Directorate of Distance Education
NALSAR University of Law, Hyderabad

Reading Material

Post-Graduate Diploma in Media Laws

1.1 Media, Ethics & Constitutional Law

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CHAPTER I

DISSEMINATING FACETS OF MEDIA

1.1. Understanding the Concept of Media

What is media? Media is generally the agency for inter-personal communication. There are two kinds of communications. Personal Communication Mechanisms is one kind of media, while the other is the print and electronic media. They also can be classified as traditional media and modern media.

1.1.1. Personal Media

The personal media or personal communication mechanisms are essential elements of mass media. These mechanisms include several aspects of social media. They are:

a) Advocacy

i) Traditional media forms like Burrakatha, Oggukatha, Street Plays,

ii) Drama, Public meetings, Seminars, Workshops, Surveys,

b) *Legislative Advocacy:* Asking MLAs, MPs to raise questions, discussions in their respective Legislative Floors, or asking members of Local bodies to raise these issues in their respective deliberative bodies, etc.)

c) *Social Justice Lobbying.* Coordinating with NGOs, Social Service Organizations, Government Agencies,

d) *Public Interest Litigation,* Lawyer Groups,

e) *Social Action,* Agitation, Demonstrations etc.

1.1.2. Mechanical Media

a) Print Media

i) Newspapers (News Releases, Press Conferences, Interviews, covering events, issues, probing into violations of Human Rights, taking the reporters to the scenes of violations, asking investigating officers to act on, mobilizing the letters to the editor, and writing columns to build public opinion against violations, News photos, etc.)

ii) Pamphlets, (booklets, brochures, letters, writing complaints to authorities, etc.)

iii) Books

iv) Photographs, Photo Exhibitions etc.

b) Electronic Media

i) Radio (Radio Talks, Interviews and Plays)

ii) Films and Documentaries

iii) Television (Talks, Interviews, Serials, News-bits, News Stories)

In more specific terms, the different media can be explained as follows:

1. Print: printed word, pictures etc., which appeal to the sense of sight. These include newspapers, periodicals, publications, advertisement etc.
2. Radio: sense of sound
3. Audio-visual: appeal to both visual and auditory sense.
   Eg. Television and Films, Video, Internet.
4. Traditional: Puppetry, folk dance, folklore, community singing, rural theatre.
5. Oral: public meetings, group discussions, individual contacts, etc.
6. Outdoor media- printed pamphlets, posters, hoarding, cinema slides, public address systems, advertisements on Buses, Trains, and other transport centres like bus stations and Railway stations or traffic centres.

1.1.3. The Purpose of Communication & Media

Media provides a vehicle for communication. Communication in the world of men and animals is an ever-continuing process on all the time. It is as necessary to human, animal and vegetable existence as life itself. Halt communication and the life processes wither and die. The need for communication is as basic as the hunger for food and drink. "Communication is the name we give", say Ashley Montagu and Floyd Matson,[1]"to the countless ways that humans have of keeping in touch- not just words and music, pictures and print, nods and becks, postures and plumages; to every move that catches someone's eye and every sound that resonates upon another's ear".

Interaction, interchange, a sharing and commonness are various phases of communication. The word communication is derived from the Latin "Communis", which means 'common'. Commonality is the basic idea. Denis McQuail says that the

[1] Ashley Montagu and Floyd Matson, *The Human Connection,* (McGraw Hill, 1979).

communication is not only a process, which increases commonality but also requires elements of commonality for it to occur at all[2]. According to him, “the human communication is the sending from one person to another of meaningful messages". Communication encompasses all forms of expression to serve the purpose of mutual understanding.

What is Communication? Peter Little explained the communication as the process by which information is transmitted between individuals and or organizations so that an understanding response results. The important elements of the communication can be explained in Professor Harold D. Lasswell's question, "Who says what in which channel, to whom with what effect". The elements are, the sendor, 'who', the message 'what', and the feedback 'effect'. All disturbances whether technical, physical, cultural, or psychological are clubbed under the comprehensive term 'noise'. They are also called 'barriers' to effective communication.[3] The mass media instruments are founded on the idea of mass production and mass distribution, which in turn results in 'mass media culture'.

The communication is a natural attribute of human beings. The need for communication is as strong and as basic as his/her need to eat, sleep and love. For a modern human being it would be impossible to function without the mass media of communication, as they become part of the fabric of modern civilization. Interaction is basic of communication. Interaction between living beings and environments in a sociological group is communication. Excommunication, cut off from communication, is a form of punishment. Deprivation of communication leads to innumerable problems. "The apparent effects of sensory deprivation and sensory overload leads to anxiety, apathy, impaired judgments, strange visions, and something akin to schizophrenia"[4].

Mass Communication*:* Mass communication is generally identified with the modern mass media like press, radio, television, cinema, video and now the internet. As generally interpreted the mass media are the press, cinema radio and television. But books, magazines, pamphlets and direct mail literature and posters also need to be included under the label as their reach extends to vast heterogeneous masses. They are media, not communication itself. They are conduit for communication. Media is vehicle for communication, which is in turn vehicle for emanating thoughts and responses and reactions to them. As Charles Wright said in **Mass Communication: A Sociological Perspective,**1959. Indeed, the term mass communication ought to refer to the totality of communication which takes within its compass not only by the electronic media, but also the spoken word, song, drama, dance, painting, sculpture and architecture. Traditional community media like the Keerthana, and by the whole treasure-house of folk song, folk-dance, and folk theatre, puppet show, Surabhi

[2] Denis McQuail, *Communication*, Longman, 1975
[3] Keval J. Kumar, Mass Communications in India, p 7
[4] Clark and Blankenburg, *You and Media*, 1973, p42

theatre, Harikatha, Burra katha, Yakshaganam, any public meeting, religious fare like Ganapathi Navaratri or Devi Navaratri, are organs of the mass media.

With the invention of printing press, the multiplication process became easy and fast. Radio came to be the most effective and far-reaching. Cinema is the most impressive medium. The obvious advantage of the modern electronic media is that they are 'the great multipliers'. Mass Communication has now become an independent academic discipline and can be considered as an important aspect of modern man's study of his civilization. This discipline has a bearing on sociology, anthropology, economics, politics, literature, the performing arts and the electronic media. The electronic media expanded the reach to millions of people in the every nook and corner of the world. The 'mass', in mass media has kept stretching its meaning with increasing reach of each modern inventive tools of media like television and internet.

Functions of Mass Media: Modern mass media serve several functions. According to Harold Lasswell, there are three major functions-surveillance of the environment, interpretation of the information and prescription for preservations and the transmission of heritage. Surveillance refers to information or 'news' about happenings in society. The mass media ought to help people to correlate their response to the challenges and opportunities which appear on the horizon and to reach consensus on social actions[5]. The mass media helps people to keep their culture and heritage alive and to transmit it to others. It's another important function is entertainment. Another equally vital function is advertising, that is it helps in selling the goods and services. In fact, this commercial function helps the mass media instruments to survive and do business.

It is the vehicle of social and religious reforms and of political independence. It incidentally purveys news and views. It has a major role as a forum for ventilating the views and grievances of the people, as a monitor of the performance of those in the authority and as a participant in the process of nation building. Justice P. B. Sawant, former chairman of Press Council of India, in his book Mass Media in Contemporary Society, at page 2, said: "This relationship between the Press and the people has yet another dimension. Since direct democracy is neither feasible nor practicable except in small habitats like villages, and for limited purposes, the deficiencies and the lacunae of the representative democracy need to be made good. The voice of the un-represented sections of the society, their problems grievances hopes and aspirations have to be heard and their participation in the governance has to be ensured. This is the social purpose of the media. Traditionally this is termed as the social responsibility theory of the media.

[5] Rivers and Schromm, p 15

1.2. History of Media

The print media is the first technological media, the history of which can be traced to the invention of the printing press. The newspaper development took place in three phases. First, the sporadic forerunners, gradually moving toward regular publication, second, more or less regular journals subjected to regulations like censorship, the third phase in which attempts to control continued through taxation and prosecution for defamation, though direct censorship was avoided. After these three phases one can see some degree of independence allowed for print medium.

The Encyclopedia Britannica gave a graphic account of the history of newspapers in Europe. The newsletter had been the conventional form of correspondence between officials and friends in Roman times. During the late middle ages, newsletters between the trading families began and they crossed the frontiers also. The Fuggers, who were the owners of a financial house in Augsburg, a German City, were engaged in writing regular newsletters with commercial information on the availability and prices of goods and services. These letters were being circulated among the trading community. They also used to include the political news. The commercial newsletter thus started conveying the serious news which formed the beginning of the concept of newspaper in shape of a newsletter. First in 1609 Johann Carolus's newsletter was accorded the status of newspaper. It is called the Relation of Strasbourg. It was first printed in 1609. Mr Heinrich Julius, duke of Brunswick-Wolfenbuttel found a rival publication, Avisa Relation Oder Zeitung (Zeitung means newspaper in German) in the same year. There was a sudden demand for newspapers at the start of the 17th Century. Dutch newspapers with their advantageous geographical and traditional position pioneered the international coverage of news through their "Leorantos" or "current news". Similar rudimentary newspapers soon appeared in other European Countries: Switzerland (1610), the Habsburg domains in Central Europe (1620), England (1621), France (1631) Denmark (1634) Italy (1636), Sweden (1645), and Poland (1661). English and French Translations of Dutch Corantos were also available. In Paris an official newspaper “La Gazette”, replaced the earlier publication Theophraste Renaudot. “La Gazette” de France continued until 1917. The first French daily Le Journal de Paris started in 1777. During revolution of 1789 there was a temporary upsurge in newspaper publication, with 350 papers being issued in Paris alone. The return to monarchy brought another clamp down. Napolean I had his own official organ “La Moniteur Universal” in 1789, which lasted till 1869.

The newspaper development was hampered in Germany due to thirty years of war from 1618 to 1648. There used to be censorship even in peace time. Parochialism, restrictions on trade, shortage of paper inhibited the growth of the newspapers in Germany. Important regional newspapers started appearing in 1689, 1705 and 1714. The oldest continuously published weekly paper is the official Swedish Gazette in Sweden. Sweden was the first country to introduce the law guaranteeing freedom of the press in 1766. But the newspaper

publishers were constantly subjected to state authority till 19th century when the concept of independent press gained strong ground. In Austria, the Wiener Zeitung was started in 1703 and it is considered as the oldest surviving daily in the world.

In Britain the news coverage was initially restricted to translation of Dutch coranto called *corante*, or *newes* from Italy, Germany, Hungarie, Spaine and France dated Sept 24, 1621. Nathaniel Butter, the printer of a Dutch Coranto was printing the translated versions of newspaper. Along with him, two London stationers, Nicholas Bourne and Thomas Archer also published a stream of *corantos and avisos*, including *Weekly Newes* beginning in 1622. There was a heavy regulation of newspapers in Britain. A publisher has to obtain a licence, there used to be regular censorship of reporting and Star Chamber decree was in force from 1632 to 1638 banning the publication of accounts of the Thirty Years' War. This Star Chamber was abolished in 1641. But the spell of freedom of publication lasted only till 1649 when Commonwealth was established bringing in the official control of the press again. Between 1640 and 1660 almost 300 distinct newspapers were published as the civil wars acted as stimulus to start the newspapers. The newspapers appeared in sheets shedding their earlier book form and the headlines filled the title page. *Truths from York, News from Hull, Intelligencers, Scouts, Spys, Posts* were some of the prominent names of the newspapers. *Mercurius Academicus and Mercurius Britannicus* were some other popular titles. There was a strict control over the press during the Parliamentarian rule, but when the was monarchy restored also the control was absolute. Licensing Act was vehemently used during 1662-94. However, the Revolution 1688 provided a little freedom for publishing newspapers. Some provincial newspapers were also brought out. Worcester Post Man 1690, Edinburgh Gazette in 1699 (Scotland) and Lloyd's News (1696) from Edward Lloyd's coffee house, which had become a centre of marine insurance. Lloyd's List and Shipping News were giving the financial news of London. By 18th century the newspaper took a mature shape in England. Firstly it was single sheet Daily Courant (1702-35), then it was triweekly Review (1704-13) to improve the contents of the newspaper. Review introduced 'editorial', and provided place for views of writers and current political topics. *Defoe*, the editor of Review was arrested for publishing a pamphlet. John Milton edited the *Mercurium Politicus*. The Spectator was another prominent newspaper Sir Richard Steele and Joseph Addison influenced the content of the contemporary newspapers. Ultimately the newspaper became part and parcel of social and literary life in London.

The *Daily Advertiser* (1730-1807) represented a news breed of English newspapers with a specific provision for advertisements side well by side the news articles of political, commercial and social character. In 1771 the parliamentary proceedings were permitted to be reported, which gave a boost to political reporting in England. When illicit accounts of debates in the House had appeared in the monthly *Political state of Great Britain (1711-40)* the authorities tried to stop the press from distorting the parliamentary proceedings and when all those efforts failed the government felt it was necessary to throw open the proceedings for

regular reporting in the newspapers. The readers were demanding to have an independent view point of the events and policies, which they could obtain as the newspaper grew in its content and quality. Eminent newspapers like Morning Post 1772 and The Times (from 1788) which started as the Daily Universal Register in 1785 and The Observer (1791). While the Morning Post merged with Daily Telegraph, other newspapers are still being published.

The regulation of the press was continuing in one way or the other. Frequently the press and journalists were made targets of prosecution for libel. In 1810 the famous radical political essayist William Cobbett wrote vehemently against the practice of flogging in the army, for which he was imprisoned and fined. All these incidents made the principle of free press an essential element of democracy at least in peacetime conditions, and readers are benefited with the independent or impartial opinions emanating from the press.

1.3. Theories of Mass Media

The link between the political society and mass media was first explained by the authors Siebert, Peterson, and Schramm in their Four Theories of the Press in 1963. It established four normative theories to illustrate the position of the press in the contemporary political context. Frederick S. Siebert has rightly explained that 'the press' means all the media of mass communication including television, radio and newspaper. His four theories are the authoritarian, the libertarian, the Soviet and the Social Responsibility theories. The media all over the world accepted this classification as appropriate categorisation of different media systems. It was also confirmed by several authors like Shirley Biagi, Journalist Ralph Lowenstein and John Merrill. However, Terje Steinulfsson Skjerdal, Northwestern College, St Paul, Mennosota, in his critical essay on these four theories said that "a critical evaluation shows that Siebert's theories, which seek to explain the relationship between mass media and the government, are outdated and too simplistic to be useful in today's media research.

1.3.1. The Authoritarian Theory

According to Siebert, the authoritarian state system requires direct governmental control of the mass media. This system is especially easy to operate in pre-democratic societies where the government consists of a very limited and small ruling class. The media in an authoritarian system is not allowed to print or broadcast anything, which could undermine, the established authority, and any offense to the existing political values is avoided. The authoritarian government may go to the extent of punishing anyone who questions the state's ideology. The fundamental assumption of the authoritarian system is that the government is infallible. Media professionals are therefore not allowed to have any independence within the media organization. Also foreign media are subordinate to the established authority, in that all imported media products are controlled by the state.

1.3.2. The Libertarian Theory

This theory is also called as free press theory. In contrast to the authoritarian theory, the libertarian view rests on the idea that the individual should be free to publish whatever he or she likes. Its history traces back to the 17th Century's thinker John Milton, who asserted that human beings inevitably choose the best ideas and values. In the libertarian system, attacks on the governments are fully accepted and even encouraged. Moreover, there should be no restrictions on import or export of media messages across the national frontiers. Moreover, journalists and media professionals ought to have full autonomy within the media organization. It is very difficult to cite the examples to this theory. Though the scope of freedom of press is very wide in US, there are still various authoritarian tendencies in the political set up and organizational network also.

1.3.3. The Soviet Theory

This theory is basically the thought prevalent in Socialist countries linked with communist ideology. Seibert looked to the origins of the socialistic thought in 1917 Russian Revolution based on the concepts evolved by Marx and Engels. There is no private ownership of media organization under this system. The media organization has to serve the interests of the working class. The state would own the organization and supervise its function strictly under its own regulatory guidelines. Soviet theory has an apparent similarity with the concept of authoritarian theory, which also believes that the media organizations should be subordinate to the state government. But there are significant differences between two theories. The element of self regulatory mechanism and character of responsibility makes the Soviet model different from authoritarian theory. The Soviet press is supposed to provide a complete and objective view of the world according to Marxist- Leninist principles. After the fall of the Soviet Union, we can find the best example of this model in China, where Television, Radio and newspapers are under total control of the communist regime. After the fall of Soviet Russia, Russia tried to retain a model which has close resemblance to social responsibility theory.

1.3.4. The Social Responsibility Theory

Media has certain obligations to the society. This is based on the American initiative in the late forties. The Commission on Freedom of the Press provided a model in which the media has to perform some specific obligations towards society. These obligations are informativeness, truth, accuracy, objectivity and balance. Media being a pluralized set up it reflected the diversity in society and it has access to various points of view, and hence it has the social responsibility.

These four theories do not reflect the systems in which they work. One cannot even assume that so and so model would be a better model for a particular system of political

thought. In the same set up one may find all the four theories working at different levels and different spheres. Or there may be a different interest that governs the functioning of the press. The press survives and sustains not because they follow one of the four theories, but because they function in an acceptable way. Some of media organisations may not stand with the changing needs and moods of the general public. A commercially successful newspaper or television organisation may not understand or follow the soviet model or social responsibility theory. Based on the functioning of the media in the contemporaneous society, the above theories did emerge. Media cannot function in a vacuum. It has connectivity with the political system and people subjected to it. Mass communication channels influenced the political environment. Thus the system of communication and the audience, which the media addresses, are very important aspects that help evolving any theory regarding the function, purpose and goals of the media. Media and society are interdependent and mutually influential. Media shapes the society and gets shaped by society. In a democratic society, media has a definite prime objective to inform the people and act as an opinion leader. Social Responsibility theory appears to be more relevant and more practical in democratic world.

1.3.5. Propaganda Model

Strictly speaking it is not a theory as such to describe functioning of the media. But it refers to one major aberration of the media. Propaganda model is expounded in Manufacturing consent by Noam Chomsky and Edward Herman. This model postulates a set of five filters that act to screen the news and other material disseminated by the media. These filters result in a media that reflects elite viewpoints and interests and mobilizes support for the special interests that dominate the state and private activity.[6]

These filters are:

1. the size, concentrated ownership, owners wealth, and profit orientation of the dominant mass-media firms;
2. advertising as the primary income source of the mass media;
3. the reliance of the media on information provided by government, business, and experts funded and approved by these primary sources and agents of power;
4. 'flak' (negative responses to a media report) as means of disciplining the media; and
5. 'anticommunism' as a national religion and control mechanism.

The raw material of news must pass through successive filters leaving only the cleansed residue fit to print according to Chomsky and Hermanmaintain. The filters fix the premises of discourse and interpretation, and the definition of what is newsworthy in the first place,

[6] Noam Chomsky and Edward Herman, Manufacturing Consent, p xi

and they explain the basis and operations of what amounts to propaganda campaigns.[7] The authors said "we do not use any kind of 'conspiracy' hypothesis to explain mass media performance. In fact our treatment is much closer to a 'free market' analysis, with the results largely an outcome of the working of market forces."

Chomsky and Herman say "censorship is largely self-censorship, by reporters and commentators who adjust to the realities of source and media organisational requirements, and by people at higher levels within media organisations who are chosen to implement, and have usually internalised, the constraints imposed by proprietary and other market and governmental centers of power.[8]

1.4. Evolution of Media in India

a. Personal Communications: Traditionally, India has many folk forms of communicating with people in rural areas. Harikatha is originally a religious media form through which the stories of Lord Vishnu were propagated. It is a collective form of music, dance, speech, and storytelling with comic interludes. It has tremendous effect in communicating the message straight into the hearts of the people. Over period of time, stories of Shiva and Shakthi and other Gods were being told in the form of Harikatha. Then, socially relevant messages were passed on through this medium. In a remote village where there are neither roads nor any other forms of communications like cable TV, the Harikatha continues to be only medium. The government controlled media like radio and TV even today use Harikatha through broadcasting or telecasting. The Burra Katha is yet another form of media for rural people. While principle person tells a historical story playing Tanpura, two assistants will support him with rhythm on their BURRAs, (a drum like sound making instrument) Oggukatha is a similar form popularly used in Telangana Area. Mixing a message with folk songs and singing them in a villager's attire is yet another popular method, which was brought into effective use by balladeers like Gaddar.

Modern Methods of interpersonal Media Communication include seminars, dramas, public meetings and workshops etc. These are effective media methods to address small and medium gatherings, which can be used as grounds for advocating the Human Rights and building public opinion in favour of strict enforcement of rights.

b. Public Advocacy: It is a mode of social action. To effect or influence of public policy, people have to question and shift existing unequal power relations in favour of the poor and the voiceless. It has to seek to make governance accountable and transparent. The advocacy has to resist unequal power relations at every level from personal to public and family to

[7] ibid, page 2
[8] ibid, page xii

governance. John Samuel, in his article Public Advocacy in India[9], classified the organized socio-political movements for public policy changes into five phases.

1. The Socio Religious reform movement from 1800 to 1857
2. Nationalist Movement for Indian Independence from 1857 to 1920s
3. A mass based political movement for freedom from 1920 to 1950
4. The period from 1950s to the emergency period of 1977.
5. The post-emergency period from 1977 onwards.

Each phase is marked by a substantial change in the character of India's political system and institutional framework. Raja Ram Mohan Roy, Bal Gangadhar Tilak, Mahatma Gandhi and Ambedkar led the social action groups to effect very significant policy changes and reshaped the nation. Gandhi is one of the best inter personal communication specialist the world has ever produced. His life, works, speeches and unmatched acceptability are the indicators of his communicative skills. He communicated with people through his moral character, attire, body language, bhajans, speech and even silence. His presence, itself was a communication. His well thought over writings and sayings remain as commandments to the humanity forever. Mortal death could not stop Gandhi from communicating to generations which he ever would have physically seen. Gandhi is readable, reachable and acceptable too.

People fought against several social issues. Some of them include: Environmental degradation, Rights of Dalits and tribals, Women's rights, Civil Rights, Nuclear Installations, Land alienation of tribals, Child labour, Drug policies and forest policies.

c. Legislative Advocacy: The space for legislative advocacy is the Parliament, Legislative Assembly and thousands of deliberative fora of local bodies. It attracts media's attention and people's concern. Whether it is a simple question raised during question hour kicking up heated discussions over supplimentaries and treasury bench replies, or zero hours issues and debates over the general administration demand notes, it is a fora to build the public opinion over the issues of violation of rights.

Criticism from opposition, dissent within ruling party and public gaze of happenings between the treasury and opposition benches under the supervision of the speaker keeps the government under continuous check and prevents them from taking oppressive measures and unilateral decisions.

d. Social Justice Lobbying: Social justice lobbying is yet another powerful opinion builder even in absence of sufficient financial sources. Crafting a successful social and

[9] John Samuel, Executive Director of the National Centre for Advocacy Studies (NCAS), Public Advocacy in India, Building Civil Society, ICSC, Bangalore, (2000) p 93

economic justice campaign is a work of art (Using the media to advance your issue, prepared by Advocacy Institute, Washington). Auditing by people, criticism from objective bystanders who do not belong to any political thought and party creates awareness about the governance indulging in perpetrating injustice. Social Justice Lobbying will act as motivators, prodders and catalysts. As any political party has to come back to people at least when ballot is needed, the lobbyists can build opinions at the grassroot levels. Opinion leaders should build a lobby around a legislator or any other elected official.

e. Print Media Lobbying: Using Print and Electronic Media to lobby for social justice and human rights is another important job of every active citizen in democracy. The press acts as a multifaceted institution with multiple activities. It takes the message to the ruled and rulers simultaneously and builds the opinion in favour of an issue, which definitely threatens the establishment from violating rights. By supplying a fact sheet, background paper, meeting a reporter or bringing him to the scene of violations, giving him an interview or making him to interview the aggrieved persons, the issue can be brought into notice of general public. Writing articles and addressing letters to the editor are other methods to use the columns of newspaper. Similarly the time slots in Radio and TV could be used for focussing issues of violations and social problems.

Thus the evolution of media from traditional forms of inter personal communication to the present day Trans-national medium like internet and electronic multiple mass media is intertwined with the history of community relations, communications and technological developments. The purpose of multiple media is significant in free and democratic societies to equip the people to participate in their own governing process.

CHAPTER II

MEDIA AND ETHICS

2.1. Era of Yellow Journalism, Tabloids and Magazines

Then it was the technological advancement that helped the journalists and publishers to bring out highly circulated newspapers and reaching the people with increased urbanization. Many newspapers emerged on the market. The mass journalism began, with massive technological support, and increased readers. However, the unprecedented circulation war resulted in the era of yellow journalism. Oversized headlines screamed, Pictures blown up. Fraudulent news filled the columns. Campaign became order of the day. As the life in America changed fast after the World War I with speeding automobiles, faster trains, airplanes brought the distant people nearer and newspapers have grown and circulation with sensationalism continued to be the staple material of news columns. This situation provided a set for tabloid to appear. Everything about the personal life of public figures or some-times any sensational private lives was the main content of the tabloids, which were smaller in size, using the colours and pictures profusely and writing more about sex and violence. This period also saw emergence of magazines for different audience, with low price, popular appeal and detailed analysis of events for reading in leisure.

2.2 The Scripps Newspapers Chain

As the independent United States of America progressed with industrialization, the newspapers responded to the changing times and challenges. The newspapers shaped public opinion and shaped the course of the great crusade in literature and political field. While Pulitzer brought forward the independent editorial policy attacking every political party and projecting only those thoughts which were in tune with liberty and democracy, Hearst attacked the criminal trusts like ice trust, the coal trust the gas trust and crooked political bosses to gain the support of and popularity among the working class. Detroit News started by Scripps as small business firm developed into a very big leader of the chain, as McRae came into partnership in 1889, and included George Scripps in 1895 to finally become Scripps McRae League of Newspapers. They have chosen industrial cities, studied the potential for newspapers and appointed young and ambitious editors and enthusiastic business managers. It was proved to be successful formula expansion of the chain of newspapers. The Scripps brought in the word economy without wasting space for big headlines and enlarged photographs, and provided ample scope for more news, information, editorial comment and other essential features.

2.3. Paid News: New Unethical Practice in Media

'Facts are sacred and comment is free' is the basic norm of journalism. This is reinterpreted as 'news is sacred and views are free'. But the situation is changed to: 'false news is for a price and the views are free'. The media, precisely regional media in Andhra Pradesh was involved in most unethical 'news selling' activity for exchange of unaccounted money, with no receipt, from contesting candidates irrespective of newspaper's known lenience towards a political party. It was not even news selling but misrepresentation to voters for consideration. The Journalists organizations criticized this as blatant abuse of freedom of speech and expression to camouflage advertisement as news and in the process they were violating the norms under Indian Penal Code, Income Tax Act, and Representation of People Act, 1951.

Selling news space by TV Channels and columns by the print media, especially some of the Telugu News Dailies breach all ethical norms such as 'an Advertisement shall be distinguished from the news item, or news programme, and accompanied by the indication that it is an advertisement and the amount charged by media'.

The Media, both the print and electronic, has freedom of speech and expression as part of the constitutionally guaranteed fundamental right. The point of emphasis here is that the media persons are not the special category to have this freedom exclusively. This is to say that the media's freedom has to sub-serve the interests of the people's expression right through which the governing process begins.

The adult franchise to the all people of India who completed 18 years of age should be realized only through their enlightenment and facilitation of exercise of such right. This right is primary in building the people's government to follow the rule of law. It is the responsibility of state machinery to provide a free atmosphere to vote in the general elections. It is an electoral corrupt practice and electoral offence to cause undue influence, make false statement, to interfere with the free exercise of the right to vote, with prescribed penal consequences. The media which is hailed as fourth estate is expected to give unbiased and objective reports informing and enlightening the people to elect their own government.

Instead of performing that role in unbiased and objective manner, the regional Telugu Media, which is more influential and far-reaching, was selling the news space as advertisement. That ideal of objectivity and unbiased stand of the media has been weakening gradually.

The Supreme Court of India has stuck down the statutes and executive orders of the government when the State tried to introduce controls on the contents of newspapers, and restrict the space allotted to advertisement saying at least 60 per cent should be of news. It was considered as state interference with the autonomy of newspaper to decide how to fill

their pages, which was violation of the freedom of press guaranteed by the Constitution. Thus, generally, the Newspapers or the News channels can decide its contents including the following

1. News Items: News items present the reports of the current events and happenings which include campaign.
2. Views: Editorial, articles, opinions, press conferences, and columns from eminent writers come under this category.
3. Advertisements: Advertisement is in fact selling the space of the newspaper for commercial promotion of the products and services offered by different companies.

2.3.1. Missing Distinction between News and Advertisement: The basic norm that there should be strict separation between news and views has been violated day in and day out. The thin line between 'news' and 'advertisement' was blurring till yesterday, has been totally disintegrated today. News is supposed to be regarded as factual reporting of events, and generally the newspaper would not be liable for the truthfulness of the contents of the advertisement unless they contain defamatory or obscene material.

Newspapers cannot survive without advertisements and using a part of their space for commercial selling is not wrong at all. There is nothing unethical in political parties purchasing the space and appeal for votes through that space by promoting their merits for gaining publicity. Some creative advertisers design the copy of advertisement in the shape of a news item to promote their product. It merges with the contents of news page confusing readers as to distinguish the news from the advertisement. The newspapers or news channels are expected to mention that a particular piece is an advertisement.

These 'paid articles' come with extra topping as they sing praise of the particular candidate and project him or her as the sole winner. While in some cases the amount collected is the same as advertisement tariff calculated per column centimeter, there is also a package deal wherein a lump sum is collected for continuous publicity in news columns or space for a particular period during campaign. Campaign coordinators and political leaders felt "Direct ads were better. Now we are forced to spend though we are not keen on it. Newspapers may resort to negative publicity if we don't play along."

This unethical practice of taking money for publishing positive stories of candidate's prospects was earlier limited to staffers of newspapers in the districts. The deal was between an individual journalist and the candidate. This time round however, the managements decided that they too wanted a piece of the cake and so every single Telugu daily newspaper formalized this underhand method of making money and cheating their readers. The rate was the same as the advertisement tariff of the newspaper for per column centimetre.

The Electronic Media too adopted similar methods to promote candidates through paid coverage in their news channels, news programmes and live coverage.

There is a lot of criticism in different circles including Parliament demanding appropriate measures to curb this unethical practice of taking money for writing favourable news stories. Press Council of India has denounced this practice and submitted a report to Government of India in August 2010 recommending measures to prevent this practice.

2.4. Fake News:

A new unethical practice that is storming the social media is the 'fake news'. Fake news is news, stories or hoaxes created to deliberately misinform or deceive readers. Usually, these stories are created to influence people's views, push a political agenda or cause confusion and can often be a profitable business for online publishers. Fake news stories can deceive people by looking like trusted websites or using similar names and web addresses to reputable news organisations. According to Martina Chapman (Media Literacy Expert), there are three elements to fake news; 'Mistrust, misinformation and manipulation'.

This is worse than yellow journalism, paid news or any other scandalous communication. Fake news is also called neologism[10] or fabricated news. The fake news is appearing as traditional news, in social media or websites created to spread the wrongful news. Fake news is one which has no basis in fact but is deliberately presented as being factually accurate. It is junk news or pseudo-news, a new type of yellow or propaganda journalism. It is deliberate disinformation or hoaxes spread via print or broadcast or online social media. The reporters pay sources for stories and circulate false information. It is a new method of check-book journalism. The new media i.e., the platform of internet is being profusely used for spreading fake news or yellow journalism. Such news though misinformation, gets huge circulation through websites or social media applications and finds its way into the mainstream media also[11]. Marju Himma-Kadakas, in his article 'Alternative facts and fake news entering journalistic content production cycle', says 'processing information into journalistic content in contemporary news media creates a favorable environment for the distribution of misleading and fake information'.

2.4.1. Types of Fake News

There are various kinds of fake news, one need to be aware of varieties of fake news which one may come across. According to a website[12], the kinds of fake news include,

- Clickbait
- Propaganda

[10] Tufekci, Zeynep (January 16, 2018). "It's the (Democracy-Poisoning) Golden Age of Free Speech". *Wired*.
[11] https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/5469
[12] https://www.webwise.ie/teachers/what-is-fake-news/

- Satire/Parody
- Sloppy Journalism
- Biased or slanted news
- Misleading headings

2.4.1.1. Click bait

The stories deliberately fabricated to gain more visitors to website and more advertisement revenue. Clickbait stories are generally having sensational headlines to grab the attention and guide the visitors to click through to their website. Truth and accuracy are never bothered about.

2.4.1.2. Propaganda

Political parties and their supporting newspapers use propaganda technic of fake news profusely to mislead voters, especially during elections or promote a biased point of view during non-election times. It is used to create emotions in support of an agenda or program or campaign.

2.4.1.3. Satire or parody

Lots of websites and media organizations use satire or parody to keep the popularity or readership and criticise particular policies. It is not as bad as other forms of fake news.

2.4.1.4. Sloppy Journalism

The reporters of biased media pick certain historic incidents to mix it with interpretational aspects and make it to appear as historic facts, which will harm the rival political party or favour one party. This is regular kind of fake news the media and political parties are using in India. For example, during the U.S. elections, fashion retailer Urban Outfitters published an Election Day Guide, the guide contained incorrect information telling voters that they needed a 'voter registration card'. This is not required by any state in the U.S. for voting.

2.4.1.5. Misleading Headings

Though content is not entirely false, the headlines are deliberately drafted to mislead, or distort a view, and sensationalise. The media persons dish out sensational headline and lead the readers to full story which may not contain the relevant details to suit the headline. Most of the viewers who do not click further to know details believe the headline and carry the opinion deliberately being spread. These get easily circulated and multiply with 'forward's and 'sharing's on various internet platforms like WhatsApp and Facebook etc.

2.4.1.6. Biased or slanted news

The media organizations behave like affiliated organs of a political party. They oppose everything proposed by the rival party and conduct big debates during prime time to promote

their financing parties or companies. The multinational companies and big business houses are allegedly involved in promoting a party, or a person within a party as Prime Ministerial candidate, bring out scandals from the rival party governments, highlight even small wrongs and hide the big scams of their party etc. Every media organization in 2010s is doubted as mouth piece of some or the other party or group. All viewers may not know the slant of a media organization. Paid news is an isolated unethical act, while biased or slanted newsmakers are continuously paid to propagate fake news as factual news and slanted views as correct views. They shout out the other points of view and promote unhesitatingly and sometimes they do not feel ashamed of for such partial views. Pre-prompted interviews, questions prepared by the leader's men to be put by the journalist, prepared answers to questions revealed in advance are some practices which brought credibility of the Indian Media to an unprecedented low in recent times. Now it is difficult to believe any news presented by any channel or newspaper. It could be mix of all six kinds of fake news that a reader/viewer is confronted with now-a-days.

The technology of internet and ever-growing power of social media made it very easy for anyone to publish any content on a website, blog or social media profile and potentially reach large audiences in seconds. The social media sites are carrying selected bits of TV channels, newspapers clips and audio clips also. Which means the reader/viewer reaches all the TV channels, newspapers and radios through social media, with addition of his own views and comments. The parties and companies are appointing several content creators/publishers to make use of these technological platforms to promote their interests.
Fake news, thus became a profitable business, generating huge revenues from political parties, advertising revenue for publishers who create and publish stories that go viral etc. More subscriptions to a YouTube channel mean good ad revenue, and more clicks for a story gets more money for online publishers through advertising revenue. And for others it is easy to share the content on this ideal communicative platform.

Political parties are creating millions of WhatsApp groups, Facebook accounts, pages, twitter users and several other groups to propagate fake news and biased views to confuse voters, mislead and divert them from logical thinking and making them to believe fake news as gospel truth.

2.4.2. Fake News & the Filter Bubble

In a recent article on media literacy, Hugh Linehan noted; "Media is no longer passively consumed – it's created, shared, liked, commented on, attacked and defended in all sorts of different ways by hundreds of millions of people. And the algorithms used by the most powerful tech companies – Google and Facebook in particular – are brilliantly designed to personalise and tailor these services to each user's profile.[13]"

[13] https://www.webwise.ie/teachers/what-is-fake-news/

Another term came into existence; 'filter bubble'. When netizen goes online or login to a social network they are generally presented with news, articles and content based on that netizen's own searches online. This type of content tends to reflect the likes, views and beliefs of net surfers and therefore isolating them from differing views and opinions. This activity is called a filter bubble.

2.4.3. How to check-out fake news?

Major social media platforms - Google and Facebook initiated a few measures to tackle fake news: they brought in certain introduction of reporting and flagging tools. Certain Media organisations like the BBC and Channel 4, India Today and several others have also established fact checking sites. The citizens should become vibrant netizens with abundant digital media knowledge and skills to critically evaluate information that is pouring in from various web-sources and recognize whether it is fake or genuine. The young viewers should not believe the information found on their smart phone or forwarded by others without critical thinking and fact-checking. The only way of preventing fake news is to thoroughly check the source, suspect the content, examine the evidence, probe genuineness, rule out fake images and see whether it sounds right.

Some of the fact checking sites are: Snopes: snopes.com/, PolitiFact: politifact.com, Fact Check: factcheck.org/, BBC Reality Check: bbc.com/news/reality-check, Channel 4 Fact Check: channel4.com/news/factcheck, Reverse image search from Google: google.com/reverse-image-search.

2.4.4. Example of Fake News

Here is a latest example of 'fake news' and how the fact-check brought out the 'facts'. Mahua Moitra, a newly elected MP from Bengal, on June 25, 2019 gave her maiden Parliamentary speech, listing down various "signs of early fascism" in India. To make her point, she borrowed 7 signs out of a list of "early warning signs of fascism" mentioned in a poster at the US Holocaust Memorial. She has shot into fame with this fiery speech. Media described that a new star was born. Her speech went viral on social media[14]. The ruling coalition was under severe attack from her and some media organizations praising her. Then immediately certain vested interest groups stepped in and created counter news reports accusing her of plagiarizing. Then the boomlive.com investigated [15] and found that Moitra had aptly given credits for the points she claimed to have borrowed from a signboard at the US Holocaust Memorial, to make her speech, and that the allegations of plagiarism were unfounded. The website reported that this was also confirmed by Martin Longman, the writer of the Washington Monthly article that Moitra was accused of plagiarising, who denied that his work was plagiarised by Moitra in her speech. On Twitter, Martin Longman wrote: "I'm

[14] https://www.huffingtonpost.in/entry/mahua-moitra-speech-wins-twitter_in_5d12eb38e4b0a394186a8be0

[15] https://www.boomlive.in/fact-checking-zee-news-fact-check-accusing-tmc-mp-mahua-moitra-of-plagiarism/

internet famous in India because a politician is being falsely accused of plagiarizing me. It's kind of funny, but right-wing assholes seem to be similar in every country". (2:33 AM - Jul 3, 2019)

The Experiential Dr @Experiential_Dr Replying to @BooMan23 wrote "I hope @sardesairajdeep @sagarikaghose @bainjal reach out to you and are able to transmit to a larger audience that Mahua Moitra hasn't "plagiarized" your article in her speech. Honestly, this whole circus has only proved her point about media and intellectual suppression". Martin wrote again: "Martin Longman @BooMan23…Whether they reach out to me or not, this is ridiculous. She didn't steal or plagiarize anything". The Zee news channel has cropped out the part where she is seen giving credits for the ideas incorporated in her speech to the memorial poster and posted it on website.

2.5. Citizen Reporters & Issues of Social Media

Information Communication Technology has converted citizens into journalists. The users of internet can create their own content and communicate. The Citizen journalism involves individuals, who are not connected with any media professional organizations but remain ordinary consumers of journalism i.e., either viewers or readers (listeners too), with platform and facility to generate and disseminate their own news content. The Citizens collect, report, analyze, and disseminate news and information, just as professional journalists would do. This is also called as user-generated content. The citizens can become amateur journalists. They can podcast editorials,[16] report about an assembly meeting, or any event that they come across on Facebook or blog or a website. Most of the videos that went viral on WhatsApp and facebook are produced by citizen journalists. They can act like journalists to produce news item, article, video, audio, text or picture and use social media to disseminate. Even if the mainstream media ignores certain events, or problems, the citizen journalist is free to bring them out. There are many instances where the mainstream media picked up sensational news events from the social media where citizen reporter generated a very useful content.

2.5.1. News revolutionised

News reporting is no longer a monopoly of the professional reporters or newspapers/channels. Anybody can generate or report. Citizen journalism is thus a cause of a revolution that made news-gathering a real democratic process. But one cannot say that citizen journalism is a threat to professional or traditional journalism. Still the printed word and video evidence carry more credibility than a social media posting.

Technological platform of social media facilitated revolutionizing the news. It is not reporters but the citizens who broke the breaking stories or gave eye-witness videos, or first-hand accounts, with authentic real-time information, with modern gadgets. Citizen reporters

[16] https://www.youtube.com/watch?v=7wvL1PuS8Ds India Today's video report on 30th June 2019

are also citizen photographers or video editors. It became inevitable for even news outlets to share their breaking stories on social media before hitting main stream headlines. It has changed the face, shape and pace of news. Citizens otherwise became real and unpaid sources of professional news media.

2.5.2. The writer-publishers

Thanks to the ICT, now a poet or story writer need not wait for nod of an editor for publication of his work or expect the writings to come back by 'return post'. Writer can post, without necessitating return posts. He can publish his own book on social media and collect the sale revenue through online payments. Social media created author-publishers.

2.5.3. Citizens' voice

This enhanced the space and scope for reflecting the voice of the citizens in the private owned media. Except in Letters to the Editor in daily newspapers or writing letters requesting a song or a drama to Akashvani or Doordarshan, there was no role for a citizen in media in yester decades. As the general public has 24/7 access to technology, citizens used their chance to be the first on-scene for breaking news, getting these stories out more quickly than traditional media reporters. The main drawback of citizen journalism is that the report is an instant coverage of an event without research or background or verification like a professional journalist was expected to do. It will affect the reliability of the report, unless supported by video proof of event ensuring total absence of morphing or mimicry. Today's citizen journalism is 21st century version of 'letter to the editor'.

The citizen reporter or journalist may not bring out a print sheet and circulate for affordability reasons, but he can create a PDF or blog post or podcast or video story which could be widely circulated in no time. Facebook Wall of an account holder could be his daily newspaper or publication with independent frequency of postings. It could be daily or weekly or hourly reporter.

The journalists who resigned or retired had a chance to have their own media platform- either a blog or a YouTube channel. In fact, some individuals are gaining monthly ad revenue too with increased number of subscriptions.

If media wants it can collaborate with readers and create a responsible journalistic content with the help of citizens. The media is making stories out of twitter or Facebook comments while the ministers and officers are sometimes responding to the problems posted on WhatsApp or Facebook.

2.5.4. Serious demerits of citizens journalism

Citizen reporting suffers from a serious demerit of irresponsibility and unrestricted freedom, whereas the mainstream media has registration, or some other amount of regulation, the citizen reporting does not have any control or regulation anywhere. Perhaps to prevent obscene or objectionable messages, many websites require readers might to register to post.

2.5.4.1. Abuse of social media

The citizens have freedom to say whatever they want in their private vicinities, like street talk or saloon comments or chat in a café. Still they are supposed to be responsible as the people around could react violently. The position of netizens is different. Great advantage of non-visibility of netizen gives him more freedom and what comes with that is the irresponsibility. Some Facebook accounts or pages disseminate slut content and fill it with porn. Certain comments on Facebook appear below the human dignity and civilization and pictures are affront to humanity. Some comments are so violent that they are capable of provoking violence across the nation. Some people spew venom, spread hatred and condemn the classes, castes, religions dividing people and tearing the social fabric.

But the technology allows the disclosure of ‘location’ breaking the non-visibility and bringing out identity, which might lead to arrest and prosecution.

2.5.4.2. Criminality

The criminality that appears in the society has its reflection on social media too. The exploiters invade privacy, use the easy access and speedy dissemination facility to expose intimate scenes which were clandestinely recorded. It destroyed several families and ended the lives of innocent youth.

CHAPTER III
MEDIA & SELF REGULATION

3.1. Media & Ethical duties

Ethics of media always come in to clash with the investigative needs of media. What methods are supposed to be followed by media in exposing the irregularities and corruption in the society or in projecting the bad side of the state, is a pertinent question often debated whenever an issue of ethical violation surfaced. Ethics as such are not enforceable. However, for keeping up the professional standards and serve the objectives of journalism the media persons are expected to value and follow the ethical norms. Ethics are not totally based on morals alone. In it there are legal rights issues also. Hence, it is essential to know the ethical and legal dimensions of media as a profession and Institution.

The basic purpose of journalism has always been the same: to hold a mirror to society, however ugly the sight. Investigative reporting deals with issues and conditions rather than incidents and events. It requires more documentation than a lot of the run of the mill work. It takes more patience and persistence. Reporter is tied up with records. It is like putting together a crossword puzzle. It takes time. It requires more money. Investigative reporting normally means that the facts are not lying there on the table. They are not readily available; there will be obstacles of various sorts lying in the way. It is a digging assignment. There is no opinion in truly investigative reporting. It resembles a scientific approach. Fact is laid upon the fact. No conclusions are drawn until the facts themselves form a conclusion. New York Times Editor Turner Cartledge wrote: “We regard depth reporting as telling the reader all the essential facts about the subject, the whys and wherefores of it, as many sides of it as we can get and plenty of background. We spell out to the reader what it means to him. Depth reporting is simply good, solid, substantial reporting as against the superficial reporting that so often graces today’s newspaper. Observation and interpretation without opinion are certainly legitimate parts of depth reporting. Scandal hunting is just one facet of investigative reporting”.

Thomas Griffith described the role of journalist in just one sentence, “discovery is his job”.

Investigative journalism has to necessarily take the help of surreptitious methods and intrusive operations. Without intruding into the domains of wrongdoers, and surreptitiously securing the documents or key information, the scandals cannot be exposed. Scam hunting,

being a very important component of investigative reporting, is an essential feature of any media organ to establish its credibility and readership.

Matt Drudge of Drudge dot com website has brought out the Monica Lewinsky and Clinton affair raising questions of morality of the first citizen of USA. Washington Post reporters Woodward and Bernstein exposed the surreptitious recordings of opposition political office in Watergate hotel ordered by Nixon, accelerating the end of the President's second term. Daniel Ellsberg leaked vital documents from Pentagon papers to New York Times reporter Neil Sheehan, which led to another historical moment for freedom of press. Two newspapers questioned the origins of Vietnam War, using the government's own secret documents.

Two reporters for the Chicago Sun Times broke the story of the Abrams M-1 tank fiasco; it could not go into most combat situations without an accompanying bulldozer to dig it in and out of protective ground cover. George Wilson, disclosed $ 750 billion mismatch between the cost of the Reagan rearmament programme and the amount of administration had yet requested from Congress. Woodward, in yet another coup revealed that the Reagan administration's secret disinformation campaign designed to destabilize Muammar el-Qaddafi' regime was in fact deceiving the American public and allies of USA. The West End operation of Tehelka is yet another expose brought by Anirudh Behar and Mathew Samuel, which can find a place with the historic expose world over.

There are some historic Indian examples too. Investigative journalism brought out bitter truths like Bhagalpur blinding in Indian Express, Bofors exposure in the Hindu, Commercial exploitation of a Prime Minister Indira Gandhi's name (Indira Gandhi Pratishtan, which collected donations from industrial houses and cement manufacturers by a Chief Minister A.R. Anthuley), favouritism in allotment of government accommodation and petrol pump licenses etc. These are all ugly facets of our real society. Another facet is added by recent revelation. It is the same story of commissions on government contracts, the same story of power brokers in high power centers the same rumours of relatives exercising extra-constitutional powers. This time, the people and parties are different.

Such revelations cannot occur with handouts supplied by the establishment. Without people on the inside willing to risk loss of their jobs in order to disclose such folly or leaking out vital secrets or reporters stealing the government documents none of these important disclosures might have occurred. Stealing documents or encouraging staff members to leak out secrets might be viewed as immoral folly or unethical procedure or an illegal activity also.

Those investigative journalistic exposures also raised more ethical issues. In 1981, Arun Shourie, as editor of Indian Express has secretly recorded the casual talk of R. Gundurao, the then Chief Minister of Karnataka, over lunch. Arun Shourie pleaded that he was invited for lunch knowing full well that he was editor of daily newspaper and thus for reporting out of that talk and hence there was no need to observe the entire talk as "off the record". In 1993 Pritish Nandi filmed an interview with former Union Minister for Law H. R. Bharadwaj, who did not know that Nandy had kept the video camera running even after the formal interview was over. His informal and frank talk included a revelation of Stock-Scam accused Harshad Mehta's corrupt links with several union ministers and arranging other favours for ministers and congressmen. After a fortnight, he was compelled to explain his stand in the parliament. He questioned the journalists, "If I have made a statement that was unauthorisedly circulated, if something behind the scene has been used, it is black mail, pure and simple. What would you call it if first you invited me home and then picked my pocket?" The question is "can journalists turn to electronic trickery and dishonesty in the pursuit of the big story?" It is a fact that a union minister will never reveal that some of his colleagues have received bribes from security scamster, if the permission is sought to record the conversation.

We have repeatedly seen on our TV screens, the chief of a ruling party accepting bribes. The givers were a website's journalists, in the garb of arms manufacturers and dealers. Then transcripts of public servants including the present generals in the army, literally selling themselves for trifling sums of money, represented the deplorably low moral standards of the Indian Establishment. This is also a proud moment for Indian Investigative Journalism. It is an example of incisive and serious journalism.

Such incidents and the Tehelka expose of institutionalized corruption in defense sector kicked off the debate not only on the bribe culture in sensitive fields of security and in political circles but also on the ethical and legal dimensions of investigative journalism. The contrast and conflict is between privacy, individual rights, secrecy of defense governance on one hand and public interest in cleansing the dirt of corruption which is eating into vitals of the system and democracy on the other.

Citizens cannot control or change government policies without information about the policies. The US Courts in several decisions held that the official version of events could not be imposed. It is not officials, whether elected or appointed for life, but citizens who make the choices. "The press was to serve the governed and not the governors. It was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." [17] The New York Times stated once, the discussion of public affairs must be uninhibited, robust and wide-open. But that is not enough. It must be informed.

[17] New York Times, v. United States, 403 US 728, 717

Duty to inform:

Meiklejohn wrote that "when a free man is voting it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them…let all the citizens shall, so far as possible, understand the issues which bear upon our common life"[18].

There some ethical and legal questions on the surreptitious operations by Tehelka journalists rose from several quarters. . The ethical questions are as follows:

- **Obscure Motive**: The obscure motives of exposing the bribe culture in defense wing, maligning the top politicians and officers of Armed Forces, and utilising services of one cricketer, who later was suspected by CBI as involved, in exposing and maligning the icons of Indian Cricket.
- **Tailor made process**: The operation was limited and tailor made for political purpose.
- **Political Motive**: Public interest cannot include political motives etc. It is common in every country to accept donations for party fund. But the quid pro quo makes it sinister. Quid pro quo here is only an imaginary one as no deal was struck.
- **Self-Interest**: Destabilisation operation to obtain public credibility and status for the organisation by startling exposures.
- **Participating in Murky Affair**: It is a manufacture of scoop by participating in murky affair. **Clandestine operation**: It is a secret operation with hidden camera not in conformity with ethical values. **Untruthful Representation**: Reporters made the offices to give information with their untruthful representation, which is immoral.

In a dynamic and functional democracy, right to information, openness of governance and the freedom of expression are very vital components. Media has a lot of things to do with regard to these three aspects to make democracy a vibrant one. Especially in a society fraught with cultural, ethnic, religious, political and ethical conflicts democracy will survive only with dynamic interaction of flowing information open administration and media freedom, facilitating the first two components.

In the process, some individual rights are always affected. Somewhere, the demarcating lines between exercise of one's own right and interference with other's rights are crossed, or interpreted to have been overstepped with expected legal consequences. Whether individual's rights are vindicated or held to have been in excessive or encroached

[18] The Fourth Estate and the Constitution, Lucas A. Powe, Jr, 1992, p172

rights of the others and led to criminality or resulted in civil liability, the exercise of fundamental rights should continue.

For all the five ethical questions above, the overriding Public interest can be rightly claimed as a major defense. Public interest could be a positive argument in favour of adopting intrusive and surreptitious practices and use of technology to collect the information, which is impossible otherwise. Media's primary interest may be investigating a story, which will sell it; public interest might be served in the process.

Legal Dimensions

1. **Intrusion of privacy**: It is intrusion of privacy of individual members of Armed Forces and Political Leaders. Using hidden cameras and technology for entrapping is another ethical violation and intrusion of privacy.
2. **Absence of Consent**: Consent is not obtained before recording the conversation at the private residences, which is not an ethical practice and legal.
3. **Illegitimate trappings & Accomplices of crime of bribery**: The members of the Armed Forces and some individual political leaders were enticed into the illegitimate trappings and the reporters are perpetrators to be treated as accomplices in the crime of bribery. **Conspiracy to corrupt**: Posing as business executives of a non-existing company and approaching some politicians of ruling combine and bureaucrats and offering them to explore and arrange for investment if they were helped to get purchase orders for their ware. **Inducement to accept bribe**: Adopting all machinations to entrap a few people to commit misdemeanour by enticing with inducements and allurements.
4. **Offering a bribe in the form of donation of Party Fund**: Targeting some specific individuals to offer to pay donations to the party fund or offering inducement to accept bribe.

Public Interest continues to be a defense even in legal problems. However, there are certain legal reasons for making the reporters inducing the officers to accept bribe, to discharge the burden of proof that their motive was to serve the wider cause of public and that there was total absence of malice.
The answers to the above four questions are as follows:

Right of Privacy & Controls on Media:

Every individual has a right to privacy as part of his or her overall right to live with dignity without being interfered by any exercise of any fundamental freedom. Any

unjustifiable interference with his right to privacy has to necessarily lead to legal consequences, if not; there will be no meaning for individual rights at all.

The debate is on about the controlling journalists' and broadcasters' intrusions into privacy. There are claims that protection of privacy would infringe the media's freedom of communication, and privacy cannot be adequately defined. These claims may not be convincing. On the other hand, there is a broader debate with arguments for providing general remedy, which could be exercised all citizens against each other's invasions of privacy, as the general law in Great Britain does not recognise a right to privacy. It is the position in India, except for some significant Supreme Court decisions reading right of privacy into the right to life under Article 21.

Code of Practice for Media in UK:

The Press Complaints Commission of UK has evolved a Code of Practice 1997, Section 4 of which deals with privacy, Section 5 deals with use of surreptitious recording devices by media, and Section 7 intends to prevent misrepresentation.

Privacy:

Section 4: Intrusions and enquiries into an individual's private life without his or her consent including the use of long-lens photography to take pictures of people on private property without their consent are not generally acceptable and publication can only be justified when in the public interest.

Listening Devices:

Section 5 of the Code deals with the listening devices, it says unless justified by public interest, journalists should not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.

Misrepresentation:

Section 7: (i) Journalists should not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge.

(ii) Unless in the public interest, documents or photographs should be removed only with the express consent of the owner.

(iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

Guidance about protecting interests in privacy is contained in as many as five separate codes of practice. The Press is governed by the Press Complaints Commission's code of practice referred above. Earlier the Press Council's declaration of Principles of Privacy in 1976 was the guide. It said that the justification for publication or inquiries, which conflict with a claim to privacy, must be legitimate and proper public interest and not only a 'prurient or morbid curiosity', that is, when "the circumstances relating to the private life of an individual occupying a public position may be likely to affect the performance of his duties or public confidence in him or his office". [19]

Deception and surreptitious surveillance or the causing of pain or humiliation could be justified where that was the only reasonable practicable method of obtaining information in the public interest. As this is for the press to judge what would affect public duties and or what were reasonably practicable methods, the Press Council in UK was never able to enforce the Declaration effectively.

Broadcasting ethics:

Even Broadcasting Code supports the public interest as the reason for infringing privacy. It says[20] an infringement of privacy has to be justified by an overriding public interest in the disclosure of the information. This would include revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, or disclosing significant incompetence in public office. Moreover, the means of obtaining the information must be proportionate to the matter under investigation."

Privacy as a Human Right:

The European Convention on Human Rights[21] defined privacy and pleaded for its protection. It says:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime for the protection of health or morals of for the protection of the rights and freedom of others.[22]

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19 The Press Council, The press and the People (1982-83) p 291.

20 Broadcasting Standards Commission's Code on Fairness and Privacy (1998) para 14

21 Human Rights Bill, 1997

22 Article 8, European Convention on Human Rights

Privacy is generally a claim about the individual's right to restrict the availability of information about him or herself. The justification for such restriction is typically couched in terms of a natural need for personal space, or control over the presentation of one's identity or self to the outside world.[23]

The facts pertaining to anti-social and harmful activities are private do not justify their continued secrecy; and facts which are relevant to politicians' ability to govern are required to be publicly known in the interest of participation in the democratic process.

Testing from the above standards recording and revelation of tapes of conversation with public servants in their private areas is not intrusion of privacy because they were not exposing the private affairs of those individuals but bringing into the light the scandalous purchases of arms, which is a public affair and people have a right to know as to how their security is being build up.

Consent:

It is generally accepted that the publication or broadcast of words or images should not take place without the individual's consent, unless the material is outside his or her private life but is sufficiently in the public domain.

In relation to hidden microphones and cameras, the BBC states that "the use of secret recording should only be considered where it is necessary to the credibility and authenticity of the story.." so as to ensure fairness to the subject as well as the protection of his or her privacy. Though under normal conditions recording in a public place should not be secret, but under exceptional circumstances it can be secret to serve an overriding public interest.

News values or values of information and its flow, public interest are preferable interests when they are opposed to individual interests in privacy and secrecy. Public interest, of course, need not be confused with interest to public.

For some leaders the 'corruption is a global phenomenon' and for others 'corruption is an individual affair'. But corruption remains a clandestine affair and no corrupt officer has given consent to record conversation of offering and accepting the bribe.

Offer of Bribe & Illegitimate trapping:

Justice Ramaswamy said in ***In re Ambujam Ammal***,[24], that "the employment of spies, agents, provocateurs and trap witnesses is in accordance with the best traditions of

[23] Thomas Gibbons, Regulating the Media, London, 1998, p 83

[24] AIR 1954 Mad. 326

Hindu and Muslim state craft. ..Our historical literature is replete with reference to the employment of such agents".

In ***Ramakrishna v. State of Delhi***,[25] the Supreme Court justified laying of traps on the ground that it would be difficult to detect the crime especially in cases of corruption, if intending offenders are not furnishing opportunities for display of their inclinations and activities. All the same, offences would not call for lenient or nominal sentences.

'Such traps would however, be severely condemned if the police authorities themselves supply the money to be given as a bribe', the Supreme Court added.[26]

3.2. Self Regulation v Legal Regulation

As there is no absolute right to freedom of speech and expression, it is sure that the state regulates the functioning of the media under any circumstances. The Constitution gives this right only to citizens according to the Article 19(1)(a). Non Citizens prosecuting media operations in India will have no constitutional safeguards available. While the print media is under the ownership of the private citizens of the country and subject to all kinds of legal control, the foreign citizens sponsored media operations are subject to much more state powers, including the department of external affairs. The electronic media's case is different. The airwaves being not under regulation, provides a wide scope open to any kind of broadcasting or telecasting by any person from any quarter of the world. The control over the electronic media is a big question because of technical revolution enhancing the reach beyond any limit. Whether it is obscenity or telecast of objectionable material, it is difficult or next to impossibility to regulate such activity.

Law of defamation, contempt of court, official secrets, contempt of legislature, sedition or any other restrictions reasonably imposed according to the Indian Constitution can control the print and cinema media, but the regulation of television and internet is not that easy.

Even the regulated media sections also have wide areas where the regulation cannot reach, for example the ethics, internal controls, elections reporting, communal riots reporting, campaign or pro-corporation journalism etc. Legal regulation cannot take care of every activity and cannot take responsibility of proper functioning of every area of media operation. Appointment of personnel, their day to day management, its impact on functioning of the organization, the policy of the proprietors, marketing strategies, advertisement requirements and other industrial relations besides politics links and bias play a major role in working of a media organization which are not amenable to legal controls. The Press Council

[25] AIR 1956 SC 476
[26] ibid

of India is meant for protecting certain professional standards and adjudicating in a quasi judicial capacity the grievances by and against the press personnel. Thus Press Council also works out to be an additional restriction and regulatory control over the independent media activity. However, the Press Council needs to be expanded to play the similar role with regard to other media too. There is a need to make it a Media Council of India. While there is a strong argument in favour of providing some more powers to the present Press Council, there is equally strong argument against increasing the powers as it would become another extra-legal restraint curtailing the independent nature of the press.

It is true that any law or regulation intending to impose restrictions on the freedom of the media would oppose the basic purpose of freedom of speech and imposes hurdles in the free flow of ideas. At the same time the need to safeguard the ethics and orient the functioning of the press towards purposeful and socially responsible activity serving democratic demands cannot be ignored. This is where the self regulatory mechanism requires to be evolved. There should be some self-disciplining machinery.

The professional associations of press and media have done enormous work in this area and came out with several codes and brought in the ombudsman like set up to respond to the day to day problems, grievances, complaints against arbitrary or indiscriminate decisions regarding the content selection and rejection. Except a few top corporate daily newspapers several media organizations are not having such ombudsman in their internal functioning. In some countries a few newspapers established Ombudsman to monitor the issues of ethics and tackle internal transgressions. Ombudsman stands as an example of self regulation. It can receive the complaints or take cognizance of certain issues suo moto and respond accordingly. The job of press council is done to some extent by the ombudsman, if properly constituted and function in accordance with objective and ethical standards.

According to P.B. Sawanth's Mass Media in Contemporary Society, around fifty Press Councils or Media Councils are in existence in different regions of the world and most of them are concerned with the press while a few are concerned also with the broadcasting. Some of these councils are voluntary bodies of the proprietors, editors and journalists while others are statutory. Even where they are statutory, their basic functioning is as internal self regulating bodies of the journalistic profession. It is necessary to check media malpractices and unethical functioning.

The Editor's Guild studied the professional requirements during the communal riots situations and evolved a code. It is common that the media is blamed every time a volatile situation has erupted leading to serious communal divide of the society apart from dreadful law and order situation. With its variety of policies each newspaper or media organization responds to the situation according to its perception of the issue and the policies. Moreover

they are guided by their vested interests and political intentions. This was proved time and again and this recurring crisis reminds the need of reforming the code for reporting communal riots. Digging out the truth, writing adventurous stories, making a campaign against what the newspaper perceives to be a crisis or communal divide, have to take a second position and responsibility to community has to be the priority to protect the lives and prevent further annihilations. Policing, politician dominated state, or court system cannot control the media reporting and writings during the communal riot, but it is the only self restraint or self restrictive mechanism that helps healthy reporting. Much more has to be done to help foster a climate to deter communalism and condition public temper against any kind of dividing ploy, whether religion or language or region.

Similarly the election reporting is equally important and invites a very sharp and objective functioning of the media to fulfill its democratic obligation of informing the people without bias or ill-will. Any amount of norms prescribed either by the Election Commission or Press Council or the State cannot serve the purpose, except the self regulatory norms.

Crime glorification, sensationalisation of routine issues, mud-slinging campaigns and neck deep involvement in promoting some goods and marketing strategies are some more unhealthy trends where the legal regulation cannot entrench upon. Free press should not lose its shine by associating itself with free market of goods and political goals of opportunistic elements. Genuine non-alignment and objective neutrality are two essential characteristics of media which can provide a forum for dissent.

Each media organization should have an internal ombudsman set up to settle several problems in the budding stage itself. Then they have to develop a policy or code with a widely discussed and deliberated list of dos and don’ts to enforce a uniformity of style and ethical functioning. Besides, the working journalists unions, Editors Guild, owners associations have to develop perfect norms and codes to guide them in situations of crisis and in Management-journalist and Journalist-people relations. Broadcasting Code, Code for Commercial Broadcasting, Code for Commercial Advertising for TV, Code of ethics for Advertising in India prepared by the Advertising Council of India, Code of Self Regulating in Advertising and several other codes were evolved to guide the functioning of various wings of media. Codification of ethical norms began in early 1920s. Around 60 countries developed such codes. They are framed and adopted voluntarily professionals themselves. In some countries the codes took the shape of enactments. They contain general principles of objectivity, fairness, impartiality, and truthful information dissemination. In almost all codes, the safeguarding unity and security of the state, protecting minorities, need to refrain from calumny, unfounded accusation, intrusion of privacy, duty to provide the right of reply, verify facts if involving allegations and to separate the opinions from fact reporting. The emphasis must be on the professional ethics and internal discipline.

As the code of behaviour or ethical norms is evolved voluntarily by the professional bodies, they have more intrinsic persuasive value and bind the professionals. The Councils role is to see that such codes are evolved and apply them in its internal regulation of the profession. If the Press Council or Media Council and the professional associations jointly or separately work out from time to time in evolving codes of behaviour and adhered to, it will facilitate emergence of fair and unbiased press and impose checks on unethical practices.

De-linking of media from other chains of industries and corporate business is presently demanded by the journalistic organisations. More than the reporters or editorial members of the press or any other media, it is the management or proprietorial interests that guide the profession today. The press is now looked as another goods producing industry which has to be perfectly marketed in the neck to neck competitive world. Instead of editorial experts the MBA's are ruling the internal administration and the question of 'freedom for whom and from whom' is rising again. In this context, the internal and self regulation of the media as per the codes evolved by professional organizations is quite relevant and significant. Such codes would also influence the ownership pattern and management purposes of a newspaper or media organization.

3.3. MEDIA & HUMAN RIGHTS

Human Rights do not exist in abstract. They have to be agitated for. Especially in a democratic set up, social action groups of active citizens and public-spirited lawyer groups should ask for enforcement of Human Rights and prevention of their violations. Media has a specific role to play in protecting Human Rights. By vociferously campaigning against the frequent violations, the media can create awakening and make people conscious of their rights; the media can be a catalyst in bringing sea change in Human Rights sensitisation, jurisprudence, execution and reform.

Modern Methods of interpersonal Media Communication include seminars, dramas, public meetings and workshops etc. These are effective media methods to address small and medium gatherings, which can be used as grounds for advocating the Human Rights and building public opinion in favour of strict enforcement of rights.

Public Advocacy:

It is a mode of social action. To effectually influence public policy, people have to question and shift existing unequal power relations in favour of the poor and the voiceless. It has to seek to make governance accountable and transparent. The advocacy has to resist unequal power relations at every level from personal to public and family to governance.

John Samuel, in his article Public Advocacy in India[27], classified the organized socio-political movements for public policy change into five phases.

1. The Socio Religious reform movement from 1800 to 1857
2. Nationalist Movement for Indian Independence from 1857 to 1920's
3. A mass based political movement for freedom from 1920 to 1950
4. The period from 1950's to the emergency period of 1977.
5. The post-emergency period from 1977 onwards.

Each phase is marked by a substantial change in the character of India's political system and institutional framework. Raja Ram Mohan Roy, Bal Gangadhar Tilak, Mahatma Gandhi and Ambedkar led the social action groups to effect very significant policy changes and reshaped the nation. Gandhi is one of the best inter personal communication specialist the world has ever produced. His life, works, speeches and unmatched acceptability are the indicators of his communicative skills. He communicated with people through his moral character, attire, body language, bhajans, speech and even silence. His presence itself was a communication. His well thought out writings and sayings remain as commandments to the humanity for ever. Mortal death could not stop Gandhi from communicating to generations which he ever would have physically seen. Gandhi is readable, reachable and acceptable too.

People fought against several social issues. Some of them include: Environmental degradation, Rights of Dalits and tribals, Women's rights, Civil Rights, Nuclear Installations, Land alienation of tribals, Child labour, Drug policies and forest policies.

We have very good laws. Progressive legislations are there to protect the rights of various sections, but they are not being effectively enforced. The corrupt administrative machinery and prosecuting agency misuse these laws to harass the innocent to extract money from victims and help the perpetrators of wrong for a price. It is under these situations, the people have to raise their voice and fight for justice. People can form into pressure groups to force the establishment to take right action.

Legislative Advocacy:

The Parliament, Legislative Assembly and thousands of deliberative local bodies promote legal advocacy. It attracts media's attention and people's concern. Whether it is a simple question raised during question hour, kicking up heated discussions over supplimentaries, treasury bench replies, zero hour issues and debates over the general administration demand notes. It is to build the public opinion over the issues of violation of rights.

[27] John Samuel, Executive Director of the National Centre for Advocacy Studies (NCAS), Public Advocacy in India, Building Civil Society, ICSC, Bangalore, (2000) p 93

Criticism from opposition, dissent within ruling party and public gaze of happenings between the treasury and opposition benches under the supervision of the speaker makes the government stay under continuous check and prevents them from taking oppressive measures and unilateral decisions.

Social Justice Lobbying:

Social justice lobbying is yet another powerful opinion builder even in absence of sufficient financial sources. Crafting a successful social and economic justice campaign is a work of art[28]. Auditing by people, criticism from objective bystanders who do not belong to any political thought and party creates awareness about the governance indulging in perpetrating injustice. Social Justice Lobbying will act as motivators, prodders and catalysts. As any political party has to come back to people at least when ballot is needed, the lobbyists can build opinions at the grass root levels. Opinion leaders should build a lobby around a legislator or any other elected official.

Print Media Lobbying:

Using Print and Electronic Media to lobby for human rights is another important job of human rights activist. The press acts as a multifaceted institution with multiple activities. It takes the message to the ruled and rulers simultaneously and builds the opinion in favour of an issue, which definitely threatens the establishment from violating rights. By supplying a fact sheet, background paper, meeting a reporter or bringing him to the scene of violations, giving him an interview or making him to interview with the aggrieved persons, the issue can be brought to the notice of general public. Writing articles and addressing letters to the editor are other methods to use the columns of newspapers. Similarly the time slots in Radio and TV could be used to focus on issues of violations.

Human Rights:

Personal and political rights form important parts of human rights. Certain personal human rights are basic like life and personal liberty, which include-

1. rights to freedom from detention without trial,
2. rights to freedom from torture,
3. rights to freedom from extrajudicial execution, and
4. rights to subsistence.

Without these rights no other rights are meaningful.[29]

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[28] Using the media to advance your issue, prepared by Advocacy Institute, Washington

[29] Robert Mathews and Cranford Pratt, "Human Rights and Foreign Policy: Principles and Canadian Practice" Human Rights Quarterly 7, No.2 (May 1983) pp 159-188

Sometimes people experience repression from different regimes. A wave of killing and disappearance followed by large numbers of people being arbitrarily detained, tortured and released by the paramilitary forces and death squads is noticed.

A. Killing:

Deprivation of life due to an action executed by government officials or people acting on behalf of the governing regime and carried out with the intention or connotation of political consequences. There are different types of killings

1. **Summary Execution.** Deprivation of life as the consequence of a legal or administrative process, generally brief and disregarding the form and/or spirit of life.
2. **Killing in presumptive armed conflicts**. Deprivation of life explained by public officials as a death in the course of an armed conflict between the opposition and government officials, when the facts have not been adequately proved. Encounter deaths are examples of such killings.
3. **Killing by torture.** Deprivation of life as a consequence of torture, applied by public officials or others acting under direct or indirect control of public officials.
4. **Killing by abuse of power in a legal process**. Deprivation of life as a consequence of an excessive use of force or violence, without respecting proportionality, by public officials or others acting under their control in an act which is formally legal.
5. **Killing in demonstrations by unidentified plainclothes agents**. Deprivation of life of a person by other person(s), who are unidentified and armed in the course of a public demonstration of the opposition.
6. **Killing by a death squad**. "Gratuitous" killing outside of even the most summary administrative proceeding, by public officials or others, acting under their control or with their approbation. This includes wide range of political assassinations.
7. **Genocide.** Systematic killing of a population group by virtue of its general characteristics or location, by public officials or others acting under their control or with their approbation.

B. Detained-Disappeared:

People detained for political or other reasons and whose detention the authorities and whose current location remains unknown in spite of all efforts to find them repeatedly deny.

C. Arbitrary Political Detention: (Arrest, detention, and abduction).

Arrest, detention, or abduction executed by public officers or people acting under the direct or indirect control of public officers with political intentions or consequences. In practical terms, deprivation of freedom for political reasons, when any of the following legal conditions have not been fulfilled:

a) Warrant for the arrest;

b) Identification of apprehenders in the presence of witnesses;

c) Holding the detainee in public detention centers;

d) Providing the detainee an expeditious hearing (which usually means within 24 hours). The arbitrary detention persists until the detainee has a hearing.

This include individual detention of political dissident, Massive detention in public demonstrations authorized or not authorized by the government, and Collective Detention, i.e., deprivation of freedom of a group because of their exercise of their right of association during military occupation. (Detention of adult inhabitants of black townships in South Africa or shantytowns in Chile is the example.)

D. Political Crimes:

Political crimes are those for which people are convicted as a result of engaging in activities which are protected as internationally accepted human rights, such as freedom of speech or association. There are two main kinds of political crimes based on the relationship of the charged offense to international law, or to the charged person's actual activities. First, the protected activity may itself be made the illegal. Often those political activities would not be crimes under a democratic rule, but they are made crimes by the repressive government. Second, individuals out of favour with the government may be falsely accused of "ordinary" crimes like robbery as a way to eliminate them. Such political prisoners are often indicted and sentenced using sham legal proceedings, confessions taken under harsh interrogation or torture, and false accusations by hired or coerced witnesses. These political prisoners are typically at high risk of continued human rights violations and their condition under imprisonment needs to be followed closely.

E. Exile:

Being forced to reside during a specified period of time in places other than the actual residence and other than a place of incarceration:

Internal exile: Being exiled to places within the country other than the actual residence by a judicial or administrative decision.

External exile: Being forced to leave the country due to (a) judicial sentencing, (b) administrative decree, (c) exchange of sentence for expatriation, or (d) well founded or documented fear of repression or punishment[30]

[30] U.S. Code Section 1101 (a) (42) (A) 1982 for determining eligibility for politcal refugee status of exile-immigrants to the US.

F. Torture:

According to the 1984 UN Convention, torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[31]

G. Harassment Intimidation:

Isolated or recurrent acts with the purpose of frightening an individual or a group of people, such as persistent following, verbal threats, anonymous notes, brief kidnappings with or without beating with a political objective, attempted killing.

The above definitions and standards are acceptable to the international scientific and human rights communities. These standards should not be permitted to be changed easily by the domestic rulers.

The question of human rights is fundamentally a political one since their protection or abuse is a function and a practice of governments. The protection of people from systematic violence and abuse is a basic role of the state and widespread torture is either a practice of states or an indication of their inability to function.

Role of Journalists:

Reporting about torture and human rights violations can be an important part of the work of the investigative journalist. Human Rights education should be included in journalists training. Their value depends on the quality of their research and their freedom to exercise their independence. These qualities need to be safeguarded and strengthened by an independent press. If the human rights situation begins to deteriorate, journalists will have a crucial part to play in the prevention of torture. Public warnings of the dangers of torture will need broadcasting once human rights abuses begin to occur. Human rights activists should be able to provide journalists with local information and with foreign examples of torture and its aftermath. A free press has a considerable power to influence respect for human rights and journalists have an important part in the public discussion on justice. Journalists can investigate, record and expose the human rights abuses that took place, contributing to national discussion and reflection on these violations. At the same time extra pressure is generated on the government to ensure that justice is done. Foreign associations of journalists and human rights NGOs can assist this process and International Human Rights NGOs can

[31] "UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment,"UN Doc. E/CN. 4/1984/L.2.

also extend support to the journalists when they are under threats for revealing the dangerous violations of rights.[32]

News of Custodial Deaths, without follow-up:

Media is consistently writing about the custodial deaths. Every newspaper takes up the cause of every lock up death and probes the details and presents the picture on both the sides forcing the state to order an inquiry into it. However, the media leaves the issue without follow up immediately after the dust is settled, and does not bother about the fizzling out of the inquiry and ultimate letting off of the officials involved in torture and killing of the people. Unfortunately every House Committee or Judicial Enquiry or Magisterial enquiry was concluded without holding any officer guilty of custodial death. The Media has to follow up the charge and chase the culprits along with the trial. Out of 41 custodial deaths reported in 1998, 19 died in police custody, 22 died in jails and two in executions. But only in three cases some kind of punitive action was taken against erring police officers.[33]

Emergency:

Emergency stands out as the one and only illustration of massive invasion of all political rights of lakhs of people all over the country.

Blitz Editor R K Karanjia exposed the pathetic conditions of prisons during the Emergency, where men and women prisoners were mixed that resulted in unwanted pregnancy to a woman leader. Editor was sued for defamation. However the internal investigative report of Prisons department saved the editor from paying the defamed person.

Starvation Deaths:

The print and electronic media has recently made very effective presentation of starvation deaths in Orissa.

Eminent Journalist P. Sainath wrote on the media's reporting on starvation deaths: "The moral outrage in the national media over the deaths in Orissa and elsewhere is good. It means the triumph of elite insensitivity has not been total. But it misses at least three things. One, the deaths are just a symptom of a much larger crisis. For every person who dies, there are millions of others who live on, but in acute hunger. It seems, though, that only deaths (in significant number) will make a story. For every farmer committing suicide in Anantapur in Andhra Pradesh, there are thousands more who do not but whose conditions are as miserable. However, to make the headlines, they have got to die."[34]

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[32] Piet van Reenen and Dan Jones, 'Torture: What Can be Done?', *A Glimpse of Hell,* Chapter 13, p 197

[33] Manju Reddy, 'Atrocities behind bars' Deccan Chronicle, Sunday Chronicle, June 6, 1998 p 1.

[34] P. Sainath, "Mass media: Disconnected from mass reality" The Hindu, Magazine, September 2, 2001, p I.

Starvation deaths are the nation's most scandalous testimony to misgovernance. S. Swaminathan calls it as a fatalistic and callous indifference of media and other community to starvation deaths. He finds two reasons for it:

First- the general fatalistic notion which has governed the public attitude is that in populous country, there are bound to be vulnerable, marginalised groups of people, whose access to food must remain insecure until that is when the country becomes self sufficient in food production. Now, we have food output of around 200 million tonnes and a public stock exceeding 60 million tonnes challenges this notion.

Second, as Prof. Amartya Sen has often pointed out, mass famines of the kind British India had to endure, becomes the staple diet for newspapers while lingering death caused by prolonged stages of malnutrition that afflicts the poor, gets mixed up with 'death due to natural causes' and thus escapes public condemnation and social indignation.[35]

The public interest litigation filed by the People's Union for Civil Liberties at the Supreme Court marks a watershed in the evolution of social conscience on poverty in general and on starvation deaths in particular. Seeing how huge mountains of food stocks have piled up at the Food Corporation of India, it would no longer be tenable to rationalise starvation deaths on the basis of inadequacy of food production. The issue then is whether or not the norms of governance in this country should include 'entitlement to food' as an integral part of 'protection of life' under Article 21 of the Constitution of India.

It is reported that while 6 crore tonnes of food stocks piled up in godowns, at least five crore people of India are starving. And the states are not committed and equipped to measure the poverty or count the people below the poverty line.[36] The Supreme Court asked the states and union territories to report within two weeks, the number of people suffering below the poverty line.

Eviction of people:

Recently, the NHRC took a serious view of likely eviction of about 75,000 people on the National Highway No. 5 between Gundugolanu in West Godavari District and Ravulapalem in East Godavari District of Andhra Pradesh for widening the road. The Commission has issued a notice to the Union Government and the Andhra Pradesh Government. A Social Activist Pentapati Pullarao sought the intervention of NHRC to prevent the demolition of a number of houses and buildings and the resultant eviction of thousands of people, till comprehensive rehabilitation plan was prepared.[37]

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[35] S. Swaminathan, 'Starvation and the Judicial Conscience' The Hindu, September, 11, 2001 p 17

[36] Outlook, Weekly, September 11 and Vaartha dated September 11 page 1.

[37] J. Venkatesan, NHRC notice to Centre and AP Govt., The Hindu, September 30, 2001

Child Labour:

Child labour, Child Sexual Abuse and Child trafficking are the worst form of rights violations endangering the future generation. Like prostitution, these violations are also perpetrated by some self-centered elements with the support of some corrupt sections of the state.

3.4. ISSUES RELATING TO ENTRY OF FOREIGN INVESTMENT IN MEDIA

The print media policy of the Government is guided by the 1955 cabinet resolution as per which no foreign owned newspaper or periodical should, in future, be allowed to be published in India. Also the resolution does not allow foreign newspapers and periodicals which deal mainly with news and current affairs to bring out Indian Editions.

With the advent of new technology introducing the electronic media, the requirements of investment increased and the media gained corporate character. At the same time, the opening up of economy of the country made entry of foreign direct investments in media sector also possible. During the regime of the Congress under the leadership of Prime Minister P V Narasimha Rao, an attempt to review the 1955 policy was made. A Cabinet Committee was set up for the purpose, which, however, could not give a unanimous report. The process of review was taken up after more than forty years. It was not easy to depart from the time old policy. K. K. Katyal, the renowned writer of the Hindu, says that foreigners could not be allowed to enter the fourth estate, when the first three - the executive, the legislature and the judiciary - were barred to them. "It is strange that the harm to be caused by foreigners' entry into the print media is not realised when the consequences of their role in the Government, Parliament, and courts is clearly understood. We are aware of the crucial role played by foreigners in the internal affairs of a country through the control of the media - as for instance, by the media baron, Mr Rupert Murdoch, in the UK, who first backed Ms Margaret Thatcher for Prime Ministership but later turned against the Conservative Party. India could not afford to have any such influences", Katyal said[38].

There is a proposal to reconsider the policy of the Government with regard to media. The issue of allowing the foreign direct investment in Indian Media is yet to be decided.

Equally, there is a stiff resistance to the idea of permitting foreign capital into the fourth Estate of Indian Democracy.

It may not also be possible for the big leaguers like the Times of India, and Hindustan Times to welcome and encourage a competitor as financially robust as them. Several sections of business entrepreneurs encourage the FDI in the media for making advanced

[38] K.K. Katyal, October 23 2001, The Hindu, page 12..

technology and latest information from world over available within fraction of seconds. However they wanted it to be in a regulated manner to safeguard national interests. The permission for FDI is to be on mutual reciprocity, i.e., if the foreign media has to be allowed to operate in this country, the India media houses should be permitted to operate in their countries. Still there is a need to see that Indian Media is not wiped out by the influence of foreign media sharks. Conceding the point to pro-FDI about better remuneration and more opportunities, there is a need to look in depth on the matter. Not only money and opportunity but the information and their channels are also to be studied. The issue of freedom of information is also involved, apart from independent functioning of the fourth estate. Heman and Chomsky in their book Manufacturing Consent, speak about the source of information being in the hands of a select few, thus maintaining the status quo. The 'few' own everything from satellite channels to newspapers to news agencies. Selected information are precipitated through these sources homogenising the news and leaving out facts like the US invasion of Panama Canal or ABC dropping out some stories altogether like General Electric's goof up (ABC is owned by GE). How many know about the death of a bishop in El Salvador as a murder by the State? In his subsequent book Global Media: The missionaries of Corporate Capitalism, Herman points out the trickling down of information through selected channels. The owners control the media and the information and use them to serve their purpose in the guise of public opinion. The public gets to hear, see and read what the 'few' want. Mandira Banerjee[39] says in her Article that the classic case of the above theory is the study of The World This Week (a weekly news magazine produced by NDTV for the DD during 1998-99) by Keval J. Kumar. More than 50 per cent stories telecast were about the First World countries. The developed world was projected as the one with the latest technology and the most progressive society. Interestingly, they owned most of the news agencies. There were very few stories about the Latin America, or the Asian Countries. And those which found its place in news capsules were either football matches (Latin America) or the diseases plaguing the Third world nations. Mandira asked, with all this impending dangers, where does the entry of foreign direct investment leave the Indian print Media. "It is a market driven by Darwin' Theory - the survival of the fittest. And the survival here means the one with larger resources, the ability to drive the smaller ones into extinction. Initially, the entry might be in form of joint ventures as it happened in automobile industry. And end up in similar manner too with foreign companies buying out the Indian counterpart's equity. Flaunting resources they buy the best brains and climb up the circulation charts leaving out the smaller ones to cope up with just the possibility of closure. They are then bought at cheaper prices and revamped. Once in charge, they can influence editorial decisions. One has to fear that once that happens, the stories about the real India - the grassroots - will find no mention", Mandira felt.

[39] Mandira Banerjee, Investing in fine print, The Pioneer, 21st Dec 1999 at page 11

The issue is still open even though the Government is in favour of permitting the FDI in to the print media, while the experts in field pleading for extreme vigilance against any move to allow foreign interests to get into India's newspaper sector.

3.5. Paid news: Role of Press Council and Election Commission

If newspaper writes a false story, it is undoubtedly an unethical act. But if media propagates falsity during elections, it could be either electoral crime or corrupt practice. The paid-news syndrome is no more an issue of impropriety, but it is a case of massive perpetration of crimes under Representation of Peoples Act 1951 and Indian Penal Code, 1860.

Freedom of content

No doubt, the media proprietors have freedom and authority to chose the contents of their page or channel or decide the portion of their space for advertisements[3]. The Supreme Court of India[4] has stuck down the statutes and executive orders of the Government when the State tried to introduce controls on the contents of newspapers, and restrict the space allotted to advertisement saying at least 60 per cent should be of news. It was considered as state's unreasonable interference with the autonomy of newspaper to decide how to fill their pages, which was violation of the freedom of press guaranteed by the Constitution.

Advertorials, News and Advertisements:

(i) News, (ii) views and (iii) advertisement was old classification of media content. Now it is (i) advertorial (no more editorial), (ii) news (events) (iii) news as advertisements and (iv) advertisements.

The basic norm was that there should be strict separation between news and views which was violated day in and day out. The thin line between 'news' and 'advertisement' was blurring till recently but totally disintegrated. News was supposed to be regarded as factual reporting of events, and generally the newspaper would not be liable for the truthfulness of the contents of the advertisement unless they contain defamatory or obscene material. Now untruthful news is appearing as 'event coverage' which in fact was an advertisement.

The deal for undue Influence

Every such item tells the readers that such a candidate is forging ahead leaving others far behind, people are receiving the candidate with great regard. These news stories claim that a particular candidate would win. Surprisingly, the newspaper did not hesitate to carry three or four such stories ascertaining the victory of the candidates contesting same seat in the same page. One 'paid-news' proves the other wrong.

In selling absolute falsity or ascertaining the victory of a candidate as daily news in package deal, there is a concerted effort to unduly influence the voters in almost all constituencies. The newspapers had offered different packages such as

1. regularly writing favorably on front page,
2. writing favorably in regular succession on front page with color photo,
3. writing regularly with color photos all through the campaign session, i.e., from the date of nomination to the date of polling with interviews, news analysis, campaign trails etc.
4. a package to write favourably and also to do negative campaign against his rival candidates.
5. An informative interview of the candidate with photos on condition that they should purchase 25,000 copies of the newspapers besides some consideration.

The electronic media too followed the trend set by Telugu moffusil print media and sold the slot of space and time of their channel to the political party or the candidate showing the surging crowds to his address from ratham or roadshow. Nowhere the media made any effort to indicate that it was a sponsored programme or sold out slot or an advertisement.

Extortion by Media

Some candidates who are not very rich, or fighting elections on their own strength or peoples' support, complained of extortion by media[9]. *The Hindu* reported on this during the Lok Sabha elections, where sections of the media were offering low-end "coverage packages" for Rs.15 lakh to Rs.20 lakh. "High-end" ones cost a lot more[10]. The State polls saw this go much further. National Election Watch 2009 reported: Your chances of winning an election to the Maharashtra Assembly, if you are worth over Rs.100 million, are 48 times greater than if you were worth just Rs.1 million or less. Far greater still, if that other person is worth only half-a-million rupees or less. Just six out of 288 MLAs in Maharashtra who won their seats declared assets of less than half-a-million rupees. Nor should challenges from garden variety multi-millionaires (those worth between Rs.1 million-10 million) worry you much. Your chances of winning are six times greater than theirs, says the National Election Watch (NEW).

Corrupt Practices

Under Section 123 of Representation of People Act 1951, bribery, undue influence, appeal on the ground of religion, caste, etc, publication of false statement relating to a candidate, free conveyance of voters, incurring of election expenditure in excess of the prescribed limit and seeking assistance of government servants are the corrupt practices. Later in 1989 booth capturing is also added as another 'corrupt practice' in the law. In the present context, media sold space and time to perpetrate undue influence, publication of false

statement relating to winning chances of a candidate, and in the process the candidates spent huge amounts of money for coverage packages which is one of the corrupt practices. These aspects have to be considered, investigated and prevented by the machinery of Election Commission of India, as and when such things are happening. The Commission should not leave it to be decided at the time of hearing of election petition, which means that the state would allow perpetration of corrupt practices and then wait for 'proof' of the same before the election tribunals. If this is allowed, the elected politicians, who purchased 'news', will take great advantage of it, the statement of Ashok Chavan is an example.

When the Press Council of India asked Maharasthra Chief Minister Ashok Chavan to depose on the allegations of indulging in paid news crime, he had to face the media, where he conveniently tried to escape saying 'appropriate forum to respond is the court of law the election petitions are tried'[11]. This means that unless the allegations are meticulously proved, it is almost impossible to handle 'paid news' offenders, who might by that time reap the benefits to get into the 'power'. One truth in his statement is that it needs to be tried in the court of law. Has Chavan's election been challenged on the grounds of 'paid news' wrongs? If not, it should be. In Andhra Pradesh, election tribunal (High Court) admitted an election petition by a candidate who contested and lost election alleging that massive media opinion rigging was cause of his defeat.

After declaring the candidates elected, only remedy left is challenging the validity of election and punishing for the poll offences. But by the time the verdict reaches final stage and assuming his conviction would be confirmed, the candidate must have served two terms minimum, before the 'justice' delivered. If the rival candidates do not choose to trouble himself in prolonged legal battle, the elected would amass wealth during his term and gets ready for a renewed attack in next election wherein he could purchase more space and sponsor more falsity. Thus the Election Commission has more responsibility in preventing this unfair information war on the side of paying candidates against the vulnerable voters of this country.

Poll Crime (1): Unduly Influencing Voters

Unduly influencing the media is an election crime: Such a propaganda for money camouflaged as a news item has to be examined to see whether it unduly influenced the free exercise of electoral right, which is defined as a crime under Section and 171C of Indian Penal Code and as undue influence under Representation of Peoples Act, 1951. While the RP Act explains undue influence in general terms and supplemented with an example that threatening a candidate or elector with injury, or consequence of divine displeasure if not favoured would constitute the undue influence, Section 171C of IPC also refers to similar language used in Section 123 saying interference or attempt to interfere with free exercise of any electoral right.

Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election. (171C(1) The punishment for the offence of undue influence is prescribed under Section 171 F of IPC, which says punishment of imprisonment up to one year or fine or both could be imposed. In both legislations the first part is general definition, which could include any attempt to unduly influence. While the subsections in both laws give an example for undue influence, it is not limited to these examples only. The subsection (2) starts with 'without prejudice to the generality of the provisions of subsection (1)'. This means that any undue influence not contemplated by this law also might be offensive. This includes media's interference through paid news. Voter can be influenced with good deeds and statements, healthy campaign explaining achievements and prospects, but that should not be undue. It refers to abuse of influence. (Bachan Singh v Prithvi Singh, AIR 1975 SC 926). The Supreme Court said in Shiv Kripal Singh v VV Giri AIR 1970 SC 2097: "What amounts to interference with the exercise of an electoral right is 'tyranny over the mind'.

As per both the laws (RP Act of 1951 and IPC) not only any interference, but also an attempt to interfere with free exercise is defined as an electoral offence. If the content of each of such pamphlet in the guise of news item is examined, the possibility of direct or indirect interference or attempt to interfere on behalf of candidate with the free exercise of electoral right would be discovered. In this case of package deals, the reporter or publisher was acting on behalf of the candidate as either of them took money to write such a news item during the election. Media, receiving money to influence the minds in this context either interfered with or attempted to interfere with, along with the paying candidate. A headline read: "Andari Deevenalu anjibabuke" (All blessed Anjibabu)". It attempts to show that the candidate has divine blessings to win[12]. Another headline: "Papam Vaalladi; Votlu Abbayigari Abbayivi", (though others distributed money, votes will poll in favour of Abbayigari Abbayi). While first headline influences votes using the divine reference, second headline throws an allegation that others distributed money, but the candidate who paid that media would win. These two statements could make the newspaper accused of crime under RP Act and IPC.

Poll Crime (2): Spreading Falsity

Publication of false statement is both corrupt practice and electoral offence. To be precise, the circulation of falsity during election is a clear offence. There is a need to investigate into camouflage-news-selling during elections and prosecute the offenders, whether it is poll agent or media person. Because, every such paid news contained false reporting might lead to violation of several other legal provisions, such as Section 123(4) of the Representation of people's Act, 1951. Section 123(4) defined that corrupt practice as under:

The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent (this expression include media which publishes statement taking money which amounts to consent of candidate or his agent), of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate's election.

This is most crucial definition the media is expected to know and prevent. Within the scope of this definition the paid news, critical remarks about personal character or conduct of any rival candidate, falsity about others and false projection of a candidate also would squarely fall. The truth or otherwise of such comments need to be established and if proved to be false, the candidate and the newspaper reporter or printer could be prosecuted under section 171 G of IPC also. This section says: Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine. Thus interpretation of 'falsity' decides the criminality of publication. Media is vulnerable here too.

Poll Crime (3): Not indicating and sending 'Paid News'

The newspapers have been the pamphlets of the politicians during elections. They performed job of a job-work press where the pamphlets are printed. As per section 127A of Representation of People's Act 1951, every pamphlet has to print the names and addresses of the printer and publisher thereof. Subsection 2(b) of 127A says that every publisher shall send one copy of such publication to the Chief Electoral officer in the capital and to the District Magistrate in case of a district publication. Any person who contravenes this provision shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both. The newspapers might have not violated Section 127A (1) as they generally publish the printers and publishers address every day. But by not sending a copy to the District Magistrates, clearly marking which part of their newspaper was in the shape of a pamphlet or advertisement, they have committed a crime under Section 127 A(2)(b) which should invite a separate punishment. This section is aimed at providing a regulatory control to the governmental machinery to check unabashed false campaign during elections. Pamphlet will operate as a source and proof of false propaganda of the political party or candidate. By not sending the clearly marked publication copies to the District Magistrate these newspapers-turned-pamphlet printers denied machinery the chance of regulation and thus committed a violation of RP Act.

Poll Crime (4) Excessive Expenditure

These sold news columns will amount to exchange of illegal money between the political parties or candidates and journalists. The income tax authorities have enough power to demand for accounts and tax for this amount. The political party or candidate has to reflect this expenditure in his election expenditure. After adding this expenditure for purchasing news columns if the amount spent exceeds the limit prescribed on expenditure, the consequential legal actions should be taken against such a candidate as per Section 77 of Representation of People's Act 1951. Media, through RTI applications, recovered the statement of election expenditure by the Chief Minister Chavan which show ridiculously low amount for advertisement, i.e., Rs 5379 only. Both his election expenditure and the campaign with falsity were not true. These are the provisions which empowered the Election Commission of India to prevent unhealthy criminal practices like 'paid news', before declaring the candidates polling highest number of polled votes as winner.

Poll Crime (5) Invalidating Election

In the second phase the false reporters could be convicted and election could be declared invalid. Because this 'corrupt practice' of candidate through newspaper reporter or publisher by 'sold news column' has materially affected the prospects of a candidate or adversely affected the prospects of rival candidate, it could become a ground for declaring election as void under section 100 of RP Act, 1951.

Poll Crime (6) Disqualification

On proof of this corrupt practice of the candidate, he would be disqualified from contesting election, according to Section 8A of RP Act, 1951, and along with him, those who committed this corrupt practice would forfeit the right to vote Section 11-A of the Representation of People Act, 1951. The machinery of Election Commission should probe into the allegations leveled by the journalists union and Loksatta Candidate and impose disqualifications on candidates from contesting and journalists from voting in coming elections.

Breach of Advertisement Code

If what is being written is believed to be an advertisement, then also it makes the newspaper liable. Besides being criminal, it is also breach of prescribed codes. The Cable Television Networks Rules 1994 prescribes 'Ten Commandments' to advertisers on Cable services. The Rule 7 says that advertising carried in the cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscriber. No advertisement shall be permitted which;

(i) derides any race, caste, color, creed and nationality,

(ii) is against any provision of the Constitution of India;

(iii) tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way; etc.,

Other Rules say: No advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature; advertisements must not be directed towards any religious or political end.

All the newspapers must voluntarily disclose as to how much money they made and amount of space they sold to the political parties. They have to account for that money and pay income tax and declare it before the Chief Election Officer or District Magistrate. The candidate should reflect that expenditure in his poll expenses report.

Every District Magistrate in his capacity as Returning officer or District Election Officer has to issue a notice to each newspaper and contested candidate to furnish details of the sale and purchase of news columns and also submit the copies of the publication for verification of falsity or otherwise of the reports and their influence on the voters. If the influence is adverse and would materially affect the result, necessary action should be taken.

Even under the general law, for giving a false affidavits showing receipts or expenditure of less amounts, such candidates and journalists could be prosecuted. Question is the lack of will and courage to punish the widespread political criminals joining hands with media persons.

The Duty of ECI:

The Election Commission of India should act stringently against those committing electoral corrupt practices and crimes at two stages:

1. During the election process the ECI is immune from Judicial, Legislative and Executive interference. It assumes all the three positions. It has to prevent over spending, spread of falsity and undue influence.
2. After the polls are over, the ECI should continue to direct the officers through the Governments to prosecute the offenders before the courts of law, though none filed the election petitions.

It is the responsibility of the Election Commission of India to curb this undue influence perpetuated by the Political Parties and candidates through the Media because it is their constitutional obligation to facilitate free and fair poll. These are crimes of false reporting, undue influence, and corrupt practice, poll crimes for which both journalists and the politicians must be prosecuted.

The Duty of PCI

The Press Council of India could also censure the persons, whether from media or politics, involved in this murky deal and release press notes immediately besides putting all that information on websites. Having tasted huge amounts of money, the media might not heed to professional and ethical advises or might feel ashamed for censure. The wide publicity of that censure might bring a feeling of shame, at least. However the prosecution would be more effective.

3.6. Self Regulation and Role of Press Council of India

Should the Press Council of India be given powers to punish the erring journalists? Or should they be fined by it? It is almost a common demand that there are no teeth to this professional regulatory institution. A controversy about regulation of media was kicked up with the critical comments on media by Justice Markandey Katju after he took over as Chairman of Press Council of India in 2011.

"If any individual aggrieved of violation of his/her rights by media's excessive deeds, there are general courts to seek remedies prescribed under law. For those who are not acquainted with the general legal remedies, think that PCI is the only forum where their grievances could be redressed. However, the judiciary which is fraught with delays and difficulties made justice almost denied. Even when some pursue their rights in the courts of law, the media big wigs fight it tooth and nail up to the level of Supreme Court. With their resources and influences, the media barons will fight every legal suit for decades. Thus enforcing rights against media is very difficult while complaints before PCI will not result in any serious consequences even if allegations are proved."

Covering electronic media

One of his main proposals was to expand the purview of Press Council by including Television media. The First Press Commission recommended the setting up of a Press Council, visualised the objectives of the Council as: "to safeguard the freedom of the press", "to ensure on the part of the Press the maintenance of High standards of public taste and to foster due sense of both the rights and responsibilities of citizenship" and "to encourage the growth of sense of responsibility and public service among all those engaged in the profession of journalism."

The Inquiry Regulations framed by the Council empower the Chairman to take suo motu action and issue notices to any party in respect of any matter falling within the scope of Press Council Act. The procedure for holding a suo motu inquiry is substantially the same as in the case of a normal inquiry except that for any normal inquiry a complaint is required to be lodged with the Council by a complainant.

Every Chairman of PCI including Justice Katju should have used this jursidictional power to pick up suo motu certain unethical and irresponsible telecasts and questioned them as per the prescribed norms and procedures under PCI. However for clarity and certainty there is a need for declaring by law that 'press' includes 'electronic media' also.

Can PCI penalize?

Second demand of Justice Katju is to give teeth to Press Council to penalize the erring media. We need to understand that the character of PCI as envisaged by law is to regulate the profession of journalism and not to penalize. The PCI can admonish, demand publication of apology or denial or version of the person affected by one-sided attack of journalist.

The Council, in 1980 had proposed amendment of the Act, for empowering the Council to recommend to the authorities concerned, denial of certain facilities and concessions in the form of accreditation, advertisements, allocation of newsprint or concessional rates of postage for a certain period in the case of a newspaper which was censured thrice by the Council. Acceptance of the Council's recommendations on the part of the authorities was sought to be made obligatory. If this power is made available it can also disentitle the media to receive benefits and advertisements from the state.

The suggestion of giving penal powers to PCI was unanimously rejected by the Council. Having considered the matter in depth, the Council felt that the moral authority presently exercised by the Council is quite effective and the Council does not need any punitive powers in showing the Press the path of self-regulation. Thus converting PCI into another court may not be proper.

The PCI should be expanded to have a bench in each State to hear the complaints and the chairmen should initiate suo motu actions against wrong deeds of media and threats against media.

Mr Justice J S Verma, chairman of a self regulatory body of private TV media commented that the Press Council of India has totally failed and hence should be scrapped. Interestingly, Mrs. Indira Gandhi also held a similar view and she scrapped PCI during dark days of emergency. It was definitely not to save public money, as suggested by Justice Verma. There was a near unanimous opinion, including from media at that time against scrapping of PCI and its revival by Janata Party Government was welcomed.

Though it is welcome measure that the private electronic media has created a self regulatory body, one single forum is not enough for entire country of 1.2 billion population with several states being bigger than Europe continent in size. Besides the distance, the fee to

be paid along with complaint is a prohibitive factor that nips the complaint in the bud. This failed so called self regulation. If the alternative is self-regulation to failed PCI regulation, it is perhaps designed to fail too.

As media is expected to be a watch dog of government in democracy performing the role of informer for the people, there should be another watch-dog for this media because of its increasing biased political and corporate business character. Who is that watch-dog? It is the civil society, citizen journalist, the neighbor media and also the blog journalists, which together are emerging as Fifth Estate.

CHAPTER IV
HISTORY OF MEDIA AND MEDIA LEGISLATION- IN INDIA

4.1. History of Media Legislation

The history of media legislation begins with the print media in modern times. The invention of printing press has made mass production process easy. The printing replaced handwritten multiplication and the communication of thought became effective, definite and certain. The printing mechanism thus became a new ground for mechanical mass media and started growing parallel to the personal media. At a point both these media converged and evolved into a very effective ground of communication. Hence the history of mechanical media begins with the origin of the newspaper and administrative regulation of the thought and communication. After the advent of radio and television the broadcasting laws emerged. The current trend is to make cyber law to deal with the internet media. It is necessary to refer to western media in developed countries to understand the evolution of the press as the first mechanical medium marking the beginning of the mass media.

4.2. Media Legislation - British Experience

The Licensing Regulation in England: Even before the first newspaper emerged in Britain, there was Licensing regulation. The Licencing Act 1662 used to require every printing press to have licence for its printing activity. The Oxford Gazette is the first newspaper publication in 1665, which is the starting point of the history of press in Britain. It was the first periodical meeting all requirements of newspaper, edited by Miuddiman, while the Royal court was fleeing from the London Plague. After 24 issues, the newspaper became London Gazette and its place of publication moved back to Capital City. It was official organ of the Courts published under Royal authority up through the twentieth century.

End of Licencing in UK: The Licensing Act continued to be in force as a regulating tool in the hands of administrators to control the newspapers that were appearing in the public life. Next important phase in the History was the repeal of Licensing Act in 1679. After a long conflict between the Crown and Parliament, the Regulation of Printing, or Licensing Act expired in 1694 because of political reasons. Though the regulation era crumbled to some extent, the laws of treason and seditious libel and regulations against reporting proceedings of Parliament continued. During the reign of Charles, the journalists tended to ignore his authority, though some of them were punished. Benjamin Harris was one journalist who consistently defied the King's laws and was convicted for it. He spent two years in prison, as he could not pay the fine. When he was raided again in 1694, Harris fled to Bristol with his family and ultimately reached America where he initiated the history of

journalism with the first-ever publication of newspaper in America. It is only after the Revolution in 1688, which changed the monarchical institution, the journalists were provided with some sort of freedom though in a limited way. The rulers William and Marry were not antagonizing the press and publishers and journalists, there were no prosecutions in their reign. The Licensing system died mainly because of the rise of two party system during the reign of William and Mary. The attack against it in Commons was also serious. Because of licensing restrictions on the printing enterprise, suspected violators resorted to use bribery.

4.3. Free Speech and Privileges of Parliament

The Parliament members were jealous of their own privileges and prerogatives and were opposing the freedom of speech and expression. However there were some champions of the press freedom though they were pleading for some restrictions against press out of due considerations of the issues. A false statement or dangerous sentiment could be opposed at once or refuted. However, they were not in a position to curb the writings before publication and could not prevent the damage. They frequently resorted to the law of seditious libel against those journalists who affront the rulers until the close of the eighteenth century, both in England and America. At the same time the exercise of and demand for freedom of press was increasing. The emergence of political parties and the evolution of press as a strong force began together and spreading their influence over political and social affairs of the people and through such activity were influencing the government. There was a sea change in socio-economic structure of the society, the middle class emerged as strong group, and standards of living went up. The Kings used the weapon of the public peace to suppress the dissent voices in the press. From Henry VIII to Elizabeth the crown used the peace card against the free press. Under the Tudors control there used to be arbitrary and ruthless suppression. The purpose of freedom and general welfare has taken a backseat and the oppression continued. However, some subjects admired such tyranny against press but there was a very little resistance to them. Yet there was a rapid growth of journalism during the Seventeenth Century since the press thrives in adverse and restrictive climate.

4.4. Press in 18th Century

The eighteenth century saw a great dawn in press freedom and some eminent personalities on the horizons of journalism emerged in Britain. This phase of British Journalism influenced the infant period of American Journalism. The newspapers won the hearts of the people under the leadership of the great editors like Defoe, Swift, Addison, Steele, Fielding and Samuel Johnson. They stood as models to be emulated by the press in American colonies. The newspaper became new medium of expression and the ordinary people started taking part in the process of journalistic activity. The first daily newspaper was printed in English and circulated in the streets of London, on March 11, 1702. It was Daily Courant established by Elizebeth Mallet, but it was sustained and revived by Samuel

Buckley. He wriggled out of political controls with innovative idea of inviting advertisement revenue for the survival of newspaper.

Several journals dawned on the horizons of British land with elaborate and analytical comments on liberty of representative government, freedom of expression and the governance.

As the American colonies were agog with revolution, the newspapers increased their reach and circulation. John Trenchard and Thomas Gordan were making very fierce comments on the contemporary political and social issues under the pen name of Cato. The Cato letters were very popular and influenced even the American press. The series of letters were published in four volumes during 1724 and were received well by the people in Britain and America. The influence of Cato Letters was unending as it could be traced up to the Declaration of Independence of America.

4.5. Waning of Absolute Rule and Emergence of Liberty of Press

As the character of rulers gradually changed under the influence of the Great Revolution and fighting spirit of the people, still, men had to sacrifice their lives for liberating the press from oppressive rulers and intolerant administrators. The Absolute rule waned and several groups challenged the authority and the press became the watchdog of public affairs. Despite the growth of liberty of press, poor communications and transport, heavy taxes hindered the spread of press to different parts of the country. It took more than one-and-half-century for another daily to appear from a city other than capital after the first daily was published in 1702. There used to be tax on advertisements and duty on a newspaper. There were several handicap arresting the growth of the press till 1855, after which the golden era for daily journalism began in 1870 and continued up to 1914. When the press was about to blossom into a great institution with greater reach, the First World War hit them. After winning the restriction and regulation regime for more than 150 years, the press had to fight to survive the War and since 1945 the press had no bounds or limits for its enormous growth all over the world.

Out of 16 daily newspapers in London, nine were national newspapers as they were being circulated throughout the whole country. The Scotsman, Glasgow Herald, The Manchester Guardian, The Yorkshire Post and the Birmingham Post were wielding a greater power over the life and thought of the nation than some of the 'national' papers.

4.6. The Royal Commission and the Chain of Newspapers

The Royal Commission recognised The Times and the Daily Telegraph as quality newspapers for their standard of the content and ability to reach the entire country. The Evening News, the Star and the Evening Standard are restricted in the main to Greater

London and the Home Countries. There were twenty four morning papers published in England and Wales outside London. Described a chain as an organization with single or multiple units in several widely separated places are known as the chain according to The Royal Commission, which named five chains with sufficient links to be worthy of the name. They were the Harmsworth Chain, Associated Newspapers, the Westminster Press, Kemley Newspapers and Provincial Newspapers Ltd. The Royal Commission studied the structure, financial potency and influence of the chains, and pleaded against the growing chains.

The Nineteenth Century saw two new newspapers Daily Mail and the Daily express with large circulation and vast financial resources. The competition became more acute and great battle of circulation began. The Royal Commission realized that it has overstated against the chains, which became almost inevitable. It admitted that the system had some advantages in that the association of a few papers spreads the financial risks and gives greater stability. With central purchases, advertising, newsgathering and other services a chain-effects-economies which enable it to produce better and viable newspapers. It will have more sources to spend on various inputs and infrastructures required for newspaper. The Commission held that while it would not be alarmed by an increase in the number of relatively small chains it would deplore any tendency on the part of the larger chains to expand, particularly by the acquisition of further papers in areas where they were already strong.

4.7. Media Legislation in America

The American newspaper was born in the New England. The first press was established in the English Colony at Cambridge (Harward) College in 1638 for the purpose of producing religious texts for educational institutions. Then these printing presses published cultural material. The New England "Puritan" contributed for the American experiment in self-rule and then for independence.

In 1681 Benjamin Harris an ex London Bookseller established a press and offered a periodical. He chose Boston City with 7000 population for launching an underground press engaged in attacking the Catholics. Even as the Harris established himself as the first American newspaper publisher, the Massachusetts Licensing Act ended his career.

The first genuine American Newspaper came into being on April 24, 1704, from Green's Shop with the name Boston News Letter. It was printed on both the sides of a sheets just a little larger than the dimensions of Harris's paper. It was slightly larger than a sheet of typewriter paper. The Campbell's Journal was another popular embryonic journal with strong sense of responsibility to his public.

Five successive postmasters contributed for regular publication of Boston Gazette until 1741, when it was merged with another rival the New England Weekly Journal. The

newspaper was not offending the officials and was dependent on the benefits from the government. They used to have the approval of official representative for each issue before it was circulated. But a little sheet of newspaper *New England Courant,* edited by James Franklin defied this practice and the honeymoon between the press and government ended. It was a rebellion and thus had a deep impact on the American Press, though the newspaper survived only for five years. It brought a fresh breeze in the atmosphere of journalism in Boston. The Courant offered literary fare also. It introduced Addison and Steele to hundreds of Americans through its columns. James was critical of administration and never scared by the jail terms imposed by the offended state authorities. The moment he was out of jail, he used to attack the authorities both in religion and politics. It was a sad end for free and bold press when James abandoned the newspaper as it lost its influence and accepted the position of government printer for Rhodes island. Later in 1732 he founded the Rhode Island Gazette.

Two years after Philadelphia was established, William Bradford has set up the first printing press in 1683 which was moved to New York in 1693 where he established the first newspaper. Bradford's son Andrew published first newspaper in Philadelphia, which was the first newspaper outside the Boston, the Mercury weekly (1791). In 1729 Franklin took over the management of the Pennsylvania Gazette. With great skill in writing, attitude of cultivating friendship with influential citizen and acute business sense, he was successful as journalist. In 1728, Keimer published the first number of "The Universal Instructor in All Arts and Sciences and Pennsylvania Gazette". It was reprinting Chamber's Cyclopaedia.

As the competition and circulation increased the press grew in its power and influence ultimately to be feared as arrogant administrators. Financial malnutrition caused the raise in the infant newspaper mortality rate, as out of 2120 newspapers between 1690 and 1820 more than one thousand perished within two years of their publication. Only 34 sustained the pressures and financial troubles. With increase in literacy and need for information, every citizen developed an access with one or the other news journal. The commerce developed and created the field for advertising in newspapers, a new source of survival for newspapers.

4.8. Struggle for Freedom: Commercial Interests

As the newspaper thrives on controversy, conflict and struggle, the war for independence provided a vast field for growth of newspaper in America. During the first half of eighteenth century, the press increased the tirade against the restrictions and championed the liberty, which formed the base for freedom struggle. With growing support from the people in general the press won over the restrictive forces and it was the most powerful weapon of the revolutionaries. The struggle for free press was the significant phase in demand for Home Rule and the ultimately the Independence. Simultaneously the wealthy merchant class demanded more share in administration of the affairs of the colony and opposed the royal power. With the Glorious Revolution in England eventually leading to triumph of Whigs, the

commercial party. It had a serious impact on the struggle for freedom in America. In the process the capitalist press emerged and gained wide influence.

4.9. Sensationalism and Pulitzer

Ben Day in 1833 started a newspaper New York Sun and sold it for a penny, while other newspapers cost 6 cents. He concentrated on street sales. In 1883 Joseph Pulitzer bought the New York World and offered a comprehensive interesting stuff to the readers with human interest, gossip and sensation with scandals. Pulitzer championed the cause of working class against the aristocracy of wealth and social position. Pulitzer's style and form of the journal became the model and success formula. Pulitzer's new journalism was based on sensation, which gained readers and became a source for reaching heights in circulation cars during 1890.

CHAPTER V
CONSTITUTIONAL RIGHTS OF MEDIA & LIMITATION ON FREEDOM OF SPEECH AND EXPRESSION

5.1. Freedom of Speech and Expression in Indian Constitution:

Significance of Freedom of speech in Democracy: The people of India gave to themselves, the Constitution of India, with a view to make a sovereign, democratic, socialistic republic. In our democratic society, place of pride has been provided to freedom of speech and expression which is the mother of all liberties. The Liberty of thought, expression, belief, faith and worship is one of the basic concepts of our democratic Constitution. The objective part of the Constitution of India, i.e., the Preamble declares that the liberty encompassing several others basic freedoms like thought and expression as one of the assurances that were given to the people. These expressions indicate the priorities of the Constitution with regard to fundamental right to freedom of speech and expression, which assumes significance as it embodies within it a great scope for building a unified and civilized human society through communications. Freedom of expression is among the foremost of human rights. It is the communication and practical application of individual freedom of thought. While freedom of thought is a personal freedom, freedom of expression is a collective freedom, whose character becomes more and more pronounced as the technical methods of their diffusion multiply and improve. Life, liberty and pursuit of happiness are the most important inalienable rights according to the Declaration of American Independence.

The right of speech "is absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed is the word right citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.[40]

This assurance of protection to free thought and speech has been provided in more explicit terms under Article 19 (1) of the Constitution. It says:

19. Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right-

(a) to freedom of speech and expression

(b) to assemble peaceably and without arms

(c) to form associations or unions;

(d) to move freely throughout the territory of India,

[40] Speiser v. Randall 357 U.S. 513

(e) to reside and settle in any part of the territory of India, and

(f) (it is omitted by the Constitution (Forty Fourth Amendment) Act, 1978, s. 8)

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in subclause (a) of clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as such law imposed reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of sovereignty and integrity of India, the security of state, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

5.2. Article 19 and other Constitutions in the World

This article is similar to several Constitutions in the world.

i. the First and Fourteenth Amendments to the Constitution of United States,
ii. the Common Law of England,
iii. Section 40(6)(1) if the Constitution of Eire 1937
iv. Section 18(1)(e)(f)(g) of the Constitution of Sri Lanka 1972,
v. Articles 50 and 51 of the Constitution of the USSR 1977, and
vi. Section 298 of the Government of India Act 1935.

The First Amendment to the Constitution of USA provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievance.

5.3. Article 19 and International Conventions

This Article also has close similarity with different International Conventions.

i. Articles 13, 20, 23, 29 of the Universal Declaration of Human Rights, 1948
ii. Article 22 of the international Covenant of Civil and Political Rights 1966
iii. Article 11 of the European Convention on Human Rights, 1950
iv. Articles 6, 12 of the International Covenant on Economic, Social and Cultural Rights, 1966

Article 19 of the Universal Declaration of Human Rights, 1948 declares the freedom of press and so does Article 19 of the International covenant on Civil and Political Rights 1966.

Article 10 of the European Convention on Human Rights, provides that

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by the public authority and regardless of the frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise.

(2) The exercise of these freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of the disorder or crime, for the protection of health and morals, for the protection of reputation or rights of the others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

5.4. Amendments to Article 19

This Article was amended by

(i.) Constitution (First Amendment) Act, 1951

(ii.) Constitution (Sixteenth Amendment) Act, 1963

(iii.) Constitution (Forty-fourth Amendment) Act, 1978

The Constitution has treated the civil liberties as distinct Fundamental Rights and made separate provisions in Arts. 19, 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged.[41] Deprivation of personal liberty does not fall within the purview of Article 19 but is controlled by the conditions stipulated in Articles 21 and 22. Though Article 19 enumerates the 'seven freedoms' it is not exhaustive by itself in respect of all the Fundamental Rights. Das, J., says as follows in Gopalan's case. "In my judgment Article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Article 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men". In this case the Supreme Court rejected the plea that a law made under Article 21 shall not infringe Article 19(1). Article 19, 21 and 31 are not in pari materia as they differ in their scope and content, for there is a material difference not only in the phraseology but also in their setting.

Article 19 deals with Fundamental Rights of freedom there are so many other rights which are not fundamental such as the right to strike, the freedom of contract, the right to

[41] Ram Singh v. State of Delhi AIR 1951 SC 270

franchise and the right to stand for the legislature in election. These rights can be regulated and curtailed by statute without infringement of the Constitution.

As already established that the freedom of speech and expression of the individual and media does not confer an absolute right to speak and or disseminate without responsibility whatever one wishes. It is not an unrestricted or unbridled immunity for using any language. The importance and scope of a free press has been successively upheld by the Supreme Court. Recently, the Supreme Court widened the scope of this freedom. It firmly stated that there is no possibility of any prior restraint on the press freedom and included the commercial speech also within the ambit of the right to speech. At the same time the Courts restricted this right to free speech and expression saying that the press cannot refuse reply and should not publish unverified allegations recklessly against the Judges. The Apex Court also restricted the freedom of expression with an emphatic 'no' to forceful enforcement of *Bundh*s violating the fundamental rights of other citizens as a whole.

5.5. Illustrative Natural Rights

Article 19 (1) provides that all citizens shall have the right to freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India and to practice any profession or to carry on any occupation, trade or business. The rights mentioned in Article 19(1) are not exhaustive of all rights of a free man. Some of the rights falling outside Article 19 are freedom to move, right of citizenship, the right to vote or contest election, the contractual right against the Government, right of government servants to continue in employment and the right to strike.

The freedoms enumerated in this article are those great and basic rights, which are recognized as natural rights inherent in the status of a citizen, but none of these freedoms is absolute or uncontrolled. The rights granted by Article 19 are available not only to citizens and to aliens or foreigners. The protection of Article 19 is coterminous with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (a) to (e) and (g) of Article 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses.[42]

5.6. Scheme

The scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. This means the State cannot

[42] Gopalan v State of Madras AIR 1950 SC 27 para 225

make a law, which directly restricts one freedom even for securing the better enjoyment of another freedom. Thus the State cannot directly restrict one freedom by placing on otherwise permissible restriction on another freedom.[43]

The courts have to interpret the provisions of this Article 19 in a manner, which would enable citizens to enjoy the rights guaranteed by the Constitution in the fullest measure subject to permissible restrictions. The rights of freedom guaranteed to the citizens by Article 19 (1) are exercisable throughout and in all parts of the territory of India.[44] Article 19 refers to citizens only. Article 31 says that no person shall be deprived of his property save by authority of law. A Hindu deity was held to be a juridical person capable of owning and possessing property and so the trustee of the deity can invoke Article 31 and not Article 19 as the Deity cannot be called a citizen of India.[45]

A corporation which is a 'person' within the meaning of the constitution by virtue of Section 3(42), General Clauses Act, read with Article 367, is construed as a citizen and eligible for the rights in Article 12(1).[46]

5.7. Interpretation of Media Freedom & Case Studies on Media and Free Expression

Louis Brandeis J., of US Supreme Court, in his classic statement, says that the Freedom of speech is bulwark of democratic government[47]. Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, pictures or any other mode. Courts in England, United States of America and India have interpreted that this right includes not merely ones right to express or propagate one's own views but also the right to public and propagate the view of others.

According to Halsbury's Laws of England[48] freedom of expression incorporates both the right to receive and to express ideas and information and the secrecy of private communications.

In *Usha Uthup v West Bengal*[49] the singer was not permitted by the State to perform at the Theater under the management and control of the State. The court held the refusal by the State was violation of fundamental right under Article 19(1)(a) as the expression 'speech and expression' includes right to sing. The Supreme Court held that the express has a broad connotation and the right to print or dance or sing or write poetry or literature is covered by Article 19 (1)(a), in *Maneka Gandhi* Case.

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[43] Sakal (P) Ltd v Union of India AIR 1962 SC 305 para 37
[44] Virendra v State of Punjab AIR 1957 SC 896 Para 8
[45] Deity Laininkhthow Pureiromboi of Iamlai v. Chief Commissioner of Manipur, AIR 1951 Mani 20
[46] Reserve Bank of India v Palai Central Bank Ltd, AIR 1961 Ker 268
[47] Whitney v California, 247 US 214 Classical Statement of Louis Brandeis J.,
[48] Fourth Ed. Vol 8 p 834
[49] AIR 1984 Cal 268

5.8. Purpose:

Freedom of Expression has four broad special purposes to serve. It helps an individual to attain self-fulfillment. It assists in the discovery of truth, it strengthens the capacity of an individual in participating decision making. It provides mechanism by which it is possible to establish a reasonable balance between stability and social change. The right to freedom of speech and expression receive generous support from all those who believe in the participation of the people in the administration of the country. That is the reason why the Government should be more cautious while levying taxes on things, which concern the newspaper industry.[50]

A Need of Democracy

An individual right of expression is guaranteed mainly for self-fulfillment in all spheres of life and not only in matters of governing importance in a democracy. In order that the governed may form a wise and intelligent judgment and create an enlightened public opinion it is necessary that the people must be informed of all the aspects of a question and, therefore public discussion assumes the nature of a public duty. In a democracy the right to free expression is not intended to define an individual right but rather a right of the community to be hared and be informed.

In *Himmatlal K. Shah v. Commissioner of Police*[51], a person sought permission to hold a public meeting in connection with an all-India students strike. The permission was refused but he Commissioner of Police on grounds of apprehension of law and order disturbance. The Commissioner relied on the notification and rules regarding processions and public meetings issued under the Bombay Police Act, 1951. The appellant challenged the constitutionality of the Statutory provisions and the powers therein as being discriminatory and imposing unreasonable restrictions on his constitutional right to freedom of speech and expression and right to assemble peaceably and without arms under Article 19(1) (a) and (b).

Justice K K Mathew allowed the appeal and nullified the refusal orders of the police commissioner as violative of Article 19(1) (a) and (b). Public processions are prima facie legal. If a, b and c have each a right to pass and repass on the high way, there is nothing illegal in their doing so in concert, unless the procession is illegal on some other ground. In *Lowdens v. Keaveney*, Gibson J., said that a procession is prima facie legal and that it differs from 'the collection of a stationary crowd' but that a procession may become a nuisance if the right is exercised unreasonably or with reckless disregard of the rights of others.

[50] Indian Express Newspapers v. Union of India, (1985) 1 SCC 642
[51] (1973) 1 SCC 227

Hence freedom of expression and assembly is an essential element of democratic system. At the root of this concept lies the citizens right to meet face to face with others for the discussion of their ideas and problems religious, political or social. Thus the freedom of speech coupled with the right to assembly in a public park was upheld in *Himmatlal* Case.

5.9. Bandh and Freedom of Expression

The Supreme Court gave another significant verdict[52] on the aspect of the freedom of expression. Upholding the historic judgement of the Kerala High Court[53], the Apex Court said that there was no right to call or enforce *Bandh* which interfere with exercise of fundamental freedoms of other citizens, in addition to causing national loss in many ways. The Supreme Court said: "we are satisfied that the distinction drawn by the High Court between a "*Bandh*" and "*Hartaal*" is well made out with reference to the effect of a "*Bandh*" on the fundamental rights of other citizens. There cannot be any doubt that the fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people."

Though the "*Bandh*" is an expression of protest of a section of the people, a forced enforcement of that *Bandh* violates the fundamental right of carrying on business, of movement and other related fundamental rights, which cannot be valid. Thus the right to freedom of expression in the form of calling for and enforcing the *Bandh* is rightly restricted by the set of fundamental rights of other citizen or a group of people. The fundamental rights of society in general could be a valid restriction on the fundamental right of an individual or a section of the people.

It is the primary duty of all the national courts to uphold the freedom of the press and invalidate all laws and administrative actions which interfere with such freedom against constitutional mandate, said the Supreme Court in *Indian Express Newspaper v. Union of India*[54]. The Government issued a notice of re-entry upon the forfeiture of lease and threatened to demolish the building of Indian Express. It was held in the above case that the Government intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices by the Government constituted a direct and immediate threat to the freedom of the press and are thus violative of Arts. 19(1)(a) read with Article 14 of the Constitution. Such notices were issued to the Indian Express when it was exposing the scandals like Bofors where the involvement of top brass of ruling party was alleged to have accepted the kickbacks in the deal of purchase of Guns from Bofors company. In yet another *Indian Express* case, Justice Venkataramiah observed that the freedom of press is one of the

[52] AIR 1998 Supreme Court 184
[53] AIR 1997 Ker 291
[54] AIR 1986 SC 872

items around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitution prevails[55].

5.10. Right to Reply: LIC Case

In *Life Insurance Corporation of India v. Manubhai D. Shah*,[56] it was held that Article 19(1)(a) includes the right to propagates one's view and to answer criticism leveled against his view through print media or electronic media. A study paper alleged that Life Insurance Corporation is charging unduly high premiums. The LIC published a counter to that allegation in the study paper in its in-house journal "Yoga Kshema". The trustee, who prepared the study paper wanted a rejoinder to be published in the in-house journal. But the LIC refused to do so. It was held that refusal to publish rejoinder to the counter in its magazine is both unfair and unreasonable and that it was an in house journals was no excuse. The Supreme Court said that the print media had the duty to publish views and counter views. If the article written by a person was criticised in a Magazine, that writer had a right to get his counter to be published in that magazine. In this case, the Supreme Court took up the appeal from the respondent trustee on different facts on the same point of law, i.e., the scope of freedom of speech. The trustee challenged the order of *Doordarshan* refusing to telecast the documentary film "Beyond Genocide" produced by the trust based on the Bhopal Gas Tragedy. The documentary was adjudged as the best non-feature film and awarded the Golden Lotus. It was also declared that all award-winning films would be telecast over *Doordarshan*. It was held: "A film maker has a fundamental right under Article 19(1)(a) to exhibit his film, and therefore onus lies on the party which claims that it was entitled to refuse enforcement of this right by virtue of law made under Article 19(2) to show that the film did not conform to the requirements of that law." The Supreme Court said that it was not proper on the part of the Government to refuse to telecast on the ground that there was a criticism against the Government and a comment that the litigation was pending in courts for a long time. The Apex Court said that these were not grounds at all. The Supreme Court rejected the appeals by LIC, and said: "LIC is a state within the meaning of Article 12 and therefore it must function in the best interest of the community. The Community is entitled to know whether or not this requirement is complied with by the LIC in its functioning…Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship."

5.11. No Geographical Limitation: Maneka Gandhi v. Union of India.

There is no geographical limitation to the freedom of speech and expression. This exercisable right is available not only in India but also outside the country. If the State sets up the

[55] AIR 1986 SC 515, 1985(1) SCC 641
[56] (1992) 3 SCC 637

barriers to check the freedom of expression by an Indian citizen in any other country of the world, it violates Article 19(1) (a). In Maneka Gandhi v. Union of India[57] it was contended on behalf of the Government that the fundamental rights guaranteed by the Constitution were available only within the territory of India, but the Supreme Court held that the right to freedom of speech and expression has no geographical limitation. The right carries with it the right to gather information as also to speak and express oneself at home and abroad and to exchange those ideas with others not only in India but also outside India. If the direct and indirect consequence of the order canceling the passport of the petitioner is to abridge or take away freedom of speech and expression, it would be violative of Article 19 (1) (a) and would not be protected by Article 19(2) of the Constitution.

The Freedom under Article 19 and Religious Faith: Bejoe Emmanuel V. State of Kerala (National Anthem Case)

The freedom of expression has been extended by Supreme Court even to include the faith of a religious group, under which they refrained from joining their voices when National Anthem was sung. In *Bejoe Emmanuel v. State of Kerala*[58] the three school children were faithful of Jehova's witnesses, a world wide sect of Christians. During the morning assembly at school these children while respectfully standing during the recitation of the National Anthem, Jana Gana Mana, refused to sing it on the ground that it was against the tenets of their religious faith. That Jehova's witnesses do have several tenets among them refusal to sing any National Anthem or salute Flag, has been well established and recognised by world over and upheld by the highest courts in the United States, Australia and Canada and found recognition in authoritative texts like Encyclopaedia Britannica. Circulars issued by the director of public instruction, Kerala obliged school children to sing National Anthem. Consequently, the three children on the instruction of the Deputy Inspector of Schools were expelled from the school. Having failed to secure relief through representations, they filed writ petition which was rejected first by Single Judge and then by a Division bench of the High Court of Kerala. The Supreme Court accepted their appeal. It was held that "the appellants truly and conscientiously believed that their religion does not permit them to join any rituals except it be in their prayers to Jehovah, their God. Though their religious belief may appear strange, the sincerity of their belief is beyond question. They do not hold their beliefs idly and their conduct is not the outcome or out of any unpatriotic sentiments. Their objection to sing is not just against the National Anthem of India. They have refused to sing other National Anthem elsewhere. They are law abiding and well-behaved children who do stand respectfully and would continue to do so when National Anthem is sung. Their refusal, while so standing to join in the singing of the National Anthem is neither disrespectful of it nor inconsistent with the Fundamental Duty under Article 51 A(a). Hence non-action should

[57] AIR 1978 SC 597, 1978 (1) SCC 248
[58] (1986) 3 SCC 615

have been taken against them. It was held to be their fundamental right of freedom of speech and expression not to sing the National Anthem during the morning assembly of the School".

This decision upholds the liberty of thought and belief apart from freedom of expression. As long as it did not mean deliberate disrespect, their right to be silent at the time of singing of National Anthem was held to be a recognized right under Article 19(1)(a). Being silent is also one kind of exercise of right of expression.

5.12. Freedom of Press:

Indian Constitution does not provide for a specific and separate right to freedom of the Press unlike that in the United States of America. Although Article 19(1)(a) does not mention the freedom of the press it is inferred from judicial decisions that the freedom of speech and expression included in its rubric, the freedom of the press and circulation also. In several cases the Supreme Court held that there was no need to mention freedom of the press separately, because it was already guaranteed under the freedom of expression[59]. It is felt unnecessary to make such specific mention, for freedom of speech and expression includes the liberty to propagate not only ones own views but also the right to print matters which have either been borrowed from someone else or one printed under the directions of that person, and also includes the liberty of publication and circulation.

Romesh Thapper v. State of Madras, [60] (Cross-Roads Case)

The Madras Government imposed a ban upon the entry and circulation of the journal called "The Cross-Roads" within the state of Madras. The order was challenged and the Supreme Court held that the Madras Maintenance of Public Order Act, 1959, which authorizes the imposition of restrictions, was void and constitutional. The Supreme Court observed that the criticism of the Government of exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press unless it is such as to undermine the security of the State or tend to overthrow the State. Unless a law restricting freedom of speech and expression is directed solely against the undermining of security of the State or the overthrow of it, such law cannot fall within the reservations under Article 19(2). Supreme Court said.

…There can be no doubt that freedom of speech and expression includes freedom or propagation of ideas, and that freedom is ensured by the freedom of circulation; Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation, the publication would be of little value.

Brij Bhushan v State of Delhi[61](Organiser case)

[59] Express Newspapers v. Union of India, 1959, SCR 12
[60] 1950 SCR 594

This case and the Cross-Roads case were disposed off by the common judgment. In this case the East Punjab Safety Act 1940 authorized the Government to take action necessary for the purpose of preventing any activities prejudicial to the public safety or the maintenance of public order. This was challenged as unconstitutional. Supreme Court agreed with the contention and held that the relevant provisions of 1940 Act as unconstitutional because the grounds of public safety and maintenance of public order were not available under Article 19(2).

Following the decision of the Supreme Court in Romesh Thapper (Cross-Roads) and Brij Bhushan (Organiser) cases, many High Courts in our country pronounced decisions to the effect that even incitement to individual murder or promoting disaffection amongst classes could not be restricted under the permissive limits set in Article 19(2). The interpretation given by the Supreme Court in these two cases just after the coming into being of the Constitution was misunderstood and misapplied which the Supreme Court noted with regrets in *State of Bihar v. Shailbala* referred below.

State of Bihar v. Shailabala Devi,[62]

The state ordered the keeper of the Bharathi Press to furnish a security in the sum of Rs 2000 on the ground that the pamphlet entitled 'Sangram' printed by it contained objectionable matter punishable under Section 4(1) of the Indian Press (Emergency Powers) Act, 1931. It was challenged as violative of freedom guaranteed by the Constitution. Supreme Court held that the pamphlet did not come within the mischief of Section 4 as it merely contained empty slogans carrying no particular meaning except some amount of figurative expressions or language borrowed at random various authors. The Supreme Court also observed that in order to determine whether a particular document was within the ambit of Section 4(1) the writing has to be considered as a whole in a fair, free and liberal spirit, not dwelling too much on isolated passages or upon a strong word here and there and an endeavour should be made to gather the general effect which the whole composition would have on the minds of the people.

The alarming situation arising out of the judgments of the Supreme Court in Organizer and cross Roads necessitated the Government to come forward with an amendment of Article 19(2) so as to restrict liberal interoperation given by the supreme Court. Additional grounds of (a) friendly relations with foreign States, (b) public orders and (c) incitement to an offence were added by the First Amendment to the Constitution.

Sakal Papers (Pvt) Limited v. Union of India[63]

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[61] AIR 1950 SC 129
[62] AIR 1952 SC 329
[63] AIR 1962 SC 305

The Newspapers (Price and Page) Act 1955 empowered central Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. Under this Act, the Central Government issued The Daily Newspaper (Price and Page) Order, 1960 and fixed the minimum number of pages that could be issued by the newspaper. This was alleged to be contravening the Article 19(1)(a) of the Constitution. The contention was accepted and both the Act of 1955 and the Order of 1960 made under it were held void for being violative of Constitutionally assured Fundamental Right which was not saved by Article 19(2). In order to propagate his ideas, a citizen has the right to publish the same, disseminate them, and circulate them by word of mouth or writing or printing. The right not only extended to the matter and its circulation but also to internal control and freedom over the allocation of space for the matter. To quote The Supreme Court:

> The Newspaper Act was intended to affect the circulation and thus directly affect the freedom of speech. The Act seeks to achieve its object of enabling what are termed the smaller newspapers to secure larger circulation by provisions, which without disguise are aimed at restricting the circulation of what are termed as larger papers with better financial strength. The impugned law far from being one, which merely interferes with the right of freedom of speech incidentally, does so directly though it seeks to achieve the end by purporting to regulate the business aspect of a newspaper. Such a course is not permissible and the Court must be ever vigilant in guarding perhaps the most pernicious of all the freedoms guaranteed by our Constitution, The freedom of speech and expression is of paramount importance under a democratic Constitution which envisages changes in the composition of legislature and Government and must be preserved.

The restrictions were sought to be justified by the Union Government on the ground that since newsprint was in short supply and to be imported, it was necessary to restrict and regulate its distribution and use. The Court pointed out that shortage of newsprint could stop with allotment. If the Government rests content with a fair and equitable allotment of the available newsprint to the consumers, none can quarrel with the policy. Once the allotments are made, newspapers must be left free to determine how they will adjust their newsprint; to determine their pages, their circulation and their new editions within the quota allotted to them. But what the government has done under the garb of distribution of newsprint is the control of the growth and circulation of newspapers so that Newsprint Control has been subverted to Newspaper Control. Freedom lies both in circulation and content. The impugned Newsprint Policy denies newspapers their right of circulation. Even by reducing circulation they are not allowed to increase the number of pages, page area or periodicity. The restrictions are not reasonable restrictions under Article 19(2).

The Court also held that the newsprint policy violates Article 14 because it treats newspapers, which are not equal as equals in assessing the needs and requirements of newsprint.

The Supreme Court acted as a perfect saviour of freedom by preventing Government from making repressive laws under the garb of the newsprint control policy, with this historical Judgement.

Bennet Coleman v. Union of India[64]

In this case it was held that to require a newspaper to reduce its space for advertisement would directly affect the circulation since it be bound to raise the price. Such attempt would amount to unreasonable restriction upon the freedom of expression or which would curtail the circulation and thereby narrow the scope of dissemination of information or fetter its freedom to choose it means of exercising the right or would undermine its independence by driving it to seek Government aid.

Indian Express Newspapers (Bombay) Pvt Ltd. v. Union of India[65]

The Supreme Court further explained the meaning and importance of this freedom in this yet another significant case:

> The expression freedom of press has not been used in Article 19 but it is comprehended within Article 19 (1) (a). The expression means freedom from interference of authority, which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make a responsible judgment. Freedom of press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions, which interfere with it contrary to the Constitutional mandate.

Blackstone said that the essence of freedom of expression is that every person should be able to lay his sentiment before the public without previous restraint, that to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his temerity.[66]

One main purpose of the constitutional provision according to Justice Holmes, was "to prevent all such previous restraints upon publications as had been practiced by other

[64] AIR 1973 SC 106
[65] (1985) 1 SCC 641
[66] Blackstone, Commentaries on the laws of England (1765; 4th Ed. 1770 in 4 volumes) Book 4 Chap II 151-152.

governments", that it generally does not prevent the subsequent punishment of such as may be deemed contrary to the public welfare and that the preliminary freedom extends as well to the false as to the true".[67]

In India too, people are free to believe and to advocate or to disbelieve and to argue against any creed and they can even say that the Constitution itself is a document which should have been differently drafted. The government is unqualifiedly forbidden to restrict or abridge that freedom.

Unlike the right to property, which is limited and is infringed by the Government, right to free speech and expression is fundamental and cannot be unreasonably restricted. Freedom of expression has a direct impact on the democracy, public officials and public figures. Indian Constitution envisages the establishment of a democratic republic. That means that the governmental powers are derived from consent of the governed, as explained by the Meiklejohn. Government without consent of the people is inconsistent with personal freedom. Government without one's consent is an affront to human dignity and respect. Everyone must be a consenting party to the Government, without such consent he is not likely to be the member of the ruling machinery. When freedom and dignity are supported by wide spread self interest and approval they stand on a sure foundation. According to Meiklejohn, when one man or some self chosen group holds control without consent over others, the relation between them is one of force and counterforce, of compulsion on the one hand and submission and resistance on the other…the only basic fact that one group has the power and the group has not. In such despotism, a ruler, by some excess of strength, or guile or both, without the consent of his subjects, forces them into obedience[68].

The idea of freedom of speech has been transplanted in our Constitution from the American Constitution and that the American Constitution borrowed this idea from the English Constitutional practice. It is clear from the English precedents that certain forms of speech in certain contexts have been considered outside the scope of Constitutional protection. They are not included within the ambit of Article 19(1). As the freedom of the press is part and parcel of freedom of speech and expression, naturally the press cannot be subjected to any restrictions by making a law unless that law itself was constitutionally valid i.e., consistent with Cl(2) of Article 19.Amrican Constitution did not spelt out restrictions on the freedom of the Press, like Indian Constitution. Due process clause, police powers and clear and present danger tests were developed by the US courts to restrict the press freedom. Douglas compared the Indian and American Constitutions on the freedom of the press and said:

[67] Pattern v. Colarado, 305 US 454, 462
[68] Alexander Meiklejohn: Political Freedom: Constitutional Powers of the People, 1960, pp25-28

> "The Indian Constitution merely spells out what the Justices of the Supreme Court of United States had expressed over the decades in regard to the Bill of Rights. There appears to be nothing wrong in stating the categories of matters in respect of which a government may impose restrictions on fundamental rights. No government can function without the power of exercising reasonable restrictions in such matters. The incorporation of the word "reasonable" makes it necessary that the restrictions imposed in each individual case are reasonable, and whether they are so or not may be determined in a court."[69]

The Supreme Court of India, in Express Newspaper case (1959) said that there was no need to incorporate freedom of press specifically as it goes by implication in the Article 19(1)(a). However, the National Commission for Review of Working of the Constitution under the chairmanship of Justice Venkatachalaiah, in its consultation paper on enlargement of Fundamental Rights, suggested specific inclusion of Freedom of Press under Article 19 along with Freedom of Information and Right to Privacy among other fundamental rights. The Consultation paper said: "These freedoms are the bedrock of democracy. In majority of national constitutions freedom of the press guaranteed in specific terms. It is felt that our Constitution should also expressly include freedom of the press and right to information as guaranteed fundamental rights in Part III. Right to know and the right to information have been spelled out by the Supreme Court in S.P. Gupta's case.[70] The Commission proposed to include freedom of press and of other media to extend it to the electronic communication vehicles. Another significant inclusion suggested is to ensure freedom to hold opinion and to seek, receive and impart information and ideas regardless of frontiers. It suggested following draft in place of present Article 19(1):

> Article 19(1): All citizens shall have the right (a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinion and to seek, receive and impart information and ideas regardless of frontiers.

5.13.Freedom of Media: Independent Editorial Authority

The freedom of the media under the Constitution is not higher than the freedom of an ordinary citizen and is subjected to the same limitations.

Freedom of the media basically guarantees absence of even indirect interference effecting the independence of the editorial authority of a newspaper. The contents of the newspaper are totally left to the choice of the editor. The reason is clear, the freedom of expression cannot be said to exist where the Government dictates what views or information should be published through the media of expression.

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[69] Dean Sivasubramanian's Review of Doubglas' We the Judges" 23, University of Chicago L. R. 563,565.
[70] S.P. Gupta & others v President of India & others AIR 1982 SC 149

5.14. Freedom of Circulation

Freedom of the press is both qualitative and quantitative. Freedom lies both in content and in circulation. When newsprint, the white paper on which the newspaper is printed, is a scarce commodity, the state assumed the responsibility of equitable distribution of the newsprint among the newspapers, which is permissible. But in the name of such permitted equitable distribution, any control of the growth and circulation of newspapers would be denial of the freedom of the press.

The press has the right to free propagation and free circulation without any previous restraint. If a law were to single out the press for laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to seek Government aid, there would be a violation of the right conferred by Article 19 (1)(a).

5.15. Defection & Article .19(1)(a)

According to law passed by Jammi & Kashmir legislature, a legislator has to resign if he defects from the party from which he was elected. This law was challenged under the Article 19(1)(a) on the ground that it unreasonably curbed the right of dissent and violated the freedom of speech and expression of a legislator. The Court rejected the challenge and pointed out that the totality of rights enjoyed by a legislator including the freedom to speak on the floor of the House are merely privileges governed by Article 105 and not fundamental rights, in *Mian Bashir v Jammu & Kashmir*[71].

5.16. Media Freedom and Advertisement

Advertisements are the main source of revenue for newspapers. Generally the Government issues number of advertisements to various newspapers. In a way it is another indirect power in the hands of the administration to muzzle the press, which do not toe their line. Then the question is whether a newspaper to which the government did not allot any advertisement can complain of the discrimination and as such a violation of freedom of expression.

Eenadu Case

In *Dainik Sambad v. State of Tripura*[72] it was held that the discriminatory allotment of Government Advertisements to different newspapers of the same category by the State Government would impair the freedom of press violating Article 14 and Article 19(1)(a).

[71] AIR 1982 J & K 26
[72] Dainik Sambad v State of Tripura, AIR 1989 Gau 30

However, it was held in *Ushodaya Publication Case*[73] *(Eenadu Case)* newspapers have no right to demand the advertisements from the Government and the Government has the right to choose the newspaper to bring out advertisement. At the same time it was held in this case, that the Government power to distribute the largess through issue of advertisement should not be arbitrary or discriminatory to muzzle a section of press which criticises its policies and programmes. It was observed in the *Gulam Nabi v State of J & K*[74] that if the State chooses to completely stop the issuance of advertisement in the newspapers in the country, no newspaper can have any grievance or seek relief from the court compelling the State to issue Advertisement.

Hamdard Dawakhana v Union of India

Whether the restriction on advertisement violates fundamental right of freedom of speech or not was the question before the Supreme Court in **Hamdard Dawakhana v Union of India**[75]**.** If there is a restriction on advertisement to promote the drugs, it was held to be valid restriction and such an order would not violate the freedom of expression. A commercial advertisement has an element of trade and commerce and not in any way connected with advancement of noble thoughts or literature. All advertisement does not relate to the freedom of speech and expression of ideas as contained in Article 19(1)(a).

Advertisement is also part of press freedom

Yellow Pages Case:

In *Tata Press Ltd., Mahanagar Telephone Nigam Ltd,*[76] the Supreme Court held that a commercial advertisement or commercial speech was also a part of the freedom of speech and expression, which could be restricted only within the limitations of Article 19(2). The Nigam permitted contractors to publish telephone directories in "yellow pages" and to raise their revenue from advertisements. These "yellow pages" used to be added to the directory published by the Nigam in white pages. The Bombay High Court allowed the appeal of the Nigam, which sought a declaration that it alone had exclusive right to publish the telephone directory and that the Tata press had no right to publish the list of the telephone subscribers without its permission as it would be violation of Indian Telegraph Act. The Tata press went in appeal to Supreme Court. Admitting the appeal, the Court said: "The Advertisement as a "Commercial Speech" has two facts. Advertising which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product-advertised. Public at large are benefited by the information made available through the advertisements. In a democratic economy, free flow of commercial information is indispensable. There

[73] Ushodaya Publication v. State of A.P. AIR 1981 AP 109
[74] AIR 1990 J & K 13
[75] AIR 1960 SC 554
[76] (1995) 5 SCC 139

cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "Commercial speech". The public at large has a right to receive the commercial speech. Article 19(1)(a) of the Constitution not only guaranteed freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. Supreme Court emphatically held that the right under Article 19(1)(a) could not be denied by creating a monopoly in favour of the Government, it could only be restricted on grounds mentioned in Article 19(2) of the Constitution.

This is a welcome deviation from the judgement of the Apex Court in *Hamdard Dawakhana v. Union of India,*[77] wherein it was held that the commercial advertisement did not fall within the protection of freedom of speech and expression as such an advertisement had an element of trade and commerce. It was also held in that case that a law which puts restrictions on the publication, through the press or other means, of advertisements to promote the sale of certain good does not violate the right to free speech or the press. But the later developments where the commercial information also became indispensable, it was rightly held in the Tata Press case that the people have right to listen and receive the commercial speech.

5.17. Freedom of Expression & Electronic Media

In Life Insurance Corporation of India v Manubhai D. Shah[78], the Supreme Court held that the words 'freedom of speech and expression' have to be broadly construed to include the freedom to circulate one's views by words of mouth, or in writing or through audio visual instrumentality. Thus electronic media which broadcasts and telecasts the information is also included in the broad spectrum of freedom of expression.

A public interest litigation under Article 226 was filed to restrain the authorities from telecasting the serial *Honi Anhoni* on the ground that it was likely to spread false and blind beliefs and superstition amongst the members of the public. The High Court of Bombay granted a temporary injunction. The matter came up before the Supreme Court by special leave under Article 136 of the Constitution. The Supreme Court[79] held that the order of injunction granted was improper as the respondent has failed to produce any material apart from his own statements to show that the exhibition of the serial was prima facie prejudicial to the community as such the issue of order of injunction would infringe a fundamental right of the producer of the serial.

[77] AIR 1960 Supreme Court 554
[78] AIR 1993 SC 173
[79] Odyssey Communication Pvt. Ltd. Lokvidayan Sanghatan AIR 1988 SC 1642

Our Constitution forbids monopoly of either the print or electronic media. The airwaves are a public property and hence are owned and controlled by the Government or a central national authority or they are not available on account of scarcity, costs and competition. It is a built-in limitation on the use of electronic media as it involves use of airwaves, which is a public property. A citizen has fundamental right to use the best means of imparting and receiving information and as such to have an access of telecasting for the purpose. This right again is limited on account of the use of the public property.

Romesh v. Union of India

In **Romesh v. Union of India**[80] a petition was filed to restrain the screening of the film serial TAMAS on the ground that it violates Article 21 and 25 and Section 5B of the Cinematography Act. The film was based on the novel of Bhisma Sahni, which depicted the events in Lahore immediately before the partition of the country. Two judges of the Bombay High Court saw the film and rejected the contention that it propagated the cult of violence. Supreme Court agreed with the High Court and emphasized the need to encourage the telecasting of the film in Television, as it is a powerful medium.

Right to Telecast
***Secretary, Ministry of I & B. v. Cricket Association of Bengal*.**

The right to freedom of speech and expression is considerably widened by the Supreme Court in a historic judgement in *Secretary, Ministry of I & B. v. Cricket Association of Bengal*.[81] In this case the Supreme Court held that the Government had no monopoly on electronic media and a citizen had under Article 19(1)(a) a right to telecast and broadcast to the viewers/listeners through electronic media any important event. The Court directed the Union to establish an independent and autonomous body to supervise the electronic media, *Doordarshan* and All India Radio, so that this media would be free from the shackles of the Government control. The Supreme Court held that the fundamental right to freedom of speech and expression includes right to communicate effectively and to a large population not only in this country but also abroad. A citizen should have access to electronic media for communication. It also warned that the airways must be used for the public good because they were the property of the members of general public. Justice B.P. Jeevan Reddy suggested relevant amendments to a century old Indian Telegraph Act as there was tremendous change due to scientific and technological advancement in the field of communication.

[80] AIR 1988 SC 775
[81] (1995) 2 SCC 161

Censorship of films:
K. A. Abbas v Union of India

In *K. A. Abbas v Union of India*[82] the censorship of films was challenged as unreasonable restriction over freedom of expression. Supreme Court upheld the censorship of the films on the ground the films have to be treated differently from other form of art and expression as the motion picture is able to stir up the emotions more deeply than any other form of art and censorship of the films on any of the grounds mentioned in Article 19(2) is justified.

The Supreme Court justified the pre-censorship of films under Article 19(2) on the grounds that films have to be treated separately from other forms of Article and expression because a motion picture was able to stir up emotions more deeply than any other product of Article. The classification of films between categories like "A" (for Adults only) and "U" (for all), was held to be valid in *K.A.Abbas. v. Union of India.*[83] This position remained unaltered.

Bandit Queen Case

A citizen Om Pal Singh Hoon asked the court to quash the certificate of exhibition given to the film "Bandit Queen" and to restrain its exhibition in India. The petitioner contended that the depiction of the life story of Phoolan Devi in this film was "abhorrent and unconscionable and a slur on the womanhood of India". He also questioned the way and manner in which the rape was brutally picturised suggesting the moral depravity of the *Gujjar* community. Delhi High Court held that the rape scene was obscene and quashed the order of Tribunal granting "A" certificate to the film. The Supreme Court allowed the appeal and held that issuance of "A" certificate by Tribunal was valid. The Supreme Court said that the film must be judged in its entirety from the point of overall impact. Where theme of the film is to condemn degradation, violence and rape on women, scenes of nudity and rape and use of expletives to advance the message intended by the film by arousing a sense of revulsion against the perpetrators and pity for the victim is permissible, said the Supreme Court in *Bobby Art International v. Om Pal Singh Hoon* case.[84]

With the advent of satellite television channels and boom of private cable TV networks, the flow of visual information containing overdose of sex, obscenity, and information not in the interest of the nation, also increased. The pre-censorship of the TV material is not practically possible. The regulation of satellite channels and cable TV is yet to take a shape of legislation, despite a direction from the Supreme Court in Hero Cup case[85]

[82] AIR 1971 SC 481
[83] AIR 1971 Supreme Court 481 and *LIC v. Manubhai D.Shah,* (1992) 3 SCC 637
[84] (1996) 4 SCC 1
[85] Supra note 10 (1995) 2 SCC 161

5.18. Reasonable Restrictions

There are limitations imposed by Article 19(2) to 19(6) on the freedoms guaranteed by Arts. 19(1) (a) to (g). They specify that freedoms are not absolute but are subject to regulation. These articles also put a limitation on the power of a legislature to restrict these freedoms. Legislature cannot impose more limitations than prescribed under these provisions.

Essential elements of these restrictions are as follows:

1. Restrictions can be imposed only by or under the authority of law. Restrictions cannot be imposed by the executive action without legal authority.

2. The restriction must be 'reasonable'.

3. Restriction must be related to the purpose specifically mentioned in these clauses.

4. The judiciary has power to test the validity of these restrictions on two grounds, firstly-whether the restriction is reasonable or secondly whether it is for the purpose mentioned in the clause under which the restriction is being imposed? Legislative determination as to reasonableness is not final and it is subjected to judicial scrutiny.

The British India Government tried to curb the press for its active role in freedom movement, by passing the Indian Press (Emergency) Act, 1931. With this law, the British Executive started trials for press offences and the licensing system in India. Earlier the English democracy fought against these offensive measures and got repealed. This Act imposed an obligation on the press to furnish a security, which stood to be forfeited if it published any matter that might (i) promote hatred or contempt for the government, (ii) incite disaffection towards the government, (iii) incite feelings of hatred or contempt between two different classes of subject, or (iv) encourage a public servant to resign or neglect his duty. After the Independence the Supreme Court declared this Act of 1931 to be ultra vires under Article 19(2) of the Constitution.[86]

The Press (Objectionable Matter) Act of 1951

The Press (Objectionable Matter) Act of 1951 was passed in place of the Act of 1931, for a temporary period. It provided for judicial scrutiny by the sessions Judge before security could be demanded from, or forfeited by a printing press, and it conferred a right of appeal to the High Court. This Act was repealed in 1957. Another enactment came in 1975 to impose curbs on free Press, during Emergency. The Prevention of Publication of Objectionable Matters Ordinance 1975 imposed pre-censorship and provided for stringent action against the hostile press. However, this oppressive legislation which suppressed the voice for about two

[86] *Srinivas v. State of Madras* AIR 1951 Mad.

years was repealed after the Indira Gandhi government was defeated in 1977 general elections. The new government restored the Parliamentary Proceedings (Protection of Publications) Act 1956, and revived the Press Council, which was removed by Indira Gandhi government. Another draconian law, which was in existence from the British regime was Official Secrets Act 1923, despite the opposition against this act as being a serious limitation on the freedom of press. It remains as an obstruction to the right to information even today.

There is no definite test to adjudge reasonableness of restriction imposed by the state through law. Every case has to be judged on its merits looking into reasonable ness of substantive law and procedural provisions. M.P. Jain, in his Book Indian Constitutional Law, Fourth Edition, says, "a reasonable restriction should have a rational relation with the grounds for which the legislature is entitled to impose restrictions. Too remote connection between a restriction and the constitutionally authorized ground for restriction will render the law invalid. When a law is found to infringe a right guaranteed by Article 19(1), the law will be invalid unless it can be brought under the protective provision of Arts. 19(2) to 19(6). The burden to show this is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid[87]. Thus the onus is on the state to justify that the restriction imposed on any fundamental right guaranteed by Arts. 19(1)(a) to (g) is reasonable under clauses 19(2) to (6).

To decide if restrictions are unreasonable, clause (4) of Article 19 suggests looking into "prevailing conditions". This phrase includes the state of affairs in the realm in all their aspects, political, economical, as well as the urgent need of society and the public interest at any given time. No abstract standard can be laid down for reasonableness. It is the function of the court to decide whether a particular statue satisfies the objective test of reasonableness. Reasonable restrictions have to be considered from the standpoint of the interest of the public and not from the point of view of persons upon whom restrictions are imposed.

The exercise of any right must not lead to a wrong, either on individuals or on society or State. In all modern states there are certain fixed principles of law enunciated and expanded by decisions of courts or by statutes which demonstrate that individual rights are never absolute but are restricted by certain limitations in the interest of decency, public order, public health, morality, security of the State etc. The doctrine of police power of the state was introduced and gained judicial recognition. This police power of the State was needed in America to counteract the all pervading 'due process clause' which gave to the citizen an everlasting spring of privileges and safety valves. In all cases where this 'due process clause' is invoked, the courts invariably asked a question: "is this fair, reasonable and appropriate exercise of the police power of the State or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty. Indian Constitution did

[87] Vrajlal M. & Company v. Madhya Pradesh, AIR 1970 SC 129

not refer to this expression of due process clause and thus the need to invoke police powers to counter it did not arise. The limitations for the exercise of Fundamental Rights guaranteed by the Constitution are explained in detail in the constitution itself and so there is no need to resort to or invent an inchoate and all pervading 'police power' in the State to safeguard public interests. The 'due process clause' gave enormous power to the American courts to strike down any interference by the State in the citizens' rights and the 'police power' of the State was the weapon of refuge for the State from the onslaught of the judiciary. Indian Constitution properly visualized that recognition of the Police power of the State would whittle down the power of the courts of law to almost nothing. In America it is the court that has to finally adjudge if the Legislature had exercised properly its police power. This supervisory power of the court was a check on excessive user under cover of the police power of the state. In India particularly after the First Amendment the element of judicial review was strengthened by adding 'reasonable' as prefix to the word 'restrictions' and by listing of the grounds on which legislation restricting the fundamental rights could be passed. The concept of reasonableness is a wholesome doctrine to harmonise individual rights with public and collective interests. Restriction ordinarily means only regulation in American usage and not prohibition. But it depends upon the circumstances and kinds of business. Thus sale of adulterated food or drugs, brickyard in thickly populated areas may be absolutely prohibited.

Article 19(2) was amended in 1951 and the State was allowed to make laws with the object of imposing reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) in the interests of

1. Security of State,
2. Friendly relations with foreign states,
3. Public order,
4. Decency or morality
5. In relation to Contempt of court
6. Defamation
7. Incitement to an offence.
8. Sovereignty and integrity of India (This ground is added in Article 19(2) by Constitution (Sixteenth Amendment) Act, 1963)

Public Order & Security of State

If an act has tendency to cause public disorder it would be valid ground under Article 19(2) to impose restrictions, even though it may not lead to breach of public order.

Supreme Court explained the meaning of the public order as that state of tranquility, which prevails amongst the members of a political society as a result of the internal regulations, enforced by the Government, which they have established[88]. The expression security of state refers to serious and aggravated form of public disorder and not ordinary law and order problem and public safety. The speeches and expressions, which encourage violent crimes, are related to security of State[89].

Official Secrets

Mere criticism of the Government action would not fall within the mischief of 'public order' and the same would be protected under Article 19(1)(a). The Supreme Court referring to Section 124A of the IPC held that the activity would be rendered penal when it is intended to create disorder.[90] In the name of security, the Official Secrets Act of 1923 is still imposing severe restrictions on the freedom of expression. However, the governments in principle accepted to reduce the seriousness of this colonial legislation and provide for Right to Freedom of Information. The Official Secrets Act poses a major impediment in the process of providing right to information.

Incitement to an Offence

The fundamental right of freedom of speech and expression ends when such incites the commission of violent crimes, which include attempts to insult the religious beliefs of any class. The aggravated forms of insult to religion which may clearly intended to disrupt public order are reasonable grounds based on which restrictions can be imposed on freedom of speech and expression. Promotion of disharmony among the classes during an election speech also can be restricted on the same ground. Seeking votes on the ground of candidates religious a in a secular state is against the norms of decency and propriety of the society[91]. Thus Section 123(3) of Representation of People Act 1951 which imposes restriction on the exercise of right under Article 19(1) (a) is based on the support from Article 19(2) which include 'decency' as a ground.

In ***Indulal K. Yagnik v. State of Maharashtra***[92] Section 3 of the Police (Incitement to Disaffection) Act 1922 was challenged as contrary to the fundamental right to freedom of expression. Bombay High Court held that the inducement of a police officer is punishable and thus the restriction on the free expression to prevent incitement to offences is valid under Article 19(2).

[88] Ramesh Thapper v. State of Madras AIR 1950 SC 124
[89] State of Bihar v. ShailaBala AIR 1952 SC 329
[90] Kedarnath v. State of Bihar AIR 1962 SC 955
[91] R.Y .Prabhoo v. P.K. Kunte AIR 1996 SC 1113
[92] AIR 1969 Bom 399

Similarly section 144 of Criminal Procedure Code which gives wide power to District Magistrates to impose restriction upon the fundamental rights of freedom of speech and assembly, is declared constitutional, in ***Babulal v. State of Maharasthra***[93] and ***State of Bihar v. K.K. Mishra***[94]

Contempt of Court

Contempt of Court has been recognised as a valid ground for imposing restrictions on the freedom of speech and expression. The Supreme Court in *C.K. Dephtery v. D.P.Guptha*[95] held that the power of contempt administered by the Supreme Court under Article 129 is reasonable under Article 19(2). Section 228 of Indian Penal Code also makes the contempt of court punishable; Contempt of Courts Act 1952 also punishes it.

When former Chief Minister of Kerala, E.M.S. Namboodripad made various critical remarks against the judiciary at a press conference, he was questioned for contempt of court. He argued that the statement was protected under Article 19(1)(a). Rejecting the argument the Court held that while exercising the right of freedom of expression one should not commit contempt of court, and any comment which could be a contempt is not protected by the Constitution.[96]

Supreme Court stated the object and content of this restriction in a recent case ***Narmada Bachao Andolon*** [97] as follows: "No person is permitted to distort orders of the court and deliberately give a slant to its proceedings, which have the tendency to scandalize the court or bring it to ridicule. Hypersensitivity and peevishness have no place in judicial proceedings- vicious stultification and vulgar debunking cannot be permitted to pollute the stream of justice".

However, the newspapers and media channels have right to publish reports on the proceedings of the court, subject to the orders of the Court resolving the dispute. But if the Court orders not to publish a particular evidence of a witness, that is not an invalid order. Thus it cannot be said that press or TV channels have fundamental right to publish the court proceedings.

Causing Contempt of Court is not part of the freedom of press. In fact, contempt of court is a ground on which the press freedom can be restricted under Article19 (2). A news item stating that two sons of senior judge of the Supreme Court and two sons of the Chief Justice of India were favoured with the allotments of petrol outlets from the discretionary quota by the Petroleum Minister was published in some newspapers. The concerned Editors, Printers

[93] AIR 1961 SC 884
[94] AIR 1971 SC 1667
[95] AIR 1971 SC 1132
[96] E.M.S. Namboodripad v. T.N. Nambiar AIR 1970 SC2015
[97] AIR 1999 SC 3345

and Publishers admitted that the news item was false and was published inadvertently and without any malice to the judiciary. "The Sunday Tribune" in its issue dated March 10, 1996 published an item with a caption "Pumps for All". A similar item also was published in "Punjab Kesari". Contempt proceedings were taken up on the petition of K.T.S.Tulasi, and Additional Solicitor General besides some senior Advocates. Supreme Court held that the newspapers did not take even ordinary care to verify the truth of the allegations and did some disservice to the society by disseminating false information affecting the credibility of newspapers and causing embarassment to the Supreme Court. The Court said that obviously this could not be regarded as something done in good faith. However, the Supreme Court accepted the apology tendered by the Journalists. The Court said: "he (senior Journalist) has no doubt, committed serious mistake but he has realised his mistake and expressed sincere repentance and has tendered unconditional apology for the same. He was present in the Court and virtually looked to be gloomy and felt repentant of what he had done. This suffering in itself is sufficient punishment for him. He being a senior journalist and an aged person and, therefore, taking lenient view of the matter his apology was also accepted." The Court directed the contemners to publish in front page of their respective newspapers within a box their respective apologies specifically mentioning that the said news items were absolutely incorrect and false.[98] However, the Supreme Court in this judgement, reiterated the importance of a vibrant free press in a democracy in the following words.

Freedom of Press has always been regarded as an essential pre-requisite of a Democratic form of Government. It has been regarded as a necessity for the mental health and the well being of a society. It is also considered necessary for the full development of the personality of the individual. It is said that without the freedom of press truth cannot be attained. The Freedom of the Press is regarded as "the mother of all other liberties" in a democratic society. A free and healthy Press is indispensable to the functioning of a true democracy. In a democratic set-up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries.

Truth as partial defence to contempt of court:

Upholding the need for fair comment and criticism of the judicial proceeding the Parliament has passed the Contempt of Court (Amendment) Act, 2006 to fulfill a longstanding demand to include ‘truth’ of criticism against court by media as defence available to writer or press or media organization to the charge of contempt of court.

[98] *In Re*: Harijai Singh and another, *In Re:* Vijay Kumar AIR 1997 Supreme Court 73

The Act provides that the "Court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that ***it is in public interest and the request for invoking the said defence is bona fide.*** This amendment answered the criticism that we claim 'Satyameva Jayathe' as the objective our nation, but make a truthful criticism of court a crime. The amendment is a major relief for makers of truthful comments, though very critical and negative, on court of law. However, the truth was not made a complete defence. The journalist making such comment has to prove that it was made in public interest and request for invocation of the defence is bona fide.

Supreme Court Judgment in 2010

In a 2010 case, the Supreme Court held that truth based on facts should be allowed as a valid defence, if courts are called upon to decide contempt proceedings relating to a speech or an article or an editorial in a newspaper or magazine unless such defence is used as a camouflage to escape the consequences of a deliberate attempt to scandalise the court. A Bench of Justices G.S. Singhvi and A.K. Ganguly said: "Section 13 of the Contempt of Courts Act represents an important legislative recognition of one of the fundamentals of our value system: truth. The amended Section enables the court to permit justification by truth as a valid defence in any contempt proceeding if it is satisfied that such defence is in public interest, and the request for invoking the defence is bona fide."

In this case, a journal 'Excise Law Times' wrote an editorial in its June 1, 2009 issue, highlighting what it perceived as irregularities in the transfer and postings of some members of the Customs, Excise and Gold (Control) Appellate Tribunal.

The Indirect Tax Practitioners Association filed a contempt petition against the Editor of the magazine, R.K. Jain, contending that the editorial amounted to contempt of court, and the respondent had violated an earlier undertaking given to the Supreme Court.

The Bench of Supreme Court consisting of Justice GS Singhvi and Justice AK Ganguly held on August 13, 2010, such criticism could not be castigated as an attempt to scandalise or lower the authority of the court or other judicial institutions or as an attempt to interfere with the administration of justice, except when such criticism was ill motivated or construed as a deliberate attempt to run down the institution or an individual or when the judge was targeted.

Dismissing the petition, the Bench said: "What was incorporated in the editorial was nothing except the facts relating to manipulative transfer and posting of some members of the CESTAT and the substance of the orders passed by the particular Bench of CESTAT, which were set aside by the High Courts of Karnataka and Kerala."

Holding that the editorial based on facts would not amount to contempt, the Bench imposed Rs. 2 lakh in costs on the petitioner, of which Rs.1, 00,000 should be deposited with the Supreme Court Legal Services Committee and Rs.1,00,000 should be paid to Mr. Jain. (Truth based on facts a valid defence in contempt proceedings: court: New Delhi News Report from Legal Correspondent, The Hindu, August 13, 2010).

Friendly Relations with Foreign States

This is yet another ground justifying the restriction on the free speech. However state cannot prevent all the criticism of the foreign policy of the Government. The press should shun systematic diffusion of deliberately false or distorted reports, which undermines the friendly relations with foreign States.

The state has general power to impose restrictions on the free speech and expression provided such restrictions are reasonable. The standard of reasonableness has t be with reference to the subject matter of legislation and the import and the purpose for which such restrictions have been imposed and other prevailing circumstances. Restriction should not be arbitrary and excessive. There should be a balance between the freedom guaranteed and the community interests protection of which necessitated the imposition of a restriction.

The Supreme Court held in ***Kharak Singh v State of Punjab***[99] that restriction cannot be imposed through an executive or departmental instructions. Reasonable restriction can be imposed by law enacted by the legislature.

Censorship of Books

Mr. Ranjit D. Udeshi, a partner of a firm which owned the Happy Book Stall in Bombay was prosecuted and convicted under Section 292, Indian Penal Code for possession of an obscene book Lady Chatterley's Lover, which was unexpurgated edition. He appealed to Supreme Court, which upheld[100] the conviction. The court said that the opinions of literary or other experts were not relevant to the question of whether a publication is obscene. The court adopted the test of obscenity laid down by the Chief Justice Cockburn in ***Regina v Hicklin***[101], which is known as Hicklin test, where it was observed:

The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall…it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.

[99] AIR 1963 SC 1295
[100] Rajit D. Udeshi v State of Maharasthra, AIR 1965 SC 881
[101] [1968] 3 QB 360

Defamation

Defamation is an injury to reputation of a person. It is both a crime and a tort. The law of civil defamation is not codified in India. However it provides for remedy in case a person's reputation is harmed without any justifiable reason. The law of criminal defamation is contained under Sections 499 and 500 of Indian Penal Code. If a person intentionally indulges in harming the reputation of another, he can be prosecuted for criminal wrong of defamation, which is a valid ground for imposing a restriction on freedom of speech and expression, under Article 19(2).

When Harbhajan Singh made scathing attack on the son of the Chief Minister Pratap Singh Kairon, he was prosecuted for defamation, in *Harbhajan Singh v State of Punjab,* [102] the matter went upto Supreme Court. Mr. Singh accused the son of Chief Minister as the leader of smugglers and responsible for several crimes in the State. His conviction under defamation was set aside by the Supreme Court and because his statement was intended for the public good, the appellant was entitled to claim the protection of exception 9 to section 499 IPC.

Besides above restrictions, taxes and other trade related restrictions could be imposed on the press like any other ordinary individual is subjected to. The freedom of expression cannot protect a reporter or media person from being prosecuted for infringing the privileges of Parliament, which were guaranteed by a special provision Article 194(3) in the Constitution. However, there are restrictions possible on the exercise of such parliamentary privileges. If such an exercise of privilege violates the fundamental right to life and liberty without any legal basis and legal procedure, the Judiciary reserves the power to review such an assault.

The Supreme Court has set an agenda for development of law on the press freedom in Auto Shankar[103] case. It laid down certain foundations for making new principles of law on this subject at an appropriate time in future. It was in fact waiting for a right case to arrive to study the impact of Article 19(1)(a) on the provisions of criminal defamation in Indian Penal Code, i.e., Sections 499 and 500. In principle the Supreme Court welcomed the wider interpretation of press freedom in *New York Times rule*[104] of US Supreme Court and *Derbyshire*[105] case in England. These judgements enhanced the scope of commenting on the public conduct of the public officials and reduced the scope of individuals occupying the public positions using the public office and public money for pursuing the actions for damages in defamation. While effectively providing for an individual civil remedy for

[102] AIR 1966 SC 97
[103] Supra note 6
[104] Supra note 8
[105] Supra note 7

defamation in favour of individuals there is need to review the continuance of the criminal defamation in present form.

Another gray area of development for law is the broadcast media. After holding that the state had no monopoly over the airwaves[106], the necessity to make statutes to regulate the electronic media by relieving it from the shackles of government control. Exercise of press freedom in a vibrant democracy and its interpretation by active judiciary is a continuous process. New principles will evolve over a period of time in tune with the developing trends and needs of the democracy.

As the freedom of expression is vehemently being exercised by the media, especially electronic media, by arranging the meeting of the important personalities from different walks of life over a teleconference or video conference or on line conferences, and moving abroad for news coverage, the other rights under Article 19 are also essential to exercise the right guaranteed under Article 19(1)(a). The other rights are freedom of assembly, freedom of association, freedom of movement, right to property and freedom of trade and business.

Freedom of Assembly

Article 19(1)(b) recognises and guarantees the freedom of assembly. But it is not an absolute right. Restrictions are possible against this right too, as provided under Article 19(3) and (4). Article 19(1) (b) guarantees to the citizens the right to assemble peacefully and without arms.

Picketing, Demonstration & Strike Picketing or demonstration may be regarded as manifestation of one's freedom of speech and expression. Peaceful picketing is free speech. Non-Violent acts are like words. Picketing or demonstration is a non-violent act of persuasion.[107] The right to make peaceable demonstration or taking out a procession or holding banners with comments in a procession or arranging a public meeting are democratic rights which the Constitution of India has recognised along with the power of the State to impose reasonable restrictions. American Constitution clause 3 provided as follows:

The Congress shall make no law abridging the right of the people peaceably to assemble.

The Supreme Court of US observed in ***Hague v Committee for Industrial Organisation***[108] that the right to peaceable assembly could be regulated in the interest of all, for peace and good order. The court said that the privilege of citizen to use the streets and public places for the communication of the views on national questions could be regulated in

[106] Supra note10
[107] Thornhill v Alabama 310 US 88 (1940)
[108] 307 US 496

community interest. This right is subordinate to the general interest. Similarly in ***Edwards v South Carolina***[109] the Supreme Court of US upheld the democratic right of the demonstrators to free speech and free assembly and the freedom of petition for redress of grievances of 187 Negros, when they were arrested and convicted by Magistrate in Columbia, South Carolina, for registering their protest against segregation in a public meeting, of the common law crime of breach of peace. The Court ruled that the guaranteed First Amendment rights are protected by Fourteenth Amendment from invasion by the State.

Similarly the Supreme Court of India in ***Babulal Parate v State of Maharashtra***[110] also upheld the citizen's right to take out procession or to hold demonstration or public meetings as part of the freedom to assemble peacefully and without arms and the right to move freely anywhere in the territory of India. In this case the Court held that Section 144 of Criminal Procedure Code was Constitutional and that the Magistrate had power to prevent such activities which would obstruct the public interest and peace. In another case[111] the Supreme Court clarified that only peaceful demonstration is protected and not all forms of demonstrations. This fundamental right with reasonable restrictions in general interest was further consolidated by the decision of the Supreme Court in Himmatlal v Police Commissioner[112]. In this case the permission to hold a public meeting in street was denied. The Supreme Court held that authorities should not be left with controlled discretion to regulate the freedom of assembly, though this right was subject to the control of the appropriate authority. In the absence of guidelines, banning public meetings on public streets was held to be arbitrary. However this right to hold public meeting does not include the right to hold meeting in Government premises.

Freedom of Association

Article 19(1)(c) guaranteed the right to form association. This does not mean that any one could claim a right to hold office for life as an integral part of this fundamental right. Neither the association nor the members can claim such right is fundamental. When the Government of Assam has enacted a law to take over the management of *Asom Rastrabhasa Prachar Samity* by a notification, the Supreme Court quashed it as illegal and unconstitutional being violative of Article 19(1)(c)[113]. Government cannot take over an association completely, depriving its members and office bearers to hold on to association, which they formed to carry on the goals and objectives.

Like any other fundamental right under Article 19, this right to Association is also not absolute and is subjected to regulation in social interest. Article 19(4) specifically

[109] (1963) 372 US 229
[110] AIR 1961 SC 884
[111] Kameshwar Prasad v. State of Bihar AIR 1962 SC 116
[112] AIR 1973 SC 87
[113] Asom Rastrabhasa Prachar Samity v State of Assam, AIR 1989 SC 2127

empowers the state to make any law to fetter, abridge or abrogate any of the rights under Article 19(1)(c).

When it was contended that the right to association also included right to get recognition, the Supreme Court rejected it and held in *Raghubir Dayal v Union of India*[114] that while the right to association was fundamental, right to recognition was not.

Right to form association includes the right of members to continue to be associated with those whom they voluntarily admitted in the Association. It was decided in *Damayanti v. Union of India*[115] that any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, will be a law violating the right to form an association. In this case the court did not approve the taking over of Hindi Sahitya Sammelan by the State and introduction of some members without the consent of existing members. It was held to be an unconstitutional interference with the guaranteed freedom of association.

Mr. D.J.De in his exhaustive book on Interpretation and Enforcement of Fundamental Rights, 2000, relevantly quoted some American Judgments. He referred to a case by National Association for Advancement of Coloured People (NAACP) which did not submit the list of the members and their addresses, though it complied with other directions of the State Court of Southern State of Alabama to produce the records and papers of the Association. The court adjudged the Association as guilty of contempt of court and imposed a fine of $100,000. The US Supreme Court unanimously held that the Association was not bound to disclose the list of their members and the right of the members was protected by the Fourteenth Amendment against the State action. It was also held that such production order trespasses upon the fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment and must be regarded as entailing the likelihood of a substantial restraint upon the exercise by the members of the association of their right to form association.

In *Ramakrishna v. the President District Board, Nellore,* the Madras High Court held that the restriction that the teachers should join only an officially approved association was an unreasonable and hence, unconstitutional restriction by the Government.[116] In ***L.N. Mishra Institute of Social Changes v State of Bihar***[117]**,** the Supreme Court held that taking ove the institution by making a law called Bihar Private Educational Institution (Taking Over) Act, 1987, the Government did not infringe the right to form association, as there was no restriction on the functioning of the society, right of the society remained unimpaired and

[114] AIR 1962 SC 263
[115] AIR 1971 SC 966
[116] Ram Kishan v President, District Board, Nellore AIR 1952 Mad 253
[117] AIR 1988 SC 1145

uninterfered by the Act. It is true that the society has lost its right of management of the institute and its control but that was the consequence of all taking over.

Freedom of Movement

Article 19(1)(d) guarantees to a citizen the right to move freely throughout the country. Clause (e) of Article 19(1) guarantees right to reside and settle in any part of the country. This right is subjected to certain limitations on the grounds mentioned under Article 19(5). The citizens can move from one state to another and to every place within the state. Externment or internment orders requiring a person to leave a particular place or enter into a specific area only are violations of this right. Article 19(5) says that restriction must be reasonable and in the interests of the general public or for the protection of the interest of the Scheduled Tribes.

Right to Travel Abroad

The question whether the right to travel abroad could be regarded as a part of Article 19(1)(a) and (g) was considered in ***Maneka Gandhi*** case. It was held that right to freedom of speech and expression is exercisable not only in India but outside as well. Right to travel abroad and return to one's country was recognised by Supreme Court in Satwant Singh[118] case also. This right finds a place in the Universal Declaration of Human Rights Article 13(2) as well as in the ICCPR Article 12 (2), (3) & (4). The Constitution Review Commission suggested inclusion of this right under Article

21 as 21A as follows:

21A (1) Every person has the right to leave and return to one's country.

(2) Nothing in clause (a) shall prevent the State from making any law imposing reasonable restrictions in the interest of the sovereignty and integrity of India, security of India and friendly relations of India with any foreign country.

Helmet Case

The condition that every two wheeler rider should wear a crash helmet is not a restriction on the movement because it facilitates safe movement, and hence no violation of freedom of movement. It was held so in *Ajay Canu v. Union of India*[119]. Exclusion of Sikh community from wearing helmet was also under question in *K. Veeresh Babu v. Union of India*[120]. While upholding the validity of condition of wearing the helmet, the

[118] Satwant Singh v. A.P.O. New Delhi, AIR 1967 SC 1836
[119] AIR 1988 SC 2027
[120] AIR 1994 Kant 56

Court held that the exemption provided to Sikhs to respect the religious practice of wearing a headgear would not vitiate the measure.

In *Kharak Singh v State of U.P.*[121] the police surveillance of suspects was upheld. The rule providing for surveillance in Regulation 236 of the UP Police Regulations was held to be constitutional. However, the watching and shadowing of suspects for the purpose of keeping a record of their movements and activities did not infringe the right to move freely. It was held that the regulation, which authorized domiciliary visits without the authority of law, violated Article 21. The Court has not approved the contention that such a restriction was an infringement of right to movement. In his dissent, Justice Subbarao said those even psychological restraints on freedom of movement violated Article 19(1)(d) and regulations authorising surveillance were unconstitutional.

The Official Secrets Act, 1923 imposes a restriction on movement in to 'prohibited' areas for security reasons. In *Gurudatta Sharma v State of Bihar*[122], restrictions under Official Secrets Act were upheld as valid on grounds of security, public order and public morality.

In case of conviction and imprisonment of an offender, right to movement will not arise, because his right of movement was curtailed by a reasonable restriction on the grounds of social security. In ***Sunil Batra v Delhi Administration*[123],** it was held that the restriction imposed on a prisoner under Section 30(2) of the prisons Act 1894 was reasonable on the grounds of safety and security of the prisoners and prison security, and hence not violative of Article 19(1)(d). On the same lines the imposition of capital punishment was held reasonable under Article 19(5) and not violative of Article 19(1)(d). In **A.K. Gopalan v State of Madras**[124] detention passed under Preventive Detention Act was held to be not unconstitutional and did not offend the Article 19(1)(d).

Section 1 of the United States 14th Amendment prohibits the Federal and State Government from abridging the privilege and immunities of the citizen of the United States. The State can impose reasonable restriction in the freedom of movement in a specific area. In the interest of Tribals, the movements of non-tribals in Tribal areas can be considered valid. In Seven North Eastern Tribal States the movement and settlement of non-tribals in tribal areas have been restricted. Non tribals can not even acquire the tribal land by transfer, nor they can transfer the property to another non-tribal.

[121] AIR 1963 SC 1295
[122] AIR 1961 SC 1684
[123] AIR 1978 SC 1675
[124] AIR 1950 SC 27

Right to Property

The right to hold property has ceased to be a fundamental right following the 44th Amendment to the Constitution whereby sub-cl (f) has been omitted from Article 19. The right of property, which was guaranteed under Article 31, was shifted from Part III of the Constitution and now find its place in Article 300A and clause (2) of said Article dealing with the compulsory acquisition of the property has been repealed.

Freedom of Trade and Business

Article 19(1)(g) guarantees right to occupation. It provides that all citizens have the right to practice any profession, or carry on any occupation, trade or business. Article 19(6) provides for reasonable restrictions to which the right under 19(1)(g) is subjected. The restrictions on this freedom should be "in public interest" and "reasonable". The State can make any law

(i) imposing reasonable restrictions in the interest of the general public;

(ii) prescribing professional or technical qualifications necessary for practicing any profession, or carrying on any occupation, trade or business and

(iii) enabling the State to carry on any trade or business to the exclusion, complete or partial of citizens.

The Constitution protects the freedom of each individual citizen to carry on his trade or business but the guaranteed right is not absolute.

Right to trade

Establishing an education institution is neither a trade nor a profession within the meaning of Article 19(1)(g). Trade or Business normally connotes an activity carried on with a profit motive. Education cannot be treated as commerce. In *Unnikrishnan v. State of A.P.* [125] the Supreme Court observed that in true aspect the education is more a mission and vocation rather than a profession or trade or business. Education cannot be converted into commerce. Establishing educational institutions can by no stretch of imagination be treated as practice of any profession. [126]

Supreme Court in *Excel Wear's* Case[127] held that the right to closed down a business was an integral part of the fundamental right to carry on any business guaranteed under

[125] AIR 1993 SC 2241
[126] State of Bombay v RMDC AIR 1957 SC 699
[127] AIR 1979 SC 25

Art. 19(1)(g). In D.C.M.'s case [128] it was held that the discretion of the Government as provided under Section 25D of the Industrial Disputes Act as amended in 1986 to refuse to grant permission to close industrial undertaking does not infringe the fundamental rights guaranteed under Article 14 and Art 19(1)(g) being saved by Article (6).

The Supreme court also held that the right to carry on the business of transporting passengers in vehicles[129]. In yet another case the Supreme Court said that hawking and trading on public streets is also covered under Article 19(1)(g)[130].

The Supreme Court upheld in several cases the involvement of state in trade to the exclusion or restriction of citizen depending upon the directive principles of state policy and Indian controlled and planned economy.

Clause 6(ii) which was added by the amendment in 1951 made it clear that the freedom guaranteed to the citizen would not prevent the State from undertaking, either directly or through a corporation owned or controlled by it, any trade, business, industry or service whether, to the exclusion complete or partial of citizens or otherwise.

In *Bank Nationalisation* case[131] the state prohibited the named banks from carrying on the banking business was a necessary incident of the business assumed by the Union and hence was not liable to be challenged under Article 19(6)(ii) in so far as it affected the right to carry on business.

Issues of Privacy

Every individual has a right to privacy as part of his or her overall right to live with dignity without being interfered by any exercise of any fundamental freedom. Any unjustifiable interference with his right to privacy has to necessarily lead to legal consequences, if not, there will be no meaning for individual rights at all.

Privacy is recognized as one of the most invaluable human rights. It means "the right to be let alone" and its object is to protect one's inviolate personality. The right to privacy has been developed as an independent concept in the field of law of Torts. It is said that an intrusion on privacy threatens that liberty just as assault, battery or imprisonment. It is an offence to personal dignity. This right has two faces, one- the general law of privacy, which affords a tort action for damages resulting from the unlawful invasion of privacy, two-the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. Right to privacy has not been enumerated as a

[128] D.C.M. Ltd, v. Union of India, AIR 1989 Del 207.
[129] Saghir Ahmed v State UP AIR 1954 SC 728
[130] Sadan Singh v New Delhi Municipal Committee AIR 1989 SC 1988
[131] R.C.Cooper v. Union of India AIR 1970 SC 1318

fundamental right in our constitution but has been inferred from Article 21. However, the National Commission for Review of Working of Constitution suggested specific inclusion of right to privacy in part III, in following terms.

1. "Every person has the right to respect for his private and family life, his home and his correspondence"

2. Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1) in the interest of national security, public safety or for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedom of others.

i) **Time Inc v Hill**

There was a first attempt to assert and establish the right to privacy vis-à-vis the freedom of press in case of *Time Inc v Hill*[132]. In this case three escaped convicts intruded into the house of James Hill and held the members of family hostage for nineteen hours whereafter they released them unharmed. The police imme3diately went after them and two of the culprits were shot dead. The newspapers reported these incidents with much distortion, while the case of the family was that they were not ill-treated. When the Life magazine published the story, Hill brought a suit for damages against Time Inc and was awarded damages. But the Supreme Court applied the rule of *New York Time v Sullivan*[133] and set aside the award of damages. The Court observed "We create grave risk of serious impairment of the indispensable services of a free press with the impossible burden of verifying to a certainty the facts associated in a news articles with a person's name, picture, or portrait, particularly as related to non-defamatory matters…"

ii) **Cox Broadcasting v Cohn**

The Georgia Law prohibited and punished the publication of the name of a rape victim. The reporter of a newspaper obtained the name of a rape victim from the record of the court and published it. It was questioned in *Cox Broadcasting v Cohn*[134] , wherein, the Justice White recognised: "in this sphere of collision between claims of privacy and those of the free press, the interest of both sides are plainly rooted in the traditions and significant concern of our society" but the learned judge decided the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name having obtained it from the public record. The court held that the press couldn't be said to have violated the Georgia Law or the right to privacy if it obtained the name of the

[132] 385 US 374
[133] 376 US 254
[134] 430 US 469

rape victim from the public record and published it. The court reasoned that the freedom of press to publish the information contained in the public records is of crucial importance to the system of the Government prevailing in that country.

iii) Kharak Singh v State of Madhya Pradesh

In *Kharak Singh v State of Madhya Pradesh*[135] the issue was the Government invasion of privacy. The petitioner was put under surveillance under police regulation involving secret picketing of the house or approaches to the houses of the suspect, domiciliary visits at night, periodical enquiry by the police officers into repute, habits, association, income or occupation, reporting by police constables on the movement of the person etc. The regulation was challenged as violative of the fundamental rights. A special bench of seven judges held, by majority, that the regulation was valid except to the extent it authorised domiciliary visits by police officers.

iv) Griswold v Connecticut

In ***Griswold v Connecticut***[136] the law made by the State of Connecticut which provided a punishment to "any person who use any drug, medicinal articles or instrument for the purpose of preventing conception.." was challenged. Appellant was running a counseling center to advise the couples on prevention of conception and other medical problems. He was even prescribing contraceptives too. The appellant was prosecuted for violation of law. He challenged the law as violative of first and fourth amendments to US constitution. The Supreme Court upheld the contention and said "governmental purpose to control and prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom. Allowing the police to search the sacred precincts of marital bedrooms of telltale sign of the use of contraceptives was basically an idea which is repulsive to the notion of privacy surrounding the marriage relationship.

v) Media and Right to Privacy: *The Peoples Union for Civil Liberties v. Union of India*

In yet another significant decision, the Supreme Court held that the telephone tapping was an invasion of right to privacy under Article 21 and freedom of speech and expression under Article 19(1)(a). *The Peoples Union for Civil Liberties v. Union of India*[137], the petitioner challenged the validity of telephone tapping under the guise of exercising the legal authority under Section 5(2) of the Indian Telegraph Act, 1885. This section permits

[135] AIR 1963 SC 1295
[136] 381 US 479
[137] AIR 1997 Supreme Court 568

interception of messages on the reasons of "occurrence public emergency" or "in the interest of public safety". The Court felt that "in the absence of just and fair procedure for regulating the exercise of power under Section 5(2) of the Indian Telegraph Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21of the Constitution". Under the guidelines laid down by the Supreme Court, an order for telephone tapping can only be issued by the Home Secretary of the Centre or State Governments. This order is subjected to review by a high power review committee and the period for telephone tapping cannot exceed two months unless approved by the reviewing authority which can extend it up to six months. This power is given to the three-member committee of Cabinet secretary, Law Secretary and Secretary Communications at the central level and Chief Secretary, Law Secretary and another member other than Home Secretary at the State level. Telephone tapping also violates Article 19(1)(a) unless the restriction falls under the grounds listed in 19(2). When two persons are having conversation with each other, both are exercising the freedom of speech and expression and mutually communicating the ideas. Tapping is a violation of this freedom. It could be violation of even right to privacy also.

vi) Privacy, Defamation of Public Officials and Public Order: *Auto Shankar Case*

Supreme Court delivered a historic judgement in *R.Rajagopal v. State of Tamil Nadu*,[138] stating that the Government has no authority to impose a prior restraint on publishing an auto biography because that is going to be defamatory or violation of a right to privacy etc. It cannot be said before hand that a publication is going to be defamatory of some public officials. If it is alleged to be defamatory after its publication, the authorities have a remedy under the ordinary law. This is a case, which emphatically opposed any imposition of a prior restraint on press freedom based on the apprehensions of possible victims. The Court also held that the press could not be prosecuted if publication was based on the "public records". When a Tamil sensational weekly "*Nakheeran*" proposed to publish the autobiography of a condemned prisoner by name Auto Shanker, with an advance announcement about sensational revelations about nexus between criminals and the public officials like police and jail authorities. The editor of the newspaper asked the court to direct the Tamil Nadu government not to interfere with the publication of the autobiography written by the prisoner who was convicted in six cases of murder and sentenced with death penalty. The Autobiography was delivered to the news weekly, for publication as a serial, through the advocate of the prisoner, with the knowledge of the jail authorities. As the autobiography contained a narration about the nexus between criminals and authorities especially, between the prisoner and several IAS, IPS and other officers, the newspaper decided to commence publication and announced that in advance. It was alleged that the police authorities extracted some letters from prisoner applying third degree methods, addressed to top authorities in the government requesting stoppage of publication of the autobiography. The

[138] (1994) 6 SCC 632.

Inspector General of Prisons, in a letter to the editor, asked to stop the publication as the prisoner denied that he had written any such autobiography. The IG termed it as a false autobiography. The Editor sought a direction from the Court to prevent the interference in the freedom of the editor to choose the contents of his newspaper as per his discretion. The Division Bench consisting of Justice B. P. Jeevan Reddy and Justice, Subhas C.Sen agreed with the petitioners and held that the newspaper had every right to publish the autobiography of Auto Shankar. The Supreme Court said that the newspaper could publish the life story so far as it appears from the public records even without the consent or authority. But if they go beyond the public record and publish, they may be invading the privacy and causing defamation of the officials named in the publication. However, the Supreme Court said that even if, the apprehensions of the officials were true about the defamatory contents, they could not impose any prior restraint on the publication, though they had right to take to legal proceedings for defamation, after publication. "The remedy of public officials and public figures, if any, will arise only after publication and will be governed by the principles indicated therein….even if they are entitled to do so, there is no law under which they can prevent the publication of a material likely to be defamatory of them", said the Supreme Court. Following broad principles are evolved in this case on several facets of the freedom of the press.

1. "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is "a right to be let alone". A citizen has a right to safeguard, the privacy of his own, his family marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

   New Exception under Article 19(2): The Supreme Court suggested an addition to the list of exceptions under Article 19(2) to restrict the press freedom.

2. The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon the public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz, a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the indecent being publicised in press/media.

3. There is yet another exception to the rule in (1) above- indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are no true, unless the official establishes that the publication was made by the defendant with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course. Where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 194 respectively of the Constitution of India, represent exceptions to this rule.

4. So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

5. Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

6. There is no law empowering the State or its officials to prohibit, or to impose prior restraint upon the press/media.

The Supreme Court gave a note of caution. It said: "The principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable." The Supreme Court wanted that such a law should evolve in a case-by-case development, as these concepts were still in the process of evolution.

vii) Derbyshire County Council v. Times Newspapers Ltd

According to the Court, these issues were not exhaustively dealt. The concept of impossibility of state being defamed by a media has been a well established principle of law enunciated in an English decision of 1993, *Derbyshire County Council v. Times Newspapers Ltd.*[139] In this case it was emphatically declared that an individual occupying a position in the

[139] (1993) 2 WLR 449, (1993) All ER 1011

state government or local authority had only a private right to claim damages for defamation, if the publication involves adverse comments on his functioning with regard to discharge of public duties. But he cannot make the claim in the name of the office/authority and use the money of that authority for fighting the case.

viii) **Official conduct and Defamation** : ***New York Times v. Sullivan***

Similarly, the rule in *New York Times v. Sullivan*,[140] was found acceptance by the Division Bench. It has a reference to the Defamation as a restriction on press freedom.

In this case the New York Times newspaper published a full page advertisement sponsored by the Committee to defend Martin Luther King and struggle for freedom in the South, which asserted or implied that the law enforcement officials in Montgomery, Alabama had improperly arrested and harassed Dr. King and other Civil rights demonstrators on the various occasions. There was description of harsh treatment meted to innocent people by the police. Alabama court found defendant newspaper liable for publishing defamatory material without verifying the facts from its own office which earlier published news stories contrary to the contents of this advertisement. The Court held that a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions and to do so on pain of libel judgments virtually unlimited in amount leads to " self censorship" under such rule, would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court and of fear of the expense of having to do so. This thus dampens the vigour and limits the variety or public debate. It is inconsistent with the First and Fourteenth Amendments to the US Constitution. The Constitutional guarantee requires a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice- that is with the knowledge that it was false or with reckless disregard of whether it was false or not.

The Division Bench in Auto Shankar case opined that the Supreme Court had to wait for a proper case to make this a rule after studying its impact on Article 19(1)(a) read with clause (2) thereof, and sections 499 (Defamation) and 500 of Indian Penal Code.

In this significant decision, the Supreme Court has prepared a ground for making new legal principles on the above concepts which definitely enhance the scope of freedom in relation to comments on the official conduct and limiting that freedom with regard to the right of privacy of a citizen.

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[140] 376 US 254: 11 L Ed 686 (1964)

The Supreme Court observed that the right to privacy is implicit in the right to life and liberty guaranteed under Article 21. It is right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters and none can publish anything concerning this in the matter without his consent. But if such publication is based upon public record including court record, then the aforesaid rule shall not apply. The Court further held that in the case of public officials, it is obvious, right to privacy or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. So far as the Government, local authority and other organs and institutions exercising government power are concerned they cannot maintain a suit for damages for defaming them. There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press or media.

However, in the interest of decency an exception was carved out to this rule. The females who are the victim of sexual assault, kidnap, abduction or a like offence should not be further be subjected to indignity of her name and the incident being published in the media or press.

ix) **English Cases**

a) Spycatcher case

In *"Spycatcher case*" the House of Lords opined that there is no public interest in allowing the Government institutions to sue for libel. It was contrary to the public interest because to admit such an action would place an undesirable fetter on the freedom of speech and further that action for defamation or threat of such action inevitably have an inhibiting effect on freedom of speech.[141]

b) Leonard Hector v Attorney General of Antiqua

In *Leonard Hector v Attorney General of Antiqua*[142] the appellant was prosecuted under section 33(b) of the Public Order Act 1972. The appellant challenged the provision as violative of freedom of expression guaranteed under Section 12(1) of the Constitution of Antiqua and Barbuda. Upholding the contention the Privy Council said power under section 33 (b) is wide enough to cover not only false statements which affect public order but also false statement which are likely to affect public order. Thus the section gives an enormous power to restrain any statement, which is unconstitutional. The criminal proceeding against appellant was quashed.

Against the Constitutional right of privacy the Supreme Court has to balance the constitutionally guaranteed freedom of the press. The Court held in Time, Inc v Hill that the

[141] Attorney General v Guardian Newspapers (1990) 1 AC 109
[142] (1990) 2 AC 312

Constitutional protection for speech and press precluded the application of the privacy statute to redress false reports of matter of public interest in the absence of the proof that Life magazine has falsely reported that the members of Hill's family were held as hostage in the Hill home by the escaped convicts. Later Supreme Court of US supported the freedom of the press against the right of privacy. The guarantee of speech and press are not the preserve of political expression or comments upon the public affair, essential as those are to healthy Government. The exposure of self to others in varying degree is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society, which places a primary value on freedom of speech, and of press.[143]

The debate is on about the controlling journalists' and broadcasters' intrusions into privacy. There are claims that protection of privacy would infringe the media's freedom of communication, and privacy cannot be adequately defined. These claims may not be convincing. On the other hand, there is a broader debate with arguments for providing general remedy, which could be exercised all citizens against each other's invasions of privacy, as the general law in Great Britain does not recognise a right to privacy. It is the position in India, except for some significant Supreme Court decisions reading right of privacy into the right to life under Article 21.

Code of Practice for Media in UK:

The Press Complaints Commission of UK has evolved a Code of Practice 1997, Section 4 of which deals with privacy, Section 5 deals with use surreptitious recording devices by media, and Section 7 intends to prevent misrepresentation.

a) Privacy:

Section 4: Intrusions and enquiries into an individual's private life without his or her consent including the use of long-lens photography to take pictures of people on private property without their consent are not generally acceptable and publication can only be justified when in the public interest.

b) Listening Devices:

Section 5 of the Code deals with the listening devices. It says unless justified by public interest, journalists should not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.

c) Misrepresentation:

[143] 4 Elliots Debates on Federal Constitution (1876)

Section 7: (i) Journalists should not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge.

(ii) Unless in the public interest, documents or photographs should be removed only with the express consent of the owner.

(iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

Guidance about protecting interests in privacy is contained in as many as five separate codes of practice. The Press is governed by the Press Complaints Commission's code of practice referred above. Earlier the Press Council's declaration of Principles of Privacy in 1976 was the guide. It said that the justification for publication or inquiries, which conflict with a claim to privacy, must be legitimate and proper public interest and not only a 'prurient or morbid curiosity', that is, when " the circumstances relating to the private life of an individual occupying a public position may be likely to affect the performance of his duties or public confidence in him or his office". [144]

Deception and surreptitious surveillance or the causing of pain or humiliation could be justified where that was the only reasonable practicable method of obtaining information in the public interest. As this is for the press to judge what would affect public duties and or what were reasonably practicable methods, the Press Council in UK was never able to enforce the Declaration effectively.

d) Broadcasting ethics:

Even Broadcasting Code supports the public interest as the reason for infringing privacy. It says[145] an infringement of privacy has to be justified by an overriding public interest in the disclosure of the information. This would include revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, or disclosing significant incompetence in public office. More over, the means of obtaining the information must be proportionate to the matter under investigation."

Privacy as a Human Right:

The European Convention on Human Rights [146] defined privacy and pleaded for its protection. It says:

[144] The Press Council, The press and the People (1982-83) p 291.
[145] Broadcasting Standards Commission's Code on Fairness and Privacy (1998) para 14
[146] Human Rights Bill, 1997

1. Every one has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime for the protection of health or morals of for the protection of the rights and freedom of others.[147]

Privacy is generally a claim about the individual's right to restrict the availability of information about himself or herself. The justification for such restriction is typically couched in terms of a natural need for personal space, or control over the presentation of one's identity or self to the outside world.[148]

Gibbons says: "Protection of privacy may be overridden by an appeal to a significant public interest in disclosure. Intrusions or deceptions, for example in the form of snooping, surreptitious surveillance, trespassing, or intercepting letters and telephone conversations, may be justified if keeping the material relatively secret would adversely affect the public at large, notwithstanding the harm or distress which may be caused to the individuals concerned".[149]

The facts about anti social and harmful activities are private does not justify their continued secrecy; and facts which are relevant to politicians' ability to govern are required to be publicly known in the interest of participation in the democratic process.

Testing from the above standards recording and revelation of tapes of conversation with public servants in their private areas is not intrusion of privacy because they were not exposing the private affairs of those individuals but bringing into the light the scandalous purchases of arms, which is a public affair and people have a right to know as to how their security is being build up.

A human being must have his/her own way of living, without any interference with or intrusion from any publicity agency. Privacy is man's copyright in his own self, where the unwarranted-and unnecessary publication is the most worrying factor. Imitation of a particular life would be emulation and emulated derive the pleasure. But unnecessary and intrusive publicity brings in public nuisance to a private life. Exposure is not imitation. Publishing details of private life in media might lead to avoidable embarrassment. Nobody

[147] Article 8, European Convention on Human Rights
[148] Thomas Gibbons, Regulating the Media, London, 1998, p 83

[149] ibid.

can invade other's privacy in a media presentation and claim copyright over it. Sir Norman Fowler[150] observed:

Newspapers are there to expose: that is their function. At their best, the media expose crooks, spies and fraudsters, although at their worst they intrude into private lives when no public interest served. The difficulty is obviously in drawing a line.

What is Privacy?

It is not possible to have a satisfactory definition for the 'privacy'. Black explained it as the right of an individual to withhold himself and his property from public scrutiny and unwarranted publicity[151].

There were attempts to introduce a statutory tort of infringement of privacy by specific definitions. They are 'either go very wide, equating the right to privacy with the right to be let alone, or they boil down to a catalogue of assorted values to which the adjective 'private' or 'personal' can reasonably, but not exclusively, be attached'. There is obvious danger that a wide privacy law will make it difficult for the media to perform the watchdog function to which the European Court of Human Rights attaches great importance[152]. The working definition as suggested by 1990 Calcutta Committee on privacy is as follows:

The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.

The Calcutta Committee was of the view that a right to privacy in this form could include protection from physical intrusion, publication of hurtful or embarrassing personal material (whether true or not), publication of inaccurate or misleading personal material, or publication of photographs or recordings of an individual taken without consent.

It is further explained by Indian apex court in R.R. Gopal case[153]:
A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst others. None can publish anything concerning the above matters without his consent – whether truthful or otherwise, and whether laudatory or critical. Of he does so, he would be violating the right to privacy of the person concerned and would be liable in action for damages.

[150] Sir Norman Fowler, *Hansard* 17.6.1998, col 404
[151] Black's Law Dictionary
[152] See Observer v UK (1991) 14 EHRR 153 and comment of Sallie Spilsbury, Media Law, Cavendish Publishing Co.Ltd, 2000, p 303
[153] R.Rajagopal v State of Tamil Nadu, AIR 1995 SC 264

Identity of Rape victims: A frequent intrusion of privacy by media

Publication of rape-victim's name affects the victim further. If a newspaper published or motion picture is made alleging that a particular woman was raped, it was held to be defamatory publication of the victim. Reason is the social atmosphere and the stigma attached to a helpless woman suffering the wrong and consequences thereto.

The privacy is to be guarded by several means such as advising the media not to publicize the identity of women victims and child victims in sexual assaults and other offences. The Press Complaints Commission, which replaced the earlier Press Council on the recommendation of the Calcutta Committee evolved a code and advised:

- The press must not, even where the law does not prohibit it, identify children under the age of 16 who are involved in cases concerning sexual offences, whether as victims or witnesses.
- Press must avoid identifying relative, friends or persons convicted or accused of crime without their consent.
- Press must not identify victim of sexual assault[154].

The Supreme Court[155] observed:

A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e., her dignity, chastity, honour and reputation. The depravation of such animals in human form reach the rock bottom of morality when they sexually assault children, minors and like the case at hand, a woman in the advance stage of pregnancy.

The court[156] rejected the argument that that commission of rape was the act of a criminal and does not involve any wrongful conduct on part of victim and hence did not involve any defamation. In view of the social stigma that attaches to the victim, such an allegation invites the social out casting. The Indian Criminal Law was amended in 1986 in tune with the western criminal law changes penalizing the publication of victim's identity. Section 228A of Indian Penal Code imposes two year punishment with or without penalty for revealing the name and identity of the victim only to protect the victim from further victimization. It is manifestation of the right of privacy and right to reputation of the victim and the duty of state and society to protect her from further onslaught of rights, which form significant parts of Article 21.

[154] The Code evolved by Press Complaints Commission UK Nos. 7, 10(i) and 12.
[155] State of Karnataka v Puttaraja, AIR 2004 Supreme Court 433, para 1
[156] Youssoupoff v Metro-Goldwin-Mayer Pictures Ltd, (1934) 50 TLR 581

Tendency to Invade Privacy

The media generally commits tort of invasion of privacy either by intruding on the person's solitude, publish private matters, putting a person in a false position in the public eye, appropriating of some element of person's personality for commercial use. While the market needs based on sensationalism is the reason for it, the 'newsworthiness' is the general defence they plead. One of famous poets Lord Byron sued to prevent the publication of inferior poems under his name. The media has to understand that the newsworthiness is no defence.

The Hyderabad media recently (in 2003) reported the ending of the life of three women in metropolis of Hyderabad. The mother and two daughters preferred closed-door life and then death to outside movements, in the aftermath of the death of the father. They lived in seclusion and died in seclusion. They did not come out of the house for a long time fearing harassment, sexual and otherwise, from the workless neighbours and street rowdies. The smacking smell of decay revealed that they had a pact suicide. Because of decomposition and other reasons their clothes perished. The visual media did not hesitate a second to expose their bare dead bodies over the small screen. Their story goes to say that they preferred death to loss of privacy, and they lost privacy after the death because of media. Most of the viewers felt that media would have avoided the exposure in close-up shots. None remained in their family to complain but the wrong is committed against the dead who preferred death rather to being wronged. This is just an example of the infringement of privacy.

To this a new dimension can be added when other video channels and broadcasters with or without 'courtesy' of the original news channel use the video clippings. While the dead could have a reason to complain based on the violation of privacy, the original broadcaster might intend to prevent copying of their 'exclusive' and 'sensational' footage. If the fundamental principle of law that courts do not incline to protect the footage, which violated a right, is applied here those who copied the exclusive video clippings would reap the benefit, of course, subject to consequences of breach of privacy. The sweat of brow cannot help the media to acquire copyright over such work in violation of individual's right in privacy. It is in this context the interface between copyright and privacy over the print, electronic and new media in cyber space has to be understood.

Section 85 of the Copyright, Designs and Patents Act (CDPA) 1988 (UK) sets out a narrow right of privacy in the following terms:

A person who for ***private and domestic purposes*** commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have:

a) copies of the work issued to the public;
b) the work exhibited or shown in public;
c) the work broadcast or included in a cable programme service, and…..a person who does or authorizes the doing of any of those acts infringes the right.

Though the person commissioning the work has copyright in it, he has a limitation not to invade privacy. There are a few exceptions to the right which are set out in section 85(2) of the CDPA, for the incidental inclusion of the work in an artistic work, film, broadcast or cable programme[157]. If the work commissioned for commercial purpose with the consent of the person the privacy question does not arise. The copyright must subsist in the photograph or film before the right of privacy can arise. The right of privacy will continue to subsist only so long as copyright subsists in the work[158]. A newspaper or broadcaster commissioning his cameraman to take photograph of a model for commercial purpose, does not involve in any infringement of privacy depending upon a contract with the model. Whereas, the intrusion of privacy would arise when the staff cameramen of news channel records the life of a private person for his commercial purpose, if they have not secured an informed consent from such a person. Personal life of victim of a crime, could be a subject matter of interest, but publication of the private life in such circumstances may not be in public interest. The media has extensively reported the details of sensation murder by Shailaja in Hyderabad, where she had cut the victim into pieces to destroy the evidence. When interviewed, she made a false allegation that victim attempted to sexually exploit her. The media rushed to publish those aspersions on character without verifying them with the wife or other members of family. It is an intrusion of privacy in a news story. In India there is no similar provision of privacy as available in CDPA 1988 in England. The privacy is also protected in England through 'The Protection from Harassment Act 1997 which punishes harassing conduct, and provides also for civil cause of action for damages. It also protects the harassment by media also.

The sexual harassment of women at workplace recognized by Indian Supreme Court as a new violation of right in Visakha[159] case offers a judicial protection to privacy of working women. The Data Protection laws impose an important restraint on the uses to which information about individuals may be put. Indirect protection for privacy is available through the enforcement of rights and interests in land, such as trespass to land and nuisance. The Wireless Telegraphy Act 1949, and Interception of Communications Act 1985 creates a criminal offence of unlawful interception of communications by post or by a public telecommunications system. The Freedom of Information Act, 2002 in India offered protection to privacy by providing exceptions to disclosure rule. Judiciary came to the rescue of privacy by recognizing the telephone tapping as intrusion of privacy.

[157] CDPA, 1988 s 31
[158] ibid, s 86
[159] AIR 1997 SC 3014

In Autoshankar Case[160] the state pleaded privacy on behalf of the prisoner and sought to restrain the Nakheeran from publishing his autobiography, written in prison and given to the petitioner- editor of that magazine, alleging involvement of the police and jail authorities. It was held that privacy was an individual right of the concerned person and no other had any domain over other's privacy even though such person was a prisoner. If Nakheeran is permitted by author to publish latter's auto biography, there is no invasion of privacy at all. The press in this case need not take the permission of the police or state to publish that autobiography. Nakheeran could also own copyright over the work having obtained it from the author. In this case the question of defamation of the state and its officers was also dealt with, because that was pleaded as one ground to prevent the publication. The court held that there could be no prior restraints on publication, and the remedy for defamation would be available to those individuals only after publication. It was also held that the state could neither claim privacy on behalf of the prisoner nor plead defamation prior to or after the publication.

Diana case

In *Hyde Part Residence Ltd, v Yelland*[161], a newspaper published still photographs taken on a security camera when Princes of Wales Diana, and her friend Dodi Fayed visited Villa Windsor in Paris, on the day prior to their deaths in a car accident. The photographs were stolen by a security guard and sold to the newspaper, which published them more than a year later. Hyde Park had sought summary judgment at the first instance relying on breach of copyright. The defendant relied on the defence of fair dealing for the purpose of reporting current events. The judge upheld it as fair use. However, it was reversed on appeal. Motives of alleged infringer, the extent and purpose of the use, whether that extent was necessary for the purpose the purpose of current events in question will decide the fairness or otherwise of the usage. In Diana case the work (photographs by security camera) had not been published or circulated to the general public. This was considered to be one of the important indicators that the use was not fair and not for the purpose of reporting current events. The Court examined the doctrine of fair use on the touchstone of a reasonable man and said: 'A fair minded and honest person would not pay for the dishonestly taken driveway stills and publish them in a newspaper knowing that they had not been published or circulated'. Another factor was that the extent of the use was also held to be excessive. It can also be objected for invading privacy of a popular personality, which will not support to create any copyright in a work opposing public policy on the point of intruding privacy.

[160] R.Rajgopal v State of Tamil Nadu, AIR 1995 SC 264
[161] [2001] Ch. 143

Selling stories of private lives

In 1998, in *Pro Sieben Media AG v Carlton UK Television Ltd*.,[162] the Calton UK TV had broadcast a current affairs programme, which critically analyzed the issue of chequebook journalism, and the sale of stories about people's private lives to the media. The programme included a 30 second sequence taken from an interview, which was the broadcast of the plaintiff Pro Sieben with Mandy Allwood, a woman who was notorious at the time for being pregnant with eight fetuses, and making money out of her situation. The plaintiff complained infringement of his copyright and the defendant pleaded the fair use defence for criticism or review. The trial judge refused to accept the defence of fair use and held there was no sufficient acknowledgment of the author of original programme The Court of Appeal reversed the decision finding that there had been sufficient acknowledgement. The Court explained that the exemptions under doctrine of fair use had achieved proper balance between protection of the rights of a creative author and the wider public interest and that the free speech is an important part of that wider public interest. She cannot, however, raise the issue of privacy since she voluntarily for money to publicize her private details. The fair dealing is for the purpose of criticism, that criticism may be strongly expressed and unbalanced without forfeiting the fair dealing defence. The words 'for the purpose of criticism or review' and 'for the purpose of reporting current events' should be construed as composite phrases. The intentions and motives of the user of copyright material were highly relevant in relation to fair dealing. The criticism includes the criticism of ideas and style. The programme was a comment on cheque-book journalism in general and the treatment by the media of the Allwood story in particular. The event was a current event, and the use of extract was short, and thus there was no infringement.

Surveillance and Privacy

It is reported that in several high profile disputes, members of the copyright industries have sought to compel unwilling third-party providers to conduct surveillance for them. Even Network Service Providers are asked to monitor and report on activities of their customers.

The controversy now is concentrated on the conflict between the commercial interests of the corporate programme maker, owning the copyright in each and every bit of creation from different people, and the ordinary viewer of the television programmes. The copyright of the commercial owner and privacy of ordinary consumer are at logger heads and the law is not in place to regulate these aspects and protect the privacy from the onslaught of the copyright owners. This provides for exploitative commerce between the individual intellectual creators and corporate commercial managers who simply trade on property of IPRs. They purchase

[162] (1999) 1 WLR 605

the copyright of individual creators at pittance or throw away prices, and merge them into corporate stream of programmes in entertainment industry canalized through their private channel of television and prepare themselves to exploit the consumers also. In the beginning it appears that you are protecting the intellectual property of an individual whose brainwork is expected to create economic benefit for the creator. Once the intellectual property changes hands and lands in the Entertainment trader, it assumes a different proposition and it will be trading over it for a very long time, charging for every minute viewing by an individual, which he knows because of its technical capability. The expression used to protect the commercial elements here is 'the Digital Rights Management' and justify it on the grounds of copyright and contract law and need to protect the copyright owners property rights and to enforce them. Like in any other ordinary contractual principle, the inadequacy of the consideration in contract of that nature is not questionable even in assignment of copyright.

Using Blog for Character Assassination of Victim of Sexual Assault

When an international school principal is involved as an accused in such a crime where he was arrested for alleged rape of a 11th class student of 17 years, the TV channels showed building shots of all the international schools of Hyderabad unmindful of the fact they are suggesting that those schools also are dangerous for the girls (during July 2010). A case of rape and criminal intimidation has been booked against Salahuddin Ayub, Principal of Parkwood International School at Manneguda near Vikarabad on the outskirts of Hyderabad. (Times of India, Hyderabad Newsreport, 22nd July, 2010). While the parents of the girl from Mumbai alleged that she was repeatedly raped by the principal during the last one year, the school authorities denied claimed that they were aimed at defaming their popular school, which has branches in the Middle East.

a) Crime: As News, Case, Story, Money, Success

Generally, once the arrest scenes are repeatedly shown, the media focus shifts on to the investigation process, which happened in this case too. The police tried to use the media's interest to reveal the details of 'confession' of the accused to tell the world that they did an efficient job and caught the real culprit. Whole strength of such reports is the unnamed 'sources', as revealed by the following sentences:

"According to sources (phrase frequently used by media, without telling who the sources are), accused confessed that he used to stay on the third floor of Princes Court Block, where girls used to stay on the school campus. Every day he used to call girl students from the first floor to the penthouse and urged them to stay even during late hours, sources said, quoting the confession statement drafted on a laptop. In March, the girl went to his room at 9.30 pm

to clear some doubts. At that time, he hatched a plan and mixed a sedative in her cool drink and gave it to the girl, who after drinking it fell unconscious. He then raped the girl and also threatened her with his licensed 0.32 pistol that if she reveals to anybody he would kill her, the sources said. ….Accused also confessed that he took the girl to two hospitals. He first took her to a corporate hospital in Banjara Hills on May 5 suspecting pregnancy. He stood outside the hospital and sent the girl inside by giving her the required money. After that, he took the girl to a private nursing home at Lower Tank Bund for subsequent treatment. A lady doctor at the hospital gave her some pills for abortion. Sources said he also confessed that he had the habit of taking photographs and videos of girl students at various times and used to see them during night. He also stated in the confession that he used to take the girls outside the school premises without noting in the security register. "On July 1, some girl students came to my room to see a movie on TV. The foreign student slept in my room while watching TV. I asked the other students to leave the girl in my room. When all the girls went away I touched her …and tried to remove her clothes…But she resisted and cried loudly. Then I changed my mind and threatened the girl not to reveal this to anybody," Ayub admitted in the confession. (Times of India, Hyderabad, 25th July 2010)

Releasing of such 'sensational' information with details of incident either formally or informally to the media will not strengthen the case of prosecution in any manner. Still give and take happens happily on both the sides.

Neither the police nor the media bother whether such confession to police officer would be admissible in court or enough to prove the guilt? After the confession story is written, both the media and police wash off their hands. Further investigation successes do not appear in media. Once media loses interest, case becomes a routine and no one would be watching the process of destroying evidence, diluting the investigation etc. Every one starts talking about the case only when the case ends in acquittal or nominal sentence is pronounced.

Reporting in media (Times of India, Hyderabad, 24th July 2010) that police seized handycam camera with memory card in which the sleazy scenes were recorded and the .32 pistol used to threaten, or other parts of investigation including the recording of statements of doctors who examined the victim, would help the readers to know the progress. The details of the recordings are again not required to be reported. All these will help the accused to develop plan to dilute or sabotage or destroy the strength, which happens when media 'forgets' this totally. Thus media by it's over enthusiastic reporting of details of confession and seized articles in the beginning and by silence or negligence or being busy with other crime of contemporary interest, will be helping accused than the victim. Crime is a just a thing of interest for media, while a challenge for police to bring publicity to their efficiency, a case for courts and ignominy or worse than that for the victim, while reports serve the accused as 'alerts' at every stage. The dishonesty and corruption in the system stand

as great strengths for the accused in destroying the case. As the judgment day arrives, it is the judiciary that gets blamed. Justice is another victim.

b) Blog to Assassinate the Character

In the process another worst thing is happening every time for the victim, this time in case of this school girl's rape is the use of new medium for character assassination of the victim in defence of the rape accused. The character assassination is being used as vital weapon by almost all accused, of sexual offence. A blog created to defame and demoralize this 17 year old student victim of rape. Times of India made it a banner item, which perhaps make people to rush to search the blog to know who the victim is. It proclaims that blog contains a photograph and other details, which evince sufficient interest among the netizens. The banner news report says: "Stooping to a new low and in contravention of various laws of the land, a blog has been floated with the express purpose of disgracing the rape victim of Class XI of Parkwood School and her family. The blog identifies the 17-year-old, who has levelled charges of rape against the school's director and has posted her pictures on cyberspace. It also raises questions about her 'relationship' with other male students of the school, apart from rubbishing all her statements made in connection with this case. Worse, it even gives out a picture of the girl sourced from her profile on a social networking site…..While it cannot be ascertained who the creator of the blog is, its content makes it amply clear that it serves the purpose of the disgruntled school management. The blog claims that it has been created to foil the "malicious attempt to defame the director and the school" and goes on to list in detail the victim's family background, naming her parents, siblings among others." (Times of India, Hyderabad, 30th July 2010). This claim would be enough to register a case against the accused and his group.

The report also quotes the father of the victim saying; "They (the management) have not only posted her pictures all over but have made false allegations. It is not just unlawful but also immoral".

The suspicion that blog is created by the accused group is further consolidated by the points made in the newsreport: "The blog reads like the repeat of the rant of the school management and carries the claims it had made last week when the rape case was filed against M S Ayub, the school director. While the school management, mainly Ayub's sister, Ayesha Tanvir, had later stated that they would let the law take its own course in the matter, the blogger has curiously used every point Tanvir had made last week."

References to the statement of the victim to the police, attributes motive of 'hidden agenda' to the victim, or ridiculing the allegations of video making or photography by the accused, are the factors which show pointing finger to the accused.

c) Can Law Comes to the Rescue of Victim

The law made it very clear that it would be a crime to reveal the identity of the rape victim. Section 228A of Indian Penal Code, which is introduced in 1983, prescribed 2 years of imprisonment and fine for this offence.

228A. Disclosure of identity of the victim of certain offences etc.

(1) Whoever prints or publishers the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C, or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is:-

(a) By or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) By, or with authorization in writing of, the victim; or

(c) Where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:

Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization.

Explanation:- For the purpose of this section, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation: - The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section

The Convention on the Rights of the Child, adopted by the U.N. in 1989 (India acceded to it in 1992), under a protocol of May 2000, calls for "protecting the privacy and identity of child victims and avoid inappropriate dissemination of information that could lead to the identification of child victims."

Section 228A provide for exemption from penalty when the victim authorizes the publisher in writing. The investigating police officer is also exempted only if the revelation is a necessity for furtherance of investigation. Otherwise the police officer also would be liable for holding a press conference and revealing the unnecessary details of the victim. Recently[163] the Supreme Court observed that it would be improper even for courts to mention the name and address of the victim in the judgments, which are considered public documents and repeatedly reported and quoted from. Though the law did not provide for it, the division bench advised all the courts to restrain from writing the name of the victim. It goes a long way in honouring the privacy of the victim. Arijit Pasayat, J (along with Justice Doraiswamy Raju) pointed out[164]:

We do not propose to mention name of the victim, Section 228A of the Indian Penal Code 1860 makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Ss 376, 376A, 376-B, 376C or 376D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228A has been enacted, it would be appropriate that in the judgments, be of this court, High Court or lower court, the name of the victim should not be indicated. We have chosen to describe her as 'victim' in the judgment.

A similar protection, of course, is not available to the accused. He has no right to seek non-disclosure of identity as a matter of right. The accusation of a criminal charge deprives him of his right to privacy and even the reputation to some extent. It is understood that the loss would be compensated when the judgment of acquittal is reported. However the report in press cannot extend the accusation beyond the prima facie basis as available for prosecution. If the media gives unnecessary allegations and details without any basis and fail to prove the truth of the narration would have to pay for invasion of privacy and also reputation. As the events cannot be copyrighted, any further modification of the work based on reports infringing privacy of individuals would not entitle him for copyright protection. Of course, the subsequent copy published in violation of privacy would be equally liable for such wrong, if not for copyright violation.

[163] State of Karnataka v Puttaraja, AIR 2004 Supreme Court 433
[164] ibid, para 2

The Juvenile Justice (Care and Protection) Act 2000 attempted to safeguard the children against invasion of their privacy by providing a penalty for reporting the identity of the child in conflict with law or child in need of care.

The guidelines of the International Federation of Journalists ask professionals to have respect for the privacy and identity of children and consider the consequences of publication of any report, and the need to minimize harm to children.

d) Norms by Press Council

The Press Council of India's norms for journalistic conduct say that in reporting sexual assault on children, names, photos and particulars of their identity shall not be published. Press Council of India laid down Norm No.14 which states: "Caution against identification: While reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published."

e) Crime against Juvenile

The Juvenile Justice (Care and Protection of Children) Act 2000 clearly lays down: "No report in any newspaper, magazine or news-sheet or visual media of any enquiry regarding a juvenile in conflict with law (under an amendment proposed and now under consideration by the Standing Committee of Parliament, the words `or a child in need of care and protection' are to be added here) under this Act shall disclose the names, address or school or any other particulars calculated to lead to the identification of the juvenile."

It is quite possible that the allegations made in the blog would attract the definition of criminal defamation under section 499 and punishment of two years of imprisonment and fine under section 500 of IPC.

f) Cyber Crimes

It could be even a crime under new cyber law in India, such as sending offensive messages (S66A of Information Technology Act, 2000 as amended in 2008), publishing or transmitting obscene material in electronic form (S 67), transmitting of material depicting children in sexually explicit act in electronic form (S 67B) besides being cyber defamation.

Any person who sends, by means of a computer resource or a communication device – (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance,

inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; …..shall be punishable with imprisonment for a term which may extend to three years and with fine. (Section 66A of IT Act, 2000)

Blocking Blogging

Section 69A gives power to state or central government to direct for blocking for public access any information through any computer resource. This is the suitable case for invoking the power under section 69A to block this blog. This direction can be issued to the intermediary or server or subscriber and if this direction is violated, it will attract a penalty of seven year imprisonment and also fine. {S 69A(3)]

It is a known fact that if the physical sexual assault is first rape of the victim, second is done by media and third by the prosecution. If the in camera is not the rule, there would be another rape by media while victim was being cross examined. Finally in the text of judgment, if it goes in appeal, in appellate court's orders, the debate and discussion continues to hurt the reputation of the victim, for which no remedy could be imagined. Blogging is another tool now to victimize the victim, further.

g) Media's onslaught on Privacy: Arushi Case

The Supreme Court on 9th August 2010 cautioned media against their irresponsible reporting intruding privacy and affecting the honour of crime victim, in Aarushi murder case. An advocate Surat Singh filed Public Interest Litigation in the Supreme Court in 2008 seeking some restraint in reporting in the wake of "wild allegations" levelled by Noida police, which first investigated the Aarushi murder case. The Bench comprising Justices Altamas Kabir and A K Patnaik passed the order after the counsel for the parents of Aarushi pointed out to news reports and repeated telecasts casting aspersion on the character of everyone — the victim, Talwars and their deceased servant. Surat Singh rightly asked in that PIL, "Can freedom of press be allowed to degenerate into a licence to malign the character of a dead person? Does our Constitution not guarantee the right to privacy even to the dead?" He had sought a direction to restrain the media from publishing any story relating to Aarushi case till investigation into the crime was complete.

Rajesh Talwar, father of teenager Aarushi, also moved the Supreme Court seeking to restrain the media from indulging in reckless and irresponsible reporting on the case. Talwar, in his application, said that the reporting by a section of electronic media and that of the print was prejudicing their case and damaging their reputation[165].

[165] (see http://www.khabarexpress.com / 21/07/2010/ Aarushi-murder-Father-seeks-legal-curbs-on-medianews_173069. html accessed on 10th August 2010)

The Supreme Court on 10th August 2010, said: "we not only reiterate our interim order of July 22, 2008, but also restrain the respondents from publishing material which has potential to interfere with the process of investigation of all cases. On July 22, 2008, a Bench comprising Justices Kabir and Markandey Katju had said, "We will only observe that both the print and electronic media should exercise caution in publishing any news regarding the case which may prejudice the case or damage reputations." On August 18, 2008 the same bench said: "We are not worried about ourselves. We have sufficiently broad shoulders but we are concerned about the reputation of people as was in Dr. (Rajesh) Talwar's case." When trial court is seized of the matter, ie, *sub judice*, the media's role is restricted. Bench said: "Extreme caution and care in reporting such cases was required, as it is not only the reputation of a person but a person is held guilty even before the trial in the case is over….In this case, what is the positive evidence against them (the accused)? "

The apex court further explained recently: "We however clarify that this would not prohibit publication of information which will not interfere with investigation, damage reputation or prejudice the accused……The press is important in a democracy. But it must observe self-restraint. When it fails to self-regulate, what can be done. No one says do not report. But do it in a manner so that none of the parties' reputation is tarnished. What is involved here is a young girl's reputation. Have some sensibility while reporting."

A section of media called it 'gag order' or new set of restrictions on media's crime reporting. Times of India (August 10, 2010) said: 'SC has c virtually slapped a ban on source-based news stories in matters under investigation, in an order which can alter the journalism landscape'.

In fact Supreme Court was cautioning against violation of a specific order in Aarushi murder case only. Even if it is a gag order it is not a general ban, as that is Aarushi-murder-report specific order. The reports in media were brought before SC which felt that such reporting was violation of the apex court's two-year-old ruling asking newspapers and TV channels to exercise restraint in reporting the Aarushi Talwar murder probe. The news media has to understand this difference between a general order and specific direction in a particular case. Another point the SC made is that in general also the media should not resort to publication of a report if it had the potential to interfere with the investigation, tarnish the image of persons or prejudicially affect the accused in trial. This is not a new 'restriction'. The right of accused to fair trial, right of privacy and reputation as part of right to life of a victim, or relatives of the victim are well protected by the Constitutionally guaranteed freedom which formed the grounds for imposing reasonable restriction by law on press freedom. Media can still investigate to explore the evidence of real culprit, collusion between prosecution and accused, or any other aspect of corruption etc. affecting the justice in any crime incident, as part of their freedom of expression and fair criticism.

h) Public Interest Validates Media Trial

The judgment of the Supreme Court on 29th July 2009 in RK Anand vs. Registrar of Delhi High Court, upheld the sting operation exposing the criminal-prosecution nexus and involvement of senior advocates in the destruction of justice. For the first time in the history of media and judiciary, an analytical judicial pronouncement has been made supporting the genuine, transparent and public interest media 'trial'. Respect for 'justice' is resurrected with this significant judgment of the apex court in the BMW hit and run case. The drunken driving of Sanjeev Nanda, son of an arms dealer, crushed six lives in Delhi a decade ago, and the rich and high profile accused also attempted to crush justice, which was brought to light by a sting operation of NDTV. The 'media trial' judgment came as morale booster to constructive sting operations, of course with some cautions and limitations. While appreciating the TV channel's exposure of a renowned criminal lawyer's crime of bribing a witness, the apex court declined to 'regulate' media in the interest of an autonomous judiciary and a free media. The 100 page judgment by Justices Agrawal, G S Singhvi and Aftab Ali is an essay on trial by media analyzing both good and bad of sting operations.

The delayed and complex trial of this high profile crime tempted the media to use the hidden camera. Explaining the backdrop of NDTV sting and role of media in BMW trial, the Supreme Court said that the trial was meandering endlessly even after eight years and not satisfactorily. The status of the main accused coupled with the flip flop of the prosecution witnesses evoked considerable media attention and public interest. To the people who watch TV and read newspapers it was yet another case that was destined to end up in a fiasco. NDTV has telecast a program on May 30, 2007 showing Sunil Kulkarni (key witness to BMW crushing crime) with IU Khan, (Special Public Prosecutor) and RK Anand, (Senior Defence lawyer) negotiating for his sell out in favour of the defence for a very high price. Earlier Kulkarni was dropped by the prosecution but summoned after the telecast. TV channel claimed before court that telecast was based on a clandestine operation by concealed camera with Kulkarni acting as the mole.

The court said: "What appeared in the telecast was outrageous and tended to confirm the cynical but widely held belief that in this country the rich and the mighty enjoyed some kind of corrupt and extra-constitutional immunity that put them beyond the reach of the criminal justice system." (emphasis mine.)The Apex court termed this 'sting' as opening of another chapter in trial. NDTV has sufficiently documented the entire episode, which is essential to nail criminals. Their half-an-hour program on delays in the trial inspired witness Kulkarni to work with TV channel to expose prosecution-defence nexus.

Reporter Pooja Agarwal used him as decoy. Before sending to talk to lawyers Kulkarni was wired with hidden camera. First microchip was formatted after taking back up copy. This created a legal problem as formatted or edited copy loses its 'originality' status and also

value as evidence. In all media channel had four rounds of sting confirming the 'nexus'. Poonam took care that decoy was in her sight and she was out of their sight. Channel used four (out of five) microchips unaltered. After the operation, another program was telecast where Kulkarni explained how they recorded criminal-prosecution 'nexus'.

Though Kulkarni withdrew his consent for telecast, the channel obtained legal opinion and went ahead with exposure. Program included comments from tainted lawyers Anand and Khan. The trial court judge saw the program and officially collected from the Managing Director of TV channel the entire unedited original record of the sting operation with names of staff involved. Furious over exposure, lawyer Anand sent a legal notice threatening to sue for Rs. 50 crore for defamation if further telecasts were not stopped. After a strong reply from NDTV the criminal lawyer was silent. Thus the record of 'media trial' reached the 'judicial trial'. On court's direction the channel and reporter Poonam filed detailed affidavits. It was stated that channel facilitated what Kulkarni conceived and executed. Then counsels of two accused lawyers pleaded that TV channel was guilty of interference in court's process. Rejecting it, court charged the lawyers for contempt of court saying: "…we are, prima facie, satisfied that advocates R.K. Anand, I. U. Khan, Sri Bhagwan, Advocate and Mr. Lovely have willfully and deliberately tried to interfere with the due course of judicial proceedings and administration of justice by the courts. Prima facie their acts and conduct were intended to subvert the administration of justice in the pending trial and in particular influence the outcome of the pending judicial proceedings".

There was yet another telecast in December 2007 by NDTV showing nexus between witness Kulkarni and lawyer Anand as past friends and exposed criminal record of Kulkarni. When the proceedings reached Delhi High Court, Anand defending himself in person asked that the court control the mass media in reporting court matters, especially live cases pending adjudication before the court. He raised the age-old argument against media trial that media reports would mould public opinion and tend to goad the court to take a certain view that may not be correct. He wanted the court to lay down the law and guidelines in respect of stings or undercover operations by media. The court rejected all these arguments and saw five microchips before convicting the advocates for contempt.

The media sting reached the second stage of trial, i.e, appeal in Delhi High Court. It was a real triumph for media trial at this stage also, perhaps for the first time in the history of freedom of the press in India. Never before has the media's trial reached the trial court, High Court and also the apex court as happened in the BMW case. The Supreme Court framed an issue on role of NDTV along with issue of 'declining standards of legal profession', the subject matter of sting. It considered the directionless trial of BMW case as root cause of all this fiasco. The SC examined entire conversation between Anand and Kulkarni. Though Anand raised technical questions objecting to the genuineness of the microchip recordings, the Supreme Court specifically pointed out that Anand never denied the genuineness of sting.

It went into details of conversation and found corroborations in their subsequent statements. Another lawyer Khan questioned formatting of one microchip, which raised doubts on credibility of content. Though the court agreed that there were noticeable lapses which Channel should have avoided, it found that only first chip was formatted and that too did not refer to significant change in position.

The counsel for prosecutor Khan questioned the propriety of the stings and the repeat telecast of the sting program concerning a pending trial involving a court witness. He suggested that before taking up the sting operations, fraught with highly sinister implications, the TV channel should have informed the trial court and obtained its permission. He also said that in our system there was no place for trial by media as that was sub-judice (under consideration of judiciary).

The apex court has respectfully distanced itself from interfering with the expression autonomy of media by rejecting the plea to lay down guidelines for sting operation. The Supreme Court did not agree with the contention that media could not proceed with sting without prior permission from the court. It rightly said: "Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media. It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to precensorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment." This is the heart of the judgment on 'free press and fair trial'.

i) Media trial should not be a 'lynch mob'

While answering the submissions of a senior lawyer who appeared as amicus, the Supreme Court attempted to explain what media trial was: "the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are

often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny." Then the apex court said that NDTV's sting operation was not media trial because there was nothing in the program to suggest that the accused in the BMW case were guilty or innocent. The program was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case.

j) Public interest, the 'essence'

Upholding 'public interest' in NDTV sting the court said: "Looking at the matter from a slightly different angle we ask the simple question, what would have been in greater public interest; to allow the attempt to suborn a witness, with the object to undermine a criminal trial, lie quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious. The sting telecast by NDTV was indeed in larger public interest and it served an important public cause."

But the judgment of apex court comes with a caution. "If the 'trial by media' or 'sting' makes prejudicial pre-judgment as to guilt or otherwise of accused, it could definitely attract the provisions of Contempt of Court. Another major constraint on stings and trials by media is the public interest. If public interest is missing and self or manipulative interests surface, the media loses its ground and invites the wrath of the court". The court observed: "We have unequivocally upheld the basic legitimacy of the stings and the sting program telecast by NDTV. But at the same time we must also point out the deficiencies (or rather the excesses) in the telecast. Another amicus spoke about the 'slant' in the telecast as 'regrettable overreach'. But we find many instances in the program that cannot be simply described as 'slants'." The court objected to certain comments in opening remarks by anchor, which later repeated, were either sans reason or not justified. Court found that some information that was spoken was not given in the script submitted to court. The court cited the fact that there was no sufficient material to hold Khan also guilty, while the channel judged him guilty. After questioning sensationalism, the court objected to stridency. It said the channel accommodated negative tendency, passionate comments and prejudicial remarks without containing any constructive suggestions to improve administration of justice. The court also discovered an element of threat in Pooja's sting preparation. Pointing out a loose end, the court said one sting talked about next meeting, which might have happened but was not reported or informed to court. Non-sharing of entire information, or sharing only with such information which would end in conviction was also objected to.

At the end, the court appreciated the sting: "…for all its faults the stings and the telecast of the sting program by NDTV rendered valuable service to the important public cause to

protect and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and RK Anand."

As rightly stated by the court, lapses and loose ends in 'sting' listed in judgment would serve the TV channels as do's and don'ts, in knowing the duty to avoid them and staunchly guard the public interest. The Supreme Court bench was conscious that Indian electronic media was just 18 to 20 year old and that "like almost every other sphere of human activity in the country the electronic news media had a very broad spectrum ranging from very good to unspeakably bad". Commercial considerations, conflict of interests and TRP trips should not dominate over the higher standards of professionalism, the court suggested the media.

When the 'media trial' was being dubbed as a crime of interference with the administration of justice under the contempt of court law, the judgment came as a great relief to the media and as a morale booster to positive 'media trial'. The apex court held that the "sting program telecast by NDTV served an important public cause. Even if the program marginally tended to influence the proceedings in the BMW trial, it served larger public interest. Both Anand and Khan were purportedly shown as colluding to influence Kulkarni in the BMW hit-and-run case in the sting operation on May 30, 2007, by offering him money". Those who recommended using of British colonial concept of 'contempt of court' for jailing journalists for writing anything related to a crime under trial, should now understand what would have happened to victims such as Jessica Lal or Priyadarshini Mattoo, or dead victims of BMW crime, without the fourth estate stepping in to build a campaign.

CHAPTER VI
MEDIA & OTHER CONSTITUTIONAL ESTATES

6.1 MEDIA AND LEGISLATURE

Print and Electronic media has to report the proceedings of the Parliament and State Legislatures. In the process they may confront the privileges of the parliamentarians. Any defiance of legislative order or any scandalization of legislative conduct can be viewed as contempt of House for which House has authority to punish.

The Constitution provides several privileges to the parliamentarians. The Black's law dictionary defines privilege as, "a special legal right, exemption or immunity granted to a person or a class of persons, an exception to a duty."

Powers, privileges and immunities of Parliament

According to Sir Thomas Erskine May parliamentary privileges maybe defined as "The sum of the peculiar rights enjoyed by each house collectively is a constituent part of the High Court of Parliament, and by members of each house of parliament individually, without which they cannot discharge their functions, and which exceed those possessed by other bodies or individuals. Even though a part of the law of the land, it is to a certain extent, an exemption from the ordinary law of the land. " A more contemporary definition of parliamentary privilege is one that has been developed by the report of Joint Committee on Parliamentary Privileges in the United Kingdom, according to which, "Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished"[166]

Article 105(1) provides freedom of speech in Parliament with an assurance that there would be no legal action for defamation even if what was said was not relevant to the business of the House. There will be no liability for anything said or any vote given by him in Parliament or any Committee thereof. Under Article 105(2), there will be no liability in respect of publication of any report, paper, votes or proceedings by/or under the authority of either House. The publication without authority is not protected and may incur the contempt liability. Article 194 provides similar privileges for legislators of State

[166] Erskine May, *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament* (now popularly known as *Erskine May: Parliamentary Practice* or simply *Erskine May*)

Assemblies. The freedom of speech within the legislative house is subject to provisions of the Constitution.

Articles 208 and 211: Article 208 prescribes rules of procedure for legislature and 211 says that a member cannot raise discussion about the conduct of the Judges.

Parliament may define powers, privileges and, immunities until so defined shall be those of that House and its members and committees immediately before the coming into force of Section 15 of 42nd Amendment Act 1976. (Precedents from House of Commons)

List of Privileges drawn from the precedents of House of Commons:

1. Freedom of speech (subject to Articles 118 and 121) (Article 118 prescribe rules of procedure for regulating the conduct of its business). Article 121 says that there shall be no discussion in parliament with respect to conduct of judges of Supreme Court or High Court, except upon a motion for presenting an address to the President praying for the removal of judge.
2. Publication of proceedings.
3. Freedom from Arrest in civil cases. In case of arrest, the Magistrate must send information to Speaker, immediately.
4. Right to exclude strangers
5. Right to prohibit publication of debates.
6. Right to regulate its own Constitution.
7. Right to regulate its own proceedings.
8. Right to punish for contempt.

The important privileges of each house of parliament, its members and committees may be further explained to be:

i. Freedom of speech in parliament[167].
ii. Immunity to a member from any proceedings in any court in respect of anything said or any vote given by him in parliament or any committee thereof[168].
iii. Immunity to a person from proceedings in any court in respect of the publication by or under the authority of either houses of parliament of any report, paper. Votes or proceedings[169].
iv. Prohibition on the courts to inquire into the proceedings of parliament[170].

[167] Art.105 (1) of the Constitution of India
[168] Art. 105(2) of the Constitution of India
[169] Art. 105 (2)
[170] Article 122

v. Freedom from arrest of the members in the civil cases during the continuance of the session of the house and 40 days before its commencement and 40 days after its conclusion[171].
vi. Exemption of the members from liability to serve as jurors;
vii. Right of the house to receive immediate information of the arrest, detention, conviction, imprisonment, and release of a member[172].
viii. Prohibition of the arrest and service of legal process within the precincts of the house without obtaining the permission of the speaker[173].
ix. Prohibition of the disclosure of the proceedings or decision of a secret sitting of the house[174].
x. Members or officers of the house are not to give evidence or produce documents in courts of law, relating to the proceedings of the house without the permission of the house.
xi. Members or the officers of the house are not to attend as witnesses before the other house or a committee thereof or before a house of state legislature or a committee thereof without the permission of the house and they can't be compelled to do so without their consent.
xii. All parliamentary committee are empowered to send for persons, papers, and records relevant for the purpose of the inquiry by a committee. A witness may be summoned by a parliamentary committee who may be required to produce such document as are required for the use of a committee[175].
xiii. A parliamentary committee may administer oath or affirmation to a witness examined before it[176].
xiv. The evidence tendered before a parliamentary committee and its report and proceedings cannot be disclosed or published by anyone until these have been laid on the table of the house[177].

Immunity

Do the privileges assume the form of immunity and extend to any activity of members of legislature? Does the media have the right to publish the investigation reports which reveal that MPs are corrupt or could courts prosecute the MPs for bribery?

In July 1993, though the Government was short of majority, it could defeat the no confidence motion 265-251. In February 1996, Ravindra Kumar filed a complaint with the

[171] Section 135A of the Code of the Civil Procedure
[172] Rules of 220 and 230 of the rules of Procedure and Conduct of Business in Lok Sabha
[173] Rules of 232 and 233 of the rules of Procedure and Conduct of Business in Lok Sabha
[174] Rules of 252 of the rules of Procedure and Conduct of Business in Lok Sabha
[175] Rules of 269 and 270 of the rules of Procedure and Conduct of Business in Lok Sabha
[176] Rules of 272 of the rules of Procedure and Conduct of Business in Lok Sabha
[177] Rules of 275 of the rules of Procedure and Conduct of Business in Lok Sabha

Central Bureau of Investigation (CBI) alleging criminal conspiracy and bribing MPs in 1993 to defeat the no-confidence motion. In March 1996, the CBI registered first information reports (FIRs) against four Jharkhand Mukti Morcha (JMM) MPs. On a complaint, the Delhi High Court ordered the CBI in May 1996 to register a fresh FIR to include the name of former Prime Minister P V Narasimha Rao. The former Prime Minister and others alleged to have bribed the four members filed leave petitions in the Supreme Court seeking constitutional immunity under Article 105(2), which provides: "No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings."

In this case, *P.V. Narasimha Rao vs State*[178], the Supreme Court, in a three-two verdict, ruled: "Therefore the bribe taker MPs who have voted in Parliament against no-confidence motion are entitled to protection of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement." It also ruled: "To the bribe giver MPs, the protection under Article 105(2) is not available." The apex court says that the MPs are also under the purview of the Prevention of Corruption Act. Since no prosecution could be launched under the Act without the sanction of the competent authority and as there was no such authority in the case of MPs, the Supreme Court said that Parliament should name the competent authority with due expedition. However, no action was taken by Parliament in this regard.

Thus in this case it was held that the privilege of immunity from courts proceedings in Article 105(2) extends even to bribes taken by the Members of Parliament for the purpose of voting in a particular manner in Parliament. The majority (3 judges) did not agree with the minority (2 judges) that the words in respect of in Article 105 (2) mean, arising out of and therefore would not cover conduct antecedent to speech or voting in Parliament. The court was however unanimous that the members of Parliament who gave bribes, or who took bribes but did not participate in the voting could not claim immunity from court proceeding's under Article 105 (2).

The National Commission for Review of Working of Constitution recommended in 2002 that Article 105 be amended to clarify that "immunity enjoyed by Members of Parliament under parliamentary privileges does not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Corrupt acts would include accepting money or any other valuable consideration to speak and/or vote in a particular manner. For such acts, they would be liable for action under the ordinary law of the land."

[178] AIR 1998, SC 2120

Media's sting leading to expulsion of MPs

On December 12, 2005, eleven MPs, ten from the Lok Sabha and one from the Rajya Sabha belonging to mainstream political parties (six from the Bharatiya Janata Party (BJP), three from the Bahujan Samaj Party (BSP), and one each from the Congress and the Rashtriya Janata Dal) were shown in a sting operation on a private TV channel (Aaj Tak) being paid for raising a question in parliament. When Lok Sabha expelled its members, such a member challenged the action before Supreme Court, which served a notice to the lok sabha speaker on January 16, 2006. The court also referred the matter to a constitutional bench of five judges. The then Lok Sabha speaker, Somnath Chatterjee called an all-party meeting on January 20, 2006. It was unanimously decided in the meeting that it was the privilege of the house to take disciplinary action against its own member. Expulsion from the house was very much within that disciplinary action. It was further held that the speaker of the Lok Sabha was the sole custodian of the rights and privileges of the house and, hence, not answerable to the judiciary for his role in that capacity. In January 2007 the Supreme Court upheld[179] the Parliament's authority to expel the members for their wrongful conduct. The five-judge bench headed by Chief Justice Y K Sabharwal rejected the contention that Parliament had no constitutional power to expel its members.

Media and Privilege Issues:

During the anti-corruption agitation by Anna Hazare in September 2011, Film Actor, Mr. Om Puri described India's Parliament as largely made up of "uneducated bumpkins". Former Indian Police Service officer, Kiran Bedi dwelt on the duplicity of politicians in a manner that would have done a professional stand-up comic proud. Both speeches were widely telecast by news channels. Some furious MPs demanded that Puri and Bedi be charged under powers vested in Parliament by Article 105(3) of the Constitution with breach of privilege—a potentially punishable offence where Parliament is both the accuser and the judge. Disagreeing with this demand Swapan Das Gupta, MP, has narrated several past incidents of critical remarks against Parliamentarians[180]. 'In 1981, the Times of India was referred to the Privileges Committee for an article in which the author claimed that "Dacoits, smugglers and bootleggers are now honoured members of legislatures." The publication escaped censure and possible punishment because the Rajya Sabha Chairman cleverly noted that the claim was not a libel of any particular MP or any House but "a libel in gross". In August 1986, MPs were agitated by the assertion of Acharya Rajneesh (Osho) that "MPs are mentally under-developed. If investigations are made they would be found to have (a) mental age of 14." The Rajya Sabha Chairman deflected the problem by stating that "It is inconsistent with our dignity to attach any importance to the vituperative outbursts or

[179] http://indiankanoon.org/doc/1459279/ Rajaram Pal v Hon'ble Speaker of Loksabha

[180] see The Telegraph, September 2, 1981 http://swapan-dasgupta.blogspot.in/2011/09/fiercely-on-guard-parliamentary.html

irresponsible statements of a frustrated person." God men, he said by way of a parting shot, should leave good men alone'[181].

The privileges are the weapons in the hands of legislature against any interference from any estate including the fourth estate. The law of privileges affects the press and media. They may be either liable for breach of privilege or contempt of House. The media persons may confront the following problems.

1. Violation of any of the rules of procedures framed by the House.
2. Breach of any privileges of legislators
3. Publication of comments or other statements which undermine dignity of the House or shake the confidence of the public in legislature, which can be punished as contempt of house.

Parliament has right of prohibition or expunction of any words, of the publication of proceedings. Under Rules 380-1 of the House of People and Rules 221-2 of the Council of States the Presiding Officers have been given power to expunge objectionable words or unparliamentary expressions.

Article 105(2) as discussed above provide absolute immunity to legislators to speak in the House, the media has a qualified privilege to report or publish the same under protection from Article 361A, which was added in 1978. If the report was fair and accurate, though brief, the reporting of parliamentary proceedings is protected by this Article. Such protection was earlier available under Parliamentary Proceedings (Protection of Publication) Act 1956, which was repealed during Emergency. This Act provided protection if a report published on the proceedings of the Legislature is substantially true, is for public good and is not actuated by malice. Orissa state provided such a protection by 1960 Act[182]. As Mrs Indira Gandhi repealed the 1956 Act, the protection was removed. The Janata Party Government amended the Constitution and added Article 361A to give Constitutional protection to publication of proceedings of Parliament or any state legislature. Immunity offered by Article 361A would be available to the press even if the speech or other material forming part of the proceedings in the House is liable under sedition, under Official Secrets Act, or conspiracy to deceive, or defamation or any other offence under the Indian Penal Code. If a member's speech in the legislature scandalizes the functioning of court of law, no proceedings for contempt of court can be initiated by the Supreme Court or High Court because of the expression 'any proceedings in any court in Article 105(2) or 194(2) would confer immunity from 'proceeding' for contempt of court as well. Such immunity cannot be available if such a speech is published outside the House.

[181] Ibid.

[182] Orissa Legislative Assembly (Protection of Publication) Act, 1960

Article 361A provides qualified privilege to media for publishing the brief, accurate and fair reporting of the proceedings, but it will not immune the media from the liability under contempt of House in case of breach of privilege by the media. Article 361A is not an exception to the immunity guaranteed to the legislators under Article 105(3) and 194(3).

In case of MSM Sharma v S,K.Sinha[183], (known as Searchlight case) the editor of Search Light newspaper published an expunged remark from the proceedings of Bihar Assembly for which a notice for breach of privilege was issued. The Editor approached the Supreme Court under Article 32 contending that the notice of action under breach of privilege violates his fundamental right under Article 19(1)(a) and also interferes with the his personal liberty under Article 21, if arrested in pursuance of the privilege motion. The Supreme Court with majority opinion ruled that the Assembly had the right to claim the said privilege under Article 194(3) of the Constitution as was enjoyed by the House of Commons. The Supreme Court also held that the provisions of clause (2) of Article 194 indicate that the freedom of speech referred to in clause (1) is different from the freedom of speech and expression guaranteed under Article 19(1)(a). Both Articles 105(3) and 194(3) are constitutional law and not ordinary law made by the Parliament or State legislatures and that therefore, they are as supreme as the provisions under Fundamental Rights. In case of conflict between Part III and Articles 105(3) and 194(3), one has to read that Article 19(1)(a) is subject to the latter part of Articles 105 or 194. The provisions of Article 19(1)(a) are general in nature and have to yield to the special provisions of the Constitution under Articles 105 and 194.

Thus the Editor lost the case and privileges of the Parliament was held supreme compared to the fundamental rights of a citizen. Justice Subbarao expressed his dissent in this case and stated that House of Commons had no privilege to prevent the publication of the correct and faithful reports of its proceedings save those in the case of secret sessions haled under exceptional circumstances and had only a limited privilege to prevent malafide publication of garbled, unfaithful and expunged reports of the proceedings.

Thus in this Searchlight case, free speech was subordinated to the privilege power over the powerful dissent of Justice Subba Rao.

If the press makes any comments casting aspersions on the character or proceedings of a house, it could be a breach of privilege and contempt of house. The Hindustan, a Hindi daily, in its issue dated 2nd June 1967 made an editorial comment on the discussion held in Rajya Sabha over the Hazari Report. The caption of editorial was "Baseless, Meaningless and Improper". The Editorial took objection to certain allegations made against Birlas on the floor of the house while discussing the Hazari Report, tabled on the floor. The comment

[183] AIR 1959 SC 395

in Editorial reads as follows: "The question is whether the absurdity, venom, character assassination and thoughtlessness which was given vent to on the floor of Parliament by making Hazari Report as the basis thereof, was in accordance with the dignity of the Parliament and its members". The Privilege Committee of Parliament took the view that the said editorial contained reflections on the character and proceedings of the Parliament and on the conduct of the House. The editor tendered an unqualified expression of regret and thus no action was taken by the Committee[184].

Casting aspersions on the Committee of the House also can be taken as contempt of House. The Financial Express, Bombay wrote an article casting aspersions on the committee of the Public Undertakings of Lok Sabha, which was held to be a breach of the privilege of the House[185].

The Blitz was involved in a Breach issue for its comments in the newsweekly dated 15th April 1961 ridiculing the speech of Sri J. B. Kripalani, a member of Lok Sabha. The comment was published along with the photograph of Kripalani, under which the caption was "Kripaloony". The report called him "senile" and a "bazar baffoon". The Delhi Correspondent of the News weekly Mr A Raghavan, dispatched a report characterizing speech of Kripalani as "lousiest and cheapest speech ever made since he was elected to Parliament". The Committee of Privileges took a serious note of these comments and issued notice to the Editor and Delhi correspondent. The journalists did not turn up. The Editor wrote to the Committee claiming that the comment was 'fair'. The Committee viewed it as personal attach on the individual member and there was casting of an aspersion on the member based on his speech and conduct in the house and disagreed with the contention that it was a fair comment. The Committee held both the editor and the Correspondent guilty of committing breach of privilege and contempt of house.[186]

There can be some more instances of breaches of privilege. They are:

1. Publishing any reflection upon a member relating to his capacity as a member of the House.
2. Premature publication of motions tabled before the house
3. Premature publication of proceedings of a committee of a House.
4. Publication of document of paper presented to a Committee before the Committee's report is presented to the House.
5. Report or the conclusions arrived at by a Committee ought not to be published, disclosed or referred to the press before the same are presented to the concerned house.

[184] XII, Privileges Digest, No. 2 p 105 (1967)
[185] XII, Privileges Digest, No.2 p 35-36.
[186] Jain M.P. Parliamentary Privileges and the Press, 1984, pp 66-67

6. Misreporting or misrepresenting the proceedings of the House
7. Misreporting or misrepresenting the speech of a member of the house.
8. Comments diminishing the dignity of the House or undermining the foundation of the parliamentary system of government.
9. Casting aspersions on the impartiality of speaker.
10. Reporting proceedings of secret session of legislature
11. Publication of expunged portions of speech.

Privilege Committee sits and adjudicates the complaints or notices referred to it by the House, when members raise or bring it to the notice of Speaker or Chairman by way of notices. If those notices are admitted by the Speaker or Chairman, they will be referred to the Privileges Committee which conducts an inquiry into it and gives a report of decision. The newspapers generally raise the criticism that the principles of natural justice are not followed in ascertaining whether there is in fact the breach of privilege or not. The Privilege Committee can impose various kinds of punishments for breach of privilege and Contempt of House. They are:

1. Admonition and Reprimand: In admonition, the offender is asked to attend at the Bar of the House, and then he is rebuked by the speaker. In Reprimand the offender is brought to the House by force and admonished. Blitz editor Karanzia was reprimanded[187].
2. Apology: An unconditional apology of the offender may convince the Committee and exempt the offender from contempt.
3. Exclusion from Press Gallery: If the contemner is the accredited journalist with a card to attend the press gallery, he can be excluded from the gallery.
4. Imprisonment: If the offenders refuse to tender unconditional apology or do not respond to summons to attend the Bar of the House, the Committee may resort to impose imprisonment. Keshav Singh in 1965 and Ramoji Rao in 1984 were awarded the imprisonment. But the Supreme Court intervened and protected the fundamental rights of these 'offenders' who were held liable for breach of privileges and contempt of House.

The Press Council of India and Second Press Commission recommended that the House should exercise this authority for imposing punishment on media persons or citizens who aired their criticism against the legislators, very sparingly in exceptional circumstances where it is satisfied that such a comment obstructed the proceedings of the house and finds it essential to provide reasonable protection to the members.

[187] Basu DD, Law of Press in India, 1980, p 200

Fair defence

The Committee of Privileges and on its recommendation the legislative House exercise an adjudicatory function in deciding whether a particular person or his comment would be construed as contempt of House or not. Thus it is implied that whenever a penal power is exercised the due process and other principles of natural justice have to be followed. It has a special obligation to discharge its functions with a judicial approach and in a non-political or non-partisan manner because, the committee is acting as a judge in its own cause. The procedure of the committee ought to conform with the canons of natural justice. It is essential to give a full and fair opportunity to defend himself and explain, to the person who is arraigned before the committee for breach of parliamentary privilege. Such decisions cannot be taken at the behest of the mentors or at their whims and fancies. The Courts have power to look into whether natural principles of justice was followed before imposing imprisonment or not.

Reasonable Opportunity

The Second Press Commission expressed a very considered opinion in the following terms: 'We are of the view that the rules of business of the House of Parliament and State Legislature in India dealing with the procedure for taking action against alleged breaches of privilege etc., should be reviewed and necessary provisions incorporated therein to provide for a reasonable opportunity to alleged contemners to defend themselves in the proceedings for breach of privilege…". In the absence of codification of privileges, such defences are not made available to journalists and political rivals in the incidents similar to Tamil Nadu Assembly's recent sentencing process.

The Press is often called an extension of Parliament. It conveys to the people the substance of Parliamentary legislation and discussion and keeps the people informed of what is happening in Parliament.

Though what appears in the Press may influence the Members and provide them with necessary background, the material itself does not form an authentic record of facts and exclusive reliance cannot be placed by a Member of Parliament on the matter as reported. Thus, it has been ruled by successive Presiding Officers that questions, motions and other notices which are merely based on Press reports may not be admitted. The Member may be required to produce some other primary evidence on which his notice is based.

Freedom of the Press has not been expressly provided for in the Constitution, but is implicit in the fundamental right of the "freedom of speech and expression" guaranteed to the

citizens under Article 19(1)(a) of the Constitution. It has been settled by judicial decisions that freedom of speech and expression includes freedom of the Press.

The drawback is that no journalist, be he editor, reporter or columnist, can function in isolation. The political support is always there. The media has become the mouthpiece of the political party and the weapon to get over another.

When Homi Mistry of the Blitz was ordered to be arrested by the legislature the Supreme Court issued an injunction against arresting him. The Court held that constitutional due process was not followed in this case[188].

Sanjeeva Reddy Case:

The speaker of Lok Sabha, Mr N. Sanjeeva Reddy[189] has criticised the observations of Tej Kiran, who was the follower and admirer of Jagadguru Shankaracharya Swamy of Goverdan Peeth Puri. It was reported that Shankaracharya supported untouchability and walked out while National Anthem was played. On this, Mr Sanjeeva Reddy, Y B Chawan and others made some strong remarks, which were complained to be defamatory by Tej Kiran. The High Court rejected the plaint of Tej Kiran claiming Rs 26,000 as damages from Sanjeeva Reddy and others for making defamatory remarks. The Supreme Court ruled that parliament has complete immunity to make fearless remarks on any matter and the courts had no say in the matter.[190]

Ramoji Rao's Case:

The Editor of Eenadu, daily Newspaper was summoned by the Andhra Pradesh Legislative Council for reporting a proceedings of the Legislative Council under a heading "Peddala Galabha" (=Elders Commotion suggesting that the elder members of council behaved in a strange manner) on March 9, 1983. Considering this as a breach of privilege and contempt of House, Mr. Ramoji Rao, Editor was asked to attend the Bar of the House to receive admonition. The Editor approached the Supreme Court on the show cause notice issued by Legislative Council. The Supreme Court directed interim stay on the operation of the show cause notice. The Chairman of the Council directed the Commissioner of Police to produce the editor before the House. The Supreme Court issued another direction restraining the Commissioner of Police from causing arrest. Instead of arresting the Editor, the Commissioner of Police handed over Council Secretary's communication. The Chairman

[188] Homi D. Mistry vs Shree Nafisul Hussan on 16 November, 1956, (1958) 60 BOMLR 279, http://indiankanoon.org/doc/790712/?type=print

[189] Tej Kiran Jain v.N. Sanjiva Reddy (1970) 2 SCC 272:AIR 1970 SC 1573

[190] AIR 1970 SC 1573

directed its office not to receive any communication, notice or summons from Supreme Court. The Council was dominated by the Congress members, while in the Assembly the Telugu Desham was having majority and in power. The Chief Minister N.T.Ramarao asked the President to refer the issue to the Supreme Court for advise as the Legislature and Judiciary were on confrontation. The Council passed another parallel resolution requesting the President to ignore the letter of the Chief Minister. The Governor prorogued the Legislative Council to avoid further confrontation between two constitutional estates on the issue concerning fourth estate. Meanwhile the Legislative Assembly of the Andhra Pradesh resolved to abolish the Legislative Council even before the controversy was settled in a different manner.

Assembly's order of Imprisoning Journalists in Tamil Nadu

A Tamil Nadu case on this subject is important. On the 7th November 2003, the Tamil Nadu legislative assembly accepted the findings of its Privileges Committee that the newspaper's editorial of 25th April 2003 affected the entire functioning of the assembly besides amounting to contempt of the House, and therefore sentenced the newspaper's editor, executive editor, publisher, chief of bureau and the writer of that editorial to 15 days simple imprisonment. Another journal 'Murasoli's' editor and others were also similarly charged and ordered to be imprisoned for criticising the Chief Minister and ruling party members. On 10th November 2003 Supreme Court stayed the arrest of the journalists.

Arguments before Supreme Court

This controversial attitude of Tamil Nadu Assembly has ensued interesting arguments before the Supreme Court. Referring to the extent and scope of judicial review, Senior Advocate Harish Salve argued that the question here was whether the power of the legislature under Article 194 (3) could be higher than the powers conferred on citizens under Article 19 (1) (a) and whether the legislature could enforce penal powers on the citizens without giving them sufficient opportunity to be heard. He cited various decisions of the apex court that had clearly held that the power of privilege of the Legislature would have to be harmonised with the fundamental rights of citizens. He argued that the powers of the State Legislatures under Article 194 of the Constitution must be read in harmony with fundamental rights as envisaged in Article 19(1)(a) (freedom of speech and expression) and Article 21 (protection of life and personal liberty) and could not be construed as authorising any authority of the State to arrest and detain a person.

Mr. Salve contended that the resolution was based on a complete misreading of law and facts by the House, however widely one were to construe the privilege of the House. He submitted that no person who had understood constitutional law correctly could ever come to

a conclusion that the articles and the editorial were intemperate and amounted to lowering the dignity or breach of privilege of the House. He argued that the articles merely described the utterances of Chief Minister Jayalalithaa inside the House and these in no way interfered with the proceedings of the House, warranting any punishment for the journalists. Mr. Salve argued that the adjectives used by media could not be a breach of privilege. Appearing for Murasoli Selvam, senior advocate Kapil Sibal contended that his client's newspaper had merely reproduced the editorial that appeared in The Hindu and this could not be construed as interference with the proceedings of the House.

"If it is a criticism of a political party, it does not amount to breach of privilege," he said. On the question of cancellation of passes to cover the proceedings in the Assembly for the newspaper as a whole, Mr. Sibal said that the House could not do it as it would be in violation of the fundamental right to equality guaranteed under Article 14.

The Chief Minister, Jayalalitha, has filed defamation case against The Hindu for an article that appeared in its issue dated April 13, 2003 under the caption "People's Court only way out for Opposition". This is the same article for which a privilege issue was raised in the Assembly. Although the Privileges Committee recommended seven days simple imprisonment, the issue was not pressed because Ms. Jayalalithaa told the Assembly that as the matter concerned her, she did not want to insist on any action.

Rajiv Dhavan's Analysis

One Lok Sabha member took part in proceedings of the Maha Moorkh Mandal (Super Stupid Collective) in 1966. Other members felt it was insulting. When they wanted to issue privilege notice, the Loksabha refused. Rajiv Dhavan, senior advocate and columnist, in his article[191] said: The Constitution of 1950 gives legislatures (i) virtually unlimited speech powers, (ii) immunity from anything said and done or spoken in legislative proceedings, including, after the Supreme Court's decision in the Jharkhand MPs' case (1998), for accepting bribes for voting, (iii) such privileges as those in 1976. The third category of privileges theoretically includes unlimited, uncodified privileges. Faced with a privilege case, courts do not interfere; and, in any event, do not sit in judgment over any irregularity where the legislature exercises this awesome power ignoring even its own procedure. Parliament must have internal autonomy over its own proceedings, protect its own free speech and possess the power to discipline members and others who directly interfere with its working. The problem arises when legislatures act arbitrarily against outsiders, including the Press and other media, who criticise what is said and done in the legislatures. Scenes such as those in the Uttar Pradesh Assembly and other legislatures, where microphones were thrown about,

[191] Rajiv Dhawan, Privilege Unlimited, November 14, 2003, http://www.hindu.com/thehindu/2003/11/14/stories/2003111401321000.htm

are painful testimony to what actually takes place. No sane public can ignore what happens in India's legislatures. Responsible media or Press cannot but discuss and comment on these legislative happenings.

He wrote that when Sir John Eliot was penalized in 17th Century by the Court of King's Bench for seditious speech in House of Commons, the concept of privilege originated. The House of Lords reversed the conviction on the ground inter alia that the words spoken in Parliament should be judged therein. The emergence of privilege was in the context of conflict for supremacy between the royal dynasty and people's representative houses in historic phase of evolution of rule of law in Great Britain.

The Indian socio-cultural backdrop is totally different. The Nationalist movement fought against the British rule was for emergence of a free country, where the conflict was between the fight for independence and foreign rule. The privilege that was necessitated in UK crept into the Constitution under Article 105(3) as a temporary measure, till the Parliament codified the privileges. Until so defined, the privileges 'shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty Fourth Amendment) Act, 1978'. To understand what exactly the privileges prevalent at the commencement of 44th Amendment were, we need to look back to 1950, where in the Constitution it referred to privileges of the House of Commons in UK at that time. Even if this temporary provision which was to survive until the parliament decided its privileges only is considered strictly, the privileges prevalent at that time in UK only would apply. The House of Commons stopped using the power to commit people to prison for contempt of House in 1880. The Joint Parliamentary Committee recommended in 1999 that Parliament's power to punish people with imprisonment should be abolished. The power not used for more than 123 years even in the House of Commons was used against a newspaper established 125 years ago, through the interpretation of Article 105(3). It is totally illogical and undemocratic and hence unacceptable especially when the current opinion in England is not even in favour of retaining the word 'privilege'.

NCRWC recommends delimiting privileges:

The National Commission to Review the Working of the Constitution, in 2002 recommended that the members of Parliament have the same rights and privileges as ordinary citizens except when they perform their duties in Parliament. The privileges do not exempt the members from their normal obligations to society. (Report Para 5.15.2, Page 112). Parliament did not find time to codify its privileges and immunities into law. When this was debated in 1994, most MPs opposed to codification.

Canada, Australia and New Zealand, whose parliamentary privileges also could be rooted to the Bill of Rights (1689) have enacted laws defining parliamentary privilege. In the United Kingdom, report by a Joint Parliamentary Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead, has become the de-facto rule book on the subject. The Nicholls Report defined parliamentary privilege as "the rights and immunities which the two Houses of Parliament and their members possess to enable them to carry out their parliamentary functions effectively." It did not list privileges. Instead, it specified the functions legislative privilege sought to achieve—passing laws, holding the executive accountable and voicing the concerns of ordinary citizens. Protecting the reputation and dignity of Parliament was missing from the list. It is significant to note that the Nicholls Report suggested doing away with the right of the House to punish non-members. It suggested that disputes could be heard by the High Court under existing laws of libel and defamation. Long before this report was published, the UK stopped using Parliamentary privileges to the detriment of journalists and other ordinary persons. It was last used when a non-MP was committed by the order of the Commons in 1880.

The conflict between the judiciary and the Parliament would continue so long as the uncertainties and vagueness prevail over the parliamentary privileges. In the process, the media and their freedom will suffer and wherever the claims or grounds of the editor or publisher are legitimate, the judiciary has come to the rescue of freedom of press using its power of judicial review. Interference with the freedom of citizen, either for expression of opinion or criticism should be bare minimum. Freedoms are more fundamental than the privileges of Parliament.

6.2. MEDIA AND JUDICIARY

Contempt of Court

The Media freedom can be curtailed when it tends to insult the state under Sedition which is a crime under I.P.C., if it results in loss of reputation of an individual i.e., defamation, and when it generates contempt of judiciary i.e., the contempt of court. Thus the Constitution incorporated grounds on which reasonable restrictions can be imposed on the fundamental rights of citizen under 19(2) which includes Contempt of Court. Among the varied classes of contemnors, the editors, reporters or writers, publishers and printers of newspapers frequently fall foul of the law. The fact that needs to be realised is that the press has no privilege, whatsoever, to scandalize any person in any manner without making itself accountable to the law. "The Liberty of the Press, says Lord Mansfield,[192] "consists in printing without any previous license, subject to the consequence of law". In the case of District Magistrate,

[192] *R.V. Dean of ST Asaph*, 3 T.R. 431

Kheri v. M. Hamid Ali Gardish,[193] the Division Bench of the Oudh Chief Court observed:

"The special privilege of the press is a time-worn fallacy and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the court against any person".

We might say further that so far from there being any special privilege of the press we are of opinion that there is on the other hand a special responsibility affecting that editor of a newspaper, namely that he is duty bound always bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of public as to prejudice the course of litigation[194].

The Media should have freedom to criticize the activities of public men belonging to one party or the other. But the matter would still be open as to the extent the courts can go to curb the freedom of criticism in the summary proceeding for contempt. If there is a freedom of criticism it has to be real and, indeed, to be encouraged within, of course, the permissible limit of fairness. It should inevitably be so done as a deterrent to political levity[195].

There is no doubt that the Media is free to criticize a system. A free Media stands as one of the great interpreters between the government and the people. However, in the garb of criticism, the press cannot commit contempt of court[196].

Meaning:

The simple literal meaning of contempt is disgrace, scorn or disobedience; whereas, in law, it means an offence against the dignity of a court, or a legislative body. The purpose of the contempt proceedings is to safeguard the dignity of the court and the administration of justice. It is quasi criminal in nature. It can also be said to be partly civil, where the object is to force the contemnor to do something for benefit of the other party, and partly criminal by way of punishment for a wrong to the public at large as the contemnor interfered with the majesty of the court, rather than to an individual. At the same time the journalists or people have the following rights with reference to the courts activity.

1. The right to information about court proceedings.
2. The right to participate in respect of matters and issues before the courts.

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[193] 1940 Oudh 137

[194] *Hakim Aari Nasir Ahmad v. anis Ahmad Abba*si, 1941 Oud

[195] *State v. Editors etc. of Matrubhumi & Krishak*, AIR 1954 Orissa 149.

[196] *In re Hiren Bose* 1967-68 Cal. W.N. 62

3. The right to free speech irrespective of pending proceedings.
4. The right to evaluate and criticize the working of the courts.

It may not be possible for a journalist to know or conscious of committing the wrong he might be charged with. Inadvertent mistakes and innocent distribution also could invoke the charge of contempt of court. A pressure group in England could ably demonstrate that the law of contempt was being used against journalists who made inadvertent mistakes and innocent distributors who had no cause to believe that the material which constituted contempt of court lay hidden in some of the magazines and newspapers distributed by them[197].

Generally the journalists think that they can protect the sources of information without disclosing their names and addresses. It is just professional ethics and necessity. There is no legal authority for a journalist to withhold the sources of information. Journalists were also punished for contempt because they refused to reveal the source of their information to tribunals of enquiry. In fact the Code of Criminal Procedure imposes a duty to inform whatever a person knows about a cognizable offence and assist the law enforcing authority.

Sunday Times newspaper brought out the difficulties of children born with congenital deformities as their mothers had taken a harmful drug called thalidomide during pregnancy. When newspaper viewed it as a matter of public interest, the courts and contempt power considered it as stifling discussion on matters of public concern, especially when courts were seized of that matter.

Kinds of Contempt:

There are many kinds of contempt. The chief forms of contempt are insults to judges, attacks upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of courts, witnesses or the parties, abusing the process of the Court, breach of duty by officers connected with the Court and scandalizing the judges or the Courts. The contempt occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disrepute. In this conduct are included all acts which brings the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single judge or a single court but may, in certain circumstances, be committed in respect of the whole of the judiciary or judicial system[198].

Definition:

[197] *R.V. Griffith Ex. p. Att. Gen*. 1957 2 A.B. 192.
[198] *E.M.S. Nambudripad, v. T.N. Nambiar,* AIR 1970 SC 2015.

Section 2 (a) of the Contempt of Court Act, 1971 deals with civil contempt and criminal contempt.

Section 2 (b) – 'Civil Contempt' means willful disobedience to any judgment, decree, order or other process of a Court or willful breach of an undertaking given to a Court.

Section 2 (c) The "criminal contempt" means the publication (Whether by words, spokes or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which

i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of any court; or
ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or
iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner Civil contempt consists of disobeying the orders and criminal contempt is about obstructing the administration of justice. There is some degree of overlap between these two kinds of contempt.[199]

Criminal contempt is again of three kinds-

1. Contempt in the face of court, i.e., directly interfering with court proceedings;
2. Contempt in relation to specific, imminent or pending proceedings by doing something which interferes with the due administration of justice;
3. Contempt by scandalizing the judges: Regarding the functions of contempt law there can be further reclassification –

    1. Contempt to interfere with the administrative efficacy of the courts "administrative contempt".
    2. Contempt which seek to influence the mind and activities of lawyers, litigants, juries and judges – 'persuasive contempt'.
    3. Contempt which seek to pre-judge an issue and which usurp the adjudicatory function of the courts- 'usurpatory contempt'.
    4. Contempt which seek to scandalize judges or the working of courts- "scandalizing contempt.

It is in the areas of 'persuasive', 'usurpatory' and 'scandalizing' contempt that most of the problems of the press arise. Contempt jurisdiction may not just prevent the press from criticizing the judges and courts, but create different problems for the press.

[199] H. Fisher *"Civil and Criminal Acts of Contempt"*, 1956 34 Can. B.R. 121.

What is Scandalizing?

Generally the press or media gets into trouble with their comments which scandalize the court or the judicial officer. There are several judgments which explained the contempt of scandalization which media is supposed to know so that it can avoid it. Eminent Advocate Fali S Nariman traced the origin of the concept of scandalization. “The origin of the branch of law known as "scandalising the court" was as controversial as was its introduction into British India. It originated from a celebrated dictum of one Justice Wilmot in his judgment of the vintage year 1765 in the Wilkes Case - a judgment which was never actually delivered, but meant to be delivered and later published by Justice Wilmot's son when his father's papers were edited! It was a judgment reserved after argument and when ready to be delivered it was discovered that the writ against John Wilkes was incorrectly titled and since at that time an amendment of the writ, unless consented to, could not be permitted, the case had to be abandoned! This is the somewhat dubious ancestry of that part of the law of contempt known today as "scandalising the court". It is based on a judgment never delivered in a case - a case which had already abated! And remember it was a case against a journalist: the bete noire of all judges all over the world. Our Constitution makes freedom of speech and expression a fundamental right, and the exception to it is the law of contempt, not any law of contempt, but only reasonable restrictions in public interest in such a law. The Contempt of Courts Act does not say that truth cannot be a defence but courts have categorically said, "No, it cannot be a defence." Judges have the last word as to who or what "scandalises" them[200].

Justice Roy has listed them in his book on Contempt of Court.

1. Imputing dishonesty to a judge by stating that he controlled the hearing and manipulating in getting erroneous Judgment from another judge of the same Bench[201].
2. Publishing scandalous matter respecting the court after adjudication calculated to lower the authority of the court and sense of confidence of the people in the administration of justice[202].
3. Allegation that ‘justice is sold’ or ‘justice is auctioned’[203].
4. To say that a judge is a prejudiced judge[204].
5. Reply to a show-cause notice stating that the respondent’s experience of court affairs in India is worse and that instead of finding his fault, the court should try to find whether it adopted an ‘abnormal’ course of justice[205].
6. Notice imputing malice, partially and dishonesty to the judge[206].

[200] Fali S Nariman: A Judge above Contempt, the Indian Express, August 5, 2012.
[201] C.K.Daphtary Vs. P.Gupta AIR 1971 SC 1132: (1971) 1 SCC 626.
[202] B.K.Lala v R.C.Dutt AIR 1967 Cal 153: 1967 Cr LJ 350.
[203] Umed v. Bahadur Singh 1981 Cr LJ NOC 85 (Raj).
[204] B.K.Lala v R.C.Dutt AIR 1967 Cal 153: 1967 Cr LJ 350.
[205] State v Ram Dass AIR 1969 Cr LJ 1380.

7. An attack on a judge ascribing to him favouritism in his judicial or official capacity[207].
8. Newspaper article proceeding inter alia to attribute improper motives to the judges, having a clear tendency to affect the prestige and dignity of the court[208].
9. Allegation that a particular judge gives judgments or orders always in favour of the clients of a particular advocate[209].
10. Aspersions against magistrate in transfer application about conspiracy to implicate the accused in a false case of theft and acceptance of bribe by him[210].
12. Unwarranted and defamatory allegations touching the character and ability of the judge in an application for transfer of a civil proceeding[211].
13. Allegations against judge in transfer application which are scandalous, scurrilous and made with determined effort to lower the authority of the court[212].
14. Scandalous allegations against Supreme Court judges in affidavit without any basis[213].
15. Charging the judiciary as 'an instrument of oppression' and the judges as 'guided by class hatred, class interests and class prejudices, instinctively favouring the rich and against the poor', since it was clearly an attack upon judges calculated to raise a sense of disrespect and distrust of all judicial decisions, weakening thereby the authority of law and law courts[214].

With regard to civil contempt also willful act alone would be punished. A simple disobedience to a order of the court would not constitute contempt unless it is willful. In a decision of the Calcutta High Court in a Letters Patent Appeal in Dulal Chandra bher v. Sukumar Banerji [215], a Division bench held that a contempt is merely a civil wrong where there has been disobediences of an order made for the benefit of a particular party, but where it consisted in setting the authority of the courts at naught and has had a tendency to invade the efficiency of the machinery maintained by the State for the administration of justice, it is public and consequently criminal in nature. A fine distinction was made between civil and criminal contempt in this case as follows:

> The line between civil and criminal contempt can be broad as well as thin. Where the contempt consists in mere failure to comply with or carry out an order of a Court made

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[206] Rachapudi v Advocate General AIR 1981 S 755: (1981)2 SSC 577: 1981 Cr Lj 315.
[207] Mohd. Vamin v Om Prakash 1982 Cr LJ 322 (Raj).
[208] Aswini Kumar Ghosh v Arabinda Bose AIR 1953 SC 75: 1953 Cr LJ 519.
[209] State v Naranbhal 1982 Cr LJ 1982 (Guj).
[210] State v Ravishankar AIR 1959 SC 102
[211] State v Chandrakant 1985 Cr LJ 1716 (MP) (DB): (1985) 2 Crimes 208.
[212] Court v Ajit 1986 Cr LJ 590 (Punj).
[213] Amrik Singh V State (1971) 3 SCC 215
[214] E.M.S. Namboodripad V T.Narayanan Nambiar AIR 1970 SC 2015: (1970)2 SSC 325: 1970 Cr LJ 1670.

[215] AIR 1958 Cal. 474, at 477.

for the benefit of a private party. It is plainly civil contempt and it has been said that when the party, in those interest the order was made, moves the Court for action to be taken in contempt against the contemnor with a view to enforcement against the contemnor with a view to enforcement of his right, the proceeding is only a form of execution. In such a case there is no criminality in disobedience and the contempt, such as it is, is not criminal. If, however, contemnor adds defiance of the Court to disobedience of the order and conducts himself in a manner which accounts to obstruction to or interference with the course of justice, the contempt committed by is of a mixed character, partaking as between him and the Court of the State, of the nature of a criminal contempt. In a case of this type, no clear distinction between civil and criminal contempt can be drawn and the contempt committed cannot be broadly classed as either civil or criminal contempt. There is, however, third form of contempt which is purely criminal and which consists in conduct tending to bring the administration of justice to scorn and to interfere with the course of justice as administered by the courts. Contempt of this class is purely criminal, because it results in an offence or a public wrong, whereas contempt consisting in disobedience of an order made for the benefit of a private individual results only in a private injury.

Constitutional aspects of Contempt of Court:

The power to punish the contempt was been inherent in the Courts of Record from a long time. This power is recognized by Article 129 (power of Supreme Court to punish for contempt) and Article 215 (power of High Courts to punish for contempt) of the Constitution of India.

In Vijay kumar v. D.I.G. of Police[216], it is observed: "…so far as superior courts are concerned, the power to punish in contempt action is inherent in them by the very nature of the functioning of the court itself. This principle is reflected in the edage that every court of record has inherent power to punish the contempt of it. This principle has been rigorously and consistently recognized and followed from times immemorial by the common law of England."

In yet another significant case, Sukhdev Singh v. Chief Justice S. Teja Singh and Judges of Pepsu High Court[217], it was said: "…Contempt jurisdiction springs not from any enactment as such nor from the provisions of the Contempt of Courts Act, 1971, but is a necessary adjunct of all the Courts of Records which has been consistently so held by judicial precedents and finally recognized by the constitutional provision in Article 215 and the statutory provision in Contempt of Court Act 1971."

[216] 1987 Cr.,L.J. 2018 Kerala High Court
[217] AIR 1954 SC 186

Contempt of Court is covered by Entry 77 of List I (Union List) and Entry 14 of List III (concurrent list) of Schedule VII of the Constitution. Entry 77 is set out as follows:

> 77: Constitution, organization, jurisdiction and powers of the Supreme Court (including Contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court. Entry 14 is set as follows: 14 : Contempt of Court, but not including contempt of Supreme Court This is no applicable to state of Jammu and Kashmir, over which only Supreme Court has jurisdiction).
>
> Article 129: "The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself".

The object of this power to punish is not the protection of the Judges personally from imputations to which they may be exposed as individuals,[218] but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired even on the ground of interference with the due course of justice the Court does not proceed by way of contempt "unless there is real prejudice which can be regarded as substantial interference" as distinguished from a mere question of propriety".[219]

> Article 215: Every High Court shall be a court of record and shall have all the powers to punish for contempt of itself.
>
> Article 211: No discussion shall take place in the Legislature of a State with respect to the conduct of my judge of the Supreme Court in the discharge of his duties.
>
> Article 212: 1.The Validity of any proceeding in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure. 2. No officer or member of the legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him those powers.

As the independence of judiciary is a basic characteristic of the constitutional structure in India, the provisions of Article 211 are to the effect that no discussion shall take place in the Legislature of a State with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his official duty.

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[218] *Brahma Prakash v. State of U.P.* 1953 SCR 1169 AIR 1954 SC 10.
[219] *Rizwan-ul-Hasan v. State of U.P.* 1953 SCR 581.

Upholding dignity of courts:

It is relevant to quote here the observation of the Press Commission. "The Indian Press as a whole has been anxious to uphold the dignity of courts and the offences have been committed out of the ignorance of law relating to contempt than to any deliberate intention of obstructing justice or giving affront to the dignity of courts. As stated before instances when it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised have been extremely rare and we do not think that any change is called for either in the procedure or in the practice of the contempt of court jurisdiction exercised by the High Courts.[220]

According to Section 2(c) of Contempt of Court Act, following activities be considered as criminal contempt.

1. Publications which are intended to or are likely prejudice fair trial or conduct of criminal civil proceedings.
2. Publications which prejudge issues in pending proceedings.
3. Publications which scandalize or otherwise lower the authority of the court.
4. Acts which interfere with or obstruct persons having duties to discharge in a court of justice.
5. Acts which interfere with persons over whom court exercises a special jurisdiction.
6. Acts in abuse of the process of the court.
7. Acts in breach of duty by the persons officially connected with the court or its process. Hurling shoes at a Judge to overawe him is held to be criminal contempt in R.K. Garg, Advocate v. State of Himachal Pradesh. [221]

Elements constituting criminal contempt:

In case any passage in any article in a newspaper or pamphlet is alleged to have been seized by the court and the charge was against the editor reporter or author, it must in fact refer to the court or the judge. If it does not it is not a criminal contempt. In Guruvayur Devaswom Managing Committee v. Pritish Nandy[222], Pritish Nandy wrote

> ….but, when sleuths descended on Guruvapur, they found that the wily high priest had tapped his political connection to secure anticipatory bail.

It was held that on the plain and proper reading of the passage it could not be said that the passage had any reference to a judge or court. The passage certainly puts the wily priest and his political connections in bad light but it does not scandalize the court or a judge, the court held.

[220] Report of the Press Commission (1954), I 408-488.
[221] AIR 1981 SC 1382.
[222] 1987 Cr.L.J., 192. D.B.,

Defamation of a judge is not contempt. It is to be noticed that mere level of defamation on a judge, other than defamatory attack calculated to interfere with the due course of justice is not contempt. Only when a publication is calculated to interfere with due course of justice or proper administration of law, it is punishable as contempt.

The press and contempt of court:

As the media generally involves in reporting, writing, criticizing, analyzing the activity of every system including the judiciary, it is necessary to deal with the contempt regarding the press publications. The freedom of the journalist is an ordinary party of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but apart from the statute law, his privilege is not other and no higher. The responsibilities which attach to his power in dissemination of the printed matter make him more careful. But the range of his assertions, his criticism or his comments, is as wide as, and no wider than that of any other subject. No privilege attaches to his position. [223]

Scandalizing the court, commenting on the proceedings of a pending criminal case reflecting on the judge, the parties, their witnesses, or writings affecting the proceedings of a pending case which has a tendency to prejudice the public, criticism of the conduct of a judge are some of the publications which amount to contempt. In cases of speeches, sermons or photographs also these principles are applicable. Here are some of the examples:

"The Bengalee" case: Writing for Independence

In our country, one of the early cases of contempt was against Surendranath Banerjee, owner and publisher of a paper called 'the Bengalee'. An article appeared in his paper containing the following remarks against Mr. Justice Norris:[224]

"The judges of the High Court have hitherto commanded the universal respect of the community. Of course, they have often erred and have often grievously failed in the performance of their duties, but their errors have hardly ever been due to impulsiveness or to the neglect of the commonest considerations of prudence or decency. We have now, however, amongst us a judge who, if he does not actually recall to mind the days of Jeffreys and Scroggs, has certainly done enough within the short time that he has filled the High court Bench to show how unworthy he is of his high office, and how by nature he is unfitted to maintain those traditions of dignity, which are inseparable from the office of the judges of the highest court in the land. From time to time we have in these columns adverted to the proceedings of Mr. Justice Norris, but the climax has now been reached, and we venture to

[223] *State v. Editors etc., of Matrubhumi and Krushak* AIR 1954, Orissa 149.

[224] *Surendranath Banerjee v. The Chief Justice and Judges of the HIgh Court of Bengal*, 10 Cal. 109 (P.C.)

call attention to the facts, as they have been reported in the columns of a contemporary. The Brahmo Public Opinion is our authority, and the facts stated are as follows:

> Mr. Justice Norris is determined to set the Hugli on Fire. The last act of Zubburdusti on His Lordship's pat was the bringing of a Salagram (a stone idol) into Court for identification. There have been very many cases both in the late Supreme Court and the present High Court of Calcutta regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged onto court. Our Calcutta Daniel looked at the idol, and said it could not be a hundred years old. So Mr. Justice Norris is not only versed in law and medicine, but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of Calcutta will tamely submit to their family idols being dragged into court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of justice.
>
> What are we to think of a judge, who is so ignorant of the people and so disrespectful to their most cherished convictions, as to drag into court and then to inspect an object of worship which only Brahmins are allowed to approach after having purified themselves according to the forms of their religion? Will the Government of India take no notice of such a proceeding? The religious feelings of the people have always been an object of tender care with the Supreme Government. Here, however, we have a Judge, who in the name of justice, sets those feelings at defiance, and commits what amounts to an act of sacrilege in the estimation of pious Hindus. We venture to call the attention of the Government to the facts here started, and we have no doubt due notice will be taken of the conduct of the Judge.

It was held that it was a most scandalous and wholly indefensible attack upon Mr. Justice Norris. The Chief Justice thought, that the imposition of a fine would not be sufficient and, therefore, he sentenced Surendra Nath Banerjee to two months simple imprisonment. The printer on account of his imperfect knowledge of the English language was discharged. It was stated that had it not been for the unsatisfactory and qualified nature of the apology and the absence of candid avowal of his guilt, the Court might have imposed a more lenient sentence. However, the journalists like Banerjee and Gandhi wrote with the spirit of nationalism and in support of independence movement. They deliberately questioned the British authority and defied their law. The colonial law was unreasonable and Contempt law being part of that was draconian because it was used to silence the criticism against British Raj.

'Search light' case: Unfair conclusion

The disputed Article was the "Recommendations of Law Commission" by an advocate which criticized judicial administration of Patna High Court with occasional reference to recommendations of Law Commission. The tone of article is observed to be far from respectful. The comments were also made on standard of judges and influence of executive on judiciary. The procedure followed by administration of writ applications and appeals was called "Stultification of justice" and "amusing". The Full Bench held the article being calculated to lower judiciary in public eye and derogatory to judicial independence and impartiality of High Courts, therefore it amounted to contempt of Court but on apology the editor and printer were discharged.[225]

"The Hindustan Times" case: Misconceived as contempt

Judicial Officers who claimed that they were raising subscription for war work as they were asked to do so by the new Chief Justice, the Editor, the Printer, the Publisher and the correspondent of the Hindustan Times were convicted by the High Court of Allahabad for having committed contempt. The disputed passage was:

> …The judicial officers all over the Province have been, I reliably learn, asked by the new Chief Justice of the Allahabad High Court, who, it is understood, has been requested by His Excellency the Governor for co- operation in war efforts, to raise subscriptions for the was fund…

The above allegation that the new Chief Justice had sent any circular was untrue. The High Court found the respondents guilty of having committed its contempt on the ground that the implication of the newspaper report was that the Chief Justice had done something which was unworthy of a person holding that high office, and that as the head and representative of the High Court he had committed the gross impropriety of forcing. Judicial officers to ask for war contributions from litigants, who notwithstanding that the giving of donations was ostensibly voluntary, were not in a position to refuse.

The Privy Council allowed the appeal and held that the publication did not amount to Contempt of Court. It was observed:

> When the comment in question in the present case is examined it is found that there is no criticism of any judicial act of the chief justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice. It can hardly be said that there is any criticism of him in his administrative capacity, for as far as their Lordships have been informed the administrative control of the

[225] In the matter of *Basanta Chandra Ghosh*, AIR 1960 Pat. 430 (F.B.)

subordinate courts of the Province whatever it is, is exercised not by the chief justice, but by the court over which he presides [226].

Lord Atkin further remarked:

No doubt it is galling for any judicial personage to be criticized publicly as having done something outside his judicial proceedings which was ill- advised or indiscreet. But judicial personages can afford not to be too sensitive. A simple denial in public of the alleged request would at once have allayed the trouble. If a judge is defamed in such a way as not to affect the administration of justice he has the ordinary remedies for defamation if he should feel impelled to use them. Their Lordships cannot accept the view taken by the court as stated above of the meaning of the comment: The words do not support the innuendo. In the opinion of their Lordships, the proceedings in contempt were misconceived, and the appellants were not guilty of the contempt alleged.

Young India case: Gandhi for public criticism

This is yet another case where authorities used contempt power against the freedom fighters. In this case[227] Gandhi published certain documents in a pending case and also commented on certain civil dissent cases. Gandhi made it a point to argue that the press had a right to discuss questions of public importance and to indulge in public criticism. It is here that the fact that the contempt process was a summary process affording practically no defenses became a convenient advantage for the rulers. Truth was no defense and fair comment was not a permissible plea. Gandhi refused to apologize, though law provided for sever punishment the Judge took a 'political decision' to let off Gandhi with a warning saying that he probably did not know what he was doing. The judges were very keen to silence the comments on pending cases. Gandhi wanted the press to have the right to express matters in public interest.

Gandhi made an apt comment on authority of government as manifested through courts. "It does not require much reflection to see that it is through courts that a Government establishes its authority and it is through schools that it manufactures clerks and other employees. They are both healthy institutions where the government in charge of them on the whole just, they are death – traps when the Government is unjust."[228]

Procedure:

Section 14, Contempt of Court Act 1971 provides for procedure when the offending conduct has been indulged in the presence or bearing of the Supreme Court or High Court.

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[226] *Debi Prasad Sharma v. E.,* 1943 p.c. 202 (204: 70 I.A. 216 : 210 I.C. 111:1943 A.L.J. 527 : 48 C.W.N. 44:46 Bom. L.R. 11:1944 M.W.N. 20: ILR 1944 A11.32

[227] In re Mohandas Karamchand Gandhi, AIR 1920 Bom. 175.

[228] M.K. Gandhi, *The Law & The Lawyer*, p. 123.

Contempt in the face of the court means a contempt which the judge sees with his own eyes; so that he needs no evidence of witnesses. He can deal with it himself[229]. Section 15 provides how the Supreme Court or the High Court may take action in the case of a criminal contempt, other than a contempt referred in Section 14. Such action in terms of the section, may be taken by the court –

1. On its motion or
2. On a motion made by

(a) the Advocate-General, or
(b) any other person with the consent in writing of the Advocate General, and
(c) in relation to the High Court for the Union Territory of Delhi, the specified law officer or with his consent in writing by any other person.

This section prescribes modes for taking cognizance of criminal contempt by the High Court or Supreme Court for taking action for contempt of its subordinate courts. Supreme Court held that even if the High Court is moved directly by a petition by a private person feeling aggrieved not being the Advocate General, the High Court can refuse to entertain the same to take cognizance on its own motion on the basis of information supplied to it in that petition.

Shiv Shankar Case

In P.N. Duda v. P. Shiv Shankar[230]. Duda, an advocate of Supreme Court, drew the attention of the court to a speech made by P. Shiv Shankar, who was Minister of Law, Justice and Company Affairs. The speech delivered before a meeting of the Bar Council of Hyderabad was reported in the newspapers. According to Sri Duda, statements in the speech were made against the Supreme Court, which were derogatory to the dignity of the court attributing to the court with partiality towards economically affluent sections of the people and using language which was extremely intemperate, undignified and unbecoming of a person of his stature and position. After having read the speech in the newspapers, Duda approached the Attorney General and Solicitor General of India for obtaining their consent for initiating a contempt proceeding. Such consent was, however, declined. The court, as it appears, refused to exercise it suo motu powers and dismissed the application.

A non-Congress Chief Minister of Kerala Mr Nambudripad was punished for contempt of court and a Law Minister Shivshankar was left out by the court for almost similar, if not, serious comments against judiciary.

[229] Lord Denning, *Due Process of Law.*
[230] AIR 1988 SC 1208.

Apology:

Section 12(0) deals with the punishment for contempt of Court. It contains a proviso "that the accused may be discharged or the punishment awarded may be remitted upon an apology being made to the satisfaction of the court. An Explanation to this section says "An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bonafide. Thus, in order to be affective, the apology made should be (i) to the satisfaction of the court and should be (ii) bonafide. In Mulk Raj Anand v. State of Punjab[231] it was held that apology being an act of contrition; it should be offered at the earliest opportunity and in good grace. If it is offered at a time when the contemner finds that the court is going to impose punishment, it ceases to be an apology and becomes an act of a cringing coward.

In re Vinay Chandra Mishra[232] is a case where a senior advocate in open court resented the questions asked by a High Court judge, used insulting language and threatened him with transfer and impeachment. He was hauled up for contempt of court by the Supreme Court and found guilty. Court refused to accept the apology tendered by the contemner.

Punishment:

Section 12 prescribes the punishment for contempt of court with simple imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both. In Narayanan Nambiar v. E.M.S. Namboodripad[233] it was held that the measure of punishment should depend upon the facts and circumstances of each case. When a statement amounts to scandalizing the court itself, the questions of malice, bonafide, and good faith do not arise. They are all circumstances to be taken into account in the mitigation of punishment. The liberal approach of the Court is to be clearly seen in its appraisal of the total effect of the speech at seminar by then Union Minister for Law and Justice, Mr. Shiv Shankar, who commented:

> "Mathadhipatis like Keshavananda and Zamindars like Golaknath evoked a sympathetic chord nowhere in the whole country except the Supreme Court of India… Anti-social elements, i.e., FERA violators, bride burners and whole horde of reactionaries have found their heaven in the Supreme Court.

The Court said that though at places a little intemperate, the speech does not denigrate the dignity and authority of the Court nor interfere with the administration of justice. Trying to explain and, perhaps, distinguish EMS Nambudripad's conviction for even less pointed attacks on the apex court, the Supreme Court pointed out that "we must recognize that times

[231] AIR 1972 SC 1197
[232] (1995) 2 SCC 584
[233] ILR (1968) 1 Ker. 384 (FB).

have changed in the last two decades" and "there have been tremendous erosion of many values."[234]

Vasudevan Case: Enforcing the Order:

The contempt law became a convenient method to enforce the orders of the court. The Vasudevan case enlightened this fact. During September, 1995 half a dozen senior civil servants of the IAS cadre were convicted for contempt by different courts, three in Tamilnadu, one in Kerala and one in Karnataka Government alone. In T.R. Dhanjaya v. J. Vasudevan case Supreme Court sentenced Mr. J. Vasudevan, Secretary to the Karnataka Government in charge of Housing and Urban Development, to one month's simple imprisonment. There were 25 writ petitions and contempt petitions against the Government filed by an engineer of the Bangalore City Corporation over a period of 16 years. Not only the litigant but the Court also felt exasperated at successive attempts by the State Government to deny the engineer what was declared by the Court to be his legitimate right in an order passed two years ago. Invoking inherent powers under Constitution Supreme Court held him guilty of willful disobedience.[235]

Penalizing some one in authority for not implementing the orders of the court is one aspect and trying the persons for commenting and criticizing the judiciary is totally a different aspect. Interfering with the court proceedings directly or writing to influence the minds of judges by what is called the "trial by the press" are some of the other areas for cases of contempt of court. Contempt by scandalizing the judges is the third aspect.

The conviction of Arundhati Roy for her remarks in an affidavit submitted to the Supreme Court in a contempt case regarding her opposition to the judgment in Narmada Bachao Andolan case, has brought forth the issue of media and contempt of court to a central discussion point. The judgment was assailed by the media and need for free discussion over the performance of judiciary was favoured.

Substantial interference

Section 13 of Contempt of Court Act 1971 says: Notwithstanding anything contained in any law for the time being in force no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, tends substantially to interfere with the due course of justice". This reflects the intention of the Parliament to provide a special safeguard to accused contemners, at a stage where their act or criticism amounted to 'contempt' of court strictly within the definitions under Section 2. This is the yardstick which they have to use before 'sentencing'. It is very clear and specific that unless it substantially interferes it is not contempt and they

[234] *Shiv Shanker* AIR 1988 SC 1208; *EMS Namboodripad Case* AIR 1970 SC 2015.
[235] N. Madhav Menon, 'Vasudevan's Case', *The Hindu*, Sept. 10 & 11. 1995.

should not be punished. This question has to be examined in every case where the contemnors are proposed to be sent to jail on the ground that their comments 'substantially' interfered with 'due process' of 'justice'.

Truth or Justification

The Contempt of Courts Act 1971, as such, do not specify any defenses for the contemner. A Special Bench of the Calcutta High Court in Aditya Vikram Birla v. Parmanand Agarwal[236] observed "an impression has gained ground that in matters relating to contempt by scandalizing the court, truth or justification is no defense. But the Supreme Court in Perspective Publications Ltd v. State of Maharashtra[237] the three judge bench ruled that, in the law of contempt there are hardly any English or Indian Cases in which a defense has been recognized". In C.K. Daphtary v. O.P. Gupta[238] also the exclusion of any such evidence was approved and upheld on the ground that "if evidence was to be allowed to justify allegations amounting to contempt of court, it would tend to encourage disappointed litigants. One party or the other to a case is always disappointed to avenge their defeat by abusing the judge. However, the Calcutta High Court in above referred case observed that "since the Contempt of Courts Act 1971 expressly provides in Sec. 17 (5) that the contemner has a right to file affidavit in support of his defense and the court may determine the matter of the charge either on the affidavits or after taking such further evidence as may be necessary", the earlier rule excluding evidence in justification, would require serious re-thinking."

In Baradakanta v. Registrar, Orissa[239] the Court observed that "it is not open to any contemner to take the plea that truth of the allegations is a justification. When the court tries a contempt application if it were to permit the contemner to establish the truth of the allegation, it would have to act as an appellate court and then decide the allegation, and that is not the function of the court trying a petition for contempt".

2006 Amendment: Truth

The Contempt of Court Act, 1971 originally did not provide any defences. However, the Contempt of Courts (Amendment) Act, 2006 which has introduced a new Section 13(b) which states: "The court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide." The Statement of Objects and Reasons to the Bill states that the amendment "would introduce fairness in procedure and meet the requirements of Article 21 of the Constitution."

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[236] (1994) 1 CHN 254
[237] AIR 1971 SC 211.
[238] AIR 1971 SC 1132.
[239] 1974 Cr.L.J. 631.

When the provisions of the Bill were discussed in the Lok Sabha, Law Minister H.R. Bharadwaj said “Suppose, there is a corrupt judge and he is doing corruption within your sight, are you not entitled to say that what you are saying is true? Truth should prevail. That is also in public interest.”

The National Commission to Review the Working of the Constitution (NCRWC) headed by the distinguished former Chief Justice of India, M.N. Venkatachaliah, in its report stated “Judicial decisions have been interpreted to mean that the law as it now stands, even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law. … A total embargo on truth as justification may be termed as an unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto ‘Satyameva Jayate’ in the High Courts and ‘Yatho dharmas tatho jaya’ in the Supreme Court, the courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change.”

The Supreme Court took the view in 1993 Pritam Lal case that its power of contempt cannot be restricted and trammeled by any ordinary legislation, including the Contempt of Court Act. The High Courts and the Supreme Court have exercised contempt powers despite the limitation of one year prescribed by the Contempt of Courts Act, the report said.

The Attorney General, whose views were sought by the Parliamentary Committee on the issue of Constitution amendment, had observed "amendment of the Constitution will be a lengthy and time- consuming affair. If the (Contempt) Act is suitably amended to provide the defence of truth in a contempt action, the same would introduce fairness in procedure and meet the requirement of Article 21. "It is unlikely that the Supreme Court and the High Courts will act in disregard of a statutory provision which, in essence, sub-serves the requirement of fairness and reasonableness," the Attorney General opined. The Committee hoped that "the higher judiciary will give due regard to this statutory provision by maintaining the principles of fairness and reasonableness, they are known for".

But the problem lies with serious nature of the law and its immediate intervention with the liberty of the people. The definition of ‘contempt of court’ as provided in the Contempt of Court Act of 1971 makes even ‘tendency’ to scandalize and interfere with justice system a contempt act. There are no norms, guidelines or criteria for establishing the tendency, which is almost invisible and opinionated. If any court infers ‘tendency’ of scandalisation, the commentator would become contemner and lose his liberty. Within hours of their writings or utterances a severe punishment is handed down.

Mid-day Journalists Case

Sensational jailing of journalists stirred up debate on truth as defence to contempt allegation. Four journalists belonging to Mid Day[240] including Resident Editor Vitusha Oberoi and City Editor MK Tayal were sentenced to four months jail on contempt of court charges on September 20, 2007[241], because of a report they had published with allegations against the ex-Chief Justice of India, Y. K. Sabharwal. Whether the allegations and critical statements made in the report were true or not was not considered in arriving at the decision.

Many in the legal community feel that in the 2006 Delhi sealing drive[242], Justice Sabharwal may have had a conflict of interest since his sons own a firm with relations to the Delhi real estate. Former Solicitor General K K Sud had called this behaviour "the height of indiscretion." The High Court, however, sentenced the journalists without considering the veracity of the reports, and this led to considerable controversy[243].

The defence of truth was not made available in Mid-day journalist's case, as there was no opportunity to plead and prove truth as a defence. Where the court acts on its own, i.e., in suo moto proceedings, the court is the complainant, prosecutor and also the adjudicator. It is difficult to remove the possible professional bias in prosecution when the three key players are not separate.

Though the truth is made a defence, it is possible to prove the allegation as true only in a full-fledged trial and not in summary proceedings that is generally adopted by higher courts in holding contemnor guilty. It is made only a qualified defence, i.e., it could be invoked only if it is stated in public interest. The amendment gave wide discretionary powers to the court that hears the complaint of contempt of court. Newly introduced Section 13(b) says court may permit, which means it may not permit. It also says that only when court is satisfied that it is in public interest and the request for invoking it is bona fide. Whether the request is bona fide or not, whether it is in the public interest or not is totally left to the opinion of the presiding officer of the court. Virtually there is no change in the position. Truth is not a statutory defence even now. It might become a defence if the courts feel so.

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[240] Mid Day (stylised as MiD DAY) is an afternoon daily Indian compact newspaper.Editions in various languages are published in Mumbai, Bangalore, Delhi and Pune

[241] "4 journos get jail term for scandalising ex-CJI". *IBNLive* (CNN). 21 September 2007, updated 22 September 2007. Retrieved 23 September 2007.

[242] "Shock, anger at Sabharwal's mall-aa-mall". Mid Day. 12 June 2007. Retrieved 4th August 2012.

[243] "Legal fraternity c o n d e m n s conviction of journos by HC". *Indiantelevision.com*. Retrieved 4th August 2012

Mysore Episode

In 2002, there were adverse comments widely reported in the print media in Karnataka regarding the private behaviour of some sitting judges of the High Court. The High Court suo motu commenced contempt proceedings against several publications for scandalising the Court and lowering its authority. The matter reached the Supreme Court and an agonised Chief Justice Khare while criticising the media for not disclosing their sources stated that "I will reward the media if they come out with the truth"… "I personally believe that truth should be a defence in a contempt case."

Pleading truth to be a valid defence, Fali S Nariman, said: If it is part of the law as is now understood that a person commits contempt even if he truthfully publishes a fact that a particular judge (God forbid and only hypothetically speaking) has accepted a bribe for giving a judgment in a party's favour - then I would submit that such a law would be void as imposing unreasonable restrictions on the freedom of speech and expression: the judge who took the bribe would be false to his oath, to do justice without fear or favour; and it would be absurd to say that although Article 124(4) provides for the removal of a judge for "proved misbehaviour", no one can offer proof of such misbehaviour, except on pain of being sent to jail for contempt of court. This is a glaring defect in our judge-made law that needs to be remedied -hopefully by the judges themselves; if not, reluctantly, then by Parliament[244].

Anil Divan, senior advocate, referred to International standards and laws of other democracies that would be informative and enable us to arrive at the right standards. Professor Michael Addo of the University of Exeter has collected the views of many European experts in "Freedom of Expression and the Criticism of Judges." In his article, Anil Divan further said: Truth was treated as an 'untouchable' while exercising contempt jurisdiction for scandalising the Court. Parliament has now opened the doors of the temple of justice for the erstwhile untouchable. In the case of Veeraswami, a former Chief Justice of Madras High Court, the Supreme Court observed: "A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system." The contest is between truth and its suppression. The choice then is between the plea of truth to expose judicial misconduct and the attempt to stifle such publication by the use of the contempt power. The Delhi High Court through its "Mid-day" judgment has catapulted the issue nationally and internationally[245].

In the U.K., the offence of scandalising the court has become obsolete. The judiciary was vigorously criticised by the English press in the Spy Catcher case. Peter Wright a former intelligence officer wrote his memoirs but the Court of Appeal injuncted the publication of the book in England. The House of Lords, by a majority of three against

[244] Fali S Nariman: A Judge above Contempt, the Indian Express, August 5, 2005

[245] Anil Divan, Contempt of Court and the Truth, the Hindu, October 29, 2007. http://www.hindu.com/2007/10/29/stories/2007102956041000.htm

two confirmed the interim injunction and enlarged it. The Times of London came out with a blistering editorial which said: "Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it. But yesterday afternoon the law was still an ass ... In the hands [of] Lords Templeman, Ackner and Brandon (the majority who ruled for the gag order) it had become unpredictable and wild seemingly responsive only to autocratic whims."

The Daily Mirror came out with a front page caption "You Fools" and published the photographs of Lords Templeman, Ackner, and Brandon upside down.

In the United States, contempt power is used against the press and publication only if there is a clear imminent and present danger to the disposal of a pending case. Criticism, however virulent or scandalous after final disposal of the proceedings, will not be considered as contempt. The U.S. Supreme Court observed — "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions ... And an enforced silence, however, limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect."

Amend Contempt Court Law

Press Council of India (PCI) chairman and retired Supreme Court Justice Markandey Katju in April 2012 advocated amendments to the Contempt of Court Act, 1971 to enable the media to write about court happenings. "This law was made during the British rule. In a democracy, people are superior and have the right to criticise the court as even the judiciary is here to serve the people. The Contempt of Court Act needs to be drastically amended to enable journalists to perform their duties," said Katju. He suggested that a reporter covering the Supreme Court must have a law degree and at least seven years of experience[246].

6.3. MEDIA & EXECUTIVE

Official Secrets Act

The Executive in Indian Democracy is shielded by a special power to keep the information secret under the Official Secrets Act. Traditionally the system of governance in India has been opaque, with the state donning the mantle of colonial secrecy. It is being continued by retaining the Official Secrets Act as well as the administrative structure which

[246] Contempt of Court Act needs to be amended for media: Katju, Indian Express, April 26, 2012 http://www.indianexpress.com/news/contempt-of-court-act-needs-to-be- amended-for-media-katju/941725/0

was designed to distance the masses from governance. In addition to that there is a traditional feudal mindset which presupposes a distance between the 'rulers' and the 'ruled' and makes the former a privileged class. As a result, this information sharing as a culture was neither consciously developed nor reflected in major legal changes until a few years ago when the requirements for public hearings or mandatory disclosures under laws like the Environment Protection Act or the Consumer Protection Act were put into place. Though the Constitution speaks about freedom of speech and expression, it provides a form of the oath of secrecy imposing an obligation on the constitutional office holders not to reveal information which they come to know during the course of official functioning. The public servants and officers are under a constitutional and contractual obligation to keep administrative affairs as secret, even without taking the aid of Official Secrets Act.

Apart from these regulatory measures, the information generally does not flow from any administrative office. The executive decisions touching upon the rights and interests of the public in general are also kept secret as a matter of routine practice and then as a matter of policy too. It is impossible to get a copy of GO even, which is normally supposed to be made available. The officers can be prosecuted either for leaking the information or actively assisting in transmitting the information, even if it was not classified as secret. For example any speculation about the budget, annual financial statement by the State or Center cannot be published. If any speculative budget publication is based on any leaked budget document, a journalist may attract two penal provisions, one - breach of privilege of parliament or two - violation of Official Secrets Act, both the provisions have penal consequences.

The Public Servants - the political executives occupying the constitutional positions like Prime Minister, member of Council of Ministers or Member of Legislature -are prevented from revealing information under the threat of breach of Oath of Secrecy which can be treated as an Unconstitutional act of those office holders, who can be even sacked from it for the revelation. The Civil Servants or the bureaucratic personnel are under a contractual and statutory obligation to not reveal according to civil service rules and the Official Secrets Act.

In contrast, the press or any other media organization or the people in general need the information and suffer by the secrecy policy as they cannot form any opinion regarding any aspect of public importance and interest. This principle was even more clearly enunciated in a case[247] where the court remarked, "The basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate

[247] Indian Express Newspapers(Bombay) Pvt. Ltd.vs India, 1985) 1 SCC 641

them freely to others. In sum, the fundamental principle involved here is the people's right to know."

The problems for the media in accessing information are many. In the absence of an open information regime, balanced reporting is very often not possible. Substantiating facts becomes very difficult and the directive to journalists to double check with a second source is difficult to follow with the 'source' very often being some government official who refuses to talk about the issue, howsoever mundane. This has also created a regime of garnering information through illegitimate means such as bribing and pandering to the whims of various government officials to eke out information. "Investigative journalism has become nothing but collecting basic information."[248] This syndrome has been aptly termed as 'co-opting and corrupting' by a senior journalist[249]. The system first 'co-opts' the media and then 'corrupts' it, making it fall in with its own requirements for giving necessary slants to news, for suppressing or distorting it and for blunting criticism. For the media, therefore, the right to information will act as a life giving elixir and will help it to deal with many of its own constraints in acting as the 'fifth estate'. A former Chairman of the Press Council of India remarked in a seminar organized by the media in 1987[250], "…important information is at times sought to be withheld by the authority in power on the plea of the bar of the Official Secrets Act even in matters where the Act may not have any application at all, causing great deal of harassment to journalists and imposing improper curbs on the freedom of the press……..I feel that appropriate legislative measures should be adopted in our country not only for the right of the Press to information but also for proper implementation of this right."[251]

The Official Secrets Act

The Official Secrets Act of 1923, a colonial relic readily adopted by the new political and bureaucratic class of independent India, clearly comes out as the main culprit in setting the tone for the culture of secrecy in the country. Experience has verified the fears of one of India's foremost statesmen and Jurists when he said in the Central Legislative Assembly: "Your provisions are so wide that you will have no difficulty whatever in running in anybody who peeps into an office for some, it may be entirely innocent enquiry as to when there is going to be the next meeting of the Assembly or whether a certain report on the census of India has come out and what is the population of India recorded in that period."[252]

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[248] N.R.Mohanty, Regional Editorial Chief for a leading English daily.

[249] Prabhash Joshi, senior media person, Consultant Editor, '*Jansatta*' a popular Hindi daily.

[250] Gujarat Newspapers Association, Ahmedabad.

[251] Quoted by A.G.Noorani in his article "The Right to Information"in "Corruption in India-An Agenda for Change", Ed. S.Guhan and Samuel Paul. Excellent reference book on the issue and relied upon in this study for the analysis of the OSA.

[252] Sir Hari Singh Gour, quoted by A..G.Noorani,

The Official Secrets Act, 1923 is a replica of the original British Official Secrets Act. While the latter has been watered down to a great extent, the former has been retained almost in its original form, with minor amendments in 1967.

It states clearly that any action which involves helping an enemy state against India is punishable. It also states that one cannot approach, inspect, or even pass over a prohibited government site or area. According to this Act, helping the enemy state can be in the form of communicating a sketch, plan, model of an official secret, or of official codes or passwords, to the enemy. The disclosure of any information that is likely to affect the sovereignty and integrity of India, the security of the State, or friendly relations with foreign States, is punishable by this act.

The catch all Section 5 of the OSA is seen to be responsible for most of the state responses in clamping down on all sorts of information, even to the extent of curtailing people's fundamental rights. A case in point often quoted is the use of the Act in the Narmada Valley[253] to prevent activists and journalists from going there. The cumulative effect of the wide Sections 3 and 5 of the OSA is to choke the flow of information, howsoever innocuous.

The relevant sections of the Official Secrets Act, 1923 read as under:

Penalties for spying: Section 3 (1) If any person for any purpose prejudicial to the safety or interest of the state-

(a) approaches, inspects, passes over or is in the vicinity of, or enters any prohibited place; or
(b) makes any sketch, plan, model, or note which is calculated to be or or might be or is intended to be, directly or indirectly, useful to an enemy; or
(c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the state or friendly relations with foreign states;

He shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or

[253] Where a large dam being constructed on the Narmada river is being resisted for the huge displacement it will cause.

otherwise in relation to the navel, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years.

(2) On a prosecution for an offence punishable under this section it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the state, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interest of the state; and if any sketch, plan, model, article, note, document or information relating to such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or from his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the state, such sketch, plan, model, article, note, document information, code or password shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interest of the state.

Wrongful communication, etc., of information

5. (1) If any person having in his possession or control any secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or related to anything in such a place, or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the state or friendly relations with foreign states or which has been entrusted in confidence to him by any person holding office under government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or who has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract,

a) willfully communicates the code or password or any sketch, plan, model, article, note, document or information to any person other than the to whom he is authorized to communicate it, or a court of justice or a person to whom it is, in the interest of the State, his duty to communicate it; or
b) uses the information in his possession for the benefit of any foreign power or in any manner prejudicial to the safety of the state; or
c) retains the sketch, plan, model, article, note, document or information in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or pass word or information;

He shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or password or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, password, sketch, plan, model, article, note document, or information is communicated in contravention of this Act, he shall be guilty of an offence under this Section.

(3) If any person having in his possession or control, any sketch, plan, model, article, note, document or information, which relates to munitions of war, communicates it, directly or indirectly, to any foreign power or in any manner prejudicial to the safety or interest of the state, he shall be guilty of an offence under this section.

(4) A person found guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both.

The main critics of these provisions have been the Press Commissions. However, their stand has varied over the years. While in 1954, the First Press Commission remarked, "In view of the international tensions and consequent need for ensuring that secret policies are not divulged, they did not recommend modification of the provisions of the Act".[254] However, the same body in 1982 felt that the provisions of the Act have 'a chilling effect on the press" and that "section 5 as it stands can prevent any information from being disclosed to the public and there is widespread public opinion in the country that the Section has to be modified or replaced and substituted by a more liberal one."

A. G. Noorani summarises his critique of the OSA to say that it is in breach of the fundamental right to freedom of speech and expression[255], as well as of the right to life and liberty[256] . An allegation of an offence under the Act must be put to strict proof and the defence of
'public interest' must be available.

[254] Quoted in A.G. Noorani, "The Right to Information" in "Corruption in India-An Agenda for Change" Ed.S.Guha and Samuel Paul.
[255] Article 19 (1) (a) of the Constitution of India
[256] Article 21 of the Constitution of India

Besides the OSA, the Central Civil Service Conduct Rules, 1964 also prohibit government servants from 'unauthorised communication of information'. Rule 11 reads as under:

> 11. Unauthorised communication of information. No government servant shall, except in accordance with any general or special order of the Government or in the performance in good faith of the duties assigned to him, communicate, directly or indirectly, any official document or any part thereof or information to any Government servant or any other person to whom he is not authorized to communicate such document or information.
>
> Explanation- Quotation by a government servant (in his representation to the Head of Office, or Head of Department or President) of or from any letter, circular or office memorandum or from the notes on any file, to which he is not authorized to have access, or which he is not authorised to keep in his personal custody or for personal purposes, shall amount to unauthorized communication of information within the meaning of this rule.

Moreover, the Manual of Office Procedure lays down that only Ministers, Secretaries and other officers specially authorized by the Minister are permitted to meet representatives of the Press and give information. The Manual of Office Procedure reads as under:

> Section 154. Communication of information to the Press: Information to the Press should normally be communicated through the Press Information Bureau by an officer authorized to do so.
>
> Section 155. Functions of Information Officer: Information Officers of the Press Information Bureau are attached to every ministry of the Government of India. It is the duty of an information officer, on the one hand, to arrange to give due publicity to the activities of the Ministry to which he is attached and on the other, to keep the ministry informed of the popular reactions thereto. In order to discharge his duties properly, the Information officer will maintain a close liaison with the Ministry to which he is attached and the latter will give him the necessary facilities.
>
> Section 161. Communication of Information to the Press. Only Ministers, Secretaries or other officers specially authorized by the Minister may give information to or be accessible to the representatives of the Press. Any other officer, if approached by a representative of the Press, should refer him to the Principal Information Officer of Government of India.

The Indian Evidence Act 1872, grants privilege to certain types of official records.

Section 123. Evidence as to affairs of State - no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Section 124. Official Communication- No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

No Leakage of Official Secrecy

The questions of official secrecy and access to government information assume a great significance. With regard to official secrecy, we are still governed by an Act, which was enlaced by the colonial rulers during the days of laissez-faire. The Act is known as the Official Secrets Act 1923 and more or less it is the exact replica of the English Official Secrets Act 1911.

The Act is an omnibus and catch-all legislation covering all kinds of official secret information whatever be the effect of disclosure, and its violation subjects the individual to heavy penalties including imprisonment. It is not merely confined to espionage, spying activity or such disclosures, which may affect national security or public interest. It acts as Damocles sword on the head of the press, hampering it from bringing to public light the secrets of the government whose disclosure may be in the public interest. The question of amending the Act has been examined by several committees and commissions such as the Press Law Enquiry Committee 1948, The Press Commission 1954, Law Commission 1971 and Second Press Commission 1982. These committees did not make deeper study of the problem. The Indian Law Institute made an in- depth and comprehensive study in collaboration with the Press Council of India. They recommended some drastic amendments in the Act. The study recommended that the catch-all provision should be deleted and the Act should specify the information which needs to be protected. According to the study, the following kinds of information need protection from disclosure:[257]

1. Information concerning defense or security of the nation,
2. Foreign relations.
3. Cabinet proceedings and documents(protection here is necessary in the interest of collective responsibility of the cabinet)

[257] Official Secrecy and the Press, Indian Law Institute and Press Council of India, 1982, p 27

4. Monetary policy and foreign exchange policy, and economic plans and policies where premature disclosure may harm the national interests.
5. Maintenance of law and order, i.e., information which is

    a) likely to be helpful in the commission of offences,
    b) likely to be helpful in facilitating an escape from legal custody or acts prejudicial to prison security; and
    c) likely to impede the prevention or detection of offences or the apprehension or prosecution of offenders.

6. Private information given to the government in confidence.
7. Trade secrets.
8. Information which, through premature disclosure, can provide opportunities for unfair financial gain by private interests.

Further, to prevent the government from abusing the prosecuting powers under the Act, the study has made recommendation that if the government proposes to prosecute the press under the Official Secrets Act, it should be done only with the approval of a committee consisting of the Attorney-General, Chairman of the Press Council of India and one member of the council nominated by it. The jurisdiction of the committee is not to extend to prosecutions for espionage or spying i.e., prosecution under S.3 of the Act.

Amendments and Army Information:

The Press Council has recommended that the Official Secrets Act be amended for greater transparency with regard to defense related matters also. In its recent report, the council has asserted that this was not merely desirable, but possible without detriment to national security. The Press Council had at the instance of the Army in 1990, inquired into media reports alleging various kinds of excesses by its personnel in Jammu and Kashmir. Subsequently in 1992 the Council received a letter from senior defense correspondents expressing apprehension that the proposed new guidelines for defense coverage might choke the flow of information on defense and national security.

The other recommendations of the committee are: The Officials Secrets Act should be amended and a privacy law enacted. The Council report entitled "Crisis and Credibility1 on Jammu and Kashmir made some recommendations concerning media-military relations. They remain valid today, especially as they pertain to situations of low intensity conflict and the need to give wide publicity to the findings of court martial proceedings so as to silence baseless propaganda to send out a strong message that wrong doing by any member of the armed forces will be swiftly punished.

A more liberal and transparent defense information policy will also mean that the public relations machinery of the defense ministry will have to be overhauled.[258] However, the Right to Information Act, 2005 made it possible to reveal the information of the military or protected agencies of the state with reference to corruption and human rights violation. Without amending the Official Secrets Act, the new enactment offers the information in a limited way, which is a significant step forward protecting the free speech and expression, right to know and right to live a liberated, free and emancipated life.

Secrecy of Executive, Hussainara Khatoon cases I-VII

It is very difficult for the media to work for disseminating the information amidst so many laws creating iron veils of secrecy. The series of Hussainara Khatoon[259] cases related to the illegal and prolonged custody of poor undertrials in the state of Bihar. In dealing with various aspects of bail, the Supreme Courts stressed the need for free legal aid to the poor and needy who are not either not aware of the procedures or not in a position to afford lawyers, and therefore unable to avail of the constitutional guarantees of legal help and bail. The Court said that it is the legal obligation of the judge or the magistrate before whom the accused is produced to inform him that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to free legal aid.

Access to places of custody and prisons, Prabha Dutt Vs. Union of India[260]

Media's access to the prisons is within the hands of executive. Administrators of Jails generally resist the media's requests to interview the prisoners on extraneous excuses. The Court held in this case that excepting there being clear evidence that the prisoners had refused to be interviewed, there could be no reason for refusing permission to the media to interview prisoners in death row. The right to acquire information includes the right to access sources of information.

Informing the accused

Accused must have the right to information about his charges. The framing of charges against a person cannot be a secret as to that person. Repeated violations of civil rights by the police and other law enforcement agencies have compelled the courts to give, time and again, directions to the concerned agencies for ensuring transparency in their functioning in order to avoid violations like illegal arrests and detention, torture in custody and the like.

Sheela Barse Vs. State of Maharashtra

[258] Times of India. July 11,1993, Indian Express, July 12, 1993 quoting PTI

[259] 1980 1 SCC 81, 1980 1 SCC 91, 1980 1 SCC 98, 1980 1 SCC 108, 1980 1 SCC 115, 1995 SCC (5) 326

[260] AIR 1982 SC 6

In this case Petitioner, a journalist[261], approached the courts to bring out the condition of women prisoners in jails in the state of Maharashtra. These cases had come to her notice in the course of interviewing women inmates in Bombay Central Jail. The court gave certain directions to the State Government, including that pamphlets on the legal rights of arrested persons, in English, Hindi and Marathi (the regional language of Maharashtra) should be printed in large numbers and circulated as well as affixed in each cell in a police lock up. Further, the Legal Aid Committee is to be immediately informed of the arrest. There should be surprise visits to the police lock ups by a City Session Judge. The relative or friend of the arrested person should immediately be informed upon the arrest. The magistrate before whom an arrested person is produced should enquire from the arrested person whether he has any complaint of ill treatment or torture in police custody and inform him of his right under the Criminal Procedure Code, to have a medical examination.

D.K.Basu Vs. State of West Bengal[262]

The information about Arrest and Custody can no longer be the official secrets. And this kind of culture of secrecy makes the jail cells and lock up cells of police stations the centers of torture and violation of civil rights of the people in general, about which the media has to write. In spite of earlier attempts by the Courts to check violation of rights in custody, instances of violations continued. The court reiterated in this case, filed by the Chairperson of the Legal Aid Committee of the state of West Bengal, that there should be complete transparency in the procedure for arrest. The court said, "Custodial violence, including deaths and torture in the lock ups, strikes a blow at the rule of law…..Transparency of action and accountability perhaps are the two safeguards which this court must insist upon."

Directions were again given to all state governments in the country to prominently display and publicise the directions on arrest and custody. Failure to follow the directions would be treated as contempt of the Supreme Court. Most of these directions translate into the right of the accused or his kin to have access to information regarding his arrest and detention such as preparation of a memo of arrest to be counter-signed by the arrestee and a relative or neighbor, preparation of a report of the physical condition of the arrestee, recording of the place of detention in appropriate registers at the police station, display of details of detained persons at a prominent place at the police station and at the district headquarters, etc.

[261] (1983) 2 SCC 96
[262] 1997 1 SCC 216

Battle against Official Secrets Act

The battle for a right to information has been fought on two main planks-firstly, the removal of the Official Secrets Act 1923 and second, for a legislated right to information.

Objections to the Official Secrets Act have been raised ever since 1948, when the Press Laws Enquiry Committee said that "the application of the Act must be confined, as the recent Geneva Conference on Freedom of Information has recommended, only to matters which must remain secret in the interests of national security."[263]

In 1977 a Working Group was formed by the Government of India to look into required amendments to the Official Secrets Act to enable greater dissemination of information to the public. This group recommended that no change was required in the Act as it pertained only to protect national safety and not to prevent legitimate release of information to the public. In practice, however, using the fig leaf of this Act, the executive predictably continued to revel in this protective shroud of secrecy.

In 1989, yet another Committee was set up, which recommended restriction of the areas where governmental information could be hidden, and opening up of all other spheres of information. No legislation followed these recommendations. In 1991 sections of the press[264] reported the recommendations of a task force on the modification of the Official Secrets Act and the enactment of a Freedom of Information Act. The Prime Minister favoured a Right to Information to combat undue secrecy in the government. The concept of social audit as an instrument of greater accountability was emphasised.

The second Administrative Reforms Commission has suggested that the Official Secrets Act (OSA) of 1923 should be repealed, saying it is incongruous with the regime of transparency in a democratic society. The commission chaired by M. Veerappa Moily submitted its first report on "Right to Information - Master key to good governance" to Prime Minister Manmohan Singh and suggested that suitable safeguards for the security of state should be incorporated in the National Security Act.

There is a need for clear definition as to what constitutes official secrets and then exempt them from the public domain. Though the Official Secrets Act appears to be a piece of legislation meant to prevent leakage of information that would endanger the security and sovereignty of India, it is in reality a legislative attempt to render governance opaque.

The sweeping generalisations contained in Section 5 of the Act were criticized as an artefact of oppressive colonialism on what comprises official secret bears that out. The

[263] Source: Corruption in India: an Agenda for Change", Ed. Guhan and Paul
[264] The Hindu, 13th December,1991

government needs to not only abolish the OSA now, but consolidate the post-RTI transparency regime, by bringing in a duty to publish law.

The inter-ministerial group in 2008 has proposed that the 1923 Official Secrets Act (OSA) be amended to not only bring it in conformity with the transparency regime ushered in by the Right to Information Act but also ensure that prior sanction is obtained from the Home Ministry before prosecution of an OSA accused.

In the Official Secrets Act Section 6, information from any governmental office is considered official information; hence it can be used to override Right to Information Act 2005 requests.

It was understood that a majority of the recommendations of the H D Shourie Committee of 1997 on definitions to be included in Section 5 of the OSA will be included in the amendments. The Shourie Committee had criticized the section for its catch-all provisions and absence of a clear definition of official secrets. Recognising the sweeping changes brought about by the RTI Act, the amended OSA will categorize and classify information which is now available in the public arena as against confidential national secrets. From the earlier vague instruction of the Home Department giving an authorization for charge-sheeting an OSA accused (objected to by the Supreme Court), an amendment is proposed wherein prior sanction will be needed for which an application of mind and, thereby, a scrutiny of investigation will be required. The amendments will take into account the availability of confidential/secret documents and information now in electronic format thanks to the use of computers and internet. Several procedural and technical amendments are also proposed, especially in view of the difficulties in investigations highlighted by officials of the CBI and Delhi Police. For instance, OSA provisions will be made compatible with amendments made over the years to the Criminal Procedure Code.

But the Government has turned down this recommendation of the second Administrative Reforms Commission for scrapping the Officials Secrets Act, saying that it was the only act that dealt with cases of espionage. While replying to written questions, minister of state for personnel Suresh Pachouri told Rajya Sabha in November 2008 that the OSA was the only law on the statute book to deal with cases of espionage and wrongful possession and communication of sensitive information detrimental to the security of the state. The government claimed that "The law has stood the test of time. Therefore, it is neither desirable nor necessary to repeal this law."

Iftikhar Gilani case

Charged with violation of Official Secrets Act, 1923, a journalist, Iftikhar Gilani, Delhi bureau chief of the Jammu-based daily Kashmir Times was, arrested in June 2002. He was charged under the OSA, along with a case of obscenity. The first military report suggested that the information he was accused of holding was "secret" despite being publicly available. The second military intelligence report contradicted this, stating that there was no "official secret". Even after this, the government denied the opinion of the military and was on the verge of challenging it when the contradictions were exposed in the press. The military reported that, "the information contained in the document is easily available" and "the documents carry no security classified information and the information seems to have been gathered from open sources". On January 13, 2003, the government withdrew its case against him to prevent possibility of two of its ministries giving contradictory opinions. Gilani was released the same month.

For seven months, Iftikhar was imprisoned without bail under the draconian and much-abused Official Secrets Act (OSA). His crime — possessing out-of-date information on Indian troop deployments in "Indian-held Kashmir" culled from a widely-circulated monograph published by a Pakistani research institute.

The IB officials who trawled his hard drive came across a file with the heading, 'Fact Sheet on Indian Forces in Indian Held Kashmir'. Sensing that they had finally found something potentially useful, the officials manually replaced all references to Indian Held Kashmir – a Pakistani term used to refer to those parts of Jammu and Kashmir not under their control – with the words 'Jammu and Kashmir', to suggest the file was extracted from an official Indian document. They then added the words, 'Only for Reference. Strictly not for publication or circulation', to heighten the suggestion of secrecy[265].

Giving above details in his foreword for My Prison Days by Iftikhar Gilani, S Varadarajan, a Senior Journalist of the Hindu said: The shocking story that this book tells is not just an indictment of the capriciousness and arbitrariness of power, or a grim chronicle of the sheer viciousness of the Indian State. It is also a depressing account of how all the so-called estates of society – including the Fourth – came face to face with an obvious injustice and were found wanting[266]. This shows the tendency of executive to misuse the law against the media men.

[265] Siddhartha Varadarajan, My foreword to Iftikhar Gilani's book "My Prison Days" 1 February,2005 http://svaradarajan.blogspot.in/2005/02/my-foreword-to-iftikhar- gilanis-my.html

[266] Ibid.

Santanu Saikia Case

A journalist is charged in 1999 under the crime of Official Secrets Act for just reporting critically against divestment policy by publishing contents of a Cabinet note. A Delhi court has ruled in 2009 that the publication of a document merely labelled "secret" shall not render the journalist liable under Official Secrets Act. Additional Sessions Judge, Delhi District Court, Inder Jeet Singh discharged accused journalist Santanu Saikia in a case booked against him by the CBI 10 years ago for divulging contents of a Cabinet note on divestment policy. The CBI case against Saikia, under OSA, had raised eyebrows because it was not uncommon for the media to do stories on the basis of Cabinet papers despite their being a classified secret.

6.4. ISSUES RELATING TO REPORTING COURTS AND LEGISLATURE IN INDIA

There are two major limitations on freedom of press, which are: the Right to reputation (by guarantying remedies against wrong of Defamation) of individuals, including legislators and judges, the Right to independence and dignity of legislators and judges protected by powers to punish for contempt. The Legislature and the Judiciary are two Constitutional institutions/ Estates, and it is the obligation of their credibility should not be destroyed[267].

A. Media & Judiciary

The Madrid principles on the relationship between the media and judicial independence 1994[268] expressly allow for legal measures for the preservation of secrecy during investigation of crimes even when such investigation forms a part of the judicial process to preserve the presumption of innocence. Siracusa principles 1984 says all trials should be public unless court determines otherwise.

"We have no control over the press. We only have control over proceedings in the court. Everybody is expected to know what they should do and what they should not," said Justice H L Dattu, heading a bench of Supreme Court hearing the plea of CBI Director Ranjit Sinha to restrain the media from reporting on the contents of the visitors' logbook at his residence, which showed frequent visits by some of the accused in the 2G and coal block cases among others. The Bench rejected it saying, that while it agreed that the issue involved a person's reputation, it also acknowledged freedom of the press and would, therefore, not pass any order, while expecting the media to act responsibly.

[267] http://www.legallyindia.com/Supreme-Court-Postcards/i-hate-you-like-i-love-you-or-the-torrid-love-between-journalists-and-the-30-headed-supreme-court-hydra

[268] https://www.cambridge.org/core/journals/journal-of-african-law/article/madrid-principles-on-the-relationship-between-the-media-and-judicial-independence/D52888FDD1BC0119AD08AEAA146CABE2

In another direction the Delhi High Court said that Rape cases can't be swayed by emotions, media reporting on 16 June 2014 as reported by PTI. Deprecating the hue and cry over acquittals in rape cases, a Delhi court has said that judiciary cannot be swayed by emotions or media reporting and must limit itself to the ambit of law, testimonies of witnesses in deciding such cases. In the case under consideration the girl retracted from her earlier statement given before the police and told the court that she had come in contact with one of the accused through social networking site and had developed physical relationship with him on her own consent. She also told the judge that she had lodged the case at the instance of her well-wishers. [269]

The Delhi High Court on June 4, 2014 directed to ban over 400 unauthorised websites from broadcasting FIFA World Cup matches, considering a petition filed by Multi Screen Media (MSM), formerly known as Sony Entertainment Television India. It is an intellectual property rights related petition. The MSM owns all rights related to live, delayed and repeat telecast and streaming of 2014 world cup matches in Indian subcontinent. also directed the various Internet Service Providers (ISPs) to block the websites mentioned in the petition of Multi Screen Media (MSM) as well as any other portals which are later found to be violating the rights of the official broadcaster of FIFA 2014 in Indian subcontinent.

Ban on TV News channels

Entire mobile services, networks, landlines were blocked couple days before 5th August 2019 in the state of Jammu & Kashmir, to announce decision to scrap the provisions of autonomy under Article 370. The prohibition continued beyond one month. The news and current affairs operations on all cable TV channels had been 'banned' till elections were over 2014, in the Jammu and Kashmir due to the violent political turmoil of 2010. Chief Minister told the Assembly some text data and communication services were also suspended so as "to prevent breach of peace and any law and order situation." He said that the private TV channels had violated the Cable Television Network (Regulation) Act. The SMS on the pre-paid mobile phones were also restricted for spreading "false and frivolous rumours which have a potential to incite violence."

The CM of UP called the media "anti-Urdu" and opponents of "Lucknow's tehzeeb" for criticizing actors who were "promoting Awadhi culture through their films". The furious Akhilesh Yadav sarkar has allegedly caused blockade of two tv channels. 'Times Now' went off the air across several parts of UP including Lucknow and Ghaziabad. The cable operators

[269] http://www.dnaindia.com/india/report-rape-cases-can-t-be-swayed-by-emotions-media-reporting-delhi-court-1995897

have not given any specific reason for not broadcasting two tv channels in 12 TRP centres of UP.

The cable TV operators have an obligation to transmit the channel. The law made it a crime of cable tv operators to telecast defamatory and insulting programs. The Cable Television Networks (Regulation) Act, 1995 regulates the operations of these networks so as to bring uniformity in their operations, avoid undesirable programes as well as to enable the optimal exploitation of the technology which had the potential of making available to the subscribers a vast pool of information and entertainment.

The Act also requires the cable operators to submit reports on the total number of subscribers, subscription rates, and the number of subscribers for free-to-air and pay channels. The Act authorised the seizure of the cable operators' equipment if the cable operator violates provisions of the Act. This period of seizure was limited to 10 days and could be extended by an order of the District Judge. Under the amendment Act 2011, there is no limitation on the period of seizure. Amendment will empower the central government to revoke or suspend a cable operator's registration if he violates the terms of registration. The cable operators themselves are not aware of their rights, responsibilities and obligations in respect of the quality of service, technical as well as content-wise, use of material protected by copyright, exhibition of uncertified films, protection of subscribers from anti-national broadcasts from sources inimical to our national interest, responsiveness to the genuine grievances of the subscribers and perceived willingness to operate within the broad framework of the laws of the land, e.g. the Cinematograph Act, 1952, the Copyright Act, 1957, Indecent Representation of Women (Prohibition) Act, 1986.

According to Section 11, an officer not below the rank of Group 'A', can seize equipment of cable operator if he violated Section 3 i.e., operating without registration. If he does not register, the equipment can be confiscated under Section 12. Section 19 gives power to prohibit transmission of certain programmes in public interest, if the officer thinks it necessary or expedient so to do in the public interest, he may, by order, prohibit any cable operator from transmitting or retransmitting or retransmitting any particular programme if it is likely to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, linguistic or regional groups or castes or communities or which is likely to disturb the public tranquility.

Under section 20 where the Central Government thinks it necessary or expedient so to do in public interest, it may prohibit the operation of any cable television network in such areas as it may, by notification in the Official Gazette, specify in this behalf. But not prohibit a tv channel not even for a day.

TRAI guidelines

To protect consumer-interests, law empowered TRAI to specify a package of free-to-air channels, called basic service tier, which shall be offered by every cable operator to the consumers. Law mandates the cable operator to offer channels in the basic service tier on *a la carte* (individual) basis to consumers at a tariff fixed by TRAI. The Cable operators have to give guarantee for transmission. The Amendment Act 2011 empowered the central government to issue notifications requiring all cable operators to transmit any channel, including free-to-air channels, in an encrypted form through a digital addressable system.

Telecast crimes

They shall not transmit or re-transmit through a cable service any programme unless such programme is in conformity with the prescribed programme code, as per section 5 of Cable Television Network Regulation Act, 1995.

If this provision is violated, as per section 16, they can be punished for the first offence, with imprisonment for a term up to **two years** or with fine which may extend to one thousand rupees or with both, and for every subsequent offence, with imprisonment up to **five years** and with fine which may extend to five thousand rupees. If the telecast violates the program code, this penalty provision could be invoked.

Program code says:

(1) No programme should be carried in the cable service which: -

(a) Offends against good taste or decency;...

(d) Contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truths; ...

(i) Criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country; ...

(m) Contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups.

Any program which violate the above rules will attract two to five years imprisonment, and perhaps every day the tv operator might end up paying five or ten thousand. Its private censorship verses commercial-cum-political expression in Hyderabad. The TV9 and The ABN Andhra Jyothi are rich and reputed channels in both Telugu states. While the complaint against TV9 is specific about a nasty telecast insulting MLAs, there was no such specific issue against ABN Andhra Jyothi channel, except for their steadfast bias in favour of Telugu Desham party and against TRS. In general, most of the electronic media in two Telugu states are neither free nor objective. Negative language Epithets used in tv9

report: *What will a loincloth-clad person do when offered with a Laptop? Where will he tuck it? Wonder if they shove it inside their loin or sell it somewhere! But the T-MLAs took them with both hands just as a drunkard would crave for spicy pickle!"* Tv9 is alleges that MLAs would sell it!

It has Libellous reflections, *"What would happen if you screen a Hollywood movie in a multiplex to someone who is habituated to watching old movies on touring theatre? Sample this!" Does it mean that those villagers who watch movies in touring talkies should never come to multiplex or that a villager should never get elected to Assembly? It is an allegation that they are incompetent and hence undeserving".*

It has effect of ridiculing CM & legislators. While showing K Chandrasekhar Rao, the first Chief Minister as he goes to take oath, a cinema song is played saying a 'wonder' happened. As the 'wonder' song continues the pan shot of tv9 camera shows legislators of almost all political parties including TDP, Congress and BJP etc, which infers that not only the leader but whole lot of legislators are incompetent. It is 'casting libellous reflections' on legislators.

While presenting the scenes of oath taking and other shots within House and beyond the House, a commentator doled out cheap content in specifically chosen Telangana *linguistic accent, using all sorts of idioms and expressions of Telangana to bring down the image of the newly elected*. Major demerit of this program was that the spoken content was not supported by visuals. All this emanated from a nasty and abusive telecast by TV 9[270]. New Assembly passed a resolution on June 14, authorizing speaker Madhusudanachary to take stern action against news channel tv9. Speaker referred the issue to a special committee (in the absence of the Privileges Committee). While media is claiming its freedom of speech, angry legislature is saying its dignity is affected by abuse of media.

Powers of legislature to punish for their contempt stems out of the privileges the Constitution. 'Restriction' on the freedom of speech and expression, grounds of restrictions listed in Article 19(2). Citizens & media have a fundamental right to criticise the actions of legislators, the proceedings of the house, budget, speeches, answers, no confidence motions etc. They can make fair comments as part of press freedom but cannot commit contempt of privilege or of court.

[270] https://www.facebook.com/video.php?v=694769493933362&set=vb.100002009544246&type=2&theater

The law of privilege & contempt

According to Halsbury's Laws of England (reissue 1977) if the comment *lowers the dignity or authority of the House or which has a tendency to produce such a result*, it may be regarded as contempt even if there is no precedent for the offence. Power to punish for contempt is considered 'keystone' of legislative privilege. This power was derived from privileges of the House of Commons.
If the comment brings the House into odium, ridicule or contempt it might attract the punishment. Casting of reflections or aspersions on the House, its committees, or its members would be the example of 'contempt' of House.

The Blitz, weekly news magazine wrote a caption "Kripaloony" under photo of J B Kripalani, MP, Committee of Privileges held R K Karanjia, guilty of 'contempt'. Journalist Karanjia was summoned to Lok Sabha on August 29, 1961 before the bar of the House and reprimanded him. The Committee explained that 'libellous reflections, contemptuous insults, gross calumny or foul epithets used against members of the House on the account of his speech or conduct in the House is gross contempt of the House'.

MISA Rape in Bhopal Jail

There was an interesting case of journalist challenged for dafamation for writing a news item. A news item published in the Blitz weekly, of which the respondent was the Editor, stated that the appellant enticed a female detenu who alongwith him, was detained in the Central Jail under the Maintenance of Internal Security Act and that she had conceived through him and that on getting released on parole she had the pregnancy terminated. Before the Magistrate the respondent prayed that the report of the Enquiry Officer be sent for. But the report could not be obtained because the State Government claimed privilege in respect of that report.

RK Karanjia filed a revision before the High Court for setting aside the order of the Magistrate. Waiving privilege, the State Government produced a copy of the enquiry report before the High Court. A single Judge of the High Court quashed the proceedings on the view that the respondent's case clearly fell within the ambit of the ninth exception to section 499, I.P.C. because, according to him, the publication had been made honestly in the belief of its truth and also upon reasonable ground for such belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances.

The Official report throws light on how Sobhani allegedly enticed Mrs. Shukla with the help of a high official of the Bhopal Central Jail despite a ban on contacts between male and female detenus. The jail official, himself a close sympathiser of the RSS allowed

Sobhani to meet her frequently in his office and their love sessions were in his anteroom. Yogesh Shukla has made a representation to the State Government alleging that Sobhani had committed adultery with his wife and demanded action against the jail authorities for permitting a "rape" of his wife. Deputy Secretary Home, inquiry discovered: (1) There was free mixing of male and female prisoners in the Bhopal Central Jail; (2) Shri Sewakram Sobhani had opportunity and availed of the opportunity and mixed very freely with Smt. Uma Shukla; and (3) Smt. Uma Shukla became pregnant through Shri Sewak Ram Sobhani.

Section 499 Exception 9 of IPC is crucial here.

The ingredients of the Ninth Exception are that (1) the imputation must be made in good faith, and (2) the imputation must be for the protection of the interests of the person making it or any other person or for the public good. SC held HC was wrong in quashing the charges and it should have been remanded to trial court[271].

Judicial Doctrine of Postponement of publication

The Supreme Court laid down a new doctrine that would allow courts to temporarily ban media from reporting a case if it would adversely affect the trial, but the special constitutional bench of five judges declined to create wider guidelines on how the media should report court cases. The SC bench of CJI S.H. Kapadia, laid down a test: said that if publishing news related to a trial would "create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial", the court could grant a postponement order, temporarily gagging electronic or print media from reporting on the case. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the "real and substantial risk of serious prejudice" to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials…[272]

In August, 2011 when the incorrect reporting of the Vodafone case occurred, Chief Justice of India Justice Kapadia had suggested passing directions or guidelines for media coverage of the court proceedings. "We will pass a short order. But you (the press) have to regulate. This is not the first time it has happened. All over several wrong reports are appearing. It has happened in other courts also," said the judge.

[271] Sewakram Sobhani vs R.K. Karanjia, Chief Editor, 1 May,1981 AIR 1514, http://indiankanoon.org/doc/1506133/

[272] Direction of the Supreme Court dated Sept 11, 2012

This order was criticised in the circles of media saying that the ambiguous order of the apex court made it easier to muzzle the media and, far worse, institutionalized the process by which individuals and entities fighting cases can ensure that these aren't covered till the order is passed. It created room for allowing courts to temporarily ban the media from reporting a case if it could adversely affect a trial, none explained the period of temporary ban. By default, it becomes permanent ban. It gives enough time to parties to manage case and media. Renowned Journalist N Ram says: "I am afraid the net effect of the latest judgement will be to add to the 'chilling effect' that the press and the other news media are already experiencing from other unreasonable restrictions and pressures on what is supposed to be a robust and expansive freedom of speech and expression, constitutionally guaranteed as a fundamental right," said N. Ram, former editor-in-chief of The Hindu.

Senior Advocate of Supreme Court HKP Salve complained the article written by *Press Trust of India (PTI*), had misquoted him in reporting on arguments in the Vodafone Group Plc. tax case. Salve was arguing why Indian income-tax authorities should not be allowed to tax the British telecom company for its 2007 acquisition of Hutchison Whampoa Ltd's Indian operations. The report had quoted Salve to say that his client had resorted to tax "evasion". He had actually said that Vodafone had taken recourse to tax planning and "avoidance". Tax evasion is a punishable offence. *PTI* in response to Salve's application tendered unconditional apology. As a result, the Journalist who wrote the report was taken off the Supreme Court beat. "The media has its own internal checks and balances. It's not only in SC," the editor said. "If a reporter on any other beat makes a mistake, he or she will be held accountable." When it comes to reporting on Supreme Court cases, the news agency is "extra careful," he said, "but unfortunately, sometimes errors do happen". CJI Kapadia from the bench asked: "he received 11-13 such complaints from senior lawyers about wrong reporting of cases. He also regularly receives letters from undertrials in criminal cases who claim to have been condemned by newspapers or on television. The Chief Justice receives letter after letter that our rights are affected. How can I keep ignoring (them)? Till when can I ignore (them)?" The constitution bench of five judges, led by him sat to frame guidelines for the media's reportage of court proceedings.

The constitutional bench hearing was born out of legendary lawyer Fali S. Nariman's complaint to Kapadia's court on 10 February. Nariman, who was representing two Sahara real estate companies facing action from the stock market regulator Securities and Exchange Board of India (Sebi), complained to the court about a confidential proposal that had made its way onto a business news channel. He wrote: We are distressed that even without-prejudice proposal submitted by the petitioners to Sebi has come on CNBC-TV18. Such incidents are increasing by the day. Such reporting not only affects business sentiments, it also affects administration of justice," the SC said in a written order.

Apology

During the hearing of the P.J. Thomas case 2013 January, where the government faced a petition for appointing an officer with a charge-sheet against him to the position CVC. KKVenugopal submitted that while the charge-sheet was in a criminal case under the Prevention of Corruption Act, his client was the victim of a political battle in Kerala. Later that night, Arnab Goswami, editor-in-chief of Times Now news channel, told his viewers that he found Venugopal's submissions to the court to be "absurd". Advocate Venugopal next day complained. CJI asked him to write complaint against Times Now and Mr. Goswami. However, Mr. Venugopal did not do as Goswami apologized (according to lawyers in Venugopal's chambers reported in Media)

The CJI had expressed displeasure at a 15 December, 2010, news report in a national daily that said the judiciary wanted to retain 1% of the Rs.2,500 crore deposit made by Vodafone in the court's registry in the tax case. The report said a "cash-starved" judiciary was trying to source funds through such "novel" methods. The CJI Kapadia said: "People write whatever they want." But the court did not initiate any action against the reporter or the newspaper.

Education of Court Reporters

Essentially, senior accredited correspondents are expected to have a law degree to report from the Supreme Court. But these were subsequently rolled back after representations from correspondents to the court's press committee that it would be unreasonable for the court to impose these. After the Vodafone judgement in January, it is reported that CJI Kapadia was targeted through a public interest litigation (it was later dismissed as "frivolous" with heavy costs) which claimed that the CJI had a conflict of interest in the Vodafone case because his son worked with Ernst and Young. The consultancy had advised Vodafone on the transaction with Hutchison.

When told that India had principally adopted a system of open justice, Kapadia said: "We are not on open justice. We are on what goes on in a trial court. A petition is filed. The press is reporting. It is analysed. Is it not prejudging the issue?" "And those petitions, no sooner than they are filed, you go on attacking the lawyers, you go on attacking the judges," he said to Rajeev Dhavan, who appeared for the Editors Guild of India and the Forum for Media Professionals. Dhavan told the judges that they didn't have the power to do what they were contemplating—muzzle the media with guidelines that could be enforced. This amounted to legislating, he said. Advocate Nariman, who filed complaint, told the court: Such guidelines could not be enforceable nor would they be punitive. It would upset the

constitutional balance among free speech, limits on free speech and the rights of an undertrial. The court was also told that the existing remedies of contempt and defamation acted as sufficient checks against a wavering press.

Twitter v Citizen Journalism

Senior advocate Rajeev Dhawan, representing the Editor's Guild of India, specifically asked the court what to make of the micro-blogging service Twitter and a world where every man and woman was a journalist, which Kapadia dismissed in his response as being outside of the scope of the hearing.

Gag order?

The Delhi High Court in an interim order has restrained a leading media house from disclosing or disseminating the contents of a CD relating to lawyer and Congress spokesperson Abhishek Manu Singhvi. Justice Reva Khetrapal in her April 13 order restrained the media house and primary defendent Mukesh Kumar Lal from disseminating or distributing the contents of the CD allegedly in their possession. According to the Indo-Asian News Service (IANS) Justice Reva Khetrapal restrained the TV channels Aaj Tak, Headlines Today and The India Today Group from disseminating the contents of the CD which was allegedly prepared by Manu Singhvi's driver[273]. (reports dated 16.4.2012)

The apex court had on February 27, 2006, restrained the electronic and the print media from broadcasting and publishing the contents of the taped conversations of anyone, including that of Amar Singh. However, the Supreme Court lifted its gag order on media on publishing taped conversations of Amar Singh on May 12, 2012 saying that there was suppression of facts by Amar Singh in the case. The conversations revolved around Amar Singh discussing with the then Uttar Pradesh Chief Minister Mulayam Singh about allegedly getting a judge of the Allahabad High Court removed from a matter related to Mulayam. Another is regarding exchange of money with an industrialist wanting to set up a shop in Uttar Pradesh and the rest are his conversations with Bollywood stars. Advocates Shanti Bhushan and Prashant Bhushans also filed a contempt petition alleging Amar Singh's role in fabricating the CD's.

In September 2013 when Asaram Bapu was subject to intense media scrutiny over allegations of sexual assault, his lawyers approached the Supreme Court of India with a plea to restrain the media from reporting on his case in a manner which prejudiced his right to a

[273] http://currentnews.in/court-restrains-media-house-from-exposing-manu-singhvi-cd-gag-on-driver/

fair trial. The Supreme Court turned him away[274]. Later Asaram Bapu was convicted and sentenced with life long term of imprisonment[275].

On 16 January, 2014 an ex- SC judge, Justice Swatanter Kumar, was accused of sexual harassment and complained intense media scrutiny. The Delhi High Court, in response to a defamation lawsuit filed by the ex-SC judge imposed publication postponement orders on media[276].

In yet another controversial case Justice Kumar's lawsuit was also based on a precedent of a Bench of five judges of the Supreme Court in the very high profile case of Sahara India Real Estate Corporation Limited and Others vs. Securities and Exchange Board of India & Another[277] decided in 2012. Justice Kumar filed as a defamation lawsuit, while the Supreme Court in the *Sahara* case had very clearly located the power to order 'postponement' of media reporting within Articles 129 and 215 of the Constitution of India which vest in the SC and the High Court's powers to punish for contempt. Sukumar Muralidharan wrote of the Gag Order case that the postponement (of media coverage) orders that it set up as a remedy, could become an "instrument in the hands of wealthy and influential litigants, to subvert the course of open justice."

It is expected that the Law should stand by weak against the strong. But unfortunately, it is becoming weak against strong and strong against weak

It was criticised that the related weakness in the judgment is the fact that the Delhi High Court (Swatanter Kumar case) has issued this postponement order in a case where it had no jurisdiction over the legal proceedings involving Justice Kumar. A day after the Delhi High Court issued gag orders on the media barring all publications and TV channels from reporting on a law intern's sexual harassment complaint against a former Supreme Court judge, the Editors Guild of India expressed serious concern and called the order a "mockery" of the rule of law and an unwarranted intrusion on media freedom.

Justice Manmohan of the Delhi High Court has said in ***Swatanter Kumar v. Indian Express and Others,*** that the pervasive sensational media coverage of the sexual harassment allegations against the retired Supreme Court judge "may also result in creating an atmosphere in the form of public opinion wherein a person may not be able to put forward his defence properly and his likelihood of getting fair trial would be seriously impaired."

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[274] https://www.indiatoday.in/india/north/story/asaram-bapu-supreme-court-media-coverage-narayan-sai-213612-2013-10-08

[275] https://www.thehindubusinessline.com/news/asaram-bapu-2-others-convicted-in-rape-case/article23667146.ece

[276] https://indiankanoon.org/doc/180037999/

[277] https://indiankanoon.org/doc/158887669/

In 2007, the Delhi High Court took *suo motu* cognizance of an article in the Mid-Day on how the sons of the then Chief Justice of India were allegedly profiting through the sealing drive initiated by their father as a sitting judge of the Supreme Court. That case ended with a conviction and jail term of 4 journalists for a period of 4 months. The Supreme Court stayed the verdict pending disposal of the appeal. [278]

Mysore episode

Karnataka High Court *suo motu* contempt notice to 56 journalists from 14 media establishments for their reporting on the conduct of 3 Karnataka High Court judges. Eventually the Supreme Court stayed the contempt proceedings while lambasting the media for their irresponsible reporting on the issue. A contempt case initiated against journalist Madhu Trehan editor of Wah India & her colleagues. In this case Ms. Trehan and her colleagues conducted a survey amongst senior advocates in the Delhi High Court asking them to rate the judges of the Delhi High Court on various factors including punctuality, integrity, knowledge etc. The results of the survey were published in the magazine leading to an unprecedented situation where the Delhi High Court acting on a contempt petition filed by the bar, ordered the Delhi Police to seize all copies of the magazine and also restrained the media from reporting on the contempt proceedings.

Guilty of contempt

The ban on the reporting of the contempt petition was lifted only after the editors of the *Indian Express, Hindustan Times, Outlook, Times of India, Punjab Kesari* & Kuldip Nayar moved court opposing the gag order. Trehan and her colleagues were found guilty of contempt by a five judge bench of the Delhi High Court and were let off after an unqualified apology to the Court.

Defamation case for misreporting

A defamation case filed by ex-SC Justice PB Sawant against *Times Now*. The trial court had found in favour of Justice Sawant and awarded him damages of Rs 100 crores that was asked for. On appeal the Bombay High Court ordered the channel to deposit with the Court, Rs 20 crore in cash and another Rs 80 crore as bank guarantees, pending appeal and the Supreme Court refused to interfere with this direction[279].

Supreme Court of India which had reduced the punitive damages in the Uphaar cinema tragedy where 56 people died, from Rs 2.5 crore to Rs 25 lakhs on the grounds that punitive damages were an exception to the rules. Supreme Court should have stayed the order

[278] https://www.livemint.com/Politics/KCYobHBh0bp2ODK2IiVFYK/MidDay-staff-held-guilty-of-contempt.html

[279] https://timesofindia.indiatimes.com/india/SC-asks-Times-Now-to-deposit-Rs-100-crore-before-HC-takes-up-its-appeal-in-defamation-case/articleshow/10734614.cms

for *Times Now* to deposit even Rs 20 crore in cash, pending appeal because the Bombay High Court was *prima facie* wrong in its conclusion[280].

Obstructing court process

Justice Markandeya Katju explained what is contempt of court, "If someone calls a judge a fool inside the courtroom and goes away, in my opinion it is not contempt, for he has not stopped the functioning of the court. But if he keeps shouting in court the whole day, and despite warning does not stop, he is obviously not letting the court function, and this would be contempt. After all disputes in society have to be adjudicated, and judges must decide cases to justify payment of salaries to them. In a newspaper article Katju dealt in detail how the contempt cases work against the media[281]. Katju claimed that he had "seen the darker side of the judicial system intimately. To disclose everything would raise such a storm that I may not be able to withstand it":

Ex-Supreme Court Justice AK Ganguly faced (unproven) allegations of a similar nature to the allegations his former brother judge, Swatanter Kumar. However, the former West Bengal Human Rights Commission chairman did not formally instruct lawyers to fight on his side. Kumar, of course, got Karanjawala and nine senior counsel to bat for him.

Media coverage around Kumar had gradually been ramping up since the story broke (for the second time, of sorts) on 10 January 2014, but it never quite reached the fever pitch and pressure surrounding Ganguly just before his resignation on the eve of a presidential reference to remove him. Frigging effigies of Ganguly were burnt outside his Kolkata office by protestors and TV cameras followed him on his morning walk in the park. In 1966 Supreme Court judgment in *Naresh Shridhar Mirajkar v. State of Maharashtra*[282], stated that the inherent powers of courts extend to barring media reports and comments on ongoing trials in the interests of justice, and that such powers do not violate the right to freedom of speech

The Court proceedings are usually open to the public. This openness serves as a check on the judiciary and ensures public faith in the judiciary. In countries as large as ours, media coverage of important cases ensures actual openness of court proceedings. When court proceedings are closed to the public (known as "in-camera" trials) or when media

[280] *From article by* Prashant Reddy Monday, 10 February 2014, http://www.legallyindia.com/Tech-Media-Comms/swatanter-kumar-how-do-journalists-keep-losing-to-judges
[281] https://economictimes.indiatimes.com/news/politics-and-nation/contempt-law-threatens-freedom-of-speech-markandey-katju/articleshow/46183470.cms?from=mdr and see Markandey Katju, The Hindu, January 22,2007.
[282] 1966 SCR (3) 744, https://indiankanoon.org/doc/1643138/

dissemination of information about them is restricted, the openness and transparency of court proceedings is compromised.

Criticism

The Supreme Court in another context, stated in principle that the openness of court proceedings should only be restricted where strictly necessary. The suppression of media coverage leaves the young woman comparatively isolated, without all the support that media coverage can bring. Wide coverage of the other sexual harassment complaint involving Justice Ganguly helped the intern in that case find support. The circulation of information led to other former interns in a similar position as well as from a larger network of lawyers and activists reaching out to her. Media coverage is often critical to whether someone relatively powerless is able to assert her rights against a very powerful person, and it is the reason that we protect the freedom of expression in our democracy. Renowned lawyer Anil Divan said in his article on Contempt of court and the truth, said the contest is between truth and its suppression. The choice then is between the plea of truth to expose judicial misconduct and the attempt to stifle such publication by the use of the contempt power. [283] He further wrote; "Broadly, criminal contempt means either scandalising the Court or prejudicing a fair trial or interference with the administration of justice. In the "Mid-day" case, a bench of the Delhi High Court without considering the defence of truth has imposed a severe sentence of four months imprisonment on the media for scandalising the Court. The case is now pending in the Supreme Court and raises far-reaching questions of public law. Truth was no defence for a long time. The law as laid down by the Supreme Court following earlier cases was that justification or truth was no defence against summary proceedings for contempt when words were used which scandalised the Court or lowered its authority. Parliament has intervened and radically changed the law by Act 6 of 2006 by amending Section 13 of the Contempt of Courts Act, 1971 which states — "Notwithstanding anything contained in any law for the time being in force ... (b) the court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafide."

When the provisions of the Bill were discussed in the Lok Sabha, Law Minister H.R. Bharadwaj said "Suppose, there is a corrupt judge and he is doing corruption within your sight, are you not entitled to say that what you are saying is true? Truth should prevail. That is also in public interest."

[283] http://www.thehindu.com/todays-paper/tp-opinion/contempt-of-court-and-the-truth/article1938590.ece

Recommendation of NCRWC

National Commission for Review of Working of Constitution has categorically suggested: "… A total embargo on truth as justification may be termed as an unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto 'Satyameva Jayate' in the High Courts and 'Yatho dharmas tatho jaya' in the Supreme Court, the courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change."

Chief Justice E.S. Venkataramiah, whose judgments on press freedom are liberal and well known — gave an interview to journalist Kuldip Nayar on the eve of his retirement. He stated "the judiciary in India has deteriorated in its standards because such judges appointed as are willing to be 'influenced' by lavish parties and whisky bottles." … "in every High Court, there are at least 4 to 5 judges who are practically out every evening, wining and dining either at a lawyers' house or a foreign embassy." The columnist further reported that "Chief Justice Venkataramiah reiterated that close relations of judges be debarred from practicing in the same High Court.[284]"

International standards

International standards and laws of other democracies would be informative and enable us to arrive at the right standards. Professor Michael Addo of the University of Exeter has collected the views of many European experts in "Freedom of Expression and the Criticism of Judges.[285]"

In European democracies such as Germany, France, Belgium, Austria, Italy, there is no power to commit for contempt for scandalising the court. The judge has to file a criminal complaint or institute an action for libel. Summary sanctions can be imposed only for misbehaviour during court proceedings.

In a Belgium case, Leo De Haes and Hugo Gijsels, editor and journalist of a weekly magazine Humo published five articles criticising judges of the Antwerp Court of Appeal in virulent terms for having awarded custody of children to their father although there were serious allegations against him of incest and abuse of children. The three judges and the Advocate-General instituted proceedings against Haes and Gijsels seeking compensation for damage caused by the defamatory articles. Primary Tribunal held against the journalists and the same was affirmed by the Brussels Court of Appeal and on further appeal by the Court of Cassation. The journalists applied to the ECHR and succeeded. It was held that though

[284] Anil Divan's article, ibid
[285] https://shodhganga.inflibnet.ac.in/bitstream/10603/129442/10/10_chapter%205.pdf

courts had to enjoy public confidence and judges had to be protected against destructive attacks that were unfounded, the articles contained detailed information based on thorough research, and the press had a duty to impart information and ideas of public interest and the public had a right to receive them[286].

It was held that there was a breach of Article 10 of the European Human Rights Convention which guaranteed freedom of speech and expression and there was also a breach of Article 6(1) (fairness of trial) because the Tribunal refused to study the reports of professors relied upon by the journalists.
The journalists were awarded damages and costs of over Francs 964000 against the State. The case shows that there is no summary right of committal for contempt and the judges adopted proceedings for libel which ultimately failed.

Spycatcher case

In July 1987 *Spycatcher* was freely available in America and Europe and, the Thatchist regime having chosen not to impound personal copies at airports, could be freely brought into England by individuals. Nonetheless, on 30 July 1987 the House of Lords upheld the interim injunctions banning the book, extracts from it, reviews of it, and even evidence given about it in the Australian court.

The decision was by majority. Those in favour of the ban were Lord (Sydney William) Templeman (b. 1920), Lord (Desmond James Conrad) Ackner (b. 1920) and Lord (Henry Vivian) Brandon (b. 1920). Those against were Lord (Nigel Cyprian) Bridge (b. 1917) and Lord (Peter Raymond) Oliver (b. 1921).

Lord Bridge stated

Bridge stated in his judgment: 'Freedom of speech is always the first casualty under a totalitarian regime. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book *Spycatcher* enter the country and circulate here, will seem more and more ludicrous.'

Spycatcher affair

The Spycatcher affair began in 1985, when the British Government started proceedings against the book being published in Australia. It lost the action in 1987. By late 1987 Spycatcher was the number one hardback bestseller in the US, selling 400,000 copies.

[286] Ibid.

Although the government had succeeded in gagging the British media for a time it failed to prevent the book's disclosure anywhere abroad.
In November 1991 the European Court of Human Rights found the government's actions had violated the right to freedom of speech. Peter Wright died a millionaire in April 1995 aged 78[287].

You Fools

In yet another instalment of the saga, it sent Bob Alexander QC into court in December 1987 to argue before Justice Scott that there was 'simply no room for saying freedom of the Press is important', because free speech and a free Press run 'headlong into the principle of confidentiality'.
Scott does not seem to have been impressed with the Government's case. Turnbull (1988, p. 209) notes that Scott found that *The Guardian* and *The Observer* were 'justified in publishing the allegations in June 1986 because they concerned important matters of public interest'; that Wright's 'duty of confidence was qualified'; and that 'henceforth, given the wide circulation of *Spycatcher* throughout the rest of the world, newspapers were free to report its contents in the United Kingdom'. The Government appealed to the English Court of Appeal.

1988: Government loses Spycatcher battle

The British Government has lost its long-running battle to stop the publication of the controversial book Spycatcher, written by a former secret service agent. Law Lords ruled the media can publish extracts from former MI5 officer Peter Wright's memoirs, because any damage to national security has already been done by its publication abroad[288]. *The Daily Mirror* once published photographs of three Judges in the House of Lords upside down with a comment "You fools". It was not hauled up for contempt of court. It means that there is no longer any acceptability and therefore legitimate authority in the courts. Nor does it mean that when the courts do something about which a paper, or even the media in general disagrees, this is illegitimate. But it does mean that on a wider level there is a relationship between the media and the legitimacy of the courts

Imminent and present danger

In the United States, contempt power is used against the press and publication only if there is a clear imminent and present danger to the disposal of a pending case. Criticism however virulent or scandalous after final disposal of the proceedings will not be considered as contempt. The US Supreme Court observed: “the assumption that respect for the judiciary

[287] http://www.austlii.edu.au/au/journals/UWALawRw/1989/8.pdf
[288] http://news.bbc.co.uk/onthisday/hi/dates/stories/october/13/newsid_2532000/2532583.stm

can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions ... And an enforced silence, however, limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect."

Veeraswamy case

In the case of Veeraswami, a former Chief Justice of Madras High Court, the Supreme Court observed: "A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system."

Ten tests of malice

The Supreme Court ruled in the *The New York Times* case that a public figure must prove malice or recklessness when he sues for libel. The House of Lords rejected this test. Lord Nicholls laid down 10 tests –

- the seriousness of the allegation;
- the nature of the information and the extent to which the subject matter is a matter of public concern;
- the credibility of the source of the information;
- the steps taken to verify the information; the status of the information;
- the allegation may have already been the subject of an investigation;
- the urgency of the matter;
- whether comment was sought from the claimant;
- whether the article contained the gist of the claimant's side of the story;
- the tone of the article and the circumstances of the publication, including the timing.

Worst behaviour

For the Asian Age, the 15th Lok Sabha has "statistically proved to be the worst in history in terms of passage of bills... The declining standards of behaviour of the **MPs was worst exemplified by the use of a pepper spray** in the house". The Tribune's editorial says the house "**lost 79% of its time** to din over various issues... Gone are the days when parliament had good orators and wit, repartee and humour marked the proceedings". (BBC newsreport)

Live telecasting

Live telecasting has its own merits. As they will be conscious of people watching them, members find it difficult to be absent during the Question Hour or doing such things that might show them in negative way. They perhaps will be better dressed and more careful about their behavior before the camera. It is necessary to telecast nationally other important debates live. The edited version becomes stale, ceases to be newsworthy and remains suspect for having omitted the most 'interesting' parts of the proceedings.

MP LADS

MPLADS - placing two crores of rupees each year at the discretion of each Member of Parliament to be spent on local projects are bound to create role conflicts and tensions. The voter-citizens and the media have a right to critically analyse the spending of MPLADs by MPs, without derogatory remarks.

Privileges

Parliamentary Privileges are attached to a house of a legislature **collectively** or to its members with a view to enabling the house to act and discharge its high functions effectively without fear or favour, or without any hindrance, interference or obstruction from any quarter. These privileges are exercised by individual members also. The Privileges are of two kinds- External- refraining anybody from outside to interfere with is working. The outsider's freedom of speech and action is limited by the exercise of privilege by House. Internal- restraining member from doing something which may amount to an abuse of their position. To ensure free debate Article 105(1) says, subject to provisions of this constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech. (No civil or criminal action possible). Full and free debate is the essence of parliamentary democracy- from this two privileges emerge a) to hold in camera meet & to exclude strangers, b) prohibiting the publication of the debates and proceedings held within the house. Article 105 (2) says No member shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof..

JMM Bribery Case

In PV Narasimha Rao v State AIR 1998 SC 210. Ruling party gave large sums to JMM members to vote in their favour. No confidence motion was defeated with votes for 251/and against 261. The Government survived but ran into legal problems. The issue before the court was Whether MP is public servant under Prevention of Corruption Act and whether a member claim immunity under Article 105(1 & 2) from prosecution for accepting a bribe for voting in favour bribe-giver. Bharucha J speaking for majority broadly interpreted immunity and said that 105(2) protects MP against proceedings that relate to, or concern, or

have connection or nexus with anything said, or vote given, by him in Parliament. Bribe as motive or reward for voting, so it has nexus with vote in House.
However, the bribe givers, though being an MP, can claim no immunity.
Delivering minority judgment, SC Agarwal J said that "criminal liability incurred by MPs who accepted bribe for speaking or giving vote in a particular manner arises independently of the making speech or giving vote by MP and such liability cannot be regarded as a liability in respect of anything said or any vote given in Parliament".

Keshav Singh Case

In a landmark case on Parliamentary Privileges in Uttar Pradesh, Keshav Singh printed some accusations in a pamphlet against a member and distributed on March 16, 1964 within the legislative house. The House considered it as breach of privilege and jailed him for 7 days. Against this order his Advocate Soloman on March 19 filed WP in Lucknow High Court, wherein Beg & Sehgal JJ, ordered interim release of Keshav Singh. On March 21 the Legislative House angrily ordered arrest of Keshava Singh, his advocate Soloman and two judges of High Court, leading to sensational headlines and constitutional crisis. Those two judges heard about this decision through a news bulletin in radio and immediately moved a petition under Art 226 before a High Court on March 22, challenging that the resolution was in violation of Article 211(No discussion about conduct of judges of HC or SC, 121 prohibits it in Parliament). Then a full bench of 28 judges ordered stay of legislature resolution. The Assembly has withdrawn the arrest warrants against the judges, but they were directed to appear before the House. Again, the High Court took up the matter on March 23 and stayed the order of Legislature demanding presence of judges.

Presidential Reference

President of India took note of the constitutional crisis and referred the issue for opinion of Supreme Court exercising the power under Article 143 of Constitution of India. The issues before the Supreme Court through this reference were: Is the House sole judge of issue whether its contempt has been committed when such act took place outside the House? Is House sole judge to impose punishment? Whether HC can entertain a WP against general warrant? It was held that the judiciary has power to examine an unspeaking warrant to ascertain whether a contempt had in fact been committed, though the legislative House also has power to punish any person for Contempt of House. It was also held that the Article 194(3) (powers of legislature) must yield to Article 21, if not Article 19, hence HC can hear the petition under 226 for violation of freedom of speech, personal liberty and right to life. Article 194(3) does not give power to act against judges. Article 211 debars discussion in Legislature on conduct of judges. Gajendragadkar CJ exhorted the need for h Harmonious functioning of three wings was pleaded. The Supreme Court held that the question of determining the construction of art 194 in regard to the nature, scope, and effect of powers of

the House ultimately rests with the judiciary of the country and the scope of Article 194 wass affected by 226, 32, 211, as the High Court has power to issue any writ against any authority including legislature under Article 226. Article 212 does not impose limitation on court Parliament and legislatures do have privileges as per the law, but it is for the Parliament to make law defining the privileges, which was not done so far. If parliament defines the law, its validity can be examined vis-à-vis Fundamental rights by the judiciary. Indian legislature has no judicial powers like House of Commons, they are not courts of record with contempt power. No immunity to general warrants from scrutiny of courts, can be claimed by them.

Qualified privilege 361A

The media has a qualified privilege when they report the proceedings of the House. The legislators had absolute privilege or protection to their expression as part of their duty to speak freely. If a news reporter presents the report in brief, without distorting it, the reporter gets the same privilege of protection from further judicial consequences. However such a report must be report of proceedings and not casual conversation between members, truly reflecting the brief of the actual happenings in the House. This is called qualified privilege, because it has certain conditions like: It must be report and not an 'article' or a 'comment'; That report must be substantially true; It must not be actuated by malice, and that Proceedings must be of those of a House. Earlier such protection was not available for reports of the Committees, journalists etc. If speech offends against the law of sedition, official secrets act, conspiracy to deceive, law of defamation and other offences under IPC like obscenity, legislator cannot be prosecuted because of this protection. But the reports of such speech were nor protected. However, Article 361A does not protect press from contempt of court. (No contempt of court against MPs). Article 361A gives immunity from court proceedings but not from breach of privilege, even if publication is true and a faithful account of proceedings. What is given with one hand is taken away by the other.

Expunging

Another limitation is that the speaker can expunge remarks of members during any debate, which cannot be reported by the newspapers or any media. Under Rule 380-1 LS and Rule 221-2 of RS Presiding officers can expunge objectionable words used in debates on the grounds of defamation, decency, unparliamentary expression. Expunged portion do not form part of record, so no right to publish them is available to any body including the Parliamentary publication authorities or media.

Objectivity & Neutrality

Unethical, indecent, obscene, defamatory reports have to be shunned by media. Divisive speech and hate speech will invite criminal consequences. Committing contempt of Court or breach of privilege could be constitutional wrong & Crime. Besides, it destroys **credibility** of media organizations. Objectivity & Neutrality are sources of credibility of media.

ANNEXURE 1

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ANNEXURE 2
CASE LAWS

CASE STUDIES ON MEDIA AND FREE EXPRESSION

CASE LAW - 1

FREEDOM OF PRESS AND RIGHT OF PRIVACY

R. Rajagopal Alias R. R. Gopal And Another, V. State Of Tamil Nadu And Others, AIR 1995 SC 264, 1994(6) SCC 632

DATE OF JUDGMENT: 07-10-1994

Supreme Court JUDGES: B P Jeevan Reddy and Sujata V Manohar

Principle:

A Judgment on Constitution of India - Articles 21 and 19(1)(a) & 2 regarding Right of privacy visa-vis freedom of Press: Held that the Publication of life story or biography of AS written in jail exposing misdeed of some public officials is permissible. Officials fearing defamation cannot seek bar on publication, because for truthful publication, suit for damages also not maintainable. So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them. There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by art. 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent -- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.

B. P. JEEVAN REDDY, J. - This petition raises a question concerning the freedom of press vis-avis the right to privacy of the citizens of this country. It also raises the question as to the parameters of the right of the press to criticise and comment on the acts and conduct of public officials.

2. The first petitioner is the editor, printer and publisher a Tamil weekly magazine Nakkheeran, published from Madras. The second petitioner is the associate editor of the

magazine. They are seeking issuance of an appropriate writ, order or direction under Article 32 of the Constitution, restraining the respondents, viz., (1) State of Tamil Nadu represented by the Secretary, Home Department, (2) Inspector General of Prisons, Madras and (3) Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from taking any action as contemplated in the second respondent's communication dated 15-6-1994 and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine. Certain other reliefs are prayed for in the writ petition but they are not pressed before us.

3. Shankar at the rate Gauri Shankar at the rate Auto Shankar was charged and tried for as many as six murders. He was convicted and sentenced to death by the learned Sessions Judge, Chenglepat on 31-5-1991 which was confirmed by the Madras High Court on 17-7-1992. His appeal to this Court was dismissed on 5-4-1994. It is stated that his mercy petition to the President of India is pending consideration.

4. The petitioners have come forward with the following case: Auto Shankar wrote his autobiography running into 300 pages while confined in Chenglepat sub-jail during the year 1991.

The autobiography was handed over by him to his wife, Smt. Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Shri Chandrasekharan. The prisoner requested his advocate to ensure that his autobiography is published in thepetitioners' magazine, Nakkheeran. The petitioners agreed to the same. Auto Shankar affirmed this desire in several letters written to his advocate and the first petitioner. The autobiography sets out the close nexus between the prisoner and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes. The presence of several such officers at the house-warming ceremony of Auto Shankar's house is proved by the video cassette an several photographs taken on the occasion. Before commencing the serial publication of the autobiography in their magazine, the petitioners announced in the issue dated 21-5-1994 that very soon the magazine would be coming out with the sensational life history of Auto Shankar. This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed. They forced the said prisoner, by applying third degree methods, to write letters addressed to the second respondent (Inspector General of Prisons) and the first petitioner requesting that his life story should not be published in the magazine. Certain correspondence ensued between the petitioners and the prison authorities in this connection. Ultimately, the Inspector General of prisons (R-2) wrote the impugned letter dated 15-6-1994 to the first petitioner. The letter states that the petitioner's assertion that Auto Shankar had written his autobiography while confined in jail in the year 1991 is false. It is equally false that the said autobiography was handed over by the said prisoner to his wife with the

knowledge and approval of the prison authorities. The prisoner has himself denied the writing of any such book. It is equally false that any power of attorney was executed by the said prisoner in favour of his advocate, Shri Chandrasekharan in connection with the publication of the alleged book. If a prisoner has to execute a power of attorney in favour of another, it has to be done in the presence of the prison officials as required by the prison rules; the prison records do not bear out execution of any such power of attorney. The letter concludes:

"From the above facts, it is clearly established that the serial in your magazine under the caption 'Shadowed Truth' or 'Auto Shankar's dying declaration' is not really written by Gauri Shankar but it is written by someone else in his name. Writing an article in a magazine in the name of a condemned prisoner is against prison rules and your claim that the power of attorney is given by the prisoner is unlawful. In view of all those it is alleged that your serial supposed to have written by Auto Shankar is (false?) since with an ulterior motive for this above act there will arise a situation that we may take legal action against you for blackmailing? Hence, I request you to stop publishing the said serial forthwith."

5. The petitioners submit that the contents of the impugned letter are untrue. The argument of jeopardy to prisoner's interest is a hollow one. The petitioners have a right to publish the said book in their magazine as desired by the prisoner himself. Indeed, the petitioners have published parts of the said autobiography in three issues of their magazine dated 11-6-1994, 18-6-1994 and 22-6-1994 but stopped further publication in view of the threatening tone of the letter dated 15-6-1994. The petitioners have reasons to believe that the police authorities may swoop down upon their printing press, seize the issues of the magazine besides damaging the press and their properties, with a view to terrorise them. On a previous occasion when the petitioner's magazine published, on 16-8-1991, an investigative report of tapping of telephones of opposition leaders by the State Government, the then editor and publisher were arrested, paraded, jailed and subjected to the third degree methods. There have been several instances when the petitioners' press was raided and substantial damage done to their press and properties. The petitioners are apprehensive that the police officials may again do the same since they are afraid of their links with the condemned prisoner being exposed by the publication of the said autobiography. The petitioners assert the freedom of press guaranteed by Article 19(1)(a), which, according to them, entitles them to publish the said autobiography. It is submitted that the condemned prisoner has also the undoubted right to have his life story published and that he cannot be prevented from doing so. It is also stated in the writ petition that before approaching this Court by way of this writ petition, they had approached the Madras high Court for similar reliefs but that the office of the High Court had raised certain objections to the maintainability of the writ petition. A learned Single Judge of the High Court, it is stated, heard the petitioners in connection with the said

objections but no order were passed thereon till the filing of the writ petition.

6. Respondents 2 and 3 have filed a counter-affidavit, sworn to by Shri T. S. Panchapakesan, Inspector General of Prisons, State of Tamil Nadu. At the outset, it is submitted that the writ petition filed by the petitioners in the High Court was dismissed by the learned Single Judge on 28-6-1994 holding inter alia that the question whether the said prisoner had indeed written his autobiography and authorised the petitioners to publish the same is a disputed question of fact. This was so held in view of the failure of the learned counsel for the petitioners to produce the alleged letters written by the prisoner to his counsel, or to the petitions, authorising them to publish his autobiography. It is submitted that the letter dated 15-6-1994 was addressed to the first petitioner inasmuch as "there was a genuine doubt regarding the authorship of the autobiography alleged to have been written by the condemned prisoner while he was in prison and which purportedly reached his wife. Besides, it was also not clear whether the said prisoner had as a matter of fact authorised the petitioner to publish the said autobiography. In the context of such a disputed claim both as to authenticity as well as the authority to publish the said autobiography, the said communication was addressed to the petitioners herein. Since the petitioners have threatened to publish derogatory and scurrilous statements purporting to (be?) based on material which are to be found in the disputed autobiography?" It is submitted that the allegation that a number of IAS, IPS and other officers patronised the condemned prisoner in his nefarious activities is baseless. "It is only in the context of such a situation coupled with the fact that the petitioner might under the guise of such an autobiography tarnish the image of the persons holding responsible positions in public institution that the communication dated 15-6-1994 was sent to him", say the respondents. They also denied that they subjected the said prisoner to third degree methods to pressurise him into writing letters denying the authorisation to the petitioners to publish his life story.

7. Neither Auto Shankar nor his wife - nor his counsels - are made parties to this writ petition. We do not have their version on the disputed question of fact, viz., whether Auto Shankar has indeed written his autobiography and/or whether he had requested or authorised the petitioners to publish the same in their magazine. In this writ petition under Article 32 of the Constitution, we cannot go into such a disputed question of fact. We shall, therefore, proceed on the assumption that the said prisoner has neither written his autobiography nor has he authorised the petitioners to publish the same in their magazine, asserted by the writ petitioners. We must, however, make it clear that ours is only an assumption for the purpose of this writ petition and not a finding of fact. The said disputed question may have to be gone into, as and when necessary, before an appropriate court or forum, as the case may be.

8. On the pleadings in this petition, following questions arise :

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1) (a) entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amount to defamation?

(2) (a) Whether the Government can maintain an action for its defamation?

(b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and

(c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?

(3) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

Question Nos. 1 and 2

9. The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin - (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising - or non-advertising - purposes or for that matter, his life story is written - whether laudatory or otherwise - and published without his consent as explained hereinafter. In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how? Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of this Court dealing with this aspect is Charka Singh v. State of U. P. (1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329) A more elaborate appraisal of this right took place in a later decision in Go bind v. State of M. P. ((1975) 2 SCC 148: 1975 SCC (Cri) 468) wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold v.

Connecticut (381 US 479 : 14 L Ed 2d 510 (1965)) and Roe v. Wade (410 US 113 : 35 L Ed 2d 147 (1973)). After referring to Kharak Singh ((1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329) and the said American decisions, the learned Judge stated the law in the following words : (SCC pp. 155-57, paras 22-29)

" privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.

* * *

Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

As Ely says :

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case. (See The Wages of Crying Wolf : A Comment on Roe v. Wade, 82 Yale LJ 920, 932)

There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures. (See 26 Stanford Law Rev. 1161, 1187)

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

The European Convention on Human Rights, which came into force on 3-9-1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing (See Privacy and Human Rights, Ed. AH Robertson, p. 176):

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of the right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

Since the right to privacy has been the subject-matter of several decisions in the United States, it would be appropriate to briefly refer to some of the important decisions in that country.

10. The right to privacy was first referred to as a right and elaborated in the celebrated article of Warren and Brandies (later Mr. Justice Brandies) entitled "The right to privacy" published in 4 Harvard Law Review 193, in the year 1890.

11. Though the expression "right to privacy" was first referred to in Olmstead v. United States (277 US 438: 72 L Ed 944 (1927), it came to be fully discussed in Time, Inc. v. Hill (385 US 374: 17 L Ed 2d 456 (1967). The facts of the case are these: On a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, where after they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill's home for an account of what happened during the hold-up. The case of the family was that they were not ill-treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. Life magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the family were ill-treated by the intruders. When Life published the story, Hill brought a suit against Time Inc., publishers of Life magazine, for the invasion of his privacy. The New York

Supreme Court found that the whole story was "a piece of commercial fiction" - and not a true depiction of the event - and accordingly confirmed the award of damages. However, when the matter was taken to united States Supreme Court, it applied the rule evolved by it in New York Times Co. v. Sullivan (376 US 254 : 11 L Ed 2d 686 (1964)) and set aside the award of damages holding that the jury was not properly instructed in law. It directed a re-trial Brennan, J. held :

"We hold that the constitutional protections for speech and press preclude disregard of the truth."

The learned Judge added:

"We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in press news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter.

Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded……"

12. The next relevant decision is in Cox Broadcasting Corpn. v. Cohn (420 US 469: 43 L Ed 2d 328 (1975)). A Georgia law prohibited and punished the publication of the name of a rape victim. The appellant, a reporter of a newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, J. recognised that "in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society" but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains the name of the rape victim from the public records and publishers it. The learned Judge held that the freedom of press to publish the information contained in the public records is of critical importance to the system of Government prevailing in that country and that, may be, in such matters "citizenry is the final judge of the proper conduct of public business."

13. Before proceeding further, we may mention that the two decisions of this Court referred

to above (Kharak Singh ((1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329) and Gobind ((1975) 2 SCC 148 : SCC (Cri) 468)) as well as the two decisions of the United States Supreme Court,Griswold (381 US 479 : 14 L Ed 2d 510 (1965)) and Roe v. Wade (410 US 113 : 35 L Ed 2d 147 (1973)), referred to in Gobind ((1975) 2 SCC 148 : 1975 SCC (Cri) 468), are cases of governmental invasion of privacy. Kharak Singh ((1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329) was a case where the petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations. It involved secret picketing of the house or approaches to the house of the suspect, domiciliary visits at night, periodical enquiries by police officers into repute, habits, association, income or occupation, reporting by police constables on the movements of the person etc. The regulation was challenged as violative of the fundamental rights guaranteed to the petitioner. A Special Bench of seven learned Judges held, by a majority, that the regulation was unobjectionable except to the extent it authorised domiciliary visits by police officers. Though right to privacy was referred to, decision turned on the meaning and content of "personal liberty" and "life" in Article 21. Gobind ((1975) 2 SCC 148: 1975 SCC (Cri) 468) was also a case of surveillance under M.P. Police Regulations. Kharak Singh ((1964) 1 SCR 332: AIR 1963 SC 1295 : (1963) 2 Cri LJ 329) was followed even while at the same time elaborating the right to privacy, as set out hereinbefore.

14. Griswold (381 US 479: 14 L Ed 2d 510 (1965)) was concerned with a law made by the State of Connecticut which provided a punishment to "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception". The appellant was running a centre at which information, instruction and medical advice was given to married persons as to the means of preventing conception. They prescribed contraceptives for the purpose. The appellant was prosecuted under the aforesaid law, which led the appellant to challenge the constitutional validity of the law on the grounds of First and Fourteenth Amendments. Douglas, J., who delivered the main opinion, examined the earlier cases of that court and observed :

"Specific guarantees in the Bill of rights have penumbras, formed by emanations from those guarantees that help to give them life and substance. ..... Various guarantees create zones of privacy.

The present case then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns in law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon the relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep

unnecessarily broadly and thereby invade the area of protected freedoms". NAACP v. Alabama (377 US 288: 12 L Ed 2d 325 (1964)) Would we allow the police to search the sacred precincts of marital bedrooms of telltale signs of the use of contraceptives ? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our schools system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

15. Roe v. Wade (410 US 113: 35 L Ed 2d 147 (1973)) concerned the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The relevant Texas law prohibited abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother. The constitutionality of the said law was questioned on the ground that the said law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and therefore violative of 'liberty' guaranteed under fourteenth Amendment and the right to privacy recognised in Griswold (381 US 479 : 14 L Ed 2d 510 (1965)). Blackmun, J. who delivered the majority opinion, upheld the right to privacy in the following words:

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however,.... the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the penumbras of the Bill of Rights, ... in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, ... These decisions made it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', Palko v. Connecticut (302 US 319: 82 L Ed 288 (1937)), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia (388 US 1 : 18 L Ed 2d 1010 (1967)); procreation, Skinner v. Oklahoma (316 US 535 : 86 L Ed 1655(1942)); contraception; Eisenstadt v. Baird (405 US 438 : 31 L Ed 2d 349 (1972)); family relationships, Prince v. Massachusetts (321 US 158 : 88 L Ed 645 (1944); and child-rearing and education, Pierce v. Society of Sisters (268 US 510 : 69 L Ed 1070 (1925)), Meyer v. Nebraska (262 US 390 : 67 L Ed 1042 (1923)).

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District

Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Though this decision received a few knocks in the recent decision in Planned Parenthood v. Casey (120 LEd 2d 683 (1992)), the central holding of this decision has been left untouched -indeed affirmed.

16. We may now refer to the celebrated decision in New York Times v. Sullivan (376 US 2564: 11 L Ed 2d 686 (1964)), referred to and followed in Time Inc. v. Hill (385 US 374 : 17 L Ed 2d 456 (1967)). The following are in facts: In the year 1960, the New York Times carried a full page paid advertisement sponsored by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the south", which asserted or implied that law-enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr. King and other civil rights demonstrators on various occasions. Respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate. The Alabama courts found the defendants guilty and awarded damages in a sum of $500,000, which was affirmed by the Alabama Supreme Court. According to the relevant Alabama law, a publication was "libellous per se" if the words "tend to injure a person .... in his reputation" or to "bring (him) into public contempt". The question raised before the United States Supreme Court was whether the said enactment abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments. In the leading opinion delivered by Brennan, J., the learned Judge referred in the first instance to the earlier decisions of that court emphasising the importance of freedom of speech and of the press and observed :

"Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth - whether administered by judges, juries, or administrative officials - and especially one that puts the burden of proving the truth on the speaker.

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -and to do so on pain of libel judgments virtually unlimited in amount - leads to ...."self-censorship". Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars .... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true,

because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone' ... The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

17. Black, J. who was joined by Douglas, J. concurred in the opinion but on a slightly different ground. He affirmed his belief that "the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power."

18. The principle of the said decision has been held applicable to "public figures" as well. This is for the reason that public figures like public officials often play an influential role in ordering society. It has been held that as a class the public figures have, as the public officials have, access to mass media communication both toe influence the policy and to counter-criticism of their views and activities. On this basis, it has been held that the citizen has a legitimate and substantial interest in the conduct of such persons and that the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.

19. The principle of Sullivan (376 US 254 :11 L Ed 2d 686 (1964)) was carried forward - and this is relevant to the second question arising in this case - in Derbyshire County Council v. Times Newspapers Ltd. ((1993) 2 WLR 449 : (1993) 1 All ER 1011, HL), a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two article published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in Attorney General v. Guardian Newspapers Ltd. (No. 2) ((1990) 1 AC 109: (1988) 3 All ER 545 : (1988) 3 WLR 776, HL) popularly known as "Spycatcher case", the House of Lords had opined that "there are rights available to private citizens which institutions of Government are not in a position to exercise unless they can show that it is in the public

interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in New York v. Sullivan (376 US 254 : 11 L Ed 2d 686 (1964)) and certain other decisions of American Courts and observed - and this is significant for our purposes

"while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available."

Accordingly, it was held that the action was not maintainable in law.

20. Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in Leonard Hector v. Attorney General of Antigua and Barbuda ((1990) 2 AC 312 : (1990) 2 All ER 103 : (1990) 2 WLR 606,PC) which arose under Section 33-B of the Public Order Act, 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was "likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs" shall be guilty of an offence. The appellant, the editor of a newspaper, was prosecuted under the said provision. He took the plea that the said provision contravened Section 12(1) of the Constitution of Antigua and Barbuda which provided that no person shall be hindered in the enjoyment of freedom of expression. At the same time, sub-section (4) of Section 12 stated that nothing contained in or done under the authority of law was to be held inconsistent with or in contravention of sub-section 12(1) to the extent that the law in question made provisions reasonably required in the interest of public order. [These provisions roughly correspond to Articles 19(1)(a) and 19(2) respectively.]The Privy Council upheld the appellant's plea and declared Section 12(1) ultra vires the Constitution. It held that Section 33-B is wide enough to cover not only false statements which are likely to affect public order but also those false statements which are not likely to affect public order. On that account, it was declared to be unconstitutional. The criminal proceedings against the appellant was accordingly quashed. In the course of his speech, Lord Bridge of Harwich observed thus :

"In a free democratic society it is almost too obvious to need stating that those who hold office in Government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

21. The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). But what is called for today - in the present times - is a proper balancing of the freedom of press and said laws consistent with the democratic way of the life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in out nation's life. They are still expanding - and in the process becoming more inquisitive. Our system of Government demands - as do the systems of Government of the United States of America and United Kingdom - constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to out legal system. The broad principles set out hereinafter are evolved keeping in mind the above considerations. But before we set out those principles, a few more aspects need to be dealt with.

22. We may not consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be ? We think not. No law empowering them to do so is

brought to our notice. As observed in New York Times v. United States ((1971) 403 US 713 : 29 L Ed 2d 822 (1971)), popularly known as the Pentagon papers case, "any system of prior restraints of (freedom of) expression comes to this Court bearing a heavy presumption against its constitutional validity" and that in such cases, the Government "carries a heavy burden of showing justification for the imposition of such a restraint". We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of "Auto Shankar" by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein.

23. We must make it clear that we do not express any opinion about the right of the State or its officials to prosecute the petitioners under Sections 499/500 IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

Question No. 3

24. It is not stated in the counter-affidavit that Auto Shankar had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule is brought to our notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before, as indicated hereinabove.

25. Lastly, we must deal with the objection raised by the respondent as to the maintainability of the present writ petition. It is submitted that having filed a writ petition for similar reliefs in the Madras High Court, which was dismissed as not maintainable under a considered order, the petitioners could not have approached this Court under Article 32 of the Constitution. The petitioners, however, did disclose the above fact but they stated that on the date of their filing the writ petition, no orders were pronounced by the Madras High Court. It appears that the writ petition was filed at about the time the learned Single Judge of the Madras High Court pronounced the orders on the office objections. Having regard to the facts and circumstances of the case, we are not inclined to throw out the writ petition on the said ground. The present writ petition can also be and is hereby treated as a special leave petition against the

orders of the learned Single Judge of the High Court.

26. We may now summarise the broad principles flowing from the above discussion :

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press / media.

27. We may hasten to add that the principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. As rightly pointed out by Mathew, J., this right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution.

28. In all this discussion, we may clarify, we have not gone into the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of the India Penal Code. That may have to await a proper case.

29. Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life story/ autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove.

30. The writ petition is accordingly allowed in the above terms. No costs.

CASE LAW - 2

CENSORSHIP OF FILMS

S. Rangarajan, Appellant V. P. Jagjivan Ram And Others, Respondents. With Union Of India And Others, Appellants V. P. Jagjivan Ram And Others, Respondents. *DATE OF JUDGEMENT: 30-03-1989 1*989-(002)-SCC -0574-SC

Principles:

Cinematograph (Certification) Rules, 1983 Rule 24: Review of film by Revising Committee after taking prompt action after presentation of application and approved is

proper as it was not showing any undue favour to producer and indeed worth appreciation if the film is reviewed as soon as it is submitted.

Cinematograph Act, 1952 Secs. 5 and 7B

Cinematograph (Certificate) Rules, 1983 - Rule 24(1) The Revising Committee is Competent authority. Question is whether the member of Board was competent to constitute revising committee? From the provisions of s. 7-B r/w. the Government order it becomes clear that the Constitution of the First Revising Committee by the member at the Regional Office is not vulnerable to any attack. It is legally justified and unassailable

Cinematograph Act, 1952 Secs. 5A and 5B

A Film criticising Government's policy of reservation in Government service cannot be restricted under art. 19(2). High Court is not justified in revoking the `U' certification of film which was already approved by two consecutive Revising Committees under the Cinematograph Act, 1952 -- Secs. 5A and 5B. The Film censorship by prior restraint must necessary be reasonable that could be saved by the well accepted principles of judicial review. There should be protection of moral values. Open criticism of Government's policies is allowable. There should not be any hesitation to approve such film criticising Government policy if it is otherwise unobjectionable and constitutionally allowable merely because of agitation, demonstration or threats of violence against the film by some persons.

Constitution of India Art. 19(1)(a) & (2) Freedom of speech and expression includes the freedom of communication of ideas by exhibiting films and it is allowable to criticise the policy of Government policy. It is subject to reasonable restrictions in larger interests of community and country set out under art. 19(2). These restrictions are intended to strike a proper balance between liberty guaranteed and the social interests specified under art. 19(2) Courts commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered - The anticipated danger should not be remote, conjectural or far- fetched.

Article 19(1)(a) of our Constitution guarantees to all citizens the right to freedom of speech and expression. The freedom of expression means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinion. The communication of ideas could be made through any medium, newspaper, magazine or movie. But this right is subject to reasonable restrictions on grounds set out under art. 19(2) of the Constitution. The reasonable limitations can be put in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. The Framers deemed it essential to permit imposition of reasonable restrictions in the larger

interests of the community and country. They intended to strike a proper balance between the liberty guaranteed and the social interests specified under art. 19(2). This is the difference between the First Amendment to the U.S. Constitution and art. 19(1)(a) of our Constitution. The decisions bearing on the First Amendment are, therefore, not useful to us except the broad principles and the purpose of the guarantee. However there should be a compromise between the interest of freedom of expression and special interests. Court cannot simply balance the two interests as if they are of equal weight. Courts commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of though should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg". - Santokh Singh vs.Delhi Administration (1973) 1 SCC 659 : 1973 SCC (Cri) 577 : (1973) 3 SCR 533 relied on.

Freedom of speech under art. 19(1)(a) means the right to express one's opinion by words of mouth, writing, printers, picture or in any other manner.

It will be seen that censorship is permitted mainly on social interests specified under art. 19(2) of the Constitution with emphasis on maintainance of values and standards of society. Therefore, the censorship by prior restraint must necessarily be reasonable that could be saved by the well accepted principles of judicial review. K.A. Abbas vs. Union of India (1970) 2 SCC 780 : (1971) 2 SCR 446 relied on.

The standard to be applied by the Board or Courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man. Court, however, wish to add a word more. The Censors Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation. Our country has had the distinction of giving birth to a galaxy of great sages and thinkers. The great thinkers and sages through their life and conduct provided principles for people to follow the path of right conduct. There have been continuous efforts at rediscovery and reiteration of those principles. - Ramesh vs. Union of India (1988) 1 SCC 668 : 1988 SCC (Cri) 266 affirmed; Bhagwati Charan Shukla vs. Provincial Government AIR 1947 Nag 1 : 47 Cri LJ 994 approved; Raj Kapoor vs. Laxman (1980) 2 SCC 175 : 1980 SCC (Cri) 383 : (1980) 2 SCR 512 relied on.

The producer may project his own message which the others may not approve of. But he has a right to "think out" and put the counter-appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and

open expression, however hateful to its policies. The democratic form of Government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of Government. - Maneka Gandhi vs. Union of India (1978) 1 SCC 248 : (1978) 2 SCR 621, Naraindas Indurkhya vs. State of M.P. (1974) 4 SCC 788 : 1974 SCC (Cri) 727 : (1974) 3 SCR 624 & Sakkal Papers (P) Ltd. vs. Union of India AIR 1962 SC 305 : (1962) 3 SCR 842 relied on; Abramson vs. United States 250 US 616 cited Whitney vs. California 274 US 357 (1927) : 71 L Ed 1045, Paul A. Freund - On Understanding the Supreme Curt 26 (1950) & Archibald Cox Society Vol. 24, p. 8, No. 1 November/December 1986 approved. The expression in the film with criticism of reservation policy or praising the colonial rule will affect the security of the State or sovereignty and integrity of India. There is no utterance in the film threatening to overthrow the Government by unlawful or unconstitutional means. There is no talk for secession either. Nor there is any suggestion for impairing the integration of the country. All that the film seems to suggest is that the existing method of reservation on the basis of caste is bad and reservation on the basis of economic backwardness is better. The film also deprecates exploitation of people on caste considerations. This is the range and rigour of the film. In this case, two Revising Committees have approved the film. The members thereof come from different walks of life with variegated experiences. They represent the cross-section of the community. They have judged the film in the light of the objectives of the Act and the guidelines provided for the purpose. Courts do not think that there is anything wrong or contrary to the Constitution in approving the film for public exhibition. The producer or as a matter of fact any other person has a right to draw attention of the Government and people that the existing method of reservation in educational institutions overlooks merits. He has a right to State that reservation could be made on the basis of economic backwardness to the benefit of all sections of community. Whether this view is right or wrong is another matter altogether and at any rate Court is not concerned with its correctness or usefulness to the people. Court is only concerned whether such a view could be advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy.

If the film is unobjectionable and cannot constitutionally be restricted under art. 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression. The fundamental freedom under art. 19(1)(a) can be reasonably restricted only for the purposes mentioned in art. 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of Government policies and operations is not a ground for restricting expression.

Court must practice tolerance to the views of others. Intolerance is an much dangerous to democracy as to the person himself.

The fundamental freedom under art. 19(1)(a) can be reasonably restricted only for the purposes mentioned in art. 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency.

The Judgment of the Court was delivered by K. Jagannatha Shetty, J. - These appeals by leave from the judgment of the Division Bench of the Madras Court revoking the 'U' Certificate' issued to a Tamil film called "Ore Oru Gramathile" (In One Village) for public exhibition. Civil Appeal Nos. 1668 and 1669 of 1988 are by the producer of the film and the Civil Appeal Nos. 13667 and 13668 of 1988 are by the Union of India.

2. The story of "One Oru Gramathile" can be summarised as follows :

A Brahmin widower, Shankara Sastry, has a talented daughter Gayathri. He apprehends that she would not be able to get admission to college because she belongs to a Brahmin community. He seeks advice from his close friend Devashyam, a Tahsildar. The Tahsildar who otherwise belongs to a very poor family and whose father was working in a local church respondents with gratitude. He devises a method to help Gayathri because it was through Sastry's father that he got proper education and rose to become a Tahsildar. He prepares a false certificate showing Gayathri as Karuppayee belonging to an Adi Dravida community and as an orphan. He issues the certificate under the reservation policy of the government for the benefit of 'backward communities' identified on caste consideration. On the basis of the false certificate, Karuppayee gets admitted to college and enters I.A.S. Witness to this arrangement is the brother-in-law of Tahsildar called Anthony who later turns out to be a villain of the piece.

Years later, Karuppayee, who was working in Delhi is sent to a rural village called Annavayil as a Special Officer for flood relief operations. Her father, Shankara Sastry happens to work in the same village as Block Development Officer. However, both of them pretend not to recognise each other. Karuppayee takes her work seriously and improves the living conditions of people to such an extent that she is held by them in high esteem. By a coincidence, after the death of the Tahsildar, Anthony comes to live in the same village and recognises Karuppayee. He starts blackmailing her and threatens to reveal the fraudulent means by which she got the caste certificate. His attempt is to extract money from her frequently. One evening when he visits Karuppayee's house, he is confronted by Shankara Sastry who puts a halt to his blackmailing. Later Anthony dies of sudden heart attack but not before he informs the government about the facts relating to Karuppayee. Upon preliminary enquiry, the government suspends both Karuppayee and her father and eventually they are put on trial in the court. The people of the village resentful of the action taken against Karuppayee rise as one man and demonstrate before

the court in a peaceful manner for her release. They also send petitions to the government.

Karuppayee and her father admit in the court the fact of their having obtained the false certificate but they attribute it to circumstances resulting by government reservation policy on caste basis. They say that they are prepared to undergo any punishment. They contend that some politicians are exploiting the caste consideration and that would be detrimental to national integration. They also argue that the reservation policy should not be based on caste, but called be on economic backwardness. Just about the time when the judgment is to be pronounced the court receives intimation from government that in the light of petitions received from the public, the case against Karuppayee and her father stands withdrawn. Karuppayee goes back to her government job with jubiliant people all round.

3. This is the theme of the picture presented. As usual, it contains some songs, dance and side attractions to make the film more delectable.

4. On August 7, 1987, the producer applied for certificate for exhibition of the film. The examining committee upon seeing the film unanimously refused to grant certificate. The appellant then sought for review by a Revising Committee which consisted of nine members. This Committee reviewed the film. Eight members were in favour of grant of certificate and one was opposed to it. The Chairman of the Censor Board however, referred the film to Second Revising Committee for review and recommendation. This again consisted of nine members and by majority of 5 : 4 they recommended for issue of 'U' Certificate subject to deletion of certain scenes. The 'U' certificate means for unrestricted public exhibition as against 'A' certificate restricted to adult only. The minority expressed the view that the film is treated (sic) in an irresponsible manner. The reservation policy of the government is provided in a highly biased and distorted fashion. They have also stated that the so called appeal in the film "India is One" is a hollow appeal, which in effect touches caste sensitivity of the Brahmin forward caste. One of the members felt that the impact of the film will create Law and order problem. Another member said that the film will hurt the feelings and sentiments of certain sections of the public. But the majority opined that the theme of the film is on the reservation policy of the government suggesting that the reservation could be made on the basis of economic backwardness. Such a view could be expressed in a free country like India, and it did not violate any guideline.

5. On December 7, 1987, 'U' certificate was granted for the exhibition of the film which was challenged before the High Court by way of writ petitions. The writ petitions were dismissed by the Single Judge, but the Division Bench upon appeal allowed the writ petitions and revoked the certificate. The Division Bench Largely depended upon the

majority view of the Second Revising Committee and also the opinion of the Examining Committee. The producer of the film and the Government of India by obtaining leave have appealed to this Court. The film has since been given National Award by the Directorate of Film Festival of the Government of India.

6. In these appeals the fundamental point made by Mr. Soli Sorabjee, learned counsel for the producer is about the freedom of free expression guaranteed under our Constitution even for the medium of movies. The counsel argued that the opinion on the effect of the film should not be rested on isolated passages disregarding the main theme and its message. The film should be judged in its entirety from the point of its overall impact on the public. The writings of the film must be considered in a free, fair and liberal spirit in the light of the freedom of expression guaranteed under our Constitution. The counsel said that the court is not concerned with the correctness or legality of the views expressed in the film and the court cannot limit the expression on any general issue even if it is controversial. Mr. Mahajan for the Union of India supported these submission. Mr. Varghese learned counsel for the contesting respondents did not dispute most of the propositions advanced for the appellants. He was, however, critical about the manner in which the reservation policy of the government has been condemned and the events and characters shown in the film. He contended that they are depicted in a biased manner and reaction to the film in Tamil Nadu is bound to be volatile.

7. Before examining these rival contentions, a few general observations may be made as to the utility of movies and the object of the Film Censors Board. The motion pictures originally considered as form of amusement to be allowed to titillate but not to arouse. They were treated as mere entertainment and not an art or a means of expression. This theory was based on the concept that motion picture was a business "pure and simple originated and conducted for profit, like other spectacles". It was considered strictly as an "amusement industry". It was so held in 1915 by the unanimous decision of the American Supreme Court in Mutual Film Corporation v. Industrial Commission (236 US 230 (1915)). It was not without significance since there were no talking pictures then. The talking pictures were first produced in 1926, eleven years after the Mutual (236 US 230 (1915)) decision (Encyclopedia Britannica, 1965, Vol. 15, p. 902). The later decisions of the American Supreme Court have therefore declared that expression by means of motion pictures is included within the free speech and free press guarantee of the First Amendment to the U.S. Constitution provides : "Congress shall make no law ... abridging the freedom of speech, or of the press." This amendment is absolute in terms and it contains no exception for the exercises of the right. Heavy burden lies on the State to justify the interference. The judicial decisions, however, limited the scope of restriction which the State could imposed in any given circumstances. The danger ruler was born in Schenck v. United States (249 US 47 : 63 L ED 470 (1919). Justice Holmes for a unanimous court, evolved the test of "clear and present danger." He used the danger

test to determination where discussion ends and incitement or attempt begins. The core of his position was that the First Amendment protects only utterances that seeks acceptances via the democratic process of discussion and agreement. But "Words that may have all effect of force" calculated to achieve its goal by circumventing the democratic process are however, not so protected.

8. The framework of our Constitution differs from the First Amendment to the U.S. Constitution. Article 19(1)(a) of our Constitution guarantees to all citizens the right to freedom of speech and expression. The freedom of expression means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinion. The communication of ideas could be made through any medium, newspaper, newspaper, magazine or movie. But this right is subject to reasonable restrictions on ground set out under Article 19(2) of the Constitution. The reasonable limitations can be put in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. The Framers deemed it essential to permit imposition of reasonable restrictions in the larger interest of the community and country. They intended to strike a proper balance between the liberty guaranteed and the social interest specified under Article 19(2). (See Santokh Singh v. Delhi Administration ((1973) 1 SCC 659 : 1973 SCC (Cri) 577 : (1973) 3 SCR 533).)

9. This is the difference between the First Amendment to the U.S. Constitution and Article 19(1)(a) of our Constitution. The decisions bearing on the First Amendment are, therefore, not useful to us except the broad principles and the purpose of the guarantee.

10. Movie doubtless enjoys the guarantee under Article 19 (1)(a) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free market-place like the newspaper, magazine or advertisement. Movie motivates though and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will a complete and immediate influence on, and appeal for everyone who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication. It is said : "as an instrument of education it has unusual power to impart information, to influence specific attitudes towards objects of social value, to affect emotions either in gross or in microscopic proportions, to affect health in a minor degree through sleep disturbance, and to affect profoundly the patterns of conduct of children". (See Reader in

Public Opinion and Communication, Second Edition by Bernard Berelson and Morris Janowitz, p. 390.) The authors of this book have demonstrated (at pp. 391 to 401) by scientific tests the potential of the motion pictures in formation of opinion by spectators and also on their attitudes. These tests have also shown that the effect of motion pictures is cumulative. It is proved that even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instil or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free marketplace just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary.

11. Here again we find the difference between the First Amendment to the U.S. Constitution and Article 19(1)(a) of our Constitution. The First Amendment does not permit any prior restraint, since the guarantee of free speech is in unqualified terms. This essential difference was recognised by Douglas, J., with whom Black, J., concurred in Kingsley Corporation v. Regents of the University of the New York (3 L Ed 1512, 1522). In holding that censorship by "prior restraint" on movies was unconstitutional, the learned Judge said :

    If we had a provision in our Constitution for "reasonable" regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible. Judges sometimes try to read the word "reasonable" into the First Amendment or make the rights it grants subject to reasonable regulation But its language, in terms that are absolute is utterly at war with censorship. Different questions may arise as to censorship of some news when the nation is actually at war. But any possible exceptions are extremely limited.

12. The Cinematograph Act, 1952 ("the Act") which permits censorship on movies is a comprehensive enactment. Section 3 of the Act provides for constitution of Board of Film Censors. Section 4 speaks of examination of films. A film is examined in the first instance by an Examining Committee. If it is not approved, it is further reviewed by a Revising Committee under Section 5. Section 5-A states that if after examining a film or having it examined in the prescribed manner, the Board considers that the film is suitable for unrestricted public exhibition, such a certificate is given which is called 'U' certificate.

13. Section 5-B provides principles for guidance in certifying films. It is significant to note

that Article 19(2) has been practically read into Section 5-B(1). Section 5-C confers right of appeal to Tribunal against refusal of certificate. Under Section 6, the Central Government has revisional power to call for the record of any proceeding in relation to any film at any stage, where it is not made the subject matter of appeal to the Appellate Tribunal.

14. Under Section 8 of the Act, the Rules called the Cinematograph (Certification) Rules, 1983 have been framed. Under Section 5-B(2) the Central Government has prescribed certain guidelines for the Censors Board. Guideline (1) relates to the objectives of film censorship. The Board shall ensure that : (a) the medium of film remains responsible and sensitive to the values and standards of society; (b) artistic expression and creative freedom are not unduly curbed and (c) censorship is responsible to social change.

15. Guideline (2) requires the Board to ensure that : (i) anti-social activities such as violence are not glorified or justified; (ii) the modus operandi of criminal or other visuals or words likely to incite the commission of any offence are not depicted; (iii) pointless or avoidable sense of violence, cruelty and horror are not shown; (iv) human sensibilities are not offended by vulgarity, obscenity and depravity; (vi) the sovereignty and integrity of India is not called in question; (vii) the security of the State is not jeopardised or endangered; (viii) friendly relations with foreign states are not strained; and (ix) public order is not endangered.

16. Guideline (3) also requires the Board to ensure that the film : (i) is judged in its entirely from the point of view of its overall impact; and (ii) is examined in the light of contemporary standards of the country and the people to whom the film relates.

17. It will be thus seen that censorship is permitted mainly on social interests specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society. Therefore, the censorship by prior restraint must necessarily be reasonable that could be saved by the well accepted principles of judicial review.

18. In K. A. Abbas v. Union of India ((1970) 2 SCC 780 : (1971) 2 SCR 446) a Constitution Bench of this Court considered important questions relating to pre-censorship of cinematograph films in relation to the fundamental right of freedom of speech and expression. K. A. Abbas, a noted Indian journalist and film producer produced a short documentary film called "A Tale of Four Cities". In that film he sought to contrast the self-indulgent life of the rich in metropolitan cities with the squalor and destitution of labouring masses who helped to construct the imposing buildings and complexes utilised by the rich. The film also goes on to explore the theme of exploitation of women by me, dealing in particular with prostitution. Abbas applied to the Board of Film Censors for a

'U' certificate, permitting unrestricted exhibition of the film. He was informed by the regional officer that the Examining Committee had provisionally concluded the film should be restricted to adults. The Revising Committee concurred in this result, whereupon Abbas, after exchanging correspondence with the Board, appealed to Central Government. The government decided to grant 'U' certificate provided that the scenes in the red light district were deleted from the film. Abbas challenged the action of the Board mainly on for issues out of which two did not survive when the Solicitor General stated before the court that the government set on foot legislation to effectuate the policies at the earliest possible date. The two issues which survived thereupon were : (a) that pre-censorship itself cannot be tolerated under the freedom of speech and expression; (b) that even if it were a legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action.

19. With regard to the power of pre-censorship, Hidayatullah, C.J., observed : (SCC p. 802, para 49 : SCR pp. 473-74)

    The task of the censor is extremely delicate .... The standards that we set out for our censors must be make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and forever from human though and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in it deal form and the line is to be drawn were the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth

20. Recently, Sabyasachi Mukharji, J., in Ramesh v. Union of India ((1988) 1 SCC 668 : 1988 SCC (Cri) 266) which is popularly called "Tamas" case laid down the standard of judging the effect of the words or expression used in the movie. The learned Judge quoting with approval of the observation of Vivian Bose, J., as he then was, in the Nagpur High Court in the case of Bhagwati Charan Shukla v. Provincial Government (AIR 1947 Nag 1 : 47 Cri LJ 994) said : (SCC p. 676, para 13)

    That the effect of the words must be judged form the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. This is our opinion, is the correct

approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law, "the man on the top of a Clampham omnibus".

21. We affirm and reiterate this principle. The standards to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man. We, however, wish to add a word more. The Censors Board should exercise considerable circumspection on movies affecting the morality or ecency of our people and cultural heritage of the country. The moral values in particular, should ot be allowed to be sacrificed in the guise of social change or cultural assimilation. Our country has had the distinction of giving birth to a galaxy of great sages and thinkers. The great thinkers nd sages through their life and conduct provided principles for people to follow the path of right onduct. There have been continuous efforts at rediscovery and reiteration of those principles. di-guru Shankaracharya, Ramanujacharya, Madhwacharya, Chaitanya Maha Prabhu, Swami am Krishan Paramhansa, Guru Nanak, Sant Kabir and Mahatma Gandhi, have all enlightened ur path. If one prefers to go yet further back, he will find "Tirukkural" the ethical code from Tiruvalluvar teaching which is "a general human morality and wisdom". Besides, we have the concept of "Dharam" (righteousness in every respect) a unique contribution of India civilization to humanity of the world. These are the bedrock of our civilization and should not be allowed to be shaken by unethical standards. We do not, however, mean that the censors should have an orthodox or conservative outlook. Far from it, they must be responsive to social change and they must go with the current climate. All we wish to state if that the censors may display more sensitivity to movies which will have a markedly deleterious effect to lower the moral standards of those who see it. Krishna Iyer, J., in Raj Kapoor v. Laxman ((1980) 2 SCC 175 : 1980 SCC (Cri) 383 : (1980) 2 SCR 512) in words meaningful expressed similar thought. The learned Judge said : (SCC p. 180, para 10, SCR p. 517)

> The ultimate censorious power over the censors belongs to the people and by indifference, laxity or abetment, pictures which pollute public morals are liberally certificated; the legislation, meant by Parliament to protect people's good morals, may be sabotaged by statutory enemies within.

22. With these prefatory remarks, let us now turn to the reasons which weighed with the High Court of revoke the 'U' certificate and rule out the film altogether. The High Court has found fault with the constitution of the First Revising Committee. It has held that the Revising Committee was constituted hurriedly and its constitution by "delegate Board Member" was illegal and without authority of law. The Committee also showed unusual

favour to the producer by reviewing the film with not (sic) haste. In the absence of a First Revision Community having come into existence as known to law, the High Court said that the constitution of the Second Revising Committee was invalid and inoperative.

23. We do not think that the High Court was justified in reaching this conclusion. Under the rules, the Regional Officer shall appoint an Examining Committee to examine the film. The reports and records relating thereto shall be treated as confidential. Rule 22 inter alia, states that after screening the film, the Examining Officer within three working days send the recommendations of all the members of the Examining Committee to the Chairman. Rule 24(1) provides for constitution of a Revising Committee. It states that on receipt of the record referred to in Rule 22, the Chairman may, of his motion or on the request of the applicant, refer the movie to a Revising Committee. In the instant case, the Chairman did not constitute the First Revising Committee but a Member of the Board did. The question is whether the member of the Board was competent to constitute the Revising Committee. Our attention was drawn to the government order dated January 21, 1987 made under Section 7-B of the Cinematograph Act. The order reads :

No. 803/1/86-F(C)

Government of India

Ministry of Human Resource Development Department of Culture

New Delhi, January 21, 1987

ORDER

In exercise of the powers conferred by Section 7-B of the Cinematograph Act, 1952 (37 of 1952) (hereinafter referred to as the said Act), the Central Government hereby directs that any power, authority or jurisdiction exercisable by the Board of Film Certification (hereinafter referred to as the Board) in relation to matters specified in Section 4, sub-sections (3) and (4) of Section 5, Section 5-A and Section 7-C of the said Act shall also be exercisable subject to the condition given below by the following members of the Board at the Regional Office indicated against each, with immediate effect and until further orders :

Shri. Samik Banerjee, Calcutta

Ms. Maitreyi Ramadhurai, Madras

Dr. B. K. Chandrashekar, Bangalore

This order clearly states that the power of the Board shall also be exercisable by the specified members within their regional office. For Madras region Ms. Maitreyi Ramadhurai has been constituted to exercise such powers.

24. It cannot contended that the Central Government has not power to delegate the powers of to issue the said order. Section 7-B empowers the Central Government to issue general or special order directing that any power, authority or jurisdiction exercisable by the Board under the Act shall be exercisable also by the Chairman or any other member of the Board. The section further provides that anything done or action taken by the Chairman or other members specified in the order shall be deemed to be a thing done or action taken by the Board. From the provisions of Section 7-B read with the government order dated January 21, 1987, it becomes clear that the constitution of the First Revising Committee by the member at the Madras Regional Office is not vulnerable to any attack. It is legally justified and unassailable. The conclusion to the contrary reached by the High Court is apparently unwarranted.

25. We also do not find any justification for the observation of the High Court that there was unusual favour shown to the producer by the First Revising Committee in reviewing the film. It is true that the film was revised within 23 hours of the presentation of the application. But there is no reason to attribute motives either to members of the Committee or to the producer. In matters of certification of films, it is necessary to take prompt action by the respective authorities. The producer who has invested a large capital should not be made to wait needlessly. He has a statutory right to have the validity of the film determined in accordance with law. It would be, therefore, proper and indeed appreciative if the film is reviewed as soon as it is submitted.

26. There are two other side issues which may be disposed of at this stage. The scene with song No. 2 in reel No. 3 and the comments by the heroine on looking at the photo of Dr. Ambedkar have come under serious criticism. It is said that the song has the effect of spreading 'kulachar' which is 'poisonous message' to the depressed classes not to educate their children. The complaint, if true, is serious. We, therefore, gave our anxious consideration to the grievance. We, as did the High Court, viewed the movie. The cobbler sings the song in question with his grandson who is eager to go to school. The song contains references to Kamaraj, Anna and MGR who without even college education became Chief Minister. The cobbler asks the grandson : "What are you going to achieve by education ? and don't forsake the profession you know and you can educate yourself as a cobbler." While these and other exchanges are going on between the cobbler and grandson, the heroin comes and insists that the boy should go to school. She promises to contribute Rs. 50 as an incentive to the cobbler every month also to make good his income deprived of by the boy's earning. They agree to her suggestion

with "Vanakkam, Vanakkam". The song thus ends a happy note and the cobbler agrees to send his grandson to school. It is true as pointed out by counsel for the respondents that one or two reference in the song are not palatable, but we should not read too much into that writing. It is not proper to form an opinion by dwelling upon stray sentences or isolated passages disregarding the main theme. What is significant to note is that the cobbler ultimately does not insist that his grandson should continue the family pursuits. He accepts the suggestion made by the heroine. It is, therefore, wrong to conclude that the song was intended to convey poisonous message against the interests of depressed classes.

27. The criticism on the alleged comments on Dr. Ambedkar is equally unsustainable. The confusion perhaps is due to the pronounced accent of an English word in the course of Tamil conversion. The matter arises in this way : Sastry shows the photograph of Dr. Ambedkar to heroine and enquiries whether she likes it. Then she makes certain comments. According to the High Court, she states : "Dr. Ambedkar worked for the poor. Not for 'par'." It is said that 'par' in Tamil means equality and if she says 'not for the par', it means that Dr. Ambedkar did not work for equality. If she states like that, it is certainly objectionable since Dr. Ambedkar did everything to have an egalitarian society. But while viewing the film, we could not hear any such word used by the heroine. On the other hand, we distinctly noted her saying. "Dr. Ambedkar worked for the poor. Not for power". This being the remark there is no basis for the criticism of the High Court.

28. The last complaint and really the nub of the case of the respondent is about the reel No. 14 covering the court scene where Karuppayee and Sastry are prosecuted for offence of obtaining a false caste certificate. The reel No. 14 contains almost a dialogue between the prosecution lawyer and Karuppayee. She criticises the reservation policy of the government. She states that during the British regime, the people enjoyed educational freedom, and job opportunities which were based on merit criteria and not vote cast in a particular constituency. Then the prosecution lawyer puts a question "Why do you regret this Madam ? Was not 'Bharat Matha' under shackles then ?" She replies : "You are right. Then 'Bharat Matha' was in chains (vilangu, is the Tamil word used for shackles which also means animals). Now 'Bharat Matha' is under animals' hands". On a further question from the prosecutor she explains that her reference to 'animals' hands' is only to those who incite caste, language and communal fanaticism, thus confusing people and making it whit profession. She also states that it is the government and its laws that have made her father to tell a lie. The presiding Judge interrupts with a question : "What is wrong in the government approach ? Can you elaborate ?" She replies : "That it is wrong not to give credence to her merit and evaluate the same on the basis of her caste and such evaluation would put a bar on the progress. "She goes on to explain : "Your laws are the barriers, Sir. You have made propaganda in nook and

corner stating "Be an Indian, Be an Indian'. And if I proudly say I am an Indian then the government divides saying 'no, no, no, You are a Brahmin, you are a Christian, you are a Muslim. It is the government that divides." Then she puts a question to herself : "What is the meaning of "Be an Indian' ?" She explains that it must be without caste, creed and communal considerations, from Kashmir to Kanyakumari, the country must be one. She then blames the government with these words : "The government in dealing with all has no one face. Take any application form they want to know your caste and religion. When all are Indians where is the necessity for this question. You have divided the people according to caste. Then if you reel off on "National integration" will not the public laugh."

29. As to the reservation policy to those who are backward she says : "On God's name, I have no objection in providing all concession to those who are backward. The list of those belonging to forward sections and backward sections could be prepared on the basis of economic considerations. And those below a specified limit of income be included in the backward list."

30. How did the High Court look at it ? On the remark of heroine as to the situations that existed during British administration, the High Court observed thus :

It is preposterous and offensive to claim that education was independent when India was under British rule and that, after independence it is not there.

31. The High Court also said :

That any denigration of Rule of law would never bring orderly society. To preach that it is only law that prompted them to utter falsehood and in its absence they would not done it is a wrong way presenting a viewpoint.

32. As to the allegations that 'Bharat Matha' is now in the hands of politicians, who are instigating the masses on the basis of caste and language, etc., the High Court remarked :

If this sort decrying India for being an independent nation is to be projected in films repeatedly, then in course of time, citizens will lost faith in the integrity and sovereignty of India. With this sort of glorification made, how could it be claimed that the film stands for national integration. That was why one member rightly said that it is a hollow claim. Hence guideline 2(vi) and (vii) are contravened.

33. On the total impact of the film, the High Court observed :

That certain peculiar factors will have to be taken into account because of guideline 3 (i) and (ii). This film is in Tamil. It deals with reservations now extended to large

sections of people on a particular basis, and who have suffered for centuries, and at a time when they have not attained equality and when their valuable rights which are secured under the Constitution is attempted to be taken away, they get agitated. This film taken in Tamil for Tamil population on being screened in Tamil Nadu, will certainly be viewed in the background of what had happened in Tamil Nadu during the preceding four decades, and the reactions are bound to be volatile.

34. We find it difficult to appreciate the observations of the High Court. We fail to understand how the expression in the film with criticism of reservation policy or praising the colonial rule will affect the security of the State or sovereignty and integrity of India. There is no utterance in the film threatening to overthrow the government by unlawful or unconstitutional means. There is no talk for succession either. Nor there is any suggestion for impairing the integration of the country. All that the film seems to suggest is that the existing method of reservation on the basis of caste is bad and reservation on the basis of economic backwardness is better. The film also deprecates exploitation of people on caste considerations. This is the range and rigour of the film.

35. The High Court, however, was of opinion that public reaction to the film, which seeks to change the system of reservation is bound to be volatile. The High Court has also stated that people of Tamil Nadu who have suffered for centuries will not allow themselves to be deprived of the benefits extended to them on a particular basis. It seems to us that the reasoning of the High Court runs afoul of the democratic principles to which we have pledged ourselves in the Constitution. In democracy it is not necessary that everyone should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means.

36. The democracy is a government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. What Walter Lippmann said in another context if relevant here :

> When men act on the principle of intelligence, they go out to find the facts When they ignore it, they go inside themselves and find out what is there. They elaborate their prejudice instead of increasing their knowledge.

37. In Maneka Gandhi v. Union of India ((1978) 1 SCC 248 : (1978) 2 SCR 621) Bhagwati, J., observed : (SCC pp. 305-06, para 29 : SCR p. 696)

> Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic setup. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.

38. The learned Judge in Naraindas Indurkhya v. State of Madhya Pradesh ((1974) 4 SCC 788 : 1974 SCC (Cri) 727 : (1974) 3 SCR 624) while dealing with the power of the State of select text books for obligatory use by students said : (SCC p. 816, para 23 : SCR p. 650) 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 (250 US 616) "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 analyse and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest.

39. In Sakal Papers (P) Ltd. v. Union of India ((1962) 3 SCR 842, 866 : AIR 1962 SC 305), Mudholkar, J. said :

> …. 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 legislature and government and must be preserved.

40. Movie is the legitimate and the most important medium in which issues of general concern can be treated. The producer may project his own message which the others may not approve of. But he has a right to "think out" and put the counter-appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and open expression, however hateful to its policies. As Professor Freund puts it : "The State may not punish open talk, however hateful, not for the hypocritical reason that Hyde Parks are a safety valve, but because a bit of sense may be salvaged from the odious by minds striving to be rational, and this precious bit will enter into the amalgam which we forge.

41. "When men differ in opinion, both sides ought equally to have the advantage of being heard by the public." (Benjamin Franklin). If one is allowed to say that policy of the government is good, another is with equal freedom entitled to say that it is bad. If one is allowed to support the government scheme, the other could as well say, that he will not support it. The different views are allowed to be expressed by proponents and opponents not because the are correct, or valid but because there is freedom in this country for expressing even differing view on any issue.

42. Alexander Meiklejohn perhaps the foremost American philosopher of freedom of expression, in his wise little study neatly explains :

> When men govern themselves, it is they - and no one else - who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, unamerican as well .... American .... If then, on any occasion in the United States it is allowable, in that situation, to say that the Constitution is a good document it is equality allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may likewise be publicly argued that it is immoral and unnecessary. It it may be said that American political institutions are superior to those of England or Russia or Germany it may with equal freedom, be said that those of England or Russia or Germany are superior to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant …… To be afraid of ideas, any idea, is to be unfit for self-government." [Political Freedom (1960) at 27].

He argued, if we may say so correctly, that he guarantees of freedom of speech and of the press are measures adopted by the people as the ultimate rulers in order to retain control over the government, the people's legislative and executive agents.

43. Brandies, J., in Whitney v. California (274 US 357, 375-78 (1927) : 71 L Ed 1045) propounded probably the most attractive free speech theory :

> that the greatest menace to freedom is an inert people; that public discussion is a political duty, It is hazardous to discourage though, 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 of evil counsels is good ones.

44. What Archibald Cox said in his article though on First Amendment is equally relevant here : Some propositions seem true or false beyond rational debate. Some false and harmful, political and religious doctrine gain wide public acceptance. Adolf Hitler's

brutal theory of a 'master race' is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may proved 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 licence 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 (Society Vol. 24, p. 8, No. 1 November/December, 1986).

45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg".

46. Our remarkable faith in the freedom of speech and expression could be seen even from decisions earlier to our Constitution. In Kamal Krishna Sircar v. Emperor (AIR 1935 Cal 636 : 36 Cri LJ 1370), the Calcutta High Court considered the effects of a speech advocating a change of government. There the accused was convicted under Section 124-A of Penal Code of making a speech recommending 'Bolshevik' form of government to replace the then existing form of government in Calcutta. While setting aside the conviction and acquitting the accused, Lord Williams, J., who delivered the judgment observed : (AIR p. 637)

> …. All that the speaker did was to encouraged the youngmen, who, he was addressing, to join the Bengal Youth League and to carry on a propaganda for the purpose of inducing as large a number of people in India as possible to become supporters of the idea of communism as represented by the present Bolshevik system in Russia.
>
> It is really absurd to say that speeches of this kind amount to sedition. If such were the case, then every argument against the present form of government and in favour of some other form of government might be alleged to lead to hatred of the government and it might be suggested that such ideas brought the government into contempt. To

suggest some other form of government is not necessarily to bring the present government into hatred or contempt.

47. To the same effect is the observation by the Bombay High Court in Manohar Damodar Patil v. Government of Bombay (AIR 1950 Bom 210 : 51 Cri LJ 829 : 52 Bom LR 275). There the writer of an article in a newspaper was convicted for an offence under the Press (Emergency Powers) Act, 1931, for incitement to violence. The writer had suggested the people to follow the example of China by rising against Anglo-American Imperialism and their agents. He had also suggested his readers to pursue the path of violence as the Chinese people did, in order that Anglo-American Imperialism should be driven out of this county. Chagla. C.J. while quashing the conviction said : (AIR p. 213)

It is true that the article does state that the working class and the toiling masses can be hold of power through the path of revolution alone. But the expression "revolution" is used here, as is clear from the context, in contradistinction to reformism or gradual evolution. The revolution preached is not necessarily a violent revolution As the writer has not stated in this article that the toiling masses should take up arms and fight for their rights and thus achieve a revolution we refuse to read this expression as inciting the masses to violent methods.

48. In Niharendu Dutt Majumdar v. Emperor (AIR 1942 FC 22 : 43 Cri LJ 504 : 46 CWN 9), the Federal Court examined the effects of a vulgar and abusive outburst against the government made by the accused for which he was convicted under Rule 34 of the Defence of India Rules. Gwyer, C. J., while acquitting the person commented more boldly : (AIR p. 27)
There is an English saying that hard words bread no bones; and the wisdom of the common law has long refused to regard as actionable any words which, though strictly and liberally defamatory, would be regarded by all reasonable men as no more than mere vulgar abuse.

The speech now before us is full of them But were cannot regard the speech, taken as a whole as inciting those who heard it, even though they cried "shame shame" at intervals, to attempt by violence or by public disorder to subvert the government of the time being established by law in Bengal or elsewhere in India. That the appellant expressed his opinion about that system of government is true, but he was entitled to do so; and his reference to it were, we might almost say, both commonplace and in common form, and unlikely to cause any government in India a moment's uneasiness. His more violent outbursts were directed against the then Ministry in Bengal and against the Governor in Bengal in his political capacity but we do not feel able to say

that his speech whatever may be thought of the form in which it was expressed, exceeded the legal limits of comment or criticism.

49. Even the European Court's approach in protecting the freedom of expression is not different although they have the extensive list of circumstances for limiting the freedom. Article 10 of the European Convention of Human Rights and Fundamental Freedom provides :

(1) Everyone has the right to freedom of expression.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in democratic society in the interests of national security, territorial integrity or public safety, for the prevention of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It appears that the second paragraph of Article 10 virtually removes the right purportedly guaranteed by the first paragraph. However, the European Court in Handyside v. United Kingdom (1976 EHRR 737) observed : (EHRR p. 754)

The court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.

50. This takes us to the validity of the plea put forward by the Tamil Nadu Government. In the affidavit filed on behalf of the State Government, it is alleged that some organisations like the Tamil Nadu Scheduled Castes / Scheduled Tribes People's Protection Committee, Dr. Ambedkar People's Movement, the Republican Party of India have been agitating that the film should be banned as it hurt the sentiments of people belonging to Scheduled Castes/Scheduled Tribes. It is stated that General Secretary of the Republican Party of India has warned that his party would not hesitate to damage the cinema theatres, which screen the film. Some demonstration made by people in front of "The Hindu" office on March 16, 1988 and their arrest and release on

bail are also referred to. Republican Party members and Dr. Ambedkar People's Movement further allege with their demand for banning the film. With these averments it was contended for the State that the exhibition of the film will create very serious law and order problem in the State.

51. We are amused yet troubled by the stand taken by the State Government with regard to the film, which has received the National award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it ? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.

52. In this case, two Revising Committees have approved the film. The members thereof come from different walks of life with variegated experiences. They represent the cross-section of the community. They have judged the film in the light of the objectives of the Act and the guidelines provided for the purpose. We do not think that there is anything wrong or contrary to the Constitution in approving the film for public exhibition. The producer or as a matter of fact any other person has a right to draw attention of the government and people that the existing method of reservation in educational institutions overlooks merits. He has a right to state that reservation could be made on the basis of economic backwardness to the benefit of all sections of community. Whether this view is right or wrong is another matter altogether and at any rate we are not concerned with its correctness or usefulness to the people. We are only concerned whether such a view could be advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy.

53. We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quickened of convenience or expediency. Open criticism of government policies an operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.

54. In the result, we allow these appeals, reverse the judgment of the High Court and dismiss the writ petitions of the respondents. In the circumstances of the case, however, we make no order as to costs.