FREEDOM OF PRESS AND THE SUPREME COURT: AN APPRAISAL

ABSTRACT

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

IN

LAW

BY

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UNDER THE SUPERVISION OF

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ABSTRACT

India declared herself as a democratic country where free and frank expression of ideas are as important as the democracy itself. The best medium through which this object can be achieved is the press. In a true democracy, therefore, the importance of freedom of press can not be denied. Blackstone rightly says, 'liberty of press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure or from criminal matter when published'.

Unlike U.S. Constitution which provides (through First Amendment) that Congress shall make no laws, abridging the freedom of speech or of the press....., 'the Indian Constitution despite, guaranteeing the same freedom under Article 19(1)(a), does not specifically mention the word press. Again unlike U.S. Constitution where the restrictions have been evolved through judicial pronouncements, the aforesaid freedom in India is directly subject to the limitations provided under Article 19 (2) because no individual right however vital by itself can be an absolute dogma. The individual good must at times give place to social good.

Since the aforesaid freedom is not absolute and reasonable re-

strictions may be imposed upon the press, the government, therefore, always try to keep some control over the press under different laws justifying them under Article 19(2). Successive governments have levelled the press as dangerous nuisance. The government raises the follwing charges;

1) Press is a source of much tension, it is a nuisance for the working of the state and various public sectors of the civil society.
2) Another popular charge against the press is that it is monopolistic. The first Indian Press Commission has aired such charges with more emphasis,
3) The third charge against the press is its failure to contribute to developmental goals.

In the light of above stated facts the freedom of press comes under the shadow of suspicion. The reason is that on the one hand the freedom of press is guaranteed as a fundamental right under the freedom of speech and expression but on the other hand the government always tries to keep the press dancing upon her tune.

In the present work, therefore, an attempt is made to find out that whether the press enjoys the freedom as envisaged under the Constitution. And what has been the role of the Supreme Court in protecting such freedom as the enforcing authority of fundamental rights.

The freedom of press is basically the freedom of individuals to express themselves through the medium of press. This freedom is fun-

damental to the life of an individual in a democratic polity. In India freedom of press is regarded as a species of which freedom of speech and expression is a genus. The jurists, various commissions on Press and the courts all have expressed their view to explain the meaning of a free press which according to them has three essential elements:

a) freedom of access to all sources of information,

b) Freedom of publication; and

c) freedom of circulation.

A free press thus, means freedom from any governmental, social, financial, internal or external pressure. The government, therefore, may neither adopt any measure which curtails the circulation or volume of a newspaper nor it may resort to any punitive action against the press.

The importance of the press in modern society is second to none. A free press is not only a necessary adjunct of democracy; it is the sine qua non for the proper functioning of a democratic society.

The importance of press has increased many folds with the development of press as an instrument of mass communication which has been recognised time and again by the various Press Commissions in U.K., U.S.A. and India alike as democracy can thrive only under the care and guidance of public opinion developed through the press.

The judiciary too, has acknowledged the importance of the press. According to U.S. Supreme Court the importance of the press stands as one of the greatest interpretors between the Government and the people. To allow it to be fettered is to fetter ourselves.

The Supreme Court of India following the U.S. Supreme Court cautioned to be vigilant in guarding the freedom of press as one of the most important freedom because it is of paramount importance under a democratic constitution. It constitutes one of the pillars of the democracy and is the heart of the social and political intercourse and has acquired the role of public educator.

Despite the acknowledgement of its importance in modern times from every segment of the society, the press does not enjoy any specific rights or privileges essential for its effective functioning either in U.K., U.S.A or in India. It is subject to same laws and regulations as are applicable to any other citizen. It does not enjoy any exemption from disclosing any information before a court of law, received by it [Sec.15(2) of Press Council Act forms an exception in any proceeding before the Press Council). Therefore, the approach of law is that where there are no exceptions the general rule of duty to disclose should be followed. Nevertheless under exceptional circumstances some additional rights have been conferred upon the press as a public institution.

In India the origin of the newspaper in its present form may be

traced to Aurangzeb's regime but the first newspaper 'Bengal Gazette' was started by James Hicky in 1780. He was extremely critical of East India Company and inturn faced the consequences when his newspaper was closed. Some other newspapers started during that period also met with the same fate.

Lord Wellesly was instrumental in imposing press censorship upon the press in 1799. Printing the name of the editor was also made obligatory upon the press. In 1813 Lord Hastings lifted the censorship of the press and adopted liberal attitude towards it but simultaneously framed new rules prohibiting it from reporting any matter regarding the proceedings of Board of Directors in London relating to India, having tendency to create any suspicion among native population.

The first Indian newspaper 'Vengal Gazette' in Bengali was started in 1821 by Ganga Kishore Bhattacharya. The next few years were turbulent for the press when it was subjected to many restrictions. It took a sigh of relief and enjoyed maximum freedom in the British India during the period of Lord William Bentinck and Sir Charles Metcalf. The Bengal Press Regulation, and Bombay Press Regulation, 1925 and 1927 respectively were repealed by the Act of 1835.

Lord Auckland did not follow his predecessors policy towards the press and an ordinance similar to that of 1823, was issued. In 1857, he introduced the Act XV to deal with the press. In the coming years several newspapers were started after passing of India Council Act, 1861.

Even then the press was not left free and in 1867, Press and Registration of Books Act was passed to regulate it. The Criminal Law Amendment Act, 1870 inserted sec. 124-A in I.P.C to curb the publication of seditious matters. The section was amended twice during 1894-1898. The Vernacular Press Act was also enforced with the intention to eliminate the seditious writings.

By the early 20th century the spirit of independence had reached to its zenith. More stringent easures, therefore, were adopted by the government to crush the press. Consequently the newspapers (Incitement to offences) Act, 1908, Official Secret Act, 1923 the Indian Press Act, 1910, Indian Press (Emergency Powers) Act, 1931 and the press (Special Powers) Act, 1947 were passed to tackle the situation. These enactments conferred wide powers upon the magistrates including demand of security deposit and seizure of the press.

When India achieved her independence a Press Laws Enquiry Committee was constituted which recommended to repeal certain enactments but advised to retain Official Secret Act, 1923. After independence few enactments including Young Persons (Harmful Publication) Act, 1954, Parliamentary Proceedings (Protection of Publication) Act, 1956 Working Journalists Act, 1955, The Newspaper (Price and Page) Act, 1956 and the Press Council Act, 1965 were passed. These enactments were instrumental in regulating the press but they were not harsh comparing to earlier enactments.

The promulgation of Emergency brought back the bitter memories of pre-independence era to the press. Several journalists were sent to jail and foreign correspondents were thrown out of the country. The Press Council Act, 1965 and Parliamentary Proceedings (Protection of Publication) Act, 1956 were repealed. Prevention of Publication of Objectionable Matter Act, 1976 was passed and used with Defence of India Act and Maintenance of Internal Security Act.

In 1977 when the Janata Party's Government took charge of the country, the repressive laws enacted during emergency were repealed and pre-emergency position was restored. The Press Council Act, 1978 was passed with certain improvements and under certain circumstances the Constitutional protection was provided to the press by inserting Article 361-A into the Constitution. Since then despite some flutter on rare occassions there has been no significant development relating to the press or the press laws in India.

In Constituent Assembly when the provision relating to freedom of speech and expression was being discussed, several members wanted a seperate provision guaranteeing the freedom of the press. They however, could not succeed as Dr. Ambedkar, the Chairman of the Drafting Committee declared that the freedom of press is included within the freedom of speech and expressiosn guaranteed under Article 19(1)(a) of the Constitution.

The aforesaid view of Dr. Ambedkar was affirmed by the Supreme

Court in Romesh Thappar and Brij Bhushan Cases when it held that freedom of speech and expression includes the freedom of press. It can neither be subjected to pre-censorship nor the government can stop the circulation of any newspaper or the publication of any matter.

The press though does not enjoy any immunity from the laws of general taxation but the same can not be levied upon it in such manner which adversely affects the freedom of the press. The government can not take any action to eliminate the unfair competition between the big and small newspapers in the guise of Press Commission recommendation by implementing newsprint policy. Similarly it can not take any punitive action to muffle the voice of the press.

The press on the rule of balance of convenience may be stopped form publishing any matter if it comes in conflict with other's fundamental right. Even in those cases considering the importance of press, it can not last beyond the period than actually required under the circumstances of a particular case. It is not that only the press can claim its freedom against the state as a fundamental right but under exceptional circumstances even an individual may claim the publication of his views in a magazine maintained out of public funds to enable the readers to have a complete picture upon which his opinion is formed.

The advertisements have always been a major source of revenue for the newspapers. They not only bring down the price of a newspaper but also fulfill the economic needs guided by information disseminated through print media. Consequently the publication of any advertise-

ment (commercial speech) can not be denied. However, this freedom (of press) is not absolute and the Constitution of India expressly provides certain grounds under Article 19(2) upon which reasonable restrictions may be placed upon the press.

The press, therefore, has no freedom to publish any material which may endanger the sovereignty and intergrity of the country neither it may be allowed to carryout any matter which is likely to put the security of the country at risk. But only the public disturbances of unmanagable magnitude and not of purely local significance may pose any risk to the security of the state. Press, may also be restrained from acting in such a manner which may disturb the public peace.

Reasonable restrictions may also be placed on the press to prevent it from publishing any material which taken as a whole may debase and debouche the minds of young and adolescent readers. Taking this plea however, the publication of any matter which is vulgar may not be denied and whenever the Court is confronted with an issue of obscenity, the opinion of experts though not binding plays a dominant role where the Court is not conversant with the language used in the work alleged to be obscene.

If the press has a duty to comment upon the day to day affairs and keep the people informed the courts too, have the pious duty to impart justice and, therefore, press is not at liberty to publish any mat-

ter which put the creditability of the courts under suspicion. However, like any other public institution the courts also are subject to public scrutiny. Any matter therefore, published with an honest intention of pointing out the shortcomings and seeking their improvement amounts fair comment and does not constitute the contempt of court.

Any person if on account of any publication is defamed, the press could not escape from the liability. It does not, however mean that the state or its officials if apprehend their defamation by any publication may prohibit it by an order having no force of law. In their individual capacity, however, such officials have equal freedom like others in matter relating to defamatory statements. It is also universally recognised principle that freedom of press may not extend to a limit where it amounts the incitement to an offence and therefore, it may be subjected to reasonable restrictions on the aforesaid ground. But taking this plea there could be no restriction upon the press if it advocates any change in the existing circumstances through peaceful means.

During emergency promulgated under Article 352 on ground of external aggression and war the freedom of speech and expression remains suspended under Article 358 of the Constitution. The press under such circumstances may be subjected to pre-censorship and could not claim the freedom as a fundamental right. But it may be restrained only in respect of aims and objects intended to be achieved under the censorship order and not beyond that.

To curtail the freedom it is not sufficient that restrictions should be based on any of the grounds enshrined under Article 19(2), but it is also essential that the restriction must be reasonable. The Constitution nowhere lays down what is and what is not a reasonale restriction ? and for that matter it does not define what a fundamental right eg. the right of freedom of speech and expression consist in or may or may not include. Hence it has been left to the courts to determine the standard of reasonableness to be adopted in judging the validity of a particular legislative restriction. Whether a particular restriction is reasonable or not will depend upon the facts of a particular case because no abstract standard can be laid down as applicable to all cases. Infact the very purpose would be defeated if it is tried to formulate a general standard to the words 'reasonable restriction'.

The phrase 'reasonable restriction' connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. A legislation which arbitrarily or excessively invades the right can not be said containing quality of reasonableness. It is essential that a restriction to be reasonable it must fulfill substantive as well as procedural aspect of reasonableness.

The substantive reasonableness require that the Court looks not to mere form but to the substance of things and it enters into an inquiry whether the legislature has transgressed its powers by imposing unreasonable restrictions. Accordingly the Court does not go by the name and description which the legislature may have choosen itself but its

real character and its reasonable and substantial effect on the right involved in the light of its practical application and for that it takes into consideration the object, purpose, and the real intention of the enactment as a whole.

Procedural reasonableness is concerned with the machinery for enforcement of restrictions. In examining the reasonableness of procedure, the Court insists that procedure must be such as may yield an objective and fair decision by the authority administering the law and does not result into arbitrary curtailment of individual freedom. Accordingly the Court has given due importance to the principle of natural justice in scrutinising the procedural reasonableness of a restriction.

The study of the cases clearly demonstrate that the Supreme Court has given a differential treatment to the restrictions under different circumstances by applying different standard of reasonableness. It has evolved following principles to ascertain the reasonableness of restriction.

1) The restriction must strike a proper balance between the freedom guaranteed and permitted social control.

2) It is only the reasonableness of restriction and not the policy of restrictive law which the Court exmine.

3) The restriction may extend to the point of complete prohibition for a limited period if the circumstances in a particular case require.

4) A restriction made exercisable on the subjective satisfaction of government may be judicially upheld but in exceptional cases

within narrow limits.

5) The restriction must have a proximate nexus with the object intended to be achieved under the law.

6) In determining the reasonableness of a restrictive law, both substantial and procedural aspect of the impunged legislation should be taken into consideration.

7) Where the conflicting rights are claimed the reasonableness of restriction is determined on the balance of convenience.

8) Reasonableness of a restrictiion demands an equality of opportu nity and beside Article 19, may be tested under Article 14 of the Constitution.

9) Different vires may be adopted under a taxing statue depending upon the nature and importance of the services being rendered by the concerned institution.

Privileges are the special rights enjoyed by the Parliament, its Committees and the individual members. The purpose of such privilege on the one hand is to enable the Parliament to function smoothly and to vindicate its authority, prestige and power and on the other hand ensure, that members may play their role in a meaningful manner. Therefor, the privileges are enjoyed individually as well as collectively.

The privileges being enjoyed by Parliament under Article 105 of the Constitution are identical to the House of Commons which it enjoyed at the Commencement of the Constitution. In India, the apex court

may decide the existence or non-existence of a particular privilege but once the existence of a privilege is established, only the Parliament is empowered to decide whether a particular act or omission amounts the breach of privilege or not.

The parliamentary privileges are not subject to Article 19(1)(a) of the Constitution and, therefore, press can not publish any matter which has been deleted from the record of proceedings. Nevertheless Article 21 may still be invoked on the grounds that the act of legislature

is malafide, capricious or against the principle of natural justice. Thus the exclusion of the application of rule of natural justice in M.S.M. Sharma's and Keshav Singh's Cases is no more a good law.

The non-codification of parlimentary privileges despite a constitutional directive has created a lot of confusion and generate controversies regarding the existence or non existence of a particular privilege. The Parliament is not sure of its privileges; the press has its own doubts and misgivings.

Parliamentary Proceedings (Protection of Publication) Act, 1977 which has now been accorded the constitutional recognition under Article 361-A of the Constitution provides a guarantee to the press from any liability Civil or Criminal before any court of law. But the immunity though available against any individual or authority can not be claimed against the Parliament itself if there is any breach of privilege. Simi-

larly the press is not immune from the contempt proceedings before apex court or the high courts as these Courts themselve possess the power to commit any one for their contempt under Article 129 and 215 respectively.

The judicial attitude since the very begining seems to be based on balancing approach. On the one hand it acknowledged the importance of press in modern society and struck down any action on the part of the government which prevents or puts any unreasonable curbs upon the press on the other hand it did not overlook national interest and declined to support any attempt by print media to keep itself immune from the laws of general application alleged as violative of Article 19(1)(a) in the guise of unreasonable restrictions. A law may be struckdown as ultravires to Article 19(1)(a) of the Constitution only if it is enacted with the sole purpose of curtailing the freedom and not covered under Article 19(2) of the Constitution. To ascertain whether the freedom of press has been encroached upon or not, the apex court formulated various tests ie. direct and inevitable effect, arbitrariness of action, imminent danger by holding that reasonableness of any restriction may be tested independently of Article 19(2) after taking into consideration the facts and circumstances of a particular case.

The Supreme Court never overlooked the ground realities when pronouncing any verdict on freedom of speech and expression. In respect of law and order the judicial attitude when the Constitution come into force was visited with a broad approach when it expressed the view

that freedom of press can not be curtailed for a more comprehensive and wider purpose than included in the constitutional provision. Later on this broad approach was side lined through a restrictive approach on the ground that there may be the situations when the authorities are supposed to act promptly. They are in the best position to assess the situation and the consequences to follow. Any drastic step, therefore, taken by the administration with certain safeguards is not bad in law. Regarding other restrictions provided under Article 19(2) of the Constitution it has tried to struck a balance. Consequently in cases relating to obscenity while following the Hicklin's test which overlooks the interest of adult and mature readers, the due weightage is being given to the expert opinion by the Court. In contempt cases the Court has not been very rigid and on most occassions contemners have been let off after a sincere apology is forwarded but while asserting its authority the Court also admitted that it is not beyond public scrutiny itself and fair comment may be passed upon its performance.

Regarding the impact of emergency on the press the judicial approach has been very positive. Any law which was itself illegal when enforced does not acquire legitimacy on account of promulgation of emergency subsequently. Moreover, the press though can not claim the freedom as a fundamental right during emergency yet it does not mean that censor can exercise his powers arbitrarily or beyond the purpose set out in the censorship order.

On the matters relating to Parliamentary privileges the attitude of

the Court has been very restrained and confined only to the point of deciding the existence or non-existance of a particular privilege and declined to interfere merely to correct the mistakes of judgement by House. The Court however, has made it amply clear that though Parliamentary privileges are not subject to Article 19 yet any committal for contempt is subject to Article 21 of the Constitution.

The discussion shows that the press in India to a large extent despite the fact that the laws if frequently used are powerful enough to be a threat to the freedom, is enjoying it as guaranteed under the Constitution. Nevertheless, it is haunted many times by the successive governments either under one pretext or the other whenever its actions do not find favour or criticised by the press. However, the Supreme Court has not taken kindly to restrictions on freedom of press until some interest considered equally vital was also involved. In cases where restrictions on the press have been upheld the maintenance of communal harmony, working conditions of journalists etc. were to be promoted. Thus it has always been aware of protecting this cherished freedom and has been sticky enough not to let the executive get away with much by bailing it out on most occassions but while doing so it has not overlooked its own authority.

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DEDICATED

TO

MY PARENTS

Dr. SALEEM AKHTAR
Professor
&
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CERTIFICATE

This is to certify that Mr.Badar Ahmad Lecturer, Department of Law, A.M.U., Aligarh has worked under my supervision for his Ph.D. thesis entitled, "FREEDOM OF PRESS AND THE SUPREME COURT - AN APPRAISAL". The study is an original contribution to the field of Constitutional Law.

Dr. SALEEM AKHTAR
Supervisor

"The Press: What is the Press?" - I cried,
When thus a wondrous voice replied.
"In me all human knowledge dwells;
The oracle of oracles,
Past, present, future, I reveal,
Or in oblivion's silence seal,
What I preserve can perish never,
What I forego is lost for ever."

James Mantgomery

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(BADAR AHMAD)

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INTRODUCTION

Statement of Problem

We in India are engaged in the task of building up a welfare state. The concept of 'social welfare state' has come to stay and this has emphasised the primary need of vigilant and courageous press. It is (the press) one of the important institutions in an open society and a forum that has the privilege of reaching large number of people. Free press is essential instrument for maintaining openness in society and also for reforming it. In a society, where overwhelming millions are mute, the access to a forum that reaches large number of people could be viewed as a trust, to be exercised on behalf of the people and for the good of the people at large. Written word is only one of the instrument of change and it has only a limited effect in society such as ours; nevertheless it serves as an important source of feed back of information.[1]

Realising the role, which press has to play in contemporary society, **J.S. Mill** rightly said that, "*If the whole mankind minus one person were of one opinion and one person were of contrary opinion, the mankind would be no more justified in silencing that one person, than he, had he the power to do so, would be justified in silencing the whole mankind*".

The press, at present is one of the most effective media of expression. In a democracy an individual should have a right to learn facts; to hear

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1. Dhirendra Krishna: Role of Press in Improving Public Administration. The Indian Journal of Public Administration Vol. XXXIV No.4. 1988. at p.898

all sides of a case, to form his own opinion and if he so desires to give expression to it. The press is one of the channels through which such goal is possible. The freedom of the press, therefore, becomes a matter of vital concern.

The concept of the role of free press in a democratic setup is best defined by the **U.K. Royal Commission on the press** in the following words.

"The democratic form of society demands of its members an active and intelligent participation in the affairs of their community whether local or national. It assumes that they are sufficiently well informed about the issues of the day to day to be able to form the broad judgement required by an election and to maintain between elections and vigilance necessary in those whose governors are their servants and not their masters".

Freedom of press is essential to political liberty. Where men can not freely convey their thoughts to one another, no freedom is secure where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present. Free expression is therefore, unique among liberties, it promotes and protects all the rest.[2]

Talking about the freedom of press, **Pt. Jawaharlal Nehru** once said : *"I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a regulated or suppressed press".* When he said this he was echoing the ideas of **Jefferson** who once said that "..... were it left to me to decide whether we should have Gov-

2. A Free and Responsible Press: Hutchinson Committee Report at p.6

ernment without newspaper or newspaper without a Government, I should not hesitate a moment to prefer the latter".[3]

Addressing a seminar in Srinagar in 1970 on "Freedom of the Press" then Minister of State for Information and Broadcasting, Government of India **Mr. I.K. Gujral** said, **"It is known to you, Mr. President, and to all of us that communication in the modern life is a carrier of social process and as such I think in a thousand unseen ways this carrier influences the political, social and cultural life of a community in which this medium functions. But this social process to a very great degree depends on the communication, exchange and transmission of knowledge. And since knowledge is an integral part of this carrier, i think knowledge again depends upon communication. Thus the social process and social change are inseperable from the means of communication, and therefore, the role of mass media can not be ignored. It is not possible for us to separate them".**

The term 'press' is used in different senses and with different connotations. The Lexicon Webster's Dictionary define the press as ' a machine for printing; a printing press; printed literature in general, especially newspapers; with the; newspaper reporters; a printing, publishing, or broadcasting establishment; and its personnel.[4]

In the aforesaid sense 'press' not only means all plants, machinery and other materials by means of which printing is done but also includes any printed literature, news establishment including a new agency.

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3 Quoted in 'Voice of People' by Reo. M. Cheristenson & Robert O. Mc. Williams at p. 119

4. Webster Lexicon Dictionary Vol. II at p. 754

The term 'press' though in a narrower sense refers to the 'newspaper' in particular[5] but in its wider meaning it includes any book pamphlet or other document. It therefore, not only means any machinery which is used in printing and news establishment but also newspaper, book, pamphlet or other document.

The freedom of press owes much to Jhon Milton's pamphlet speech to parliament, to which he gave the resounding title 'Areopagitica'. The argument **Milton** used for unlicensed printing were for the most part already afloat the British air; they were chiefly appeals to experience and good sense. In the last point Milton comes to nub of principle and rises to the full grandeur of his subject. His words, often quoted may here be brought to mind again. **"Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licening and prohibiting to misdoubt her strenght. Let her and Falsehood grapple; in a free and open encounter. Her words confuting is the best and surest suppressing.**[6]

The contents of the expression freedom of press have been variously understood. some have understood as meaning freedom to publish any matter by printed words, whether by way of statement or comments without any legal restraint or prohibition. Others have coupled it with freedom from prejudices and pre-concerned notions. Some others have thought that freedom of press consists in freedom from executive control. Another opinion suggests that it consists in freedom from the influence of

5. Under Section 1 (1) of Press and Registration of Books Act, 1867 a newspaper means 'any printed periodical work containing public news or comments on public news. Thus it not only presents facts but also gives opinions through its editorial torials.

6. Quoted in Freedom of Press - A Frame work of principles by Hocking, W.E at p.5

advertisers and proprietors or pressure groups. Still others have read into it the notion of freedom from want ie. freedom from dependence on others for financial assistance.[7]

Freedom of press has three essential elements

i) Freedom of access to all sources of information;

ii) Freedom of publication; and

iii) Freedom of circulation

It is the function of the press to disseminate correct news and spread the truth. Free flow of information is essential to a democratic society and freedom to have access to public records is an important aspect of freedom of press. If the press has to rely on what the government chooses to supply it, the picture may be one sided and distorted and may not represent the truth. It is necessary, therefore, that the press should have access to public records but the government is reluctant to allow the press to have access to such records and has often denied it under the pretexts ie. defence, national security etc.

Though freedom of thought is a personal freedom, freedom of expression and publication, which the press enjoys, is a collective freedom. It includes not only the right to propagate one's views but also the views of others. It follows that contributors to newspapers and journalists enjoy the same rights and privilege as the press.[8] The freedom of publication is secured by freedom of circulation. The Supreme Court as early as in 1950 held that freedom of circulation is as essential to the freedom (of expression) as the liberty of publication. Indeed without circulation

7. Kedar Ghosh: Freedom or Fraud of the Press at p.4

8. Sarkar R.C.S: The Press in India at p. 9

publication would be of little value.[9] Explaining it further the apex court held that "Freedom of expression covers both content and circulation if any law unreasonably curtails, directly or indirectly, the right of circulation, it would be void".[10]

The Constitution of India unlike the American Constitution does not expressly provide the freedom of press as a fundamental right. Instead, it provides the guarantee of freedom of speech and expression but the analysis of discussion held in **Constituent Assembly** leaves no doubt that it was made a part of freedom of speech and expression.[11] Judicial verdicts of the Supreme Court in a catena of cases have confirmed it.[12] This right, like other rights is not absolute as certain amount of control over the press is of course necessary for the protection of the right where the right has to be harmonised with duties of the individual constituting the society. The right must be subjected to certain restrictions . To achieve this goal the Constitution itself subjects the freedom to Article 19 (2) which empowers the state to impose reasonable restrictions upon the press.

Prior to the amendment Act of 1951 restrictions were not justiciable. The Constitutional Amendment Act, 1951, which added three more grounds under Article 19(2) had one noteworthy feature which made the restrictions reasonable with the result that the courts were given the power to

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9. Romesh Thapper V. State of Madras AIR 1950 Sc 124
10. Express Newspapers V. Union of India AIR 1958 Sc. 578
11. C.A.D. Vol VII at p. 780
12. The Supreme Court since the constitution came into force has held on various occasions from Romesh Thapper (1950) to TATA Press Company's case (1995) that freedom of press is included under Article 19(1)(a) as a part of freedom of speech and expression.

decide in any particular case whether the restrictions imposed upon the press are reasonable or not. Article 19 (2) thus became justiciable like other restrictions enumerated under clauses (3), (4), (5) and (6) of Article 19 which were justiciable from the very beginning.

Besides the restrictions provided under Article 19 (2) the need to impose the restrictions on the freedom of press on some other genuine grounds is universally recognised and no sensible person will ever say that the state should not be armed with adequate powers to deal with emergency. Under Article 250 of the Constitution, Parliament becomes empowered to legistate even with respect to the subjects enumerated under state list till the emergency exist and, therefore, any law so made affecting the freedom of press can not be challenged before any court of law on the ground of legislative incompetency.

The 44th Constitutional Amendment Act, 1978 to a little extent has restricted the scope of Article 358 of the Constitution. No restriction can be imposed now upon the press if the emergency is declared under Article 352 of the Constitution on the ground of armed rebellion. Moreover a law which seeks to curtail the freedom under Article 358 must bear the requisite recital.

The press has often found itself caught in the dragnet of parliamentary privileges and it is an area where the press requires a very cautious approach to deal with. It has been held by the Supreme Court that the House is the sole judge to the occasion and the manner of its exercise and that Article 105 (3) or 194 (3) are not subject to Article (19)(1)(a).

The judicial verdicts, therefore, have further complicated the work of a journalist.

The press at present is facing various new challenges in the form of mob violence, militancy, monopolistic attitude of press barons and allurment of journalists and workers of the press by the vested interest politicians to suit their own interests. In addition to the above stated pressures which the press is already facing, the government too, sometimes leaves no stone unturned to harass the press where its wishes are not complied with. In a democracy the press discharges its function as the watchdog of public interest and it is destined to get into the hair of the government. Thus inevitably, the press and the government find themselves at cross purpose with each other, and a constant confrontation is the out come. The following charges are levelled by the successive Governments against the press.

(1) Press is a source of much tension, it is a nuisance for working of the state and various public sectors of civil society;
(2) The press is monopolistic, charges the Government by referring that the First Press Commission also aired such charges with added emphasis;
(3) The press has become a source of entertainment rather than of information and for most of the part failing to make the important news understandable;
(4) The press has lost much of its prestige as a leader of public opinion as it has fully involved itself with business activities and making only profits; and
(5) The press has failed to contribute to the developmental goals.

The state, therefore, in order to force the press to dance upon her tune adopts several measures ie. pre-censorship, prohibiting the circulation in particular areas under the protective cover of Article 19(2) of the Constitution. It also adopts punitive measures against the press by imposing excessive tax upon it and by denying various facilities ie. electricity, land for constructing office etc.

The government in order to muffle the voice of the press has introduced special bills. One of them was the Bihar Bill, introduced in the House in 1982. It created an opportunity to expose how the state can design the law to harass the press by making the provisions more stringent than necessary. A lot of hue and cry was raised in the press against it and after one year the Bill lapsed quietly. Similar laws were also intended in the states of Tamil Nadu and Orissa and the State of Jammu & Kashmir. Not lagging behind the Central Government also introduced the Defamation Bill in the Lok Sabha on Aug 29, 1988. The most controversial provision of the Bill was section 13, whereby a journalist might have been lodged in jail for a minimum period of one month if he failed to disprove the violation of law. It also placed the newspaper in place of prosecutor while at the same time the state with its police powers and its various agencies would have stand between the press and proof available in its vault protected by right of privilege. The Bill, therefore, also violated the rule of natural justice provided under Article 21 of the Constitution. But all round condemnation both in side and out side the Parliament forced the government to appoint a five member Cabinet Committee with Mr. H.K.L. Bhagat as its convenor to look into the matter. The Committee recommended the withdrawal of the Bill and the government did accordingly.

The position of press in India, in the light of aforesaid facts seems to be ambiguous. The freedom of press, on the one hand is provided as a fundamental right under the caption freedom of speech and expression under Article 19 (1) (a) of the Constitution but on the other hand the government by adopting various measure always try to keep the press under her control. In the light of these two conflicting facts the object of the study is to find out.

(1) Whether or not the press enjoy the freedom as guaranteed under Article 19 of the Constitution? and ;

(2) The role being played by the Supreme Court in protecting the freedom of the press, as the final interpreter of the Constitution and enforcing authority of fundamental rights.

SCOPE

Legislation having relevance to the press may be divided as following:-

(A) Legislation which primarily or exclusively concern the press e.g.Press and Registration of Books Act. 1867 and Press Council Act, 1978.

(B) Laws under which speech or writing of certain categories are punishable or actionable, being legislation which is not aimed only at the press but would take within its coverage the press as well as other forms of written or oral expression.

The legislation considered in the present study belongs to the second category, comprising a number of enactments regulating the press media.

Though the major part of the study is related to the newspapers but other forms of print media have also been included, wherever required. In other words the terms press has been used in wider context.

RESEARCH METHODOLOGY -

The present work is based upon Doctrinal Research Methodology. Being library based work the text books, reference books, journals, reports of various commissions appointed to look into the various aspects of the press have been used extensively. Beside above stated sources dissertations and doctoral thesis have also been used in the accomplishment of the present work.

CHAPTERISATION

Chapter first contains a general discussion on the freedom of press where the concept and importance of free press in present society has been discussed.

To trace the origin and development of any institution is of vital importance to work on that subject. To fulfill this requirement, the second chapter is devoted to the historical development of the press. An attempt has been made under this chapter to bringout the growth of press and press laws in India.

The sope of the freedom of press is discussed in the third chapter of the present study with the help of case law decided by the Supreme Court. Though the work is based on case law decided by the apex court, but at places where no case by the Court is reported, the judgements of various High Courts have been referred in order to assess the ambit of the freedom. This chapter consists of two parts. The deliberations held in

the Constituent Assembly are analysed in part A.While part-B which again consists of two sub-parts evaluates the scope of freedom during peace time under sub-part (i), and the consequences of Emergency declared under Article 352 of the Constitution on the aforesaid freedom under sub-part (ii).

The Constitution under Article 19 (2) empowers the state to impose the reasonable restrictions on the freedom of press on certain grounds. The material point of the provision is that restriction must be reasonable. An analysis of different opinions expressed by the Supreme Court to assess the reasonableness of restriction is made under chapter IV of the present work.

Fundamental rights are one of the most important feature of the Indian Constitution. But like any other democracy our Constitution too attaches great importance to parliamentary privileges. These two concepts often conflict with each other. Under chapter Vth of the thesis a discussion, therefore, has been made on the relation between the freedom of press and parliamentary privileges.

The Supreme Court is not bound by its own decisions. Consequently, the Court is empowered to make a shift in its approach, in the interest of justice, whenever required. Chapter VIth, therefore, deals with the judicial approach adopted by the apex court while dealing with the issues relating to the freedom of press .

Finally, in the last chapter, on the basis of the present study a conclusion has been expressed on the issues as raised in the object of the thesis.

I hope that the present study would open new avenues regarding the freedom of press and also encourage further studies on the aforesaid subject.

CHAPTER: I

FREEDOM OF PRESS: THE CONCEPT

A) *The Meaning of Free Press*

B) *Importance of the Press*

C) *Position of the Press*

FREEDOM OF PRESS: THE CONCEPT

The Meaning of Free Press

A free press is the very basis of democracy. But there had been persistent opposition to freedom of press and to all democratic movements from the Government all over the world. Freedom of press, as it is today, is the result of few centuries hard - won fight in the name of the people.[1]

The freedom of press is basically the freedom of individuals to express themselves through the medium of press. This freedom (of press) is fundamental to the life of an individual in the democratic polity. The concept of free press was explained by **William Blackstone** long ago in 1769 in the following words;

"The liberty of the press, is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentimetns he pleases before the public; to forbid this, is to destroy the freedom of press; but if he publishes what is improper, mischivous, or illegal he must take consequence for his own temerity. To subject the press to the restrictive power of licensor.....is to subject all freedom of sentiments to the prejudice of one man, and make him

1. Sarkar, R.C.S: The Press in India at p.4

the arbitrary and infalliable judge of all controverted points in learning, religion, and Government. But to punish..... any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of Government and religion, the only solid foundation of liberty.[2]

Lord Ellenborough in **Rex V. Cobbet** observed - *"The law of England is the law of liberty, and consistently with this liberty we have not what is called an imprimature; there is no such priliminary licence necessary but if a man publishes a paper he is exposed to the penal consequence as he is in every other act, if it be illegal.*

The view of **Prof. A.V. Dicey** also sounded similar to that of Blackstone when he says: *"The freedom of press means the right of a person to publish what he pleases in books or newspapers but the laws of England do not recognise any special privilege attached to the press.*[3]

The **First Royal Commission on Press**, (1947 - 48), however, choose not to discuss the meaning and significance of the press. The another **Royal Commission on the press (1977)** emphasised the freedom of press as, *"that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate can not make re-*

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2. Blackstone Commentaries (1765) Vol. IV at p. p 151 - 52

3. Dicey, A.V.: Study of Law and Constitution at p. 239 - 41

sponsible judgements."[4]

In the absence of a written Consititution or any guarantee of fundamental rights in England, the concept of freedom of press, like the wider concept of freedom of expression, has been basically negative. But as Dicey observes, *"No such thing is known with us as a licence to print, or a censorship either of the press or political newspaper, leaves no doubt in the mind that it means the right to print and publish any thing which is not prohibited by a law or made an offence like sedition, contempt of court, obscenity, defamation, blasphemy, official secrets, public order etc.*

The freedom of press in England, therefore, is measured by freedom to write anything provided the law is not infringed. Since the constitutionality of any law made by parliament can not be questioned, eventually freedom of press is nothing but the residue left after parliamentary regulation. And, therefore, the freedom of press in England is the freedom from prior restraints to precensorship.

In United States freedom of press has been guaranteed by the **First-Amendment** to the Constitution. It says *"Congress shall make no law .....abridging the freedom .....of the press"*. **The Fourteenth Amendment** bars the states from making any law depriving any person, inter alia, of liberty without due process of law. The U.S. Supreme Court has held that this amendment made the First Amendment binding on the states.[5]

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4. Final Report of Royal Commission on Press (1977) at p.p. 8 - 9

5. Gitlaw V. New York, 268 U.S. 652 (1925)

Social and Economic developments in USA, in modern times have added a positive content to initial negative approach of freedom of press. Thus it has come to include not only absence of prior restraint of any form, but also a freedom from control as to what may be published through the press and from any restriction which may even indirectly hamper the freedom.

This dual aspect of freedom of press was expressed by **Commission on Freedom of Press in USA in the following words.**.*"A free press is free for the expression of opinion in all its phases. It is free for the achievement of those goals of press service on which its own ideals and the requirement of the community combine and which existing techniques make possible. For these ends it must have full command of technical resources, financial strength, reasonable access to source of information at home and abroad and the necessary facilities for bringing the information to the national market. The press must grow to the measure of this market.*[6]

The more liberal interpretation to the freedom of speech and the press started in thirties of this century and now the broader aspect of freedom of press has been formulated judicially. "..... the guarantee of freedom of speech and press were not designed to prevent the censorship of the press merely but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.[7]

It does not however, mean that the press in USA is absolutely free to publish whatever it please. The judiciary there has evolved the restrictions

6. Report of the Commission on Freedom of Press in USA at p. 208

7. Bigelow V. Virginia (1975) 44 L. Ed. 2nd. at p. 600

be placed upon it in the interest of public at large, and the violation of which may invite punishment. In the words of **Cooley**, *"..... liberty of the press might be rendered a mockery and a dilusion, ...if while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.*[8]

Though no specific or seperate guarantee or identity is provided to the press under the Indian Constitution, nevertheless it is accorded recognition as a part of freedom of speech and expression enshrined under Article 19(1)(a). In India, therefore, freedom of press is regarded as a species of which freedom of speech and expression is a genus. This freedom is stated in wide terms and includes not only freedom of speech which manifests itself by oral utterances, but freedom of expression, whether such expression is communicated by written word or printed matter. There can, therefore, be no doubt that the freedom of press is included in the fundamental right of freedom of speech and expression guaranteed to the citizens under Article 19 (1)(a) of the Constitution.

In Indian the freedom of press is an expression which is both elastic and ambiguous. The term press is used in different senses in different contexts. It may mean an establishment where Printing is done. In that sense it includes all plants, machinery and other material by means of which printing is done. similary the content 'freedom of press' is also differently understood by different persons. Some have understood to mean freedom to publish any matter by printed words without any legal re-

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8. Cooley : Constitutional Limitations, at p. 833

straint or prohibition. Others take it as freedom from prejudices and pre-concieved notions. However, neither the First Royal Commission on the press in England nor the Second Press Commission in India choose to discuss the meaning and significance of this aspect. The **First Press Commission** however, expressed the view that freedom of press means, *"freedom to hold opinion, to recieve and impart informations through the printed words without any interference from any public authority".*[9]

The judgement delivered by the **Press Council of India** in **Verghese's** Case views the concept of freedom of press into following words.

"Freedom of press is commonly understood as the freedom of expression, idea, views and information through the printed material and publishea for circulation; and free from interference, pressure, restraint or compulsions from whatever source; Government or social."

The Supreme Court lost no time and held in a catena of cases that imposition of pre - censorship[10], or any order which amounts to prior restraints[11] are a restriction on the freedom of press and, therefore, violative of constitutional provision under Article 19 (1) (a). Similarly prohibiting newspaper from publication of its own views or the views of the correspondants about the burning topic of the day is a serious encroachment upon the valuable right of freedom of speech and expression.[12]

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9. Report of Ist Press Commission 1954 at p. 358
10. Brij Bhushan V. State of Delhi AIR 1950 S.C. 129
11. R.Rajgopalan V. State of Tamil Nadu AIR 1995 S.C. 264
12. Virendra V. State of Punjab. AIR 1957 S.C. 896

The freedom of press also includes propagation of ideas, the liberty of circulation and consequently any order under a law curtailing circulation or banning entry on the ground of 'public safety' or 'maintenance of public order' falls out side the scope of reasonable restrictions provided under Article 19 (2). The foremost function of the press is the dissemination of news and to provide the information to the people and this can not be denied. If any order affects the freedom, it infringes not only the freedom of the press but also the people's right to information so important in a democratic society. The policies of the government[13] or the orders of the administration either levying excessive tax[14], and thereby putting excessive burden on the press or adopting punitive measures[15] against the press which ultimately curtail the freedom of press, therefore, are not permissible.

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13. Sakal Papers Ltd. V. Union of India AIR 1962 S.C. 305

14. Indian Express Newspapers V. Union of India AIR 1986 S.C. 515 Printer (Mysore) Ltd. V. Asstt. Commercial Officer (1994) 2 S.C.C 434

15. A.I.R. 1986 S.C. 872

Importance of The Press

In a democracy, freedom of press is regarded extremely vital and crucial. A free press is not only a necessary adjunct of democracy; it is the sine qua non for the proper functioning of a democratic society.

The American Press Commission has said *"Freedom of press is essential to political liberty and proper functioning of democracy. When men can not freely convey their thoughts to one another, no freedom is secured where freedom of expression exists the begining of a free society and means for every retention of liberty are already present".*

During many years in which one country after another was striving to extort full self government from monarches and oligarchies, the press became the strongest force on popular side. It exposed oppression and corruption; it helped the friends of liberty to rouse the masses. It won popular confidence and sympathy because it embodied and focused the power of public opinion without which the victory of opinion over the armed forces of the Government could not have been won.[16] **Bismark's** so called reptile press proved effective engine for strengthening his position and set an example followed in other countries.

The democratic form of society demands of its members an active and intelligent participation in the affairs of their community, whether local or na-

16. Bryce : Modern Democracies Vol. I at p. 105

tional. The responsibility for fulfilling these needs unavoidably rests in large measure upon the press, that is on the newspaper and periodicals which are the main source from which information, discussion and advocacy reach the public. The views of **Thomas Jefforson,** one of the architect of American Constitution in this regard are noteworthy. He was so much infatuated by the power of the press that he was even ready to prefer a newspaper at the cost of the establishment of the Government.

Acknowledging the power of the press **Nepoleon Bounaparte** who played with the destiny of **Europe** said that, *"A journalist is a grumbler, a censure, a giver, a regent of sovereign, a tutor of nations. Four hostile newspapers are to be feared more than a thousand baynots".*

The press if honest promotes the, **"Victory of truth over false hood"** in the public arena. It is a necessary condition of a free society to have discussion on the subject of public importance and for that freedom of speech and expression which includes freedom of press is a necessry condition. A newspaper is, in all literalness, a **"Bible of Democracy"** the book out of which people determine its conduct. It is the only serious book, most people read everyday.[17]

The importance of freedom of press has been stressed time and again. Emphasising its importance Pt. Nehru once said," The press is one of the vital organs of life , more especially in a democracy. The press has to be respected , the press has to be co-operated. **Justice P.B. Gajendragadkar**, former

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17. Walter Lipman : Liberty and the News at p. 57

Chief Justice of India, wrote that freedom is of (Press) considerable significance in a democratic society as it gives full scope to an individual for his development and ample opportunity for propagation of his views, philosophy and ideology; and also as it plays a vital role in education, growth and development of public opinion on issues of public importance.[18]

The liberty of the press is indeed essential to the nature of a free state. It forecloses the state from assuming 'a guardianship of the public mind'. Authority is to be controlled by public opinion, not the public opinion by the authority.

The importance of the press has greatly increased with the development of the press as an instrument of mass communication. Its importance lay in the fact that it forms the very root and agency of mass communication. It must be understood that the freedom of press is not a fixed and isolated value, the same in every society and in all times. It functions within a society and must vary with the social contexts.

The Royal Commission on the Press has emphasised the importance of press by saying that , *"It advance the public interest by publishing the facts and opinions without which a democratic electorate can not make responsible judgements."*[19]

The Indian Press Commission too, has echoed the same views when it says that *"Democracy can thrive not only under the vigilant eyes of its leg-*

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18. Gajendrahadkar, P.B: Law, Liberty and Social Justice at p.p. 89 - 90

19. Supra note (4)

islatures but under the care and guidance of public opinion and the press is par execellance, the vehicle, through which the opinion can become articulative". The judiciary too, has acknowledged the importance of press in modern society **Lord Denning** observed that, "The reason why in these cases (where freedom of speech prevailed over other rights) the law gives no remedy is because of the importance it attaches to the freedom of press; or better put, the importance in a free society of the circulation of true information. The metes and bounds of this are already staked out by the rule of law."[20]

Speaking on the importance of the press the American Supreme Court observed *" The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed more light on the public ana business affairs of the nation than any other instrumentality of publicity; ana since informed public opinion is the most patent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press can not be regarded otherwise than with grave concern..... A free press stands as one of the greatest interpretors between the Government and the people. To allow it to be fettered is to fetter ourselves".*[21]

Supreme Court of India since the time Constitution came into force has been very conscious in highlighting and protecting the aforesaid freedom. In Romesh Thappar and Brij Bhushan's cases, speaking through **Patanjali Sastri**, the Supreme Court observed that, *"Freedom of speech and expression is the foundation of all democratic organisations and is essential for the proper functioning of the process of democracy,"* quoting Blackstone's commentaries he

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20. In rex (1975) 1 All E.R. 697

21. Alice Lee Grosjean V. American Press Co. 297 U.S. 233 at p. 250 (1936)

further said that, *"Every free man has undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of press."*[22]

Sounding a note of caution in **Sakal Paper's** case about the importance of freedom of speech and expression (of the which the freedom of press is a part), **Mudhalkar, J**. said that the, *"courts must be ever vigilant in guarding perhaps the most important freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression is of paramount importance under a democratic Constitution which envisage changes in the composition of legislatures and the Governments and must be preserved."*[23] While according to **Ray. J**; The faith in popular Government rest on the old dictum, "Let the people have the truth and the freedom to discuss it and all will go well". *The liberty of press remains an "Ark of covenants" in every democracy. Steel will yield the products of steel. Newsprint will manifest whatever is thought by man. Therefore, freedom of press is to be enriched by removing the restrictions.*[24] *"It is the most cherished and valueo freedom in a democracy: indeed democracy can not survive without a free press. Thus freedom of press constitutes one of the pillars of democracy ano indeed lies at the foundation of democratic organisation."*[25]

The Supreme Court re-interated its earlier views in Express Newspapers V. Union of India [26] and held that the "Freedom of paress is the heart of

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22. Supra note (10) at p. 134
23. Sakal Papers V. Union of India AIR 1962 S.C. 305 at 315
24. A.I.R. 1973 S.C. 106 at p. 129
25. Maneka Gandhi V. Union of India AIR 1978 S.C. 597 at p. 640
26. Supra note (14) at p. 527

social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidiate all laws or administrative actions which interfere with it contrary to constitutional mandate."

The Auto Shankar's case further established the importance of press in a democratic society where it was held that freedom of press is more important and it can not be restrained from publishing the autobiography of a condemned prisoner even if it is defamatory to state officials and any remedy if available to such officials whould arise only after the publication [27]

27. Supra note (11) at p . 276

Position of The Press

The primary function of the press in a democratic society is to disseminate correct news and spread the truth. Obviously a question which arise at this stage is while performing the aforesaid function, does press enjoy any special right or privilege ?

Dicey remarks: *"The law of England does not recognise in general any specific privilege on behalf of the press. The law of press as exists in England is merely part of the law of libel and the so called liberty of the press is a mere application of the general principle that no man is punishable except for a distinct breach of law".*[28] In the words of **Ivor Jennings**: *"Anything is lawful which is not unlawful. There is no more a right of free speech than there is a right than to tie up my shoe laces.*[29]

Earlier in England, the common law rule regarding the disclosure of informations was applicable and the decisions delivered before 1981, when the Contempt of Courts Act, 1981 was enacted clearly reflect the aforesaid view. The **Vassal cases** are worth note in this regard.[30] To investigate into the leakage of certain admiralty secrets known as 'Vassal Scandal' a tribunal

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28. Op cite note (4) at p. 240

29. Jennings, S.I: The Law and The Constitution at p. 247

30. A.G. V. Claugh (1963) 2 W.L.R. 343, A.G. V. Mulholand (1963) 2 W.L.R. 658

presided over by **Lord Radcliff** had been appointed. The **Tribunal** ordered two journalists one of the**'Daily Sketch'** and other of the **'Daily Mail'** to disclose the source of informtion. These journalists however, did not follow the order but preferred to go to jail under the orders of the **Lord Chief Justice Parker**, for a period of six months each.

The Contempt of Courts Act, 1981, however, provided the protection and under sec 10 of the Act there can be no compulsions against a journalist unless it fell within the ambit of any exception.

In USA the rights or privileges of the press has received closest attention. Before **Garland case** [31] journalists claim to privilege has been based on the common law but for the first time **Miss Torre** refused to identify her source of information on First Amendment ground. She was held for criminal contempt.

Justice Stewart, then of Second Circuit Court of Appeals, heard the case in 1958. He was agree with Torrence Attorney that compulsory disclosure might abridge press freedom by imposing some limitations upon availability of news. But such freedom, he said, is not absolute. A determination of when curtailment is justified often presents a " delicate and difficult " task which requires a balancing of rights. Concerning the conflicting rights, he agreed that freedom of press is basic to a free society, but so too are courts armed with the power to discover truth. Further, the concept that it is duty of the witness to testify has roots as deep in history as a guarantee of a free press. If so the Court would not hesitate to conclude that freedom of press

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31. Garland V. Torre 358 U.S. 910 (1958)

must give place under the Constitution to a paramount public interest in the fair administration of justice. The U.S. Supreme Court declined to review the case and so Miss Torrence went to jail for 10 days.

On **June 29, 1972**, the U.S. Supreme Court delivered its long awaited first decision on the claim of newsmen to a constitutional privilege against disclosing source of information or the information itself. In a 5-4 decision the court held that freedom of press is not abridged when the newsmen are required to appear and testify before state and federal grand juries.[32]

In the decision for the Court, **Justice White** observed that *"The great weight of authority is that newsmen are not exempted from the normal duty of all citizens. Neither the common law nor constitutional law exempt newsmen from such duty and that there is no shield law and upto this time the only testimonial privilege has been rooted in Fifth Amendment. We are being asked to create another by interpreting First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. Thus we decline to do."* However, he also held that *harrasment of the press would not be countenanced by the Court.* Such juries are subject to judicial control. (Thus creating a qualified privilege for the newsmen under First Amendment). **Justice Stewart**, however in a dissenting opinion noted that traditionally the judiciary has imposed virtually no limitations on the grand jury's broad powers to investigate. The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press.

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32. Branzburg V. Haynes. 408 U.S. 663 (1972)

The Supreme Court thus held that the First Amendment, in guaranteeing freedom of speech does not implicitly confer upon newsman the right to conceal his sources from a state or federal grand jury, if their identity is relevant to an investigation into the commission of a crime. In holding so, the Court rejected the argument that such a newsman's privilege was necessary in order to prevent the threatened exposure of those source from having a chillig effect on communications to newsmen by persons who desire to remain anonymous.

Under certain situations, however, even after the Branzburg judgement, the courts still give protection to newsmen from forced disclosure of their source of information. In the words of Floyd Abrams *"First Amendment privilege is only qualified. It is not absolute and it is not absolutely sure that all the courts understand that this is the law, but there have been a number of decisions since Branzburg case including court of Appeals decisions in the Second Circuit and in the D.C. Circuit and Supreme Court opinions in Vermont and Virginia. These decisions seems likely to continue to issue and to hold that certainly in rather wide variety of situations the newsmen will not be required to disclose confidential sources on the basis of a First Amendment claim of the newsmen that they should not be required to do so."*[33]

In India, it is well established by decisions rendered both before and after the Constitution came into force, that the freedom of journalist is an ordinary part of the freedom of citizen (apart from statutory provisions specially applicable to press). And the press does not stand on higher footing

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33. Francois W.E. : Mass Media, Law and Regulation at. p. 335

from an ordinary citizen in any way. **Lord Show's** observation in this context is often quoted.

"The freedom of a journalist is an ordinary part of the freedom of the subject and to whatever lenghts 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 conscentious 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.[34]

The same position continues under the Constitution. Since freedom of press is included in the freedom of speech and expression guaranteed under Art 19 (1)(a) to citizens , the press stands on no higher footing than any other citizen. In Constituent Assembly **Dr. B.R. Ambedekar**, Chairman of Drafting Committee of the Constitution, stated that - "The press is merely another way of stating an individual or a citizen. The press has no special rights which are not to be given to or which are not to be exercised by the citizen in his individual capacity".[35]

In many countries including India, journalist have been claiming that when they obtain information from any source in confidence, they should not be compelled to disclose the source.[36] This demand in a limited sense has

34. C. Arnold V. King Emperor A.I.R. 1914 P.C. 116 at p. 124

35. C.A.D. Vol VII at p. 780

36. Bakshi, P.M: Legal Protection of the Source of Information Obtained by a Journalist J.B.C.I. Vol. VIII No. 2 at p. 233

been acceded to **The Press Council Act 1978, under Sec. 15(2)** [37] says that no neswpaper,news agency, editor or journalist can be compelled to disclose the source of any news or information published by the newspaper or received or reported by the news agency editor or the journalist.

The **Indian Evidence Act**, however, does not recognise any such privilege (as some persons are given privilege uder Section 122 - 126). According to the law of evidence a person can be compelled by a court of law to answer all questions which are relevant.[38]

The approach of the law is where there are no exceptions, the general rule of duty to disclose will prevail. On the same reasoning any person relating to the affair of the press can not claim in a court of law any privilege against the disclosure of the source of information obtained by him in confidence. There are instances when the editors of the newspapers were called before the courts. In the first case Kaliprassna Kauyabi Sharad of Hitabodi[39] and in the second case well known editor and journalists Bipin chandra Pal[40] refused to depose in court about the authors of the articles appeared in

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37. Sec. 15 (2) says, "Nothing in sub-section (1) shall be deemed to compell 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 journalist".

38. Sec. 23, however, makes it clear that if an admission is extrcted under a promise of secrecy, it is irrelevant but not protected from disclosure, unless protected from disclosing the same by any other law for the time being in force.

39. Journalistic Privilege: Supreme Court Appeals No. 9 (1963) Vol. I

40. Editorial: Journalists & Their Sources (1980) V. 84 CWN 85 - 87

their newspapers. **In M.S. Sharma ,V. Sri Krishna Sinha** Supreme Court held that, freedom of press in India "being only a right flowing from the freedom of speech and expression it" stands on no higher footing than the freedom of speech and expression of a citizen" and that the press enjoys no privilege as such, that is to say, "as distinct from the freedom of a citizen".[41] Once again it clearly laid down that the press is subject to same laws and regulations as are applicable to other citizens, and press was not immune from the laws of general application or ordinary forms of taxation.[42]

In another case involving the same newspaper (Express Newspaper) the Supreme Court reiterated its earlier stand when it held that press industry was not free from taxation. Taxes have to be levied by reason of public services, facilities and amenities enjoyed by the newsprint industry, the burden of maintaining which falls on the government. But simultaneously made an important departure from its earlier stand in respect of privilege of press when it said that different parameters may be adopted in respect of a statue taxing newsprint and of ordinary taxing statute thus created a limited scope for privilege.[43]

In India though the press as a general rule does not enjoy any privilege as distinct from a citizen, nevertheless the Supreme Court under exceptional circumstances has created a little privilege in favour of the press. In **Prabha Dutt's** case the Supreme Court allowed the press to conduct interveiw of the persons, condemned to death provided they are willing to be interviewed.

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41. M.S.M. Sharma V. Sri Krishna Sinha AIR 1959 S.C. 395 at p.402
42. AIR 1958 S.C. 578.
43. Supra note (14) at p. 540

Court further held that, unless, in a given case there are weighty reasons for denying the opportunity to interview a condemned prisoner, the right of the press to interview the prisoner should not be denied. The reasons for the denial of the same should be recorded in writing.[44]

Another aspect of privilege issue is related to the business activities of the press and that is whether the press has any privilege to claim any advertisement released by the government. On various occassions the courts have held that the newspapers have no right to demand the advertisement from the government. On the other hand the Government did have a right to choose the newspaper in which it would advertise. But the government's discretion to grant largess must be structured by rational, relevant and non discriminatory standards or norms.[45]

In **printer (Mysore) Ltd. V. Asst Commercial Tax Officer**, the Supreme Courts opinion seems to be that, "freedom of press stands on a higher footing than other enterprises in matters of taxing statutes. In view of the above opinion test for determining vires of statute taxing newsprint, have therefore, to be differnet from that is usually adopted for testing the vires of other taxing statutes.[46]

Thus freedom of press not only means and includes freedom from restraint imposed upon it by the government but also any measure which helps

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44. Prabha Dutt V. Union of India AIR 1982 S.C. 06 at p. 07
45. Ramanna V. International Airport Authority 1979 S.C 1628 at p. 1642
46. Printers (Mysore) Ltd. V. Asstt. Commercial Tax Officer (1994) 2 S.C.C. 434

or keeps the press independent and free from any external pressure while disseminating news and views without which people living in a democratic system can not form a correct opinion.

In modern democratic societies the press had acquired great importance. On the one hand by disseminating the information on various issues of the day, it greatly influences the minds of the people on the other hand it keeps vigil over the functioning of modern welfare state. But despite the express recognition of its importance form every segment of the society and the judiciary as well the press simply being a part of freedom of speech and expression does not enjoy any privilege. The basic principle of common law that the law favours the disclosure in legal proceedings, of all relevant material in the interest of justice, and it does not enjoy any privilege as distinct from a citizen is being followed. Nevertheless it has been accorded a little privilege as a public institution under exceptional circumstances.

CHAPTER: II

HISTORICAL PERSPECTIVE

- ***A)*** *Press and Press Laws upto 18th Century*
- ***B)*** *During the 19th Century*
- ***C)*** *During the 20 th Century*
  - ***i)*** *Pre - Independence Period*
  - ***ii)*** *Post - Independence Period*

HISTORICAL PERSPECTIVE

The humanity has marched from the **"Stone - Age"** to the **"Modern Age"**. Enormous progress during this period has been made in every walk of life. Be it social, political, economic, scientific or what soever. One of the gift to the society as a result of such advancement is the press which has played an important role at crucial junctures. **C.R. Srinivasan** rightly says, *"Many are the miracles of modern age of them all, I should think the greatest is the modern newspaper. It is not a miracle in itself. It has laid the foundation for many miracles that we have witnessed in modern life. It makes and unmakes things. It creates and destroys the strength of the nation. It is a pivot around which revolvs the universe. It occupies the nuclear position in the life of the world. The present is essentially the age of newspaper and the immediate future is not likely to be different."*[1] The history of journalism is the man's striving for ways and means of satisfying his curiosity and learning what is going on in the world. The man, since the time immemorial has striven for the knowledge and the press has made the material available quicker as well as cheaper to all those who desire it. In the words of Herbert Brucker, **"Journalism, then, is the instrument we use to stock our**

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1. Srinivasan C.P: The Press and Press and the public at p. 01

heads with information about the world that we can never know of our selves.[2]

Like Indian jurisprudence the press too, has got its roots in British counterpart. However, unlike the jurisprudence it has been brought to this country not as a result of **"conscious and calculated thought"** by those who had built slowly the magnificient empire as a miracle, but by a band of adventurous men who were allured to this country in the expectation of shaking the Pagoda Tree.[3]

The development of press in any country is essentially according to its political, cultural and economic conditions and, therefore, to understand its development and the influence, it is essential to know the prevalent conditions in that country. Thus, the history of press in India is the history of consolidation and extension of British rule in India. According to Margarita Barns, **" A history of Indian press must, to a certain extent be a history of British occupation of India, or a cross section of that society."**[4]

For the better understanding of the development of press and Press Laws in India, the study may be undertaken as following.

1. Press and Press Laws up to the 18th Century.
2. during the 19th Century
3. during the 20th Century
   (a) Pre-independence period, and
   (b) Post-independence period

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2. Herbert Brucker: Freedom of information at p. 4
3. Sanial, S.C: History of Journalism in India at p. 355
4. Margarita Barns : The Indian Press at p. 13.

Press and Press Laws Upto 18th Century

The human mind is always occupied by the instinct of curiosity which in turn creates apetite for knowledge. From the earliest times man's inquisitiveness compelled him to find out ways and means to know about the happenings occuring in different parts of the Globe. The ancient Postal system of Europe and Western Asia and the banjara system in ancient India may be called as earliest form of journalism.

After the conquest of India, the Muslim rulers also followed the ancient system of emissories with certain improvements for the effective administration. They also gave it the form of an organisation. The state regularly maintained a seperate department for keeping the court informed about the description of events, ceremonies and complaints etc. in the form of **Waqias** or newsletter under the command of **Waqia-Nigar**. However the origin of modern Indian journalism can be traced to **Aurangzeb's** regime. Sanial observes, " The earlier distinct mention of ante-typographic newspaper is to be found in the **Muntabakhat-Al-Lubab** of **Khafi Khan** where we find the death news of Raja Ram of the House of Shivaji. The great historian also gives us clearly to understand that the common soldiers in Aurangzeb's time were supplied with the newspapers".[5]

The papers enjoyed great liberty during Aurangzeb's time and it is evident from the fact that the newspapers were often commenting

5. Op Cit note (3)

on the relations between him and his grand son Azim O Shan. In the year 1828 **Colonel James Tod** has sent to the **Royal Asiatic Society in London** hundreds of original manuscript newspaper of the **Moghul Court (1660)**. The size of these papers was eight inches by four and half inches, written in different hands. They give notices about promotion, visits by the emperors to mosques, hunting expeditions, the bestowel of presents and items of other interests etc.[6]

The growing weakness of Moghul power caused frequent conflicts among the rival provinces. The death of Nawab inevitably resulted in inheritance tangles among the rival claimants to the throne. The **East India Company** first seized these opportunities for selling their services to the warring group in lieu of profits and later on started direct intervention to suit her own interests.

The battle of Plassey in 1757, decided the fate of India in favour of the British. Though before this battle printing press has already been brought in India by **Vasco de Gama in 1557** to print religious books. The East India Company established its first printing press in **Bombay in 1674** and the first official printing press was installed in **Calcutta in 1779**. The company's administration took precaution to ensure that any of these presses in its settlement were not used for printing any account of their activities in their country and, therefore, the efforts to start newspapers were strongly suppressed by bureaucrats of East India Company.

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6. Journal of Royal Asiatic Society, 1908 at p. 1121

In September, 1768 **William Bolts**, an ex-servant of the East India Company notified:

Mr.Bolts takes this method of informing the public that the want of a printing press in this city being of a great disadvantage in business and making extremely difficult to communicate such intelligence to the community, as is of importance to every British subject, he is ready to give best encouragement to any person or persons who are versed in the business of printing, to manage a press, the types and utensils of which he can produce. In the Meantime he begs leave to inform the public that having in manuscript things to communicate, which must intimately concern every individual, any person who may be induced by curiosity or other more laudable motives, will be permitted at Mr. Bolts house to read and take copies of the same. A person will give due attendance at the hours from ten to twelve any morning".[7]

Mr. Bolt's notification came like a thunderbolt; it alarmed the administrators. He was served with a notice for deportation. It was held that he, by his attempt to utter "an odium upon the administration and to promote friction and discontent in the settlement" has rendered himself unworthy of any further indulgence from the company and of the company's protection.

For the next twelve years, no attempt was undertaken to publish any newspaper. Finally on **Jan 29, 1780 the first Indian newspaper** was published by **James Augustus Hicky** entitled **Bengal Gazette** or

7. Quoted in 'A History of the Press in India by S. Natrajan at p. 10

Calcutta General advertiser. This man was a printer by trade and for his newspaper venture; he says - **" I have no particular passion for printing newspaper; I have no propensity. I was not bred to slavish life of hard work, yet I take pleasure in enslaving my body in order to purchase freedom for my mind and soul."**[8]

Hickey's "Bengal Gazette or the Calcutta General Advertiser was a two sheet weekly political and commercial paper open to all parties but influenced by none."

Hicky was bitterly opposed to those who were in power and targeted even to **Governor General Hastings** and his **wife**. This policy soon landed him in trouble and in Nov. 1780 the circulation of his newspaper through General Post Office was banned. Even then Hicky kept continue his newspaper and it was delivered in Calcutta through peons in neighbouring areas. But Warren Hastings was determined to crush the paper as well as the editor.

Hicky was sentenced to two years imprisonment and a fine of Rs 2000 on another count, he was ordered to pay Hastings Rs 5000 as damages for libel. Bail of Rs. 80000 was demanded of him on two counts during the trial. Protesting against the demand of such heavy amount for bail Hicky wrote a letter to the clerk of the Crown. This letter was published in Bengal Gazette during the week June 16-23, 1781. But his prayer was not granted. Failing to deposit Rs 80000 for granting the bail, Hicky was sent to jail. However he continued to edit the paper

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8. Quoted in 'Press, Public opinion and Government in India' by Shushila Agrawal at p.24

from jail. The equally indomitable, Warren Hasting on the other hand filed suit after suit to harras the Hicky. Finally with the help of his friend **Sir. Eliza Impey, chief justice of Supreme Court**, he finally succeeded in selling out the Hickey's press, as he failed to pay the fine imposed upon him.

During this period, Warren Hastings encouraged other men**B. Messink and Peter Reed** who started in the same year (1780) another newspaper **"India Gazette"** and assured the authorities that they would abide by the instructions and the regulations issued by them. Four years later **"Calcutta Gazette"** came into existence under official patronage.

"Madras Courier" was the **first newspaper published in Madras** in the year **1785** and in **Bombay** the **first newspaper** appeared in the year **1791** by the name **"Bombay Herald"** and another one named **"Bombay Gazette"**.

The editors of these journals, though, agreed to abide by the rules often attacked the authorities. Inturn they incurred the wrath of the such authorities. As a result Bombay Gazette suffered heavy losses, the Editor **Mr. Farr**, was deported and his successor readily agreed to sumbit proof sheets to the secretary for inspection before publication. Later on, the paper sought the patronage of government on the ground of heavy losses and became Government paper.

In 1786, Lord cornwallis was appointed the **Governor-General** and was entrusted with an uphill task of consolidation on the one hand.

and to reform the administration on the other.

But in Bengal the case was different and editors revived their voice against bureaucratic norms. **In 1791, William Duane** editor of "Bengal Journal" published a false news of the Lord Cornwallis's death. Thereafter, he could not continue as the editor. Nevertheless Duane started another paper, **Indian World in 1794**. In the meantime his house was twice raided so he decided to sell the paper and arranged to transfer it to new proprietor on Jan 1, 1795. But on Dec 26th, 1794, he was arrested and deported to England without a single word of information or explanation and without providing any compensation for the properties left behind here in India.[9]

In 1789, **Lord Wellesly** assumed the office of Governer General when **Mr. Bruce**, the editor of **`Asiatic Mirror'**, published an article on the relative strength of Europeans and native populations. Wellesly got furious and wrote from Madras to **Sir, Alfred Clarke** in Calcutta in April 1799:

"I shall take an opportunity for transmitting rules for the conduct of the whole tribe of editors, in the meantime if you cannot tranquilize this and other mischivous publications be so good to suppress the papers by force and send their persons to Europe".[10]

This threat was immediately put into action and a fresh set of rules was published to shackle the press on May 13, 1799. Which provided

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9. Ghose H.P: The Newspaper in India at p. 11

10. Op Cit note (4) at p. 67

1. Every printer of a newspaper to print his name at the bottom of the paper.
2. Every editor and proprietor of a paper to deliver in his name and place of abode to the secretary to the Government.
3. No paper to be published on Sunday.
4. No paper to be published at all until it shall have been previously inspected by the secretary to the Government or by a person authorised by him for that purpose.
5. The penalty for offending against any of the above regulations to be immediate embarkatian for Europe.

The censor was instructed to prevent publication of matter relating to the subjects like "Public Credit". The aforesaid measures were justified on the ground of emergency so long as the necessity existed for the maintenance of absolute power. These new rules were communicated to the editors and printers of various newspapers of that time. The editors viewed them with dismay yet they did not resent them.

During The 19th Century

The 19th Century is important from the Indian as well as British point of view. On the one hand the British consolidated their position, and on the other hand Indians realised that no foreign administration working for her own country can take care of them against poverty and famines. This factor gave life, impetous and encouragement to the Indian National Movement and Indian public awakening.

The first decade of the 19th century did not bring any major change in the repressive policies of the government towards press. It continued to regard newspapers with great suspicion and was ready to strike it at first opportunity provided by them. The attitude of the government towards the press during that period is evident form the following opinion, recorded in a minute by **Mr. Elliot, Governor of Madras:** "The principal objects of those who desire the freedom of press are to disseminate the worst political doctrines of the times, to bring the constitutional authorities in Europe and Asia into contempt and to provide profits for the lawyers from prosecutions of libel in the courts of justice".

Lord Wellesly was very harsh towards the press. All these restrictions led to publication of a large number of pamphlets which bore neither the names of the authors nor those of the printers who printed it. **Lord Minto**, who had succeeded Lord Wellesley as Governor General.

therefore, in 1811 issued the orders that "It was the duty of all the proprietors of all public presses established in this presidency or its dependencies to cause, the name of the printer to be affixed to all works. papers and advertisements printed at or issuing from those presses and that any breach of regulations hereafter would incur the severe displeasure of Government.

In 1813 **Lord Hastings** became the Governor - General. He treated the Indian Press with leniency. In 1814 **Dr. James Bryce** acquired the 'Asiatic Mirror' and became its editor. After some time he came to a bitter conflict with **Mr. Jhon Adam**, the **Chief Secretary** who was also the censor. Thereafter Dr. Bryce made repeated representations against Mr. Jhon Adams. However, his representations were not acceeded.

The pre - censorship came to an end under peculiar circumstances. When asked to exclude certain portions from his newspaper **Morning Post**, the editor **Heatly** refused to comply claiming that no action can be taken against him as he was a native of India (He was born of a European father and Indian mother). The press censor represented to the Governor - General that he was "powerless in dealing with an editor who was Indian born". Lord Hastings abolished the post of censor in 1818 and placed the responsibility for excluding any matter likely to affect the authority of the government or anything injurious to the public interest on the editors themselve but the directors of the company did not like it. Therefore, to appease them **His Lordship** formulated the following regulations prohibiting editors from publishing any matter falling under the following heads:

1. Animadversions on the measures and proceedings of Court of Directors, or other public authorities in England connected with the Government of India, or disqualifications on political transactions of local administration or offensive remarks levelled at the public conduct of the members of the Council, of the judges of the Supreme Court or the Lord Bishosp of Calcutta.

2. Discussions having a tendency to create alarm or suspicion among the native population of any intended interference with their religious opinions or observances.

3. The republication, from English or other newspapers, of passages coming under any of the above heads, or otherwise calculated to affect the British power or reputation in India.

4. Private scandal and personal remarks on individuals to excite dissension in society.

These regulations were hailed in India and despite vigilence over press in the form of aforesaid regulations the newspaper press once again breathed a free air, people again got busy starting new journals, when a few days ago none had dared to do such a thing. According to Margarita Barns the,"Most contemporary commentators regarded the new regulations as opening the way to a free press .[11] .

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11. Id at p. 91

During this period three men played an important part in establishing the freedom of press in India. They were **James Silk Buckingham**, an indefatigable fighter for press freedom, second **Raja Ram Mohan Rai's** three newspapers were cosidered as fraught with danger and likely to explode all over India like spark thrown into a barrel of gunpowder, because of resolutely opposing Hindu social and religious belief and **Lord Hastings** who adopted a benevolent attitude towards press because he realised that most effective safeguard for the government was permitting full freedom of discussion by the press as this would serve to strengthen the hands of the administration.[12]

The same year in 1818, James Silk Buckingham started the Calcutta Journal. He was a strong critic of the East India Company's monopoly, taxation etc. In 1819, he was warned for attacking the then Governor of Madras and after few years in 1823 he was deported when Jhon Adam became the officiating Governor - General.

Meanwhile, **Ganga Kishore Bhattacharya** started the first Bengali Weekly paper **Vangal Gazette**. He was a man of progressive reformist ideas which reflected in his paper. Raja Ram Mohan's first Bengali tract on Sati was printed in that weekly.[13]

In 1822 Raja Ram Mohan Rai had taken over the charge of **Samvad Kaumudi**, a vernacular paper. He also published one paper **Miratool Akhabar** in Persian.

12. Mudhalkar : Press Law p.p 15 -16

13. Sophia Dawson: The Life and letters of Raja Ram Mohan Rai at p. 205

Within the fortnight of Buckingham's departure, Jhon Adam, the Acting Governor - General issued a **nine point ordinance** making prior registration and licence of every publication compulsory. Six eminent Indians Including Raja Ram Mohan Rai presented a joint petition but it was lost and in protest Raja Ram Mohan Rai declared the closure of his papers.

Lord William Bentinck was well aware of the attitude of Court of Directors towards the press in India. He was having a liberal attitude but certainly was not prepared to take any permanent measure to liberate the press. When he fell ill and resigned **Sir Charles Metcalf** assumed the office of Governor General. He could realise the feeling of bondage. He wrote, **"All India is looking for our downfall. The people every where would rejoice or fancy they would promote it by all means in their power.**[14]

Metcalf had an intutional love for the freedom of press. Inspite of his knowledge of the contrary views of his colleagues and the Court of Directors he decided to remove all fetters on press in India and frame a uniform law for both European and Indian newspapers. He with the help of Macaulay, the Law member in his council proposed to frame a uniform law for both European and Indian newspapers all over India and to repeal the harsh press laws, prescribing licencing of newspapers and providing for the summary action.

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14. Quoted in 'A History of Indian Journalism ' by Mohit Mitra at p.101

Maculay pointed out that licencing regulations were indefensible and should be repealed. He expressed the view that the licences to printout not to be refused or withdrawn except under very peculiar circumstances. While agreeing with the views of the Lord Macaulay, the Governor - General expressed the view that as the press laws differed in different provinces the enactment of general law for the whole of India was indispensible. But there were others in the Governor - General's Council who emphasised the importance of the government keeping a watchful eye particularly on the '**Native press**'. However, the Council passed a new Act repealing the **Bengal Regulations of 1823** and **Bombay Press Regulations of 1825 and 1827**. The new Act was made applicable to all the territories of the East India Company and required the printer and publisher to give a declaration about the precise location of the premise of the publication. For this change of law Sir Charles Metcalf brought the displeasure of the Court of Directors but under the Metcalf's Act of 1835 the press in India developed rapidly in the three province of Bengal, Bombay and Madras.[15] **Sir Edward Thompson** on the progress of press in India said.

In India Metcalf liberated the press as Governor General and it angered the directors and that powerful immovable mass, the retired officials.[16]

The year 1835, when press was liberated by Metcalf thus marked a turning point in the history of Indian Press. However, a reaction had

15. Sankhdhar, B.M: People Press & public opinion in India at p.88.

16. P.Sitaramiyya: The History of Indian National Congress at p. 19

already begun in 1826, with the publication of **First Hindi Newspaper Oodunt Martund**. From this year to 1857 the press kept dealing with Indian aspirations and awake the sleeping giants of this country.

When the news of removing all the restrictions over the press reached England, the Court of Directors became furious and dispatched a letter on Ist Feb 1836 which stated, " We are compelled to observe that this proceeding must be considered as the most unjustifiable in as much as it has been adopted by a Government only provisional; and also when a commission for framing a code of laws for the three presidencies was about to commence its important labours.[17]

Metcalf had to pay a very heavy price for his love for the freedom of press. Inspite of his just claim he was not made permanent Governor - General. The Court of Directors found another opportunity of slighting Metcalf when, in 1836, he was passed over for the Governorship of Madras. One of the Company's directors informed him that his freeing of press was unforgiven.

Lord Auckland too, followed the foot steps of Metcalf and during his regime cordial relations existed between the press and the Government. This attitude also encouraged the establishment of new newspapers. Five newspaper in Persian language were started. Among them **Jamai - Jahannuma** and **Sultan - ul - Akhbar** were more prominent.

Lord Ellenborough who succeeded Lord Auckland in 1842, how-

17. Quoted in 'A History of Indian Journalism ' By Mohit Mitra at p. 104

ever, had no sympathy for the press. This behaviour resulted in a wide gulf between the government and the press. He directed that, **"Official documents and papers were in no case to be made public or communicated to individuals without the previous consent of the Government to which alone they belong."** The government issued instructions to newspapers prohibiting publication of official orders and deliberations to which they could not have had access except through good offices of highly placed officials. Thereafter a controversy arose as to what may be officially communicated to press and what should not and also by whom ? This laid the foundation of **Official Secret Act**. Later on the idea of Government official publicity was evolved.

The language newspapers devoted themselves to questions like Sati, Caste, widow remarriage, polygamy, the atrocities of the indigo planters and the blunder of young magistrates. The importance of native press by then had become very considerable.

In 1856, **Lord Canning** became Governor General. He was unlike **Dalhousie** but the seeds sown by Dalhousie were to sprout. In fact the seeds had not been sown by any particular person but the ideology on which British imperialism was based. As soon as the mutiny broke out. the government gagged the press with an **ordinance** akin to the **press laws of 1823**. The revolt aroused great apprehension in the mind of the government and it felt that sedition had been poured to an audicious extent into the hearts of the people of India. Lord Canning introduced **Act XV of 1857** to regulate the establishment of the printing press ana to restrain the circulation of printing books and papers in India.

The **Act** applied to every kind of publication, be it in English or in an Indian language owned by Indians or by Europeans. Therefore, the Act reintroduced the main features of the **Adam's licencing Regulations of 1828**. The Act was applicable to the whole of India and was limited for a period of only one year.

In **1860**, when **Indian Panel Code** came up for final adoption, Lord Canning, sensing that the sedition section could be injudiciously used against the liberty of press, recommended its omission and the section was omitted.

In **1861**, the first constitutional advancement **India Council's Act. 1861** came up, and it stirred the public opinion and resulted in the establishment of a number of newspapers including the Pioneer (1865).

The press in India took a new turn after the mutiny of 1857. It adopted nationalistic approach in character and the aspirations. The vernacular press became more important as it appealed directly to the masses and spoke their own language.

The rapid growth of Indian languages press made the government rather uneasy. The official opinion hardened towards the language press and the diehards among them stressed the need for a more effective law than that which existed. As **Mill** says *"A people may be unprepared for good institution: but to kindle a desire for them is a necessary part of the preparation. To recommend and advocate a particular institution or form of Government, and set its advantages in the strongest light, is*

one of the modes, after the mode within reach, of educating the mind of nation, not only for accepting or claiming, but also for the working of the institution". [18]

The Indian newspapers have already started to nourish the public mind on the important political issues. In 1864 **Jhon Lawrence** became the **Viceroy** and during his regime **Act No. XXV of 1867** known as the **Press and Registration of Books Act** was promulgated to regulate the press and newspapers.

In 1869 - 70 the Wahabi movement came to the light. The government, therefore, felt the necessity of new measures to crush such activities. Thereafter, **Act XXVIII of 1870** was passed which again inserted sec.124-A I.P.C, omitted by **Charles Metcalf in 1835.**[19]

" This section was quite vague in its language and was applied according to the wishes of the rulers. These Acts however, proved a blessing in disguise as the press became more conscious of itself and started to struggle for its own freedom.

The Indian papers were advocating the idea of a national government and their preachings prepared the people for a national struggle.

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18. Mill, J.S: Representative Government at p. 11

19. Sec. 124 - A I.P.C provided: " Who so - ever, by words, either spoken or intended to be read or by signs, or by visible representations or otherwise excites or attempts to excite feelings of disaffection to the government established by law in British India. shall be punished with transportation for life or any term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or without fine."

With the Russio - Turkish war of 1876, which was joined by the English, people became critical of the foreign policy of the government. In the year 1877, the Press Association, headed by **Surendra Nath Banerjee**, waited on the then Viceroy and made a fervent appeal not to impose any stringent restrictions on the language press. The Viceroy in his reply made no reference of the subject. **In 1878, the Vernacular Press Act** was passed. The salient provisions of this enactment were to place newspapers published in the Indian languages under "better control" and to furnish the government with more effective means than the existing law provided for punishing and suppressing seditious writings. The Act empowered the government, if necessary to require the editor of a Vernacular newspaper either to give a bond to print nothing calculated to excite disaffection or to submit its proof for censoring. In case of breach of this undertaking, the security deposits with the district magistrate would be confiscated.

The Vernacular Press Act, instead of cowing down the language press produced exactly the opposite effect. The general tone of the newspapers was one of opposition to Government and its measures.[20] This hostile attitude continued till 1880 when **Gladestone**, who himself has criticised the Act, as a leader of the opposition on July 23rd, 1878 in the **House of Commons**, became the **Prime Minister**, gave directions to repeal the Act. It was **repealed in 1882 by Act IIIrd of that year** which however, maintained the powers of Post Office authorities to search for and seize any vernacular publication of a seditious nature, and to seize any seditious material the importation of which had

20. Op Cit note (12) at p. 20

had been prohibited under Sea Customs Act, 1875.

With the advancement in public consciousness the press run by the Indians was gaining influence and strength. In the later part of 19th Century, The Government of India was haunted by the spectre of sedition. By a **notification promulgated on 25th June, 1891**, the Government restricted the rights of the free press even in Indian states. The notification prohibited the publication of a newspaper within the territory of a Native State without the permission of a political agent and the disobedience of the aforesaid order made one liable to forcible expulsion.

In 1894, during the regime of **Lord Elgin** an amendment was made regarding sedition in Indian Panel Code. Dr. Pattabhi Sitaramayya writes about it *" While the cronic sores of abridged jury powers, and combined judicial and executive functions were still festering and showed no signs of improvement, new ulcer broke out in the body politics in 1897 which brought to light regulation III of 1818 (Bengal), II of 1819 (Madras) and XXV of 1827 (Bombay) under which anybody could be deported without trial. This was applied to the Sirdar Natu who by the time the Congress of 1897 met had been imprisoned over five months."*[21]

Secret Press Committees were established in 1898 which provoked a vehement protest from Mr. W.A. Chambers at the 14th Congress. These committees acted as thinly veiled censor. Another amendment was passed amending Section 124 -A of Indian Penal Code[22].

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21. Op Cit note (16) at p. 36

22. 124 - A Whoever by words, either spoken or written or by signs, or by visible representation or otherwise, brings or attempts, or excites or attempts ot excite disaffection towards her majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term , to which fine may be added or with .....Contd:

In July the same year **Amba Prasad**, the proprietor, editor and publisher of newspaper called the **Jamil-ul- Ulam** was charged for sedition under the aforesaid law.

The closure of century thus, saw a critical state of affairs while the public clamoured for political advancement the government did not respond to their call and this led even to few terrorist movements in 20th Century.

Contd:..... imprisonement which may extend to three years, to which fine may be added or without fine.

During The 20th Century

Pre - Independence Period

The early 20th Century period has been described by **S. Natrajan** as " amazingly hysterical period which the press in India passed through". Further **Gokhle's** remark that, "no where was the press so weak in influence as it was in India" was borne out by the fact that the Government promulgated an **ordinance** and enacted **laws** to control public meetings (1907), followed by the **Newspapers (Incitement to offences) Act, 1908**. Under the provisions of this Act, power was given to a magistrate to seize a printing press if he was convinced that a newspaper printed therein contained any incitement to murder or to an act of violence or to an offence under the **Explosive substance Act 1908**. Power was conferred on the magistrate to make the conditional order absolute either by an ex-parte decision in an emergency or after hearing the evidence from persons concerned against the order. However an appeal could have been made to the High Court within 15 days of order being made. The effect of this harsh law was that several newspapers, which expressed sympathy with terrorist activities, ceased publication in 1908.

Meanwhile two incidents occured. On Nov. 18, 1909, in Ahmedabad, a bomb narrowly missed the carriage in which **Lord and Lady Minto** were travelling. And in Nasik on Dec. 21, a magistrate **A.M.P. Jackson** was shot dead by extremists. In order not to allow the press

from highlighting such incidents from nationalistic point of view, the **Indian Press Act 1910**, was passed.

The Act increased Government control over the printing presses and publishers. The most harsh provision was that all proprietors who had made a declaration under the Act of 1867, for the first time, were required to deposit security of Rs 500/- to Rs 2000/- unless it was waived by the local magistrate. This security was to be forfeited in all cases where the matter contained in the newspaper had a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise, to incite to murder or to any offence under the Explosive Substances Act, 1908, or to any act of violence, or to seduce any officer from his allegiance or his duty, to put any person in fear or incite any person to interfere with the administration of law or the maintenance of law and order and so on. Similarly a newspaper printed and published in India could not have been transmitted through post unless a declaration was made as required under Sec. 5 of the Press and Registration of Books Act, 1867; and the publishers had deposited security when so required under this Act. Custom and Postal authorities were authorised to detain and search suspicious mail. Once a security was forfeited, a person was required to make a fresh declaration with a higher amount than the first, and on third occassion, if an offence was alleged, the security deposited, the printing press used for printing the newspaper and all copies of such newspapers were forfeited. In all during 1910 - 1914, 355 cases were initiated against the printing presses. Vernacular Publications were main tartget of the attack and between 1917 to 1920 some 963 newspapers and printing presses which had

existed before the Press Act of 1910, had been proceeded against under the Act.[23]

Lord Chemsford became the Viceroy of India in 1916. He used the Press Act with severity and too often. Mrs. Besant was prohibited from entering the Bombay Presidency by **Lord Willingdon** under the **Defence of India Act 1914**. In Bengal, the number of young men in. ran up to nearly three thousand. The Congress urged the government to repeal immediately the **Defence of India Act, The Press Act, The Seditious Meetings Act**, **The Criminal Law Amendment Act and similar other repressive measures.**[24]

Far from responding to the Indian public opinion to repeal these Acts, the Government adopted harsh measures. The conduct of **Gen. Dyar** and Lt. Governor of Punjab **O'Dwyer** came in for strong condemnation in Indian Press. The position had become intolerable and a **Press Law Committee** was appointed under the Chairmanship of **Sir Tei Bahadur Sapru**. The journalists deposed before the committee testified that Anglo - Indian Press was free to make most violent attack against them but if they replied they found themselves prosecuted for spreading hatred.

The Press Committee was of the view that the special reasons (to crush the promotion of revolutionary conspiracies) for which these Acts were passed are over and the purpose of these Acts may be served by the ordinary laws by incorporating the provisions in the Act of 1910 of

23. Agrawal, S.K: Press at the Crossroads in India at p.34

24. Op Cit note (12) at p. 24

seizure and confiscation of seditious publications in the Press and Registration of Books Act, the **Sea - Customs Act** and the **Post Office Act** by suitable amendments. Therefore, it recommended to repeal the Acts 1908 and 1910 which was done accordingly by **Press Law Repeal and Amendment Act, 1922**.

In April 1931, **Lord Willingdon** became the Viceroy of India. Unsympathetic to the nationalist movement he adopted the policy of non-concilation with nationalist leaders and **Indian Press (Emergency Powers) Act**,1931 was passed. This was described as an Act to provide against the publication of matter inciting to or encouraging murder or violence. This Act imposed on the press an obligation to furnish security at the call of the executive. This security was liable to be forfeited if the press published any matter by which any of the mischivous acts enumerated in Sec. 4 of the Act were furthered eg. bringing the Government into hatred or contempt or inciting disaffection towards the Government, inciting feelings of enmity and hatred between different classes of subjects, including a public servant to resign or neglect his duty. This Act was, in fact, an antiquated revival of trial by **Star Chamber of Press** offences and the licencing system which English democracy had fought and suppressed. The Draconian law hampered the growth of press in India. Various reputed newspapers, advocating nationalistic approach like Amrit Bazar Patrika, Al-balagh by Maulana Azad and numerous other were persecuted.

The British Governement tightened its grip on the printed matter with the begining of the World War II. The **censorship machinery** was

revived with a **chief censor** and **advisory committees** in each province. Later on the **Press (Speical Powers) Act, 1947** was passed. It declared that it is an act to continue certain special powers conferred on the administration for the better control of the dissemination of undesirable matter. Under the provisions of the Act power was conferred upon the Provincial Government to prohibit or regulate any matter which tends directly or indirectly to promote feelings of enmity or hatred between different classes of **His Majesty's subject**. (Sec. 4) It also empowered to prohibit or regulate the entry into or sale or distribution or circulation and publication in a province (Sec. 5). Moreover, this Act also empowered the executive to take preventive measures in the form of forfeiture and seizure of a newspaper or any other document (Sec. 6).

The Act was made applicable to **Chief Commissioner's Province** and was in force up to **Dec. 1949**.

POST - INDEPENDENCE PERIOD

After achieving independence on Aug. 15, 1947, the Government of India in the same year appointed a **Press laws Enquiry Committee**. The Committee submitted its report in May 1948 where it recommended to repeal **Indian States (protection) Act, 1934**, the **Indian Press (Emergency Powers) Act, 1931**, and repeal of **Foreign Relations Act, 1932**, and its replacement with a new comprehensive legislation. However, it recommended the retention of **Official Secret Act,1923**, and Section 124-A,153 - A and 505 of the **Indian Penal Code** dealing with disaffection towards legally established Government, communal hatred and tempering with the loyality of the armed forces.[25]

In the **Constituent Assembly Dr. Ambedkar** the **Chairman** of the **Constitution Drafting Committee** made it clear that the freedom of speech and expression also includes the freedom of Press. But the circumstances after the country got the independence, deteriorated. The partition of country had taken place on communal lines resulting into hatred and mutual suspicion among two major communities named, Hindus and Muslims. The press too could not remain unaffected and, therefore, to curb this menace two steps were taken by the Government. first the consititution was amended in June 1951 whereby three grounds **(a)** friendly relations with foreign states; **(b)** public order, and **(c)** incitement to an offence were added under **Article 19 (2)** as reasonable

25. Op Cit note (23) at p. 43

restrictions. And Secondly in October 1951 the **Press Objectionable Matters Act**, was passed. This legislation was similar to those which were passed during 1910, and 1931. The press raised much hue and cry over this Act as a result it was allowed to lapse. It was finally in 1952, **Nehru** announced the appointment of a **Press Commission**. It composed of **Dr. Zakir Hussein, M. Chalpati Rao** and **Justice G.S. Rajadhayksha**. The commission beside favouring emergency legislation rather than incorporation of the provisions of 1951, Act into Indian Penal Code, improvement of working conditions, salary and benefits for the journalists and vesting administrative control to editor over the staff recommended the establishment of **Press Council** which came into existence **in 1966** through **Press Council Act, 1965**.

During the Nehru era press enjoyed enormous freedom as he was a democrat to his heart and soul. He strongly favoured the editorial independence and detested proprietal interference in the running of the papers. Even during the Chinese aggression in 1962 when an emergency was declared and **Defence of India Act** was passed to deal with the situation, the restrictions imposed on the press were minimal.

In contrast to Nehru's era, Mrs. Gadhi's period, marked the confrontation between the Government and the press. Visibly there were two reasons. First - The Indian Press by that time had gained maturity and had started to react more freely second, Mrs. Gandhi's chair was being challenged by the old Congressmen and her action of nationalising the banks, insurance companies and abolition of privy purse made the business community suspicious and frightened resulting in adverse com-

ments in press owned by this strong lobby.

On June 12, 1975, a historic judgement was delivered by **Justice Jagmohan Sinha** of **Allahabad High Court**, declaring Mrs. Gandhi's election from **Rae Bareilly** constituency of **Uttar Pradesh**, **invalid** for adopting corrupt electoral practices in the 1971 parliamentary elections and barred her from contesting any election or holding a political office for a period of six years. Mrs. Gandhi filed an appeal against the judgement and **Justice Krishna - Iyer** ruled that she may remain the Prime Minister conditionally (she was not entitled to particapte in the business of parliament or to vote but could speak in either house). This decision further complicated her position and her resignation was demanded by all quarters.

On **June 25, 1975, Mrs. Gandhi recomended the president to declare the emergency under Article 352 of the Constitution** on the ground of **internal disturbances which was done accordingly**. On the same day all prominent leaders of opposition were arrested and the newspapers run by these parties were banned. Many journalists were also arrested and among them was **Kuldeep Nayer**, an internationally acclaimed journalist. However, timely action of Delhi High Court saved him .

Few foreign journalists including **Peter Hazelhurst of London Times, Loren Jenkins of News week, Peter Gill of London Daily, Lewis. M. Simpson of the Washington Post and most notably Mark Tully of B.B.C were expelled from the country**.

During this period, Central Censorship orders were passed and

no news, comment or rumour or other reports relating to an action taken by the government in accordance with the proclaimation of emergency, (**Maintenance of Internal - Security Act, 1971, Defence of India Act.** 1971 and other Acts come into force) could have been published without their first being submitted for scrutiny to an authorised officer of the Government. **The Chief Censor** was given total responsibility to enforce these measures.

During emergency three enactments which had already come into existence were passed. First, **The Press Council (Repeal) Act, 1976** by this Act the Press Council Act was repealed and the Press Council constituted under the Act was abolished on the ground that it had failed to fulfill the objective with which it had been set up. But in fact the actual and proximate reason for this action was that Press Council seemed likely to pronounce against **K.K. Birla**, a proprietor of **Hindustan Times** and a supporter of emergency regime.[26]

The second enactment was **Parliamentary Proceeding (Protection of Publication) Act, 1976** which eliminated the Parlimentary proceedings (Protection of Publication) Act which was on statute book since 1956. This was a retrograde step and **P.G. Mavlankar**, an independent member said, **"..... the record (of parliamentary proceedings) may have every thing for the future historians, but people of the present generation will not known what is taking place in parliament".**[27]

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26. Raghvan, G. N : The Press in India. A New History at p. 139

27. Ibid

Beside repealig these Acts during emergency another enactment **prevention of publication of Ojectionable Matter Act, 1976** was also passed [28] for government's view, the press in India had been abusing its freedom by vilifying high dignatories which reached at its climax after High Court judgement in election case against Mrs. Gandhi. It was infact a reproduction of **1951 Act** with some improvements with the requirement of Art. 19 (2) of the Constitution.

In General Election of 1977, a coalition of various parties known as **Janta Party** defeated Congress and came into power. The muzzled Press viewed it as a indication of democrary. The Prime Minister **Morarji Desai** after assuming office, in an interview said **"fundamental rights should never be touched whether, there is an emergency or not. They must be maintained under the Constitution**." He translated this belief by proceeding to dismantle the provisions of emergency by instituting safeguard of press.

The first step taken by his government was to **repeal** the **Prevention of Publication of Objectionable, Matter Act, 1976** by passing a repealing Act on **9th April, 1977**. On the same day **Parliamentary Preceedings (Protection of Publication) Act, 1971** which had been repealed by a repealing Act of 1976, was passed. A constitutional amendment was also made by which **Art. 361 - A** was inserted which provided the constitutional protection to the aforesaid laws. Some other amendments were also made in the provisions providing for emergency. [These amendments are discussed in detail in Chapter 3(b)(ii)]

28. Section 5 of the Act empowered a District Magistrate to direct that any matter relating a particular subject or class of subjects may not be published for a period of two months.

The next step which the Desai's Government took was passing of **The Press Council Act, 1978**, with a more representation, composition and improved provisions. Desai's Government also appointed the **Second Press Commission** to look into all aspects of press laws in India. But this government could not last beyond July 1979 and in 1980 Mrs. Gandhi again came into power. She **re-constituted the Press Commission in 1980**. It sumbitted its report in 1982, however, no special legislation has been passed till date in pursuance of the recommendations of this Commission.

Though the press praised Mr. Desai for liberating the press from shackles but it could not ignore the political, economic and social chaos in the country.

In the words of Prof. **D.D. Basu**, **"Whatever may be the success or failure of Janta Government's rule for two years,"** he continues. **"the press ought to be grateful to them for removing all the fetters that had been imposed on the press during emergency regime".**[29]

Soon after Mrs. Gandhi sworn in as Prime Minister she was confronted with question of press censorship during emergency. She gave the following **reply**.

"Censorship was a special remedy for a very severe, acute disease. We dont think that particular disease will hit the country again nor do we want to give the same medicine.

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29. Basu. D.D: Law of the Press at p. 261

Rajiv Gandhi started well with the press. In early days of his Prime Ministership he was of the opinion that press should be absolutely free and inturn expected the press to present the correct picture of the country to the people. However, Rajiv's cordial relations with press did not last long because of his two statements, first defending the emergency and reiterating that if the conditions as that of 1975 crop up again, he would not hesitate to impose the emergency and second, he categorically rejected the idea of giving autonomy to radio and television and said that electronic media could not function the way press behaved.[30]

His relations with the press further deteriorated after income tax raids on big business houses and Bofors scandal in later part of 1985 and early 1986 leading scathing remarks by the press against the government. Rajiv Gandhi blamed that press had changed its attitude suddenly after the government began taking action against erring industrialists including the press barons. A Bill was also introduced in the Parliament in 1988 known as **Defamation Bill**. This raised a great hue and cry in the press (as it was feared that when the Bill becomes the Act, it would be used frequently against the press). Consequently the Bill was withdrawn.

Similarly during the period after independence in various states also either different laws are passed which affect the press or few Bills were introduced in different State Assemblies in the guise of maintaining law and order.

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30. Op Cit note (23) at p. 65

During the regime of Mr. V.P. Singh, Mr. P.V. Narsimha Rao and H.D. Devegowda, th epress has so far been free from any notable restrictions.

The above discussion makes it clear beyond any doubt that there has been no smooth sailing for the press from the earliest times. It has been tested time and again by different kind of laws which were felt necessary in pre-independence as well as in post - independence era by different regimes at different times. Nevertheless press has survived on account of its sheer determination to stand against all odds.

CHAPTER: III

CONSTITUTIONAL GUARANTEE

A) *Constituent Assembly Debates*

i) *Framing of Article 19(I)(a)*

B) *Scope of the Freedom*

I) ***DURING PEACE TIME***

a) *Permissible Restraints*

i) *Sovereignty and Integrity of India*

ii) *The Security of the State*

iii) *Friendly Relations with Foreign States*

iv) *Public Order*

v) *Decency of Morality*

vi) *Contempt of Court*

vii) *Defamation*

viii) *Incitement to an Offence*

II) ***DURING EMERGENCY***

CONSTITUENT ASSEMBLY DEBATES

Framing of Article 19 (1) (a)

Even before India achieved her independence in 1947, the **Constituent Assembly** had begun its deliberations. As the first great achievement,the Assembly adopted the historic **Objectives Resolution** on 22nd Jan 1947 moved by Pt. Nehru. This formed the basis not only of various provisions of the Constitution but of its **preamble** also. The Assembly declared in its resolution its firm resolve to draw up a constitution, guaranteeing, inter alia, Freedom of thought and expression.[1]

After adopting the aforesaid resolution, on 24th Jan 1947, the **Advisory Committee on Fundamental Rights, Minorities etc**. came into existence by a resolution proposed by **Pt. Govind Ballabh Pant** who expressed the hope that the Advisory Committee would function keeping in mind the ideals of humanity.[2]

The Advisory Committe in its first meeting on 27th Febraury 1947. setup five Sub - Committees including one on Fundamental Rights. Achariya Kriplani was elected the chairman of Sub - Committee[3].

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1. C.A.D Vol. I at p.p. 58 - 59
2. Rao, B.S. : The framing of India's Constitution Select Documents Vol II p.p. 58-63
3. Rajkumari Amrit Kaur, Mrs. Hansa Mehta, M.R. Masani, K.T. Shah, A.K. Ayyar,K.M. Munshi, Harnam Singh, Maulana A.K. Azad, B.R. Ambedkar, Jairamdas Daulat Ram, and K.M. Panikkar were the other members of the Sub-committee.

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

(I) Every citizen within the limits of the law of the union and in accordance therewith has :

(a) The right of free expression of opinion;

(2) The press shall be free subject to such restrictions imposed by the law of the union as in its opinion may be necessary in the interest of public order and morality.[4]

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

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

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

4. Some other drafts were also presented before the Sub.Committee. Dr. Ambakdar's draft laid emphasis on fundamental rights, he did not feel it necessary to justify the inclusion of these rights in the constitution as he observed that their necessity and importance have received an express recognition in almost .....Contd :

for its consideration. This annexure of draft report contained two chapters; the first chapter enumerated justiciable rights while the second chapter included non - justiciable rights. The right to freedom of speech and expression figured as justiciable right under clause (9) which provided.

"There shall be liberty for the exercise of following rights subject to public order and morality. (a) The right of every citizen to freedom of speech and expression. The publication or utterances of seditious, obscene, slanderous, libelous or defamatory matter shall be actionable or punishable in accordance with law.[5]

The Sub - Committee drafted the rights during the ten meetings

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

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

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

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

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

5. Commenting on the draft report Prof. Shah observed that freedoms guaranteed under Article 9 have been subjected to "public order and morality." He pointed out with the help of various instances that the term morality is very vague and its connotation changes from time to time, and in the guise of this 'public morality' in various countries basic freedoms have been denied to the citizens. He stressed the need for defining the term suitably or to drop this exception.....Contd:

held in March - April 1947. Early in the April it passed its tentative conclusions to the Sub-Committee on Minorities of the Advisory Committee. (It has already drafted its first report on 4th April 1947). Therefore,, considering the recommendations made by Sub-Committee on Minorities and reconsidering their own draft report, the Sub-Committee on Fundamental Rights submitted its report on 16th April 1947 to the Advisory Committee.[6]

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

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

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

The Advisory Committee on Fundamental Right and Minorties met on 21st April to discuss the recommendations made by the Sub-Committee on Fundamental Rights.[7] The Advisory Committee submitted its interim report to the **Constituent Assembly** on **29th April 1947**. The Committee observed that it has given due credence to the view that fundamental rights should be made justiciable and laid stress on the need to make adequate provisions to define the scope of the remedies for the enforcement of Fundamental Rights.

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

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

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

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

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

In the Constituent Assembly, Pt. H. N. Kunzru raised doubts about the justiciable character of certain rights as the imposition of various restrictions on the exercise of rights destroy their justiciable charactor. He referred as an example clause (8) of the report. Some other members also echoed the same view. At this Juncture Patel dispelled the doubts of members saying that it was only a consideration stage and the members were free to move amendments.[8]

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

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

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

K.M. Munshi sought a change in the opening words of clause (8) and observed that the words "except in grave emergency" should replace the words "to the existence of grave emergency" as the words sought to be inserted sound a better sense. .....Contd

To scrutnise the draft of the text of Constitution as prepared by the Constitutional Advisor, giving effect to the decisions, already taken by Constituent Assembly including ancilliary methods which should be provided in such a constitution, and to submit to the Constituent Assembly the ***Draft Constitution*** *as prepared by the Committee.*[9] The Drafting Committee after scrutinising the Draft Constitution and material before it prepared a draft of the revised Constitution of India and submitted it to the Constituent Assembly on **21st Feb, 1948.** Under this Draft Constitution the right to freedom of speech and expression fell under Article 13 which provided:

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

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

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

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

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

The Drafting Committee decided to revise sub - clause (1) of clause 15 of Rau's Draft and suggested the omission of the reference to the "minorities" from sub - clause (3)

(2) *Nothing in sub - clause (a) of clause (1) of this article shall affect the operation of any existing law or prevent the state from making any law, relating to libel, slander, defamation, sedition or any other matter which offends decency or morality or undermines the authority or foundation of the state.*[10]

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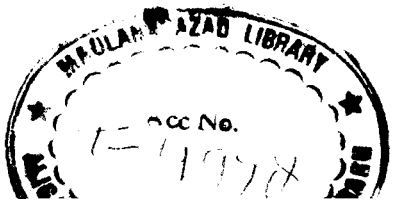
10. This **Draft Constitution** prepared by Drafting Committee was published and the copies were sent to each member of the **Constituent Assembly, Provincial Legislature, Provincial Government, Federal Court** and the **High Courts inviting comments** and **suggestions**. After receiving comments and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

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

Various amendments were proposed at this stage of consideration by the Constituent Assembly. These amendments were moved by Mihir Lal Chatopadhaya, K.T.Shah, Naziruddin, Bhopinder Singh Man and Seth Govind Das. Most of the proposed amendments were lost when put to vote.



This Draft Constitution, with the amendments adopted by Assembly, was then referred again to Drafting Committee with instructions to carry out such renumbering of the articles, clauses, and sub - clauses. such revision of punctuation and such revision and completion of marginal notes as might be necessary, and to recommend such formal or consequential or necessary amendments to the Constitution as might be required. Thereafter, it was revised and re-numbered as Article 19 which provided:[11]

(1) All citizens shall have the right-

(a) to freedom of speech and expression

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

Finally the Draft Constitution was adopted on **26th Nov. 1949** and the president of Constituent Assembly **Dr. Rajendra Prasad** authenciated it by putting his signature so that the Bill became an Act."[12]

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

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

12. C.A.D. Vol. XI at p. 995

no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are all citizens and, therefore, when they choose to write in newspapers, they are merely exercising their right of expression and in my judgement, therefore, no special mention is necessary of the freedom of press at all.[13]

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

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

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13. C.A.D. Vol. VII at p. 780

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

"19 (1) All citizens shall have the right-

(a) to freedom of speech and expression

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

SCOPE OF THE FREEDOM

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

Article 19 contained in part III of the Constitution guarantees the freedom of speech and expression into following words.
Article 19 (1) "All citizens shall have the right

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

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

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

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14. Preamble to the Constitution of India

in express terms. The discussion on the Article 19[15] in the Constituent Assembly as well as judicial decisions, however [16] have proved it beyond any doubt that the freedom of press is included in the right to freedom of speech and expression.

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

Apart from the restrictions which may be placed under Article 19(2), the right may be taken away, completely under Article 358 when a Proclaimation of Emergency is in force. Therefore, for the better understanding of the subject the study may be undertaken as following.

(A) Freedom during peace time; and

(B) Freedom during emergency.

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

16. Right from the Romesh Thappar (AIR 1950 S.C. 124) to Auto Shankar Case (AIR 1995 S.C. 264) the Supreme Court repeatedly asserted that Article 19 (1)(a) includes the freedom of press.

During Peace Time

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

In Romesh Thappar[17] and Brij Bhushan's[18] cases the scope of Article 19(1)(a) was raised, for the first time, before the Supreme Court.

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

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

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17. AIR 1950 S.C. 124

18. AIR 1950 S.C. 129

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

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

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

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

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19. AIR 1958 S.C. 578

(a) The freedom of speech comprehends the freedom of the press and the freedom of speech and press are fundamental personal rights of the citizens;

(b) The freedom of press rest on the assumption that the widest possible dissemination of information from diverse and antagonistic source is essential to the welfare of the public;

(c) Such freedom is the foundation of free government of a free people;

(d) The purpose of such guarantee is to prevent public authorities from assuming the guardianship of the public mind; and

(e) The freedom of the press involves freedom of employment or non-employement of the necessary means of exercising this right or in other words, freedom from restriction in respect of employement in the editorial force.

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

The Supreme Court on the point of taxing a newspaper industry said that while no immunity from general laws can be claimed by the press, it would certainly not be legitimate to subject the press to laws which take away or abridge the freedom of speech and expression or which would curtail circulation, or fetter its freedom to choose its means of exercising the right, or would undermine its independence by driving it to seek government aid. *Laws which single out the press for laying upon it excessive and prohibitive*

burden which would restrict the circulation, impose a penalty on its right to choose the instrument for its exercise or to seek an alternative media, prevent newspaper from being started and ultimately drive the press to seek government aid in order to survive, would, therefore, be struck down as unconstituional.[20]

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

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

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

20. Id at p.p 616 - 17

21. A.I.R. 1960 S.C. 554

22. Sec. 3 - " Subject to the provisions of this Act no person shall take any part in publication of any advertisement referring to any drug .....Contd:

be used to advocate them or which tended to spread the evil, and not merely to stop all advertisements offending against morality and decency". As to the general nature of the advertisements the Court stated that an advertisement was no doubt a form of speech and expression, its true character was reflected by the objects for the promotion of which it was employed. It is only when an advertisement was concerned with the expression or propagation of ideas that it could be said to relate to the freedom of speech. And therefore when it took the form of a commercial advertisement which had an element of trade or commerce it no longer fell within the concept of freedom of speech for the object [(of Article 19 (1)(a)] was propagation of ideas social, political or economic or furtherance of literature or human thought; but in the present case it was the commendation of efficacy, value and importance in treatment of particular disease by certain drugs and medicines.

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

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Contd:..... in terms which suggests or are calculated to lead to the use of that drug for

(d) The diagnosis, cure, mitigation, treatment or prevention or any veneral disease or any other disease or condition which may be specified in rules made under this Act."

This rule making power is provided under Sec 16 of the Act which provide that-

1. The Central Government may by notification in official gazette, make rules for carrying out the purpose of this Act.

2. In particular and without pre-judice to the generality of foregoing power, such rules may -

a) Specify any disease or condition to which the provisions of Sec 3 shall apply;

23. Sec 8 of the Act provides "Any person authorised by the State Government,in this behalf may, at any time seize and detain any, document, article, or things which such person has reason to believe contains any advertisement which contravenes any of the provisions of this Act and the court trying such contravention may direct that such document (including all copies thereof), article or thing shall be forfeited to the Government.

NOTE - The aforesaid provisions have been amended since then by the Amendment Act (42 of 1963).

further [24]. The advertisement of prohibited drugs and commodities of which the sale was not in the interest of general public could not be regarded as speech so as to fall within the concept of 'freedom of speech' under Article 19(1)(a). However the court found Sec 3(a) of the Act which empowered the government an impermissible delegation of legislative power and Sec 8, imposing unreasonable restrictions as violative of Article 19(1)(a) and applying the doctrine of severablity struck down those provisions.

In Sakal Paper V. Union of India [25] the newspaper was started in 1932 and it claimed that its circulation was 52000 copies on week days and 56000 copcies on Sundays in Maharashtra. The daily edition of the newspaper contained six pages a day for five days. This edition was priced at 7 paisa. The Sunday edition consisted 10 pages and price at 12 paisa. about 40% of the space in the newspaper was covered by advertisements.

The Newspapers (Price and Page) Act, 1956 and Daily Newspapers (Price and Page) order, regulated the price and pages of the newspaper. Sec 3 of the Act empowered the Government of India to regulate the price and pages of the newspaper in relation to their size, prescribe the number of supplements to be published and prohibit the publication and sale of newspaper in contravention of any order made under Sec. 3 of the Act[26].

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24. Supra note (21) at p. 563

25. AIR 1962 S.C. 305

26. Sub - Sec (I) of Section 3 empowers the Central Government. to regulate the price of newspapers in relation to their pages and sizes if it is of opinion that it is necessary to do so for the purpose of preventing unfair competition among newspapers and in particular those published in Indian Languages. It also empowered the government to regulate the allocation of space to be alloted for advertising matter.

The Act also provided the size and area of advertisement matter in relation to other matters contained in the newspaper. It was challenged before the Supreme Court as violative of Article 19(1)(a).

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

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

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

the circulation of some newspapers by making the price so unattractively high for a class of its readers as was likely to deter it from purchasing such newspaper, and thereby hampered the free propagation of ideas and thus violated the freedom."

On the contention raised on behalf of the government that the object of the propagation of ideas could be achieved by reducing the advertisements in the newspapers. In other words the newspaper would be able to devote more space for news and views if they reduce the advertisements. The Court while rejecting the argument held that if the area for advertisement was curtailed the price of the newspaper would be forced up. If that happened the circulation of the newspaper would inevitably go down. This would be no remote but a direct consequence of curtailment of advertisement[27]. He was of the view that, "The advertisement revenue of a newspaper was proportionate to its circulation. Thus the higher the circulation of a newspaper the larger would be its advertisement revenue. So if a newspaper with a high circulation were to raise its price its circulation would go down and this inturn would bring down the advertisement revenue. It would create a vicious circle where a newspaper would be left with no option but to closure of the newspaper. If on the other hand the space for advertisement was stated to be to prevent `unfair' competition, it was thus directed against circulation of newspaper. When a law was intended to bring about this result. there would be a direct infringement of the right of freedom of speech and expression.[28] To determine the constitutionally protected areas of press freedom. the Court talked of "essential part" of freedom of speech and expression but failed to disclose as to what constitute this"essential part" and how it is to be determined? The Court remained trapped in the language of 'direct and inevitable effect' and wanted to prevent "excessive and prohibitive" burden upon the press.

27. Supra note (25) at p. 313

28. Ibid

Once again the validity of price and size of a newspaper was raised in Bennett Coleman V. Union of India.[29] Due to the shortage of indigenous news-print in India, it has to be imported from foreign countries. But as country's foreign exchange position was not good, a liberal import of newsprint was not possible to fulfill India's newsprint requirement. In order to achieve that goal some rules were laid down by the Government of India as Newsprint Policy for 1972-73. The new import policy was contained in the Newsprint Control Policy (1972 - 73), effectuated by the Newsprint Control Order, 1972 passed under Section 3 of Essential Commodities Act. The main features of the impunged policy which was under consideration were:

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

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

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

29. AIR 1973 S.C. 106

incidental restrictions of newsprint quota policy for newspaper did not constitute any violation of freedom of speech and expression.

It was observed by Justice Ray, delivering the majority opinion for Sikri C.J., Reddy J. and for himself, that, *"Under the policy the newspaper within the ceiling of ten pages could get 20% increase in the number of pages. They required circulation more than the number of pages. They were denied the circulation, on the other hand the big English dailies which needed to increase their pages were not permitted to do so. These features were not newsprint control but really newspaper control in the guise of equitable distribution of newsprint. Where a quota is fixed newspaper control could be said as post-quota restrictions. The freedom of press is both 'qualitative' and 'quantitative'; the freedom guarantees both 'circulation' and 'content'*[30]*: The newspaper must be left free to determine their pages, their circulation, and their new editions within their quota of what has been fixed fairly.*[31]

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

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30. Id at p. 130

31. Id at p. 129

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

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

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

The Court, thus took the view that any rule or policy which seeks to regulate newspaper publication by eihter fixing the price or the size

of the newspaper having the affect of hampering the growth of press is violative of Article 19(1)(a) of the Constitution.

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

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

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

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

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

32. AIR 1986 S.C. 515

33. Sec 25 (1) of the Custom Act, 1962 provides that, "If the Central Govt. is satisfied that it is necessary in the public interest to do so, it may, by notification in the Offical Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified description from the whole or any part of the duty of customs leviable thereon."

19 (1) (f), the first because it is concerned with the field of expression and communication and second because of communication has become an occupation or profession while there can be no tax on the right to exercise the freedom of expression, tax is leviable on profession, occupation, trade, business and industry. Hence, tax is leviable on the newspaper industry." However, the Court also made it clear that, *"When such tax transgress into the field of freedom of expression and stifles that freedom, it becomes unconstitutional. As long as it is within reasonable limits and does not impede freedom of expression, it will not be contravening the limitation of Article 19(2). The delicate task of determining when it crosses the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with freedom is entrusted to courts* [34].

On the question of advertisements Supreme Court examined its earlier decisions alongwith the American Case law. Reiterating that though the commercial advertisement do not form part of freedom of speech and expression, the court observed that, *"It is no doubt true that some of the observations made in Hamdard Dawakhana case go beyond the need of that case and tend to affect the right to publish* all commercial advertisements.[35] *"The Supreme Court, therefore, expressed the view that all commercial advertisement can not be denied the protection of Article 19(1)(a) merely because they were issued by the businessmen.*

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34. Supra note (32) at p.p. 538 - 39

35. Id at p. 548

The Supreme Court's view seems to be that though the commerciai advertisements were not the part and parcel of the right guaranteed under Article 19(1)(a), nevertheless that right could not be denied to the advertisements if they directly affect the right by raising price or curtailing circulation, unless they fall under Article 19 (2).

The question of levying a tax on newpaper was once again before the Supreme Court for its consideration in Printers (Mysore) Ltd. V.Asstt. Commercial Tax Officer.[36] The facts of the case are following - Before the amendment of the definition of the expression "goods" in Section 2(d)[37] by the 1958 (Amendment) Act, the publisher of newspapers [Who held the certificate of registration contemplated under Sec 8(3)(b)][38] were issuing Farm 'C' [a declaration under section 8(4)(a)][39] and on that basis the selling dealer was collecting from them the Central Sales Tax at the concessional rate of 4% (in case of non declared goods). After the amendment newspapers were excluded from the perview

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36. (1994) 2 S.C.C. 434

37. Sec 2-In this Act, unless the context otherwise requires.

(d) "good" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspaper, actions, claims, stokcs, shares, and securities;

38. Section 8(3). The goods referred to in clause (b)

(b) are the goods of class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or subject to any rules made by Central Govt. in this hehalf, for use by him in the generation or distribution of electricity or any other form of power.

39. Section 8 (4) provides - provisions of sub-section (1) shall not apply to any sale unless the selling dealer furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority.

of the goods. Thereafter the newspapers were disabled from issuing Farm'C'hence they became liable to pay tax at the higher rate of 10% on goods (non declared goods) purchased by them as raw material for producing (manufacturing) their newspapers. The publishers of the newspaper, therefore, questioned the action of Central Sales Tax Authorities before different High Courts who expressed different opinion. Finally the matter was brouhgt before the Supreme Court.

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

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

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40. Supra note (36) at p. 442

41. AIR 1986 S.C. 872

perpetual registered lease under Sec. 3 of Government Grants Act 1895 [42] in the year 1958 from Union of India. In the year 1980, petitioners received a notice of re-entry upon forfeiture of lease for violating the terms of the lease deed. Another notice was served upon them to show cause as to why the Express building should not be demolished (Under Sec. 343 & 344 of D.M.C. Act, 1957) as being unauthorised construction.

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

The apex court allowing the plea held that, "the impunged notices of re-entry upon forfeiture of lease and the threatened demolition of Express building are intended and meant to silence the voice of the Indian Express and, therefore, the impunged notices constitute a direct and immediate threat to the freedom of the press and thus are violative of Article 19(1)(a)."[43] The Court reminded that *"the permissible restrictions on any fundamental right guaranteed under part III of the Constitution have to be imposed by a duly enacted law and must not be excessive ie. they must not go beyond what is necessary to achieve the object of the law under which they are sought to be imposed"*. The Court further observed the power to impose the restrictions on fundamental rights is essentially a power to 'regulate' the exercise of those rights and not to 'extinct' those rights.

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

43. Supra note (41) at p. 909

The issue before the Supreme Court in Reliance Petrochemical Ltd. V. Indian Express Newspapers Bombay [44] was to what extent press is free to report on the matters of public importance pending before the Court. The Reliance Petrochemicals Ltd; the petitioner company issued the Public Issue of 12.5% Secured Convertible Debentures of Rs 200/- each for cash at par aggregating to Rs 539.40 crores (inclusive of retention of 15% excess subscription of Rs 77.40 crores). It was claimed by the petitioner that the debentures were issued after obtaining the consent of the Controller of Capital Issues on the basis of schedule indicated therein, and after complying with all the requirements of the Companies Act and otherwise.

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

Later on the respondents published an article claiming that the Controller of Capital Issues had not acted properly and legally in granting the sanction to the issue for various reasons stated therein and it was further stated that issue was not a prudent or a reliable venture.

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44. A.I.R. 1989 S.C. 190

The petitioner contended that the said article by commenting on a matter which is sub-judice amount the contempt of court and prayed that the respondents be prohibited from publising any other article or material on the subject. The Court issued an order of injunction, restraining all the respondants from publishing any article, comment, report or editorial in any of the issues of Indian Express or their related publication questioning the legality or validity of any of the consents, approval or permissions of controller of Capital Issues. Later on the respondents approached to the Supreme Court for the vacation of its order.

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

The Supreme Court while ignoring the contempt application due to procedural infirmity, adopted the balancing approach and as the issue had already been over subscribed even before the expiry of last date vacated the order and held that *issue is not going to affect the general public nor any injury is involved, it would be proper and legal, on an appraisal of the balance of convenience between the risk which will be caused by the publication of the article and damage to the fundamental right of freedom of knowledge of the people concerned and the obligation of the press to keep people informed that the injunction should not keep continue any further*[45]. Misra, J.

45. Id at p. 203

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

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

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46. (1992) 3 S.C.C. 637

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

(i) It is available to anyone on payment of subscription; and

(ii) members of the public are invited to contribute articles for publication [47].

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

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

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47. Id at p. 653 - 54

48. Id at p.655

49. Ibid

"It must be broadly construed to include the freedom to circulate one's views by the words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution [50]. The immense value of the verdict lies in the fact that it recognised the qualified privilege of respondent's right to reply.

Once again whatever the Indian Express case has forcefully hinted, TATA Press Ltd V. Mahanager Telephone Nigam Ltd. brought out in express terms that a commercial speech is protected under Article 19(1)(a).[51] The Mahanagar Telephone Nigam Ltd. under rule 458 made under section 7 of the Indian Telegraph Act was the sole authority to publish the telephone directory. Later on when under rule-458 it entrusted the work of printing the telephone directory to private parties, it allowed them to publish the advertisements under rule 459 in order to meet out the cost of the directory.

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

The publication of Tata-Pages was challenged as contrary to the rule 457, and 458 and 459 of the Indian Telegraph Rules 1957 made under section 7 of Indian Telegraph Act 1885.[52]

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50. Id at p. 656
51. A.I.R. 1995 S.C. 2438
52. Rule-458- Except with the permission of the Telephone Authority no person shall publish any list of telephone subscribers.
Rule-459 "The Telehone Authority may publish or allow the publication of advrtisements in the body of telephone directory.

It was contended on behalf of the appeallant that the said rules were violative of Article 19(1)(a) as the right to commercial speech is protected under the aforesaid provision of the Constitution.

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

The Court took into the consideration its earlier verdicts and concluded that "commercial speech" is a part of freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution. Examining the aspect from another angle it observed that *"the public at large has a right to receive the commercial speech. Article 19(1)(a) not only guarantees freedom of speech and expression, but it also protects the right of an individual to listen. read and recieve the said speech. So for as the economic needs of the citizens are concerned, their fulfilment has to be guided by information disseminated through advertisements. The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech."*[53]

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

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

53. Ibid

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

PERMISSIBLE RESTRAINTS:

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

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

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54. Supra note (41) at p. 909

Sovereignty and Integrity of India

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

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

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55. V.R.V. Sree Rama Rao V. Telgu Desam a Political Party AIR 1984 A.P.at p.353

56. Sec. 123 (3) of Representation of People Act provides. "The appeal by a candidate or his agent or by any other person .....Contd:

propagate secessionist tendency by the use of the word "Desam" and it is bound to go contrary to the preservtion and maintenance of sovereignty and integrity of India as envisaged by Article 19(2) of the Constitution.

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

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

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

Security of State

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

The first two cases which came before the Supreme Court when the Constitution was enforced were Brij Bhushan V. State of Delhi [57] and Romesh Thappar V. State of Madras.[58]

In Brij Bhushans case a weekly paper **organiser** was asked by the Chief Commissioner of Delhi under Sec 7(1)(c) of the East Punjab Public Safety Act, 1949 [59]. To sumbit for scrutiny before publication till further orders all communal matter and news and views about Pakistan, including photographs and cartoons except received from official agencies. The aforesaid order was challenged before the Supreme Court as violative of Article 19 (1)(a) of the Constitution.

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57. Supra note 18

58. Supra note 17

59. Sec 7 (1) (c) of East Punjab Public Safety Act provided that, "The Provincial Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for preventing or combating any activity prejudicial to public safety or the maintenance of public order may by order in writing addressed to a printer, publisher or editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny.

Since there is no provision under the Constitution prohibiting prior censorship, the Supreme Court followed common law principle, it rejected the contention of the State that the law was saved by Article 19(2), and said that, *"There can be no doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press, which is an essential part of the freedom of speech and expression declared by Article 19(1)(a)"* and held that pre-censorship of journal fell outside the scope of constitutional provision, and therefore, not only the order but also the law under which the order was made, was unconstitutional.

Once again in Romesh Thappar V. State of Madras where a weekly journal **Cross Roads** publishd and printed from Bombay was denied entry into, or the circulation, sale or distribution in the State of Madras under Sec. 9 (1-A)[60] of Madras Maintenance of Public Order Act 1949. The said Act was challenged as violative of Article 19 (1) (a) of the Constitution. The Court struckdown the impunged provision on the ground that unless the law restricting the freedom of speech and expression is directed solely against the undermining the security of the state or at overthrowing it, such law could not fall within The reservation clause (2) of Article 19 even though the restrictions it sought to impose may have been conceived generally in the interest of public order. It further observed that the impunged law which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order fell outside the scope of authorised restrictions under clause (2), and was, therefore, void the unconstitutional.

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60. Sec 9 (1A) of the Madras maintinance of Public Order Act, 1949, authorised the Provincial Government to prohibit or regulate the entry into, or the circulation sale or distribution in, the province of Madras any document or class of documents for the purpose of securing the safety or the maintenance of public order in the province.

In both Romesh Thappar and Brij Bhushan cases the issue before the Supreme Court was the constitutional validity rather than the executive action taken thereunder. The Court held that the expression "public order" and "public safety" covered much wider fields than were contemplated by the use of the words, "undermines the security of, or tends to overthrow the state. The Court expressed the view that in many circumstances and on most occassions a danger to public order or public safety would also be a danger to the security of the state, but that many acts prejudicial to public order or public safety would not be as grave as to endanger the security of the state. The constitutional provision justifying legislative abridgement of freedom of expression would cover only those grave offences against public order which would endanger the security of the state and not all offences against public order.

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

However, the observations expressed by Fazal Ali J. in his dissenting opinion could not be ignored. He while recognising the importance of the right given to a citizen, said that liberty of press is not to be confused with its "licentiousness". The Constitution itself has prescribed certain limits for the exercise of the freedom of speech and expression and this Court is only called upon to see whether a particular case comes within those limits. In my opin-

ion the law impunged (East Punjab Public Safety Act, 1949) is fully saved by Article 19(2). [61] It is, therefore, clear that in Fazal Ali's J. opinion the term undermining the secutiry of or tends to overthrow the state includes "public disorder" though it may not be grave enough as to undermine the security or tends to overthrow the state.

Placing emphasis on the word "solely" in the judgement, some of the High Courts [62] interpreted that the impunged law would be invalid unless it was directed solely against the freedom of speech and expression undermining the security of the state or tending to overthrow it. But later on when the Supreme Court decided the Press Bharti Case[63], it pointed out that the decisions in Romesh Thappar and Brij Bhushan have been more than once misapplied and misunderstood and have been construed as laying down a wide proposition that restriction of a nature imposed by Sec. 4(1)(a) of the Indian Press (Emergency Powers) Act,[64] or of a similar character are outside the scope of Article 19(2) of the Constitution as much as they are conceived generally in the interest of public order. The Court while upholding the constitutional validity of this section, further observed that, *"expression on the part of an individual inciting to, or encouraging the commission of violent offences like murder could not but be matters which would undermine the security of the state or lead to its overthrow and fall within the ambit of a law permitted by the Article 19 (2)."*

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61. Supra note (57) at p. 133
62. A.I.R. 1951 Pat. 12, A.I.R. 1951 Mad. 70, A.I.R. 1951 Pun. 18, A.I.R.1951, Saura. 09
63. A.I.R. 1952 S.C. 329
64. The Sec. 4 (1)(a) of Indian Press (Emergency Powers) Act, 1931 dealt with words or signs or visible representation which incite to, or tend to incite or encourage the Commission of any offence of murder or any congnizable offence involving violence.

Explaining the difference between Romesh Thappar and the present case, Supreme Court said that in earlier case the question was whether the impunged Act (Madras Maintenance of Public Order Act, 1949), authorising the Provincial Government to take certain steps[65] to secure the public safety and maintenance of public order was a law relating to any matter which undermined the security of or tend to overthrow the state (which in the Court's opinion was not, as public safety and public order had wider concept than undermining the security of or tends to overthrow the state). But the restrictions imposed by sec 4 (1)(a) of Indian Press (Emergency Powers) Act,on the freedom of speech and expression are solely directed against the underminning the security of state or the overthrow of it and are within the ambit of Article 19(2) of the Constitution.

Thus in the light of the Supreme Court's interpretation a legislation restricting the freedom of speech and expression in relation to incitement to aggravated forms of prejudicial activity or commission of violent crimes like murder which would undermine the security of the state is protected under Article 19(2), however the same provision could not protect a legislation covering the large field of public order and incitement to crimes, not of an aggravated nature and which may not undermine the security of State[66].

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

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65. Supra note (63)

66. J. Minattur : Freedom of Press in India at p. 44

Friendly Relations With Foreign States

It is the need of the time that in the close but disturb world of today the friendly relations with foreign states should be established and maintained in the national and international interest of political stability, economic development and world peace. Therefore, this ground as reasonable restriction was added by the First Amendment Act, 1951.[67]

Clause (2) of the Constitution (Declaration as to Foreign States) Order, 1950 was interpreted by Supreme Court in Jagannath Sahu V. Union of India.[68] The petitioner was detained under Sec. 3 of the Preventive Detention Act, 1950 [69] as he was likely to act further in a manner pre-judicial, inter alia, to the relations of India with foreign powers. The allegation against him was that he used to sent for publication to a foreign newspaper despatches of news and views containing false, incomplete, one sided and misleading information about the state of Jammu and Kashmir. These despatches were not only pre-judicial to the Government of India vis-a-vis Pakistan but obviously

67. Under Article 367of the Constitution the word Foreign States has been defined. The Article provides that "for the purpose of this Constitution 'foreign state' mean any state other than India, provided that, subject to provisions of any law made by Parliament, the President may by order declare any state not to be a foreign state for such purpose as may be specified in the order."
Exercising the power as provided under Article 367, the Constitution(Declaration as to Foreign States) Order 1950 was issued. Clause (2) of the order provides that "subject to a law of parliament, every country within the commonwealth would not be foreign state for the purpose of this Constitution.

68. AIR 1960 S.C. 625

69. Under Sec.3 of the Act the Central Govt. or the State Govt. if satisfied with respect to any person, with a view to preventing him from acting in any manner pre-judicial to the defence of India, the relation of India with foreign powers or the security of India, make an order directing that such person be detained, if it thinks it necessary to do so.

to the relations of India with foreign powers in general. The detention was challenged inter alia that Pakistan being a member of a Commonwealth is not a foreign state within the terms of the order, and therefore, there is no question of his acts being pre-judicial to the relations of India with foreign powers. Rejecting the argument the Court expressed the view that though for the purpose of the Constitution, in view of the order, Pakistan was not a foreign state but a distinction had to be made between a country not being regarded as a foreign state for the purpose of Constitution and that a country being a foreign power for other purposes. In their relations with each other and countries out side Commonwealth, the member of Commonwealth must be regarded as foreign powers-their affairs between themseleves were foreign affairs. Again, the expression "foreign affairs" under item 9 in list I of Seventh Schedule of the Constitution includes the relation of India with foreign powers. In this context, Pakistan though a member of commonwealth, was a foreign power for the purpose of the Act. Accordingly the order of 1950 was not applicable in the case of the petitioner.[70]

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

Public Order

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

In Ramji Lal Modi V. State of U.P [71] the editor, printer and publisher of a monthly magazine *Gaurakshak* was convicted for publishing an article with the deliberate and malicious intention of out raging the religious feelings of Muslims. The question before the Court was whether Sec 295-A[72] of Indian Penal Code could be supported as a reasonable law saved by Article 19(2). The plea raised on behalf of the appeallant was that the law in question had no bearing on the maintenance of public order or tranquility and consequently it could not claim protection of saving clause under Article 19(2). But the Supreme Court while upholding the constitutional validity said that fundamental rights guaranteed under Articles 25 & 26 are expressly subject to public order. It could not, therefore, be predicted that freedom of religion should

71. AIR 1957 S.C. 620

72. S.295 - A - Provide that, " who soever with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words either spoken or written, or by signs or visible representations or otherwise, insults or attempts to insult the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

have some or no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion could not, under any circumstances, be said to have been enacted in the interest of public order. Thus the Supreme Court came to conclusion that the impunged law had a bearing on the maintenance of public order and law of the nature of the impunged provision could be enacted in the interest of public order. The Court further observed that the law penalises only aggravated forms of insult to religion which are perpetrated with a deliberate and malicious intention of outraging the religious feelings of a class of citizens, when such insult have a tendency to disturb public order.

The bold and broad view expressed in Brij Bhushan's Case came under the cloud in Virendra V. State of Punjab [73] where in mid 1957 a **'Save Hindi Agitation'** was started in Punjab and the petitioners began publishing criticisms and news concerning the agitation in two newspapers,Viz, **Daily Pratap** and **Vir Arjun**, published simultaneously from **Jullandhar** and **New Delhi**. The first petitioner was editor, printer and publisher of the paper published from Jullandhar and second was editor, printer and publisher of the paper published from New Delhi. As the agitation gained momentum some unwarranted incidents took place. The Government of Punjab, therefore, issued notification against the first petitioner prohibiting him from printing and publishing news and other matters relating to the agitation for a period of two months under Sec. 2 (1) (a) of Punjab Special Powers

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73. AIR 1957 S.C. 896

(Press) Act, 1956.[74] The first step was taken to combat calculated and persistent propaganda carried on in the two newspapers published from Jalladar. The government also issued to the second petitioner two identical notifications under Section 3(1) of the aforesaid Act, [75] prohibiting the entry into Punjab, of the newspaper published from Delhi

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

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

75. Sec. 3(1) empowered the Government or any named authority to prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication for the aforesaid purpose.

Expressing agreement with state's plea the Court held (Das. C.J) that it was for the State Government, which was charged with the duty of preserving law and order in the state, to arrive at decision. Therefore, it had to be in possession of all material facts and whould be the best authority to investigate the circumstances and assess the urgency, the determination of the time and extent to which the restrictions should be imposed on the press must of necessity be left to the judgement and discretion of the State Government. Thus the Court upheld the legislation and the exercise of this power after talking of the extensive influence of the press on the public order [76]. It (public order) was seen as being very important and it was not considered unreasonable to give it priority over the freedom of the press[77].

The judgement thus extended the sweep of the restrictions. According to H.M. Seervai, this decision clearly shows that "restrictions more stringent than pre-censorship could be imposed in the interest of public order and the publication of certain matters could be totally prohibited for a limited period of time [78] Prof. D.K. Singh's view "censorship should be restored to only when the fabric of the society is in jeapardy [79] is supported by Rajiv Dhavan who even though recognising the wide scale agitation expresses fear of emergency like situation when he said "suppose the existence of such a state of affairs was not publicly known beyond a carefully guarded affidavit in court. For a short duration, the government could exercise absolute powers akin to those it can exercise during an emergency when civil liberties are threatened.

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76. Supra note (73) at p. 899
77. Rajeev Dhavan: The Press and the Constitutional guarantee of freedom of speech and Expression JILI Vol.28 N0. 3, 1986 at p. 325
78. Seervai, H.M: Constitutional Law of India Vol. 1 at p. 365
79. Singh D.K: Freedom of Expression and the Press"Press and the Law 10 (1968) P.I.I. publication.

The ground "public order" was graphically examined by the Supreme Court in Suprintendent, Central Prison V. Ram Manohar Lohia.[80] where the constitutional validity of Sec. 3 of Uttar Pradesh Special Powers Act 1932[81] was successfully challenged before the Supreme Court.

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

The Supreme Court took into consideration the interpretations made by it in earlier decisions in Romesh Thappar and Brij Bhushan on the words "public order" alongwith the first constitutional amendment in Article 19(2). Subba Rao. J. delivering the opinion of the Court rejected the plea of the state of "public order" and observed that in Article 19(2) the wide concept of "public order" was split up under different heads. The amended clause (2) enables Parliament to impose reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. All

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80. A.I.R 1960 S.C. 633

81. Sec. 3 of U.P. Special Powers Act provided "Whoever by words, either spoken or written, or by signs or by visible represenatation or otherwise, instigates expressly or by implication, any person or class of persons not to pay or defer payments of any liability and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representation containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250, or with both"

these grounds, said the Court, could be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicate that they must be intended to exclude each other. Public order is something which is demarcated from the others. In that limited sense, it could be postulated that public order is synonymous with public peace, safety and tranquility. Another conclusion in the case derived by the Supreme Court was that any remote or fanciful connection between the impunged Act and public order would not be sufficient to sustain its validity and pointed out that in Virendra V. State of Punjab, the Court made a distinction between a law which expressly and directly purported to maintain public order and the one which did not but left it to be implied from it, and between a law which directly maintained public order and the one which indirectly brought about the same result. The distinction did not ignore the necessity of intimate connection between the law and the public order [82].

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

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

82. Supra note. (80) at p.p. 639 - 40

83. Ibid

next to Ram Manohar Lohia's case" which in his opinion indicates, "a more liberal appraoch by the Court in judging of the validity of legislation competent under Article 19(2)." [84] However, the view of the Court that any instigation to break a law may not always be an offence is untenable.

In Babu Lal Parate [85] the constitutional validity of Sec. 144 of Code of Criminal Procedure[86] was challenged on the ground that it places unreasonable restriction on the right of freedom of speech and expression. It was held by the Court that this section read as a whole clearly showed that it was intended to secure the public weal and order by preventing disorders, obstructions and annoyances and the orders that could pass under it by responsible magistrate were only of temporary nature. The Court also did not accept the plea of 'clear and present danger' evolved in Schenck V. United States [87] that previous restraints on the exercise of fundamental right were permissible only if there was a clear and present danger, stating that it has no application in India since the rights guaranteed under Article 19(1) were not absolute but subject to the restrictions under clause (2) of Article 19. Thus the Court once again followed the test expressed in Virendras case and allowed extensive preventive and other powers to local officials as long as some pattern of control existed.

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84. Setalvad, M.C : The Indian Constitution at p. 72

85. AIR 1961 S.C. 885

86. Sec. 144 Cr. P.C. says a Magistrate, if he is of the opinion that there is sufficient ground for immediate prevention, can by a written order direct a person or persons to abstain from certain acts if he considers that such direction is likely to prevent a disturbance of public tranquility or a riot or an affray.

87. Schenck V. U.S. 249 U.S. 47 (1919)

In Kedar Nath V. State of Bihar [88]. Once again the scope of public order was under consideration when the constitutional validity of Sec. 124-A and 505 [89] was challenged.

The Supreme Court, perhaps to point out that though the sedition under Article 19(2) was not a ground upon which the restrictions could be placed on freedom of speech and expression, but the concept was not altogather dropped by the Assembly, referring several Indian and English decisions alongwith the opinion of Fazal Ali. J. (who expressed a dissenting opinion in Romesh Thappar and Brij Bhushan Cases) the Court also quoted the following observations of Federal Court in N.D. Majumdar V.Emperor [90].

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88. A.I.R 1962 S.C. 955

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

Explanation 1

The expression "disaffection" includes disloyality and ill feelings of enmity.

Explanation 2

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

Explanation 3

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

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

90. A.I.R. 1942 F.C. 22

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

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

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

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91. Quoted in AIR 1962 S.C. 955 at p. 964.

The Supreme Court in view of above observations also upheld the constitutionality of Sec. 505 I.P.C. It however, added that each one of the constituent element of the offence under this section had reference to, and a direct effect on, the security of the state or public order. Hence its provisions did not exceed the bounds of reasonable restrictions on the freedom of speech and expression and consequently saved by Article 19 (2).[92]

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

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

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92. Id at p.p. 967 - 70

Decency or Morality

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

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

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

93. Basu D.D. : Law of the Press at p.p. 100 - 01

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

In India, it was Ranjit D. Udeshi's Case [94] where for the first time the Supreme Court had an occassion to explain the meaning of obscenity when the constitutional validity of Sec. 292 of I.P.C. was challenged. The appeallant was convicted as he had exhibited for sale the unexpurgated edition of **The Lady Chatterley's Lover by D.H. Lawrence** at his book stall. The plea raised on his behalf was that Sec. 292. I.P.C. is violative of Article 19(1)(a) as the meaning of the term "obscene" was too vague, or as at any rate, it applied only to the writings, pictures etc. intended to arouse sexual desire. The mere treating with sex and nudity in art or literature was not per se, evidence of obscenity.

The Supreme Court while upholding the constitutional validity of the impunged law adopted the Hicklin's test laid down by Cockburn C.J.in Queen V. Hicklin which runs into following words.[95]

"Whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.....It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of most impure and libidinous charcter.[96]

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94. AIR 1965 S.C. 881

95. (1868) 3 Q.B. 360

96. Quoted in AIR 1965 S.C. 881 at p. 887

The Court was of the view that in judging a work stress should not be laid upon a word here and a word there, or a passage here and a passage there. Though the work as a whole must be considered, the obsence matter, however must be considered by itself and seperately to find out whether it was so gross and its obscenity so decided that it was likely to deprave and corrupt those whose minds were open to the influences of this sort. Where obscenity and art were mixed. The art must be so preponderant as to throw obscenity, into a shadow or the so trivial and insignificant that it could have no effect and might be over looked.

The judgement of the Supreme Court traversed a substantial corpus of authority, English[97] as well as American[98] . Ultimately Hidayatullah, J. rested his decision upon the authority of Hicklin, though he acknowledged the continuing shift in standards and values. He did not, however, enquire deeply into the uncertainities of meaning in the words 'deprave and corrupt' and strongly emphasised the relevance of contemporary community standards. The issues decided by the Court may be summarised as following.

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

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

3) Though the expertopinion is admissible butnotconclusive because

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

98. a) Roth V.U.S. (1957) 354 U.S. 478 (b) Manuel Enterprises Inc V.J. Edward Ray (1962) 370 U.S. 478 (c) Nico Jacobellis V. State of Ohio (1964) 112 Penn. L. Rev 834.

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

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

The Hicklin test and the observations made there- under were followed in Chandrakant Kakodkar V.State of Maharashtra[99] where the appeallant was the author of a story 'Shama' published in a monthly Marathi magazine 'Ramba' of Diwali issue in 1962. The story dealt with the relationship of three women who came into the frustrated life of the male character, Nishikant. One of the women who entered into the life of Nishikant after realising that her love could not be consummated as her parents would not allow her to marry with her lover, encourages him to bring it to a culmination point. The story was adjudged obscene and the author was convicted under Section 292 of Indian Panel Code.

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

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99. AIR 1970 S.C. 1390

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

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

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

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100. Samaresh Bose V. Amal Mitra AIR 1986 S.C. 967

His reminiscences of that affair were held obscene by trial court and the High Court. There were other episodes suggestive of sex ie. Sukhen and his friends's sister Manjari and affair of his brother with the maid servant's daughter. The author and the publisher were prosecuted under Sec 292 of Indian Panel Code, 1860. The Conviction and sentence was maintained by Calcutta High Court.

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

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

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101. Id at p. 983
102. Ibid
103. Id at p. 984

Contempt of Court

The press plays a vital role in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and abov board. Any misconduct in a trial is sure to receive notice in the press and subsequent condemnation by public opinion. The press itself is liable to make mistakes. The watchdog may sometimes break loose and have to be punished for misbehaviour.[104] The contempt of court, therefore, is an area where a journalist has to tread warily. Oswald, an authority on the subject defines it in the following terms.

"To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring any authority and the administration of the law into disrespect or disregard or to interfere with or prejudice parties litigant or their witnesses during the litigation."[105]

The Indian Constitution empowers the Supreme Court under Article 129 and the High Court udner Article 215 to punish a person for their contempt.[106] Article 19(2), also permits the imposition of restrictions on the freedom of speech and expression in relation to contempt of court.

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104. Quoted in freedom of press in India by J. Minattur. at p. 78

105. Quoted in Press Law by. Mudhalkar, J.R. at p. 49

106. **Article 129** :- The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish, for contempt of itself.
Article 215:- Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

After the Constitution came into force Contempt of Courts Act, 1952 was enacted. The aforesaid Act, however, did not define the word contempt, and, therefore, the courts in India had to import the English concept of the contempt.

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

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

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

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107. AIR. 1954 S.C. 743

of appointment of Hon'ble judges as Ambassdors, Governors, High Commissioner etc. who give judgement against government but this has so for not made any difference in the firmness and justice of Hon'ble judges."

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

In E.M.S. Namboodaripad V.T.N. Nambiar,[108] the appeallant was the Chief Minister of Kerala. He, in a press conference made certain critical remarks about the judiciary and described it as an *"instrument of oppression" and judges as "guides and dominated by class hatred"* instinctively favouring the rich against the poor. The remarks were reported in newspaper. The appeallant was convicted on a charge for contempt and sentenced to a fine of Rs 1000/- and in default to undergo imprisonment for one month. On appeal the Supreme Court held that the words constituted the contempt of court and were intended to weaken the authority of law and the law courts by having the effect of lowering the prestige of judges and the courts alike. Accordingly the Court dismissed the appeal but reduced the penalty up to Rs 50/.

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108. AIR 1970 S.C. 2015

It was observed that *"The courts in India are not sui generis. They owe their existence, form, powers and jurisdiction to the Constitution and the laws. The Constitution is the Supreme law and other laws are made by parliament. It is they that give the courts their obligatory duties, one such being the settlement of disputes in which the state (by which we mean those in authority) are ranged against citizens. Again they decide disputes in which class interests are apparent. Explaining further its role the Court said. The Court as well as all the other organs and institutions are equally bound by the Constitution and the laws. Although the courts in such cases imply the widest powers in the other jurisdictions and also give credit where it belongs they can not always decide either in favour of the state or any particular class. There are inumerable cases in which the decisions have gone against what may be described in the language of communism as the exploiting classes.*[109]

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

The aforesaid Act classified contempt of court into two categories. A) Civil contempt which means and includes wilful disobedience to any

109. Id at p. 2023

judgement, decree, direction or order, and (B) Criminal contempt which means and includes publication whether by words spoken or written, signs, visible representation or otherwise and scandlising, lowering the authority of law and administration of justice.

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

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

In C. K. Daphtary V. O. P. Gupta[111] where the first respondent had

110. AIR 1970 S.C. 1694

111. AIR 1971 S.C. 1132

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

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

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112. Barda Kanta V. Registrar Orissa High Court AIR 1974 S.C. 710

113. Language of Article 235.provides....."The control over district courts and courts subordinate there to including posting and promotion, of and the grant of leave to , perosns belonging to the judicial service of state and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this articles shall be construed as taking away from any such person any right of appeal wich may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

court under section 2(c) of Contempt of Courts Act, 1971.[114] Barad Kanta was a subordinate judicial officer who refused to follow the decisions of the High Court. His conduct was considered by the Supreme Court as falling within the preview of law of contempt. He also complained against the Chief Justice and other judges of Orissa High Court.

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

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

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

c) "Criminal contempt" means the publication (whether by words, spoken or written or by sings, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which -

i) Scandlises or tends to scandlise, or lowers or tends to lower the authority of, any court, or

ii) Prejudices, or interferes or tends to interfere with, the due course of any jucidical proceeding; or

iii) Interferes , tends to interfere with, or obstructs or tends to obstruct, adminis-tration of justice in any other manner.

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

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

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115. AIR 1976 S.C. 1207

116. In Re Sham Lal AIR 1978 S.C. 489

117. Id at p. 493

that 'irrational and abusive' contempt is not a fair comment, an exception to contempt of court. However, whatever may be the reason for dropping the case, it clearly demonstrates the risk which a journalist faces by merely re-producing the signed document on a judgement, made by eminent persons. On the other hand in Indian Express Case known as in re Mulgaonkar[118] case, Chief Justice Beg was willing to drop proceedings even though the judges had been criticised and in which he was also attacked for framing a code of ethics for judges. He talked of the responsibilities of judges and lawyers and hoped that "the seperate statement of reasons for dropping the proceedings (would) succeed in at least emphasising that they would not have been in vain[119]. The Supreme Court laid down certain norms regarding publication in newspapers which may be summarised as under.

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

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118. AIR 1978 S.C. 727

119. Id at p. 735

supremacy of the rule of law by fauling its source and stream.

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

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

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

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120. Ram Dayal V. State of U.P. AIR 1978 S.C. 921

121 (1974) L.J. 924

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

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

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

122. National Textile Worker's Union V.P.R. Ramakrishinan AIR 1983 S.C. 759

of contempt must be proved beyond reasonable doubt. He, in the course of his judgement rightly observed that if a high dignitory wish to avoid the risk of being charged with contempt of court, it was pre-eminently desirable that the speech should be reduced to writing or a script prepared soon after, or what is now customary, that a tape recording should be made.[123]

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

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123. A.I.R. 1984 S.C. 615 at p. 617

Defamation

Defamation is an injury to a man's reputation which is regarded as his property while insult is an injury to one's self respect. In other words a person is defamed when his reputation is lowered in the estimation of others.[124]

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

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124. Op Cit note (93) at p. 112

However, the law of criminal liability is codified and contained under Sections 499-502 of Indian Penal Code. The offence requires the mensrea and the section 499 of the Penal Code provides defences which exhaust almost all the traditional defences.

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

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

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

125. Sahib Singh V. State of U.P. AIR 1965 S.C. 1451 at p. 1454

of the article no evidence of an object of advancing the public good was established and there was also no evidence to show the defamatory remarks have been made with due care and attention. The Supreme Court while stressing the great power of the press in impressing the public mind held the press guilty of causing defamation.

The issue of 'good faith' was one of the major factor in determining the freedom of press in relation to defamation in Sewak Ram Sobhani V. R.K. Karanjea.[126] During Emergency Sobhani, a top R.S.S. leader was lodged in Bhopal Central Jail. Another young lady Mrs. Uma Shukla was also lodged in the same jail. The jail rules do not allow free mixing among male and female inmates but the rules were not strictly followed. Mrs. Uma Shukla was found pregnant and underwent an abortion. An enquiry was conducted by a high rank official who in his report indicated that Mr.Sobhani was responsible for empregnating the young lady. The summary of the report appeared in 'Blitz', edited and printed by Mr. R.K. karanjia. When emergency was revoked, the appeallant filed a suit for defamation against the editor. The editor claimed exeption of Sub. Sec.(9) of Sec 499 IPC[127] and insisted to produce the enquiry report to the magistrate before his statement is recorded. The Government claimed the privilege and the prayer of the editor was rejected. He filed an appeal before the High Court and a copy of the report was supplied. The High Court on the basis of that report quashed the prosecution of the editor.

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126. Sewak Ram Sobhani V. R.K. Karanjia AIR 1981 S.C. 1514

127. Exception IX to Sec. 499 IPC provides that 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 interest of the person making it, or of any other person or for the public good.

Finally the matter came before the Supreme Court.

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

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

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

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

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128. Id at p. 1517

129. Id at p. 1520

would be a matter of inference."[130]

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

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

130. Id at p. 1523

131. Rajgopal V. State of T.N. AIR 1995 S.C. 264

Inspector General (Prison) wrote a letter to the editor that Auto-Shankar has denied of writing any autobiography and, therefore, the publication should be stopped. The editor moved to the Supreme Court. The question before the Supreme Court was whether public officials who apprehend that they or their colleagues may be defamed can impose a prior restraint upon the press to prevent such publications?

Referring the New York Times V. U.S. popularly known as Pentagan Paper's Case that *'any system of prior restraint of (freedom of) expression comes to this court bearing a heavy presumption against its constitutional validity and in such cases the Government 'carries a heavy burden of showing justification for the imposition of such a restraint'* held that, **"neither the Government nor the officials who apprehend that they may be defamed, have the right to impose prior restraint upon the publication of alleged autobiography of Auto-Shankar. The remedy to public official, public figures, if any, will arise only after the publication and will be governed by principle indicated herein"** or in other words such official could take action for damages after publication, if they prove that the publication was based on **false and published without any reasonable verification of facts.**[132] The Court however, made it clear that as a general rule no remedy is availabe to public officials if they are defamed due to any act done by them in discharge of their official duty but if they are defamed in their individual capacity they are free to seek remedy under the civil law or the criminal law like any other individual.

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132. Id at p. 277

The Court in the same case further extended the scope of freedom of press by holding that even the person whose own biography is to be published or being published can not restrain the press if it is based on public record including the court record. Nevertheless, it also warned at the same time that if published beyond that ie. life story then unless it is published with the consent of the person concerned it would be an invasion on his privacy and the press in that case would be liable to the consequences.[133]

133. Supra note 131 (at p. 276)

Incitement to an offence

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

In India, amendment to Article 19(2) of the Constitution permits restrictive legislation on the right of freedom of speech and expression in relation to incitement to an offence. Under Article 367 the word "offence" has been assigned the same meaning as is given to it under Section 3(38) of General Clause Act, 1897.[135]

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

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134. Schenck V. U.S. 249 U.S. 47 (1919)

135. Under Sec 3(38) of General Clause Act the "offence" has been defined as an omission made punishable by law.

In State of Bombay V. Balsara[136]. The Supreme Court upheld the constitutional validity of section 24(1) (b) of the Bombay Prohibition Act, 1949[137]. But simultaneously struck down the validity of Sec. 23(b) holding it so wide and vague that it would be difficult to define or limit the scope. Therefore, in order to be saved by the clause (2) to Article 19, the legislation must be levelled against a "definite" offence and a vague restriction is not a valid restriction.

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

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136. 1951 S.C.J. 478

137. Sec. 24 (1) - "No person shall print in any newspaper, newsheet, book, leaflet, booklet, or any other single or periodical publication or otherwise display or distribute any advertisement or other matter.....

(b) which is calculated to encourage or incite any individual or class of individuals or the public generally to commit an offence under the Act, or to commit a breach or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence permit, pass or authorisation granted thereunder.

138. A. I. R 1960 S.C. 633

During Emergency

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

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

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

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

139. Quoted in Law of Press Censorship in India By Sorabjee, S.J. at p. o3
140. Article 19 of the Declaration provides that, "Every one has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"

press was not an end in itself but a means to the end of a free society. This freedom of press did not imply the freedom from responsibilities for its exercise and without a disciplined sense of responsibility, a free press which is an inestimable privilege may well become the 'scourage of the Republic'.

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

The emergency provisions under the Constitution of India are the result of a compromise between the principles of Constitutinal Govern

ment and strong and effective government. When one attempts to reconstruct the intentions of the founding fathers, the other becomes entangled in all sorts of ambiguties The Granville Austin rightly observes that, **"It is clear that even in the minds of individual members of Constituent Assembly there existed considerable tension between three competing concerns: (1) The desire for personal freedom nurtured by the experience with oppressive despotic colonial rule; (2) The drive for social reform and building up a welfare society; and (3) The fear of disruption and instability arising from the divisive forces or region, provinces, language, community, ethnicity and extremist political ideologies.**[141]

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

An emergency under Article 352 can be proclaimed by the President of India, if he is satisfied that a grave emergency exist whereby the security of India or any part thereof is threatened due to war, external aggression, or armed rebellion. The Article also makes it clear that emergency can be declared before the actual occurance of aforesaid grounds[142]. So for as the satisfaction of the President is concerned, it is now well established that it means

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141. Granville Austin: The Indian Constitution: Cornerstone of a Nation at p.p.105-6

142. Article 352 .....[Explanation-A : Proclamation of Emergency declaring that the security of India or any part of the .....Contd

satisfaction of the cabinet. A Proclaimation of Emergency may be issued under Article 352 (on the ground of war, external aggression and armed rebellion), 356 (failure of constitutional machinery in a state), and 360 (Financial Emergency). But it is only the emergency declared under Article 352 which affects the freedom of press.

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

Conted..... territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurence of war or any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof].

143. Article 358(1) .....[While a Proclaimation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression is in operation], nothing in article 19 shall restrict the power of the state as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclaimation ceases to operate except as respects things done or omitted to be done before the law so ceases to have effect

Thus the first fetter on the power of Parliament breaks down in emergency and a law made under Article 358 curtailing the freedom of press or any of the right under Articel 19 of the Constitution can not be challenged so long as emergency is in force. Similarly under Article 359 the fundamental rights guaranteed under part III of (except rights provided under Article 20 and 21) the Constitution can be curtailed when a Proclaimation of Emergency under Article 352 of the Constitution is in operation.[144]

A Proclaimation of Emergency under Article 352 has far reaching effect under Article 250 when the parliament becomes empowered to legislate on the subjects enumerated under list II[145] and under Article 353 where the power of union extends to giving executive directions to the states.[146] prior to 44th amendment to the Constitution upon a Proclaimation of emergency by the President of India, Article 358 had automatic operation whereby the rights guaranteed under Article 19 were automatically suspended. 44th Constitutional Amendment Act, 1978, however, Amended Article 358 and now under this Article as soon as the proclaimation of emergency is issued under Article 352 on the ground of war or external aggression only and so long it lasts, Article 19 stands suspended in view of Article 358 and the executive power of the state to that extent widened. But when the Proclaimation is issued on the ground of armed rebellion, Article 19 will not be affected nor the power of the state shall be enlarged in that respect. More over any law which curtails the freedom must contain a recital to the effect that it is in relation to the proclaimation of Emergency in operation when such law is made.

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

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

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

146. Article 353- while a proclaimation of Emergency is in operation, then notwith standing anything in this Constitution, the executive power of the.....Contd:

Before 1978, every law enacted or the executive action taken during emergency which infringed Article 19 was protected and immune from challenge before any court of law. But if any law was made or action taken before the issuence of proclaimation of emergency, such laws or action were open to be challenged on the ground of violation of Article 19 even during the emergency.[147]

The same view was affirmed in B.C. & Co. V. Union of India[148] where the Supreme Court held that the News Print Policy of 1972-73 which was a continuation of old policy made before the Proclaimation of Emergency was not protected even during the Emergency from attack under Article 19. It held that executive action which is unconstitutional at the time its being taken, is not immune from being challenged in a court of law during the emergency. Proclaimation of Emergency would not authorised the taking of detrimental executive action during that period affecting Article 19 without any legislative

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

147. State of M.P. V. Bharat Singh AIR 1967 S.C. 1170

148. B.C. & Co. V. Union of India AIR 1973 S.C. 106 at p. 116

authority or in purported exercise of power conferred under any pre-emergency law which was invalid when enacted.There is no reported case by the Supreme Court on press censorship during emergency.[149] Therefore, in the absence of such decision reference may be made of the two unreported decisions delivered by the Bombay High Court on the freedom of press during emergency to have an idea of ambit of censorship on the press.

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

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

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

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149. Though four judgements were delivered by the apex court during that period on personal liberty but in Habeas Corpus (AIR 1976 S.C. 1207), the judgement was banned by censors.

the merits the Court struck down the action of the censor and held that he has misdirected himself in law and had taken into consideration extraneous matters. This was the first judgement of its kind after the fresh Proclaimation of Emergency and the censorship order.

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

An appeal was made against this judgement which was heard by a Division Bench consisting of Mr. justice D.P.Madan and Mr. Justice H. Kania. The appeal court rejected the preliminary contention that the writ petition was not maintainable and held *"Inspite of Proclaimation of Emergency and the Presidential orders a citizen is free to say, write and act as he likes so long as he does not transgress the law. What the respondent was doing by his writ petition was not to seek to enforce any of his common law rights or any rights under part-III of the Constitution but to challenge the legality of the action by the appeallant on the ground that it was without the authority of law. "The guidelines issued under clause (3) of censorship order do not have any: statutory authority"* and that *"guidelines issued under clause (3) of censorship order must be read in conjunction with the purpose for which the said order was made, and any provision thereof which may at the first blush appear to be too wide must be interpreted in the light of purpose and object of censorship order."*

The immense value of the judgements lie in the fine balance it has achieved between two important social interests, liberty of thought and expression and public safety. The judgement has done a great service by recognising that even in times of emergency the right of dissent is essential for the welfare of the society. It has re-assured every right thinking person that he need not to fear of speaking and writing in praise of it.

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

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

The press though does not enjoy any immunity from the laws of general taxation but the same can not be levied upon it in such manner which adversely affects the freedom of press. The government can not take any action to elimenate the unfair competition between big and small newspapers in the guise of Press Commission recommendation by implementing newsprint policy. Similarly it can not take any punitive action to muffle the voice of

the press.

The press on the rule of balance of convenience may be stopped from publishing any matter if it comes in conflict with other's fundamental rights. However, considering the importance of press, it can not last beyond the period than actually required under the circumstances of a particular case. It is not that only the press can claim its freedom against the state as a fundamental right, under exceptional circumstances even an individual may claim the publication of his views in a magazine maintained out of public funds to enable the readers to have a complete picture upon which his opinion is formed.

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

Unlike U.S. Constitution, (where the courts have evolved noble rules of restrictions) the Constitution of India expressly provides certain grounds under Article 19(2) upon which reasonable restrictions may be placed on the press. Therefore, press can not publish any matter it pleases. It has no freedom to publish any material which may endanger the sovereignty and intergrity of country neither it may be allowed to carrry out any matter which is likely to put the security of the country at risk. But it is the public disturbances of unmanagable magnitude and not of purely local significance which may pose any risk to the security of the state. Public peace and tranquility is essentialto

the development of the country and the press, therefore, may be restrained from acting in such a manner which may disturb the public peace. Reasonable restrictions may also be placed on the press to prevent it from publishing any material which may debase and debouche the mind of young and adolescent readers. Simlarly the freedom is not available to express one's views in such manner that amount the contempt of courts. Nor it is at liberty to defame any person and if any person is defamed because of any publication the press can not escape from the liability. It is also universally recognised principle that freedom of press may not extend to a limit where it amounts the incitement to offence; and therefore, press may be subjected to reasonable restrictions on the aforesaid ground.

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

CHAPTER: IV

REASONABLENESS OF RESTRICTIONS

A) *Substantive Reasonableness*

B) *Procedural Reasonableness*

REASONABLENESS OF RESTRICTIONS

The First (Constitutional Amendment) Act, 1951 amended the Article 19(2). The amendment beside adding three new grounds namely. Public order, Friendly relations with foreign states and incitement to an offense, also added the word 'reasonable' before the restrictions envisaged under Article 19(2). Consequently to restrict the freedom of the press, it is not enough that the restriction was saved by Article 19(2), but it must also be reasonable. This was an attempt to strike a proper balance between the freedoms guaranteed under Article 19(1) (a) and the social control permitted by the other clauses of the Article. The word 'reasonable' precedes the word 'restriction' in the clause (2) to (6) has not only limited the scope of legislative abridgement but has also made the reasonableness a justiciable one.

It is beyond controversy that the term 'reasonable' was intended to give and is actually used by the courts to exercise the power to review the laws restricting the freedoms guaranteed under Article 19 of the constitutition itself, the courts have to decide the actual scope of such review, or in other words it may be said that the Constitution is silent on the issue of what is and what is not a reasonable restriction? Hence it has been left to the courts to determine the standard of reasonableness to be adopted while scrutinising the validity of any impunged law. It is not an easy task and the view expressed by Madras High Court in **V.G. Row V. Stae of Madras** was affirmed by the Supreme Court when the case went in appeal.[1] Patanjali Sastri.C.J;

1. A.I.R. 1952 S.C. 196

said that, *"It is not possible to think only in abstract. Several circumstances must be taken into consideration ie. (i) The purpose of the Act, (ii) The conditions prevailing in the country at that time, (iii) The duration of the restrictions. and (iv) its nature and the extent."*

The Supreme Court for the first time in Dr.N.B.Khare V. State of Delhi[2] considered the scope of the reasonableness of the restrictions. The petitioner had challneged the restrictions imposed upon his right under Article 19(1) (d) to move freely throughout the country by externment order passed against him under **East Punjab Public Safety Act, 1949**.

The grounds relied upon by the petitioners were mostly directed against the procedural aspect of impunged law. It was argued on behalf of the government that the Court could examine only the substantive law on the point and if the restrictions in their substance were found to be reasonable, the petition had to be rejected without going into the other aspects of the law. The Court categorically rejected this narrow interpretation sought to be put on the term 'reasonable' to restrict the Court's power to consider only the substantive law on the point. It was observed, by **Kania, C.J**. in majority opinion. *The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive as well as procedural provisions. While the reasonableness of restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the court the question of reasonableness of the procedural part of the law. It is obvious if a law prescribe five years externment or ten years externments, the question whether such period of externments is reasonable, being the substantive part, is necessarily for the consideration of*

2. 1950 S.C.J. 328

the Court under clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also open for the consideration of the court. [3]

Mukherjee, J. who delivered a dissenting judgement was agree with the majority opinion on the point that, in determining the reasonableness of a law all the relevant circumstances have to be taken into consideration and one can not dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. The question of reasonableness may arise as much from the substantive part of the law as from its procedural portion. [4]

It is, thus, noteworthy that both majority as well as minority view of the Court held that reasonableness of restrictions meant reasonableness of all the aspects of restrictions, and therefore, both the substantive and procedural aspects of the restrictions were justiciable.

This distinction between the substantive and procedural aspect can best be explained in the following words.

" We may view substantive due process as referring to the content or subject-matter of a law, an ordinance, whereas due process refers to the manner in which a law, an ordinance or an administrative practice, or a judicial task is carried out.[5]

The aforesaid distinction between substantive and the procedural aspects may also be traced in the judicial interpretation of the constitutional provision contained in Article 19 of the Constitution.

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3. Id at p. 330
4. Id at p. 335
5. Abraham, H. J: Freedom and the Court at p. 110

SUBSTANTIVE REASONABLENESS

In the performance of its duty as the guardian of the Constitution. the Supreme Court looks not only the form but also its real character and its reasonable and substantial affect on the rights which are alleged to be curtailed on account of the restriction.

In V.G. Row V. State of Madras.[6] Patanjali Sastri, C.J. observed that. *It is important to bear in mind the test of reasonableness, wherever prescribed, should be applied to each individual statute impunged, and no abstract standard, or general pattern of reasonableness as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of judges participating in the decision should play an important part and the limit to their interference with legislative judgement in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of their elected representatives of the people have, in authorising the imposition of restrictions,*

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6. Supra note 1

considered them to be reasonable [7]

In Ramji Lal Modi V State of U P [8], the Court held that the expression 'in the interest of' has extended the scope of 'public order' because a law may not have been designed to directly maintain public order and yet it may have enacted in the interest of public order. If, therefore, a law penalising such activities having tendency to cause public disorder as an offence can not but to be held a law imposing reasonable restrictions. The learned Chief Justice, Das, however, made it clear that the impunged section "only punishes aggravated forms of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings" of a class of citizens. The calculated tendency of the aggravated form of insult would clearly be to disrupt public order, and it has, therefore, been held that the section which penalises such activities is well within the protection of Article 19 (2), as being a law imposing reasonable restrictions on the exercise of the right of freedom of speech and expression guaranteed under Article 19 (1) (a).[9]

The Supreme Court in **Virendra V. State of Punjab** [10], struck down sec 3(1) of the **Punjab Special Powers (Press) Act, 1956**, on the ground that it was substantially objectionable because no limitation was imposed as to the duration of the ban on the importation of certain newspapers. The Court observed, "The surrounding circumstances in which the impunged law came to be enacted, the underlying purpose of the enactment and the extent and the urgency of the evil sought to be remedied

7. Id at p. 200
8. A. I. R. 1957 S.C. 620
9. Id at p. 623
10. A.I.R. 1957 S.C. 896

have already been adverted to". The Court further observed, "The powerful influence of the newspapers for good or evil, on the minds of the readers, the wide sweep of their reach, modern facilities for their swift circulation to territories, distant and near, must all enter into the judicial verdict, and the reasonableness of the restrictions imposed upon the press has to be tested against this background. It is certainly a serious encroachment on the valuable and cherished right of freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondants relating to or concerning what may be the burning topic of the day." [11]

The Supreme Court while applying the aforesaid test however, held sec 2 (1) (a) of the same Act valid as the conferment of wide powers upon executive with proper safeguards of time and opportunity of representation was nothing else but the imposition of permissible reasonable restriction on the exercise of the freedom, guaranteed under Article 19 (1) (a)[12] and which may extend to amount prohibition if required under the circumstances for certain period.

In Supt. Central Prison V. Dr. R. M. Lohia,[13] the Supreme Court however, did not follow the extending approach of restrictions where under the impunged section any instigation by words or visible representation not to pay or defer any payment of tax or even contractual dues to the government authority or land owners was made an offence

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11. Id at p. 900
12. Id at p. 902
13. A.I.R. 1960 S.C. 633

and which also included even an innocuous utternace. Emphasising the need of proximate relation betwen the action and restriction it held that, *"The limitations imposed in the interest of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order but not one farfetched, hypothetical or problematical or too remote in the chain of its relations with public order."* Thus a restriction which has no proximate relation with public order is not a reasonable one and bound to be struck down by the Court.

The Court interpreted the decision in Virendra's case differently. In the words of Subba Rao. J; **"The Court in that case was only making a distintion between an act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose, but left it to be implied therefrom; and between an Act that directly maintains public order and one that indirectly brought about the same results.**[14]

Whether a law which prohibits an advertisement from being published is an unreasonable restriction or not, was taken into consideration in Hamdard Dawakhana V. Union of India,[15] where the law prohibited the advertisement relating to the sale of certain drugs and medicines as they might have led to injurious practice of self medication. Considering the object, the purpose, the intention, the mischief aimed at and the expert opinion in order to upheld the validity. Kapoor, J; observed, *"An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed.*

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14. Id at p.p. 639 - 40

15. A.I.R. 1960 S.C. 554

..... it can not be said that every advertisement is a matter dealing with the freedom of speech nor it can be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Article 19 (1) (a) it seeks to further".

The Court further observed, **"when the proximate relations with the object of law had been established, it could not be said that the definition of the word `advertisement' was too wide. Had it not been so broad. it would have defeated the very purpose for which the Act was brought into the existence."** Consequently the Supreme Court did not find the restrictions arbitrary or imposing unreasonable restriction. Nevertheless it struck down Sec. 8 of the impunged Act [Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954] where no limitation was placed on the right to search and seizure of any document which in the opinion of authority contained any advertisement contravening the Act, as arbitrary, excessive and for beyond the purpose of the Act, and therefore, amounting to an unreasonable restriction.[16]

Another view for determining the reasonbaleness of a restriction seem to have been developed in Gopalan's case, where Kania, C.J., said that **"the true approach is only to consider the directness of the legislation and not what will be the result of the detention, otherwise valid, on the mode of detenues life.[17]**

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16. Id at p. 568

17. A.K. Gopalan V. State of Madras A.I.R. 1950 S.C. p.235

The aforesaid view to adjudge the reasonableness of a restriction was further developed by Patanjali Sastri, in a case while upholding the preventive detention of the petitioner under the **Preventive Detention Act, 1950**, said that, *"The direct object of the order was the preventive detention and not the infringement of the right of freedom of speech and expression which was merely consequential."*[18] Therefore, the inevitable result of the decision is that the object and form of state action became the determining test to ascertain the violation of the right.

Relying on Ram Singh's Case Bhagavati, J, as he then was, formulated the **doctrine of inevitable effect test** in Indian Express Ltd. V. Union of India for adjudging the reasonableness of a particular law infringing the fundamental right. All the consequences resulted on account of the Working Journalists (Condition of Services) and Miscelleneous Act, 1955, said Bhagvati. J. would be remote unless they were the direct and inevitable consequence of the measure enacted in the impunged Act. The Court observed:

"All the consequences which have been visualised in this regard by the petitioners viz - the tendency to curtail circulation and thereby narrow the dissemination of information, fetters the petitioner's freedom to choose the means of exercising the right. Likelihood of the independence of the press being undermined by having to seek government's aid, the imposition of penalty on the petitioner's right to choose the instrument for exercising the freedom or compelling them to seek alternative media etc. would be remote and depend on various factors which may or may not come into play. Unless these were the direct and inevitable consequence of the measures enacted in the impunged Act, it would not be possible to strike the legislation as having effect and operation. A possible eventuality of this type would not necessarily

18. Ram Singh V. State of Delhi A.I.R. 1951 S.C. 270

be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned.[19]

In Sakal Newspaper V. Union of India [20] where the upshot of all the restrictions in the order would have effected the circulation of newspaper and violate the constitutional guarantee of free speech, the Court took the view that there was a link between price, size, advertisements, price of advertisement and circulation. The Supreme Court, speaking through Mudhalkar, J., did not appreciate the Government policy and made a priori statement that the freedom of a newspaper to publish any number of pages was an integral part of the freedom of speech and expression. The freedom would be directly infringed when some integral aspect of it was sought to be curbed. The impunged Act and order were intended to affect the circulation of newspaper and hence, were void as being unconstitutional. The contention of the government that price - page ratio was adopted from the recommendations of the Press commission which in so far as took into account all the relevant factors acted fairly and reasonably was not considered by the Court as a sufficiently weighty or sufficiently clear purpose to justify such interference with the liberty of press.

The similar question, once again was raised before the Supreme Court in Bennett Coleman V. Union of India [21], where newsprint control order, 1962 made in the exercise of the powers conferred under the **Essential Commodi-**

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19. A.I.R. 1958 S.C. 578 at p. 620

20. A.I.R. 1962 S.C. 305

21. A.I.R. 1973 S.C. 106

ties Act, 1955 was imposed which consequently was affecting the circulation of the newspaper.

The Court asserted that freedom of press was **both qualitative and quantitative**. In other words it comprised of free, unhindered circulation and free unspecified volume of news and views. The Court was of the opinion that it was not for the government to say which newspaper should grow in page and circulation and which were not to grow in a specified direction. The Court further explained that once the quota of newsprint fixed for a newspaper, it should have been left to the concerned newspaper as to how it should be used. The newspaper might have consumed it within months or utilise it for the whole year. Consequently the majority did not approve the aim of impunged policy as reasonable in trying to reduce the advertisement revenue of bigger dailies because it operated like a double edged weapon.[22]

Mathew. J; in his dissenting opinion follwed the observations made by Bhagvati. J. in Indian Expressand expressed the view that measures which are directed at other forms of activities but which have secondary, indirect or incidental effect upon expression do not generally abridge the freedom unless the content of speech itself is regulated and therefore *"if the scheme of distribution brings the smaller newspapers at equal footing with the newspapers enjoying greater circulation that would not, in any way, be made a ground as violation of Article 19 (1)(a)."* He further observed that *"It is because newsprint is scare that it is being rationed Ex - hypothesi, newsprint can not be distributed according to the needs of every consumer".*

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22. Id at p. p. 128 - 130

The freedom of speech does not mean a right to obtain or use unlimited quantity of newsprint. Article 19 (1) (a) is not a 'guardian of unlimited talkativeness' [23]. In his opinion, therefore, a restriction would not be unreasonable if it attempts to help the smaller newspapers to stand before the big newspapers.

The test of direct and inevitable effect however, was not applied with the same vigour in Express Newspapers Pvt. Ltd. V. Union of India. Sen J. though admitted that the freedom of speech was not absolute and unlimited at all times and under all circumstances but is subject to the restriction contained under Article 19(2) of the Constitution. He referred to cases already been decided by the Court and relied upon the principles as laid down in Bank Nationalisation Case to determine the effect of impunged notice. He observed that **"we have only to substitute the word 'executive' for the word 'law' and the result is obvious. The impunged notices of re-entry upon forfeiture of lease and of the threatened demolition of Express Building are intended and meant to silence the voice of the Indian Express. It must logically follow that the impunged notices constitute a direct and immediate threat to the freedom of the press.**[24] Consequently the action of the government was held an unreasonable restriction upon the press.

Venkataramiah & Misra J.J., however emphasised the point of arbitrariness which may be tested under Article 14 also and non application of mind rather than the effect of the impunged notices.[25]

The shift towards concentrating upon the arbitrary action was once agian reiterated to ascertain the reasonableness of a restriction in **Life Insurance**

23. Id at p. 134
24. A.I.R. 1986 S.C. 872 at p. 910
25. Id at p. 953

Corporation V. Manubhai D Shah.[26] **Ahmedi. J**. (As he then was) in the course of his judgement observed that, *"The attitude on the part of L.I.C can be described as both unfair and unreasonable."* Explaining the reason the Court said, "unfair because fairness demanded that both view points were placed before the readers, however limited be their number, to enable them to draw their own conclusions and unreasonable because there was no logic or proper justification for refusing publication". The Court further said that. "A monopolistic state instrumentality which survives on public funds can not act in an **arbitrary manner** on the specious plea that the magazine is an in house one and it is a matter of its exclusive privilege to print or refuse to print the rejoinder.....The respondent's fundamental right of speech and expression clearly entitled him to insist that his views on the subject should reach those who read the magazine so that they have a complete picture before them and not a one sided or distorted one.[27]

In respect of literature the Supreme Court is of the view that while restriction on a book which if taken as a whole may deprave and corrupt the minds of young persons into whose hands it may fall amounts a reasonable restriction. But the same restriction upon a book using vulgar language to create an exact impact on the readers while exposing evil providing the society, could not be approved. The Court observed that the portrayal of characters by the author is not just figments of the author's imagination. Such characters are often to be seen in real life in society. The author has used his skill in focussing the attention of the readers on such characters in the society and to describe the situation more eloquently has used

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26. (1992) 3 S.C.C. 637

27. Id at p. 655

unconventional and slang words so that in the light of author's understanding, the appropriate emphasis is there on problems.....and we do not think that any reader on reading this book would become depraved debased and encouraged to lasciviousness. [27-A]

The judiciary has a pious duty to impart justice and , therefore, any restraint which aims to protect its impartiality and credit in the minds of ordinary prudent man is nothing else but a reasonable restriction. It is also to be kept in mind that when people attack judges they can not defend themselves and the law of contempt of court is meant to provide such defence. The persons who attack a judge .....must remember that they are attacking an institution which is indispensable for the survival of rule of law. However, the courts do not like to assume the posture that they are above criticism and that their functioning needs no improvement, and therefore, bonafide criticism of any institution including courts to induce the administrators of the institution to look inwards and improve its image is left unimpared in the interest of public institutions themselves.

This concept of reasonableness is not static and vary according to the needs of an institution. In Express Newspaper Pvt. Ltd. V. Union of India, the Court while holding that press is not immune from the laws of taxation emphasised the fact that what can be a reasonable tax for other industries may not be reasonable for newspaper industry due to the special interest the society has therein. Venkataramiah J; expressed the view that *it should be realised that imposition of a tax like newsprint is an imposition on knowledge*

27 -A AIR 1986 S.C. 967 at p. 983

and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself about the world around him. [28]

Explaining the point the Court said, *"since the newsprint is closely linked with the freedom of press, the test for determining the vires of a statute taxing newsprint have, therefore, to be different from the test usually adopted for testing the vires of other statute."* The Court further said that, **"An ordinary taxing statute may be questioned only on the ground being confiscatory in nature or for using colourable device but an statute, taxing newsprint may be challenged simply on the ground being burdensome**.

The view expressed in the aforesaid case was in verbatim repeated in Printers (Mysore) Ltd. V. Asstt Commercial Tax Officer where the apex court laid down that no sale tax can be levied on the sale of newspapers in India while emphasising that press is not immune from the application of the taxing statute, at the same time it should not be to an extent which throttle the voice of the press.[29] Therefore, in view of the apex court a tax on newspaper which is burdensome amount an unreasonable restriction on the freedom of press. Recently the Supreme Court made another dig on the subject in **R. Rajgopal V. State of Tamil Nadu** when Justice Jeevan Reddy held that the press can not be restrained by state or its officials by an order having no force of law. Even while admitting that restrictions may be placed on the press on the ground of defamation contained under Article 19 (2), it curtailed the scope of the restriction. In view of Supreme Court judgement, therefore, a restriction would not be

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28. AIR 1986 S.C. 515 at p.p. 539 - 40

29. (1994) 2 S.C.C. 434 at p. 442

treated as reasonable on the ground of defamation if the writing or the statement is based upon the public record including the court record unless it is totally devoid of the truth and published without reasonable verification of facts.

The Supreme Court in **Tata Press Ltd. V. Mahanagar Telephone Nigam Ltd,** [31] gave further boost when Kuldip Singh, J; said that freedom of speech and expression can be restricted under Article 19 (2) and not by creating a monopoly by state or any other authority. *Publication of advertisement* which is a *"commercial speech"* is an integral part of freedom of speech and expression which can only be restricted under Article 19 (2). The rule 458 made under Sec. 7 of Telegraph Act, 1885 simply prohibit the publication of "any list of telephone subscribers" and under no circumstances it can be equated with the "publication of advertisement". Hence rule 458 and 459 can not be interpreted so as to restrict the commercial speech.[32] and therefore, it did not declare the aforesaid rules unreasonable.

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30. A.I.R. 1995 S.C. 264 at p. 277

31. A.I.R. 1995 S.C. 2438

32. Id at p. 2448

PROCEDURAL REASONABLENESS

Procedural reasonableness is concerned with the implementation of the restrictions contained under Article 19(2) of the constitution. A restriction though valid substantially, may fail to satisfy the requirements of procedural reasonableness. In such a case the restriction would be liable to be struck down. Therefore, in order to be a valid restriction, beside satisfying substantive test it must fulfill the procedural requirement also.

While examining the procedural reasonableness the Supreme Court laid emphasis that the procedure must be such as may yield an objective and fair decision by the authority administering the law and does not result into arbitrary curtailment of individual freedom. The principles of the administrative law particularly of natural justice have considerably influenced the judicial policy in this area.[33]

In democratic countries wide powers are conferred upon the executive which leaves an individual sometimes upon their mercy. Under such circumstances the only safeguard available is the good sense of the administration itself which is quite rare. In practice it is the executive which controls the

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33. Misra, S.P: Fundamental Rights and the Supreme Court Reasonableness of Restrictions at p. 194

legislative bodies[34] and, therefore, it is once again the judiciary, required to take judicial review of administrative action in order to save the rights of an individual.

The Supreme Court in N.B. Khare V. State of Delhi [35] considered the reasonableness of a restriction based upon the subjective satisfaction of an authority. The Court held that *"the legislature can confer on an executive officer the authority to make an order externing a person from a particular area on his subjective satisfaction without prescribing a judicial scrutiny of this satisfaction. A law providing for externment is not bad because it leaves the desirability of making an order of externment to the subjective satisfaction of a particular officer as an element of emergency requires taking of prompt steps to prevent apprehended danger to public tranquility and so the authority has to be vested in executive officers to take appropriate action on their own responsiblity."* In arriving to this conclusion the Supreme Court took into consideration all the aspects of concerned law i.e.

(i) the law was of temporary nature. Its life was limited to two years so that no externment order could remain in force beyond that period,

(ii) It gave the externee a right to be informed of grounds of restrictions if it was for more than three months, and

(iii) an opportunity to externee was provided to make a representation to the Advisory Board. All these proper safeguards were taken into consideration by Supreme Court in order to determine the procedural reasonableness of the impunged law.

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34. Though in a democratic system the executive is responsible to the legislature. But in practice it seems to be the executive who controls the legislature as they enjoy certain powers i.e. to recommend the dissolution of the House which most of the members do not want to happen as they fear that they would loose their privileges and other facilities once they cease to be a member of the House.

35. Supra note (2)

In Virendra's Case Supreme Court followed the same test while holding **Sec 2(1) (a) of Punjab Special Powers (Press) Act, 1956** as both substantially as well as procedurally reasonable because proper safeguards were provided in case if the rights of any person were to be curtailed and on the same reasoning, in the absence of proper safeguards, struck down Sec 3 of the said Act while observing that it placed the whole matter upon the subjective determination of State Government and there was no provision even for any representation by the affected party. It thus violate the natural justice.[36] In order to make a restriction procedurally reasonable, it is also necessry that the opportunity afforded to a person affected must be real and effective. It is, therefore, necessry that whenever a notification is made for the forfeiture of any book, newspaper or any other material which is prejudicial to the safety or security of India, it must state the representation from the book. newspaper, or other material which offeneds the law.[37]

Whenever the freedom of an individual is sought to be restricted it must communicate the grounds of restriction failing which the order is liable to be struck down. In state of Madras V.V.G. Row it was held that **adequate communication is an important element of procedural reasonableness**. The Court observed, *"No personal service on any office bearer or the member of the association concerned or service by affixture at the office, if any of such association is prescribed nor is any other mode of proclaimation of the notification at the place where such association carries on its activities provided for. Publication in any official gazette, whose publicity value is by no means great may not reach the members of the association declared unlaw-*

36. A.I.R. 1957 S.C. 896 at p. 902

37. Narayana V. State of M.P. (1972) 1 S.C.W.R. 984 at p.p. 990 - 92

ful and if the time fixed expired before they knew of such declaration, their right of making a representation which is the only opportunity of presenting their case would be lost. Yet the consequences to the members which the notification involves are most serious for their very membership thereafter is made an offence under Sec. 17". [38]

Again in Dwarka Prasad V. State of UP [39] it was held that a law which only required recording of reasons for the action taken by the authority but made no express provision for the communication if there is no higher authority to examine the propriety of those reasons and revise or review the decision,is not a good law. The reasons recorded in such case are only for the satisfaction of the authority making it.

The priciple of reasonableness is not applicable to the subordinate legislation. In **Express Newspapers Pvt Ltd. V. Union of Inida** giving its verdict in negative the Supreme Court observed, *"A subordinate legislation may be struck down as arbitrary or contrary to the statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute, or say the Consitution. This can however, be done only on the ground that it does not conform to the statutory or constitutional requirement that it offends Article 14 or 19 (1) (a) of the Constitution. It can not, no doubt be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant."* [40]

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38. Supra note (6) at p. 260

39. 1954 S.C.J. 238

40. Supra note (28) at p. 543

The Supreme Court in Life Insurance Corporation V. Munubhai D. Shah held the action of L.I.C, violative of prinicple of natural justice and consequently **unfair, unreasonable and arbitrary**. It was observed that , *"It is not the case of L.I.C. that the rejoinder contains any thing offensive in the sense that it would fall within any of the restrictive clauses of Article 19 (2) or that it is in any manner prejudicial to the members of the community, or that it is based on imaginary or concocted material. That being so on the fairness doctrine L.I.C. was under an obligation to . publish the rejoinder since it had published counter to the study paper."*[41]

Reliance Petro Chemical Ltd V. Indian Express Newspaper,[42] apex Court once again followed the principle of natural justice in the form of balancing of convenience and vacated the stay order on Express Newspapers to write anything about the debentures of petitioner company even before the expiry of the last date on the ground that the debentures had already been over - subscribed and there was no need to keep the stay order in force. The Court, therefore, expressed the view that once the purpose for which an injunction was granted, is fulfilled the continuance of the stay order would constitute an unreasonable restriction.

It is, therefore, clear that to curtail the freedom of press, it is not sufficient that restriction is based on any of the grounds enshrined under Article 19 (2) of the Constitution but it is also essential that the restriction must be reasonable. The Constitution nowhere lays down what is and what is not

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41. Supra note 26 at p. 655

42. A.I.R. 1989. S.C. 190

reasonable restriction. Hence it has been left to the courts to determine the standard of reasonableness to be adopted in judging the validity of a particular legislative restriction. It is necessary that a restriction to be a reasonable one must fulfill substantive as well as procedural aspects of reasonableness. A restriction would be substantially reasonable if it put the curbs with the sole purpose of achieving the objects included under Article 19(2). Further to stand the test of reasonableness the law must define expressly or by necessary implication the powers of an authority. The proceedural reasonableness requires that any opportunity provided to the party concerned must be real and effective. The concept of **equality** and the principle of **natural justice** are the essential elements of proceedural reasonableness. It means that action of the authority must be based on equal treatment and equal opportunity to the parties unless there is a justification for denying the same.

CHAPTER : V

PRESS AND PARLIAMENTARY PRIVILEGES

A) *Privileges in England*

B) *Privileges in India*

PRESS AND THE PARLIAMENTARY PRIVILEGES

The Parliamentary privileges is one of the most sensitive area where a journalist has to tread warily. In democracy people have the right to know what their representatives are doing both inside as well as outside the Parliament. The press in its efforts to keep the people informed about the matters being transacted by Parliament, its Committees and its members some times incroaches upon their privileges. This often leads towards a conflict between the press and the parliamentary privileges.

The concept of parliamentary privileges has been defined by various eminent jurists. May defines the privileges as, **"The sum of 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. Thus privilege though part of the law of the land, is to a certain extent an exception from the ordinary law".**[1]

According to Halsbury's Law of England **"Any act or Omission which obstructs any member or officer of the House in the discharge of their duties, or which has a tendency to produce such a result would constitute contempt of legislature".**[2]

1. Erskine May: Parliamentary Practice at p. 67
2. Halsbury's Law of England, Vol. 28 at p. 465

Earl Jowitt, (Lord Chancellor of Great Britian since 1945-51) defines the privilege in the following words, **"An exceptional right of advantage , an exemption from some duty, burden or attendance to which certain persons are entitled, from a supposition of the law that the stations they fill or the offics they are engaged in, are such as require all their care, and that therefore, without this indulgence, it would be impractible to execute such offices so advantageously as the public good requires".**

Thus the privileges may be called as those special rights which are essential for the Parliament, its Committees and individual members for the smooth functioning of this institution. The Indian Constitution provides for the parliamentary privileges on the pattern of British System, it is, therefore. essential to discuss the privileges, in brief, being enjoyed by the House of Commons.

PRIVILEGES IN ENGLAND: The powers, privileges and immunities of the House of Commons in England have not been defined anywhere. They are a part of Common Law of England and have to be pieced togather from numerous precedents. Historically speaking, the king of England claimed all the privileges and they were enjoyed by his servants who acted in his name. With the passage of time, however, people wrested these rights from the King claiming them for the House of Commons. In the later period (Stuart Kings time) lawyers and judges were frequently punished for committing the contempt of the House who claimed to be the sole judge of the nature, existence and extent of privileges. But the courts in England did not concede this right.

The decisions of the court are not accepted as binding by the House in matters of privileges, nor the decisions of the House by the courts. This old dualism remained unresolved. The Ashby V. White, Stockdale V. Hansard and Bradlaugh V. Gosset are glaring example of such dualism[3]. This dualims, later on, was resolved amicably and has become a history. House of Commons and the Courts now seldom encroach upon the sphere of others.

The various privileges claimed by the House of Commons in earlier days have fallen into disuse and faded out of existence and till date, are not readily ascertainable. In his book **'Law Custom and Constitution' Anson** points out that, **"The rules of which they (the privileges) consists are not readily ascertainable, for they obtain legal definition when they are cast in statutory form, or when a conflict between the House and the Courts have resulted in some questions of privilege being settled by judicial decisions".**[4]

Neverthless, the House of Commons has certain well- known privileges. These may be divided into two groups. The first group contains those privileges which are claimed by any member in the individual capacity of being a member of House of Commons.

This include:

a) Freedom of speech;

b) Freedom from arrest;

c) The right having most favourable construction placed upon its proceedings; and

d) The right of access to the Crown as well as other rights and immunities which have come to be recognised as part of the law and custom of Parliament.

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3. Op Cit note (1)at p.p. 184 - 190

4. Quoted by R.C.S. Sarkar in "Press and Privileges of Parliament" in J.C.P.S. Vol XV, 1981 at p. 85

The second group consists of the privileges claimed by the House in its corporate capacity and include.

a) The right to provide for the due composition of its body;

b) The right to regulate its own proceedings:

c) The right to exclude strangers;

d) The right to prohibit the publication of its debates;

e) The right to exercise penal jurisdiction and to punish breaches of privileges and contempt.[5]

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5. Ibid

PRIVILEGES IN INDIA : India was ruled by English people for a long time. For the proper functioning of the government, they made laws, while adopting their own pattern prevailing in England with certain modifications i.e. they made laws in accordance with situations and circumstances at that time. The system copied or based on English pattern exercised a great influence upon the members of the Constituent Assembly who drafted the Indian Constitution. so, naturally, this Constitution carries with it the British concept of Parliamentary privileges.

In India, the privileges, immunities etc. of Parliament and its members are provided under Article 105 [5-A] and that of State Legislatures under Article 194 of the Constitution [5-B]. The position under clause (1) & (2) of Article 105 is that subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in the Parliament. And that no person can be made liable in respect of publication by or under the authority of either House of Parliament of any report, paper, votes or the proceedings of the Parliament or any Committee thereof. Similar provision exist under Article 194 Clause (1) & (2) which is applicable to the House of State Legislatures. Thus it is also clear clear that under clause (1) & (2) of the aforesaid Articles of the Constitution, full freedom is accorded to the committees and the members of the Parliament as well as State Legislatures. But at the same time it is also clear that such immunities are provided only when anything is said inside the parliament. Secondly nobody can be made liable in a proceeding before a court of law in respect of the publication under the authority of either House of Parliament or State Legislature.

5-A. Article - 105 Provides - (1) subject to the provisions of this Constitution and to the rules and standing orders regulating the proceedure of Parliament, there shall be freedom of speech in Parliament.
(3) In other respect, 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].

5-B. Article 194 provides for identical provision using the word legislature in place of Parliament.

In other respects under clause (3) of Article 105 (As it stands today after 44th Amendment of 1978) the powers, privileges and immunities of each House of Parliament and of its members and committees shall be such as may be defined from time to time by Parliament 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 (44th Amendment) Act, 1978. Article 194 (3) contains identical provision in respect of State Legislature.[6]

Under Article 105(3) of the Constitution, therefore, the privileges of our Parliament are identical with those of the **House of Commons** as they existed on the Jan 26th 1950. The Supreme Court, however, in special reference no 1 of 1964 held that the Parliament can not claim all the privileges as enjoyed by the House of Commons at the Commencement of the Constitution. It can exercise only those privileges of the House of Commons which are incidental to legislative functions.[7]

As a House continues to enjoy the same privileges as it enjoyed at the commencement of the Constitution, the answer to the question that, what were the privileges of parliament and the State Legislature being enjoyed at the commencement of 44 Amendment is that they enjoyed the same privileges which were being enjoyed by House of Commons at the commencement of Constitution.

6. In 1976, 42nd Amendment to the Constitution was enacted by which Article 105 (3) and 194(3) were amended. The net result of this amendment was that a House could have "evolved" its own privilege. Before this, it was possible only through a law to define privilege. 42nd Amendment done away with this need of passing any law to define the privilege. Consequently it also done away with the need of president's assent which is necessary, if a law is to be made. Moreover, it also authorised either House of the Parliament, as well as State Legislature, to evolve its privilege and it was no more necessary that both Houses should be agree for evolving a new privilege.

   Later on in 1978, 44th Amendment was incorporated in the Constitution. This amendment in the first place cancelled the amendments made by the Constitution (42nd Amendment) Act, 1976. It then amended Article 105(3) and 194(3) so as to drop completely any reference to the House of Commons in future. But even this new phraseology did not bring any change in the circumstances.

7. A.I.R. 1965 S.C. 745.

This amendment, therefore, merely excluded the name or reference of the House of Commons from Article 105 and 194 but retained the same position to continue which was existing at the commencement of the Constitution.

The parliamentary privileges restrict the freedom of press and while publishing the reports of proceedings of a House of Parliament or of its committees or on a conduct of a member or members inside or out side the House, a lot of caution is required to be undertaken by the press.

The following privileges of the parliament affect the freedom of press.

1) **Right to Exclude Strangers**:- The parliament has the privilege to exclude the strangers[8].

The Speaker or Chairman, as the case may be, whenever, thinks fit under the rules of the House, may order the withdrawl of strangers from any part of the House, including the representatives of the press. The Parliament has not. yet exercised this rights. However, it may exclude press whenever holding a secret session. Though such chances are quite rare. The Parliament is also empowered to withdraw press cards of any particular journalist if any default is committed by him. The Lok Sabha has, infact, withdrawn press cards twice. Once of a special corresponsent of **Blitz** and on another occassiosn of a special correspondent of **Hindustan** New Delhi. Any person including a press representative

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8. The rule 387 - 387 - A made by the House of People provide for the expulsion.

Rule . 387 Says That the speaker may, when ever he thinks fit order the withdrawl of strangers from any part of the House.

Rule . 387 - A - An officer of the Secretariate authorised in this behalf by the speaker shall remove from the pricincts of the House or take into custody, any stranger whom he may seem or who may be reported to him to be, in any portion of the pricincts of the House which is reserved for exclusive use of members, and also any stranger, who having been admitted into any portion of the pricincts of the House, misconducts himself or wilfully infringes the regulation made by the speaker under rule 386 or does not withdraw when the strangers are directed to withdraw under rule 387 while the House is sitting.

is excluded from the House under rule 248 of the House when it sits in a secret session.[9]

2) **Right to prohibit the publication of its proceedings**: It is another important privilege which has been enforced by the Parliament on various occassions with a specific intention, only to prevent malafid publication of any inaccurate report or expunged portions of any proceeding

Unlike England, in India, there is no rule or standing order of the Parliament prohibiting the publication of its proceedings. In **Searchlight** case[10] the question before the Court was whether the legislature is empowered to prohibit the publication of expunged portion of the proceeding of the House. The Supreme Court gave the answer in affirmative and held that Article 105 (3) and Article 194(3) confer all those powers and privileges on Parliament and State Legislature.

3) **Power to Commit for Contempt**: One of the most important privileges available to Parliament is the power to commit for its contempt and also defined as the **'keystone of Parliamentary privilege'**. The power is identical with that of House of Commons in England. The power to punish for contempt was not available to the legislature under the Government of India Act, 1919. For the first time. **Government of India Act, 1935** conferred such powers. The question that whether the existence of such punitive powers affects the freedom of press. To answer such question it is to be kept in mind the difference between the existence of power and

9. Rule 248 (1) - On a request made by the leader of the House, the speaker shall fix a day or part thereof for sitting of the House in secret.
Rule 248 (2) - When the House sits in secret no stranger shall be permitted to be present in the Chamber, Lobby or Galleries provided that members of the Council may be present in their Gallery:Provided further that persons authorised by the Speaker may be present in the Chamber, Lobby or Galleries.
10. M.S.M. Sharma V. Sri Krishna Sinha A.I.R. 1959 S.C. 395

mind the difference between the existence of power and the exercise of that power. In India, like the House of Commons, it has been the practice of each of the House to exercise privilege under great limitation and conditions. In majority of the cases the Parliament though oversenstive to its privileges did not take any action when the editor or person making the defamatory statement as the case may be expressed his sincere regret. In the **Blitz** case the editor of the newspaper was reprimanded by the **Lok Sabha** but the Privilege Committee recognised the right of fair comment and observed as following.

"Nobody would deny the members or as a matter of fact, any citizen, the right of fair comment. But if the comments contain personal attack on individual members of parliament on account of their conduct in Parliament, or if the language of the comment is vulgar or abusive, they can not be deemed to come within the bounds of fair comment or justifiable criticism .[11]

It is, therefore, clear that the privileges of the Parliament as discussed above are of extreme importance for the smooth and proper functioning of the parliament and State Legislatures and whenever, these privileges are violated by the press, it would be guilty of committing contempt of parliament or State Legislature. Under the following circumstances the press has been held guilty of committing the contempt:

1) Comments in a newspaper casting reflections on the character or proceedings of the House, or of its committees, or member or members collectively and thereby lowering their prestige in the eyes of the public.
2) Pre - mature publication of a motion tabled before the House and of proceedings of a Committee of a House or the proceedings of a meeting thereof

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11. Quoted in "Press and Parliament" by A.N. Grover in J.C.P.S. VXIII 1984 at p. 141.

by a newspaper before the committee completes its task and presents its report to the house.

3) Publication of proceedings of a committee of a House before it is presented to the House concerned.

4) Misreporting of the proceeding of the House, or of a report of a Parliamentary Committee or, of a member of the House by newspaper.

5) Casting aspersions on the impartiality of the speaker attributing malafides to him in discharge of his duties in the House.

6) Publication of expunged portion of the proceedings of a House.

7) Publication of a document or paper presented to a committee before the committee's report is presented to the House.

8) Comments on the officers of the House casting reflections.

The position of the parliamentary privileges when they are in conflict with the freeedom of press has been settled in re-under Article 143 of the Constitution of India. The advisory opinion of the Supreme Court in this case however. has made Article 105 (3) quite ambiguous in its approach as if and when a law is made defining the privileges it would be subject to Article 19 (1) (a) but in case if no law is made then the same provision would yield to parliamentary privileges. However, inspite of the fact that freedom of press is subject to privileges of the House, there are certain enactments which give protection to press against a third party if substantial and true report of the proceeding of either House is published. In 1956 Parliamentary Proceedings (Protection of Publication), Act was passed. Under the Act, no liability, Civil or Criminal, attaches to the publication of proceedings of either Hosue, provided it is true and without malice and also for public good. This Act was repealed in Dec. 1975 during Emergency but re-enacted in April 1977 and currently is the law relating to the publication of proceeding of either House of Parliament. The law also extends

to the radio broadcasts. The Act of 1977 therefore, provides immunity from any civil or criminal liability for publishing any proceedings of either Hosue of Parliament, if the following conditions are fulfilled.

i) The report of the proceedings is substantially true;

ii) It is not made with malice; and

iii) It is made for public good.

The protection thus, extended by the aforesaid Act is confined not only to the wrong or offence of defamation but also comprehedns any other wrong or offence which might possibly be caused by such publication, eg. obscenity, incitement to an offence, sedition etc. notwithstanding that they are otherwise punishable under Indian Penal Code or any other law in force.

In the year 1978 Article 361 - A was inserted into the Constitution through the 44th Constitutional Amendment. The amendement provided the constitutional protection to the Parlimentary Proceedings (Protection of Publication) Act, 1977 and to the similar state enactments.[12]

Article 361-A, therefore, extends to the press absoslute immunity from any leal proceedings, civil or criminal under the following conditions.

a) The first condition, the press is required to fulfill in order to protect itself against any civil or criminal proceeding in respect of a publication is that it must be related to the proceedings of either House of Parliament or State Legislature.

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12. Article 361 - A provides that, (I) " No person shall be liable to any proceeding, Civil or Criminal, in any court in respect of the publication in a newspaper of a substantially ture report of any proceedings of either house of Parliament or Legislative Assembly, or as the case may be, either House of Legislature of a state unless the publication is proved to have been made with malice.

Provided that nothing in this clause shall apply to the publication of any report of the proceddings of a secret sitting of either House of Parliament, or the Legislative Assembly or, ...Contd:

The word "proceedings" has not been defined either in India or England itself but the Select Committee in **Duncan's case** explained the expression as. *".....it covers both the asking of a question and giving written notice of such question, and includes everything said or done by a Member in a committee of either House, as everything said or done in either House in the transaction of parliamentary business."*[13]

It is therefore, clear that in order to constitute the proceeding it must relate to some business of the House. The Supreme Court in Tej Kiran's case[14] has held that the absolute immunity of a Member for 'anything said' in the legislature, under Article 105 (2) or 194 (2) extend to everything said by a Member during the course of business in a House of Legislature while it was sitting and its business was being transacted, even though what was said might not be relevant to business before the House. Consequently if the report of such speech is published it is immune from any liability civil or criminal provided the other conditions are also fulfilled.

Though the Clause (2) of Article 105 and Clause (3) of Article 194 use both the words 'House' and its 'committees' but Article 361 - A mentions only the 'House' and consequently the constitutional protection can not be claimed in respect of the proceedings in a committee of a House of Legislature. however bonafide and correct it might be. The only remedy, therefore, under such circumstances would be the precedents of the British House of Commons as adopted with supplement or modification by Indian precedents, if any.

Contd:..... as the case may be, either House of the Legislature of a state.

2) Clause (I) shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applies in relation to reports or matters published in a newspaper.
Explanation: In this Article "Newspaper" includes a news agency report containing material for publicatin in a newspaper.

13. Quoted in Law of the Press by Basu D.D. at p. 189

14. Tej Kiran V. Sanjeevan, A. AIR 1970 S.C. 1573 at p. 1574

In order to seek the protection under Article 361-A it is essential that the publication must be a report which is the narration of the proceedings as they took place in the House. No other material i.e. article, comment etc. is therefore, protected under the aforesaid provision.

C) The publication of the report of the proceedings must be substantially true and must not be made with malice. Consequently if any publication is false, no protection is available. Similarly if the publication is actuated with malice, it is not protected though the report might be true.

d) The report must not be of any proceedings of a secret sitting of the House. Any newspaper who publishes report of a secret sitting of a House of Legislature can not claim protection under Article 361 - A as the report of said sitting has been expressly excluded from the protection of aforesaid provision of the Constitution and would constitute a breach of privilege of the House under rule 252.[15]

The immunity provided under Article 361 - A would thus be available even in the cases where speech or other material forming part of the proceeding in the House offends against.

a) The Official Secret Act;
b) The law of defamation;
c) The law of sedition;
d) Other offences provided under IPC, eg. obscenity.

The protective umbrella of Article 361-A whether provides any immunity in respect of contempt of Supreme Court or of the High Court as their power to

15- Rule 252 Provides ".....disclosure of proceedings or decisions of a sercret sitting by any person in any manner shall be treated as a gross breach of privilege of House.

punish for contempt are recongised under Article 129 and 215 respectively of the Constitution. The Supreme Court has held that there may be proceedings which are neither civil nor criminal such as proceeding for the contempt of the court.[16] The jurisdiction conferred by Article 129 and 215 of the Constitution is a special jurisdiction and, therefore, not governed by the criminal procedure code.

The net result in this regard is that while no proceeding can be initiated by the Supreme Court or a High Court for any speech made inside the Parliament because the expression any proceeding in any court under Article 105 (2) or 194 (2) would confer immunity from the 'proceeding' far contempt of court as well, nevertheless a proceeding may be initiated under Aritcle 129 and 215 of the Consitutiton if the same speech is published outside Parliament and Article 361 - A would not confer any immunity.

The Indian Constitution thus adopts a mean between the two extremes. the American system of judicial supremacy and the English principle which provides for the ascendency of Parliament. Kania, C.J in re Delhi Acts observed: *'The principal point of distinction between British Parliament remains and that is the Indian Parliament is the creature of the Constitution of India, and its powers, rights, privileges and obligations have to be found in the relevant articles of the Constitution of India. It is not a sovereign body, uncontrolled, with unlimited powers. The Constitution of India has conferred on the Indian Parliament powers to make laws in respect of matters specified in the appropriate place and schedules, and curtailed its rights and powers under other articles and in particular by the articles found in Chapter IIIrd dealing with the fundamental rights.'*[17]

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16. Naryanan V. Ishwar A.I.R. 1965 S.C. 66 at p. 67.
17. In re Delhi Laws Acts (1951) S.C.R. 747 at p. 765

The first case in which the Supreme Court dealt with such issue was **Nafisul Hasan's case.**[18] The facts of the case are following: In September 1951 issue the **Blitz** a **Bombay Weekly**, had published a news item which contained certain derogatory aspersions on the speaker of **U.P. Legislatuve Assembly**. He was served with a notice by the **Committee of privileges** of the House to appear before it and explain the position. The editor, however, neither appeared before the committee of the House nor sent any reply. The Committee found that the editor was guilty of breach of privilege of the House. Legislative Assembly by a resolution authorised the Speaker to issue a warrant of arrest against the editor. He was arrested and taken into custody but not produced before a Magistrate within twenty - four hours of his arrest and was in detention of Speaker's custody. On his behalf a writ of habeas corpus was filed under Article 32 of the Constitution on the ground that the fundamental rights guaranteed under Article 22(2), which says that any person arrested must be produce before a Magistrate within 24 hours of his arrest has been violated. The Supreme Court upheld the contention and declared the action as a clear breach of provision of **Article 22 (2)** and ordered his release.

Arising out of the above case as a sequel the matter went to the **Bombay High Court** because after his release the editor was again served with a notice by the speaker to appear at the bar of the House and again he failed to comply. But no further action was taken in the matter by the Legislative Assembly. On the other hand the editor **Mr. Mistry** filed a civil suit in Bombay High Court claiming damages for wrongful arrest and detention agaisnt the speaker of U.P. Legislative Assembly contending that the speaker had no authority to issue a warrant of arrest agaisnt him. The Bombay High Court, however, dismissed the suit on the following grounds.

1) The power to punish for contempt is expressly conferred under Article 194 (3) and the House is a sole judge or on a question of admitted privilege.

2) In pursuant to Article 194, by virtue of the resolution passed by the Legislatures under Article 212 (2) of the Constitution, the protection is provided to the speaker who signed the warrant as an officer of the House and in performance of his duties arising in con -

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18. Gunupati Keshavram Reddy V. Nafisul Hasan AIR 1954 S.C. 63

nection with the internal affairs of the House. This immunity is absolute even if the warrant is wrongfully executed by others.[19]

3) The privileges of the State Legislatures can be exercised against every citizen of India, therefore, it can not be imagined that this power can be exercised only within the state, as in such case any person living outside the state would be free to assail the dignity of the House.

In **Search Light Case** [20] the Speaker of a House of **Bihar Legislature** had directed certain parts of the speech made by a member, to be expunged. The newspaper 'searchlight' ignored this order and published the entire speech including the expunged portion. A notice was, therefore, issued to him by the House to show cause why steps should not be taken against him for the breach of privilege of the House prohibiting publication of certain parts of its proceeding. The editor moved to the Supreme Court under Article 32 of the Constitution. He contended that under Article 19 (1) (a) he was at liberty to publish whatever he wanted and any restriction upon his right can be imposed only by a law enacted under Article 19 (2) of the Constitution. In support of his case, the editor referred the case of G.K. Reddy V. Nafisul Hasan where the Parliamentary privilege yielded to the fundamental right guaranteed under Article 22 (2) of the Constitution. It was, therefore, on his behalf contended that on the same analogy Article 19 (1)(a) could be held applicable to the area of legislative privi

19. Article 212 (2) provides.

" No officer or member of the Legislature of a state in whom powers are vested by or under this Constitution for regulating procedure or conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

20. Supra note. 10

leges. By a majority the Court ruled that privileges enjoyed by a House of Parliament or a State Legislature under Article 105 (3) and 194 (3) respectively on the analogy of the House of Commons in England, were not subject to Article 19 (1)(a). The House, therefore, has the full authority to prohibit the publication of any report of its debte or proceeding though the same may contravene the fundamental right guaranteed under Article 19 (1) (a) of the Constitution. It was pointed out by the Court that any inconsistancy between Article 105 (3) or Article 194 (3) and the Article 19 (1) (a) could be and ought to be resolved by harmonious construction and consequently Article 19 (1) (a), being a provision of general nature must yield to the special provisions of Article 105(3) or Article 194 (3). The Court, however, made it clear that if Parliament or State Legislature enacted a law under aforesaid provision then such a law would be subject to Article 19 (1)(a) of the Constitution.

The Court also rejected the plea of Article 21 on the ground that rules of the House are supposed to be in accordance with the requirements of Article 21 of the Constitution.

K. Subba Rao, J. however, adopted dissenting view. In his opinion in case of a conflict between Article 19 (1) (a) and the Article 105(3) or 194(3), the privilege must yield to the extent it violates fundamental right as, if and when any law is made to define the privileges of parliament or state legislature it would be subject to fundamental rights. He observed, **"I would not have ventured to do so, but for the conviction that the reasoning adopted therein would unduly restrict and circumscribe the wide scope and content of one of the cherished fundamental rights Viz; the freedom of speech in its application to the press"**.

It may be submitted that the present case is not decided on merits. On the question that whether House of Commons, at the commencement of the Constitution, was having the privilege of prohibiting a true report of the proceedings, the majority answered in positive. Once it is established, the House was well within her right to punish the contemnor under Article 194(3) of the Constitution.

The most important case which came before the Supreme Court, involving the freedom of press and parliamentary privilege is **Keshav Singh's** case. where he alongwith few others printed and publishd, a pamphlet against a member of the House. While being administered a reprimand, he behaved in an objectionable manner. In accordance with the decision taken by the House later on the same day, the speaker directed that Keshav Singh be jailed for seven days for committing contempt of the House. This led to a number of events. On 19th March 1964 an advocate, Mr. M.B. Soloman presented a habeas corpus petition before the **Allahabad High Court** on behalf of Keshav Singh. He was ordered to be released on bail. The House pre-emptorily passed a resolution. holding that Keshav Singh, the advocate Soloman and the two judges who had made the orders had committed its contempt and they should be brought before it in custody. The two judges filed the petition before the High Court under Article 226 of the Constitution contending that resolution of the House was unconstitutional and violative of Article 211 of the Constitution [21] and that resolution passed by the Legislative Assembly amounted to the contempt of the Court.

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21. Article 211 says that no discussion can take place in a state legislature with respect to the conduct of a Supreme Court or a High Court judge in the discharge of his duties except when a motion for removal is under consideration in a House.

A full bench of Allahabad High Court consisting all the twenty-eight judges ordered the stay of implementation of resolution of the House till the disposal of the petition.

On the same day the House passed another resolution making it clear that the House does not intend to dispose of the charge of privilege against the High Court judges without providing them an apportunity of explanation as provided under the rules (Under Article 208 of the Constitution)[21-A]. There after, the House withdrew the arrest warrants issued against the judges but they were placed under the obligation to appear before the House and explain why the House should not proceed agaisnt them for its contempt. The bench of twenty three judges again granted stay of the resolution passed by the House. This brought face to face judiciary and the legislature. At this stage the president of India referred the matter to Supreme Court for its advisory opinion under Article 143 of the Constitution.[22]

The main issues before the Supreme Court were whether the House is the sole and exclusive judge of its privilege and whether it is competent to punish a person for its contempt taking place out side the four walls of the House? And whether if in enforcement of its decision the House issues a general or unspeaking warrant, is the High Court empowered to entertain a habeas corpus petition challenging the validity of the detention of the person sentenced by the House?

The Court gave its opinion 6:1. The majority opinion delivered by Gajendragadkar, C.J, held that House of Commons enjoyed the privilege to commit a person for its contempt by a general warrant, which is non-justiciable,

21-A. Article 208 (1) provides that a House of the Legislature of a State may make rule for regulating, subject to the provisions of this Constitution, its proceedure and the conduct of its business.

22. In re under Article 143 of the Constitution of India AIR 1965 S.C. 745

as a Superior Court of Record and not as a legislature. Even if the House of Commons has this privilege as a legislative organ, the legislature can not claim it as Indian Constitution also envisages fundamental rights and doctrine of judicial review, particlualrly, Article 32 and 226 impose a duty to enforce the fundamental rights by Supreme Court and the High Court respectively. Thus the House can not claim those privileges existing in the House of Commons at the Commencement of Constitution as a Superior Court of Record. But only those powers of House of Commons which are integral part of its privileges and which are incidental to legislative function. Whether a particular privilege exist or not, it is for the courts to give definitive answer by finding out if such a privilege was being enjoyed by House of Commons at the commencement of the Constitution. Once it comes to conclusion that such privilege exists, then it is for the House to judge the occassion and manner of its exercise and the courts would not sit in judgement over the way the House has exercised its privilege.

On the question whether High Court is empowered to entertain a habeas corpus petition against the detention order passed by the House. Supreme Court said that the searchlight case excluded the application of Article 19 (1) (a) so as to control the legislative privileges, but it did not exclude the possibility of application of Article 21. Referring the aforesaid case the Chief Justice observed, " *Therefore, we do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by part III, the latter must always yield to the former. The majority decision, therefore, must be taken to have settled that Article 19 (1) (a) would not apply, Article 21 would.*"[23]

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23. Id at p. 765

Regarding the contempt of House by a judge it was held that Article 226 confers on High Court the power to issue a writ of habeas corpus. A person may complain, under Article 21 that he has been deprived of his personal liberty not in accordance with law but for capricious or malafide reasons. The Court will then be bound to look into the matter. Similarly Article 211 of the Constitution debars the State Legislature from discussing the conduct of a High Court Judge for anything done in the discharge of his duties. The net result of Article 226 and 211 is that,"**Judicial conduct can never become the subject matter of contempt proceedings under the latter part of Article 194(3), even if it is assumed that such conduct can become the subject matter of contempt proceeding under the powers and privileges passed by the House of Commons in England.**"[24]

The opinion given by the Supreme Court, thus may be summarised as following.

1) The legislature has the sole and exclusive power to punish anyone for its contempt, but the order of the legislature can not be non-justiciable.
2) The order of committee for contmept of House is not subject to Article 19 (1) (a), but under Article 21 and 22, the court can review such order (Thus the scope of judicial review is very limited).
3) No action can be taken against a judge of a High Court on the plea of contempt for anything done in official capacity.

The Allahabad High Court on the basis of the advisory opinion of the Supreme Court disposed off the petition on merits. Based on the observations it was argued on behalf of petitioner that though the House of Commons enjoy the privilege to commit anyone for its contempt by a general warrant which is non-justiciable such privileges can not be claimed in India as the power is vested

24. Id at p. 770

in the House of Commons as a Court of Record and not as legislative organ. But the Allahabad High Court ignored this plea by saying that once it is established that particular privilege existed in the House of Commons at the commencement of the Constitution, then whatever is its origin the state legislature also possess the same privilege. The Allahabad High Court, therefore, adopted only in part the opinion of the Supreme Court that House of Commons enjoyed privilege of committing any person by general warrant, which is non-justiciable, but ignored the other part that these privileges can not be claimed in India as the House is not a Court of Record.

The advisory opinion of the Supreme Court in re under Article 143 of the Constitution reaffirmed the view taken in search light case that whenever there is a conflict between the provisions contained under Article 19(1)(a) and Article 105(3) or 194(3), the provisions of Article 19 (1) (a) which are general in nature had to yield to the special provisions of Article 105 (3) or 194 (3) and it is a well settled law. But the earlier view of the apex court in Search Light case and Allahabad High Court in Keshav Singh's case that a person, committed for contempt under the rules of the House can not claim the protection of Article 21 as such rules are supposed to stand the test of fairness enshrined under the constitutional provision has come under the shadow of doubt after **Maneka Gandhi's case.**

The Eanadu Privilege issue [25] once again brought the judiciary and the legislature **face** to **face**. The Chief Editor of a Telgu Newspaper was found guilty of contempt of Andhra Pradesh Legislative Council for publishing an item "Peddalu Golaba" (elders's commotion) and was ordered by the House to appear before it for admonition. Instead of complying with the summons, the editor

25. The Hindustan Times, March 30, 1984

approached the Supreme Court for relief who issued a show cause notice to the Council and also passed an interim order to the effect that editor is not to be arrested in pursuance of any process or warrant, if issued against the editor. The House ignored the Supreme Court's order and directed the Police Commissioner to produce the editor before the House on March 28. Then on March 25 the Supreme Court passed an order directing the Police Commissioner not to arrest, and should not cause to arrest to be made. The Police Commissioner under such circumstances sought the clarification of the House who reiterated its earlier stand. The controversy was diffused for the time being as the Governor on the advice of the Chief Minister prorogued the Council on March 30. 1984. Consequently the motion lapsed.

The experience in India shows that our Houses, like the House of Commons do not exercise these powers except in gross cases. The aforesaid episode clearly demonstrtes that our legislature are oversenstive in the matter of their privileges. By not complying the Supreme Court's order the House simply showed the lack of patience since the apex court has issued only an interim order. There was no harm had the House waited till the Court decided the matter on merits.

The Parliamentary privileges thus, are special rights available to legislative organ of the Government at Centre as well as in the states, their committees and the individual members. Such rights have been conferred to enable these bodies to play their role effetively. The privileges at present, being enjoyed by Parliament and State Legislature are identical to the privileges the House of Commons enjoyed at the commencement of the Constitution. In India the courts are empowered to look into the existence of a particular privilege but once it is affirmed then only the Parliament or State Legislature are competent

to decide whether commission or omission of any act amounts breach of privilege or not. The Parliamentary privileges are not subject to Article 19 (1)(a) of the Constitution. The press, therefore, can not publish any matter relating to Parliament or State Legislature if it is in conflict with the legislative privileges neverthless, Article 21 may be invoked on the ground that the act of the legislature is malafide capricious, perverse or violative of natural justice. The press though protected under certain circumstances from any liability civil or criminal before any court of law can not claim immunity against the legislatures itself under the same circumstances. Further any proceeding under Article 129 or 215 which is neither civil nor criminal in nature is not saved under Article 361-A of the Constitution.

CHAPTER: VI

JUDICIAL APPROACH

JUDICIAL APPROACH

Unlike the American Constitution which guarantees the freedom of press in express terms through **First Amendment**, the Constitution of India does not guarantee the same freedom expressly. The Judicial decisions however, have made it amply clear that it is guaranteed under Article 19(1)(a) of the Constitution. The ambit of the freedom of press, therefore, largely depends upon the judicial approach. In the last few decades since the Constitution came into force a sufficient body of case law has grown up upon the subject. These cases show that how the state often tried to make the press less active by adopting various methods, i.e. legislative and administrative. claiming that the grounds were saved by Article 19 (2) of the Constitution.

In **Romesh Thappar's** case, **Patanjali Sastri J**. delivering the majority opinion observed:

"The Constitution ..... has placed in a distinct category these offences against public order which aim at undermining the security of state or over throwing it, and made their prevention the sole justification for legislative abridgement of freedom of speech and expression, that it is to say, nothing less than endangering the foundations of the state or threatening its overthrow could justify curtailment of right to freedom of speech and expression".[1]

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1. A.I.R. 1950 S.C. 124 at p. 128

The Supreme Court expressed the opinion that a statute seeking to restrict the freedom of speech and expression for maintaining the public order or ensuing public safety could not be considered valid in as much it purported to impose restrictions for a more comprehensive and wider purpose than contemplated by the constitutional provisions which delimited the sphere of legislative abridgement by words, "undermines the security of or tends to overthrow the state".

The Court, thus made it clear that only the serious and aggravated forms of public disorder calculated to endanger the security of state and not the relatively minor breach of peace of purly local significance upon which the freedom of speech and expression may be curtailed.

While considering the laws dealing with the problem of public order, the Supreme Court in earlier cases adopted a broader view. In **Ramji Lal Modi**, the Supreme Court interpreted the words **'in the interest of public order'** as wider than **'for the maintenance of public order'** and , therefore, a law providing for curbing the activities which have a tendency to cause public disorder, is valid.[2]

The broad approach was questioned in **Virendra's** case where the public order was considered of extreme importance and was given priority over the freedom of the press. The Court observed: *"Quick decision and swift and effective action must be the essence of these powers and exercise of it must, therefore, be kept to the subjective satisfaction of the Government charged with the duty of maintaining law and order. To make an exercise of these powers justiciable and subject to judicial scrutiny will defeat the very*

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2. Ramji Lal Modi V. State of U.P. A.I.R. 1957 S.C. 620

purpose of the enactment.[3]

But in **R.M. Lohia,s** case the Supreme Court did not follow its own view and narrowed the sweep of public order as a ground of reasonable restriction so as to exclude normal 'law and order' and 'security of state' situations and include only such situations where there were threats to public safety and tranquility, **Subba Rao, J**; stated that the words of Das, C.J. in Virendra V.State of Punjab did not indicate that any remote or fanciful connection between the impunged Act and the public order would be sufficient to sustain its validity. The Court proceeded to state that "The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it implied therefrom, and between an Act that directly maintained public order and one that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act."[4]

It is difficult to state precisely what Subha Rao, J., meant to say in an eleborate analysis of the amended Article 19(2): he certainly did not dispute the distinction made by the Supreme Court between the expressions "For the maintenance of public order" and in the "interest of public order". But it is submitted that contrary to the terms of those decision, he held that distinction was only this, that where as the expression "for the maintenance of pub-

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3. Virendra V. State of Punjab A.I.R. 1957 S.C. 896 at p. 901

4. Suptt. Central Prison V. Ram Manohar Lohia A.I.R 1960 S.C. at p.p. 639 - 40

lic order" meant that the restrictions directly referred to such maintenance "in the interest of public order" meant that it was merely implied. The judicial opinion is contrary to well settled principles laid down by the Supreme Court itself, and ought to be over ruled as being clearly wrong and productive of public mischief.[5]

The constitutionlal position is, therefore, visited with a vulnerable lack of clarity where on the one hand in Ramji Lal Modi's case wider interpretation of the phrase 'in the interest of public order' is insisted but the same was not followed in Virendra's case on the other hand Lohia's case suggested that there are some criterion for testing the validity of state action. The evoluation of such test is politically necessary because sedition had an imperical history. But such cases are rare and the apex court by and large has supported the government's plea for almost a blanket power to deal with these situations.

Bhagavati J., in **Express Newspaper's** case developed a new approach of "direct and inevitable effect" test in order to test the validity of a law imposing restrictions upon the freedom of press. The Court opined that *"All the consequences which have been visualised in this regard by the petitioners viz. the tendency to curtail circulation and thereby narrow the dissemination of information fetters the petitioners freedom to choose the means of exercising the right, likelihood of independence of the press being undermined by having to seek alternative media etc. would be remote and depend on various factors which may or may not come into picture. Unless these were the direct and inevitable consequences of the measures enacted in the impunged Act it would not be possible to stike down the legislation as having that*

5. Searvai, H.M : Constitutional Law of India at p. 620

effect and operation."[6] **It appears that the Court wanted the 'direct and inevitable effect' test to be operated in such way that where the infringement was brought about by the likely occurance of some connected social, economic, political or other event than the one formally stated in the statue, the effect will not be direct and inevitable because that event, even if likely to happen, may or may not happen.**

This test of 'direct and inevitable effect' was followed in **Sakal Newspaper's Case** [7]. Rejecting the state's plea that drop in the circulation was only an indirect consequence and that reasonableness of the restriction should be considered under Article 19(1)(g) and clause (6) and not under Article 19(2), the Supreme Court observed that, *"the fixation of minimum price for the number of pages which a newspaper is entitled to publish is obviously not for ensuring a reasonable price to the buyers but for expressly cutting down the circulation. The restraint on the freedom to publish any number of pages unless the price of a newspaper is raised alongwith the curtailment of advertisement, forcing the hike in the price of newspapers, is no remote but the direct consequence of the impunged order. The net direct and immediate effect of the said order is bringing down the circulation. And when a law is intended to bring about that result, it is a*

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6. Express Newspapers V. Union of India A.I.R. 1958 S.C. 578 at p. 620

7. Sakal Papers V. Union of India A.I.R. 1962 S.C. 305

direct interference with the freedom of speech and expression.[8]

The aforesaid approach was firmly established in Bank Nationalisation case[9] where **Shah, J**. speaking for the Court said, *"It is not the object of the authority making the law imparing the right of citizen nor the form of the action taken that determines the protection that he may claim; it is the effect of the law and the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of state action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of legislature nor by the form of action, but by its operation upon the individual right".*[10] Thus Shah J., delivering judgement on behalf of the ten judges in this case has **rejected the theory of object and form of state action** as it is inconsistent with the constitutional scheme.

The Supreme Court's attitude is of extreme importance to the press for two reasons. First: because what the legislature can not do directly they seek to do it indirectly; and secondly, the Government often pretends to enact the legislation for pro-bono publico reasons when its real object is to infringe private and public rights.[11]

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8. Id at p. p. 310 - 14
9. R.C. Cooper V. Union of India AIR 1970 S.C. 564
10. Id at p. 596
11. Dhavan, R : Only the Good News - On The Law of Press In India at p. 106

In Bennett Coleman's Case[12] the Supreme Court while following the aforesaid approach and expressing its agreement with Mr. Palkhivala and describing his views of pith and substance of the subject matter and of direct and of incidental effect of the legislation are relevant questions of legislative competence but are irrelevant to the question of infringement of fundamental rights as sound and correct approach, opined, *"If it be assumed that the direct object of the law or action has to be the direct abridgement of the right of free speech by the impeached law or action it is to be related to the directness of the subject matter of the impunged law or action. The action may have direct effect on the fundamental right although its direct subject matter may be different ..... therefore, the word "direct" would go to the quality or character of the effect and to the subject matter. The object of the law or executive action is irrelevant when it establishes the petitioner's contention about the fundamental rights".*[13]

Mathew J., however in his dissenting judgement has linked and equated the "pith and substance" theory to the "direct effect test". and pointed out that, "pith and substance test although not strictly appropriate, might serve a useful purpose" in deciding whether the law in question infringes the fundamental right. The Court finally observed:

"The various provisions of the newsprint import policy have been examined to indicate as to how the petitioner's fundamental rights have been infringed by the restriction on page limit, prohibition against new newspapers and new editions." The Court created a chain of events in highlighting the effect of impunged policy on fundamental rights. It said,

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12. Bennett Coleman V. Union of India AIR 1973 S.C. 106
13. Id at p. p. 119 - 20

"The effect and the consequences of the impunged policy upon the newspaper is directly controlling the growth and circulation of newspaper. The direct effect is restriction upon the circulation of newspapers. The direct effect is upon the growth of newsprint through (The limitation of) pages. The direct effect is that newsprint are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss, the direct effect is that freedom of speech and expression is infringed.[14]

The Supreme Court, it may be submitted, adopted the test in determining the validity of a law impunged as violating the fundamental right, guaranteed under Article 19 (1)(a) to (g) has been formulated without considering the situation where several fundamental rights inhere in one person in respect of the business of publishing newspaper; and the test adopted by Mathew. J., though not in substance but in form is the correct test and the conclusions which he reached are correct.

The extent of direct and indirect intervention by the government can be seen from the Express Newspaper case[15] where on behest of Lieutinent Governor of Delhi, notices for the forfeiture and demolition of the building constructed by the Indian Express were issued. The Supreme Court did not laid emphasis on "direct and inevitable effect" and only one judge (A.P. Sen J.) saw this as a clear, direct and immediate threat to freedom of speech when he said that, "impunged notices threatening the re - entry and demolition of Express Building constitute a direct and immediate threat to the free-

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14. Id at p.p.120 - 21

15. Express Newspapers Pvt. Ltd. V. Union of India A.I.R 1986 S.C. 872

dom of press". But in later newsprint case.[16] the Supreme Court while acknowledging and reiterating the freedom of press tends to avoid a systematic discourse on the kind of direct and indirect pressure that can be placed upon the press. Sounding more formally the Court held that there appears to be a good ground to direct the Central Government to reconsider the matter afresh when it observed that, "*The Government should strike a just and a reasonable balance of freedom of speech and expression on the one hano and the need to impose the social control on the other.*" In other words the government must at all material times be conscious of the fact that is dealing with an activity protected by Article 19(1)(a). Thus Venkataramiah, J; emphasised the absence of any arbitrariness in State's action. He added that the power exercisable under Sec. 25 of Customs Act, 1962 was a discretionary power, but it was not unrestricted, and stressed the need that the discretion must be exercised according to law.

The apex Court in **printer (Mysore) Ltd. V. Asstt. Commercial Tax Officer**[17] evolved one more formula of testing the validity of a taxing statute and laid emphasis on the spirit of the amendment into consideration. The court observed, "*Though the Parliament was empowered at any rate, till 1956 to levy tax on sale or purchase of newspaper, no such tax was ever levied by it. On the contrary, soon after coming into force of the Constitution the Parliament enacted the Tax on Newspapers (Sales ano Advertisement) Repeal Act, 1951, whereby taxes levied earlier on the sale of newspapers and on the advertisement of published therein was repealed.*" *The Court further observed. In short the position is : "no tax can*

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16. India Express Newspaper (Bombay) Pvt. Ltd. V. Union of India AIR 1986 S.C 515.

17. Printers Maysore Ltd. V. Asst Commercial Tax Officer (1994) 2 S.C.C 434.

be imposed on the inter state sale of newspaper and no tax is imposed on thier intra - state sale.[18]

The Supreme Court, therefore, avoided the literal construction but examined the spirit of the amendment and found though in accordance with the provision tax can be levied on the sale of newspapers but as the spirit of amendment clearly excludes this possibility, newspapers are free from the tax which might have been imposed upon it.

The right to publish advertisements has always been an important aspect of freedom of press as they are major source of revenue and consequently responsible for lowering the price of the newspaper. The question whether the advertisements are protected under Article 19 (1) (a), for the first time, was raised in **Hamdard Dawakhana V. Union of India**[19] where the advertisement in respect of certain drugs claiming a magical relief was banned. The Supreme Court in such cases stressed the need of ascertaining its **nature and true character** and came to the conclusion that it was only when an advertisement was concerned with the expression or the propagation of ideas, it could be said to relate to the freedom of speech.

The Supreme Court though admitted that advertisement is a part of freedom of speech and expression yet it is not protected under Article 19(1) (a) of the Constitution as it is purely commercial in nature and has nothing to do with the propagation of ideas. It is submitted that the advertisement could have been prevented on the ground of decency and morality under Article 19 (2) because at the time

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18. Id at p. 441.
19. Hamdard Dawakhana V. Union of India AIR 1960 S.C. 554.

when the advertisement was released and the diseases it claimed to cure were not considered fit to be discussed or brought in public. The Supreme Court, therefore, need not to go into the nature and character of the advertisement once it admitted that they were the part of freedom of speech and expression. The same position regarding the publication of advertisement was reiterated in Express Newspaper case but simultaneously easing the commercial concept the Court declared that they can not be denied the protection of Article 19 (1) (a) simply because they were issued by businessmen. Referring the Hamdard Dawakhana case the Supreme Court made it clear that certain observations in that case were beyond the need and made in the light of American decisions, which in America itself in latter cases were not approved by the courts.[20] The judgement of the Court though reiterating its earlier stand widened the scope as the advertisements were not to be denied the protection of Article 19(1) (a) because they were issued by the businessmen. In Tata Press Case the Court however, adopted a different approach and examined it not from the angle of person issuing it but for whom it was made. The Court declared that Article 19 (1) (a) protects not only the interest of person making the speech but also of those for whose benefit it was made as the economic interests of a citizen are guided by the information guided through the advertisements. Thus the Supreme Court boldly asserted, a position in most clear terms which it failed to adopt in earlier case.[21]

In **L.I.C of India V. Munubhai. D. Shah** with the added emphasis of **'fairness'** while rejecting the plea placed by the L.I.C. the Court observed,

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20. Supra note (16) at p. 548.

21. *The Tata Press Ltd. V. Mahanagar Telephone Nigam Ltd. AIR* 1995 S.C. 2438 at p. 2448.

"The attitude on the part of L.I.C. refusing to publish the rejoinder in their magazine financed from public funds can be described as both unfair and unreasonable; unfair because fairness demands that both view points were placed before the readers, however limited be their number, to enable them to draw their own conclusions and unreasonable because there was no logic or proper justification for refusing publication [22]. ***The most striking feature of the judgement is that for the first time the apex court recognised that the freedom guaranteed under Article 19 (1) (a) incudes the right to reply though limited to the exceptional circumstances.*** [23]

In Reliance Petro Chemicals Ltd. Case the "present and imminent danger concept evolved by U.S. Supreme Court was followed by our Supreme Court . Though it admitted, *"It is difficult to lay down a fixed standard to judge as to how clear, remote or imminent the danger is. It must be remembered that the continuance of the injunction would amount to interference with the freedom of press in the form of preventive injunction and it must, therefore, be based on reasonable grounds for the sole purpose of keeping the administration of justice unimpared. There must be reasonable ground to believe that the danger apprehended is real and eminent.*[24]

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22. L.I.C. V. Manubhai. D. Shah (1992) 3 S.C.C. 637 at p. 655

23. The right is not general in nature but available only in the cases where an attempt is made by the state to negate its cirticism through publishing the views of a person favouring the working of the state in a departmental magazine but simultaneously denying, without providing any opportunity, to publish rejoinder of the person who earlier criticised the functioning of the corporation.

24. A.I.R. 1989 S.C. 190 at p. 202

The Court nevertheless admitted the failure to lay down any formula or test to determine how the balance of convenience under the situations as posed in the aforesaid case should be judged where it is a case of preventive publication of an article in a pending manner. The only formula, in the opinion of the Court, therefore, remains of reasonable apprehension of such danger that is mere upon a suspicion of "present and imminent danger", the freedom of press can not be curtailed. But the court once again failed to laydown the guide lines as to when such an apprehension would constitute the "present and imminent danger" to the freedom of press.

Article 19 (1)(a) of the Constitution while providing the freedom of speech and expression also puts a rider upon it and makes the right qualified that reasonable restrictions may be placed upon the freedom. In the opinion of the Court no party may be restrained from propogating to develop any of the language recognised under the Constitution itself. The Court in the instant case however, ignored the fact that any appeal to voters to favour it on a ground of any language is prohibited under Sec. 123 of Representation of People Act.[24-A]

Our country has always been a great preacher of peace and good neighbourly relations. The Constitution of India, therefore, contains the provision giving effect to this long standing policy under Article 19 (2)advocated by our leaders. It is therefore, not permissible to the press to publish any material which adversely affects India's relations with other countries. In **Jagannath Sahu V. Union of India** [25]. The apex Court made a distinction between a 'foreign state' and a ' foreign power ' and held that Pakistan though a member of Common Wealth, was a foreign power of the purpose of the **Preventive Detention Act, 1950**, hence the Foreign State Order 1950 was not applicable in petitioner's case.

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24 - A A.I.R 1984 A P 353.

25. Jaganath Sahu V. Union of India A.I.R. 1960 S.C. 625

Supreme Court based its decision upon the distinction between a foreign state for the purpose of constitution and the foreign power under the Act of 1950. The question for Supreme Court's consideration should have been whether Sec. 3 of Preventive Detention Act, 1950, was saved by Artilcle 19 (2) of the Constitution as a reasonable restriction. It is submitted that the law could have been saved as a reasonable restriction on following grounds.

(1) If such writing in the newspapers create the tension to an extent that there was a likelihood of war or other restrictions, then under the security of state: and,

(2) Since the writings in the newspapers not only had the tendency to affect relations with the countries of commonwealth but also with other countries out side the Commonwealth who were still the foreign states for the purpose of this Constitution.

The Supreme Court in India borrowed the English Concept of **"deprave and corrupt"** the minds of those in whose hand it is likely to fall, developed in Hicklin's case. Hidayatula J. (as he then was) in **Ranjit Udeshi V. State of Maharashtra** acknowledged in a thoughtful, careful and humane consideration of the problem that times and values have changed and might change very considerably and significantly, but he upheld the conviction on Hicklin's principle. Expressly recognising the clash of the "claims of society to suppress obscenity and claims of the society to allow free speech", He observed :

> *"(Counsel) is not right in saying that Hicklin case emphasized the importance of few words or a stray passage. The words of Chief Justice were that `the matter charged' must have ` a tendency to deprave and*

corrupt".

The observations do not suggest that even a stray word or an insignificant passage would suffice. An observation to that effect in the ruling must be read *secundum subjectum materium*, that is to say, applicable to the pamphlet there considered .....We need not attempt to bowdlerize all literature and thus rob the freedom of speech and expression. 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.[26]

After the amendment of Indian Penal Code in 1969, the Supreme Court in **Chandrakanta Kakodkar V.State of Maharashtra** while affirming the 'deprave and corrupt' test restricted the scope of the offence under section 292 I.P.C and expressed the view that, *"It was the duty of the Court to consider the obscene matter by taking an over all view of the entire book and to determine whether obscene passages were so likely to deprave and corrupt those whose minds were open to such immoral infuences and into whose hands the book was likely to fall."*[27]. The Court further held that while doing so it must not overlook the influence of the book on the social morality of our contemporary society. It was observed that, "The concept of obscenity would differ from country to country depending upon the standards of morals in contemporary society..... But to insist that the standard should always be for the writer to see the adolescent ought not to be brought into contact with sex or if they read any reference to sex in what is written whether if that is the dominant theme or not they would be affected would be to require authors to write books only for adolescents and not for adults.

26. Ranjit Udeshi V. State of Maharashtra A.I.R. 1965 S.C. 881 at pp. 888-89

27. Chandrakant Kakodkar D. V. State of Maharashtra A.I.R. 1970 S.C. 1390 at p. 1392

Finally in **Samresh Bose V. Amal Mitra** [28] the Supreme Court expressed it's opinion in favour of dominant theme of the book alleged to be obscene. On the question of obsenity it made an important observation that "The mere fact that the language used was vulgar would not be enough to adjudicate the book as obscene because a vulgar writing is not necessarily obscene. The essence of obscenity of a novel is the effect of depraving. debasing and corrupting the morals of readers. Vulgarity may arouse disgust and revulsion among them but does not necessarily corrupt their morals[29]. It is however difficult to agree with the view of Sen J, that description of female bodies, scantly dressed or involved in love making are not necessarily obscene. It may be submitted that the public in general still has not become so adventurous.

Thus, the test of 'deprave and corrupt' as borrowed from English decision in Hicklin's case is still being follwed in India with certain adjustments. Though the continuing affirmation has been criticised as the legacy of English law "has not been a very happy one and the Indian courts in spite of their several attempts have failed to adjudge the concept of obscenity to the needs of a different society and a different time and have not been able to free it completely from the concepts of a more intolerent age". Inspite of the aforesaid criticism it is wrong to say that the law in this regard has been static and the Supreme Court in Samresh Bose's case has tried to bring the law in tune with the time by giving enough weightage to the expert testimoney in arriving to its conclusion though at the same time it made clear that the Court was not bound by the expert opinion and it was only for its own satis-

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28. Samresh Bose V. Amal Mitra A.I.R. 1986 S.C. 967

29. Id at p. 983

faction. **It may however, be submitted that the Court has deliberately over looked the interest and right of adult and mature persons to read whatever they like declaring that if the work may deprave and corrupt the adolescents, it may be banned**.

The law of contempt of Court is well settled in India. Any act done or writing published, calculated to bring judiciary into contempt, or to lower its authority, or to interfere with the administration of justice is bound to suffer the wrath of the courts.

The apex Court's approach prior to the contempt of Courts Act, 1971 regarding the contempt by the press, keeping in view the role of the press in the society, seems to be quite lenient and where the judicial verdict was criticised in an objectionable manner the Supreme Court did not inflict any exemplary punishment. In E. M. S. Namboodaripad's case[30] where the appeallant was the Chief Minister of Kerala and levelled certain allegations against the judiciary as " an instrument of oppression" and guided by "class hatred", he was held guilty of committing contempt of the court. Neverthless the decision of the **Supreme Court** even after holding him guilty **leaves an impression** that the Court **softened** its attitude by not only reducing the fine to a nominal but also when it seems to justify its decision by saying that it had given various decisions against the exploiting class too, instead of insisting a rigid stand on the contemptous remarks made by the scandlising jurisdiction to cover other than serious allegations of corruption but went out of its way to prove that the erring Chief Minister has also misunderstood his marxism and was, therefore, entitled to a reduction in fine.

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30. E.M.S. Namboodaripad V. T. Narayanan Nambiar A.I.R. 1970 S.C. 2015

This lenient approach on the part of Supreme Court continued even after coming into existence of **contempt of courts Act, 1971**, though time and again it exercised the contempt jurisdiction. In **C.K. Daphtary's** case [31] apex court held that a person can commit contempt by scandlising a sitting judge, avoid execution of an arrest warrant and then contend that there was no contempt. A man can not take advantage of his own wrong to convert contempt of a sitting judge into the contempt of a retired judge. The apex court, however, did not rest the decision on special facts and **laid down general proposition** and its view that truth can not be a defence after it has found that statements made by Gupta were untrue, is not correct. Moreover, under the special circumstances, the criticism of a retired judge may amount contempt but not under general circumstances because he is no more a judge and, therefore, the confidence of public is not shaken out of fear that they may not get justice.[32] Again a retired judge is entitled to file a suit against a person if he is defamed on account of false allegations.

Any attempt to interfere in the administration of justice amounts the contempt of court. But in **Baradkant Mishra V. Registrar Orissa High Court** [33] it felt the problem of not having any comprehensive definition of 'administration of justice'. Nevertheless under the circumstances vilificatory criticism of a judge functioning even in an administrative or non-adjudicatory matter amounted to a contempt and further an appeal does not give a right

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31 C.K. Daphtary V. O.P.Gupta AIR 1971 S.C. 1132

32. Op Cit note (5) at p. 516

33. Baradkant Mishar V. Registrar Orissa High Court AIR 1974 S.C. 710

to commit contempt of court. *The Court in this case failed to take into consideration the importance of freedom of speech and expression, ano therefore, the concurring opinion of Krishna Iyer. J. that power of committing for contempt could not be used to stifle freedom of speech is noteworthy in its appraoch.*

The extent of fair criticism was further explained in **National Textile Worker's Union case** [34] where the Supreme Court made clear that fair criticism, even if strong, may not be actionable but attributing improper motives to judges without justification tending to bring them to ridicule, hatred and contempt can not be ignored. The judicial approach seems to be that the defence of fair comment would be available even if it extend to atributting improper motive against judge as well as the Court itself provided it is justified under the circumstances.[35]

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34. National Textile Workers Union V. P.R. Ramakrishnan AIR 1983 S.C. 759

35. The Court, therefore, did not agree with its own view expressed in Umaria Pamphlet case where it curtailed the scope of fair criticism by subjecting it to non-pendency of the suit.

The approach of the Court was firmly established in **M.R. Parashar V. Farooq Abdulla** when it expressed the view that *"..... the right of free speech is an important right of the citizen, in the exercise of which he is entitled to bring to the notice of the public at large the infirmities from which any institution suffers, including the institution which administer justice*, but the court also warned that *"though law does not restrain the expression of disapprobation against what is done in or by the courts of law, the liberty of free expression is not to be confounded with a licence to make unfounded allegations of corruption against the judiciary. The abuse of the liberty of free speech and expression carries the case nearer the law of contempt.*[36]

In India therefore, what is needed as proof is the tendency to bring the administration of justice into contempt, to prejudice the fair trial if any case which is the subject of civil or criminal proceeding, or obstruct the course and cause of justice. The obstruction may be actual or merely a definite tendency. What the general public will feel how the administration of justice is likely to be lowered in the estimation of the public is the criterion.

Freedom of press does not extend to the publication of false and malacious allegations in order to defame a person. If publication has been made in good faith and for public good, it is protected under ninth exception to section 499 I.P.C. The issue whether or not a particular publication based on an enquiry report by a government official and which is yet to be proved if published in 'good faith' and for 'public good' is protected under the afore-said exception. The judicial opinion does not seem to be unanimous. **A.P.Sen J**. expressed the view that even if it is proved that the publi-

36. M. R. Parashar V. Farooq Abdulla AIR 1984 S.C 615 at p.p. 617 - 18

cation was made on the basis of an enquiry report and was in good faith and for 'public good', it may not be sufficient to exonerate a person for defaming other unless the enquiry report has been proved[37].

Chennappa Reddy J. on the other hand expressly held that questions of "good faith" and "public good" etc. are questions of fact to be decided after the regular trial is held. He observed, "were the imputations made rashly without any attempt at verification? was the imputation was the result of any personal ill will or malice which the author bore towards the political group to which the complainant belonged? was the article merely intend to malign the political group to which the complainant belonged? was the article intended to expose rottenness of jail administration which permitted free sexual approaches between male and female detenus? was the article intended to expose despicable character of persons who were passing off as saintly leaders. Answer to these and several other questions which may arise are of questions of fact and matters for evidence.[38]

Bahrul Islam, J., in his minority judgement held that if a report has been officially prepared by a Government offials after examining several witnesses, it is exhaustive, reasoned and based on evidence and, therefore, it can not be said that respondent published the report with out due care and attention.[39] He also made it clear that even if the findings of report be proved to be false, the respondent is protected because under the law (IXth exception U / S 499 IPC) if any person genuinely believes that a particular

37. S.R. Sobhani V. R.K. Karanjia AIR 1981 S.C.1574 at p.p.1517 - 19

38. Id at p. 1520

39. Id at p.p. 1523 - 24

statement or fact is true and in good faith and for public good, publishes it. he is protected though the statement or fact may not be true.

Thus the majority opinion therefore, seems to revolve around the technical aspect of report and cross examination of accused to asertain questions of fact.[40] While the minority opinion directly descends upon the law. And, therefore, it may be submitted that the minority opinion presents correct approach as it is also in consonance with the apex court's own verdict on several occassions that procedural hurdles should not be allowed to come in the way of imparting justice.

The view that if a person is defamed, may claim damages against the press is not correct approach as it would amount to provide a licence to press as first to defame any one and then compensate, him did not find favour from the Supreme Court in **Auto Shankar's case** where it opined that when an autobiography is claimed to have been written on the basis of public records then the press can not be denied the freedom to publish it on the ground that it is defamatory to some public officials. In case, if the officials feel that they have been defamed they may seek remedy under the law. The view of the Court is that the press would be liable only if it publishes any matter which is false and also without any reasonable attempts to verify it, is not laudable because it excludes the requirement of mensrea. The freedom, therefore, may be abused by press barons to serve their own political interests.[41]

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40. The Court seems to give over emphasis to the fact that the report must have been verified through independent source and questions of facts may be ascertained only after cross-examination conducted during regular trial.

41. R. Rajagopal V. State of Tamil Nadu A.I.R 1995 S.C. 264 at p. 277

Again the view expressed by the Supreme Court that no body can publish any material about a person, relating to himself, his family, marriage, procreation, motherhood, child bearing and education without his consent or when he, himself invites or raises a controversy extends the restriction even where the statement is true or essential and for the public good. The position is not laudable as right to privacy being a constitutional provision, civil law (where truth is defence) or criminal law (where under exception 9th of Sec. 499 I.P.C. any statement made for public good in good faith is exempted from any liability) can not have over riding effect upon such provision even where such publication beside being violative of Article 21 of Constitution is alleged to be defamatory [42].

Extending the scope of freedom, Supreme Court observed that anybody can publish the biography of a person if based upon public records. The reasoning forwarded by the Court that any publication concerning certain aspects becomes unobjectionable if publication is based upon public records including Court records because then it is a legitimate subject for comment by press and media among other, is logical.[43]

It has been a universally recognised principle that freedom of press could not be extended to a limit where it constitute the incitement to an of-

42. The language used by the Court is also vague and may include even a publication warning the people not to marry their daughter to a particular person (where there is a definite evidence to prove the intention of contracting a bigamous marriage on the part of such person) as he is already a married man. Under such circumstances if in order to authenciate the statement, the name and address of his legally wedded wife or children or any other material to substantiate the claim is published, the press would become liable for violating the privacy. The press, therefore, is left to publish either the statement made by him or other activities at public places whether defamatory or not.

43. Id at p. 276

fence. As the term 'incitement to an offence' is of very wide connotation it is only the judicial review of the facts which decides that whether under the circumstances a particular act amounts the incitement to an offence or not. The Supreme Court has expressed its opinion time and again that the offence alleged must be a "definite offence". Further it is also important that any incitement upon which the reasonable restriction is being placed must be a pre-existing offence. Unless the alleged incitement is a pre-existing offence no restriction can be imposed to curtail the freedom. Further when a citizen would consider it desirable to raise his voice, in the public interest, to disobey the order in non violent manner to create a public opinion and force the government to reconsider its decision, he can not be held guilty for incitement of an offence.

The judical attitude regarding freedom of press during emergency has been very encouraging. Though Article 19 may be suspended during the operation of a proclaimation of Emergency declared under Article 352 of the Constitution and the freedom as the fundamental right remains suspended, it does not mean that even an illegal order made prior to the aforesaid proclaimation would survive. In Bennett Coleman's Case the Supreme Court observed' *"Executive action which is unconstitutional is not immune during the proclaimation of Emergency. Article 19 is suspended but it would not authorise taking of detrimental executive action during the emergency affecting the fundamental rights in Article 19 without any legislative authority or in purported exercise of power conferred by any pre-emergency law which was invalid when enacted"* [44].

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44. Supra note (12) at p. 116

On the question of press censorship during emergency the view expressed by Bombay High Court is noteworthy. It opined that it is true when the emergency is in operation fundamental rights guaranteed under Article 19 are not enforceable. But the censor can not exercise the power beyond the purpose stated in censorship object and guidelines, and in case if the censor acts beyond that it can be challenged notwithstanding of the fact that the emergency is in operation. Because in that case it would not be a prayer for enforcing the fundamental rights but to prevent the censor from using his powers, illegally.

The gist of the judgement is that despite the fact that proclaimation of emergency is inforce, a person is free to write whatever he likes so far as no law is violated. The censor also should exercise his authority having regard to the purpose and objects setout in the censorhsip order, and in such a manner as to interference with the ordinary advocations of life and the enjoyment of property as little as may consonant with these purposes.[45]

The judgment has renderd an equally great service by recognising the limits and responsibilities of the right of dissent. The end of every civilised society has not been lost in an over emphasis of the means. Dissent does not and can not mean freeom to destroy, weaken the nation. Civil liberties. including freedom of speech, imply the existence of an organised society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuse.

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45. The views were expressed by Bombay High Court in B.U. Rao V. M. R. Masani. The judgement was delivered during emergency period and remained unreported.

Privileges are essential for the Parliament to discharge its functions without any hindrance. In India the Parliament enjoys such privileges which were being enjoyed by the House of Commons when the Costitution came into force.[46] On the point whether a particular privilege exist or not, the apex court is of the view that the issue is justiciable. But once the existence of a privilege is established, it is exclusively for the Parliament to decide whether a particular act or ommission constitute the breach of privilege or not. Because if the function is assigned to the Court it may, in a given situation may acquire untenable situation where the House and the individual or authority involved would occupy the position of two contesting parties and the Court will act as a court of original jurisdiction.[47] The decision of Allahabad High Court based on the opinion of the Supreme Court represents a sound judicial approach that House is free to decide the question of breach or contempt and the courts would refrain from interfering merely to correct the mistake of judgement of the House.

The application of Article 22 (2) of the Constitution in Nafisul Hasan case indicated that the exercise of parliamentary privileges must conform to the requirementof fundamental right. But in S.M. Sharma's case it was made clear that the privileges enjoyed by the Parliament on the analogy of House of Commons were not subject to Article 19 (1) (a) and that the House could

46. The Supreme Court in its advisory opinion held that legislature may claim only those privileges which were being enjoyed by the House of Commons as legislative organ and not as a court of record. But Allahabad High Court seems to have deviated from the opinion of the apex court in Keshav Singh's Case where it held that it is sufficient tha a privilege exist but in what from did it exist, the Court refused to entertain.

47. Khan, G. A: privileges: Dilemma of Democretic Indian Alig. L.J. Vol VIII 1983 at p.159

validly prohibit the publication of any report of its debate and proceedings even if the action contravenes the fundamental right guaranteed under Article 19(1) (a). Article 21, may however, be invoked against any action in case of breach of privilege on the ground of being malafide, capricious or perverse. The observations in M.S. Sharma and Keshav Singh's cases that where the House acted under the rules laying down procedure for enforcing its privilege to commit for contempt will be treated as valid procedure under Article 21 of the Constitution indicate that whenever a person is committed for breach of privilege according to procedure laid down in the rules of procedure it can not be challenged as violative of fundamental rights. The view expressed in Maneka Gandhi's Case, however makes it difficult to concede the aforesaid position according to which the procedure must be in confirmity with natural justice otherwise the courts may hold the procedure unconstitutional.

The judicial attitude as a whole has concentrated upon two factors - national and social interest on the one hand and the freedom on the other. While dealing with these two issues whenever they come in conflict with each other the apex court has tried to struck a balance between the two. It is however, not possible to adopt any uniform principle when dealing with different situations. The Supreme Court, therefore, has evolved various principles from time to time to achieve this balance. The judicial approach regarding press censorship has provided a sigh of relief to the press where the action of the censor if beyond his power may be challenged as ultra vires to the law. Regarding legislative privileges it has been very restrained. The exercise of legislative privileges in India, until now has not been very happy one and the relationship between press and legislature during the last few

years have raised many problems. The Court which are very much conscious about the guarantee and implementation of fundamental rights, often in the absence of codified law, is being asked to intervene.

CHAPTER: VII

CONCLUSION

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Never in the history of India was there such a pressing need for ascertaining the independence and role of the press as it is today. The vital decisions in every sphere of life be it political, social, economic, or otherwise are influenced by it. The freedom of speech and expression including freedom of press has been regarded by great thinkers and the jurists alike as necessary for achieving a variety of ends.

In the absence of a written Constitution in England the freedom of press means to write whatever it pleases and a cut off line can only be drawn at a point where it violates any law. Thus the liberty consists in printing without any previous licence, subject to the consequences of law.

In U.S.A., freedom of press has been given specific recognition through first amendment which makes any law unconstitutional if it abridges the freedom. It, therefore, not only disallow the censorship but also any action of the government provided it places any hindrance in general discussion of public matters which is essential in a democratic society. However, the view developed by American Supreme Court through a catena of cases is that the freedom of press includes more than merely serving as a "neutral conduit of information between the people and their elected leaders or as a neutral form of debate." A free

press means a press which is free from compulsions from whatever sources governmental, social, financial, external or internal.

A free press is free for the expression of opinion in all its phases but simultaneously it also means that it may be punished under constituionally permissible limitations (evolved by the judiciary) where it offends against an action, legitimately undertaken by the state in order to protect eg. security of state, obscenity and the like and the restriction imposed is in accordance with due process of law.

Though there is no specific provision under the Indian Constitution guaranteeing the freedom of press but Dr.Ambedkar's speech in the Constituent Assembly and the judicial verdicts leave no doubt that it is guaranteed under article 19(1)(a).

The freedom of press means freedom from and freedom for. The essence of the freedom of press lies in the right of dissent and co-existence of varying and conflicting view points contending for the supermacy in the minds of the citizens of a democratic state. Or in other words one of the important feature of the democracy which distinguishes it from dictatorship and other forms of Governments is the freedom to express a view different from that of a ruling party or the individual.

The importance of the press at present is second to none. It can help the community by giving men knowledge of the world and of one another by promoting comprehension and appreciation of the goals of free society that shall embrace all men.

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The observations made by the Supreme Court of India in this regard are noteworthy. In its opinion "Liberty of press remains an **`Ark of covenant'** in every democracy and that it has acquired the role of **public educator.**" The freedom of press thus, is the very foundation of democratic way of life contemplated by the Constitution and the bulwork of the democratic form of Government in India. At the time when the world is facing various problems, vital for the survival of mankind, the press can certainly create a climate conducive for the settlement of those problems.

The press despite its importance in modern society does not enjoy any specific rights or privilege in U.K., U.S.A. or India other than those to which a citizen is entitled. Though as an exception the Contempt Of Courts Act, 1981 in England and the Press Council Act, 1977 in India provide some relief against the disclosure of source of information. Similarly under exceptional circumstances the press has been allowed to enjoy to a little extent some additional rights.

Therehas been no smooth sailing for the press from its earliest days. No opportunity was missed to prevent the press from awakening

the political aspirations among the native people; Therefore, for most of the part the laws made by the British rulers relating to press were appressive in nature barring occassional exceptions during which the press was encouraged to react more freely on the affairs of the state.

The freedom of press primarily means the dissemination of information which in turn is ensured by the freedom of circulation. No measures, therefore, can be adopted which would have the effect of curtailing the circulation and consequently narrowing the scope of information. The freedom not only includes the matter which a citizen is entitled to circulate but also the volume of circulation to propagate his views. Any order, therefore, if forcing a newspaper to cut down its size or raise its price to the extent that it affects the concerned newspaper adversely, or any policy which hampers the free growth of newspaper would be unconstitutional.

However, the liberty of press is confined not merely to freedom of circulation, or freedom of publication, or freedom to determine the extent or volume of circulation, or freedom of fixation of price or page, or freedom to determine the area of advertisement but would also include the freedom which will leave the press free in regard to the choice of employment or non-employment in the editorial force, and above all which will enable the press to choose any instrument for the exercise of the freedom.

However any law which affects the economic position of the press

is not unconstitutional per se, but requires two elements.

(1) it must be made with the specific intention to curb the press; and

(2) it must not be saved under Article 19(2) of the Constitution.

Every modern government, liberal or otherwise has a specific position in the field of ideas; its stability is vulnerable to critics in propagation to their ability and persuasiveness. A government on popular suffrage is no exception to this rule. It does not however, mean that the state is free to take any action against the press to compel it to follow its line. If the press, therefore, refuse to follow the state's directive to adopt a particular stand on certain issues or where it vehemently criticise the state policies, no punitive action may be taken against it by the government. Similarly the state or any public authority can prevent the press by an order having no force of law from publishing any material if it is based on public records. Moreover a person whose own biography is being published can not restrain the press from publishing it provided it is based on public records because the concept of invasion of privacy becomes irrelevant in such cases.

Though the press doesn't enjoy any privilege to defame others but if it is proved that the publication was made in good faith and for public good, no liability would accrue . The good faith implies due care and attention and may be ascertained only after cross examining the accused but at the same time it is not necessary to prove that each and every word spoken or written is literally true. If the allegations are such that having regard to certain facts and circumstances with his knowl-

edge the accused might as an ordinary, reasonable and prudent man have drawn the conclusion which the press expressed in defamatory language for the protection of his own interest, he can be said to have acted in good faith. The reason behind the defense of public good is that right of a person to have his reputation maintained has some times to give way to public good, but any injury caused to a person must be compensated for by the resultant advantage to the public. Nevertheless, press may still be held liable for violation of privacy if it publishes any matter relating to certain aspects, obtained through any other source and without consent of the person concerned.

In present scenario when the economic activities are showing an upward trend, the freedom may come in conflict with the other,s fundamental rights under such situation where respective fundamental rights are claimed by the litigating parties, on balance of convenience approach the press may be restrained from publishing any material which is injurious to the commercial interest of other party. But due to importance the press has in society, the restraint should not last beyond the period than actually required under the circumstances of the case. In other words it may be said that the moment present and imminent danger is removed, the press can not be restrained any more from enjoying its freedom. Though no person can claim as a matter of right to get his views published in any departmental magazine even if it is being published out of public funds. However, if the views of any person against the policy of a particular department are seemed to negate through the 'in house magazine' the person whose opinion is so ne-

gated has a right to reply through the same magazine. The absence of arbitrariness in the action on the part of any authority, therefore, extends even to the publications of the government itself.

The issue that whether commercial advertisements are protected under Article 19(1)(a) or not has now been settled by the Court and such advertisements are now covered under protective umbrella of Article 19(1)(a). The press, therefore, has a right to publish the advertisements which are purely commercial in nature unless they fall under any of the prohibition provided under Article 19(2) of the Constitution.

The absolute powers or rights are always open to be abused by the state and the individuals alike. The absolute power in any society, therefore, is neither practicable nor desirable. The Constitution of India unlike U.S. Constitution where the courts have evolved the noble rules of restrictions, expressly recongnise this principle and provides for reasonable restrictions which may be imposed upon the press on the grounds enshrined under Article 19(2) of the Constitution.

The restrictions however can not be imposed in such manner which take away the spirit of the freedom itself. There must be a balance between the freedom and the restrictions provided under Article 19(2). Consequently it is not permitted to place any restriction on the ground of integrity of India if there is a promise for the development of any particular language recognised by the Constitution itself.

It is universally recognised principle that under no circumstances the press may be allowed to publish any material which may endanger even the security of the state. In India too, this cardinal principle of patriotism is followed without any hesitation. The apex court however. has made it clear that the disturbances of extreme nature and not which create local law and order problem may be dangerous to the security of state. The press, therefore, may be restrained only when there are disturbances of exceptional nature, and not of local, significance on the ground of security of state.

The press may also be restrained from publishing any matter which causes or has the tendency to cause public disorders. In such cases it would not be an unreasonable restriction. The restriction if circumstances warrant may extend even to complete prohibition provided it is done with proper safeguards. But a law which prohibits even the innocuous speech or writing is not a valid law because mere instigation to disobey the law itself is not a disturbance to public order. It excludes normal law and order situations and includes only when there are threats to public peace, safety and tranquility. Similarly the press can not publish any matter the overall impact of which may deprave and debase the adolescent readers into whose hand the book may fall. However, taking the aforesaid plea every work containing suggestive portions can not be banned because there is a difference between obscene and vulgar writing. Therefore, in order to present an honest and correct picture of the events if the language becomes vulgar, it can not be restrained. But on the issue whether language used in a particular

work is obscene or not, the opinion of the experts though not binding upon the Court play an important and dominant role especially where the Court is not conversant with the language used in the work alleged to be obscene. It is for the courts and not the press to decide any case pending before it . The press would be guilty of contempt if it ventures to form its own opinion which cast a shadow on the impartiality of judiciary or place any hindrance in the administration of justice. In a democratic set up, however no public institution is beyond criticism and the judiciary is no exception to such scrutiny. Any fair comment by the press, therefore, made in good faith to point out the short coming and to secure its improvement would not amount the contempt of Court. But the fairness of any comment will depend upon the facts of particular case to be judged by the courts. The apex court has not been very strict in respect of contempt jurisdiction and on most occasions let off the press after giving warning or when an apology was forwarded by erring press. The Court however, has not missed any opportunity to stress that no attempt to undermine the confidence of the people in the administration of justice should be allowed because all those public rights can not outweigh the public interest in the judiciary as the public institution.

The press does not enjoy any right to publish a matter which is defamatory to others. It is however exempted from any liability if the publication is made in good faith and for public good. But the issue whether the publication was made in good faith or not can only be decided after the accused has been cross examined before trial court. The press is not liable to

the state or any of its officials for their alleged defamation unless the publication was false and the same was published without any attempt to verify the facts. Nevertheless such officials continue to enjoy the equal rights with others in their personal capacities. Further the freedom may not extend to a point where it amounts incitement to an offence. Every publication however may not amount the incitement to offence because changes may be brought not only by advocating violence but also through democratic means.

During emergency declared under Article 352 of the Constitution the freedom of speech and expression is suspended under Article 358 to deal with emergent situations. The Constitution (44 th) Amendment Act, 1978 has enhanced the scope of the freedom because the press now, can not be restricted if the emergency is declared under Article 352 on the ground of armed rebellion. It is also obligatory that a law which tends to curb the freedom guaranteed under Article 19(1)(a) must bear a specific recital as provided under Article 358(2)(a) failing which any law placing restrictions upon the press would be unconstitutional. Moreover, a law curtailing the freedom of press, if itself was ultra-vires when enforced would not acquire legitimacy even if a promulgation of emergency under Article 352 is issued subsequently. Declaration of

emergency though suspends fundamental right of speech and expression, the press, nevertheless, remains free to express its views unless it violates any law for the time being in force and the order of censor though may not be challenged as violative of Article 19(1)(a), yet it is still open to be attacked on other legal grounds, i.e. for exceeding its

power and acting without the authority of law etc.

After the First Constitutional Amendment in 1951, it is no more sufficient that the restriction was saved by Article 19(2), but it must also be reasonable. The concept of reasonableness of any restriction includes both substantive as well as procedural reasonableness. The substantive reasonableness refers to the content or subject matter ie. an ordinance, while the procedural reasonableness refers to the manner in which a law, an ordinance or an administrative practice or act is enforced. Consequently where the restriction fails to stand the test of reasonableness it is bound to be struckdown as ultra-vires to Article 19 (1)(a) of the Constitution.

The reasonableness of any restriction may also be tested independently of Article 19(2), and if the 'chilling effect' of the legislation places a restriction which directly affect the press adversely the restriction would be unreasonable and violative of Article 19(1)(a) of the Constitution.

The privileges at present being enjoyed by the parliament and state legislature are identical to the House of Commons. The High Courts and the Supreme Court are competent to examine and settle the issue of existence or non-existence of any particular privilege but once it is established that a particular privilege exist, only the Parliament is empowered to decide whether there is any breach of such privilege or not.

The dual system (Parliamentary privileges and the fundamental rights) has sometimes given rise to a situation where the action of the House is challenged as violative of fundamental rights. It has now been settled that Parliamentary privileges are not subject to Article 19 (1)(a), but Article 21 can be invoked on the ground that the act of legislature is malafide; capricious or perverse. The exclusion of the rule of natural justice too (M.S.M. Sharma & Keshav Singh's cases) in the light of Maneka Gandhi's case is no more a good law. Though a guarantee has been extended to the press under Parliamentary Proceedings (protection of publication) Act, 1977 (which has now been accorded constitutional recognition under Article 361-A of the Constitution) against any proceeding civil or criminal before any court of law but the same protection is not available either against the parliament itself or the Supreme Court and the High Courts.

The entire discussion shows that despite the constitutional guarantee of a free press the government often attempts to interfere by resorting various coercive measures i.e. policies, newsprint control, taxing statute, punitive measures, etc. Whenever its actions do not find favour or criticised by the press. The press too, some times behave in an irresponsible manner but this does not lessen the graveness of the actions of the government. The press is to provide the society a truthful account of events, a forum for exchange of comments and criticism. and agency for the presentation and classification of goals and values of society. If such goals are to be achieved the government must set

limits on its authority to interfere with, regulate or suppress the voice of the press or to manipulate the data on which public opinion is formed. government must set these limits on itself, not merely because freedom of expression is a reflection of important interests of the community but also because it owes a duty about it.

However, there is a consensus of opinion that the government must necessarily have some control over the press as it must over all other sort of institutions operating in the society in a suitable manner which prevent the undermining of the basic structure of the society without affecting the spirit of freedom.

The Supreme Court too, has shown considerable awareness in protecting the press whenever its freedom is encroached upon. It has time and again rescued the press against the arbitrary actions and harsh measures adopted by the government and allowed any restriction only when there is a resultant public advantage. Thus, it has tried to struck a balance between freedom of press and the social and national interests as a result laws dealing with such issues have been given a blanket protection under Article 19 (2). Similarly it has always been over conscious of its criticism resulting into contempt cases. Lately a very positive indication (of extending the scope of fair comment) has been given by the apex court expanding the scope of the freedom. We must hope that this positive attitude on the the part of the apex court would be helpful in broadening the horizons of freedom of the press. The following suggestions may however, be forwarded to strengthen the freedom

of press guaranteed under the Constitution.

(1) Though the Supreme Court has often administered the sermon to the press whenever it transgresses the freedom guaranteed to it under the Constitution but nothing has been done to confer some additional rights to the press required as public institution enabling it to play its role more effectively. Therefore, there is a need to confer certain privileges upon the press as a public institution.

(2) The enactments dealing with law and public order are given almost blanket protection. The experience of the enforcement of such laws in certain cases however, shows their misuse. Such enactments. therefore, should be amended to define the powers of the authorities in clear terms and to assure the compliance of natural justice whenever any action is proposed or taken under such statutes.

(3) The Hicklin's test in cases relating to obscenity is still being followed with certain modifications and while doing so the interest of 'young readers' has been given due protection but simultaneously the interest of 'adult and mature' persons has been overlooked. The Court must pay the attention towards the right of such class of persons.

(4) During emergency promulgated under Article 352 of the Constitution the rights guaranteed under Article 19 remain suspended. The press may be restrained under Article 19(2) on the ground of 'security of state' also, such restriction may extend even to the 'prohibi-

tion' if the circumstances require. The purpose of Article 358, therefore, may be achieved under Article 19 (2) itself. Consequently Article 358 should have no application in respect of Article 19(1)(a). Such step will also eliminate unnecessary interference in the affairs of the press.

(5) The privileges of the Parliament and state legislatures must be codified. It will remove the existing doubts and the journalists would know the sphere of their freedom and stop intruding into the legislature's domain.

(6) The press under certain circumstances is not liable for any civil or criminal liability before any court of law but not against the legislature. The protection must be extended against the legislature also in accordance with the constitutional spirit of rule of law.

Some problems may crop up when the aforesaid suggestions are put into practice and to overcome those problems further study may be undertaken.

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