

IN DEFENCE OF JOURNALISTS



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Human Rights Law Network VISION

- To protect fundamental human rights, increase access to basic resources for the marginalised communities, and eliminate discrimination.
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In Defence of Journalists

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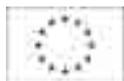
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INTRODUCTION

“When the conspiracy of lies surrounding me demands of me to silence the one word of truth given to me, that word becomes the one word I wish to utter above all others.”

Andre P. Brink

Freedom of speech, and in particular, the freedom of the press, is, as Chief Justice BP Sinha stated in *Kedar Nath Singh v. the State of Bihar* [1962] AIR 955, “the sine qua non of a democratic form of government that our Constitution has established.” Despite this and many other high-minded declarations of the importance of journalistic freedom, the courts of India have given little actual protection to the journalists who regularly put their lives and reputations on the line to provide the public with current and relevant information. Instead, in almost every instance a journalist or his editor must risk the wrath of the courts whenever they publish on sensitive issues, which, of course, are often the instances when such information is most necessary to informing the public.

It is with this “journalists’ dilemma” in mind that this casebook has been conceived and written. Though any journalist who faces the charges discussed in this book faces an uphill battle, it is hoped that the chapters included here will inform them of the general parameters set by precedent and statute, and therefore what burdens they will have to prove and where they might make novel arguments. While this book is intended to discuss as wide a range of topics and arguments as possible, it is by no means intended to be comprehensive. Rather our intention is to provide a clear and succinct statement of the law. Equally, this book is not intended to be a substitute for formal legal advice.

One threshold question that courts will have to deal with is whether the content in question qualifies as “Obscene.” The courts of India have come a great distance from the British common law rule laid out by Chief Justice Alexander Cockburn, which makes obscene that which would be found to incite violence or other untoward reactions in people inclined to such reactions. This standard was notably over-inclusive, and India has moved away from it. However, the old case has not been overruled, and while the courts are fairly solicitous of works and interpretations of artistic, literary and scientific merit, they have not been quite so solicitous of works of political commentary. In this vein, however, the state will often utilise other avenues of attack to stifle speech which has political content. In sum, the journalist who faces charges of obscenity has recourse to argue that the work presents artistic merit, is within the standards of common and contemporary decency, and does not describe sexual content in a “patently offensive manner.”

Writings and broadcasts of political content will more likely be challenged under Defamation and Contempt. If the content of the publication is directed at a political or public figure, that individual may bring both civil and criminal claims of defamation. Under current law, the civil claim may be defeated even when the journalist's statements, though honestly believed and well researched, are in fact false, which relieves the accused of the more serious damages claims that may lie there. One should be aware however, that the criminal law is less forgiving in this regard and often results in jail sentences. Furthermore, under the criminal claim, what is most upsetting is that the burden of proof rests not on the plaintiff who wishes for the case to proceed, but on the accused to show that not only are the statements true, but also that the statements are in the public interest.

Setting aside issues that arise during the course of proving truth in a court of law, the challenge of proving that the statements are in the public interest creates its own judicial "escape hatch" which allows a judge to sit as arbiter of content, to say whether this or that may or may not benefit society. Added to this is the difficulty of deciding what aspects of a person's life are public and which are private. Take for instance this hypothetical: it is discovered that a politician claims an inordinately large dowry from his wife's family. This may be a private aspect of his life (indeed what could be more essentially private than one's family relations?) but is he not a public servant, sworn to uphold the very law which he is breaking in perpetuating the practice of dowry? What if he is the secretary of the National Human Rights Commission? What if he is a judge who has sentenced others to fines and imprisonment for dowry practices? Is it not relevant to the public's interest that these public figures are violating (in private) the very standards they are meant to enforce? The journalist and her advocate must tread a thin line and remain objective, but to the extent possible should argue persuasively to frame the content (even when it appears to be private) as public.

Returning to the notion of truth, it is assumed (at least by this book, if not by the courts) that a journalist may publish the truth or may, at the very least have a good faith belief that it is true, but that alone is not sufficient to defend against the criminal charges — the journalist must also argue that such information served the interests of the public and was not merely an aspect of the private life of the plaintiff. Therefore, the journalist's advocate must focus her energies on convincing the sitting judge(s) that a well-informed and democratic people must be apprised of events in the personal lives of such public figures.

Parliamentary Privilege is yet another immunity that may exist beyond the public-private distinction. Under this archaic argument, legislators are protected from media coverage by virtue of the need to protect the legislature from outside power and influence. This defensive

policy arose in response to British oppression and interference with the burgeoning Republic, but it is no longer necessary and its vestige serves to insulate the government from the very people it purports to provide for, that is the people of India. Advocates may find it difficult to overcome this immunity when journalists have published on material which comes from parliamentary hearings, but to the extent possible they should argue that the intent of the privilege was to foster democracy, and it has therefore outlived its usefulness.

Contempt is a particularly troubling doctrine as it specifically restricts what journalists can publish regarding the courts, who will often have the final say on a plethora of other political issues. Judges jealously defend their positions of power and there are few means of oversight to keep potentially vindictive tempers in check. For instance, there is no rule prohibiting the judge who was the target of published criticism from presiding over the case of the journalist who published the material. Courts will often, as if in an aside, dismiss outright the notion that a judge might not be absolutely and infallibly objective.

The essential legal argument that journalists' advocates must make is that the statements do not interfere with the administration of justice. This may seem simple on its face, though often the angle the courts take is that the statements in question dishonour a judge, who is an analogue of the law, and, therefore the statements criticise the law, which should be above reproach. This approach is not only damaging to the notion that democracy requires open criticism of the law, but also irresponsibly obtuse to the fact that judges are people also. Courts most often treat contempt as their own private version of defamation, and to the extent possible, advocates should frame the critical statements as criticism of the legal interpretation or as an attack on the law itself, rather than as a personal attack on the judge (which in all honesty should be classed as defamation). In the end though, judges often sentence offenders of contempt to relatively minor fines and imprisonment. If the statements are truly newsworthy, the contempt case might actually serve to make a larger story out of it. This is, of course, a very slight victory, and little comfort for the journalist who spends a month's salary and several weeks in jail for a little extra publicity.

The most serious charge a journalist might face is that of Seditious. Seditious is a crime against the State, and as such the journalist faces a formidable foe. The primary and strongest argument available to a journalist in the face of such charges is to point out the essential paradox that lies in finding a journalist guilty of seditious through the expression of ideas — often, statements which criticise laws (the exercise of constitutional rights) are found to be attacks on the very same constitutional rights, *vis-à-vis* the State, which those laws are designed to protect.

However, this approach is not the norm; there is no single approach taken by the courts, although the most common is a balancing test between the importance of the individual freedom of speech and the potential harm of the statements. The extent to which courts abstract this notion of individual or private freedom of speech as a stand-in for “the public right of free speech,” indicates a court’s willingness to find in favour of the accused’s (and indeed all individuals’) right of free speech. Conversely, where a court frames the issue in terms of the danger to society, the journalist will need to rely on something stronger than the old adage, “sticks and stones may break my bones, but words will never hurt me.”

Perhaps more troubling than the Government of India’s means of censorship and its avid interest in stifling free thinking, is its failure to recognise the value of journalists as harbingers and protectors of democracy. In this regard, there is no special consideration for journalists who publish information not out of motives of spite or profit, but out of the altruistic intention to enlighten the public, to better equip the citizens of India for participation in government. India cannot afford to silence the voices of dissent, for it is on those voices, sometimes unpopular or outrageous, that the rights of all citizens rely on. If the least among us can be stripped of her constitutional rights, so too can any of us.

India has the world’s largest democracy, and also one of its newest. Fostering and protecting that democracy are critical concerns of both the government and the citizenry. To this end the government must recognise several essential features: first the government is not the democracy which requires protection, it is a servant and tool of that democracy and to the extent that it fails such purpose it should be discarded. Second, in a democracy the government does not control the people, the people control the government and as such the people have a duty to police government and hold it to its task. Finally, the media are that police. Countless judicial decisions in this book give cursory mention to these principles but few ever actually apply them. Instead, judges find ways to forgive the government. But this cannot continue forever — our hope is that journalists will not be dissuaded by those judges who choose to favour the government over democracy and that they will continue to speak truth to power.

CHAPTER ONE

OBSCENITY

Freedom of speech in India is protected by Article 19(1)(a) of the Constitution. However, this right is not absolute and is subject to “reasonable restrictions” in the interests of, amongst other things, “decency or morality” under Article 19(2)(a). Restrictions and punishments relating to obscene publications mark an important battleground between free speech and its limitations. Determining what is and is not obscene is important in that it establishes what gains the right’s protection, and what does not.

The charge of obscenity is established by section 292 of the Indian Penal Code, 1860. While introducing charges relating to obscene material, the section fails to define what the term ‘obscene’ means. Instead, this task falls to the courts. In India, the courts have adopted the test laid down in *R v. Hicklin* [1868] LR 3 QB 360, in which Cockburn, C.J., stated the following:

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

The first thing to note about this test is that it is likely to encompass far too many publications, most notably by virtue of the fact that it focuses on the effect of those who are already sensitive and open to immoral influences. In this regard, it is a significant step away from the usual standard of the assessment that would be made by the reasonable man or woman. In addition to this problem of overinclusiveness, there is also a more abstractly stated problem with the *Hicklin* rule — it punishes one person on the basis of other people’s reactions over which the original actor has no control.

The next concern is simply the power that it gives to the judge. This criticism of both section 292 and the *Hicklin* test is nicely summarised in *Director General of Doordarshan and Others v. Anand Patwardhan and Another* JT 2006 (8) SC 255:

“The present provision is so vague that it becomes difficult to apply it. The purposeful omission of the definition of obscenity has led to attacks of section 292 as being too vague to qualify as a penal provision. It is quite unclear what the provisions mean. This unacceptably large ‘grey area,’ common in laws restricting sexual material, would appear to result not from a lack of capacity or effort on the part of drafters or legislators. The Indian Penal Code on obscenity grew out of the English law, which made the court the guardian of public morals. It is important that where bodies exercise discretion which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law. The effect of provisions granting broad discretionary regulatory powers is unforeseeable and they are open to arbitrary abuse.”

Over time, the unsatisfactory test from *Hicklin* has been reinterpreted. However, this process has been slow and generally less satisfactory in India than has been the case for other jurisdictions. The current approach requires a higher standard before deeming a publication as obscene, in part due to a greater focus of context in terms of examining contemporary community standards as well as literary merit. The following guidelines were laid down in *Doordarshan*:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

This test is certainly an improvement, but still presents a concern in terms of the heavy role of the judges by requiring them to examine literary value and so forth. Additionally, it is important to note that this decision did not officially repudiate the presence of the *Hicklin* test in India.

In short, while this area of the law has improved greatly, the “unacceptable grey area” is still present and in danger of being exploited in some circumstances.

INDIAN PENAL CODE, 1860

Section 292: Sale, etc., of obscene books, etc.

- (1) For the purposes of subsection (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
- (2) Whoever:
 - (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever; or
 - (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation; or
 - (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation; or
 - (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person; or
 - (e) offers or attempts to do any act which is an offence under this section,
 - (f) shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception — This section does not extend to:

- (a) any book, pamphlet, paper, writing, drawing, painting, representation or figure:
 - (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or
 - (ii) which is kept or used bona fide for religious purposes.

CONSTITUTION OF INDIA, 1949

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

- (1) All citizens shall have the right:
 - (a) to freedom of speech and expression . . .
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the 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.

IN THE SUPREME COURT OF INDIA

RANJIT D. UDESHI

VERSUS

THE STATE OF MAHARASHTRA

1965 AIR 881, 1965 SCR (1) 65

19 August 1964

P. B. Gajendragadkar, CJ, M. Hidayatullah, K. N. Wanchoo, J. C. Shah, N. R. Ayyangar, JJ.

Rule of Law: Laws relating to obscenity are a reasonable restriction on the right to freedom of expression. The test for what is obscene will be whether the material depraves and corrupts those whose minds are open to such immoral influences and into whose hands a publication of that sort may fall.

This case concerned a bookseller who sold an unexpurgated copy of “Lady Chatterley’s Lover.” He was convicted for selling an obscene publication under section 292 of the Indian Penal Code. He subsequently appealed, arguing that the section was void because it was an unreasonable restriction on the right to freedom of expression contained in the Constitution, and in the alternative, that this book was not obscene.

The Court dismissed the appeal by holding that the laws relating to obscenity were a reasonable restriction on the right to freedom of expression in that they uphold public decency and morality. In assessing whether the publication was obscene, the Court held that the test was whether the matter (read as a whole) had a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

It should be noted that this case was mostly concerned with publications that constituted a piece of art, rather than journalism per se. It was noted that the test aforementioned should be read in light of the interests of contemporary society and that artistic merit may be able to overcome obscenity in some circumstances.

Cases discussed and relied upon:

Establishing the test for indecency: *R v. Hicklin* [1868] LR 3 QB 360.

Judgement of the Court delivered by Hidayatullah, J

[The defendant] bases his argument on [two] legal grounds which briefly are:

- (i) That section 292 of the Indian Penal Code is void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by Article 19(1)(a) and is not saved by clause (2) of the same article; and
- (ii) that even if section 292 be valid, the book is not obscene if the section is properly construed and the book as a whole is considered.

* * *

[There is no doubt that article 19(1) of the Constitution] guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925)... It does not go beyond obscenity which falls directly within the words “public decency and morality” of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity... [the defendant] seeks to limit action to cases of intentional lewdness which he describes as “dirt for dirt’s sake” and which has now received the appellation of hardcore pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse, sexual feelings. Speaking in terms of the Constitution it can hardly be claimed, that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292 [of the] Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word obscenity is really not vague because it is a word which is well-understood even if persons differ in their attitude to what is obscene and what is not... Condemnation of obscenity depends as much upon the morals of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity

by itself has extremely “poor value in the propagation of ideas, opinions and information of public interest or profit.” When there is propagation of ideas, opinions and information of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292 deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19.

* * *

It may, however, be pointed out that one may have to consider a plea that the publication was for public good. This bears on the question whether the book etc can in those circumstances be regarded as obscene. It is necessary to bear in mind that this may raise nice points of the claims of society to suppress obscenity and the claims of society to allow free speech... We are not called upon to decide this issue in this case but we have found it necessary to mention it because ideas having social importance will prima facie be protected unless obscenity is so gross and decided that the interest of the public dictates the other way.

We shall now consider what is meant by the word “obscene” in section 292... The Indian Penal Code borrowed the word from the English statute. As the word “obscene” has been interpreted by English courts something may be said of that interpretation first... In *R v. Hicklin* [1868] LR 3 QB 360... Cockburn, C.J. laid down the test of obscenity in these words:

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

This test has been uniformly applied in India. The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or if it needs to be modified and, if so, in what respects. The first of these questions invites the Court to reach a decision on a constitutional issue of a most far-reaching character and we must beware that we may not lean too far away from the

guaranteed freedom... The Indian Penal Code does not define the word “obscene” and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for.

* * *

We do not think that [the *Hicklin* test] should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases. [The defendant], however, urges that the test must be modified in two respects. He wants us to say that a book is not necessarily obscene because there is a word here or a word there, or a passage here and a passage there which may be offensive to particularly sensitive persons. He says that the overall effect of the book should be the test and secondly, that the book should only be condemned if it has no redeeming merit at all, for then it is “dirt for dirt’s sake”...

[The defendant] is not right in saying that *Hicklin* emphasised the importance of a few words or a stray passage. The words of the Chief Justice were that “the matter charged” must have “a tendency to deprave and corrupt.” The observation does not suggest that even a stray word or an insignificant passage would suffice... Nor is it necessary to compare one book with another to find the extent of permissible action...

The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him: “Madam, you must have been looking for them.” To adopt such an attitude towards art and literature would make the courts a board of censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society

and particularly the influence of the book etc on it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate. . . . A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

IN THE SUPREME COURT OF INDIA
SHRI CHANDRAKANT KALYANDAS KAKODAR
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS
AIR 1970 SC 1390

25 August 1969

G. K. Mitter, P. Jaganmohan Reddy and S. M. Sikri, JJ.

Rule of Law: When considering an allegation of obscenity, the court should be aware of varying and changing standards of what is and is not offensive. The focus of the inquiry should be on a class of people, rather than individuals who may be overly sensitive.

This case concerned a short story that was published in a monthly magazine. The complainant felt that the story was intended to corrupt and deprave the minds of readers, and young readers in particular.

While finding that the story contained little by way of literary merit, the Court did not consider it to be likely to corrupt those in whose hands the book was likely to fall. In reaching this conclusion, the Court upheld the decision of *Udeshi* and the test from *Hicklin*. However, it placed greater emphasis on the freedom of expression of writers by stressing that what is considered obscene will vary from place to place and from time to time dependant on the community's standards. It also held that the test of obscenity should be applied by focusing on groups of people and how they are likely to react to the publication, rather than considering individuals and the risk of hypersensitivity.

Cases discussed and relied upon:

Determining the test and approach for charges of obscenity: *R v. Hicklin* [1868] L.R. 3 Q.B. 360; *Ranjit D. Udeshi v. State of Maharashtra* 1965 SCR (1) 65.

Judgement of the Court delivered by Jaganmohan Reddy, J.

4. It is apparent that the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of section 292 [of the Indian Penal Code]. Even so as the question of obscenity

may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court.

5. What is obscenity has not been defined either in section 292 or in any of the statutes prohibiting and penalising mailing, importing, exporting, publishing and selling of obscene matters. The test that has been generally applied in this country was that laid down by Cockburn, C.J. in *R v. Hicklin* [1868] L.R. 3 Q.B. 360 and even after the inauguration of the Constitution and considered in relation to the fundamental right of freedom of speech and expression this test, it has been held, should not be discarded. . . . Cockburn, C.J. formulated the test in these words:

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

* * *

[The Court then goes on to describe the approach and findings of *Ranjit D. Udeshi v. State of Maharashtra* 1965 SCR (1) 65. It then states its intention to apply this test to the publication and outlines the plot of the story in question.]

10. The story read as a whole does not, in our view, amount to its being a pornography nor does it pander to the prurient interest. It may not be of a very high literary quality and may show immaturity and insufficient experience of the writer, but in none of the passages referred to by the complainant do we find anything offending public order or morality. . . . We have been taken through the [relevant] passages in the English translation and even allowing for the translation not bringing out the literary or artistic refinement of the original language, we find little in these passages which could be said to deprave or corrupt those in whose hands the book is likely to fall, nor can it be said that any of the passages advocates, as the High Court seems to think, a licentious behavior depraving

and corrupting the morals of adolescent youth. We do not think that it can be said with any assurance that merely because adolescent youth read situations of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situations is given in a setting emphasising a strong moral to be drawn from it and condemns the conduct of the erring party as wrong and loathsome it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall-particularly the adolescent.

* * *

13. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view, but society has changed since then to allow litterateurs and artists to give expression to their ideas, emotions and objectives with full freedom, except that [they] should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Udeshi*, if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in any way tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

IN THE SUPREME COURT OF INDIA
SAMARESH BOSE AND ANOTHER
VERSUS
AMAL MITRA AND ANOTHER

1986 AIR 967, 1985 SCR Supl. (3) 17

24 September 1985

A. N. Sen and R. S. Pathak, JJ.

Rule of Law: To ensure that the question of obscenity is decided objectively, the judge should follow a process whereby they first try to place themselves in the position of the author and then in the place the likely readers to determine the concepts that will be conveyed. The judge should then apply his mind dispassionately to the publication as a whole, using the evidence of experts where desirable.

This case was an appeal against a prosecution for obscenity under section 292 of the Indian Penal Code. In the initial trial, the judge had disregarded the evidence of experts stating that the book in question had literary merit and was not obscene.

On appeal, the Court outlined a process that should be adopted to ensure that the decision made by the judge is an objective one. It was held that the judge should first place him or herself in the position of the author so as to ascertain the themes which are trying to be conveyed. Secondly, the judge should examine the situation from the likely audience of the publication so as to ascertain the themes that it actually does convey. From this, the judge should make a dispassionate assessment. If it is desirable to do so, the judge shall hear expert evidence in assisting with these steps. In this case, the publication was held not to be obscene.

Cases discussed and relied upon:

Considering the approach to obscenity: *Ranjit D. Udeshi v. State of Maharashtra* [1965] 1 S.C.R. 65; *R v. Hicklin* [1868] LR 3 QB 360; *Chandrakant Kalyandas Kakodar v. State of Maharashtra* [1970] 2 S.C.R. 80.

Judgement of the Court delivered by Sen, J.

The question for consideration in this appeal is whether the two appellants can be said to have committed an offence under section 292 of the Indian Penal Code and the answer to this question will necessarily depend on the finding whether the novel 'Prajapati' is obscene or not.

* * *

The first witness called on behalf of the accused was Shri Budhadev Bose. In his evidence Shri Budhadev Bose stated that he was a whole time writer and in addition to that he was a Professor of various institutions and he had also been the Chairman of the Comparative Literature at Jadavpur University...

* * *

In the course of his evidence, his attention was drawn to various passages in the book which were alleged to be obscene and he categorically stated that there was nothing obscene in any of these passages. This witness was cross-examined at length. Various passages in the book alleged to be obscene were put to this witness and it was suggested to him that these passages were obscene. Shri Basu emphatically and categorically denied that those passages or any part thereof could be characterised as obscene.

* * *

[During the course of his cross-examination he stated] "...These words may have been unknown in literature but they were very widely current in speech. By introducing these new and forceful words into literature the author has done a service to Bengali literature and language and that is one of the reasons why the book is praiseworthy..." It was put to this witness that this novel 'Prajapati' has no moral value and in answer the witness stated, "in my opinion, it has great social and moral value."

...The other witness called on behalf of the accused was Dr. Naresh Chandra Guha who at the time of giving his evidence was the Professor and Head of the Department of Comparative Literature at Jadavpur University... It is his categorical evidence that he has read the novel 'Prajapati' and he does not consider that book as an obscene one and this novel is not obscene either in part or as a whole. When certain passages of the book alleged to be obscene by the complainant were pointed out to him to ascertain his views as to whether those passages were obscene, this witness stated that he did not consider the same to be obscene as in his view it is a necessary part of the scheme of the novel which scheme was social criticism with a moral purpose. When asked whether the moral purpose

of the novel will come through to the general reader, this witness said in his evidence:

“If the reader is one who is used to literature, by which I mean who does not read once in a while a book in his life, the moral purpose of the book will be very obvious...”

* * *

...It may be noted that the learned Chief Presidency Magistrate had placed no reliance on the testimony of these two witnesses. In fact, he has placed no reliance on the oral testimony which was adduced before him. The learned Chief Presidency Magistrate has proceeded to make his own assessment after reading the book, and as stated by him, with an open mind and a number of times. He has observed “moreover expert knowledge has nothing to do with such cases. Whether a book is obscene or not depends on the interpretation of section 292 and not on expert evidence.” ...Dealing with the statement made on behalf of the accused author, that the passages complained of are not obscene and even if it may be said that there is some amount of indecency in those passages and the words used therein are vulgar, it has to be appreciated that they became necessary to put the scheme of the novel in its right perspective, the learned Chief Presidency Magistrate has observed:

“It may have exposed the hypocrisy of the people, exposed the politicians who live on others, exposed the teachers who do not care to look after the interests of the students, exposed the big officers of the workshops and factories and their most ultra modern wives who do not take care of their children. No doubt, such a thing has been said and such characters have been depicted, but to me it seems it has been depicted in a very veiled way... As a forceful writer, Shri Samaresh Basu has depicted those characters in his own way, but unfortunately the purpose has been frustrated by his bringing some slang and unconventional words and for his depiction of some incidents which cannot be tolerated in a society like ours.”

* * *

In the case of *Ranjit D. Udeshi v. State of Maharashtra* [1965] 1 S.C.R. 65 this Court had to decide the question of the constitutional validity of section 292 and had also to interpret the word ‘obscene’ used in the said section. This Court upheld the constitutional validity of the section and the question of validity of the said section is, therefore, no longer open and has not been very appropriately challenged in the present case.

* * *

[The Court then went onto to outline the test offered by *R v. Hicklin* [1868] LR 3 QB 360 and the treatment of obscenity in *Udeshi*.]

The question of obscenity of a book within the meaning of section 292 again fell for consideration before this Court in the case of *Chandrakant Kalyandas Kakodar v. State of Maharashtra* [1970] 2 S.C.R. 80. In this case a complaint had been filed against the appellant who was an author of short-story entitled Shama which came to be published in the Diwali Issue of Rambha, a monthly magazine. On the basis of the complaint, criminal proceedings had been started under section 292, but the Magistrate dealing with the complaint acquitted the accused of the charge. The complainant and the State filed appeals against this judgement of acquittal by the Magistrate. The High Court, however, held the accused to be guilty of the charge and imposed, in convicting the accused, a fine. Against the judgement of the High Court, an appeal had been preferred to this Court. While dealing with the question of obscenity within the meaning of section 292 this Court relied on the earlier decision *Udeshi* and referred to various observations made therein. This Court observed at page 82:

“It is apparent that the question of whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of section 292. Even so as the question of obscenity may have to be Judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant... the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court.”

This Court held that the book in question was not obscene within the meaning of section 292 and observed at page 87:

“We do not think that it can be said with any assurance that merely because adolescent youth read situations of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situations is given in a setting emphasising a strong moral to be drawn from it and condemning the conduct of the erring party as wrong and loathsome, it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall particularly the adolescent.”

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex, or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expressions to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene,' having regard to the standards of contemporary society in India that are also fast changing. The adults and adolescents have available to them, a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Udeshi* if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. . . . What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

These two decisions of this Court lay down the legal principles to be observed in deciding the question of obscenity within the meaning of the section. As these two decisions of this Court settle the legal principles involved, it does not really become necessary to refer to the other authorities cited. . . . In England the question of obscenity is left to the jury and the jury decides whether the book in question is obscene or not. It is of interest to note the summing up of Byrne, J., the learned Judge who presided over the Central Criminal Court which was deciding the question of obscenity of the novel *Lady Chatterley's Lover* in *B. v. Penguin Books Ltd.*, as reported in *Criminal Law Review* 1961. . . . his lordship instructed the jury that "they must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was, was the book obscene? Was its effect taken as a whole to stand to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might

be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good . . .”

In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions of this Court earlier referred to, the question of whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of section 292. In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passage complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.

Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question.

A judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is molded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of section 292 by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment.

IN THE SUPREME COURT OF INDIA

AJAY GOSWAMI

VERSUS

THE UNION OF INDIA AND OTHERS

1 (2007) SCC 145

12 December 2005

A. R. Lakshmanan and T. Chatterjee, JJ.

Rule of Law: The right to freedom of expression shall only be limited where it is reasonably necessary to do so in order to protect some other public interest. Restrictions on newspapers in order to protect children from material that is objectionable without being obscene does not constitute a reasonable limitation.

The Petitioner in this case sought to argue that the freedom of speech and expression enjoyed by the newspaper industry was not appropriately balanced with the protection of children from harmful and disturbing material, rights which he alleged were contained within the Indian Constitution and at international law. He sought action from the Court that would restrain newspapers' ability to publish material that was objectionable but not necessarily obscene.

The case is a useful one in that it examines a number of different considerations that interact with the courts' approach to obscenity and freedom of expression. The Court dismissed the petition holding that in light of the law already in place, the further restrictions he sought were not reasonable limitations on the right to freedom of expression. In arriving at this conclusion, the Court examined the law relating to obscenity, including the test to be applied and the approach that a judge should take. It then went on to state that requiring any information published to be appropriate for children would encroach on the media's ability to communicate information to adults. Relatedly, it held that in order to limit a constitutional freedom, the threat from allowing the freedom to be exercised must be immediate.

Cases discussed and relied upon:

Establishing the importance of freedom of expression: *Virendra v. State of Punjab and Another* AIR 1957 SC 896. Establishing the test and approach for a charge relating to obscenity: *Director General of Doordarshan and Others v. Anand Patwardhan and Another* JT 2006 (8) SC 255; *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Others* 1969 (2) SCC 687; *Samaresh Bose and Another v. Amal Mitra and Another* (1985) 4 SCC 289; *K. A. Abbas v. The Union of India and Another* 1971 SCR (2) 446. Establishing it would be inappropriate to limit the right so as to shield children: *Alfred E. Butler v. State of Michigan* 1 Led 2d 412; *Janet Reno v. American Civil Liberties Union* 138 Led 2d 874; *United States v. Playboy Entertainment Group Inc.* 146 Led 2d 865. Establishing that there must be clear and present danger before limiting a constitutional right: *S. Ragarajan v. P. Jagjivam Ram* 1989 (2) SCR 204.

Judgement of the Court delivered by Lakshmanan, J.

The lawyer Petitioner... seeks protection from this Court to ensure that minors are not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. The real objective is that the nature and extent of the material having sexual content should not be exposed to the minors indiscriminately and without regard to the age of minor. The discretion in this regard should vest with parents, guardians, teachers or experts on sex education. The petitioner is not in any way seeking restraint on the freedom of press or any censorship prior to the publication of articles or other material. The petitioner is only seeking for the regulation at the receiving end and not at the source. Whatever is obscene is not protected by any law and there are numerous avenues for the redressal of grievance for the publication of any obscene material. However, sexually oriented material is not always obscene or even indecent or immoral. The effect of words or written material should always be judged from the standards of a reasonable strong minded, firm and courageous man i.e. an average adult human being. No attempt has been made to date to define any yardstick for the minors whose tender minds are open for being polluted and are like a plain slate on which any painting can be drawn.

These articles etc. may not be obscene within the four corners of law but certainly have tendencies to deprave and corrupt the minds of young and adolescent who by reasons of their physical and mental immaturity need special safeguards and care. [The Petitioner] invited our attention to some of the clippings annexed along with the petition. These clippings are only examples and such examples not only confine to newspapers mentioned herein but are of a general nature. The double meaning jokes cannot in any way leave a

healthy impact on the tender minds of the teenagers. The photographs certainly are part of news from around the world and India. However, the tone and tenor of the article as a whole and the way some of the photographs are published and described may not be in the interest of the minors... If the minor is of an age where he/she cannot understand the meaning, he/she would like to know from others and if the minor has come to an age where he/she is able to understand this would certainly energize his grey cells in the brain and would titillate him/her. What kind of culture and message does the article titled “moan for more” or “get that zing back into your sex life” convey? Is it really necessary for a child to read at a very early stage about the concept of masturbation, ejaculation, penetration etc. as is normally discussed by so called sex experts in columns of newspapers? At what age should we start telling our children where to have sex and how to break their monotony?

No doubt, we are not living an era of Gandhari but certainly we have culture and respect for elders and some decorum and decency towards children. Undoubtedly, such kind of stuff is available freely on internet, movies, television etc. but are the families and the community environment really ready to accept it in toto or are they passive receivers of the same without any control or check? Are these articles really making our children morally healthy? Moral values should not be allowed to be sacrificed in the guise of social change or cultural assimilation.

... The right of the minor flows from Article 19(1)(a), Article 21 read with Article 39(f) of the Constitution of India and the United Nation Convention on the Rights of the Child. In a recent judgement delivered by this court in the matter of *Director General of Doordarshan and Others. v. Anand Patwardhan and Another* (C. A. No. 613 of 2005) [it was] observed as under:

“...one of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas.”

It was further observed by this Court:

“...It is important that where bodies exercise discretion [as to obscenity], which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law.”

“The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers.”

It was observed by this Court in the matter of *Lakshmikant Pandey v. Union of India* (1984) 2 SCC 244 as follows:

“It is obvious that in a civilised society the importance of child welfare cannot be over-emphasised, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children...”

* * *

In view of the availability of sufficient safeguards in terms of various legislation [such as the Indecent Representation of Women (Prohibition) Act 1986 and section 292 of the Indian Penal Code], norms [such as the “Norms of Journalistic Conduct”] and rules and regulations to protect the society in general and children, in particular, from obscene and prurient contents, we are of the opinion that the writ at the instance of the petitioner is not maintainable. Article 19(1)(a) deals with freedom of speech and expression. In the matter of *Virendra v. State of Punjab and Another* AIR 1957 SC 896 this Court held: “It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day.”

Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public.

Therefore, the crucial question must always be, are the restrictions imposed on the exercise of the rights under Articles 19(1)(a) and 19(1)(g) reasonable in view of all the surrounding circumstances?

* * *

This Court has time and again dealt with the issue of obscenity and laid down law after considering the right of freedom and expression enshrined in Article 19(1)(a) of the Constitution of India, its purport and intent, and laid down the broad principles to determine/judge obscenity. In the recent judgement of *Doordarshan* this Court has referred to the test laid down in *R v. Hicklin* [1868] LR 3 QB 360 and observed:

- (a) whether the average person applying contemporary community standards would find that the work, taken as a whole appeal to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state law;
- (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

In *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Others* 1969

(2) SCC 687, this Court has held:

“In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, emotions and objectives with full freedom except that this should not fall within the definition of ‘obscene’ having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. . . What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect”

[The Court then went on to discuss the approach that was outlined in *Samaresh Bose and Another v. Amal Mitra and Another* (1985) 4 SCC 289.]

* * *

It was also submitted that in order to shield minors and children the State should not forget that the same content might not be offensive to the sensibilities of adult men and women. The incidence of shielding the minors should not be that the adult population is restricted to read and see what is fit for children.

In *Alfred E. Butler v. State of Michigan* 1 Led 2d 412, the United States Supreme Court held as under:

“The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.”

[The Court then went on to cite and quote the United States decisions of *Janet Reno v. American Civil Liberties Union* 138 Led 2d 874 and *United States v. Playboy Entertainment*

Group Inc. 146 Led 2d 865 as upholding the proposition that freedom of expression should not be limited so as to protect children.]

* * *

In *S. Ragarajan v. P. Jagjivam Ram* 1989 (2) SCR 204 while interpreting Article 19(2), this Court borrowed from the American test of clear and present danger and observed:

“The commitment to freedom demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably like the equivalent of a ‘spark in a powder keg.’”

The test for judging a work should be that of an ordinary man of common sense and prudence and not an “out of the ordinary or hypersensitive man.” As Hidayatullah, C.J. remarked in *K. A. Abbas v. The Union of India and Another* 1971 SCR (2) 446:

“If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman’s legs in everything, it cannot be helped.”

* * *

The definition of obscenity differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions. The term obscenity is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. On the other hand the Constitution of India guarantees the right of freedom to speech and expression to every citizen. This right will encompass an individual’s take on any issue. However, this right is not absolute if such speech and expression is immensely gross and will badly violate the standards of morality of a society. Therefore, any expression is subject to reasonable restriction. Freedom of expression has contributed much to the development and well-being of our free society. This right conferred by the Constitution has triggered various issues. One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas.

Be that as it may, the respondents are leading newspapers in India they have to respect the freedom of speech and expression as is guaranteed by our Constitution and in fact reach out to its readers in a responsible and decent manner. In our view, any steps to ban publishing of certain news pieces or pictures would fetter the independence of the free press which is one of the hallmarks of our democratic setup. In our opinion, the submissions and the propositions of law made by the respective counsel for the respondents clearly established that the present petition is liable to be dismissed as the petitioner has failed to establish the need and requirement to curtail the freedom of speech and expression. . . . An imposition of a blanket ban on the publication of certain photographs and news items etc. will lead to a situation where the newspaper will be publishing material which caters only to children and adolescents and the adults will be deprived of reading their share of their entertainment which can be permissible under the normal norms of decency in any society.

IN THE SUPREME COURT OF INDIA
DIRECTOR GENERAL OF DOORDARSHAN AND OTHERS
VERSUS
ANAND PATWARDHAM AND ANOTHER
2007 (1) ACR 766 (SC), AIR 2006 SC 3346

25 August 2006

A. R. Lakshmanan and L. S. Panta, JJ.

Rule of Law: The guidelines for obscenity will be whether the average person, applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest, whether the work describes sexual conduct in a patently offensive way and whether the work lacks serious literary, artistic, political or scientific value.

This case involved a challenge to a network's decision not to screen a documentary which it deemed to be unnecessarily violent and providing little societal value. The Court ordered that the film should be shown and in doing so reconsidered the test for obscenity in India. Having recognised that the definition of obscenity is intentionally ambiguous, the Court recognised the following guidelines that should be adopted in making an assessment. First, whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest. Secondly, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law. Finally, whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The Court stressed the value of the film and the message contained within it. It also reiterated the nature of freedom of expression, and noted India's obligations at international law. The Court ultimately held that the film was not obscene and that the network's refusal to show it amounted to an unjustified limitation on the filmmaker's right to freedom of expression.

Cases discussed and relied upon:

Considering the courts' previous approach to obscenity: *Samaresh Bose and Another v. Amal Mitra and Another* (1985) 4 SCC 284; *R v. Hicklin* [1868] LR 3 QB 360.

Judgement of the Court delivered by Lakshmanan, J.

9. In view of the rival submissions, the following substantial questions of law arise for adjudication by this Court:

- (a) Whether any film producer has a right to insist that his film must be shown on Doordarshan?
- (b) Whether the High Court was justified in directing the screening of the film certified as U/A. Notwithstanding the fact as a matter of policy, Doordarshan does not telecast adult films?
- (c) Whether the policy of Doordarshan of not telecasting adult movies can be said to be violative of Article 19(1)(a) of the Constitution of India as has been held by the High Court?
- (d) Whether or not it is open to the High Court to substitute its opinion for that of the competent authority as to whether a film is fit for being telecast on a public medium such as Doordarshan?

* * *

10. The film of the respondent no doubt deals with the communal violence. At the same time, we also listen to a stirring speech made by a woman activist on a street who exhorts people to “remember their neighbours” during communal riots. The film contains a narrative of a Muslim woman, a social worker who has been raped by the communal murderers of her husband and that of a Hindu mill worker whose children were killed in the bomb blast which occurred in the aftermath of the communal riots. The attempt of the film maker is to portray the miseries of the innocent victims of the communal riots. These sequences convey an obvious message of communal harmony as an ordinary Muslim slum dweller is seen in the closing sequences of the film re-building the destroyed home of his Hindu neighbour. The message of the filmmaker cannot be gathered by viewing only certain portions of the film in isolation but one has to view it as a whole. There are scenes of violence, social injustices but the film by no stretch of imagination can be said to subscribe to the same. They are meant to convey that such social evils are evil. There cannot be any apprehension that it is likely to affect public order or it is likely to incite commission of an offence. We are shocked at the observation of the Prasar Bharati Board that the film is not suitable due to unsatisfactory production quality and that the film has nothing specific to convey in the public interest. The documentary was given two awards in 42nd National Film Festival of 1995 conducted by the Ministry of Information and Broadcasting, Government of India as

Best Investigative Film and Best Film on Social Issues. It is, therefore, highly irrational and incorrect to say that the documentary... promotes violence and its production quality was unsatisfactory and that the film has no specific message to convey. The documentary has won several awards in international film festivals...

11. ...Mr. Rajeev Sharma made an attempt to object to certain scenes in the documentary especially one scene where a person is seen selling aphrodisiacs on the road and while doing so is making certain remarks on the sexuality of males. As indicated in paragraphs supra, a film must be judged from an average, healthy and common sense point of view. If the said yardstick is applied and the film is judged in its entirety and keeping in view the manner in which the filmmaker has handled the theme, it is impossible to agree that those scenes are offended by vulgarity and obscenity...

12. One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas. The Constitution guarantees freedom of expression but in Article 19(2) it also makes it clear that the State may impose reasonable restriction in the interest of public decency and morality. The crucial question therefore, is, 'what is obscenity?' The law relating to obscenity is laid down in section 292 of the Indian Penal Code, which came about, by Act 36 of 1969. Under the present section 292 and section 293 of the Indian Penal Code, there is a danger of publication meant for public good or for bona fide purpose of science, literature, art or any other branch of learning being declared as obscene literature as there is no specific provision in the Act for exempting them from operations of those sections. The present provision is so vague that it becomes difficult to apply it. The purposeful omission of the definition of obscenity has led to attacks of section 292 as being too vague to qualify as a penal provision. It is quite unclear what the provisions mean. This unacceptably large 'grey area,' common in laws restricting sexual material, would appear to result not from a lack of capacity or effort on the part of drafters or legislators. The Indian Penal Code on obscenity grew out of the English law, which made the courts the guardian of public morals. It is important that where bodies exercise discretion which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law. The effect of provisions granting broad discretionary regulatory powers is unforeseeable and they are open to arbitrary abuse.

13. [The Court then went on to describe the approach to obscenity outlined in *Samaresh Bose and Another v. Amal Mitra and Another* (1985) 4 SCC 284.] ...This is one of the

few liberal judgements the courts have given. The point to worry about is the power given to the judge to decide what he or she thinks is obscene. This essentially deposits on the Supreme Court of India, the responsibility to define obscenity and classify matters coming on media as obscene or otherwise. This Court has time and again adopted the test of obscenity laid down by Cockburn, C.J. The test of obscenity is, 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and in whose hands a publication in media of this sort may fall.' Interestingly, this test of obscenity, which was laid down in *R v. Hicklin* [1868] LR 3 QB 360, is the only test in India to determine obscenity.

14. The Encyclopaedia definition of obscenity states, 'By English law it is an indictable misdemeanor to show an obscene exhibition or to publish any obscene matter, whether it be writing or by pictures, effigy or otherwise.' The precise meaning of "obscene" is, however, decidedly ambiguous. It has been defined as something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd....

[Adopting the approach from the United States], one can observe that, the basic guidelines for the tier of fact must be:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

15. The Constitution of India guarantees everyone the right to freedom of expression. India is also a party to the International Covenant on Civil and Political Rights and therefore bound to respect the right to freedom of expression guaranteed by Article 19 thereof, which states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in form of art, or through any other media of his choice.

This right guaranteed by the Indian Constitution is subject to various restrictions. Like, respect of the rights or reputation of others; protection of national security or of public order, or of public health or morals etc. The catchword here is 'reasonable restriction' which corresponds to the societal norms of decency. In the present matter, the documentary film 'Father, Son and Holy War' depicts social vices that are eating into the very foundation of our Constitution. Communal riots, caste and class issues and violence against women are issues that require every citizen's attention for a feasible solution. Only the citizens, especially the youth of our nation, who are correctly informed can arrive at a correct solution. This documentary film in our considered opinion showcases a real picture of crime and violence against women and members of various religious groups perpetrated by politically motivated leaders for political, social and personal gains.

This film so far as our opinion goes does not violate any Constitutional provision nor will create any law and order problems as Doordarshan fears. This movie falls well within the limits prescribed by our Constitution and does not appeal to the prurient interests in an average person, applying contemporary community standards while taking the work as a whole, the work is not patently offensive and does not proceed to deprave and corrupt any average Indian citizen's mind.

* * *

19. In our opinion, the respondent has a right to convey his perception on the oppression of women, flawed understanding of manhood and evils of communal violence through the documentary film produced by him. As already noticed, this film has won awards for best investigative film and best film on social issues at the national level. The documentary film has won several awards at the international level as well. The freedom of expression, which is legitimate and constitutionally protected, cannot be held to ransom on a mere fall of a hat. The film in its entirety has a serious message to convey and is relevant in the present context. Doordarshan being a State controlled agency funded by public funds could not have denied access to screen the respondent's documentary except on specified valid grounds.

CHAPTER TWO

SEDITION AND CENSORSHIP

Sedition and similar offences can be thought of as offences which are committed against the state and which risk disrupting its continued existence. They represent the state's efforts to employ the law to maintain public order and ensure its own security. The perceived threat to public order may be in the form of books, films, political speeches or the work of journalists. The method of dismantling the problem is through the threat of criminal sanction and various forms of censorship.

There are several areas of the Indian Penal Code which give effect to this philosophy of using the law to deal with threats to the security of the state. Most notably, section 124A provides that:

“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.”

In addition to this, section 153A deals with the promotion of enmity between different groups within society, section 153B focuses on assertions prejudicial to national integration, and section 295A makes it an offence to deliberately outrage religious groups. Relatedly, section 95 of the Code of Criminal Procedure allows the state to require the pre-emptive forfeiture of any document or publication which is likely to be punishable under one of the sections aforementioned.

A clear difficulty with these sections is summarised by Chief Justice Sinha in *Kedar Nath Singh v. the State of Bihar* 1962 AIR 955:

“... it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order, is the very basic consideration upon which legislation with a view to punishing offences against the State is undertaken. Such legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the sine qua non of a democratic form of government that our Constitution has established.”

To express this slightly differently, there is a danger of hypocrisy if a law is enacted to protect the State and to ensure that its benefits and the rights of citizens are secured, but in doing so, that same law unduly limits the fundamental rights and benefits it was trying to protect in the first place.

The primary concern for the courts in this area is the appropriate balancing of the competing interests involved — on the one hand, the need for public order and tranquillity,

and on the other, fundamental rights and liberties. The difficulty with a balancing test such as this is the inevitable inconsistencies that arise. Different judges in different areas at different times are going to have differing views as to the importance of the competing factors and the appropriate outcome for any given set of circumstances. In that regard, beyond discussing the various components and rules which make up these laws and their interpretation, these cases are also intended to illustrate the diverse value systems which different judges possess. Some are intended to provide examples in which the courts have placed more emphasis on the need for state control, such as *Ramji Lal Modi v. the State of Uttar Pradesh* 1957 AIR 620 and *Sri Baragur Ramachandrappa and Others v. the State of Karnataka and Others* (2007) 3 SCC 11. Conversely, some decisions give greater effect to the rights of journalists and others, such as *Kedar Nath Singh* and *S. Rangarajan v. P. Jagjivan Ram* 1989 SCC (2) 574.

In this regard, beyond introducing the concepts and elements related to the various public order offences, this chapter intends to explore the unpredictability of the application of these sections and the potential effect that this may have on journalists.

INDIAN PENAL CODE, 1860

Section 124A: Sedition

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.

Explanation 1 — The expression “disaffection” includes disloyalty and all feelings of enmity.

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

Explanation 3 — Comments expressing 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.

Section 153A: Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony

(1) Whoever-

- (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities; or
- (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity. . .

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Section 153B: Imputations, assertions prejudicial to national integration

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise-

- (a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India; or
- (b) asserts, counsels, advises, propagates or publishes that any class of persons by reason of their being members of any religious, racial, language or regional group or caste or community be denied, or deprived of their rights as citizens of India; or
- (c) makes or publishes an assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Section 295A: Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

THE CODE OF CRIMINAL PROCEDURE, 1973

Section 95: Power to declare certain publications forfeited and to issue search warrants for the same

(1) Where-

(a) any newspaper, or book, or

(b) any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in section 96:

(a) “newspaper” and “book” have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867)

(b) “document” includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 96.

Section 96: Application to High Court to set aside declaration of forfeiture

(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the

newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in subsection (1) of section 95.

* * *

- (3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.
- (4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in subsection (1) of section 95, set aside the declaration of forfeiture.

IN THE SUPREME COURT OF INDIA

RAMJI LAL MODI

VERSUS

THE STATE OF UTTAR PRADESH

1957 AIR 620, 1957 SCR 860

5 April 1957

R. S. Das, CJ, S. J. Imam, S. K. Das, P. G. Menon and A. K. Menon, JJ.

Rule of Law: The amendment to focus Article 19(2) of the Constitution on “the interests of” public order etc, had the effect of broadening the exceptions to the right to freedom of expression. The fact that some acts under a contested law may fall out outside of this exception will not render the law void.

This case was a challenge to the constitutionality of section 295A of the Indian Penal Code, following a prosecution of a journalist for an article that was held to have been written “with the deliberate and malicious intention of outraging the religious feelings of Muslims.” The journalist argued that the section fell outside of the protection of Article 19(2). He argued further that where a law prohibits various acts, some of which in a manner that is constitutionally permissible and some of which in a manner that is not, that law will be void, even so far as it may be applied within the constitutionally permissible limits, given it is not severable.

The Supreme Court upheld the validity of section 295A, placing particular emphasis on the amendment to Article 19(2) changing the text from “for the maintenance of” public order and so forth, to the broader “in the interests of” public order. The Court held that section 295A was in the interests of the public order and that it was limited enough so as to apply only to acts which genuinely do threaten tranquillity.

Cases discussed and relied upon:

Discussing the circumstances in which a law will be deemed unconstitutional: *Romesh Thapar v. The State of Madras* (1950) S.C.R. 594; *Brij Bushan v. The State of Delhi* (1950) S.C.R. 605; *Chintaman Rao v. The State of Madhya Pradesh* (1950) S.C.R. 759. Establishing the effect of the amendments to Article 19(2): *Debi Soron v. The State of Bihar* A.I.R. (1954) Patna 254.

Judgement of the Court delivered by Das, CJ

This is a petition filed under Article 32 of the Constitution of India praying for a declaration that section 295A of the Indian Penal Code is ultra vires and unconstitutional and for a writ in the nature of certiorari quashing the petitioner's conviction under that section and for ancillary reliefs.

* * *

Learned counsel appearing in support of this petition urges that section 295A... interferes with the petitioner's right to freedom of speech and expression guaranteed to him as a citizen of India by Article 19(1)(a) of our Constitution. The contention is that this section cannot be supported as a law imposing reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) as provided in clause (2) of the said Article. Learned counsel says that the interest of public order is the only thing in clause (2) which may possibly be relied upon by the State as affording a justification for its claim for the validity of the impugned section. A law interfering with the freedom of speech and expression and imposing a punishment for its breach may, says counsel, be "in the interests of public order" only if the likelihood of public disorder is made an ingredient of the offence and the prevention of public disorder is a matter of proximate and not remote consideration. Learned counsel points out that insulting the religion or the religious beliefs of a class of citizens of India may not lead to public disorder in all cases although it may do so in some case. Therefore, where a law purports, as the impugned section does, to authorise the imposition of restriction on the exercise of the fundamental right to freedom of speech and expression in language wide enough to cover restrictions both within and without the limitation of constitutionally permissible legislative action affecting such right, the court should not uphold it even in so far as it may be applied within the constitutionally permissible limits as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out it must, according to learned counsel, be held to be wholly unconstitutional and void. Reference has been made to the cases of *Romesh Thapar v. The State of Madras* (1950) S.C.R. 594 and *Brij Bushan v. The State of Delhi* (1950) S.C.R. 605.

In *Romesh Thapar*, in exercise of powers conferred on him by section 9(1A) of the Madras Maintenance of Public Order Act, 1949, the Governor of Madras, being satisfied that for the purpose of securing public safety and the maintenance of public order it was necessary so to do, prohibited the entry into or the circulation, sale or distribution in the State of

Madras or any part thereof of the newspaper entitled 'Cross Roads,' an English weekly published at Bombay. The impugned section was a law enacted for the purpose of securing the public safety and the maintenance of public order. 'Public order' was said to be an expression of wide connotation and to signify that state of tranquillity which prevailed among the members of a political society as a result of the internal regulation enforced by the Government which they had established. 'Public safety' used in that section was taken as part of the wider concept of 'public order.' Clause (2) of Article 19, as it stood then, protected a law relating, inter alia, to a matter which undermined the security of or tended to overthrow the State. Some breach of public safety or public order may conceivably undermine the security of or tend to overthrow the State, but equally conceivably many breaches of public safety or public order may not have that tendency. Therefore, a law which imposes restrictions on the freedom of speech and expression for preventing a breach of public safety or public order which may not undermine the security of the State or tend to overthrow the State cannot claim the protection of clause (2) of Article 19. Section 9(1-A) was challenged as it embraced both species of activities referred to above and as the section was not severable, the whole section was held to be bad.

In *Brij Bushan* the validity of section 7(1)(c) of the East Punjab Public Safety Act, 1949, as extended to the Province of Delhi, came up for consideration. That section provided that "the Provincial Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for preventing or combating any activity prejudicial to the public safety or the maintenance of public order, may, by order in writing addressed to the printer, publisher or editor, require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny." It was held by this Court (Fazl Ali, J. dissenting) that inasmuch as the section authorised the imposition of restrictions on the fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a) for the purposes of preventing activities prejudicial to public safety and maintenance of public order, it was not a law solely relating to a matter which undermined the security of or tended to overthrow the State within the meaning of clause (2) of Article 19 as it then stood. The principles laid down in *Romesh Thapar* were applied to this case and the law was held to be void. The case of *Chintaman Rao v. The State of Madhya Pradesh* (1950) S.C.R. 759 has also been relied upon in support of the contention that where the language employed in the statute is wide enough to cover restrictions on a fundamental right both within and without the limits of constitutionally permissible legislative action affecting the right and the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, the law must be held to be wholly void.

After this Court decided the cases of *Romesh Thapar* and *Brij Bushan*, clause (2) of Article 19 of the Constitution was amended. Clause (2), as amended, protects a law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by sub-clause (a) of clause (1) of Article 19 “in the interests 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.” The question for our consideration is whether the impugned section can be properly said to be a law imposing reasonable restrictions on the exercise of the fundamental right to freedom of speech and expression in the interests of public order. It will be noticed that the language employed in the amended clause is “in the interests of” and not “for the maintenance of.” As one of us pointed out in *Debi Soron v. The State of Bihar* A.I.R. (1954) Patna 254, the expression “in the interests of” makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order. It is pointed out that section 295A has been included in Chapter XV of the Indian Penal Code which deals with offences relating to religion and not in Chapter VIII which deals with offences against the public tranquillity and from this circumstance it is faintly sought to be urged, therefore, that offences relating to religion have no bearing on the maintenance of public order, or tranquillity and, consequently, a law creating an offence relating to religion and imposing restrictions on the right to freedom of speech and expression cannot claim the protection of clause (2) of Article 19. A reference to Article 25 and 26 of the Constitution, which guarantee the right to freedom of religion, will show that the argument is utterly untenable. The right to freedom of religion assured by those Articles is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. These two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order.

Learned counsel then shifted his ground and formulated his objection in a slightly different way. Insults to the religion or the religious beliefs of a class of citizens of India may, says learned counsel, lead to public disorders in some cases, but in many cases they may not do so and, therefore, a law which imposes restrictions on the citizens’ freedom of speech and expression by simply making insult to religion an offence will cover both varieties of insults, i.e., those which may lead to public disorders as well as those which may not. The law in so far as it covers the first variety may be said to have been enacted in the interests

of public order within the meaning of clause (2) of Article 19, but in so far as it covers the remaining variety will not fall within that clause. The argument then concludes that so long as the possibility of the law being applied for purposes not sanctioned by the Constitution cannot be ruled out, the entire law should be held to be unconstitutional and void. We are unable, in view of the language used in the impugned section, to accede to this argument. In the first place clause (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression “in the interests of” public order, which is much wider than “for maintenance of” public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction “in the interests of public order” although in some cases those activities may not actually lead to a breach of public order. In the next place section 295A does not penalise any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. . . . The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the section, which penalises such activities, is well within the protection of clause (2) of Article 19 as being a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression guaranteed by Article 19(1)(a). Having regard to the ingredients of the offence created by the impugned section, there cannot, in our opinion, be any possibility of this law being applied for purposes not sanctioned by the Constitution.

IN THE SUPREME COURT OF INDIA

KEDAR NATH SINGH

VERSUS

THE STATE OF BIHAR

1962 AIR 955, 1962 SCR Supl. (2) 769

20 January 1962

B. P. Sinha, CJ, S. K. Das, A. K. Sarkar, N. R. Ayyangar and J. R. Mudholkar, JJ.

Rule of Law: If a provision can be interpreted in a manner that is consistent with the Constitution and a manner that is inconsistent, then the former is to be preferred. In the case of sedition, an interpretation that requires an intention or tendency to create disorder is a reasonable restriction on the right to freedom of expression, while an interpretation that does not require such intention would be unconstitutional. Accordingly, the first interpretation has been adopted.

This case was the amalgamation of a series of different cases where individuals had been charged with sedition. The various defendants sought to challenge the charges on the grounds that section 124A of the Indian Penal Code was an unreasonable restriction of their right to freedom of expression, as secured by Article 19 of the Indian Constitution.

The Court undertook a thorough and lengthy analysis of the charge of sedition, noting two distinct interpretations from the Federal Court and the Privy Council respectively. The Federal Court held that an offence was only committed when the words used had the intention or the tendency to disturb public tranquillity. Conversely, the Privy Council held that such intention was not necessary. The Court found that the second of these approaches encroached too far on the right for it to be considered as a reasonable restriction under clause (2) of Article 19. It was noted that where the Court has to decide between two interpretations, one constitutional and one not, then it should opt for the former. Accordingly, it was held that a charge of sedition requires either intention or words that have a tendency to create disorder.

Cases discussed and relied upon:

Establishing the nature of a charge for sedition: *Queen-Empress v. Jagendra Chunder Bose* (1891) I.L.R. 19 Cal. 35; *Queen-Empress v. Balqanqaddhar Tilak* 22 Bombay 1112; *Niharendu Dutt Majumdar v. The King Emperor* (1942) F.C.R. 38; *Romesh Thapar v. The State of Madras* (1950) S.C.R. 594; *Brij Bhushan v. The State of Delhi* (1950) S.C. R. 605. Clarifying how the court should approach restrictions on Article 19: *Ramji Lal Modi v. The State of U.P.* (1957) S. C. R. 860.

Judgement of the Court delivered by Sinha, CJ

In these appeals the main question in controversy is whether sections 124A and 505 of the Indian Penal Code have become void in view of the provisions of Article 19(1)(a) of the Constitution.

* * *

Before dealing with the contentions raised on behalf of the parties, it is convenient to set out the history of the law, the amendments it has undergone and the interpretations placed upon the provisions of section 124A by the courts in India, and by their Lordships of the Judicial Committee of the Privy Council. . .

* * *

The first case in India that arose under the section is *Queen-Empress v. Jagendra Chunder Bose* (1891) I.L.R. 19 Cal. 35... While charging the jury, the learned Chief Justice explained the law to the jury in these terms:

“...If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his bearers or readers, he will be guilty of the offence of attempting to excite disaffection [as the section was then labelled] within the meaning of the section though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling.”

The next case is the celebrated case of *Queen-Empress v. Balqanqaddhar Tilak* 22 Bombay 1112... The learned judge, in the course of his charge to the jury, explained the law to them in these terms:

“The offence as defined by the first clause is exciting or attempting to excite feelings of disaffection to the Government. What are “feelings of disaffection”? . . . It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. “Disloyalty” is perhaps the best general term, comprehending every possible form of bad feeling to the Government. . . . You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment: if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place, it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. . . .”

* * *

The section was amended by the Indian Penal Code Amendment Act (IV of 1898). As a result of the amendment, the single explanation to the section was replaced by three separate explanations as they stand now. . . . Section 124A, as it has emerged after successive amendments by way of adaptations as aforesaid, reads as follows:

“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.

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

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

Explanation 3. Comments expressing 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.”

This offence, which is generally known as the offence of sedition, occurs in chapter IV of the Indian Penal Code, headed ‘Of offences against the State’ . . . Every State, whatever its form of Government, has to be armed with the power to punish those who, by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder. In England, the crime has thus been described by Stephen in his Commentaries on the Laws of England,

21st edition, volume IV, at page 141, in these words.

“...We are now concerned with conduct which, on the one hand, falls short of treason, and on the other does not involve the use of force or violence. The law has here to reconcile the right of private criticism with the necessity of securing the safety and stability of the State. Sedition may be defined as conduct which has, either as its object or as its natural consequence, the unlawful display of dissatisfaction with the Government or with the existing order of society. The seditious conduct may be by words, by deed, or by writing. Five specific heads of sedition may be enumerated according to the object of the accused. This may be either:

1. to excite disaffection against the King, Government, or Constitution, or against Parliament or the administration of justice;
2. to promote, by unlawful means, any alteration in Church or State;
3. to incite a disturbance of the peace;
4. to raise discontent among the King’s subjects;
5. to excite class hatred.

It must be observed that criticism on political matters is not of itself seditious. The test is the manner in which it is made. Candid and honest discussion is permitted. The law only interferes when the discussion passes the bounds of fair criticism. More especially this will be the case when the natural consequence of the prisoner’s conduct is to promote public disorder.”

* * *

... Sir Maurice Gwyer, C.J., speaking for the Federal Court, made the following observations in the case of *Niharendu Dutt Majumdar v. The King Emperor* (1942) F.C.R. 38...:

“.. The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilisation and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of government that in our opinion the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt...”

This statement of the law was not approved by their Lordships of the Judicial Committee of the Privy Council in the case of *King-Emperor v. Sadashiv Narayan Bhalerao* (1947) L.R. 74 I.A. 89. . . The Privy Council referred to their previous decision in *Wallace Johnson v. The King* [1940] A. C. 231 which was a case [regarding the Criminal Code of the Gold Coast]. In that case, their Lordships had laid down that incitement to violence was not necessary ingredient of the Crime of sedition as defined in that law.

Thus, there is a direct conflict between the decision of the Federal Court in *Niharendu* and of the Privy Council in a number of cases from Indian and the Gold Coast. . . It is also clear that either view can be taken and can be supported on good reasons. . .

So far as this Court is concerned, the question directly arising for determination in this batch of cases has not formed the subject matter of any decision previously. But certain observations made by this Court in some cases. . . between freedom of speech and seditious writing or speaking have been made in the very first year of the coming into force of the Constitution. . . In *Romesh Thapar v. The State of Madras* (1950) S.C.R. 594 the majority of the Court declared [a section] which had authorised the imposition of restrictions on the fundamental right of freedom of speech, to be in excess of clause (2) of Article 19 of the Constitution. . . and, therefore, void and unconstitutional. In *Brij Bhushan v. The State of Delhi* (1950) S.C. R. 605, the same majority struck down [a section] authorising the imposition of restrictions on the freedom of speech and expression for preventing or combating any activity prejudicial to the public safety or the maintenance of public order. The Court held those provisions to be in excess of the powers conferred on the Legislature by clause (2) of Article 19 of the Constitution. Sastri J., speaking for the majority of the Court in *Romesh Thapar* made the following observations. . . as to what the law of sedition in India was:

“ . . . [I]t may be recalled that the Federal Court had, in defining sedition in *Niharendu* held that “the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency”, but the Privy Council overruled that decision and emphatically reaffirmed the view. . . that “the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small” [*Bhalerao*]. Deletion of the word “sedition” from the [initial draft of Article 19(2)] shows that criticism of Government exciting disaffection or bad feelings toward it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security of or tend to overthrow the State. . . Thus, very narrow and stringent limits have been set to permissible legislative abridgement of

the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations...”

* * *

In *Brij Bhushan*, Fazl Ali J., who was again the dissenting judge, gave his reasons [in] greater detail... After having pointed out the divergency of opinion between the Federal Court of India and the Judicial Committee of the Privy Council, the learned Judge made the following observations in order to explain why the term “sedition” was not specifically mentioned in Article 19(2) of the Constitution:

“The framers of the Constitution must have therefore found themselves face to face with the dilemma as to whether the word “sedition” should be used in article 19(2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected in some way or other with public disorder; and, on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word “sedition” in clause (2) but used the more general words which cover sedition and everything else which makes sedition such a serious offence...”

As a result of their differences in the interpretation of Article 19(2)... the Parliament amended clause (2)... in the form in which it stands at present... This amendment was made with retrospective effect, thus indicating that it accepted the statement of the law as contained in the dissenting judgement of Fazl Ali J., in so far as he had pointed out that the concept of “security of the state” was very much allied to the concept of “public order” and that restrictions on freedom of speech and expression could validly be imposed in the interest of public order.

Again the question of the limits of legislative powers with reference to the provisions of Articles 19(1)(a) and 19(2) of the Constitution came up for decision by a Constitution Bench of this Court in *Ramji Lal Modi v. The State of U.P.* (1957) S. C. R. 860. In that case, the validity of section 295A of the Indian Penal Code was challenged on the ground that it imposed restrictions on the fundamental right of freedom of speech and expression beyond the limits prescribed by clause (2)... [T]he Court observed as follows:

“The question for our consideration is whether the impugned section can be properly said to be a law imposing reasonable restrictions on the exercise of the fundamental

rights to freedom of speech and expression in the interests of public order. It will be noticed that language employed in the amended clause is “in the interests of” and not “for the maintenance of.”.. [T]he expression “in the interests of” makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order.”

Though the observations quoted above do not directly bear upon the present controversy, they throw a good deal of light upon the ambit of the power of the legislature to impose reasonable restrictions on the exercise of the fundamental right of freedom of speech and expression.

* * *

It is common ground [in this case] that the right is subject to such reasonable restrictions as would come within the purview of clause (2), which comprises (a) security of the State, (b) friendly relations with foreign States, (c) public order, (d) decency or morality, etc. . .

It has not been contended before us that if a speech or a writing excites people to violence or has the tendency to create public disorder, it would not come within the definition of ‘sedition.’ What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But, in our opinion, such words written or spoken would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a view to punishing offences against the State, is undertaken. Such legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the sine qua non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. . . If it is held, in consonance with the views

expressed by the Federal Court in the case of *Niharendu* that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State... the law will be within the permissible limits laid down in clause (2) of Article 19... [I]f on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is... very much beyond the limits laid down in clause (2) aforesaid.

...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 favour 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 resort to violence. As already pointed out, 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.

IN THE SUPREME COURT OF INDIA

S. RANGARAJAN

VERSUS

P. JAGJIVAN RAM

1989 SCR (2) 204, 1989 SCC (2) 574

30 March 1989

K. J. Shetty and K. N. Singh, JJ.

Rule of Law: When limiting the right to freedom of expression under Article 19(2), the commitment to the right demands that it cannot be suppressed, unless the situation that would flow from allowing it is pressing and the community interest is endangered.

This case involved the classification of a film which questioned various social institutions in India, most notably processes within the education system. There was particular concern about how the film would be received and the potential consequences that may eventuate. The case's importance is in its discussion and treatment of the right to freedom of expression and the circumstances in which it can be limited.

The Court undertook a substantial review of the legal and philosophical background to the right and its exceptions. It was held that when assessing the right against a competing interest, they should not be balanced as though they are of equal weight. The importance of the right demands that it should only be limited when allowing the right to be exercised would result in a pressing threat to the community interest.

Cases discussed and relied upon:

Establishing that the threat of allowing a right to be exercised must be immediate: *Schenek v. United States* 249 U.S. 47 (1919). Discussing the extent and importance of freedom of expression: *Kingsley Corporation v. Regents of the University of New York* 3 L. Ed. 1512; *Maneka Gandhi v. Union of India* [1978] 2 SCR 621; *Naraindas v. State of Madhya Pradesh* [1974] 3 SCR 624; *Sakal v. Union of India* [1962] 3 SCR 842; *Whitney v. California* 274 US 357 (1927); *Kamal Krishna v. Emperor* AIR 1935 Cal 636; *Manohar v. Government of Bombay* AIR 1950 Bom 210; *Niharendu Dutt Majumdar v. Emperor* AIR 1942 FC 23.

Judgement of the Court delivered by Shetty, J.

... The First Amendment to the United States Constitution provides, “Congress shall make no law ... abridging the freedom of speech, or of the press.” This Amendment is absolute in terms and it contains no exception for the exercise of the right. Heavy burden lies on the State to justify the interference. The judicial decisions, however, limited the scope of restriction which the State could impose in any given circumstances. The danger rule was born in *Schenek v. United States* 249 U.S. 47 (1919). Justice Holmes for a unanimous Court, evolved the test of “clear and present danger.” He used the danger test to determine where discussion ends and incitement or attempt begins. The core of his position was that the First Amendment protects only utterances that seek acceptance via the democratic process of discussion and agreement. But “words that may have all the effect of force” calculated to achieve its goal by circumventing the democratic process are however, not so protected.

The framework of our Constitution differs from the First Amendment to the United States Constitution. Article 19(1)(a) of our Constitution guarantees to all citizens the right to freedom of speech and expression. The freedom of expression means the right to express one’s opinion by words of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinion. The communication of ideas could be made through any medium, newspaper, magazine or movie. But this right is subject to reasonable restrictions on grounds set out under Article 13(2) of the Constitution. The reasonable limitations can be put in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. The Framers deemed it essential to permit imposition of reasonable restrictions on the larger interests of the community and country. They intended to strike a proper balance between the liberty guaranteed and the social interest specified under Article 19(2) (see *Santokh Singh v. Delhi Administration* [1973] 3 SCR 533). This is the difference between the First Amendment to the United States Constitution and Article 19(1)(a) of our Constitution. The decisions bearing on the First Amendment are, therefore, not useful to us except the broad principles and the purpose of the guaranty.

* * *

... Again we find the difference between the First Amendment to the United States Constitution and Article 19(1)(a) of our Constitution. The First Amendment does not permit any prior restraint, since the guaranty of free speech is in unqualified terms. This

essential difference was recognised by Douglas, J., with whom Black, J., concurred in *Kingsley Corporation v. Regents of the University of New York* 3 L. Ed. 1512. In holding that censorship by “prior restraint” on movies was unconstitutional, the learned Judge said:

“If we had a provision in our Constitution for “reasonable” regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible. Judges sometimes try to read the word “reasonable” into the First Amendment or make the rights it grants subject to reasonable regulation. . . . But its language, in terms that are absolute is utterly at war with censorship. Different questions may arise as to censorship of some news when the nation is actually at war. But any possible exceptions are extremely limited.”

* * *

The High Court, however, was of opinion that public reaction to the film, which seeks to change the system of reservation [in educational institutions] is bound to be volatile. . . . It seems to us that the reasoning of the High Court runs a foul of the democratic principles to which we have pledged ourselves in the Constitution. In democracy it is not necessary that every one should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Every one has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means.

The democracy is a government by the people via open discussion. The democratic form of government itself demands from its citizens an active and intelligent participation in the affairs of the community. The public discussion with people’s participation is a basic feature and a rational process of democracy, which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. What Walter Lippmann said in another context is relevant here:

“When men act on the principle of intelligence, they go out to find the facts. . . . When they ignore it, they go inside themselves and find out what is there. They elaborate their prejudice instead of increasing their knowledge.”

In *Maneka Gandhi v. Union of India* [1978] 2 SCR 621 Bhagwati J., observed at 696:

“Democracy is based essentially on free 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, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.”

The learned judge in *Naraindas v. State of Madhya Pradesh* [1974] 3 SCR 624 while dealing with the power of the State to select text books for obligatory use by students said at 650:

“It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. As pointed out by Mr. Justice Holmes in *Abramson v. United States* 250 U.S. 616, ‘the ultimate good desired is better reached by free trade in ideas, the best test of truth is the power of the thought to get itself accepted in the competition of the market.’ There must be freedom of thought and the mind must be ready to receive new ideas, to critically analyse and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest.”

In *Sakal v. Union of India* [1962] 3 SCR 842 at 866, Mudholkar, J. said:

“This Court must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved.”

* * *

Brandies, J., in *Whitney v. California* 274 US 357 (1927) propounded probably the most attractive free speech theory:

“...that the greatest menace to freedom is an inert people, that public discussion is a political duty... It is hazardous to discourage thought, hope and imagination, that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.”

What Archibald Cox said in his article the “First Amendment” (Society Vol. 24 p. 8 No. 1 November/December 1986) is equally relevant here:

“Some propositions seem true or false beyond rational debate. Some false and harmful, political and religious doctrine gain wide public acceptance. Adolf Hitler’s brutal theory of a ‘master race’ is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough: no man, no committee, and surely no government, has the infinite wisdom and disinterestedness to accurately and unselfishly separate what is true from what is debatable, and both from what is false. To license one to impose his truth upon dissenters is to give the same licence

to all others who have, but fear to lose, power. The judgement that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of free people.”

The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg.”

Our remarkable faith in the freedom of speech and expression could be seen even from decisions earlier to our Constitution. In *Kamal Krishna v. Emperor* AIR 1935 Cal 636, the Calcutta High Court considered the effects of a speech advocating a change of Government. There the accused was convicted under section 124A of the Penal Code for making a speech recommending a ‘Bolshevik’ form of Government to replace the then existing form of Government in Calcutta. While setting aside the conviction and acquitting the accused, Lord Williams, J., who delivered the judgement observed:

“All that the speaker did was to encourage the young men, whom he was addressing, to join the Bengal Youth League and to carry on a propaganda for the purpose of inducing as large a number of people in India as possible to become supporters of the idea of communism as represented by the present Bolshevik system in Russia. It is really absurd to say that speeches of this kind amount to sedition. If such were the case, then every argument against the present form of government and in favour of some other form of Government might be allowed to lead to hatred of the Government, and it might be suggested that such ideas brought the Government into contempt. To suggest some other form of government is not necessarily to bring the present Government into hatred or contempt.”

To the same effect is the observation by the Bombay High Court in *Manohar v. Government of Bombay* AIR 1950 Bom 210. There the writer of an article in a newspaper was convicted for an offence under the Press (Emergency Powers) Act, 1931, for incitement to violence. The writer had suggested the people to follow the example of China by rising against Anglo-

American imperialism and their agents. He had also suggested to his readers to pursue the path of violence, as the Chinese people did, in order that Anglo-American imperialism should be driven out of this country. Chagla C.J., while quashing the conviction said:

“It is true that the article does state that the working class and the coiling masses can get hold of power through the path of revolution alone. But the expression ‘revolution’ is used here, as is clear from the context, in contradistinction to reformism or gradual evolution. The revolution preached is not necessarily a violent revolution... As the writer has not stated in this article that the toiling masses should take up arms and fight for their rights and thus achieve a revolution we refuse to read this expression as inciting the masses to violent methods.”

In *Niharendu Dutt Majumdar v. Emperor* AIR 1942 FC 23, the Federal Court examined the effects of a vulgar and abusive outburst against the Government made by the accused for which he was convicted under Rule 34 of the Defence of India Rules. Gwyer, C.J., while acquitting the person commented more boldly:

“There is an English saying that hard words break no bones; and the wisdom of the common law has long refused to regard as actionable any words which, though strictly and liberally defamatory, would be regarded by all reasonable men as no more than mere vulgar abuse. The speech now before us is full of them. But we cannot regard the speech, taken as a whole as inciting those who heard it, even though they cried “shame, shame” at intervals, to attempt by violence or by public disorder to subvert the Government for the time being established by law in Bengal or elsewhere in India. That the appellant expressed his opinion about that system of Government is true, but he was entitled to do so; and his reference to it were, we might almost say, both common place and in common form, and unlikely to cause any Government in India a moment’s uneasiness.”

* * *

...We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression. In this case, two Revising Committees have approved the film. The members thereof come from different walks of life with variegated experiences. They represent the

cross section of the community. They have judged the film in the light of the objectives of the Act and the guidelines provided for the purpose. We do not think that there is anything wrong or contrary to the Constitution in approving the film for public exhibition. The producer or as a matter of fact any other person has a right to draw attention of the Government and people that the existing method of reservation in education institutions overlooks merits. He has a right to state that reservation could be made on the basis of economic backwardness to the benefit of all sections of community. Whether this view is right or wrong is another matter altogether and at any rate we are not concerned with its correctness or usefulness to the people. We are only concerned whether such a view could be advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy. We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom, by an intolerant group of people. The fundamental freedom under Article 19(1) (a) can be reasonably restricted only for the purposes mentioned in Articles 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.

IN THE SUPREME COURT OF INDIA
SRI BARAGUR RAMACHANDRAPPA AND OTHERS
VERSUS
STATE OF KARNATAKA AND OTHERS
(2007) 3 SCC 11

2 May 2007

B. Singh and H. S. Bedi, JJ.

Rule of Law: The ability of the Government to require the forfeiture of publications deemed seditious under the Criminal Procedure Code is a reasonable restriction on the right to freedom of expression so far as protecting various religions against malicious criticism and interference is concerned.

This case involved a notice issued by a state government requiring the forfeiture of all copies of a book that was said to be offensive to followers of certain Hindu philosophies. The power to issue such a notice is granted by section 95 of the Criminal Procedure Code and allows for forfeiture where a book is seditious or is likely to cause unrest. At issue was whether this section was inconsistent with Article 19(1) of the Constitution, and what had to be proven.

The Court held that while freedom of expression was important, it was not an unfettered right and could not allow for unwarranted and malicious criticism of different religious faiths. Accordingly, the section represented a reasonable restriction of the right. Instead, the state had an obligation to create an environment where various religions could be freely practiced without interference. Allowing otherwise may endanger public order.

In order to issue an order under section 95, it was not necessary to show that the publication actually was seditious for the purposes of the Indian Penal Code, only that it “appeared” to be. After this was established, the onus to prove otherwise is on the person seeking to have the notification quashed.

Cases discussed and relied upon:

Recognising the importance of an environment that avoids animosity between religious groups: *State of Uttar Pradesh v. Lalai Singh Yadav* (1976) 4 SCC 213. Establishing the approach the Court should take to section 95: *S. Rangarajan v. P. Jagjivan Ram and Others* (1989) 2 SCC 574; *Nand Kishore Singh v. State of Bihar* AIR 1986 Patna 98.

Judgement of the Court delivered by Bedi, J

It is true that the inculcation of a scientific temperament and a spirit of enquiry is essential for human development and is a sine qua non for progress and for social change and Article 51A(h) of the Constitution clearly recognises this principle. Likewise Article 19(1) (a) of the Constitution gives every citizen the right to freedom of speech and expression and this freedom is yet another vehicle towards the same direction and goal. This Court in *Indian Express Newspapers (Bombay) Pvt. Ltd. and Others. v. Union of India and Others* (1985) 1 SCC 641 held:

“Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people’s right to know. Freedom of speech and expression should, therefore receive a generous support from all those who believe in the participation of people in the administration.”

It is however clear that the freedom of speech and expression is not unfettered and section 95 of the Code [of Criminal Procedure] exemplifies this principle on the understanding that this freedom must be available to all and no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. It cannot be ignored that India is country with vast disparities in language, culture and religion and unwarranted and malicious criticism or interference in the faith of others cannot be accepted. This Court while discussing the scope of section 99A of the old Code (corresponding to section 95 of the Code) in the Constitutional context in *State of Uttar Pradesh v. Lalai Singh Yadav* (1976) 4 SCC 213 observed:

“After all fundamental rights are fundamental in a free republic, except in times of national emergency, when rigorous restraints, constitutionally sanctioned, are clamped down. We are dealing with the Criminal Procedure Code and Penal Code and these laws operate at all times. We have therefore to interpret the law in such a manner that liberties have plenary play, subject of course to the security needs of the nation, as set out in the Constitution and the laws.”

It was also observed that it was the duty of the State, being a State based on secular principles, not to take sides with one religion or the other but to “create conditions where the sentiments and feelings of people of diverse or opposing beliefs and bigotries are not so molested by rigid writings or offensive publications as to provoke or outrage groups into possible violent action” and that a drastic restriction on the right of a citizen imposed by section 99A required that a strict construction be put on its applicability.

* * *

While further delineating the circumstances under which this provision could be applied this Court in *S. Rangarajan v. P. Jagjivan Ram and Others* (1989) 2 SCC 574 observed:

“The standard to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man. We, however, wish to add a word more. The Censors Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation...”

The Government thus has the power to nullify a publication which endangers public order, although the freedom of expression in this situation is undoubtedly restricted... It must also be noted that it would be difficult to examine all publications on a common yardstick and what may be a laughable allegation to a progressive people could appear as sheer heresy to a conservative or sensitive one.

* * *

It will be seen that section 95 and section 96 of the Code when read together are clearly preventive in nature and are designed to pre-empt any disturbance to public order. At the same time, we find that section 95 does not by itself create a criminal offence and the reference to the various sections of the Penal Code are merely descriptive of the kind of offences which need to be prevented by a declaration under section 95. In this view of the matter, [the] assertion that the onus of proof would lie on the State Government is not acceptable as the intention has, to some extent, to be inferred from the nature of the publication. It is true that a forfeiture of a newspaper or book or a document is a serious encroachment on the right of a citizen, but if forfeiture is called for in the public interest it must without a doubt have pre-eminence over any individual interest. We also endorse the argument... that the State Government must take a pragmatic approach in the matter as explained by this Court in *Lalai Singh Yadav*:

“The rule of human advancement is free thought and expression but the survival of society enjoins reasonable curbs where public interest calls for it. The balance is struck by governmental wisdom overseen by judicial review. . .”

* * *

The Court [in *Nand Kishore Singh v. State of Bihar* AIR 1986 Patna 98 stated that] section 95 did not require that it should be “proved” to the satisfaction of the State Government that all requirements of the sections [124A, 153A, 153B, 292, 293 or 295A], including mens rea were fully established and all that section 95(1) therefore required was that the ingredients of the offence(s) should “appear” to the Government to be present. The Court further opined that the general rule that a man was presumed to intend the natural consequences of his act would be attracted, and in conclusion observed: “The onus to dislodge and rebut the prima facie opinion of the Government that the offending publication comes within the ambit of the relevant offence including its requirements of intent is on the applicant and such intention has to be gathered from the language, contents and import thereof.” It must also be observed that section 96 itself takes care of any misuse of the authority conferred under section 95 and the right of an individual vis-a-vis the larger public interest can be put under scrutiny as the final decision is left to a High Court Bench. . . To sum up, section 95 of the Code is not violative of Article 19(1)(a) of the Constitution, as the action taken thereunder is of a preventive nature and that a extremely efficacious remedy under section 96 of the Code is available to an aggrieved party or person. It is significant, and it is clear from the very large number of judgements that have been cited before us, that most of the matters pertain to attacks on minorities or religious and social groups or individuals who are perceived as being prodigals or heretics and therefore unacceptable to the conservatives amongst the mainstream. It cannot ever be over emphasised that India is a country with huge diversities in language and religion and the weaker amongst them must be shown extra care and consideration.

IN THE SUPREME COURT OF INDIA
STATE OF MAHARASHTRA AND OTHERS
VERSUS
SANGHARAJ DAMODAR RUPAWATE AND OTHERS
(2010) SC 476

9 July 2007

D. K. Jain and H. L. Dattu, JJ.

Rule of Law: Where a State Government issues a notice requiring forfeiture of a publication under section 95 of the Code of Criminal Procedure, it must state the reasons as to why it believes that the material is punishable for sedition or any other relevant charge. Failure to do so will result in the notice being void.

This case concerned a book that was written by an American author and published by an Indian company. The book was found to be objectionable by some people and they asked for the book to be withdrawn. This occurred, but shortly after there were two attacks by large groups. One involved the assault of a person who was acknowledged in the book, the other was an attack on a research institute containing a number of historical documents.

The State Government issued a notice under section 95, seeking the forfeiture of all copies of the book. This was successfully challenged in the High Court on the grounds that the notice did not set out the reasons for the State Government's belief that the book was punishable under any of the sections listed in section 95. On appeal, the Supreme Court upheld this decision. Perhaps of most use, is the summary of the considerations relating to forfeiture found at the end of the judgement.

Cases discussed and relied upon:

Establishing that reasons must be given when issuing a notice under section 95: *Harnam Das v. State of Uttar Pradesh* AIR 1961 SC 1662; *Narayan Dass Indurakhya v. State of Madhya Pradesh* (1972) 3 SCC 676; *The State of Uttar Pradesh v. Lalai Singh Yadav* (1976) 4 SCC 213.

Judgement of the Court delivered by Jain, J

5. ...[The petition] was laid mainly on the grounds that: (1) there was no material to show that the publication of the book had resulted in disturbance of public tranquillity or maintenance of harmony between various groups as set out therein, and (2) the publication does not disclose any offence under section 153A of the Indian Penal Code. Finding substance in both the grounds, as stated above, by the impugned judgement, the High Court has quashed and set aside the notification dated 20 December 2006 by observing thus:

“We called upon the learned Associate Advocate General to show us any material in their possession which would indicate, that the publication of the book is causing enmity between various communities and which were those communities. The learned Associate Advocate General was unable to produce or disclose any such material or which were the groups based on religion, race, language or religion or caste or communities who do not revere Shree Chhatrapati Shivaji Maharaj. The only answer was that the order is based upon the grounds set out in the notification. In our opinion, to make a legal order under section 95 of the Code of Criminal Procedure, apart from the fact that offence as set out therein must be indicated, the notification must disclose the grounds based on which the State has formed an opinion that the author by his publication sought to promote or attempted to promote disharmony or feeling of enmity between various groups as set out therein...”

6. Being aggrieved, the State of Maharashtra and its functionaries are before us in this appeal.

* * *

18. Section 95 of the Code is an enabling provision, which, in the circumstances enumerated in the section, empowers the State Government to declare that copy of a newspaper, book or document be forfeited to the Government. It is evident that the provision deals with any newspaper, book or document which is printed. The power to issue a declaration of forfeiture under the provision postulates compliance with twin essential conditions, (i) the Government must form the opinion to the effect that such newspaper, book or document contains any matter, the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code, and (ii) the Government must state the grounds of its opinion. Therefore, it is mandatory that a declaration by the State Government in the form of notification to the effect that every copy of the issue of the newspaper, book or document be forfeited to Government, must state the grounds on which the State Government has formed a particular opinion. A mere citation of the words of the section is not sufficient. Section 96 of the Code entitles

any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture is made under section 95 of the Code, to move the High Court for setting aside the declaration on the ground that it does not contain any such matter as is referred to in subsection (1) of section 95.

19. Undoubtedly, the power to forfeit a newspaper, book or document is a drastic power inasmuch as it not only has a direct impact upon the due exercise of a cherished right of freedom of speech and expression as envisaged in Article 19(1)(a) of the Constitution, it also clothes a police officer to seize the infringing copies of the book, document or newspaper and to search places where they are reasonably suspected to be found, again impinging upon the right of privacy. Therefore, the provision has to be construed strictly and exercise of power under it has to be in the manner and according to the procedure laid down therein.

20. The scope and width of a somewhat similar provision contained in section 99A of the Code of Criminal Procedure, 1898 was examined by a Constitution Bench of this Court in *Harnam Das v. State of Uttar Pradesh* AIR 1961 SC 1662. Speaking for the majority, A. K. Sarkar, J. held that in that case though the order of forfeiture passed by the Government had set out its opinion that the books contained matters the publication of which was punishable under sections 153A and 295A of the Indian Penal Code, it did not state, as it should have, the grounds of that opinion. Striking down the order of forfeiture, the learned judge observed as under:

“Two things appear clearly from the terms of this section. The first thing is that an order under it can be made only when the Government forms a certain opinion. That opinion is that the document concerning which the order is proposed to be made, contains any matter the publication of which is punishable under [the offences aforementioned]... The other thing that appears from the section is that the Government has to state the grounds of its opinion. The order made in this case, no doubt, stated that in the Government’s opinion the books contained matters the publication of which was punishable under sections 153A and 295A of the Penal Code. It did not, however, state, as it should have, the grounds of that opinion. So it is not known which communities were alienated from each other or whose religious beliefs had been wounded according to the Government, nor why the Government thought that such alienation or offence to religion had been caused.”

... It was held that if the grounds of opinion are not stated, the order of forfeiture must be set aside, because then the Court cannot be satisfied that the grounds given by the Government justify the order. Inter alia observing that it is the duty of the High Court to set

aside an order of forfeiture if it is not satisfied that the grounds on which the Government formed its opinion could justify that opinion. The Court also noted that it is not the duty of the High Court to find for itself whether the book contained any such matter.

21. Significance of setting out the grounds of the opinion of the Government was again emphasised in *Narayan Dass Indurakhya v. State of Madhya Pradesh* (1972) 3 SCC 676. It was observed that grounds must be distinguished from the opinion, as grounds of the opinion must mean the conclusion of facts on which the opinion is based. The Court said:

“There is a considerable body of statutory provisions which enable the State to curtail the liberty of the subject in the interest of the security of the State or forfeit books and documents when in the opinion of the Government, they promote class hatred, religious intolerance, disaffection against the State, etc. In all such cases... the State Government has to give the grounds of its opinion. Clearly the grounds must be distinguished from the opinion. Grounds of the opinion must mean the conclusion of facts on which the opinion is based. There can be no conclusion of fact which has no reference to or is not *ex facie* based on any fact”

It was also observed that mere repetition of an opinion or reproduction of the section without giving any indication of the facts will not answer the requirement of a valid notification.

22. Section 99A of the 1898 Code again came up for consideration before a bench of three Judges of this Court in *The State of Uttar Pradesh v. Lalai Singh Yadav* (1976) 4 SCC 213. Emphasising the importance of furnishing of grounds by the Government for its opinion, speaking for the bench, V.R. Krishna Iyer, J. observed as under:

“A drastic restriction on the right of a citizen when imposed by statute, calls for a strict construction, especially when quasi-penal consequences also ensue. The imperial authors of the Criminal Procedure Code have drawn up section 99A with concern for the subject and cautionary mandates to government... When the section says that you must state the grounds it is no answer to say that they need not be stated because they are implied. You do not state a thing when you are expressively silent about it... The conclusion is inescapable that a formal authoritative setting forth of the grounds is statutorily mandatory.”

While reiterating that a formal authoritative setting forth of the grounds is statutorily mandatory and the Court cannot make a roving enquiry beyond the grounds set forth in the order and if the grounds are left out altogether then there is nothing available to the Court to examine and the notification must fail, the Court also observed that the grounds or reasons linking the primary facts with the forfeiter’s opinion need not be stated at ‘learned length.’ In some cases, a laconic statement may be enough; in others a longer ratiocination

may be proper. The order may be brief but it cannot be blank as to the grounds which form the basis of the opinion on which the Government relies. It was also observed that since an order of forfeiture constitutes a drastic restriction on the rights of a citizen, the relevant provisions of the Code have to be strictly construed.

* * *

25. ... [N]o inflexible guidelines can be laid down to test the validity of a notification issued under section 95 of the Code. Nonetheless the following legal aspects can be kept in mind while examining the validity of such a notification:

- (i) The statement of the grounds of its opinion by the State Government is mandatory and a total absence thereof would vitiate the declaration of forfeiture. Therefore, the grounds of Government's opinion must be stated in the notification issued under section 95 of the Code and while testing the validity of the notification the Court has to confine the inquiry to the grounds so disclosed;
- (ii) Grounds of opinion must mean conclusion of facts on which opinion is based. Grounds must necessarily be the import or the effect or the tendency of matters contained in the offending publication, either as a whole or in portions of it, as illustrated by passages which Government may choose. A mere repetition of an opinion or reproduction of the section will not answer the requirement of a valid notification. However, at the same time, it is not necessary that the notification must bear a verbatim record of the forfeited material or give a detail gist thereof;
- (iii) The validity of the order of forfeiture would depend on the merits of the grounds. The High Court would set aside the order of forfeiture if there are no grounds of opinion because if there are no grounds of opinion it cannot be satisfied that the grounds given by the Government justify the order. However, it is not the duty of the High Court to find for itself whether the book contained any such matter whatsoever;
- (iv) The State cannot extract stray sentences or portions of the book and come to a finding that the said book as a whole ought to be forfeited;
- (v) The intention of the author has to be gathered from the language, contents and import of the offending material. If the allegations made in the offending article are based on folklore, tradition or history something in extenuation could perhaps be said for the author;

- (vi) If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under section 153A of the Indian Penal Code that the writing contains a truthful kind of past events or is otherwise supported by good authority . . .
- (vii) Section 95(1) postulates that the ingredients of the offences stated in the notification should “appear” to the Government to be present. It does not require that it should be “proved” to the satisfaction of the Government that all requirements of punishing sections, including mens rea, were fully established;
- (viii) The onus to dislodge and rebut the prima facie opinion of the Government that the offending publication comes within the ambit of the relevant offence, including its requirement of intent is on the applicant and such intention has to be gathered from the language, contents and import thereof;
- (ix) The effect of the words used in the offending material must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The class of readers for whom the book is primarily meant would also be relevant for judging the probable consequences of the writing.

26. Having assessed the validity of notification dated 20 December 2006 on the touchstone of the aforesaid principles, we are of the opinion that in the present case, the conditions statutorily mandated for exercise of power under section 95 of the Code are lacking and therefore, the action of the Government cannot be sustained.

CHAPTER THREE

CONTEMPT OF COURT

Journalists who criticise the functioning and judgements of the courts may invariably face the charge of contempt. Contempt is an archaic legal doctrine inherited from the British Monarchical legal system that has little place in the functioning of a modern democratic system, but is nevertheless often employed in India. Contempt allows a court to issue an order, *suo moto* (or, “of its own accord”), to fine and imprison the object of the order. This area of law is intended to maintain public order by deterring criticism which may shake people’s faith in the ability of the courts and the “majesty” of the law. However, too often the law of contempt is employed as a method of silencing critics and activists on the questionable ground that such criticism wounds the integrity and public respect of the court. The great irony in many contempt judgements is how the court will extol the virtues of judicial restraint and detachment, as well as the importance of democracy and democratic rights, with one hand and with the other render an order fining and imprisoning a person — proving unmistakably the court’s lack of judicial restraint or detachment, and undermining the rights and democratic principles that it is bound to uphold.

Perhaps the best example of this is provided by the completely contrasting judgements offered in *In re S. Mulgakar v. Unknown* (1978) 3 SCC 339. Chief Justice Beg in that case was of the view that ill-informed or bad faith criticism of the court risked undermining the faith that people had in it as an institution, and that this presented an unacceptable threat to democracy rather than having the intended effect of strengthening it. Conversely, Justice Krishna Iyer took a more liberal approach in suggesting that even where statements were ill-informed, the judicial mind should not be concerned and that mercy towards such statements would be a sign of strength rather than weakness. He stressed the importance of discussion and debate in an open and self-strengthening democracy. Sadly, the development of contempt law in India appears to have followed the jurisprudence of Chief Justice Beg, rather than that of Justice Krishna Iyer.

This chapter will provide a cross-section of cases that pronounce and explain the relevant laws and arguments to be employed should a journalist find they are the target of contempt charges. The acts which give rise to contempt charges can vary widely, but here we deal primarily with charges of contempt arising from comments directed at the judiciary in the public forum. While they are distinct charges, it may be helpful to re-imagine contempt in this context as related to the charge of defamation.

To mount a successful case, the accused journalist should be aware of the potential arguments that may overcome a charge of contempt. One should be aware that the contempt jurisdiction is powerful. Claims of truth (although one should be aware of the

recent amendment to section 13 regarding truth as a defence) or that the statements did not actually lower the status of the court may not be successful. A re-occurring theme within the judgements is the boundary between good faith criticism of the court, which is permissible, and contemptuous statements that go beyond good faith, which are not. While these boundaries are very much blurred and are bent in some circumstances, it is important to note that not every bad word said about the court will amount to contempt.

Equally important is that the punishment for contempt while serious, is in many ways more symbolic than severe (although still very much undesirable). The punishment may be imprisonment up to six months and/or a fine of two thousand rupees. In many of the cases here, the punishment is significantly less than that, particularly when an apology is offered. More importantly though, section 13(a) provides that no sentence shall be imposed unless the court is satisfied that the contempt is of such a nature that it substantially interferes with the due course of justice, or would tend to do so.

Ultimately, laws regarding contempt represent perhaps the biggest threat to journalists and the freedom of the press in India. What is particularly sad is that this barrier is justified on the grounds that contempt law is necessary to preserve democracy, fundamental rights and the people's faith in the system, when in fact it has a tendency to undermine all of these.

CONTEMPT OF COURTS ACT, 1971

Section 2: Definitions

In this Act, unless the context otherwise requires:

- (a) “Contempt of court” means civil contempt or criminal contempt.
- (b) “Civil contempt” means willful disobedience to any judgement, 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 representation, or otherwise) of any matter or the doing of any other act whatsoever which:
 - (i) Scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court, or
 - (ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or
 - (iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Section 3: Innocent publication and distribution of matter not contempt

- (1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.
- (2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in subsection (1) in connection with any civil or criminal proceeding which is not pending at the time of publication shall not be deemed to constitute contempt of court.
- (3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in subsection (1), if at the

time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid: Provided that this subsection shall not apply in respect of the distribution of:

- (i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in section 3 of the Press and Registration of Books Act, 1867.
- (ii) any publication which is a newspaper published otherwise than in conformity with the rules contained in section 5 of the said Act.

Explanation — For the purposes of this section, a judicial proceeding:

(a) is said to be pending:

- (A) in the case of a civil proceeding, when it is instituted by the filing of a plaint or otherwise,
- (B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898 or any other law:
 - (i) where it relates to the commission of an offence, when the charge sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused; and
 - (ii) in any other case, when the court takes cognisance of the matter to which the proceeding relates,

and in the case of a civil or criminal proceeding, shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired;

(b) which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending.

Section 4: Fair and accurate report of judicial proceeding not contempt

Subject to the provisions contained in section 7, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding or any stage thereof.

Section 5: Fair criticism of judicial act not contempt

A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.

Section 7: Publication of information relating to proceedings in chambers or in camera not contempt except in certain cases

- (1) Notwithstanding anything contained in this Act, a person shall not be guilty of contempt of court for publishing a fair and accurate report of judicial proceeding before any court sitting in chambers or in camera except in the following cases, that is to say:
 - (a) where the publication is contrary to the provisions of any enactment for the time being in force;
 - (b) where the court, on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceeding or of information of the description which is published;
 - (c) where the court sits in chambers or in camera for reasons connected with public order or the security of the State, the publication of information relating to those proceedings;
 - (d) where the information relates to a secret process, discovery or invention which is an issue in the proceedings.
- (2) Without prejudice to the provisions contained in subsection (1), a person shall not be guilty of contempt of court for publishing the text or a fair and accurate summary of the whole, or any part, of an order made by a court sitting in chambers or in camera, unless the court has expressly prohibited the publication thereof on grounds of public policy, or for reasons connected with public order or the security of the State, or on the ground that it contains information relating to a secret process, discovery or invention, or in exercise of any power vested in it.

Section 8: Other defences not affected

Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt of court has ceased to be available merely by reason of the provisions of this Act.

Section 12: Punishment for contempt of court

- (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation — An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

- (2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in subsection (1) for any contempt either in respect of itself or of a court subordinate to it.

Section 13: Contempt not punishable in certain cases

Notwithstanding anything contained in any law for the time being in force:

- (a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;
- (b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.

CONSTITUTION OF INDIA, 1949

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

(1) All citizens shall have the right:

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

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

Article 129: 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.

Article 215: 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 THE SUPREME COURT OF INDIA

BATHINA RAMAKRISHNA REDDY

VERSUS

THE STATE OF MADRAS

1952 AIR 149, 152 SCR 425

14 February 1952

M. P. Sastri, CJ, B. K. Mukherjea, N. C. Aiyar, M. C. Mahajan and S. R. Das, JJ.

Rule of Law: The High Courts will be able to take cognisance of a contempt, unless the publication is capable of being dealt with under a specific provision of the Indian Penal Code. However, this limitation will only apply where that other provision is a provision which deals with contempt, rather than just any type of offence. Therefore, the fact that a publication may constitute defamation under section 499 will not oust the contempt jurisdiction of the High Court.

The appellant was the publisher and managing editor of a publication which contained an article purporting that a local Sub-Magistrate was corrupt. The High Court took note of the article and eventually convicted the appellant of contempt of court. The appellant appealed, seeking to make use of section 2(3) of the Contempt of Courts Act (note that this is now section 10 of the Act), which provided that the High Court shall not take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it, where such contempt is an offence punishable under the Indian Penal Code. The appellant argued that because the publication could be considered defamation under section 499 of the Code, the High Court did not have jurisdiction.

This argument was rejected by the Supreme Court. They held that section 2(3) should be read as only limiting the jurisdiction of the High Court in circumstances where the offence for which a publisher could be punished, was a contempt offence within the Indian Penal Code. They held further that while defamation and contempt may overlap in some circumstances, defamation could not be considered as a contempt offence. Accordingly, they held that the High Court did have jurisdiction.

The Court held further that a contempt had occurred in this case. The fact that the publisher had not acted reasonably by failing to verify the information he had received precluded any argument that he had acted in good faith.

Cases discussed and relied upon:

Confirming the interpretation of section 2(3) of the Contempt of Court Act: *Subordinate Judge. First Class Hoshangabad v. Jawaharlal* A.I.R. 1940 Nag. 407; *Narayan Chandra v. Panchu Pramanick* A.L.R. 1935 Cal. 684; *Naresh Kumar v. Umaromal* A.I.R. 1951 Cal. 489; *Kaulashia v. Emperor* I.L.R. 12 Pat. 1; *State v. Brahma Prakash* A.I.R. 1950 All. 556; *Emperor v. Jagannath* A.I.R. 1938 All. 358; *Bennet Colman v. C. S. Monga* I.L.R. 1937 Lah. 34.

Judgement of the Court delivered by Mukherjea, J

The propriety of the decision of the High Court...has been challenged...[T]he first and main contention is that as the contempt in this case was said to have been committed in respect of a court subordinate to the High Court and the allegations made in the article in question constitute an offence under section 499 of the Indian Penal Code, the jurisdiction of the High Court to take cognisance of such a case is expressly barred under section 2(3) of the Contempt of Courts Act... So far as the first point is concerned, the determination of the question raised by the appellant would depend upon the proper interpretation to be put upon section 2(3) of the Contempt of Courts Act which runs as follows:

“No High Court shall take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.”

According to [the appellant], what the subsection means is that if the act by which a party is alleged to have committed contempt of a subordinate court constitutes an offence of any description whatsoever punishable under the Indian Penal Code, the High Court is precluded from taking cognisance of it. It is said that in the present case the allegations made in the article in question amount to an offence of defamation as defined by section 499 of the Indian Penal Code... This contention, though somewhat plausible at first sight, does not appear to us to be sound. In our opinion, the subsection referred to above excludes the jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate court are punishable as contempt under specific provisions of the Indian Penal Code but not where these acts merely amount to offences of other description for which punishment has been provided for in the Indian Penal Code. This would be clear from

the language of the subsection which uses the words “where such contempt is an offence” and does not say “where the act alleged to constitute such contempt is an offence.” It is argued that if such was the intention of the legislature, it could have expressly said that the High Court’s jurisdiction will be ousted only when the contempt is punishable as such under the Indian Penal Code. It seems to us that the reason for not using such language in the subsection may be that the expression “contempt of court” has not been used as description of any offence in the Indian Penal Code, though certain acts, which would be punishable as contempt of court in England, are made offences under it.

It may be pointed out in this connection that although the powers of the High Courts in India established under the Letters Patent to exercise jurisdiction as Superior Courts of Record in punishing contempt of their authority or processes have never been doubted, it was a controversial point prior to the passing of the Contempt of Courts Act, 1926, as to whether the High Court could, like the Court of King’s Bench in England, punish contempt of courts subordinate to it in exercise of its inherent jurisdiction. The doubt has been removed by Act XII of 1926 which expressly declares the right of the High Court to protect subordinate courts against contempt, but subject to this restriction, that cases of contempt which have already been provided for in the Indian Penal Code should not be taken cognisance of by the High Court. This seems to be the principle underlying section 2(3) of the Contempt of Courts Act.

What these cases are need not be exhaustively determined for purposes of the present case, but some light is undoubtedly thrown upon this matter by the provision of section 480 of the Criminal Procedure Code, which empowers [a] court to punish... a person... found guilty... under sections 176, 178, 179, 180 or section 228 of the Indian Penal Code... Offences under sections 175, 178, 179 and 180 may also, as section 480 of the Criminal Procedure Code shows, amount to contempt of court if the “public servant” referred to in these sections happens to be a judicial officer in a particular case. [For these sections] the court has been expressly given summary powers to punish a person who is guilty of offending its dignity in the manner indicated in the section.

... The only authority which [the appellant] could cite... is *Kisan Krishna Ji v. Nagpur Conference of Society of St. Vincent de Paul* A.I.R. 1943 Nag. 334. The authority is undoubtedly in his favour as it proceeds upon the assumption that the idea underlying the provision of section 2(3) of the Contempt of Courts Act is that if a person can be punished by some other tribunal, then the High Court should not entertain any proceeding for contempt. It is to be noticed that the learned Judge, who decided this case, himself

took the opposite view in the case of *Subordinate Judge, First Class, Hoshangabad v. Jawaharlal A.I.R. 1940 Nag. 407* . . . This decision was neither noticed nor dissented from in the subsequent case, and it is quite possible that the attention of the learned Judge was not drawn to this earlier pronouncement of his, in which case the matter would certainly have been more fully discussed. We think further that the decision of the Calcutta High Court in *V. M. Bason v. A. H. Skone I.L.R. 53 Cal. 401* which was the basis of the decision of the learned Judge in the subsequent case does not really support the view taken in it. In the Calcutta case . . . there was a general observation made by Chief Justice Sanderson at the close of his judgement that it is not desirable to invoke the special inherent jurisdiction of the High Court by way of proceeding for contempt if ordinary proceedings in a Magistrate's court are sufficient to meet the requirements of a case. This was not a case under section 2(3) of the Contempt of Courts Act.

It is next urged by [the appellant] that even assuming that this view is correct, the language of section 499 of the Indian Penal Code is wide enough to cover a case of contempt of court. What is said is, that if a libel is published against a judge in respect of his judicial functions, that also is defamation within the meaning of section 499 of the Indian Penal Code and as such libel constitutes a contempt of court, it may be said with perfect propriety that libel on a judge is punishable as contempt under the Indian Penal Code [which would oust the jurisdiction of the High Court under section 2(3)]. We do not think that this contention can be accepted as sound. A libellous reflection upon the conduct of a judge in respect of his judicial duties may certainly come under section 499 of the Indian Penal Code and it may be open to the judge to take steps against the libeller in the ordinary way . . . but such libel may or may not amount to contempt of court. As the Privy Council observed in *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court I.L.R. 10 Cal. 109 at 131*, "although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character." When the act of defaming a judge is calculated to obstruct or interfere with the due course of justice or proper administration of law, it would certainly amount to contempt. The offence of contempt is really a wrong done to the public by weakening the authority and influence of courts of law which exist for their good . . . "not for the sake of the judges as private individuals but because they are the channels by which the King's justice is conveyed to the people."

What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of court. If the defamation of a subordinate court amounts to contempt of court, proceedings can certainly be taken under section 2 of the Contempt of Courts Act, quite apart from the fact that other remedies may be open to the aggrieved

officer under section 499 of the Indian Penal Code. But a libel attacking the integrity of a judge may not in the circumstances of a particular case amount to a contempt at all.

The second point raised by the [appellant, that the article was published in good faith and does not amount to contempt,] does not appear to us to have any real substance. The article in question is a scurrilous attack on the integrity and honesty of a judicial officer. . . . 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 disrepute. The appellant. . . was not in a position to substantiate by evidence any of the allegations made therein. He admitted that the statement was based on hearsay. Rumours may have reached him from various sources, but before he published the article it was incumbent upon him as a reasonable man to attempt to verify the information he received and ascertain, as far as he could, whether the facts were true. . . . As the appellant did not act with reasonable care and caution, he cannot be said to have acted bona fide, even if good faith can be held to be a defence at all in a proceeding for contempt.

IN THE SUPREME COURT OF INDIA

E. M. SANKARAN NAMBOODIRIPAD

VERSUS

T. NARAYANAN NAMBIAR

1970 AIR 2015, 1971 SCR (1)

31 July 1970

M. Hidayatullah, CJ, G. K. Mitter and A. N. Ray, JJ.

Rule of Law: Freedom of expression is limited by the law of contempt. The law will punish for acts that are likely to interfere with the courts and their processes, regardless of whether they actually do and regardless of the speaker's intention.

During a press conference, the Chief Minister of Kerala, Mr Namboodiripad had made remarks labelling the judiciary as “an instrument of oppression” which operated against the working class. The comments were intended to reflect a Marxist perspective. Mr Namboodiripad was convicted of contempt of court.

Mr Namboodiripad initially sought to argue that contempt legislation should be read without encroaching on the right to freedom of expression, protected by Article 19(1)(a) of the Constitution. However, the Court noted that the second clause of that Article expressly identified contempt as an area that would act as an exception to this right.

Secondly, Mr Namboodiripad sought to justify his remarks as an expression of Marxist ideology. The Court engaged in a lengthy analysis of Marx and similar writers, concluding that the statements of the appellant were not an accurate reflection of that philosophy.

In response to what they perceived as a faulty interpretation of Marx and others, the Court noted that whether or not an accused intended to bring the justice system into disrepute, and alternatively, whether or not they actually did bring the justice system into disrepute, may be relevant so far as sentencing is concerned, but will not affect a finding of guilt. All that is necessary is that their statements, intentionally or otherwise, were likely to raise general dissatisfaction with, and distrust of, judicial decisions.

Cases discussed and relied upon:

Establishing 'scandalisation' as a ground for contempt: *Mcleod v. St. Aubyn L.R.* [1899] A.C. 549; *Andre Paul Terence Ambard v. The Attorney General of Trinidad and Tobago* A.I.R. 1936 P.C. 141; *Queen v. Gray* [1900] 2 Q.B. 36. Illustrating the discretionary nature of contempt: *Court, Bombay v. Tulsidas Subhanrao Jadhav* I.L.R. [1938] Bom 179. Discussing the relationship with freedom of expression: *Samuel Roth v. United States of America* 1 L. Ed.2d 1489; *Arthur Terminiello v. City of Chicago* 93 LM Ed. 1131; *Charlotte Anita Whitney v. People of the State of California* 71 L. Ed. 1095; *New York Times Company v. L. B. Sunivan* II L. Ed. 2d. 686; *Kedar Nath Singh v. State of Bihar* [1962] 2 Supp. S.C.R. 769.

Judgement of the Court delivered by Hidayatullah, CJ

The law of contempt stems from the right of the courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all courts when contempt is committed in *facie curiae* and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a Court of Record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts. There are many kinds of contempts. The chief forms of contempt are insult to judges, attacks upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of the courts, witnesses or the parties, abusing the process of the court, breach of duty by officers connected with the court and scandalising the judges or the courts. The last form occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disregard. In this conduct are included all acts which bring the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single judge or a single court but may, in certain circumstances, be committed in respect of the whole of the judiciary or judicial system.

* * *

It is no doubt true that Lord Morris in *Mcleod v. St. Aubyn L.R.* [1899] A.C. 549 at 561 observed that the contempt of court known from the days of the Star Chamber as *Scandalum Justiciae Curiae* or scandalising the judges, had fallen into disuse in England. But as pointed out by Lord Atkin in *Andre Paul Terence Ambard v. The Attorney General of Trinidad and Tobago* A.I.R. 1936 P.C. 141 at 143, the observations of Lord Morris

were disproved within a year in *Queen v. Gray* [1900] 2 Q.B. 36 at 40. Since then many convictions have taken place in which offence was held to be committed when the act constituted scandalising a judge.

We may dispose of *High Court, Bombay v. Tulsidas Subhanrao Jadhav* I.L.R. [1938] Bom 179. The contemner in that case had expressed contempt for all courts. Beaumont C. J. (Wasoodew, J. concurring) held that it was not a case in which action should be taken. The case did not lay down that there could never be contempt of court even though the court attacked was not one but all the courts together. All it said was that action should not be taken in such a case. If the Chief Justice intended laying down the broad proposition contended for, we must overrule his dictum as an incorrect statement of law. But we think that the Chief Justice did not say anything like that. He was also influenced by the unconditional apology and therefore discharged the rule.

[In] . . . *In Re Basuddeo Prasad*, the offending statement was that many lawyers without practice get appointed as judges of the High Courts. The remark was held by this Court not to constitute contempt of court. The remark was made after the report of the Law Commission was published and this Court held that the person concerned, who was then the Secretary of the Indian Council of Public Affairs and an advocate, was entitled to comment on the choice of judges and that the remarks were within the proper limits of public criticism on a question on which there might be differences of opinion. In our judgement that case furnishes no parallel to the case we have here.

* * *

The appellant has contended before us that the law of contempt should be so applied that the freedom of speech and expression is not whittled down. This is true. The spirit underlying Article 19(1)(a) must have due play, but we cannot overlook the provisions of the second clause of the article. While it is intended that there should be freedom of speech and expression, it is also intended that in the exercise of the right, contempt of court shall not be committed. The words of the second clause are:

“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 sub-clause . . . in relation to contempt of court, defamation or incitement to an offence.”

These provisions are to be read with Articles 129 and 215 which specially confer on this Court and the High Courts the power to punish for contempt of themselves. Article

19(1)(a) guarantees complete freedom of speech and expression but it also makes an exception in respect of contempt of court. The guaranteed right on which the functioning of our democracy rests, is intended to give protection to expression of free opinions to change political and social conditions and to advance human knowledge. While the right is essential to a free society, the Constitution has itself imposed restrictions in relation to contempt of court and it cannot therefore be said that the right abolishes the law of contempt or that attacks upon judges and courts will be condoned.

[The Court heard] observations from *Samuel Roth v. United States of America* 1 L. Ed.2d 1489 at 1506, *Arthur Terminiello v. City of Chicago* 93 LM Ed. 1131 at 1134, *Charlotte Anita Whitney v. People of the State of California* 71 L. Ed. 1095 and *New York Times Company v. L. B. Sunivan* II L. Ed. 2d. 686 on the high-toned objective in guaranteeing freedom of speech. We agree with the observations and can only say that freedom of speech and expression will always prevail except where contempt is manifest, mischievous or substantial. The question always is on which side of the line the case falls. The observations of this Court in *Kedar Nath Singh v. State of Bihar* [1962] 2 Supp. S.C.R. 769 in connection with sedition do not lend any assistance because the topic there discussed was different. Freedom of speech goes far but not far enough to condone a case of real contempt of court.

We, shall, therefore, see whether there was any justification for the appellant which gives him the benefit of the guaranteed right. The appellant has maintained that his philosophy is based upon that of Marx and Engels. . .As a Marxist-Leninist he advocates the radical and revolutionary transformation of the State from the coercive instrument of exploiting classes to an instrument which the exploited majority can use against these classes. In this transformation he wishes to make the state wither away and with the state, its organs, namely, the legislature, the executive and the judiciary. He has justified the press conference as an exposition of his ideology and claims protection of the first clause of Article 19(1) which guarantees freedom of speech and expression. The law of contempt, he says, cannot be used to deprive him of his rights.

All this is general but the appellant attacked the judiciary directly as “an instrument of oppression” and the judges as “dominated by class hatred, class interests and class prejudices”, “instinctively” favoring the rich against the poor, He said that as part of the ruling classes the judiciary “works against workers, peasants and other sections of the working classes” and “the law and the system of judiciary essentially serve the exploiting classes.” Even these statements, he claims, are the teachings of Marx, Engels and Lenin whose follower he is. This was also the submission of his counsel to us.

[The Court then engaged in a lengthy analysis of the writing of Marx, Engels and Lenin, arriving at the conclusion that] . . . in all the writings there is no direct attack on the judiciary selected as the target of people's wrath. Nor are the judges condemned personally. Engels regarded the courts as one of the means adopted by the law for effectuating itself. . . [t]he fault was with the state and the laws and not with the judiciary. Indeed in no writing, which we have seen or which has been brought to our notice, Marx or Engels has said what the appellant quotes them as saying.

* * *

It will be noticed that in all these writings there is not that mention of judges which the appellant has made. Either he does not know or has deliberately distorted the writings of Marx, Engels and Lenin for his own purpose. We do not know which will be the more charitable view to take. Marx and Engels knew that the administration of justice must change with laws and changes in society, there was thus no need to castigate the judges as such beyond saying that the judicial system is the prop of the state. The courts in India are not *sui generis*. They owe their existence, from, powers and jurisdictions to the Constitution and the laws. The Constitution is the supreme law and the other laws are made by Parliament. It is they that give the courts their obligatory duties, one such being the settlement of disputes in which the state (by which we mean those in authority) are ranged against citizens. Again they decide disputes in which class interests are apparent. The action of the courts when exercised against the state proves irksome to the state and equally when it is between two classes, to the class which loses. It is not easily realised that one of the main functions of courts under the Constitution is to declare actions, repugnant to the Constitution or the laws (as the case may be), to be invalid. The courts as well as all the other organs and institutions are equally bound by the Constitution, and the laws. Although the courts in such cases imply the widest powers in the other jurisdictions and also give credit where it belongs they cannot always decide either in favour of the state or any particular class. There are innumerable cases in which the decisions have gone against what may be described in the language of communism as the exploiting classes.

For those who think that the laws are defective, the path of reform is open, but in a democracy such as ours to weaken the judiciary is to weaken democracy itself. Where the law is silent the courts have discretion. The existence of law containing its own guiding principles, reduces the discretion of courts to a minimum. The courts must do their duty according to their own understanding of the laws and the obligations of the Constitution. They cannot take their cue from sentiments of politicians nor even indirectly give support to

something which they consider to be wrong against the Constitution and the laws. The good faith of the judges is the firm bed-rock on which any system of administration securely rests, and an attempt to shake the people's confidence in the courts is to strike at the very root of our system of democracy. . .

The question thus in this case is whether the appellant has said anything which brings him out of the protection of Article 19(1)(a) and exposes him to a charge of contempt of court. It is obvious that the appellant has misguided himself about the true teachings of Marx, Engels and Lenin. He has misunderstood the attack by them on state and the laws as involving an attack on the judiciary. No doubt the courts, while upholding the laws and enforcing them, do give support to the state but they do not do so out of any impure motives. They do not range themselves on the side of the exploiting classes and indeed resist them when the law does not warrant an encroachment. To charge the judiciary as an instrument of oppression, the judge as guided and dominated by class hatred, class interests and class prejudices, instinctively favouring the rich against the poor is to draw a very distorted and poor picture of the judiciary. It is clear that it is an attack upon judges which is calculated to raise in the minds of the people a general dissatisfaction with, and distrust of all judicial decisions. It weakens the authority of law and law courts. Mr. V. K. Krishna Menon tried to support the action of the appellant by saying that judges are products of their environment and reflect the influences upon them of the society in which they move. He contended that these subtle influences enter into decision making and drew our attention to the writings of Prof. Laski, Justice Cordozo, Holmes and others where the subtle influences of one's upbringing are described. This is only to say that judges are as human as others. But judges do not consciously take a view against the conscience or their oaths. What the appellant wishes to say is that they do. In this he has been guilty of a great calumny. We do not find it necessary to refer to these writings because in our judgement they do not afford any justification for the contempt which has patently been committed. . . Mr. V. K. Krishna Menon exhorted us to give consideration to the purpose for which the statement was made, the position of the appellant as the head of a State, his sacrifices, his background and his integrity. On the other hand, we cannot ignore the occasion (a press conference), the belief of the people in his word as a Chief Minister and the ready ear which many in the party and outside would give to him. The mischief that his words would cause need not be assessed to find him guilty. The law punishes not only acts which do in fact interfere with the courts and administration of justice but also those which have that tendency, that is to say, are likely to produce a particular result. Judged from the angle of courts and administration of justice, there is not a semblance of doubt in our minds that

the appellant was guilty of contempt of court. Whether he misunderstood the teachings to Marx and Engels or deliberately distorted them is not to much purpose. The likely effect of his words must be seen and they have clearly the effect of lowering the prestige of judges and courts in the eyes of the people. That he did not intend any such result may be a matter for consideration in the sentence to be imposed on him but cannot serve as a justification. We uphold the conviction.

IN THE SUPREME COURT OF INDIA

IN RE S. MULGAKAR

VERSUS

UNKNOWN

(1978) 3 SCC 339, 1978 3 SCR 162

21 February 1978

M. H. Beg, CJ, P. Kailasam and V. R. Krishna Iyer, JJ.

Rule of Law: The broad, discretionary contempt jurisdiction will not be engaged in response to honest opinions intended to strengthen democracy, but the court will not permit statements perceived as undermining it as an institution, or its process or function.

The Indian Express newspaper published an article alleging that Supreme Court judges were disowning a code of ethics they themselves had written. The Chief Justice, presiding in this case, had previously written a letter to the Chief Justices of the various High Courts suggesting that such a code be put in place, but nothing had been written. The Supreme Court judges were unaware of the letter. No opportunity to be heard was given to the editor and accordingly, the charges were dropped. However, the Court used this as an opportunity to provide obiter comments on contempt jurisprudence.

In the two main judgements, both Beg, C.J. and Krishna Iyer, J. were of the view that it was within the Court's jurisdiction to initiate proceedings and punish for constructive contempt, a media outlet for scandalising judges. They equally agreed that this was a discretionary power and that the court would have to determine whether such punishment was justified in the circumstances. Where the judgements differed however, was in the types of statement that they felt warranted a formal judicial response. Beg, C.J. took the harder line stating that while freedom of the press was necessary and the court was open to criticism, this would not extend itself to statements that were ill-informed, misguided or vindictive. He believed that such statements risked undermining the faith that people had in the court as an institution and thus presented a threat to democracy rather than strengthening it.

Krishna Iyer, J. took a more liberal approach by suggesting that even where statements were ill-informed, the court should not engage proceedings, suggesting that the judicial mind should not be concerned with such criticism and that mercy towards such statements would be a sign of strength rather than weakness. He stated that the decision of whether to punish should be reached following an assessment of the facts in light of certain principles.

Cases discussed and relied upon:

Outlining the basic principles of contempt law: *Perspective Publications Ltd. v. State of Maharashtra* [1971] 2 S.C.R. 779. Discussing the relationship between the law of libel and the law of contempt: *King v. Nicholls* (1911) 12 C.L.R. 280; *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* (1953) S.C.R. 1169; *Bahama Islands* (1893) A. C. 138; *Devi Prasad v. King Emperor* 70 I. A. 216; *Reddy v. The State of Madras* (1952) S.C.R. 452. Discussing a more measured approach to contempt: *R. v. Brett* (1950) C.L.R. 226; *Ambard v. Attorney-General for Trinidad* (1936) A.C. 322; *Regina v. Metropolitan Police Commissioner ex parte Blackburn* (1968) 2 W.L.R. 1204. Discussing 'scandalisation' as a ground for contempt: *Queen v. Gray* (1900) Q.B.D. 36. Establishing the availability of punishment for contempt: *Vide C. K. Daphtary and Others v. O. P. Gupta* (1971) Supp. S.C.R. 76.

Judgement of Beg, CJ

The matter before us arises out of a publication in the Indian Express newspapers dated 13 December 1977. Some people perhaps believe that attempts to hold trials of everything and everybody by publications in newspapers must include those directed against the highest court of justice in this country and its pronouncements. If this is done in a reasonable manner, which pre-supposes accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, I would, speaking for myself, be the last person to consider it objectionable even if some criticism offered is erroneous.

* * *

Although our Constitution does not contain a separate guarantee of freedom of the press, apart from the freedom of expression and opinion contained in Article 19(1)(a) of the Constitution, it is well recognised that the press provides the principal vehicle of expression of their views to citizens... Never has criticism been more necessary than today, when

the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited.

* * *

It seems to me that editors of at least responsible newspapers should be aware that it is courts of law and not newspaper readers who have to try certain issues which courts alone are empowered to determine... Editors of newspapers are expected to know also something of the special place of this Court in the Republic's Constitution which amply protects its judges so that they may not be exposed to opprobrious attacks by either malicious or ignorant persons.

This Court is armed, by Article 129 of the Constitution, with very wide and special powers, as a Court of Record, to punish its contempts... [T]he principle of Supremacy of the Constitution requires for its maintenance in full force and vigour; firstly, an executive which respects the judiciary... and does not take away [its] powers to deal with the rights of citizens even against executive actions of the State; and, secondly the absence of any legislative interference with judicial functions [by] threats of any kind... Articles 121 and 211 of our Constitution, prohibiting discussion of the conduct of a Supreme Court or a High Court Judge in the discharge of his duties even by Parliament or a State Legislature, except upon a motion for his removal by the constitutionally prescribed procedure... are there in our Constitution to ensure this. Can ordinary citizens do elsewhere, with impunity, what Members of Parliament cannot do in Parliament and legislators cannot do in a State Legislature, and, if so, to what extent? Such questions will have to be answered by courts with reference to the facts of particular cases if and when brought to their notice.

It would be a sad day for the supremacy of the Constitution and for the Rule of Law, which it implies, if malicious or ill informed persons, filled with the irrationality... or misguided zest or vindictiveness, acting in a manner freed from the restraints of law or reason, were allowed to take upon themselves the task of passing judgements on actions of others particularly of Judges performing judicial functions... Judges, who have taken oaths of allegiance to the Constitution, are bound to uphold it, conscientiously without fear or favour, affection or ill will. They have to give their honest judgements without caring for popular approval or disapproval.

* * *

Mr. Jethmalani appearing for A. G. Noorani, to whom we had issued no notice, tried to convince us that there was no intention on the part of the writer of the article or the editor to injure the dignity or position of this Court but the intention was only to direct public attention to matters of extreme importance to the nation. If this were so it would be a desirable object. But, as we should all know, there are proper and permissible ways of carrying out such an object and others which are not permitted by law, or, at least by elementary rules of fairness.

* * *

The judiciary cannot be immune from criticism. But, when that criticism is based on obvious distortion or gross misstatement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. I am not one of those who thinks that an action for contempt of court, which is discretionary, should be frequently or lightly taken. But, at the same time, I do not think that we should abstain from using this weapon even when its use is needed to correct standards of behavior in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of bona fide concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralise judges of the highest court by making malicious attacks, anyone interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed. I sincerely hope that my own undisguised perturbation at what has been taking place recently is unnecessary. One may be able to live in a world of yogic detachment when unjustified abuses are hurled at one's self personally, but, when the question is of injury to an institution, such as the highest court of justice in the land, one cannot overlook its effects upon national honour and prestige in the comity of nations. Indeed, it becomes a matter deserving consideration of all serious minded people who are interested in seeing that democracy does not flounder or fail in our country. If fearless and impartial courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them..

... [T]he question whether an attack is malicious or ill intentioned, may be often difficult to determine, yet, the language in which it is made, the fairness, the factual accuracy, the logical soundness of it, the care taken in justly and properly analysing the materials before the maker of it, are important considerations. Moreover, in judging whether it constitutes a

contempt of Court or not we are concerned more with the reasonable and probable effects of what is said or written than with the motives lying behind what is done.

Judgement of Krishna Iyer, J.

The contempt power, though jurisdictionally large, is discretionary in its unsheathed exercise. Every commission of contempt need not erupt in indignant committal or demand punishment, because judges are judicious, their valour non-violent and their wisdom goes into action when played upon by a volley of values, the least of which is personal protection—for a wide discretion, range of circumspection and rainbow of public considerations benignly guide that power. Justice is not hubris; power is not petulance and prudence is not pusillanimity, especially when judges are themselves prosecutors and mercy is a mark of strength, not whimper of weakness.

* * *

Poise and peace and inner harmony are so quintessential to the judicial temper that huff, 'haywire' or even humiliation shall not besiege; nor, unvarnished provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral yoga of shanti and neeti is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the court. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge.

* * *

What then are the complex of considerations dissuasive of punitive action? To be exhaustive is a baffling project; to be pontifical is to be impractical; to be flexible is to be realistic. What, then, are these broad guidelines—not a complete inventory, but precedentially validated judicial norms?

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 jeopardised 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 offenses—the dogs may bark, the caravan will pass.

The second principle must be to harmonise the constitutional values 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... not because the judge... is personally armoured by a regal privilege but because be you-the condemner-ever so high, the law-the people's expression of justice-is above you... Speaking of the social philosophy and philosophy of law in an integrated manner... there is no conceptual polarity but a delicate balance, and judicial 'sapience' draws the line.

[His Honour then went on to discuss the definition of "criminal contempt" contained in section 2(1)(c) of the Contempt of Courts Act, 1971.] This is an extremely wide definition. But... [the] laws relating to contempt of court had, according to the provisions of Article 19(2), to be "reasonable restrictions" on the exercise of the right of free speech. The courts were given the power-and, indeed, the responsibility-to harmonise conflicting aims, interests and values.

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.

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. Scandalising the court means any hostile criticism of the "judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel." (See 'Newspapers and Contempt of Court' (1935) 48, Harvard L.R. 885, 898.)

Similarly, Griffith, C. J. has said in the Australian case of *Nicholls* (1911) 12 C.L.R. 280, 285 that:

"In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a judge calculated to bring him into contempt in that sense amounts to contempt of court."

The fourth functional canon 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 criticisms 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.

Speaking generally, there are occasions when the right to comment may be of supreme value (for instance, the thalidomide babies cases in England) [*Attorney General v. Times Newspapers Ltd.* (1972) 3 All. E.R. 1136 (D.C.): (1973) 1 All. E.R. 815 (C.A.): (1973) 3 All. E.R. 54 (H.L.)]... [T]he law of contempt must adjust competing values and be modified, in its application by the requirements of a free society and the shifting emphasis on paramount public interest in a given situation.

[The] Australian decision *R. v. Brett* (1950) C.L.R. 226 has relevance for our case and I quote from the Australian Law Journal:

“...O’ Bryan, J. pointed out that the fact that the article made ridiculous mistakes of fact and that its logic was greatly at fault, did not prove that it was a contempt. The question was whether the article, honestly though mistakenly and offensively, criticised the policy of this and previous administrations in appointing judges, or whether it did indeed set out to lower the authority of the Court as such and to excite misgivings as to its partiality...”

Another useful illustration... is contained in... [the] Australian Law Journal, 1928-29, Vol. 2, 145:

“[In] the Tasmanian case (*The King v. Ogilvie*) Nicholls, C. J., in delivering the judgement of the Court, agreed with the authorities that fair comment of judicial actions is not only justifiable, but beneficial. He then pointed out “that we regard these proceedings as instituted and our powers conferred, not for the benefit or comfort of the judges personally, to protect them from criticism or even from libel, but simply to secure that this institution, the Supreme Court, which in the final analysis has to declare and enforce the rules which hold the community together, shall be challenged only in the proper ways, which are two, first, by appeal, and secondly by approach in the proper form to Parliament.”

A quick flash back to English decisions also is instructive. [In] *Queen v. Gray* (1900) Q.B.D. 36 Lord Russell of Killowen C. J. observed:

“Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke characterised as “scandalising a court or a judge.””

The learned Law Lord, however, indicated a guideline which is extremely important:

“Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.”

* * *

In *Ambard v. Attorney-General for Trinidad* (1936) A.C. 322 the Privy Council pronounced on a case of public criticism of the administration of justice. Lord Atkin stated, with admirable accuracy, the law on this branch of contempt of court:

“But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way, the wrong headed are permitted to err therein, provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism.”

* * *

[In] *Regina v. Metropolitan Police Commissioner ex parte Blackburn* (1968) 2 W.L.R. 1204 Lord Denning’s judgement is particularly instructive. . . :

“[This] is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

“It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of

justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political. We must rely on our conduct itself to be its own vindication.

“Exposed as we are to the winds of criticism, nothing which is said by this person or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.”

The Indian precedents must naturally receive referential attention from us. In *Sambhu Nath Jha v. Kedar Prasad Sinha and Others.* :

“...the court would exercise circumspection and judicial restraint in the matter of taking action for contempt of court. The court has to take into account the surrounding circumstances and the material facts of the case and on conspectus of them to come to a conclusion whether because of some contumacious conduct or other sufficient reason the person proceeded against should be punished for contempt of court.”

Perspective Publications Ltd. v. State of Maharashtra [1971] 2 S.C.R. 779... stated the result of the discussion of the cases on contempt as follows:

- (1) It will not be right to say that committals for contempt for scandalising the court have become obsolete.
- (2) The... jurisdiction... must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.
- (3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him.
- (4) A distinction must be made between... whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that will be punishable as contempt.
- (5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public.

Hidayatullah, C. J., in *R. C. Cooper v. Union of India* observed:

“...We are constrained to say also that while fair and temperate criticism of this Court or any other court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgement of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril.”

In *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* (1953) S.C.R. 1169, 1178, 1180 this court [reinforced the rule from *Ambard v. Attorney-General for Trinidad* (above) and stated that]:

“...when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt. The distinction between a libel and a contempt was pointed out... [in] *Bahama Islands* (1893) A. C. 138, by Lord Atkin in the case of *Devi Prashad v. King Emperor* 70 I. A. 216..., [in] *King v. Nicholls* 12 Com. L.R. 280 and has been accepted as sound by this Court in *Reddy v. The State of Madras* (1952) S.C.R. 452. The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libeler in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.”

There is no doubt that condign and quick punishment for scandalising publications has been awarded by this Court, (*Vide C. K. Daphtary and Others v. O. P. Gupta* (1971) Supp. S.C.R. 76, 92.

Another one is *Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Another*, in [which], I had occasion to examine the root principles of Indian contempt jurisprudence and I summed up thus:

“Judges and courts have diverse duties. But functionally, historically and jurisprudentially, the value which is clear to the community and the function which deserves to be cordoned off from public molestation, is judicial. Vicious criticism of personal and administrative acts of judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealous, criticism cannot be overlooked. Justice is no cloistered virtue.”

I relied on an observation made by Justice Gajendragadkar, C.J., to Special Reference No. 1 of 1964 and proceeded to state the key to the jurisdiction:

“We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgements, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.”

* * *

To wind up, the key word is “justice”, not “judge”; the key thought is unobstructed public justice, not the self-defence of a judge; the cornerstone of the contempt law is the accommodation of two constitutional values, the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.

* * *

... The issue is one of the gravest moment for free peoples and to choose between the cherished basics of free expression and fair hearing is a trying task. For a free press it may be argued, as did the United States judges... [i]t is the means by which the people receive the free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.

The argument further asserts that a curtailment of press freedom is a serious matter. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert...an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

* * *

Prejudicial publicity, indulged in by a 'free' press owing no institutional responsibility or public accountability, cannot be all that good, especially when judges are personally vilified, assured that the 'robes' traditionally, and for good reasons, do not and should not wrestle with calumniating columnists or yellow journalists. Likewise, a litigant or judge, run down by powerful vested interests wearing the mask of mass media owned by them or hiring the pen of arch spokesmen of political or economic reactionaries, cannot run riot, raising the alarm that free speech is in peril and get away with it. Heroism on the face may often be villainy at heart and the law cannot retreat from its justice-function scared by slogans. Balancing of values is difficult, delicate but indispensable. Neither the press nor the courts are above the People.

The Court is not an inert abstraction; it is people in judicial power. And when drawing up standards for press freedom and restraint, as an 'interface' with an unafraid court, we must not forget that in our constitutional scheme the most fundamental of all freedoms is the free quest for justice by the small man.

* * *

A concluding note. I have launched on this long, inconclusive essay in contempt jurisprudence bearing on scandalising the judges qua judges, aware that not high falstaffian rhetoric but hard-headed realism, illumined by constitutional values, must set the limit and interpret the statute. It is a disturbing development in our country that the media and some men in the trade of traducement are escalatingly scandalising judges with flippant or motivated write-ups wearing a pro bono public veil and mood of provocative mock-challenge. The court shall not meditate nor hesitate but shall do stern justice to such 'professional' contemnners, not shrink because they are scurrilous, influential or incorrigible. Even so, to be gentle is to be just and the quality of mercy is not strained. So, it is that a benign neglect not judicial genuflexion, is often the prescription, and to inhibit haphazardness or injustice it is necessary that the Bar and the press evolve a dignified consensus on the canons of ethics in this area, with due regard to the Constitution and the laws, so that the Bench may

give it a close look and draw the objective line of action... Freedom is what freedom does and justice fails when judges quail. For sure, my plea is not for judicial pachydermy, but for dignified detachment which ignores ill-informed criticism in its tolerant stride, but strikes when offensive excesses are established.

IN THE SUPREME COURT OF INDIA

RAMA DAYAL MARKARHA

VERSUS

THE STATE OF MADHYA PRADESH

1978 AIR 921, 1978 SCR (3) 497

14 March 1978

D. A. Desai and S. M. Fazalali, JJ.

Rule of Law: Contempt is to be assessed in light of the circumstances of the case. In a situation where the audience is rural, illiterate or generally not used to criticism, it is more likely that the comments will interfere with the administration of justice. Additionally, the authority of the contemner will be important in assessing the likely effect of the statements.

This case concerned a senior advocate whose clients were convicted by an Additional District Magistrate. An appeal was lodged and allowed. Following this, the Advocate published a pamphlet suggesting that the Magistrate had acted on improper motives and had already resolved to convict the accused before the presentation of evidence. The Advocate was charged with contempt of court. He was convicted in the High Court and subsequently appealed. He sought to argue that the pamphlet amounted to fair comment (which is protected by section 5 of the Contempt of Court Act, 1971) or, in the alternative, that the publication would not substantially interfere with the administration of justice, and so shouldn't be punished by virtue of section 13 of the Act.

The Court rejected the State's argument that section 5 was only available in situations where the case commented on had been heard and finally decided (which was not the case here). However, it held that the comments contained in the pamphlet amounted to contempt of court. The Court outlined the guiding principles of contempt and paid particular attention to the fact that the assessment must be made in light of the surrounding circumstances. It noted that in rural areas inhabited by illiterate persons, such as where this pamphlet was distributed, the effect of such comments will be greater than in areas where criticism is more common place. Additionally, the fact that the comments were made by a lawyer meant that the comments carried greater weight.

The Court did however, hold that a large punishment was not necessary. Instead a token fine would remind the appellant to pursue his object of offering fair comment within legitimate boundaries.

Cases discussed and relied upon:

Providing that fair comment will not amount to contempt: *Queen v. Gray* (1900) 2 Q.B. 36; *Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn* (1968) 2 WLR 1204.

Judgement of the Court delivered by Desai, J

The appellant does not question the authorship and publication of the pamphlet by him. In fact, his attempt is to justify the course of action taken by him. Broadly stated, his defence is that what he has done is merely publishing a fair comment on the merits of a criminal case which has been heard and finally decided and, therefore, he is entitled to the benefit of section 5 of the Contempt of Courts Act. Alternatively, it was suggested that even if the Court comes to the conclusion that the appellant is guilty of contempt of court, no sentence should be imposed upon him because the publication is not likely to substantially interfere or would tend substantially to interfere with the due course of justice and, therefore, he is entitled to the benefit of section 13.

... In this background, the contemner made a sort of a preliminary submission that while dealing with the appeal this Court should confine itself to only those passages noticed by the High Court in holding him guilty of contempt and the other passages, even if they find a place in the judgement, should be ignored. Ordinarily, it is true that this Court while hearing an appeal against a conviction for contempt of Court would confine its attention to the material which has received consideration of the High Court while adjudging the contemner guilty. However, there would be no lack of jurisdiction to take into consideration the passages in respect of which notice for contempt was issued and served upon the contemner. But the wider question of law apart, we propose to confine ourselves only to the material which has received the consideration of the High Court. . .

* * *

... As the judgement of Shri Thakur was the focal point of attack by the contemner, it was imperative for the High Court to take into consideration the appellate judgement against the judgement under attack so as to satisfy itself whether the judgement was so manifestly

incorrect or perverse as to merit a scurrilous attack on it. The submission of the contemner that the appellate judgement should not have been taken into consideration has no merit.

...The contemner strenuously contended that actuated by the most laudable object of contributing to the establishment of the rule of law in our democratic polity, an ideal cherished by our Constitution and established for the benefit of the rural backward population, the very fact which has appealed to the High Court in convicting the appellant a member of the legal fraternity for contempt, he published the pamphlet fairly commenting on the merits of a case already decided so that people's faith in administration of justice is vindicated. Even prior to the enactment of the Contempt of Courts Act, 1971, a fair and reasonable comment of a judicial act did not constitute contempt and this cherished and noble facet of the larger liberty of freedom of speech and expression enshrined in Article 19(1)(a) of the Constitution has found its echo in section 5 of the Contempt of Courts Act which provides that a person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided. What constitutes fair comment and what are its peripheral limits beyond which the comment ceases to be fair and strays into the forbidden field inviting penalty has been the subject-matter of a catena of decisions. The limit of fair comment being an integral part of the larger liberty of freedom of speech and expression it could not be put in a straight-jacket formula or converted into a master-key which will open any lock. More or less it would depend upon the facts and circumstances of each case, the situation and circumstances in which the comment was made, the language employed, the context in which the criticism was offered and the people for whose benefit the exercise was undertaken, and the effect it will produce on the litigants and society in relation to courts and administration of justice.

... It was submitted [on behalf of the State] that in order to attract section 5 it must be affirmatively shown that the case in respect of which comments were offered was heard and finally decided and that the expression heard and finally decided, would comprehend that the limitation for appeal had also expired and the judgement had become final. Proceeding from this angle it was said that the judgement in appeal was rendered by the Additional Sessions Judge on 23 December 1973 and the offending publication saw the light of the day on 1 January 1974 and that the limitation for appeal by the State against the order of acquittal being 90 days, the limitation had not expired and, therefore, it could not be said that the case was finally decided... [W]e do not propose to deny to the contemner the benefit of section 5 if in fact he is entitled to it on the short ground that the case was not finally decided.

Contempt jurisdiction is a special and to some extent an unusual type of jurisdiction wherein the prosecutor and the judge are combined in one. To some extent it trenches upon the fundamental right of free speech and expression and stifles criticism of a public officer concerned with administration of public justice in discharge of his public duty. . . . Therefore, the contempt jurisdiction has to be sparingly exercised with utmost restraint and considerable circumspection. Undoubtedly, judges and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court (*Queen v. Gray* (1900) 2 Q.B. 36 at 40). No criticism of a judgement, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith (*Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn* (1968) 2 WLR 1204 at 1207).

* * *

. . . Fair and reasonable criticism of a judgement which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less judges, can claim infallibility. A fair and reasonable comment would even be helpful to the judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work. . . . But then the criticism has to be fair and reasonable. Such a criticism may fairly assert that the judgement is incorrect or an error has been committed both with regard to law or established facts. It is one thing to say that a judgement on the facts as disclosed is not in consonance with evidence or the law has not been correctly applied. Ordinarily, the judgement itself will be the subject-matter of criticism and not the judge. But when it is said that the judge had a pre-disposition to convict or deliberately took a turn in discussion of evidence because he had already resolved to convict the accused, or he has a wayward bend of mind, is attributing motives, lack of dispassionate and, objective approach and analysis and pre-judging of the issues, which would bring administration of justice into ridicule if not infamy. When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly repose in the courts of law as courts of justice, the criticism would cease to, be fair and reasonable criticism as contemplated by section 5. . . .

[I]t is also to be borne in mind the setting in which the court is functioning and the attack on the administration of justice. In this country justice at grass-root level is administered by courts set up in rural backward areas largely inhabited by illiterate, persons. It is they who bring their problems to the court for resolution and they are the litigants, or consumers of justice service. Their susceptibility is of a different type than the urban elite reading newspapers and exposed to winds of change or even winds of criticism. The people in rural backward areas unfortunately illiterate have different kinds of susceptibilities. A slight suspicion that the judge is predisposed or approaches the case with a closed mind or has no judicial disposition would immediately affect their susceptibilities and they would lose confidence in the administration of justice. There is no greater harm than infusing or instilling in the minds of such people a lack of confidence in the character and integrity of the judge. Conversely, it makes the task of the judge extremely difficult when operating in such an area...

... [T]he contemner is a lawyer belonging to the fraternity of noble and liberal profession. A criticism by him would attract greater attention than by others because of his day-to-day concern with the administration of justice in that area and his belief about the judge's judicial disposition would adversely affect a large number of persons.

* * *

It was next contended that even if the comments made by the appellant appear in bad taste or that they are outspoken or blunt, in view of section 13 no sentence can be imposed upon him for contempt unless the court is satisfied that the contempt is of such a nature that it substantially interferes or tends substantially to interfere with the due course of justice... [I]t was said that we should bear in mind the most laudable object with which the contemner published the comments and in his enthusiasm for a public cause, viz., the establishment of the rule of law in a backwards area, and therefore, even if he had strayed slightly from the path of rectitude, the case does not call for sentence as contemplated by section 13 of the Contempt of Courts Act... [T]he vituperative language appeared to be a very serious matter... [especially] when it concerned a place where there are one or two courts and a few lawyers, and the litigating public is mostly illiterate or poorly educated, and it is such a thing which could not be ignored or allowed to pass by. Such criticism is bound to substantially interfere with due course of justice...

The contemner did not recant either before the High Court or even before us. Even then the question is whether the sentence of the fine [imposed by the High Court] is called for in this

case... While not exonerating the contemner, we think a token punishment would serve the ends of justice because if the contemner while pursuing his object zealously is required to be kept to the path of rectitude, a token fine will also consciously remind the contemner that he is not a gentleman at large. We, therefore, modify the sentence of fine awarded by the High Court and impose a token fine of Rs 1.

IN THE SUPREME COURT OF INDIA

ASHARAM M. JAIN

VERSUS

A. T. GUPTA AND OTHERS

1983 AIR 1151, 1983 SCR (3) 719

25 August 1983

O. Chinnappa Reddy, A. P. Sen and E. S. Venkataramiah, JJ.

Rule of Law: Contempt will be assessed not from the position of the judge, but from the position of the public, and their right to the proper administration of justice. Equally, there is no risk that judges will be hypersensitive.

In a petition seeking leave to appeal a previous decision, the petitioner was highly critical of the Chief Justice of the High Court from where the original order had come. Upon receiving the petition, the Court issued a notice asking why the petitioner should not be prosecuted for contempt. The petitioner stated that he was not prepared to withdraw the allegations that had been made, but did make a sincere and unconditional apology. Counsel for the petitioner urged the court to accept the apology, arguing that the court should not be hypersensitive, but should respond to such statements with condescending indifference and repudiation by judicial rectitude.

The Court held that there was never any risk of judicial hypersensitivity. The nature of the position and the familiarity with litigation makes judges sympathetic, responsible and largely insensitive. Rather, contempt of court should be assessed not from the view of the judges, but instead from the public. It is not judges who need protection, but instead, the public's interest in the proper administration of justice. Accordingly, the petitioner was convicted.

Cases discussed and relied upon:

Establishing that contempt should be assessed from the interests of the public: *Advocate General Bihar v. M. P. Khair Industries* [1980] SCR (2) 1172. Discussing the possibility of hypersensitivity: *In Re: Shri S. Mulgaonkar* [1978] 3 S.C.R. 162.

Judgement of the Court delivered by Chinappa Reddy, J

[Following a notice issued to the appellant asking why he should not be committed for contempt, the appellant did not withdraw the allegations he had made, but instead offered a sincere and unconditional apology. Counsel for the appellant] submitted that the court should be so gracious as to accept the unqualified apology tendered by the contemner and refrain from sending the contemner to prison. He invited our attention to *In Re: Shri S. Mulgaonkar* [1978] 3 S.C.R. 162, where Krishna Iyer, J suggested that a normative guideline for the judges to observe in this jurisdiction was “not to be hypersensitive where distortions and criticism overstep the limits, but to deflate vulgar denunciation by dignified bearing, condescending indifference and repudiation by judicial rectitude.”

There is never any risk of judicial hypersensitivity. The very nature of the judicial function makes judges sympathetic and responsive. Their very training blesses them with ‘insensitivity,’ as opposed to hypersensitivity. Judges are always seeking good reasons to explain wrong conduct. They know there are always two sides to a coin. They neither give nor take offence because they deal with persons and situations impersonally, though with understanding. Judges more than others realise the foibles, the frustrations, the undercurrents and the tensions of litigants and litigation. But, as elsewhere, lines have to be drawn. The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorise and destroy the system of administration of justice by vilification of judges. It is not that judges need be protected; judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected. We had occasion to point this out in *Advocate General Bihar v. M. P. Khair Industries* [1980] SCR (2) 1172, where we said:

“But, on the other hand, it may be necessary to punish as a contempt, a course of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice...The Court has the duty of protecting the interest of the public in the due administration of justice and, so, it is entrusted with the power to commit for contempt of court, not in order to protect the dignity of the court against insult or injury as the expression “contempt of court” may seem to suggest, but, to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with.”

So we approach the question not from the point of view of the judge whose honour and dignity require to be vindicated, but from the point of view of the public who have entrusted

to us the task of due administration of justice. Having given our utmost consideration, we have come to the conclusion that it is not open to us to accept the easy and ready solution suggested of accepting the apology and imposing a fine. We think that a contumacious disregard of all decencies, such as that exhibited by the contemner in this case can only lead to a serious disturbance of the system of the administration of justice, unless duly repaired atones by inflicting an appropriate punishment on the contemner which must be to send him to jail to atone for his misconduct and thereafter to come out of prison a chastened but a better citizen. We accordingly sentence him to suffer simple imprisonment for a period of two months.

IN THE SUPREME COURT OF INDIA

S. K. SUNDARAM

VERSUS

UNKNOWN

2001 (1) ALD CRI 222, 2001 (1) ALT 19 SC

15 December 2000

K. T. Thomas and R. Sethi, JJ.

Rule of Law: Contempt need not require publication but can be based on ‘the doing of any act.’ Furthermore, “publication” for contempt purposes will mean communicating information to any third party and in that sense, adopts the same meaning as in defamation jurisprudence. Finally, “good faith” requires a belief arrived at having taken due care and attention.

An advocate sent a telegram to the Chief Justice alleging that he had falsified his age so as to continue in the position despite passing the age of superannuation. The advocate also filed a criminal complaint. He in turn, was charged with contempt.

The advocate argued that there was no publication, as the message had been communicated by telegram. This was rejected on two grounds. First, it was held that the statutory requirements of contempt did not require publication, but merely “any act.” Secondly, the Court adopted the meaning of the word “publication” used in defamation proceedings, meaning that the message just had to be communicated to one other person. It was held that communicating the message to the staff at the telegram office would constitute publication. This decision is significant in that it goes against the earlier decision of *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* 1954 AIR 10 1954 SCR 1169, which held that “publication” for the purpose of contempt proceedings required more than would be the case for defamation proceedings.

Finally, the Court rejected the advocate’s claim that the allegation had been made in good faith in that he genuinely believed the Chief Justice to be past the age of superannuation. It was held that good faith required more than just an honest belief, and instead focused on an honest belief or act arrived at after due care and attention.

Judgement of the Court delivered by Thomas, J

... The second [of the contemner's initial objections] was that "hitherto all suo motu contempts were initiated by a report of the witness to the contempt, which would be the basis on which the contemnor would be charged." In other words, he expected the Hon'ble Chief Justice of India to initiate the contempt proceedings against him. As mentioned by us at the very outset, the contempt of court jurisdiction is not to protect an individual judge, it is to protect the administration of justice from being maligned. Hence, when his expectation that the Chief Justice of India himself would have personally filed a petition against the contemnor did not fructify, he cannot question the maintainability of the action which was initiated suo motu by the court.

* * *

On the merits ... Counsel for the contemnor raised mainly three lines of arguments. First is that the action initiated against the contemnor is on the telegraphic communication sent by him to the Chief Justice of India and it would not amount to publication and hence no contempt action could be taken on that premise. ... Dealing with [this] contention we may look at the definition of "criminal contempt" in the Act. Section 2(c) contains the definition of "criminal contempt" which reads thus:

"Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:

- (i) scandalises or tends to scandalise, 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.

Criminal contempt is thus vivisected into two categories. One is publication of any matter which scandalises or tends to scandalise the authority of any court etc. Second, is the doing of any act whatsoever which scandalises or tends to scandalise the authority of any court etc. If an act is not a criminal contempt merely because there was no publication such act would automatically fall within the purview of the other category because the latter consists of "the doing of any other act whatsoever." The latter category is thus a

residuary category so wide enough from which no act of criminal contempt can possibly escape.

* * *

In this connection we also considered the contention of the learned counsel for the contemnor that sending such a telegram would not amount to publication. On the legal premise the contention is unacceptable. A telegraphic message can be transmitted only after the sender gives the contents of the message to the telegraph office which would invariably be manned by the staff of that office. The message after transmission reaches the destination office which also is manned by the members of the staff. From there only the message would be despatched to the sender. At all those levels the message is open to be read by at least those who are engaged in the process of transmission. . . .

In this connection a reference can be made to Gately on Libel and Slander under the Chapter "Publication." The learned author has stated the following:

"... Publication is effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated."

* * *

Now, we will consider the contention for the contemnor that it was an act done in good faith as he believed honestly that the year of birth of Dr. Justice A. S. Anand was 1934.

The expression "good faith" in criminal jurisprudence has a definite connotation. Its import is totally different from saying that the person concerned has honestly believed the truth of what is said. Good faith is defined in Section 52 of the Indian Penal Code thus:

"Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

See the language of the law in this regard. It starts in the negative tone excluding all except what is allowed to be within its amplitude. Insistence sought to be achieved through the commencing words of the definition "nothing is said to be done or believed in good faith" is that the solitary item included within the purview of the expression "good faith" is what is done with "due care and attention." Due care denotes the degree of reasonableness in the care sought to be exercised. In Black's Law Dictionary, "reasonable care" is explained as "such a degree of care, precaution, or diligence as may fairly and properly be expected or required, having regard to the nature of the action, or of the subject matter and the circumstances surrounding the transaction. It is such care as an ordinary prudent person would exercise under the conditions existing at the time he is called upon to act."

So before a person proposes to make an imputation on another the author must first make an enquiry into the factum of the imputation which he proposes to make. It is not enough that he does just a make-believe show for an enquiry. The enquiry expected of him is of such a depth as a reasonable and prudent man would make with the genuine intention in knowing the real truth of the imputation which is up in his sleeves. If he does not do so he cannot claim that what he did was bona fide.

Dealing with the expression “good faith” in relation to the exceptions enumerated under section 499 of the Indian Penal Code (relating to the offence of defamation) this Court in *Harbhajan Singh v. State of Punjab and Anr.* has stated thus:

“...There is no doubt that the mere plea that the accused believed that what he stated was true by itself, will not sustain his case of good faith under [section 52]. Simple belief or actual belief by itself is not enough. The appellant must show that the belief in his impugned statement had a rational basis and was not just a blind simple belief. That is where the element of due care and attention plays an important role.”

IN THE SUPREME COURT OF INDIA

IN RE ARUNDHATI ROY

VERSUS

UNKNOWN

AIR 2002 SC 1375

6 March 2002

G.B. Pattanaik and R.P. Sethi, JJ.

Rule of Law: Despite a bona fide and public interest motive, an accused contempt offender can still be found guilty and leniency withheld where she shows no remorse. The Court did however find little limitation on the range of defences available under the Contempt of Courts Act.

Arundhati Roy, an award-winning journalist, published articles in Outlook Magazine and in a book, which criticised judicial orders regarding construction of the Sardar Sarovar Reservoir Dam on the Narmada River in Gujarat. In response to similar protests and statements made by the petitioners in the case as well as other activists, the Court issued a warning but did not file contempt charges. Thereafter, the petitioner in the prior case, Narmada Bachao Andolan led a darhna outside the offices of the Court which prompted the respondents in that case to attack the protestors. The following day, the respondents filed a contempt complaint at the local police station, which the court ultimately did not entertain. In an averment in response, however, Ms. Roy contrasted the Court's hesitancy to hear another previous case involving government scandal with its willingness to hear the contempt proceedings, which prompted the contempt charges at issue.

Specifically the Court took cognisance of three paragraphs which it found to be evidence of prima facie contempt. In an extraordinary showing of judicial impunity, the Court summarily denied Ms. Roy's request that Justice Pattanaik recuse himself, and furthermore denied that she could plead truth as a defence, finding no facts at issue. The Court also placed little importance on Ms. Roy's lack of any "personal or improper motive." The court went on to define "scandilisation" of the court as a wrong done to the laws and judiciary rather than to an individual judge and expanded on this notion with reference to the historical approach used in *Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Another* 1974

(1) SCC 374. Finding distortion and misstatement of facts which goes beyond fair and bona fide criticism is the line at which individual free speech must be cut short, the Court held Ms. Roy guilty of contempt. Her final plea was for leniency on account of there being no injury, but the court likewise denied this argument, preferring instead to base its leniency on the author's gender.

Cases discussed and relied upon:

Discussing the ability to plead truth as a defence: *Dr. Subramanian Swamy v. Rama Krishna Hegde* 2000 (10) SCC 331; *Perspective Publications Ltd. v. State of Maharashtra* 1969 (2) SCR 779. Discussing the nature of 'scandalising the Court as a ground of contempt: *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* 1953 SCR 1169; *Queen v. Gray* (1900) 2 G.B. 36; *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* AIR 1954 SC 10; *Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Another* 1974 (1) SCC 374. Discussing the limits of fair comment: *In Re S. Mulgaokar* 1978 (3) SCC 339; *Dr. D. C. Saxena v. Hon'ble Chief Justice of India* 1996 (5) SCC 216; *Andre Paul v. Attorney General* (1936) AC 322.

Judgement of the Court delivered by Sethi, J

The law of contempt has been enacted to secure public respect and confidence in the judicial process. If such confidence is shaken or broken, the confidence of the common man in the institution of the judiciary and democratic set up is likely to be eroded which, if not checked, is sure to be disastrous for the society itself.

In this backdrop of the mandate of the rule of law, we are called upon to deal with the case of the respondent against whom suo motu contempt proceedings have been initiated by this Court. The respondent, who is stated to be an author of name and fame, has landed herself in the dock of the court, apparently by drifting away from the path on which she was traversing by contributing to art and literature. During whole of the proceeding she has not shown any repentance or remorse and persistently and consistently tried to justify her action which, prima facie, was found to be contemptuous. To frustrate the present proceedings, the respondent has resorted to all legal tactics and pretences. In view of this we have no option but to deal with the case on its merits, not being influenced by any other factor or circumstance except our commitment to protect the dignity and respect of the institution of the judiciary so that the confidence of the common man is not shaken in the institution.

... [T]he Court felt that respondent number 3 therein (Arundhati Roy) was found to have, prima facie, committed contempt as she had imputed motives to specific courts for entertaining litigation and passing orders against her. She had accused courts of harassing her as if the judiciary were carrying out a personal vendetta against her. She had brought in matters which were not only not pertinent to the issues to be decided but has drawn uninformed comparisons to make statements about this Court which do not appear to be protected by law relating to fair criticism. It was stated by her in the Court that she stood by the comments made by her even if the same are contumacious. For the reason recorded therein, the Court issued notice in the prescribed form to the respondent herein asking her to show cause as to why she should not be proceeded against for contempt for the statements in the offending three paragraphs of her affidavit, reproduced [hereinafter].

In her reply affidavit, the respondent has again reiterated what she had stated in her earlier affidavit. It is contended that as a consequence of the Supreme Court judgement the people in the Narmada Valley are likely to lose their homes, their livelihood and their histories and when they came calling on the Supreme Court, they were accused of lowering the dignity of the court which, according to her is a suggestion that the dignity of the Court and the dignity of the Indian citizens are incompatible, oppositional, adversarial things. She stated: "I believe that the people of the Narmada Valley have the constitutional right to [protest] peacefully against what they consider an unjust and unfair judgement. As for myself, I have every right to participate in any peaceful protest meeting that I choose to. Even outside the gates of the Supreme Court. As a writer I am fully entitled to put forward my views, my reasons and arguments for why I believe that the judgement in the Sardar Sarovar case is flawed and unjust and violates the human rights of Indian citizens. I have the right to use all my skills and abilities such as they are, and all the facts and figures at my disposal, to persuade people to my point of view."

[Despite Roy's claim that none of the statements were intended to show contempt, the Court found the following paragraphs as evidence of prima facie contempt:]

"On the grounds that judges of the Supreme Court were too busy, the Chief Justice of India refused to allow a sitting judge to head the judicial enquiry into the Tehelka scandal, even though it involves matters of national security and corruption in the highest places."

"Yet when it comes to an absurd, despicable, entirely unsubstantiated petition in which all the three respondents happen to be people who have publicly — though in markedly different ways — questioned the policies of the government and severely criticized a recent judgement of the Supreme Court, the Court displays a disturbing willingness to issue notice."

“It indicates a disquieting inclination on the part of the court to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm.”

Before dealing with the main case we propose to dispose of the preliminary objection ... [Roy had filed for recusal of the judges who had presided over the initial proceedings. However, the Court denied this request, first distinguishing the case from one held under section 14 of The Contempt of Courts Act (which allows the respondent to request a different judge — instead the court brought a suo moto action under Section 15 without explaining its motivation in doing so), then claiming the request for recusal was not bona fide because it had not been filed in the initial show cause. The court provided this specious reasoning as support] ... The narration of facts indicate only a frustration on the part of the contemner and such belated prayer for bench haunting is to be curbed as it would be against the administration of justice.

[The Court likewise took exception to the respondent's attempt to defer the proceedings by claiming truth as defence under *Dr. Subramanian Swamy v. Rama Krishna Hegde* 2000 (10) SCC 331 and *Perspective Publications Ltd. v. State of Maharashtra* 1969 (2) SCR 779. The court concluded that] There is no point or fact in those proceedings which requires to be defended by pleading the truth.

After referring to various judgements of this Court and courts of other countries, the learned Senior Counsel for the respondent has asserted that no proceedings for contempt can be initiated against any person on the ground of his/her allegedly scandalising the court. Much reliance is placed upon the judgement in *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* 1953 SCR 1169. [Where it] was... held that the aforesaid six members of the Bar were not actuated by any personal or improper motive and the statement made on their behalf was that their object did not intend to interfere with but to improve the administration of justice. Nevertheless it was observed that the terms used in the resolution were little removed from personal abuse and whatever might have been the motive, they were guilty of contempt... .

* * *

The High Court in its judgement had concluded that the allegations made against the judicial officers come within the category of contempt which is committed by “scandalising the court.” The learned judges observed on the authority of the pronouncement of Lord

Russell in *Queen v. Gray* (1900) 2 G.B. 36 that this class of contempt is subject to one important qualification. In the opinion of the judges of the High Court, the complaint lodged by the contemnors exceeded the bounds of fair and legitimate criticism. This Court [in *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* AIR 1954 SC 10] referred to various judgements of the English Courts and concluded:

“The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court’s administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.”

We cannot agree with the submission made on behalf of the learned counsel for the respondent that in the light of *Brahma Prakash Sharma* no contempt proceedings can be initiated against the respondent for scandalising the court. No wrong appears to have been done to any judge personally by filing the offending affidavit but the contemptuous part of the affidavit demonstrates the wrong done to the public. The respondent has tried to cast an injury to the public by creating an impression in the mind of the people of this backward country regarding the integrity, ability and fairness of the institution of the judiciary.

Similarly reliance of Shri Shanti Bhushan, Senior Advocate on *Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Another* 1974 (1) SCC 374 is of no great help to his client. After referring to the definition of criminal contempt in Section 2(c) of the Act, the Court found that the terminology used in the definition is borrowed from the English law of contempt and embodies certain concepts which are familiar to that law which, by and large, was applied in India. The expressions “scandalise”, “lowering the authority of the court”, “interference”, “obstruction” and “administration of justice” have all gone into the legal currency of our sub-continent and have to be understood in the sense in which they have been so far understood by our courts with the aid of English law, where necessary. Sub-clause (i) of the definition was held to embody the concept of scandalisation, as

discussed by Halsbury's Laws of England, 3rd Edition in Volume 8, page 7 at paragraph 9. Action of scandalising the authority of the court has been regarded as an "obstruction" of public justice whereby the authority of the court is undermined. All the three clauses of the definition were held to justify the contempt in terms of obstruction of or interference with the administration of justice. It was declared that the Act accepts what was laid down by the Privy Council and other English authorities that proceedings in contempt are always with reference to the administration of justice. . . . The object obviously is not to vindicate the judge personally but to protect the public against any undermining of their accustomed confidence in the institution of the judiciary. Scandalisation of the court was held to be a species of contempt which may take several forms. Krishna Iyer, J. while concurring with the main judgement authored by Palekar, J. observed that the dilemma of the law of contempt arises because of the constitutional need to balance two great but occasionally conflicting principles — freedom of expression and fair and fearless justice. After referring to the judgements of English, American and Canadian Courts, he observed: "...[I] would like to underscore the need to draw the lines clear enough to create confidence in the people that this ancient and inherent power, intended to preserve the faith of the public in public justice, will not be so used as to provoke public hostility as overtook the Star Chamber. A vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to public regardless of truth and public good and permits a process of *brevi manu* conviction, may unwittingly trench upon civil liberties and so the special jurisdiction and jurisprudence bearing on contempt power must be delineated with deliberation and operated with serious circumspection by the higher judicial echelons. So it is that as the palladium of our freedoms, the Supreme Court and the High Courts, must vigilantly protect free speech even against judicial umbrage — a delicate but sacred duty whose discharge demands tolerance and detachment of a high order."

According to him the considerations, as noticed in the judgement, led to the enactment of the Contempt of Courts Act, 1971 which makes some restrictive departures from the traditional law and implies some wholesome principles which serve as unspoken guidelines in this branch of law. Section 2(c) emphasises to the interference with the courts of justice or obstruction of the administration of justice or scandalising or lowering the authority of the court — not the judge. According to him, "The unique power to punish for contempt of itself inheres in a court *qua* court, in its essential role of dispenser of public justice. After referring to host of judicial pronouncements, Krishna Iyer, J., concluded:

“We may now sum up. Judges and courts have diverse duties. But functionally, historically and jurisprudentially, the value which is dear to the community and the function which deserves to be cordoned off from public molestation, is judicial. Vicious criticism of personal and administrative acts of judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the counter-vailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealous, criticism cannot be overlooked. Justice is no cloistered virtue.”

The Court in that case did not spare even a judicial officer and convicted him of the offence by awarding the punishment of paying a fine of Rs 1000 or in default to suffer imprisonment for three months.

In *In Re S. Mulgaokar* 1978 (3) SCC 339 Beg, C.J. observed that the judiciary is not immune from criticism but when that criticism is based on obvious distortion or gross misstatement and made in a manner which is designed to lower the respect of the judiciary and destroy public confidence in it, it cannot be ignored. He further declared “I do not think that we should abstain from using this weapon even when its use is needed to correct standards of behaviour in a grossly and repeatedly erring quarter.”

* * *

In *Dr. D. C. Saxena v. Hon'ble Chief Justice of India* 1996 (5) SCC 216 this Court held that if maintenance of democracy is the foundation of free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. Nobody has a right to denigrate others right of person and reputation. Bona fide criticism of any system or institution including the judiciary cannot be objected to as healthy and constructive criticism are tools for improving its function.

Relying upon some judgements of foreign courts and the cherished wishes expressed or observations made by the judges of this country it cannot be held as law that in view of the constitutional protection of freedom of speech and expression no one can be prosecuted for contempt of court on the allegation of scandalising or intending to scandalise the authority of any Court. The Act is far more comprehensive legislation which lays down the law in respect of several matters which hitherto had been the subject of judicial exposition. The legislature appears to have in mind to bring the law on the subject into line with modern trends of thinking in other countries without ignoring the ground realities and prevalent socio-economic system in India, the vast majority of whose people are poor, ignorant,

uneducated, easily liable to be misled, but who acknowledgedly have the tremendous faith in the dispensers of justice...

* * *

This Court has occasion to deal with the constitutional validity of the Act and came to the conclusion that the same was *intra vires*. If the constitutional validity of criminal contempt withstood the test on the touchstone of constitutionality in the light of the fundamental rights, it is too late to argue at this stage that no contempt proceeding can be initiated against a person on the ground of scandalising the authority of the court.

Dealing with the meaning of the word “scandalising,” this Court in [*Saxena*] held that it is an expression of scurrilous attack on the majesty of justice which is calculated to undermine the authority of the courts and public confidence in the administration of justice. The malicious or slanderous publication inculcates in the mind of the people a general disaffection and dissatisfaction on the judicial determination and indisposes in their mind to obey them. If the people’s allegiance to the law is so fundamentally shaken it is the most vital and most dangerous obstruction of justice calling for urgent action. Dealing with Section 2(c) of the Act and defining the limits of scandalising the court, it was held:

“... [A] tendency to scandalise the court or tendency to lower the authority of the court or tendency to interfere with or tendency to obstruct the administration of justice in any manner or tendency to challenge the authority or majesty of justice, would be a criminal contempt. The offending act apart, any tendency if it may lead to or tends to lower the authority of the court is a criminal contempt. Any conduct of the contemnor which has the tendency or produces a tendency to bring the judge or court into contempt or tends to lower the authority of the court would also be contempt of the court.”

* * *

The law of contempt itself envisages various exceptions as incorporated in sections 3, 4, 5, 6 and 7. Besides the aforesaid defences envisaged under the Act, the court can, in appropriate cases, consider any other defence put forth by the respondent which is not incompatible with the dignity of the court and the law of contempt. Taking a cue from the language of section 8 of the Act, learned Senior Counsel appearing for the respondent submitted that a reply submitted to a contempt notice can, in no case, amount to contempt of court in the light of second exception to Section 499 of the Indian Penal Code. Such a broad and general proposition is contrary to the law of contempt as adjudicated by the courts in the country from time to time and the limits prescribed by the Act and the judicial

pronouncements which are well within the knowledge of all reasonable citizens. It has to be always kept in mind that the law of defamation under the Penal Code cannot be equated with the law of contempt of court in general terms. . .

* * *

As already held, fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in the public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. A litigant losing in the Court would be the first to impute motives to the judges and the institution in the name of fair criticism which cannot be allowed for preserving the public faith in an important pillar of the democratic set up.

* * *

In the instant case the respondent has not claimed to be possessing any special knowledge of law and the working of the institution of the judiciary. She has only claimed to be a writer of repute. She has submitted that “as an ordinary citizen I cannot and could not have expected to make a distinction between the Registry and the Court.” It is also not denied that the respondent was directly or indirectly associated with the Narmada Bachao Andolan and was, therefore, interested in the result of the litigation. She has not claimed to have made any study regarding the working of this Court or judiciary in the country and claims to have made the offending imputations in her proclaimed right of freedom of speech and expression as a writer.

The Constitution of India has guaranteed freedom of speech and expression to every citizen as a fundamental right. While guaranteeing such freedom, it has also provided under Article 129 that 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. Similar power has been conferred on the High Courts of the States under Article 215. Under the Constitution, there is no separate guarantee of the freedom of the press and it is the same freedom of expression, which is conferred on all citizens under Article 19(1). Any expression of opinion would, therefore, be not immune from the liability for exceeding the limits, either under the law of defamation or contempt of court or the other constitutional limitations under Article

19(2). If a citizen, therefore, in the garb of exercising the right of free expression under Article 19(1), tries to scandalise the court or undermines the dignity of the court, then the court would be entitled to exercise power under Article 129 or Article 215, as the case may be. In relation to a pending proceeding before the court, while showing cause to the notices issued, when it is stated the court displays a disturbing willingness to issue notice on an absurd despicable, entirely unsubstantiated petition, it amounts to a destructive attack on the reputation and the credibility of the institution and it undermines the public confidence in the judiciary as a whole and by no stretch of the imagination, can be held to be a fair criticism of the court's proceeding. When a scurrilous attack is made in relation to a pending proceeding and the noticee states that the issuance of notice to show cause was intended to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it, is a direct attack on the institution itself, rather than the conduct of an individual judge. The meaning of the expressions used cannot come within the extended concept of fair criticism or expression of opinion, particularly to the case of the contemner in the present case, who on her own right is an acclaimed writer in English. At one point of time, we had seriously considered the speech of Lord Atkin, where the learned Judge has stated:

“The path of criticism is public way: the wrongheaded are permitted to err therein... Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.” [*Andre Paul v. Attorney General* (1936) AC 322].

* * *

... But in view of the utterances made by the contemnor in her show causes filed and not a word of remorse, till the conclusion of the hearing, it is difficult for us either to shrug off or to hold the accusations made as comments of outspoken ordinary men and permit the wrongheaded to err therein, as observed by Lord Atkin.

We are not impressed with any of the arguments of the learned counsel for the respondent which could persuade us to drop the proceedings and are of the opinion that it has to be found on facts as to whether the offending portion of the affidavit of the respondent amounts to scandalising the court and thus a criminal contempt within the meaning of section 2(c) of the Act.

In the offending portion of her affidavit, the respondent has accused the Court of proceeding with absurd, despicable and entirely unsubstantiated petition which, according to her, amounted to the Court displaying a disturbing willingness to issue notice. She has further

attributed motives to the Court of silencing criticism and muzzling dissent by harassing and intimidating those who disagree with it. Her contempt for the Court is evident from the assertion “by entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm.” In the affidavit filed in these proceedings, the respondent has reiterated what she has stated in her earlier affidavit and has not shown any repentance. She wanted to become a champion to the cause of the writers by asserting that persons like her can allege anything they desire and accuse any person or institution without any circumspection, limitation or restraint. Such an attitude shows her persistent and consistent attempt to malign the institution of the judiciary found to be most important pillar in the Indian democratic set up. It is no defence to say that as no actual damage has been done to the judiciary, the proceedings should be dropped. The well-known proposition of law is that it punishes the archer as soon as the arrow is shot no matter if it misses or hits the target. The respondent is proved to have shot the arrow, intended to damage the institution of the judiciary and thereby weaken the faith of the public in general and if such an attempt is not prevented, disastrous consequences are likely to follow resulting in the destruction of the rule of law, the expected norm of any civilised society.

* * *

... The respondent is, therefore, held guilty for the contempt of court punishable under section 12 of the Contempt of Courts Act.

As the respondent has not shown any repentance or regret or remorse, no lenient view should be taken in the matter. However, showing the magnanimity of law by keeping in mind that the respondent is a woman, and hoping that better sense and wisdom shall dawn upon the respondent in the future to serve the cause of art and literature by her creative skill and imagination, we feel that the ends of justice would be met if she is sentenced to symbolic imprisonment [for one day] besides paying a fine of Rs 2000.

IN THE SUPREME COURT OF INDIA
RAJENDRA SAIL
VERSUS
MADYA PRADESH HIGH COURT BAR ASSOCIATION AND OTHERS
 (2005) 6 SCC 109

21 April 2005

Y. K. Sabharwal and Tarun Chatterjee, JJ.

Rule of Law: Journalists may escape liability for contempt where they have issued sincere apologies for republication of critical remarks about the judiciary. However, the original speaker may still be held liable where, based on his prior experience, he should have known the comments were likely to “transgress the limits of fair and bona fide criticism and have the effect of lowering the dignity and authority of the court.” In such instances, a plea of emotional disturbance will not be persuasive.

In *Rajendra Sail*, the respondents appeal contempt convictions. On 4 July 1998 the newspaper ‘Hitavada’ published a report under the caption “Sail terms High Court decision in Niyogi murder case as rubbish”, which referred to the acquittal of one of the accused standing trial for the murder of Shankar Guha Niyogi, a trade union leader. Ravi Pandey, a trainee correspondent of the newspaper, wrote the report, which was based on a speech delivered by appellant Rajendra Sail at a rally commemorating the death of Shankar Guha Niyogi and an interview given by Rajendra Sail. The newspaper published an apology for the news report on 6 August 1998, prior to receiving a notice of contempt on 11 August 1998. Hitavada also sent letters of apology to the Chief Justice of the High Court, the concerned judges, and to the Madhya Pradesh High Court Bar Association before the notice of contempt was received. Rajendra Sail denied giving the interview and said that his speech was made under emotional disturbance. He claimed to have only expressed his personal grief and emotional trauma and prayed that the court accept his apology.

Relying on *In Re Harinai Singh and Another* (1996) 6 SCC 466, the Supreme Court accepted the apologies issued by Ravi Panedey and the newspaper and set aside the sentence previously awarded by the High Court with a warning to be more careful in the

future. In regards to Rajendra Sail, the court held that his statements did not constitute a fair and reasonable criticism of the judiciary. His speech transgressed the limits of fair and bona fide criticism and had the effect of lowering the dignity and authority of the court. The court reasoned that Rajendra Sail was not emotionally disturbed at the time he made the speech because his background as a law graduate and involvement in public life should have made him more cautious and moderate in his criticism. The court did not accept his apology; however, his sentence was reduced from six months to one week.

Cases discussed and relied upon:

Discussing the nature of contempt law generally: *Andre Paul Terence Ambard v. Attorney-General* AIR 1936 PC 141; *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* AIR 1954 SC 10; *In re S. Mulgaokar* (1978) 3 SCC 339; *P. N. Duda v. P. Shiv Shanker and Others* (1988) 3 SCC 167; *Re Ajay Kumar Pandey* (1996) 6 SCC 510; *J. R. Parashar, Advocate and Others v. Prasant Bhushan, Advocate and Others* (2001) 6 SCC 735; *S. Abdul Karim, Appellant v. M. K. Prakash and Others* (1976) 1 SCC 975; *Perspective Publications Pvt. Ltd. and Another v. The State of Maharashtra* AIR 1971 SC 221; *Aswini Kumar Ghose and Another v. Arabinda Bose and Another* AIR 1953 SC 75. Recognising the importance of unconditional apologies: *In Re Harijai Singh and Another* (1996) 6 SCC 466. Discussing the nature of 'scandalisation' as a ground for contempt: *Dr. D. C. Saxena v. Hon'ble Chief Justice of India* (1996) 5 SCC 216; *Shri C. K. Daphtary and Others v. Shri O. P. Gupta and Others* (1971) 1 SCC 626; *R. C. Cooper v. Union of India* (1970) 2 SCC 298. Discussing the limits of fair comment: *Re. Roshan Lal Ahuja* 1993 Supp. (4) SCC 446; *In re Arundhati Roy* (2002) 3 SCC 343. Establishing the standard of proof involved in contempt proceedings: *M. R. Parashar and Others v. Dr. Farooq Abdullah and Others* (1984) 2 SCC 343; *Mrityunjoy Das and Another v. Sayed Hasibur Rahaman and Others* (2001) 3 SCC 739; *In re Bramblevale Ltd.* (1969) 3 All ER 1062; *Chhotu Ram v. Urvashi Gulati and Another* (2001) 7 SCC 530; *Anil Ratan Sarkar v. Hiran Ghosh* (2002) 4 SCC 21; *Radha Mohan Lal v. Rajasthan High Court* (2003) 3 SCC 427; *Bijay Kumar Mahanty v. Jadu Alias Ram Chandra Sahoo* AIR 2003 SC 657.

Judgement of the Court delivered by Sabharwal, J

In answer to contempt, while tendering unconditional and unqualified apologies, the stand of the editor and printer and publisher of the newspaper before the High Court was that the news report was published on account of oversight and they were unaware of the publication. It was further stated that even before receipt of notice for contempt, on their own, they published an unconditional apology in the newspaper on the front page on 6

August 1998. The letters of apology were also sent to the Chief Justice and the concerned judges of the High Court as well as to the Madhya Pradesh High Court Bar Association.

* * *

Rajendra Sail denied that he gave any interview to the correspondent and alleged that the news report was false, prejudiced and intended to malign his image in the eyes of judiciary and public. It was further stated that he was not satisfied with the judgement of the High Court in Niyogi murder case and had only made a bona fide analysis of the judgement without bringing into disrepute the judiciary in general and the judges in particular. It was claimed that he expressed only his personal grief and emotional trauma that arose out of the murder of Shankar Guha Niyogi, who was his close associate and that he was also a key prosecution witness in the murder trial. He further took the stand that he is ready to tender an apology, if his plea does not satisfy the court.

* * *

The principles relating to the law of contempt are well settled. It has been repeatedly held that the rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. The confidence, which the people repose in the courts of justice, cannot be allowed to be tarnished, diminished or wiped out by contemptuous behaviour of any person. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded. It is for this purpose that the courts are entrusted with extraordinary powers of punishing for contempt of court, those who indulge in acts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalising it. When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice.

The law as it stands today is same as has been aptly put by Lord Atkin in *Andre Paul Terence Ambard v. Attorney-General* AIR 1936 PC 141:

“No wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat

of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.”

In *Aswini Kumar Ghose and Another v. Arabinda Bose and Another* AIR 1953 SC 75 it was held that the Supreme Court is never over-sensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

In *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh* AIR 1954 SC 10 it was held that, if the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court’s administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.

In *Perspective Publications Pvt. Ltd. and Another v. The State of Maharashtra* AIR 1971 SC 221, a bench of three judges after referring to the leading cases on the subject held that:

- (1) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

- (2) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because “justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”
- (3) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt. Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. The publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court’s administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

In *Shri C. K. Daphtary and Others v. Shri O. P. Gupta and Others* (1971) 1 SCC 626 it was said that, a scurrilous attack on a judge in respect of a judgement or past conduct has an adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the judiciary. If confidence in the judiciary goes, the due administration of justice definitely suffers. There can be no justification of contempt of court. In *R. C. Cooper v. Union of India* (1970) 2 SCC 298 giving a word of caution to those who embark on the path of criticising the judgement of the Court, it was said:

“There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgement of the judges. They do not think themselves in possession of all truth or hold that whenever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others. . . . We are constrained to say also that while fair and temperate criticism of this Court or any other court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of courts is serious contempt of which notice must and will be taken. . . .”

In *In re S. Mulgaokar* (1978) 3 SCC 339 a three judge bench held, the judiciary is not immune from criticism but when that criticism is based on obvious distortion or gross misstatement and made in a manner which is designed to lower the respect of the judiciary and destroy public confidence in it, it cannot be ignored.

In *P. N. Duda v. P. Shiv Shanker and Others* (1988) 3 SCC 167 it has been held that administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office i.e. to defend and uphold the Constitution and the laws without fear and favour. Any criticism about the judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of the judges and brings administration of justice to ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgements can be criticised, motives to the judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market place of ideas criticism about the judicial system or judges should be welcome so long as such criticism does not impair or hamper the administration of justice. In a democracy judges and courts alike are, therefore, subject to criticism and if reasonable argument or criticism in respectful language and tempered with moderation is offered against any judicial act as contrary to law or public good, no court would treat criticism as a contempt of court.

In *Re. Roshan Lal Ahuja* 1993 Supp. (4) SCC 446, a three judge bench held, judgements of the court are open to criticism. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgements. Fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language don't attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of the judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bester themselves to uphold their dignity and the majesty of law. No litigant can be permitted to overstep the limits of fair, bona fide and reasonable criticism of a judgement and bring the courts generally in disrepute or attribute motives to the judges rendering the judgement... Liberty of free expression is not to be confused with a license to make unfounded, unwarranted and irresponsible aspersions against the judges or the courts in relation to judicial matters. No system of justice can tolerate such

an unbridled license. Of course “justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”, but the members of the public have to abstain from imputing improper motives to those taking part in the administration of justice and exercise their right of free criticism without malice or in any way attempting to impair to administration of justice and refrain from making any comment which tends to scandalise the court in relation to judicial matters... In *Re Ajay Kumar Pandey* (1996) 6 SCC 510, it has been held, any threat of filing a complaint against the judge in respect of the judicial proceedings conducted by him in his own court is a positive attempt to interfere with the due course of administration of justice. In order that the judges may fearlessly and independently act in the discharge of their judicial functions, it is necessary that they should have full liberty to act within the sphere of their activity. If, however, litigants and their counsel start threatening the judge or launch prosecution against him for what he has honestly and bona fide done in his court, the judicial independence would vanish eroding the very edifice on which the institution of justice stands.

In *Dr. D. C. Saxena v. Hon'ble Chief Justice of India* (1996) 5 SCC 216 the Court while dealing with the meaning of the word ‘scandalising,’ held that it is an expression of scurrilous attack on the majesty of justice which is calculated to undermine the authority of the courts and public confidence in the administration of justice. The malicious or slanderous publication inculcates in the mind of the people a general disaffection and dissatisfaction on the judicial determination and indisposes their mind to obey them. If the people’s allegiance to the law is so fundamentally shaken it is the most vital and most dangerous obstruction of justice calling for urgent action. The court further held that, “scandalising the court, therefore, would mean hostile criticism of judges as judges or the judiciary. Any personal attack upon a judge in connection with the office he holds is dealt with under law of libel or slander. Yet defamatory publication concerning the judge as a judge brings the court or judges into contempt, a serious impediment to justice and an inroad on the majesty of justice. Any caricature of a judge calculated to lower the dignity of the court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice. It would, therefore, be scandalising the judge as a judge. In other words, imputing partiality, corruption, bias, improper motives to a judge is scandalisation of the court and would be contempt of the court. Even imputation of lack of impartiality or fairness to a judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the contemnor challenges the authority of the

court, he interferes with the performance of duties of judge's office or judicial process or administration of justice or generation or production of tendency bringing the judge or judiciary into contempt.

In *J. R. Parashar, Advocate and Others v. Prasant Bhushan, Advocate and Others* (2001) 6 SCC 735 the court has observed:

“To ascribe motives to a judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole and nothing is more pernicious in its consequences than to prejudice the mind of the public against judges of the court who are responsible for implementing the law. Judges do not defend their decisions in public and if citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticised by anyone who thinks that it is erroneous.”

In *re Arundhati Roy* (2002) 3 SCC 343 the Court held, fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. The litigant losing in the court would be the first to impute motives to the judges and the institution in the name of fair criticism, which cannot be allowed for preserving the public faith in an important pillar of democratic set-up.

A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. The court has to act with great circumspection. It is only when a clear case of contemptuous conduct not explainable otherwise, arises that the contemnor must be punished.

In *S. Abdul Karim, Appellant v. M. K. Prakash and Others* (1976) 1 SCC 975 a three judge bench held, the broad test to determine whether there is contempt of court or not, is to see whether the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required for establishing a charge of 'criminal contempt' is the same as in any other criminal proceeding. Even if it could be urged that mens rea as such, is not an indispensable ingredient of the offence of contempt, the courts are loath to punish a contemnor, if the act or omission complained of, was not willful.

In *M. R. Parashar and Others v. Dr. Farooq Abdullah and Others* (1984) 2 SCC 343 a contempt petition was filed against the Chief Minister of Jammu and Kashmir for making certain contemptuous statements against the judiciary and the editor and the correspondent of a newspaper in which those statements were published. The Chief Minister denied to have made the statements, as the editor asserted that the reports of the speeches published in his newspaper are true. The court held that in the absence of any preponderant circumstances which, objectively, compel the acceptance of the word of one in preference to the word of the other, it was unable to record a positive finding that the allegation that the Chief Minister made the particular statements is proved beyond a reasonable doubt.

In *Mrityunjay Das and Another v. Sayed Hasibur Rahaman and Others* (2001) 3 SCC 739 the Court held that a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of the Contempt of Courts Act is quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt. The Court quoted with approval the following observations of Lord Denning in *re Bramblevale Ltd.* (1969) 3 All ER 1062:

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.... Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.”

This legal position has been reiterated in the subsequent line of cases namely, *Chhotu Ram v. Urvashi Gulati and Another* (2001) 7 SCC 530; *Anil Ratan Sarkar v. Hiral Ghosh* (2002) 4 SCC 21; *Radha Mohan Lal v. Rajasthan High Court* (2003) 3 SCC 427; *Bijay Kumar Mahanty v. Jadu Alias Ram Chandra Sahoo* AIR 2003 SC 657.

With this factual and legal background, we would consider the submissions made in support of these appeals.

The learned counsel appearing for the editor, printer and publisher and the chief sub-editor has very candidly not made any attempt to justify the actions of the newspaper in publishing the news report. Learned counsel has only argued for acceptance of the apology. Learned counsel submits that the appellants tendered an apology on 6 August 1998 by publishing it prominently in the front page of Hitavada, even before the receipt of notice

of initiation of contempt action. It was pointed out that the notice of contempt though issued on 13 June 1998 was received only on 11 August 1998. The letters of apology were sent to the Chief Justice of the High Court and to the concerned judges as well as to the Madhya Pradesh High Court Bar Association before receipt of contempt notice. Counsel further submits that the act of the newspaper functionaries of having immediately tendered the apology admitting their mistake shows that there was no intention to scandalise the judiciary but it was case of genuine error on their part.

The reach of media in present times of 24-hour channels is to almost every nook and corner of the world. Further, large numbers of people believe as correct that which appears in the media, print or electronic. It is also necessary to always bear in mind that the judiciary is the last resort of redressal for resolution of disputes between State and subject. The confidence of people in the institute of the judiciary is to be preserved at any cost. That is its main asset. Loss of confidence in the institution of the judiciary would be the end of the rule of law. Therefore, any act which has such tendency deserves to be firmly curbed. For the rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected. The judgements of courts are public documents and can be commented upon, analysed and criticised, but it has to be in a dignified manner without attributing motives. Before placing before the public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has, then resist every temptation to make it public. In every case, it would be no answer to plead that the publisher, editor or anyone else concerned did not know or it was done in haste. Some mechanism may have to be devised to check the publication which has the tendency to undermine the institution of judiciary. . . .

* * *

[The court briefly considers self-regulation, but finds that it has not been very successful in the United Kingdom.]

The only aspect, we wish to emphasis is that the present matter reinforces the need to ensure that the right of freedom of the media is exercised responsibly. It is for media itself and others concerned to consider as how to achieve it. Regarding an institution like the judiciary which cannot go public, media can consider having an internal mechanism to prevent these types of publications. There can be an efficient and stringent mechanism to scrutinise the news reports pertaining to such institutions which because of the nature of their office cannot reply to publications which have tendency to bring disrespect and

disrepute to those institutions. As already noted such publications are likely to be believed as true. Such a mechanism can be the answer to pleas like the one in the present case by the editor, printer and publisher and correspondent that either they did not know or it was done in a hurry and similar pleas and defences.

The power and reach of the media, both print as well as electronic is tremendous. It has to be exercised in the interest of the public good. A free press is one very important pillar on which the foundation of the rule of Law and democracy rests. At the same time, it is also necessary that freedom must be exercised with utmost responsibility. It must not be abused. It should not be treated as a license to denigrate other institutions. Sensationalism is not unknown. Any attempt to make news out of nothing just for the sake of sensitisation has to be deprecated. When there is temptation to sensationalise particularly at the expense of those institutions or persons who form the nature of the office cannot reply, such temptation has to be resisted and if not it would be the task of the law to give clear guidance as to what is and what is not permitted. While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgement of a court for public good or report any such statements; it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalise the court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. It should be kept in mind that judges do not defend their decisions in public and if citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticised by anyone who thinks that it is erroneous. This Court on an earlier occasion in *Re Harijai Singh and Another* (1996) 6 SCC 466 held the editor, printer and publisher and reporter guilty of publishing a false report against a senior judge of the Supreme Court. The Court expressed its displeasure at the irresponsible conduct and attitude on the part of the editor, publisher and the reporter who failed to make reasonable enquiry or a simple verification of the alleged statement. The Court held that this cannot be regarded as a public service, but a disservice to the public by misguiding them with false news. However, the Court accepted the unconditional apology tendered by the editor, printer and publisher and reporter with a warning that they should be careful in future.

[Because of their deference to the court and their sincere apologies the other journalists' orders were set aside.]

Learned counsel appearing for the appellant, Rajendra Sail also submits that the apology tendered by his client too deserves to be accepted. He submits that the statements made by Rajendra Sail should be understood in the context in which the same were made. The context pointed out is that Rajendra Sail was a close associate of Mr. Shankar Guha Niyogi, who was murdered and he was a key prosecution witness in the murder trial; he was emotionally disturbed because of the judgement of the High Court; the news report was intended to malign his image and he had lodged a complaint against this with the Press Council of India. Learned counsel further submits that Rajendra Sail neither made statements nor gave the interview attributed to him and that the conclusions reached by the High Court that he did not deny having termed the decision of the High Court as rubbish is not sustainable. Learned counsel further contends that the charge that was communicated to the appellant was only about the contents of the news report and the contemptuous statements extracted in the judgement of the High Court were not part of the news report. The audio and video recordings on which conclusions of the High Court are based were never put to him, the same were not part of the record and no opportunity was granted to rebut the contents of the audio and video recording and, therefore, the contents thereof cannot be taken as proof of the statements contained in the news report. The appellant tendered an unconditional apology during the course of the arguments and urged for its acceptance.

The counsel appearing for the Madhya Pradesh High Court Bar Association, supporting the impugned judgement, submits that having regard to the nature of the scandalous statements that were made, it is not a case where the apology should be accepted.

The issue as to whether the alleged statements amount to contempt or not does not present any difficulty in the present case. If the conclusions reached by the High Court are correct, there can be little doubt that it is serious case of scandalising the Court and not a case of fair criticism of a judgement. Undoubtedly, judgements are open to criticism. No criticism of a judgement, however vigorous, can amount to contempt of court, provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable criticism of a judgement which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgement is incorrect or an error has been committed both with regard to law or established facts.

It is one thing to say that a judgement on the facts as disclosed is not in consonance with evidence or the law has not been correctly applied. But when it is said that the judge

had a pre-disposition to acquit the accused because he had already resolved to acquit them or has a bias or has been bribed or attributing such motives, lack of dispassionate and objective approach and analysis and prejudging of the issues, the comments that a judge about to retire is available for sale, that an enquiry will be conducted as regards the conduct of the judge who delivered the judgement as he is to retire within a month and a wild allegation that the judiciary has no guts, no honesty and is not powerful enough to punish wealthy people would bring the administration of justice into ridicule and disrepute. The speech that the judgement is rubbish and deserves to be thrown in a dustbin cannot be said to be a fair criticism of a judgement. These comments have transgressed the limits of fair and bona fide criticism and have a clear tendency to affect the dignity and prestige of the judiciary. It has a tendency to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge and to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, it is also likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public reposes in the courts of law as courts of justice, the criticism would cease to be fair and reasonable criticism but would scandalise courts and substantially interfere with administration of justice.

Having perused the record, we are unable to accept the contention urged on behalf of Mr. Rajendra Sail that on facts the conclusions arrived at by the High Court are not sustainable. Once this conclusion is reached, clearly the publication amounts to a gross contempt of court. It has a serious tendency to undermine the confidence of the society in the administration... Whether Rajendra Sail gave the interview to the correspondent or not, the speech itself, seen in the light of the audio and video recording of the speech and the transcript of the speech speaks for itself and has the effect of lowering the dignity and authority of the court and is an affront to the majesty of justice.

... Having regard to the aforesaid facts of the case, the High Court has refused to accept the apology tendered by Rajendra Sail. The contention that statements should be understood in the context in which they have been made as he was emotionally disturbed because of the judgement of the High Court cannot be accepted. It is borne out from the record that Rajendra Sail is a law graduate and has been in the public life for considerable time and

has in fact approached the court on several occasions by filing public interest litigations in different matters. With this background, he should have been cautious and moderate and should have known the limits up to which he could go while criticising the judgement of the High Court. The contemptuous statements cannot be regarded as an ill-tempered or emotional outburst of an uninformed person. Having given the serious and anxious consideration to the facts of the case and submissions made, we feel that the acceptance of apology and sympathy in a case like this would be uncalled for.

The sentence awarded to Rajendra Sail by the High Court having regard to nature of contempt cannot be said to be unjustified. But having regard to his background and the organisation to which he belongs which, it is claimed, brought before various courts including this court many public interest litigation for the general public good, we feel that the ends of justice would be met if the sentence of six month is reduced to a sentence of one week simple imprisonment. We order accordingly.

THE RESPONSIBILITY OF FREEDOM*

Justice Ajit Prakash Shah

Oscar Wilde remarked on the influence of the press when he wrote:

“In old days men had the rack. Now they have the press. That is an improvement certainly. But still it is very bad, and wrong, and demoralising. Somebody called journalism the fourth estate. That was true at the time, no doubt. But at the present moment it really is the only estate. It has eaten up the other three. The Lords Temporal say nothing, the Lords Spiritual have nothing to say, and the House of Commons has nothing to say and says it. We are dominated by journalism.”

With the arrival of radio and television in the following century, the influence of the media has grown to an extent that would have surprised Wilde.

Freedom of the press is not specifically guaranteed as a fundamental right in the Indian Constitution. In a series of decisions from 1950 onwards, the Supreme Court has ruled that freedom of the press is implicit in the guarantee of freedom of speech and expression.

The Constitution of India does not recognise any hierarchy of rights. There are, however, dicta of the Supreme Court describing this freedom as the ‘ark of the covenant of democracy,’ “the most precious of all the freedoms guaranteed by our Constitution.”

In *Indian Express Newspapers (Bombay) Pvt. Ltd. and Others. v. Union of India and Others* (1985) 1 SCC 641, Justice Venkataramiah, speaking for the Court, gave a heartening assurance that “as long as this Court sits, newspapermen need not have the fear of their freedom being curtailed by unconstitutional means.”

In India, today more and more time in the newscasts on radio and television and more space in the daily newspaper is devoted to judicial proceedings, especially criminal cases, since by their very nature, they have sensation value, and other cases which in the opinion of the press will catch public interest. There is increasing and intense public focus on courts and the cases filed in them. Indians avidly devour this information, since they are curious about what happens in court. Now that the courts have come under the media’s microscope, they are likely to remain there forever. As with most changes, both positive and negative consequences have flowed from this. A positive by-product of changes

* Presentation of Justice AP Shah at the HRLN’s “Media & the Law” conference held in New Delhi on April 3-4, 2010

spurred by the media and addressed by the courts is that more Indians are aware of their constitutional rights than ever before.

One critical area, which has proved to be the source of continuous friction between the judiciary and the media, is contempt laws.

Judges are not immune from criticism either in respect of their judicial conduct or their conduct in a purely private capacity. Criticism of a judgement, howsoever vigorous or pungent, does not amount to contempt of court because justice is not a cloistered virtue, and fair criticism against any judicial decision would be in the public good, as it would enlighten not only the public, but also the judges themselves. However, it is an altogether different matter to impute motives to the judges who have delivered the judgement, to accuse them of dishonesty or having been swayed by extraneous considerations.

The Supreme Court, however, laid down a law that truth is no defence to a contempt action. This was perceived in many circles as an anomaly, especially in a democratic country like India whose motto is “satya meva jayate” (truth shall prevail).

There were repeated calls for reform of the law of contempt in this regard. The Parliament has responded and by the Contempt of Courts (Amendment) Bill, 2006, it is inter alia provided that “the court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.”

However, according to media, there has been a great deal of uncertainty in the application of contempt jurisdiction. As a result, the media is often left guessing whether or not some report or comment would be regarded as contempt.

* * *

I may also refer to the *Wah India* case, which demonstrates the need for greater journalistic responsibility in the exercise of freedom of expression, which could in turn strengthen the case for curtailing the invocation of criminal contempt. The publishers of *Wah India* published on their website, the results of a purported survey grading the judges of the Delhi High Court. Each of the judges (whose photographs were also published) were graded in a five-column table rating them on criteria including their personal integrity, understanding of law and quality of judgements delivered. The publishers claimed that the grades were based on a survey where 50 senior members of the Delhi Bar were consulted.

The publication caused a scandal and the Delhi High Court promptly passed an order summarily directing the confiscation of all the unsold copies of the news magazine, banned its circulation and ordered the media not to publish anything that would lower the authority, dignity and prestige of the judiciary (the next day the Court lifted the ban on the reporting of the contempt proceedings and directed that the reporting must be fair and accurate).

It is rather unfortunate that those responsible for the publication did not know the implications of such a publication that attacked the integrity of individual judges, without material to back the allegations. Yet, the publishers achieved their purpose — to create sensation and increase the profit and possibly the readership of their publications. The *Wah India* case does no credit to the case for journalistic freedom. If the media demands greater freedom to criticise the administration of justice, there is also a corresponding duty on the media to report with a much greater degree of responsibility.

* * *

The other area of friction between the judiciary and the press is the rule of sub-judice.

Trial by the media has created a problem because it involves a tug of war between two conflicting principles — free press and free trial, in both of which the public are vitally interested. The right to fair trial, namely, a trial uninfluenced by extraneous pressures is recognised as a basic tenet of justice in India. A journalist may thus be liable for contempt of court if he publishes anything which might prejudice a “fair trial” or anything which impairs the impartiality of the court to decide a cause on its merits, whether the proceedings before the court be a criminal or a civil proceeding.

However, there is an urgent need to liberalise the sub-judice rule, invoking it only in cases of an obvious intent to influence the trial and not to any act that might have the remote possibility of influencing it. A greater latitude needs also to be allowed on issues of obvious public interest and which are being debated in the public and the political realm.

Gag orders are infrequently issued by Indian courts. In the case of *Reliance Petrochemicals Ltd.*, the Supreme Court, by an interim order, restrained the newspaper from publishing any article questioning the validity of the debentures issued by the company when the matter was sub-judice, because in its view the publication would clearly and obviously prejudice or tend to prejudice the fate of the debenture issue and affect the course of the pending proceedings. The Court, however, declined to continue the gag order any further because

the debenture issue was over-subscribed and in view of the Court, a “preventive remedy in the form of an injunction is no longer necessary.”

Recently, the Supreme Court directed that “electronic and print media” would not publish or display the unauthorised and illegally recorded telephone tapped versions of any person till the matter is further heard and guidelines are issued by the Supreme Court.

* * *

I may conclude with the observation of one of the finest judges of our times, Justice H. R. Khanna. He said that the freedom of the press and the independence of the judiciary are two of the most important indices of democracy in a country. It is essential to preserve both. Pliable press and subservient judiciary are the first step in the process of extinguishment of democratic lights. It is essential that these two institutions should understand each other and appreciate the complementary role which each of them has to play in the preservation of democratic values. It is also essential that points of conflict between the two should, as far as possible, be avoided.

*Justice Ajit Prakash Shah is a former Chief Justice
of the Delhi High Court*

CHAPTER FOUR
DEFAMATION

Defamation is the publication of words, either spoken or written, which have the effect of lowering an individual in the estimation of others or to expose him or her to hatred, contempt or ridicule. The law in this regard is intended to protect the reputation of individuals or groups, as opposed to public entities.

In India, defamation exists as both a civil action and a criminal offence. While significant overlap exists, it is important to be aware of the rules and principles which guide a particular charge or allegation. The judgement in *R. Rajagopal and Another v. State of Tamil Nadu and Others* JT 1994 (6) SC 514, enunciates six principles applicable to a civil claim of defamation that focus on the relationship between, on the one hand, the right to freedom of expression, and on the other, protection from defamatory statements and the right to privacy. The right to privacy has been identified by the courts as falling within the shadow of Article 21 of the Constitution, although it is not explicitly mentioned there. The decision of *Rajagopal* attempts to give effect to both values by stating that information regarding the private lives of private individuals cannot be published, while at the same time allowing greater freedoms to journalists and others in regard to public officials. Most notably, the decision provides that public officials ought to have a lower expectation of what can be published about them and that this may extend to statements that are false, but which have been made in good faith and where due care has been taken.

The protection offered to journalists and others by allowing them to publish information which is honestly believed and well researched, but which is in fact false, is significant in that it allows the media to pursue a matter that may well be true, but that they might not have otherwise published for fear of being mistaken or an inability to prove its truth.

Defamation as a criminal offence is provided by section 499 of the Indian Penal Code. This section is lengthy but descriptive as to what constitutes an offence and the available exceptions. Despite being descriptive, there are several issues which accused journalists should be aware of when faced with a charge under this law. First, truth is not a total defence. Amazingly, the fact that a defamatory statement may be demonstratively true does not save it from prosecution for defamation under the criminal law. Rather, the statement must not only be true, but its publication must also be in the public interest. This is troublesome because it allows a government to prosecute an individual even in circumstances where they are telling the truth. This caveat is apparently intended to protect the privacy rights of the plaintiff as a private citizen. Conversely, the presence of a public element to any statement, normally in the form of it being of the public interest or relating to public officials in their public lives, is notable throughout the exceptions to section 499.

Another critical difference between civil and criminal defamation is that the punishment for criminal defamation, provided by section 500, presents the risk of imprisonment, which is not present in a civil action. However, it should be noted that the damages arising from a civil action are likely to be much higher than a fine from a criminal conviction.

The topic of remedies for defamation gives rise to another fact that journalists and their advocates should be aware of. This is that generally, the courts are unwilling to grant injunctions that would prevent the publication of potentially defamatory material. Applications for an injunction must balance the plaintiff's ability to nullify any potential future threat against the defendant's right to freedom of expression and to publish material on the possibility that it may well fall within the boundaries of what is lawful. Fearful of accusations of pre-publication censorship, the courts prefer to settle such potential and hypothetical defamation claims after publication has occurred. Thus, in a situation where the plaintiff applies for an injunction and the accused indicates that, should the matter go to trial, they would plead truth or honest opinion, damages (rather than an injunction) is the appropriate remedy and the matter should be approached after publication has occurred. Essentially, the courts have recognised that the potential evil of withholding valuable information from the public is greater than the potential harm caused to a single reputation. Moreover, in deciding matters such as this, the court is unlikely to assess the veracity of the defendant's claim of truth until actual, measurable damage has occurred.

What is perhaps the most troublesome aspect of India's law in this area, and what is particularly important for our purposes, is that the law does not attach any special significance to the rights of journalists above the rights of ordinary citizens. This recognition exists elsewhere and indeed, in many of the jurisdictions which are often cited by the Indian courts. This, coupled with the continued existence of defamation within the criminal law (an anachronism of colonial repression) mean that this area of the law presents a real obstacle to the advancement of India's media.

INDIAN PENAL CODE, 1860

Section 52: Good faith

Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.

Section 499: Defamation

Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1 — 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 or 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 caste or 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.

Illustrations:

- (a) A says “Z is an honest man; he never stole B’s watch”; intending to cause it to be believed that Z did steal B’s watch. This is defamation, unless it falls within one of the exceptions.
- (b) A is asked who stole B’s watch. A points to Z, intending to cause it to be believed that Z stole B’s watch. This is defamation, unless it falls within one of the exceptions.
- (c) A draws a picture of Z running away with B’s watch, intending it to be believed that Z stole B’s watch. This is defamation, unless it falls within one of the exceptions.

First Exception — It is not defamation to impute anything which is true concerning any person, if it 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 — It is not defamation to express in a 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 — It is not 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.

Illustration — It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception — It is not defamation to publish a substantially true report of the proceedings of a court of justice, or of the result of any such proceedings.

Explanation — A Justice of the Peace or other officer holding an inquiry in open court preliminary to a trial in a court of justice, is a court within the meaning of the above section.

Fifth Exception — It is not defamation to express in good faith any opinion whatever 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.

Illustrations:

- (a) A says "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, in as much as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.
- (b) But if A says "I do not believe what Z asserted at that trial because I know him to be a man without veracity." A is not within this exception, in as much as the opinion which

he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

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

Explanation — A performance may be submitted to the judgement of the public expressly or by acts on the part of the author which imply such submission to the judgement of the public.

Illustrations:

- (a) A person who publishes a book, submits that book to the judgement of the public.
- (b) A person who makes a speech in public, submits that speech to the judgement of the public.
- (c) An actor or singer who appears on a public stage, submits his acting or singing to the judgement of the public.
- (d) A says of a book published by Z "Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within the exception, if he says this in good faith, in as much as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.
- (e) But if A says "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, in as much as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

* * *

Ninth Exception — 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.

Illustrations:

- (a) A, a shopkeeper, says to B, who manages his business "sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

- (b) A, a Magistrate, in making a report of his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception — 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.

Section 500: Punishment for defamation

Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

CONSTITUTION OF INDIA, 1949

Article 21: Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law.

IN THE SUPREME COURT OF INDIA

SEWAKRAM SOBHANI

VERSUS

R. K. KARANJIA

1981 AIR 1514, 1981 SCR (3) 627

1 May 1981

A. P. Sen, O. Chinnappa Reddy and B. Islam, JJ.

Rule of Law: For the exceptions relating to defamation, notions of 'good faith' and the 'public good' are questions of fact to be assessed in each circumstance. The burden of proof is on the person seeking to claim they fall within an exception. There is some suggestion also, that journalists do not enjoy any kind of special privilege in this area.

This appeal concerned a High Court judge's decision to quash a prosecution relating to a publication that was alleged to be defamatory. The article claimed that the complainant had impregnated another man's wife while they had been imprisoned together. The publication occurred on the back of a government report into the matter. In quashing the prosecution, the High Court judge held that the matter fell squarely within the Ninth Exception of section 499 of the Indian Penal Code (imputations made in good faith for the protection of his or other's interests).

The majority judgement allowed the appeal saying that the prosecution should have continued. In doing so, it outlined the nature of the 'good faith' and 'public good' within the Ninth (and other) Exceptions. The majority held that these must be assessed in the circumstances and gave a list of some considerations. It was held that the High Court had not undertaken this assessment properly.

In his judgement, Justice Sen also held that journalists do not enjoy any kind of special privilege and have no greater freedom than normal citizens to make imputations or allegations. Justice Sen followed the case of *Arnold v. King Emperor* LR (1913-14) 41 Ind. App. 149, holding that the freedoms of journalists are an ordinary part of the freedoms of all citizens. The media will be assessed in the same way and to the same standard when considering the Exceptions to section 499.

Justice Islam offered a dissenting judgement, holding that by following the report, the case was within the Ninth Exception. He argued that the fact that the definition of 'good faith' is expressed in the negative means that it is a lack of good faith which has to be shown, and that accordingly, the burden should lie with the prosecution.

Cases discussed and relied upon:

Establishing that whether the Ninth Exception is made out is a question of fact to be assessed in the circumstances: *Harbhajan Singh v. State of Punjab* [1965] 3 SCR 232; *Chaman Lal v. The State of Punjab* [1970] 3 SCR 913; *Sukro Mahto v. Basdeo Kumar Mahto and Another* [1971] Supp. SCR 329; *Dr. N. B. Khare v. M. R. Masani and Others* ILR 1943 Nag 347. Arguing that journalists do not enjoy a privileged position: *Arnold v. King Emperor* LR (1913-14) 41 Ind. App. 149.

Judgement of Chinnappa Reddy, J

... The position now is this: The news item in the 'Blitz' under the caption 'MISA Rape in Bhopal Jail' undoubtedly contained serious imputations against the character and conduct of the complainant. In order to attract the Ninth Exception to section 499 of the Indian Penal Code, the imputations must be shown to have been made (1) in good faith, and (2) for the protection of the person making it or of any other person or for the public good. 'Good faith' is defined, in a negative fashion, by section 52 of the Indian Penal Code as follows: "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." The insistence is upon the exercise of due care and attention. Recklessness and negligence are ruled out by the very nature of the definition. The standard of care and attention must depend on the circumstances of the individual case, the nature of the imputation, the need and the opportunity for verification, the situation and context in which the imputation was made, the position of the person making the imputation, and a variety of other factors. Good faith, therefore is a matter for evidence. It is a question of fact to be decided on the particular facts and circumstances of each case. So too the question whether an imputation was made for the public good. In fact the First Exception of section 499 expressly states "whether or not it is for the public good is a question of fact." "Public good" like 'good faith' is a matter for evidence and not conjecture.

In *Harbhajan Singh v. State of Punjab* [1965] 3 SCR 232, this Court observed (at page 244):

"Thus, it would be clear that in deciding whether an accused person acted in good faith under the Ninth Exception, it is not possible to lay down any rigid rule or test. It would be a question to be considered on the facts and circumstances of each case...what is the nature of the imputation made; under what circumstances did it

come to be made; what is the status of the person who makes the imputation; was there any malice in his mind when he made the said imputation; did he make any enquiry before he made it; are there reasons to accept his story that he acted with due care and attention and was satisfied that the imputation was true? These and other considerations would be relevant in deciding the plea of good faith made by an accused person who claims the benefit of the Ninth Exception.”

Again in *Chaman Lal v. The State of Punjab* [1970] 3 SCR 913 this Court said (at page 916):

“In order to establish good faith and bona fide it has to be seen first the circumstance under which the letter was written or words were uttered; secondly, whether there was any malice; thirdly, whether the appellant made any enquiry before he made the allegations; fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the appellant acted in good faith.”

Later the Court said (at page 918):

“Good faith requires care and caution and prudence in the background of context and circumstances. The position of the person making the imputation will regulate the standard of the person making the imputation, which will regulate the standard of care and caution.”

Several questions arise for consideration if the Ninth Exception is to be applied to the facts of the present case. Was the Article published after exercising due care and attention? Did the author of the article satisfy himself that there were reasonable grounds to believe that the imputations made by him were true? Did he act with reasonable care and a sense of responsibility and propriety? Was the article based entirely on the report of the Deputy Secretary or was there any other material before the author? What steps did the author take to satisfy himself about the authenticity of the report and its contents? Were the imputations made rashly without any attempt at verification? Was the imputation the result of any personal ill will or malice which the author bore towards the complainant? Was it the result of any ill will or malice which the author bore towards the political group to which the complainant belonged? Was the article merely intended to malign and scandalise the complainant or the party to which he belonged? Was the article intended to expose the rottenness of a jail administration which permitted free sexual approaches between male and female detenus? Was the article intended to expose the despicable character of persons who were passing off as saintly leaders? Was the article merely intended to provide salacious reading material for readers who had a peculiar taste for scandals? These and several other questions may arise for consideration, depending on the stand taken by the

accused at the trial and how the complainant proposes to demolish the defence. Surely the stage for deciding these questions has not arrived yet. Answers to these questions at this stage, even before the plea of the accused is recorded can only be a priori conclusions. 'Good faith,' 'public good' are, as we said, questions of fact and matters for evidence. So, the trial must go on.

* * *

Judgement of Sen, J

... The order recorded by the High Court quashing the prosecution... is wholly perverse and has resulted in a manifest miscarriage of justice. The High Court has pre-judged the whole issue without a trial of the accused persons. The matter was at the stage of recording the plea of the accused persons under section 251 of the Indian Penal Code. The requirements of section 251 are still to be complied with. The learned Magistrate had to ascertain whether the respondent pleads guilty to the charge or demands to be tried...

* * *

We have considerable doubt about the propriety of the High Court making use of the Enquiry Report [which the article was based on] which has no evidentiary value and in respect of which the Government claimed privilege... There was no factual basis for the observations made by the High Court underlined by me, except the Enquiry Report. The contents of the Enquiry Report cannot be made use of unless the facts are proved by evidence aliunde. There is also nothing on record to show that the accused persons made any enquiry of their own into the truth or otherwise of the allegations or exercised due care and caution for bringing the case under the Ninth Exception. The Enquiry Report cannot by itself fill in the lacunae.

* * *

It is for the accused to plead Ninth Exception in defence and discharge the burden to prove good faith which implies the exercise of due care and caution and to show that the attack on the character of the appellant was for the public good. In *Sukro Mahto v. Basdeo Kumar Mahto and Another* [1971] Supp. SCR 329 this Court observed:

“The ingredients of the Ninth Exception are first that the imputation must be made in good faith; secondly, the imputation must be for protection of the interest of the person making it or of any other person or for the public good. Good faith is a question of fact. So is protection of the interest of the person making it. Public good is also a question of fact.”

After referring to the two earlier decisions in *Harbhajan Singh* and *Chaman Lal* the Court held that there must be evidence showing that the accused acted with due care and caution:

“He has to establish as a fact that he made enquiry before he made the imputation and he has to give reasons and facts to indicate that he acted with due care and attention and was satisfied that the imputation was correct. The proof of the truth of the statement is not an element of the Ninth Exception as of the First Exception to section 499. In the Ninth Exception the person making the imputation has to substantiate that his enquiry was attended with due care and attention and he was thus satisfied that the imputation was true.”

The High Court appears to be labouring under an impression that journalists enjoy some kind of special privilege, and have greater freedom than others to make any imputations or allegations, sufficient to ruin the reputation of a citizen. We hasten to add that journalists are in no better position than any other person. Even the truth of an allegation does not permit a justification under First Exception unless it is proved to be in the public good. The question whether or not it was for the public good is a question of fact like any other relevant fact in issue. If they make assertions of facts as opposed to comments on them, they must either justify these assertions or, in the limited cases specified in the Ninth Exception, show that the attack on the character of another was for the public good, or that it was made in good faith: per Vivian Bose, J. in *Dr. N. B. Khare v. M. R. Masani and Others* ILR 1943 Nag 347.

As the matter is of great public importance, it would, perhaps, be better to quote the well-known passage of Lord Shaw in *Arnold v. King Emperor* LR (1913-14) 41 Ind. App. 149:

“The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to this power in the dissemination of printed matter may, and in the case of a conscientious journalist, make him more careful. But the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.”

For these reasons, we must set aside the order passed by the High Court and direct the Magistrate to record the plea of the accused persons under section 251 of the Criminal Procedure Code, 1973 and thereafter, to proceed with the trial according to law.

* * *

10. The only question is whether the publication falls within the Ninth Exception to section 499 of the Penal Code, as claimed by the respondents. . .

11. Section 499 defines `defamation.' It is as follows:-

“Whoever, by words either spoken or intended to be read, or by signs or by visible representations makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.”

The Ninth Exception reads:

“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.”

The Ninth Exception requires, inter alia, that the imputation made must be in good faith for the public good.

12. `Good faith' has been defined in section 52 of the Penal Code as:

“Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.”

The definition is expressed in negative terms. Normally proof of an exception lies on the person who claims it; but the definition of the expression ‘good faith’ indicates that lack of good faith has been made a part of the offence which the prosecution has to establish beyond reasonable doubt. On the other hand the mere proof by the accused of the report to be an authentic document is enough; it will create a doubt in the mind of the Court as to the lack of “good faith” on the part of the accused.

13. The inquiry was made and the report prepared by a highly responsible officer and submitted to the Government. It was in pursuance of a complaint made by one of the citizens pointing out laxity in observance of jail rules and highly objectionable practices of some of the prisoners and seeking improvement in jail administration. The object was to see improved conditions, and maintenance of certain standards of moral conduct by prisoners in jail. If the complaint and the consequent inquiry report be for public good, and the respondents had reasons to believe its contents to be true, they will be protected under the Ninth Exception. Even if the burden of proof of `good faith' be on the accused `good faith' need not be proved beyond reasonable doubt. Once this is done, whether the publication was for public good would be a matter of inference.

IN THE HIGH COURT OF DELHI

CHARANJIT SINGH

VERSUS

ARUN PURIE AND OTHERS

1983 (4) DRJ 86, 1983 RLR 48

5 November 1982

S. Singh, J.

Rule of Law: The courts will be unwilling to grant an injunction restraining a publication which may be defamatory, but is yet to be written. Even then, an injunction will not be granted where a defendant wishes to mount a recognised defence, unless it can be shown that that defence will fail.

The plaintiff was a businessman and a Member of Parliament. He sought an injunction preventing the defendants, “India Today” magazine, from publishing an article which was not yet written, but which he believed would be defamatory. This belief was based on a series of written questions which he had received from the defendants.

The Delhi High Court outlined the principles of defamation, including the fact that public figures (such as the plaintiff) should have lower expectations when it comes to information published about their public life.

It then held that in order to successfully obtain an injunction in circumstances where the defendant wishes to mount a recognised defence, the plaintiff must show that that defence is unable to succeed. In these circumstances, the defendant wished to argue justification, fair comment and qualified privilege. Because the article was yet to come into existence, it was not possible for the plaintiff to show that these defences would not succeed, the no injunction was granted.

Cases discussed and relied upon:

Establishing that public figures should have a lower expectation of protection when it comes to information about their public life: *Kartar Singh and others v. The State of Punjab* AIR 1956 SC 541.

Judgement of Singh, J

The short question is whether the defendants should be restrained from publishing an article which has not come into existence as yet and whether there is any material on record to hold prima facie that the proposed article would be defamatory.

Defamation is injury to a man's reputation. The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification (Salmond on the Law of Torts, 15th edition, page 179).

Gatley on Libel and Slander, 8th edition, page 15, has observed as follows:

“The gist of the torts of libel and slander is the publication of matter, usually words, conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally.”

* * *

On the basis of [previous] references in ‘India Today,’ the learned counsel for the plaintiff submits that malice, ill will and mala fides of the defendants towards the plaintiff are prima facie visible and therefore the defendants should be restrained. [These] various references to the plaintiff. . . cannot be said to be defamatory, specially for a public man like the plaintiff. The words used for the plaintiff in these issues may not be in good taste causing annoyance to him. A right thinking person, after reading the said article and writings under the photographs of the plaintiff will not find anything adverse in regard to the plaintiff's reputation.

The plaintiff admittedly is a Member of Parliament. He is a public man. In Gatley on Label and Slander, 8th edition, page 387, it is observed:

“Those who fill public positions must not be too thin-skinned in reference to comments made upon them. . . One who undertakes to fill a public office offered himself to public attack and criticism and it is now admitted and recognised that the public interest requires that a man's public conduct shall be open to the most searching criticism.”

Similar observations were made by the Supreme Court in *Kartar Singh and others v. The State of Punjab* AIR 1956 SC 541:

“... It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust, yet they must bear with them and submit to be misunderstood for a time.”

* * *

... Counsel for the plaintiff... submits that... the trial court is not entitled to scrutinise the controversy on merits. He submits that while deciding the application for interim injunction the court should determine the limited question [of whether the] case requires investigation and that it cannot transgress the limits by pre-judging the case... There is no dispute about the statement of law regarding the grant of temporary injunction. The facts of the case at the time of granting a temporary injunction may not be scrutinised but it has to be determined whether the plaintiff has a case at all for investigation.

* * *

Learned counsel for the defendants submits that they intend to defend the article to be published by them on the grounds of justification, fair comment and qualified privilege and as such no temporary injunction should be issued... In Halsbury's Laws of England, 4th edition, volume 28, page 87 it is observed, “it is well settled that no injunction will be granted if the defendant states his intention of pleading a recognised defence, unless the plaintiff can satisfy the court that the defence will fail. This principle applies not only to the defence of justification but also the defences of privilege, fair comment, consent and probably any other defence...”

In the instant case the article is not in existence... The difficulty in dealing with this case is that I do not know what the article when published will contain. It is not known what facts will be stated and what comments will be made. It is therefore not possible at this stage to determine whether the proposed article would be defamatory or not. But as the defendants state that they would plead justification and fair comment for publishing the article pertaining to the plaintiff, I am of the opinion that the injunction should not be issued. None of the questions asked by the defendants relate to the private life of the plaintiff. All questions are directly connected with his public life.

IN THE SUPREME COURT OF INDIA
R. RAJAGOPAL AND ANOTHER
VERSUS
THE STATE OF TAMIL NADU AND OTHERS
1995 AIR 264, 1994 SCC (6) 632

7 October 1994

B. P. Jeevan Reddy and S. C. Sen, JJ.

Rule of Law: While Article 21 of the Constitution provides a right to privacy, this will not exist in relation to public officials/figures discharging public duties. Material written on this will be protected from defamation proceedings, even where the substance is untrue but the author acted reasonably. Relatedly, the state is unable to maintain a suit for defamation or restrain prior to publication.

This case related to the wish of Tamil weekly magazine 'Nakkheeran' to publish the alleged autobiography of condemned prisoner Auto Shankar. It was believed that the autobiography would contain numerous disparaging remarks about the conduct of various public officials. Following this, a letter was sent which alleged that Shankar did not consent to the autobiography being published. While the authenticity of the letter was questioned, this was a question of fact and was not considered by the Court. Accordingly, the matter proceeded on the grounds that the letter was legitimate.

The case instead centred on an individual's right to privacy and its relationship with the media's right to freedom of expression. It also concerned the ability of the government to maintain a suit in defamation and the ability of government officials to restrain the press prior to publication.

The Court undertook a substantial review of the law relating to privacy and its limits in India, the United States and the United Kingdom. Having done so, the Court held that a right to privacy was found in Article 21 of the Constitution as an extension of the right to liberty. It was held that certain matters were unpublishable without the consent of the individual concerned. However, this would not be the case where the material was a matter of public record or the individual was a public official or figure and what was to be published related

to their public life. In such circumstances, the right to privacy would not be infringed, even where the information was false, unless the author had failed to take reasonable care. The Court noted that the state was not able to restrain publication, nor could it maintain a suit for defamation.

Cases discussed and relied upon:

Establishing a right to privacy: *Kharak Singh and Others v. State of Uttar Pradesh and Others* 1963 Cri LJ 329; *Gobind v. State of Madhya Pradesh and Another* 1975 Cri LJ 1111; *Griswold v. Connecticut* [1965] 385 U.S. 479; *Roe v. Wade* [1973] 410 U.S. 113; *Time Inc. v. Hill* [1967] 385 U.S. 374. Discussing the right to privacy and defamation in the case of public officials: *New York Times Co v. Sullivan* [1954] 376 U.S. 254; *Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469; *NAACP v. Alabama* [1958] 357 U.S. 449; *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 2 W.L.R. 449; *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 2 W.L.R. 449; *Attorney General v. Guardian Newspapers Ltd.* (1990) 1 A.C. 109; *Leonard Hector v. Attorney General of Antigua and Barbuda* (1990) 2 A.C. 312. On restraining the media prior to publication: *New York Times v. United States* [1971] 40 U.S. 713.

Judgement of the Court delivered by Jeevan Reddy, J

1. This petition raises a question concerning the freedom of press vis-a-vis the right to privacy of the citizens of this country. It also raises the question as to the parameters of the right of the press to criticize and comment on the acts and conduct of public officials.

* * *

8. On the pleadings in this petition, the following questions arise:

- (1) whether a citizen of this country can prevent another person from writing his life-story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitle the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?
- (2) Whether the government can maintain an action for its defamation? Whether the government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? Whether the public officials, who

apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication...?

9. The right to privacy as an independent and distinctive concept originated in the field of tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin: (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising — or non-advertising — purposes or for that matter, his life-story is written — whether laudatory or otherwise — and published without his consent as explained hereinafter. In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how. The right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of this Court dealing with this aspect is *Kharak Singh and Others v. State of Uttar Pradesh and Others* 1963 Cri LJ 329. A more elaborate appraisal of this right took place in a later decision in *Gobind v. State of Madhya Pradesh and Another* 1975 Cri LJ 1111 wherein Mathew, J., speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well known decisions in *Griswold v. Connecticut* [1965] 385 U.S. 479 and *Roe v. Wade* [1973] 410 U.S. 113. After referring to *Kharak Singh* and the said American decisions, the learned Judge stated the law in the following words:

“.. [P]rivacy-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. . . [P]rivacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. . . Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as a unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty....

... There are two possible theories for protecting privacy of the home. The first is

that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such ‘harm’ is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute...”

10. Since the right to privacy has been the subject matter of several decisions in the United States, it would be appropriate to briefly refer to some of the important decisions in that country.

* * *

12. Though the expression “right to privacy” was first referred to in *Olmstead v. United States* [1928] 277 U.S. 438, it came to be fully discussed in *Time Inc. v. Hill* [1967] 385 U.S. 374. The facts of the case are these: on a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, whereafter they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill home for an account of what happened during the hold-up. The case of the family was that they were not ill-treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. ‘Life’ magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the family were ill-treated by the intruders. When ‘Life’ published the story, Hill brought a suit against Time Inc., publishers of ‘Life’ magazine, for invasion of his privacy. The New York Supreme Court found that the whole story was “a piece of commercial fiction” and not a true depiction of the event, and accordingly confirmed the award of damages. However, when the matter was taken to United States Supreme Court, it applied the rule evolved by it in *New York Times Co v. Sullivan* [1954] 376 U.S. 254 and set aside the award of damages

holding that the jury was not properly instructed in law. It directed a re-trial. Brennan, J. held:

“We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless disregard of the truth.”

The learned Judge added:

“We create grave risk of serious impairment of the indispensable services of a free press with the impossible burden of verifying to a certainty the facts associated in a news article with a person’s name, picture or portrait, particularly as related to non-defamatory matter. . . . Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.... That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded.”

13. The next relevant decision is in *Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469. A Georgia law prohibited and punished the publication of the name of a rape victim. The appellant, a reporter of a newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, J. recognised that “in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society” but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains, the name of the rape victim from the public records and publishes it. The learned Judge held that the freedom of press to publish the information contained in the public records is of critical importance to the system of government prevailing in that country and that maybe, in such matter “citizenry is the final judge of the proper conduct of public business.”

14. Before proceeding further, we may mention that the two decisions of this Court referred to above (*Kharak Singh* and *Gobind*) as well as the two decisions of the United States Supreme Court, *Griswold* and *Roe v. Wade*, referred to in *Gobind*, as cases of governmental invasion of privacy. *Kharak Singh* was a case where the petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations. It involved secret picketing of

the house or approaches to the house of the suspect, domiciliary visits at night, periodical enquiries by police officers into repute, habits, association, income or occupation, reporting by police constables on the movements of the person etc. The regulation was challenged as violative of the fundamental rights guaranteed to the petitioner. A Special Bench of seven learned judges held, by a majority, that the regulation was unobjectionable except to the extent it authorised domiciliary visits by police officers. Though right to privacy was referred to, the decision turned on the meaning and content of “personal liberty” and “life” in Article 21. *Gobind* was also a case of surveillance under M.P. Police Regulations. *Kharak Singh* was followed even while at the same time elaborating the right to privacy, as set out hereinbefore.

15. *Griswold* was concerned with a law made by the State of Connecticut which provided a punishment to “any person who uses any drug, medicinal article or instrument for the purpose of preventing conception....” The appellant was running a center at which information, instruction and medical advice was given to married persons as to the means of preventing conception. They prescribed contraceptives for this purpose. The appellant... challenge[d] the constitutional validity of the law on the grounds of the First and Fourteenth Amendments. Douglas, J., who delivered the main opinion, examined the earlier cases of that court and observed :

“...specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy... The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon the relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms” [*NAACP v. Alabama* [1958] 357 U.S. 449]...”

16. *Roe v. Wade* concerned the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The relevant Texas law prohibited abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother. The constitutionality of the said law was questioned on the ground that the said law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and was therefore violative of “liberty” guaranteed under Fourteenth Amendment and the right to privacy recognised in *Griswold*. Blackmun, J., who delivered

the majority opinion, upheld the right to privacy in the following words:

“The Constitution does not explicitly mention any right of privacy... [However, the] Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution... These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in this guarantee of personal privacy... This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

* * *

18. We may now refer to the celebrated decision in *New York Times v. Sullivan*, referred to and followed in *Times Inc. v. Hill*... [In] 1960, the ‘New York Times’ carried a full page paid advertisement sponsored by the ‘Committee to Defend Martin Luther King and The Struggle for Freedom in the South,’ which asserted or implied that law enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr. King and other civil rights demonstrators on various occasions. The respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate. The Alabama Courts found the defendants guilty... According to the relevant Alabama law, a publication was libelous per se if the words “tend to injure a person...in his reputation” or to “bring (him) into public contempt.” The question raised before the United States Supreme Court was whether the said enactment abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments. In the leading opinion delivered by Brennan, J., the learned Judge referred in the first instance to the earlier decisions of that court emphasising the importance of freedom of speech and of the press and observed:

“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognise an exception for any test of truth — whether administered by judges, juries, or administrative officials — and especially one that puts the burden of proving the truth on the speaker... Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far

wider of the unlawful zone.” ...The rule thus dampens the vigor and limits the variety of public debate...”

* * *

20. The principle of the said decision has been held applicable to “public figures” as well. This is for the reason that public figures like public officials often play an influential role in ordering society. It has been held that as a class the public figures have, as the public officials have, access to mass media communication both to influence the policy and to counter criticism of their views and activities. On this basis, it has been held that the citizen has a legitimate and substantial interest in the conduct of such persons and that the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.

21. The principle of *Sullivan* was carried forward — and this is relevant to the second question arising in this case — in *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 2 W.L.R. 449, a decision rendered by the House of Lords. The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two articles published in the ‘Sunday Times’ questioning the propriety of investments made for its superannuation fund. The articles were headed “Revealed: Socialist tycoon deals with Labour Chief” and “Bizarre deals of a Council Leader and the Media Tycoon.” [In deciding that there was no cause of action available] Lord Keith delivered the judgement agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in *Attorney General v. Guardian Newspapers Ltd.* (1990) 1 A.C. 109, popularly known as the “Spycatcher case”, the House of Lords had opined that “there are rights available to private citizens which institutions of... government are not in a position to exercise unless they can show that it is in the public interest to do so.” It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was “contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech” and further that action for defamation or threat of such action would “inevitably have an inhibiting effect on freedom of speech.” The learned Law Lord referred to... *Sullivan* and certain other decisions of American Courts and observed — and this is significant for our purposes — “while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which under laid them are no less valid in this country. What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are

known to be true, but admissible evidence capable of proving those facts is not available.” Accordingly, it was held that the action was not maintainable in law.

22. Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in *Leonard Hector v. Attorney General of Antigua and Barbuda* (1990) 2 A.C. 312 which arose under section 33(B) of the Public Order Act, 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was “likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs” shall be guilty of an offence. The appellant, the editor of a newspaper, was prosecuted under the said provision. He took the plea that the said provision contravened section 12(1) of the Constitution of Antigua and Barbuda which provided that no person shall be hindered in the enjoyment of freedom of expression. At the same time, subsection (4) of section 12 stated that nothing contained in or done under the authority of law was to be held inconsistent with or in contravention of the subsection 12(1) to the extent that the law in question made provisions reasonably required in the interest of public order (these provisions roughly correspond to Articles 19(1)(a) and 19(2) respectively). The Privy Council upheld the appellant’s plea... it held that section 33(B) is wide enough to cover not only false statements which are likely to affect public order but also those false statements which are not likely to affect public order. On that account, it was declared to be unconstitutional. The criminal proceeding against the appellant was accordingly quashed. In the course of his speech, Lord Bridge of Harwich observed thus:

“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.”

23. The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1) (a). But the said right is subject to reasonable restrictions placed thereon by an existing law

or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in Clause (2). The law of torts providing for damages for invasion of the right to privacy and defamation and sections 499/500 of the Indian Penal Code are the existing laws saved under Clause (2). But what is called for today — in the present times — is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding and in the process becoming more inquisitive. Our system of government demands, as do the systems of government of the United States of America and United Kingdom, constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good government. At the same time, we must remember that our society may not share the degree of public awareness obtained in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system. The broad principles set out hereinafter are evolved keeping in mind the above considerations. But before we set out those principles, a few more aspects need to be dealt with.

24. We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be. We think not. No law empowering them to do so is brought to our notice. As observed in *New York Times v. United States* [1971] 40 U.S. 713..., “any system of prior restraints of (freedom of) expression comes to this Court bearing a heavy presumption against its constitutional validity” and that in such cases, the government “carries a heavy burden of showing justification for the imposition of such a restraint.” We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of ‘Auto Shankar’ by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein.

25. We must make it clear that we do not express any opinion about the right of the State or its officials to prosecute the petitioners under sections 499/500 of the Indian Penal Code.

This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

* * *

28. We may now summarise the broad principles flowing from the above discussion:

- (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be left alone.” A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. The position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.
- (2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interest of decency... an exception must be carved out to this rule, viz, a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.
- (3) There is yet another exception to the Rule in (1) above, indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious the right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (a member of the press or media) to prove that he acted after a reasonable verification of the facts. It is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal

animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that the judiciary, which is protected by the power to punish for contempt of court and the Parliament and Legislatures, protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

- (4) So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.
- (5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.
- (6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

29. We may hasten to add that the principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. As rightly pointed out by Mathew, J., this right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution.

30. In all this discussion, we may clarify, we have not gone into the impact of Article 19(1) (a) read with clause (2) thereof on sections 499 and 500 of Indian Penal Code. That may have to await a proper case.

IN THE HIGH COURT OF DELHI
KHUSHWANT SINGH AND ANOTHER
VERSUS
MANEKA GANDHI
 AIR 2002 Delhi 58

18 September 2001

D. Gupta and S. K. Kaul, JJ.

Rule of Law: Generally, the right to freedom of expression will trump the right to privacy when the public affairs of public officials are involved. Equally, damages, rather than an injunction, are the appropriate remedy for any wrong that may be committed in this regard.

This case involved the appellant's yet to be published autobiography, which gave insight into the family relationships of the respondent, a public figure. The respondent, citing her right to privacy, sought an injunction to stop the book from being published. It was argued on behalf of the appellant that these relationships had been widely publicised in the past and the appellant wished to justify the book by the avenues of truth and honest opinion.

The Delhi High Court ultimately decided that an injunction would be inappropriate, and that damages would be the preferable remedy, should any wrong be committed. The judgement (albeit slightly convoluted) offers an interesting and wide analysis from both counsel and the Court itself, of the various aspects of the right to freedom of expression, the right to privacy, public officials, public interest, honest opinion and so forth. Generally speaking, the Court felt that balancing between these various, and often conflicting, considerations was inappropriate. It placed a lot of weight on the importance of freedom of expression in a free and democratic society.

Cases discussed and relied upon:

Establishing the guiding principles of the right to privacy, including its relationship with freedom of expression: *R Rajgopal and Another v. State of Tamil Nadu and Others* JT 1994 (6) SC 514; *New York Times v. United States* (1971) 403 US 713. Outlining the nature of

the defence of fair comment: *Silkin v. Beaverbrook Newspapers Ltd. and Another* [1958] 2 All ER 516. Establishing that damages are a more appropriate remedy than an injunction in such cases: *Woodward and Others v. Hutchins and Others* [1977] 2 All ER 751; *Bonnard v. Perryman* (1891) 2 Ch. 269.

Judgement of the Court delivered by Kaul, J

... [Considering the submissions of counsel for the appellant regarding the right to privacy, the Court stated that the Supreme Court in *R. Rajgopal and Another v. State of Tamil Nadu and Others* JT 1994 (6) SC 514] felt that a proper balancing of the freedom of press as well as the rights of privacy and defamation had to be done in terms of the democratic way of life laid by our constitution. The Supreme Court concluded that the State or its officials have no authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials. The Supreme Court quoted with approval the observations in *New York Times v. United States* (1971) 403 US 713, popularly known as the Pentagon papers case to the effect that “any system of prior restraints of [freedom of] expression comes to this court bearing a heavy presumption against its constitutional validity” and that in such cases, the Government “carries a heavy burden of showing justification for the imposition of such a restraint.” The Supreme Court thus held that the remedy of the public official/public figure would arise only after the publication and would be governed by the principles indicated in the judgement and there was no law under which they could prevent the publishing of a material on the ground of such material being likely to be defamatory to them. The remedy was only after publication.

[The Court then outlined the six principles from *Rajgopal*.]

* * *

The next decision cited at the bar was *Silkin v. Beaverbrook Newspapers Ltd. and Another* [1958] 2 All ER 516 [and the] observations of Diplock J:

“I have been referring, and counsel in their speeches to you have been referring, to fair comment, because that is the technical name which is given to this defence, or, as I should prefer to say, which is given to the right of every citizen to comment on matters of public interest. The expression “fair comment” is a little misleading. It may give the impression that you, the jury, have to decide whether you agree with the comment, whether you think that it is fair. If that were the question which you had to decide, you realise that the limits of the freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate, or prejudiced, provided –and this is the important thing– they

are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?"

* * *

The learned counsel [for the appellant] also referred to the observations of Lord Denning in *Woodward and Others v. Hutchins and Others* [1977] 2 All ER 751:

"[In libel] the courts do not grant an interlocutory injunction to restrain publication of the truth or of fair comment... If there is a legitimate ground for supposing that it is in the public interest for it to be disclosed, the courts should not restrain it by an interlocutory injunction, but should leave the complainant to his remedy in damages... Finally, there is the balance of convenience. At this late hour, when the paper is just about to go to press, the balance of convenience requires that there should be no injunction. Any remedy for Mr Tom Jones and his associates should be in damages and damages only."

The judgement of the *Bonnard v. Perryman* (1891) 2 Ch. 269 was cited to advance the submission that the subject matter of an action of defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong.

* * *

[Having considered the submissions from the Appellant, the Court turned to the submissions of the respondent] ...learned counsel for the respondent then referred to the judgement of Supreme Court in *S. M. D. Kiran Pasha v. Government of Andhra Pradesh and Others* 1989 SCR Supl. (2) 105. The said case dealt with an individual's right against alleged harassment at the hands of public authorities. Apprehending certain orders from different authorities, the petitioner therein approached the court and it was held that where a right of a person is threatened to be violated or its violation is imminent and the affected person resorts to Article 226 of the Constitution of India the court can protect observance of his right by restraining those who threaten to violate it. The protection of the right was held to be distinguished from its restoration or remedy after violation. [Counsel for the respondent] contended that this would be equally true where it was an inter se dispute between two individuals.

* * *

[In arguing against the claim that the Court should prefer an injunction over damages] ... counsel for the respondent... referred to... *Chapman v. Lord Ellesmere and Others* [1932] (2) KB 431 and drew support from the observation, “if it were, the power of the press to libel public men with impunity would in the absence of malice be almost unlimited.”

Learned counsel for the respondent referred to a judgement of the single Judge in *Hari Shankar v. Kailash Narayan and Others* AIR 1982 MP 47 to contend that an injunction cannot be refused on the ground that repetition can be compensated by paying damages where false and defamatory news is published in the newspaper. The Madhya Pradesh High Court was of the view that if the reputation of a respectable citizen can be measured in terms of money then it would amount to issue of a license against a citizen and asking him to take money as compensation for injury. It was thus contended that the freedom of speech under Article 19(1) of the Constitution of India cannot be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person's honour and reputation.

... [I]n *K. V. Ramaniah, Accused v. Special Public Prosecutor* AIR 1961 AP 190 ... the Madhya Pradesh High Court held that the right guaranteed by the Constitution of India was to all citizens alike and such rights had corresponding duties....:

“...It is therefore impossible to accept the argument of the learned counsel for the revision petitioners that freedom of speech in Article 19(1) must be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person's honour and reputation. The right guaranteed by the Constitution, it must be borne in mind, is to all the citizens alike. The right in one certainly has a corresponding duty to the other and judged in that manner also the right guaranteed cannot but be a qualified one... Without such limitations it is bound to be a scourge to the Republic.”

... Our Constitution framers taking benefit of the experience in America have in terms provided the necessary qualifications to this right. Article 19(2) in this behalf contains safeguards of reasonable restrictions on the exercise of the right and it reads thus:

“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 security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

The same matter is discussed on page 1028 in Row's Law of Injunction, volume 2, 1976 edition, under the heading 'Newspapers' as under:

"Newspapers are subject to the same rule as other critics and have no special right or privilege, and in spite of the latitude allowed to them, it does not mean that they have any special right to make unfair comments or to make imputations upon or in respect of a person's profession or calling. The range of a journalist's criticism or comment is as wide as and no wider than that of any subject. Though it may be said to be true in one sense that newspapers owe a duty to their readers to publish any and every item of news that may interest them, that is not, however, such a duty as makes every communication in the paper relating to a matter of public interest a privileged one. The defendant has to show that what he communicated was relevant or pertinent to the privileged occasion."

* * *

[Counsel for the respondent] then proceeded to deal with the plea of justification advanced on behalf of the appellant, to contend that the same would not be available to the appellant where the right of privacy of the respondent are violated.

... [He] contended that the plea of justification would be available where truth was pleaded and it was in public interest. In the case of a public figure, learned counsel for the respondent contended, it could apply to the performance of public duties by the public figure but it cannot be a ground to go into the private lives of such public figures. He sought to draw strength from the commentary of Dr. D. D. Basu on Law of Press, 3rd edition at page 42 where matters which would constitute public interest were sought to be defined as under:

- (a) The exercise of governmental functions, statutory powers and duties.
- (b) Any transaction which is carried on by a person or persons for the public benefit, as distinguished from private profit, e.g. charitable institutions.
- (c) Discharge of public functions, e.g. transport, hospital, health services or the official conduct of a public official.
- (d) Judicial proceedings, excepting those which the Court would be entitled to hear in camera because they relate to private affairs or the countervailing public interests of decency, morality or safety of the State, matters which require secrecy, e.g., trade secrets.

- (e) Detection or investigation of crimes, so long as it does not come to Court, and does not constitute an interference with the ordinary course of justice.
- (f) Purity of food, drugs.
- (g) Financial affairs of companies in which the public have interest.

* * *

... Counsel contended that the right to privacy has been guaranteed under Article 21 of the Constitution of India and it imposed an obligation on the society and the press to protect such rights and other than the exceptions provided for under Article 19(2) of the Constitution of India, the rights to such privacy cannot be violated. In such a situation, it was contended, that damages in lieu of injunction is not a remedy. It is only when grant of an injunction would be oppressive that a substitute of damages can be a valid substitute. . . . It was contended that an injunction would arrest the mischief and protect the appellants from possibly avoidable damages. It was thus contended that in such a situation even if justification was pleaded, the same was not available as a defence when the rights of the plaintiff were based on privacy. Justification was, as observed before, entitled only if it was a true, a fair comment and was in public interest.

* * *

... Counsel for the appellant... sought to repel the contention of [counsel for the respondent] in so far as the right of privacy was concerned as he contended that the same was available only against the State and all the cases in that behalf were in respect to the protection provided from action by the State. It was contended that justification or claim of truth was an absolute defence and there was no right of privacy available to individual in such a situation.

* * *

[Counsel for the appellant referred to *Rajgopal*] ...to contend that it was not simply a case of balancing two interests as if they are of equal weight. The freedom of speech and expression could not be suppressed unless the situation created by allowing the freedom is pressing and the community interest is endangered.

* * *

We have duly considered the elaborate submissions and the large number of decisions cited at the bar by both the learned senior counsel for the appellant and learned counsel for the respondent. The matter was required to be dealt with in depth as the development

of law of privacy is at a nascent stage and the decision of this case would have wider ramifications for the claim of right of privacy by public figures as against the right of the press to publish and write about such public figures.

It would be appropriate to first consider the portions which have been extracted by the respondent in her plaint as derogatory and defamatory. It is not seriously disputed [that most of the information written about]... had already been commented upon and published in previous magazines and books... The words may not be exact but the concept, the meaning sought to be conveyed are more or less same... The question thus to be considered is the effect of such prior publications on the claim made by the respondent in respect of these publications. There is force in the submissions of the learned counsel for the appellants that not only was there wide publicity about these aspects in view of the same relating to the then first family of the nation but the respondent possibly drew strength from the media to put forth her point of view against what she claimed was the injustice meted out to her by her late mother-in-law. Thus the controversy in question which is being commented upon did not really remain in the four walls of the house but drew wide publicity and comments even to the extent of poll surveys being carried out in respect of the controversy in question. No grievance was made at that stage of time. It is not a case of prevention of repeated defamatory statements as is sought to be made out by learned counsel for the respondent... The respondent did not make grievance about the reporting of their disputes in the press. The nature of controversy was more or less the same as is now sought to be published by the appellant in his autobiography and thus the respondent cannot make a grievance of the same matter now being published so as to seek prevention of the publication itself. The silence of the respondent and her not making a grievance against the prior publication prima facie amounts to her acquiescence or at least lack of grievance in respect of publication of the material. Needless to add that the remedy of damages against the appellant is still not precluded in so far the respondent is concerned.

The right to publish and the freedom of press, as enshrined in Article 19(1)(a) of the Constitution of India is sacrosanct. This right cannot be violated by an individual or the State. The only parameters of restriction are provided in Article 19(2) of the Constitution of India. The total matter of the book is yet to be published including the chapter in question. The interim order granted by the learned single Judge is a pre-publication injunction. The contents of subject matter had been reported before and the author stands by the same. In view of this we are of the considered view that the respondent cannot make a grievance so as to prevent the publication itself when the remedy is available to her by way of damages.

An important aspect to be examined is the claim of right of privacy advanced by the learned counsel for the respondent to seek the preventive injunction. This aspect was exhaustively dealt with in the case of *Rajgopal*. The Supreme Court while considering these aspects clearly opined that there were two aspects of the right of privacy. The first aspect was the general law of privacy which afforded tortious action for damages from unlawful invasion of privacy. In the present case we are not concerned with the same as the suit for damages is yet to be tried. The second aspect, as per the Supreme Court, was the constitutional recognition given to the right of privacy which protects personal privacy against unlawful governmental action. This also is not the situation in the present case as we are concerned with the inter se rights of the two citizens and not a governmental action. It was in the context of the first aspect that the Supreme Court had given the illustration of the life story written — whether laudatory or otherwise and published without the consent of the person concerned. The learned counsel for the respondent sought to draw strength from this aspect i.e., the lack of consent of the respondent to publish her life story in the autobiography written by the appellant. However, this will give rise to tortious action for damages as per the Supreme Court since this is the aspect which is concerned with the first aspect dealt with by the Supreme Court in respect of the invasion of privacy.

The Supreme Court while considering the right of privacy in the aforesaid judgement was clearly of the view that the freedom of press extended to engaging in inhibited debate about the involvement of public figures in public issues and comments. There is force in the contention of... counsel for the appellant, that a close and microscopic examination of the private lives of public men is a natural consequence of holding of public offices. What is good for a private citizen who does not come within the public gaze may not be true of a person holding public office... What a person holding public office does within the four walls of his house does not totally remain a private matter. It may however, be added that the scrutiny of public figures by media should not also reach a stage where it amounts to harassment to the public figures and their family members. They must be permitted to live and lead their life in peace. But the public gaze cannot be avoided, which is necessary corollary of their holding public offices.

* * *

This aspect of right of privacy analysed in view of the conclusions of the Supreme Court as set forth in *Rajgopal* fully support the argument advanced by the learned counsel for the appellant... [T]he Supreme Court further went on to observe that the position would be different if a person voluntarily thrusts himself into a controversy or voluntarily invites or raises a controversy... The task, though difficult it may be, for persons holding public

office, cannot be summed up but to say that such persons have to show greater tolerance for comments and criticisms.

... Be that as it may the respondent has already chosen to claim damages and her claim is yet to be adjudicated upon. She will have remedy if the statements are held to be vulgar and defamatory of her and if the appellants fail to establish the defence of truth.

We are unable to accept the contention advanced on behalf of the respondent... that if the statements relate to private lives of persons, nothing more is to be said and the material must be enjoined from being published unless it is with the consent of the person whom the subject matter relates to. Such pre-censorship cannot be countenanced in the scheme of our constitutional framework.

... People have a right to hold a particular view and express freely on the matter of public interest. There is no doubt that even what may be the private lives of public figures become matters of public interest.

* * *

There is no doubt that there are two competing interests to be balanced as submitted by the learned counsel for the respondent, that of the author to write and publish and the right of an individual against invasion of privacy and the threat of defamation. However, the balancing of these rights would be considered at the stage of the claim of damages for defamation rather than a preventive action for enjoining of against the publication itself.

There is also considerable force in the submission of... counsel for the appellant, that what is sought to be really protected against the invasion of the right of privacy is the action of government and governmental authorities. It is, thus, this right which is protected under Article 19(1)(a) of the Constitution of India.

* * *

There have to be great dangers to the community if valuable rights of freedom of speech and expression enshrined under Article 19(1)(a) of the Constitution of India are to be curtailed...

Writings and comments by authors, publishers cannot be restricted to public interest as defined to include what is good for the public. It must be used in the connotation of what is of interest to the public as submitted by the learned counsel for the appellant. For the purposes of publication if it is to the interest to the public, it would suffice...

IN THE HIGH COURT OF DELHI
HIS HOLINESS SHAMAR RIMPOCHE
VERSUS
LEA TERHUNE AND OTHERS

AIR 2005 Delhi 167, 2005 (79) DRJ 465

2 December 2004

M. Mudgal, J.

Rule of Law: When considering a claim for injunctive relief prior to publication, the court shall not test the veracity of the material to be published where the defendant claims the publication is justified and fair comment. The proper relief for any wrong committed shall be damages.

This case involved a book that was to be published about a man claiming to be the 17th Karmapa of Karmo Kargu, which would have contained some less than favourable statements. The man sued for defamation, seeking injunctive relief. The defendant, the author of the book, indicated that he would argue that the statements in the book were fair comment.

The plaintiff sought to rely on a series of cases from the Bombay High Court that indicated that the Indian approach to pre-publication injunctions was distinct from the British approach, in that it would allow the court to examine the strength of any claim of fair comment made by the defendant. The Delhi High Court however, felt itself bound by the previous Delhi Division Bench in *Khushwant Singh and Another v. Maneka Gandhi* AIR 2002 Delhi 58, where it was held that the court should not examine any claim and instead prefer the relief of damages after publication had occurred.

This case held that *Khushwant Singh* did not turn on the fact that the material alleged to be defamatory had already been published and the plaintiff in that case had not taken action at that time.

Cases discussed and relied upon:

Favouring an award of damages over a pre-publication injunction: *Khushwant Singh and Another v. Maneka Gandhi* AIR 2002 Delhi 58. To suggest that India may be more willing to award an injunction: *Shree Maheshwar Hydel Power Corporation Ltd. v. Chitroopa Palit and Another*, AIR 2004 Bombay 143.

Judgement of the Court delivered by Kaul, J

This court is fully bound by the judgement of the Division Bench in *Khushwant Singh and Another v. Maneka Gandhi* AIR 2002 Delhi 58. The sum and substance of the said judgement is that in a case of an article/publication of an allegedly offending and defamatory nature, a pre-publication injunction of restraint should not be granted in case the defendant who supports the publication cites truth as a defence and pleads justification. In such a case... damages are the appropriate remedy.

However, a judgement of the learned single judge of the Bombay High Court in *Shree Maheshwar Hydel Power Corporation Ltd. v. Chitroopa Palit and Another* AIR 2004 Bombay 143 has been cited before me which appears to take a view different from the view taken by the Division Bench of this Court in *Khushwant Singh*.... The relevant portion... reads as under:

"49. After having heard the learned counsel for both the parties at length and after perusal of the impugned judgement and order and also the various judgements cited by both the parties, it is clear that in any event, the principles of law in England and in India with regard to grant of interlocutory reliefs in a civil action for libel are different. In England, the principle of law is that in case of an action for defamation, once the defendants raise the plea of justification at the interim stage, the plaintiff will not be entitled to an interlocutory injunction. To put in other words, in England, a mere plea of justification by the defendant would be sufficient to deny the plaintiff any interim relief. As far as India is concerned as has been clearly held by this Court in the judgement referred to hereinabove, especially the judgement of this Court in the case of *Dr. Yaswant Trivedi v. Indian Express Newspapers (Bombay) Private Ltd.* dated 21 March 1980 and the judgement of Appellate Bench dated 2 June 1989 with regard to the same matter in appeal, the judgement of this Court in *Purshottam Odhnvji Solanki v. Sheela Bhatta* dated 3 December 1990, the judgement of this Court in the case of *Mrs. Betty Kapadia v. Magna Publishing Co. Ltd.* dated 22 July 1995, it is clear that in India a mere plea of justification would not be sufficient for denial of interim relief. The defendants apart from taking a plea of justification will have to show that the statements were made bona fide and were in public interest, and, that the defendants had taken reasonable precaution to ascertain the truth, and that the statements were based on sufficient material which could be tested for its veracity. Therefore, in India, the Court is very much entitled to scrutinise the

material tendered by the defendants so as to test its veracity and to find out whether the said statements were made bona fide and whether they were in public interest. Therefore, in India, even at the interlocutory stage, the Court is very much entitled to look into the material produced by the defendants for the plea of justification, so as to test its veracity with regard to the allegations, alleged to be defamatory.”

[T]he learned senior counsel for the plaintiff has very fairly stated that all the judgements noted above by the Bombay High Court were only of the Bombay High Court. In this view of the matter, apart from the fact that I am fully bound by the judgement of the Division bench of this Court in *Khuswant Singh*, which takes a view in direct variance to that taken by the learned single Judge of the Bombay High Court, nevertheless I respectfully find myself unable to agree with what is said to constitute the position of law across the country. The position of law summed up in the above judgement is at best that of four judgements of the Bombay High Court, which cannot be said to constitute the all India position. . . .

* * *

The plea of the plaintiff is that no material was disclosed which shows that defamatory statements of the personal life of the plaintiff were matters of public interest or that the public interest said to be underlying the impugned publication was based on any reasonable verification of the assertion forming part of the defamatory statement. This on its own cannot lead to a departure from the law laid down by the Division Bench in *Khuswant Singh* and I am bound by the statement of law in [that case]. . . . Similarly, the plea of the plaintiff that there must be supporting material in respect of such allegations loses sight of the statement of law particularly when the Division Bench has held that the plea of justification is sufficient to oust the interlocutory injunction. The very fact that the plaintiff is said to be the religious leader of the Karma Kgyu sect of Tibetan Buddhism shows that he cannot claim to be a wholly private person. Furthermore, the plaintiff himself asserts that communal tension and ethnic violence involving the Karma Kgyu sect may take place upon the publication of the book and thus on his own plea, it cannot be said that the plaintiff was a private figure if such consequences result as per the plaintiff’s pleas.

It is no doubt that past publication of the offending portion without protest was a factor which also weighed with *Khuswant Singh’s* judgement. . . . However, [this was] not the governing factor in view of the law laid down. . . .

CHAPTER FIVE

DISCLOSURE OF SOURCES

Confidential sources are an essential component to successful journalism. By using sources, journalists can access a larger amount of information, more accurate and detailed information, and they can therefore bring to light information that would otherwise remain hidden (intentionally or otherwise) in the shadows. This results in a more effective media, which in turn is likely to produce a more informed public that can demand greater accountability from government, private business and elsewhere.

In many cases, the capacity to attract sources depends on the ability of journalists and news agencies to guarantee the anonymity of those sources. In the absence of this security, there is a strong disincentive for would-be sources to come forward and consequently, a loss of information vital to the public good. Alternatively, if they do come forward, sources risk retribution from the public, government or their employer without any of the legal or equitable protections available to their counterparts in jurisdictions that recognise “whistleblower” legislation. Any retribution that does occur is in turn, likely to strengthen the disincentives that already exist.

The ultimate effect of this lack of protection for sources is that it compromises the ability of the media to inform the public of the misuse of power and thereby weakens democracy.

At present, India has no statutory law establishing either the right of journalists to refuse to disclose their sources or alternatively, the power of the courts to require disclosure and the circumstances in which that will take place. It should be noted that there are parts of enactments which have been used as aides in trying to establish a law either one way or the other, most notably section 15 of the Press Council Act, 1978, section 14 of the now repealed Prevention of Terrorism Act, 2002 and various parts of the Evidence Act, 1972.

Ultimately however, the courts have operated in somewhat of a vacuum and the inability to provide a definite position or guidelines on the matter has resulted in a large ambiguity in this part of the law. At present, disclosure will only be required when it is “in the interests of justice” to require it, and to do so would not be against the public interest (*Jai Parkash Aggarwal v. Vishambhar Dutt Sharma and Others* 30 (1986) DLT 21). This position in itself appears undesirable given that it merely requires it not to be against the public interest for the source to be disclosed, as opposed to being in the public interest.

But moreover, this vague statement of the law has resulted in inconsistent judgements and further for encroachments by subsequent courts. The most concerning of these is the case of *Javed Akhtar v. Lana Publishing Co. Pvt. Ltd.* AIR 1987 Bom 339, where the Court ruled because the publication was “merely muckraking”, there was no public interest in

protecting the undisclosed source and that rather, the public interest lay in an expedient trial to assist the plaintiff in his claim. Basing the decision of whether or not to require disclosure on how the court rates the quality of journalism is a dangerous and concerning precedent.

The example set by precedent indicates that journalists facing a court's requirement to disclose sources have to carefully weigh the wrath of the court against the irreparable damage done to the profession by such disclosure. There are still brave individuals willing to say what is true even when it is dangerous, but without effective and strategic advocacy all those individuals may be at the mercy of the jailer, or worse, the mob. The two most essential points that the advocates defending these journalist must impress upon the courts are that first, determining the veracity of the statements is what will or will not serve the public interest — the identity of the source will only serve to place blame and confuse the issue, and secondly, that the publication is more than “mere muckraking” and instead had the bona fide intention of alerting the public to information that will better equip them to participate in India's democratic processes.

PRESS COUNCIL ACT, 1978

Section 15: General powers of the Council

- (1) For the purpose of performing its functions or holding any inquiry under this Act, the Council shall have the same powers throughout India as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the followings matters, namely:
 - (a) summoning and enforcing the attendance of persons and examining them on oath;
 - (b) requiring the discovery and inspection of documents;
 - (c) receiving evidence on affidavits;
 - (d) requisitioning any public record or copies thereof from any court or office;
 - (e) issuing commissions for the examination of witnesses or documents; and
 - (f) any other matter, which may be prescribed.
- (2) Nothing in subsection (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalists.

IN THE HIGH COURT OF DELHI
JAI PARKASH AGGARWAL
VERSUS
VISHAMBHAR DUTT SHARMA AND OTHERS
30 (1986) DLT 21, 1986 (11) DRJ 121

21 May 1986

D. K. Kapur and N. N. Gonwami, JJ.

Rule of Law: The media does not have an absolute privilege to refuse to disclose its sources. However, the court will only require disclosure where it is satisfied that it is in the nature of justice and not against the public interest to do so.

This case in the Delhi High Court resulted from the legal challenge of a result of an election. Vishambhar Dutt Sharma challenged the success of Jai Parkash Aggarwal. In the later stages of this process, two newspapers published similar reports suggesting that Aggarwal had asked the State Minister for Law to change the officer presiding over the electoral challenge. Aggarwal filed a petition under the Contempt of Court Act, 1971. The journalists involved apologised unreservedly, but Aggarwal submitted that the Court should also require them to disclose their source.

The Court refused this submission, instead accepting the journalists' apologies. It was held that while there is no absolute right of journalists to withhold their sources, the Court will only demand otherwise when justice requires them to do so and disclosure would not be against the public interest. In this case, it was held that the apologies were sufficient.

Cases discussed and relied upon:

Discussing the circumstances in which the courts will require disclosure: *Attorney-General v. Mulholland* 1963 (1) All ER 767; *British Steel Corporation v. Granada Television Ltd.* 1981 (1) All ER 417.

Judgement of the Court delivered by Goswami, J

(4) ... On the very first date of [the hearing into whether there had been a contempt of court], unqualified apologies were tendered on behalf of the two newspapers, *Punjab Kesari* and *Jansatta*. The unqualified apologies are in the form of affidavits of Mr. Ram Babadur Roy, Chief Reporter of *Jansatta* and of Mr. Sheetal, Sub-Editor of *Punjab Kesari*. In both the affidavits it is stated that the deponents while writing the news items did not realise that any part of the articles could be construed as amounting to contempt of court. It is further stated that they have the highest regard and respect for the judiciary in this country and the concerned papers always stood for the dignity of the judiciary in this country.

(5) On consideration of the aforesaid unqualified apologies we were inclined to accept the same, but the learned counsel for the petitioner strenuously canvassed that he had no objection to our accepting the unqualified apologies provided the respondents were directed to disclose the source of their information for publishing the item inasmuch as according to the learned counsel for the petitioner, the source was the petitioner in the election petition. It is categorically stated in both the affidavits, that the news items were not published at the behest of Shri Vishambhar Dutt Sharma. The question for consideration is whether the two newspapers should be asked to disclose the source of their information for publishing the items in question. Reliance was placed at the bar on *Attorney-General v. Mulholland* 1963 (1) All ER 767 and *British Steel Corporation v. Granada Television Ltd.* 1981 (1) All ER 417. It is not necessary to discuss the facts of those two cases because the same are entirely different from the facts in the present case. However, the ratio of the two decisions is to the effect that the press does not have an absolute privilege not to disclose the source of information on the basis of which the news item has been published. The journalists or the information media have no absolute immunity or obligation to disclose their source of information in court when asked to do so. However, it is not in every case that the press must be asked to disclose the source. Before the Court directs the disclosure of the source it must satisfy itself that it is in the nature of justice and is not against the public interest [to do so]. It will necessarily depend on the nature of the case and the offending item of the news published.

(6) Considering the facts of the present case, we are of the opinion that in the news items there was no attack made on the Presiding Officer of the Court, but it does put

Shri Aggarwal in an awkward position in the eyes of public in that such a responsible person, who is also a Member of Parliament, can go to the extent of seeking transfer of the presiding officer who is dealing with his case through the agency of the Minister. Admittedly, the ministers have no power or right to transfer the presiding officer of a court as it is entirely the business of the High Court. The election petition as we are told at the bar is concerned mainly with the recount of the ballot papers and for which the result is bound to be the same before any presiding officer. In the circumstances, it is unimaginable that a person of the status of Shri Aggarwal would go to the extent of seeking transfer of the presiding officer. On a careful consideration of the entire matter, we have no doubt that the apologies tendered, are unqualified and are bona fide. The nature of the case does not require any further action to be taken against the respondents and therefore, we have no hesitation in accepting the unqualified apologies tendered to this Court. The rule is, therefore, discharged.

IN THE HIGH COURT OF BOMBAY
JAVED AKHTAR
VERSUS
LANA PUBLISHING COMPANY PRIVATE LIMITED AND OTHERS
AIR 1987 Bom 339

14 July 1987

S. Manohar, J.

Rule of Law: Generally, the courts will only require journalists to disclose their sources where there is a strong public interest in disclosure which outweighs the general benefits of the presumption otherwise. However, in some circumstances, there will be no public interest in allowing the source to remain confidential in any event.

This is a decision from the Bombay High Court, which concerns proceedings for defamation brought by a script writer. The plaintiff issued an interrogatory requesting the identity of an unnamed source used in the article.

The Court examined the proposition that generally, disclosure will not be required during the preliminary stages of proceedings, except where there was a countervailing public interest to the opposite effect.

In deciding that the name of the source should be disclosed, the Court noted that there was no established law in India which prevented ordering disclosure. It was held that in this instance, the matter was merely gossip, rather than being a matter of public interest. Accordingly, the Court did not believe that there was any significant reason as to why the source should be able to remain confidential.

Cases discussed and relied upon:

Discussing a general presumption against disclosure: *Hennesey v. Write (No. 2)* (1888) 24 QBD 455, *Georgius v. Vice-Chancellor and Delegates of the Press of Oxford University* (1949) 1 KB 720. Discussing the possibility of exceptions to this presumption: *Edmondson*

v. Birth & Co. Limited 1905 2 KB 523; *Lyle-Samuel v. Odhams Limited* (1920) 1 KB 135; *British Steel Corporation v. Granada Television Ltd.* [1981] 1 All ER 417; *Branzburg v. Hayes* (1972) 408 US 665; *Garland v. Torre* (1958) 250 F 545.

Judgement of Manohar, J.

2. Order XI Rule 1 of the Civil Procedure Code deals with discovery by interrogatories. Every party is entitled to administer interrogatories to know the facts which constitute the opponent's case. But he cannot obtain disclosure of evidence by which the opponent hopes to prove his case. He cannot ask for the names of the opponent's witnesses. A party is also not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case. Interrogatories are permissible in connection with one's own case, for example, for obtaining admission or they may be aimed at impeaching or destroying the adversary's case.

* * *

4. The plaintiff is seeking the names of persons referred to in the article who are supposed to have made comments which are reproduced in the article. The names of these persons who feature in the article itself cannot be considered merely as names of witnesses of the defendants. Their comments are the subject matter of the article itself and they have been used by the author for the purpose of lending an air of authenticity to the statements which are made in the article. Hence the names of these persons form a material part of the subject matter which is said to be defamatory.

5. The suit is for libel where the defence is a rolled up plea of justification and fair comment. The question whether in fact such comments were made or not and if made by whom, is directly relevant. Disclosure of these names is also relevant for establishing malice. In fact, it is the contention of the plaintiff that such comments were never made by anybody. In support he points out that the comments attributed in the article to [the source, is denied] in an affidavit which [was made by that same source]. . . . The disclosure of these names is therefore directly relevant for the establishment of the plaintiff's case.

6. In his affidavit in support of this Chamber Summons the plaintiff has given the following grounds for obtaining this discovery: (i) it is to enable the plaintiff to make the proceedings more effective and complete; (ii) to substantiate his case and (iii) to sue these persons by adding them as defendants to the suit. The third reason is not germane to discovery. The plaintiff has a complete cause of action against the present defendants. It is unnecessary for the plaintiff to join these other persons in order to succeed in the present suit. The

first two reasons however, are material. The plaintiff is therefore entitled to obtain the disclosure of the names of these persons...

7. It is however, submitted on behalf of [the author] that such a discovery should not be ordered because a journalist should not be directed to disclose his source of information. In England there has been what is commonly called the “newspaper rule” under which, in an action for libel or slander, a newspaper cannot be asked to disclose the source of its information at an interlocutory stage. This rule was accepted as well established as far back as 1888 in the case of *Hennesey v. Write (No. 2)* (1888) 24 QBD 455. In the case of *Edmondson v. Birth & Co. Limited* 1905 2 KB 523, the plaintiff sought to administer to the defendants, in an action for libel, an interrogatory inquiring (inter alia) from whom the defendants received the information. The Court held that this interrogatory was not for the purpose of the pending action, but in order to enable the plaintiff to bring an action against a person or persons from whom the information was derived. This interrogatory was disallowed. Romer L.J. observed that though the court has jurisdiction to allow an interrogatory asking from whom such information was obtained, undoubtedly an interrogatory of that kind is one which ought to be regarded with some caution for it might, in some cases, be made an engine of great oppression.

8. In a later case of *Lyle-Samuel v. Odhams Limited* (1920) 1 KB 135, a weekly newspaper... published statements said to be defamatory against a candidate standing for election to the House of Commons. The defence was of fair comment. The plaintiff sought to administer interrogatories to ascertain what information the defendants had upon which they founded their comment and the source from which that information was obtained. The court referred to the settled practice in the case of newspapers not to allow interrogatories as to the source of information at an interlocutory stage. It pointed out that the exact reasons for the rule were not clear and that the rule was subject to exceptions in special circumstances. The Court felt that it was a rule from which it was not at liberty to depart....

9. In the case of *Georgius v. Vice-Chancellor and Delegates of the Press of Oxford University* (1949) 1 KB 720... [t]he trial Judge refused leave to administer [an interrogatory seeking disclosure]. The appeal court held that it saw no reason to interfere with the discretion exercised by the trial Judge. Denning L.J. in the course of his judgement observed that if the objection in administering such an interrogatory was to find out the name of the informant in order to sue him, it was not necessary to administer such an interrogatory because the remedy against the publisher would be sufficient.

10. Another reason which has been advanced in support of the newspaper rule is that it is in public interest to protect the newspapers' source of information. Hence early disclosure of the source of information would not be desirable. The rule does not prevent questions being asked in cross-examination at the trial regarding the source of information.

* * *

12. Since 1949 the newspaper rule in England is made applicable to all categories of defendants in a libel action in certain circumstances. Now under Order 82 of Rule 6 of the Supreme Court Practice in an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest. . . no interrogatories as to the defendant's source of information shall be allowed. The comments complained of must be on a matter of public interest or be made on a privileged occasion, to invite this rule.

13. We do not have any specific rule of this nature. No special privilege is granted to a newspaper or journal under the Evidence Act protecting a newspaper's source of information. I have not been shown any case in which in our country, this newspaper rule has been directly applied. Even assuming that the principles embodied in Order 82, Rule 6. . . should be applied in the public interest, the present case is not a case which would be covered by the principles laid down in Order 82, Rule 6. The article here deals entirely with the private life of a film script writer and his actress wife, and their relationship with another couple in the 'film world.' Such an article cannot be considered as an article on a matter of public interest. The private life of a film script writer and his actress wife may cater to the curiosity of a certain kind of reader. But what is interesting to the public is not necessarily of public interest. . .

14. It is undoubtedly true that a disclosure of a newspaper's source of information should not be ordered if such disclosure would be injurious to public interest. Freedom of the media to investigate and report on matters which are of public interest is essential to a free society. As a result, information which would otherwise not be available is made available to the public. If the name of a person who gives confidential information to a newspaper is required to be disclosed by the newspaper, it is possible that a newspaper's sources of information may dry up and the public would not have the benefit of disclosure of matters which are of public importance. But this protection can be extended only when the information or material published is of public importance, as for example, if the information relates to malpractices in a government organisation. Even information

relating to the private life of a public figure may be of public importance if such information has a bearing on the manner in which the public figure discharges his duties or if such information reflects on the suitability of such a public figure to hold the office that he occupies. But, unless it can be shown that the information is such as needs disclosure and publicity in the public interest, there is no reason for extending any special protection to the source of everything which may be published in a newspaper, periodical, journal or any other publication.

15. In the case of *British Steel Corporation v. Granada Television Ltd.* [1981] 1 All ER 417, . . . the plaintiffs instituted an action to discover the name of the informant who sent various confidential papers pertaining to British Steel Corporation to Granada Television. This information and the confidential papers were made use of by Granada Television in one of its broadcasts. The House of Lords held that the person who betrayed the confidentiality reposed in him by his employer was certainly a wrongdoer. The Court had to weigh the public interest in bringing the wrongdoer to book as against the public interest in not having the source of information disclosed. It held that the public interest in bringing the wrongdoer to book outweighed other public interests. Lord Denning, while dealing with this case at the stage of the Court of Appeal, referred to various cases in the United States of America on this subject. Among them we referred to the case of *Branzburg v. Hayes* which was before the Supreme Court in (1972) 408 US 665 where a newspaper reporter who had obtained special information on the Black Panther Party was asked to disclose the names of his informants before a grand jury in a federal investigation of the Panthers. The court weighed the public interest of prosecuting a criminal against the public interest of protecting a newspaper's source of information. It held that the former outweighed the latter and directed the journalist give evidence for which he had been subpoenaed. In each case therefore, even when protection can legitimately be extended to a newspaper or journalist, there may be other vital constitutional and social interests which may have to be balanced, depending on the facts of each case. There can be no hard and fast rule as to when a newspaper may be asked to disclose and when not to disclose its source of information. It will depend on the balancing of various public interests which may be involved.

16. In a United States case which comes close to the present case, *Garland v. Torre* (1958) 250 F 545. . . the New York Herald Tribune published an article which was highly defamatory of a film actress. The article was published by a columnist who said that she had got the information from an executive of a broadcasting network. The court ordered the columnist to disclose the name of the informant.

17. In the present case the article does not disclose any information which can be said to be of public importance or public interest. The article merely comments on public interest. The article merely comments on the private life of a film script writer and his actress wife. It has no bearing on any matter of public importance. The disclosure of names asked for is directly material to the plaintiff's case. It is not a case where any special protection needs to be given to the author. There is no investigative journalism involved here, which may be of value to an open and free society. It is merely muckraking.

IN THE HIGH COURT OF DELHI
COURT ON ITS OWN MOTION
VERSUS
THE PIONEER

68 (1997) DLT 259, 1997 (41) DRJ 564

6 March 1997

M. Rao and M. Surin, JJ.

Rule of Law: Generally there will be no obligation for journalists to disclose their sources, but this is coupled with the duty of responsible journalism. It should be noted that there may be circumstances where justice requires sources to be disclosed.

This case involved a newspaper article which alleged that the courts were hampering efforts to combat the building of illegal structures. The article contained comments from a senior government official. The Court initiated contempt proceedings and required the defendants (the journalist and the editor) to disclose the source. The defendants apologised unreservedly for the article, but refused to disclose the source.

The Court held that the article was contemptuous and that it had been published without being properly researched. It accepted the defendants' argument that generally there was no duty to disclose sources, but stated that this was coupled with the duty to report responsibly and that such a duty may exist where justice required it. Ultimately the court did not insist on the sources being disclosed, but largely because it felt it was unnecessary.

Cases discussed and relied upon:

Discussing the presumption against disclosure: *British Steel Corporation v. Granada Television Ltd* [1981] 1 All ER 417.

Judgement of the Court delivered by Surin, J

Counsel for the contemnors submitted that the respondents should not be compelled to disclose the name of the Government functionary interviewed by the correspondent. This he submitted was essential to protect and preserve the sources of information and

for effectually exercising the freedom of the press. Learned counsel submitted that if the source of information was not protected, the same would dry up and gathering of news would become impossible and the freedom of press would become an empty shell. Reliance was placed by the learned counsel on the 93rd Report of the Law Commission, which recommended the addition of Section 132A of the Indian Evidence Act, to protect the source of information, if information had been provided on the agreement or understanding that it would be kept confidential. Learned counsel also relied on Section 15(2) of the Press Council Act. Reference was also made to the decision of Lord Denning in *British Steel Corporation v. Granada Television Ltd* [1981] 1 All ER 417.

“It was held that the newspaper should not be in general compelled to disclose the sources of information. Neither by means of discovery before trial, nor by questions or cross examination at the trial. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their source would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed, unforeseen would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known. Investigative journalism has proved itself as a valuable adjunct to the freedom of press.....”

It is significant that while making the observations, Lord Denning observed nevertheless this principle is not absolute and the journalist has no privilege by which he can claim as if by right to refuse to disclose. There may be exceptional cases in which on balancing the various interest, the court decides that the source should be disclosed. Lord Denning observed, “the rule by which a newspaper should not be compelled to disclose the source of information is granted to a newspaper on condition that it acts with a due sense of responsibility. In order to be deserving of freedom, the press must show itself worthwhile of it. A free press must be a responsible press. As the power of the press is great it must not abuse its power. If a newspaper should act irresponsibly then it forfeits its claim to protect its source of information.” The House of Lords in *Granada* held that they were bound to disclose the name of informers though such names need not be disclosed in all cases.

The principle that emerges is that the Courts ought not to compel confidences bona fide given to be breached unless necessary in the interest of justice. . . . Reference to Section 10 of the amended Contempt of Courts Act in England was made which provides that no court would require a person to disclose or hold a person guilty of contempt for not disclosing the source of information unless it is established to the satisfaction of the court that the disclosure is necessary and in the interest of national security or for the prevention of

disorder or crime. We, therefore, hold that the court has the power to direct disclosure of the source of information, when considered necessary in the interest of justice.

In the instant case, it is not necessary to direct disclosure of the source as we have concluded that the news report was written without requisite material or factual foundation. There was no verification of facts or research and analysis. It is a case of the author acting irresponsibly and accepting whatever is told to him in an alleged interview. Besides, the respondents as noted earlier initially were not willing to disclose the source or the name of person interviewed. However, soon thereafter in view of the legal position and the “altered circumstances” their counsel indicated their willingness to disclose the name of person interviewed. Later on, at the third stage, the respondents did a volte face and declined to disclose the person interviewed or the source of information, on the ground that it would adversely affect their information gathering capacity in future. In these circumstances, we have justifiably and legitimately drawn an adverse inference that there is no factual foundation or requisite material available with the respondents. No useful purpose would be served by insisting on the disclosure of the person interviewed or the source of information.

IN THE SUPREME COURT OF INDIA
PEOPLE'S UNION FOR CIVIL LIBERTIES AND ANOTHER
VERSUS
THE UNION OF INDIA

2004 (2) ACR 1400 (SC), AIR 2004 SC 456

16 December 2003

S. Rajendra Babu and G. P. Mathur, JJ.

Rule of Law: Section 14 of the now repealed Prevention of Terrorism Act, 2002, was a constitutionally valid restriction on the ability of journalists to refuse to disclose information about their sources. There is no such sacrosanct right for journalists to do so, and the precautions in the Act ensure minimum interference.

This case was a challenge to the various provisions of the now repealed Prevention of Terrorism Act, 2002. Of particular relevance is the challenge to section 14, which enabled officers investigating terrorism to compel any person furnish any relevant information. It was argued that this was in violation of Articles 14, 19, 20(3) and 21 of the Constitution, and the need for journalists to be able to protect their sources.

The Court, having provided a background to the nature of the Act and terrorism, held that there was no sacrosanct right to withhold information regarding a crime under the guise of professional ethics. Instead, it stressed the importance of citizens' involvement in preventing offending. The Court recognised the importance of officers acting with a level of caution and the checks in place, such as requiring approval from an officer not below the rank of Superintendent of Police. The Court also made it clear that any action that was inconsistent with the Act or that infringed any other right, could still be subject to existing legal remedies.

Cases discussed and relied upon:

Discussing the nature of terrorism: *Mohd Iqbal M. Shaikh v. State of Maharashtra* 1998 Cri LJ 2537. Holding that the right to privacy will not enable an individual to withhold information about a crime: *Sharda v. Dharmpal* [2003] 3 SCR 106; *State of Gujarat v.*

Anirudhsing 1997 Cri LJ 3397. Discussing the ability of journalists to withhold the name of their sources: *Pandit M.S. M. Sharma v. Shri Sri Krishan Sinha* 1959 Supp (1) SCR 806; *Sewakram Sobhani v. R.K. Karanjia* 1981 Cri LJ 894).

Judgement of the Court delivered by Rajendra Babu, J

1. In this batch of Writ Petitions before us the Constitutional validity of various provisions of the Prevention of Terrorism Act, 2002 (hereinafter POTA) is in challenge.

* * *

4. In [considering this petition] it is necessary to understand the contextual backdrop that led to the enactment of POTA, which aims to combat terrorism. Terrorism has become the most worrying feature of contemporary life. Though violent behaviour is not new, the present day ‘terrorism’ in its full incarnation has obtained a different character and poses extraordinary challenges to the civilised world. The basic edifices of a modern State, like democracy, state security, rule of law, sovereignty and integrity, basic human rights etc are under the attack of terrorism. Though the phenomenon of terrorism is complex, a ‘terrorist act’ is easily identifiable when it does occur. The core meaning of the term is clear even if its exact frontiers are not...

5. Paul Wilkinson, an authority on terrorism related works, culled out five major characteristics of terrorism. They are:

- (1) It is premeditated and aims to create a climate of extreme fear or terror.
- (2) It is directed at a wider audience or target than the immediate victims of violence.
- (3) It inherently involves attacks on random and symbolic targets, including civilians.
- (4) The acts of violence committed are seen by the society in which they occur as extra-normal, in the literal sense that they breach the social norms, thus causing a sense of outrage.
- (5) Terrorism is used to influence political behaviour in some way — for example to force opponents into conceding some or all of the perpetrators’ demands, to provoke an over-reaction, to serve as a catalysis for more general conflict, or to publicise a political cause.

6. In all acts of terrorism, it is mainly the psychological element that distinguishes it from other political offences, which are invariably accompanied with violence and disorder. Fear

is induced not merely by making civilians the direct target of violence but also by exposing them to a sense of insecurity... It is in this context that this Court held in *Mohd Iqbal M. Shaikh v. State of Maharashtra* 1998 Cri LJ 2537, that:

“..it is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism. But... it may be possible to describe it as a use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. ... if the object of the activity is to disturb harmony of the society or to terrorise people and the society, with a view to disturb even tempo, tranquillity of the society, and a sense of fear and insecurity is created in the minds of a section of society at large, then it will, undoubtedly be held to be terrorist act...”

7. Our country has been the victim of an undeclared war by the epicentres of terrorism with the aid of well-knit and resourceful terrorist organisations engaged in terrorist activities in different States such as Jammu and Kashmir, North-East States, Delhi, West Bengal, Maharashtra, Gujarat, Tamilnadu, Andhra Pradesh...

8. All these terrorist strikes have certain common features. It could be very broadly grouped into three:

- (1) Attacks on the institution of democracy, which is the very basis of our country (by attacking Parliament, Legislative Assembly etc) and attacks on the economic system by targeting economic nerve centres.
- (2) Attacks on symbols of national pride and on security/strategic installations (e.g. Red Fort, military installations and camps, radio stations etc).
- (3) Attack on civilians to generate terror and fear psychosis among the general populace and attacks at worshipping places to injure sentiments and to whip up communal passions. These are designed to position the people against the government by creating a feeling of insecurity.

9. Terrorist acts are meant to destabilise the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralise the security forces, to thwart the economic progress and development and so on. This cannot be equated with a usual law and order problem within a State... Today, the government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of

India from terrorists, both from outside and within borders. To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. In the above said circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomised in POTA.

* * *

15. The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and the courts' responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to human rights. Our Constitution laid down clear limitations on the State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' human rights is the responsibility of courts in a matter like this. Constitutional soundness of POTA needs to be judged by keeping these aspects in mind.

* * *

35. ...The constitutional validity of section 14 is challenged by advancing the argument that it gives unbridled powers to the investigating officer to compel any person to furnish information if the investigating officer has reason to believe that such information will be useful or relevant to the purpose of the Act. It is pointed out that the provision is without any checks and is amenable to misuse by the investigating officers. It is also argued that it does not exclude lawyers or journalists who are bound by their professional ethics to keep the information rendered by their clients as privileged communication. Therefore, the Petitioners submitted that section 14 is violative of Articles 14 [equality before the law], 19 [freedom of expression], 20(3) [right to be free from self-incrimination] and 21 [protection of life and liberty] of the Constitution. Learned Attorney General maintained that the Act does not confer any arbitrary or unguided powers; that such power is restricted to furnish information in one's possession in relation to terrorist offences 'on points or matters where the investigating officer has reason to believe (not suspect) that such information would be useful for or relevant to the purposes of the Act.' [It is submitted] that this provision is essential for the detection and prosecution of terrorist offences; and that the underlying rationale of the obligation to furnish information is the salutary duty of every citizen.

36. Section 39 of the Code of Criminal Procedure, 1973 casts a duty upon every person to furnish information regarding offences. The criminal justice system cannot function without the cooperation of people. Rather it is the duty of everybody to assist the State in detection of crime and bringing criminals to justice. Withholding such information cannot be traced to the right to privacy, which itself is not an absolute right (See *Sharda v. Dharmpal* [2003] 3 SCR 106). The right to privacy is subservient to that of security of the state. Highlighting the necessity of people's assistance in detection of crime this Court observed in *State of Gujarat v. Anirudhsing* 1997 Cri LJ 3397, that:

“..It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence...”

Section 14 confers power to the investigating officer to ask for furnishing information that will be useful for or relevant to the purpose of the Act. Furthermore such information could be asked only after obtaining a written approval from an officer not below the rank of a Superintendent of Police. Such power to the investigating officers is quiet necessary in the detection of terrorist activities or terrorists.

37. It is the settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics... There is also no law that permits a newspaper or journalist to withhold relevant information from courts though they have been given such power by virtue of section 15(2) of the Press Council Act, 1978 as against the Press Council (see also *Pandit M. S. M. Sharma v. Shri Sri Krishan Sinha* 1959 Supp (1) SCR 806, and *Sewakram Sobhani v. R. K. Karanjia* 1981 Cri LJ 894...). Of course the investigating officers will be circumspect and cautious in requiring them to disclose information. In the process of obtaining information, if any right of a citizen is violated, nothing prevents him from resorting to other legal remedies.

38. In as much as the main purpose of section 14 of POTA is only to allow the investigating officers to procure certain information that is necessary to proceed with the further investigation we find there is no merit in the argument of the petitioners and we uphold the validity of section 14.

CHAPTER SIX

PARLIAMENTARY PRIVILEGE

Parliamentary privilege concerns the powers and protections given to India's Parliament, the various state legislatures, and their members. These laws are intended to create an environment which allows for freer debate, more effective decision-making and ultimately, a more productive government and democratic system. To achieve this, the law allows for a greater degree of freedom of expression, greater immunity, the ability to control proceedings within the House, as well as the ability to control reports and comment on what occurs, and so on. The problem, and what this chapter discusses, is that laws which were once meant to foster democracy by protecting the legislatures from outside influence are now shielding it from legitimate influence by the people for whom the legislatures were created.

Indeed, steps taken to ensure that legislatures are able to engage in frank and meaningful debates are important in creating a working democracy and ensuring optimal law-making. However, such steps also risk undermining other important aspects of democracy, most notably, a public informed of what its elected officials are doing as well as representative and responsible government. The more vigorous a legislature is in limiting access to its affairs and controlling information which is published about it, the greater the risk to democratic principles.

The legislatures of India derive their powers from those of colonial England, where the functions of the House of Commons was under threat from both the Crown and the House of Lords. When the Constitution of India was passed, these same implements of protection were granted by virtue of Article 105 (for the national Parliament) and Article 194 (for state legislatures). However, the same threat cannot be said to be present in modern India, where there is no equivalent of the press from the Crown and the House of Lords. Rather than being under the threat of a higher power, the legislatures are the higher power, rendering much of the privilege anachronistic and unnecessary. Instead, there should be genuine concern that parliamentary privilege is being used as a tool to punish and constrain journalists and as a barrier to journalistic freedom. Parliamentary privilege now serves to endanger democracy more than promote it, as it shields the legislature from much needed public oversight.

These cases are intended to provide a broad overview and history of parliamentary privilege in India, as well as to illustrate its treatment by the courts. Beyond their immediate subject-matter, both decisions shed light on other aspects of this area of the law.

CONSTITUTION OF INDIA, 1949

Article 13: Laws inconsistent with or in derogation of the fundamental rights

- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
- (3) In this article, unless the context otherwise requires, law includes any ordinance, order, by-law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
- (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.

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

- (1) All citizens shall have the right:
 - (c) to freedom of speech and expression . . .
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the 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.

Article 105: Powers, privileges, etc of the Houses of Parliament and of the members and committees thereof

- (1) Subject to the provisions of this constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

- (2) No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
- (3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty Fourth Amendment) Act, 1978.
- (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of Parliament or any committee thereof as they apply in relation to Members of Parliament.

Article 194: Powers, privileges, etc of the Houses of Legislatures and of the members and committees thereof

- (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the legislature, there shall be freedom of speech in the legislature of every State.
- (2) No member of the legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a legislature of any report, paper, votes or proceedings.
- (3) In other respects, the powers, privileges and immunities of a House of the legislature of a State, and of the members and the committees of a House of such legislature, shall be such as may from time to time be defined by the legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution (Forty Fourth Amendment) Act, 1978.
- (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of the legislature of a State or any committee thereof as they apply in relation to members of that legislature.

IN THE SUPREME COURT OF INDIA

PANDIT M. S. SHARMA

VERSUS

SHRI SRI KRISHNA SINHA AND OTHERS

1959 AIR 395, 1959 SCR Supl (1) 806

12 December 1958

S. R. Das, CJ, N. H. Bhagwati, B. P. Sinha, K. Rao and K. N. Wanchoo, JJ.

Rule of Law: At the commencement of the Indian Constitution, the various legislatures possessed the power or privilege of prohibiting the publication of even a true and faithful report of their proceedings. In the event of a conflict between the powers possessed under Article 194(3) and a fundamental right like that of Article 19(1), the former will prevail.

This case involved proceedings initiated against the editor of a newspaper who had published the complete speech of a member of the Bihar legislative assembly, including parts which the Speaker had ordered to be expunged. The editor contended that the legislature did not enjoy any privilege in this regard. The case centred around two issues. First, whether this privilege existed by virtue of Article 194 of the Constitution (which granted the various legislatures the same powers as the United Kingdom's House of Commons at the time the Constitution was enacted) and secondly, if it did, whether this power was inconsistent and secondary to the editor's right to freedom of expression and liberty.

The majority embarked on a lengthy analysis of the history of the House of Commons' ability to restrain publications of its proceedings. It held that although not exercised regularly, such a power did exist, even in relation to reports that were true and accurate. Accordingly, the Bihar legislative assembly enjoyed the same privilege by virtue of Article 194. The majority found no violation of Article 21 and held that this privilege was an exception to Article 19(1).

In his dissent, Justice Rao relied on case law to suggest that by the time the Constitution was enacted, the United Kingdom House of Commons only possessed privilege in relation to false or bad faith publications. He held further, that he did not recognise any conflict between Article 194 and Article 19(1).

Cases discussed and relied upon:

Discussing the right to freedom of expression and its application to journalists: *Romesh Thapar v. State of Madras* 1950 CriLJ 1514; *Brijbhushan v. The State of Delhi* 1950 CriLJ 1525; *Express Newspapers Ltd. v. Union of India* (1961) ILLJ 339 SC; *Srinivasan v. The State of Madras* AIR 1951 Mad 70. Discussing the rights of journalists: *Arnold v. King Emperor* (1914) L.R. 41 Ind Ap 149. Discussing the ability of a legislature to prevent publications relating to its proceedings: *Wason v. Walter* (1868) L.R. IV Q.B. 73. Determining whether Article 194 is subject to fundamental rights: *Anand Bihari Mishra v. Ram Sahay* AIR (1952) MB 31; *Gunupati Keshavram Reddy v. Nafisul Hasan* AIR 1954 SC; *Anantha Krishnan v. State of Madras* AIR 1952 Mad 395.

Judgement of Das, CJ, Bhagwati, Sinha and Wanchoo, JJ delivered by Das, CJ

10. The present petition under Article 32 of the Constitution was filed on 5 September 1958. The petitioner contends that the [notice issued by the Committee] and the proposed action by the Committee of Privileges are in violation of the petitioner's fundamental rights to freedom of speech and expression under Article 19(1)(a) and to the protection of his personal liberty under Article 21 and the petitioner claims by this petition to enforce those fundamental rights.

11. An affidavit in opposition affirmed by Sri Enayat Rahman, the present incumbent of the office of Respondent No. 3, has been filed on behalf of the respondents wherein it is maintained that the report contained in the offending publication was not in accordance with the authorised report of the proceedings in the House in that it contained even those remarks which, having been, by order of the Speaker, directed to be expunged, did not form part of the proceedings. It is claimed that generally speaking proceedings in the House are not in the ordinary course of business meant to be published at all and that under no circumstances is it permissible to publish the parts of speeches which had been directed to be expunged and consequently were not contained in the official report. Such publication is said to be a clear breach of the privilege of the Legislative Assembly, which is entitled to protect itself by calling the offender to book and, if necessary, by meting out suitable punishment to him. This claim is sought to be founded on the provisions of clause (3) Article 194 which confers on it all the powers, privileges and immunities enjoyed by the House of Commons of the British Parliament at the commencement of our Constitution.

12. Learned advocate for the petitioner relies upon Article 19(1)(a) and contends that the petitioner, as a citizen of India, has the right to freedom of speech and expression and that,

as an editor of a newspaper, he is entitled to all the benefits of freedom of the press. It is, therefore, necessary to examine the ambit and scope of liberty of the press generally and under our Constitution in particular.

13. In England freedom of speech and liberty of the press have been secured after a very bitter struggle between the public and the Crown. A short but lucid account of that struggle will be found narrated in the Constitutional History of England by Sir Thomas Erskine May (Lord Farnborough), Volume II, Chapter IX under the heading "Liberty of Opinion." In the beginning the Church is said to have persecuted the freedom of thought in religion and then the State suppressed it in politics. Matters assumed importance when the art of printing came to be developed. The press was subjected to a rigorous censorship. Nothing could be published without the imprimatur of the licenser and the publication of unlicensed works was visited with severe punishments. "Political discussion was silenced by the licenser, the Star Chamber, the dungeon, the pillory, mutilation and branding." Even in the reign of Queen Elizabeth printing was interdicted, save in London, Oxford and Cambridge. "Nothing marked more deeply the tyrannical spirit of the first two Stuarts than their barbarous persecutions of authors, printers and the importers of prohibited books: nothing illustrated more signally the love of freedom than the heroic courage and constancy with which those persecutions were borne" (May's Constitutional History of England, Volume II, page 240). There was no mention of freedom of speech or of liberty of the press in the Petition of Rights of 1628. The fall of the Star Chamber augured well for the liberty of the press, but the respite was short lived, for the Restoration brought renewed trial upon the press. The Licensing Act placed the entire control of the press in the Government. Liberty of the press was interdicted and even news could not be published without licence. Then came the Revolution of 1688, but even in the Bill of Rights of 1688 there was no mention of freedom of speech or of liberty of the press. In 1695, however, the Commons refused to renew the Licensing Act and the lapse of that Act marked the triumph of the press, for thenceforth the theory of free press was recognised and every writing could be freely published, although at the peril of the rigorous application of the law of libel. William Blackstone in his Fourth Book of Commentaries published in 1769 wrote at page 145:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

14. ...It was thus, as a result of a strenuous struggle, that the British people have at long last secured for themselves the greatest of their liberties — the liberty of opinion.

* * *

16. Prior to the advent of our present Constitution, there was no constitutional or statutory enunciation of the freedom of speech of the subjects or the liberty of the press. Even in the famous Proclamation of Queen Victoria made in 1858 after the British power was firmly established in India, there was no reference to the freedom of speech or the liberty of the press, although it was announced that “none be in any wise favoured, none molested or disquieted by reason of their Religious Faith or Observances; but that all shall alike enjoy the equal and impartial protection of the law...” Indeed during the British period of our history the press as such had no higher or better rights than the individual citizen. In *Arnold v. King Emperor* (1914) L.R. 41 Ind Ap 149 which was a case of an appeal by the editor of a newspaper against his conviction for criminal libel under section 499 of the Indian Penal Code, Lord Shaw of Dunfermline in delivering the judgement of the Privy Council made the following observations at page 169:

“Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.”

17. Then came our Constitution on January 26, 1950...

18. It will be noticed that [Article 19] guarantees to all citizens freedom of speech and expression but does not specifically or separately provide for liberty of the press. It has, however, been held that the liberty of the press is implicit in the freedom of speech and expression which is conferred on a citizen. Thus, in *Romesh Thapar v. State of Madras* 1950 CriLJ 1514 this Court has held that freedom of speech and expression includes the freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. In *Brijbhushan v. The State of Delhi* 1950 CriLJ 1525 it has been laid down by this Court that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by

Article 19(1)(a). To the like effect are the observations of Bhagwati, J., who, in delivering the unanimous judgement of this Court in *Express Newspapers Ltd. v. Union of India* (1961) 111 339 SC said at page 118 that freedom of speech and expression includes within its scope the freedom of the press. Two things should be noticed. A non-citizen running a newspaper is not entitled to the fundamental right to freedom of speech and expression and, therefore, cannot claim, as his fundamental right, the benefit of the liberty of the press. Further, being only a right flowing from the freedom of speech and expression, the liberty of the press in India stands on no higher footing than the freedom of speech and expression of a citizen and that no privilege attaches to the press as such, that is to say, as distinct from the freedom of the citizen. In short, as regards to citizens running a newspaper the position under our Constitution is the same as it was when the Judicial Committee decided the case of *Arnold* and as regards non-citizens the position may even be worse.

* * *

20. Besides a few minor miscellaneous points raised by the learned advocate for the petitioner, which will be dealt with in due course, two principal points arising on the pleadings have been canvassed before us and they are formulated thus:

- I. Has the House of the Legislature in India the privilege under Article 194(3) of the Constitution to prohibit entirely the publication of the publicly seen and heard proceedings that took place in the House or even to prohibit the publication of that part of the proceedings which had been directed to be expunged?
- II. Does the privilege of the House under Article 194(3) prevail over the fundamental right of the petitioner under Article 19(1)(a)?

* * *

[Having laid out Article 194, the Court then goes on to consider] what, then, were the powers, privileges and immunities of the House of Commons which are relevant for the purposes of the present petition?

Parliamentary privilege is defined as “the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals” (Sir Thomas Erskine May’s *Parliamentary Practice*, 16th Edition, Chapter III, page 42). According to the same author

“privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.” ... Learned Solicitor General appearing for the respondents... claimed that the House of Commons has the power and privilege to prohibit the publication in any newspaper of even a true and faithful report of its proceedings and certainly the publication of any portion of speeches or proceedings directed to be expunged from the official record.

21. As pointed out in May’s Parliamentary Practice, 16th Edition, page 151, in the early days of British history the maintenance of its privileges was of vital importance to the House of Commons. They were necessary to preserve its independence from the King and the Lords and, indeed, to its very existence. The privileges of the House of Commons have been grouped under two heads, namely, (1) those demanded of the Crown by the Speaker of the House of Commons at the commencement of each Parliament and granted as a matter of course and (2) those not so demanded by the Speaker. Under the first heading come (a) freedom from arrest (claimed in 1554), (b) freedom of speech (claimed in 1541), (c) the right of access to the Crown (claimed in 1536) and (d) the right of having the most favourable construction placed upon its proceedings. The second head comprises (i) the right to provide for the due composition of its own body, (ii) the right to regulate its own proceedings, (iii) the right to exclude strangers, (iv) the right to prohibit publication of its debates and (v) the right to enforce observation of its privileges by fine, imprisonment and expulsion (Ridge’s Constitutional Law, 8th Edition, page 61; also Halsbury’s Laws of England, 2nd Edition, Volume 24, page 351).

22. For a deliberative body like the House of Lords or the House Commons, freedom of speech is of the utmost importance. A full and free debate is of the essence of Parliamentary democracy. Although freedom of speech was claimed and granted at the commencement of every Parliament, it was hardly any protection against the autocratic kings, for the substance of the debates could be and was frequently reported to the King and his ministers which exposed the members to the royal wrath. Secrecy of Parliamentary debates was, therefore, considered necessary not only for the due discharge of the responsibilities of the members but also for their personal safety. “The original motive for secrecy of debate was the anxiety of the members to protect themselves against the action of the sovereign, but it was soon found equally convenient as a veil to hide their proceedings from their constituencies” (Taswell-Langmead’s Constitutional History, 10th Edition, page 657). This object could be achieved in two ways, namely, (a) by prohibiting the publication of any report of the debates and proceedings and (b) by excluding strangers from the House and holding debates within closed doors. These two powers or privileges have been adopted to ensure the secrecy of

debates to give full play to the members' freedom of speech and therefore, really flow, as necessary corollaries, from that freedom of speech which is expressly claimed and granted at the commencement of every Parliament.

23. As to (a)... the right to control and, if necessary, to prohibit the publication of the debates and proceedings has been claimed, asserted and exercised by both Houses of Parliament from very old days. In 1682 and again in 1640 the clerk was forbidden to make notes of "particular men's speeches" or to "suffer copies to go forth of any arguments or speech whatsoever" (May's Parliamentary Practice, 16th Edition, page 55). The House of Commons of the Long Parliament in 1641 framed a standing order "that no member shall either give a copy or publish in print anything that he shall speak in the House" and "that all the members of the House are enjoined to deliver out no copy or notes of anything that is brought into the House, or that is propounded or agitated in this House"... This standing order has not up to this date been abrogated or repealed... In 1722 the House of Commons passed the following resolutions :

"Resolved, That no News Writers do presume in their Letters, or other Papers, that they disperse as Minutes, or under any other Denomination, to inter-meddle with the Debates, or any other Proceedings, of this House.

Resolved, That no Printer or Publisher of any printed News Papers, do presume to insert in any such Papers any Debates, or any other Proceedings of this House, or any Committee thereof."

24. In 1738 the publication of its proceedings was characterised in another resolution of the House of Commons as "a high indignity and a notorious breach of privilege." The publication of debates in the "Middlesex Journal" brought down the wrath of the House of Commons on the printers who were ordered to attend the House. Having not been found, warrants were issued for the printers' arrest and one printer was arrested and brought before Alderman John Wilkes who immediately discharged him on the ground that no crime had been committed. Another printer was arrested and brought before another Alderman who, likewise, discharged the prisoner inasmuch as he was not accused of having committed any crime. By way of reprisal the House of Commons imprisoned the Lord Mayor and an Alderman, both of whom were the members of the House. Both men, on their release, were honoured in a triumphal procession from the Tower of London to the Mansion House. After this political controversy, debates in both Houses continued to be reported with impunity, although technically such reporting was a breach of privilege. Accurate reporting was, however, hampered by many difficulties, for the reporters had no accommodation in the House and were frequently obliged to wait for long periods in the

halls or on the stairways and were not permitted to take notes. The result was that the reports published in the papers were full of mistakes and misrepresentations. After the House of Commons was destroyed by fire in 1834, galleries in temporary quarters were provided for the convenience of reporters, and in the new House of Commons a separate gallery was provided for the Press. In 1836 the Commons provided for the publication of parliamentary papers and reports...

25. Learned advocate for the petitioner has drawn our attention to the judgement of Cockburn, C.J., in the celebrated case of *Wason v. Walter* (1868) L.R. IV Q.B. 73. The plaintiff in that case had presented a petition to the House of Lords charging a high judicial officer with having, 30 years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons and praying enquiry and the removal of the officer if the charge was found true. A debate ensued on the presentation of the petition and the charge was utterly refuted. Allegations disparaging to the character of the plaintiff had been spoken in the course of the debate. A faithful report of the debate was published in the Times and the plaintiff proceeded against the defendant, who was a proprietor of the Times, for libel. It was held that the debate was a subject of great public concern on which a writer in a public newspaper had full right to comment, and the occasion was, therefore, so far privileged that the comments would not be actionable so long as a jury should think them honest and made in a fair spirit, and such as were justified by the circumstances as disclosed in an accurate report of the debate. Learned advocate for the petitioner contends that this decision establishes that the press had the absolute privilege of publishing a report of the proceedings that take place in Parliament, just as it is entitled to publish a faithful and correct report of the proceedings of the courts of justice, though the character of individuals may incidentally suffer and that the publication of such accurate reports is privileged and entails neither criminal nor civil responsibility. This argument overlooks that the question raised and actually decided in that case, as formulated by Cockburn, C.J., himself at page 82, was simply this:

“The main question for our decision is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question.”

26. The issue was between the publisher and the person whose character had been attacked. The question of the privilege, as between the House and the newspaper, was not in issue at all. In the next place, the observations relied upon as bearing on the question of

privilege of Parliament were not at all necessary for deciding that case. . . . In the third place the observations of the learned Chief Justice clearly indicate that, as between the House and the press, the privilege does exist.

* * *

27. With the facilities now accorded to the reporters, the practice of reporting has improved, and the House, sensible of the advantage which it derives from a full and clear account of its debates, has even encouraged the publication of reports of debates and proceedings that take place in the House. From this it does not at all follow that the House has given up this valuable privilege. The following passage in Anson's Law and Custom of the Constitution at page 174 is significant and correctly states the position:

"We are accustomed, therefore, to be daily informed, throughout the Parliamentary Session, of every detail of events in the House of Commons; and so we are apt to forget two things. The first is that these reports are made on sufferance, for the House can at any moment exclude strangers and clear the reporters' gallery; and that they are also published on sufferance, for the House may at any time resolve that publication is a breach of privilege and deal with it accordingly. The second is that though the privileges of the House confer a right to privacy of debate they do not confer a corresponding right to the publication of debate."

* * *

31. As to (b) it has already been said that the freedom of speech claimed by the House and granted by the Crown is, when necessary, ensured by the secrecy of the debate which in turn is protected by prohibiting publication of the debates and proceedings as well as by excluding strangers from the House. Any member could in the old days "spy a stranger" and the Speaker had to clear the House of all strangers which would, of course, include the press reporters. . . . This right was exercised in 1923 and again as late as on 18 November 1958. This also shows that there has been no diminution in the eagerness of the House of Commons to protect itself by securing the secrecy of debate by excluding strangers from the House when any occasion arises. The object of excluding strangers is to prevent the publication of the debates and proceedings in the House and, if the House is tenaciously clinging to this power or privilege of excluding strangers, it is not likely that it has abandoned its power or privilege to prohibit the publication of reports of debates or proceedings that take place within its precincts.

32. The result of the foregoing discussion [is] therefore, that the House of Commons had at the commencement of our Constitution the power or privilege of prohibiting the publication

of even a true and faithful report of the debates or proceedings that take place within the House. A fortiori the House had at the relevant time the power or privilege of prohibiting the publication of an inaccurate or garbled version of such debates or proceedings. The latter part of Article 194(3) confers all these powers, privileges and immunities on the House of the Legislature of the State, as Article 105(3) does on the Houses of Parliament. . . Our Constitution clearly provides that until Parliament or the State Legislature, as the case may be, makes a law defining the powers, privileges and immunities of the House, its members and Committees, they shall have all the powers, privileges and immunities of the House of Commons as at the date of the commencement of our Constitution. . . Nor do we share the view that it will not be right to entrust our Houses with these powers, privileges and immunities, for we are well persuaded that our Houses, like the House of Commons, will appreciate the benefit of publicity and will not exercise the powers, privileges and immunities except in gross cases.

Re. II : Assuming that the petitioner, as a citizen and an editor of a newspaper, has under Article 19(1)(a) the fundamental right to publish a true and faithful report of the debates or proceedings that take place in the Legislative Assembly of Bihar and granting that that Assembly under Article 194(3) has all the powers, privileges and immunities of the House of Commons which include, amongst others, the right to prohibit the publication of any report of the debates or proceedings, whose right is to prevail?...

33. Learned advocate for the petitioner seeks to support his client's claim [that Article 194(3) is subject to Article 19(1)(a)] in a variety of ways which may now be noted seriatim:

- (i) that though clause (3) of Article 194 has not, in terms, been made "subject to the provision of the Constitution", it does not necessarily mean that it is not so subject, and that the several clauses of Article 194 or Article 105 should not be treated as distinct and separate provisions but should be read as a whole and that, so read, all the clauses should be taken as subject to the provisions of the Constitution, which, of course, would include Article 19(1)(a);
- (ii) that Article 194(1), like Article 105(1), in reality operates as an abridgment of the fundamental right of freedom of speech conferred by Article 19(1)(a) when exercised in Parliament or the State Legislatures respectively, but Article 194(3) does not, in terms, purport to be an exception to Article 19(1)(a);
- (iii) that Article 19, which enunciates a transcendental principle and confers on the citizens of India indefeasible and fundamental rights of a permanent nature, is

enshrined in Part III of our Constitution, which, in view of its subject matter, is more important, enduring and sacrosanct than the rest of the provisions of the Constitution, but that the second part of Article 194(3) is of the nature of a transitory provision which, from its very nature, cannot override the fundamental rights;

- (iv) that if, in pursuance of the provisions of Article 105(3), Parliament makes a law under entry 74 in List I to the Seventh Schedule defining the powers, privileges and immunities of the House or Houses of Parliament and its members and committees or if, in pursuance of the provisions of Article 194(3), the State Legislature makes a law under entry 39 in List II to the Seventh Schedule defining the powers, privileges and immunities of the House or Houses of the Legislature of a State and its members and committees and if, in either case, the powers, privileges and immunities so defined and conferred on the House or Houses are repugnant to the fundamental rights of the citizens, such law will, under Article 13, to the extent of such repugnancy, be void and that such being the intention of the Constitution makers in the earlier part of Article 194(3) and there being no apparent indication of a different intention in the latter part of the same clause, the powers, privileges and immunities of the House of Commons conferred by the latter part of clause (3) must also be taken as subject to the fundamental rights;
- (v) that the observations in *Anand Bihari Mishra v. Ram Sahay* AIR (1952) MB 31 and the decision of this Court in *Gunupati Keshavram Reddy v. Nafisul Hasan* AIR 1954 SC 636 clearly establish that Article 194(3) is subject to the fundamental rights.

34. The arguments, thus formulated, sound plausible and even attractive, but do not bear close scrutiny, as will be presently seen. Article 194 has already been quoted in extenso. It is quite clear that the subject matter of each of its four clauses is different. Clause (1) confers on the members freedom of speech in the Legislature, subject, of course, to certain provisions therein referred to. Clause (2) gives immunity to the members or any person authorised by the House to publish any report etc. from legal proceedings. Clause (3) confers certain powers, privileges and immunities on the House of the Legislature of a State and on the members and the committees thereof and finally clause (4) extends the provisions of clauses (1) to (3) to persons who are not members of the House, but who, by virtue of the Constitution, have the right to speak and otherwise to take part in the proceedings of the House or any committee thereof. In the second place, the fact that clause (1) has been expressly made subject to the provisions of the Constitution but clauses (2) to (4) have not been stated to be so subject indicates that the Constitution makers did not intend clauses

(2) to (4) to be subject to the provisions of the Constitution. If the Constitution makers wanted the provisions of all the clauses to be subject to the provisions of the Constitution, then the Article would have been drafted in a different way... The argument that the whole of Article 194 is subject to Article 19(1)(a) overlooks the provisions of clause (2) of Article 194. The right conferred on a citizen under Article 19(1)(a) can be restricted by law which falls within clause (2) of that Article and he may be made liable in a court of law for breach of such law, but clause (2) of Article 194 categorically lays down that no member of the Legislature is to be made liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or in committees thereof and that no person will be liable in respect of the publication by or under the authority of the House of such a Legislature of any report, paper or proceedings. The provisions of clause (2) of Article 194, therefore, indicate that the freedom of speech referred to in clause (1) is different from the freedom of speech and expression guaranteed under Article 19(1)(a) and cannot be cut down in any way by any law contemplated by clause (2) of Article 19.

35. As to the second head of arguments noted above it has to be pointed out that if the intention of clause (1) of Article 194 was only to indicate that it was an abridgement of the freedom of speech which would have been available to a member of the Legislature as a citizen under Article 19(1)(a), then it would have been easier to say in clause (1) that the freedom of speech conferred by Article 19(1)(a), when exercised in the Legislature of a State, would, in addition to the restrictions permissible by law under clause (2) of that Article, be further subject to the provisions of the Constitution and the rules and standing orders regulating procedure of that Legislature. There would have been no necessity for conferring anew the freedom of speech as the words “there shall be freedom of speech in the Legislature of every State” obviously intend to do.

36. Learned advocate for the petitioner has laid great emphasis on the two parts of the provisions of clause (3) of Article 194, namely, that the powers, privileges and immunities of a House of the Legislature of a State and of the members and committees thereof shall be such as may from time to time be defined by the Legislature by law and that until then they shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees. The argument is that a law defining the powers, privileges and immunities of a House or Houses and the members and committees thereof can be made by Parliament under entry 74 in List I and by the State Legislature under entry 39 of List II and if a law so made takes away or abridges the right to freedom of speech guaranteed under Article 19(1)(a) and is not protected under Article 19(2), it will at once attract the operation of the preemptory provisions of Article 13 and become void to the extent of the

contravention of that Article. But it is pointed out that if Parliament or the State Legislature does not choose to define the powers, privileges and immunities and the Houses of Parliament or the House or Houses of the State Legislature or the members and committees thereof get the powers, privileges and immunities of the House of Commons, there can be no reason why, in such event, the last mentioned powers, privileges and immunities should be independent of and override the provisions of Article 19(1)(a). The conclusion sought to be pressed upon us is that that could not be the intention of the Constitution makers and, therefore, it must be held that the powers, privileges and immunities of the House of Commons and of its members and committees that are conferred by the latter part of Article 105(3) on each House of Parliament and the members and committees thereof and by the latter part of Article 194(3) on a House of the Legislature of a State and the members and committees thereof must be, like the powers, privileges and immunities defined by law, to be made by Parliament or the State Legislature as the case may be, subject to the provisions of Article 19(1)(a). We are unable to accept this reasoning. It is true that a law made by Parliament in pursuance of the earlier part of Article 105(3) or by the State Legislature in pursuance of the earlier part of Article 194(3) will not be a law made in exercise of constituent power... but will be one made in exercise of its ordinary legislative powers under Article 246 read with the entries referred to above and that consequently if such a law takes away or abridges any of the fundamental rights it will contravene the peremptory provisions of Article 13(2) and will be void to the extent of such contravention and it may well be that that is precisely the reason why our Parliament and the State Legislatures have not made any law defining the powers, privileges and immunities... It does not, however, follow that if the powers, privileges or immunities conferred by the latter part of those Articles are repugnant to the fundamental rights, they must also be void to the extent of such repugnancy. It must not be overlooked that the provisions of Article 105(3) and Article 194(3) are constitutional laws and not ordinary laws made by Parliament or the State Legislatures and that, therefore, they are as supreme as the provisions of Part III. Further, quite conceivably our Constitution makers, not knowing what powers, privileges and immunities Parliament or the Legislature of a State may arrogate and claim for its Houses, members or committees, thought fit not to take any risk and accordingly made such laws subject to the provisions of Article 13; but that knowing and being satisfied with the reasonableness of the powers, privileges and immunities of the House of Commons at the commencement of the Constitution, they did not, in their wisdom, think fit to make such powers, privileges and immunities subject to the fundamental right conferred by Article 19(1)(a)... In this connection the observations made in *Anantha Krishnan v. State of*

Madras AIR 1952 Mad 395 by Venkatarama Aiyar, J., appear to us to be apposite and correct:

“... [Article 13] applies in terms only to laws in force before the commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions of Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole... This conclusion is also in accordance with the principle adopted in interpretation of statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided...”

37. Article 19(1)(a) and Article 194(3) have to be reconciled and the only way of reconciling the same is to read Article 19(1)(a) as subject to the latter part of Article 194(3)...

38. [Given this interpretation] the petitioner falls back upon Article 21 and contends that the proceedings before the Committee of Privileges threaten to deprive him of personal liberty otherwise than in accordance with procedure established by law. The Legislative Assembly claims that under Article 194(3) it has all the powers, privileges and immunities enjoyed by the British House of Commons at the commencement of our Constitution. If it has those powers, privileges and immunities, then it can certainly enforce the same, as the House of Commons can do... If, therefore, the Legislative Assembly has the powers, privileges and immunities of the House of Commons and if the petitioner is eventually deprived of his personal liberty as a result of the proceedings before the Committee of Privileges, such deprivation will be in accordance with procedure established by law and the petitioner cannot complain of the breach, actual or threatened, of his fundamental right under Article 21.

* * *

Judgement of Rao, J (Dissenting)

47. I have had the advantage of perusing the well considered judgement of my Lord the Chief Justice. It is my misfortune to differ from him and my learned brethren. I would not have ventured to do so but for my conviction that the reasoning adopted therein would unduly restrict and circumscribe the wide scope and content of one of the cherished fundamental rights, namely, the freedom of speech in its application to the press.

* * *

50. At the outset it would be convenient to clear the ground of the subsidiary ramifications falling outside the field of controversy and focus on the point that directly arises in this case. We are not concerned here with the undoubted right of a State Legislature to control and regulate its domestic affairs. . .

51. Nor we are called upon to decide on the scope of a Court's jurisdiction to set aside the orders of contempt made by the Legislature or warrants issued to implement the said orders. Reported decisions seem to suggest that if the order committing a person for contempt or the warrant issued pursuant thereto discloses the reasons, the Court can decide whether there is a privilege and also its extent; but, when it purports to issue a bald order, the Court has no power to decide, on the basis of other evidence, whether in fact a breach of privilege is involved. As this question does not arise in this case, I need not express any opinion thereon. The stand taken by the Legislature. . . is that the legislature of a state has the privilege to prevent any citizen from publishing the proceedings of the legislature or at any rate such portions of it as are ordered to be expunged by the Speaker, and therefore it has a right to take action against the person committing a breach of such a privilege. The main question, therefore, that falls to be decided is whether the Legislature has such a privilege. If this question is answered against the Legislature, no other question arises for consideration.

* * *

53. In *Romesh Thapar*, this Court ruled that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. This freedom is, therefore, comprehensive enough to take in the freedom of the press. The said view is accepted and followed in *Brij Bhushan*. To the same effect is the decision of this Court in *Express Newspapers Ltd.*, where Bhagwati, J., delivering the judgement of the Court, held that freedom of speech and expression includes within its scope the freedom of the press. In *Srinivasan v. The State of Madras* AIR 1951 Mad 70 it was held, on the basis of the view expressed by this Court, that the terms "freedom of speech and expression" would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own views but have either been borrowed from someone else or are printed under the direction of that person. I would, therefore, proceed to consider the argument advanced on the basis that the freedom of speech in Article 19(1)(a) takes in also the freedom of the press in the comprehensive sense indicated by me supra. The importance of the freedom of speech in a democratic country cannot be over-emphasised, and in recognition thereof, clause (2) of Article 19 unlike other clauses of that Article,

confines the scope of the restrictions on the said freedom within comparatively narrower limits. Clause (2) enables the State to impose reasonable restrictions on the exercise of the said right 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. The said Article finds place in Part III under the heading “Fundamental Rights.” Article 13 makes laws that are inconsistent with or in derogation of the fundamental rights void and clause (2) thereof expressly prohibits the State from making laws in contravention of the said rights... It is true, and it cannot be denied, that notwithstanding the transcendental nature of the said rights, the Constitution may empower the Legislature to restrict the scope of the said rights within reasonable bounds, as in fact it did under clauses (2) to (6) of Article 19. Such restrictions may be by express words or by necessary implication. But the Court would not and should not, having regard to the nature of the rights, readily infer such a restriction unless there are compelling reasons to do so. The Constitution adopted different and well-understood phraseology to resolve conflicts and prevent overlapping of various provisions... But, there are other Articles which are not expressly made subject to provisions of the Constitution or whose operation is not made effective notwithstanding any other provisions. In such cases, a duty is cast upon the Court to ascertain the intention of the Constituent Assembly...

54. ... If two Articles appear to be in conflict, every attempt should be made to reconcile them or to make them to co-exist before excluding or rejecting the operation of one.

Article 194(3) of the Constitution, with which we are concerned, does not in express terms make that clause subject to the provisions of the Constitution or to those of Article 19. Article 194 has three clauses... The third clause, with which we are now directly concerned, confers upon a House of the Legislature of a State and of the members and the committees thereof certain powers, privileges and immunities. It is in two parts. The first part says that the powers, privileges and immunities of a House of the Legislature of a State and of the members and the committees of a House of such Legislature shall be such as may from time to time be defined by the Legislature by law; and the second part declares that until so defined, they shall be those of the House of Commons of the Parliament of the United Kingdom and its members and committees, at the commencement of the Constitution. The question is whether this clause confers on the Legislature powers, privileges and immunities so as to infringe the fundamental right of a citizen under Article 19(1)(a) of the Constitution. The first thing to be noticed is that while Article 19(1)(a) of the Constitution deals with the freedom of speech and expression of a citizen, Article

194(1) declares that there shall be freedom of speech in the Legislature of every State. While Article 19(1) is general in terms and is subject only to reasonable restrictions made under clause (2) of the said Article, Article 194(1) makes the freedom of speech subject to the provisions of the Constitution and rules and standing orders regulating the procedure of the Legislature. Clause (2) flows from clause (1) and it affords protection for liability to any proceedings in a Court for persons in respect of the acts mentioned therein. But these two provisions do not touch the fundamental right of a citizen to publish proceedings which he is entitled to do under Article 19(1) of the Constitution. That is dealt with by clause (3). That clause provides for powers, privileges and immunities of a House of the Legislature of a State and of the members and the committees of a House, other than those specified in clause (2). It is not expressly made subject to the provisions of the Constitution. I find it difficult to read in that clause the opening words of clause (1), viz., “subject to the provisions of this Constitution”, for two reasons: (i) clause (3) deals with a subject wider in scope than clause (1) and therefore did not flow from clause (1); and (ii) grammatically it is not possible to import the opening words of clause (1) into clause (3). Therefore, I shall proceed on the basis that clause (3) is not expressly made subject to Article 19 or expressly made independent of other Articles of the Constitution. We must, therefore, scrutinise the provisions of that clause in the context of the other provisions of the Constitution to ascertain whether by necessary implication it excludes the operation of Article 19...

* * *

57. I cannot... appreciate the argument that Article 194 should be preferred to Article 19(1) and not vice versa. Under the Constitution, it is the duty of this Court to give a harmonious construction to both the provisions so that full effect may be given to both, without the one excluding the other. There is no inherent inconsistency between the two provisions. Article 19(1)(a) gives freedom of speech and expression to a citizen, while the second part of Article 194(3) deals with the powers, privileges and immunities of the Legislature and of its members and committees. The Legislature and its members have certainly a wide range of powers and privileges and the said privileges can be exercised without infringing the rights of a citizen, and particularly of one who is not a member of the Legislature. When there is a conflict, the privilege should yield to the extent it affects the fundamental right. This construction gives full effect to both the Articles. This Court in *Gunupati Keshavram Reddy v. Nafisul Hasan* AIR 1954 SC 636 held that the order of arrest of Mr. Mistry and his detention in the Speaker's custody was a breach of the provisions of Article 22(2) of the Constitution. In that case, the said Mistry was directed by the Speaker of the U. P.

Legislative Assembly to be arrested and produced before him to answer a charge of breach of privilege. Though the question was not elaborately considered, five judges of this Court unanimously held that the arrest was a clear breach of the provisions of Article 22(2) of the Constitution indicating thereby that Article 194 was subject to Articles of Part III of the Constitution. I am bound by the decision of this Court. In the result, I hold that the petitioner has the fundamental right to publish the report of the proceedings of the Legislature and that, as no reasonable restrictions were imposed by law on the said fundamental right, the action of the respondents infringes his right entailing him to the relief asked for.

* * *

61. The main question, therefore, that falls to be decided is the existence and the extent of the privilege claimed by the respondents. As the privilege claimed by the respondents is in derogation of the fundamental right of a citizen, the burden lies heavily upon them to establish by clear and unequivocal evidence that the House of Commons possessed such a privilege. In the words of Coke “as the privilege is part of the law of custom of the Parliament, they must be collected out of the rolls of Parliament and other records and by precedent and continued experience. . . .”

62. The respondents claimed two privileges: (i) that the House of Commons has the privilege of preventing the publication of its proceedings; and (ii) that it has the privilege to prevent the publication of that part of the proceedings directed by the Speaker to be expunged. Indeed the second privilege is in fact comprehended by the first, which is larger in scope.

63. A history of the said privilege is given in May’s Parliamentary Practice as well as in Halsbury’s Laws of England. In Halsbury’s Laws of England, 2nd Edition, Volume 24 (Lord Hailsham’s Edition), it is stated at page 350 as follows:

“It is within the power of either House of Parliament, should it deem it expedient, to prohibit the publication of its proceedings. In the House of Lords, it is a breach of privilege for any person to print or publish anything relating to the proceedings of the House without its permission. The House of Commons, upon many occasions, has declared the publication of its proceedings without the authority of the House to be a breach of privilege, and the House has never formally rescinded the orders which from time to time it has made [that] has regard to this subject. At the present time, however, neither House will consider a report of its proceedings in a newspaper or other publication to be a breach of its privileges, unless such report is manifestly inaccurate or untrue.”

* * *

67. The same idea is repeated at page 56 [of May] as follows:

“So long as the debates are correctly and faithfully reported, however, the privilege which prohibits their publication is waived.”

68. At page 118, the same result is described in different words thus:

“So long as the debates are correctly and faithfully reported, the orders which prohibit their publication are not enforced; but when they are reported mala fide, the publishers of newspapers are liable to punishment.”

69. Then the following eight instances of misconduct in connection with the publication of the debates which is generally treated as a breach of privilege of the House are given by the learned author:

- (i) Publishing a false account of proceedings of the House of Lords;
- (ii) Publishing scandalous misrepresentation of what had passed in either House or what had been said in debate;
- (iii) Publishing gross or wilful misrepresentations of particular Members' speeches;
- (iv) Publishing under colour of a report of a Member's speech a gross libel on the character and conduct of another Member;
- (v) Suppressing speeches of particular Members;
- (vi) Publishing a proceeding which the House of Lords had ordered to be expunged from the Journals;
- (vii) Publishing a libel on counsel appearing before a committee under colour of a report of the proceedings of such committee; and
- (viii) Publishing a forged paper, publicly sold as His Majesty's speech to both Houses.

70. It would be seen from the instances that mala fides is a necessary ingredient of the publication to attract the doctrine of privilege. . . .

71. Cockburn, C.J., in *Wason v. Walter* forcibly pointed out the irrelevance of the privilege claimed in the modern democratic set up. At page 89, the learned Chief Justice observed:

“It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their

walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed, — where would be our attachment to the Constitution under which we live, — if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?"

72. At page 95, dealing with the contention based upon the Standing Orders of both the Houses of Parliament prohibiting the publication of the proceedings, the learned Chief Justice proceeded to state as follows :

"The fact, no doubt, is, that each House of Parliament does, by its Standing Orders, prohibit the publication of its debates. But, practically, each House not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both Houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of Parliamentary proceedings is prohibited by Parliament. The Standing Orders which prohibit it are obviously maintained only to give to each House the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded."

73. I have given the said passages in extenso as they give neatly and graphically not only the extent of the privilege in modern times, but the reasons for and the process by which the larger concept of the privilege has been gradually reduced to its present form. These are weighty observations and, if they were appropriate to the conditions obtaining in the nineteenth century, they would be more so in 1950, when the parliamentary system of government was perfected in England.

76. The extent of the privilege of the House of Commons in regard to the publication of its proceedings may be stated thus : In the seventeenth century, the House of Commons made standing orders prohibiting the publication of its proceedings. But that was a necessary precaution in that critical period when the representatives of the people were in conflict with the Crown and they were careful that their proceedings should not reach the ear of the Crown. In the aristocratic eighteenth century, the opposition to publication was founded not only on the fear of misrepresentation, but on impatience of the pressure of public opinion. But gradually and imperceptibly, as a result of conflicts and compromises and as Parliamentary form of government became perfect and broad based, not only publication was allowed but actually encouraged by the Houses of Commons. In the year 1950, it would be unthinkable and indeed would have been an extraordinary phenomenon for the House of Commons claiming the privilege of preventing the publication of its proceedings. The said orders, though not expressly repealed or modified, were no longer enforced in accordance with their tenor; but were in effect modified by practice and precedents. The stringent part of the orders had fallen into disuse and in practice it was restricted to mala fide publication of the proceedings. I, therefore, hold that in the year 1950, the House of Commons had no privilege to prevent the publication of the correct and faithful reports of its proceedings save those in the case of secret sessions held under exceptional circumstances and had only a limited privilege to prevent mala fide publication of garbled, unfaithful or expunged reports of the proceedings.

77. It follows from my view, namely, that the petitioner's fundamental right under Article 19(1) is preserved despite the provisions of Article 194(3) of the Constitution, that the petitioner is entitled to succeed. I am further of the opinion that even if Article 194(3) of the Constitution excludes the operation of Article 19(1), the petitioner in the circumstances of the present case would not be in a worse position...

IN THE SUPREME COURT OF INDIA
SHRI DINESH TRIVEDI, M. P. AND OTHERS
VERSUS
UNION OF INDIA AND OTHERS

1997 4 SCC 306

20 March 1997

A. M. Ahmadi, CJ, and S. V. Manohar, J.

Rule of Law: Citizens will generally have the right to access information relating to the Government's affairs, but this right is qualified by the countervailing public interest in some information remaining confidential. Generally speaking, the presumption will be in favour of the release of information.

This matter concerned the availability of a Government report into the role of organised crime in public affairs. Despite initially being confidential, the report was tabled in Parliament following public pressure. The Petitioner however, argued that the Report tabled was incomplete and that the material it contained was of sufficient importance to warrant it being more freely available. He sought orders from the Court to this affect, and also orders relating to the implementation of the report.

The Court assessed the matter through the right to information. It held that while such a right did exist, in some circumstances it would be qualified by the need to keep sensitive information private. The Court held that this report, and its supporting material, was not intended to be made public, and as a result, it contained information and accusations that would not serve the public interest if released. The Court did however, recommend that the Government act on the report.

Cases discussed and relied upon:

Establishing the right to freedom of information and its nature: *State of U. P. v. Raj Narain* (1975) 4 SCC 428; *S. P. Gupta v. Union of India* 1981 SCC Supp. 87.

Judgement of the Court delivered by Ahmadi, CJ

The petitioners allege that a cursory analysis of the [Vohra Committee] Report reveals the following disturbing aspects: (1) several governmental agencies have, in their written reports, indicated that they are aware of the vast local, national and international links of criminal syndicates; (2) these links are such that they amount to a parallel system of government; (3) the common citizen is unprotected and must live in constant fear of his life and property; (4) even the members of the judicial system have not escaped the embrace of the mafia; and (5) the existing criminal justice system is unable to deal with the activities of the mafia. The petitioners state that since the Report reveals such alarming trends, it is of the utmost importance that it be made the subject of considerable scrutiny. They allege that the document tabled in the Parliament is not the complete report but betrays an incomplete substitute prepared hurriedly for the purpose of meeting the demand in Parliament and suppresses vital information regarding the unholy connections between politicians, bureaucrats, criminals and anti-social elements. They base this assertion on the statement made in the Lok Sabha, a day prior to the publication of the Report, by the erstwhile Minister for Parliamentary Affairs that the Report extended to about 100 pages, and the fact that the document placed before the House numbered only 11.5 pages. In this respect, the petitioners have also pointed out that the Report, as it was tabled in Parliament, is not in the form of continuous paragraphs; on the contrary, after reaching paragraph 3.7, the next recorded paragraph is numbered as paragraph 6.1. The petitioners further state that the Report is itself based on a number of reports that had been placed before it and, without this supporting material, the Report is incomplete. Thus the genuineness of the Report was shrouded in suspicion.

The petitioners aver that the people at large have a right to know about the full investigatory details of the Report. Such disclosure is stated to be essential for the maintenance of democracy and for ensuring that transparency in government is secured and preserved. Towards this end, the petitioners have urged us to direct the Union Government to make public the annexures, memorials and the written evidence that were placed before the Committee. A direction to the Union Government to reveal the names of all bureaucrats, police officials, Parliamentarians and Judicial personnel against whom there is tangible evidence, to enable action to be taken in accordance with law, is also being sought. We are also asked to direct the Union Government to present to us an effective package of the follow-up measures taken in accordance with law. We are also asked to direct the Union Government to present to us an effective package of the follow-up measures taken or that are proposed to be taken with regard to the Report. Lastly, a declaration to the effect that Section 5 of the Official Secrets Act, 1923 is overbroad and unreasonable by the formulation of a Freedom of Information policy, is also sought.

[The Respondents stated that the Report tabled in Parliament is the genuine document. While there were other documents to support the Report, these documents did not add any additional information. It was also claimed that the paragraph numbering was a typographical error.]

* * *

We may first deal with the assertion based on the petitioners' right to freedom of information. It has been contended before us that the citizens of India have a right to be informed not only of the contents of the Report, but also of the details of the various reports, notes, letters and other forms of written evidence that was placed for the consideration of the Vohra Committee.

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. This Court has had many an opportunity to express itself upon this issue. In the case of *State of U. P. v. Raj Narain* (1975) 4 SCC 428, Mathew, J. eloquently expressed this proposition in the following words:

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with a veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.”

Implicit in this assertion is the proposition that in transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.

The case of *S. P. Gupta v. Union of India* 1981 SCC Supp. 87, decided by a seven-Judge Constitution Bench of this Court, is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters

relating to public affairs. In that case, the consensus that emerged amongst the Judges was that in regard to the functioning of government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest. The Court held that the disclosure of documents relating to the affairs of State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a judge must balance the competing interests and make his final decision depending upon the particular facts involved in each individual case. It is important to note that it was conceded that there are certain classes of documents which are necessarily required to be protected, e.g. Cabinet Minutes, documents concerning the national safety, documents which affect diplomatic relations or relate to some State secrets of the highest importance, and the like in respect of which the Court would ordinarily uphold Government's claim of privilege. However, even these documents have to be tested against the basic guiding principle which is that wherever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure. What then is the test? To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve the public interest.

[The Court then went on to hold that they accepted that the Report tabled was the genuine one. The question then became whether it should be disclosed for the benefit of the general public.]

It is... evident that Shri N. N Vohra had himself drafted and signed the Report in the belief that it would be read by a select few high-ranking officials who would then take necessary action. It is doubtful whether the candour exhibited and the liberal mentioning of intelligence

reports would have been forthcoming if he had not felt assured of complete confidentiality. Indeed, much of the information contained in the Report, which has now become publicly available might well have adversely affected the various intelligence agencies involved.

We are reluctant to direct the disclosure of the supporting material which consists of information gathered from the Heads of the various Intelligence Agencies to the general public. To do so would cause great harm to the agencies involved and to the conditions of assured secrecy and confidentiality under which they function. Furthermore, it must be noted that not all of the information collected and recorded in the intelligence reports is substantiated by hard evidence. Often on the basis of unverified suspicion names are thrown by people to save their own skins. Intelligence Agents are not obliged to adhere to the principles of natural justice before they compile reports of possible suspects; quite frequently, individuals are shortlisted based purely on the investigators' hunches and surmises or on account of the past background of the suspects. The disclosure of these reports would lead to a situation where public servants and elected representatives who, though entirely innocent, are compelled by virtue of their offices to associate with individuals whose culpability is beyond doubt, will also find themselves mired in suspicion. Such a situation would, in the long run, prove to be disastrous for the effective functioning of government...

* * *

We are, therefore, of the view that the disclosure of the supporting material placed before the Vohra Committee to the public at large would, instead of aiding the interest of the public, be severely and detrimentally injurious to it... [The Court then went on to consider the implementation of the Report, recommending an independent body be set up. While not addressing the matter explicitly, the Court implied that the availability of the Report should remain as is.]

CHAPTER SEVEN

STING OPERATIONS

A sting operation in a media context, is the covert recording of someone to discover something that otherwise would not have been discovered. This form of undercover journalism has the ability to perform an important role in uncovering corruption and other shortcomings in the system, by employing an approach which is able to reach further than would typically be the case.

However, sting operations present a unique array of ethical and legal issues. Most notably are concerns about the potential invasion of privacy which occurs when someone is being filmed without their knowledge. Beyond this is the issue of entrapment, whereby the actions of those undertaking the sting operation are the cause of a crime that would not have occurred otherwise. Relatedly, there is the risk of the operator committing offences themselves, not only in terms of the offence which is the subject of the sting, but also offences such as criminal trespass. Finally, there is the risk of a 'trial by media' in that a news agency takes on the role as the primary finder of fact in a manner that is typically reserved for the courts.

Accordingly, journalists considering undertaking a sting operation risk the possibility of liability resulting from these issues. Unfortunately, there is little by way of statutory law or judicial guidelines to assist in assessing where the legal boundaries lie. Indeed, these boundaries are still the subject of debate. The Supreme Court in *R. K. Anand v. Registrar, Delhi High Court* (2009) 8 SCC 106 assessed the matter as a balancing exercise between the two public interests involved. The first potential public interest is the dangers and undesirable elements of sting operations, while the other is the benefit of shedding light on an issue that may have otherwise continued to exist in the shadows. However, beyond this, there are a number of other actions that journalists can take to ensure that any sting operations they undertake are more likely to be seen as legitimate. Most notable of these is ensuring that the operation goes no further than is necessary, and that police or law enforcement agencies are involved when it is appropriate.

Ultimately however, journalists should be aware that this is an unclear area of the law, but an area that is developing.

IN THE HIGH COURT OF DELHI
COURT ON ITS OWN MOTION
VERSUS
STATE

146 (2008) DLT 429

14 December 2007

M. Sharma, CJ, and S. Khanna, J.

Rule of Law: Accurate reporting is an essential component to a legitimate sting operation, failure to do so may result in serious consequences for those undertaking the operation. Further, inducing a person to commit an offence they would not otherwise undertake, as part of an operation is impermissible.

This case involved a sting operation where a teacher at a government school was filmed purportedly forcing a student into prostitution. As a result of the subsequent media report, the teacher was physically attacked and dismissed from her position. Following a police investigation, it emerged that the student was actually a journalist and the interaction had been falsely arranged by a man who had a monetary dispute with the teacher.

The Court discussed the responsibilities that accompany the freedom of the press and the nature of legitimate sting operations. The Court stressed in particular the fact that it is impermissible to induce a person to commit an offence that they are unlikely to commit otherwise. Failure to carry out a sting operation legitimately risks making those undertaking the operation liable for a breach of privacy as well as the offences of impersonation, criminal trespass under false pretence and making a person commit an offence.

Finally, the Court noted a list of guidelines proposed by counsel appointed to assist the Court. While not holding that these guidelines were legal obligations, the Court appeared to give its tacit approval.

Cases discussed and relied upon:

Establishing the inducement or entrapment as part of a sting operation is impermissible: *Keith Jacobson v. United States* reported in 503 US 540 (1992).

Judgement of the Court delivered by Sharma, CJ.

8. The [situation] clearly establishes the fact that an innocent person was being induced to commit a very heinous crime. Her reputation has been damaged in the eyes of the public and even her modesty was outraged in the sense that she was manhandled and her clothes were torn by some people. The sting operation has become a stinking experience for Ms. Uma Khurana as she has not only lost her reputation but also her job. The question is how the recurrence of such an incident could be stopped and minimised so that an innocent person cannot be victimised and not made to lose their reputation.

* * *

11. Section 5 of the [Cable Television Networks (Regulation) Act, 1995] provides that no person shall transmit or re-transmit through cable service any programme unless the programme is in conformity with the prescribed programme code. Rule 6 of the Cable Television Network Rules, 1994 prescribes a programme code that should be followed by any person responsible for transmission/re-transmission of any programme. The programme code is fairly exhaustive and stipulates that no programme which encourages and incites violence, maligns and slanders any individual and person, contain any false and half truths etc, should be carried and broadcast in a cable service. Section 20 of the said Act empowers the government to prohibit operation of any cable television network if it thinks it is necessary and expedient in public interest to do so, by a notification in the official gazette. Further, the Central Government can by an order regulate or prohibit transmission or re-transmission of any programme which is not in conformity with the programme code. Additionally, power has been given to the Central Government to regulate and prohibit transmission or re-transmission by any channel of a programme if it is not in the interest of the integrity and sovereignty of India, security of India, friendly relations of India with any foreign State or public order, decency or morality.

12. Regulation of electronic media has always invoked sharp and divergent views with emotive and logical pleas and counter arguments. . . . But it cannot be denied that electronic media should and must protect innocent people so that their reputation cannot be sullied and damaged by false and incorrect depictions in the name of a sting operation.

* * *

15. Such incidents should not happen and false and fabricated sting operations directly infringing upon a person's right to privacy should not recur because of desire to earn more

and to have higher TRP rating. The right to freedom of press is a valuable right but the right carries with it responsibility and duty to be truthful and to protect rights of others.

16. We have also come across an article titled “A tale in the sting”, relating to the Uma Khurana incident, written by Ms. Barkha Dutt, Managing Editor of NDTV wherein she has referred to media reports/sting operations in the United States. Ms. Dutt in her article referred to reports of the American newspaper ‘Chicago Sun Times’ wherein Police officers were bribed by journalists to get a bar license. Police officers taking bribes were caught on hidden camera and later the sting operation was shown on TV. The said programme won many awards but not the Pulitzer Prize because they could not agree on whether the methods used were honourable enough. After having referred to the said incident, Ms. Dutt observed:

“This is, perhaps, what is at the heart of the matter. There is something unseemly and mildly sleazy about reporters playing Pied Pipers who lay out the cheese to seduce conmen into their rat traps. It is much easier to justify the use of a hidden camera when it is for capturing the event that would take place whether or not the camera was there. Entrapment somehow can’t manage to shake off the suggestion of fabrication.”

17. There is no doubt and there is no second opinion that truth is required to be shown to the public in the public interest and the same can be shown whether in the nature of a sting operation or otherwise but what we feel is that entrapment of any person should not be resorted to and should not be permitted. In this connection we may appropriately refer to the decision of the Supreme Court of the United States decided on 6 April 1992 titled *Keith Jacobson v. United States* reported in 503 US 540. In the said decision it was held by the Supreme Court of the United States that in their zeal to enforce the law, law protectors must not originate a criminal design, implant in an innocent person’s mind a disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute. Where the government or their agents induce an individual to break the law and the defence of entrapment is at issue, the prosecution must meet and answer by establishing and answering beyond reasonable doubt that the defendant was predisposed to commit the criminal act prior to first being approached by government agents. The Supreme Court of the United States has also declared that law enforcement officials go too far when they implant in the mind of an innocent person a disposition to commit an offense and induce its commission in order that they may prosecute. The Court held in very unambiguous terms that the Government should not play on the weakness of an innocent party and beguile the party into committing a crime which the party otherwise

would not have attempted. While artifice and stratagem may be employed to catch those who are engaged in criminal enterprises, there would be a need to prove that the person in question had a predisposition to commit the said criminal act prior to being approached by the enforcement agencies. The Government must not punish an individual “for an alleged offence which is produced because of the creative activity of its own officials.” [The] ratio of the aforesaid decision rendered by the Supreme Court of the United States, in our considered opinion, can be applied to the instant context also i.e. to the media.

18. Giving inducement to a person to commit an offence, which he is otherwise not likely inclined to commit, so as to make the same part of the sting operation is deplorable and must be deprecated by all concerned including the media. Sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.

19. The duty of the press as the fourth pillar of democracy is immense. It has great power and with it comes increasing amounts of responsibility. No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise he is not known and likely to commit. In such cases there is no predisposition. If one were to look into our mythology even a sage like Vishwamitra succumbed to the enchantment of “Maneka.” It would be stating the obvious that the media is not to test individuals by putting them through what one might call the “inducement test” and portray it as a scoop that has uncovered a hidden or concealed truth. In such cases the individual may as well claim that the person offering inducement is equally guilty and a party to the crime that he/she is being accused of. This would infringe upon the individual’s right to privacy. We believe and trust that all TV channels/media shall take steps and prohibit its reporters from producing or airing any programme which is based on entrapment and which is fabricated, intrusive and sensitive. . .

20. Certain proposed guidelines were also placed before us by the learned amices. The said proposed guidelines are as follows:

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

2. There must be concurrent record in writing of the various stages of the sting operation.
3. Permission for telecasting a sting operation [is to] be obtained from a committee appointed by the Ministry of Information and Broadcasting. The said committee will be headed by a retired High Court judge to be appointed by the Government in consultation with the High Court and two members, one of which should be a person not below the rank of Additional Secretary and the second one being the Additional Commissioner of Police. Permission to telecast sting operations will be granted by the committee after satisfying itself that it is in public interest to telecast the same. This safeguard is necessary since those who mount a sting operation themselves commit the offences of impersonation, criminal trespass under false pretence and making a person commit an offence.
4. While the transcript of the recordings may be edited, the films and tapes themselves should not be edited. Both edited and unedited tapes [are to] be produced before the committee.
5. Sting operations shown on TV or published in print media should be scheduled with an awareness of the likely audience/reader in mind. Great care and sensitivity should be exercised to avoid shocking or offending the audience.
6. All television channels must ensure compliance with the Certification Rules prescribed under the Cable Television Network (Regulation) Act, 1995 and the Rules made there under.
7. The Chief Editor of the channel shall be made responsible for self regulation and ensure that the programmes are consistent with the Rules and comply with all other legal and administrative requirements under various statutes in respect of content broadcast on the channel.
8. The subject matter of reports or current events shall not:
 - (a) Deliberately present as true any unverified or inaccurate facts so as to avoid trial by media since a “man is innocent till proven guilty by law”;
 - (b) Present facts and views in such a manner as is likely to mislead the public about their factual inaccuracy or veracity;
 - (c) Mislead the public by mixing facts and fiction in such a manner that the public are unlikely to be able to distinguish between the two;

- (d) Present a distorted picture of reality by over-emphasising or under-playing certain aspects that may trivialise or sensationalise the content;
 - (e) Make public any activities or material relating to an individual's personal or private affairs or which invades an individual's privacy unless there is an identifiable large public interest;
 - (f) Create public panic or unnecessary alarm which is likely to encourage or incite the public to crime or lead to disorder or be offensive to public or religious feeling.
9. Broadcasters/media shall observe general community standards of decency and civility in news content, taking particular care to protect the interest and sensitivities of children and general family viewing.
 10. News should be reported with due accuracy. Accuracy requires the verification (to the fullest extent possible) and presentation of all facts that are necessary to understand a particular event or issue.
 11. Infringement of privacy in a news based/related programme is a sensitive issue. Therefore, a greater degree of responsibility should be exercised by the channels while telecasting any such programmes, as may be breaching privacy of individuals.
 12. Channels must not use material relating to persons' personal or private affairs or which invades an individual's privacy unless there is identifiable larger public interest reason for the material to be broadcast or published.
21. The Ministry of Information and Broadcasting is already examining whether a statute and/or a code of conduct should be enacted. The above proposed guidelines should be considered by the concerned Ministry and if they find favour, they may be incorporated in the enactment/guidelines, with modifications as deemed fit and proper.

IN THE HIGH COURT OF DELHI
COURT ON ITS OWN MOTION
VERSUS
STATE AND OTHERS
WP (CRL.) NO. 796/2007

21 August 2008

M. B. Lokur and M. Sarin, JJ.

Rule of Law: The law relating to sting operations is generally unclear, but guided by certain principles. Such operations must be carried out in accordance with the law and should only observe (and not induce) any illegal activity committed by someone who is already suspected of such acts.

This case concerned a sting operation undertaken by NDTV to expose inappropriate actions by the prosecutor (Mr Khan) and defence counsel (Mr Anand and Mr Sharma) in an ongoing trial. The sting operation itself was undertaken on behalf of NDTV by Mr Kilkarni, a possible witness in the trial. Following the report of NDTV, the Court undertook contempt proceedings against Mr Khan, Mr Anand and Mr Sharma.

It is important to note that this is a decision of the Delhi High Court on a matter that was subsequently appealed to the Supreme Court. That decision is *R. K. Anand v. Registrar, Delhi High Court* (2009) 8 SCC 106, and is included in this chapter. The statements of the Supreme Court take precedent over the statements in this case. This case has been included in this chapter as a tool for considering the types of issues and arguments that may arise, and for providing some background to the Supreme Court decision. It also includes some concepts which were not discussed on appeal.

The relevance of this case is the unsuccessful defence mounted by the accused arguing that by undertaking a sting operation, NDTV had acted unlawful and had undermined the functioning of the court in the original trial, and accordingly, had committed contempt themselves. In a lengthy judgement, the Court spent considerable time outlining the nature of contempt, the ethical and legal obligations of journalists when reporting proceedings and

the legality of sting operations. The case is particularly useful for the summaries it offers on each of these.

In relation to the third of these, the Court declined to make a final statement of the law, saying that it was an area that was still developing. The Court did however, outline several important principles. They noted that generally, sting operations are unpalatable, but they will be legitimate in circumstances where an agency, appropriately supervised by the law or some authority (although this notion was rejected by the Supreme Court), records an offence being committed in circumstances in which the agency has not induced the offence and has not acted unlawfully themselves.

Cases discussed and relied upon:

Establishing the nature of contempt in regard to commenting on court proceedings: *Ananta Lal Singh v. Alfred Henry Watson* AIR 1931 Calcutta 257; *Telhara Cotton Ginning Co. Ltd. v. Kashinath Gangadhar Namjoshi* AIR 1940 Nagpur 110; *Thirumalaiappa v. Kumaraswami* AIR 1956 Madras 621; *Damayanti v. S. Vaney* 1966 Cri LJ 9; *Delhi Tamil Education Association v. J. Samimalai* 97 (2002) DLT 352 (DB); *Smith v. Zakeman* (1856) 26 LJ Ch 305; *R v. Machin* [1980] 3 All ER 151. Discussing the role of the media in relation to court proceedings and the legal limits: *D. N. Prasad v. Principal Secretary* 2005 Cri LJ 1901; *Surya Prakash Khatri v. Smt. Madhu Trehan* 92 (2001) DLT 665 (FB); *M. P. Lohia v. State of West Bengal* (2005) SCC 686; *State of Maharashtra v. Rajendra Jawanmal Gandhi* (1997) 8 SCC 386; *Indian Council of Legal Aid and Advice v. State* WP No. 17595/2006; *R. v. Savundranayagan* [1968] 3 All ER 439; *Kartongen Kemi Och Forvaltning AB v. State* 2004 (72) DRJ 693; *Subhash Chander v. S. M. Aggarwal* 25 (1984) DLT 52; *Brig. E. T. Sen v. Edatata Narayanan* 5 (1969) DLT 348; *Reynolds v. Times Newspapers Ltd.* [1999] 4 All ER 609. Discussing the availability of injunctions: *Attorney-General v. Times Newspapers Ltd.* [1972] 3 All ER 1136; *Attorney-General v. Times Newspapers Ltd.* [1973] 3 All ER 54. On the legality of sting operations: *Regina v. Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2001] 1 QB 885; *Brannan v. Peek* [1947] 2 All ER 572; *In re M. S. Mohiddin* AIR 1952 Madras 561; *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh* AIR 1954 SC 322; *Bhupendra Singh Patel v. State (CBI)* Cri M.C. No.59/2004; *Shri Bharadwaj Media Pvt. Ltd. v. State* W.P. (Cri) No.1125/2007; *Ramjanam Singh v. State of Bihar* AIR 1956 SC 643; *Sumitra Debi Gour v. Calcutta Dyeing and Bleaching Works* AIR 1976 Calcutta 99; *Joginder Kaur v. Surjit Singh* AIR 1985 PandH 128.

Judgement of Lokur, J

[The defendants] submitted firstly, that NDTV had committed contempt of court by telecasting the programme on 30 May 2007; secondly, the mass media needs to be checked and controlled, especially in respect of reporting pending cases, since it uses its reach to influence or prejudice mankind in general to hold a particular view which may not necessarily be the correct view; thirdly, this Court needs to lay down the law in respect of sting or undercover operations such as the ones that we are concerned with. . . .

Mr. Anand [who was the advocate for the defence in the original criminal trial] submitted that the exposé by NDTV on 30 May 2007 actually cast him in a bad light in as much as aspersions were made on his professional integrity and even otherwise it attacked his professional competence. According to him, viewers were made to believe that he is capable of resorting to unethical conduct to save his client from conviction (assuming his client is guilty). By casting aspersions on him and attacking his professional integrity and competence, NDTV has prevented him from fearlessly discharging his duties as an advocate for the cause of his client. Thus, it was contended, that actually NDTV had interfered in the administration and due course of justice. In this context, it was also submitted that NDTV had violated the “sub judice principle” by unfairly telecasting untruths or half truths thereby seriously prejudicing the pending proceedings in the BMW case. It was submitted that NDTV selectively telecast clandestinely obtained video clips with the intention of deliberately misleading the general public, and to make matters worse, it did not air the viewpoint of Mr. Anand but only telecast one side of the story on national television. The sum and substance of the contentions of Mr. Anand in this regard were that he is more a victim rather than a villain — in fact NDTV had committed criminal contempt rather than he.

On the issue whether or not proceedings should be initiated against NDTV for criminal contempt of court, we wish to make it clear that Mr. Anand did not ask for a notice of criminal contempt to be issued to NDTV — he left it to our wisdom to take whatever steps are necessary.

We find that Mr. Anand has advanced a rather peculiar argument: he did not wish to move a petition against NDTV for committing contempt of court, but he “invited” us to exercise our contempt power *suo motu*. We are of the opinion that since Mr. Anand has not moved any petition for initiating proceedings for contempt of court against NDTV in respect of the telecast of 30 May 2007 nor has he made any oral request in that regard, we should decline to consider his “suggestion.” As regards exercise of *suo motu* jurisdiction, we are of the opinion that a court should exercise its contempt jurisdiction sparingly, with scrupulous

care and caution. Contempt of court is serious business and no court should wantonly invoke its contempt jurisdiction only because it is vested with the power to do so. Given the facts of this case, we are of the view that this is not one of those rare or brazen cases where we should initiate suo motu action against NDTV for contempt of court.

Consequently, it does not appear to be necessary to deal with the cases cited by Mr. Anand. However, we are doing so because we feel it necessary to clear the air in so far as the rights of litigants and their advocates are concerned. . .

* * *

30. *Ananta Lal Singh v. Alfred Henry Watson* AIR 1931 Calcutta 257 is important because it deals with allegations made in the mass media (in a newspaper) during the pendency of a trial. The Court noted and accepted the argument of learned counsel that a tendency to interfere with the due course of justice may be noticed in two ways. One form of contempt (which the Court watches very narrowly) is of “prejudicing mankind against persons who are on their trial raising an atmosphere of prejudice against them by comment which is addressed to the public at large.” Another form of contempt is if aspersions are cast on certain clients of an advocate such that it deters the advocate from continuing with his duty towards the client or embarrasses him in discharging that duty. Similarly, commenting on an advocate with reference to his professional conduct of cases may also amount to contempt of court, if it has the tendency to or is calculated to interfere in the administration of justice. The Court cautioned, however, that, “the Court’s jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice. It is not every theoretical tendency that will attract the action of the Court in its very special jurisdiction.”

[The Court then went on to consider issues of contempt that arise out of situations where either an advocate or a party has been threatened so as to derail the course of justice. Specifically, it discussed *Telhara Cotton Ginning Co. Ltd. v. Kashinath Gangadhar Namjoshi* AIR 1940 Nagpur 110, *Thirumalaiappa v. Kumaraswami* AIR 1956 Madras 621, *Damayanti v. S. Vaney* 1966 Cri LJ 9, *Delhi Tamil Education Association v. J. Samimalai* 97 (2002) DLT 352 (DB), *Smith v. Zakeman* (1856) 26 LJ Ch 305, *R v. Machin* [1980] 3 All ER 151.]

* * *

41. From a review of the decisions cited before us, the following principles may be deduced, in so far as the right of an advocate to conduct a case is concerned. The principles are:

1. It is of primary importance to ensure that the administration of justice is kept unsullied from any external influence whatsoever.
2. An advocate is an officer of the Court and if he is interrupted or hindered from performing his duty faithfully and devotedly to his client or from rendering effective assistance to the Court, a prima facie case for contempt of court is made out.
3. It is irrelevant that the advocate is not actually prevented from performing his duty to his client or to the Court. It is enough to invite proceedings for contempt if the act complained of is such that it has a real tendency to do so.
4. While the nature of contemptuous acts may be several, some examples are where the client of an advocate is portrayed in such light that it is embarrassing for an advocate to represent him; where the professional competence, conduct or integrity of an advocate is doubted or criticised; where the advocate is sought to be cowed down or browbeaten through applications, notices or pleadings that are drafted in a manner calculated to make it difficult for an advocate to appropriately represent his client, etc. Prejudicing mankind against a person on trial (in the broader sense) may also invite action for contempt of court.
5. The Court is obliged to satisfy itself that the act complained of results in the advocate running a real risk of not being able to perform his duty or that there is a real prejudice that the administration of justice may be interfered with or prejudicially affected or compromised. To put it negatively, the act complained of must not have only a theoretical tendency of preventing the advocate from performing his functions fearlessly.
6. It is also the duty of the Court to protect its officers (including advocates) from being maligned or suffer calumnies of a degree that interfere with the due course of justice.
7. The principles enunciated above are applicable only in respect of pending causes or causes that are imminent. Where the proceedings have terminated, an advocate is not entitled to complain of contempt of court, but his remedy lies in taking recourse to the normal legal channels and processes of law.
8. Similarly, there is a thin line between preventing or tending to prevent an advocate from performing his duties and heaping calumny upon him. The latter does not

necessarily interfere or tend to interfere in the administration of justice and may be otherwise actionable at law.

* * *

(4) . . . It was submitted that NDTV should not have used a clandestine method of collecting news and it ought to have telecast [the defendant's] version of the events and his comments on the sting operation, which it did not, except after the event.

(5) We are not really concerned with journalistic norms or how the mass media behaves in a given situation. This is really a matter that falls within the domain of journalists and broadcasters and their disciplinary bodies. The courts come into the picture only if there is an allegation of transgression of the law by the media. Similarly, if there is an allegation of defamation by the media against an individual, he has a right to approach the courts to redress his grievances. The courts are not and cannot be expected to deal with subjective issues of bias, attitude, behaviour etc. in reporting events.

(6) However, since considerable arguments were advanced on the role of the media in matters such as the present, we think it appropriate to explain the legal limits for the benefit of those concerned.

* * *

52. In *D. N. Prasad v. Principal Secretary* 2005 Cri LJ 1901 it was observed:

“Unfortunately, it is not realised that any item of news telecast in the channels would reach persons of all categories, irrespective of age, literacy, and their capacity to understand or withstand. The impact of such a telecast on the society is phenomenal. Unfortunately, this uncontrolled or unedited telecast or propagation of news is resorted to [in] the name of exercise of the right to freedom of speech and expression, or freedom of press.”

53. In *Surya Prakash Khatri v. Smt. Madhu Trehan* 92 (2001) DLT 665 (FB) it was observed that the power of the press is almost like nuclear power, it can create and it can destroy. Keeping this in mind, it is imperative for the media to exercise due care and caution before publication of a potentially damaging piece. It was said that such news reports are like a loaded gun and it may not be appropriate for the media to contend that it did not know that the gun was loaded. It was observed that:

“The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant.”

54. It was also observed that it is well settled that once proceedings in court have begun, the media has no role to play in the administration of justice.

55. In the context of the last observation, it is necessary to refer to *M. P. Lohia v. State of West Bengal* (2005) SCC 686 wherein the Supreme Court deprecated the practice of a “trial by media” since it certainly interferes in the administration of justice. In this case, anticipatory bail in a dowry death case was declined by the Calcutta High Court and while a similar petition was pending in the Supreme Court, a magazine brought out an interview with the family of the deceased extensively giving their version of the events. This was deprecated by the Supreme Court. Similarly, in *State of Maharashtra v. Rajendra Jawanmal Gandhi* (1997) 8 SCC 386 the Supreme Court observed that “a trial by press, electronic media or public agitation is the very antithesis of the rule of law.”

56. However, what is of limited importance from *M. P. Lohia* in so far as we are concerned is whether the Supreme Court gave its assent to the principle of “strict liability contempt.” This is so because it is not clear from a reading of the decision whether or not the magazine was aware of the pendency of the proceedings before the Supreme Court. It is quite possible that the magazine unknowingly took an incorrect decision to publish the interview and invited strict liability contempt.

57. Our attention was drawn to *Indian Council of Legal Aid and Advice v. State* WP No. 17595/2006 decided on 27 November 2006 wherein this Court stated:

“The kind of media trial which is going on in this country creates bias not only in the minds of the general public but also vitiates the atmosphere and this certainly has the tendency to put pressure on the magistrate or the sessions judge or on the court, while taking decisions, which is not a healthy sign for development of criminal jurisprudence. Media does not know what harm the media is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution. Judges are also human beings and when hue and cry is made by the media it is possible that the equilibrium of a judge is also disturbed. It is high time that under the garb of freedom of press the parallel proceedings of media people in criminal trial should stop immediately.”

58. No doubt the advice given by this Court has gone unheeded and so we frequently come across instances of trial by media.

59. [Reliance was placed] on *R. v. Savundranayagan* [1968] 3 All ER 439 to suggest that the law in England is no different. This decision is of some importance and deals with

two vital issues that we are concerned with. The first relates to “a press campaign of considerable magnitude” in July 1966 in connection, inter alia, with the disappearance of Savundra and his past unsavory record. In this regard, the Court held that at that stage there was nothing to suggest that criminal proceedings were even in contemplation against him and, therefore, there was no question of any contempt of court. It was held, “when an insurance company fails and its policy holders are left stranded, this is undoubtedly a matter of public interest and, indeed, public concern. When, in such circumstances, the moving figure in the company is a man with an unsavoury record who appears to have used large sums of the company’s money for his own purposes and disappeared abroad, the matter becomes a public scandal. There is no doubt that a free press has a right, and indeed the duty, to comment on such topics so as to bring them to the attention of the public. It is in the public interest that this should be done. Indeed, it is sometimes largely because of facts discovered and brought to light by the press that criminals are brought to justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair...”

60. The second issue related to an interview of Savundra in February 1967 shortly after his return to England. The Court observed that at that time it surely would have been obvious to everyone that he was about to be arrested and tried on charges of gross fraud. Commenting on the interview, it was held, “it must not be supposed that proceedings to commit for contempt of court can be instituted only in respect of matters published after proceedings have actually begun. No one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial. On any view the television interview with the appellant Savundra was deplorable. None of the ordinary safeguards for fairness that exist in a court of law were observed, no doubt because they were not understood. They may seem prosaic to those engaged in the entertainment business, but they are the rocks on which freedom from oppression and tyranny have been established in this country for centuries...”

* * *

63. To highlight his travails and tribulations caused by the exposé, Mr. Anand referred to *Kartongen Kemi Och Forvaltning AB v. State* 2004 (72) DRJ 693. In this case, the Central Bureau of Investigation (CBI) filed a charge sheet after thirteen years of investigation, which included three years of “investigative journalism” by the media. In a petition

against the framing of charges, it was conceded by learned counsel appearing for the CBI that there was no evidence showing the receipt of bribe money, but the CBI was on the trail for gathering such evidence. In this context, the Court observed: “This case is a nefarious example which manifestly demonstrates how the trial and justice by media can cause irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives, and friends by the society. He is ostracised, humiliated and convicted without trial. All this puts at grave risk due administration of justice...”

64. We are unable to appreciate the relevance of this case, except to the extent that investigative journalism has been adversely commented upon. But, the real questions that this decision raises are: what is the media to do in a case where investigations go on interminably? Is the media expected to remain a silent spectator during the entire period? What if the investigations are shoddy or patently one-sided or are carried out with a ‘sweep it under the carpet’ attitude? What about the rights of the victim of a vilification campaign? Is he without recourse to any remedy in law...?

65. Mr. Anand cited another decision, which we find to be inapposite. This was *Subhash Chander v. S. M. Aggarwal* 25 (1984) DLT 52... In discussing the “atmosphere of prejudice”... the Court held that:

“It cannot be denied that one of the most valuable rights of our citizens is to get a fair and impartial trial free from an atmosphere of prejudice. This right flows necessarily from Article 21 of the Constitution which makes it obligatory upon the State not to deprive any person of his life or personal liberty except according to the procedures established by law. It is, therefore, obligatory on all the citizens that while exercising their right they must keep in view the obligations cast upon them. If accused have a right to a fair trial then it necessarily follows that they must have a right to be tried in an atmosphere free from prejudice or else the trial may be vitiated on this ground alone.”

* * *

68. In *Brig. E. T. Sen v. Edatata Narayanan* 5 (1969) DLT 348 the allegation was that pending the trial of a complaint for libel, the respondents carried out a persistent one-sided press campaign against the cause of the petitioner with a view to poisoning the mind of the general public and thereby hampering the course of justice...:

“Neither the press reporter nor the publisher of a newspaper can in my view, claim an indefeasible right to put his own gloss on the statements in Court by selecting stray passages out of context which may have a tendency to convey to the reader to the prejudice of a party to the proceedings, a sense different from what would

appear when the statement is read in its own context. To reproduce stray misleading passages in bold headlines in order to attract the attention of casual readers may serve as an aggravating factor. Similarly, while reproducing the Court proceedings, no words may be added, omitted or substituted if their effect is to be more prejudicial to a party litigant than the actual proceedings. Any deviation in the report from the correct proceedings actually recorded must, if it offends the law of contempt of court, render the alleged contemnor liable to be proceeded against.”

* * *

[The Court then went on to discuss the remedies available. After briefly mentioning proceedings in defamation, it went on to discuss injunctions through the cases *Attorney-General v. Times Newspapers Ltd.* [1972] 3 All ER 1136 and *Attorney-General v. Times Newspapers Ltd.* [1973] 3 All ER 54, both relating to an injunction sought by the Attorney-General to limit reporting on cases regarding the thalidomide children, which it was feared would mobilise the public against one of the litigants.]

72. Given this background, the concern of the Court was ensuring that justice would be administered impartially. The Court considered the impact of the proposed publication on the administration of justice and concluded that there are three ways in which due and impartial administration of justice may be affected: first, it may affect and prejudice the mind of the tribunal itself; second it may affect witnesses who are to be called, “in an extreme case the comment might amount to a threat to the witness sufficient to deter him from giving evidence at all, and even where the comment is temperate and in no sense threatening, it is well known that witnesses often have difficulty in reconstructing the events of an occurrence some time previously, and it is clearly possible that comment sufficiently strong and sufficiently often repeated might persuade a witness, quite unwittingly, to adopt a version of the events to which he speaks which is not the true version at all”; third, it may prejudice the free choice and conduct of a party himself. “. . . it is quite clearly established that comment on a pending action, directed to the conduct and integrity of a party, may have a result of causing that party to abandon his claim or to settle his claim for a lower figure than he would otherwise have been prepared to accept. If a party is subjected to pressure by reason of unilateral comment on his case, and that pressure is of a kind which raises a serious prospect that he will be denied justice because his freedom of action in the case will be affected, then a contempt of court has been established and may be the subject of prosecution or injunction.”

75. [In allowing the injunction] . . . Lord Morris of Borth-y-Gest said:

“When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted.”

Lord Diplock observed:

“The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that once the dispute has been submitted to a court of law, they should be able to rely on their being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.”

76. Finally, on the issue of responsible journalism, Mr. Anand cited the ten principles enunciated in *Reynolds v. Times Newspapers Ltd.* [1999] 4 All ER 609. These principles are:

- (a) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- (b) The nature of the information, and the extent to which the subject matter is of public concern.
- (c) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- (d) The steps taken to verify the allegation.
- (e) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- (f) The urgency of the matter. News is often a perishable commodity.
- (g) Whether comment was sought from the claimant (the aggrieved party). He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.

- (h) Whether the [publication] contained the gist of the claimant's side of the story.
- (i) The tone of the [publication] can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- (j) The circumstances of the publication, including its timing.

77. On the basis of the case law cited before us on the issue of media ethics and conduct, infractions thereof which tend to or constitute interference with the administration of justice so as to constitute contempt, the following norms emerge:

1. The reach of the mass media is undoubtedly enormous. It can make contact with just about everybody, anywhere in the world. This range itself puts the media under the spotlight requiring it to act with a great degree of care and responsibility.
2. Most people tend to believe what is published in the mass media making it necessary for the media to ensure that what is being published is accurate. In respect of a potentially damaging publication, the media cannot feign ignorance or plead that it did not know that it had a "loaded gun."
3. The concept of self-regulation of the media appears to be a myth. There will always be a debate about whether, in a given case, the media has transgressed its limits so as to invite an injunction or later an action for contempt of court. The less frequently this happens, the better it is for an ordered society.
4. Once proceedings have begun in a court of law or are otherwise imminent, the media has no role to play in the form of "investigative journalism" or as a fact finder. The matter then rests entirely within the domain of the Court, litigants and their lawyers, no matter how long the litigation lasts. The media ought to keep its hands off an active case.
5. It follows from the above that before a cause is instituted in a court of law, or is otherwise not imminent, the media has full play in the matter of legitimate investigative journalism. This is in accord with our Constitutional principle of freedom of speech and expression and is in consonance with the right and duty of the media to raise issues of public concern and interest. This is also in harmony with a citizen's right to know particularly about events relating to the investigation in a case, or delay in investigation or soft-peddling on investigations pertaining to matters of public concern and importance.

6. When a cause is pending in court, the media may only report fairly, truly, faithfully and accurately the proceedings in the Court, without any semblance of bias towards one or the other party. The media may also make a fair comment in a pending cause without violating the sub-judice rule.
7. While trial by media ought to be deprecated, in the event any person feels victimised or unfairly treated by the media, either through a trial by media or otherwise, he is not without remedy. Proceedings for defamation or injunction can always be initiated in an appropriate case.
8. It is not very clear whether the principle of “strict liability contempt” is accepted in our jurisprudence or not. Until a definite conclusion is arrived at in an appropriate case, knowledge about the pendency of a case or its imminent institution is crucial in so far as the media is concerned. It may be said, to be on the safer side, that if the media (or reporter) is unaware about the pendency of a case, and comments on it, no case of contempt of court can be made out.
9. In the administration of justice, no balancing act is permissible. It is not permissible to contend that the public interest or the right to know outweighs the administration of justice. Such a view may shake the very structural foundations of an impartial justice delivery system.
10. The norms mentioned above are in addition to the principles laid down in *Reynolds*, with which we are in agreement.

78. On the issue raised by Mr. Anand, so far as we are concerned, there has been no trial by media in as much as the telecast does not concern itself with the merits of the BMW case. The telecast merely seeks to project what NDTV believes to be the state of affairs in respect of the conduct of the lawyers handling the case...

79. We do appreciate that in respect of some cases (largely criminal cases) the justice delivery system in our country progresses virtually at a snail's pace and often an innocent person has no real remedy available to him, if he is framed in a matter, or is subjected to a trial by media. As a result, seldom does anyone approach a court of law for relief either by way of an injunction or for damages in a case of trial by media. Such being the reality, we are of the opinion that the courts have a great responsibility and, therefore, need to be far more vigilant and proactive in protecting the rights and reputation of an individual from an unwarranted trial by media. In a sense, the courts have to enervise the rule of law. While this may add to the burden of our criminal courts, we are of the view that it is

imperative for the courts to protect a citizen from what may appear to be victimisation. This is certainly the duty if not an obligation of the courts. This is all the more important in a pending matter. For example, if a person is arrested on the suspicion of having committed a crime, it is not the function of the media to “declare” him (by implication) innocent or guilty. That is within the exclusive domain of the judiciary. But if the accused is subjected to a trial, either through the print or audio-visual medium, it may subconsciously affect the judgement of the judge, and that may well be to the prejudice of the accused. who is, in our justice delivery system, presumed innocent until proven guilty. In such a situation, the judge must be proactive by restraining the media from carrying out a parallel trial otherwise our criminal justice delivery system will be completely subverted. . .

* * *

81. Mr. Anand addressed us at length on the law relating to sting or undercover operations. While we do not see the relevance of this for deciding the merits of the issue before us, we are dealing with the decisions cited since this issue apparently arises quite frequently and our discussion may contribute to an understanding of the correct legal position. The broad contention of Mr. Anand is that a sting operation is unethical and that he was secretly trapped by NDTV and Mr. Kulkarni to say and do the things that he did.

82. To begin with, Mr. Anand referred to a passage from *Regina v. Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2001] 1 QB 885 criticising such an activity in the following words: “It would be departure from proper standards if, for example, the BBC without justification attempts to listen clandestinely to the activities of a board meeting. The same would be true of secret filming of the board meeting. The individual members of the board would no doubt have grounds for complaint, but so would the board and the company as a whole.”

83. Similarly, reference was made to the following passage from *Brannan v. Peek* [1947] 2 All ER 572:

“The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasised that, unless an Act of Parliament does so provide, and I do not think any Act of Parliament does so provide, it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence.”

84. This decision was followed in *In re M. S. Mohiddin* AIR 1952 Madras 561 wherein it was stated:

“But I have held in several cases already that there are two kinds of traps, ‘a legitimate trap,’ where an offence has already been born and is in course, and ‘an illegitimate trap,’ where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be ‘a legitimate trap,’ wholly laudable and admirable, and adopted in every civilised country without the least criticism by any honest man. But where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts, it will be ‘an illegitimate trap’ and, unless authorised by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who will all be ‘accomplices’ whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of court which has ripened almost into a rule of law.”

85. A similar view and sentiment was expressed in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh* AIR 1954 SC 322.

86. Reference was also made to erudite and academic articles on the subject, but we are not inclined to discuss them in this judgement. The views of various scholars, based on the law in some other countries, lead us to conclude as follows:

1. A sting operation by a private person or agency is, by and large, unpalatable or unacceptable in a civilised society. A sting operation by a State actor is also unacceptable if the State actor commits an offence so that an offence by another person is detected.
2. A State actor or a law enforcement agency may resort to hidden camera or sting operations only to collect further or conclusive evidence as regards the criminality of a person who is already suspected of a crime.
3. The law enforcement agency must maintain the original version of the actual sting operation. Tampering with the original video or audio clips of a sting operation may lead to a presumption of the spuriousness of the entire operation.
4. A sting operation cannot be initiated to induce or tempt an otherwise innocent person to commit a crime or entrap him to commit a crime.

5. Normally, if a private person or agency unilaterally conducts a sting operation, it would be violating the privacy of another person and would make itself liable for action at law.
6. A sting operation must have the sanction of an appropriate authority. Since no such authority exists in India, and until it is set up, a sting operation by a private person or agency, ought to have the sanction of a court of competent jurisdiction which may be in a position to ensure that the legal limits are not transgressed, including trespass, the right to privacy of an individual or inducement to commit an offence etc.

87. The law in India in this regard is still in the process of development, but we feel that the views expressed by us help in a better understanding of the subject and implementation of the law.

88. In *Bhupendra Singh Patel v. State (CBI)* Cri M.C. No.59/2004... a first information report was lodged against a journalist who conducted a sting operation in which he bribed the Additional Private Secretary of a Union Minister of State with the avowed object of exposing corruption at the highest level in government. While declining to quash the first information report, this Court held that immunity is given to a bribe-giver where he is unwilling to pay illegal gratification to a public servant and approaches the police to get the public servant trapped while accepting a bribe. However, in the case under review, the accused bribed the public servant on three occasions and in not a single instance did he report the matter to the police in advance, otherwise they could have laid a legally admissible trap and apprehended the bribe takers. To make matters worse, the accused did not inform the police even after the transaction was complete.

89. Similarly, in *Shri Bharadwaaj Media Pvt. Ltd. v. State* W.P. (CrI) No.1125/2007... this Court declined to quash a first information report against a private television channel and some of its officials who had conducted an undercover operation wherein a Member of Parliament received money for raising questions in the House. This Court was of the opinion that prima facie an offence had been committed by the bribe-givers as well as by the bribe-takers.

90. [Counsel for the accused] referred to an important decision of the Supreme Court on the question of entrapment. In *Ramjanam Singh v. State of Bihar* AIR 1956 SC 643 it was said:

“Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; it is one thing to tempt a suspected offender to overt

action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done. The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them.”

* * *

102 ...While the sting operation conducted on Mr. Anand and Mr. Khan may be criticised on ethical grounds and as violating their privacy and may have left them with a sense of having been deceived by Mr. Kulkarni, to say that they were trapped into indiscretions would certainly not be correct because the tenor of the conversations that they had with Mr. Kulkarni does not suggest that they were being led up the garden path. The conversations were, by and large and in the circumstances, quite normal and showed that Mr. Anand and Mr. Khan were in control of the conversations. Moreover, both Mr. Anand and Mr. Khan are seasoned lawyers with a tremendously long stint at the Bar and it is difficult to imagine that they would not have suspected anything amiss had the conversation with Mr. Kulkarni been anything but normal...

* * *

118. Reference was made to *Sumitra Debi Gour v. Calcutta Dyeing and Bleaching Works* AIR 1976 Calcutta 99 wherein it was held, in connection with regard to a tape recording without the knowledge and consent of the person concerned, who may be unknowingly trapped into it, that: “anything which is born of trickery or trapping or cunningness should be very cautiously and carefully considered by the court before it is admitted and accepted.” On the issue of stealthy tape recording it was observed in *Joginder Kaur v. Surjit Singh* AIR 1985 PandH 128 that such a recording “proves nothing else than an effort to create evidence.”

IN THE SUPREME COURT OF INDIA**R. K. ANAND****VERSUS****REGISTRAR, DELHI HIGH COURT**

(2009) 8 SCC 106

29 July 2009

H. S. Bedi, J. M. Panchal and A. Alam, JJ.

Rule of Law: When assessing a sting operation, a balancing act should be undertaken between the various competing public interests. The media outlet will not need to seek permission from the court, but it does need to be open and frank in its subsequent dealings with them. Finally, the operation should be considered separately from any subsequent programming.

This case is an appeal to the Supreme Court from *Court on its own Motion v. State and Others* WP (CRL.) No. 796/2007, which is included earlier in this chapter. It concerns charges laid against two advocates who had been covertly filmed engaging in inappropriate conversations with a witness during the “BMW trial.” During their appeal, the Supreme Court considered the legal nature and implications of such sting operations.

The Court held that it was not necessary for a media outlet to receive permission from a court to undertake a sting operation. It did however, note the importance of being completely open with the court during any subsequent proceedings that may result from the operation.

In determining the legitimacy of an operation, the Court held that a balancing exercise should be undertaken, between the public interest in the operation going ahead (in this case, bringing to light shortcomings in the criminal justice system) and the public interest served by it not going ahead. It was argued here that the public interest in deeming the sting operation unlawful was the risk of trial by media. However, the Court noted that the operation was not aimed at the defendants of the BMW trial, but rather at the lawyers involved in the case. It held that if anything, the operation was more likely to assist the functioning of the trial. Accordingly, it was held that the operation was desirable.

The Court noted a distinction between the sting operation itself and the subsequent programming. It held that while the operation was desirable, there were other aspects of NDTV's public handling of the material that paid inadequate attention to the truth in order to sensationalise what had occurred.

Cases discussed and relied upon:

Discussing the approach of balancing a public interest which assists justice against a public interest which undermines justice: *Re Lonrho plc and Others* [1989] 2 All ER 1100.

Judgement of the Court delivered by Alam, J.

59. ... Inherent in the facts of the case are a number of issues, some of which go to the very root of the administration of justice in the country and need to be addressed by this Court. The two appeals give rise to... some other important issues... that need to be addressed by us. These are...:

5. The role of NDTV in carrying out sting operations and telecasting the programme based on the sting materials in regard to a criminal trial that was going on before the court....

* * *

167. NDTV came under heavy attack from practically all sides for carrying out the stings and airing the programme based on it. On behalf of R. K. Anand the sting programme was called malicious and motivated, aimed at defaming him personally. Mr. P. P. Rao appearing for I. U. Khan questioned the propriety of the stings and the repeated telecast of the sting programme concerning a pending trial and involving a court witness. Mr. Rao submitted that before taking up the sting operations, fraught with highly sinister implications, the TV channel should have informed the trial court and obtained its permission. If for any reason it was not possible to inform the trial judge then permission for the stings should have been taken from the Chief Justice of the Delhi High Court. Also, it was the duty of that TV channel to place the sting materials before the court before telecasting any programme on that basis.

168. Mr. Gopal Subramaniam [acting as counsel for the Court] submitted that this case raised the important issue regarding the nature and extent of the right of the media to deal with a pending trial. He submitted that a sting operation was, by its nature, based on deception and hence, overriding public interest alone might justify its publication/telecast. Further, since the operation was based on deception the onus would be heavy on the person behind the sting and publication/telecast of the sting materials to establish his/her

bona fide, apart from the genuineness and truthfulness of the sting materials. In regard to sting operations, bona fide could not be assumed. In this case, therefore, it was the duty of the High Court to inquire into and satisfy itself whether the sting operation was a genuine exercise by the TV channel to expose the attempted subversion of the trial... Mr. Subramaniam further submitted that the act of publication/telecast and the contents of publication/telecast, though interlinked, were still needed to be viewed separately and whether or not a publication or telecast was justified would, to a large extent, depend, as much on the contents of the publication/telecast, as the act of publication/telecast itself. He further submitted that, in the facts of the case, the sting operation was in the public interest and there was nothing objectionable there. But the same cannot be said of the telecast...

169. The other amicus Mr. N. Rao was more severe in his criticism of the telecast of the sting programme by NDTV. He maintained that NDTV was equally guilty of contempt of court, though under a different provision of law. Mr. Rao submitted that the programme was an instance of, what is commonly called, 'trial by media' and it was telecast while the criminal trial was going on. He submitted that in our system of law there was no place for trial by media in a sub-judice matter. Mr. Rao submitted that freedom of speech and expression, subject of course to reasonable restrictions, was indeed one of the most important rights guaranteed by the Constitution of India. But the press or the electronic media did not enjoy any right(s) superior to an individual citizen. Further, the right of a free and fair trial was of far greater importance and in case of any conflict between free speech and fair trial the latter must always get precedence. Mr. Rao submitted that though the law normally did not permit any pre-censorship of a media report concerning an ongoing criminal trial or sub-judice matter, any person publishing the report in contravention of the provisions of law would certainly make himself liable to the proceeding of contempt...

170. Mr. Salve learned Senior Advocate appearing for NDTV, on the other hand, defended the telecast of the programme. Mr. Salve submitted that commenting on or exposing something foul concerning proceedings pending in courts would not constitute contempt if the court is satisfied that the report/comment is substantially accurate, it is bona fide and it is in public interest. He referred to the new section 13 in the Contempt of Courts Act substituted with effect from March 17 2006 which is as under:

"Notwithstanding anything contained in any law for the time being in force:

- (a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

- (b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in the public interest and the request for invoking the said defence is bona fide.”

171. Mr. Salve submitted that in a situation of this kind two competing public interests are likely to arise; one, purity of trial and the other public reporting of something concerning the conduct of a trial (that may even have the tendency to impinge on the proceedings) where the trial, for any reason, can be considered as a matter of public concern. With regard to the case in hand Mr. Salve submitted that in the sting programmes there was nothing to influence the outcome of the BMW trial. But even if the telecast had any potential to influence the trial proceedings that risk was far outweighed by the public good served by the programme. He further submitted that in a case where two important considerations arise, vying with each other, the court is the final arbiter to judge whether or not the publication or telecast is in the larger public interest; how far, if at all, it interferes or tends to interfere with or obstructs or tends to obstruct the course of justice and on which side the balance tilts. In support of his submission he relied upon a decision of the House of Lords in *Re Lonrho plc and Others* [1989] 2 All ER 1100 paragraphs 7.2 and 7.3 at 1116.

* * *

173. We are also unable to agree with the submission made by Mr. P. P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media. It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre-censorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting

operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.

174. The submissions of Mr. N. Rao are based on two premises: one, the sting programme telecast by NDTV was of the genre, 'trial by media' and two, the programme interfered or tended to interfere with or obstructed or tended to obstruct the proceedings of the BMW trial that was going on at the time of the telecast. If the two premises are correct then the rest of the submissions would logically follow. But are the two premises correct? What is trial by media? The expression 'trial by media' is defined to mean:

“the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny.”

175. In light of the above it can hardly be said that the sting programme telecast by NDTV was a media trial. Leaving aside some stray remarks or comments by the anchors or the interviewees, the programme showed some people trying to subvert the BMW trial and the state of the criminal administration of justice in the country (as perceived by the TV channel and the interviewees). There was nothing in the programme to suggest that the accused in the BMW case were guilty or innocent. The programme was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case. It indeed made serious allegations against the two lawyers. The allegations, insofar as R. K. Anand is concerned, stand established after strict scrutiny by the High Court and this Court. Insofar as I. U. Khan is concerned, though this Court held that his conduct did not constitute criminal contempt of court, nonetheless allegations against him too are established to the extent that his conduct has been found to be inappropriate for a Special Prosecutor. In regard to the witness the comments and remarks made in the telecast were never subject to a judicial scrutiny but those too are broadly in conformity with the materials on the court's record. We are thus clearly of the view that the sting programme telecast by NDTV cannot be described as a piece of trial by media.

176. Coming now to section 3 of the Contempt of Courts Act we are unable to appreciate Mr. Rao's submission that NDTV did not have the immunity under subsection (3) of section 3 as the telecast was hit by proviso (ii) Explanation (B) to that sub section. . .

178. Subsection (1) of section 3 provides immunity to a publisher of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct the course of justice in any civil or criminal proceeding if he reasonably believed that there was no proceeding pending. Subsection (3) deals with distribution of the publication as mentioned in subsection (1) and provides immunity to the distributor if he reasonably believed that the publication did not contain any matter which interfered or tended to interfere with, or obstructed or tended to obstruct the course of justice in any civil or criminal proceeding. The immunity provided under subsection (3) is subject to the exceptions as stated in the proviso and explanations to the subsection. We fail to see any application of section 3(3) of the Contempt of Courts Act in the facts of this case. In this case there is no distribution of any publication made under subsection (1). Hence, neither subsection (3) nor its proviso or explanation is attracted. NDTV did the sting, prepared a programme on the basis of the sting materials and telecast it at a time when it fully knew that the BMW trial was going on. Hence, if the programme is held to be a matter which interfered or tended to interfere with, or obstructed or tended to obstruct the due course of the BMW case then the immunity under subsection (1) will not be available to it and the telecast would clearly constitute criminal contempt within the meaning of section 2(c)(ii) and (iii) of the Act. But can the programme be accused of interfering or tending to interfere with, or obstructing or tending to obstruct the due course of the BMW case. Whichever way we look at the programme we are not able to come to that conclusion. The programme may have many other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people (the courts not excluded) that a conspiracy was afoot to undermine the BMW trial. What was shown was proved to be substantially true and accurate. The programme was thus clearly intended to prevent the attempt to interfere with or obstruct the due course of the BMW trial.

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

180. We have held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceeding, rather it was intended to prevent the attempt to interfere with or obstruct the due course of law in the BMW trial. We have also held that the sting programme telecast by NDTV served an important public cause. In view

of the twin findings we need not go into the larger question canvassed by Mr Salve that even if the programme marginally tended to influence the proceedings in the BMW trial the larger public interest served by it was so important that the little risk should not be allowed to stand in its way.

181. We have unequivocally upheld the basic legitimacy of the stings and the sting programmes telecast by NDTV. But at the same time we must also point out the deficiencies (or rather the excesses) in the telecast. Mr. Subramaniam spoke about the `slant' in the telecast as `regrettable overreach.' But we find many instances in the programme that cannot be simply described as `slants.' There are a number of statements and remarks which are actually incorrect and misleading...

[The Court then went on to outline statements in the programme that were false.]

186. ...It is not that NDTV did not know these facts. NDTV was covering the BMW trial very closely since its beginning and was aware of all the developments taking place in the case. Then why did it introduce the programme in this way, running down the prosecution and [falsely] presenting Kulkarni as the only person standing upright while everyone else had fallen down? The answer is not far to seek. One cannot start a highly sensational programme by saying that it was prepared with the active help of someone whose own credibility is extremely suspect. The opening remarks were thus designed to catch the viewer and to hold his/her attention, but truth, for the moment at least was relegated to the sidelines. It is indeed true that later on in the programme facts concerning Kulkarni were stated correctly and he was presented in a more balanced way and Mr. Subramaniam wanted to give NDTV credit points for that. But the impact and value of the opening remarks in a TV programme is quite different from what comes later on. The later corrections were for the sake of the record while the introductory remarks had their own value.

187. Further, on the basis of the sting recordings NDTV might have justifiably said that I. U. Khan, the Special Prosecutor appeared to be colluding with the defence (though this court found that there was no conclusive evidence to come to such a finding). But there was no material before NDTV to make such allegations against the prosecution as a whole and thus to run down the other agencies and people connected with the prosecution. There are other instances also of wrong and inappropriate choice of words and expressions but we need not go any further in the matter.

188. Another sad feature is its stridency. It is understandable that the programme should have started on a highly sensational note because what was about to be shown was really

quite shocking. But the programme never regained poise and it became more and more shrill. All the interviewees, highly eminent people, expressed their shock and dismay over the state of the legal system in the country and the way the BMW trial was proceeding. But as the interview progressed, they somewhat tended to lose their self restraint and did not pause to ponder that they were speaking about a sub-judice matter and a trial in which the testimony of a court witness was not even over. We are left with the feeling that some of the speakers allowed their passions, roused by witnessing the shocking scenes on the TV screen, to get better of their judgement and made certain very general and broad remarks about the country's legal system that they might not have made if speaking in a more dispassionate and objective circumstances. Unfortunately, not a single constructive suggestion came from anyone as to how to revamp the administration of criminal justice. The programme began on negative note and remained so to the very end.

* * *

193. [The Court then noted certain omissions in the evidence that NDTV had presented to the High Court and stated that this left] one with the feeling that it was not sharing all the facts within its knowledge with the court. The disclosures before the Court do not appear to be completely open, full and frank. It would tell the court only so much as was necessary to secure the conviction of the wrongdoers. There were some things that it would rather hold back from the court. We would have appreciated the TV channel to make a fuller disclosure before the High Court of all the facts within its knowledge.

194. Having said all this we would say, in the end, that for all its faults the stings and the telecast of the sting programme by NDTV rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and R. K. Anand.

195. We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old. We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad.

196. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they sometimes tend to trivialise highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In quest of excellence they have still a long way to go.

197. A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards of professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.

198. It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.

PRICE OF TAKING ON PRIVILEGED CORRUPTION*

Aniruddha Bahal

I would like to share my own experiences about a certain story and the manner in which that story developed and I had my own small brush with the Lok Sabha. But, I do not consider myself a victim at all, in spite of having a dozen cases slapped against me by authorities of all kinds. Journalists as such who come in friction with the State are more likely to become the “shoot the messenger” club. We are all messengers who are being shot.

In December 2005, Cobrapost.com carried out Operation Duryodhana, which captured on camera eleven members of the Parliament of India accepting money to table questions on the floor of the Parliament, and subsequently all of them were dismissed from the Parliament. I just want to narrate the sequence of events. Sometime in March 2005, there was a story on *India TV* where actor Shakti Kapoor was caught on camera in a casting couch. The manner in which they used hidden cameras was very voyeuristic and there was a big legitimate hue and cry that there was no public interest dimension to that particular story.

National dailies called me up to write a column for them that hidden cameras cannot be used for such voyeuristic purposes. They should be used when there is a specific need and a larger public interest dimension to it. Subsequently, I wrote an article in *Hindustan Times* where I mentioned several story ideas in which hidden cameras could be used. And one of those ideas that I gave was that I have heard that Members of Parliament take money to ask questions in the Indian Parliament and I thought it was worthy enough to be investigated. I wrote, “an undercover investigation into how questions really get asked in Parliament would yield rich dividends. It would be reminiscent of the mid 1990s of the *Sunday Times* Commons’ cash for questions sting in the United Kingdom. I was alarmed that someone told me recently that the going rate will be as low as Rs 5,000 for some Members for asking questions.”

A few days after the publication of this story, I received a breach of privilege motion sent to me by Lok Sabha Speaker Somnath Chatterjee. It was a notice under Rule 223 of the Rules and Procedures of Conduct of Business in the Lok Sabha... The notice from the Speaker said that this allegation is derogatory and scandalous in nature with a purported

* Presentation of Aniruddha Bahal at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

intent of lowering the image and esteem of the House as well as the honourable members. The notice said that it is a serious breach of privilege amounting to contempt of the House.

The clipping of my column was attached to the notice and the speaker asked me to reply to the notice. In my reply, I said that mere mentioning of the story idea legitimately to be pursued couldn't perhaps be termed as derogatory. I am not taking any names, etc. But it also instilled in me a sense of provocation to prove that it does happen, because I knew it was true; my sources had told me that these things happen. Though I had no intention of pursuing this story but this came as a provocation from the Speaker's chamber and that was the genesis and start of the "Operation Duryodhana" which culminated six to seven months later into a story on Members of Parliament taking bribes to ask questions in Parliament. It was followed by enquiries in both the Lok Sabha and Rajya Sabha since there was a lone upper House Member involved and there were ten lower House Members in the net.

The Lok Sabha enquiry was of the view that such an expose was very necessary and should be undertaken, as happens in western democracies. The Rajya Sabha report, on the other hand, which concerned just one Member raised a point and that the sting operation team should have come with the story to them and subsequently they would have taken action on it. Our view was that we could not have gone to the House with the story when our primary responsibility is to the readers and viewers. The Rajya Sabha took the view that we should not be raising such issues in public domain.

Everything was quiet for about two years but then suddenly in 2007, out of the blue, Delhi police filed an FIR against me stating that the journalist concerned has abetted corruption in the sense that the money was exchanged in return for Members of Parliament asking questions in the Indian Parliament. This case is still going on and I have filed an appeal in the High Court and I have asked for the quashing of that particular FIR concerned with that particular abetment. Since it is sub-judice so I won't go into detail, but it was just to show certain principles that came up of undercover journalism.

I will digress a bit here and go into how the whole story was principled in my mind. There are a lot of people running around with hidden cameras not really knowing the principles behind which we are using such kind of tools to get certain undercover truths. Operation West End about the defence procurement system in India was always in the larger public interest. The second principle is that whether you know of the inclination or predisposition of the person whom you are filming to commit that particular act which in a sense means

that you should never be on a fishing expedition. So all investigations are based on sources telling us what is happening, sources set up the meetings with those particular people, and this is how the investigation is carried forward. So there was never any fishing expedition. In fact, during the Rajya Sabha enquiry, a few members asked me a very strange question of how did I choose the Members that led to Operation Duryodhana, and I answered them that it was the middlemen who took us to those Members. If there had been ten Congress members involved, we had gone to them and if there were ten BJP members, the middlemen took us to them as well. There is no quota system in investigation and the whole line of questioning by the Rajya Sabha Privileges Committee was on this and I told them that what you are suggesting is totally atrocious.

In fact, a Rajya Sabha Member told me that I should have picked up the Members from a telephone directory to give a perception of neutrality. There was a failure to understand the basic journalistic principles behind the whole purpose of doing such stories. That itself is suggestive of how you sense the whole system coming back at you.

I work in the national capital and here you can assume that you are fairly more protected than journalists working in the areas where the authorities are entrusted with unimaginable powers of harassment if they wish to harass a particular journalist. In such areas there is no media protection as compared to what the scribes in the metro cities enjoy to some extent. Whether the national media will also take their cause is another area of suspicion. So they are a much more courageous tribe than we people sitting in Delhi. My heart goes out to these people . . .

For the last decade since I carried out Operation West End in the year 2000 along with Matthew Samuel, exposing corruption in the defence procurement system in India . . . a situation has developed where the reporters have become living examples of “shoot the messengers.” They have been labeled as the biggest villains of peace. Then I had to face a Commission of Enquiry besides a slew of cases that were mounted to harass us. From there I faced the Official Secrets Act case where we were accused, because of an article of ours in October 2000 said that Dutch NGOs were allegedly funding militants in the north-east. We were accused of spoiling India’s relationship with the Dutch. These kinds of bizarre Official Secrets Act cases are still going on, which are nothing but instruments of harassment of journalists so that they don’t do investigative stories fearing intimidation. It is a particular trend that started then and is going on. Since 2000 to date, on average, one day per week I have been in the courts — whether it is a magistrate’s court in Delhi or the apex court. The content of my night time reading has now been changed from novels to

affidavits, which speaks of the plight of a journalist doing investigative reporting in India. If you do not have a big organisation backing you in court, you have to bear the legal cost out of your own pocket. And I am fortunate that my classmates are lawyers now. If they had not been around as a support base, things would have been tough. I must confess that one group of people who really stood for Tehelka and then Cobrapost were lawyers who did so much pro bono work for us. . . . We need a pro bono system where if a journalist gets in trouble then the legal costs and the lawyer are taken care of, because there was no support structure to help us in that way or to support the journalists now in any way. If now journalists are under any judicial scrutiny or enquiry which makes them appear in court, there is no legal support system for such scribes. They have to depend upon their own resources — friends and lawyers — to support them. There is no civil liberties group here with a big budget that can help journalists who are facing problems.

Aniruddha Bahal is a journalist who is perhaps best known for his work in undercover investigative journalism, including his exposé on corruption in the Indian Parliament

CHAPTER EIGHT

**ATTACK ON JOURNALISTS AND
MEDIA FREEDOM**

ATTACK ON JOURNALISTS AND MEDIA FREEDOM: THE INDIAN STORY

Harsh Dobhal

Thus far we have discussed in previous chapters the dangers and protections that the law presents to journalists. However, it is important to note that beyond the law, journalists in India and elsewhere face dangerous attacks by the State or private agencies for pursuing stories against governments, powerful people or political parties, resulting in restrictions on their freedom. Such targeting of journalists is often driven by a sense of vengeance or with an intention to silence them and discourage others from daring to do their professional duty. The impunity with which such attacks take place only shows that, in India, freedom of speech and expression cannot be taken for granted.

Apart from assaults on journalists by 'unidentified individuals,' many of such actions are often veiled behind a plethora of legal charges such as sedition, contempt of court, public disorder, obscenity, Official Secrets Act, defamation or other such charges. These actions represent dramatic curtailments on the liberty and freedom of journalists and substantially interfere with their ability to inform the public.

Assassination, it was once jokingly said, was the deadliest form of censorship. The practice of killing journalists in our times has become so routine that this observation no longer remains a mere joke but has a truly tragic ring to it.

In the first six months of 2011, according to the International Press Institute, a global press freedom organisation, as many as 51 journalists were killed.¹ Sixteen of those journalists were killed in Latin America and 21 in the Middle East. Eight journalists were killed in Iraq alone in the first six months, as opposed to six in the whole of 2010.

In the South Asian region, Pakistan, which was the world's most dangerous country for journalists in 2010, and where dozens of journalists have been killed since 2000, saw four journalists lose their lives for doing their jobs. On May 29, 2011, journalist Saleem Shahzad, 40, was abducted in Islamabad; his tortured, mutilated body was discovered on May 31. In an attempt to silence criticism, he had received threats reportedly from Inter-

1 <http://www.freemedia.at/our-activities/death-watch.html>

Services Intelligence (ISI) about his article in Asia Times Online linking Pakistan's Navy with Al-Qaida.²

India, which claims to be the 'largest democracy in the world,' is supposed to be relatively better off compared to other countries in the developing world when it comes to freedom of the press.

However, when it comes to attack on the press, the Indian record was only slightly better than neighbouring Pakistan. By mid-2011, three journalists, including *Mid-Day* (special investigations) editor J. Dey, were murdered by unknown assassins.³ In all three instances, investigations are on but no arrests have been made; much less is there any headway as to the killers or their motives. Apart from these deaths, there have been 14 instances of attacks on journalists in this year alone.⁴

There is no doubt that the media in India continues to play a very prominent role in defending democracy as compared to other countries in South Asia and much is made of the vibrant press that is said to frequently criticise the powerful and discuss controversial matters. In many cases, sting operations and other exposes have had a powerful effect at curbing corruption and misuse of official power.

Freedom of the media is the freedom of communication which is expressed through various modes of electronic and print versions of a range of material. The country consumed 99 million newspaper copies as of 2007—making it the second largest market in the world for newspapers.⁵ By 2009, India had a total of 81,000,000 registered Internet users—comprising 7.0% of the country's population,⁶ and 100,000,000 people in India also had access to broadband Internet as of 2010⁷—making it the 11th largest country in the world in terms of broadband Internet users. As of 2009, India is among the fourth largest television broadcast stations in the world with nearly 1,400 stations.⁸

Though freedom of the press has not been expressly provided for in the Constitution, but is implicit in the Fundamental Right pertaining to the Freedom of Speech and

2 <http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc17/ALRC-COS-17-09-2011>

3 <http://wearethebest.wordpress.com/2011/06/14/3-deaths-14-attacks-on-journos-in-last-six-months/>

4 Ibid

5 ^ a b c d "World Association of Newspapers (2008), "World Press Trends: Newspapers Are A Growth Business"". Wan-press.org. 2008-06-02. Retrieved 2010-09-01.

6 See *The World Factbook: Internet users and Internet World Stats*

7 <http://www.internetworldstats.com/asia/in.htm>

8 *CIA World Factbook: Field Listing - Television broadcast stations.*

Expression guaranteed to the citizens under article 19 (1) (a) of the Constitution of India.⁹

However, this right is subject to restrictions under sub clause (2), whereby this freedom can be restricted for reasons of “sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, preserving decency, preserving morality, in relation to contempt, court, defamation, or incitement to an offense.” Laws, such as the Official Secrets Act and Prevention of Terrorist Activities Act (PoTA), have been used to limit press freedom. Under PoTA, a person could be detained for up to six months for being in contact with a terrorist or terrorist group. PoTA was repealed in 2006, but the Official Secrets Act 1923 continues.¹⁰

The freedom of media in conflict zones is more often for just name’s sake. The situation in India’s volatile North-east illustrates the common tendency displayed by parties locked in conflict to deny opposing sides a voice and to target journalists who may be suspected of harbouring contacts with rival groups, even if such contacts are of a professional nature. The outcome is to seriously impair one possible means through which the media could contribute to conflict resolution, by promoting a public dialogue between contending groups.¹¹

Thanks to our draconian laws but even more so the lack of tolerance and democratic culture in Indian society, the uncompromising role of journalists in upholding free speech has not been without severe consequences for those who have tirelessly fought to carry stories despite threats to their careers and their lives.

This is particularly so in conflict zones in India like Kashmir, Manipur and Chhattisgarh where journalists are routinely caught in the crossfire between state security forces and militants of different hues and other non-state actors. Both State and non-State actors carry out with impunity violations of media rights and freedom of expression becomes extremely difficult without inviting physical harm.

The story of Maqbool Sahil, currently editor in-charge of the Urdu weekly Pukaar based in Srinagar is illustrative of the perils of being a journalist in Kashmir. In January 2004, Sahil was detained and accused of being allegedly involved in an espionage network working for Pakistan. For more than 15 days, he was subjected to third-degree torture and finally

9 <http://parliamentofindia.nic.in/ls/intro/p20.htm>

10 en.wikipedia.org/wiki/Freedom_of_expression_in_India

11 See <http://asiapacific.ifj.org/assets/docs/186/028/5128fba-454c61c.pdf>

charged under the Official Secrets Act (OSA) and Enemy Agents Ordinance (EAO), which are non-bailable and carry death penalty.

“It was a hellish experience and the modes of torture inflicted on me during interrogation extended to putting a wooden roller on my legs, suspend me from the roof, cane my feet, besides officials regularly beating me. As I was unable to provide any lead to my alleged involvement in espionage, the intensity of the torture increased. I could not stand on my feet. Other detainees would help me change clothes and eat. My house was raided thrice, and all equipment including a computer, books, CDs and diaries were taken away by the CID personnel, which have not been released till date,” remembers Sahil.¹² He was released in January 2008 after over 40 months in prison. In his work as a journalist covering the Kashmir conflict, Sahil has faced pressures from both State and non-State actors. But, according to him, the State uses both direct action and undercover tactics to force the journalists to toe its line, which to an extent has intimidated newsrooms in Srinagar to practice self-censorship.

“I see myself as a living testimony of this repression, which has clamped the State for the last 20 years under the garb of restoring peace in Jammu & Kashmir,” he said.

Irengbam Arun, editor of IREIBAK, a daily published from Imphal and member of All Manipur Working Journalists Union, said: “The situation of journalists in Manipur is similar to that of Kashmir.”¹³ According to him, in Manipur government agencies such as the police and security forces operate with impunity created by the prolonged imposition of the Armed Forces Special Powers Act (AFSPA).

The AFSPA, 1958 has been enforced in the whole of Manipur since 1980. Under this Act, a mere suspicion by a non-commissioned officer of the armed forces is enough to call for the arrest without warrant, torture and killing of any person, or destruction of any property.

One example of the misuse of such powers by security forces he gives is that of Konsam Rishikanta, a twenty-two-year-old journalist working for the Imphal Free Press. On November 17, 2008, he was supposed to report at his office at 5 pm for the night shift. But around 4.30 pm, an unidentified caller informed the editor about Rishikanta’s death. The spot where Rishikanta was found dead had witnessed many ‘fake’ encounters taking place in the past and also happens to be a security zone where a person entering or departing from the area had to clear at least three security checks manned by the state forces.

12 ‘National Conference on Media and the Law,’ HRLN, 3-4 April, 2010.

13 National Conference on Media and the Law,’ HRLN, 3-4 April, 2010.

Rishikanta is the fifth journalist who was gunned down by unidentified persons in the past few years in Manipur. The state government has failed to either identify or book the perpetrators of such cold-blooded killings. The media fraternity in the state had strong reasons to suspect involvement of the security forces in the killing of Rishikanta. In the wake of such soaring killings, media persons in Manipur find it almost impossible to function freely without fear and discharge their duties.

In the heart of India, the State is greatly challenged by the so-called Maoists. The war between the State and the Maoists has sandwiched the tribals with no option than just to succumb to it. Victims of neo-liberal development practices and the constant State and Maoist armed violence have curtailed the freedom of movement and options for livelihood of the tribes. In such a scenario, when a local adivasi tries to bring out the truth in public domain, she/he is made a victim by the State machinery. One such young tribal journalist is Lingaram Kodopi.

As Arundhati Roy writes in her article 'The Dead Begin to Speak up in India,'¹⁴ the largest democracy is afraid of this Adivasi as he knows how to speak Gondi (local language) and hence he knows how to negotiate the remote forest paths in Dantewada, the other war zone in India from which no news must come. Before he became a journalist, he was a driver. He was picked up by the police and his jeep was confiscated. Further he was locked up in a toilet for 40 days where he was forced to become a Special Police Officer (SPO) which is the government sponsored army of civilians. There were accusations of Lingaram being the official spokesperson of the Maoist Party by the Chhattisgarh Police which was severely criticised and it had to step back from its statement. Lingaram remained in Delhi and completed his Diploma in Journalism in March 2011.

He returned back to Chhattisgarh and constantly reported about the violence in the state. In such a situation, he became the lens for many by sharing glimpses of brutal atrocities on the people resulting out of the state-corporate nexus. As Arundhati states, "it's not hard to see why young Lingaram Kodopi poses such a threat. Having signed over vast tracts of indigenous tribal homelands in central India to multinational mining and infrastructure corporations in a series of secret memoranda of understanding, the government has begun to flood the forests with hundreds of thousands of security forces. All resistance, armed as well as unarmed has been branded Maoist." Lingaram had joined the ranks of people exposing the State brutality and to discourage people like him, he was arrested on September 9, 2011 on charges of accepting 'protection' money from Essar Group to be handed over to the Maoist Party.

¹⁴ Arundhati Roy, 'The Dead Begin to Speak up in India,' *The Guardian*, London, September 30, 2011.

Even in non-conflict zones in India, many journalists have been killed while investigating reports against powerful people and political parties. Media offices have been attacked, ransacked and journalists have been assaulted. Criminal defamation cases have been filed against investigative journalists,¹⁵ in order to muzzle them from further reporting. Many journalists, typically from regional language publications and TV channels, have been arrested in such cases and are facing trial.

The English language media, which is far more influential than the regional press, has also not been spared harassment by various vested interests. One disturbing trend emerging in recent years has been the slapping of contempt charges against journalists daring to question the integrity of the Indian judiciary.

While the Indian Supreme Court itself laid down a law that truth is no defence to a contempt action,¹⁶ this led to repeated calls for reform of the law of contempt in this regard. The Indian Parliament responded and through the Contempt of Courts (Amendment) Bill, 2006, it is *inter alia* provided that “the court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.”

However, according to media practitioners, there has been a great deal of uncertainty in the application of contempt jurisdiction leaving them guessing whether or not some report or comment would be regarded as contempt.

One of those caught up in the recurrent tensions between the media and judiciary was Captain MK Tayal, former City Editor of Mid-Day, who wrote about the allegedly direct linkage between actions of former Chief Justice of India YK Sabharwal and benefits flowing to his sons' business interests. After the story about Justice Sabharwal's improprieties was first reported in Mid Day,¹⁷ a senior lawyer flashed the copy of the newspaper in Delhi High Court and demanded that contempt proceeding be initiated against Tayal and the editor of the newspaper. Justice RS Sodhi and Justice BN Chaturvedi of the Delhi High Court promptly sentenced both of them as well as the cartoonist and the publisher to four months of imprisonment.

The court said, “We feel, in this peculiar case, the contemnors have tarnished the image of the highest court and the sentence of four months' imprisonment would serve the justice.”

15 Colin Gonsalves, *Freedom of the Press: Using the Law to Defend Journalists*, Human Rights Law Network, New Delhi, December 2009.

16 *Bijoyananda v. Bala Krishna* AIR 1953 Ori 249

17 ‘Sab Chalta Hai’, *Mid-Day*, Mumbai, June 26, 2007

“The judges were in a hurry to sentence us and please their fraternity. They did not go into the merits of the argument, nor did they give us adequate time to represent ourselves properly. They did not even apply their judicial minds while delivering the judgement” said Tayal.¹⁸

Similarly, journalists are often the target of breach of privilege motions from Parliament and state Assemblies. Journalists have been ordered by courts to disclose their sources, thus rendering informants vulnerable to legal proceedings.

When *Aniruddha Bahal*, a journalist who is among pioneers of undercover-investigative journalism in the country, exposed Members of Parliament accepting money to raise questions in the Indian Parliament in 2007,¹⁹ all hell broke loose. Instead of being appreciative of his work for exposing such shameful behaviour, the Indian Parliament took it as an assault on their hallowed institution. Harassment and notice for breach of parliamentary privilege followed while government agencies took the cue and filed cases against him.

Four years after the incident, he takes almost weekly rounds of courts. This however has not daunted the spirit of Aniruddha as he points out, “if you don’t have the courage to take on such occupational hazards, then don’t be a journalist, try sales jobs rather.”²⁰

It is important to note that for the few cases of assault on journalists detailed above, there are many, many more. They cover various types of actions which differ in terms of their causes, environment, seriousness and consequences. This is a vast area of journalistic freedom and journalists should familiarise themselves with the challenges they may face beyond those which exist in the relative clarity of the law.

The enemy, however, has not always been outside. Communal coverage of events and partisan communal writings continue to undermine press freedom from within. Hate speech, though obnoxious and universally condemned, is allowed quite a free run in India.

A more serious sabotage of media freedom is by corporations who have taken control of media houses and pressured journalists from reporting according to their conscience. Very often journalists are not free to bravely report the news accurately and honestly when the party adversely commented upon is a powerful corporation.

18 National Conference on Media and the Law, HRLN, 3-4 April, 2010.

19 Aniruddha Bahal: *The King of Sting*, The Independent, 19 November, 2006

20 National Conference on Media and the Law, HRLN, 3-4 April, 2010.

The reason for this is simply that the financial stakes involved in the Indian media industry today are enormous. According to one estimate, gross revenue of the Indian media business grew by an estimated ten fold from 1991 to 2005 while advertising revenue as a whole expanded seven-fold between 1991 and 2004. From being a modest sized business even in the Eighties, the Indian media has now turned into an economic giant, with a turnover of over US\$6 billion.²¹

All this growth has not come through an improvement in the quality of journalism in the media but mainly using aggressive marketing techniques to expand circulation of newspapers and TRPs in the case of TV news channels.

One such marketing approach that some leading newspapers began in the early Nineties was of giving away their publications at well below cost price to boost circulations. Other newspapers, in order to compete, have had to follow suit resulting in loss of circulation revenue, which once used to be a significant portion. This in turn has led to an unhealthy dependence on advertising within the media.

According to one estimate,²² advertisements on average occupy more than 20 percent of newspaper space. For the bigger or leading papers, the ratio is 60 percent or more, while for the English-language press, the ratio is 65 percent-plus. Such dependence means less and less autonomy from the corporate interests which buy advertising space or time. Fierce competition for a share of the market in the Indian media has resulted in trivialisation of content as less space is available for serious journalism. Many smaller publications that have tried to promote good quality journalism have had to fold up or compromise in order to survive under the pressure of the market.

Ultimately, the challenge before the Indian media is to both ward off attacks from outside by powerful vested interests who use the legal system to curb freedom of speech and expression as well as the more insidious corrosion of its ability to report the truth from media owners who constantly put profits before professionalism.

Following articles in this chapter consist of a series of testimonies of journalists who have come under all sort of attacks by the state and non-state actors. These select testimonies were all given at the Human Rights Law Network's Media and the Law Conference held in Delhi in 2010.

21 'Asia Media Report: A Crisis Within' (2006)

22 'Asia Media Report: A Crisis Within' (2006)

This chapter, a brief introduction to this area, highlights first-hand accounts of journalists who have been the victims of some horrendous acts. These actions by the State and non-state actors represent a tremendous threat to the work and the importance of the media. They are something that all journalists (and indeed, all citizens generally) should be aware of in order to protect freedom of expression and, indeed, democracy.

REPORTING IN TIMES OF CONFLICT*

Maqbool Sahil

Kashmir's battered history has pushed it into one of the worst phases of turbulence since 1989. While all the aspects of life went through and suffered in a blood-soaked situation in the State, the fourth estate could not have remained an exception. The journalists in Kashmir valley have performed the most challenging task since the eruption of armed struggle in early 1990's. Notwithstanding a small community, which has now grown not only in size but also in quality, the press had to face the wrath of all those actors who orchestrated death and destruction in the valley. This institution has been at the receiving end for not pleasing all the factions active in the State. Eleven journalists have so far died in direct or indirect attacks from the state-sponsored repression, security forces and the militant outfits. Many cases are still wrapped in mystery. While the visible and invisible pressures worked to the hilt to demoralise the newsmen, they have been able to fulfill their responsibilities within the given circumstances. The pressures have worked from non-state actors as well, but the state repression is something which cannot be ignored. It has used both direct action and undercover tactics to force the journalists to toe their lines, which to an extent gave birth to self-censorship in newsrooms in Srinagar. Attacks on journalists by security forces and police, kidnappings by pro-government and surrendered militants had become the order of the day in Kashmir. Additionally, many innocent media persons against whom cases fell flat in the courts were arrested, tortured and humiliated. I am one such victim who went through horrible situations after being falsely implicated. The draconian Public Safety Act was used against me five times, charges of sedition were leveled against me, and the infamous Enemy Agents Ordinance was slapped on me. But the government could not prove any of the charges in the court of law. I see myself as a living testimony of this repression, which has clamped the state for the last 20 years under the garb of restoring peace in Jammu and Kashmir.

Since my childhood, I had wanted to become an army officer, and as I passed my school, I told my father that I wanted to join the National Defence Academy. Hearing this he asked me, "do you know that insurgency and militancy in Punjab is at its peak and the number of conflict zones is increasing on the world map, while nuclear weapons have changed the

* Presentation of Maqbool Sahil at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

theme of war in the present times. So whom are you going to fight, your own people? The nationals of your own country, the civilians or the rebels?”

I realised that the old man was correct and dropped the idea of joining the army. My next idea of a vocation was to become a journalist, as I found it a thrilling job to expose corruption, anti-national elements, suppression etc. But as I plunged in and reached the middle of this ocean, I found it was so deep and big tides were all around me.

In the beginning, sometimes when provoked, I would have second thoughts, but then the experiences of the new day would hold me back. “Why don’t you switch over to a normal job? It is hard to see you in the centre of trouble,” my father asked me when I came home after a five-day detention in a para-military camp in Srinagar in January 1995. I was beaten up by the security forces while covering a crackdown in the city and was picked up by a provoked officer. In Kashmir a journalist is in the eye of a storm from all sides.

The looming threat from the non-state actors was another strain on the media fraternity in the valley. If a press statement issued by a militant group would not carry the intended meaning in a newspaper, it was hard to convince its leaders. The covering note would always carry a threat (in words) and sometimes it would translate into reality.

The gunning down of a local daily editor by “unknown assassins” in 1990 is still a mystery, like the mystery murders of eleven others, who paid through their lives for us. On the whole, journalists in Kashmir have failed to keep the warring sides happy. If an atrocity by security forces is reported, the journalist may be dubbed as “anti-national” and highlighting the misdemeanours of militants, or if the extra-political activities of separatists are reported, it would mean that he is “anti-Tehreek” (anti-movement). A sword hangs over his head all the time.

The killings of the innocent left a strong impact on my mind initially as I dabbled into journalism. But with the passage of time and events, I found myself getting stronger in taking the lead to have a look at a row of 27 dead bodies in coffins after a military-militant standoff in Hazratbal shrine, and later in Wandhama Ganderbal where the number was 26 and in Nandi Marag in south Kashmir where 34 members of a minority community were targeted. But the shocking moment came when I witnessed a parcel bomb explode in the hands of a young photojournalist, Mushtaq Ali. Within minutes, it was blood all over. He died three days later in the hospital.

Again, in August 2000, I had a close shave. A devastating blast happened just near my office. I rushed out to see the aftermath and found my colleagues already on the spot. Before I could move ahead, a deafening sound threw another lot of bodies towards the road. It could have been me, I told myself. It was just a reprise of terror stories I had been reporting for the last two decades in the Kashmir valley.

In Kashmir, each journalist has a story to tell. Yusuf Jameel, a well-respected journalist who worked with the BBC and Reuters, escaped several attempts. The parcel bomb that claimed Mushtaq Ali's life was meant for him. His office was attacked with grenades. Though threat was a permanent feature in his life, Jameel was awarded an international press freedom award by the New York-based committee to protect journalists. Habib Naqash is a photojournalist who has made a record of not missing a single incident in which media persons were attacked.

Four years ago, a young reporter survived an attack in his office. Bullets pierced through his nose but missed the nervous system. Doctors said it was a miracle how he is leading a normal life. The last victim of the attacks on media was Parvaz Muhammed Sultan, a 36-year-old young and dynamic editor of a local news agency who was gunned down in his office apparently for reporting a feud between two factions of a militant group. For a small community of journalists (not more than 100) to lose eleven members is a big price. And it is difficult to exist and perform with recurrent harassment and intimidation. But amid the daily grind of violence, life goes on, of course with a difference. It is stressful and sleep is difficult. Who knows about tomorrow?

I was one of the five journalists who were taken hostage in south Kashmir by a pro-government militant outfit, Ikhwan. We were locked up in a room and the self-styled commander of the group thundered, "I want bodies of these five tomorrow." Even though our lives were saved, it was unbelievable.

In January 2004, I was taken under detention from Badami Bagh area of Srinagar while coming out of the headquarters of the 15 Corps of Indian army. The then army public relations officer had given me a ride in his car so that I could collect the payment of a bill of my employer (*Weekly Chattan*) from his office. After detaining me, the policemen put me in an unmarked white-colour Gypsy and took me to Hari Nivas interrogation centre. There I was told that I had been arrested by the CID, as according to them I was involved in an espionage network working for Pakistan. For more than 15 days I was subjected to third-

degree torture. They charged me under Official Secrets Act and Enemy Agents Ordinance, which are non-bailable and carry the death penalty.

It was a hellish experience and the modes of torture inflicted on me during interrogation extended to putting a wooden roller on my legs, suspending me from the roof, caning my feet, besides officials regularly beating me. As I was unable to provide any lead to my alleged involvement in espionage, the intensity of the torture increased. I could not stand on my feet. Other detainees would help me change clothes and eat. My house was raided thrice, and all equipment including a computer, books, CDs and diaries were taken away by the CID personnel, which have not been released till date. On 1 October, I was shifted to the central jail in Srinagar where I was kept for a month. A month later I was again taken to the interrogation centre and then shifted to Kote Balwal central jail in Jammu along with a Public Safety Act detention order for a period of two years. The Jammu and Kashmir High Court quashed the detention order after one year. I was brought back to Srinagar and lodged in an interrogation centre. I was again detained under the Public Safety Act and shifted back to the Kote Balwal jail. The process was repeated four times in forty months till January 2008.

During those forty months in jail and under interrogation, I was almost cut-off from my family. I could hardly see my children and met my ailing mother after two years in Humhama interrogation centre. My physically challenged brother would repair radios and TVs at home to feed my eight-member family during my detention.

In 2007, I was shifted to Amphalla district jail, where I was kept in a dark, solitary cell in the hot summer months of May, June, July and August. There was no fan in my cell and each 24 hours I was allowed only a single visit to the toilet located outside the cell. For the rest of the time, I had to use a tin canister as a toilet and later clean it in the “main” toilet. That was the toughest time for me, but it passed.

It was very difficult to while away time inside a strange and tough place like prison. So I decided to read and write, as there was ample material available in the jail to read. I started interacting with other detainees and each would speak the truth and honestly confess his crimes, if any, but I found that more than 80 percent of the inmates were innocent. During my detention, I almost completed the scripts of seven books, including my jail diary “Shabistan-e-wajood” which was adjudged as the second best book by the France-based Reporters Sans Frontiers in 2009. My other writings included a story collection, poetry and fiction, which are now in the process of being published.

The authorities were supposed to file a charge sheet against me in a court of law within 60 days of my detention but I was held without trial for more than 30 months. When the courts quashed the fifth Public Safety Act detention order slapped on me, my case was presented before a sessions court in Srinagar. The case is still going on and I have to attend the court every month.

Finally, my release came on 9 January 2008. But, by then I had lost all my professional contacts and it was like starting from the scratch again, after 18 years in the field of journalism. All Party Hurriyat Conference (APHC) senior leader Shabir Ahmed Shah offered me to join Hurriyat Conference but I rejected the offer and started building up my career again to carry on my mission of seeking truth through courage as journalism stood for me always.

Maqbool Sahil is the editor-in-charge of the Urdu weekly Pukaar, which is based in Srinagar

KHAKI'S WRATH*

Laxman Choudhury

I hail from one of the most backward blocks of Orissa, the Mohana block in the Gajapati district. This block has 32 gram panchayats and is predominantly a tribal area with an overwhelming Christian community. The block is equally infested with Maoists who have a parallel administration in almost 16 gram panchayats.

I started my career in the year 2000 as a paper hawker for *Sambad*, the leading local daily in Orissa. Taking note of my reporting skills and inputs, which I provided to the newspaper, the editor asked me to work as the block reporter for *Sambad*. I successfully reported on some important issues which put the administration in a bad light. There was an outbreak of diarrhea and dysentery in the district which claimed seven lives. I reported on how the district administration had failed in providing basic amenities like a clean water supply, which led to the spread of the epidemic and ultimately the loss of lives. The District Collector and the Superintendent of Police, Gajapati at that time had chided me for trying to 'frame up' a wrong picture of the district administration.

Unholy Nexus

A few months ago I exposed a racket of trafficking of teenage girls where poor innocent tribal girls from my block were being taken away by brokers and touts posing as officers. These girls were lured through the assurance of a good salary in big cities, but they were then pushed into prostitution. When three girls were rescued from Goa, I reported on the trafficking ring under which more than 100 girls were illegally frisked to far away places from Mohana. Once again the administration and police cried foul as my report invited the wrath of the State Government, and the State Women's Commission sought several explanations from the authorities on this racket.

But what attracted the biggest ire of the police was when I investigated the nexus between the drug mafia and the local police. The vast tribal area in Mohana block has large-scale marijuana (*ganja*) cultivation supported by a well-organised mafia syndicate. [I alleged that] they control and operate this racket from outside the State and that illegal smuggling

* Presentation of Laxman Choudhury at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

of cannabis is done in connivance with the local police. I had filed several stories exposing the nexus and consequently received threats from the offenders for my revelations...

The Framing

A couple of days before my arrest, a vehicle loaded with ganja was intercepted by the Mohana police, but was let out in the evening after paying a bribe of Rs 50,000... When I questioned the IIC of the local police over this deal, it made him nervous as he feared that publishing such sensitive information in the newspaper could lead to an enquiry. A plot was hatched to silence me and executed with perfection by the police. A packet containing seven Maoist pamphlets addressed to me was handed over to a bus conductor at Raipanka village, about 45 kilometers from my place. According to the plan, the police intercepted the bus about 500 metres from my shop and seized the packet and arrested the bus conductor. It is a day that I cannot forget all my life.

On the fateful day of 20 September 2009, I was summoned to the Mohana police station at around 1.30 pm... Officers showed me a brown packet which they said had come from the Maoists and was addressed to me. When I said that I was not aware of this, they beat me up and tried to force me to sign on some blank papers. I was puzzled, hassled and taken aback by the ruthless behaviour of the policemen who were adamant to present me as a hardcore criminal. I was not allowed to contact anyone. The constables of the station, who were known to me, avoided even eye contact. It was only late in the afternoon that my wife came to know of my presence in the police station. In desperation, she contacted the general manager of the Berhampur edition of *Sambad*, Prasad Rao, who in turn communicated the information to the district correspondent, Debasis Padhi. By evening the journalists in Gajapati district realised that the police had arrested me on charges of propagating Maoist ideology and distributing pamphlets on their behalf. Serious charges of sedition and waging war against the state were leveled against me and by dusk I was in jail. I was not given a chance to say or do anything in my defence, and the police did not entertain a single query from the reporters who wanted details of my arrest.

In this context, I would like to mention that the IIC of Mohana police station, who had taken the initiative of putting me behind bars was recently nabbed by the vigilance sleuths while accepting a bribe of Rs 10,000. The then SDPO Anirudh Singh, who had prepared the blueprint of my arrest on that fateful day is facing many charges of corruption against him. I could never have, but for the support of the media, survived the torture and humiliation inflicted on me during my stay in the jail.

The superintendent of the R Udayagiri jail was a thorough gentleman who always encouraged me saying that justice will prevail in the end. The press from all over Orissa protested against my arrest. Never before had the journalists of the entire State united like this to organise a protest rally and then to meet the Chief Minister Navin Patnaik. The Chief Minister assured them the cancellation of what he himself called 'ridiculous charges' against me. But nothing happened. The media community met him a second time, and the same promises were repeated. However, after the second meeting, the sedition charge against me was dropped. But the section on waging war against the state remained.

Law unto themselves

During my confinement in the R Udayagiri jail in the Gajapati district, I understood that the police never accepted criticism in any form, and their way to seek revenge was really torturous. Several times I had come across police atrocities on common people in the newspapers, but only when I was a victim myself, could I understand the hard reality. My wife was alone with my little daughter, and had to manage my business of newspaper distribution, the sole source of income for us. Finally, with the help of fellow journalists and human rights activists in the State and the strong presentation of my case by top Orissa lawyer and former chairman of the Bar Council of India, Jagannath Pattanaik, the Orissa High Court granted me bail on 1 December 2009.

*Laxman Choudhury is a stringer for the daily Orissa newspaper Sambad.
He is mostly based in rural areas.*

PAINTED AN ENEMY OF THE STATE FOR BEING THE PEOPLE'S VOICE*

Lenin Kumar

I am from the state of Orissa where state atrocities against people are a common feature. In Narayanpatna, more than 120 people are rotting in jail, among them about fourteen children, for opposing 'forcible land acquisition.' In the same district, more than 610 adivasi have also been jailed in the name Maoists. In Kalinanagar, police have been burning down people's houses to put up a factory. It's a state where the ruling class has assumed the role of 'middle men' and facilitator for large corporations and multi-national companies. The way the state has been treating its own people make me wonder if we are really a democracy.

On 8 December 2008 I was arrested. You would be aware that the BJP-BJD run government was in rule at that point of time and in Kandhamal there was a massacre of Dalit and Christians because they had taken Christianity as their religion, so RSS and the Sangh Parivar were doing this cleansing up. At that time Nishan (the author's publication) and some other organisations together went to Kandhamal, we heard their tales and we released a book "*In the Name of Religion Blood River in Kandhamal.*"

Based on this book we were arrested and it was publicised that I am a close aide of the Maoist organisation and also a big terrorist. My CDs and paintings were taken out of my house and were shown as proof of my involvement with Maoists. Pictures of adivasis, Marx, Lenin and Che Guevara recovered from my house were also displayed as proof.

Police tortured me mentally day and night. There were protests by many big and small social workers, intellectuals and writers in front of the media, though it didn't come to my knowledge because I was in jail. The amount of love I got from the inmates I have never got from anyone. After 11 days I came out of the jail and all of them were waving at me because I explained to them who is a Maoist and what is politics. I took their class, told them stories and poems. I enjoyed my 11 days but the moment I came out of the jail I became untouchable. It is true that of any bloodshed that has taken place in history, most is regarding religion. In our society all the democratic voice is given the name of Maoist.

* Presentation of Lenin Kumar at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

It is a war against the people. In Orissa, the Green Hunt operation is on and there is open violation of human rights. Many adivasis who don't even know the name of the country, who even don't know who the prime minister is and even those who do not know the name of the villages beyond their hills are being targeted as Maoist. All this does not bode well for the country.

*Lenin Kumar is the editor of socio-literary magazine
Janbadi Sanskrutir Nishan*

BRAVING SAMANTVADI POLITICIANS AND ADMINISTRATION*

Shilvant Pachuari

The condition of media working in the area of Chattarpur, Madhya Pradesh, basically known as Bundelkhand, is quite pathetic. Even now, Samantshahi and Rajshahi exist in the area and the prevailing mindset makes the task of journalists, especially camera persons, quite difficult.

There are many incidents that have happened with me, out of which two incidents occurred in recent months. One incident occurred six months ago in Chattarpur, where a reporter from one channel and my cameraman went to the house of a doctor. He was involved in private practice and there were many complaints against him. When media persons reached there for coverage, the doctor and some other people circled the cameraman and the reporter and damaged the camera. When this information reached me I went to the site and later, along with other media persons went to the police station. But there was pressure placed on us by the police to leave the doctor alone as he had connections with a large political party. Police even refused to file a complaint against him.

However, we protested and persisted for three days, after which a complaint was finally filed against the doctor. However, to our dismay, police also filed complaints against media persons under the Doctors' Protection Act. This was ostensibly done to force us into a compromise with the doctor. Although the doctor was sent to jail and later granted bail, media persons had been persistently harassed by the police. Police have a special grudge against me as I had secretly filmed policemen telling us that the doctor was guilty and they will take action against him. Our case is today before the court and we have been falsely implicated in a counter case for performing a professional and public duty.

[The testimony then goes on to describe political violence which occurred on 11 February 2010 in the Chattapur Municipality].

Here the Vice-Chairman is from the Congress Party and the Chairman from BJP. There was some trouble in the Municipality and our cameraman was present there. [The perpetrators]

* Presentation of Shilvant Pachuari at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

didn't allow the cameraman to use his camera. The cameraman called me and informed me about the situation. I reached the spot but by [that time the Chairman had been beaten and the perpetrators had left the scene].

Further, I got information that they have reached the Zilla Parishad along with some Congress leaders. There we captured them on camera misbehaving with policemen on duty. This was filmed and sent to our editorial office, which flashed the news.

On seeing the news, I was threatened by these party men to stop the telecast of the news, to which I expressed my helplessness. Upon this, they threatened me with my life. I filed a police complaint but no action has been taken against them till date.

It may be easy for a journalist to fight their battle in big cities like Delhi. But in a place which is remote and the mindset of [the] administration and politicians is that of Rajshahi, it is not easy to work with full independence and without fear.

Shilvant Pachauri is a television journalist working in Bundelkhand, Madhya Pradesh

MACHINATIONS OF THE UNCOUTH*

B. V. Seetaram

Booked under Sedition

In 2007, *Karavali Ale* had published a couple of write-ups giving expression to a sense of public outrage against the nude parading of certain religious figures. There was a great sense of appreciation among the *Karavali Ale* readers for the bold articles. There was no whimper of protest from any quarter. However, three months after the publication of the write-ups, the president of the local private bus owners association, nursing a grudge against us, went to a police station in Mangalore in the evening and filed a compliant invoking sections 153A, 153B and 295 of the Indian Penal Code (which relate to the charge of sedition) in connection with the write-ups.

The police, in what appeared to be pre-planned move, registered the complaint immediately and lost no time in barging into my house to arrest me and my wife, who is neither printer, nor publisher, nor editor, to attract criminal liability for publication of the write-ups. It was a well-planned coup sort of thing. We were taken to the judicial magistrate's house in the dead of night and sent into custody. Our plea for spot bail on the ground that we had been falsely implicated and we were tax-paying responsible citizens and that we would cooperate with the police in the investigation of the case fell on deaf ears. For the next five days we were in custody in Mangalore. Our family members, staff and well-wishers were denied permission to meet us in custody. Home-cooked food was not allowed to us, while dreaded criminals got the food of their choice from outside...

Protests all over the state followed, and five days after our arrest we were released only to be re-arrested by the Shimoga district police as soon as we emerged out of Mangalore jail. We were then taken to Sagar town police station in the Shimoga district through a seven-hour journey, which started at 7 pm and ended only in the wee hours the next morning. My wife and I were not in a position to take this journey as both of us required immediate medical care and hospitalization. Our plea was ignored. My wife practically fell unconscious after the initial thirty-minute journey and my request to the accompanying inspector to take her to the nearby hospital was not heeded to. Ultimately, she was carried to Sagar in an unconscious state.

* Presentation of B. V. Seetaram at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

The five-day ordeal repeated even while public outrage at our arrests grew. The Shimoga Court ordered our release five days after the second arrest. . . . [W]hile not allowing our plea for the blanket anticipatory bail in case of further arrests, [the Court] had taken a verbal undertaking from the Advocate General that arrests for the same offence at other places would not be done.

The offence committed by *Karavali Ale* for its directors to be jailed was exhorting the law enforcement authorities to invoke anti-nudity clauses in the Indian Penal Code in disallowing the nudity of certain pontiffs. Instead of booking lawbreakers, my wife and I of the media group were hauled up notwithstanding that we are only directors of the company. The unfavourable bias of the government towards our publication clearly showed up.

* * *

[In 2009 the newspaper published criticism of politicians alleging them to be elitist and suggesting they had handled matters inappropriately], I was arrested through a fake warrant to put me behind bars for a month, most of the period of which was declared to be illegal detention by the High Court later.

[This was followed by] as many as seven cases being booked against my wife and me, invoking the sedition clauses of sections 153A, 153B and 295 of the Indian Penal Code. Body warrants, while I was under detention, were taken by the trial courts to see that I was kept in detention indefinitely. But the High Court obviously came to my rescue. The Court, besides declaring my detention for most of the period illegal, slapped a fine on the police officers, which they paid a year later after the Supreme Court dismissed its appeal against the High Court order. Now they are facing a damages suit by us at the High Court.

All the seven sedition cases under which I was booked in 2009 (apart from the earlier two in 2007), pertained to either letters-to-editor questioning certain irrational religious practices or factual reports on the illegitimate practices of fake godmen.

The High Court came out strongly against the routine application for body warrants by police and mechanical grant of permission by trial courts. The Court declared null and void the fake warrants — setting me free after my illegal custody. Even though the High Court struck down the government action as a mala fide, the question is, who will give me back my freedom for the one month long illegal detention.

* * *

We sought the intervention of the Press Council of India. Its team visited Mangalore and Bangalore... The Press Council, months after the fact-finding mission, chided the Government and the police officials for being unhelpful to us when attacks on our circulation network went on uninterrupted. The Government is yet to act on the Press Council of India findings by identifying the policemen who helped anti-social elements in their campaign against *Karavali Ale*.

Booked under Defamation

[Following the resumption of an old defamation case] a team of fully-armed 30 policemen with two inspectors and three sub-inspectors led by saffron-clad Bajrang Dal men raided my house. Their intention appeared to indulge in a shootout to physically annihilate me if I offered even a semblance of resistance. However, not finding me at home, they ransacked my belongings and damaged glass fittings. Immediately after landing at my premises, some cops entered my home office and took away some important files and Rs 50,000 in cash. They threatened my son with dire consequences before leaving the place. Somehow, they came to know that I was with my wife journeying between Karkala and Kundapura in the Udupi district. Another team of policemen waylaid us when we were passing through a jungle stretch.

A deputy superintendent of police at that time was heading the team of policemen. It was around 7 pm and I was informed by him that I was under arrest. When I asked for the warrant, he had none. Still, we were made to rot at the place for a couple of hours and then the officer produced some papers purported to be a police warrant which I could not see in the dark. A suspicion lurked in my mind that I would be killed in what the police could later claim was an encounter of sorts. But what saved the situation for me was a couple of cell phone calls made by my wife to some people in the media who started making calls to various police officials

After my arrest, I was handcuffed and taken to a Magistrate's house almost at midnight. The judge, having been woken up from sleep, showed no signs of patience to hear my plea for spot bail on the ground of illegal arrest, and sent me to custody with orders for producing me before the court the subsequent day. My plea, that I suffered from diabetes and required immediate release or hospitalisation, fell on deaf ears. I had to spend the entire night without food in jail and had to be hospitalised early morning. The police took me from the hospital to the court in handcuffs. My picture in handcuffs while being taken to court appeared in the print media and footage was flashed by TV channels. A furor

erupted. Civil society reacted strongly. Hon'ble Justice M. F. Saldanha petitioned the High Court against my handcuffing. The Press Council in a suo moto action sent a team of two to Mangalore and. The Press Council report confirms my handcuffing, even while the State Government sought to make light of thing claiming that it was I who insisted on being handcuffed and the police had no option left. Once I was produced before the Udupi Court, I was given bail, which I refused as a posse of policemen from Mangalore was waiting outside the court to re-arrest me in connection with a series of sedition cases filed by them. I told the Court that since I was apprehending arrest by the Mangalore police, which could result in my killing, I would prefer to remain in judicial custody for a few days, till we were able to secure legal remedy.

I was sent back to the hospital ward of the jail in Udupi and within hours I was shifted to Mangalore jail without the Court's permission and from there again to Mysore jail. To avoid the waiting newsmen at the Mysore jail gates, I was taken there early morning, by which time the journalists, after waiting for five hours, had left. Fatigued and tired, I fell unconscious at the jail gates in Mysore. I was readmitted to the hospital, where I remained for the rest of the period which the High Court later identified as 'illegal detention.' I should have been released after the judicial custody period of a week but was kept in detention for over a month. I was only released after my wife filed a habeas corpus in the High Court.

B. V. Seetaram is a senior journalist and the director of Karavali Ale, a newspaper published from Mangalore, Karwar and Shimoga

CONCOCTIONS OF TROIKA*

Iftikhar Gilani

I was arrested on 9 June 2002 by the Intelligence Bureau on [a charge under the] Official Secrets Act related to availability of a document, which is freely available and downloadable on the internet. When questions were raised in Parliament as to why a reporter was arrested, the then Minister of Home Affairs said in his reply that I had been arrested in the national interest. For eight months I was in Tihar Jail in the national interest. I have written a book on my imprisonment, which has been published by Penguin. Last year its Urdu translation got the Sahitya Academy Award.

After I was released another question was raised in the Rajya Sabha as to why government had arrested a reporter and released without substantiation of any charge and also, why was I arrested in the first place? The reply of the Government was that I had been freed in the public interest. So that means the gap between national interest and public interest is getting deeper day by day. Public interest isn't national interest and national interest isn't public interest.

My grievances are not so much against the executive, police or the government as they are with the media and judiciary. I guess for the executive, it has become their job to arrest and harass people instead of helping them. Their accountability is to the political bosses and not to the people. But we talk of freedom of the press and independence of the judiciary, but they have been made subservient to the executive or have allowed themselves to become docile before the executive. Rather than being watchdogs they are mostly acting in concert with the administration.

In the case of journalists, it's very rare to find organisations backing them when they are in trouble. Mine is not a singular case. There was a reporter working for *Statesman* at Dehradun. He was arrested and we asked his paper to take up his case but the organisation was not ready to back its own reporter. The paper may have had its own reason but it was a very disappointing experience.

When I was arrested I was told that my remand would be put up before a judge. I was very happy that when the judge asks as to why I had been arrested, I could say that the Intelligence Bureau has downloaded a document from my computer which is a freely available research paper on the internet. Based on that they have charged me under the

Official Secrets Act. I was sure the judge would reprimand the policemen for making a false case against me and would set me free. But when I was presented before the Judge, he didn't ask me anything.

After two minutes I was back in police remand. For the next eight months, I endured constant mental and physical torture. I don't want to go into that detail but what surprised me was the conduct of the judiciary and some media persons. We made the plea that if the document was freely downloadable from the internet then how could it become a case under the Official Secrets Act. After a lot of difficulty the Judge understood that and asked the police to verify whether the file was present on the internet or not.

The police kept delaying the matter and ultimately got a certificate from a cyber café that the file was not available on the net! We contested their claim. Then the Judge asked us to show the content in the next hearing. I was happy that I would be released in the next hearing.

On the next hearing, we arranged for a computer and requested the Judge to allow us to use her official phone for the internet to be connected. At that time, things like pen-drives or broadband had not hit the market. It was an in camera hearing. But the Judge would just not allow us to use the phone. She even failed to understand that the phone line could be used for an internet connection. She told us that she cannot allow the use of her phone for anti-national activities and ordered us to give a demonstration without phone! When we told her that internet can't be connected without a telephone line, she retorted by saying that we had been misleading the court and rejected my application.

Around the same time, there was a unanimous resolution by the Press Council of India that any document downloaded from the internet can't be an official secret and no case can be made on this basis. When my lawyer in the next hearing took this resolution to the Judge, she got wild saying that we were trying to influence the judiciary through some private association. When we told her that Press Council was a quasi-judicial statutory body, she retorted that she did not recognise any Press Council. She said she would hang me for this...

In my case the Government withdrew the case after eight months because there was pressure from journalist bodies. And I was lucky in the sense that I was in Delhi and I had worked with a national newspapers in Delhi. People knew me. I used to cover the political parties so they knew me by my name and face. So after two or three months

* Presentation of Iftikhar Gilani at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

some introspection began within the Government, that there was something wrong with my arrest.

But end to my suffering was not easy. The military intelligence sent a report to the Home Ministry that the documents related to my case had no security relevance. But the Home Ministry officials changed that report and gave a false affidavit in the court that military intelligence has certified that documents recovered from my residence were in fact sensitive and prejudicial to the security of the country.

To my rescue, my friend from *Hindustan Dainik*, Umakant Lakhera, managed to get a copy of the original affidavit from the Defence Ministry. When the original affidavit was presented, there was a huge commotion as to how the document of military intelligence was with us. The Judge started asking questions on that. We urged her to verify as to which document was right, whether it was the one with us or one in the police file. She then summoned the Director General of Military Intelligence. He came to the court and verified the document and said that he had no clue about the document with the police. The Judge then again slapped the Official Secrets Act. She said that this person who is in jail for eight months instead got the document of military intelligence so put another case against him. But by that time the Government had understood and we had put up a counter-case of contempt of court alleging that they had presented a fraudulent document and that the Court should have taken cognisance.

So they decided in the Cabinet Meeting itself that the case would be withdrawn and they filed that they did not want to proceed further and wanted to take back the case. When this case was being withdrawn, I was present in the Court as it was an in camera hearing and no one else was allowed. Instead of asking me they called my wife inside and my lawyer was there too. They told my wife that we had filed a case against the Government for contempt of court and asked what she wanted to do about it, saying they would then pronounce the judgement in the current case. It was total blackmail. I and my lawyer were adamant to fight the case, even though I could have been sent back to jail. The Judge literally blackmailed my wife who was more concerned about my release than anything else. She told the judge that she has nothing to do with the case, but that we will withdraw the contempt of court case. She noted it down and court was adjourned. Fifteen minutes later I was discharged.

I have seen in jail how people rot under Official Secrets Act. This is a blot on our statute books. On one hand we talk about the right to information and on the other hand ministers

and officials take an oath of secrecy. What thing are they keeping secret? What secrets do they talk about? They want to keep it secret from the same public which elects them. . .

*Iftikhar Gilani is the Delhi Bureau Chief of the Kashmir Times.
He was imprisoned for eight months in Tihar Jail for charges
relating to the Official Secrets Act.*

WALKING ON THE RAZOR'S EDGE*

Irengbam Arun

Manipur, my home state, is a place where the government agencies such as the police and security forces operate with impunity created by the prolonged imposition of the Armed Forces Special Powers Act, 1958.

The Armed Forces Special Powers Act has been enforced in the whole of Manipur since 1980. Under this Act, a mere suspicion by a non-commissioned officer of the armed forces is enough to call for the arrest without warrant, torture and killing of any person, or destruction of any property.

It took a movement of unprecedented proportions in 2004 to wake the State up from its deep slumber. Although the enforcement of the draconian Act was ultimately withdrawn from the Imphal Municipal area, the state police commandos along with para-military forces continued to kill innocent people in the name of suspects with a rare sense of bravado, otherwise interpreted as a symptom of the air of impunity, percolating down to the state forces.

Konsam Rishikanta fell to such a volatile situation. Twenty-two-year-old Rishikanta was a young journalist working for the Imphal Free Press. On 17 November 2008, he was supposed to report at his office at 5 pm for the night shift. But around 4.30 pm, an unidentified caller informed the editor about Rishikanta's death. The spot where Rishikanta was found dead had witnessed many 'fake' encounters taking place in the past and also happens to be a security zone where a person entering or departing from the area had to clear at least three security checks manned by the state forces.

Rishikanta is the fifth journalist who was gunned down by unidentified persons in the past few years in Manipur. The state government has failed to either identify or book the perpetrators of such cold-blooded killings. The media fraternity in the state had strong reasons to suspect involvement of the security forces in the killing of Rishikanta. In the wake of such soaring killings, media persons in Manipur find it almost impossible to function freely without fear and discharge their duties.

* Presentation of Irengbam Arun at the HRLN's "Media & the Law" conference held in New Delhi on April 3-4, 2010

Let me come to the Tehelka expose with regard to the 23 July 2009 incident in Imphal in which a former militant was killed in a staged encounter by the police commandos. Tehelka flashed damning photographs of the cold-blooded murder which were taken by a local photojournalist. But the fear psychosis of the state repression was such that the said photojournalist did not want to expose himself and sent the pictures to Tehelka, known for its courageous reporting.

In another incident, the State Director General of Police threatened the editors of three local dailies in Imphal for exposing the nexus between Manipur police and the urea smugglers active in the State. The news item had exposed the delivery of 13 truckloads of urea that was reportedly smuggled from India to Myanmar.

Earlier in June, the State Chief Secretary, along with the Direction General of Police, pushed for censoring the publication of the handouts of the banned organisations in dailies with a threat that refusal to do so might compel the State to approach the Registrar of Newspapers of India for cancellation of registration. The All Manipur Working Journalists Union delegation challenged the Government allegation that the local press was not adhering to the Press Council of India guidelines. Eventually, the government had to back down with a threat that they will be closely monitoring the newspapers. The State Government's reprisal came when the media community was grappling with a threat from a splinter group of the banned Kangleipak Communist Party for refusing to publish one of their press notes.

While the State and the security forces under its command exert undue stress to curtail the freedom of the press, the non-state actors and their factions continue to pressurise the local press to publish their propaganda material verbatim. Such a pressure comes mostly from small factions in their bid to gain legitimacy through the media (press is seen by some of them as a notice board for posting their warnings and summons to their victims, and mud-slinging between the factions). In all, reporting in a conflict situation is like walking a minefield.

The most glaring example of the state-sponsored intimidation of the press was storming of some media houses in Imphal by goons with an active support of the state police force. On the night of 25 September 2009, nearly 10 busloads of supporters of the Chief Minister escorted by the state police stormed some prominent media houses in the capital and threatened their heads with dire consequences if they did not publish the ruling party's version of the statewide protests against fake encounters.

A month later, two journalists were threatened at gunpoint at night. On 10 October 2009, two journalists returning home from duty were singled out and waylaid at Bir Tikendrajit Road point in Imphal by police commandos. Upon demands for identification, the two scribes produced their ID-cards. However, they were separately questioned and one of them was physically assaulted. The policemen also threatened to eliminate them at gunpoint in the name of carrying out an “encounter.” This is the real situation in Manipur where terror groups and the State both infringe upon freedom of the media. Journalists work under constant fear of state retribution, and if spared from that then looming threats from the banned outfits.

Irengbam Arun is a senior journalist and the editor of IREIBAK, a daily newspaper in Manipur. He is also a member of the All Manipur Working Journalists Union.

NOTES

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This is a publication of the Human Rights Law Network written to inform journalists and the lawyers representing them of their free speech rights and responsibilities under the most current law in India. Free speech in the media is an integral part of democracy and necessary for the protection and enforcement of many other constitutional rights. Journalists in India stand at the forefront in the battle against censorship, corruption and repression, and are to be commended for their defense of democracy.

In Defence of Journalists has been organised into chapters that cover the broad issues and charges which are common in cases dealing with journalists. At the beginning of each chapter is a brief background and a summary of the law that coincides with the topic. Otherwise the chapters consist of excerpted judgments which highlight various rules and arguments from the courts of India. Each case is preceded by a summary designed to quickly recite the facts and rule of the case.

In Defence of Journalists is written with the journalists in mind. While it is not intended to be a substitute for legal advice in any way whatsoever, it is hoped that this book will allow journalists to be better informed about their rights and their position at law, and to assist them in speaking truth to power.

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