CHAPTER: III

CONSTITUTIONAL GUARANTEE

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II) DURING EMERGENCY
Even before India achieved her independence in 1947, the Constituent Assembly had begun its deliberations. As the first great achievement, the Assembly adopted the historic Objectives Resolution on 22nd Jan 1947 moved by Pt. Nehru. This formed the basis not only of various provisions of the Constitution but of its preamble also. The Assembly declared in its resolution its firm resolve to draw up a constitution, guaranteeing, inter alia, Freedom of thought and expression.  

After adopting the aforesaid resolution, on 24th Jan 1947, the Advisory Committee on Fundamental Rights, Minorities etc came into existence by a resolution proposed by Pt. Govind Ballabh Pant who expressed the hope that the Advisory Committee would function keeping in mind the ideals of humanity.

The Advisory Committee in its first meeting on 27th February 1947 setup five Sub - Committees including one on Fundamental Rights. Achariya Kriplani was elected the chairman of Sub - Committee.

In its meeting on 24th March 1947 the Sub - Committee considered the various documents presented before it which consisted of all proposals, suggestions and memoranda on fundamental rights prepared by B.N.Rau and others members. The Sub - Committee decided to take up Munshi’s draft for consideration. Article (V) of the draft dealt with the freedom of expression. It provided:

1. Every citizen within the limits of the law of the union and in accordance therewith has:
   
   a. The right of free expression of opinion;

2. The press shall be free subject to such restrictions imposed by the law of the union as in its opinion may be necessary in the interest of public order and morality.

The Sub-Committee resolved that the right should be extended only to the citizens and accordingly the clause was revised and ran as following.

There should be liberty for the exercise of followig rights, subject to public order and morality: (a) the right of the citizens to freedom of speech and expression. The publication or utterances of seditious, obscene, slanderous libelous or defamatory matter shall be actionable or punishable in accordance with the law.

B.N. Rau, on the basis of recommendations of the Sub - Committee prepared a draft report and submitted before it on 3rd April 1947.

4. Some other drafts were also presented before the Sub.Committee. Dr. Ambakdar’s draft laid emphasis on fundamental rights, he did not feel it necessary to justify the inclusion of these rights in the constitution as he observed that their necessity and importance have received an express recognition in almost .........................Contd:
for its consideration. This annexure of draft report contained two chapters; the first chapter enumerated justiciable rights while the second chapter included non-justiciable rights. The right to freedom of speech and expression figured as justiciable right under clause (9) which provided.

"There shall be liberty for the exercise of following rights subject to public order and morality. (a) The right of every citizen to freedom of speech and expression. The publication or utterances of seditious, obscene, slanderous, libelous or defamatory matter shall be actionable or punishable in accordance with law."

The Sub-Committee drafted the rights during the ten meetings

Contd:............ every Constitution of the world.

Prof. K.T. Shah in his note stressed that the basic objective of the constitution was the protection or guarantee of life, liberty and pursuit of happiness as the birth right of all the human beings. He categorised these rights as political, civil, economic and social. He placed the 'right of speech' written or by means of press' under clause (9) of his draft as Political Right. To give the right more effectiveness be under clause (11) freed it from censorship by any public authority.

A.K. Ayyar concentrated upon the need for making a distinction between rights which were justiciable and rights which were merely intended as a guide and directing objectives to state policy. He was of the opinion that all the justiciable rights should be formulated in very general and comprehensive terms.

Sardar Hamam Singh's draft on the other hand sought to give express recognition to the right to equality before the law and the freedom of the press.

Thus all the members highlighted the importance of the fundamental rights and expressed the view that these rights must be given due constitutional recognition. But simultaneously they opined that these rights can not be absolute in nature and restrictions may be placed upon them, whenever necessary.

5. Commenting on the draft report Prof. Shah observed that freedoms guaranteed under Article 9 have been subjected to "public order and morality." He pointed out with the help of various instances that the term morality is very vague and its connotation changes from time to time, and in the guise of this 'public morality' in various countries basic freedoms have been denied to the citizens. He stressed the need for defining the term suitably or to drop this exception..........................................................Contd:
held in March - April 1947. Early in the April it passed its tentative conclusions to the Sub-Committee on Minorities of the Advisory Committee. (It has already drafted its first report on 4th April 1947). Therefore, considering the recommendations made by Sub-Committee on Minorities and reconsidering their own draft report, the Sub-Committee on Fundamental Rights submitted its report on 16th April 1947 to the Advisory Committee.  

Contd: A.K. Ayyar drew the attention of the Sub-Committee towards the fact that few rights have been made subject to "public morality" while the others have not been subjected to this qualification. He pointed out that there may be circumstances, i.e., war time or a similar emergency where it would be difficult to bring such cases under public order and morality. In this regard he made a reference to the Defence of India Act as well as rules made thereunder and desired that the words "Security and Defence of the state or National Security" be added to the words public order. Similarly with regard to freedom of speech and expression, he stressed the need of examining the provisions in the light of Sec. 153 - A of Indian Penal Code. He pleaded for the inclusion of words or "calculated to promote class hatred" as he feared that in clause 9 (a) reference to "obscene, slanderous and libelous utterances" might give an impression that preaching class hatred might not come under that clause.

6. Under this draft report the freedom of speech and expression was guaranteed under clause (10) in the following words:

There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the Unit as the case may be, is threatened:
The Advisory Committee on Fundamental Right and Minorities met on 21st April to discuss the recommendations made by the Sub-Committee on Fundamental Rights. The Advisory Committee submitted its interim report to the Constituent Assembly on 29th April 1947. The Committee observed that it has given due credence to the view that fundamental rights should be made justiciable and laid stress on the need to make adequate provisions to define the scope of the remedies for the enforcement of Fundamental Rights.

A.K. Ayyar conveyed his intention of moving certain amendments to the report submitted by the Sub-Committee. He wanted to include the words "likely to promote class hatred" in clause (10) of the draft report. He pointed out that most of the things enumerated are governed by penal code and, therefore, the words "class hatred have to be added because it was not covered under "defamation" or "sedition" failing which people may get licence to promote class hatred. Shyama Prasad Mukherjee raised his apprehension about the viability of these words but C. Rajgopalachari vehemently supported A.K. Ayyar as he was of the view that fundamental peace and orderly progress of the country is possible only when the communal peace and harmony exist in the country.

K.M. Munshi while expressing a contrary view felt that the right of free expression which have the effect of promoting communal hatred should be restricted only when it goes to the extent of causing violence or crime. Bakshi Tek Chand also lended his support to this view. Hence it was decided that it should be limited to the occasion when there was grave danger to public order and so the original clause was sufficient to cover the situation. The proposed amendment was lost and after redrafting by the committee the said right [(which till now was as clause 10)] was renumbered as clause 8 with amended provision. Thus Clause 8 (a) providing for freedom of speech and expression ran into following words:

There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit, as the case may be, is threatened:

(a) The right of every citizen to freedom of speech and expression.

Provisions may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libelous, or defamatory matter actionable or punishable.
In the Constituent Assembly, Pt. H. N. Kunzru raised doubts about the justiciable character of certain rights as the imposition of various restrictions on the exercise of rights destroy their justiciable character. He referred as an example clause (8) of the report. Some other members also echoed the same view. At this Junction Patel dispelled the doubts of members saying that it was only a consideration stage and the members were free to move amendments.  

The Constituent Assembly after discussing the report sent it to the Constitutional Advisor B.N. Rau along with amendments to be incorporated in the Draft Constitution and for further consideration by Drafting Committee which it appointed through a resolution which read as:

8. **Sardar Patel** moved the clause (8) for the consideration of Constituent Assembly but dropped the provision to the said clause. Somnath Lahiri moved an amendment so that following provision may be added to existing clause 8 (a). "Liberty of the press shall be guaranteed subject to such restrictions as may be imposed by law in the interest of public order or morality, (b) The press shall not be subjected to censorship and shall not be subsidised. No security shall be demanded for keeping a press or the publication of any book or other printed matter. But the proposal was opposed by some members as in their view it was quite independent and might be considered later on."

**Lahiri**s another proposed amendment sought the substitution of the words "defence of union" in place of the "security of the union". He also pleaded for the deletion of the word "sedition" from clause (8). He feared that it was very vague and may be abused by the Government but Patel pointed out that the word "defence" covered only an external aspect of the security and did not indicate any thing about the internal chaos, the amendment was put to vote and consequently lost.

K.M. Munshi sought a change in the opening words of clause (8) and observed that the words "except in grave emergency" should replace the words "to the existence of grave emergency" as the words sought to be inserted sound a better sense.
To scrutinise the draft of the text of Constitution as prepared by the Constitutional Advisor, giving effect to the decisions, already taken by Constituent Assembly including ancilliary methods which should be provided in such a constitution, and to submit to the Constituent Assembly the **Draft Constitution** as prepared by the Committee.  

The Drafting Committee after scrutinising the Draft Constitution and material before it prepared a draft of the revised Constitution of India and submitted it to the Constituent Assembly on **21st Feb, 1948**. Under this Draft Constitution the right to freedom of speech and expression fell under Article 13 which provided:

(1) Subject to the other provisions of this Article, all citizens shall have the right (a) to freedom of speech and expression.

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Contd: The amendment was accepted. Thus the Clause(8) as approved by the Constituent Assembly after amendment provided.

> There shall be liberty for the exercise of following rights subject to public order and morality and except in grave emergency declared to be such by the Government of the Union or the unit concerned, as the case may be, is threatened: (a) the right of every citizen to freedom of speech and expression.

> Provision may be made by law to make the publication or utterance of seditious, obscene blasphemous, slanderous or defamatory matter actionable or punishable.

9. Dr. B.R. Ambedkar was elected the Chairman of the Drafting Committee at its first meeting held on 27th October 1947.

The Drafting Committee decided to revise sub-clause (1) of clause 15 of Rau's Draft and suggested the omission of the reference to the "minorities" from sub-clause (3)
(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law or prevent the state from making any law, relating to libel, slander, defamation, sedition or any other matter which offends decency or morality or undermines the authority or foundation of the state.¹⁰

10. This Draft Constitution prepared by Drafting Committee was published and the copies were sent to each member of the Constituent Assembly, Provincial Legislature, Provincial Government, Federal Court and the High Courts inviting comments and suggestions. After receiving comments and suggestions the Committee again met to consider it.

Jaya Prakash Narayan wanted the redrafting of Article 13 as according to him the rights guaranteed were taken away by subsequent restrictions. He also wanted to incorporate an independent provision guaranteeing the freedom of press. His suggestions could not find favour as it was made clear by Dr. Ambedkar that freedom of press was implicit in the freedom of speech and expression. The Drafting Committee further decided to substitute the words "security of, or tends to overthrow" for the words "authority or foundation" in sub-clause (2) of Article 13. The Drafting Committee, therefore, prepared a revised draft in the light of comments and suggestions and presented to Constituent Assembly for its consideration.

Various amendments were proposed at this stage of consideration by the Constituent Assembly. These amendments were moved by Mihir Lal Chatopadhaya, K.T.Shah, Naziruddin, Bhopinder Singh Man and Seth Govind Das. Most of the proposed amendments were lost when put to vote.
This Draft Constitution, with the amendments adopted by Assembly, was then referred again to Drafting Committee with instructions to carry out such renumbering of the articles, clauses, and sub-clauses, such revision of punctuation and such revision and completion of marginal notes as might be necessary, and to recommend such formal or consequential or necessary amendments to the Constitution as might be required. Thereafter, it was revised and re-numbered as Article 19 which provided:  

(1) All citizens shall have the right-  

(a) to freedom of speech and expression  

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the state”.

Finally the Draft Constitution was adopted on 26th Nov. 1949 and the president of Constituent Assembly Dr. Rajendra Prasad authenciated it by putting his signature so that the Bill became an Act.”

The deliberations held during the entire drafting of the Constitution clearly show that almost at every stage the issue of a separate provision for the press was discussed. But the demand was not accepted as Dr. Ambedkar did not acceed their demand by saying that “Press is merely another way of stating an individual or a citizen. The press has

11. When it was finally drafted, it contained 395 Articles and Eight Schedules and was submitted to the President of Constituent Assembly Dr. Rajendra Prasad on 3rd November 1949.

12. C.A.D. Vol. XI at p. 995
no special rights which are not to be given or which are not to be exer-
cised by the citizen in his individual capacity. The editor of a press or
the manager are all citizens and, therefore, when they choose to write
in newspapers, they are merely exercising their right of expression and
in my judgement, therefore, no special mention is necessary of the free-
dom of press at all.13

The freedom of speech and expression as enshrined under Ar-
ticle 19 (1)(a) unlike other freedoms guaranteed under Article 19 was
not made subject to the reasonableness of restrictions. The omission ot
the world 'reasonable' in Article 19(2) conferred wide powers upon the
government leaving little scope for the courts to struck down the re-
striction even if the same was disproportionate than required.

However, The Constitution (First Amendment) Act, 1951, was
made to remove difficulties arising out of Supreme Court's decisions in
Brij Bhushan and Romesh Thappar cases. The amendment beside re-
arranging the provision dropped the words 'libel' and 'slander' but in-
cluded other grounds namely public order, friendly relations with for-
eign states and incitement to an offence and also included the words
"reasonable" and "in the interest of" before the restrictions. Thus, the
amendment clearly brought out the intention of legislatures to empower
the High Courts and the Supreme Court to interfere whenever the free-
dom is encroached on any ground not included under Article 19 (2), and
protect this cherished freedom of the citizens.

The provision was again amended by Constitution (sixteenth Amendment) Act, 1963 which added one more ground ie. "the sovereignty and integrity of India" in clause (2) of Article 19. And presently Article 19 run as following -

"19 (1) All citizens shall have the right-
(a) to freedom of speech and expression

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

The Constitution of India was enacted, adopted and given to themselves by the people of India with a view to constitute India into a sovereign democratic republic and to secure among other things, liberty of thought and expression for all its citizens.\textsuperscript{14}

Article 19 contained in part III of the Constitution guarantees the freedom of speech and expression into following words.

Article 19 (1) “All citizens shall have the right

(a) to freedom of speech and expression.................

(2) Nothing in sub-clause (a) of clause(1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause 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”.

A plain reading of Article 19 makes it clear that unlike American Constitution, our Constitution does not contain any guarantee of freedom of press

\textsuperscript{14. Preamble to the Constitution of India}
in express terms. The discussion on the Article 19\textsuperscript{15} in the Constituent Assembly as well as judicial decisions, however \textsuperscript{16} have proved it beyond any doubt that the freedom of press is included in the right to freedom of speech and expression.

Article 19, therefore, on the one hand guarantees the freedom of press but simultaneously, also places reasonable restrictions on the exercise of this right on the grounds mentioned under Article 19(2). The freedom of press, thus is not absolute under Article 19(1)(a) and may be curtailed on the grounds mentioned under Article 19(2).

Apart from the restrictions which may be placed under Article 19(2), the right may be taken away, completely under Article 358 when a Proclamation of Emergency is in force. Therefore, for the better understanding of the subject the study may be undertaken as following.
(A) Freedom during peace time; and
(B) Freedom during emergency.

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\textsuperscript{15} The Article was numbered as Article 13 when Drafting Committee presented it before the Constitution Assembly. It appeared as Article 19 only in the final Draft Constitution. On 4th Nov. 1948 Dr. Ambedkar, Chairman of Drafting Committee of the Constitution made it clear that the right to freedom of speech and expression includes the press when some members wanted to include an express provision guaranteeing the said freedom.

\textsuperscript{16} Right from the Romesh Thappar (AIR 1950 S.C. 124) to Auto Shankar Case (AIR 1995 S.C. 264) the Supreme Court repeatedly asserted that Article 19 (1)(a) includes the freedom of press.
\end{flushleft}
During Peace Time

The freedom of press as Article 19 (1)(a) envisages, like any other freedom guaranteed under part IIIrd of the Constitution, is not absolute but is subject to certain limitations that can be imposed by law. The test to ascertain whether in a given case the freedom of press has been violated, is to see whether press is restricted unreasonably by the state action before or after the publication.

In Romesh Thappar17 and Brij Bhushan's18 cases the scope of Article 19(1)(a) was raised, for the first time, before the Supreme Court.

In the former case the entry and circulation of a journal "Cross Roads" printed and published in Bombay, was banned into the State of Madras under Sec 9(1-A) of Madras Maintenance of Public Order Act, 1949. And in latter case an order was issued under Sec 7(1)(c) of East Punjab Public Safety Act, 1949, which required from the editor, printer and publisher of the weekly "organiser" published from Delhi, to submit for scrutiny before publication all matters i.e. news, views, caricatures etc. relating to Pakistan except those provided by the official sources.

Both the orders were challenged before the Supreme Court as violative of Article 19(1)(a) of the Constitution.

17. AIR 1950 S.C. 124
18. AIR 1950 S.C. 129
The Supreme Court held that there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of the publication. Indeed without circulation the publication would be of little value.

The Court in the later case too, expressed the similar views referring the Blackstone’s Commentaries which say that, "Liberty of the press consists in laying no previous restraint upon publications and not in freedom from censure for criminal matter when published. Every freeman has undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press". Consequently in both the cases orders interfering with the freedom of press were struck down.

It was in Express Newspaper Case\(^{19}\) when Supreme Court for the first time considered in detail the constitutional position regarding the liberty of the press. In this case validity of working Journalists Act, 1955, was challenged. The Act was enacted to regulate condition of service of persons employed in newspaper industry e.g. payment of gratuity, hours of work, leave, fixation of wages etc. It was contended that the Act would adversely affect financial position of newspaper which might be forced to close down or and curtail circulation and thereby narrow the scope for dissemination of information and hence violative of Article 19(1)(a).

Supreme Court, in the paucity of authority in India of precedents, made reference to American Cases. After a survey of such cases the Court summed up that in U.S.A:

\(^{19}\) AIR 1958 S.C. 578
(a) The freedom of speech comprehends the freedom of the press and the 
freedom of speech and press are fundamental personal rights of the 
citizens;
(b) The freedom of press rest on the assumption that the widest possible 
dissemination of information from diverse and antagonistic source is 
esential to the welfare of the public;
(c) Such freedom is the foundation of free government of a free people;
(d) The purpose of such guarantee is to prevent public authorities from 
assuming the guardianship of the public mind; and
(e) The freedom of the press involves freedom of employment or non-
employment of the necessary means of exercising this right or in other 
words, freedom from restriction in respect of employment in the edi-
torial force.

Applying the aforesaid test, the Court said "the necessary corollary 
thereof is that no measure can be enacted which would have the effect of 
imposing a pre-censorship curtailing the circulation or restricting the choice 
of employment or unemployement in the editorial force. Such a measure 
would certainly tend to infringe the freedom of speech and expression and 
would, therefore, be liable to be struck down as unconstitutional".

The Supreme Court on the point of taxing a newspaper industry said 
that while no immunity from general laws can be claimed by the press, it 
would certainly not be legitimate to subject the press to laws which take away 
or abridge the freedom of speech and expression or which would curtail 
circulation, or fetter its freedom to choose its means of exercising the right, 
or would undermine its independence by driving it to seek government aid. 
Laws which single out the press for laying upon it excessive and prohibitive
burden which would restrict the circulation, impose a penalty on its right to choose the instrument for its exercise or to seek an alternative media, prevent newspaper from being started and ultimately drive the press to seek government aid in order to survive, would, therefore, be struck down as unconstitutional.\textsuperscript{20}

In Hamdard Dawakhana V. Union of India\textsuperscript{21}. The Constitutional validity of Drug and Magic Remedies (Objectionable Advertisement) Act, 1954 was considered by the Supreme Court under Article 19(1)(a).

The Parliament had enacted the aforesaid law in order to control the advertisement of drugs in certain cases and to prohibit them for certain purpose of remedies alleged to possess magic qualities. Sec. 3 (d) empowered the government to add any disease under Sec. 3\textsuperscript{22}. And Sec. 8 of the Act empowered the seizure and detention of documents, article or things which in view of the prescribed authority were in contravention of the Act.\textsuperscript{23} It was challenged on the ground that the restriction on the advertisement was a direct infringement of the freedom of speech and expression guaranteed by the Constitution.

The Court said that when a provision is challenged as violating a fundamental right, it was necessary to ascertain its true nature and character. exploring the history it observed "The object of the Act was to prevent self-medication and self treatment by prohibiting instrument which may

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\item \textsuperscript{20} Id at p.p 616 - 17
\item \textsuperscript{21} A.I.R. 1960 S.C. 554
\item \textsuperscript{22} Sec. 3 - " Subject to the provisions of this Act no person shall take any part in publication of any advertisement referring to any drug 
\end{itemize}
be used to advocate them or which tended to spread the evil, and not merely to stop all advertisements offending against morality and decency". As to the general nature of the advertisements the Court stated that an advertisement was no doubt a form of speech and expression, its true character was reflected by the objects for the promotion of which it was employed. It is only when an advertisement was concerned with the expression or propagation of ideas that it could be said to relate to the freedom of speech. And therefore when it took the form of a commercial advertisement which had an element of trade or commerce it no longer fell within the concept of freedom of speech for the object [(of Article 19 (1)(a)] was propagation of ideas social, political or economic or furtherance of literature or human thought; but in the present case it was the commendation of efficacy, value and importance in treatment of particular disease by certain drugs and medicines.

Therefore, in every case one had to see what was the nature of advertisement and what activity is falling under Article 19(1)(a) it sought to

Contd:......... in terms which suggests or are calculated to lead to the use of that drug for
(d) The diagnosis, cure, mitigation, treatment or prevention or any venereal disease or any other disease or condition which may be specified in rules made under this Act."

This rule making power is provided under Sec 16 of the Act which provide that-
1. The Central Government may by notification in official gazette, make rules for carrying out the purpose of this Act.
2. In particular and without pre-judice to the generality of foregoing power, such rules may -
   a) Specify any disease or condition to which the provisions of Sec 3 shall apply;
23. Sec 8 of the Act provides "Any person authorised by the State Government, in this behalf may, at any time seize and detain any, document, article, or things which such person has reason to believe contains any advertisement which contravenes any of the provisions of this Act and the court trying such contravention may direct that such document (including all copies thereof), article or thing shall be forfeited to the Government.

NOTE - The aforesaid provisions have been amended since then by the Amendment Act (42 of 1963).
further. The advertisement of prohibited drugs and commodities of which the sale was not in the interest of general public could not be regarded as speech so as to fall within the concept of 'freedom of speech' under Article 19(1)(a). However the court found Sec 3(a) of the Act which empowered the government an impermissible delegation of legislative power and Sec 8, imposing unreasonable restrictions as violative of Article 19(1)(a) and applying the doctrine of severability struck down those provisions.

In Sakal Paper V. Union of India the newspaper was started in 1932 and it claimed that its circulation was 52000 copies on week days and 56000 copies on Sundays in Maharashtra. The daily edition of the newspaper contained six pages a day for five days. This edition was priced at 7 paisa. The Sunday edition consisted 10 pages and price at 12 paisa. about 40% of the space in the newspaper was covered by advertisements.

The Newspapers (Price and Page) Act, 1956 and Daily Newspapers (Price and Page) order, regulated the price and pages of the newspaper. Sec 3 of the Act empowered the Government of India to regulate the price and pages of the newspaper in relation to their size, prescribe the number of supplements to be published and prohibit the publication and sale of newspaper in contravention of any order made under Sec. 3 of the Act.

24. Supra note (21) at p. 563
25. AIR 1962 S.C. 305
26. Sub - Sec (I) of Section 3 empowers the Central Government. to regulate the price of newspapers in relation to their pages and sizes if it is of opinion that it is necessary to do so for the purpose of preventing unfair competition among newspapers and in particular those published in Indian Languages. It also empowered the government to regulate the allocation of space to be allotted for advertising matter.
The Act also provided the size and area of advertisement matter in relation to other matters contained in the newspaper. It was challenged before the Supreme Court as violative of Article 19(1)(a).

It was contended on behalf of the petitioner that an increase in the price without increase in number of pages would reduce the circulation on the other hand any decrease in number of pages would reduce the column space for news, views and ideas.

The respondent took the plea that the petitioner can increase the space for news by revising the prices and it would not adversely affect the circulation of the newspaper and thus not violative of Article 19(1)(a).

Delivering the judgement, Mudhalkar, J; observed that, "effect of the commencement of the impugned Act and coming into force the order would certainly be that a newspaper which had a right to publish any number of pages for carrying it's news and views would be restrained from doing so except upon the condition that it would have to raise the selling price as provided in the schedule to the order." The learned judge emphasised the importance of the propagation of ideas, news and views when he said that. "The right to propogate one's idea was inherent in the concept of freedom of speech and expression. For the purpose of propagating his ideas every citizen had a right to publish them, to disseminate them and to circulate them." Further, the fixation of the minimum price for the number of pages which a newspaper was entitled to publish was obviously not for ensuring a reasonable price to the buyers of newspapers but for expressly cutting down
the circulation of some newspapers by making the price so unattractively high for a class of its readers as was likely to deter it from purchasing such newspaper, and thereby hampered the free propagation of ideas and thus violated the freedom."

On the contention raised on behalf of the government that the object of the propagation of ideas could be achieved by reducing the advertisements in the newspapers. In other words the newspaper would be able to devote more space for news and views if they reduce the advertisements. The Court while rejecting the argument held that if the area for advertisement was curtailed the price of the newspaper would be forced up. If that happened the circulation of the newspaper would inevitably go down. This would be no remote but a direct consequence of curtailment of advertisement. He was of the view that, "The advertisement revenue of a newspaper was proportionate to its circulation. Thus the higher the circulation of a newspaper the larger would be its advertisement revenue. So if a newspaper with a high circulation were to raise its price its circulation would go down and this in turn would bring down the advertisement revenue. It would create a vicious circle where a newspaper would be left with no option but to closure of the newspaper. If on the other hand the space for advertisement was stated to be to prevent "unfair" competition, it was thus directed against circulation of newspaper. When a law was intended to bring about this result, there would be a direct infringement of the right of freedom of speech and expression. To determine the constitutionally protected areas of press freedom the Court talked of "essential part" of freedom of speech and expression but failed to disclose as to what constitute this "essential part" and how it is to be determined? The Court remained trapped in the language of 'direct and inevitable effect' and wanted to prevent "excessive and prohibitive" burden upon the press.

27. Supra note (25) at p. 313
28. Ibid
Once again the validity of price and size of a newspaper was raised in Bennett Coleman V. Union of India. Due to the shortage of indigenous newsprint in India, it has to be imported from foreign countries. But as country’s foreign exchange position was not good, a liberal import of newsprint was not possible to fulfill India’s newsprint requirement. In order to achieve that goal some rules were laid down by the Government of India as Newsprint Policy for 1972-73. The new import policy was contained in the Newsprint Control Policy (1972 - 73), effectuated by the Newsprint Control Order, 1972 passed under Section 3 of Essential Commodities Act. The main features of the impugned policy which was under consideration were:

(a) No newspaper or a new edition be started by a common ownership even within authorised quota of newsprint;
(b) The maximum number of pages were limited to ten and no adjustment was permitted between circulation and the pages so as to increase the pages;
(c) no interchangeability was permitted between different papers of common ownership units or different editions of the same paper; and
(d) allowance of a twenty percent increase in the page level up to maximum of ten had been given to newspapers with less than ten pages.

The policy was challenged as violative of Article 19(1)(a) of the Constitution.

The government contended that the newprint policy did not “directly and inevitably” deal with the right mentioned in Article 19(1)(a). And that

29. AIR 1973 S.C. 106
incidental restrictions of newsprint quota policy for newspaper did not constitute any violation of freedom of speech and expression.

It was observed by Justice Ray, delivering the majority opinion for Sikri C.J., Reddy J. and for himself, that, "Under the policy the newspaper within the ceiling of ten pages could get 20% increase in the number of pages. They required circulation more than the number of pages. They were denied the circulation, on the other hand the big English dailies which needed to increase their pages were not permitted to do so. These features were not newsprint control but really newspaper control in the guise of equitable distribution of newsprint. Where a quota is fixed newspaper control could be said as post-quota restrictions. The freedom of press is both 'qualitative' and 'quantitative'; the freedom guarantees both 'circulation' and 'content'... The newspaper must be left free to determine their pages, their circulation, and their new editions within their quota of what has been fixed fairly."

The Court further observed that,"The individual requirements of the different dailies render it entirely desireable in some cases to increase the number of pages than circulation. Such adjustment was necessary to maintain the quality and the range of the readers in question. The denial of such flexibility would hamper the quality, range and standard of the dailies and to affect the freedom of speech. Therefore, the restrictions on the petitioners that they could use their quota to increase circulation but not the page number was violative of Article 19(1)(a)."

30. Id at p. 130
31. Id at p. 129
It was also pleaded by the government that reduction to page level to ten pages was not only because of shortage of newsprint but also because the big newspaper devoted high percentage of space to the advertisements and if the same is curtailed the adjustment could be made where news and views would not suffer. Rejecting the argument Ray, J., (As he then was) pointed out that advertisements are not only the source of revenue but also one of the factors for circulation. Once circulation is lost, it would be very difficult to regain its old level. Because as a cut in page level the space for advertisement would be less, and this will affect the financial position of the press on the other hand if advertisements are not sacrificed it will leave not enough place for news and views. But the loss of advertisement not only entail the closing down but also affect the circulation and consequently impinge on freedom of speech and expression.

Another issue raised on behalf of the government was that the petitioners were companies, and therefore, could not claim any protection under Article 19(1)(a). Rejecting the contention the Court held that, "No doubt a corporation can not enjoy the freedom guaranteed under Article 19(1)(a). nevertheless the editor, printers and publishers or the share holders all are citizens and in that capacity they were entitled to enjoy the freedom."

The government further pleaded that the impugned legislation would be able to break the monopolistic nature of the press and to create an open society where there would be a greater freedom of speech and expression. Justice Ray, however rejected the argument even without really considering it.

*The Court, thus took the view that any rule or policy which seeks to regulate newspaper publication by either fixing the price or the size*
of the newspaper having the affect of hampering the growth of press is violative of Article 19(1)(a) of the Constitution.

Thus, Ray J. adopted the 'broad effect theory' that is what in substance is the loss or injury caused to the citizen and alongwith the manner and method adopted by the State in placing restrictions.

Mathew J. in his dissenting opinion went into wider policy implications and approved the policy of the Government. In his view ten pages were sufficient to express its views and publish the news and that the petitioners moved to the Court not because their freedom was abridged, but because they were deprived of a part of revenue earned by them as profit from commercial advertisements.

The issue of taxing a newsprint industry once again was raised before the Supreme Court in Indian Express newspaper V. Union of India 32 where the import duty was imposed under Sec. 25 of the Custom Act, 1962 33.

The petitioner contended that imposition of such duty has the direct effect of crippling the freedom of speech and expression guaranteed by the Constitution as it has led to increase in the price of newspaper and inevitable consequence of reduction of their circulation.

Venkataramiah J., for himself, Chinnappa Reddy and A.P.Sen J.J. considered thoroughly the question of freedom of press vis-a-vis the state's power of taxation. Referring various decisions from American Supreme Court and other literature on the subject, the Court said that, "Newspaper industry enjoys two of the fundamental rights namely the freedom of speech and expression guaranteed under Article 19(1)(a) and the freedom to engage in any profession, occupation, trade or business, guaranteed under Article 32.

32. AIR 1986 S.C. 515
33. Sec 25 (1) of the Custom Act, 1962 provides that, "If the Central Govt. is satisfied that it is necessary in the public interest to do so, it may, by notification in the Offcial Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified description from the whole or any part of the duty of customs leviable thereon."
19 (1) (f), the first because it is concerned with the field of expression and communication and second because of communication has become an occupation or profession while there can be no tax on the right to exercise the freedom of expression, tax is leviable on profession, occupation, trade, business and industry. Hence, tax is leviable on the newspaper industry.” However, the Court also made it clear that, “When such tax transgress into the field of freedom of expression and stifles that freedom, it becomes unconstitutional. As long as it is within reasonable limits and does not impede freedom of expression, it will not be contravening the limitation of Article 19(2). The delicate task of determining when it crosses the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with freedom is entrusted to courts.

On the question of advertisements Supreme Court examined its earlier decisions alongwith the American Case law. Reiterating that though the commercial advertisement do not form part of freedom of speech and expression, the court observed that, “It is no doubt true that some of the observations made in Hamdard Dawakhana case go beyond the need of that case and tend to affect the right to publish all commercial advertisements.” “The Supreme Court, therefore, expressed the view that all commercial advertisement can not be denied the protection of Article 19(1)(a) merely because they were issued by the businessmen.

34. Supra note (32) at p.p. 538 - 39
35. Id at p. 548
The Supreme Court's view seems to be that though the commercial advertisements were not the part and parcel of the right guaranteed under Article 19(1)(a), nevertheless that right could not be denied to the advertisements if they directly affect the right by raising price or curtailing circulation, unless they fall under Article 19 (2).

The question of levying a tax on newspaper was once again before the Supreme Court for its consideration in Printers (Mysore) Ltd. V. Asstt. Commercial Tax Officer.\(^{36}\) The facts of the case are following -

Before the amendment of the definition of the expression "goods" in Section 2(d)\(^{37}\) by the 1958 (Amendment) Act, the publisher of newspapers [who held the certificate of registration contemplated under Sec 8(3)(b)]\(^{38}\) were issuing Farm 'C' [a declaration under section 8(4)(a)]\(^{39}\) and on that basis the selling dealer was collecting from them the Central Sales Tax at the concessional rate of 4% (in case of non declared goods). After the amendment newspapers were excluded from the perview...
of the goods. Thereafter the newspapers were disabled from issuing Farm'C'hence they became liable to pay tax at the higher rate of 10% on goods (non declared goods) purchased by them as raw material for producing (manufacturing) their newspapers. The publishers of the newspaper, therefore, questioned the action of Central Sales Tax Authorities before different High Courts who expressed different opinion. Finally the matter was brought before the Supreme Court.

The Court while developing a new approach and taking into account the spirit of the amendment of the definition "goods" rather than the form of law prescribed therein concluded that no sales tax can be imposed on the sale of newspaper in the country. The Court, nevertheless, made it clear that it does not mean that the press is immune either from taxation or from the general laws of industrial relations or from the state regulation of the condition of service of its employees. Nor is it immune from the general law of the land. The prohibition is upon the imposition of any restriction directly relatable to the right to publish, the right to disseminate information and to the circulation of newspaper.40

In Express Newspapers Pvt. Ltd. v. Union of India 41. The petitioners were engaged in the business of printing and publishing the national newspaper Indian Express (Delhi Edition) from the Express building constructed at plot no's 9 & 10 Bahadur Shah Zafar Marg. New Delhi, held through a

40. Supra note (36) at p. 442
41. AIR 1986 S.C. 872
perpetual registered lease under Sec. 3 of Government Grants Act 1895 in the
year 1958 from Union of India. In the year 1980, petitioners received a no-
tice of re-entry upon forfeiture of lease for violating the terms of the lease
deed. Another notice was served upon them to show cause as to why the
Express building should not be demolished (Under Sec. 343 & 344 of D.M.C.
Act, 1957) as being unauthorised construction.

The contention of the petitioners was that impugned notices directly
constitute violation of Article 19(1)(a) of the Constitution.

The apex court allowing the plea held that, "the impugned notices of
re-entry upon forfeiture of lease and the threatened demolition of Express
building are intended and meant to silence the voice of the Indian Express
and, therefore, the impugned notices constitute a direct and immediate threat
to the freedom of the press and thus are violative of Article 19(1)(a)." The
Court reminded that "the permissible restrictions on any fundamental right
guaranteed under part III of the Constitution have to be imposed by a duly
enacted law and must not be excessive i.e. they must not go beyond what is
necessary to achieve the object of the law under which they are sought to be
imposed". The Court further observed the power to impose the restrictions
on fundamental rights is essentially a power to 'regulate' the exercise of those
rights and not to 'extinct' those rights.

42. Sec. 3 provides that - All provisions, restrictions, conditions and limitations
contained in any such grant or transfer as aforesaid shall be valid and take
effect according to their tenor, any rule of law, statute or enactment of the
legislature to the contrary notwithstanding.

43. Supra note (41) at p. 909
The issue before the Supreme Court in Reliance Petrochemical Ltd. v. Indian Express Newspapers Bombay was to what extent press is free to report on the matters of public importance pending before the Court. The Reliance Petrochemicals Ltd, the petitioner company issued the Public Issue of 12.5% Secured Convertible Debentures of Rs 200/- each for cash at par aggregating to Rs 539.40 crores (inclusive of retention of 15% excess subscription of Rs 77.40 crores). It was claimed by the petitioner that the debentures were issued after obtaining the consent of the Controller of Capital Issues on the basis of schedule indicated therein, and after complying with all the requirements of the Companies Act and otherwise.

Several writ petitions were filed in different High Courts challenging the validity of the grant of consent or sanction for the issuance of aforesaid debentures. The petitions were transferred to the Supreme Court and an order was made that the, "Issue of Secured Convertible Debentures be proceeded with, without let or hindrance, notwithstanding any proceeding instituted or may be instituted before any court or tribunal or other authority alongwith the order that any direction, order or injunction of any court, tribunal or any other authority which had already been passed or may be passed, the operation of the same, is suspended till further orders of this Court."

Later on the respondents published an article claiming that the Controller of Capital Issues had not acted properly and legally in granting the sanction to the issue for various reasons stated therein and it was further stated that issue was not a prudent or a reliable venture.
The petitioner contended that the said article by commenting on a matter which is sub-judice amount the contempt of court and prayed that the respondents be prohibited from publishing any other article or material on the subject. The Court issued an order of injunction, restraining all the respondents from publishing any article, comment, report or editorial in any of the issues of Indian Express or their related publication questioning the legality or validity of any of the consents, approval or permissions of controller of Capital Issues. Later on the respondents approached to the Supreme Court for the vacation of its order.

The plea raised on behalf of the respondents was that the pre-stop-page of newspaper article or publication on matters of public importance was uncalled for and contrary to the freedom of press enshrined in our Constitution. On the other hand it was also true that the administration of justice must be unimpaired. Therefore, the Court was required to balance between the two interests of great public importance that i.e. freedom of speech and administration of justice.

The Supreme Court while ignoring the contempt application due to procedural infirmity, adopted the balancing approach and as the issue had already been over subscribed even before the expiry of last date vacated the order and held that issue is not going to affect the general public nor any injury is involved, it would be proper and legal, on an appraisal of the balance of convenience between the risk which will be caused by the publication of the article and damage to the fundamental right of freedom of knowledge of the people concerned and the obligation of the press to keep people informed that the injunction should not keep continue any further. Misra, J.

Id at p. 203
in his concurring opinion held that *press may be prevented from publishing any material* (Article, Report, News) *in case if the publication had the tendency to defeat the earlier order but only till the time it is necessary and not beyond that period.* Thus in the opinion of the Supreme Court once the commercial interest of the party is protected even before the expiry of deadline, the press could not be restrained from expressing its views till the date of closure of issues.

In *L.I.C. of India V. Manubhai D. Shah,* *46* Supreme Court was provided with another opportunity regarding the scope of right in respect of a citizen guaranteed under Article 19(1)(a). An executive trustee (The respondent) of the Consumer Education & Research Centre (C.E.R.C) Ahmedabad, after undertaking research into the working of Life Insurance Corporation published a study paper captioned "**A Fraud on Policy Holders - A Shocking Story.**" The study paper portrayed the discriminatory practice adopted by the L.I.C. by pointing out that unduly high premiums were charged by L I C from those taking out life insurance policies and thereby denying access to insurance to a vast majority of people who can not afford to pay the high premiums. The paper was based upon statistical information and it was widely circulated. A member of LIC wrote a counter article "LIC and its policy holders" which was published in *The Hindu,* a daily newspaper, refuting the allegations made by the respondent. The respondent again got published a rejoinder in *The Hindu.* The member of LIC then prepared and published his own counter article in Yogakshema, a LIC house magazine. The respondent thereupon requested the LIC to publish his own rejoinder also in the said magazine but his request was turned down by LIC on the ground that it was a house magazine circulated only among the subscribers who were policy holders. The respondent filed a petition before Delhi High Court and got a favourable verdict.

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46. (1992) 3 S.C.C. 637
Before the Supreme Court LIC raised the same plea that the magazine was a house magazine. Rejecting the petitioners argument the Court approved the view taken by the Delhi H.C. which turned down LIC contention that 'Yogakshema' was a house magazine and not put in the market for sale to general public on two grounds -

(i) It is available to anyone on payment of subscription; and
(ii) members of the public are invited to contribute articles for publication 47.

The Court observed that the contention of the petitioner that the rejoinder of respondent has become out dated and hence has lost relevance cannot be accepted as the respondent thinks that the views raised by him regarding high premium rates were still relevant. The Court further held that "LIC was under an obligation to publish the rejoinder since it had published the counter to study paper. The respondent's fundamental right clearly entitle him to insist that his views on subject should reach those who read the magazine so that they have a complete picture before them and not a one sided or distorted one. 48

The Court however, simultaneously made it clear that merely because the L.I.C. is a state and running a magazine with public funds it is not under an obligation to print any matter that any informed citizen may forward for publication. The view has been taken keeping in view the peculiar facts of the case. 49 Stating the scope of Article 19 (1) (a) the Court observed that,

47. Id at p. 653 - 54
48. Id at p.655
49. Ibid
"It must be broadly construed to include the freedom to circulate one's views by the words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The immense value of the verdict lies in the fact that it recognised the qualified privilege of respondent's right to reply.

Once again whatever the Indian Express case has forcefully hinted, TATA Press Ltd V. Mahanager Telephone Nigam Ltd. brought out in express terms that a commercial speech is protected under Article 19(1)(a). The Mahanagar Telephone Nigam Ltd. under rule 458 made under section 7 of the Indian Telegraph Act was the sole authority to publish the telephone directory. Later on when under rule-458 it entrusted the work of printing the telephone directory to private parties, it allowed them to publish the advertisements under rule 459 in order to meet out the cost of the directory.

The appeallant was also publishing Tata-Pages, a buyers guide comprising of a compilations of advertise-ments given by businessmen, traders, professionals duly classified according to their trade business or profession alongwith their telephone numbers.

The publication of Tata-Pages was challenged as contrary to the rule 457, and 458 and 459 of the Indian Telegraph Rules 1957 made under section 7 of Indian Telegraph Act 1885.

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50. Id at p. 656
51. A.I.R. 1995 S.C. 2438
52. Rule-458- Except with the permission of the Telephone Authority no person shall publish any list of telephone subscribers.
   Rule-459 "The Telephone Authority may publish or allow the publication of advertisements in the body of telephone directory."
It was contended on behalf of the appellant that the said rules were violative of Article 19(1)(a) as the right to commercial speech is protected under the aforesaid provision of the Constitution.

The issue before the Supreme Court was whether Tata-Pages was a telephone directory within the meaning of Rule 458 or was a Buyers Guide in a broader constitutional aspect and whether "commercial advertisement" fall within the concept of "freedom of speech and expression" guaranteed under Article 19(1)(a) of the Constitution.

The Court took into the consideration its earlier verdicts and concluded that "commercial speech" is a part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Examining the aspect from another angle it observed that "the public at large has a right to receive the commercial speech. Article 19(1)(a) not only guarantees freedom of speech and expression, but it also protects the right of an individual to listen, read and receive the said speech. So far as the economic needs of the citizens are concerned, their fulfilment has to be guided by information disseminated through advertisements. The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech."

Making difference between appellant and the respondent's directories, the Court said that the former's was a Buyer's Guide while latter's was a telephone directory having a certain format and criterion different from appellant's.

The judgement is bound to give further boost to the freedom of press by enabling it to reach a large number of people as the additional revenue generated through the advertisements would help in reducing the price of the newspapers. The present position, therefore, is that even an advertisement which is purely commercial in nature is protected under Article 19(1)(a)

53. Ibid
and the press could not be prevented to publish such an advertisement unless it falls under clause (2) of Article 19 of the Constitution.
PERMISSIBLE RESTRAINTS:

The foregoing discussion gives a general impression that whenever the Supreme Court has been approached, to protect the freedom of Press, it has responded favourably. But simultaneously the Supreme Court made it clear that a freedom however important, may never be an absolute dogma. In Express Newspapers v. Union of India, Sen J., rightly observed that, "However precious and cherished the freedom of speech is under Article 19(1)(a), this freedom is not absolute and unlimited at all times but is subject to the restrictions. That must be so because unrestricted freedom of speech and expression which includes the freedom of press and is wholly free from restraints, amount to uncontrolled licence which would lead to disorder and anarchy and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of State." 54

The Constitution under Article 19(2) itself provides for the restrictions which may be imposed upon the press. Let us examine these restrictions.

54. Supra note (41) at p. 909
Sovereignty and Integrity of India

The ground sovereignty and integrity of India was inserted to clause (2) to Article 19 by the Constitution (16th Amendment) Act, 1963, on the recommendations of the Committee on National Integration and Regionalism. The amendment conferred powers on the government to impose restrictions against those individuals or organisations who want to make secession from India or the disintegration of India. India is a federation of states and being union it is indestructible. Though the country and the people may be divided into different states for the convenience of administration, the country is one integral whole; its people a single people living under a single imperium derived from a single source. Accordingly, any expression prejudicial to the sovereignty and integrity of India may be punished by law whose constitutionality can not be jeopardised because of the new ground of restriction.

Though any judicial pronouncement by the apex court is yet to come but in a significant judgement by the Andhra Pradesh High Court\(^{55}\), where the registration of the 'Telugu Desam' party with the election commission was challenged under sec. 123 of Representation of People Act and particularly sub-clause (6) to clause (3) of Election Symbols (Reservation and Allotment) order, 1968\(^{56}\) On the ground that the name of the party tends to

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55. V.R.V. Sree Rama Rao V. Telgu Desam a Political Party AIR 1984 A.P.at p.353
56. Sec. 123 (3) of Representation of People Act provides. "The appeal by a candidate or his agent or by any other person .......................................Contd:
propagate secessionist tendency by the use of the word "Desam" and it is bound to go contrary to the preservation and maintenance of sovereignty and integrity of India as envisaged by Article 19(2) of the Constitution.

The Andhra Pradesh High Court however, did not accept this contention and held that naming the party as "Telgu Desam" did not violate Article 19(2) of the Constitution or any law. It expressed the view that since Telgu is one of the fifteen official languages in the state and happens to be language of the majority of the people in Andhra, any party such as Telgu Desam Party which emphasises linguistic character of the state can not be deemed to be acting contrary to the intendment of the Constitution including Article 19(2) thereof. An appeal for the all round development of Telgu language can not be deemed to be antinational or an activity calculated to disrupt the integrity or sovereignty of India as envisaged by Article 19(2) of the constitution.

The judgement of the Court seems not to be consistent with section 123(3) of R.P. Act, 1951, though there is no doubt that an appeal to the all round development could not be deemed to be anti-national yet the same appeal would form a corrupt electoral practice by seeking vote on the ground of language (very cleverly in the guise of development of a language which is constitutionally recognised), under the aforesaid provisions of the Representation of People Act, 1951. The decision of the Court is not laudable on the issue of corrupt practices under the Act.

Contd:......with the consent of the candidate or his election agent to vote or refrain from voting on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of or appeal to national symbols such as the national flag or the national emblem, for the furtherence of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.
Security of State

The original Article 19(2) as enacted by the Constituent Assembly included the words "undermines the security of, or tends to overthrow the state". But when the First (Constitutional Amendment) Act, 1951 amended the aforementioned Article, it beside deleting as well as adding few words, re-drafted the entire Article 19(2) and 'Security of State' was added as a ground of restriction on the freedom of speech and expression.

The first two cases which came before the Supreme Court when the Constitution was enforced were Brij Bhushan V. State of Delhi and Romesh Thappar V. State of Madras.

In Brij Bhushan's case a weekly paper organiser was asked by the Chief Commissioner of Delhi under Sec 7(1)(c) of the East Punjab Public Safety Act, 1949. To submit for scrutiny before publication till further orders all communal matter and news and views about Pakistan, including photographs and cartoons except received from official agencies. The aforesaid order was challenged before the Supreme Court as violative of Article 19(1)(a) of the Constitution.

57. Supra note 18
58. Supra note 17
59. Sec 7(1)(c) of East Punjab Public Safety Act provided that, "The Provincial Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for preventing or combating any activity prejudicial to public safety or the maintenance of public order may by order in writing addressed to a printer, publisher or editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny."
Since there is no provision under the Constitution prohibiting prior censorship, the Supreme Court followed common law principle, it rejected the contention of the State that the law was saved by Article 19(2), and said that, "There can be no doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press, which is an essential part of the freedom of speech and expression declared by Article 19(1)(a)" and held that pre-censorship of journal fell outside the scope of constitutional provision, and therefore, not only the order but also the law under which the order was made, was unconstitutional.

Once again in Romesh Thappar V. State of Madras where a weekly journal Cross Roads publishd and printed from Bombay was denied entry into, or the circulation, sale or distribution in the State of Madras under Sec. 9 (1-A) of Madras Maintenance of Public Order Act 1949. The said Act was challenged as violative of Article 19 (1) (a) of the Constitution. The Court struckdown the impugned provision on the ground that unless the law restricting the freedom of speech and expression is directed solely against the undermining the security of the state or at overthrowing it, such law could not fall within The reservation clause (2) of Article 19 even though the restrictions it sought to impose may have been conceived generally in the interest of public order. It further observed that the impugned law which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order fell outside the scope of authorised restrictions under clause (2), and was, therefore, void the unconstitutional.

60. Sec 9 (1A) of the Madras maintainance of Public Order Act, 1949, authorised the Provincial Government to prohibit or regulate the entry into, or the circulation sale or distribution in, the province of Madras any document or class of documents for the purpose of securing the safety or the maintenance of public order in the province.
In both Romesh Thappar and Brij Bhushan cases the issue before the Supreme Court was the constitutional validity rather than the executive action taken thereunder. The Court held that the expression "public order" and "public safety" covered much wider fields than were contemplated by the use of the words, "undermines the security of, or tends to overthrow the state. The Court expressed the view that in many circumstances and on most occasions a danger to public order or public safety would also be a danger to the security of the state, but that many acts prejudicial to public order or public safety would not be as grave as to endanger the security of the state. The constitutional provision justifying legislative abridgement of freedom of expression would cover only those grave offences against public order which would endanger the security of the state and not all offences against public order.

Thus the ratio decidendi of the judgement would seem to be that unless the danger that the exercise of the right was likely to create would be so serious as to undermine the security of state or to tends to overthrow it, restrictions on the right to freedom of speech and expression could not be justified.

However, the observations expressed by Fazal Ali J. in his dissenting opinion could not be ignored. He while recognising the importance of the right given to a citizen, said that liberty of press is not to be confused with its "licentiousness". The Constitution itself has prescribed certain limits for the exercise of the freedom of speech and expression and this Court is only called upon to see whether a particular case comes within those limits. In my opin-
ion the law impugned (East Punjab Public Safety Act, 1949) is fully saved by Article 19(2). It is, therefore, clear that in Fazal Ali's J. opinion the term undermining the security of or tends to overthrow the state includes "public disorder" though it may not be grave enough as to undermine the security or tends to overthrow the state.

Placing emphasis on the word "solely" in the judgement, some of the High Courts interpreted that the impugned law would be invalid unless it was directed solely against the freedom of speech and expression undermining the security of the state or tending to overthrow it. But later on when the Supreme Court decided the Press Bharti Case, it pointed out that the decisions in Romesh Thappar and Brij Bhushan have been more than once misapplied and misunderstood and have been construed as laying down a wide proposition that restriction of a nature imposed by Sec. 4(1)(a) of the Indian Press (Emergency Powers) Act, or of a similar character are outside the scope of Article 19(2) of the Constitution as much as they are conceived generally in the interest of public order. The Court while upholding the constitutional validity of this section, further observed that, "expression on the part of an individual inciting to, or encouraging the commission of violent offences like murder could not but be matters which would undermine the security of the state or lead to its overthrow and fall within the ambit of a law permitted by the Article 19 (2)."

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61. Supra note (57) at p. 133
63. A.I.R. 1952 S.C. 329
64. The Sec. 4 (1)(a) of Indian Press (Emergency Powers) Act, 1931 dealt with words or signs or visible representation which incite to, or tend to incite or encourage the Commission of any offence of murder or any cognizable offence involving violence.
Explaining the difference between Romesh Thappar and the present case, Supreme Court said that in earlier case the question was whether the impugned Act (Madras Maintenance of Public Order Act, 1949), authorising the Provincial Government to take certain steps to secure the public safety and maintenance of public order was a law relating to any matter which undermined the security of or tend to overthrow the state (which in the Court's opinion was not, as public safety and public order had wider concept than undermining the security of or tends to overthrow the state). But the restrictions imposed by sec 4 (1)(a) of Indian Press (Emergency Powers) Act, on the freedom of speech and expression are solely directed against the undermining the security of state or the overthrow of it and are within the ambit of Article 19(2) of the Constitution.

Thus in the light of the Supreme Court's interpretation a legislation restricting the freedom of speech and expression in relation to incitement to aggravated forms of prejudicial activity or commission of violent crimes like murder which would undermine the security of the state is protected under Article 19(2), however the same provision could not protect a legislation covering the large field of public order and incitement to crimes, not of an aggravated nature and which may not undermine the security of State.

The Constitutional Amendment Act, 1951, not only introduced public order as a ground under Article 19(2) but two other subjects namely friendly relations with foreign states and incitement to an offence with retrospective effect. In other words the amendment enlarged the sweep of legislative abridgement of this right. In addition, the qualifying word "reasonable" was added to the legislative restrictions. As a result of this amendment the restrictions to be imposed must be reasonable, which means that the courts will be entitled to examine whether restrictions imposed by law are reasonable or not.

65. Supra note (63)
66. J. Minattur: Freedom of Press in India at p. 44
Friendly Relations With Foreign States

It is the need of the time that in the close but disturb world of today the friendly relations with foreign states should be established and maintained in the national and international interest of political stability, economic development and world peace. Therefore, this ground as reasonable restriction was added by the First Amendment Act, 1951.67

Clause (2) of the Constitution (Declaration as to Foreign States) Order, 1950 was interpreted by Supreme Court in Jagannath Sahu V. Union of India.68 The petitioner was detained under Sec. 3 of the Preventive Detention Act, 195069 as he was likely to act further in a manner pre-judicial, inter alia, to the relations of India with foreign powers. The allegation against him was that he used to sent for publication to a foreign newspaper despatches of news and views containing false, incomplete, one sided and misleading information about the state of Jammu and Kashmir. These despatches were not only pre-judicial to the Government of India vis-a-vis Pakistan but obviously

67. Under Article 367 of the Constitution the word Foreign States has been defined. The Article provides that "for the purpose of this Constitution 'foreign state' mean any state other than India, provided that, subject to provisions of any law made by Parliament, the President may by order declare any state not to be a foreign state for such purpose as may be specified in the order."

68. AIR 1960 S.C. 625

69. Under Sec.3 of the Act the Central Govt. or the State Govt. if satisfied with respect to any person, with a view to preventing him from acting in any manner pre-judicial to the defence of India, the relation of India with foreign powers or the security of India, make an order directing that such person be detained, if it thinks it necessary to do so.
to the relations of India with foreign powers in general. The detention was challenged inter alia that Pakistan being a member of a Commonwealth is not a foreign state within the terms of the order, and therefore, there is no question of his acts being pre-judicial to the relations of India with foreign powers. Rejecting the argument the Court expressed the view that though for the purpose of the Constitution, in view of the order, Pakistan was not a foreign state but a distinction had to be made between a country not being regarded as a foreign state for the purpose of Constitution and that a country being a foreign power for other purposes. In their relations with each other and countries outside Commonwealth, the member of Commonwealth must be regarded as foreign powers—their affairs between themselves were foreign affairs. Again, the expression "foreign affairs" under item 9 in list I of Seventh Schedule of the Constitution includes the relation of India with foreign powers. In this context, Pakistan though a member of commonwealth, was a foreign power for the purpose of the Act. Accordingly the order of 1950 was not applicable in the case of the petitioner. 70

70. It was explained by Dr. Ambedakar in the Parliament when moving the 1st Amendment that it was simply the extension of another ground namely the ‘defamation’ then it would cover only the heads of the states, their families and their representatives. Again if it wanted to protect Pakistan from malicious propaganda by press it was not possible as in view of Constitution (Declaration as to Foreign States) Order, 1950 it was not a foreign state. The amendment was sharply criticised as it was felt that the language was very wide and could be exploited for preventing or curbing even legitimate criticism of foreign policies of Government. This view was also supported by the Press Commission. In case if it is an aspect of Government’s foreign policy and the inclusion of this subject in Article 19 (2) tends to help the Government in silencing or restraining criticism of their policy, the provision can not be regarded as being in consonance with the concept of freedom of press.
Public Order

Alarmed by the decisions of the different High Courts in the light of Supreme Court's judgements in Romesh Thappar and Brijbhushan cases, the first Constitutional Amendment was made without waiting to hear from apex court any thing about the appeals against the decisions of the High Courts. The amendment inserted 'public order' as a ground upon which restrictions might be imposed on the press.

In Ramji Lal Modi V. State of U.P the editor, printer and publisher of a monthly magazine Gaurakshak was convicted for publishing an article with the deliberate and malicious intention of out raging the religious feelings of Muslims. The question before the Court was whether Sec 295-A of Indian Penal Code could be supported as a reasonable law saved by Article 19(2). The plea raised on behalf of the appeallant was that the law in question had no bearing on the maintenance of public order or tranquility and consequently it could not claim protection of saving clause under Article 19(2). But the Supreme Court while upholding the constitutional validity said that fundamental rights guaranteed under Articles 25 & 26 are expressly subject to public order. It could not, therefore, be predicted that freedom of religion should

71. AIR 1957 S.C. 620
72. S.295 - A - Provide that, "who soever with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words either spoken or written, or by signs or visible representations or otherwise, insults or attempts to insult the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."
have some or no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion could not, under any circumstances, be said to have been enacted in the interest of public order. Thus the Supreme Court came to conclusion that the impugned law had a bearing on the maintenance of public order and law of the nature of the impugned provision could be enacted in the interest of public order. The Court further observed that the law penalises only aggravated forms of insult to religion which are perpetrated with a deliberate and malicious intention of outraging the religious feelings of a class of citizens, when such insult have a tendency to disturb public order.

The bold and broad view expressed in Brij Bhushan's Case came under the cloud in Virendra V. State of Punjab where in mid 1957 a 'Save Hindi Agitation' was started in Punjab and the petitioners began publishing criticisms and news concerning the agitation in two newspapers, Viz, Daily Pratap and Vir Arjun, published simultaneously from Jullandhar and New Delhi. The first petitioner was editor, printer and publisher of the paper published from Jullandhar and second was editor, printer and publisher of the paper published from New Delhi. As the agitation gained momentum some unwarranted incidents took place. The Government of Punjab, therefore, issued notification against the first petitioner prohibiting him from printing and publishing news and other matters relating to the agitation for a period of two months under Sec. 2 (1)(a) of Punjab Special Powers

73. AIR 1957 S.C. 896
(Press) Act, 1956. The first step was taken to combat calculated and persistent propaganda carried on in the two newspapers published from Jalladar. The government also issued to the second petitioner two identical notifications under Section 3(1) of the aforesaid Act, prohibiting the entry into Punjab, of the newspaper published from Delhi.

The crucial issue in this case that fall for the consideration before the Supreme Court was that whether the State Government was the proper authority to determine whether circumstances at any given point of time require some restrictions to be placed on the freedom of press and to what extent i.e. whether Sec. 2(1) (a) of the said Act imposed reasonable restrictions on the freedom of press.

74. Sec 2 (1)(a) of the Act empowered the State Government or any named authority to issue an order to the printer, publisher or editor prohibiting the printing or publishing of any matter in any document or class of documents relating to a particular subject or class of subjects for a specified period or in a particular issue of a newspaper or periodical for the purpose of preventing and combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order. It also provides for the period of two months during which the said order may remain in force along with a right to presentation against the order within ten days of making such order. The section also authorised the Government, or any named authority to modify, conform or rescind the order.

75. Sec. 3(1) empowered the Government or any named authority to prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication for the aforesaid purpose.
Expressing agreement with state's plea the Court held (Das. C.J) that it was for the State Government, which was charged with the duty of preserving law and order in the state, to arrive at decision. Therefore, it had to be in possession of all material facts and should be the best authority to investigate the circumstances and assess the urgency, the determination of the time and extent to which the restrictions should be imposed on the press must of necessity be left to the judgement and discretion of the State Government. Thus the Court upheld the legislation and the exercise of this power after talking of the extensive influence of the press on the public order. It (public order) was seen as being very important and it was not considered unreasonable to give it priority over the freedom of the press.

The judgement thus extended the sweep of the restrictions. According to H.M. Seervai, this decision clearly shows that "restrictions more stringent than pre-censorship could be imposed in the interest of public order and the publication of certain matters could be totally prohibited for a limited period of time." Prof. D.K. Singh's view "censorship should be restored to only when the fabric of the society is in jeopardy" is supported by Rajiv Dhavan who even though recognising the wide scale agitation expresses fear of emergency like situation when he said "suppose the existence of such a state of affairs was not publicly known beyond a carefully guarded affidavit in court. For a short duration, the government could exercise absolute powers akin to those it can exercise during an emergency when civil liberties are threatened.

76. Supra note (73) at p. 899
77. Rajeev Dhavan: The Press and the Constitutional guarantee of freedom of speech and Expression JIIL Vol.28 No. 3, 1986 at p. 325
78. Seervai, H.M: Constitutional Law of India Vol. 1 at p. 365
The ground "public order" was graphically examined by the Supreme Court in Superintendent, Central Prison V. Ram Manohar Lohia.\(^8^0\) where the constitutional validity of Sec. 3 of Uttar Pradesh Special Powers Act 1932\(^8^1\) was successfully challenged before the Supreme Court.

The case arose out of Dr. Lohia's, (a prominent opposition leader) prosecution on account of making two speeches instigating the audience not to pay enhanced irrigation rates to the government. The U.P. Government had enhanced the rates for water supplied to cultivators and the Socialist Party of India under Dr. Lohia's leadership had resolved to start an agitation against the enhancement for the alleged reason that it was unbearable burden on the cultivators.

The Supreme Court took into consideration the interpretations made by it in earlier decisions in Romesh Thappar and Brij Bhushan on the words "public order" along with the first constitutional amendment in Article 19(2). Subba Rao. J. delivering the opinion of the Court rejected the plea of the state of "public order" and observed that in Article 19(2) the wide concept of "public order" was split up under different heads. The amended clause (2) enables Parliament to impose reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of 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. All

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80. A.I.R 1960 S.C. 633
81. Sec. 3 of U.P. Special Powers Act provided "Whoever by words, either spoken or written, or by signs or by visible representation or otherwise, instigates expressly or by implication, any person or class of persons not to pay or defer payments of any liability and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representation containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250, or with both"
these grounds, said the Court, could be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicate that they must be intended to exclude each other. Public order is something which is demarcated from the others. In that limited sense, it could be postulated that public order is synonymous with public peace, safety and tranquility. Another conclusion in the case derived by the Supreme Court was that any remote or fanciful connection between the impugned Act and public order would not be sufficient to sustain its validity and pointed out that in Virendra V. State of Punjab, the Court made a distinction between a law which expressly and directly purported to maintain public order and the one which did not but left it to be implied from it, and between a law which directly maintained public order and the one which indirectly brought about the same result. The distinction did not ignore the necessity of intimate connection between the law and the public order 82.

In view of the above observations, the Court held that the impugned section was of very wide sweep. Even innocuous speeches and writings were prohibited by threat of punishment. Nobody would accept that in a democratic setup there was no scope for agitational approach that if a law was bad the only course was to get it amended by democratic process and that any instigation to break the law was in itself a disturbance of public order. If this view is accepted without obvious limitations would destroy the freedom of speech and expression the very foundation of democratic way of life 83.

It may be submitted that the decision in this case narrowed the sweep of Virendra's case and into the words of Setalvad, "It is refreshing to turn

82. Supra note. (80) at p.p. 639 - 40
83. Ibid
next to Ram Manohar Lohia's case which in his opinion indicates, "a more liberal approach by the Court in judging of the validity of legislation competent under Article 19(2)." However, the view of the Court that any instigation to break a law may not always be an offence is untenable.

In Babu Lal Parate the constitutional validity of Sec. 144 of Code of Criminal Procedure was challenged on the ground that it places unreasonable restriction on the right of freedom of speech and expression. It was held by the Court that this section read as a whole clearly showed that it was intended to secure the public weal and order by preventing disorders, obstructions and annoyances and the orders that could pass under it by responsible magistrate were only of temporary nature. The Court also did not accept the plea of 'clear and present danger' evolved in Schenck v. United States that previous restraints on the exercise of fundamental right were permissible only if there was a clear and present danger, stating that it has no application in India since the rights guaranteed under Article 19(1) were not absolute but subject to the restrictions under clause (2) of Article 19. Thus the Court once again followed the test expressed in Virendras case and allowed extensive preventive and other powers to local officials as long as some pattern of control existed.

84. Setalvad, M.C: The Indian Constitution at p. 72
85. AIR 1961 S.C. 885
86. Sec. 144 Cr. P.C. says a Magistrate, if he is of the opinion that there is sufficient ground for immediate prevention, can by a written order direct a person or persons to abstain from certain acts if he considers that such direction is likely to prevent a disturbance of public tranquility or a riot or an affray.
In Kedar Nath V. State of Bihar. Once again the scope of public order was under consideration when the constitutional validity of Sec. 124-A and 505 was challenged.

The Supreme Court, perhaps to point out that though the sedition under Article 19(2) was not a ground upon which the restrictions could be placed on freedom of speech and expression, but the concept was not altogether dropped by the Assembly, referring several Indian and English decisions alongwith the opinion of Fazal Ali J. (who expressed a dissenting opinion in Romesh Thappar and Brij Bhushan Cases) the Court also quoted the following observations of Federal Court in N.D. Majumdar V. Emperor.

88. A.I.R. 1962 S.C. 955
89. Sec. 124 - A of I.P.C. Provides: Whoever by words, either spoken or written, or by signs, or by visible representation, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1
The expression "disaffection" includes disloyalty and ill feelings of enmity.

Explanation 2
Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3
Comments expressing disapparabation of the administrative or the other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Sec. 505 of I.P.C makes it a punishable offence to make rumours or reports among the members of armed forces with intent to cause mutiny or an offence against public tranquility, or to induce one class or community to commit an offence against another.

90. A.I.R. 1942 F.C. 22
The first and most fundamental duty of every government is the preser-
vation of order since order is the condition precedent to all civilisations and
the advance of human happiness. This duty has no doubt been sometimes
performed in such a way as to make the remedy worse than the disease; but
it does not cease to be a matter of obligation because some on whom the
duty rests have performed it ill. It is to this aspect of functions of the govern-
ments that in our opinion the offences of sedition stands related.

It is answer of the state to those, who for the purpose of attacking or
subverting it seek ............to disturb its tranquility, to create public disturbance
and to promote disorder, or who incite others to do so .................... Public
disorder, or the reasonable anticipation or liklihood of public disorder, is thus
the gist of an offence. The acts and words complained of must either incite to
disorder or must be such as to satisfy reasonable man that this is their inten-
tion and tendency.91

The Court in the light of above observations upheld the constitutional-
ity of Sec. 124 - A. The Court said that the expression “in the interest of public
order” was of wide amplitude and much more comprehensive than the ex-
pression “ for the maintenance of public order.” In the opinion of the Court,
Sec.124 - A read as a whole alongwith the explanations appended to it leaves
no doubt that the section aimed at making penal only such activities as would
be intended, or have a tendency, to create disorder or disturbance of public
peace by resort to violence.

The Supreme Court in view of above observations also upheld the constitutionality of Sec. 505 I.P.C. It however, added that each one of the constituent element of the offence under this section had reference to, and a direct effect on, the security of the state or public order. Hence its provisions did not exceed the bounds of reasonable restrictions on the freedom of speech and expression and consequently saved by Article 19 (2).  

The Court thus by adopting the well known principle severability, up­held the section by restricting it to the narrower meaning propounded by the Federal Court (Which in fact had been turned down decisively by the Privy Council).

After Ram Manohar Lohia’s Case the Supreme Court in Kishori Mohan V. State of West Bengal once again explained the term law and order, public order and security of state. The Court made it clear that in case if an individual is affected, it would effect ‘law and order’ however another act though of a similar kind may have such an impact that it would disturb even the tempo of the life of the community in which case it would be said to affect ‘public order’ the test being the potentiality of the act in question.

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92. Id at p.p. 967 - 70
Decency or Morality

The development of a society depends upon the high standards of decency and morality because without following them, it is bound to be affected by lower instincts of the society. The Geneva Conference of 1923 on Suppression of Circulation, and Traffic in, Obscene Publication raised this issue with vigour. The need therefore, was felt to include the ground “decency or morality” in Article 19(2), in the absence of which the freedom might have been frequently abused.

Article 19(2) of the Indian Constitution permits legislative abridgement of the right to freedom of speech and expression in the interest of decency or morality. The expression “indecency” apparently seems to be easily interchangable with “obscenity”. However, there is some difference between the two. The indecency includes any thing which an ordinary man or woman would find to be shocking, disgusting and revolting where as the obscenity contains the prurient appeal as an essential element. It is evident, therefore, that indecency has a wider concept than obscenity. A horror movie may be indecent for a young person but not obscene, but an obscene object almost certainly must be indecent. 93

The law of obscenity in India is contained in S.s 292 to 294 of Indian Penal Code, 1860. The law under these sections make it an offence to sell, let

to hire, distribute, publicly exhibit, export, import any book, pamphlet, paper
drawing, painting or participation in any activity as provided under the provi-
sions.

In India, it was Ranjit D. Udeshi's Case where for the first time the
Supreme Court had an occasion to explain the meaning of obscenity when
the constitutional validity of Sec. 292 of I.P.C. was challenged. The appeallant
was convicted as he had exhibited for sale the unexpurgated edition of The
Lady Chatterley's Lover by D.H. Lawrence at his book stall. The plea raised
on his behalf was that Sec. 292. I.P.C. is violative of Article 19(1)(a) as the
meaning of the term "obscene" was too vague, or as at any rate, it applied
only to the writings, pictures etc. intended to arouse sexual desire. The mere
treating with sex and nudity in art or literature was not per se, evidence of
obscenity.

The Supreme Court while upholding the constitutional validity of the
impunged law adopted the Hicklin's test laid down by Cockburn C.J. in Queen
V. Hicklin which runs into following words.

"Whether the tendency of the matter charged as obscene 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 most impure and libidinous charcter."  

94. AIR 1965 S.C. 881
95. (1868) 3 Q.B. 360
96. Quoted in AIR 1965 S.C. 881 at p. 887
The Court was of the view that in judging a work stress should not be laid upon a word here and a word there, or a passage here and a passage there. Though the work as a whole must be considered, the obscenity matter, however must be considered by itself and separately to find out whether it was so gross and its obscenity so decided that it was likely to deprave and corrupt those whose minds were open to the influences of this sort. Where obscenity and art were mixed. The art must be so preponderant as to throw obscenity into a shadow or the so trivial and insignificant that it could have no effect and might be over looked.

The judgement of the Supreme Court traversed a substantial corpus of authority, English as well as American. Ultimately Hidayatullah, J. rested his decision upon the authority of Hicklin, though he acknowledged the continuing shift in standards and values. He did not, however, enquire deeply into the uncertainties of meaning in the words ‘deprave and corrupt’ and strongly emphasised the relevance of contemporary community standards. The issues decided by the Court may be summarised as following.

1) The Hicklin test is still correct test to be applied in establishing obscenity and it should continue to apply.

2) The test was the tendency to deprave and corrupt and not the intention or the knowledge, as they are not mentioned in the section.

3) Though the expert opinion is admissible but not conclusive because

97. a) Queen V. Hicklin (1868) 3 Q.B. 360 (b) R.V. Curl (1708) 11 Mod 142 Case No. 205 (c) R.V. Reiter (1954) Q.B. 16, (d) R.V. Martin Secker and Warburg Ltd. (1954) WLR, 1138

the offending novel and the portions which are subject to charge must judged by the Court in the light of section 292 IPC and the provisions of the Constitution and not in the light of the expert opinion.

4) A balance should be maintained between freedom of speech and expression and decency or morality. But when the latter was substantially transgressed, the former must give way.

The Hicklin test and the observations made thereunder were followed in Chandrakant Kakodkar V. State of Maharashtra where the appellant was the author of a story 'Shama' published in a monthly Marathi magazine 'Ramba' of Diwali issue in 1962. The story dealt with the relationship of three women who came into the frustrated life of the male character, Nishikant. One of the women who entered into the life of Nishikant after realising that her love could not be consummated as her parents would not allow her to marry with her lover, encourages him to bring it to a culmination point. The story was adjudged obscene and the author was convicted under Section 292 of Indian Penal Code.

Before the Supreme Court the impugned section was challenged as ultra-vires to the Article 19(1)(a) of the Constitution. The apex court once again following the Hicklin's test observed that, "in obscenity cases the courts were bound to see whether alleged material caused the \'likely reader to suffer in their moral outlook or depraved them on reading it or arouse \'impure and lecherous thoughts\' in their minds. If it was so the impugned material could be judged as obscene."

99. AIR 1970 S.C. 1390
However, realising the changes through which the society at present is passing, the Court further made some thoughtful observations on the issue involved in obscenity cases.

"The concept of obscenity would differ from country to country depending upon the standards of morals in contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries not harmful may be obscene in our country. If the writers were always expected to write in accordance with the adolescents only, then they would be deprived of the opportunity to write for adults and, therefore, the Court finally declared that it was only ‘class of persons’ and not isolated cases of ‘young and adolescents’ which should be taken at the time of determining the ‘debasing and debauching’ effect of any work.

In Samresh Bose V. Amal Mitra\textsuperscript{100}, a novel Prajapati, published in the annual Puja number of well known Bengali magazine ‘Desh’ had main character Sukhen depicted as a person who hates hypocrisy, political leaders who thrive on others, teachers who do not devote themselves for the welfare of the students etc. It contained several obscene passages. The main theme of the book charged as obscene had the character and mental order of its hero Sukhen who because of his unhappy life at home of his parents turns restless causing him to be involved in a number of sexual episodes which were described in the book in inhibited manner. In the novel Sukhen is shown involved in catching a butterfly but attempt was thwarted by girl Shikha lying in the bed with a scanty dress on. He notices it. At this moment he remembers how few days back he had an affair with another girl about 14 years of age during a picnic.

\footnote{100. Samaresh Bose V. Amal Mitra AIR 1986 S.C. 967}
His reminiscences of that affair were held obscene by trial court and the High Court. There were other episodes suggestive of sex i.e. Sukhen and his friends’ sister Manjari and affair of his brother with the maid servant’s daughter. The author and the publisher were prosecuted under Sec 292 of Indian Penal Code, 1860. The Conviction and sentence was maintained by Calcutta High Court.

The Supreme Court showing disagreement with the view of Calcutta High Court once again expressed its opinion in favour of dominant theme and held the book as not obscene. It opined that references to kissing, descriptions of the body and figures of female character in the alleged book with suggestions of acts of sex by themselves did not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness.\(^{101}\) However it was admitted by the Court that there were certain episodes suggestive of sex but they were vulgar and could not be equated with obscenity. Making a distinction between vulgarity and obscenity the Court said vulgarity arouse only feeling of ‘disgust’, ‘revulsion’, and ‘boredom’ and did not possess to have the effect of depraving, debasing and corrupting the morals of any reader, whereas the obscenity has a tendency to deprave and corrupt those whose minds were open to such immoral influences. Thus the Court once again affirmed the Hicklin’s test.\(^{102}\)

Another important point decided by the Court is the relevance of expert testimony. It was observed by Sen J. that though the Court was not altogether bound to rely on the oral evidence of experts but it may be necessary to rely upon to certain extent on the evidence and views of leading literati on that subject particularly when a book is in a language with which the Court is not conversant.\(^{103}\) However, it made it clear that such an opinion is a matter for its own subjective satisfaction.

\(^{101}\) id at p. 983
\(^{102}\) ibid
\(^{103}\) id at p. 984
Contempt of Court

The press plays a vital role in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board. Any misconduct in a trial is sure to receive notice in the press and subsequent condemnation by public opinion. The press itself is liable to make mistakes. The watchdog may sometimes break loose and have to be punished for misbehaviour. The contempt of court, therefore, is an area where a journalist has to tread warily. Oswald, an authority on the subject defines it in the following terms.

"To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring any authority and the administration of the law into disrespect or disregard or to interfere with or prejudice parties litigant or their witnesses during the litigation."**

The Indian Constitution empowers the Supreme Court under Article 129 and the High Court under Article 215 to punish a person for their contempt. Article 19(2), also permits the imposition of restrictions on the freedom of speech and expression in relation to contempt of court.

104. Quoted in freedom of press in India by J. Minattur at p. 78
105. Quoted in Press Law by Mudhalkar, J.R. at p. 49
106. 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.
    Article 215: Every High 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.
After the Constitution came into force Contempt of Courts Act, 1952 was enacted. The aforesaid Act, however, did not define the word contempt, and, therefore, the courts in India had to import the English concept of the contempt.

The Supreme Court in 1952 for the first time held the Editor, Printer and publisher of the newspaper 'Times of India' guilty of contempt for publishing an article, criticising its judgement in an objectionable manner. Besides other things, it was stated in the article that, "Politics and parties have no place in the pure region of law; and the courts of law would serve the country and the constitution better by discarding all extraneous considerations and uncompromisingly observing divine detachment which is the glory of law and guarantee of justice." The Court while dropping the proceeding on account of an unconditional apology tendered by the respondents, observed: No objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and bonafide criticism, but had a clear tendency to affect the dignity and prestige of this Court."

In Hira Lal Dixit V. State of U.P.107 the party to pending appeal in the Supreme Court to which the state of U.P was the respondent, distributed in the court premises a printed leaflet which had the following paragraph:

"The public has full and firm faith in the Supreme Court but the sources that are in the know say that the government acts with partiality in the matter

107. AIR. 1954 S.C. 743
of appointment of Hon'ble judges as Ambassdors, Governors, High Commissio-
ner etc. who give judgement against government but this has so far not made any difference in the firmness and justice of Hon'ble judges."

The apex court made it clear that the object of writing the above parag
graph and publishing it particularly at that time was obviously to affect the minds of the judges and to deflect them from the strict performance of their duties, thus tending to hinder or obstruct the due administration of justice. It was not a fair comment on proceedings but an attempt to prejudice the Court against the state and to star up public feeling on the very question pending for the decision. The Supreme Court, therefore, expressed the view that it were not only those activities which actually interfere in the administration of justice that constitute the contempt but even those activities which have a tendency of interfering with the administration of justice.

In E.M.S. Namboodaripad V.T.N. Nambiar, the appeallant was the Chief Minister of Kerala. He, in a press conference made certain critical re-
marks about the judiciary and described it as an "instrument of oppression" and judges as "guides and dominated by class hatred" instinctively favouring the rich against the poor. The remarks were reported in newspaper. The appeallant was convicted on a charge for contempt and sentenced to a fine of Rs 1000/- and in default to undergo imprisonment for one month. On appeal the Supreme Court held that the words constituted the contempt of court and were intended to weaken the authority of law and the law courts by having the effect of lowering the prestige of judges and the courts alike. Accordingly the Court dismissed the appeal but reduced the penalty up to Rs 50/.

It was observed that "The courts in India are not sui generis. They owe their existence, form, powers and jurisdiction to the Constitution and the laws. The Constitution is the Supreme law and other laws are made by parliament. It is they that give the courts their obligatory duties, one such being the settlement of disputes in which the state (by which we mean those in authority) are ranged against citizens. Again they decide disputes in which class interests are apparent. Explaining further its role the Court said. The Court as well as all the other organs and institutions are equally bound by the Constitution and the laws. Although the courts in such cases imply the widest powers in the other jurisdictions and also give credit where it belongs they can not always decide either in favour of the state or any particular class. There are innumerable cases in which the decisions have gone against what may be described in the language of communism as the exploiting classes."

Later on it was felt that the law on the subject was uncertain, undefined and unsatisfactory, a Committee was constituted under the chairmanship of Mr. H.N. Sanyal, the then Additional Solicitor General to scrutinise the existing law and make recommendations relating to the revision of contempt law which affected two important fundamental rights namely freedom of speech and expression and personal liberty. On the recommendations of the Committee the Contempt of Courts Act, 1971 was enacted and section 24 of this Act repealed the contempt of Courts Act, 1952. However in the year 1976 an amendment was made in the Contempt of Courts Act, 1971.

The aforesaid Act classified contempt of court into two categories. A) Civil contempt which means and includes wilful disobedience to any
judgement, decree, direction or order, and (B) Criminal contempt which means and includes publication whether by words spoken or written, signs, visible representation or otherwise and scandlising, lowering the authority of law and administration of justice.

The question before the Supreme Court in A.K. Gopalan V. Noordeen was whether any publication regarding a case pending before it amounts to contempt.\textsuperscript{110}

In this case a statement was made by the first appeallant charging one group of persons being guilty of conspiracy to commit murder. Some persons were subsequently arrested in connection with abov referred case. The said statement of first appeallant was also published in a newspaper edited by the second appeallant. They were convicted by the Kerala High Court for Committing contempt by making and publishing the said statement. They made an appeal to Supreme Court. The first appeallant was acquitted on the ground that it would be an undue restriction on the liberty of speech to lay down that even before any arrest had been made there should be no comments on the facts of any particular case. The Court however, confirmed the conviction of second appeallant who despite having knowledge of the fact that arrests have been made, published the statement. The Court took the statement published by the second appeallant regarding the case when it was pending before the Court as to prejudicing the case and consequently amounted interference in the administration of justice.

In C. K. Daphtary V. O. P. Gupta\textsuperscript{111} where the first respondent had

\begin{itemize}
  \item[110.] AIR 1970 S.C. 1694
  \item[111.] AIR 1971 S.C. 1132
\end{itemize}
got printed published and circulated a pamphlet containing scurrilous criticism of a senior judge of Supreme Court who sat alongwith another judge for deciding an appeal, using the words "dishonest judgement" "open dishonesty", "deliberately and dishonestly", and "utter dishonesty" etc. He also stated in the pamphlet that the senior judge cleverly asked the junior judge to deliver the judgement who toed to his line by writing what the senior told him to write. Proceedings for committing contempt were initiated against him but the respondent avoided the service till the senior judge retired. Thereafter he filed a counter affidavit containing an unconditional apology but also hurling fresh abuses against the senior judge. It was brought on record that proceeding had been initiated against the respondent when the Senior judge was still on bench. The Supreme Court held that by avoiding the execution of warrant the he had tried to take advantage of his own wrong. And consequently convicted him on finding that the remarks in the pamphlet made against a judge were wholly unjustified. The Court based its judgement on the fact that contempt proceedings had already been initiated before the senior judge retired but failed to take into notice the fact that since he had already retired the administration of justice could not have suffered.

In Barad Kanta V. Registrar Orissa High Court\textsuperscript{112} the Supreme Court considered the scope of Article 235\textsuperscript{113} in context with a criminal contempt of

\begin{itemize}
\item[\textsuperscript{112}]
Barda Kanta V. Registrar Orissa High Court AIR 1974 S.C. 710
\item[\textsuperscript{113}]
Language of Article 235 provides:........................."The control over district courts and courts subordinate there to including posting and promotion, of and the grant of leave to, persons belonging to the judicial service of state and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this articles shall be construed as taking away from any such person any right of appeal which may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."
\end{itemize}
court under section 2(c) of Contempt of Courts Act, 1971. Barad Kanta was a subordinate judicial officer who refused to follow the decisions of the High Court. His conduct was considered by the Supreme Court as falling within the preview of law of contempt. He also complained against the Chief Justice and other judges of Orissa High Court.

The Supreme Court observed that no comprehensive definition of “administration of justice” had been brought to the attention of the Court. It pointed out that the administration of justice did not consist merely in the adjudication of disputes between parties. Article 235 entrusts the High Court of disciplinary control over the subordinate judiciary and exercise of this jurisdiction was essential for the administration of justice. Consequently, vilificatory criticism of a judge functioning even in an administrative or non-adjudicating matter amounted to criminal contempt. However, if the alleged vilification of a judge takes the form of a complaint which is absolutely made in good faith to persons in authority to prevent abuse in the administration of justice, would this amount the contempt? Seervai gives the answer correctly an obvious ‘No’ otherwise the disciplinary jurisdiction of the High Court can never be invoked without risking committal for contempt.

Though the fair comment does not amount the contempt but on the other hand if the criticism exceeds the limit and tends to scandlise the admin-

114. Sec 2 provides: In this Act, unless the context otherwise requires.

C) “Criminal contempt” means the publication (whether by words, spoken or written or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which -

i) Scandlises or tends to scandlise, 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 proceeding; or

iii) Interfere, tends to interfere with, or obstructs or tends to obstruct, adminis-tration of justice in any other manner.
istration of justice or undermines the confidence which the public rightly re-
pose in the courts of justice or is likely to interfere with the administration of
justice, the press becomes liable to contempt as its criticism no more, is based
on public good. In Habeas Corpus Case\(^{115}\) during the Emergency the Su-
preme Court made a radical interpretation of the effect of a presidential order
under Article 359 of the Constitution which took away the locus standi of the
detenu to move the Supreme Court or the High Court to complain against the
deprivation of his liberty. The denial of judicial review evoked a protest from
the lovers of liberty prominently the lawyers from Bombay subscribed a docu-
ment of protest criticising the judgement in strong words and alleging that the
judges who had decided the case had behaved in a cowardly manner. Chief
Justice Beg explained and defended the judgement in that case and took the
view that to say that it was a misdeed on the part of the judges in the case
and that they should be 'ostracised' for such a perverse veiw, was 'irrational
and abusive' and amounted contempt.\(^{116}\)

But the majority (consisting of Justice Untwalia and Kailasam), did not
deal with the case and simply disposed of the matter on the basis that it is
not a fit case where a formal proceeding should be drawn up\(^{117}\) they pro-
posed to drop the proceedings, Beg, C.J. also joined in the common order.
Since it was a proceeding under Article 129 of the Constitution and the ma-
majority gave no reasons for their order, it is difficult to say on what ground they
ignored what Beg, C.J. called 'irrational and abusive' contempt. Unless the
majority differed from the finding of the fact of Chief Justice, it must be said

\(^{115}\) AIR 1976 S.C. 1207
\(^{116}\) In Re Sham Lal AIR 1978 S.C. 489
\(^{117}\) Id at p. 493
that 'irrational and abusive' contempt is not a fair comment, an exception to contempt of court. However, whatever may be the reason for dropping the case, it clearly demonstrates the risk which a journalist faces by merely reproducing the signed document on a judgement, made by eminent persons. On the other hand in Indian Express Case known as in re Mulgaonkar\textsuperscript{118} case, Chief Justice Beg was willing to drop proceedings even though the judges had been criticised and in which he was also attacked for framing a code of ethics for judges. He talked of the responsibilities of judges and lawyers and hoped that "the separate statement of reasons for dropping the proceedings (would) succeed in at least emphasising that they would not have been in vain\textsuperscript{119}. The Supreme Court laid down certain norms regarding publication in newspapers which may be summarised as under.

"National interest requires that all criticism of judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by partisan spirit or tactics. The judiciary can not be immune from criticism. But when that criticism is based on obvious distortions or gross misstatement and made in a manner which seems designed to lower the respect for the judiciary and destroy public confidence in it, it can not be ignored. The court must harmonise constitutional values of fair criticism and need for fearless curial process and its presiding functionary - the judge. To criticise a judge fairly, albeit fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice can not gag it or manacle it. But if the Court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits the strong arm of law must strike a blow on him who challenges the

\begin{itemize}
\item \textsuperscript{118} AIR 1978 S.C. 727
\item \textsuperscript{119} Id at p. 735
\end{itemize}
supremacy of the rule of law by faulting its source and stream.

The Supreme Court once again examined the scandalising jurisdiction in Umaria Pamphlet Case\textsuperscript{120} where pamphlet accused the magistrate of being 'wayward' and having a predisposition to convict. He was alleged to have misinterpreted the evidence and the case was reversed on appeal. The author of the pamphlet took the plea of fair comment and non-interference with the due course of justice. Under the Act of 1971, the plea of fair comment is available only when case is not pending, since an appeal was possible in the case, justice Desai was of the view that it can not be raised, but even then Supreme Court allowed it to take the plea as the High Court had allowed the same. Justice Desai relying upon pre-1971 Supreme Court and English cases observed that contempt jurisdiction was not obsolete.

Whether a statement in a press affecting trade when the case is pending would amount to contempt was before the court in Naraindas V, State of M. P. Bhagvati J.\textsuperscript{121} took the view that the effect of press release at the most might have affected the business interest of the appellant but it was quite different as the said press release could not have prejudiced the writ petition pending before a Court which is essential in contempt jurisdiction.

It seems that Bhagvati J. gave a restrictive interpretation of contempt jurisdiction because in this case the reason for getting the injunction was to protect the business interest of the complainant. Therefore, if the Press Note adversely affected very business which the interim injunction was designed to protect it was an interference with the due administration of justice hence amounted the contempt of the Court.

\textsuperscript{120} Ram Dayal V. State of U.P. AIR 1978 S.C. 921

\textsuperscript{121} (1974) L.J. 924
In National Textile Worker's Union's Case\(^\text{122}\), Supreme Court explained the extent of fair comment. According to the facts of the case, contemner had made serious allegations which were published in the press against a judge of Madras High Court. The allegations could not be proved. The Supreme Court while holding him guilty observed that, while commenting on matters pending in courts, the press should bear in mind that the parties to case have as much right to get redress and the hands of Court uninfluenced by external pressure as the press has its right to publish news and comments. Fundamental rights are guaranteed to all citizens and their enjoyment is possible only when every citizen respects the rights of others.

The Supreme Court while admitting that courts may not be always correct and that fair criticism though strong is not contempt added one more observation that allegation of improper motive without any justification can not be ignored. Though the court did not explain as to what constitute the improper motive but the language if taken in the light of aforesaid observation makes it clear that only those allegations which could not be justified were allegations with improper motive, and therefore, any allegation which is proved in a court of law would be treated as fair criticism.

The same interpretation was adopted in M.R. Parashar V. Farooq Abdulla where it was alleged that the Chief Minister had made certain statements which amount the contempt of court. Chief Minister in an affidavit denied the allegations. It was not clear under the circumstances to hold as to who (Editor or Chief Minister) has committed the contempt of court. Under such situation chandrachud, J. choose the general principle of criminal law and held that in the cases of criminal contempt the charge

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\(^{122}\text{National Textile Worker's Union V.P.R. Ramakrishnan AIR 1983 S.C. 759}^\)
of contempt must be proved beyond reasonable doubt. He, in the course of his judgement rightly observed that if a high dignitory wish to avoid the risk of being charged with contempt of court, it was pre-eminently desirable that the speech should be reduced to writing or a script prepared soon after, or what is now customary, that a tape recording should be made.\textsuperscript{123}

Thus the fact that the decisions of the courts are reversed by higher courts and the highest court reviews its own judgement itself shows that they may not be always correct. But while fair criticism, even if strong, may not be actionable, attributing improper motives to judges without justification tending to bring them to ridicule, hatred and contempt can not be ingnored. This is not so because individual judges should be protected but because courts as institutions of national importance should be protected so that they may be able to discharge their duties prescribed by the Constitution and the laws.

\textsuperscript{123} A.I.R. 1984 S.C. 615 at p. 617
Defamation is an injury to a man's reputation which is regarded as his property while insult is an injury to one's self respect. In other words a person is defamed when his reputation is lowered in the estimation of others.  

In India, the liability for defamation is two fold: (a) Civil, and, (b) Criminal. Defamation, when viewed as a civil wrong may be defined as the publication by a defendant to a third party of a false statement which tends to lower the plaintiff in the estimation of right thinking members of the society or which causes him to be shunned or avoided by such members. On the subject of civil liability for defamation there is no codified law in India and the rules that are applied by our courts are mostly those borrowed from the common law. Under common law there is complete immunity from liability not only in respect of defamatory statements of fact if those statements are true, but also in respect of defamatory statements of opinions which are fair comment on matter of public interest. A number of occasions are privileged, some absolutely privileged ie. speech of a member in the parliament etc. so that no action can lie under any circumstances and some of qualified privileges so that no action can be without proof of malice that is ill-will.

124. Op Cit note (93) at p. 112
However, the law of criminal liability is codified and contained under Sections 499-502 of Indian Penal Code. The offence requires the mensrea and the section 499 of the Penal Code provides defences which exhaust almost all the traditional defences.

It has been established by the decisions of the apex court that the freedom of journalist is an ordinary part of the freedom of a citizen and the press does not enjoy any special privilege. The press, therefore, is bound by Article 19(2) which places reasonable restrictions on the ground of defamation upon the freedom of press.\(^\text{124-A}\)

Since the word 'defamation' has not been defined under the Constitution and the civil law is not codified there remains the section 499 of Indian Penal Code which expressly defines the word 'defamation'. The section says that a person commits defamation when by words either spoken or intended to be read, or by signs or visible representation, he makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm, the reputation of such person unless the case falls under any of the exceptions attached to the section. Moreover the press possess all the rights enjoyed by a citizen the editorial good faith becomes a crucial factor in the determination of a criminal liability of a newspaper for defamation. In Sahib Singh's case \(^\text{125}\) a newspaper kaliyug, published from Aligarh, contained defamatory statements against public prosecutors and assistant public prosecutors. From the tenor

\(^{124-A}\) Article 361-A [forms an exception to Article 19(2)] exempts any person from any liability civil or criminal before any court of law in respect of any publication in a newspaper of substantially true report to the proceedings of either House of Parliament or State Legislatures provided it is not made with malice even if such publication is defamatory to others. The above provision therefore, also provides the constitutional protection to the Parliamentary Proceeding (Protection of Publication) Act, 1977 which also contains a similar provision.

\(^{125}\) Sahib Singh V. State of U.P. AIR 1965 S.C. 1451 at p. 1454
of the article no evidence of an object of advancing the public good was est-
established and there was also no evidence to show the defamatory remarks
have been made with due care and attention. The Supreme Court while stress-
ing the great power of the press in impressing the public mind held the press
guilty of causing defamation.

The issue of ‘good faith’ was one of the major factor in determining the
freedom of press in relation to defamation in Sewak Ram Sobhani V. R.K.
Karanjea. During Emergency Sobhani, a top R.S.S. leader was lodged in
Bhopal Central Jail. Another young lady Mrs. Uma Shukla was also lodged in
the same jail. The jail rules do not allow free mixing among male and female
inmates but the rules were not strictly followed. Mrs. Uma Shukla was found
pregnant and underwent an abortion. An enquiry was conducted by a high
rank official who in his report indicated that Mr. Sobhani was responsible for
empregnating the young lady. The summary of the report appeared in ‘Blitz’,
edited and printed by Mr. R.K. karanjia. When emergency was revoked, the
appeallant filed a suit for defamation against the editor. The editor claimed
exeption of Sub. Sec.(9) of Sec 499 IPC and insisted to produce the en-
quiry report to the magistrate before his statement is recorded. The Govern-
ment claimed the privilege and the prayer of the editor was rejected. He filed
an appeal before the High Court and a copy of the report was supplied. The
High Court on the basis of that report quashed the prosecution of the editor.

127. Exception IX to Sec. 499 IPC provides that it is not defamation to make an impu-
tation on the character of another provided that the imputation be made in
good faith for the protection of the interest of the person making it, or of any
other person or for the public good.
Finally the matter came before the Supreme Court.

The issue before the apex court was that whether or not the report was published in 'good faith' and 'public interest'. All the three judges (A.P. Sen, J., O.Chinnoppa Reddy J., majority and Bahrul Islam, J. minority) delivered the separate judgements.

A. P. Sen, J., answered in affirmative when he observed, "It was a publication of report for welfare of the society ............. The balance of public benefit lay in its publicity rather than in hushing up the whole episode. The report further shows that the publication has been honestly made in belief of its truth and also upon reasonable ground for such a belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances."128 But even then he opined that unless an enquiry report has been duly proved, it has no evidentiary value. Moreover, when there was nothing to show that accused has taken due care and caution and had acted in good faith. The High Court should not have used it for basing its conclusion.

Chinnappa Reddy, J., however, was of the view that, "questions of 'good faith' and 'public good' are questions of fact and could be decided only after a regular trial is held and should not have been answered at the stage when even the accused was not examined."129

Bahrul Islam, J., however in his dissenting opinion observed that, Inquiry was made by a highly responsible officer and submitted to Government............. If the complaint and consequent inquiry report be for public good, and the respondents had reasons to believe its content to be true, they will be protected under exception 9 of Sec. 499 IPC. Even if the burden of proof of 'good faith' be on the accused; good faith need not be proved beyond reasonable doubt. Once this is done whether publication was for public good

128. Id at p. 1517
129. Id at p. 1520
would be a matter of inference.'\textsuperscript{130}

Though Sen J. admitted that report was made in good faith and for 'public good' and that publication was honestly made in belief of being true but he made a self contradictory observation that there was nothing to show that accused has taken due care and caution and had acted in good faith. The stand point of majority view seems to be that question of 'good faith' and public good can be decided only after examining the accused and the gist of exception clearly lays down 'any defamatory statement if made in good faith and for public good would not amount defamation'. Therefore, if once the Court concludes that a statement is based on an enquiry report which the accused reasonably believes to be true and for public good, benefit of exemption is available to him and there is no need to prove the report before basing the conclusion upon it. It may, therefore, be submitted that the minority judgement of Bahrul Islam presents a correct view.

The landmark judgement in Auto-Shankar Case,\textsuperscript{131} narrowed the sweep of the ground of defamation as a reasonable restriction on the freedom of press. In this case Auto-Shankar who was sentenced to death for committing six murders wrote autobiography in the jail. He gave it with the knowledge and approval of jail authorities to his wife to hand over the same to his advocate with a request to publish it into the petitioners magazine 'Nakheeran'. The autobiography depicted a close nexus between the prisoner and some I.A.S. and I.P.S. officials. Some of whom were his partners in various crimes. When the magazine announced its publication in serial, the news sent shock waves among the officials as they feared that they would be exposed. Thereafter

\textsuperscript{130} Id at p. 1523

\textsuperscript{131} Rajgopal V. State of T.N. AIR 1995 S.C. 264
Inspector General (Prison) wrote a letter to the editor that Auto-Shankar has denied of writing any autobiography and, therefore, the publication should be stopped. The editor moved to the Supreme Court. The question before the Supreme Court was whether public officials who apprehend that they or their colleagues may be defamed can impose a prior restraint upon the press to prevent such publications?

Referring the New York Times V. U.S. popularly known as Pentagan Paper's Case that 'any system of prior restraint of (freedom of) expression comes to this court bearing a heavy presumption against its constitutional validity and in such cases the Government 'carries a heavy burden of showing justification for the imposition of such a restraint' held that, "neither the Government nor the officials who apprehend that they may be defamed, have the right to impose prior restraint upon the publication of alleged autobiography of Auto-Shankar. The remedy to public official, public figures, if any, will arise only after the publication and will be governed by principle indicated herein" or in other words such official could take action for damages after publication, if they prove that the publication was based on false and published without any reasonable verification of facts." The Court however, made it clear that as a general rule no remedy is available to public officials if they are defamed due to any act done by them in discharge of their official duty but if they are defamed in their individual capacity they are free to seek remedy under the civil law or the criminal law like any other individual.

132. Id at p. 277
The Court in the same case further extended the scope of freedom of press by holding that even the person whose own biography is to be published or being published cannot restrain the press if it is based on public record including the court record. Nevertheless, it also warned at the same time that if published beyond that i.e. life story then unless it is published with the consent of the person concerned it would be an invasion on his privacy and the press in that case would be liable to the consequences.\textsuperscript{133}

\textsuperscript{133} Supra note 131 (at p. 276)
Incitement to an offence

Most countries consider incitement to an offence to be an offence irrespective of the results of such incitement. For example, in England a person who solicits or incites another to commit a felony or misdemeanour is liable to indictment at common law, even though the solicitation or incitement produces no effect. Thus where the addressee does not read the letter containing incitement, the writer is guilty of the offence of incitement. In United States incitement to commit a crime is punishable and it has been held by the court that if the act, tendency of the act and the intent with which it is done, are the same, there is no ground for the saying that success alone warrants making the act a crime.¹³⁴

In India, amendment to Article 19(2) of the Constitution permits restrictive legislation on the right of freedom of speech and expression in relation to incitement to an offence. Under Article 367 the word "offence" has been assigned the same meaning as is given to it under Section 3(38) of General Clause Act, 1897.¹³⁵

Thus the term is of very wide connotation and only redeeming feature is the judicial review of the fact that as to under what particular circumstances an act constitutes the incitement to an offence? so that a reasonable restriction may be placed upon the right.

¹³⁵ Under Sec 3(38) of General Clause Act the "offence" has been defined as an omission made punishable by law.
In State of Bombay V. Balsara\textsuperscript{136}. The Supreme Court upheld the constitutional validity of section 24(1) (b) of the Bombay Prohibition Act, 1949\textsuperscript{137}. But simultaneously struck down the validity of Sec. 23(b) holding it so wide and vague that it would be difficult to define or limit the scope. Therefore, in order to be saved by the clause (2) to Article 19, the legislation must be levelled against a "definite" offence and a vague restriction is not a valid restriction.

It is also essential that incitement must relate to a pre-existing offence meaning thereby the incitement in order to be punishable, must be an act already an offence under any law for the time being in force. Consequently a person is not liable for any act of instigating or advocating for any activity which is not an offence or where a law is declared ultra vires to Article 19 no person may be punished under such law.\textsuperscript{138} Again where an act is not an offence to ask the people to bring a change in the existing system by valid means (ie, In a democracy to change the Government through election), an appeal in newspaper to the aforesaid effect could not be said to have constituted the incitement to an offence. No restriction, therefore, could be placed upon the press to desist from publishing such appeals.

\textsuperscript{136} 1951 S.C.J. 478

\textsuperscript{137} Sec. 24 (1) - "No person shall print in any newspaper, newsheet, book, leaflet, booklet, or any other single or periodical publication or otherwise display or distribute any advertisement or other matter\ldots\ldots\ldots (b) which is calculated to encourage or incite any individual or class of individuals or the public generally to commit an offence under the Act, or to commit a breach or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence permit, pass or authorisation granted thereunder.

\textsuperscript{138} A. I. R 1960 S.C. 633
During Emergency

John Milton's Aeropagatica (1644) was primarily directed against the power of the licensor, when he said,

"Give me liberty to know, to utter and argue freely according to conscience, above all liberties; whoever knew truth put to the worse, in a free and open encounter." 139

This freedom of speech and expression has always held pride of place in civilised societies and has been humanity's ideal in times, ancient and modern. Its importance is reflected in 'The Universal Declaration of Human Rights' 140 which lays down certain essential freedoms that mankind should have, of which freedom of speech and expression is one of the most important. The right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The founding fathers of our Constitution attached great importance to freedom of speech and expression and freedom of press, and therefore, they provided for ample freedom of speech and expression, yet as men of wisdom and vision they knew that nothing is more certain than the principle that there are no absolute. Whilst recognising that without a free press there can be no free society, they also realise that freedom of

139. Quoted in Law of Press Censorship in India By Sorabjee, S.J. at p. 103
140. Article 19 of the Declaration provides that, "Every one has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"
press was not an end in itself but a means to the end of a free society. This freedom of press did not imply the freedom from responsibilities for its exercise and without a disciplined sense of responsibility, a free press which is an inestimable privilege may well become the 'scourge of the Republic'.

The founding fathers were also aware of the fact that there may arise some extreme situations which may throw the entire nation out of gear and such situations may only be tackled through certain drastic steps. They have anticipated such situations as a force of tradition and experience with the working of colonial statutes. To deal with such situations, therefore, the Constitution envisages the emergency provisions under Article 352 to Article 360. Here it would not be out of context to mention that Democracy and the rule of law are the concepts alien to the Indian history and society. Indians became familiar of these concepts after the British rule was firmly established and western-style education changed the mind of the people though it seems that the British policies themselves preferred a strong rule rather than rule of law. The British rulers enforced and perpetuated this double standard and exploited the people behind the facade of constitutionalism and rule of law, as they were well aware of the fact that authoritarianism was embedded in Indian history, society and culture.

The emergency provisions under the Constitution of India are the result of a compromise between the principles of Constitutinal Govern
ment and strong and effective government. When one attempts to re-
construct the intentions of the founding fathers, the other becomes en-
tangled in all sorts of ambiguities. The Granville Austin rightly observes
that, "It is clear that even in the minds of individual members of
Constituent Assembly there existed considerable tension between
three competing concerns: (1) The desire for personal freedom nur-
tured by the experience with oppressive despotic colonial rule; (2)
The drive for social reform and building up a welfare society; and
(3) The fear of disruption and instability arising from the divisive
forces or region, provinces, language, community, ethnicity and
extremist political ideologies."\footnote{Granville Austin. The Indian Constitution: Cornerstone of a Nation at p. 105-6}

Thus the framers of the Constitution of independent India though com-
mitted to the liberal democratic ideals were nevertheless prisoners of tradi-
tion. They built the structure of emergency powers, even enlarged and
rationalised it, to serve a regime which was no longer colonial in character or
merely regulatory in function.

An emergency under Article 352 can be proclaimed by the President of
India, if he is satisfied that a grave emergency exist whereby the security of
India or any part thereof is threatened due to war, external aggression, or
armed rebellion. The Article also makes it clear that emergency can be de-
clared before the actual occurrence of aforesaid grounds\footnote{Article 352 \[Explanation-A : Proclamation of Emergency declaring
that the security of India or any part of the \] Contd}.
satisfaction of the cabinet. A Proclamation of Emergency may be issued un-
der Article 352 (on the ground of war, external aggression and armed rebel-
lion), 356 (failure of constitutional machinery in a state), and 360 (Financial
Emergency). But it is only the emergency declared under Article 352 which
affects the freedom of press.

The Proclamation of Emergency under Article 352, as a consequence
affects the freedom of press to a great extent. Under Article 358 while a
Proclamation of Emergency is in operation the state may make any law or
take any executive action infringing the rights guaranteed under Article 19 of
the Constitution. But any law so made shall cease to have effect as soon as
the Proclamation of Emergency ceases to operate except as respects things
done or omitted to be done before the law ceases to have effect.\footnote{143}

\footnote{143. Article 358(1) [While a Proclamation of Emergency declar-
ing that the security of India or any part of the territory thereof is
threatened by war or by external aggression is in operation], noth-
ing in article 19 shall restrict the power of the state as defined in
Part III to make any law or to take any executive action which the
State would but for the provisions contained in that Part be com-
petent to make or to take, but any law so made shall, to the extent
of the incompetency, cease to have effect as soon as the
Proclamation ceases to operate except as respects things done
or omitted to be done before the law so ceases to have effect}
Thus the first fetter on the power of Parliament breaks down in emergency and a law made under Article 358 curtailing the freedom of press or any of the right under Article 19 of the Constitution can not be challenged so long as emergency is in force. Similarly under Article 359 the fundamental rights guaranteed under part III of (except rights provided under Article 20 and 21) the Constitution can be curtailed when a Proclamation of Emergency under Article 352 of the Constitution is in operation.

A Proclamation of Emergency under Article 352 has far reaching effect under Article 250 when the parliament becomes empowered to legislate on the subjects enumerated under list II and under Article 353 where the power of union extends to giving executive directions to the states. Prior to 44th amendment to the Constitution upon a Proclamation of emergency by the President of India, Article 358 had automatic operation whereby the rights guaranteed under Article 19 were automatically suspended. 44th Constitutional Amendment Act, 1978, however, Amended Article 358 and now under this Article as soon as the proclamation of emergency is issued under Article 352 on the ground of war or external aggression only and so long it lasts, Article 19 stands suspended in view of Article 358 and the executive power of the state to that extent widened. But when the Proclamation is issued on the ground of armed rebellion, Article 19 will not be affected nor the power of the state shall be enlarged in that respect. More over any law which curtails the freedom must contain a recital to the effect that it is in relation to the proclamation of Emergency in operation when such law is made.

The justification of provisions is that during emergency state needs more power than in normal times and the actions of the state taken to meet emergency should not impeded by protacted litigation as to its reasonableness.

144. Article 359 (1A): While an order made under clause(1) mentioning any of [the rights conferred by part III (except articles 20 and 21)] is in operation, nothing in that Part conferring those rights shall restrict the power of the state as defined in the said Part to make any law or to take any executive action which the state would but for the provisions contained in that Part be competent to make or to take but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

145. Article 250... (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. (2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

146. Article 353- while a proclamation of Emergency is in operation, then notwithstanding anything in this Constitution, the executive power of the........................Contd:
Before 1978, every law enacted or the executive action taken during emergency which infringed Article 19 was protected and immune from challenge before any court of law. But if any law was made or action taken before the issuance of proclamation of emergency, such laws or action were open to be challenged on the ground of violation of Article 19 even during the emergency.¹⁴⁷

The same view was affirmed in B.C. & Co. V. Union of India¹⁴⁸ where the Supreme Court held that the News Print Policy of 1972-73 which was a continuation of old policy made before the Proclamation of Emergency was not protected even during the Emergency from attack under Article 19. It held that executive action which is unconstitutional at the time its being taken, is not immune from being challenged in a court of law during the emergency. Proclamation of Emergency would not authorised the taking of detrimental executive action during that period affecting Article 19 without any legislative

Contd:………..Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised; Part (b) of Article 353 is similar to Article 250. However, in view of Article 365, if any state fails to comply with the executive directions given by the Union as to manner in which such power is to be exercised, it may be hold by the President that a situation has arisen when the Government of the State can not be carried on in accordance with the provisions of Constitution and this may led to President rule in the State.


authority or in purported exercise of power conferred under any pre-emergency law which was invalid when enacted. There is no reported case by the Supreme Court on press censorship during emergency. Therefore, in the absence of such decision reference may be made of the two unreported decisions delivered by the Bombay High Court on the freedom of press during emergency to have an idea of ambit of censorship on the press.

The first case was of Minoo. R. Masani, a well known figure in the field of politics and journalism. In view of the provisions of censorship order Masani submitted for scrutiny of the censor at Bombay certain material which were sought to be published in the issue of 'Freedom First' for the month of August. This consisted of material the publication of which had been previously allowed as well as some fresh material. The Censor prohibited the publication of several items.

Another veteran journalist Y.D. Lokurkar also filed a petition against the Bombay censor, Mr. Binod Rao, as two articles submitted by him for scrutiny were banned on flimsy grounds. His petition reached at hearing stage before the Masani's and came up before Justice R.P.Bhatt.

The plea of the government that petition was not maintainable because of the Proclamation of Emergency and the Presidential order dated 27th June 1975 passed under Article 359, was rejected. On

149. Though four judgements were delivered by the apex court during that period on personal liberty but in Habeas Corpus (AIR 1976 S.C. 1207), the judgement was banned by censors.
the merits the Court struck down the action of the censor and held that he has misdirected himself in law and had taken into consideration extraneous matters. This was the first judgement of its kind after the fresh Proclamation of Emergency and the censorship order.

Masani’s petition came up for hearing in the last week of Nov. 1975 and once again the Court held that there was nothing objectionable in any of the eleven articles which had been banned by the censor on the ground that he had acted without the authority of law and exceeded the power vested in him under the censorship order.

An appeal was made against this judgement which was heard by a Division Bench consisting of Mr. justice D.P. Madan and Mr. Justice H. Kania. The appeal court rejected the preliminary contention that the writ petition was not maintainable and held “Inspite of Proclamation of Emergency and the Presidential orders a citizen is free to say, write and act as he likes so long as he does not transgress the law. What the respondent was doing by his writ petition was not to seek to enforce any of his common law rights or any rights under part-III of the Constitution but to challenge the legality of the action by the appellant on the ground that it was without the authority of law. “The guidelines issued under clause (3) of censorship order do not have any statutory authority” and that “guidelines issued under clause (3) of censorship order must be read in conjunction with the purpose for which the said order was made, and any provision thereof which may at the first blush appear to be too wide must be interpreted in the light of purpose and object of censorship order.”
The immense value of the judgements lie in the fine balance it has achieved between two important social interests, liberty of thought and expression and public safety. The judgement has done a great service by recognising that even in times of emergency the right of dissent is essential for the welfare of the society. It has re-assured every right thinking person that he need not to fear of speaking and writing in praise of it.

In the light of the above discussion the scope of freedom of press may be summarised into following words.

In Constituent Assembly when the provision relating to freedom of speech and expression was being discussed, several members raised various apprehensions and insisted for a separate provisions guaranteeing the freedom of the press. But their demand was not acceded as Dr. Ambedkar, the Chairman of Drafting Committee declared that the freedom of press is included within the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. The aforesaid view of Dr. Ambedkar was affirmed by the Supreme Court in Romesh Thappar and Brij Bhushan Cases when it held that freedom of speech and expression includes freedom of press. It can neither be subjected to pre-censorship nor the government can stop the circulation of any newspaper or publication of any matter.

The press though does not enjoy any immunity from the laws of general taxation but the same can not be levied upon it in such manner which adversely affects the freedom of press. The government can not take any action to eliminate the unfair competition between big and small newspapers in the guise of Press Commission recommendation by implementing newsprint policy. Similarly it can not take any punitive action to muffle the voice of
The press on the rule of balance of convenience may be stopped from publishing any matter if it comes in conflict with other's fundamental rights. However, considering the importance of press, it can not last beyond the period than actually required under the circumstances of a particular case. It is not that only the press can claim its freedom against the state as a fundamental right, under exceptional circumstances even an individual may claim the publication of his views in a magazine maintained out of public funds to enable the readers to have a complete picture upon which his opinion is formed.

The advertisements have always been a major source of revenue for the newspapers and it becomes available to public at reasonable price. Advertisements not only bring down the price of a newspaper but also fulfill the economic needs guided by information and disseminated through print media. Therefore, the press can not be denied the freedom to publish advertisements unless they fall within the ambit of Article 19(2) of the Constitution.

Unlike U.S. Constitution, (where the courts have evolved noble rules of restrictions) the Constitution of India expressly provides certain grounds under Article 19(2) upon which reasonable restrictions may be placed on the press. Therefore, press can not publish any matter it pleases. It has no freedom to publish any material which may endanger the sovereignty and integrity of country neither it may be allowed to carry out any matter which is likely to put the security of the country at risk. But it is the public disturbances of unmanageable magnitude and not of purely local significance which may pose any risk to the security of the state. Public peace and tranquility is essential.
the development of the country and the press, therefore, may be restrained from
acting in such a manner which may disturb the public peace. Reasonable re­
strictions may also be placed on the press to prevent it from publishing any
material which may debase and debouche the mind of young and adolescent
readers. Similarly the freedom is not available to express one’s views in such
manner that amount the contempt of courts. Nor it is at liberty to defame any
person and if any person is defamed because of any publication the press can
not escape from the liability. It is also universally recognised principle that free­
dom of press may not extend to a limit where it amounts the incitement to of­
fence; and therefore, press may be subjected to reasonable
restrictions on the aforesaid ground.

By virtue of Article 358 of the Constitution, the freedom of speech and
expression remains suspended during emergency promulgated under Article 352
on the ground of external aggression and war. The press under such circum­
stances may be subjected to pre-censorship and has no right to claim the free­
dom as a fundamental right. But it may be restrained only in respect of aims and
objects intended to be achieved under the censorship order and not beyond
that.