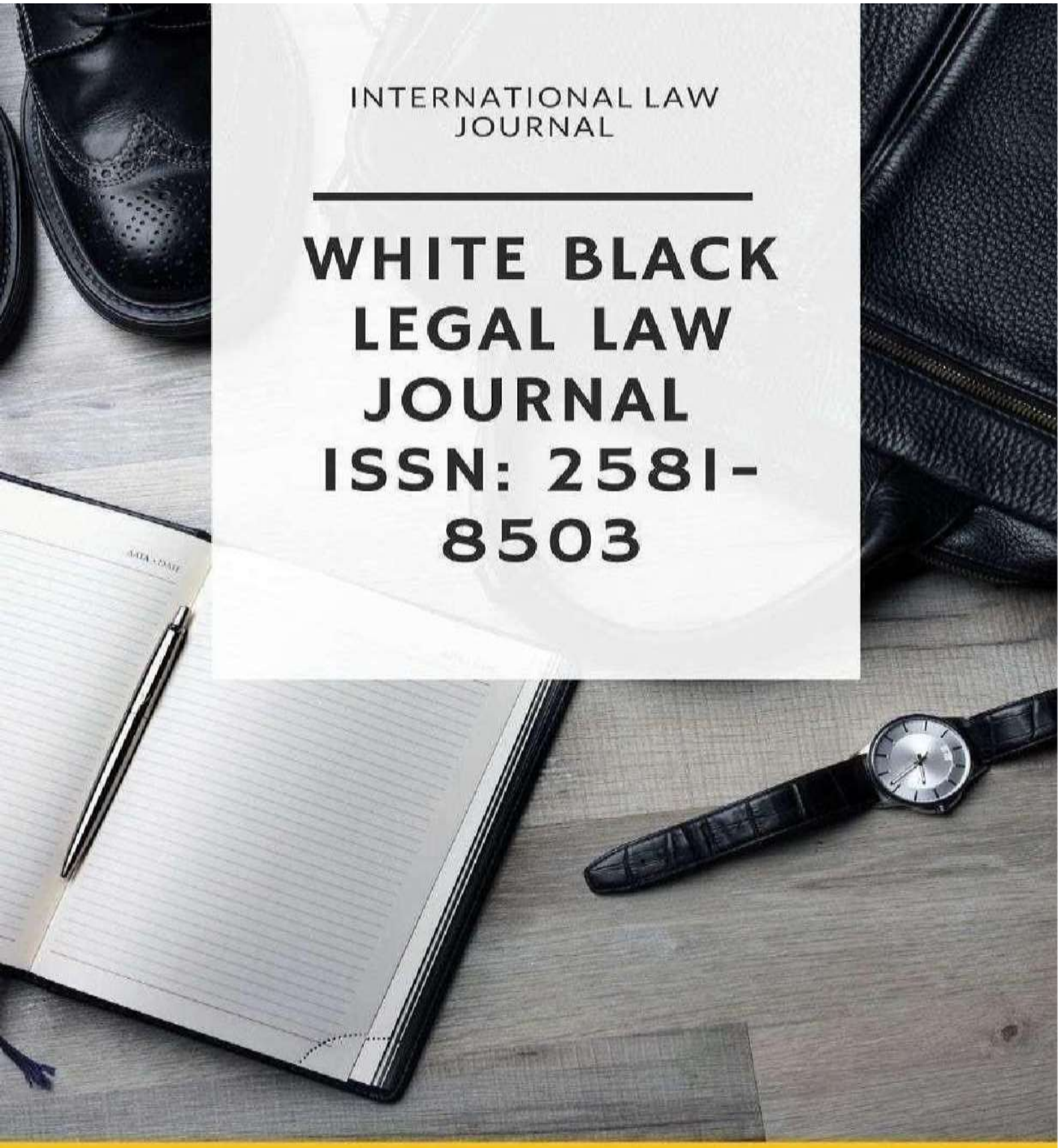

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

FREEDOM OF SPEECH AND EXPRESSION: A CONSTITUTIONAL FALLACY IN CONTEMPORARY ERA?[1]

AUTHORED BY - NAINA AGARWAL & ARCHIE ANANT

"I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me."[2]

Freedom of speech and expression: A droit or delusion?

Freedom of Speech and Expression is the most basic and crucial right entitled to every human being. The purpose of such freedom is to ensure the attainment of an individual's self-fulfilment, assistance in the discovery of truth, strengthening of the decision making ability of an individual and to strike equilibrium between stability and social change.[3]

We are not relating to the legal aspect of freedom of speech and expression like US First Amendment but the principle of speech and expression which is much broader in sense and includes speech which may or may not interfere with the government. We are not taking into consideration some non-existent rights but the inalienable ones! We are taking about the free exchange of ideas on any platform and any level of life. Debating, arguing, discussing pros and cons are the process of growth, progress, liberalization and democracy.

The foundation of WikiLeaks by Julian Assange, removal of General Stanley McChrystal by US President Barack Obama, violating privacy of royal couple of Kate Middleton and William Charles during a private holiday by French magazine despite security have led to the abuse of freedom of speech and expression. But the question is where does the boundary lie? Is there a need for government to revisit laws that govern such ideas? Are dissemination of ideas and restrictions self-contradictory and impractical? Should government tolerate unlimited and

[1]Authors of the article: Archie Anant, B.A. LL. B (Hons.), Second year, Rajiv Gandhi National University of Law, Punjab and Naina Agarwal, B.A. LL. B (Hons.), Second year, Rajiv Gandhi National University of Law, Punjab.
[2] Nelson Mandela.
[3] Stephen Schmidt, Mack C. Shelly et. al, American Government and Politics Today 11 (Cengage Learning, USA, 2014).

unrestricted freedom of speech, no matter how derogatory and disrespectful it is? Can states be justified in interfering what consulting adults choose to do with consent in private space? Are all laws acting as a stumbling block to freedom able to achieve the very condition? Can people be free in a real sense? These are some serious typical questions which need to be answered as early as possible. As it was rightly said, "I want freedom for the full expression of my personality".[4]

Sedition: An impediment in the furtherance of free speech and expression

Freedom of Speech and Expression is one of the most fundamental aspects of a democratic society. The basic fabric of any democracy allows its citizens to analyse the government in power, laws made by it and provisions laid down even if it includes "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials"[5]. Plurality of views and opinions is an essential facet of a democracy and of great societal importance. It is this underlying theme that envelopes the concept of the 'market place of ideas'.[6]This is what distinguishes a democracy from any other form of state.

However, the most potent question posed to the existence of the freedom of speech and expression is the degree of regulation that has to be coupled with this essential human right. The question of the reasonableness of restrictions which could be imposed upon the fundamental right of free speech and expression has been considered. It was pointed out that the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and scope of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at that time should all enter into the judicial verdict.[7] What is the extent up to which the state can regulate an individual's conduct?[8] How can the existence of such liberty and national interest exist, simultaneously and efficiently? Here comes the role of Section 124A of Indian Penal Code, which deals with sedition. It propounds as follows:

> "*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*

[4] Mahatma Gandhi.
[5] New York Times v. Sullivan, (1964) 376 (United States).
[6]Arun Jaitley v. State of U.P. 2015 SCC 6013.
[7]State of Madras v. V.G. Row, (1952) SCR 597.
[8] S. Sivakumar, Press Law and Journalists 18-20 (Universal Law Publishing Co. Lexis Nexis, Gurgaon, 2015).

> *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.*"[9]

Sedition in itself is quite a comprehensive term and it, in every possible manner, embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavor to subvert the Government and laws of the country.[10]It consists of those acts that incite violence and cause disturbance with the public order with intention of disturbing constitutional authority[11]. It is the 'pernicious tendency' of creating public disorder or disturbance of law and order. The Supreme Court in Kedar Nath Singh v. State of Bihar[12] observed in the same context that "A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder." It is the draconian colonial law. However, this law of sedition is a necessary evil. The lack of which might destroy the existing public and social order and the excess of which might lead to an "anachronistic and an unjustified interference with freedom of expression"[13].

Does the critical analysis of a government fall under the purview of Sedition?

As citizens of a democratic nation, every individual has the right to express his/her pinions, assent and dissent. Freedom of speech and expression is the strong foundation of all democratic organizations and is of extreme importance for the proper functioning of the processes of democracy.[14] It is formally and officially approbated by our Constitution[15]. The honorable Supreme Court in *Maneka Gandhi v. Union of India*[16] upheld the same principle and propounded that "Democracy is based essentially on free debate and open discussion, for that is the only corrective of Government action in a democratic set up". The learned Judge in *Naraindas Indurkhya* v. *State of Madhya Pradesh*[17] emphasized upon the importance of the

[9]Indian Penal Code, 1860.
[10]Nazir Khan v. State of Delhi, (2003) 8 SCC 461.
[11] R. v. Boucher, 1951 2 D.L.R.369.
[12] Kedar Nath Singh v. State of Bihar AIR 1962 SC 955.
[13] Palmer and others, above n 14, at 49.
[14] Romesh Thapar v. State of Madras, (1950) SCR 594.
[15]INDIA CONST. Art. 19.
[16] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[17]Naraindas Indurkhya v. State of Madhya Pradesh, (1974) 4 SCC 788.

same and observed as under:

> "*It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. As pointed out by Mr. Justice Holmes in Abramson v. United States*[18] *'the ultimate good desired is better reached by free trade in ideas — the best test of truth is the power of the thought to get itself accepted in the competition of the market'. There must be freedom of thought and the mind must be ready to receive new ideas, to critically analyze and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest."*

The meaning of sedition cannot and must not be equated with strong criticism of the government.[19] Criticism and disloyalty are two different concepts and must be seen with much objectivity. Any bona fide criticism of government officials with a view to improve the functioning of the government will not be illegal under this section.[20]Brandies, J., in *Whitney* v. *California*[21]emphasized upon the same and gave the most attractive interpretation of free speech theory in this context:

> *"... that the greatest menace to freedom is an inert people; that public discussion is a political duty; It is hazardous to discourage thought, hope and imagination; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."*

Is dissent equal to disloyalty?

Dissent is an important part and parcel of democracy. If, as responsible citizens of any nation, it is our duty to appreciate and support the affirmative decisions of the government then it is also our duty to rightfully and lawfully express dissent towards any unjust or erroneous step taken by the same government. Archibald Cox's views in his article on "First Amendment" are quite relevant here:

> *"Some propositions seem true or false beyond rational debate. Some false and harmful, political and religious doctrine gain wide public acceptance. Adolf*

[18]Abramson v. United States, 250 US 616.
[19] Sanskar Marathe v. State of Maharashtra, 2015 Cri LJ 3561.
[20] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955.
[21]Whitney v. California, (1927) 274 US 357.

> *Hitler's brutal theory of a 'master race' is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough: no man, no committee, and surely no Government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false. To license one to impose his truth upon dissenters is to give the same license to all others who have, but fear to lose, power. The judgment that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of free people".*[22]

The case of P.J Manuel v. State of Kerala[23] can be referred to her in order to comprehend the political equation between dissent and sedition in India. The accused pasted posters on a board at the Kozhikode public library, in order to make people to boycott the general election to the Legislative Assembly of the state. The poster said, "No vote for the masters who have become swollen exploiting the people, irrespective of difference in parties." Criminal proceedings were initiated against the accused on the charges of sedition under section 124A of IPC. However, the Kerala High Court observed that the charges were frivolous as it was found that no intention to incite disaffection against the nation was there. The most puissant factor in the determination of an act as seditious in nature or not is the intention involved. An act which does not have the mala fide intention of invoking disloyalty towards the nation cannot be categorized as sedition.[24] Moreover, sedition can be observed against the nation and not against the government or the ones running the government.

The arrest of the cartoonist Aseem Trivedi in the case Sanskar Marathe v. State of Maharashtra[25] in 2011 is still considered an important case in context of sedition charges with respect to the usage of social media as a platform. The arrest was based on the allegation that Aseem Trivedi intended to mock the Parliament of India by uploading the cartoons of the Parliament in the form of a derogatory sketch on his social media handle. He was charged with sedition under Section 124-A[26] of the Penal Code, 1860, Section 66(A) of the IT

[22] Cox, *The First Amendment*, Society Vol. 24, p. 8, No. 1 November/December 1986.
[23] P.J. Manuel v. State of Kerala, ILR (2013) 1 Ker 793.
[24] Pankaj Butalia v. Central Board of Film Certification, (2015) 221 DLT 29.
[25] Sanskar Marathe v. State of Maharashtra, 2015 Cri LJ 3561.
[26] PENAL CODE, 1860, S. 124-A, (1860).

Act[27] and Section 2 of the Prevention of Insults to National Honour Act[28]. The decision was widely criticized by people all across the country as a mere act of criticism of the government and its administrative defects were equalized with the heinous charges of the attempt to incite disaffection and disloyalty towards the nation. It was felt that the whole purpose behind the existence of democratic guarantee of free speech and expression failed.

Moreover, trivial acts, deviant from the mainstream society does not make an act grave enough to fall under the purview of sedition. For instance, mere keeping of communist books does not make a person liable for plotting sedition against the state. It can be clearly upon as a matter of choice and. How can a person's choice in book genres be held as a substantial ground for categorizing him as an anti-national? How can it be understood as a sufficient ground for constituting sedition? The Supreme Court in the cases, Indra Das v. State of Assam[29] and Arup Bhuyan v. State of Assam[30] unambiguously stated that only those speeches and actions which amount to "incitement to imminent lawless action" can be criminalized. However, the instant situation lacks the presence of any such intention to incite lawless action. Then how can an expression of dissent be equated with the grievous charge of sedition?

Obscenity: Set Standards or Dynamic?

Obscenity is subjective and odd. It is an important constitutional principle that speech cannot be suppressed just because of it being unpopular or offensive to the community.[31] 'Offensiveness' along with constitutional standard was considered as the basis for suppression of obscenity. "obscene materials have been denied protection under first amendment due to offensiveness and contemporary moral standards."[32] Supreme Court of US criminalized mere possession of matter which infringes freedom of conscience. But Court, in Stanley v. Georgia[33], struck down such criminalization of matter possession rejecting the notion that the state has the right to decide on moral standards[34].

[27] THE INFORMATION TECHNOLOGY ACT, S. 66(A), (2000).
[28] PREVENTION of INSULTS TO NATION HONOUR ACT, S. 2, (1971).
[29] Indra Das v. State of Assam, (2011) 3 SCC 380.
[30] Arup Bhuyan v. State of Assam, (2011) 3 SCC 377.
[31] Texas v. Johnson, 491 U.S. 397, 408-09; Cox v. Louisiana, 379 U.S. 536, 551.
[32] FCC v. Pacifica Found., 438 U.S. 726, 745.
[33] Stanley v. Georgia 394 U.S. 557.
[34] *Id.* 565.

For John Stuart Mill, liberty of conscience is the most important aspect which cannot be separated from freedom of expression and requires the 'liberty of taste and pursuits' and 'framing our plan of life to suit our own character'[35]. And hence, in this sense society has no right to punish for private conduct on moral grounds which causes no harm to others. Prevention can take place by using powers of education but punishment should be there only in case of actual harm or infliction of pain[36]. For a longer time period, the court permitted it to b offensive on the grounds of community standards. But recent developments have focused more on individual rights and autonomy specially in sexual matters.

> *In Lawrence v. Texas[37], the court proclaimed the fact "that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"[38].*

After this case, things became more complicated as if sexual activity between consenting adults is not criminalized how can descriptions of such activity be criminalized? The Supreme Court of Canada avoided this conflict by focusing on harm rather than morality. In Regina v. Butler, the Canadian court rejected the claim of state asking for "imposing standard of public and sexual morality solely because it reflects conventions of given community."[39]I further held that pornography may cause harm to the society because it 'predisposes persons to act in an antisocial manner'.[40]

> *"The Labaye Court recognized that an obscenity doctrine based on community standards is impossibly subjective and unworkable, and insisted that harm must be proved beyond a reasonable doubt, not just assumed on the basis of community opinion."[41]*

Our society is closer to it, since both share many legal and cultural features like pluralism, secularism, law systems etc. Both countries shared history with Victorian idea to use community standards as liberalizing reaction. It led to questions on harm v. morality, national v. local standards, taste v. tolerance. This sub head makes an attempt to argue that invocation of community standards cannot reconcile with fundamental individual rights and harm based standard has not resolved the problem. The concept of obscenity cannot be reformed may what come and hence it must be scrapped.

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[35] John Stuart Mill, On Liberty 26 (Legal Classics Library ed., 1992) (1859).
[36] *Id.* 134-51, 168-69.
[37] Lawrence v. Texas, 539 U.S. 558, 571-74.
[38] *Id.* 577.
[39] Regina v. Butler, 1 S.C.R. 452, 492.
[40] *Id* 485.
[41] Regina v. Labaye 3 S.C.R. 728, pp. 738-41, 743, 749-50.

In words of Justice Stewart, obscenity cannot be defined ever[42]. The common law included defamation, sedition, blasphemy and obscenity as four species of libel. In 1708, Read[43] case courted rejected idea that obscenity was common law crime unless it was also blasphemous. Turning point came in 1727, Curll's[44] case which led to the foundation of obscenity. Hicklin test was rejected and community standard test came into consideration. First obscenity regulating legislation was enacted in 1842 and aimed at importation of pictorial matter. Anthony Comstock passed new legislation as no provision covered material published in newspaper and introduced stricter punishment but made no attempt to define obscenity. The new test was laid down by court in Roth v. US, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal to the prurient interest?"[45]

But here also lies a problem, which community? Can a community have standards that are independent of standards of its members? How can these be ascertained? Scope lies in issue of geographic scope as it may vary from community to community. Should local or national standard be followed?

Recently, the ban of TikTok was lifted by Madras High Court but the question was raised by the members of the community why such a ban as it leads to suppression and distortion of creativity. Further, the court pointed out that it leads to obscenity but the interpretation leads to the point that only a part of it may be obscene then what is the sense of restricting freedom of speech and expression of whole society by banning the app. In Chandrakant Kalyandas Kakodar v. State of Maharashtra, the court held that:

> "*The standards of contemporary society in India are also fast changing---It is the duty of the Court to consider the article, story or book by taking an overall view of the entire work.*"[46]

In Bobby Art International & Ors. v. Om Pal Singh Hoon[47], the Supreme Court while dealing with the question of obscenity in the context of film called Bandit Queen pointed out that the so-called objectionable scenes in this particular film have to be taken into consideration in the

[42] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[43] The Queen v. Read, (1708) 88 Eng. Rep. 953, ItMod. 142 (Q.B.).
[44] Rex v. Curl, (1727) 93 Eng. Rep. 849, 2 Strange 788 (K.B.).
[45] Roth v. US, 354 U.S. 476 (1957).
[46] Chandrakant Kalyandas Kakodar v. State of Maharashtra, 1969 (2) SCC 687.
[47] Bobby Art International & Ors. v. Om Pal Singh Hoon (1996) 4 SCC 1.

context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless and poor female child which transformed her innocent self into a dreaded dacoit. In Ajay Goswami v. Union of India[48], while examining the scope of Section 292 IPC and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, the Supreme Court held that the commitment to freedom of expression demands that it cannot be suppressed, unless the situations created by it allowing the freedom are pressing and the community interest is endangered. Further, in Aveek Sarkar v. State of W.B[49], Supreme Court held,

> *"While judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons."*

Rethinking freedom of speech and expression

> *"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".*[50]

Freedom of speech and expression forms a very strong facet of an individual's personality. Without such a freedom, a man's moral and intellectual life lacks the health it requires.[51] It helps in the discovery of ultimate and unfeigned truth.[52] Lord Steyn, very remarkably, explained the gravity of the freedom of speech and expression in the lives of people. He propounded that "Freedom of speech and expression is the lifeblood of democracy. The free and unrestricted flow of information and ideas informs political debate. It is a safety valve. People are more willing to accept those decisions that go against them if they can in principle seek to influence them. It acts as a brake in the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."[53] Without freedom of speech, the appeal to reason which is the basis of democracy cannot be made.[54]

[48] Ajay Goswami v. Union of India (2007) 1 SCC 143.
[49] Aveek Sarkar v. State of W.B, 6 (2014) 4 SCC 257.
[50] Ambard v. Attorney General of Trinidad and Tobago (1936) 1 All ER 704
[51] Johan Milton, Aeropagitica and Other Tracts, 27 (1644).
[52] Franklyn S. Haiman, *Speech and Law in a Free Society*, University of Chicago Press, 1981.
[53] Regina v. Secretary of State for the Home Department, (2000) 2 LR 115 (AC)
[54] Jennings, W.I., Cabinet Government, 13. [Cited in Dr. Madhabhusi Sridhar, The Law of Expression, An Analytical Commentary on Law for Media 18 (Asia Law House, Hyderabad, 18, (2007)].

Freedom of expression constitutes one of the most essential foundations of such a society, one of the basic prerequisites for its progress and for the development of every individual of this society.[55] In order to maintain the enforcement of such an essential right, it becomes the responsibility of the judicial authority of any democracy to ensure the provision of a free and fair speech and expression. The court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a 'democratic society'.[56] Honorable Justice Mudholkar, in *Papers* (*P*) *Ltd.* v. *Union of India*[57], observed the importance of the role of courts in ensuring the constitutional guarantee of free speech and expression and propounded that:

> *"... The courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and Governments and must be preserved."*

The importance of the freedom of speech and expression can never be fathomed in terms of any statutory provisions. It is the quintessential natural right, guaranteed to every individual by the virtue of being social and political animals. It is not something that the state has given to its subjects. It is rather something that has led to the creation of the state. The same proposition can be backed up by the statement of Ai Weiwei that *"Without freedom of speech there is no modern world, just a barbaric one."* It is the tool of the assertion, expression and protection of human rights without which the human race will be reduced to a mere blood and flesh.

[55] *Ibid.*
[56] Handyside v. United Kingdom, 1976 EHRR 737.
[57] Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.