

CONSULTATION PAPER-CUM-QUESTIONNAIRE ON UNDERCOVER/STING OPERATIONS

1. Technology is offering many ways to invade private and professional lives. The media with the help of private entities is making effective use of such technological opportunity to carry out the sting operations (for short, SO) to expose corruption, immorality, exploitation, flouting of the rule of law by those holding public offices, influential persons and businessmen. However, it is noticed that in some high profile criminal cases, the media by conducting SO and broadcasting the same on TV channels regularly, have been prompted by a motive to play up the emotions and sensationalise the events for a commercial purpose. It has a tendency to generate public opinion in a particular direction much to the embarrassment of law enforcement agencies. Instances are not lacking where instant SMS polls have been held to decide between guilt and innocence. Such parallel proceedings by media in a criminal case pending before a court of law can create a forceful impression on the public minds about guilt and might affect a fair trial and uninhibited verdict which is a part of constitutional guarantee.

2. On one hand, SO serves the public interest by strengthening the democratic framework by disseminating information about facts of vital interest to society that are not easy to obtain by simple requests or efforts. The records from the world over show that without the use of SO, public would have never learnt about many economic and political wrong doings. On the other hand, some recent incidents prove the misuse of SO by media and private entities to increase the channel viewership, settle political scores, harm corporate interests, malign reputation etc. Such SO that are carried on with ulterior motives not only harm the person and the institution trapped in the sting, but has the potential to shake people's faith in the institutions and create a general atmosphere of cynicism in the society.

3. The only law we have at the moment is the Cable Television Networks (Regulation) Act, 1995 and the Rules framed thereunder. This Act and Rules being a product of era when SO had not arrived on the television scene, do not have any direct provisions related to the SO. At the same time, some provisions of this Act may be applied to check malpractices associated with the SO because Sections 3 and 5 read with the Programme Code referred to in Section 6 lays down that *no programme can be transmitted/re-transmitted on any cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths.*

4. However, some TV channels were found flouting these provisions. In the recent past, instances of Television channels exceeding the limits of decency by using SO as a tool for the on-going reality shows to expose waywardness or infidelity of a spouse, boyfriend, etc. have been noticed. Such SO showing private life of common man and woman are not conducted for exposing public wrongs and do not serve any public interest or public purpose. Further, manipulated and fabricated SO noticed in several instances have sullied the image of media and damaged the reputation of targeted persons irretrievably. These kinds of SO are exploiting technology available to intrude private space thereby violating the right to privacy and taking the civilization backward.

5. There is therefore need felt to evaluate whether TV channels are fulfilling their social responsibility in revealing private wrongdoing? Whose interests are served by such expose? How far they can be allowed to invade the right to privacy, when expose does not serve a legitimate public interest? Even if SO serves public interest in some way, how far the undercover operators can go? Can they themselves become party to crime to unearth the crime?

6. The Committee on Petitions of Rajya Sabha in its report dated 12.12.2008 made the following pertinent observations:

“The Committee feels that the electronic media should not air information gathered through SO unless and until there is ample evidence to conclusively prove the guilt of the alleged accused; if it is required in public interest, the version of the alleged accused should also be aired simultaneously and with equal prominence...Where a SO is found to be false and fabricated, the media company ought to be given stringent punitive punishment commensurate with the damage caused to the innocent individual... The Committee is of the view that freedom of the press is essential for healthy functioning of democracy; however, democracy comes with responsibility. Freedom of the press case responsibility on media as well. The Committee therefore expects the media to contribute to success of democracy by protecting the freedom of individual including his/her right to privacy. The Committee observes that even though the right to know takes precedence over the right to privacy, the right of privacy should not be encroached upon, under the garb of freedom of the Press unless prompted by genuine public interest. Therefore the Committee advocates following of a middle path approach between both the rights, to meet the ends of justice.”

6.1 The Committee of Ethics too in its proceedings dated 24th Feb 2006 concerning the SO – ‘Operation Chakravyuh’ stressed the need to evolve a regulatory mechanism for undercover operations which have the potential of encroaching upon the right to privacy of an individual and further observed that the Committee feels that the electronic media should also put in place a self regulatory mechanism to ensure justice and fair play in their functioning.

7. The Government of India proposed to set up an independent regulatory authority viz., the Broadcasting Regulatory Authority of India (BRAI) under a proposed law – the Broadcasting Services Regulation Bill 2007. The accompanying Content Code revised in March 2008 lays down in detail what content can be aired and what cannot be, but, it has met strong opposition from the media agencies and channel owners who favour self

regulation. According to the very recent newspaper reports, the Hon'ble Minister of I&B stated that a National Broadcasting Authority - a statutory body will be set up, but it will not regulate the content. However, the I&B Ministry has devised certain non-statutory and informal guidelines and machinery to check objectionable publications/exhibitions. For instance, the Electronic Media Monitoring Center has been set up to undertake monitoring of content of various FM and TV channels for any violation of Programme Code, Advertisement Code and the provisions of Cable TV Networks Regulation Act etc.

7.1 While so, the News Broadcasting Association (NBA) have been formed to put in place a self-regulatory mechanism and accordingly the News Broadcasting Standard Authority (NBSA) was set up in October 2008. The NBSA consists of an eminent retired Judge, eminent editors associated with broadcasting and eminent persons having special knowledge in the fields of law, education, medicine, literature, public administration etc. It has formulated a Code of Ethics and Broadcasting Standards governing the broadcasters and television journalists. 'Broadcaster' is defined to mean any association of persons/organization or corporate entity being member of NBA who owns, manages and controls a satellite or cable T.V. channels that comprises exclusively news and current affairs contents or capsules as part of its programming and the said term includes the editor. The said Authority, on the basis of a complaint or otherwise, can proceed to hold an inquiry into the alleged violation of code of conduct and after giving an opportunity of hearing to the broadcaster concerned, may for reasons recorded in writing, warn, censure or impose a fine upon the broadcaster and or recommend the concerned authority for suspension/revocation of license of such broadcaster. The avowed purpose of the principles of self regulation is stated to be "to empower the profession of Television Journalism by an abiding set of values, which will stand the test of time and ensure that balanced and comprehensive journalism flourishes to strengthen India's democracy". As regards sting operation, it is stated thus in paragraph 9 of the Code of Ethics:

"As a guiding principle, sting and undercover operations should be a last resort of news channels in an attempt to give the viewer comprehensive coverage of any

news story. News channels will not allow sex and sleaze as a means to carry out sting operations, the use of narcotics and psychotropic substances or any act of violence, intimidation, or discrimination as a justifiable means in the recording of any sting operation..... News channels will as a ground rule, ensure that sting operations are carried out only as a tool for getting conclusive evidence of wrongdoing or criminality, and that there is no deliberate alteration of visuals, or editing, or interposing done with the raw footage in a way that it also alters or misrepresents the truth or presents only a portion of the truth.”

7.2 Whether such a self-regulatory mechanism has proved to be adequate and effective and whether it would obviate the need for a statutory mechanism to regulate the contents of broadcasting including SO and taking appropriate action under law, is a matter of debate.

8. In the UK, the Broadcasting Standards Commission exists as the statutory body for regulating both standards and fairness in text, cable and digital services broadcast over television and radio, both terrestrial and satellite. Established by the Broadcasting Act, 1996 it has to: (i) produce codes of conduct relating to standards and fairness; (ii) consider and adjudicate on complaints; (iii) monitor, research and report on standards and fairness in broadcasting. It has power to require recordings of broadcast material and written statements. It may also hold hearings. Its decisions are published regularly and broadcasters must report any action they have taken as a result. It is accountable to the Parliament and each year publishes a full report of its work. It is financed by the Government and broadcasters and its accounts are subject to scrutiny by the National Audit Office.

9. The decided case law from Courts on the subject of SO has not laid down any clear cut principles or uniform approach on the legality and extent of permissibility. However certain broad principles are discernible such as the considerations of public interest, the need to recognize the fundamental rights of the targeted persons including the right of privacy and liberty. Also, the illegality inherent in the publication/exhibition of

fabricated and misleading content obtained by SO which is universally condemned, is recognized by the courts in India.

10. The Law Commission of India, in view of sharp and divergent views with emotive and logical pleas that are raised regarding permissibility of SO, is eliciting suggestions from the public, including the media representatives, the NGOs, academia, professional bodies, social activists, officials and elected representatives on a set of Questionnaire prepared mainly regarding: whether there is necessity to control the misuse of SO by way of a regulatory law? what should be the nature and extent of that regulation to check unwarranted invasion of right to privacy? what kind of mechanisms has to be put in place to prevent publication/broadcasting of the content of SO so as to control fabricated versions of the SO and to protect larger public interest?

11. The response to this questionnaire can be sent to the e-mail address given in the website of the Commission or to the postal address of the Commission by 30th November, 2010.

Questionnaire:

1. The media led SO that expose corrupt and criminal activities of a person accused in a case create a widespread public perception of the guilt of the accused and the regular broadcast on a television/internet medium strengthens such public perception and might influence a trial court judge who has to independently conduct a trial in an atmosphere free from pressures and inhibitions. In order to have a fair and objective trial by courts, should the State prohibit or regulate the broadcast /publishing of SO expose in such a case?
2. In R.K. Anand's case, the Supreme Court observed that the media is not free to publish any kind of report concerning a *sub-judice* matter or to do a sting as it pleases in a pending trial matter. It was also observed that a sting based on deception would attract the legal restrictions with far greater stringency. More or less on similar lines, the Supreme Court commented in a recent case related to

Manu Sharma that *the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held impermissible.* Do you suggest therefore regulation of a SO in a *sub-judice* matter by restricting its broadcast/publication or placing a complete ban thereof in a *sub-judice* matter?

3. Should a restraint be placed on SO where a special machinery is created under the Statute like the Prevention of Corruption Act, the Narcotics Drugs and Psychotropic Substances Act, etc to unearth and investigate specific crimes under those Acts?
 4. (a) With a view to expose corruption or anti-social activities prevalent in society, and without any other ulterior/objectable motive, a person (including a media representative) conducts a SO against a public servant or a middleman. Should he/she enjoy immunity against possible prosecution for the illegal acts committed in the course of such SO?
 - b. It was observed in a case decided by the Delhi High Court that the immunity to the bribe giver is available in a case where he/she is unwilling to pay the bribe and approaches the police in order to get the public servant trapped. Whether the scope of immunity, provided under section 24 of the Prevention of Corruption Act, should be extended further so that the journalists etc. undertaking SO are protected?
5. It has been observed that some of the SO(s) make considerable intrusion into private lives of people without serving any public interest and such operations are conducted by the television channels solely to increase their viewership. In

this context, would a sting qualify as investigative journalism when firstly, there was no obvious relevance of the sting to the public and secondly, if there was clear ensnarement to commit the offence?

6. If SO turns out to be manipulated or distorted or is published in a misleading or reckless manner, should it be treated as a distinct offence? If so, what punishment should be appropriate? What other sanctions do you suggest?
7. It is said that a proper balance should be struck between the right to privacy of an individual and public interest likely to be served by SO. What suggestions do you make in ensuring that SO does not substantially impinge on the right to privacy and thus the intrusion of the same is reduced to minimal? What restrictions could be imposed by law in this regard? What according to you may constitute unwarranted and palpable invasion of the right to privacy?
8. (a) Please offer your views as to which test – ‘public interest’ or ‘infringement of privacy’ – should be the predominant test for judging the legality or permissibility of the SO. Which of them may be given more consideration by a regulatory law, if enacted? Even if the test of public interest is broadly satisfied, should the regulatory law should still consider the permissible extent and degree of invasion to the right of privacy as a relevant factor?
 - b. Do you think that the means and modalities of expose should be irrelevant wherever public interest is served in some degree or the other?
9. In the false SO of a School Teacher case, the Delhi High Court observed that the Court trusts that *all TV channels/Media will take steps and prohibit its reporters*

from producing or airing any programmes which are based on entrapment or fabricated and intrusive. The court also observed that TV reporters and editors should take steps for drawing up a self-regulatory code of conduct. It implies that such Code of Conduct should be one capable of being enforced effectively. Do you think that the NBSA set up by News Broadcasting Association is adequate and effective enough to put in check on the undesirable practices associated with SO and to restrain the publication/exhibition of objectionable contents of SO?

10. In the said case, the Delhi High court disapproved of the tactic of using a budding journalist eager to make a name in the media world to pass off as a student of school to trap school teacher in a motivated SO. It relied on the US Supreme Court decision and article by a well known TV journalist to justify the use of hidden cameras when it is for capturing the event that would take place whether or not the camera was there and deploring the practice of entrapment to induce commission of crime so that the Government may prosecute. The High Court approvingly referred to the observations in the US Supreme Court judgment that the Government should not play on the weakness of an innocent party and beguile the party into committing a crime which the party otherwise would not have attempted. The State must not punish an individual for an alleged offence which is the product of the creative activity of its own officials. The High Court held that this can be applied in the Indian context also to the media. Do you agree with the above suggestion that SO should only be used for capturing what is already going on and should not create a scoop by testing individuals by putting them through inducement test?

11. In its judgment rendered on 14th December 2007, the Delhi High Court issued guidelines to be followed when undertaking a sting and observed that the Ministry of I&B may consider their incorporation in the proposed law – the

Broadcasting Services Regulation Bill of 2007. What are your suggestions in this regard? According to these guidelines:

1. A channel proposing to telecast a SO shall obtain a certificate from the person who recorded or produced the same certifying that the operation is genuine to his knowledge.

....

3. Permission for telecasting a SO be obtained from a committee appointed by the Ministry of Information and Broadcasting. The said committee will be headed by a retired High Court Judge to be appointed by the Government in consultation with the High Court & two members, one of which should be a person not below the rank of Additional Secretary and the second one being the Additional Commissioner of Police. Permission to telecast SO will be granted by the committee after satisfying itself that it is in public interest to telecast the same. This safeguard is necessary since those who mount a SO themselves commit the offences of impersonation, criminal trespass under false pretence and making a person commit an offence.

4. While the transcript of the recordings may be edited, the films and tapes themselves should not be edited. Both edited and unedited tapes be produced before the committee.

....

7. The Chief Editor of the channel shall be made responsible for self regulation and ensure that the programmes are consistent with the Rules and comply with all other legal and administrative requirements under various statutes in respect of content broadcast on the channel.

8. The subject matter of reports or current events shall not:

(a) Deliberately present as true any unverified or inaccurate facts so as to avoid trial by media since a "man is innocent till proven guilty by law";

....

11. Infringement of privacy in a news based/related programme is a sensitive issue; therefore, greater degree of responsibility should be exercised by the channels while telecasting any such programmes as may be breaching privacy of individuals.

12. By capturing the evidence of a criminal activity through SO against a person not yet accused of an offence and publishing the same in print/electronic media, the chances of tampering or suppressing the evidence might diminish. At the same time, such publication has the tendency to defame a person whose version is not available. Could it be yet another reason to regulate the publishing of SO through law?
13. Where the SO covers a crime or a gory incident concerning a child victim or a juvenile accused, what restrictions ought to be placed on the media publicity details of SO?
14. What should be the procedure to ensure that an expose by private entity or media led SO is not used for taking undue advantage? Who will regulate its transmission/ publication/ withholding? With whom this expose should be deposited? Should there be an independent statutory body to grant permission, monitor and take custody of all the materials collected by a SO?

P.N: It is clarified that the Commission is not contemplating to go into the issues concerning mode of proof of material obtained by way of SO, their evidentiary value and the defences that may be open to the accused in a trial.

Archived