institute's comments on allegations made against IIPM in the articles Peri was planning to publish in *Careers360*, a new magazine he was launching at that time.[137] IIPM obtained an injunction from a magistrate's court in Delhi in March 2009 restraining the magazine from publishing any defamatory articles about IIPM.[138]

Outlook and Peri appealed against the order and the Delhi High Court modified the interim injunction order in May 2009, allowing the magazine to publish articles about IIPM as long as IIPM's view, if received within two days, would be published with the same prominence in subsequent issues of the magazine without modification.[139]

Once the articles were published, IIPM filed several more criminal and civil defamation complaints against Peri and *Careers360*, each one in a different part of India, including in

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[134] Apar Gupta, "Going by precedent," post to "India Law and Technology" (Blog), February 18, 2013, http://www.iltb.net/2013/02/going-by-precedent/ (accessed April 12, 2014).

[135] "IIPM's Rs500-million lawsuit against The Caravan," *The Caravan* magazine, July 1, 2011, http://www.caravanmagazine.in/print/1659 (accessed August 18, 2014).

[136] Maheshwer Peri, "Racket Game Lobs," *Outlook magazine*, June 30, 2008, www.outlookindia.com/article/Racket-Game-Lobs/237792 (accessed August 18, 2014).

[137] B. Mahesh Sarma, "IIPM-Best only in claims?" *Careers360 magazine*, Updated January 6, 2014, http://www.university.careers360.com/articles/IIPM-Best-only-in-claims (accessed August 18, 2014).

[138] Cordelia Jenkins and Prashant K. Nanda, "Maheshwer Peri's long war around," Livemint, November 4, 2013, http://www.livemint.com/Specials/13TE2UEtexMf1GDeEt5rCP/Maheshwer-Peris-long-way-around.html (accessed August 18, 2014).

[139] Delhi high Court, *M/S Outlook Publishing (India) v. M/S Planman Consulting India Pvt.*, 4324/2009, September 13, 2011, http://indiankanoon.org/doc/1040249/ (accessed August 18, 2014).

Assam, Delhi, Gurgaon, and Uttarakhand.[140] Criminal lawyers say the practice of filing complaints in far away, remote places and thereby requiring defendants to travel thousands of miles to appear for every court hearing is in itself a form of harassment, another way in which the process itself is the punishment.[141]

In the criminal defamation case against Peri in Uttarakhand, a non-bailable warrant was issued. Peri told Human Rights Watch that while he had a lot of support in fighting the cases against him, this was the first time he was rattled.

> You suddenly realize that the entire system is corrupt. They have to serve three summons before a non-bailable warrant can be issued but that did not happen.

In October 2010, the Uttarakhand High Court quashed the criminal case pending there against Peri.[142] The criminal defamation case filed in Gurgaon was also quashed in 2015. By January 2016, IIPM had withdrawn all legal cases against Peri.

However, Peri paid a high price in financial costs and stress as a result of the abusive application of the criminal defamation law. He told Human Rights Watch of some of the chilling effects:

> The entire process of fighting these cases is something an ordinary man cannot undertake. It is so damaging in terms of financial costs and stress, it is not possible. Going to various courts in various places. I may have gone through about 100 court hearings. The total costs I have incurred is in crores [tens of millions]. All this I was paying through my personal savings.

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[140] Internet Democracy Project, Shehla Shora, "DoT-blocked IIPM URLs: Analysis and history," February 15, 2013, http://internetdemocracy.in/2013/02/dot-blocked-websites-analysis-and-history/ (accessed July 15, 2015). See also Sohini Chattopadhyay, "Gag order," *Open magazine*, July 30, 2011, http://www.openthemagazine.com/article/books/gag-order (accessed July 15, 2015).

[141] Human Rights Watch telephone interview with lawyer Vijay Hiremath, August 11, 2014.

[142] High Court of Uttarakhand and Nainital, *M/S Pathfinder Publishing Pvt. Ltd. and Ors. v. The State and another*, C-482, No. 368 of 2010, October 20, 2010, http://www.university.careers360.com/careers360_cms/newsimages/file/Full%20judgement.pdf (accessed August 18, 2014).

> One of the chilling effects was trying to get investments for my magazine because no one wants to be associated with you as soon as you have a criminal case against you. Also, if I want to get a visa to some country, I have to disclose I have criminal cases against me and that's an impediment.
>
> These cases not only affect you but also people around you. When they filed a case against me, they also filed a case against the owner of *Outlook* magazine, Rajan Raheja who is a mentor to me. Similarly, when they filed against my magazine *Careers360*, they also filed against a shareholder who I consider a mentor and a friend. Criminal defamation is used to threaten and bully rather than to seek justice, and should be done away with.[143]

Information Technology Act

The Internet has become a key means by which individuals can exercise their rights to freedom of opinion and expression, as guaranteed by article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR).[144] India's 2008 Information Technology (Amendment) Act ("IT Act") and the Intermediary Guidelines issued under it contain several provisions inconsistent with those international standards.[145]

Section 66A of the IT Act is a broadly worded provision regulating anyone using a computer or other electronic communications device. Section 66A prohibits content that is "grossly offensive," "has menacing character," or causes "annoyance" or "inconvenience"; it provides for punishment of up to three years in prison. In March 2015, the Supreme Court

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[143] Human Rights Watch telephone interview with Maheshwer Peri, January 25, 2016.

[144] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue ("La Rue Report"), A/HRC/17/27, May 2011. See also UN Human Rights Council Resolution on Internet Freedom, adopted by consensus on July 6, 2012, UN Doc. A/HRC/20/L13 (affirming that the same rights that people have offline must also be protected online, in particular freedom of expression). India opposed the UN Resolution.

[145] The Information Technology (Amendment) Act, 2008, No. 10 of 2009, http://deity.gov.in/sites/upload_files/dit/files/downloads/itact2000/it_amendment_act2008.pdf (accessed June 12. 2014).

of India struck down the provision, holding it unconstitutional. The two judges on the bench concluded that:

> Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net.

Section 66A has been used repeatedly to arrest peaceful critics of the government.[146]

Among the first to challenge section 66A in the Supreme Court was law student Shreya Singhal, who filed a petition in 2012 after two young women in Maharashtra state, Shaheen Dhada and Rinu Srinivasan, were arrested for a post on Facebook questioning the shutdown of Mumbai following the death of a powerful political leader (a case discussed under "Hate Speech" below).[147] But a wide range of parties joined the appeal, including a rights group, a member of parliament, a private Internet company, and an industry association.

In its arguments before the court, the government asserted that, given the reach and impact of the Internet, the law was needed to preserve public order. "Morphing of images can be done and put on internet or some rumour can be spread through internet which can create social disorder in society," the government's lawyer said.[148]

The Supreme Court disagreed, ruling that Section 66A did not pass the test of "clear and present danger," which requires that the speech intend to incite imminent lawless action and be likely to produce such action.[149]

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[146] For a list of arrests made under section 66A of the IT Act. Software Freedom Law Centre, see http://sflc.in/chilling-effects/66a-arrest/ (accessed June 11, 2014).

[147] For more on the case of Dhada and Srinivasan, refer to the section on hate speech in this chapter.

[148] Amit Choudhary, "Internet needs stricter curbs than print, TV: Centre to SC," Times of India, February 26, 2015, http://timesofindia.indiatimes.com/tech/tech-news/Internet-needs-stricter-curbs-than-print-TV-Centre-to-SC/articleshow/46375883.cms (accessed April 1, 2015)

[149] The court also examined other provisions of the Information Technology Act, including section 79 and subsequent rules that require intermediary companies (such as online service providers) to censor content posted by third parties. The judges upheld the section and the rules, but said that now a court order or a notification from an appropriate government agency would be required before an intermediary is liable to take down information that is prohibited. At the same time, the court left intact section 69A, which allows for blocking of online content on certain grounds and the rules that lay down the procedure for blocking. For a detailed discussion on website blocking, refer to chapter III of this report.

Cases of abusive application of Section 66A are too numerous to list in detail here, but include the following examples:

- In May 2014, five students were temporarily detained in Bangalore for allegedly sharing a message on a mobile application "WhatsApp" that was critical of newly elected Prime Minister Narendra Modi;[150]
- In May 2014, Devu Chodankar, an engineer in Goa, was booked for sedition for allegedly posting anti-Modi remarks on Facebook;[151]
- In August 2013, police in Uttar Pradesh detained Dalit scholar Kanwal Bharti for four hours under Section 66A over Facebook posts in support of a civil servant. Bharti's post criticized government actions and commended a civil servant who was suspended for allegedly demolishing an illegally constructed wall of a mosque;[152]
- In October 2012, police in Puducherry arrested S. Ravi, a businessman, for posting messages on Twitter questioning the wealth amassed by the son of the country's then-finance minister;[153]
- In September 2012, police in Mumbai arrested political cartoonist Aseem Trivedi for his work focusing on political corruption;[154]
- In April 2012, Ambikesh Mahapatra, a professor of chemistry at Jadavpur University in the eastern Indian state of West Bengal, was arrested for forwarding an email featuring a spoof on the state chief minister, Mamata Bannerjee.[155]

In July 2015, the telecommunications minister informed parliament that the government had formed a committee to examine the implications of the Supreme Court judgment on

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[150] "Bangalore: Youth arrested for sharing Anti-Modi messages on WhatsApp," *FirstPost*, May 26, 2014, http://www.firstpost.com/india/bangalore-youth-arrested-for-sharing-anti-modi-messages-on-whatsapp-1542047.html (accessed June 11, 2014).

[151] Prakash Kamat, "Goan shipbuilding professional faces jail for anti-Modi comment on social media," *The Hindu*, May 23, 2014, http://www.thehindu.com/news/national/other-states/goan-shipbuilding-professional-faces-jail-for-antimodi-comment-on-social-media/article6041143.ece (accessed June 11, 2014).

[152] Kanwal Bharti, "In the name of socialism," *The Hindu*, September 21, 2013, http://www.thehindu.com/opinion/op-ed/in-the-name-of-socialism/article5150999.ece (accessed March 10, 2015).

[153] Kim Arora, "Twitter: Outcry over man's arrest for tweets against Chidambaram's son," *Times of India*, November 1, 2012, http://timesofindia.indiatimes.com/tech/social/Twitter-Outcry-over-mans-arrest-for-tweets-against-Chidambarams-son/articleshow/17044513.cms (accessed August 17, 2014).

[154] Please refer to the case study of Aseem Trivedi, set forth in the section on the sedition law earlier in this chapter.

[155] "Professor arrested for poking fun at Mamata," *Hindustan Times*, April 13, 2012, http://www.hindustantimes.com/india-news/professor-arrested-for-poking-fun-at-mamata/article1-839847.aspx (accessed August 17, 2014).

section 66A and that the ministry of home affairs had asked the committee to "suggest restoring [section] 66A of Information Technology Act 2000 with suitable modifications and safeguards to make it fully compatible with constitutional provisions."[156] In August 2015, a two-judge bench of the Supreme Court examining the constitutionality of criminal defamation provisions suggested that the parliament should enact a new law to regulate social media.[157]

Hurting Religious Sentiments

The Indian Penal Code also contains provisions that criminalize certain types of speech related to religion. Section 298 of the penal code criminalizes expression of any kind that is "deliberately intended to wound the religious feelings of any person" and carries a possible penalty of up to one year in prison. Section 295A criminalizes language that "with deliberate and malicious intention of outraging the religious feelings of any class of persons resident in the Union… insults or attempts to insult the religion or the religious beliefs of that class" and carries a sentence of up to three years in prison.

These provisions effectively criminalize speech that may offend others or be viewed as insulting to their religion. The UN Human Rights Committee, in General Comment 34, made clear that laws prohibiting "displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [ICCPR]" except in circumstances where the speech rises to the level of advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence, as provided in ICCPR article 20(2).[158] Sections 295A and 298, which criminalize any speech that is viewed by those who hear it as "insulting" to their religion or as "wound[ing] their religious feelings," are far too sweeping to meet this strict standard.

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[156] "Government working on restoring 66A of IT Act with changes," Press Trust of India, July 31, 2015, http://articles.economictimes.indiatimes.com/2015-07-31/news/65074578_1_section-66a-apex-court-mha (accessed August 3, 2015).

[157] "SC calls for new law to regulate social media," *Times of India*, August 7, 2015, http://timesofindia.indiatimes.com/tech/social/SC-calls-for-new-law-to-regulate-social-media/articleshow/48384370.cms (accessed August 8, 2015).

[158] UN Human Rights Committee, General Comment No. 34, para. 48. General Comment No. 34, para. 48 further notes that such laws should not be used "to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."

The "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" ("Rabat Plan of Action"), released by the Office of the High Commissioner for Human Rights in November 2012, specifically recommends the repeal of all national laws against insulting religion:

> At the national level, blasphemy laws are counter-productive, since they may result in the de facto censure of all inter-religious/belief dialogue, debate, and also criticism, most of which could be constructive, healthy and needed…. Moreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.[159]

Laws that prohibit "outraging religious feelings" were specifically cited by Frank La Rue, when he was UN special rapporteur on freedom of expression, as an example of overly broad laws that can be abused to censor discussion on matters of legitimate public interest.[160]

Freedom of expression is applicable not only to information or ideas "that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[161] A prohibition on speech that wounds someone's religious feelings or is perceived as insulting someone's religion, reinforced by criminal penalties, is neither necessary to protect the legitimate interests of those who say they are offended nor proportionate to the imposition on their interests.[162]

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[159] UN Office of the High Commissioner for Human Rights (OHCHR), Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitements to discrimination, hostility or violence ("Rabat Plan of Action"), October 2012, para. 19, http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (last accessed May 9, 2016).

[160] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/67/357, September 2012, para. 52. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement (last accessed May 2, 2016).

[161] European Court of Human Rights, *Handyside v. United Kingdom*, para. 49. See also UN Human Rights Committee, General Comment No. 34, para. 11.

[162] UN Human Rights Committee, General Comment No. 34, para. 34. See also UN Human Rights Committee, Decision: *Ballantyne v. Canada*, para. 11.4 (restriction on advertising in English not necessary to achieve stated aim of protecting the francophone population of Canada).

Sections 295A and 298 enable prosecutions based on the subjective response of those who hear the speech, and are often used by the majority to silence those with whom they disagree. Prosecutions under these laws can be initiated by the filing of complaints by individuals or interest groups, often claiming that the "offensive" statement or piece of work by an author, artist, or filmmaker is likely to lead to public disorder. While the government does not have to act on those complaints or the accompanying threats of public disorder, all too frequently it does so willingly, despite a landmark 1989 Supreme Court ruling that freedom of expression cannot be suppressed on account of threats of violence.[163]

The stifling of the discussion of religious differences is likely to lead to intolerance and efforts to silence dissenting voices rather than communal harmony. Instead of prosecuting "insulting" speech, state and religious leaders should "actively promote tolerance and understanding towards others and support open debates and exchange of ideas.[164]

Kiku Sharda

Kiku Sharda, a comedian on a popular television show, was arrested under Section 295A on January 13, 2016, for alleged "deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs." Sharda had mimicked spiritual leader Gurmeet Ram Rahim Singh on a television show, prompting Singh's followers to file the case. Singh heads the spiritual organization Dera Sacha Sauda, which has its main center in the north Indian state of Haryana.

Sharda was arrested in Mumbai by Haryana state police and taken to Kaithal district of Haryana, where he was remanded in judicial custody for 14 days. He was released on bail the same day, only to be arrested again in Fatehabad district of Haryana in a similar case.[165] Sharda was released on bail the next day.

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[163] *S. Rangarajan v. P. J. Ram*, [1989] SCR (2) 204, 230.

[164] UN Human Rights Council, La Rue Report, A/67/357, September 2012, para. 85. Given the rise of religious conflict in Burma, true "hate speech," defined in international law as "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" can, and in fact should, be penalized, as required by ICCPR art. 20.

[165] "Comedian Kiku Sharda rearrested, Haryana CM Khattar says govt has no hand," *Indian Express*, January 15, 2016, http://indianexpress.com/article/india/india-news-india/comedian-kiku-sharda-of-comedy-nights-with-kapil-fame-held-for-mimicking-dera-sacha-sauda-chief-gurmeet-ram-rahim-singh/ (accessed January 20, 2015).

On January 21, the High Court of Punjab and Haryana, hearing a petition filed by Sharda seeking the quashing of the two complaints lodged against him at Kaithal and Fatehabad, stayed his arrest and also stayed the proceedings in a lower court. The judge noted that cases were being registered against Sharda at various police stations in Punjab and Haryana states and ruled that Sharda should not be arrested in any case related to the controversy.[166] A First Information Report has been filed at the Faridkot police station in Punjab against Sharda for the same episode.

Sharda alleged that Singh's followers have filed multiple First Information Reports against him in an "orchestrated manner" to "harass, humiliate and terrorize him and his co-accused in general and media in particular."[167] The High Court asked the Haryana government to file its reply by the first week of February.

Sharda's arrest prompted condemnation from media, actors, comedians, and several industry associations such as the Federation of Western India Cine Employees, Cine & TV Artistes Association, and the Film Writers Association.[168]

Shirin Dalvi

In January 2015, Shirin Dalvi, the editor of an Urdu newspaper in Mumbai, was charged under Section 295A "for outraging religious feelings" with "malicious intent." At least three First Information Reports were registered against her in different police stations in Mumbai for reprinting a controversial cartoon originally published by French satirical magazine *Charlie Hebdo*. Facing backlash, Dalvi published a front-page apology in her newspaper the day after the cartoon was published.[169] However, facing the wrath of Muslims who were offended by the cartoon, the Mumbai edition of the paper was shut

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[166] "Punjab and Haryana HC stays arrest of Kiku Sharda," *Indian Express*, January 22, 2016, http://indianexpress.com/article/cities/chandigarh/punjab-and-haryana-hc-stays-arrest-of-kiku-sharda/ (accessed January 23, 2016).

[167] Ajay Sura, "HC stays Kiku Sharda's arrest in all cases," *Times of India*, January 21, 2016, http://timesofindia.indiatimes.com/city/chandigarh/HC-stays-Kiku-Shardas-arrest-in-all-cases/articleshow/50672465.cms (accessed January 23, 2016).

[168] "Artistes back comedian, condemn arrest," *Hindu*, January 19, 2016, http://www.thehindu.com/news/cities/mumbai/news/artistes-back-comedian-condemn-arrest/article8122866.ece (accessed April 6, 2015).

[169] Mohammed Wajihuddin, "Mumbra editor hounded for reprinting Hebdo toon," *Times of India*, January 31, 2015, http://timesofindia.indiatimes.com/india/Mumbra-editor-hounded-for-reprinting-Hebdo-toon/articleshow/46071964.cms (accessed February 12, 2015).

down. Dalvi is out on bail while the cases against her are pending in the Bombay High Court. Dalvi said she had to stay away from home until she received bail in all the cases. She said she was being harassed and threatened on the phone and had taken to wearing a veil for months to hide her identity.

In February, she told *Indian Express* that "facing the community again has become a great concern for me as there is still a lot of unrest. I have avoided showing my face in Muslim-populated pockets. I have not gone back to my house [in Mumbra] since the protest started."[170] Six months after the incident, Dalvi told a reporter that she was struggling to make ends meet and provide as single mother for her two children. "The Urdu papers had manufactured a social boycott – there was a conspiracy against me that almost everyone believed, except my relatives and friends."[171]

Wendy Doniger and Penguin India

The existence of "insulting religion" laws and their frequent use to silence authors and artists have had a chilling effect on free speech and led to self-censorship. In 2014 publisher Penguin India, facing a civil suit for four years and criminal complaints under Section 295A, decided to recall and destroy all copies of the book, *The Hindus: An Alternative History*, by author Wendy Doniger.[172] The publisher cited threats to its staff in the country as the reason for its actions, after an out-of-court settlement with the Shiksha Bachao Andolan Samiti, a right-wing group, which had sought judicial intervention to restrict sale and circulation of the book.

Penguin India came under fire from authors and free speech advocates for its failure to support free speech, but said it had a "moral responsibility to protect our employees against threats and harassment" and blamed Indian penal laws, in particular Indian Penal Code section 295A, saying that "it will make it increasingly difficult for any Indian

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[170] Tabassum Barnagarwala and Srinath Raghvendra Rao, "Case over Paris cartoon forces Mumbai editor to go behind a veil," *Indian Express*, February 3, 2015, http://indianexpress.com/article/india/india-others/case-over-paris-cartoon-forces-mumbai-editor-to-go-behind-a-veil/99/ (accessed February 12, 2015).

[171] Aarefa Johari, "Six months since she published Charlie Hebdo cover, Urdu editor struggles for work and money," *Scroll.in*, July 15, 2015, http://scroll.in/article/739406/six-months-since-she-published-charlie-hebdo-cover-urdu-editor-struggles-for-work-and-money (accessed August 1, 2015).

[172] A. G. Noorani, "Penguin & the Parivar," *Frontline magazine*, April 4, 2014, http://www.frontline.in/social-issues/penguin-the-parivar/article5787832.ece (accessed March 11, 2015).

publisher to uphold international standards of free expression without deliberately placing itself outside the law."[173]

Hate Speech

India has a variety of laws prohibiting what broadly might be termed "hate speech." While certain types of hate speech can and should be restricted under international law pursuant to ICCPR article 20, the threshold for such restrictions is very high "because, as a matter of fundamental principle, limitation of speech must remain an exception."[174]

Article 20(2) of the ICCPR provides:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Under the text of this provision, for speech to be susceptible to penalty as hate speech under international law, it must not only be intended to cause a subjective, internal emotion of hatred towards a particular group, but constitute actual incitement to act upon such hatred, such as through acts of discrimination, hostility, or violence. For this reason, mere disparagement of a group that falls short of such incitement, or simply causing hurt feelings to the group or giving offense to group members, is insufficient to justify penalizing speech, under either article 19 or article 20 of the ICCPR.

As then-Special Rapporteur La Rue made clear in 2012:

> [F]irst, only advocacy to hatred is covered; second, hatred must amount to advocacy which constitutes incitement, rather than incitement alone; and third, such incitement must lead to one of the listed results, namely, discrimination, hostility or violence. As such, advocacy of hatred on the basis of national, racial or religious grounds is not an offense in itself. Such advocacy becomes an offence only when it also constitutes incitement to

[173] Penguin India's statement on 'The Hindus' by Wendy Doniger, February 2014 (accessed August 16, 2014).

[174] UN OHCHR, Rabat Plan of Action, October 2012, para. 18, http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outrcome.pdf (accessed August 16, 2015).

discrimination, hostility or violence, or when the speaker seeks to provoke reactions on the part of the audience.[175]

Any restriction of expression based on article 20 must also comply with the limitations of article 19(3) of the ICCPR and, as such, must be narrowly tailored to restrict speech as little as possible to achieve the goal of preventing incitement to violence.[176] The various "hate speech" laws currently in place in India are not sufficiently tailored to meet international legal standards.

Section 153A of the penal code authorizes a prison sentence of up to three years on anyone who by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities.

Far from requiring advocacy of hatred—"a state of mind characterized by intense and irrational emotions of opprobrium, enmity and detestation towards the target group" — section 153A criminalizes speech that simply promotes "disharmony" between groups.[177] Even advocacy of hatred, however repugnant, may not be criminalized under international law unless it constitutes incitement to discrimination, hostility, or violence.[178] The prohibited speech thus must be limited to "statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."[179] Section 153A, however, criminalizes speech simply on the grounds that it promotes hatred or ill-will between communities, without any requirement that it incite the listeners to act upon that hatred. As a result, the law restricts speech far more broadly than can be justified under international law.

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[175] UN HRC, La Rue Report, A/67/357, September 2012, para. 43.

[176] UN Human Rights Committee, General Comment No. 34, para. 50.

[177] Camden Principles, principle 12(1)(i). See also La Rue Report, A/67/357, September 2012, para. 44(a) (citing the Camden Principles), Rabat Plan of Action, fn. 4.

[178] Incitement is "[t]he action of provoking unlawful behaviour or urging someone to behave unlawfully." Oxford Dictionary, http://www.oxforddictionaries.com/definition/english/incitement.

[179] Camden Principles, principle 12(1)(iii).

Section 505(2) of the penal code criminalizes the publication or circulation of statements or reports "containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds or religion, race, place of birth, residence, language, caste, or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religions, racial, language or regional groups or castes or communities."[180] While section 505(2), unlike section 153A, does not penalize speech that promotes "disharmony," it is still too broad to meet international standards.

Section 505(2) criminalizes not only speech intended to incite or promote hatred, but also speech that "is likely to" do so, regardless of the speaker's intention. International standards, however, make clear that only advocacy of hatred—defined as "the explicit, *intentional*, public and active support and promotion of hatred towards the target group"—can be prohibited.[181] Negligence or recklessness is not sufficient.[182] Moreover, as with section 153A, the law fails to contain a requirement that the speech create an imminent risk of discrimination, hostility, or violence against members of the target group.

The excessive breadth of these hate speech laws is made worse by the use of vague, subjective language such as "disharmony," "ill-will," and "alarming news." As former Special Rapporteur La Rue has stressed:

> The risks that legal provisions prohibiting hate speech may be interpreted loosely and applied selectively by authorities underline the importance of having unambiguous language and of devising effective safeguards against abuses of the law.[183]

India's overly broad definitions of "hate speech" open the door for arbitrary and abusive application of the law, and create an unacceptable chill on the discussion of issues relating to race and religion. While the goal of preventing inter-communal strife is an important one in a country as diverse as India and home to increasing incidents of communal violence, under international law it must be done in ways that restrict speech as

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[180] Section 505(1)(c) is discussed in sec.III, supra.

[181] La Rue Report, A/67/357, September 2012, para. 44(b) (emphasis added). See also Camden Principles, principle 12.1(ii).

[182] Rabat Plan of Action, para. 22.

[183] La Rue Report, A/67/357, September 2012, para. 42.

little as possible. As UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Githu Muigai said, "It is absolutely necessary in a free society that restrictions on public debate or discourse and the protection of racial harmony are not implemented at the detriment of human rights, such as freedom of expression and freedom of assembly."[184]

Prosecutions under the hate speech laws, as under the "insulting religion" laws, can be initiated by the filing of complaints by individuals or interest groups who dislike or disagree with the speech, art, or other expression, and can easily be used by those in the majority to suppress minority views.

Shaheen Dhada and Rinu Srinivasan

In November 2012, Shaheen Dhada and Rinu Srinivasan, both 21 years old at the time, got into trouble because of a post on a social networking website. Dhada and Srinivasan live in Palghar town in the western Indian state of Maharashtra. On November 17, the day after the death of Bal Thackeray, the head of the Shiv Sena party, Dhada posted a comment on Facebook criticizing the shutdown of transport and services in several parts of the state. She wrote that Mumbai was shut down due to fear, not respect. Dhada's friend Srinivasan pressed the "like" button and commented on Dhada's post on Facebook. Soon after, Dhada said she started getting comments and calls from friends, asking her to take the post down.[185]

That evening, Shiv Sena workers led a mob which attacked the health clinic of Shaheen's uncle, Abdul Dhada, ransacking it while four patients were inside. Abdul Dhada told media that the attack would cost him as much as $27,000. "My operation theatre and all the machinery, everything was ruined, totally broken. It was horrible, horrible."[186]

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[184] Joint submission by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, to the OHCHR Expert Workshop on the prohibition of incitement to national, racial or religious hatred (July 6-7, 2011, Bangkok), http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/SRSubmissionBangkokWorkshop.pdf (discussing similar provision of Singapore's Penal Code).

[185] Rajini Vaidyanathan, "India Facebook arrests: Shaheen and Renu speak out," *BBC.com*, November 26, 2012, http://www.bbc.com/news/world-asia-india-20490823 (accessed August 16, 2014).

[186] Ibid.

After vandalizing the hospital, the mob went to the police station and demanded that police take action against Shaheen Dhada and Rinu Srinivasan. The police filed First Information Reports against both on the complaint of local Shiv Sena leader and businessman Bhushan Anant Sankhe under Section 295A of the penal code, which criminalizes "deliberate and malicious" speech intended to outrage religious feelings, and Section 66A of the Information Technology Act, which criminalizes certain kinds of "offensive" speech on the Internet.[187]

The police then summoned the young women for questioning. When Dhada and Srinivasan reached the police station, the angry mob was waiting. "They were shouting, and at that time I was really very scared," Dhada said.[188] Dhada and Srinivasan were detained overnight and arrested the next morning.

However, Section 295A, the law cited in the First Information Reports, requires a "malicious and deliberate" intent to insult religion or religious beliefs. Dhada's comment did not demonstrate any such intent or even mention religion. Indeed, Thackeray was not a religious leader, but a politician. Recognizing the inappropriateness of the initial charge but apparently still wanting to charge the young women with something, the police changed the charge the following day to a violation of Indian Penal Code section 505(2), which requires only that the statement at issue be "likely" to create or promote enmity or ill-will between two classes of people or religious groups.[189] The police appeared to have applied this on the basis of the fact that Dhada, a Muslim woman, posted the comment against Thackeray, who was a Hindu leader.[190]

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[187] "'Mumbai shuts down due to fear, not respect,'" *The Hindu*, November 20, 2012, http://www.thehindu.com/todays-paper/mumbai-shuts-down-due-to-fear-not-respect/article4113485.ece (accessed August 16, 2014).

[188] Julie McCarthy, "Facebook Arrests Ignite Free-Speech Debate In India," *NPR.org*, November 29, 2012, http://www.npr.org/2012/11/29/166118379/arrests-ignite-free-speech-debate-in-india (accessed August 16, 2014).

[189] "How the nightmare unfolded," *Mumbai Mirror*, November 20, 2012, http://www.mumbaimirror.com/mumbai/others/How-the-nightmare-unfolded/articleshow/17857060.cms (accessed August 17, 2014).

[190] See also Zulfikuar Memon, "Why Shaheen shouldn't have been booked under 295 (A)," *Mumbai Mirror*, http://www.mumbaimirror.com/mumbai/others/How-the-nightmare-unfolded/articleshow/17857060.cms (accessed August 17, 2014).

The application of hate speech laws in this case provides a clear example of the willingness of the police to act based on pressure from political groups, powerful people, or angry mobs. Author Naresh Fernandes said:

> There were thousands of guys outside their police station and inside the station house who were doing what the Shiv Sena has always done—threatening to burn the town up… They [the police] just wanted to get them off their backs and wanted to make sure that order was maintained even as they didn't quite uphold the law.[191]

Dhada and Srinivasan were released on bail the same day following nationwide protests against their arrest.[192] Two senior police officers connected to their case were transferred and the government dropped the charges against Dhada and Srinivasan in December 2012.[193] After her ordeal, Dhada told the BBC:

> I'm not angry, I'm not sad, but I'm just shocked. It was just my point of view, I'm shocked that it was my post because of which all this happened.[194]

Maqbool Fida Husain

The case of award-winning and internationally acclaimed artist Maqbool Fida Husain, though nearly 20 years old, is an emblematic one when it comes to illustrating how individuals and interest groups can use vague laws to harass peaceful activists while the state caves in to their threats of violence. It is also significant because of a historic judgment by the Delhi High Court upholding the right to freedom of expression.

In 1996, a campaign against Husain began with an article in a Hindi magazine arguing that he had painted a "nude" image of Hindu goddess Saraswati. The sketch the article referred

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[191] Julie McCarthy, NPR.org, http://www.npr.org/2012/11/29/166118379/arrests-ignite-free-speech-debate-in-india (accessed August 16, 2014).

[192] Kiran Tare and Aditi Pai, "I will be back on FB: Shaheen," *India Today magazine*, December 7, 2012, http://indiatoday.intoday.in/story/mumbai-girls-shaheen-dhada-rinu-shrinivasan-arrested-over-facebook-remark-on-bal-thackeray/1/236626.html (accessed August 16, 2014).

[193] "Charges dropped against girls arrested for Facebook post on Bal Thackeray," Press Trust of India, December 18, 2012, http://www.ndtv.com/india-news/charges-dropped-against-girls-arrested-for-facebook-post-on-bal-thackeray-507890 (accessed April 6, 2016).

[194] "India woman arrested over Facebook post in 'shock'," *BBC.com*, November 20, 2012, http://www.bbc.com/news/world-asia-india-20405457 (accessed August 16, 2014).

to was drawn by Husain in 1976, 20 years before the Hindu right-wing organization Vishwa Hindu Parishad (VHP) and its militant youth wing Bajrang Dal took notice. Maharashtra's minister for culture and Shiv Sena leader, Pramod Navalkar, filed a complaint on the basis of the article. Mumbai police filed criminal charges against Husain under Indian Penal Code section 153A for promoting enmity between different groups on the basis of religion and under section 295A for insulting religious feelings and beliefs.

Three days later, Bajrang Dal members stormed into Ahmedabad's Husain-Doshi art complex and destroyed several of Husain's works that were on exhibit.[195] This was the first of many acts of violence that would be visited on Husain and his work even as the government watched silently. Several artists pointed out that the Hindutva campaign against Husain was based on untruths and protested against the attacks on his work.[196]

Two years later, in 1998, the VHP argued that another of Husain's works titled "Sita Rescued," displayed at an exhibition in New Delhi, portrayed both Hindu god Hanuman and goddess Sita in the nude. The gallery was threatened with violence and a few weeks after the exhibition shut down, on May 1, Bajrang Dal activists attacked Husain's home in Mumbai. Shiv Sena's leader Bal Thackeray endorsed the attack, saying, "If Husain can enter Hindustan [India]… why can't we enter his house?"[197]

Criminal complaints under the hate speech and obscenity laws were filed against Husain in various parts of the country, requiring the artist, then in his 80s, to frequently appear at court hearings.[198] In 2004, the Delhi High Court dismissed eight criminal complaints under section 153A and section 295A against Husain for allegedly promoting enmity between different groups by painting Hindu goddesses Durga and Saraswati in a manner that hurt the sentiments of Hindus, and for outraging religious feelings by insulting religion or

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[195] Madhu Jain, "Communalizing art," *India Today magazine*, October 31, 1996, http://indiatoday.intoday.in/story/m-f-husain-20-year-old-painting-of-nude-deity-raises-questions-about-artistic-freedom/1/282509.html (accessed August 15, 2014).

[196] Praveen Swami, "Predatory Pursuit of Power," *Frontline magazine*, May 23 – June 5, 1998, http://www.frontline.in/static/html/fl1511/15110990.htm (accessed August 15, 2014).

[197] Statement by artists and writers, "Assault on M.F.Husain's House in Mumbai," *Sahmat.org*, May 4, 1998, http://www.sahmat.org/451998.html (accessed August 15, 2014).

[198] Anupama Katakam, "Hounded Out," *Frontline magazine*, June 18 – July 1, 2011, http://www.frontline.in/static/html/fl2813/stories/20110701281302200.htm (accessed August 15, 2014).

religious beliefs.[199] Although Judge J.D. Kapoor found merit in the allegations, he dismissed the complaints because they had been filed without complying with the statutory requirement of obtaining central or state government approval for invoking provisions relating to creation of disharmony on grounds of religion.[200]

In 2006, Husain was accused of obscenity and of hurting religious feelings under Indian Penal Code section 298 when his painting of a nude woman merging with the map of India was displayed by auctioneers who had named it "Bharat Mata," literally meaning Mother India.[201] Soon after, the union home minister, Shivraj Patil, sent an advisory to police commissioners in Delhi and Mumbai of possible communal trouble arising out of Husain's paintings.[202] In 2008, Husain's works were attacked again in Delhi.

The same year, the Delhi High Court, ruling on three separate cases related to the "Bharat Mata" painting that had been transferred to Delhi from Maharashtra, Madhya Pradesh, and Gujarat states by the Supreme Court of India at Husain's request, dismissed all of the charges against him. In a landmark judgment, Justice Sanjay Kishan Kaul said:

> There should be freedom for the thought we hate. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends…It must be realised that intolerance has a chilling, inhibiting effect on freedom of thought and discussion. The consequence is that dissent dries up. And when that happens democracy loses its essence.[203]

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[199] High Court of Delhi, *Maqbool Fida Hussain v. State of Bihar and Anr.*, Crl. M(M) 420/2001, April 8, 2004, http://www.hindujagruti.org/wp-content/uploads/2014/03/hussain_verdict.pdf (accessed April 5, 2016). See also "Delhi HC dismisses complaints against M.F. Husain," The Hindu, April 9, 2004, http://www.thehindu.com/2004/04/09/stories/2004040904231400.htm (accessed December 9, 2015).

[200] Manoj Mitta, "M F Husain: A casualty of his one painting," *Times of India*, June 10, 2011, http://timesofindia.indiatimes.com/india/M-F-Husain-A-casualty-of-his-one-painting/articleshow/8795317.cms (accessed December 9, 2015).

[201] Ibid.

[202] Harbans Mukhia, "In India multi-communalisms pass as secularism," *Deccan Chronicle*, June 13, 2011 http://www.sacw.net/article2142.html (accessed August 14 2014).

[203] *Maqbool Fida Husain v. Raj Kumar Pandey and Ors, Delhi High Court*, CRL. Revision Petition 114/2007, May 8, 2008, http://delhidistrictcourts.nic.in/May08/MAQBOOL%20FIDA%20HUSAIN%20VS.%20RAJ%20KUMAR%20PANDEY.pdf (accessed August 10, 2014).

Senior lawyer Rajeev Dhawan argues that in a sense Husain's case set a pattern for the future.

> The first stage was to create a controversy where none existed. Prior to this, no hate speech was either attributed to or provoked by the Husain sketches and paintings. In fact, this first stage could be described as the "manufacturing of hate speech" by the forces of the Sangh Parivar. The second stage was to manipulate the law in an Indian state where the political scenario was favorable to harassing Husain… The third stage was that of intimidation by vandalism… It was not necessary that these three stages follow any linear pattern. They were part of a composite strategy which could be disaggregated for strategic use.[204]

This pattern has been repeated many times in India by religious forces and interest groups of all stripes to intimidate, harass, and prosecute. Dhawan writes that, ironically, it is those who clamor against hate speech that are actually responsible for creating it in the first place, often generating it by way of protests about art and writing.[205]

Following the numerous court cases against him, Husain decided to go into exile after Hindu right-wing groups not only harassed him with legal prosecution in many cities across the country under hate speech and obscenity laws, but also threatened him with violence and death. Husain left India in 2006 and was offered citizenship by Qatar in 2010. He reportedly said at that time:

> I'm honoured by Qatar nationality but deeply saddened by my forced exile. I, the Indian-born painter, will have to give up the citizenship of my land of birth if I accept nationality.[206]

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[204] Rajeev Dhawan, Publish and Be Damned: Censorship and Intolerance in India, 2008, India: Tulika Books, ch. "Harassing Husain".

[205] Ibid.

[206] "M F Husain granted Qatar citizenship," *CNN-IBN Online*, March 26, 2010, http://ibnlive.in.com/news/mf-husain-granted-qatar-citizenship/110670-3.html (accessed August 16, 2014).

Husain never returned home due to threats on his life and fear of being targeted. People who took violent actions against him were never prosecuted. Husain died in exile in 2011. With his death, a few remaining complaints in the lower courts came to an end.[207]

Book Bans, the Heckler's Veto, and Harassment of Authors and Artists

The unacceptable suppression of peaceful expression resulting from "offensive speech" laws is exacerbated by section 95 of the Code of Criminal Procedure, which allows a state government to seize and forfeit books, newspapers, art work, or other items that it believes contain material punishable under sections 153A, 153B, and 295A of the Indian Penal Code.[208]

The breadth and vagueness of these three penal provisions have enabled state governments to seize and forfeit books, plays, and art on a wide range of topics and to use the law for political ends to appease various pressure groups.[209] While many of these seizures have been invalidated on appeal, the quashing of a forfeiture order after years of litigation, for those who can afford the time and expense of challenging it, is no real remedy for the violation of their right to freely express themselves. For those who cannot afford to do so, the violation remains unabated.

There are many examples of populist state censorship of books after violent protests or threats of violence by religious groups. In 2003, the West Bengal state government banned Taslima Nasreen's *Dwikhondito* after Muslim groups said it would disturb communal harmony. The book was banned under section 95 of the Code of Criminal Procedure for spreading enmity between different religious groups (Indian Penal Code section 153A).[210] In 2004, the Maharashtra state government banned James Laine's *Shivaji* under Section 95 of the Code of Criminal Procedure and IPC section 153A after Hindu groups protested and went on a rampage in the city of Pune, destroying valuable manuscripts and artifacts.[211]

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[207] J. Venkatesan, "Husain fought legal battle against vandals, puritans," The Hindu, June 9, 2011, http://www.thehindu.com/news/national/husain-fought-legal-battle-against-vandals-puritans/article2091052.ece (accessed December 9, 2015).

[208] Code of Criminal Procedure, sec. 95, http://indiankanoon.org/doc/875455. Sec. 95 also applies to material punishable under sections 124A (sedition), 292 (obscenity) and 293 (providing obscenity to minors) of the penal code.

[209] Forfeiture notices have been issued for, among other things, a scholarly book on Shivaji, a play about Gandhi's assassin, and a book about a Sikh saint.

[210] "WB govt bans Taslima Nasreen's book," Press Trust of India, November 28, 2003, www.rediff.com/news/2003/nov/28beng.htm (accessed August 16, 2014). The ban was lifted in 2005 by the Calcutta High Court. http://news.bbc.co.uk/2/hi/south_asia/4272858.stm (accessed August 16, 2014).

[211] Sheela Raval, "Shivaji spark,"India Today magazine, February 2, 2004, http://indiatoday.intoday.in/story/james-wlaines-book-on-shivaji-sparks-controversy/1/196669.html (accessed August 16, 2014). In July 2010, the Supreme Court lifted the

Salman Rushdie and Jaipur Literature Festival

The heckler's veto has prevailed in many cases because the state has failed to uphold its responsibility to protect artists and writers against threats posed by hostile audiences. In 2012, some Muslim groups protested when author Salman Rushdie, whose book *The Satanic Verses* was banned in October 1998, was invited to speak at the Jaipur Literature Festival. Instead of ensuring his security, Indian officials advised Rushdie not to attend the event, citing law and order concerns.[212]

The festival organizers said that after Rushdie's visit was canceled, they tried to negotiate with local Muslim groups, various government agencies, police, and intelligence agencies to facilitate Rushdie's participation at least through an online video. But after a large number of Muslim protesters arrived at the venue threatening violence and intimidating the audience, the frightened organizers, on the advice of the police commissioner, canceled the online discussion too. Festival organizer William Dalrymple, explaining his decision, wrote:

> Outdated colonial laws need to be repealed, violent fringe groups must be stopped from holding the nation to ransom and we need a movement to stop politicians abusing religious sentiment for political gain. Only when freedom of expression can be taken for granted can India really call itself the democracy it claims so proudly to be.[213]

To show support for Rushdie, four authors at the festival read out excerpts from the banned book *The Satanic Verses*, only to have to leave the city in haste to avoid potential arrest. News reports suggested Muslim organizations filed several police complaints seeking action against the authors under various penal laws such as sections 153, 153A, 295, 295A, 298, 505, 504, and 120B dealing variously with intent to cause riot, promoting enmity between groups on grounds of religion, causing insult to religion or religious beliefs, and outraging religious feelings.[214] Before he read from Rushdie's novel, author Hari Kunzru told the audience:

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ban on the book. V. Venkatesan, "Blow to a ban," *Frontline magazine*, July 31-August 13, 2010, http://www.frontline.in/static/html/fl2716/stories/20100813271604100.htm (accessed August 16, 2014).

[212] Akhilesh Kumar Singh, "Rushdie not to attend Jaipur Literature Festival, *Times of India*, January 20, 2012, http://timesofindia.indiatimes.com/india/Salman-Rushdie-not-to-attend-Jaipur-Literature-Festival/articleshow/11565622.cms (accessed August 16, 2014).

[213] William Dalrymple, "Why Salman Rushdie's voice was silenced in Jaipur," *The Guardian*, January 26, 2012, http://www.theguardian.com/books/2012/jan/26/salman-rushdie-jaipur-literary-festival (accessed August 16, 2014).

[214] Bhanu Pratap Singh, "Muslim organizations file cases against authors who read from Rushdie's book," *Times of India*, January 24, 2012, http://timesofindia.indiatimes.com/city/jaipur/Muslim-organizations-file-cases-against-authors-who-read-from-Rushdies-book/articleshow/11609430.cms (accessed September 12, 2015).

> There are many rights for which we should fight, but the right to protection from offence is not one of them. Freedom of speech is a foundational freedom, on which all others depend. Freedom of speech means the freedom to say unpopular, even shocking things.[215]

Perumal Murugan

In January 2015, Tamil writer Perumal Murugan announced that he was withdrawing all of his books from publication and would never write again. Murugan's decision was a result of protests by rightwing Hindu and local caste groups against his book *One Part Woman,* the story of a childless woman who plans to get pregnant through consensual sex with a stranger as part of a local religious ritual. Protesters burned copies of his books and shut down shops in his village, and residents asked the police to ban the book and take action against him. Instead of protecting Murugan from the threat and intimidation of protesters, the district administration, including the police, asked him to tender an unconditional apology. Murugan, tired of the harassment, announced the demise of his writing career.[216]

[215] Hari Kunzru, "Why I quoted from The Satanic Verses," *The Guardian*, January 22, 2012, http://www.theguardian.com/commentisfree/2012/jan/22/i-quoted-satanic-verses-suport-rushdie (accessed September 12, 2015).

[216] "Who 'killed' Indian author Perumal Murugan?" *BBC.com*, January 14, 2015, http://www.bbc.com/news/blogs-trending-30785930 (accessed February 12, 2015).

Counterterrorism Laws

India's counterterrorism laws pose serious threats to peaceful expression and freedom of association.[217] The primary counterterrorism law, the Unlawful Activities (Prevention) Act (UAPA),[218] enables the government to declare associations, even peaceful political associations, unlawful if they have as their object, or encourage, any of a very broad range of "unlawful activities" as defined in the statute.[219] The definition of "unlawful activity" includes speech which "causes disaffection against India" or "supports any claim" that any part of the country should secede from the Union.[220] Once an association has been declared unlawful, the UAPA authorizes the arrest and prosecution of anyone who is a member of the association or in any way assists in its operations.[221] These very broad prohibitions can be and indeed already have been used to restrict both freedom of expression and freedom of association in ways that violate international norms.

Under article 22 of the ICCPR, everyone has the right to freedom of association. Any restriction on that right must be (1) provided by law; (2) imposed for the purpose of protecting national security or public safety,

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[217] The counterterrorism laws also raise significant concerns in other areas that are outside the scope of this report. See, e.g., Human Rights Watch analysis of the amendments to the Unlawful Activities Prevention Act (UAPA), enacted after the November 26, 2008 attacks on Mumbai, http://www.hrw.org/reports/2010/07/28/back-future-0; Human Rights Watch analysis of proposed amendments which were enacted in 2012, http://www.hrw.org/news/2012/12/14/india-reject-amendments-counterterrorism-law.

[218] The Unlawful Activities Prevention Act (UAPA), No. 37 of 1967, (December 30, 1967), http://web.archive.org/web/20100827013835/http://www.nia.gov.in/acts/The%20Unlawful%20Activities%20%28Prevention%29%20Act,%201967%20%2837%20of%201967%29.pdf, was amended in 2008, containing the same vague definitions of terrorist activity and unlawful association, harsh penalties, and wide powers of detention and investigation that had defined previous counterterrorism laws such as the 1985 Terrorist and Disruptive Activities (Prevention) Act (TADA) and the 2002 Prevention of Terrorism Act (POTA). Both predecessor laws were known to pursue discriminatory and abusive counterterrorism tactics. TADA was allowed to lapse in 1995 and POTA was repealed in 2004 because both laws had led to the arbitrary detention, torture, enforced disappearance, and extrajudicial killing of numerous terrorism suspects and others, including Sikhs, Muslims, Dalits, and citizens of India's northeastern states. The UAPA is inconsistent with international law's guarantee of the right to form associations which may only be restricted when necessary in a democratic society for important state interests including national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others, and where such restrictions must be the least intrusive measure possible to protect the state interest.

[219] UAPA sec. 2. The statute further defines an unlawful association as one which "has for its object any activity which is punishable under section 153A or section 153B of the Indian Penal Code, or which encourages or aids persons to undertake any such activity, or whose members undertake any such activity." As discussed below, sections 153A and 153B themselves impose restrictions on free speech that violate international standards on freedom of expression, so a ban on an organization based on those overly broad laws is unlikely to meet international standards for protection of freedom of association.

[220] Ibid.

[221] UAPA sec. 10(a).

public order (*ordre public*), public health or morals or the rights and freedoms of others; and (3) necessary in a democratic society to achieve one of those purposes.[222]

As the UN Human Rights Committee, the body charged with interpreting the ICCPR, has said: "The reference to a "democratic society" indicates… that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose."[223]

Provisions of the UAPA that allow the government to ban an association because, for example, it encourages disaffection against India, are far too broad to satisfy this standard and can be used in ways that violate the freedom of association of those with whom the government does not agree.

The UAPA also impinges on freedom of expression, both directly and indirectly. Associations allow individuals to exercise their right to freedom of expression collectively. When a government bans an organization for its views, it restricts that collective speech as well as the speech of individual members, who are subject to prosecution for their membership.

Moreover, the government can use the law to silence those who share the ideology of a banned organization, even if they are not members, by claiming that speech consistent with the organization's aims is proof of membership. As advocate Trideep Pais notes, "By banning organizations, the authorities can restrict free speech by saying you are a member of a certain organization. How do you prove membership of an organization? Do they have registers? It becomes 'guilt by association.' And once you start criminal prosecution against someone, people shut up."[224]

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[222] ICCPR art. 22(2).

[223] Lee v. Republic of Korea, UN Doc CCPR/C/84/D/1119/2002, July 2005, para. 7.2. See also Report of the Special Rapporteur on the Rights to Freedom of Assembly and of Association, Maina Kiai, A/HRC/20/27, May 2012, para. 75: "suspension of an association "should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law"; Freedom and Democracy Party (OZDEP) v. Turkey, European Court of Human Rights, 93 1998/22/95/784 (Grand Chamber decision, December 8, 1999), available at http:/www.icnl.org (dissolution of party advocating for rights for the Kurdish minority a violation of freedom of association under art. 11 of the ECHR).

[224] Human Rights Watch interview with Trideep Pais, lawyer, New Delhi, August 13, 2014.

Minorities and marginalized communities are often particularly vulnerable. The Maharashtra state government's case against the cultural group Kabir Kala Manch is illustrative of how officials can use counterterrorism laws to stifle peaceful expression.

Between 2011 and 2013, Maharashtra authorities arrested six members of Kabir Kala Manch, a Pune-based cultural group of singers, poets, and artists, under the UAPA, claiming they were secretly members of the banned Communist Party of India (Maoist), also known as Naxalites. The six were Deepak Dengle, Siddharth Bhosle, Sheetal Sathe, Sachin Mali, Sagar Gorkhe, and Ramesh Gaichor. Kabir Kala Manch, largely consisting of Dalit youth, uses music, poetry, and street plays to raise awareness about issues such as the oppression of Dalits and tribal groups, social inequality, corruption, and Hindu-Muslim relations.

Bail is rarely granted in cases involving the UAPA, but in this case the Bombay High Court did so for two members of the group, Dengle and Bhosle, albeit after they had been in jail for almost two years. The court noted that the charges filed indicated that the two were sympathetic to the Maoist philosophy but not active members of the Maoist organization.

The court reasoned that "drastic provisions" added to the UAPA in 2008 required that membership in an illegal organization be interpreted in the light of fundamental freedoms such as the right to freedom of expression and association, and thus "passive membership" was insufficient for prosecution.[225] Another one of the accused, Sathe, was arrested when she was six months pregnant, yet spent almost two months in jail before being released on bail. At the time of writing, however, Mali, Gorkhe, and Gaichor remained in jail awaiting trial.

The Official Secrets Act, 1923

The colonial era Official Secrets Act, 1923 ("OSA"), is a wide-ranging law that penalizes receiving or disseminating a broad range of documents and information, particularly government documents.[226] Although called "The Official Secrets Act," nowhere in the act is the term "official secrets" defined and the statute is phrased so broadly that it could be applied to almost anything.

[225] "India: Stop Misuse of Counterterrorism Laws," Human Rights Watch news release, June 26, 2013, www.hrw.org/news/2013/06/26/india-stop-misuse-counterterrorism-laws. See full text of High Court order, BA.1536.1634.1692 of 2012, January 31, 2013, https://kabirkalamanch.files.wordpress.com/2013/02/ba153612310113.pdf (accessed December 8, 2015).

[226] Official Secrets Act (OSA), 1923, http://indiankanoon.org/doc/61492784/ (accessed August 8, 2014).

The OSA puts severe limitations on the ability of anyone working for or connected to the government to disclose information of any kind. Section 5(1) of the act makes it an offense for any person who holds or has held office, or has worked under contract for the government or been employed by a contractor, to:

A. communicate "any document or information" that he received or had access to by virtue of his position to anyone other than those to whom he is specifically authorized to disclose it;
B. retain any such document or information when he has no right to retain it; or
C. fail to take reasonable care of such document or information.227

It is also an offense for anyone to receive such a document or information "knowing or having reasonable ground to believe" that it was communicated in contravention of the OSA.[228] Both offenses carry a penalty of up to three years' imprisonment.

As India's Second Administrative Reforms Commission ("ARC") noted in 2006 in recommending repeal of the statute:

> While section 5 of OSA was obviously intended to deal with potential breaches of national security, the wording of the law and the colonial times in which it was implemented made it into a catch-all legal provision converting practically every issue of governance into a confidential matter.[229]

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[227] Official Secrets Act (OSA), sec. 5(1). The section applies to "any secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign states or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, *or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office of contract.*" (emphasis added).

[228] OSA, sec. 5(2).

[229] "Right to Information: Master Key to Good Governance," Second Administrative Reforms Commission, First Report ("RTI Report"), June 2006, www.arc.gov.in/rti8finalreport.pdf (accessed May 21, 2014), para. 2.1.2. In 2008, a Group of Ministers accepted about 62 recommendations of the Administrative Reforms Commission but rejected the proposal to repeal OSA.

Despite the strong recommendation by the Second Administrative Reforms Commission, the Home Ministry announced in 2013 that it opposed any changes to the law.[230]

The imposition of criminal penalties for the disclosure of documents by public employees, without any requirement that the disclosure pose a real risk of harm, violates international standards for the protection of freedom of expression.

The Global Principles on National Security and the Right to Information (the Tshwane Principles) are expert standards that examine the issue of leaks of government information in light of international law on national security, freedom of expression, and access to information.[231] Under the Tshwane Principles, criminal cases against those who leak information should be considered only if the information disclosed poses a "real and identifiable threat of causing significant harm" to national security.[232] Moreover, the public's interest in the disclosure of important information should be available as a defense in any such prosecution.[233] Pursuant to the Tshwane Principles, journalists and others who do not work for the government should not be prosecuted for receiving,

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[230] Bharti Jain, "Home ministry opposes changes in Official Secrets Act," *Times of India*, July 25, 2013, http://timesofindia.indiatimes.com/india/Home-ministry-opposes-changes-in-Official-Secrets-Act/articleshow/21321623.cms (accessed August 15, 2014).

[231] The Global Principles on National Security and the Right to Information ("Tshwane Principles"), https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf, princ. 43 and 46. The Tshwane Principles were launched in Tshwane, South Africa on June 12, 2013, to provide guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information. The principles were drafted by 22 organizations and academic centers in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative, and in consultation with the four special rapporteurs on freedom of expression and/or media freedom and the special rapporteur on counter-terrorism and human rights.

[232] The Ontario Superior Court of Justice invalidated a provision strikingly similar to India's sec. 5 in Canada's Security of Information Act ("SOIA"), finding that it imposed impermissible restrictions on free expression in violation of the right to freedom of expression under Canada's Charter of Rights and Freedoms. O'Neill v. Canada (Attorney General), 82 O.R. 3d 241, 2006. Among the grounds cited by the court in invalidating the provision is the fact that it criminalizes the communication or receipt of information that does not in any way harm the national interest or national security. The law was challenged by a journalist who was accused of violating sec. 5 by receiving (and publishing) classified information from an anonymous source. She was not prosecuted, but her home was searched and items seized based on a warrant that cited her alleged violation of the law.

[233] Tshwane Principles, princ. 43(a), "Whenever public personnel may be subject to criminal or civil proceedings, or administrative sanctions, relating to their having made a disclosure of information not otherwise protected under these principles, the law should provide a public interest defense if the public interest in disclosure of the information in question outweighs the public interest in non-disclosure."

possessing or disclosing even classified information to the public, or for conspiracy or other crimes based on their seeking or accessing such information.[234]

By criminalizing the disclosure, possession, or receipt of documents or information without the necessity of demonstrating that disclosure of such a document or information would threaten national security or public order, section 5 of the OSA fosters a culture of secrecy that runs counter to the public's interest in access to information about government activity.[235]

The breadth of the OSA is even more troubling in the context of its definition of "spying."[236] Section 3 of the OSA defines the offense of "spying" extremely broadly to include making, receiving, or communicating any document that is "calculated to be," "might be," or is "intended to be… directly or indirectly useful to a foreign country."[237] The statute does not require that the conduct result in any actual harm to national security, or even that it create a significant risk of such harm.[238] Rather, it requires only that the individual be acting "for any purpose prejudicial to the safety or interest of the State" and that the material be potentially "useful" to another country. Being "useful" to another country is not the same as being a threat to national security.[239]

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[234] Tshwane Principles, princ. 47.

[235] The right to seek and receive information, including information held by public bodies, is specifically recognized in arts. 19 of both the Universal Declaration of Human Rights and the ICCPR. UN Human Rights Committee General Comment, no. 34, para. 18; La Rue Report June 202, para. 90. Similarly, the Indian Supreme Court has recognized the existence of such a right under the Indian constitution. *Gupta v. President of India*, 2. S.C.R. 365, 1982, para. 66.

[236] Official Secrets Act, sec. 3 (Penalties for Spying).

[237] Sec. 3(a) prohibits approaching, inspecting, passing over, being near or entering a prohibited place; sec. 3(b) prohibits the making of any documents meeting the above standards; sec. 3(c) prohibits the obtaining, collection or dissemination of any secret password or sign or "any article, note, document or information" which meets the above standards.

[238] Sec.3 authorizes imposition of a lengthier term of imprisonment for offenses "committed in relation to any work of defense, arsenal, naval, military or air force establishment or state, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of the State or in relation to any secret official code," but still requires no showing that the offense caused a real risk of harm to national security. Such offenses carry a penalty of fourteen years, while all other cases carry a penalty of three years.

[239] UN Human Rights Committee, Keun-Tae Kim v. Republic of Korea, UN Doc. CCPR/C/64/D/574/1994, January 4, 1999, http://www.refworld.org/docid/3f588eff7.html
(accessed April 4, 2014), finding no showing that "benefit" that might arise to North Korea from statements created any risk to national security that justified restricting the speech. See also UN Human Rights Committee, Yong-Joo Kang v. Republic of Korea, UN Doc. CCPR/C/78/D/878/1999, July 16, 2003, http://www.refworld.org/docid/404887efa.html (accessed April 4, 2014), finding violation of art. 19 where complainant was convicted of espionage for distributing pamphlets critical of the government where government did not show how pamphlets threatened national security.

The provision is far too broad to be justified as "necessary" to protect national security, and too vague, for example, for journalists and academic writers to know for certain when they might fall afoul of the law. A journalist investigating a report of defective military equipment, or an academic writing about missile technology, could find themselves charged with "spying" on the premise that their writings "could benefit" other countries. Fear of that outcome is likely to lead to self-censorship.[240]

Section 3(2) of the statute effectively places the burden on the defendant to prove that he or she is not guilty, providing that:

> It shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State… he may be convicted if, from the circumstances of the case, his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State.

The ability to use the "known character" of a defendant to prove that he or she was acting for a purpose "prejudicial to the safety or interest of" India is an open invitation to the government to use the law against those known to be critical of the government.

Although the law is not used with the frequency of the sedition provisions, the breadth of its language and the severity of possible penalties place a chill on freedom of expression. A letter from India's national security advisor to the cabinet secretary, leaked in late 2014, revealed that each government ministry and department had been asked to prevent leakage of classified information to media and crack down harder on any violations of secrecy laws by media.[241] As lawyer Prashant Reddy T noted, the national security advisor's

[240] Sec. 3(2) effectively places the burden on the defendant to prove that he or she is not guilty. Placing the burden on the defendant to disprove that he or she was acting for a purpose prejudicial to the interests of India violates the presumption of innocence enshrined in art. 11 of the Universal Declaration of Human Rights and art. 14(2) of the ICCPR.

[241] Deepak Sharma and Akshay Singh, "Government wants crackdown on violation of Official Secrets Act," *India Today* magazine, December 30, 2014, http://indiatoday.intoday.in/story/official-secrets-act-media-nsa-ajit-doval-ins-arihant-ajit-kumar-seth-aaj-tak/1/410485.html (accessed February 12, 2014).

demand for more prosecutions under the Official Secrets Act was bad news for media, especially given that the law was already leading to self-censorship.[242]
Saikat Datta, a former journalist who extensively covered issues of national security, said that the Official Secrets Act is a huge impediment for journalists covering matters of defense and intelligence and has a serious chilling effect on their work. "As journalists we are all the more vulnerable because we have an archaic law that is in conflict with our work. It is our duty as journalists to unearth facts. And many of those facts would be covered under Official Secrets Act."[243]

Tarakant Dwivedi

In May 2011, journalist Tarakant Dwivedi, working for a tabloid in Mumbai, was arrested under section 3(1)(a) of the Official Secrets Act for reporting on how arms purchased by the government railway police after the 2008 terror attacks were rotting in the city armory due to poor storage.[244] Dwivedi's arrest on May 17 prompted protests by journalists and much condemnation by media, and he was granted bail on May 21. He then moved the Bombay High Court to quash his case.

In February 2013, the Bombay High Court dismissed charges against him after the state government assured the court that it would file a closure report. The government's lawyer admitted that police action against Dwivedi was "incorrect" and that his reportage was in fact in the public interest.[245] After the judgment, Dwivedi said:

> The case was seen as an attempt by the establishment to gag reporters. Now it has turned into an example of the best kind of investigative journalism.[246]

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[242] Prashant Reddy T., "Doval threatens OSA axe," *Thehoot.org*, January 16, 2015, http://thehoot.org/web/DovalthreatensOSAaxe/8022-1-1-7-true.html (accessed February 12, 2014).

[243] Human Rights Watch interview with Saikat Datta, New Delhi, July 24, 2015.

[244] "Journalist held under OSA for report on armoury," *Indian Express*, May 20, 2011, http://indianexpress.com/article/news-archive/web/journalist-held-under-osa-for-report-on-armoury/ (accessed February 12, 2015).

[245] "Action against MID DAY reporter was 'incorrect,'" *Mid-Day*, February 2, 2013, http://www.mid-day.com/articles/action-against-mid-day-reporter-was-incorrect/198944 (accessed April 1, 2015).

[246] Ibid.

Dwivedi spoke of the chilling effect his arrest had on media fraternity. "After I was charged under Official Secrets Act, journalists were quite afraid that this was something that could be used against them. It had a chilling effect. Journalists used more caution when doing sensitive stories," he told Human Rights Watch. He added that "I too, use a lot of caution in my own reporting now such as calculating whether I should do a story or not. I take into account whether certain kinds of stories could implicate me under Official Secrets Act—I am not ashamed to say that. I take a lot more care."[247]

Iftikhar Gilani

Iftikhar Gilani, New Delhi bureau chief of the Jammu-based daily *Kashmir Times,* was imprisoned for seven months under the Official Secrets Act in 2002 after being accused of possessing a supposedly classified document which detailed, among other things, the deployment of Indian troops in Indian-administered Kashmir. The document in question was published by a Pakistan-based think tank, the Institute of Strategic Studies, and was available both on the Internet and in libraries in New Delhi.

Gilani told Human Rights Watch that the court failed to examine the evidence against him, and instead was influenced by a military intelligence agency tasked with evaluating documents recovered from him. "We even gave them names of libraries which had this document but they kept relying only on the military intelligence report," Gilani noted.[248]

During his incarceration in the Tihar jail, Gilani documented the cases of some prisoners charged under the OSA. He wrote that the law was not frequently used but after the December 13, 2001, attack on the Indian parliament, there was an unusual surge in the number of cases. "The tendency to book people in and around Delhi under the OSA has assumed menacing proportions particularly over the past three years," he wrote in his 2005 book.[249]

While some of the cases filed under the OSA are ultimately dismissed by the higher courts, such dismissals do not obviate the harm suffered by those charged. Those accused under

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[247] Human Rights Watch telephone interview with Tarakant Dwivedi, July 27, 2015.

[248] Human Rights Watch interview with Iftikhar Gilani, New Delhi, August 16, 2014.

[249] Gilani, *My Days in Prison*, chapter 7. See also the four-part series by Ritu Sarin in the Indian Express investigating cases pending under the OSA, March 9, 2003 to March 12, 2003.

the OSA are considered serious enemies of the state, which makes bail extremely difficult. "By the time you prove that the material you have is not a secret, you may have been in jail for many years. That's the kind of bias judges have when someone is charged with OSA," said Trideep Pais, a lawyer who has dealt with OSA cases in Delhi.[250] Ifthikar Gilani said it took four months for him to even get a bail hearing, and then his application was rejected.

Prisoners charged with offences under OSA are also singled out for ill-treatment, beatings, and torture in jail by both officials and other inmates, Gilani wrote in his book *My Days in Prison*.[251] He told Human Rights Watch:

> The jail was a nightmare. I was singled out. For those charged under OSA and terrorism-related cases, ragging by the authorities begins in the control room itself. First at jail entry, then control room, then ward entry, then barrack entry, at every point I was beaten and tortured.[252]

S. Nambi Narayanan

Even when the Official Secrets Act is invoked in relation to appropriate national security issues, it can be an abusive charge due to investigation deficiencies and abuses attendant to enforcement. This was the case in 1994, when Kerala police accused a senior scientist at the Indian Space Research Organization, S. Nambi Narayanan, of allegedly leaking secret documents related to India's space technology to other countries. Narayanan was arrested along with another scientist, D. Sasikumaran, and charged under the Official Secrets Act for allegedly selling documents and drawings to Pakistan through two Maldivian women and a conduit from the Russian space agency. Two Bangalore-based businessmen were also accused in the case.[253]

The case was first investigated by a special investigative team and then handed over to the Central Bureau of Investigation. Narayanan told a reporter that the police team which

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[250] Interview with Trideep Pais, lawyer, New Delhi, August 13, 2014.

[251] Iftikhar Gilani, *My Days in Prison*, London: Penguin, 2005. Print.

[252] Human Rights Watch interview with Iftikhar Gilani, New Delhi, August 16, 2014.

[253] "Nambi Narayanan seeks action against police officials," *The Hindu*, December 20, 2012, http://www.thehindu.com/news/national/kerala/nambi-narayanan-seeks-action-against-police-officials/article4218776.ece (accessed August 12, 2014).

arrested him took him to a government guesthouse and interrogated and tortured him for three days.

> Throughout three days of interrogation by the Kerala police, I was treated like a criminal and subjected to brutal torture. The investigating officer, Siby Mathews, was not present. He turned up another day on my request and spent a few minutes. He did not ask me anything and only said that he had not expected me to commit such a crime.[254]

Narayanan was in jail for 50 days. He also spoke about how being called a traitor affected him and his family.

> First, I was upset. I could not understand what was going on. I would never have dreamt of something like that happening to me. It was very difficult to digest when society pointed the finger at me.
>
> My wife was asked to get out of an autorickshaw because she was married to me. My children were targeted and branded a traitor's children.[255]

In 1996, the Central Bureau of Investigation concluded that there was no evidence to prove espionage charges, listing serious lapses by the Intelligence Bureau officials and officers from the special investigative team who had investigated the case, and recommended action against them. By then, K. Karunakaran, then-chief minister of Kerala, had to resign after some of his party leaders accused him of shielding a police officer allegedly involved in the case.

Despite the Central Bureau of Investigation's report, which found the case baseless, the new state government ordered reinvestigation into the case in 1996. The CBI challenged this in the Supreme Court and in 1998, the court quashed the Kerala government notification for reinvestigation.

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[254] Shahina KK, "Slap a Case, Ruin a Life," *Open* magazine, October 13, 2012, http://www.openthemagazine.com/article/nation/slap-a-case-ruin-a-life (accessed August 12, 2014).

[255] Shobha Warrier, "Wronged ISRO scientist: India will be safe in Modi's hands," *Rediff.com*, February 26, 2014, http://www.rediff.com/news/interview/wronged-isro-scientist-india-will-be-safe-in-modis-hands/20140226.htm (accessed August 12, 2014).

Following the Supreme Court judgment, Narayanan petitioned the National Human Rights Commission for compensation and in 2001, the organization ordered 10 lakh rupees (US$16,487) to be paid to him on the basis of the findings of the CBI report. The state government challenged the NHRC order in court in 2006. In September 2012, 11 years after the NHRC's verdict, the Kerala High Court dismissed the state government petition and ordered the compensation amount to be paid to Narayanan within three months.[256]

To date, however, no action has been taken against any of the police or intelligence officials responsible for the abuse despite recommendations made in the CBI report.[257] Narayanan, who lost his job because of the charges, has asked for the prosecution of police and intelligence officials who investigated his case. He said his fight for justice continues.

> Who will give my life back? The most productive years in the career of a scientist lost for absolutely no reason. Who will compensate?[258]

[256] "Government asked to pay Rs 10 lakh compensation to ISRO scientist Nambi Narayanan," Press Trust of India, September 12, 2012, http://articles.economictimes.indiatimes.com/2012-09-07/news/33677179_1_isro-scientist-lakh-compensation-isro-espionage-case (accessed August 12, 2014).

[257] "Those behind the ISRO spy case should be prosecuted: Nambi Narayanan," *Firstpost.com*, November 8, 2013, http://www.firstpost.com/india/those-behind-the-isro-spy-case-should-be-prosecuted-nambi-narayanan-1218727.html (accessed August 12, 2014).

[258] Shahina KK, "Slap a Case, Ruin a Life," *Open* magazine, October 13, 2012, http://www.openthemagazine.com/article/nation/slap-a-case-ruin-a-life (accessed August 12, 2014).

III. Other Laws that Restrict Freedom of Expression

India has many more laws that criminalize free speech. While the list below is not comprehensive, it offers analysis of several such laws, looking at how they compare to international standards and India's obligations under international law, how they can be misused, and what changes are needed to bring them into line with international standards.

Criminal Intimidation

Section 503 of the Indian Penal Code provides that anyone who:

> threatens another with injury to his person, reputation or property, or to the person or reputation of anyone in whom the person is interested, with intent to cause alarm to that person, **or** to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation (emphasis added).

Section 506 of the Indian Penal Code states that the penalty for criminal intimidation is up to two years in prison, a fine, or both.

Generally speaking, the crime of intimidation involves the threat of violence or injury to person or property as a means of coercing that individual to commit acts he or she otherwise would not commit.[259] In many countries, criminal intimidation is limited to threats intended to influence witnesses or others in judicial proceedings,[260] and intimidation for other purposes is dealt with by civil orders.

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[259] See, e.g., section 45-5-203 of the Montana Code 2013, http://leg.mt.gov/bills/mca/45/5/45-5-203.htm: "A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, the person communicates to another, under circumstances that reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts: (a) inflict physical harm on the person threatened or any other person; (b) subject any person to physical confinement or restraint; or (c) commit any felony." See also Criminal *Code of Canada*, sec. 423, http://yourlaws.ca/criminal-code-canada/423-intimidation (accessed August 20, 2014).

[260] See, e.g., sec. 51 of the United Kingdom Criminal Justice and Public Order Act 1994, c. 33, Part III, http://www.legislation.gov.uk/ukpga/1994/33/part/III/crossheading/intimidation-etc-of-witnesses-jurors-and-others (accessed August 20, 2014).

Section 503, however, is not limited to intimidation in the judicial sphere: it criminalizes speech in very broad terms. Rather than limiting the restriction to speech that threatens harm to person or property, as is generally the case, the statute also penalizes speech that threatens reputational harm. The breadth of the restriction on speech is demonstrated by the explanation contained in the penal code itself, which notes that a threat to injure the reputation of a deceased person can constitute criminal intimidation.[261]

Moreover, by criminalizing speech that is intended "to cause alarm," rather than more narrowly criminalizing only speech intended to incite criminal action, the Indian Penal Code sets a very low standard for restriction on speech. Under section 503, almost any dispute between neighbors could become a criminal offense. For example, two neighbors may be arguing over noise levels. If one, in a fit of anger, threatens to tell people that his neighbor is a liar, such speech may well be intended to alarm the neighbor, and is indeed a threat to harm the neighbor's reputation. However, prohibiting such threats through the criminal law is not "necessary" to protect the rights of others or to preserve public order, nor is it the least intrusive way in which to do so.

Protection of "Public Tranquility"

Indian Penal Code Section 505(1)(b) provides a sentence of up to three years' imprisonment for anyone who "makes, publishes, or circulates any statement, rumour or report… with intent to cause, or which is likely to cause, fear, or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility." As written, the law can be applied to true statements or even statements of opinion if the authorities deem them "likely to cause fear or alarm to the public… whereby any person may be induced to commit an offence against the State or against the public tranquility."

While it is legitimate, under international law, to impose restrictions on speech to protect public order, the limitations imposed must be "appropriate to achieve their protective function" and be "the least intrusive instrument amongst those which might achieve their protective function."[262] Section 505(1)(b) is far too broad to meet that standard. A statement about suspected electoral fraud, for example, could "alarm" a segment of the

[261] Indian Penal Code, sec. 503, Explanation.

[262] UN Human Rights Committee, General Comment No. 34, para. 34.

population and cause it to publically protest – thereby "offending" public tranquility. Criminalizing the speech in that instance, possible under section 505(1)(b) as written, arguably would not serve any "protective function" and certainly would not be "the least intrusive instrument" to that end.[263]

Criminalizing speech not because it urges unlawful action but simply because it is likely to alarm others, possibly causing them to disturb public order, cannot be justified as "necessary" in a democratic society.[264] While purporting to protect public order, it may actually encourage those who disagree with a speaker to threaten public disorder to instigate criminal investigations of the speaker. That is, it could easily become a tool for those seeking to use a "hecklers veto" against those with whose views they disagree. Indeed, some types of provocative and disturbing speech—such as criticism of government or public figures—are vital to a democratic society and if made in good faith should be protected even if inaccurate.

Section 505(1)(b) also fails to meet the requirement that any restriction on speech be formulated with sufficient precision to enable an individual to know what speech would violate the law. An individual cannot always be deemed to know what statements are "likely to cause fear and alarm in the public," nor what will be considered an offense "against public tranquility." The provision thus does not provide an individual with sufficient guidance to enable him or her to regulate his conduct accordingly,[265] or provide clear limitations on those who are charged with enforcing it.[266] The lack of clarity leaves the provision subject to abuse by officials looking for a way to silence government critics or others who are saying things the government does not like.

[263] ECHR, *Sunday Times v. United Kingdom*, para. 59.

[264] Ibid.

[265] UN Human Rights Committee, General Comment No. 34, para. 25; *Sunday Times v. United Kingdom*, para. 49.

[266] UN Human Rights Committee, General Comment No. 34, para. 25. "Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not."

Contempt of Court

The Contempt of Courts Act, 1971,[267] as amended by the Contempt of Courts (Amendment) Act 2006,[268] defines the offenses of civil and criminal contempt and provides penalties for those offenses. Criminal contempt is defined as the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:

1. scandalizes or tends to scandalize, or lowers or tend to lower the authority of, any court;
2. prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
3. interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.[269]

Criminal contempt is punishable by imprisonment for up to six months, a fine of up to two thousand rupees (US$30), or both.[270]

The purpose of criminal contempt laws is to prevent interference with the administration of justice. While there is no doubt that courts can restrict speech where that is necessary for the orderly functioning of the court system, the Contempt of Courts Act is too broadly worded to be limited to that purpose and should be amended to narrow its scope, as detailed below.[271]

"Scandalizing" the Court

Subsection (2)(i) of the Contempt of Courts Act, 1971, which criminalizes speech that "scandalises or tends to scandalise, or lowers or tends to lower the authority of any court," has particularly troublesome implications for freedom of speech. As with other forms of

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[267] The Contempt of Courts Act, 1971, http://indiankanoon.org/doc/1396751/ (accessed August 26, 2014).

[268] The Contempt of Courts (Amendment) Act, 2006, No.6 of 2006, http://indiankanoon.org/doc/1068778/ (accessed August 26, 2014).

[269] Contempt of Courts Act, sec. 2(c).

[270] Contempt of Courts Act, sec. 12(1).

[271] UN Human Rights Committee General Comment No. 34, para. 31 (noting that contempt of court proceedings could be warranted in the exercise of the court's power to maintain orderly proceedings, but must not be used to restrict legitimate defence rights).

contempt, the doctrine of "scandalising the court" is rooted in the English common law. The primary rationale for this form of contempt is the maintenance of public confidence in the administration of justice.[272] As the Indian Supreme Court has held:

> The courts of justice are, by their constitution, entrusted with functions directly connected with the administration of justice, and it is the expectation and confidence of all those who have or likely to have business therein that the court perform all their functions on a high level of rectitude without fear or favour, affection or ill-will. It is this traditional confidence in courts of justice that the justice will be administered to the people which is sought to be protected by proceedings in contempt.[273]

The act does not prevent all criticism of the court. In fact, it specifically exempts from the definition of contempt a number of categories, including "fair comment on the merits of any case which has been heard and finally decided."[274] Unfortunately, the line between what is considered "fair comment" and what can be considered as "unfair" criticism that "scandalizes" or lowers the authority of the court is very murky, and the determination of what is, in essence, a subjective test is left to the discretion of the very judges who may have felt offended by the criticism at issue. The law was amended in 2006, which added another exemption, allowing truth as a valid defense in contempt proceedings if "it is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*."[275]

The reliance on interpretation by individual judges also leaves the scope of the law uncertain. What one judge may view as "tending to lower the dignity of the court" may be shrugged off by another judge. The law thus does not give clear guidance to those wishing to express opinions about the conduct of the court, in violation of the requirement that laws restricting expression be formulated "with sufficient precision to enable an individual

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[272] See, e.g., *Chokolingo v. AF of Trinidad and Tobago* [1981] 1 All ER 244, p. 248 (describing the offense as "a scurrilous attack on the judiciary as whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice").

[273] In re: *Arundhati Roy*, Judgment of 6 March 2002, www.indiankanoon.org/doc/505614 (accessed August 24, 2014).

[274] Contempt of Courts Act, sec. 5.

[275] Section 13, The Contempt of Courts (Amendment) Act, 2006, No. 6 of 2006, http://bombayhighcourt.nic.in/libweb/actc/yearwise/2006/2006.06.pdf (accessed January 22, 2016).

to regulate his or her conduct accordingly."[276] Moreover, the lack of clarity as to what kinds of expression may be considered to scandalize or lower the authority of the court leaves wide scope for the restriction of speech simply on the basis that it is critical of the court and its rulings.[277]

The ambiguity in the law is made evident by the varying ways in which it has been analyzed and applied by the Indian courts. Justice Krishna Iyer, writing in the *Mulgaokar* case, stressed the need to limit the application of the provision:

> The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process. The court is willing to ignore, by a majestic liberalism, trifling and venial offenses – the dogs may bark, the caravan will pass. The court will not be prompted to act as a result of an easy irritability. Much rather, it shall take notice, look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt.[278]

However, another panel of the Supreme Court appears to have taken a much broader view, making the defense of "fair comment" dependent on some sort of specialized knowledge of the case at hand:

> All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigants losing in the Court would be the first to impute motives to the judges and the institution in the name of fair criticism which

[276] UN Human Rights Committee, General Comment No. 34, para. 25.

[277] UN Human Rights Committee, General Comment No. 34, para. 25, "A law cannot confer unfettered discretion for restriction of freedom of expression on those charged with its execution."

[278] In re: *S. Mulgaokar v. Unknown* (1978) 3 SCC 339, para. 27, http://indiankanoon.org/doc/219441/ (accessed August 24, 2014).

> cannot be allowed for preserving the public faith in an important pillar of democratic set-up, i.e. judiciary.[279]

In December 2015, the Bombay High Court issued a notice of contempt to author Arundhati Roy for an article she wrote in May 2015, in which she criticized the court's decision to deny bail to G. N. Saibaba, a former Delhi University professor accused of having links with the banned Communist Party of India (Maoist). While charging Roy with criminal contempt, the judge also canceled bail to Saibaba, who had received temporary bail in June 2015 from a two-judge bench of the Bombay High Court on medical grounds. In the December order, the judge said "the author has even gone to the extent of scandalizing and questioning the credibility of the higher judiciary."[280]

In January 2016, the Supreme Court admitted Roy's plea challenging the High Court's contempt proceedings against her along with a bail petition for Saibaba, and sought a response from the Bombay High Court and the Maharashtra government.[281] The court did not, however, exempt Roy from appearing in high court proceedings.

How the courts decide Roy's case could set an important precedent for dealing with the offense of scandalizing the court.

As the Law Commission of the United Kingdom noted in recommending abolition of the offense:

> Preventing criticism contributes to a public perception that judges are engaged in a cover-up and that there must be something to hide. Conversely, open criticism and investigation in those few cases where something may have gone wrong will confirm public confidence that wrongs

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[279] In re: *Arundhati Roy*, March 6, 2002, http://indiankanoon.org/doc/505614 (accessed August 24, 2014).

[280] Anumeha Yadav, "Court cancels wheelchair-bound professor's bail, charges Arundhati Roy with contempt for defending him," *Scroll.in*, December 23, 2015, http://scroll.in/article/777704/court-cancels-wheelchair-bound-professors-bail-charges-arundhati-roy-with-contempt-for-defending-him (accessed January 22, 2016).

[281] Krishnadas Rajagopal, "Have no fear, we are there, SC tells Arundhati," *The Hindu*, January 22, 2016, http://www.thehindu.com/news/national/no-relief-from-court-appearence-for-arundhati-roy/article8139542.ece (accessed January 23, 2016).

can be remedied and that in the generality of cases the system operates correctly.[282]

The United Kingdom abolished the offense of scandalizing the court in 2013.[283] India should do the same.

Interference with Judicial Proceedings

The Contempt of Courts Act criminalizes not only speech that prejudices or interferes with the due course of any judicial proceeding or interferes with or obstructs the administration of justice—it also criminalizes speech that "tends" to do any of those things. This term leaves judges wide discretion to make their own subjective assessments as to whether expression has a "tendency" to prejudice, interfere, or disrupt, and creates uncertainty about the scope of the law.

The Contempt of Courts (Amendment) Act 2006 narrowed the scope of the law by limiting punishment for contempt of court to an act or expression "of such a nature that it substantially interferes, or tends substantially to interfere, with the due course of justice."[284] The requirement of substantial interference is more protective of freedom of expression and a positive addition to the law. However, the amended law still permits punishment for expression that "tends" substantially to interfere. As discussed above, this leaves wide discretion for judges, and creates uncertainty for those wishing to comment on ongoing judicial proceedings.[285] As the European Court of Human Rights recognized in the

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[282] The Law Commission, *Contempt of Court: Scandalising the Court*, para. 27, http://lawcommission.gov.uk/docs/lc335_scandalising_the_court.pdf. (accessed 16 June 2014).

[283] Crime and Courts Act 2013.

[284] Contempt of Court (Amendment) Act, sec. 2 (creating new section 13(a)).

[285] Some court judgments in the past have set worrisome precedents for restrictions on media coverage of sub-judice matters, leading to fears of censorship and prior restraints. For instance, in 2012, the Supreme Court in *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India & Another* held that high courts or the Supreme Court can "postpone" media reporting of a sub-judice matter to protect the right of an accused to have a fair trial. For more analysis on this ruling, see Apar Gupta, "The advent of the gag writ," *TheHoot.org*, September 20, 2012, http://www.thehoot.org/media-watch/law-and-policy/the-advent-of-the-gag-writ-6309. In 2014, the Delhi High Court in *Swatanter Kumar v. Indian Express and Others,* a case dealing with a law intern's sexual harassment complaint against retired Supreme Court judge Swatanter Kumar, prohibited media from publishing headlines connecting Kumar with the intern's allegations and from publishing his photograph in connection with the allegations. Following the order, there was little press coverage of the case. Free speech advocate Chinmayi Arun wrote that the judgment "raises very worrying questions about how the judiciary views the boundaries of the right to freedom of expression, particularly in the context of reporting court proceedings." Chinmayi Arun, "Making the powerful accountable," *The Hindu*, January 29, 2014, http://www.thehindu.com/opinion/op-ed/making-the-powerful-accountable/article5627494.ece

seminal case *Sunday Times v. United Kingdom,* this is of particular concern with respect to media:

> There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do media have the task of imparting such information and ideas: the public also has a right to receive them.[286]

Website Blocking under the Information Technology Act

Section 69A of the IT Act authorizes blocking of Internet content "in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign states or public order" or for preventing incitement to the commission of offenses that threaten those interests.[287] Secondary legislation passed in 2009, the Information Technology (Procedures and Safeguards for blocking for Access of Information by Public) Rules ("the blocking rules"), lays down the procedure for blocking content.[288] The blocking rules empower the central government to direct any agency or intermediary to block access to information when satisfied that it is necessary or expedient.[289] Anyone can submit a website for consideration to be blocked. Intermediaries who fail to comply with blocking orders are punishable with fines and prison terms up to seven years.[290]

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[286] European Court of Human Rights, *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A, no. 30, www.coe.echr.int, para. 65.

[287] Sec. 69A (1) of the Information Technology Act, 2008, http://deity.gov.in/sites/upload_files/dit/files/downloads/itact2000/it_amendment_act2008.pdf

[288] "Centre for Internet and Society critiques the law and the procedure for blocking online content," December 11, 2014, http://cis-india.org/internet-governance/blog/is-india2019s-website-blocking-law-constitutional-2013-i-law-procedure (accessed March 10, 2015).

[289] Information Technology (Procedures and Safeguards for blocking for Access of Information by Public) Rules ("the blocking rules"), 2009, http://dispur.nic.in/itact/it-procedure-safeguards-blocking-access-rules-2009.pdf

[290] Sec. 69A (3) of the IT Act, 2008.

According to the blocking rules, the person or intermediary hosting the content is to be notified and given an opportunity to raise objections. The Supreme Court pointed to these safeguards when upholding the constitutional validity of section 69A and the blocking rules. But in practice, this rarely happens. According to a media law practitioner, "not even a single instance exists on record for such a hearing."[291] Leaked blocking orders show that government authorities often do not specify the grounds on which the content is being blocked and require that the orders be kept confidential.[292] There is no provision that allows an appeal under the rules. In its 2015 transparency report, Verizon stated, "We were also required to block access to websites in India but are precluded by law from identifying the specific number of websites."[293]

In theory, the blocking process includes an important safeguard: review by a committee mandated to meet once every two months to examine all website blocking orders. But the workings of the committee are not public and lack transparency. An anonymous employee of a popular social networking site told Human Rights Watch that the committee only examines whether procedure was followed, not the validity of the block itself.[294] Also, as explained below, blocking rules allow Indian courts to order websites blocked without this review process.[295]

Because of the secrecy surrounding the process, it is difficult to assess how much material in India is being blocked. Testing four major Indian Internet Service Providers in 2009-2010, the OpenNet Initiative found that when users attempted to access a blocked website, they received a "server not found" error page.[296] Internet experts in India say this is still the case today. Users are thus led to believe there is a genuine server error even when there may be government censorship.

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[291] Apar Gupta, "But what about Section 69A?" *Indian Express*, March 27, 2015, http://indianexpress.com/article/opinion/columns/but-what-about-section-69a/ (accessed April 1, 2015).

[292] A government of India order to Internet Service Providers to block 32 websites on December 17, 2014, was leaked and posted on the website of Centre for Internet and Society: http://cis-india.org/internet-governance/resources/2014-12-17_DoT-32-URL-Block-Order.pdf (accessed March 9, 2015).

[293] Verizon's Transparency Report for the First Half of 2015, https://www.verizon.com/about/portal/transparency-report/wp-content/uploads/2016/01/Verizon-Transparency-Report-International.pdf (accessed April 5, 2016).

[294] Human Rights Watch interview with an employee of a social networking site, January 7, 2015.

[295] Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, Rule 10, http://cis-india.org/internet-governance/resources/information-technology-procedure-and-safeguards-for-blocking-for-access-of-information-by-public-rules-2009 (accessed April 8, 2016).

[296] OpenNet Initiative, India profile, August 9, 2012, https://opennet.net/research/profiles/india (accessed March 10, 2015).

In a written reply to the parliament in December 2013, the then-minister for communications and information technology said the government had blocked 1208 web addresses or URLs to comply with court orders.[297] A Right to Information request filed by Software Freedom Law Center for copies of blocking orders as well as court orders was denied, citing the confidentiality clause under rule 16 of the blocking rules.[298] Although the government reported contradictory information in 2014, the number of URLs blocked increased that year. In a submission to the Supreme Court, the government said 2,455 URLs were blocked from January through December 6, 2014. However, in April 2015, the minister for communication and information technology told the parliament that 2,346 URLs had been blocked in 2014.[299]

In addition, rule 9 of the blocking rules permits procedural shortcuts in "emergency" situations.[300] Under this rule, no notice is sent but a committee has to examine the order within 48 hours of blocking. The rules do not allow an opportunity to challenge the decision, nor is there a clause allowing for the decision to be revoked after the emergency has passed. What constitutes an emergency is not defined either. According to some reports, the government has often resorted to wholesale blocking of websites and content under this measure.[301]

In all, the blocking procedures allow far too much discretion to officials to decide when blocking websites is necessary. The lack of procedural safeguards and channels to appeal decisions only exacerbates the risk that blocking measures will be abused. Arbitrarily shutting down websites or taking down content limits the open and public debate of ideas,

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[297] "Govt asked social networking sites to block 1,208 URLs in 2013," Press Trust of India, December 11, 2013, http://timesofindia.indiatimes.com/tech/tech-news/internet/Govt-asked-social-networking-sites-to-block-1208-URLs-in-2013/articleshow/27221024.cms (accessed March 10, 2015).

[298] "DEITY provides list of sites blocked in 2013, but withholds orders!," Software Freedom Law Centre, March 27, 2014, http://sflc.in/deity-provides-list-of-sites-blocked-in-2013-but-withholds-orders/ (accessed March 10, 2015).

[299] Freedom House, Freedom on the Net 2015, India, https://freedomhouse.org/report/freedom-net/2015/india (accessed April 5, 2016).

[300] Blocking rules, 2009, Rule 9, http://cis-india.org/internet-governance/resources/information-technology-procedure-and-safeguards-for-blocking-for-access-of-information-by-public-rules-2009 (accessed March 10, 2015).

[301] "Haphazard censorship? Leaked list of blocked sites," *CNN-IBN Online*, August 23, 2012, http://www.ibnlive.com/news/india/blocked-sites-500850.html (accessed April 8, 2016); Kim Arora, "Government blocks 32 websites to check ISIS propaganda," *Times of India*, January 1, 2015, http://timesofindia.indiatimes.com/tech/tech-news/Government-blocks-32-websites-to-check-ISIS-propaganda/articleshow/45712815.cms (accessed April 8, 2016).

preventing moderate voices from offering narratives to counter expressions of hate and intolerance.

In August 2012, in an attempt to calm ethnic and communal tensions, the government ordered Internet service providers to block 309 webpages, including news articles of mainstream media outlets, images, and links on sites including Facebook, Twitter, Wikipedia, Australia-based news channel ABC, and the Qatar-based media organization Al-Jazeera.[302] This was after doctored images of alleged Muslim victims in Burma had helped fuel violent protests by Muslim groups in Mumbai and attacks on students from northeastern states who share physical features with the Burmese, including a mob attack on a Tibetan student.

Home Minister Sushil Kumar Shinde said the government was "only taking strict action against those accounts or people which are causing damage or spreading rumours."[303] But a senior Supreme Court lawyer called it illegal under the IT Act. Vivek Sood told *Economic Times*: "It's a gross abuse of power by the government. It's like banning cars because of drunken driving by a few individuals."[304] Such large-scale government blocking proved ineffective and many of the blocked accounts remained accessible. An Internet expert at the Centre for Internet and Society, Pranesh Prakash, told media: "I hope that this fiasco shows the folly of excessive censorship and encourages the government to make better use of social networks and technology to reach out to people."[305]

Following the horrific January 7, 2015, attack on the French satirical magazine *Charlie Hebdo* in Paris, Mumbai police, citing law and order concerns, reportedly responded by blocking 650 posts and pages on a social networking site for uploading controversial

[302] "Indian government defends Internet blocking," AFP, August 23, 2012, http://cis-india.org/news/afp-com-aug-23-2012-indian-govt-defends-internet-blocking (accessed August 17, 2014).

[303] Ibid.

[304] Joji Thomas Philip, "After paralysis, UPA-II develops Twitter block; blocks handles of journalists, right-wing groups," *Economic Times*, August 24, 2012, http://articles.economictimes.indiatimes.com/2012-08-24/news/33366769_1_twitter-accounts-twitter-block-websites (accessed August 17, 2014).

[305] "Indian government defends Internet blocking," AFP, August 23, 2012, http://cis-india.org/news/afp-com-aug-23-2012-indian-govt-defends-internet-blocking (accessed August 17, 2014).

cartoons from the magazine.[306] While subsequent reports put the number of sites blocked at just three or four,[307] the Mumbai police's social media lab, set up to detect social media content that is offensive or could threaten public order, refused to divulge the exact number. This followed just weeks after a December 17 order by the government to block 32 websites, including video sharing sites such as Vimeo and Dailymotion, for allegedly posting "jihadi propaganda."[308] Some of these websites were blocked wholesale, despite the fact that the vast majority of content they host—including potentially millions of news or related videos—were not deemed a threat to security. Following pushback, the government started lifting blocks on some sites.

Given how these provisions have been misused, the government should amend section 69A and the blocking rules to ensure due process and accountability.

Prevention of Atrocities against Scheduled Castes and Tribes

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, bans expression that "intentionally insults or intimidates with intent to humiliate" a member of a scheduled caste or tribe.[309]

This law, also popularly known as the Prevention of Atrocities Act, is one of the most important pieces of legislation for the protection of Dalits. India's constitution prohibits discrimination on any grounds and has also laid down the basis for affirmative action measures such as quotas in education and government jobs for backward classes. But in reality, as research conducted by Human Rights Watch and others has repeatedly shown,

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[306] Debasish Panigrahi, "After Paris attack, Mumbai police block 650 controversial posts," *Hindustan Time*s, January 9, 2015, http://www.hindustantimes.com/india-news/after-paris-attack-mumbai-police-block-650-controversial-posts/article1-1305032.aspx (accessed March 10, 2015).

[307] Ayesha Arvind, "Mumbai Police say they 'only blocked three or four' Charlie Hebdo cartoons," *Mail Online*, January 12, 2015, http://www.dailymail.co.uk/indiahome/indianews/article-2905878/Mumbai-Police-say-blocked-three-four-Charlie-Hebdo-cartoons.html (accessed March 10, 2015).

[308] Shashidhar KJ, "India blocks 32 sites including github; some blocks removed," *Medianama.com*, January 1, 2015, http://www.medianama.com/2015/01/223-india-blocks-32-sites-including-github-some-blocks-removed/ (accessed March 10, 2015).

[309] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, section 3 (1)(x), http://tribal.nic.in/WriteReadData/CMS/Documents/201303131039493105468poaact989E4227472861.pdf (accessed August 10, 2015).

discrimination against socially marginalized communities such as Scheduled Castes (also known as Dalits, formerly "Untouchables") and Scheduled Tribes continues.[310]

While most cases under the Prevention of Atrocities Act are entirely appropriate and involve prosecution of violent actions against members of protected groups, the law has been occasionally used against individuals for expression that, as a 2015 report by PEN International concluded, "arguably does not rise to the level of hate speech. Again, the vague and overbroad language of the act, which targets humiliating rather than hateful speech, makes it ripe for abuse."[311]

The case of sociologist Ashis Nandy best illustrates how this well-intentioned law could be misused. In January 2013, Nandy was booked under the act after allegedly making a comment about Dalits being among the "most corrupt" at the Jaipur Literature Festival. Nandy clarified that he had said that the corruption of the poor was more visible and in fact, this corruption was an equalizer because it allowed them to access the entitlements that should be theirs by right.[312] Nandy also apologized for his comments. Nonetheless, it drew the ire of some members of the scheduled castes and a politician from Rajasthan filed a First Information Report against him under Section 3(1)(x) of the Prevention of Atrocities Act.[313] Criminal cases were also filed against him in Maharashtra, Bihar, and Chhattisgarh. Nandy, fearing arrest, appealed to the Supreme Court and the court stayed

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[310] Human Rights Watch, *Cleaning Human Waste: "Manual Scavenging," Caste, and Discrimination in India* (New York: Human Rights Watch, 2014), https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india; Human Rights Watch, '*They Say We're Dirty': Denying an Education to India's Marginalized,* (New York: Human Rights Watch,2014, https://www.hrw.org/report/2014/04/22/they-say-were-dirty/denying-education-indias-marginalized; Human Rights Watch, *Hidden Apartheid: Caste Discrimination Against India's "Untouchables,"* (New York: Human Rights Watch, 2007), http://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables.

[311] PEN Canada, PEN International, and International Human Rights Program (IHRP) at the University of Toronto, *Imposing Silence: The use of India's Laws to Suppress Free Speech*, 2015, p. 31.

[312] "What Ashis Nandy Actually Said at JLF," *Outlook magazine*, January 30, 2013, http://www.outlookindia.com/article/what-ashis-nandy-actually-said-at-jlf/283737 (accessed August 10, 2015).

[313] "Ashis Nandy's remarks create furore at Jaipur Literature Festival," *Economic Times*, January 27, 2013, http://articles.economictimes.indiatimes.com/2013-01-27/news/36564478_1_vulgar-statement-ashis-nandy-corruption (accessed August 10, 2015).

his arrest.[314] In January 2015, the Supreme Court admitted Nandy's plea to quash all criminal proceedings against him.[315]

As the 2015 PEN International report notes: "While the Prevention of Atrocities Act aims to address the realities of caste violence and discrimination, the vague and overbroad language in s.3(1)(x), coupled with the manner in which the Act has been applied to cases such as Ashis Nandy raise concerns."[316]

In December 2015, the parliament passed a bill to amend the law.[317] The new law amends some existing categories of actions and adds some new categories of actions to be treated as offences. Some of these amendments are problematic from the perspective of freedom of expression. Under Section 3 (1), the amended law bans any expression that "promotes or attempts to promote feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes" and also any expression that "disrespects any late person held in high esteem by members of the Scheduled Castes or the Scheduled Tribes."[318] As discussed above, disrespectful speech, or expression that promotes negative feelings, however offensive, is not the same as incitement to acts of hostility, discrimination, or violence, and as such should not be subject to criminal penalty.

Human Rights Watch welcomes efforts to strengthen the law to end caste-based discrimination and hatred, especially in the light of the high pendency and low conviction rates in cases filed under the Act. According to the latest government data, in 2013, 84.1 percent of the cases filed under the Prevention of Atrocities Act were pending while only 22.8 percent resulted in conviction, compared to a 30 percent conviction rate in 2011.[319]

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[314] Dhananjay Mahapatra, "Supreme Court issues stay on Ashis Nandy's arrest," *Times of India*, February 1, 2013, http://timesofindia.indiatimes.com/india/Supreme-Court-issues-stay-on-Ashis-Nandys-arrest/articleshow/18286027.cms (accessed August 10, 2015).

[315] " SC admits Ashish Nandy's plea for quashing case over corruption remark," *Times of India*, January 10, 2015, http://timesofindia.indiatimes.com/india/SC-admits-Ashish-Nandys-plea-for-quashing-case-over-corruption-remark/articleshow/45830189.cms (accessed August 10, 2015).

[316] PEN Canada, et al., *Imposing Silence*, p. 31.

[317] "Parliament passes bill to protect SC, STs from crimes," *Firstpost.com*, December 21, 2015, http://www.firstpost.com/india/parliament-passes-bill-to-protect-sc-sts-from-crimes-2554506.html (accessed December 22, 2015).

[318] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2014, http://www.prsindia.org/uploads/media/SC%20ST%20Atrocities%20%28A%29,%202014/SC%20ST%20%28Prevention%20of%20Atrocities%29%20%28A%29%20bill.pdf (accessed August 10, 2015).

[319] Conviction under SC/ST Act, Press Information Bureau, Government of India, February 24, 2015, http://pib.nic.in/newsite/PrintRelease.aspx?relid=115777 (accessed January 23, 2015).

But vague and over broad language expanding restrictions on speech raises concerns over potential misuse of the law.

Penal Code Section 505(1)(c)

Section 505(1)(c) of the Indian Penal Code imposes criminal penalties on anyone who "makes, publishes or circulates any statement, rumour or report… with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of persons."

As previously discussed, it remains the view of the General Assembly, the UN special mechanisms, and other experts on international law that the criminalization of hate speech is acceptable only where the speech intentionally advocates hatred that constitutes incitement to discrimination, hostility, or violence. Section 505(1)(c), which restricts speech that "is likely to incite" any class or community to commit "any offense" against another class or community is too broad to meet that standard. Penalizing speech without requiring proof of intent to provoke acts of hostility or discrimination or other unlawful acts is incompatible with freedom of expression.

IV. Recommendations

To the Government of India

- Amend India's criminal laws to conform to international standards for the protection of freedom of expression and association, as set forth in the International Covenant on Civil and Political Rights and as expounded on by the UN Human Rights Committee and UN mechanisms such as the UN Special Rapporteur on the promotion of the right to freedom of opinion and expression.
- Establish policies and procedures to counter hate speech through affirmative or non-punitive measures, tailoring the government's response to the specific context. This could include public education, promotion of tolerance, publicly countering libelous or incendiary misinformation, and strengthening security to protect a threatened population.

To the Indian Parliament

- Develop a clear plan and timetable for review and repeal or reform of the rights-violating laws identified in this report and, where legislation is to be repealed or amended, consult thoroughly with civil society groups in a transparent and public way.
- Specific recommendations for repeal or revision of laws include:
    - Repeal section 124A of the Indian Penal Code, the sedition law.
    - Repeal sections 298 and 295A of the Indian Penal Code to eliminate the criminal penalties for insulting religion or wounding religious feelings.
    - Repeal sections 153A, 505(1)(c), and 505(2) of the Indian Penal Code, and replace them with a single hate speech law that criminalizes "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" to conform to article 20 of the ICCPR.
        - Ensure that the new law allows for regulation of hate speech only when it is intended to, and likely to produce, "imminent harm."
        - Ensure that "imminent" harm is not defined to include mere possible or potential harm, but only harm that is or is likely to be directly and immediately caused or intensified by the speech in question.

- Ensure that the law makes clear that "violence" refers to physical attack; "discrimination" refers to the actual deprivation of a benefit to which similarly situated people are entitled or the imposition of a penalty or sanction not imposed on other similarly situated people; and "hostility" refers to criminal harassment and criminal intimidation.

- Amend the overly broad definition of “unlawful activity” in both the Unlawful Activities Prevention Act and the Chhattisgarh Special Public Security Act to prohibit only activity that poses a genuine threat to national security or public order.
- Amend the Official Secrets Act to:
  - Revise section 5(1) to criminalize only disclosures of clearly defined categories of documents, to require proof by the government that the disclosure poses a genuine and identifiable threat of causing significant harm to national security, and to allow for a defense of public interest;
  - Repeal section 5(2) to eliminate the criminal penalties for receipt or disclosure of information by persons who are not government personnel; and
  - Revise section 3 to penalize only conduct that the government can establish poses a genuine risk to national security.
- Repeal sections 499 and 500 of the Indian Penal Code to eliminate the offense of criminal defamation. Defamation should be solely a civil matter.
- Amend section 69A of the Information Technology Act and related blocking rules to strengthen the due process requirements that must be met prior to any blocking of online content and put in place necessary safeguards for basic rights.
  - Such amendments should include notice to the author of the content (where feasible), the ability to challenge the blocking order through an independent legal review process, and the ability to have the content restored if it is found to be legal.
  - The amended rules should also include a requirement that a copy of each blocking order be published, along with the reasons for blocking, on the blocked website and on a public page of the website of Department of Electronics and Information Technology under the Ministry of Communications and Information Technology.

The Ministry of Communications and Information Technology should also lift restrictions on the ability of telecommunications and Internet service providers to disclose the number of requests for website blocking they receive and number of websites blocked over a given period of time.

- Either repeal section 503 dealing with the offense of criminal intimidation or narrow it to exclude speech threatening only reputational harm and speech intended only to "alarm" rather than incite criminal action.
- Amend section 505(1)(b) of the Indian Penal Code to criminalize only speech that is intended to incite violence or serious public disorder, and clearly define those terms to ensure that they conform to international standards.
- Repeal section 2(i) of the Contempt of Court Act and amend section 13 and the definition of contempt of court in section 2 to delete the reference to conduct that "tends to" interfere or obstruct.
- Amend section 3(1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act to bring it in line with ICCPR article 20 by allowing for restriction of speech only when it constitutes incitement to discrimination, hostility, or violence. Section 3(1) in the proposed amendments to the Act should be similarly narrowed down.
- Repeal the Prevention of Insults to National Honour Act, 1971.

To the Attorney General's Office

- Drop all investigations and charges under the sedition and criminal defamation laws.
- Drop all prosecutions and investigations for insulting speech and establish a clear policy that insulting someone, in itself, is never a criminal offense.
- Drop all charges and investigations against those who merely participated in or organized peaceful protests.
- Instruct all prosecutors' offices that requests for suspects to be held without bail should be made only when there is strong and clear evidence that the suspects are likely to flee, destroy evidence, or interfere with the investigation.
- Introduce education programs for all prosecutors to ensure that they are fully aware of the limitations imposed by the Supreme Court on laws restricting freedom of expression.

- Pending repeal or amendment of section 124A of the penal code, prosecutors should be specifically informed that, under applicable Supreme Court decisions:
  - The sedition law is only applicable to speech that has the tendency or intention of creating public disorder.
  - Mere criticism of the government or government policies cannot be the basis of prosecution under IPC section 124A.
  - Speech or expression perceived as disrespectful of India or its national symbols cannot, alone, be the basis of a prosecution for sedition.
- Pending amendment of the Unlawful Activities (Prevention) Act, prosecutors should be specifically informed that the holding of anti-government views or views sympathetic to the goals of "outlawed" groups is not sufficient to justify charges under that law.
- Restrictions to protect public order should only be directed at speech inciting or likely to incite imminent lawless action.

- Introduce clear policies and procedural guidelines to minimize abuse of laws discussed in this report.
- Take steps to limit litigants' practice of filing multiple complaints across the country and the practice of overcharging for an alleged offense, including training prosecutors to vet potential charges to ensure they are reasonable.

To State Governments

- Promptly begin long-proposed police reforms to ensure police are free to act independently and, without political interference.
- Instruct all police departments that they have a duty to protect individuals threatened for their speech.
- Instruct all police departments that decisions on whether or not to arrest someone for speech should not be based on threats of violence or disorder by those who dislike or are somehow offended by that speech. Decisions to arrest someone for speech should be based solely on an evidentiary assessment of whether or not the individual has violated a law.
- Introduce education programs for all police officers to ensure that they are fully aware of the limitations imposed by the Supreme Court on laws restricting freedom of expression.

- Pending repeal or amendment of section 124A of the Indian Penal Code, police should be specifically informed that, under applicable Supreme Court decisions:
    - The sedition law is only applicable to speech that has the tendency or intention of creating public disorder.
    - Mere criticism of the government or government policies cannot be the basis of prosecution under Indian Penal Code section 124A.
    - Speech or expression perceived as disrespectful of India or its national symbols cannot, alone, be the basis of a prosecution for sedition.
    - Consistent with the guidelines accepted by the Bombay High Court, make it mandatory for police to obtain a legal opinion in writing, along with reasons, from the law officer of the district and from the state's public prosecutor before filing sedition charges.
- Pending amendment of the Unlawful Activities (Prevention) Act, police should be specifically informed that the holding or expression of anti-government views or views sympathetic to the goals of "outlawed" groups is not sufficient to justify charges under that law.
- Police should be specifically informed that threats to public order should pass the "clear and present danger" test and involve speech inciting or likely to incite imminent lawless action.

To The Judiciary

- Train judges and magistrates in relation to article 19 of the Indian Constitution which guarantees freedom of expression and lays down grounds for restricting speech, and India's obligations under international human rights law.
- Introduce education programs for all magistrates and judges to ensure that they are fully aware of the limitations imposed by the Supreme Court on laws restricting freedom of expression.
    - Pending repeal or amendment of section 124A of the penal code, prosecutors should be specifically informed that, under applicable Supreme Court decisions:
        - The sedition law is only applicable to speech that has the tendency or intention of creating public disorder.
        - Mere criticism of the government or government policies cannot be

the basis of prosecution under IPC section 124A.

        - Speech or expression perceived as disrespectful of India or its national symbols cannot, alone, be the basis of a prosecution for sedition.
    - Pending amendment of the Unlawful Activities (Prevention) Act, prosecutors should be specifically informed that the holding or expression of anti-government views or views sympathetic to the goals of "outlawed" groups is not sufficient to justify charges under that law.
    - Restrictions to protect public order should only be directed at speech inciting or likely to incite imminent lawless action.
- Judges and magistrates should be specifically informed that threats to public order should pass the "clear and present danger" test and involve speech inciting or likely to incite imminent lawless action.

To the International Community

- Urge India to protect the rights to peaceful expression and assembly, including through the reforms detailed in the recommendations above.
- Regularly and publicly raise concerns with the Indian government about the arrests of activists and ordinary citizens for exercising their right to freedom of expression and assembly, and demand the dropping of charges and immediate release of those already imprisoned for doing so.
- Raise the freedom of speech concerns outlined in this report during India's Universal Periodic Review in 2017.
- Encourage India to invite the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on a fact-finding visit.
- Offer assistance to train judges at all levels of court in international laws on rights to freedom of expression and assembly.

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Appendix 1

HRW Letter to the Government of India

April 4, 2016

Mr. Rajnath Singh,
Minister of Home Affairs,
Government of India,
New Delhi, India

Re: Criminalization of Peaceful Expression in India

Dear Minister Singh,

I am writing to request the Indian government's response and perspective regarding research that Human Rights Watch has recently conducted on the criminalization of peaceful expression in India. Human Rights Watch plans to release a report on this topic later this year. Similar research is being conducted in a number of countries throughout Asia.

Human Rights Watch is an independent, nongovernmental organization that investigates and reports on violations of international human rights law in more than 90 countries. We produce reports based on our findings to urge action by governments and other stakeholders to address the problems we have identified and to hold accountable those responsible for human rights abuses. Human Rights Watch has worked on human rights issues in India for many decades.

Human Rights Watch is committed to producing material that is evidence-based, accurate, and impartial. For this reason, we wanted to provide an opportunity for you and your staff to present your views and to add information that reflects your perspectives on the issue of freedom of expression in India. We hope that you and your staff can answer the following questions so that your views are accurately reflected in our reporting:

I. Sedition Law

- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals convicted under Section 124A of the Indian Penal Code in each of the past five years?
- Could you please provide information on the number of individuals charged with sedition in the last ten years?
- A private member's bill has been introduced in parliament to amend the sedition law. Will the government consider amending or repealing the law?

II. Criminal Defamation

- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals convicted for criminal defamation in each of the past five years?
- Could you please provide information on the number of individuals charged with criminal defamation in the last ten years?

III. Hate Speech

- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals convicted under sections 298, 295A, 153A, 153B, 505(1)(c) and 505(2) of the Indian Penal Code in each of the past five years?
- Could you please provide information on the number of individuals charged under sections 298, 295A, 153A, 153B, 505(1)(c) and 505(2) of the Indian Penal Code in the last ten years?

IV. Official Secrets Act

- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals convicted under the Official Secrets Act in each of the past ten years?
- Could you please provide information on the number of individuals charged under the Official Secrets Act in the past ten years?
- A letter from India's National Security Advisor to the Cabinet Secretary, leaked in late 2014, revealed that each government ministry and department had been asked to prevent leakage of classified information to media and crack down

harder on any violations of secrecy laws by media. What action has been taken by the government departments and ministries in adherence to the letter to prevent such leakage? Has the Official Secrets Act been used by any of the government departments and ministries after that letter was sent?

- The Second Administrative Reforms Commission, in its 2006 report, recommended that the Official Secrets Act be repealed and substituted by a chapter in the National Security Act, containing provisions relating to official secrets. Prime Minister Narendra Modi has also repeatedly expressed a strong commitment to an open and transparent government. In light of that commitment, is the government considering amending or repealing the Official Secrets Act? If not, why not?

V. Freedom of Expression Online

- Could you please provide information on the number of web addresses or URLs the government blocked in 2015 and on what basis they were blocked? How many of them were blocked pursuant to a court order?
- What is the government's position on the appropriate response to the Supreme Court's ruling on section 66A?
- In July 2015, the telecommunications minister informed parliament that the government had formed a committee to examine the implications of the Supreme Court judgment invalidating section 66A of the Information Technology Act and suggest restoring it with suitable modifications and safeguards to make it fully compatible with constitutional provisions. What is the status of the committee? If it has submitted a report, what are its recommendations?

We would very much appreciate any information your offices can provide regarding these questions and the issues they raise. You can email your response to us at bauchns@hrw.org. In order to reflect your responses in our report, we would appreciate receiving them by May 5, 2016.

Thank you in advance for your consideration.

Sincerely,

Brad Adams
Executive Director
Asia Division

Cc:
Ravi Shankar Prasad, Minister for Communications and Information Technology, Government of India
D.V. Sadananda Gowda, Minister of Law, Government of India
Pradeep Kumar Sinha, Cabinet Secretary, Government of India

Appendix 2

HRW Letter to the State Government of Tamil Nadu

April 4, 2016
Ms. Selvi J. Jayalalithaa
Chief Minister,
Tamil Nadu,
India

Re: Criminalization of Peaceful Expression in Tamil Nadu

Dear Hon. Chief Minister,

I am writing to request the Tamil Nadu government's response and perspective regarding research that Human Rights Watch has recently conducted on the criminalization of peaceful expression in India. Human Rights Watch plans to release a report on this topic later this year. The report documents several cases in Tamil Nadu state.

Human Rights Watch is an independent, nongovernmental organization that investigates and reports on violations of international human rights law in more than 90 countries. We produce reports based on our findings to urge action by governments and other stakeholders to address the problems we have identified and to hold accountable those responsible for human rights abuses. Human Rights Watch has worked on human rights issues in India for more many decades.

Human Rights Watch is committed to producing material that is evidence-based, accurate, and impartial. For this reason, we wanted to provide an opportunity for you and your staff to present your views and to add information that reflects your perspectives on the issue of freedom of expression in Tamil Nadu. We hope that you and your staff can answer the following questions so that your views are accurately reflected in our reporting:

I. <u>Sedition Law</u>

- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals

convicted under Section 124A of the Indian Penal Code since May 2011 when you government came to power?

- Could you please provide information on the number of individuals charged with sedition in the past ten years?
- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; and (c) individuals charged under Section 124A of the Indian Penal Code for protesting against the Kudankulam nuclear plant?
- Is your government aware that the Indian Supreme Court has held that the sedition law should be applied only to "acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence"? If so, can you please explain the rationale for using the sedition law against peaceful demonstrators and activists such as protestors at Kudankulam and activist S. Kovan?

II. Criminal Defamation

- Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals convicted for criminal defamation since your government came to power in May 2011?
- Could you please provide information on the number of individuals charged with criminal defamation in the past 10 years?
- Recently, the Indian Supreme Court questioned the large number of criminal defamation cases coming out of your state. Could you please explain why your government files such a large number of criminal defamation cases?
- Journalists, media houses, and opposition politicians have alleged that your government is using criminal defamation law to shut down any criticism of itself and its policies, resulting in a chilling effect on freedom of expression as well as self-censorship in media. What is your government's response to this allegation?

We would very much appreciate any information your offices can provide regarding these questions and the issues they raise. You can email your response to us at bauchns@hrw.org. In order to reflect your responses in our report, we would need to have them no later than May 5, 2016.

We thank you in advance for your consideration.
Sincerely,

Brad Adams
Executive Director
Asia Division

Cc:
Thiru K. Gnanadesikan, Chief Secretary, Government of Tamil Nadu
Thiru S.P. Velumani, Minister of Law, Courts and Prisons, Government of Tamil Nadu

Appendix 3

HRW Letter to Bloomsbury India

April 4, 2016

Rajiv Beri
Managing Director
Bloomsbury Publishing India Private Limited
New Delhi

Re: Withdrawal of the book, *The Descent of Air India*

Dear Mr. Beri,

Human Rights Watch is working on a report about laws that criminalize peaceful expression in India, including the criminal defamation provisions of the Indian Penal Code. Among the defamation cases we have documented is one involving the book "*The Descent of Air India,*" which was published and later withdrawn by Bloomsbury Publishing India. Human Rights Watch has spoken to the book's author and I am writing to you to ensure that your perspective, and that of your staff, is also reflected in the report.

Human Rights Watch is an independent, nongovernmental organization that investigates and reports on violations of international human rights law in more than 90 countries.

It is our understanding that in January 2014, Bloomsbury India decided to withdraw copies of the book *The Descent of Air India*, written by Jitender Bhargava, after a criminal defamation case was filed against the author and the publisher by former aviation minister and then union minister Praful Patel.

1. Why did Bloomsbury India decide to withdraw the book? Did Bloomsbury believe that it contained defamatory material? What role, if any, did the criminal case and the prospect of incurring financial and other costs play in the decision?
2. Were any individuals other than Mr. Bhargava named in the criminal defamation case filed by Mr. Patel?

3. In January 2015, Bloomsbury India apologized to Mr. Praful Patel through an advertisement in leading newspapers, for the contents of the book. Why did the company decide to issue that apology? Did Mr. Patel ask for an apology, and did he suggest this was a condition for dropping the lawsuit?
4. What is your view on the existence of the criminal defamation law in India and the impact it has on freedom of expression, especially in the publishing industry?
5. Did Bloomsbury reach an out-of-court settlement with Mr. Patel? If so, what were the terms of the settlement if you are able to disclose them?

In order to reflect your responses in our report, we would appreciate receiving them by April 20, 2016. You can email your response to us at adamsb@hrw.org or bauchns@hrw.org.

Thank you in advance for your consideration.

Sincerely,

Brad Adams
Executive Director
Asia Division