

**NUJS LAW REVIEW & FICCI SYMPOSIUM ON PRIVACY,
FREE SPEECH AND TECHNOLOGY
EVENT TRANSCRIPTS**

(Session 1 Speaker 1)

Hello, and it's very nice to be here in Kolkata and thank you for having me here. This is a city, of course, with many happy associations and the city of my childhood. I am very happy to come back here. My husband often remarks that my mood seems to lift even before I've actually landed in Calcutta so here I am.

Any discourse on free speech in this city is of special significance, because this has been the nerve center and hub of art, literature, music, dance, films and intellectual discourse. The 'adda' originated in Kolkata. Therefore, with its straight traditions of free speech, I think it's a matter of great disappointment that a professor from this city should be taken to task for his irreverent cartoons or authors who write provocatively and maybe, defensively, should be denied entry into the city. I think Kolkata, and the state of West Bengal, has been far more robust and broad-shouldered than that. I think we can handle much more than that and I think Kolkatans are made of much firmer stuff.

The freedom of speech is ultimately a notion, a very dynamic notion, that takes new colour and acquires new dimensions with changing times and evolving technologies. In today's context, the freedom of speech means a myriad of fascinating things. We continue to have the traditional, classical media, which is books, newspapers, art forms, cartoons, films, dance, theatre, music. We also, of course, have television, the internet and social media. We also have the mobile phone which is not just a means of communication but also a source of information and entertainment. With all these different forms of media, it may be difficult to have a common regulatory framework and from a censorship standpoint, all these different media, they have such different nuances that they cannot be treated all alike. For example, when we think of the internet and think that the damage that something on the net can do is far greater than what a book can do, for example. Therefore, it's, at a certain level, acceptable that censorship rules would be different for the net. We've seen, for example, only a few months ago, the young Boston bombers, how they were indoctrinated and how they derived inspiration from the speeches of a Yemeni cleric, which they downloaded from the internet. This man, of course, the cleric, had been dead for some years now but still draws that kind of awe and inspiration. These young men also learned how to make the bomb from materials which they accessed on the net so the kind of damage that media is capable of is incalculably greater. Therefore, perhaps, all of these different media are treated a little differently but underlying all of them is the constitutional freedom of speech and expression under Article 19(1)(a).

I think the game-changer in the last few years has been technology and technology has encouraged the normal private individual who would otherwise have no interaction with the

public sphere and suddenly thrust him or her into the public domain. This is interesting because free speech is not just important from the media standpoint or from the view of those who are actively involved in the media but those outside, ordinary people like you and me, because their daily routine is, by virtue of technology, entwined with free speech. Whether it's texting or blogging or tweeting or using Facebook, all of this is eventually about the exercise of free speech. Technology, by its very nature, makes all of us so exposed to the public domain. For example, earlier, before we had these technologies, the individual was shielded from the public domain but now we are thrust in the public domain and wittingly or unwittingly, and this makes us more vulnerable for what we say or do not say. Also, in a sense, it violates our personal space in a manner that we do not recognize. For example, if you're in the mall, there may be a CCTV camera which is capturing you or a roaming mobile phone with which photographs are being taken. It may be the Aadhar card which you are required to apply for and disclose all sorts of personal information which may be used and abused in so many ways that we cannot imagine. It just may be blogging or using Facebook. All of this has important complications for us because it has blurred the boundaries between the public and the private. In other words, what I am getting at here is that free speech is no longer just a media concern. It is, much more, than ever before, the private individual's concern.

As I said, technology has been the game-changer and it's interesting to see how the internet has panned out in so many different ways. On the one hand, it's been this hugely liberating medium, I think we all recognize that but in some ways, it has also been a very limiting medium and I will explain this paradox. Liberating, of course, because it's just revolutionized the game. I had finished most of my education before the internet came on the scene and I cannot tell you how transformational it has been for some of us who grew up without it. The reach, the speed, the access is just phenomenal. It's also provided, in the last few years, that alternate space for people to find expression. People who are not influential enough to get their articles published in the Times of India and other leading newspapers, they suddenly have an option to find expression. In that sense, it's been a great democratizer of free speech. I think that in the aftermath of media scandals, whether it's the Radia tapes expose or paid news, there has been a huge trust deficit in the mainstream media. This has really thrown up the guild for an alternative space and I think that social media has led the race. We've seen how the Arab Spring was catalyzed by social media. That's, of course is a very liberating impact of the internet. But there is another side to it, which is, as I said, a very limiting, inhibiting side. Let me explain this. No matter how globalized how the world is today, there are some fundamental value systems which are unlikely to converge, no matter how much the world has shrunk. Ultimately, we should let every nation, every people, every society determine for themselves which core values should be a part of their constitution. It's nobody's business for anybody to be judgmental about what a society chooses for itself.

So, you have on the one hand, western democracies which allow for a more robust kind of free speech, perhaps even to the extent where in the US, you have the right to burn the flag. You have that on the one hand and then you have other jurisdictions which do not allow for such a robust right. Difficulty arises, when by virtue of technology, speech which is perfectly

permissible and constitutional wafts across the web and finds itself in another jurisdiction where it might not just be proscribed, it might be outrageous, it may be blasphemous, it may be punishable with death. What happens then? I think we've seen the mindless mayhem about two years ago, with the release of a film on the Holy Prophet on the web. We've seen the consequences of that. It's the sheer seamlessness of the media which has rendered us helpless, in the sense that we do not know who our audience is anymore. The notion of a select audience, a limited audience, an intended audience is a thing of the past because the whole world, as it were, has been transformed into one single theatre. That is, in some ways limiting, because what is to happen to a citizen who says, "Look, my constitution give me the right to offend" or a much more robust right of free speech. Is he entitled to exercise those rights to the fullest or must he restrict himself to the sensibilities of others in other jurisdictions. Alternatively, does this make a case for barriers to be set up? Does it make a case for some kind of internet regulation? Do we need some form of censorship only to ensure a more robust kind of free speech? This is, again, a paradox but it's something to think about.

When we talk of free speech, my own views are that we have had a fairly free and feisty media in India which some would even say is too free. I would agree in the sense that we have had such sliding standards of content and of quality, a lot of which we see on television and in newspapers. Then, some feel the need for regulation. However, unlike in the past when there was much more direct interference by the government with the rights of the media, I don't think there is such interference anymore. The days of Romesh Thapar, Sakal Newspapers, Bennet Coleman, when there was real confrontation between the government and the media is no longer in force and has reached its absolute low point and I no longer see that anymore. What we do see is that there are other challenges like censorship from within. I see that censorship comes from within the media. For example, you have various forms of censorship. Any form of publication involves some amount of censorship. For example, do we publish this story at all. How much space do we give to it? How much prominence do we give to it? This may be guided by various factors like political proclivities, different philosophies or pure commercial reasons and the disturbing this is that, only two weeks we had a SC judge and a Calcutta journalist speak on the subject. What they said was that today, increasingly, the genuine players, the senior journalists who are gradually getting squeezed out of the mainstream media and what you have is the mafia and all sorts of commercial interests taking over. That is a serious threat to free speech. Economic censorship is something to be thought of because that is something that creates commercial pressures which will impact free speech in the long run. But I think, overall, as far as the mainstream media is concerned, by and large, there is so much multiplicity and plurality, whether it's newspapers or TV channels, that is really going to be the best safeguard for free speech. The threats of free speech are really going to be face by small individuals, whether they are film makers or authors or cartoonists, they are much more vulnerable. Another disturbing trend that we have seen is parallel censorship, extra-constitutional censorship where one group representing one group or community saying, "I find this film completely offensive and even though it may have been cleared by the Censor Board, we are going to disrupt things and create law and order situations." That State, instead of ensuring that law and order is not

breached, seems to become a supine spectator or even a supporter of that kind of parallel censorship. That is very unfortunate and there is a host of vote bank politics that plays out behind it. You see it with Aarakshan, which was cleared by the Censor Board and more recently, you see it with Vishwaroopam. The threats are not at the level of the mainstream media because the government needs the media. It's important for them to keep the media on the right side. I think Justice Ganguly touched upon privacy as an aspect of Article 19 and I will just make a few remarks.

I mentioned, at the beginning, this exposure of the private individual (perhaps unwittingly) to the public domain and I'm going to make a mention of one case which shows how nuanced a right privacy is. That's a case from the UK called *Peck v. UK* (2003). If I could recount the facts very quickly – there was a man who was undergoing severe depression and he decided to commit suicide by slashing his wrists on a public street outside his home. While he was doing this, there was a CCTV camera which captured it and an alert operator alerted the police and the police rescued this man and saved his life. The local council thought they had scored a point there and decided to extol the virtues and benefits of having a CCTV camera. They put it on television for thousands of people to see and the man went to court and said it was a violation of his privacy. The court asked him what he was talking about since he had done it on a public street. Finally, he lost in the UK and had to go to the ECJ and this court held in his favour. It held that even though he had been on a public street outside his home, he was still entitled to privacy in the sense that his reasonable expectation was that he would have been seen by passers-by but not by thousands of people on national television. This case tells us that privacy is such a nuanced right. It is not even a spatial concept. It does not mean that within the confines of my home, I possess privacy and once I step out, I have waived these rights. That is interesting from the privacy point of view. All of us, in some form or another, face this challenge. For example, if there is a photo on Facebook, you feel so exposed because people you may not have wanted to see that photograph have seen it because somebody else has seen. Also, there are time when I am faced with a select audience and I know who I am talking to but once it's tweeted out, we don't know where it's going. This notion of an unknown audience is an important thing.

(Session 1, Speaker 3)

Thank you for inviting me to the speech. It is very difficult when all the three speakers, who have worked in the field, have spoken. They have covered most of the issues involved in it. The whole issue of Hate speech, till now we have spoken where people have been arrested, how actions are taken and how people are prosecuted. There are a whole lot of people who are not being prosecuted and sometimes we feel there should be prosecution for hate speech. There is a very thin line between free speech and hate speech and that thin line is something which has to be decided. When to draw the line, who should draw the line and what should be the criteria for drawing the line, because what we have seen in the UP riots or for that matter the Gujarat riots is that these people never get arrested, those who do hate speech and for that matter in this state also, the chief minister says she has the right to free speech and for that matter in Maharashtra, the MNS leader thinks he only has the right to free speech and nobody else and nobody else can say anything about him and this is the whole issue where it starts

and this whole culture of intolerance towards saying anything against a leader or a party or anything. Like the recent incident about national anthem which Madhavi mentioned. I don't know whether it was reported in the newspapers here, but, an actor's wife went for a movie in Bombay and I don't know whether it is practiced here but, before every movie in Bombay you should stand for the national anthem and its little bit surprising that in such a big movie, why should I show my patriotism. It is because RR party wants it. RR party brought this thing that before every movie there has to be national anthem and everybody has to stand. So, one gentleman who was actually not a citizen of India, but, an Australian decided not to stand and was beaten up and instead of taking action against this lady, the police came and failed to take action after the movie. She made a confession on the front page of the leading newspaper that yes, I slapped the man because he did not stand for national anthem. Who gave her the right and no action was taken against her and we don't know what action will be taken against her. The whole issue is also of intolerance that is growing with technology. Are we becoming more and more intolerant when we have so much technology and free speech available to us. I am going to discuss few cases with which I am involved or the court has dealt with and this shows the way the state are dealing with, political parties are dealing with and that we should lay down, bring out principle of free speech and only then we can proceed further in this debate because of Art. 19(a) and certain restrictions have been put in because there is also a clause which says morality. So, whose morality it is ultimately we are going to decide while talking about free speech and the whole coming down on free speech and on people, cut across political parties, cut across political lines like it has nothing to do with hardline or right wing or left wing or someone in the centre. Everybody wants to appease the people and wants to say that we are much better than the right wing, i.e. what is happening, especially in Bombay and Maharashtra like when the Shiv Sena, BJP government was there, they did not ban the dance bars, but when the Congress and the NCP government came, they banned the dance bars and we know what has happened all these years. Women have lost livelihood and now even though the Supreme Court has said they can open, none of the dance bars are open. But, going back to some of the cases which I wanted to discuss and which happened in different states, which also shows that it is not only in one state it happens but, across all states. The Shilpa Shetty- Richard Gere case which happened in 2007-2008, I don't know how many people are aware about this. Richard Gere is an actor, who we all know and Shilpa Shetty was an actor from India and they were working on an event around HIV Aids with truckers in Jaipur, Rajasthan and around that time or a while before that Gangs of Wasseypur was released in India and he just happened to be there with Shilpa Shetty and he asked "can we have a dance" and then they came together and there was a less than 30 seconds dance that they did on stage and that offended the people of Rajasthan and the dance was shown and there was no kiss involved, no peck involved, it was just a simple dance. The whole issue is that magistrates issued processes in Ghaziabad, Jaipur and Alwar. So basically, these actors who came to promote an event on HIV Aids have done something that would completely not offend anybody's sensibilities. But, the magistrates issued processes without going into what it is. But, there is also somewhere, as Gita said, the issue of lower judiciary. How the lower judiciary reacts to a certain situation just because some big lawyer is coming before the court and arguing the matter. Are you going to issue a process without looking into

it. Finally, the case still stands against Richard Gere and Shilpa Shetty. The Supreme Court had transferred all the cases to Bombay but, the case still continues and we are still waiting to know what happens. Clearance has not come to Bombay yet.

The second case is about the Kabir Kalamanch. I don't know whether you have heard about this case. Now these are artists protesting about various issues like corruption, price rise, and various issues they were protesting about. But, the whole issue is that the governments are saying "you can't protest against us and the moment you go against us. We will prosecute you" and that is exactly what happened in the Kabir Kalamanch's case. Majority of the group members who are singers, musicians and whose videos are available in Youtube. Some of the songs have nothing to do with revolution or even with protests. One of the song "*maaji ma*" is about a mother's feelings, mother saying about a child. This lady is being prosecuted. The whole thing is, again when it comes to court, the court has been generous in this case and granted a bail to majority of the Kabir Kalamanch people but, many still remain in prison. While granting bail, the court also said that it is something to do with protest which comes in Art. 19 and the government cannot muscle the right to protest just because someone is against the government policy.

The third case I wanted to mention was the case of Khushboo, a nationalist from Tamil Nadu, you must be knowing and in 2005-06 there was a survey done by India Today on sexual patterns and sexual behaviour of the people and there was a question asked to women "whether they will have pre-marital sex?". Majority of the women didn't say we would not and this was the question asked to Khushboo by India Today specifically, what will you say about it and she only said that there is nothing wrong about it, and if women indulge in it they should use proper protection as there are risks in premarital sex and she was being prosecuted. Several cases across Tamil Nadu were filed. Political parties were involved in filing these cases. The High Court refused to grant any relief to Khushboo and finally, the Supreme Court came to her aid and granted her release. This is a long battle she had to fight and what happens is, looking at these cases and defending these people involved, at the initial stage when the case is filed, everybody is with you. The media is with you, protest groups are with you and ultimately when the case prolongs it is a lone battle you are fighting. Nobody is with you and after 1 year or six months and it is only for that person to keep on going to the court and face the harassment. Complainant hasn't come, but the magistrate won't close the case and especially these kind of cases, the case is filed by social activists and there should be something. This exactly happened in one of our cases which I'm going to discuss like the Greenpeace cases which we call the "slap litigation" happening across the country. Every time Greenpeace raises an issue about the port that is coming up in Orissa built by L&T and Tata, a case is filed against them that they cannot protest here, they cannot protest there. So, one case was filed in Delhi, one in Bombay, of course, with some modifications. High Court did give them release saying Greenpeace can protest, but at a certain distance. Sometimes, the company may hear you and sometimes no one takes cognizance of what you say. Like the whole issue of protest in Bombay or Delhi that happened, there are judgements of the court saying in this vicinity you can't protest. So, in Bombay you can protest only in Azad Maidan and if you get permission to protest in Azad Maidan make sure nobody is listening to you because many times when you go to

Mantralaya and say people are protesting. The government says let them protest, who can hear them in Azad Maidan. This is the reaction to this thing. Why should the people not protest in any other part of city? Because, it is said in an order of the Bombay High Court in one of the cases that judges pass on these roads, ministers pass on these roads and thus, there can be no protest in these roads. There is a pride march that happens every year in Bombay, Ganapathi festivals are allowed in Chowpathybut, every year, pride march asks for only one permission. Within 10 minutes allow us to cross the road to disperse at Chowpathy. We will not stop at Chowpathy and we will not do anything. But, the police refuses to give permission just by saying that there is High Court order that excepting Ganapathy Puja and Christmas there can't be any other protests. And I don't understand the logic. Well, I'm only saying that somewhere there is a basic understanding, being the state and the people who are doing these things and police and also the judiciary is not coming in favour of free speech. Of course, as I said earlier, there are releases granted by the judiciary and probably they would not have released people who continued to remain behind bars. But, continued to prosecute these people. In the case of a writer who writes story books for many years. He wrote a book about life in Bombay, short stories it was and this particular book was published two years before the complaint was filed and in one particular story, a builder is taking out a chaul which is full of Maharashtrians and the resident is Maharashtrian only and the builder was also a Maharashtrian and the builder was shown as a villain in the story. This was condemned by state of Maharashtra that how can you call a Maharashtrian, a villain. Without looking into the book, without looking into the story it was. The magistrate only picked up that word and said that an investigation under section 163 be carried on by the police. Eventually, the police filed a report that no case is made out because there is only one word of "ghati" being used and the complaint has nothing to do in the context. The person is not calling all Maharashtrians as ghati. The magistrate rejects the report and says that move on with investigation. Instances I can't understand, that even after the police files a report that no case is made out, still the magistrate says the case is made out. Of course, we went to the High Court and got relief for the person and the case was quashed out. But, the whole thing has been traumatising for the person going through this. He is not sure what the relief he is going to get and how the court's order will come and why he had to go through all this process. Just because one person's sensitivity has been disturbed by that word. That is something which is disturbing.

Then there is this case of a sedition which has been used against all people and there is the recent famous case of AsimTrivedi. You may not agree with one of his cartoons and I may not agree with one of his cartoons, the court also said that his cartoons are in bad taste. Bad taste is different from sedition. Just because you drew the parliament in a way you may not agree with. The lawyers agree that you may not agree, but he still has the right to protest and still has the right to draw what he wants to draw and the cartoon has not harmed anyone or caused violence in society. So, how can you prosecute someone on sedition and what is sedition? Are you saying that he is going against the state by drawing the parliament or Ashok Chakra in a particular way. Again he explained what the cartoons are meant to be. It was a protest against the corruption issues and protest against the work going on but, still he was arrested by the police. He was granted a bail by the High Court. The lower courts did not

grant him bail. And now the petition to quash the proceeding is pending before the High Court. And in this process, since the people have realised that this case is going to go away, they have filed cases in small places like this place in Maharashtra, particularly he is travelling to these places. Why does he have to do this?

There is this interesting case of one Sunitha Phule. Now this is like how you use the defamation law to curb free speech. She is basically an environmental activist from Bombay who has worked with the Times of India and also on their CSR for the environment and she realised that illegal cutting of trees is going on near her neighbourhood and this friend informed the police and gave a complaint saying that trees are being fallen and probably no permission has been taken regarding these trees and on the basis of complaint, of course, the investigation was finally done, the police filed the C summary report as neither true nor false and they came to us much later that report was not challenged. But, on the basis of the report and complaint, a defamation case was filed against her saying that she defamed me by saying that I was doing an illegal act and this defamation case was going on since 2003 for 10 years. Every time, Sunitha has to go to court, magistrate is not interested in taking her case. The complainant hasn't come, but the case is not dropped. But, when she was not present, warrant was issued against her. How do you deal with this.

And finally this is very interesting case of one author called Rashmi Bansal, who was an editor of a magazine in Mumbai, which was targeting young people. It was called JLT (just like that) I'm not very sure of the name, probably that. On World Aids day, she published an advertisement, on the top it was clearly written in context of World Aids day. Around 2006-2007, the rate of HIV was very high and government was doing many things to keep it down. Probably, now the government are stating that the rates have come down. But, at that point of time, the rate were very high and everywhere there were advertisements. So, this ad was put in context of World Aids day in the very same page and below it was written "kadha hai toh condom pehen" it was very understandable for anyone by what she meant. I do not have to explain what she meant. It was clear thing that use condom for preventing HIV. But, again some right wing group saw the magazines and said that let's file a case. They go to police station, that person reaches at 5 o'clock. By 6 pm a FIR is registered against Rashmi Bansal and not only one FIR. That person contacts other persons in Maharashtra and cases are filed in other districts of Maharashtra also. This is going on for so many years, 7-8 years. She tried for quashing in the High Court but, it did not work, the court said no. The whole issue is about hurting religious sentiments and §294 with intention. Where is the intention here, the intention is very clear, and whatever it was she issued an apology next day. Immediately the government came to know about this thing. We tried to write to government to withdraw these cases against many of these activists saying that they are intending about social cause or something. But, we have a home minister, I think, I don't know what his thinking is but, he said no. Yeh hinduo ka apman hai. Where is the incitement to Hindu, the intention is clear, the message is very clear. The entire issue is becoming caste centric, which is what I think because it is always left to the individual magistrate, the sessions judge, the high court judge. There are no principles that have been laid down. What is hate speech, when will a person be prosecuted. Whether there is a need for something to happen and then we will prosecute or it may be just I felt bad and it may hurt religious sentiments and so case is filed.

All have been a gamble, like which court it will go to, which bench it will go to, why should we do that, why can't there be basic principles which are laid down and said that under these things it is a matter of free speech, you cannot prosecute the people. As I said earlier, any form of protest is being muzzled by the government and courts are not fully coming to the rescue of the people and things when it comes to hate speech. Many times the courts takes suo moto actions, many times in environmental issues. When it comes to hate speech, no court takes suo moto action. Knowing what has happened, there is no single case where we have seen that the court has taken suo moto action on basis of hate speech also, knowing and realising what are the repercussions of the hate speech.

At the end, I would only say that, this is not because it is said in the Delhi High Court. It is not your morality or my morality. It is not my religious sentiment or your religious sentiment. What should be the touchstone is the constitutional morality which should be the point for all these cases when they are deciding or whether at the threshold anybody should be prosecuted or not. Whether the constitutional morality is being challenged and only then we should proceed with the filing of the case or prosecution against a person because his liberty is extremely important and it is not only that one day a person goes inside the jail. It is a traumatic experience and this experience remains with the person for a long time and this repeated comings for the activists, they are seasoned activists. But, they also breakdown after coming to court for 10 years continuously and nothing is moving. They break down and done with it and I don't want to do this anymore. A person other day cried before the magistrate and he only said don't cry before me, I can't take all this, I can't do anything, your complainant is not coming. But, he filed an application saying complainant is not coming close the cases but, the complainant did not come for more than one and half years and repeatedly dates was given but, no action was taken. That is all I want to say. Thank you so much.

(Session 2, Speaker 1)

You know opening a session after lunch is a pretty difficult task . Its like facing Dale Steyn on a very humid Durban pitch in the morning. Now I would like to make a very brief presentation so that you don't fall asleep, and let me try to make a few points that I felt as a public law person. As as teacher who deals primarily with Constitutional Law I feel that there are certain points that are lacking in any privacy initiatives towards legalizing or legislating on privacy. So when I talk about surveillance, I don't talk about State made surveillance per se. I am taking about certain inter-se surveillance among citizens. So when I talk about surveillance, I will largely be talking about the paparazzi, the way the celebrity's rights get trampled, the celebrity's privacy gets trampled and what does our legal system have to offer.

So I would begin my presentation which just tries to streamline privacy as to whether it's question of legitimacy. You see, we all know that we have a fundamental right to privacy, call it a part of 21, call it a part of 19 but we do have that. But the problem is that all of us know that the Courts have very severely limited this fundamental right to privacy. You know privacy not being absolute, privacy being trampled and endless stuff, other greater common goods and so on and so forth. Now in that situation, what we have ended up with is a

situation where privacy needs to be legislated upon. Now we have these several versions of the Privacy Bill, some of which is leaked. I think all the different drafts have been leaked on some point of time or the other. Now, if you look at one of the draft versions of the leaked Privacy Bill, you find that there is a reference to the Right to Privacy. But interesting enough that references in the first draft was- "every citizen has the right to privacy." Subsequently, citizens was changed to individual and individual is defined as "citizen of India." Now, if we say privacy stems from 21, then 21 applies to all "persons", not only to citizens. So even a normal person has the right to life and personal liberty. If we construe privacy as an element of personal liberty, then we have law that grants the right to privacy only to citizens.

Now that constitutional issue apart, there is another problem that this law in so far as it talks about right to privacy or granting right to privacy, this law is primarily aimed at surveillance. So in the beginning, in the first few sections where the right to privacy is talked about, the rest of the Act is about surveillance and legitimizing surveillance. So one stands to wonder as to whether this is a law, which gives recognition to privacy or it is a law which gives recognition to curbs on privacy. Now leaving that aside, that draft, that one draft of the Draft Privacy Bill also creates a very interesting inroad for journalistic purposes that the right to privacy, whatever it is can be curbed for journalistic purposes. Now this is also a very interesting formulation that I will come to briefly.

We see that out laws or laws from any other part of the world, privacy becomes a very serious issue when we are talking about a celebrity's privacy in light of the celebrity's publicity rights. That if you are a celebrity or a public figure, then you have been given certain rights of publicity, essentially proprietary in nature, and since you have gotten certain rights of publicity, you have to make certain compromises on your privacy. That is the linkage to privacy that is drawn in Maneka, it is not just in India when we talk about celebrities or public figures.

Now even while defining a public figure, there is a small dichotomy that we face. The American Courts in this interesting case called Martin Luther King Jr. Center for Social Change has defined a celebrity for right to publicity purposes in a very, you know, interesting manner. What it says is "When an unauthorized use of a person's identity is made that is direct in nature and commercial in motivation, that person whose identity has been misappropriated becomes a celebrity for right to publicity purposes." Now look at two things. First of all we are talking about a right to publicity orientation of a celebrity. And secondly, we are talking about an element of commercial exploitation, which again comes in when we talk about publicity rights. This is as if to say your definitions of celebrity or your definition of privacy will exist only when we are talking about a commercial exploitation. In the previous session, Madhavi was making a very interesting point. She said that privacy is a value in a democratic society. It does not depend on the individual, who the individual is, whether this individual is a public figure or is like any one of you, or any one of us. She was making reference to this English case, the case of Peck where this person was out in the road and out in the road the State would argue that out in the road his reasonable expectation of private space would automatically get curtailed. But the Court still held that he did not expect

the surveillance agencies to keep a tab on him. So his reasonable expectation of privacy actually pegged at that level.

Now when we are talking about privacy as an intrinsic fundamental value, a constitutional value, then how are we defining privacy solely in terms of the commercial element in it? This is a lurking question that I am going to leave with you. Now the Indian test for public figure is also a very vague test. We have a tautological formulation- public figure because of public attention, so whoever has public attention becomes a public figure. We had in *Indu Jain v Forbes*, a kind of a definition which said that persons of standing, accomplishment, fame, mode of life or profession gives a public a legitimate interest in their affairs becomes a public figure. Now I don't know whether by this decision Asaram could be called a public figure because his standing, accomplishment, fame, mode of life or profession is not something which a standard, a typical definition of public figure would normally entail. And interestingly you have no public figure by affiliation. In *A Raja's Case*, *A. Raja v P. Srinivasan*, his relatives, Raja's relatives were specifically excluded from the list of public figures. Public figures could also mean celebrities. Now going by that logic do you say that a Robert Vadra is a celebrity or a public figure? Do you say that an Aradhana Bachchan is a public figure or a celebrity? Now why I am asking this question is because the moment we come to celebrities, the natural response or the natural point the media makes is that if you are a celebrity you should have a lower degree of a reasonable expectation of privacy than the rest, and anyway you are getting the right to publicity. You are getting a right for full commercial exploitation of a personality. So, in a very proprietary manner, your reasonable expectation of privacy gets adequately lower the moment you become a public figure by definition. So naturally question do arise- whether you can become a public figure by affiliation.

More importantly, another reason the newspaper or the media gets in relation to the right to privacy if you are a public figure is the element of newsworthiness; saying that not only do you have a lower reasonable expectation of privacy, being a celebrity, you are also a newsworthy commodity. So that element of commodification definitely does come in which says that since you are newsworthy, since we have the right to know about you and since it is a manifestation of the people's right to freedom of speech and expression, right to know about you, right to know about what's happening around, therefore you cannot probably keep your right to privacy. Now I will give you a few examples to figure out whether newsworthiness could be even defined or to be given a straight jacket. Before that, the journalistic purpose, which can breach your right to privacy, here's a very illustrative list that has been given in the Draft Privacy Bill. It says that reasonable expectation of privacy suspends when any one or more of the factors need to be present. Now, if you look at the factors, you will see that they are extremely vague ones. So one cannot really make out as to the presence of one of these factors can act as a mitigant, can act as something that can allow a legalized violation of your right to privacy. These questions remain very blurred. The lines remain very very ambiguous, very blurred, which the subsequent slide will show.

Ranbir Kapoor and Katrina Kaif enjoying in Ibiiza, Southern France. Do you see an element of reasonable expectation of privacy here? Or are they newsworthy items to be published in Indian Express and all newspapers and Stardust the next issue? And this is what Katrina Kaif does- she writes a very scathing letter to the media. A very interesting part, a very important part in the letter is “there is a breed of journalism that preys on celebrities in the worst possible manner, crossing all lines of privacy and decency, which she definitely seeks to target, which she definitely seeks to criticize. But for that journalist, it is a simple matter of newsworthiness- people are really curious to know whether they are a couple or whether they are living together. Now, where do you draw the line?

Priyanka Chopra at her father’s funeral. This photo, which is again taken from Indian Express, has Priyanka Chopra, naturally in a state of shock because her father has passed away, being consoled by Shah Rukh Khan. The next day’s news tabloids, the next day’s news channels that I consider news tabloids, they have headlines like “Priyankakorahatmili Shah Rukhki baton mein” and neutrally there is a very curious element of extra-marital because Shah Rukh Khan and Priyanka Chopra was a story for some time. There is a very curious element of extra-marital relationship being drawn in at a situation where this poor woman is grieving because her father is no more. Now, do you think Priyanka Chopra had a reasonable expectation of privacy in this circumstance? Do you think since Priyanka Chopra happens to be a celebrity the reasonable expectation of privacy gets lowered even if her father has passed away? Or do you think that it is such a newsworthy thing that Priyanka Chopra’s father has died and Priyanka Chopra is standing in this white saree and is being consoled by Shah Rukh Khan, that there will be such media hypes? So again newsworthiness is a standard which seeks very demanding questions.

Now let me come to my third point of my presentation which is are we technologically competent to handle such interferences being a celebrity or a non celebrity. I have given a reference to the California Anti-Paparazzi law, which talks about a very interesting distinction that it makes between two different kinds of invasions of privacy. One is a physical invasion, which necessitates an actual act of trespass. The other is a constructive invasion of privacy where you use visual or originally enhancing devices regardless of actual trespass. So if you’re using a high power zoom, you know high zoom camera and invading privacy, then that can be deemed to a constructive trespass or a constructive invasion of privacy. Of course that law also necessitates a commercial motive behind such an exploitation, but what that law does is that it gives a very inclusive definition of a private, personal and familiar entity, which has things like- It also talks about a reasonable expectation of privacy, but it widens the net to cover things like intimate details of personal life, interaction with family or significant others, activities in a residential property, which is defined as a residence, hotel, inn, lodge etc., other aspect of his private affairs and it does not include illegal or criminal activities. And this law also talks about, when there is an actual or a constructive invasion of privacy, there is a limit of fine that needs to be paid. And half of that fine will be use to promote the arts and entertainment fund. So, in a way you are legislating on the invasion of privacy from the angle of the state, from the perspective of the state. Even though the starting point is a commercial exploitation angle, but your appreciation

of privacy is not only limited to whether privacy is a conquest of publicity. It goes beyond that. Maybe that was something Madhavi was trying to relate to in her presentation.

Now, how far are we competent, I am not getting into these because there is a statutory or state sanction included. We have heard about the CMS, the CCTMS, NATGRID, TCI, ECI, all of these. And I am sure we have very eminent speakers who will be talking about that. But the media's tryst with modern technology, the media getting hold of the new technological innovations and advancements is also creating space for the other journalism. The amount of Indian paparazzi has doubled tripled, has increased manifold in the last few years.

(Session 2, Speaker 2)

Good afternoon everyone. Thanks for being here. Funnily enough, I think this gentleman just stated my conclusion very emphatically. So I am going to keep plugging at a point I am fully in agreement with him on – which is that the right to privacy as currently conceptualized within the draft legislation and other instruments including civil society, and judgments of the Supreme Court – just doesn't break free of the conception of privacy as involving commercial transactions.

To start with the most strict criticism, I think the most laudable literature on the point in India seems to be the Justice Shah Committee letter that reported the findings of the expert group on privacy and I finally had a chance to go over it last evening. I was fairly shocked to see that each and every parallel legislation that was examined was examined free of its constitutional bearings. For instance, when they look at the European Data Protection legislation, they forget that it works within the ECHR, UDHR and international law on privacy. When they look at New Zealand and the US, the constitutional context within which the more recent initiatives have been taken and the more commercial element of privacy has been ignored. The report of the expert committee, thus, didn't do justice to those references and disturbingly enough, I see the same lapse in current efforts to get a privacy bill in the laws of India as soon as possible because it is a scary situation.

My first critique and my major focus in this short presentation is to clarify the political economy within which initiatives to move laws towards a particular end point find themselves. Also, what the major force behind the particular direction that a privacy legislation takes and highlight how any sense of privacy in India will have to open the debate to much bigger questions of dignity and liberty in the Indian constitutional sense. It also gets you to think about whether the Indian idea of privacy can be premised on a liberal, individualistic rational private-public separation and a continuous transition towards a mode of thinking about privacy because I think there is a place within our constitution and within the statutes that we have in India today and certainly within the more enlightened judgments that the SC has passed for thinking of India as a country that hasn't bent over for law. There is a possibility of a community existing before private zones of liberty such as in the case of

rights of forest dwellers and what that does to our notions of private property. I don't have a clear answer but I hope to give a rubric within which you can think of privacy in the context of free speech and surveillance. The quotes on the first slide capture how most of the world feels about privacy today. When you replace 'we' with 'Indian citizen' or the 'Indian tribal woman', or the 'raped Indian tribal woman', then fragmentation of this unitary idea of citizenship does locate itself within the ambit of privacy.

Given my stated desire to be skeptical about the current effort, it is important to ask upfront the sponsors of today's discourse – FICCI, how much they are influencing discourse on FICCI in India. Is that the reason the 2010 bill is being uprooted by organizations such as the one the following speaker represents in a participatory manner today? Is that the reason why there seems to be a particular focus on procedure and techniques of restraining the powers that without opening the larger question of what is possible for privacy given that we have a such a beautiful constitution that is still resonant? The constitution is not a carbon copy of another constitution, but allows Indians to discover its constitutionalism in many different ways. This is something I encourage you to think about what does corporate India have to gain or lose by privacy and this point isn't polemic against FICCI but one of the major points that I will be making. Rather than enjoying armchair theorizing, an empirical analysis of who wins or loses in different privacy contexts must be done before a law is theorized. That is why I work on privacy and am so fascinated with it. That there is something about the informational realm that really queers things up. There is a possibility of mutation, replication, schizophrenia or a strange vulnerability of your Facebook account committing suicide. There is something that is both frail and not limited by the physical constraints that are not electronic, that the real world personality is confined to live with them. That factual situation brings the possibility of thinking about a law that operates with greater intensity of spirit, a human approach to time and a clearer claim to reason guiding action. The only phrase among these that requires clarification is "a more human approach to time". As JS Mill pointed out, an enlightened despot who is perfect would be great but is not possible and can't be everywhere at the same time. The nature of the informational world and how it occupies certain circuits and the possibilities of our surveillance technologies today allows time and distance to be circumvented and I think that is not only a bad thing.

There is some great promise for law can do in this realm and other realms as well. The distributional effect of privacy protections throws up surprising results. If you have really good EU approval stand clause relating to CCTVs in India, who gains? The response would be, we the citizens gain due to CCTVs controlled by law. An empirical analysis will tell you that those who sell CCTVs really gain from the legislation. That is only one sense in which privacy related law has a winner and a loser. That is the broader context in which it is useful to think of if we have the Privacy Act of 2013 in a particular form, who gains from each of those protections, who gains? You must have a certain level of security, you must only intercept in so and so manner, intermediaries must disclose so and so. There is a whole nebulous zone of operators that have huge commercial gain from laws that say merging of databases is allowed between banks or health insurance companies subject to compliance with certain requirements. In terms of actual rupees and dollars, it is not just the people, but

also a clear corporate interest. To comfort you, I am not attacking the corporate sector today but in a particular context relating to paternity or DNA testing relating to it, the people no longer benefit from a legislation saying that the court can order a DNA test to determine the father. There is the father who may be somewhat reluctant, the mother who has an interest in the test coming out a particular way and the best interest of the child and then the court, so on and so forth. Spend some time doing an empirical analysis of privacy law, then get back to the normative/ethical theorizing. Let it be both eye opening and useful in defining the contours of your rights, entitlements and duties.

I will briefly return to how we can deal with that in the Indian context. Second point, the big elephant in the room is, when I think of privacy, where do I focus my energies on? The abstract nature of the private person, the technology itself as India and South Korea managed to do, when it ensured that when a picture is clicked from a phone, a light must flash or a shutter sound must play so that voyeuristic pictures are minimized. Do I embed it in the technology or focus on who the private person is. This question is not trivial and I do not have a clear answer on it.

Before I move on, Strenelaf also makes 4 interesting assertions about surveillance. First he makes the assertion that privacy definitely has a 100 good things about it, you can prevent disasters such as Uttarakhand, you can organize food supplies in a better way, you can prevent wastage of resources, spread information about health, only by the state treating its citizens as population and collecting stats about it as Michel Foucault highlighted in her essay Governmentality. Strideler leaves us with four take-home lessons on surveillance. One, that surveillance as a secret is illegitimate. You can have surveillance that affects your right, but you can't have it entirely in secret. Second, total surveillance is also illegitimate. Third, surveillance in its present form transcends the public-private divide. No longer just about the media corporations, government. They and we are all implicated and just to rile my friend Raman here, I will also bring in the example of Google and virtual Alabama where through spatial satellite mapping, every camera in the city is not even recording, but constantly monitoring. All CCTVs, home security plugged into something that Google has built for good purposes, ostensibly. What Daniel Keitset and David Gray, also the same sort of slide tellers about what I just outlined as Richard's position say is that I think he got that wrong, Richard asks us to focus on intellectual privacy, yet privacy is implicated in so many ways, but the real privacy that should get us worried when activities that allow us to be intellectual beings such as our reading, writing etc are threatened by intrusion, that's where surveillance is doing something wrong. The best way for checking such intrusions would be by litigants going to court because the government market complex is responsible for intrusions of your intellectual privacy. Daniel Keitsetren and David Gray say no – that is a slippery slope. If you as a judge are deciding on what are the intimate areas of married life that the state cannot intervene on, the judge will never be sure. It will always be your individual position. As Justice Scalia said "I can't really do this. Who am I to decide what intimate areas in married life are for a zillion different American couples." What I'll do is focus on the technology, the fancy instruments that allow one to see inside a house through say thermal heat patterns for example.

The last point, to some extent my speculative input on this, where can we place privacy in the Indian context and how can we begin to unpack this difficulty in understanding privacy. If we have to come up with a catch all, constitutional discussion which is more than *Kharak Singh, Govind, Rajgopal and even Naz Foundation*, if we have to have one position, the meta-key to privacy, what analysis would be useful.

Talking about an equation on his slide. (22.00-22.40)

Winners and losers of the ... projection in India. It is not just about the privacy bill, Article 19, 21, there have been 700 cases on this and my friend Prashant Iyengar who has done some good work on this said, "the 700 cases in RTI forums across the country on the battle between privacy and transparency." Who is winning and who is losing and what that means for the existence of a privacy right is something worth thinking about.

For those who have studied criminal law, you have the right to summon people, obtain saliva, spit, semen from a suspect, medical exam of a rape victim, procuring of documents all results in winners and losers depending on privacy in privileged communications, lawyers, doctors, the fact that the Evidence Act allows those to be used in court, communication between husband and wife lead to a particular balance in the privacy field. So, there's a host of areas in the Shah committee report too that privacy already exists in India and pans out differently for different people – immigration, murders, medical privacy, banks, insurance companies, cyber cafes etc.

As the students introducing the session did point out, the post office legislation started pretty okay, things went alright with the IT legislation and the proposed privacy legislation which achieved its first draft in 2010 continues with the weakened approach to privacy. Speculations for why that might be – I gave you the conspiracy theory- too much FICCI, but really too much EU level trade and too much pressure from the European data controller to comply or lose trade. Section 43 of the IT Act finally allows the possibility of damages for loss of privacy and the quick question I want you to think about is what it would mean for India, if Indians had privacy torts as actionable claims. If you could go to a tribunal that does not have a ten year waitlist and get money every time your privacy is violated. So I will just flag that thought. Privacy as an actionable tort has some basis in the US while there is a battle going on in Canada and Australia. I think Ontario has accepted it very recently.

We move to the final slide. My hypothesis for your consideration is that privacy rights as we all enjoy them are simultaneously manifest in two ways. One sense is a property based sense, i.e., a right that is subject to reasonable restrictions, proportionality, all of the stuff that we're trying to do in India today. The other sense, which only the German constitution has been courageous enough to take a position on is that privacy also exists as a guarantee inherent in us, which Madhvi I think was referring to in the morning. There's something about how we live together that makes privacy more than my individualistic right. It's the very basis for our existence as a social community. Going with the German constitutional

court, I would speculate that it is worthwhile to scour through the Indian constitution in search of a core area that cannot be violated. There's a particular term there, "inviolable private life sphere"; if that is possible in the Indian context, why not? Why stick to the weaker limit. So, that is my final provocative position and hopefully we can have some comments in the discussion.

(Session 2, Speaker 3)

Thank you. First, I want to differ with my colleague about Black Friday. Black Friday went through three rounds of censorship including receiving a certificate from the censor board. The principle then follows that once something is passed by the censor board, it should not be struck down by any other body.

Privacy Protection through Executive Action

In the past 2-3 years the Government, civil society and industry have taken efforts and developed a privacy protecting provision. It is unique in many ways – its a meeting of minds between people who disagree a lot. Therefore, there is a shared need between them, to create these laws, though perhaps for different motives.

But I want to differ over here; and talk about the ease with which one can develop privacy laws by executive action. However, before that, I want to place it in a context. In the 2000s, and even now, a context exists in the Supreme Court and higher judiciary. This context locates itself, first, in 2004 when the first UPA government came to power. It had a pronounced a leftist agenda that immediately clashed with the Supreme Court; that represented, as you all may know, certain middle class values. In 2004, the Supreme Court even struck down a statute deciding it was not 'efficacious;' thus introducing a 3rd ground to invalidate statutes. Every Friday, the Court had a routine hearing on the matter of forests in which the Central Government hired a person purely to challenge the jurisdiction of the Court. The SC said that the Union government did not have wide executive powers to run the country. They tried to strengthen this, but couldn't because of the jurisprudence that exists since the 1950s which argues to the contrary.

There are three kinds of executive power: First, the wide executive power originating from Article 73 that deals with the executive power of the Union. In the Punjab Exports Case it was held that even in the absence of legislation, the Central government can legislate on the matter. This was further affirmed in cases of 1982 and 1990. Even in the presence of controlling legislation, it could legislate as long as there is no conflict between the two legislations. Hence, if there is a surveillance law, the central government can still legislate upon it as long as it does not cause conflict between the two legislations. Therefore there are two wider executive powers here. Second, as we have all studied under administrative law; the legislature cannot delegate an essential legislative function or the right to frame policy. Later decisions have almost flattened it this principle, though. There exist two subordinate

powers – rule-making powers – and there more interesting one: orders. The distinction between them is important. Using this power, orders have been passed on issues relating to the partition, Tibet, Sri Lanka, Bangladesh, Burma, Uganda, Iran, Iraq, Ethiopia, Sudan, etc. It is a vast power.

In addition, there exists the directory power, which we are not presently concerned with. The point I am trying to make is that the constitution and case law on the matter allows the central government to cover surveillance in the absence, and even in the presence, of existing legislation, as long as it does not conflict directly with it.

Before we move on, it is important to note that there are large, important and pervasive government programs implemented solely through the executive. This is demonstrated by examples of the CMS and UID. The general rule of executive action and fundamental rights is that executive actions in furtherance of the wider power, not subordinate action, can do anything parliament can do but cannot violate Fundamental Rights. There is a host of case law. Under Article 21 stating that the right to privacy is located here. There has been some discourse under Article 19, but there is consensus that right to privacy exists as a furtherance of personal liberty under Article 21. The specific rule for this arises from Subbaro's dissent on privacy where he locates it under personal liberty. In the case of *Govind v State of Madhya Pradesh*, some rights can be seen as contributing to the right to privacy. The rule in Article 21, as opposed to the general rule is that any executive action invoking personal liberty requires the process of affirmation to be just and fair. Hence, wider executive power can be used to govern privacy, as long as it does not directly contradict any existing legislation.

Now, moving on to the issue of categorization – it is just not possible. However, regarding the general taxonomy on the subject, the 2011 Government Bill deals with four types of issues: data for commercial purposes, data for communication, visuals of grievance and spam (direct marketing). If you remove spam which is not harm, but nuisance, then three basic aspects arise:

- a) Collection of data by state or private persons;
- b) Inceptions; Voice and data communications;
- c) Surveillance;
- d) Collection of data by state or private persons.

With respect to collection of data, there is very little law on the limited or large scale collection of data for specific purposes. However, this is dated and is an area that is open to new legislations.

With respect to the second field, the only existing legislation is under S. 5(2) of the Telegraph Act and several Rules. The Central Government can legislate on this area, if it does not conflict with 5(2). There is no decided law for if 'wider executive power conflicts with subordinate executive power.' Further, there is no law that covers surveillance currently. To the limit or extent of the Telegraph Act, the government under its wider power can

legislate, as long as it does not directly conflict with existing legislation. If it does so, it will provide for two things. Firstly, it will provide an immediate regime for privacy protection. Second, it will hold the field till the Parliament takes over.

The last thought, is on legislative competence. The issue here lies under Articles 245-247 of the Constitution and between entries under List One and List Three. The Central Government is competent to frame laws on the same. The only problem is with respect to the fact, that public order and police are state subjects. Under List 2, State List matters exclusively of state power are present. However, even this distinction is not black and white. The courts have held that in cases of or elevated threat, like terrorism and surveillance, the Central Government may intervene. The only issue is whether privacy or matters of such are elevated threats, allowing Central Government to intervene.

This entire process would allow the Central Government to act without going to Parliament, dilute the bill and pass a document that would eventually be a compromised legislation. This is the limited argument I wanted to make on this subject, thank you.