CHAPTER VI

Judicial response towards Media and Media Trial
CHAPTER VI:

JUDICIAL APPROACH ON FREEDOM OF MEDIA AND MEDIA TRIAL

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The basic idea of freedom of speech and expression is as old as the human civilization. In India, before independent there was no Constitutional or statutory guarantee of individual or media freedom. At the most some English common law
freedom could be taken by the press as was observed by the privacy council – the Apex Court of for India then in the following words¹:

‘The freedom of the journalist an ordinary part of the freedom of the subject and to whatever length the subject may go, so also may one journalist apart from states his privilege is no other and no higher. The range of his assertions, his criticism or his comments is a wide as, and no wider than, that of any other subject.

The freedom of media though not expressly stated in Article 19(1)(a) of the Constitution as such has been put on a high pedestal by judicial interpretation thereby vindicating the view of Dr. B.R. Ambedker expressed in Constituent Assembly². In a service of directions from 1950 onwards, the Apex Court has ruled that the freedom of media i.e. press is implicit in the guarantee of freedom of ‘speech and expression’, and therefore freedom of media by judicial interpretation, can now be regarded as one of the fundamental right guaranteed by the Constitution of India.

The importance of the freedom of press in democracy like India was time and again recognized, stated, re-stated and confirmed by the Apex Court despite the fact that the Art. 19(1)(a) does not contain any specific enumeration of this freedom. As and when called upon to do so, the Court have annulled the legislative instruments and administrative actions which seek to impinge on the freedom of media i.e. press because it was recognized that this freedom is absolutely imperative for the system of parliamentary democracy envisaged in the Constitution.³

Indeed, as no freedom is absolute and has to subject to reasonable restrictions, the freedom of media also is subject to reasonable restriction and regulation but those restrictions must squarely fall within one or more heads of restriction specified in Art. 19(2) of the Constitution of India and must be reasonable and not excessive or disproportional. The procedure and the manner of imposition of the restriction or regulation, on the freedom press has also to be just, fair and reasonable. The validity of the restriction is of justifiable. How the judiciary in the country has been supportive of

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². The Architect of the Indian Constitution, Dr. Ambedkar, in his brief reply to the criticism about the “omission” to include freedom of press as a fundamental right said: “the Press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The Editor of Press or its Manager are all citizens and, therefore, when they chose to write in newspapers, they are merely exercising their right of expression” and, therefore, no special mention of the freedom of press was necessary in Part-III of the Constitution.

³. Justice G.S. Singhi, Role of Media in Indian Democracy, Protection under19(1)(a)and Abuse of such freedom, IIFJS (2009)
protection of this right can be illustrated by reference of some leading judicial pronouncement classified (I) In general (II) on media trial.

6.1.2. Judicial Approach on Constitutionality and Freedom of media in general

Soon after the Constitution of India come into force the Apex Court was required to examine whether the restriction could be imposed outside the scope of clause (2) of Art. 19. In Romesh Thappar vs. State of Madras is one of earliest case in which the Supreme Court laid down an important principle and giving restrictive interpretation of clause (2) of Art. 19 said that if the law being applied is not sectioned by the Constitution, it must be held to be wholly unconstitutional and void. In other words, what the Court said was that the clause (2) of Art. 19 having allowed the imposition of restriction on the freedom of speech and expression for specified purpose, any law imposing restriction which are capable of being applied to causes beyond the express purpose cannot be held to be Constitution al or valid to any extent.

Again the Supreme Court of India in May, 1950 had to resolve the tension between freedom of expression and censorship. In Brij Bhushan V. state of Delhi, section 7(1)(c) of The east Punjab safety Act, 1949, provide for submission of material of scrutiny it the government was satisfied that such action was necessary for the purpose of preventing or combating any activity pre-judicial to public safety or the maintenance of public order. The Court declared the statutory provision in question unConstitution al on the ground that the restrictions imposed were outside the preview of Article 19(2), which did not include public order as a permissible head of restriction.

The Parliament was, however, quick to react, Article 19(2) was amended by the Constitution (First Amendment) Act 1951, with retrospective effect on 18th June, 1951. The substituted Article 19(2) then read as follows:

“(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 impose reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with

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5. AIR 1950 SC124
6. AIR 1950 SC 129
foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.”

Thus, freedom of press was further curtailed and further restrictions’ were permitted to be imposed on the freedom of speech and expression and generally speaking on Freedom of Press – in the interest of security of State, friendly relations with foreign states, public order and even for incitement to an offence. However, the Parliament also provided that the restrictions to be imposed by any such law must be “reasonable”. The Supreme Court expressed its doubt whether the First Amendment could be enacted with retrospective effect but did not rule on the point7.

After the Constitution (First Amendment) Act, the decisions of the Punjab and Patna High Courts could no longer be regarded as good law in as much as the amendment expressly permitted imposition of reasonable restrictions under the head of incitement to an offence8.

Thus, it is seen that the amendment of Article 19(2) by the Constitution (First Amendment) Act 1951 curtailed the freedom of the press because it enlarged the existing heads of permissible restrictions by adding “friendly relations with foreign state, public order, and incitement to an offence”. However, the inclusion of the word ‘reasonable’ before restrictions on the exercise of the right of freedom of speech and expression was a significant gain for the defenders of freedom of press.

Aggression by China on 20th October, 1962 appears to have prompted the Parliament to once again amend Article 19(2) by the Constitution (Sixteenth Amendment) Act in 1963. By the said amendment a further restriction was introduced and another head of restriction, “sovereignty and integrity of India”, was added to clause (2) of Article 19 but this time only with prospective effect9.

7 Madhu Limaye Vs. Sub Divisional Magistrate, AIR 1971 S.C.2486 at 2491
8 State of Bihar Vs. Shailabala Devi, AIR 1952 SC 329
9 Article 19(2) of the Constitution at present reads as follows:“(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 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.”
6.1.3. Judicial Approach on Freedom of media and its Dimension

The Democracy is based on essentially on freedom of debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people, by the people and for the people it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligent exercise his right of making a choice, free and general discussion of public matter is absolutely essential\(^{10}\). The apex Court of India has contribute a lot to develop the law and expansion of freedom of speech and expression and declared that it includes right to receive, collect, disseminate information propagate, freedom of press\(^{11}\). The freedom of speech and expression has been given paramount importance by the Supreme Court and it has given landmark judgments to develop the dimension of freedom of media and declared that the following rights and freedom of media is a species of freedom speech and expression:

**The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia,\(^{12}\)** In this case Ram Manohar Lohia, the respondent, was the general secretary of the Socialist Party of India. The Uttar Pradesh Government had enhanced the irrigation rates for water supplied to farmers from canals. The Socialist Party decided to start an agitation against this hike. As such, the respondent addressed two public meetings in Farrukhabad, wherein he instigated the audience not to pay the enhanced irrigation rates to the Government.

Subsequently, he was arrested. The respondent filed a petition before the High Court for a writ of *habeas corpus* on the ground inter alia, that section 3 of the Uttar Pradesh Special Powers Act, 1932 (Act XIV of 1932), under which he was prosecuted for delivering the speeches, was void under the Constitution.

The impugned section 3 reads as follows:-

“Whoever, by word either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication any person or class of persons not to pay or to defer payment of any liability, and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class

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\(^{10}\) Maneka Gandhi Vs. Union of India \(\text{AIR 1978 SC 5976(Justice P.N.Bhagwati)}\)

\(^{11}\) Dinesh Trivedi Vs. Union of India, 1977, 4 scc 306, Association for Democratic Reforms Vs. Union of India \(\text{AIR 2001Del.137}\)

\(^{12}\) 1960 SCR 821
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.”

The Supreme Court held that even though all the grounds specified in Article 19(2) of the Constitution on the basis of which reasonable restrictions on the right to freedom of speech can come under public order, yet the term is distinct from the other terms and must be ordinarily read to mean public peace, safety and tranquility and not national upheavals such as revolution, civil strife and war, affecting the security of the State.

The Court held that the limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

The Court said that it would be incorrect to argue that since instigation by a single individual not to pay taxes might ultimately lead to a revolution resulting in destruction of public order, that instigation must have a proximate connection with public order. No fundamental right can be restricted on such hypothetical and imaginary consideration.

The acts prohibited under section 3 of the Act cannot be said to have any proximate or foreseeable connection with public order sought to be protected by it. Thus, that section being violation of the right to freedom of speech guaranteed by Article 19(1)(a) of the Constitution, was struck down by the Court as unconstitutional. As such, the prosecution of the respondent under that section was declared to be void.

The Freedom of Press does not merely end with the printing of the newspaper or journal. For this right to be meaningful, it must have a capacious content. It is essential that people should have access to the news and views. Freedom of circulation is, therefore, essential to the effective exercise of the Freedom of Press. Indeed without circulation, publication would be of little value13. In a democracy, great emphasis is laid on the freedom of the Press and the sanctity of its role as an independent, fearless body voicing popular feelings and opinions. Mahatma Gandhi on the role of the Press said, “One of the objects of a newspaper is to understand the popular feeling and give expression to it; another is to arouse among the people certain desirable sentiments; the third is fearlessly

13 Sakal Papers (P) Ltd. v. Union of India, AIR 1962 Sc 305)
to expose popular defects.” We can say India has the distinction of being the world’s largest democracy and we can take rightful pride in that great achievement. The experience of some of our neighbors’ shows that it is indeed a big feat; however, great vigil is required to sustain democracy. The Legislature, an independent Judiciary and Free Press are three of the essential pillars on which it rests. They have to play their roles fairly and in public interest to uphold our basic national objective of secularism, democracy and socialism. In *Sakal Papers (P) Ltd. v. Union of India*\(^{14}\), the Supreme Court annulled the Newspaper (Price and Page) Act, 1956. The apex Court held that the freedom of the Press could be interfered with by the government indirectly, even by enacting laws which did not directly impose any restriction on that freedom on the ground of security of the state or the like.

This Act was framed to prevent unfair competition among newspapers through price-cutting. Empowered by this Act, the central government issued the Daily Newspapers (Price and Page) Order, 1960, whereby the number of pages published by a newspaper was made to depend upon the price charged to the readers, so that a newspaper could not increase the volume of its publication without raising its price. The government vindicated its stand by saying that such a regulation was essential to protect the smaller newspapers from unfair competition with bigger ones. Moreover, it wanted to prevent concentration of ownership in the hands of a few commercial groups of newspapers. The Supreme Court, however, turned down the contentions of the government and observed as follows:

(a) The fixation of a minimum price for the number of pages which a newspaper is entitled to publish would deter a class or section of its readers from purchasing such newspaper (because of the higher price) and thus curtail its circulation;

(b) Limiting the number of subscribers of a newspaper is an infringement of the freedom of the Press, guaranteed by Article 19(1)(a), even though it is effected through a schedule of rates;

(c) The volume of circulation of a newspaper cannot be curtailed for the purpose of protecting or promoting smaller newspapers or for suppressing unfair practices by other newspapers or for prevention of monopolies.

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\(^{14}\)AIR 1962 SC 305
Mudholkar, J. said: “The right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interest of 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. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public”.

It was further observed that “while there is no immunity to the Press from the operation of the general laws, it would not be legitimate to subject the Press to laws which take away or abridge the freedom of speech and expression or adopt measures calculated or intended to curtail circulation and thereby narrow the scope of dissemination of opinion”.

**Express Newspapers (Private) Ltd. v. Union of India**\(^5\) In this case Certain newspaper establishment filed petitions challenging the Constitutional validity of the Working Journalist (Condition of Service) and Miscellaneous Provisions Act, 1955 and the legality of the decision of the Wage Board, taken under section 9 of the Act.

The Act aims to regulate the conditions of service of working journalists and other persons employed in newspaper establishments. Section 9 of the Act laid down the principles that the Wage Board had to adhere to while fixing the rates of wages of working journalists.

The petitioners claimed that the provisions of the impugned Act violated their fundamental rights under Articles 19(1)(a), 19(1)(g), 14 and 32 of the Constitution. They also contended that the decision of the Wage Board fixing the rates and scales of wages was arrived at without taking into consideration the capacity of the newspaper establishment to pay the same. This was a heavy financial burden on the newspaper industry and was against the principles of natural justice.

The Court upheld the Constitutional validity of the impugned act with the exception of section 5(1)(a)(iii) which infringed section 19(1)(g) of the Constitution

**D.P. Mishra v. Kamal Narain Sharma,**\(^6\)

It was published in a daily newspaper ‘Mahakoshal’ that the appellant was guilty of a corrupt practice under section 123(4) of the Representation of the People Act, 1951.

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\(^5\) 1959 SCR 12  
\(^6\) AIR 1971 SC 856
A notice was issued to the editor, publisher and printer of the newspaper, Shukla, to show because why he should not be named under section 98 of the Act.

At the hearing before the High Court, Shukla admitted that he was the registered printer, publisher and editor of the newspaper at the relevant time. But, he claimed that he had left the entire management of the newspaper with Tarangi and the he had no knowledge about the publication until the election petition was filed. On hearing further evidence, the High Court accepted Shukla’s plea.

The Supreme Court, confirming the High Court’s order, held that although section 7 of the Press and Registration of Books Act, 1867, raises a presumption that a person whose name is printed in a copy of the newspaper is the editor of every portion of that issue, the same could be rebutted by evidence. Thus, the appeal filed by Mishra was dismissed.

In *K.K. Birla V. The Press Council*[^17], S.S. Chadha, J., said that the concept of freedom of Press cannot be put in any narrow straitjacket. It is a living concept and cannot be confined in any narrow limits, which restricts its growth.

In *Maneka Gandhi V. Union of India*,[^18]

By an order dated July 7, 1877, the passport dated June 1, 1976 of a journalist (the petitioner) was impounded “in public interest”. The Government of India, “in the interests of general public” refused to give her the reasons for its decision. As such, she (the journalist) filed a writ petition under Article 32 of the Constitution on the grounds that it violated Articles 14, 19 and 21 of the Constitution. In its counter-affidavit, the respondent stated that the petitioner’s passport was impounded as her presence was likely to be required before a Commission of Inquiry. The Court held that “any procedure which permits impairment of the Constitutional right to go abroad without giving a reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence there is, in the present case, clear infringement of the requirement of Article 21. Even when the statute is silent, the law may make an implication and apply the principle of *audi alteram partem*.” The Court further held, “the right to go abroad cannot be said to be part of the right of free speech and expression as it is not of the same basic nature and character as freedom of speech and expression. It is true that going abroad may be necessary in a given case for exercise of the right of freedom of speech and expression but that does not make it

[^17]: ILR 1976 Del 753,
[^18]: (1978) I SCC 248
an integral part of the right of free speech and expression.” It went on to hold that, “the right to go abroad cannot be treated as part of the right to carry on trade, business, profession or calling guaranteed under Article 19(1)(g). The right to go abroad is clearly not guaranteed under any clause of Article 19(1) and section 10(3)(c) of the Passports Act, 1967, which authorizes imposition of restrictions on the right to go abroad by impounding of passport cannot be held to the void as offending Article 19(1)(a) or (g) as its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade, business, profession or calling.”

The Court, on examining the facts, found that “a good enough reason has been shown to exist for impounding the passport of the petitioner by the order dated July 7, 1977.” And so the Court thought it fit not to interfere with the impugned order.

In Re: S. Mulgaokar19, The present matter relates to a publication in the Indian Express newspaper of December 13, 1977, in which the following sentence about the supposed code of judicial ethics assumed to have been drafted by some Judges of the Supreme Court appeared: “So adverse has been the criticism that the Supreme Court judges, some of whom had prepared the draft code, have disowned it.” The letter mentioning that a code of ethics was drafted was sent by the then Chief Justice of India, M.H. Beg, to the Chief Justice of various High Courts.

Justice Krishna Iyer made the following observations: “The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process. The Court is willing to ignore, by a majestic liberalism, trifling and venial offences.

“The second principle must be to harmonise the Constitutional value of free criticism, the fourth estate included, and the need for a fearless curial process and its presiding functionary, the judge. A happy balance has to be struck, the benefit of the doubt being given generously against the judge slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant condemners, be they the powerful press, gang-up of vested interests, veteran columnists or Olympian establishmentarian.

19 AIR 1978 SC 727.
“The third principle is to avoid confusion between personal protection of a libeled judge and prevention of obstruction of public justice and the community’s confidence in that great process. The former is not contempt; the latter is, although overlapping spaces.

“Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual judges as such.

“The fourth functional cannon which channels discretionary exercise of the contempt power is that the fourth estate which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the Court, including the highest Court..

“The fifth normative guideline for the judges to observe in this jurisdiction is not to be hypersensitive even where distortions and criticism overstep the limits, but to deflate vulgar denunciation by dignified bearing, condescending indifference and repudiation by judicial rectitude…

“The sixth consideration is that, after evaluating the totality of factors, if the Court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream”.

When this matter was taken up, the contempt proceedings were dropped without calling upon the counsel for the respondent. As the Court did not hear the parties concerned, it refrained from making any comments with regard to the article in question written by A.G. Noorani. Accordingly, the proceedings were dropped.

In the case of *Bennett Coleman Company vs. Union of India*20 the Supreme Court once again came to the aid of the freedom of press. It held that freedom of press entitles newspapers to achieve any volume of circulation and ‘freedom lies both in circulation and in content.’ Newspapers have the right to determine their pages, their circulation and the new editions which they can bring out within the quota of newsprint allotted to them. The Court also recognized that the main source of income for the newspaper is from advertisements which are not only a source of revenue but also one of the factors for circulation. The Court

\[20\text{AIR 1972 SC 106}\]
ruled that loss of advertisement seriously affects the circulation of the newspaper and, therefore, restraints on advertisements would affect the fundamental right under Article 19(1) (a). Indeed a newspaper does not have any Constitutional right to obtain advertisements from the Government but at the same time it must be remembered that the Government cannot use this power or privilege to give advertisements to favour one set of newspapers or to show its displeasure against another section of the press. It cannot be permitted to use the power over large funds at its disposal to muzzle the press and the funds must be used in a reasonable manner consistent with the object of the advertisement.

Freedom of the Press has been held to entitle a newspaper the right to publish its own views or the views of its correspondents concerning what may be the burning topic of the day. This right is not confined to newspapers and periodicals but includes pamphlets, leaflets, hand-bills and every sort of publication, affording a vehicle of information and opinion. The judiciary on the whole has endorsed freedom of Press. What could be the reason? A close analysis would indicate that one of the main considerations for judicial solicitude is that freedom of the press embraces a variety of rights. The right guaranteed is not merely the individual right of the proprietor of the newspaper, or the editor or the journalist to print and publish the newspaper. It includes within its capacious content the collective right of the community; the right of citizens to read and to be informed. In substance, it is right of the public to know. The Right to Know has been spelled out by the Supreme Court from the guarantee of free speech in Article 19(1) (a) in its path-breaking judgment in S.P. Gupta vs. Union of India21. “To restrict substantially the rights of speech, Press, assembly and voting, however, is to cut the arteries that feed the heart of the democratic model.” Jawaharlal Nehru had said, “I have no doubt that even if the government dislikes the liberties taken by the Press and considers them dangerous, it is wrong to interfere with the freedom of the Press. By imposing restrictions you do not change anything; you merely suppress the public manifestation of certain things, thereby causing the idea and thought underlying them to spread further. Therefore, I would rather have a completely free Press with the dangers involved in the wrong use of that freedom than, a suppressed or regulated Press. In New York Times v. U.S.23 the Court held that it was a right to have free access to sources of information.

21 AIR 1982 SC 149  
22 M. Glenn Abernathy in ‘Civil Liberties under the Constitution’ 1977, p. 352  
23 1971 403 US 713
The scope of the freedom of Press was broadened in *Maneka Gandhi v. Union of India*[^24], P.N. Bhagwati, J., held that there are no geographical limitations to the freedom of speech and expression guaranteed under Article 19(1)(a) and this freedom is exercised not only in India but also outside India. If State action impedes the citizens’ freedom of expression in any country in the world, it would violate Article 19(1)(a) as much as it restrained such expression within the country.

The right to freedom of speech and expression can have meaning only if the right to travel abroad is ensured and without it, freedom of speech and expression would be limited by geographical constraint. Preventing anyone from going abroad to communicate his ideas or share his thoughts and views with others or to express himself in any other form, would be direct interference with the freedom of speech and expression. “The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction”.

In *Indian Express Newspapers v. Union of India*[^25], the Court held that freedom of Press must be considered as the “basic structure” of the Constitution.

In *Cricket Association of Bengal v. Doordarshan*,[^26] The Cricket Association of Bengal in March, 1993 offered Doordarshan two alternatives regarding telecast of cricket matches—either DD creates host broadcaster signal and undertakes live telecast of all matches or some other party creates host broadcaster signal and DD purchases the rights to telecast the said signal in India. DD asked CAB to indicate the amount of royalty it expected if the rights were given to DD exclusively for India without the Star TV getting it. CAB informed that it would charge $800,000. DD then sent its bid as host broadcaster for a sum of $333,000 (Rs. 1 crore). The amount being much less than expected, CAB entered into an agreement with World Production Establishment which represented TWI for telecasting all the matches and gave TWI sole and exclusive right to sell and exploit other ways of exhibiting the tournament. CAB, under this agreement, was to receive $550,000 as guaranteed sum. On hearing of this; DD informed CAB that it would not telecast the matches by paying TWI TV rights fee. CAB wrote to DD, that the amount offered by DD was uneconomical and moreover, since they were given to understand that DD was not interested in increasing that offer, they had entered into a contract with TWI.

[^24]: AIR 1978 SC 597
[^25]: AIR 1986 SC 515
[^26]: AIR 1986 SC 515
However, if DD did not telescast the matches, the people of India would be deprived. As such, CAB made TWI agree for a co-production with DD. DD was however, not agreeable to CAB’s offer.

Thus, the controversy between DD and CAB was with regard to the terms for the telecasting of the matches. It was held that “broadcasting media is affected by the free speech right of the citizens guaranteed by Article 19(1)(a). This is also the view expressed by all the Constitutional Courts whose opinions have been referred to in the body of the judgment. Once this is so, monopoly of this medium (broadcasting media), whether by Government or by an individual body or organization is unacceptable. Clause (2) of Article 19 does not permit a monopoly in the matter of freedom of speech and expression as is permitted by clause (6) of Article 19 vis-à-vis the right guaranteed by Article 19(1)(g).

“The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an ‘aware’ citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly—whether the monopoly is of the State or of any other individual, group or organization. As a matter of fact, private broadcasting stations may perhaps be more prejudicial to free speech right of the citizen than the Government controlled media. The broadcasting media should be under the control of the public as distinct from Government. This is the command implicit in Article 19(1)(a). It should be operated by a public statutory corporation or corporations, as the case may be, whose Constitution and composition must be such as to ensure its/their impartiality in political, economic and social matters and on all other public issues. It/they must be required by law to present news, views and opinions in a balanced way ensuring pluralism and diversity of opinions and views. It/they must provide equal access to all the citizens and groups to avail of the medium.” The Court held the ‘airways’ or ‘electromagnetic’ spectrum to be public property for the enjoyment of citizens’ fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution and not the private property of the government.
As observed in Romesh Thappar v. State of Madras,\textsuperscript{27} the freedom of speech and of the Press does not confer an absolute right to speak or publish, without responsibility, whatever one may choose or an unrestricted or unbridled licence that gives immunity for every possible use of language and prevents punishments for those who abuse this freedom. Article 19(2) specifies the areas with respect to which this freedom can be curtailed. These are security of the State, friendly relations with foreign States, public order, decency or morality, contempt of Court, defamation, incitement to an offence and sovereignty and integrity of India.

These restrictions, however, must “not be far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order”. In Superintendent, Central Prison v. Ram Manohar Lohia\textsuperscript{28}, the Supreme Court annulled section 3 of the Uttar Pradesh Special Power Act which punished a person, even if he incited a single person not to pay or defer the payment of government dues. The Court held: “We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite revolutionary movement, destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary consideration”.

As the freedom of the Press is included in the freedom of speech and expression and is a fundamental right guaranteed by Article 19(1) (a) of the Constitution, any person aggrieved by the infringement of this right can approach the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution. In Romesh Thappar v. State of Madras,\textsuperscript{29} the Court held that the printer, publisher or editor of a newspaper may bring a petition for appropriate relief to quash an order which imposes a ban on the entry of their journal in a state or other local area.

However, the Constitution also provides for suspension of fundamental rights during an emergency declared under Article 352. Article 358 suspends the operation of Article 19 during the emergency period, i.e., it allows the State to make any law in contravention of Article 19 only during the pendency of the Proclamation of Emergency. Yet, as mentioned in Makhan Singh v. State of Punjab,\textsuperscript{30} laws made prior to the coming into operation of the Proclamation of Emergency are not protected from the challenge of

\textsuperscript{27} AIR 1950 SC 124
\textsuperscript{28} AIR 1960 S.C. 633,
\textsuperscript{29} AIR 1950 SC 124,
\textsuperscript{30} AIR 1988 SC 1705
unconstitutionality on the ground of contravention of Article 19(2). Any law or order made after the Proclamation of Emergency cannot be challenged during the pendency of the Emergency. In *Amadavalasa Co-op. Society v. Union of India*, the Court observed that the effect of Article 358 was to remove the shackles of Article 19 on the legislative and executive powers. The validity of any law or Act of the legislature and the executive, passed or done during the Emergency, inconsistent with the fundamental rights cannot be challenged either during the continuance of the Emergency or thereafter. But as soon as the Emergency period is over, the laws passed during the period become inoperative to the extent to which they conflict with the fundamental rights guaranteed under Article 19.

Article 359 authorizes the President to issue an order whereby the right to move any Court for the enforcement of the fundamental rights remains suspended. On June 26, 1975 Internal Emergency was declared in India by the then Prime Minister Indira Gandhi.

“After 28 years of struggling to make liberty a reality, India’s impoverished millions are confronted by mass arrests and censorship as Prime Minister Indira Gandhi fights to stay in power”. This was published on July 7, 1975 in the U.S. News and World Reports, New York, under the heading - ‘How Freedom was lost in Democratic India’.

Perhaps, the worst to be hit during the period was the media. Indira Gandhi herself proposed at a meeting held on July 26, 1975 that the Press Council be abolished, news agencies be fused into one, advertisement policy be reviewed, housing facilities given to journalists be withdrawn and foreign correspondents not willing to fall in line be deported.

The points discussed in meetings held by Indira Gandhi and others in July and August, 1975 are as follows:

1. A law of libel to prevent scurrilous, malicious and mischievous writings in newspapers and journals should be considered by the Law Ministry in consultation with the Ministry of Information and Broadcasting.
2. The Press Council should be allowed to die its natural death.
3. Necessary action on the report of the Fact Finding Committee on newspaper economics; and copy of the report to be sent to the Law Minister.
4. Delinking of editorial policy of newspapers vis-à-vis disffusion of ownership.

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31 AIR 1976 SC 958,
5. The organization of news agencies needs re-structuring. The advisability of constituting a public sector corporation with one agency each for –

(i) Indian newspapers and journals, and
(ii) Foreign journals should be considered.

6. The policy of giving advertisement and printing work by DAVP and public sector undertakings should be reviewed.

7. A review of facilities including the allotment of government quarters given to the journalists.

8. A review of the policy relating to the allocation of newsprint.


10. Publicity should be given to the speech of Shri Gadgil in Parliament through TV/Radio.

11. A series of talks/articles on democracy/civic sense and discipline should be published through All India Radio, TV and Press, the inhouse magazines of the public and private sector undertaking should also be utilized for this purpose.

12. Infiltration of the news agencies, namely, ‘Hindustan Samachar’ and ‘Samachar Bharati’, by communal elements should be assessed and necessary action taken.

13. A vigilant eye should be kept on some language magazines and periodicals like ‘Sarita’ and ‘Kalpna’. The latter is published from Hyderabad.

14. Action should be taken against such objectionable foreign journals which are being sent directly to the readers in India. Particular attention was drawn to the ‘Calling India’ published by Anant Singh of Toronto (Canada).

15. Foreign correspondents refusing to furnish undertakings and submit writings for pre-censorship should be deported.

16. Care and imagination should be exercised in enforcing censorship so that no undue harassment is caused to the journalists. Censorship regulations should be enforced in all states. Violation of censorship by some newspapers in Tamil Nadu should be looked into. The chief censor should visit Tamil Nadu, Jullundur and some other states to satisfy him, that the censor officers have understood the spirit of censorship and are enforcing the censorship order.
17. An informal advisory group of editors should be constituted for advising the Information and Broadcasting Ministry in the enforcement of censorship\(^32\).

Rule 48 of the Defence and Internal Security of India Rules authorized the pre-censorship of all matters or any specified class of matters, by the Central Government as well as by State Governments. These original censorship powers were circumscribed by the following considerations:

(i) Defence of India

(ii) Civil defence

(iii) Public safety

(iv) Maintenance of public order

(v) Sufficient conduct of military operations.

On June 26, 1975, the first day when the Proclamation of Emergency became effective, the Cabinet approved a proposal to impose pre-censorship and an order under Rule 48 of the then Defence of India Rules, 1971 was issued which listed the subjects falling within the scope of pre-censorship. This order was subsequently expanded to include additional subjects\(^33\).

On September 9, 1975, Indira Gandhi, addressing a conference of All India Radio station directors, said on the credibility of All India Radio, “Quite honestly, I don’t understand what it (credibility) means. Who has credibility? The Newspapers, who had day in and day out printed falsehood?”

Indira Gandhi ordered for censorship under the Defence and Internal Security of India Rules. On the day before the formal declaration of Emergency, the government resorted to blatant means to prevent publishing of newspapers on June 26. Power supply to newspaper offices was cut. Most newspapers in Delhi, therefore, failed to bring out their editions on June 26, 1975.

TV, too, was under similar pressures. Attempts were made to build mass support for Indira Gandhi and Sanjay Gandhi.

The film ‘Bobby’ was telecast from the Delhi TV Centre on February 6, 1977 at 5 p.m. instead of the scheduled film ‘Waqt’ at 6 p.m. It was believed that this was done to


prevent people from going to Jayaprakash Narayan’s meeting at the Ramlila Grounds as ‘Bobby’ was a very popular film.

The circumstance in which the substitution of the film took place lend weight to this allegation.34.

As regards films, several guidelines issued for censorship led to confusion in the minds of film makers. The movie, ‘the entire President’s Men’, which depicted the Watergate scandal, was banned in India. ‘Aandhi’ which was cleared in January 1975 by the Board of Film Censors went through difficult times. It was believed that the heroine had a similarity to Indira Gandhi. In July 1975, the film was suspended for two months and on October 1, 1975, its producer was issued a notice to show cause why the film should not be banned. Ultimately, a revised version of the film was cleared on March 24, 1976.35.

It would be apposite here to quote the words of Faiz Ahmad Faiz:

“My tablet and my pen,
My two cherished treasures
Are snatched from me.
But does it matter?
For, I have dipped my fingers
In the blood of my heart.
My tongue they sealed
But does it matter?
For, I have placed a tongue
In every link of chain
That fetters me.”

On March 23, 1977, in the ‘Houston Post’, appeared the following words:

“With the resignation of Indira Gandhi as Prime Minister of India, democracy has triumphed. By their votes the people of India reclaimed their freedoms and their rights.”

34. White Paper on Misuse of Mass Media during the Internal Emergency.
And by their votes, they brought down every major architect of Gandhi’s totalitarian regime the Prime Minister who had changed the Constitution to suit her purpose, the Information Minister who had clamped censorship on the Press, the Law Minister who designed the Ordinances that stripped the Indians of their civil liberties, and the Defence Minister who was her unpopular son Sanjay’s closest ally”.

In case of Subhash Chand v. S.M. Aggarwal the petitioner, Subhash Chand, along with his mother, Shakuntala, and brother, Lakshman, were found guilty of killing Sudha Lakshman’s wife. S.M. Aggarwal, the Additional Sessions Judge, who tried the case, sentenced all the three accused to death. He, then, submitted the record for confirmation of the death sentences to the Delhi High Court.

While the matter was subjudice, the respondent, S.M. Aggarwal gave interviews to the Press and Doordarshan on the merits of the case. As a result, public opinion was built up against the accused, and even before the Delhi High Court could confirm the sentences, an atmosphere of prejudice was created against the accused in the mind of the general public. Counsel for the respondent, Ram Jethmalani, contended that section 4 of the Contempt of Courts Act rendered the publication privileged. Section 4 reads: “Fair and accurate report of judicial proceedings not contempt.—Subject to the provision contained in section 7, a person shall not be guilty of contempt of Court for publishing the fair and accurate report of judicial proceeding or any stage thereof.”

The Court refuting this contention observed, “Reading section 4 with provisions of section 7 of the Contempt of Courts Act, 1971, it is clear that what is meant by the words ‘judicial proceeding’ is day-to-day proceedings of the Court. Assuming, though not granting that it is capable of a wider construction, it only permits a publication of ‘fair and accurate report of a judicial proceeding’. The media reports under consideration certainly do not represent a fair and accurate report thereof. It is absolutely a one-sided picture.”

The Court further observed, “The whole episode took shape in a manner that it undoubtedly created an atmosphere of prejudice which is amply borne out by the demonstrations that were held after the decision of the case by this Court, and we can neither ignore nor overlook such development. We are, therefore, of opinion that the conduct of the respondents is neither permitted by law nor by justice and in the case of respondent No. 1, apart from the fact that such a conduct on his part is disapproved by

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36 1984 Cr LJ 481 (Del)
law, we are of the opinion that his conduct is also violation of judicial propriety which for long has become a necessary adjunct of the office which the judges are holding. The least that can be said is that the conduct of the respondents verges on contempt.”

“In Ancient Greek drama, tragedy frequently results, not from the conflict between right and wrong, but from the conflict of two rights, both equally moral and important, but apparently irreconcilable. A typical example of this painful dilemma is the tension between the media and the Courts in the field of contempt of Court. The media invokes the invaluable right of free speech. The Courts rest their authority and power upon the right to independent justice”[37]. Both these rights are, however, not absolute and should be exercised reasonably and in good faith. As observed in Romesh Thappar v. State of Madras[38], the freedom of speech and of the Press does not confer an absolute right to speak or publish, without responsibility, whatever one may choose or an unrestricted or unbridled licence that gives immunity for every possible use of language and prevents punishments for those who abuse this freedom. Article 19(2) specifies the areas with respect to which this freedom can be curtailed. These are security of the State, friendly relations with foreign States, public order, decency or morality, Contempt of Court, defamation, incitement to an offence and sovereignty and integrity of India.

But these restrictions must “not be far-fetched, hypothetical or problematical or too remote in the chain of its relation” with the restriction. In Superintendent, Central Prison v. Ram Manohar Lohia[39], the Supreme Court annulled section 3 of the Uttar Pradesh Special Powers Act which punished a person, even if he incited a single person not to pay or defer the payment of government dues. The Court held, “We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite revolutionary movement, destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary consideration”.

“In order that the restriction may be valid, three conditions have to be fulfilled. First, the restriction must be imposed by law. Executive fiats or orders are not permissible.

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38. AIR 1950 SC 124
39. AIR 1960 SC 633
Second, the restriction imposed by the law has to be under one or more of the heads mentioned above and none other. And third, the restriction must be reasonable, that is, it must not be excessive or disproportionate, having regard to the object of the legislation”.

On the other hand, the judiciary’s powers, too, cannot be exercised without caution and reason. As was held in *Ambard v. Attorney General for Trinidad and Tabago* by the Privy Council in 1946, “Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, though outspoken comments of ordinary men”.

This clearly puts forth the fact that judges have no general immunity from criticism of their judicial conduct, as long as it is genuine and made in good faith and without any *mala fide* intentions or motives. In *E.M.S. Namboodiripad v. T.N. Nambiar*, the Supreme Court observed that the freedom of speech shall always prevail except where contempt of Court is manifested, mischievous or substantial. In this case, Namboodiripad at a Press conference, made some remarks on the judiciary. He tried to justify his stand by saying that he was only expressing a Marxist philosophy. However, the Court held him guilty of contempt of Court. The right to freedom of speech and expression, though essential in a democracy, is not an absolute right and cannot be considered as mollifying the law of contempt of Court, nor does it absolve one for attacking the judges or Courts. Mathew, J., in his dissenting judgement in *Nambiar v. Namboodiripad* observed, “We should leave it to the people of this country to decide whether the system of administering justice in Courts has the defects alleged and requires change.

Soli J. Sorabjee, in his article – ‘Media and the Law of Contempt’ – made the following observation : “There is no reason why the public should be kept in the dark about the true state of the judiciary, a consequence which would inevitably follow if a journalist or any other person is deterred by the present application of the contempt laws. The doctrine that truth is no defence clearly inhibits Press freedom and journalistic activity. The Press would hesitate when it ought to make comments in the public interest. A freedom as cherished as the freedom of the Press cannot be made dependent upon the over sensitiveness of judges”.

In case of *P.N. Duda v. P. Shiv Shanker* P. Shiv Shankar who was the Minister of Law, Justice and Company affairs delivered a speech before a meeting of the Bar

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42. AIR 1988 SC 1208
Council of Hyderabad on November 28, 1987 which contained certain derogatory passages against the Supreme Court. P.N. Duda, who was an advocate practicing in the Supreme Court drew the Court’s attention to the speech. In the speech, Shiv Shanker attributed the Court with partiality towards the affluent sections and used extremely intemperate and undignified language. P. Shiv Shanker himself was once a judge of the High Court before he resigned and took to politics.

P.N. Duda, in his petition presented to the Attorney General/Solicitor General for consent under section 15 of the contempt of Courts Act, 1971 had expressed his apprehensions about the possible outcome of his request. He expressed his lack of confidence in their judgment and their ability to discharge their duties objectively and impartially. As such, the Attorney-General declined to exercise his functions under section 15 of the Act. The Supreme Court too, on the same grounds, dismissed the petition.

In Hamdard Dawakhana v. Union of India43, In this case Petitions were filed under Article 32 of the Constitution questioning the Constitutional validity of the Drug and Magic Remedies (Objectionable Advertisement) Act, (XXI of 1954). The petitioners, Hamdard Dawakhana and another, alleged that soon after the Act came into force, they faced difficulties with regard to publicity of their products as the authorities raised objections to their advertisements. The Drugs Controller said that they had contravened section 3 of the Act and asked Hamdard Dawakhana to recall their products sent to Bombay and other States. The Drugs Controller also stopped the sale of 40 of their products and raised objections to the advertisements of the other drugs.

The petitioners contended that advertisement is a means by which freedom of speech and expression under Article 19(1)(a) is exercised and the restrictions imposed by the impugned Act are not covered by Article 19(2). They further claimed that the Act and the rules made there under impose arbitrary and excessive restrictions on the rights guaranteed by Articles 19(1)(f) and (g). Section 3 of the Act gives “unguided power” to the executive to add to the diseases enumerated in section 3. Moreover, the power of confiscation under section 8 of the impugned Act is violation of the rights under Articles 21 and 31 of the Constitution.

The Court, on examining the history of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, found that its objects was the prevention of self-

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43 AIR 1965 SC 1167.
medication and self-treatment and not merely stopping of advertisements offending against morality and decency.

The Court held that “advertisement is no doubt a form of speech, but its true character is reflected by the object for the promotion of which it is employed. It is only when an advertisement is concerned with the expression or propagation of ideas that it can be said to relate to freedom of speech. But it cannot be said that the right to publish and distribute commercial advertisements advertising an individual’s personal business is a part of the freedom of speech guaranteed by the Constitution.”

It also held that the provisions of the Act were in the interests of the general public and placed reasonable restrictions on the trade and business of the petitioners and were saved by Article 19(6) of Constitution of India.

Regarding section 3 of the Act44, the Court held that the words, “or any other disease or condition which may be specified in the rules made under this Act” in clause (d) of section 3 which empowers the Central Government to add to the diseases falling within the mischief of section 3 conferred uncontrolled power on the executive and were ultra vires. Striking down the impugned words did not affect the rest of the clause as the words were severable.

The Court then held that, “the first part of section 8 which empowered any person authorized by the State Government to seize and detain any document, article or thing which such person had reason to believe contained any advertisement contravening the provisions of the Act imposed an unreasonable restriction on the fundamental rights of the petitioners and was unconstitutional. If this portion was excised from the section, the remaining portion would be unintelligible and could not be upheld.” the Court observed that commercial advertisement does not fall within the protection of freedom of speech and expression as there is an element of trade and commerce in them. Thus, a law which lays restrictions on the publication of advertisements to promote the sale of certain goods through the Press or other means does not violate the right to free speech. As such, the impugned words of section 3(d) and the whole of section 8 were declared unconstitutional. The rest of the Act remained unimpaired. The Court directed the respondents to returns the goods seized. The petitions were thus partly allowed.

44 The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954
6.2 Judicial Approach on Restrictions of freedom of media

The position that emerges is that Freedom of the media is implicit in the guarantee of freedom of expression and speech under Article 19 but the same is not absolute. It can be restricted provided three distinct and independent prerequisites are satisfied.

(1) The restriction imposed must have the authority of law to support it. Freedom of the Press cannot be curtailed by executive orders or administrative instructions which lack the sanction of law.

(2) The law must fall squarely within one or more heads of restrictions specified in Article 19(2), namely, (a) security of the State, (b) sovereignty and integrity of India, (c) friendly relations with foreign States, (d) public order, (e) decency or morality, (f) contempt of Court, (g) defamation or (h) incitement or an offence. Restriction on freedom of expression cannot be imposed on such omnibus grounds as “in the interest of the general public”.

(3) The restriction must be reasonable. In other words, it must not be excessive or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.”

The validity of the restrictions on freedom of speech and expression i.e. freedom of media is justifiable. The Courts in India exercising the power of judicial review can invalidate laws and measures which do not satisfy the above requirements and have done so repeatedly and ungrudgingly.

In a landmark judgment in the case of Sakal papers the Supreme Court ruled that Article 19(2) of the Constitution permits imposition of reasonable restrictions on the heads specified in Article 19(2) and on no other grounds. It is, therefore, not open to the State to curtail the freedom of speech and expression for promoting the general welfare of a section or a group of people unless its action can be justified by a law falling under Article 19 clause 2 of the Constitution of India.

45 Sakal Papers (P) Ltd. v. Union of India, AIR 1962 Sc 305
46 AIR 1962 SC 305
6.2.1 Contempt of Court: The Constitution of India, Article 19 (2) specifically enables the legislature to impose reasonable restrictions on the freedom of the Press in cases of ‘contempt of Court. The expression ‘Contempt of Court’ is defined in section 2 of the Contempt of Courts Act, 1971, as under:

(a) ‘Contempt of Court’ means civil contempt or criminal contempt;

(b) ‘Civil Contempt’ means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;

(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) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of any Court; or

(ii) Prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or

(iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

The Supreme Court and High Courts under Articles 129 and 215 of the Constitution of India, respectively, can punish persons for contempt of Court.

Article 129 reads: Supreme Court to be a Court of record – 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.

In Aswani Kumar Chose v. Arabinda Bose, the Court observed that a Court of record is one whereof the acts and judicial proceedings are enrolled for perpetual memory and testimony and which has authority to fine and imprison for contempt of itself. In Delhi Judicial Service Association v. State of Gujarat, it was held that the Supreme Court could impose punishment even in cases where there was Contempt of subordinate Courts. The words ‘including the power to punish for contempt of itself’, are not the words of restriction and do not exhaust or exclude its jurisdiction as a Court of record to punish for

47 AIR 1952 SC 369,
48 (1989) 2 scale 748
the contempt of all subordinate Courts. The Constitutional power of the Court cannot be curtailed or taken away by any legislation such as the Contempt of Courts Act, 1971, nor can it be denied because similar power can also be found with the High Courts in Article 215. Article 215 reads: High Courts to be Courts of record- 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.

In R.L. Kapoor v. State of Madras\textsuperscript{49}, it was held that the High Courts’ jurisdiction to try and punish for contempt of Court includes all necessary and incidental powers to effectuate that jurisdiction.

Article 142(2) confers ancillary powers on the Supreme Court for “the investigation and punishment of any contempt of itself”. The rule-making power of the High Courts in this behalf is preserved by Article 225.

Section 10 of the Contempt of Courts Act, 1971, defines the power of the High Court to punish contempt’s of its subordinate Courts. Section 10 reads: Power of High Court to punish contempt of subordinate Courts: - Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of Courts subordinate to it as it has and exercises in respect of contempt of itself:

Provided that no High Court shall take cognizance of contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the IPC.\textsuperscript{50}

In E. Chandra v. Member Secretary, MMDA, it was held that the power of committal for contempt must be wielded with the greatest reluctance and the greatest anxiety and only with the object of seeing that the dignity and authority of the Court are not imposed.

As per section 13 of the Contempt of Courts Act, 1971 all contempt are not punishable. Section 13 reads: Contempts not punishable in certain cases:- Notwithstanding anything contained in any law for the time being in force, no Court shall impose a sentence under this Act for a contempt of Court unless it is satisfied that the

\textsuperscript{49} AIR 1972 SC 858,
\textsuperscript{50} Indian Penal Code (45 of 1860).
contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.

The origin of the law of contempt can be traced back to eighteenth century England. In 1765, a person called Almon was brought before the King’s Bench for publishing a pamphlet containing derogatory remarks on the Court of King’s Bench and Lord Mansfield, C.J. Thereupon, Wilmot, J., made the following observation: “The arraignment of the justice of the judges is arraigning the King’s justice. It is an impeachment of his wisdom and goodness in the choice of his Judge, and excites in the minds of the people a general dissatisfaction with all judicial determination and indisposes their mind to obey them; and whenever men’s allegiance to the laws is so fundamentally shaken it is the most fatal and most dangerous obstruction of justice….”

Fletcher, J., an Irish Judge, severely criticized this as “the hasty and warm ebullition of a mind fraught with arbitrary notions irritated and excited by a severe attack upon his whole Court, especially upon his venerated and adored Chief Justice, and the very reverse of what is called a considered, digested and ulterior opinion”.

The Indian law of contempt follows the English law. The right of the Indian High Courts to punish for contempt was recognized by the Judicial Committee of the Privy Council which equated its powers to punish for contempt with that of the Supreme Court in England. The English Common Law was applied to the three chartered High Courts of Calcutta, Bombay and Madras, which, as Courts of record, had inherent power to punish summarily for their own contempt. When the High Courts were constituted by Letters Patent, they were made as ‘Courts of record’ so that the English Common Law could be invoked by them.

As to imposing punishment for contempt of subordinate Courts, the High Court’s differed in their views. While in **L.R. v. Moti Lal**, the Calcutta High Court held that the High Court has inherent power to punish for contempt of a subordinate Court, the Madras, Bombay and Allahabad High Courts in **Torburn v. Venkata, Gandhi in re**, and **Abdul Hasan, in re**, respectively, held a contrary view. The first codified law on the contempt of Court was the Contempt of Courts Act which was passed in 1926. It defined and limited the powers of certain Courts to punish for contempt of Courts. Along with the Contempt of Courts Act of 1926, were in existence several other enactments on the law of contempt in various Indian states. These states were Hyderabad, Madhya Bharat, Mysore, Pepsu,
Rajasthan, Travancore-Cochin and Saurashtra. The Contempt of Courts Act and the state enactments were replaced by the Contempt of Courts Act, 1952.

However, this Act too was found to be unsatisfactory. In April 1960, the government brought out a Bill on the subject. On examining, it was found that a further study of the subject was necessary. As such, a Committee was set up with A.N. Sanyal the, then Solicitor General and was called the Sanyal Committee. It submitted its report on February 28, 1963, with a draft Contempt of Courts Bill, 1963. The objective of the Bill was to define and limit the powers of certain Courts in punishing for contempt of Courts and regulate their procedure in relation thereto. This Bill was finally passed as the Contempt of Court Act, 1971 (70 of 1971) in December, 1971 and it came into force with effect from December 24, 1971. The Act was amended in 1976.

The Act of 1971 codifies concepts and terminology of English Common Law which had gone into the legal currency of India. This Act of 1971 has codified the law laid down in many judicial decisions, e.g., in providing definitions of civil and criminal contempt, and thus, this Act has become more elaborate and exhaustive than the Act of 1952.

The Court decisions show an interesting pattern in the development of the law of contempt in India. It was as early as 1952, when the issue of the contempt of Court was brought before the Supreme Court in the case of Bathina Ramkrishna Reddy v. State of Madras. The Supreme Court held that if defamation of a subordinate Court amounts to contempt of Court, proceedings can be taken under the Contempt of Courts Act, besides taking recourse to the remedy available to the aggrieved party under section 499 of the Indian Penal Code, 1860. Holding that the article in question was a scurrilous attack on the integrity of a judicial officer, the Court observed, “Specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to the litigants who did not satisfy his dishonest demands, If the allegations were true, obviously it would be to the benefit of the public to bring these matters into light. But if they were false, they cannot but undermine the confidence of the public in the administration of justice and bring the judiciary into this repute”.

But in Perspective Publications v. State of Maharashtra, the Supreme Court held that “it may be that truthfulness or factual correctness is a good defence in an action

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51 Baradakanta Mishra v. Registrar of Orissa High Court, AIR 1974 SC 710
52 AIR 1971 SC 221
for libel, but in the law of contempt there are hardly any English or Indian cases in which such defence has been recognised”.

In *Md. Vamin v. O.P. Bansal*,\(^3\) it was held that a defence of truth or justification is not available to the publisher of a newspaper in proceedings for contempt of Court. However, fair and accurate report of judicial proceedings and a fair criticism of a judicial act is not contempt.

In *Subhash Chand v. S.M. Aggarwal*,\(^4\) it was held that media reports must represent a fair and accurate report of a judicial proceeding and not be a one-sided picture.

In a recent incident, which was published in the *Times of India*\(^5\) a sitting judge of the Allahabad High Court, I.M. Quiddishi, J., conducted a Court at the New Delhi railway station to try a railway employee for contempt of Court for not allotting him a berth on a train on March 8. Supreme Court lawyer Arvind Nigam said that Quiddishi, J., could not have exercised his powers as a judge to pass an order under the Contempt of Courts Act. He says, if a person is a complainant or a witness to an offence, he cannot be a prosecutor or a judge in the same case. Moreover, Quiddishi, J., lacked jurisdiction and it was not contempt of any of his orders. “Denial of a railway berth to a judge is not contempt of the Court,” said another lawyer.

In *Mohammed Vamin v. Om Prakash Bansal*,\(^6\) A notice was given to Om Prakash Bansal, editor, printer and publisher of a weekly, ‘Prsant Jyoti’, under section 15 read with section 2 (c) of the Contempt of Courts Act, 1971, for a news item published in the newspaper. The news item, in the opinion of the Court, was *prima facie* contemptuous of the Rajasthan High Court and the subordinate Courts. It scandalized the former and present judges of the said High Court, besides 32 judicial officers.

It was contended that the suit was barred by limitation as the matter referred to happened in 1977, three-and-a-half years before, and the news item contained the contents or a representation given by 25 advocates of Jaipur in 1977 to the President of India. Thus, the contempt had been committed in 1977 itself. The Court observed that “the exercise of the jurisdiction to punish for contempt commences with the initiation of proceedings for contempt whether *suo motu* or on a motion or a reference. The *terminous-a-quo* for the period of limitation provided in section 20 is the date when a proceeding for contempt is

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\(^3\) 1982 Cr. LJ. 332 (Raj).
\(^4\) 1984 Cr. LJ. 481 (Del).
\(^5\) March 13, 2000, p.8
\(^6\) 1982 Cr. LJ. 322 (Raj)
imitated by the Court. It is not in dispute that the present news item has been published by the non-petitioner in the weekly newspaper, ‘Prasant Jyoti’ dated 30\textsuperscript{th} March, 1981 and the proceedings for contempt have been initiated by this Court on 4\textsuperscript{th} May, 1981. Though there is nothing on record to hold that the non-petitioner only published the contents of the representations made by Jaipur Advocates in 1977 or Bikaner Advocates in 1978, but that apart, every publication itself gives a fresh ground for taking proceedings for contempt and the present proceedings cannot be held to be barred by limitation even though the news item might relate to the same subject matter which was given in the representations of 1977 and 1978 as alleged by Bansal.”

Regarding the contention that the matter was defamatory as it did not relate to any proceedings pending in the Court, the Court observed, “Whether defamatory matter amounts to contempt of Court in any particular case is a question of fact or degree and of circumstances. The defamatory statement scandalizing a judge in his official capacity calls for an action in contempt, if the impugned article attacks the judge personally and not on account of any of his official actions; it can only be questioned by libel action. However, venomous and sarcastic an article may be, if it is only an attack on the judge in his personal capacity and not in the capacity of a judge, there is no contempt… But if the impugned article attacked the judge ascribing to him favoritism in his judicial or official capacity, it is contempt.”

The Court held that “in the reply as well as in the arguments advanced before us, the condemnor has tried to defend the contents of the news item published by him in his weekly newspaper, ‘Prasant Jyoti’ dated March 30, 1981. He has not furnished any apology nor has shown any regret about such publication. He is all in all, the editor, publisher and printer of such article. There was no indication of any remorse or contrition on the part of the contemnor during the whole case. The contemnor has scandalized the past and present judges of the High Court of this state and also 32 judicial officers of the lower Courts.” As such, he was found guilty of contempt of Court.

\textit{Delhi Judicial Service Association, Tis Hazari Courts, Delhi v. State of Gujarat,}\textsuperscript{57} In this Case N.L. Patel was posted in Nadiad, Gujarat as Chief Judicial Magistrate in October, 1988. Soon after his posting, he found that the local police was not cooperating with the activities of the Courts, as a result of which trials were unduly delayed. He lodged a complaint against the local police with the District Superintendent of Police, but to no

\textsuperscript{57} 1991) 4 SCC 406.
effect. The Police Inspector, Sharma, in order to take revenge on Patel for complaining against the local police, on the pretext of discussing a case invited Patel to the police station.

When Patel arrived at the police station, he was assaulted and forced to drink liquor. He was handcuffed and tied up with a rope. On the dictation of Sharma, a panchnama was prepared stating that Patel was in a drunken state. This was signed by Sharma and two panchas.

Patel was then taken to the Civil Hospital in that state and made to sit outside where a press photographer was called to take photographs of Patel. Patel’s request to the doctors to contact the District Judge was turned by Sharma. When lawyers sought bail for the offence registered under the Bombay Prohibition Act, Sharma registered another case under sections 332 and 506 of the Indian Penal Code to make it a non-bailable offence.

Two questions of law arose in this matter before the Court:

- Whether the incident constituted Contempt of Court;
- Whether the Supreme Court has inherent jurisdiction or power to punish for contempt of subordinate or inferior Courts under Article 129 and whether the inherent jurisdiction and power of the Supreme Court is restricted by the Contempt of Courts Act.

The Court held that “the definition of criminal contempt is wide enough to include any act by a person which would tend to interfere with the administration of justice or which would lower the authority of Court. The public have a vital stake in effective and orderly administration of justice. The Court has the duty of protecting the interest of the community in the due administration of justice and so, it is entrusted with the power to commit for contempt of Court, not to protect the dignity of the Court against insult or injury, but, to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with. The power to punish for contempt is thus, for the protection of public justice, whose interest requires that decency and decorum is preserved in Courts of Justice. Those who have to discharge duty in a Court of justice are protected by the law, and shielded in the discharge of their duties. Any deliberate interference with the discharge of such duties either in Court or outside the Court by attacking the presiding officers of the
Court, would amount to criminal contempt and the Courts must take cognizance of such conduct.”

As for the other question, the Court held that “the Supreme Court as well as High Courts is Courts of Record. The Constitution does not define Court of Record, but this expression is well recognized in the juridical world. A Court of Record is ‘a Court where of the acts and judicial proceedings are enrolled for a perpetual memorial and testimony’ and has power of summarily punishing contempt of itself as well as of subordinate Courts.” It further held, “where jurisdiction is conferred on a Court by a statute the extent of jurisdiction is limited to the extent prescribed under the statute. But there is no such limitation on a superior Court of record in matters relating to the exercise of Constitutional powers. The conferment of appellate power on the Supreme Court under section 19 of the Contempt of Courts Act does not and cannot affect the width and amplitude of its inherent powers under Article 129.

The Court then laid down the following guidelines for the arrest of a judicial officer:

A. If a judicial officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court, as the case may be.

B. If facts and circumstances necessitate the immediate arrest of a judicial officer of the subordinator judiciary, a technical or formal arrest may be affected.

C. The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned district and the Chief Justice of the High Court.

D. The judicial officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.

E. Immediate facilities shall be provided to the judicial officer for communication with his family members, legal advisers and judicial officers, including the District and Sessions Judge.

F. No statement of a judicial officer who is under arrest be recorded nor any panchnama be drawn up nor any medical tests be conducted except in the presence

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58 Constitution of India, Art. 129
G. There should be no handcuffing of a judicial officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the judicial officer and if it be established that the physical arrest and handcuffing of the judicial officer was unjustified, the police officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and/or damages as may be summarily determined by the High Court.

The Court however, went on to say that “in our opinion, no judicial officer should visit a police station on his own except in connection with his official and judicial duties and functions. If it is necessity for a judicial officer or a subordinate judicial officer to visit the police station in connection with his officer or a subordinate judicial officer to visit the police station in connection with his official duties, he must do so with prior intimation of his visit to the District and Sessions Judge.”

6.2.2 Defamation

The defamation\(^59\) is the publication to a third party of a statement which tends to lower a living person in the estimation of right thinking members of society generally; or which makes them shun or avoid that person; or which disparages his reputation in relation to his work.

In Youssoupa\(^{\text{ff v. MGM Pictures Ltd.}}\) (1934), a film was made by the defendant in which was suggestion that the plaintiff, a Russian princess, had either been raped or seduced by Rasputin. When the film appeared, the princess was in exile in Paris. She sued the defendants as there was no proof of the suggestions made, in real life. They contended that people seeing the film would not hate, ridicule or feel contempt for the princess. The Court rejected their arguments as the princess was able to show that her friends had started

\(^{59}\) The classical definition of defamation in England as given by Robin Callender Smith (Press law, 1978)
pitying her for no fault of her own and had begun avoiding her to save her from embarrassment.

In India, defamation comes under both the criminal law and civil law. The Constitution of India under Article 19(2) mentions defamation as one of the reasonable restrictions on the freedom of speech and expression guaranteed under Article 19(1)(a).

Section 499 of the Indian Penal Code defines defamation\(^{60}\) as whoever by words either spoken or intended to be read, or by sign or by visible representations, makes or publishes and imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the case, hereinafter excepted, to defame that person.

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\(^{60}\) Explanation S.499 of I.P.C.,1860, Explanation I – It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2 – It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3 – An imputation in the form of an alternative expressed ironically, may amount to defamation.

Explanation 4- No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

First exception.-Imputation of truth which public good requires to be made or published – It is not defamation to impute anything which is true concerning any person, if to be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second exception – Public conduct of public servants – It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third exception- Conduct of any person touching any public question :- It is no defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth exception – Publication of reports of proceedings of court :- It is not defamation to publish substantially true report of the proceedings of a court of justice or of the result of any such proceedings.

Fifth exception – Merits of case decided in court or conduct of witnesses and others concerned :- It is not defamation to express in good faith any opinion respecting the merits of any case, civil or criminal, which has been decided by a court of justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Sixth exception – Merits of public performance :- It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Seventh exception – Censure passed in good faith by person having lawful authority over another :- It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Eighth exception – Accusation preferred in good faith to authorize :- It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Ninth exception – Imputation made in good faith by person for protection of his or other’s interests. :- It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Tenth exception – Caution intended for good of person to whom conveyed or for public good :- It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.
The punishment for the criminal offence of defamation is mentioned in section 502 of the Indian Penal Code. Section 502 reads: “Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both”.

However, “defamation is primarily a civil matter with the plaintiff seeking to recover damages for the tort (civil wrong) or injury to his reputation. If his reputation is not damaged but statements are made which affect him financially in his work, then he may have an action for the tort of injurious falsehood if he can prove the words were published maliciously and that the facts stated were untrue”.

The criminal law of defamation is different from the civil law of damages for defamation in India. In a civil action, the intention of the defendant is no defence to defamation. But under criminal law as enshrined in section 499 of the Indian Penal Code, the imputation must be published, “intending to harm, or knowing or having reason to believe that such imputation will harm”. In Capital & Counties Bank v. Henty, it was held that in a civil action for defamation, intention of the defendant is, in general immaterial. “A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both”. However, the position, as ruled in T.V. Ramasubha Iyer v. A.M.A. Mohideen, is different in India. Here, the point of law that came up before the Madras High Court was whether a person would be held liable for publishing a defamatory statement without the intention to defame the plaintiff. In this case the defendants published news in their newspaper that a person exporting agarbathis to Ceylon, had smuggled opium into Ceylon and that he was arrested in Ceylon. The plaintiff who manufactured agarbathis and exported them to Ceylon brought an action against the defendants alleging that the news item had defamed him. The defendants also carried a correction of the news in their paper so as to apologise.

The Court referring to English cases and the Defamation Act, 1952 reversed the judgment in Hulton v. Jones, saying it was against justice, equity and good conscience.

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63. AIR 1972 Mad 398 : (1972) 1 MLJ 508.
64. 1910 AC 20
Section 4 of the Defamation Act also alters the English law, by which the publisher of an innocent but defamatory statement is not liable. In India, therefore, there is no liability for matter published innocently.

Any matter which exposes a person, about whom it is published, to hatred, ridicule or contempt, is said to be defamatory. Defamation can be either libel or slander. Defamatory matter becomes a libel, if it is in writing, is printed or is in some other permanent medium. Slander has to be in spoken words or gestures.

To invoke the law of defamation, a statement must fulfill four essential conditions. The statement must be defamatory, must refer to the plaintiff, must be published by the defendant and must be false.

A statement is defamatory if it has a tendency to injure a person’s reputation. the test is whether the statement has a tendency to excite against the plaintiff the “adverse opinions or feelings of others”, such as hatred, ridicule or contempt. In Ramdhara v. Phulawatibai, imputation of illegitimacy was held to be defamatory, so was the imputation of unchastity to a married woman or a widow. In Youssoupoff v. MGM Pictures, the suggestion that a woman was either raped or seduced in a film was found to be defamatory as in real life her friends came to avoid her to save her from embarrassment. In D.P. Choudhary v. Manulata, a statement was published in a local daily in Jodhpur that Manjulata went out of her house in the night on the pretext of attending night classes and eloped with a boy named Kamlesh. The news was false and was published with utter-irresponsibility. This brought the plaintiff to ridicule and contempt and even affected her marriage prospects as she was a young girl. The statement being defamatory and false, the defendants were held liable. In Lewis v. Daily Telegraph, a newspaper report that the police fraud squad was inquiring into the company’s affairs and was naming the chairman was defamatory. In Dunlop Rubber Co. v. Dunlop, it was held that the form or mode in which the disparagement of the plaintiff is done is immaterial, if it has the tendency of rousing the adverse opinion of others against the plaintiff. A statement is defamatory if under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libelous sense.

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65 1970 Cr. LJ. 286 (MP),
66 AIR 1977 Raj 170.
67 1963 (2) All ER 151
Where a statement in its ordinary meaning has a defamatory imputation, the defendant would be liable, unless he proves that the persons to whom it was conveyed or published, did not construe it in that sense, owing to certain other factors which lent it a special meaning. On the other hand, words which are not defamatory in the ordinary sense could nevertheless be defamatory, if the particular circumstances in which they were spoken were taken into account.

The second condition is that the statement must refer to the plaintiff. The plaintiff must be able to prove that the defendant intended it to be so. In *Hulton v. Jones*[^68^], the appellants published an article in their newspaper in which one Artemus Jones, referred to as a church-warden was alleged to be living with a mistress in France. However, there was an English barrister and journalist by the same name and those who knew him, thought that the article referred to him. It was held by the House of Lords that the defendants were liable; notwithstanding the fact that the defendants had no intention to defame the plaintiff in as much as reasonable men understood the article to refer to the plaintiff. “A person charged with a libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both.”

In *Newstead v. London Express Newspapers*,[^69^] it was held that when the plaintiff establishes that those acquainted with him reasonably believed the statement to refer to the plaintiff, the defendant cannot take the defence that there was another person who answered the description given in the statement and of whom the imputation made was true.

The third essential condition for defamation is that the statement must be published. There can be no civil action, if the defamatory words are communicated only to the person spoken of as it cannot harm his reputation although it may hurt his self-esteem. Communication must be made, at least, to one third person. A libelous statement if sent straight to the person of whom it is made in a sealed envelope addressed to him will not amount to defamation. However, if on the other hand the matter is communicated even to a single individual other than the person defamed, and such other individual is capable of understanding the defamatory significance of the statement, such matter then amounts to the civil wrong of defamation. Thus, if a defamatory statement is sent through a telegram or a postcard which can in all probability be read by other persons, the person sending

[^68^]: 1910 AC 20
[^69^]: 1940 1 KB 377
such libelous matter will be liable. However, if a sealed envelope containing such matter is opened by a servant or other person who is not supposed to do so and who has in fact no right to do so, the defendant will not be liable.

In **Bryansten v. de Vries**⁷⁰, it was held that the writer of a letter and his typist or a photocopier having a common interest in the writing of the letter in the usual course of business, there would be no publication by the defendant even though the purpose of the letter was to defame the address.

The Press has a responsibility to see that defamatory statements are not published. Every repetition of a defamatory matter is a new publication and gives rise to a fresh cause of action. It is no defence to say that the defendant received the libelous statement from another person whose name he disclosed at the time of publication. If a libel appears in a newspaper, all those involved with the process of publication, the proprietor, editor, printer and the publisher, can be jointly and severally sued even if they had no intention to defame the plaintiff.

In **Cassidy v. Daily Mirror**,⁷¹ the defendants published a photograph of the plaintiff’s husband in a newspaper with another lady announcing that they were engaged. The photograph as well as the caption was given to them by the plaintiff’s husband. It was held that though the defendants had no reason to believe that the matter published was defamatory, the plaintiff was entitled to damages as the publication was capable of conveying the meaning that the plaintiff was her husband’s mistress.

Apart from the news which is recognized by law as ‘privileged’ as for instance, reports of parliamentary or judicial proceedings, the media does not enjoy any protection under the law of defamation, even if the matter is in public interest. A newspaper vendor, who circulates libelous matter, cannot be held liable if he can prove that he did not know, nor could with reasonable diligence have known that he was circulating defamatory matter. This is also applicable to booksellers and librarians who are not aware or could not have with reasonable diligence been aware of the libelous matter they were circulating.

The fourth condition for a matter to be defamatory is that the statement must be false. There can be no civil action for the publication of a defamatory statement which is true. The burden of proof lies on the defendant to prove that the statement is true.

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⁷⁰ 1975 (2) All ER 609
⁷¹ 1929 (2) KB 331
In an action for defamation, a defendant can take up three general defence: justification, fair comment and privilege. According to Durga Das Basu, possible defence to an action for defamation in India can be:

(i) That the alleged statement was not published.
(ii) That that statement did not refer to the plaintiff.
(iii) That the words complained of did not bear any defamatory meaning.
(iv) That the statement was true in substance and in fact.
(v) That the statement was absolutely privileged.
(vi) That the statement was published in good faith and without malice towards the plaintiff on a matter of public interest.
(vii) That the publication was made by the authority or with the consent of the plaintiff.
(viii) That the plaintiff has agreed to forgo the claim or has given a written release from liability.
(ix) That the person defamed has died.
(x) That the suit is barred by limitation.
(xi) That the suit is barred by res judicata.

The truth of a defamatory statement is a complete defence and other extraneous factors like motive and intention cannot hold ground. This is said to be the plea of justification, whereby a defendant justifies his statement. If a statement is substantially true even if certain unimportant details are incorrect, the plea of justification still stands.

Deference is fair comment. No statement can be said to be defamatory if it is a fair comment on a matter of public interest. To take fair comment as a defence, the defendant must be able to show that the published matter is in public interest, is a comment and not a statement of fact and that the comment is fair. In London Artists v. littler were pointed out three situations where the defence of fair comment can be exercised. Whenever any matter is such as to affect people at large then is a matter of public interest and everyone can make a fair comment on it. The statement in question must be only a comment and not
a statement of fact. Thirdly, whether there were any facts on which a fair comment could be made.

In certain circumstances, a person is allowed to make defamatory statements. The defence available in such cases is called the defence of privilege. This again is of two kinds—absolute and qualified.

Absolute privilege arises in matters of public policy, where a man is allowed to speak freely without fear of consequences, even if the statement made is false or malicious.

Qualified privilege exists where the exemption is not absolute. This privilege is recognized in cases where the defendant had some lawful interest or duty in making the statement. However, absence of malice or improper motive has to be proved. In *Adam v. Ward*, it was held that the basis of qualified privilege is that the person making the statement “has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The reciprocity is essential.”

In any defamatory statement, the presence of malice, like falsity is always presumed and the plaintiff need not prove it except in cases where the defendant seeks the defence of qualified privilege.

*Hulton v. Jones*, 73 The appellants published in the ‘Sunday Chronicle’ an article defamatory of a person described as ‘Artemus Jones’. One Artemus Jones, a barrister, was in fact at one time working with the ‘Sunday Chronicle’. At the trial, the respondent’s friends gave evidence that they had read the libel and belied it to refer to the respondent. The evidence of the appellants that they did not know of the respondent’s existence was accepted as true by the respondent’s counsel.

The appellant contended that there could be no intention to defame the respondent, when the writer was not even aware of the respondent’s existence.

The Court held, “Tort consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he

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73 1910 AC 20 (23)
intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact, he did both.”

**Cassidy v. Daily Mirror Newspapers Ltd.** The plaintiff, Mrs. Mildred Anna Cassidy, was the lawful wife of one Kettering Edward Cassidy, also known as Michael Dennis Corrigan, an owner of race horses and known to be a General in the Mexican Army at one time. Though the plaintiff and her husband did not live together, he used to visit her at the shop where she worked.

The plaintiff brought an action of libel against the defendant for a photograph of her husband, K.E. Cassidy, with a woman whose name was not mentioned at the trial but referred to as Miss X, which was published in their newspaper, the Daily Mirror, on February 21, 1928, with the words, “Mr. M. Corrigan, the race horse owner and Miss” X, “whose engagement has been announced”.

The plaintiff contended that she suffered damage on account of the above publication inasmuch as it was intended and by several people understood to mean that the said K.E. Cassidy was not the plaintiff’s husband, but was living with her in immoral cohabitation. At the trial, the plaintiff produced three of her acquaintances who had held her in respect and treated her as a friend, but who on seeing the publication thought that she has been deceiving them.

The defendants, on the other hand, showed evidence to the effect that on February 18, 1928, at Hurst Park races, one Stanley Earnest King Richardson, who was a partner in the News Illustrations Press Agency, saw K.E. Cassidy with Miss X, whose photograph he had taken on a former occasion; that Cassidy told him that he was engaged to Miss X, that Richardson asked if he might publish a photograph and the news of the engagement; that Cassidy had consented to it and that Richardson then sent to the defendants for publication a print of their photograph along with the words complained of and the defendants had published the same. The Court held that the publication was capable of conveying a meaning defamatory of the plaintiff and so the appeal failed.

**Newstead v. London Express Newspapers Ltd.** The plaintiff was one Harold Cecil Newstead, a hairdresser in Camberwell and the defendants were printers and publishers of the Daily Express newspaper. The words objected to, published in the Daily Express of March 30, 1938 are as follows: “Harold Newstead, 30 year-old Camberwell men, who

74 1929 (2) KB 331
75 1940 (1) KB 377
was jailed was jailed for nine months, liked having two wives at once. Married legally for a second time in 1932-his legal wife is pictured right, above—he unlawfully married 19 year old Daris Skelly (left, above). He said, ‘I kept them both till the police interfered’.”

The plaintiff contended that he was well known in the hairdressing trade as Harold Newstead, and that he was about 30 years old and a Camberwell man. He alleged that the words objected to be understood by a number to refer to him.

The defendants denied that the words complained of were intended or understood to refer to the plaintiff, or that they were defamatory of him. They contended that the words referred to an existing person of whom the words were true.

The news item reported the proceedings for bigamy at the Central Criminal Court. The Harold Newstead, who was the convict, was referred to as a barman and his address in Camberwell given. While making it into a story, the address and occupation of Harold Newstead were omitted. These omissions made the words capable of being referred to the plaintiff.

Du Parcq L.J. held, “In the present case and in any similar case in which a defendant says that he was only speaking the truth of another person and not meaning to attack the plaintiff, it may well be right to direct the jury that a reasonable man must be aware of the possibility that in any district there may be more than one person of the same name, and that, in considering how a reasonable man would understand the words, they must assume that he will read them with such care as may fairly be expected of him, not ignoring any parts of the description which are inapplicable to the plaintiff. If a defendant has been careful and precise, he may by his care, avoid the risk of a successful action, but he cannot in my opinion escape liability merely by showing that he was careful and that his intentions were good.”

Ramdhara v. Mst. Phulwatibai In this matter, the relation between the parties was already strained. Few days before the incident in question took place, there was a quarrel between the parties and a report was lodged in the police station. On the day of the incident, Ramdhara, the plaintiff, on her way to bring her cattle happened to come across defendant No. 1. On seeing her, defendant No. 1 abused her filthily and uttered defamatory words, calling her the keep of their daughter-in-law’s maternal uncle, Jagatram.

76 1970 Cr LJ 286 (MP)
The Court observed, “In the present case, if the defendants had merely uttered the word ‘chinal’, I would have held that the word did not convey its literal meaning, that is, a woman of easy virtue, but was only a vulgar abuse, which is not uncommon in villages when women quarrel among themselves. Mere vulgar abuse, which does not tend to lower a person addressed in the estimation of others or to bring him into obloquy, contempt or ridicule, does not amount to defamation. In such a case the abuse is uttered merely to put an affront upon the feeling of the person abused, or as an insult to his dignity or self-respect without other persons knowing of it or without producing such an impression in their mind as its natural meaning would convey. But where words are uttered in circumstances tending to lower the person addressed in the estimation of the people present and to bring him into ridiculous or contempt, they will constitute defamation and will be actionable.

“Here, the words uttered by the defendant did not constitute a mere vulgar abuse. There was a definite imputation upon the plaintiff’s chastity. The attending circumstances cannot be lost sight of. She is a widow of 45 years, her husband having died several years before. Jagatram is a close relation of hers, being maternal uncle of her daughter-in-law. If in these circumstances, there is an imputation that the plaintiff is the keep of Jagatram, or that she had developed illicit relations with him, the statement is undoubtedly defamatory. A language is defamatory on the face of it when defamatory meaning is the only possible or the only natural and obvious meaning.”

*London Artists, Ltd. V. Littler*, 77 In this Case Four top theatrical artiests, through their agents gave one month’s notice to the defendant to move out of their engagements in a play being staged by the defendant at Her Majesty’s Theatre, London. The notices were in accordance with their contracts. The moving out of tour top performers in a play was a big jolt and was likely to bring the play to an end. The defendant, convinced there was a plot to stop the play wrote a letter to each artiste concerned in which he suggested that all the four artistes had taken part in what appeared to be a plot to bring about the end of a successful play.

The defendant pleaded justification, fair comment on a matter of public interest (*i.e.* the fate of the play) and publication on an occasion of qualified privilege, in actions for libel against him. The Court held that although the comment was on a matter of public interest, the allegation of a plot was in itself defamatory of the plaintiffs and was not

77 1969 2 All ER 193
reasonably capable of being considered a fair comment and which the defendant failed to prove as true, As such the plea of fair comment failed. The appeal was dismissed and
leave to appeal to the House of Lords refused.

T.V.Ramasubba lyer v. A. M. Ahamed Mohideen, 78  The appellants in this matter are the editor and owner of a daily, ‘The Dhinamalar’, published from Tirunelveli. In the February 18, 1961 issue of the daily, a news item with the dateline as Ceylon, February 17, reported that a person from the Tirunelveli district, who was exporting scented agarbathis to Ceylon and who was also called the ‘king of Agrarbathi business’ had smuggled opium into Ceylon in the form of agarbathis. On information, the Madras police with the help of the Ceylon police, arrested him and got him to Madras.

The respondent, who is a resident of Alakiamanavalapuram, is a manufacturer of scented agarbathis and he exported the same to Ceylon. The respondent alleged that the said publication defamed him as the news item was understood to refer to him and so instituted a suit for damages of Rs. 5,000.  The appellants contended that the news item was not defamatory. More importantly, they were not aware of the respondent’s existence and did not intend to publish the news item with reference to the respondent. In the May 14, 1961 issue of the ‘Dhinamalar’, they even published a correction clarifying that the person referred to in the earlier news item was not the respondent. The subordinate Judge, relying on the decision of the House of Lords in E. Hulton and Co. v. Jones79, concluded that the intention was not the test of liability so long as the respondent had actually been defamed. However, the decision of Hulton v. jones was overruled in English law by section 4 of the Defamation Act, 1952. The position therein as summarized by S. Ramaswami lyer in his Law of Torts is as follows:

“A publisher of words alleged to be defamatory of another cannot be sued if he published them ‘innocently’ and if he follows the prescribed procedure. Words shall be treated as having been published ‘innocently’ if either of two conditions are satisfied, first, he did not intend to publish them of and concerning the party aggrieved and did not know of circumstances by virtue of which they might be understood to refer to him, or second, the words are not defamatory on the face of them and he did not know of circumstances by virtue of which they might be understood to be defamatory of that person; and in either case the publisher exercised all reasonable care in relation to the publication.”

78 AIR 1972 Mad 398
79 1910 AC 20
The Court held that “even assuming that the English principle of law, as it is in existence, is automatically approvable to the Indian conditions, still by the time this case came to be decided, even the English law has been altered by section 4 of the Defamation Act, 1952, and therefore on this basis, it is the law as it stood after modification by section 4 of the Defamation Act, 1952. As I have pointed out already, the trial Court came to the conclusion that the appellants neither did not know of the existence of the respondent herein and the respondent, as PW 6 admitted, had no connection with the appellants. The explanation of the appellants was that they published the news item as they got it from the correspondent in “Ceylon by name Thambiuithorai. Even though they have failed to prove the truth of the news item with reference to any particular individual, the case of the appellants that they published the news on the basis of a communication received by them from their correspondent in Colombo was not disbelieved by either of the Courts below. Under these circumstances, I am clearly of the opinion that this is a case in which, looked at from any point of view, the appellants should not have been made liable in damages at all.” Accordingly, the appeal was allowed.

**M.R. Parashar v. Farooq Abdullah,** 80 In this case, a petition was filed against the Chief Minister of Jammu and Kashmir, Farooq Abdullah for contempt of Court. On November 13, 1982, a news item appeared in the Daily Kashmir Times which read: “CM asks engineers to forcibly occupy club building.” It was reported that the Chief Minister advised the Institute of Engineers to move quickly in the matter before the management of the club could obtain a stay order from the Court.

In another news item on November 23, 1982, it was reported that the Chief Minister while addressing a rally of Judicial Employees’ Welfare Association, denounced and ridiculed the judiciary by saying that “justice is being bought in the judicial Courts”.

The Court had to however, dismiss the case as there was no official record whatsoever of the speeches made by the Chief Minister at the two functions.

**D.P. Chaudhary v. Manjulata,** 81 In this case, the plaintiff respondent, Manjulata, was a member of a distinguished family in Jodhpur. On December 18, 1977, Dainik Navjyoti published a news regarding Manjulata with unfair comments and false imputations. The news item said that Manjulata, who had left her residence the previous night on the pretext of attending night classes, had eloped with one Kamlesh.

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80 AIR 1984 SC 615
81 AIR 1997 Raj 170
The news item was untrue and was published negligently with utter irresponsibility which gave rise to negative feelings against Manjulata. The Court found from the evidence on record that the defendant appellants, “after having received information from the police, without any proper verification published the news item, with the result Manjulata and her parents lost their prestige in the society and in the eyes of relatives as well as the persons who know them,” This also affected her marriage prospects. Thus, held that damages of Rs. 10,000 awarded was not excessive.

- Emergency and Press censorship
- Morality, obscenity and censorship

6.2.3 Right to Privacy

Privacy as a concept involves what privacy entails and how it is to be valued. Privacy as a right involves the extent to which privacy is (and should be legally protected). “The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection.”82 It is interesting to note that the common law does not know a general right of privacy and the Indian Parliament has so far been reluctant to enact one.

At this point begins the role of the Judiciary. Judicial activism has brought the Right to Privacy within the realm of Fundamental Rights. Article 141 of the Constitution states that “the law declared by the Supreme Court shall be binding on all Courts within the territory of India.” Therefore, the decisions of The Supreme Court of India become the Law of the Land. The Supreme Court of India has come to the rescue of common citizen, time and again by construing “right to privacy” as a part of the Fundamental Right to “protection of life and personal liberty” under Article 21 of the Constitution, which states “no person shall be deprived of his life or personal liberty except according to procedures established bylaw”. In the context of personal liberty, the Supreme Court has observed “those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must strictly and scrupulously observe the forms and rules of the law”. Even the fundamental right “to freedom of speech and expression” as enumerated in Article 19(1)(a) of the Constitution of India comes with reasonable restrictions imposed by the State relating to (i) defamation; (ii) Contempt of Court; (iii) decency or morality;(iv) security of the State; (v) friendly relations with foreign states; (vi)

incitement to an offence; (vii) public order; (viii) maintenance of the sovereignty and integrity of India. Thus, the right to privacy is limited against defamation, decency or morality. The Supreme Court has reiterated the Right to Privacy in the following cases:

**Kharak Singh v. State of UP**\(^83\) In this case the appellant was being harassed by police under Regulation 236(b) of UP Police Regulation, which permits domiciliary visits at night. The Supreme Court held that the Regulation 236 is unconstitutional and violate of Article 21. It concluded that the Article 21 of the Constitution includes “right to privacy” as a part of the right to “protection of life and personal liberty”. The Court equated ‘personal liberty’ with ‘privacy’, and observed, that “the concept of liberty in Article 21 was comprehensive enough to include privacy and that a person’s house, where he lives with his family is his ‘castle’ and that nothing is more deleterious to aman’s physical happiness and health than a calculated interference with his privacy”.

**Gobind v. State of M.P.** \(^84\) is another case on domiciliary visits. The Supreme Court laid down that, “privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.

**State v. Charulata Joshi**\(^85\) the Supreme Court held that “the Constitutional right to freedom of speech and expression conferred by Article 19(1)(a) of the Constitution which includes the freedom of the press is not an absolute right. The press must first obtain the willingness of the person sought to be interviewed and no Court can pass any order if the person to be interviewed expresses his unwillingness”.

**R. Rajagopal v. State of Tamil Nadu**\(^86\), The Supreme Court held that the petitioners have a right to publish what they allege to be the life-story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorization. But if they go beyond that and publish his life story, they may be invading his right to privacy, and then they will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restraint the said publication. It stated that “A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent- whether truthful or

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\(^83\) (AIR 1963 SC 1295)  
\(^84\) (1975) 2 SCC 148  
\(^85\) (1999) 4 SCC 65.  
\(^86\) (1994) 6 SCC 632
otherwise and whether laudatory or critical. If he does so, he would be violating the right
to privacy of the person concerned and would be liable in an action for damages……..”

People’s Union for Civil Liberties (PUCL) v. Union of India, the Supreme Court held
that the telephone tapping by Government under S. 5(2) of Telegraph Act, 1885 amounts
infraction of Article 21 of the Constitution of India. Right to privacy is a part of the right
to “life” and “personal liberty” enshrined under Article 21 of the Constitution. The said
right cannot be curtailed “except according to procedure established by law”. In Mr. ‘X’
v. Hospital ‘Z’ for the first time the Supreme Court articulated on sensitive data related
to health. In this case, the appellant’s blood test was conducted at the respondent’s hospital
and he was found to be HIV (+). His marriage, which was already settled, was called off
after this revelation. Several persons including the members of his family and those
belonging to their community came to know of his HIV (+) status and were ostracized by
the community. He approached the National Commission against the respondent hospital
claiming damages from them for disclosing information about his health, which, by norms
of ethics, according to him, ought to have been kept confidential. The National
Commission summarily, dismissed his complaint. Consequently he moved the Supreme
Court by way of an appeal.

The appellant argued that the principle of ‘duty of care’ as applicable to persons in
medical profession also included the duty to maintain confidentiality and that since this
duty was violated by the respondents, they were liable to pay damages. “Right of privacy
may, apart from contract, also arise out of a particular specific relationship, which may be
commercial, matrimonial, or even political. Doctor-patient relationship, though basically
commercial, is professionally, a matter of confidence and, therefore, doctors are morally
and ethically bound to maintain confidentiality.” It however, held that although it was the
basic principle of jurisprudence that ‘every Right has a correlative Duty and every Duty
has a correlative Right’, the rule was not absolute and was ‘subject to certain exceptions’
in the sense that ‘a person may have a Right, but there may not be correlative Duty, and
the instant case fell within exceptions. The Court observed that even the Code of Medical
Ethics carved out an exception to the rule of confidentiality and permitted the disclosure in
certain circumstances ‘under which public interest would override the duty of
confidentiality’ particularly where there is ‘an immediate or future health risk to others’.

According to the Court, the ‘right to confidentiality, if any, vested in the appellant was not

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87 6 (1997) 1 SCC 301
88 1998) 8 SCC 296
enforceable in the present situation, as the proposed marriage carried with it the health risk from being infected with the communicable disease from which the appellant suffered. As regards the argument of the appellant that his right to privacy had been infringed by the respondents by disclosing that he was HIV (+) and, therefore, they were liable in damages, the Supreme Court observed that as one of the basic human rights, the right of privacy was not treated as absolute and was ‘subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others.” District Registrar and Collector v. Canara Bank, it was held, that “exclusion of illegitimate intrusions into privacy depends on the nature of the right being asserted and the way in which it is brought into play; it is at this point that the context becomes crucial, to inform substantive judgment. If these factors are relevant for defining the right to privacy, they are quite relevant whenever there is invasion of that right by way of searches and seizures at the instance of the State.”

If one follows the judgments given by the Hon’ble Supreme Court, three themes emerge: (1) that the individual’s right to privacy exists and any unlawful invasion of privacy would make the ‘offender’ liable for the consequences in accordance with law; (2) that there is Constitutional recognition given to the right of privacy which protects personal privacy against unlawful governmental invasion; (3) that the person’s “right to be let alone” is not an absolute right and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others;

Privacy uses the theory of natural rights, and generally responds to new information and communication technologies. In North America, Samuel D. Warren and Louis D. Brandeis wrote that privacy is the "right to be let alone” focuses on protecting individuals. This citation was a response to recent technological developments, such as photography, and sensationalist journalism, also known as yellow journalism. Warren and Brandeis declared that information which was previously hidden and private could now be "shouted from the rooftops." Privacy rights are inherently intertwined with information technology. In his widely cited dissenting opinion in Olmstead v. United States (1928), Brandeis relied on thoughts he

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89 8 (2005) 1 SCC 496: AIR 2005 SC 186

developed in his *Harvard Law Review* article in 1890. But in his dissent, he now changed the focus whereby he urged making personal privacy matters more relevant to Constitutional law, going so far as saying "the government was identified, as a potential privacy invader." He writes, "Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in Court of what is whispered in the closet." At that time, telephones were often community assets, with shared party lines and the potentially nosey human operators. By the time of Katx, in 1967, telephones had become personal devices with lines not shared across homes and switching was electro-mechanical. In the 1970s, new computing and recording technologies began to raise concerns about privacy, resulting in the Fair Information Practice Principles.

*Kedar Nath Singh v. State of Bihar* 91

In this matter, the appellant, one Kedar Nath Singh, was prosecuted at Begusarai in Bihar. In the charges framed against him, he was accused of speaking the following words: “Today the dogs of CID are loitering around Barauni. Many official dogs are sitting even in this meeting. The people of India drove out the Britishers from this country and elected these Congress goonads to the gaddi and seated them on it. Today these Congress goonads are sitting on the giddy due to the mistake of the people. When we drove out the Britishers, we shall strike and turn out these Congress goonads as well. These official dogs will also be liquidated along with these Congress goonads. These Congress goonads are banking upon the American dollars and imposing various kinds of taxes on the people today. The blood of our brothers-mazdoors-and kisans-is being sucked. The capitalists and the zamindars of this country help these Congress goonads. These zamindars and capitalists will also have to be brought before the people’s Court along with these Congress goonadas.

“On the strength of the organization and unity of kisans and mazdoors, the Forward Communists Party will expose the black deeds of the Congress goonads, who are just like the Britishers. Only the colour of the body has changed. They have today established a rule of lathis and bullets in the country. The Britishers had to go away from this land. They had aeroplanes, guns, bombs and other weapons with them.

“The Forward Communist Party does not believe in the doctrine of vote itself. The party had always believed in revolution and does so even at present. We believe in that

91. AIR 1962 SC 955
revolution, which will come and in the flames of which the capitalists, zamindars and the Congress leaders of India who have made it their profession to loot the country, will be reduced to ashes and on their ashes will be established a Government of the poor and the down trodden people of India.

“It will be a mistake to expect anything from the Congress rulers. They (Congress rulers) have set up V. Bhave in the midst of the people by causing him to wear a langoti in order to divert the people’s attention from their mistakes. Today Vinova is playing a drama on the stage of Indian politics. Confusion is being created among the people. I want to tell Vinova and advise his agents, ‘you should understand it that the people cannot be deceived in the hands of Congressmen. Those persons, who understand the Yojna of Vinova, realize that Vinova is an agent of the Congress Government.

“I tell you that this Congress Government will do no good to you.

“I want to tell the last word even to the Congress tyrants, ‘you play with the people and ruin them by entangling them in the mesh of bribery, black marketing and corruption. Today the children of the poor are hankering for food and you Congressmen are assuming the attitude of Nawabs sitting on the chairs.” The charges that were framed against Kedar Nath Singh were that aforesaid words “brought or attempted to bring into hatred or contempt or attempted to excite disaffection towards the Government established by law in the Indian Pinal code.” Secondly, the words were spoken “with intent to cause or which was likely to cause fear or alarm to the public whereby any person might be induced to commit an offence against the State of Bihar and against the public tranquility, and thereby committed an offence punishable under section 505 (b) of the Indian Penal Code.”

The question that arose was whether sections 124A and 505 of the IPC had become void in view of the provisions of Article 19 (1)(a) of the Constitution which guaranteed the right to freedom of speech and expression.

Sections 124A and 505 of the IPC read as follows: Section 124A : Sedition.92

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92 Explanation of sedition. Explanation 1. –The expression “disaffection” includes disloyalty and all feelings of enmity.

Explanation 2. –Comments expressing disapprobation of the measures 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 disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the 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.

Section 505: Statements conducing to public mischief.-

1. Whoever makes, publishes or circulates any statement, rumor or report,-

   (a) With intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such; or

   (b) With intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility; or

   (c) With intent to incite, or which is likely to incite, any class or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

1. Statements creating or promoting enmity, hatred or ill-will between classes.- Whoever makes, publishes or circulates any statement or report containing rumor or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

2. Offence under sub-section (2) committed in place of worship, etc.- Whoever commits an offence specified in sub-section (2) in any place of worship or in an assembly engaged in the performance of religious worship or religious ceremonies, shall be punished it imprisonment which may extend to five years and shall also be liable to fine.

Exception.- It does not amount to an offence, within the meaning of this section when the person making, publishing or circulating any such statement, rumor or report, has
reasonable grounds for believing that such statement, rumor or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

The Court observed, “It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favor of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resorting to violence, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section in our opinion strikes the correct balance between individual fundamental rights and the interest of public order. Privileges of Parliament and State Reporting Indians Proceeding, Broadcasting and Publishing.

6.3. Constitutionality of sting operation

6.3.1 Sting operation

It was in the 1980s, that the first sting operation on how women were being trafficked was carried out by the Indian Express reporter Ashwin Sarin. As part of the sting, the Express purchased a tribal girl called Kamla. Subsequently, in 2001, the sting operation conducted by Tehelka exposed corruption in defence contracts using spy cams and journalists posing as arms dealers. The exposé on defence contracts led to the resignation of the then defence minister George Fernandes. Sting operations gained legitimacy in India, especially in the aftermath of the Tehelka operation, exposing corruption within the government. The original purpose of a sting operation or an undercover operation was to expose corruption. Stings were justifiable only when it served a public interest. Subsequent to the Tehelka exposé, stings have assumed the status of investigative journalism, much of which has been questioned in recent times, especially, with respect to ethics involved in conducting sting operations and the methods of entrapment used by the media. Further, stings by Tehelka, where the newspaper used sex
workers to entrap politicians have brought to question the manner in which stings are operated. Although, the overriding concern surrounding sting operations has been its authenticity, as opposed to, the issue of personal privacy.93

On 30 August, 2007 Live India, a news channel conducted a sting operation on a Delhi government school teacher forcing a girl student into prostitution. Subsequent to the media expose94, the teacher Uma Khurana95 was attacked by a mob and was suspended by the Directorate of Education, Government of Delhi. Later investigation and reports by the media exposed that there was no truth to the sting operation. The girl student who was allegedly being forced into prostitution was a journalist. The sting operation was a stage managed operation.

The brazenness that was seen in BMW case where the lawyers were caught in a sting operation by a TV channel for bribing a key witness to turn hostile is a real slur on the judicial history of this nation. Such instances call for strict penal action. The experiences in many sensational cases wherein the witness turned hostile lead us to look at the legal remedy of this criminality which too often involves "buying" of witness by influential accused can be handled only by strictly enforcing the penal law on perjury. However, the action against making a false statement should be initiated during the trial itself, & not at the end of it-which may take a long time. That may be a deterrent against persons who intentionally mislead the Court or make false statements under oath or file tainted affidavits96 much against the public good. Initiating action against a person for perjury after the trial is over is one of the reasons -why in India several perjury cases go totally unnoticed as a fresh trial begins on perjury running into years97.

6.4.1 Judicial Approach on media trial

Trial by Media is a phrase popular in the late 20th century and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by

93 http://cis-india.org/internet-governance/blog/privacy/privacy-media-law, visited on 14 April, 2015
94 Section 5 of the Cable Television Networks (Regulation) Act, 1995 and the Cable Television Network Rules (hereafter the Cable Television Networks Act), stipulates that no programme can be transmitted or retransmitted on any cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths. The Rules prescribes a programming code to be followed by channels responsible for transmission/re-transmission of any programme
95 WP(Crl.) No. 1175/2007
96 The Delhi High Court on April 17th 2005 summoned the Deputy Commissioner, Municipal Corporation, Delhi, East N.K. Sharma and three other officials to appear before it following a complaint that the officials have filed a false affidavit regarding the ongoing demolition drive in the capital’s Krishnanagar and Gandhinagar areas. http://www.Newkerala.com/
97 The Law Commission of India has examined aspects of this in 1958, 1966 and more recently in a consultative paper in 2005
creating a widespread perception of guilt regardless of any verdict in a Court of law. The Apex Court observed that the freedom of speech has to be carefully and cautiously used to avoid interference in the administration of justice. If trial by media hampers fair investigation and prejudices the right of defense of the accused it would amount to travesty of justice. The Court remarked that the media should not act as an agency of the Court.\textsuperscript{99} The Court, commented, "Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending."\textsuperscript{99}

Under the Contempt of Court Act, 1971, pre-trial publications are sheltered against contempt proceedings. Any publication that interferes with or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding, which is actually ‘pending’, only then it constitutes contempt of Court under the Act.\textsuperscript{100} Certain acts, like publications in the media at the pre-trial stage, can affect the rights of the accused for a fair trial. Such publications may relate to previous convictions of the accused, or about his general character or about his alleged confessions to the police. Under the existing framework of the Contempt of Court Act, 1971, media reportage, as seen during the Aarushi Talwar case, where the press, had literally gone berserk, speculating and pointing fingers even before any arrests were made, is granted immunity despite the grave treat such publications pose to the administration of justice. Such publications may go unchecked if there is no legislative intervention, by way of redefining the word ‘pending’ to expand to include ‘from the time the arrest is made’ in the Contempt of Court Act, 1971, or judicial control through gag orders as employed in United States of America. Due to such lacunas, the press has a free hand in printing colourful stories without any fear of consequences. Like a parasite, it hosts itself on the atrocity of the crime and public outrage devoid of any accountability. The Supreme Court has expounded that the fundamental principle behind the freedom of press is people’s right to know. \textsuperscript{101} Elaborating, the Supreme Court opined, “The primary function,
therefore, of the press is to provide comprehensive and objective information of all aspects of the country’s political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion”. However, the Chief Justice of India has remarked, “freedom of press means people’s right to know the correct news”, but he admitted that newspapers cannot read like an official gazette and must have a tinge of “sensationalism, entertainment and anxiety”. In the Bofors Case, the Supreme Court recounted the merits of media publicity: “those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues.” Two important core elements of investigative journalism envisage that (a) the subject should be of public importance for the reader to know and (b) an attempt is being made to hide the truth from the people.

Some scholars justify a ‘trail-by-media’ by proposing that the mob mentality exists independently of the media which merely voices the opinions which the public already has. In a democracy, transparency is integral. Without a free press, we will regress into the dark ages of the Star Chambers, when the judicial proceedings were conducted secretly. All these omnipresent SMS campaigns and public polls only provide a platform to the public to express its views. It is generating public dialogue regarding issues of public importance. Stifling this voice will amount to stifling democracy. Quoting Jeremy Bentham, on secrecy in the administration of justice, “In the darkness of secrecy, sinister interest and evil in every shape are in full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the

\[\text{\textsuperscript{102} In Re: Harijai Singh and Anr.; In Re: Vijay Kumar, (1996) 6 SCC 466, para 10}\]

\[\text{\textsuperscript{103} CJI says media must not run parallel trials, http://www.asiamedia.ucla.edu/article.asp?parentid=99360 (Last visited on October 21, 2009).}\]

\[\text{\textsuperscript{104} Kartongen Kemi Och Forvaltning AB v. State through CBI, 2004 (72) DRJ 693}\]

\[\text{\textsuperscript{105} Ibid., para 10}\]

\[\text{\textsuperscript{106} G.N. Ray, Should there be a Lakshman Rekha for the Press, http://presscouncil.nic.in/speech7.htm Last visited on September 25, 2009).}\]


\[\text{\textsuperscript{108} Prabhshahay Kaur, Freedom of Press vis-à-vis Responsible Journalism, www.legalserviceindia.com/articles/fre_pre_v.htm (Last visited on 20 May, 2009)}\]
judge himself while trying under trial.” In **Ajay Goswami v. Union of India**

, the shortcomings of the powers of the Press Council were highlighted: Section 14 of the Press Council Act, 1978 empowers the Press Council only to warn, admonish or censure newspapers or news agencies and that it has no jurisdiction over the electronic media and that the Press Council enjoys only the authority of declaratory adjudication with its power limited to giving directions to the answering respondents arraigned before it to publish particulars relating to its enquiry and adjudication. It, however, has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with the Press Council of India has tied its hands in exercising control over the erring publications. The PCI also has criminal contempt powers to restrict the publication of prejudicial media reports. However, the PCI can only exercise its contempt powers with respect to pending civil or criminal cases. This limitation does not consider the extent to which pre-trial reporting can impact the administration of justice.

Another example is the case of **Zee News v. Navjot Sandhu** in which the Supreme Court held that media interviews do not prejudice judges. Media Activism - Evils of ‘Trial by Media’ Justice Katju and P. Sainath have attacked the media for focusing attention on “non-issues” and “trying to divert attention of the people from the real issues to non-issues” and “stifling of smaller voices”. Who will watch the watchdog as it abdicates its role as an educator in favour of being an entertainer. A line between informing and entertaining must be drawn.

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110 (2007) 1 SCC 143

111 ibid., para 41

112 www.legalserviceindia.com/articles/fre_pre_v.htm (Last visited on 25 May, 2009)

113 2003 (1) SCALE 113

114 State v. Mohd. Afzal, 2003 (3) JCC 1669, para 137


opinion may exercise an indirect influence over the criminal justice system. “Justice should not only be done, it should manifestly and undoubtedly be seen to be done”\textsuperscript{119} In \textit{Zahira Habibullah Sheikh v. State of Gujarat} \textsuperscript{120}, the Supreme Court explained, “Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.”\textsuperscript{121} The media played an excessive and negative role in shaping the public conscience before Afzal was even tried.\textsuperscript{122} Sometimes, the media working as watchdog of system. In \textit{D. K. Basu V. State of West Bengal} \textsuperscript{123}, the Supreme Court took cognizance of the existence of custodial violence after a letter was sent to the Chief Justice of India drawing attention to newspaper reports regarding death in police lock-ups and custody. Markandey Katju J. remarked, nobody is trying to gag the media. They must play a responsible role. By investigation, the media must not do anything which will prejudice either the prosecution or the accused. Sometimes the entire focus is lost. A person is found guilty even before the trial takes place. See what happened in this [Aarushi] case. Till today what is the evidence against anyone? We will lay down guidelines on media coverage. We are not concerned about media criticizing us. Let media say anything about us, we are not perturbed. Our shoulders are broad enough and we will ignore it [the criticism]. We are for media freedom. What we are saying is there is no absolute freedom. See what happened to Dr. Talwar (Aarushi’s father), his reputation is tarnished.\textsuperscript{124}

Pre-trial publicity is injurious to the health of a fair trial. Even before the accused is arrested and tried, the cacophony of media proclaims the accused to be guilty. In a democracy, the right of free press and right of fair trial must peacefully co exist. Our Constitution s, whether written or unwritten, proclaim, protect and promote the same set of fundamental rights: both the First Amendment of the American Constitution and Article 19

\textsuperscript{119} R v. Sussex Justices : Exparte McCarthy : 1924(1) KB 256
\textsuperscript{120} (2004) 4 SCC 158
\textsuperscript{121} Ibid., para 36.
\textsuperscript{122} State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru, AIR 2005 SC 3820,This can be demonstrated by the observations of Justice P. Venkatarama Reddi in upholding the imposition of the death penalty on Mohammed Afzal, “the incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender.
\textsuperscript{123} (1997) 1 SCC 416.
\textsuperscript{124} J. Venkatesan, Apex Court to lay down coverage norms, http://www.thehindu.com/2008/08/19/stories/2008081957360100.htm (Last visited on September 28, 2009).
(1)(a) of the Indian Constitution guarantee the freedom of speech and expression. *Bridges v. California* the American Supreme Court did note that; legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper., the Court prescribed certain methods for controlling the pre-trial publicity:(i) Control the presence of the press at the judicial proceedings.(ii) The Court should have insulated the witnesses. This implies protecting and isolating the witnesses during the trial. (iii) The Court should make efforts to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. More specifically, the trial Court might well have proscribed extrajudicial statements by any lawyer, party, witness, or Court official which divulged prejudicial matter.(iv) Reporter who wrote or broadcast prejudicial stories could have been warned as to the impropriety of publishing material not introduced in the proceedings.(v) Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.(vi) If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. While the American Courts have favoured the press over the accused, the British Courts have thought vice versa. Laws, J. in *R. v. Lord Chancellor* observed, indeed, the right to a fair trial is as near to an absolute right as any which I can envisage. The English Courts recognize the potential threat to justice posed by unrestrained publicity. Certain information, especially reports of confessions made by criminal defendants and details of defendants. prior convictions, is considered inherently prejudicial. Courts tend to halt prosecutions when detrimental publicity interferes with criminal trials. If the rules of evidence preclude the production of particular facts during trial, and members of the jury are exposed to those same facts, British Courts simply assume that justice has been compromised. Thus, the English Courts have followed the test of; presumed prejudice; to hold that pre-trial publicity has violated the right to fair trial. In *Attorney General v. Guardian Newspapers Ltd.* Collins, J. observed that in assessing whether there has been a violation, Courts must determine whether the risk of prejudice from the publication is both immediate and serious. In order to ensure fair trial; the English have restricted the flow of information. Under the Contempt of Court Act, 1981, the English Courts have the power to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice. While the American and the English Courts have grappled with

125 86 L Ed 192 : 314 US 252 (1941)
127 1999 EMLR 904
this problem, the Indian Courts have gingerly touched the issue. The reason is not far to seek: trial by media is a recent phenomenon. Hence, we find sporadic obiter, but no concrete ratio decidendi. The concept of ‘denial of a fair trial’ has been coined by authoritative judicial pronouncements as a safeguard in a criminal trial. But what does the concept ‘denial of fair trial’ actually mean: The conclusions of the judicial decisions can be summed as follows: The obstruction or interference in the administration of justice Vis a Vis a person facing trial. In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay (P) Ltd.*\(^\text{128}\), the Hon;ble Supreme Court partly dealt with the issue of freedom of press and administration of justice. Dealing with an adverse article published in the Indian Express with regard to the public issues of Reliance Petrochemicals, the Supreme Court had restrained; all the six respondents; from publishing any article, comment, report or editorial in any of the issues of the Indian Express or their related publications questioning the legality or validity of any of the consents, approvals or permissions to the [said issue of debentures]. The issue raised was about the continuation of such injunction especially when the shares had been oversubscribed though the day of allotment had not yet expired and before the allotment the subscribers could withdraw their subscriptions. The Apex Court held: There must be reasonable ground to believe that the danger apprehended in continuance of the injunction is real and imminent. This test is acceptable on the basis of balance of convenience. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*\(^\text{129}\), while dealing with a case of alleged attempt to rape a minor, the Apex Court observed; A trial by press, electronic media or pubic agitation is the very antithesis of the rule of law. It can well lead to miscarriage of justice. A Judge has to guard himself against any such pressure and he is to be guided strictly by the rules of law. In *M.P. Lohia v. State of W.B.*\(^\text{130}\), the Hon;ble Supreme Court dealt with a case where a trial for dowry death was sub judice, when an article appeared in a magazine Saga, entitled *Doomed by Dowry*; The article was based on the interview of the family of the deceased, giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The Apex Court observed; we have no hesitation that these type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue is sub judice. Recently, in *Manu* \(^\text{128}(1988)\ 4\ SCC\ 592\)
\(^\text{129}(1997)\ 8\ SCC\ 386\ :\ 1998\ SCC\ (Cri)\ 76\)
\(^\text{130}(2005)\ 2\ SCC\ 686\ :\ 2005\ SCC\ (Cri)\ 556\)
Sharma v. State (NCT of Delhi), the Apex Court has extensively observed about the danger of trial by media. It opined as under: There is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the Court.

Despite the significance of the print and electronic media in the present day, it is not only desirable but the least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused ordinary manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial. It further held: Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it [would] be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution.

It is essential for the maintenance of dignity of the Courts and is one of the cardinal principles of the rule of law in a free democratic country, that the criticism or even the reporting particularly, in sub judice matters must be subjected to check and balances so as not to interfere with the administration of justice. The Indian judiciary has not dealt substantially with the issue of freedom of press versus the right to fair trial. But this issue has taxed the imagination of the media, both the world over and in India. In 1994, thirty-nine distinguished legal experts and media representatives met for three days in Madrid. One of the basic principles, enunciated in the Madrid Principles on the Relationship Between the Media and Judicial Independence, is that: It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. In Saibal v. B.K. Sen it said: “It would be mischievous for a newspaper to systematically conduct an independent investigation

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134 AIR 1961 SC 633
into a crime for which a man has been arrested and to publish the results of the investigation. This is because, trial by newspapers, when a trial by one of the regular tribunal is going on, must be prevented. The basis for this view is that such action on the part of the newspaper tends to interfere with the course of justice”. In **Sahara India Real Estate Corp. Ltd. & Ors Vs. Securities & Exchange Board of India**\(^{135}\) The Apex Court observed that, the Courts to postpone reporting of judicial proceedings in the interest of administration of justice. Under Article 19(2) of the Constitution, law in relation to contempt of Court, is a reasonable restriction. It also satisfies the test laid down in the judgment of this Court in **R. Rajagopal v. State ofT.N.**\(^{136}\) As stated, in most common law jurisdictions, discretion is given to the Courts to evolve neutralizing devices under contempt jurisdiction such as postponement of the trial, retrials, and change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the Courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, Courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence.

\(^{135}\) I.A. Nos. 14 and 17 in C.A. No. 733 of 2012  
\(^{136}\) [(1994) 6 SCC 632].