FREEDOM OF THE PRESS IN INDIA

CONSTITUTIONAL PROVISIONS AND THEIR APPLICATION

J. MINATTUR

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PREFACE

This study is intended to present to the reader the main provisions of law affecting freedom of the press in India. It is specially concerned with examining how far freedom of the press obtains in free India. It is proposed to discuss constitutional provisions and their application through various legislative measures with a view to seeing whether these provisions are sufficiently protective of this freedom. The introductory chapter attempts to indicate what is meant by *freedom of the press*. In the first chapter constitutional provisions are set out and discussed. The next five chapters deal, in the main, with statutory provisions relating to this freedom. The concluding chapter purports to make certain suggestions in relation to repeal or amendment of a few of these provisions.

It may be mentioned that this study deals only with freedom of the press in normal times. The subject of civil liberties in India during a period of emergency has been dealt with in the present writer's doctoral thesis, *Emergency Powers in the States of Southern Asia* (London University, 1959)

In the preparation of this study, I have benefited from the guidance and encouragement given by several persons and the assistance and facilities provided by various institutions. I wish to express my thanks to all of them.

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CONTENTS

Preface v

Table of cases x

INTRODUCTION
(i) Freedom of the Press 1
(ii) Judicial opinions in India 1
(iii) Judicial opinions in the United States 2
(iv) Further judicial opinions in India 4

I. CONSTITUTIONAL PROVISIONS
(i) Guarantee of freedom of expression 6
(ii) Reasonableness of restrictions 14
(iii) Prior restraints 24
(a) Pre-censorship 24
(b) Other prior restraints 25

II. SEDITION AND RELATED OFFENCES
(i) The law of sedition in India 28
(a) Introductory remarks 28
(b) Section 124A of the Penal Code 30
(c) Section 505 of the Penal Code 35
(d) Police (Incitement to Disaffection) Act, 1922 36
(e) Section 27B of the Post Office Act 36
(f) Sections 181A to 181C of the Sea Customs Act 36
(g) Section 108 of the Criminal Procedure Code 37
(h) Sections 99A to 99G of the Criminal Procedure Code 37
(ii) Promoting feelings of enmity between different classes 37
(iii) The Official Secrets Act, 1923 39
(iv) Endangering friendly relations with foreign states 40

III. PUBLIC ORDER AND INCITEMENT TO AN OFFENCE
(i) Public order 45
(a) Public order distinguished from security of State 46
(b) Section 5 of the Indian Telegraph Act 48

(c) Section 26 of the Post Office Act 49
(d) Section 144 of the Criminal Procedure Code 49
(e) Section 295A of the Penal Code 52
(f) Public Security Acts 53
(g) Wide powers of the Executive 56
(h) The expression "in the interests of public order" 60
(ii) Incitement to an offence 61
IV. OBSCENITY
(i) What is obscene? 65
(ii) Statutory provisions 71
(a) Sections 292 and 293 of the Penal Code 71
(b) Sections 18 and 19A of the Sea Customs Act 73
(c) Section 20 of the Post Office Act 74
(d) The Young Persons (Harmful Publications) Act 74
(iii) Problems of application 75
V. CONTEMPT OF COURT AND OF LEGISLATURE
(i) The law of contempt of Court 78
(ii) Constitutional provisions 82
(iii) Statutory provisions 84
(a) The Contempt of Court Act, 1952 84
(b) Provisions in the Penal Code 88
(c) Provisions in the Code of Criminal Procedure 88
(iv) Procedure in contempt cases 90
(v) Contempt of legislature 94
VI. DEFAMATION
(i) Introductory remarks 102
(ii) Civil liability 103
(iii) Criminal liability 104
(iv) Defamation of public servants 109
(a) Section 198B of the Code of Criminal Procedure 110
(b) Press Commission's views 111
(c) Suggested procedure 112
(v) Suggested changes in the law of defamation 113
VII. CONCLUSION 117
(i) Article 19(2) of the Constitution 120
(ii) The Press and Registration of Books Act, 1867 123
(iii) Section 124A of the Penal Code 124
(iv) Section 292 of the Penal Code 125
(v) Section 295A of the Penal Code 126
(vi) Contempt of Court 126

(vii) Contempt of legislature 128

Bibliography 130

Index 133

TABLE OF CASES

Abdul Hameed *v.* District Magistrate 19
Abrams *v.* United States 29
Adkins *v.* Children's Hospital 6
In re Alavandar 27, 123
Amarnath Bali *v.* The State 11
Ambard *v.* Attorney-General for Trinidad and Tobago 80
Anantha Krishnan *v.* State of Madras. 97
Anon. (1877) I.L.R. 1 Madras 305 90
Associated Press *v.* National Relations Board 3
Associated Press *v.* United States 3
Aswini Kumar Ghose *v.* Arabinda Bose 80

Balasubramonia Mudaliar *v.* Rajagopalachariar 108
Barucha *v.* Excise Commissioner 19
Bengal Immunity Company *v.* State of Bihar 2
In re Bharati Press. 10, 11, 12, 65
Bowman *v.* Secular Society, Limited 32, 33
Brahma Prakash Sharma *v.* State of Uttar Pradesh. 87
Brajnandan Sinha *v.* Jyoti Narain 87
Bridges *v.* California 82, 120
Brij Bhushan *v.* State of Delhi 2, 8, 9, 12, 24, 25, 46, 47

Cantwell *v.* Connecticut 45
P.T. Chandra *v.* The Emperor 50
Chaplinsky *v.* New Hampshire 45, 119
Chintaman Rao *v.* State of Madhya Pradesh 14, 18
N. N. Choudhuri *v.* Bela Bala Devi. 90, 91
Commonwealth *v.* Gordon 68
Cox *v.* New Hampshire 120
Craig *v.* Harney 82

Debi Soran *v.* The State 33, 125
Debs *v.* United States 29
Dennis *v.* United States 28
Dina Nath *v.* Sayad Habid 104
Doraiswami Naidu *v.* Kanniappa Chetti 107
Dwarka Prasad Laxmi Narain *v.* State of Uttar Pradesh . . . 16

Emmens *v.* Pottle 104
Emperor *v.* Ambalal Paranngji 73
Emperor *v.* Genda Ram 109
Emperor *v.* Ghulam Hussain 72
Emperor *v.* Harnam Das 72
Emperor *v.* Inderman 72
Emperor *v.* Kherode Chandra Roy Chaudhury 72
Emperor *v.* Kundammal 107
Emperor *v.* Maniben Kara 38
Emperor *v.* Maung Sein 109
Emperor *v.* G. V. Mavlankar 50
Emperor *v.* Nga On Thin 107
Emperor *v.* Alex Pimento 109
Emperor *v.* Salig Ram 88
Emperor *v.* Sankara Narasimha Bharati 108
Emperor *v.* Sree Ram Saksena 70
Emperor *v.* Sukdeo 107
Emperor *v.* Thakkar Datt 72
Emperor *v.* Venkatrao 89
Emperor *v.* Vishnu Krishna 72, 73
Eubank *v.* Richmond 7
Express Newspapers *v.* Union of India 2, 4, 14

Forrester *v.* Tyrell 102

K. L. Gauba *v.* Chief Justice and Judges, Lahore 127
Girdharlal Popatlal Shah *v.* State of Bombay 72
Gitlow *v.* New York 29
A. K. Gopalan *v.* State of Madras 6, 15, 18
Govinda Chetti *v.* Perumal Chetti 50
Grosjean *v.* American Press Company 3

Hamdard Dawakhana *v.* Union of India 5, 121

Hira Lal Dixit *v.* State of Uttar Pradesh 80, 81
Hussain Buksh Kausar *v.* The State 34

Indu Kumar Shankerlal Saherwala *v.* The State 11
Ismail *v.* State of Orissa 20

In re Jackson 3
Jagannath Satha *v.* Union of India 43, 58
Jang Bahadur Santpal *v.* Principal, Mohindra College 13, 121
Jnanendra Prasad Bose *v.* Gopal Prasad Sen 85, 86
In re Johnson 92
De Jonge *v.* Oregon 120

Kamini Mohan Das Gupta *v.* Narendra Kumar 50
Kartar Singh *v.* State of Panjab 53, 54, 109
Kelly *v.* Sherlock 109
N. B. Khare *v.* State of Delhi 14, 16, 17, 18, 20, 57, 94
King Emperor *v.* Sadashiv Narayan 32, 125
Kovacs *v.* Cooper 46

Lee *v.* Argus 104
Legal Remembrancer *v.* B. B. Das Gupta 83, 85
Loknath *v.* State of Orissa 19
Lovell *v.* Griffin 3

Mahmud Zaman *v.* District Magistrate 124
Marsh *v.* Alabama 24
In re Motilal Ghose and others 83
Municipal Corporation *v.* Virgo 19
Muthuramalinga *v.* The State 59

Near *v.* Minnesota 28, 120
Niharendu Dutt Mazumdar *v.* King Emperor 32, 33
Nizam of Hyderabad *v.* B. G. Keskar 78
Nye *v.* United States 93

Panhandle Pipeline *v.* State Highway 7
Parashuram Detaram *v.* Emperor 94
Pattammal *v.* Chief Presidency Magistrate 11
Pennekamp *v.* State of Florida 5

C. T. Prim *v.* The State 73
Public Prosecutor *v.* Markandeyulu 72

Queen Empress *v.* J. C. Bose 31
Queen Empress *v.* Ramchandra Narain 31
Queen Empress *v.* B. G. Tilak 31, 32
Queen *v.* Hicklin 67, 68, 70
Queen *v.* Reiter 68

Ram Manohar Lohia *v.* Superintendent, Central Prison . . . 13, 14
Ram Singh *v.* State of Delhi 15, 58, 59
Ramji Lal Modi *v.* State of Uttar Pradesh 52, 53
Ram Nandan *v.* The State 33
Read *v.* Huggonson 78
B. R. Reddy *v.* State of Madras 86
G. K. Reddy *v.* Nafisul Hasan 97, 100
R. *v.* Almon 79
R. *v.* Antonelli 41
R. *v.* Close 69
R. *v.* Editor, The New Statesman 79
R. *v.* The Evening Standard 82
R. *v.* Gordon 41
R. *v.* Leese and Whitehead 38, 46
R. *v.* Penguin Books, Limited 69
R. *v.* Stockdale 129
Reynolds *v.* United States 120
Romesh Thappar *v.* State of Madras . . . 2, 8ff, 14, 28, 38, 45, 47
Roth *v.* Goldman 73
Roth *v.* United States 70, 121
V. G. Row *v.* State of Madras 17

Saia *v.* New York 45
Sanatan Daw *v.* Dasarathi Tah 108
R. Sankar *v.* State 108
Sarju *v.* Uttar Pradesh 58
Schaefer *v.* U.S. 29
Schenck *v.* U.S. 62, 119
Schneider *v.* Irvington 46
M.S.M. Sharma *v.* Sri Krishna Sinha 95ff
Sodhi Shamser *v.* State of Pepsu 14, 18

State *v.* Abdul Gaffar Khan 34, 38
State *v.* Baboo Lal 17
State *v.* Deadley Misra 50
State *v.* Editors and Publishers of Eastern Times and Prajatantra 84
State *v.* Ramanand Tiwari 21, 22, 54
State of Bihar *v.* Shailabala Devi. 12
State of Bombay *v.* Atmaram Sridhar Vaidya 59
State of Bombay *v.* Balsara 18, 65
State of Madras *v.* V. G. Row 14, 15, 16
State of West Bengal *v.* Subodh Gopal 6
Sukhdev Singh Sodhi *v.* Chief Justice and Judges of the Pepsu
High Court 91
Sundaram Chetti *v.* The Queen 50
Superintendent, Central Prison *v.* Dr. Lohia 46, 47, 54, 56
Surendranath Banerjea *v.* Chief Justice and Judges of the High
Court of Bengal 82, 86
Stromberg *v.* California 29

Talhara Cotton Ginning Company *v.* K. G. Namjoshi 83
Tara Singh Gopichand *v.* State of East Panjab. 33, 38
Thomas *v.* Collins 3, 27, 124
Tilok Chand *v.* The State 38
Trilok Chand *v.* The State. 24

United Public Workers *v.* Mitchell 45
United States *v.* Burleson 29
United States *v.* Dennis. 127
United States *v.* Kennerley 67
United States *v.* Macintosh 29
United States *v.* Married Love 66, 67
United States *v.* One Book called Ulysses 67
United States *v.* One Book entitled Ulysses 67

Valentine *v.* Chrestenson 5
In re Vengan 121
In re Venu Gopal 24
Virendra *v.* State of Panjab 22, 53, 55ff, 61

Wallace-Johnson *v.* The King 125
Weston *v.* The Bengalee 90
Whitney *v.* California. 29, 63

STELLINGEN

1.

Preventive detention by the Executive in a period of normalcy is to be regarded as not in consonance with the concept of the rule of law.

2.

It is necessary to make legislative provisions in relation to declaration and administration of martial law.

3.

The Indian Courts, in their law-making function, are bound to follow the directive principles of state policy enunciated in Part IV of the Constitution, although they may not constrain the other organs of the State to take positive action in accordance with these principles.

4.

The ordinance-making power of the Head of the State in India, exercisable when the legislature is not in session, is liable to easy abuse, especially if it is held, as has been done in *In re Veerabhadra* (A. I. R. 1950 Madras 243), that the conduct of the President or a Governor in proroguing the legislature for the express purpose of exercising this power cannot be impugned as illegal or fraudulent.

5.

The rule of *stare decisis* may be regarded as part of the existing law referred to in Article 13 of the Indian Constitution, but there are reasonable grounds to hold that the Supreme Court of India is not bound by the rule, just as its predecessor, the Judicial Committee of the Privy Council, was (and is) not bound by it.

6.

If the President of India continues to confer titles like *Bharat Ratna* and *Padma Vibhushan*, it is desirable that Article 18(I) of the Indian Constitution, which prohibits the State from conferring any title other than military or academic distinction, be abrogated or suitably amended.

7.

The directive principle that the State shall take steps to separate the judiciary from the executive in the public services of the State (Article 50 of the Indian Constitution) should be implemented as soon as possible in all the units of the Indian Union.

8.

Article 16 of of the Dutch *Staatsregeling* of 1798 should be considered superior to Article 7 of the present Constitution of the Netherlands in that the former purports to provide for better protection to the citizen's right to freedom of expression by laying down a definite principle as a basis for any restriction on the basic right.

JOSEPH MINATTUR

Freedom of the Press in India

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INTRODUCTION

(i) FREEDOM OF THE PRESS

Before we proceed to examine the constitutional provisions relating to freedom of the press in India, it is necessary to investigate what is meant by the expression "freedom of the press" in this context.

When the Indian Press Commission was appointed by the Central Government in 1952, it was required to examine, among other things, "freedom of the press and repeal or amendment of laws not in consonance with it."[1] The Commission therefore attempted to indicate the connotation of the expression *freedom of the press*. It said: "The expression "freedom of the press" has been understood in various senses by different persons. It is sometimes confused with the idea of the independence of the press. We think that the expression should be understood as meaning freedom to hold opinions, to receive and impart information through the printed word, without any interference from any public authority."[2] It is in this sense that the expression is used in this study.

(ii) JUDICIAL OPINIONS IN INDIA

There is not an abundance of authority in India on the concept of freedom of the press. The Constitution guarantees to all citizens freedom of speech and expression, but the nature, scope and extent of the fundamental right have not been exhaustively commented upon by the Courts. A few ideas on this right, however, clearly emerge from the observations of the Courts.

In the first case involving an interpretation of the guaranteed right, Patanjali Sastri, J., (as he then was) of the Supreme Court said: "There

[1] Notification dated September 23, 1952, issued by the Government of India, Ministry of Information and Broadcasting.

[2] Press Commission, *Report*, Part I, paragraph 1453. The Commission on freedom of the Press in the United States, while stressing for the press freedom from various external compulsions and freedom for the achievement of its conception of service, admitted that "freedom of the press is most commonly thought of in relation to the activities of the government." (*A Free and Responsible Press*, p. 79)

can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value."[3]

In the second case the same learned Judge observed: "... liberty of the press... is an essential part of the right to freedom of speech and expression declared by Article 19(1) (a)"[4] of the Indian Constitution.

Interpreting the words "freedom of speech and expression" in the Article, the Madras High Court observed that "the term 'freedom of speech and expression' would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own but have either been borrowed from some one else or are printed under the direction of that person."[5]

(iii) JUDICIAL OPINIONS IN THE UNITED STATES

In the absence of authority in Indian judicial decisions, it is not uncommon for Indian Courts to look for light and leading in the pronouncements of the Supreme Court of the United States, especially in matters involving interpretation of certain constitutional provisions.[6] The decisions of the United States Supreme Court on the subject of freedom of the press would indicate:

(i) freedom of speech and freedom of the press are fundamental personal rights of the citizen;[7]

(ii) the exercise of these freedoms is the foundation of free government by free men;[8]

[3] *Romesh Thappar* v. *State of Madras,* 1950 S.C.R. 594 at 597

[4] *Brij Bhusman* v. *State of Delhi,* 1950 S.C.R. 605 at 608

[5] *Srinivas Bhat* v. *State of Madras,* A.I.R. (1951) Madras 70 at 73

[6] In *Express Newspapers* v. *Union of India,* the Supreme Court of India said: "It is trite to observe that the fundamental right to the freedom of speech and expression enshrined in Article 19(I) (a) of our Constitution is based on these provisions in Amendment I of the Constitution of the United States of America and it would be therefore legitimate and proper to refer to these decisions of the Supreme Court of the United States of America in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this Court against the use of American and other cases." (1958 S.C.J. 1113 at 1157–58) Note also the observation: "Our Constitution has drawn freely *inter alia* upon the Constitution of the United States" (Bhagwati, J., in *Bengal Immumity Company* v. *State of Bihar,* 1955 S.C.J. 672 at 714).

[7] *Schneider* v. *Irvington,* (1939) 308 U.S. 147 at 160

[8] *id.* at 161

(iii) the State is foreclosed from assuming a guardianship of the public mind through regulating the press:[9]

(iv) freedom of the press assumes that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public;[10]

(v) freedom of the press involves the freedom to employ the necessary means of exercising the right, for instance, freedom from restraint in respect of employment of the editorial force.[11]

According to this concept of freedom of speech and of the press obtaining in the United States, no measure can be enacted which would have the effect of imposing prior censorship,[12] reducing circulation,[13] or restricting the employment or non-employment of the editorial staff.[14] If any such measure happened to be passed, it would be struck down as constitutionally invalid, on the ground that it would infringe the right to freedom of speech and of the press guaranteed by the First Amendment. This concept of freedom cannot be stretched so far as to make the press immune from the application of general laws,[15] for instance, laws relating to industrial relations or the ordinary forms of taxation. In *Grosjean* v. *American Press Company*,[16] it was observed:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vocal source of public information. 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 and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad... because in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves.

[9] *Thomas* v. *Collins* (1945) 323 U.S. 516 at 544

[10] *Associated Press* v. *United States*, (1945) 326 U.S. I

[11] *Associated Press* v. *National Labour Relations Board*, (1936) 301 U.S. 103 at 140.

[12] *Lovell* v. *Griffin* (1938) 303 U.S. 444 at 451

[13] *Re Jackson*, (1878) 96 U.S. 727

[14] *Associated Press* v. *National Labour Relations Board*, (1936) 301 U.S. 103

[15] *ibid.*

[16] (1935) 297 U.S. 233 at 250. The case was concerned, among other things, with the question whether the First Amendment provided protection against a licence tax levied for "selling, or making any charge for, advertising." Sutherland, J., in his opinion, related how in England in the 18th century the imposition of taxes had been used for the purpose of gagging the press, and expressed the view that such "modes of restraint" as the one involved in the case were inhibited by the constitutional provision.

It was held in *The Associated Press* v. *National Labour Relations Board*[17] that the provisions of the National Labour Relations Act which inhibited an employer from discharging an employee on account of union activities would be applicable in the case of an editor. The Court characterised as an "unsound generalisation," having no relevance to the circumstances of the present case, the contention that any protective regulation of union activities or the right to collective bargaining on the part of such employees was necessarily an invalid invasion of the freedom of the press. Thus the application to newspapers of the anti-trust laws, the minimum wage laws, or the Fair Labour Standards Act does not abridge freedom of the press.

(iv) FURTHER JUDICIAL OPINIONS IN INDIA

Citing with approval these decisions of the Supreme Court of the United States, Bhagwati, J., of the Indian Supreme Court has observed that while no immunity from the 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 and thereby narrow the scope of dissemination of information, 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 burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media, prevent newspapers from being started and ultimately drive the press to seek government aid in order to survive, would therefore be struck down as unconstitutional.[18]

Such laws would not be saved by the permissible restrictions contemplated in Article 19(2) of the Constitution.

Thus, freedom of the press does not mean that the general laws of the country should be inapplicable to the press; nor does it mean that special laws should not be adopted governing certain types of utterances.[19] But the laws applicable to the press, whether general or special, should not be unduly repressive or restrictive, and, in particular, should not subject the press to the control of the executive. "The fact that the press is only subject to the ordinary law of the land may not

[17] (1936) 301 U.S. 103

[18] *Express Newspapers* v. *Union of India*, 1958 S.C.J. 1113 at 1161

[19] This was pointed out by the Commission on the Freedom of the Press in the United States. (*A Free and Responsible Press*, p. 81)

in itself be sufficient if these laws are themselves repressive and particularly affect the press in practice... The existence of special press laws may or may not be a restriction on freedom according to the content of these laws."[20]

Again, freedom of the press does not mean that the press is free from responsibility in the exercise of its freedom.[21] A free press must be responsible to society for promoting the general interests of the public, including the maintenance of the rights of citizens.[22] The Supreme Court of India has observed that the advertising of prohibited drugs or commodities of which the sale is not in the interests of the general public cannot be speech within the meaning of freedom of speech contemplated in the Indian Constitution.[23] It has been decided by the Court that commercial advertisements do not fall within the concept of freedom of speech, for the object of such advertisements is "not propagation of ideas, social, political, or economic, or furtherance of literature or human thought," but the commendation of the efficacy, value or importance of the advertised article. Quoting with approval the observations of Roberts, J., of the United States Supreme Court to the effect that the United States Constitution imposed no restraint on government as respects purely commercial advertising,[24] Kapur, J., said that commercial advertisement was a part of business and that it was being used for the purpose of furthering the business of the person concerned and "had no relationship with what may be called the essential concept of the freedom of speech."[25]

It appears from the above observations that the Indian Supreme Court is inclined to adopt the concept of press freedom envisaged in the decisions of the United States Supreme Court.

[20] D. C. Holland, Freedom of the Press in the Commonwealth, *Current Legal Problems*, Vol. IX (1956) p. 186.

[21] While emphasising the point that freedom of the press is not a freedom from responsibility for its exercise, it has been said in the United States: "That there was such a legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out." (Frankfurter, J., in *Pennekamp* v. *State of Florida*, (1946) 328 U.S. 331

[22] The interests of the community seem to have been given legitimate emphasis in the Dutch *Staatsregeling* of 1798. Article 16 of the *Staatsregeling* begins with the declaration that "Every citizen may utter and spread his sentiments in whatever way he sees fit, which is *not inconsistent with the purpose of the community*." (emphasis added)

[23] *Hamdard Dawakhana* v. *Union of India*, 1960 S.C.J. 611

[24] *Valentine* v. *Chrestenson*, (1942) 316 U.S. 52

[25] *Hamdard Dawakhana* v. *Union of India*, 1960 S.C.J. 611 at 621

CHAPTER I

CONSTITUTIONAL PROVISIONS

(i) GUARANTEE OF FREEDOM OF EXPRESSION

The Constitution of India, unlike its predecessor, the Government of India Act, 1935, enacted by the Parliament of the United Kingdom, was adopted, enacted and given to themselves by the people of India with a view to constituting India into a sovereign democratic republic and to securing, among other things, liberty of thought and expression for all its citizens.[1] Part III of this basic law deals with fundamental rights; it contains, to quote the Supreme Court of India, "the express constitutional provisions limiting the legislative powers and controlling the temporary will of the majority by a permanent and paramount law settled by the deliberate wisdom of the nation."[2] Some of these rights are guaranteed to the citizens only, while others, like protection of life and personal liberty, are guaranteed to all persons, whether citizens or aliens, residing within the territory of India and subject to its jurisdiction. Article 19 in this Part guarantees to all citizens what Indian legal literature usually calls the seven freedoms, namely, freedom of speech and expression, of assembly, of association, of movement, of residence, of ownership and disposal of property, and of profession or occupation. This Article declares and protects "those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country."[3] But individual rights of an absolute nature cannot exist in a modern state. "The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good."[4] Hence the scope of the civil rights guaranteed by the article has been limited by certain restrictions contemplated in the article itself. Let us consider as an example the first of the seven freedoms, namely, freedom of speech and expression, with which we are mainly concerned in the following

[1] See Preamble
[2] *A. K. Gopalan* v. *The State of Madras,* (1950) S.C.J. 174
[3] *State of West Bengal* v. *Subodh Gopal,* (1954) S.C.R. 65 at 74
[4] *Adkins* v. *Children's Hospital,* (1923) 261 U.S. 525

pages, as freedom of expression includes freedom of the press.[5] The Article in part states:

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

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

This apparently unlimited freedom is restricted by clause (2) of the article which says,

"Nothing in subclause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to centempt of court, defamation or incitement to an offence." Thus the Constitution first guarantees a right, then permits the State, as an exception, to make laws for some specified purposes, and then imposes further restrictions on the permissible subjects, as exception to the exceptions, in so far as all exceptions are required to be reasonable.

In the United States, where no limitations were imposed by the first ten Amendments of the Constitution, the Supreme Court invented the doctrine of the police powers of the State, which meant in substance that the State had the inherent power to impose such restrictions as were necessary to protect the common good, for example, public health, safety and morals. The police power "is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury."[5a] It is to secure general convenience, prosperity and welfare.[6] As the Constitution of India, after having guaranteed a civil right, mentions the permissible restrictions on that right, it has not been necessary for the courts in India to develop any doctrine similar to that of the police power of the State in the United States.

It is of interest to note that the permissible restrictions on freedom of speech and expression in India were not exactly the same as given above when the Constitution was first adopted in 1949. Sub-clause (2) of Article 19 in its present form is the result of the First Amendment of the Constitution in 1951. This amendment is considered to have been necessitated by the interpretation given by the Courts in India to the sub-clause as it then stood. The sub-clause was as follows:

[5] "Liberty of the press... is included in the right of freedom of speech and expression guaranteed by Article 19(1) (a)" *Brij Bhushan* v. *State of Delhi*, (1950) S.C.J. 425 at 426

[5a] *Panhandle Pipeline* v. *State Htighway*, (1935) 79 L. Ed. 1090 at p. 1097

[6] *Eubank* v. *Richmond*, (1912) 226 U.S. 137

"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating 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."

In *Romesh Thappar* v. *State of Madras*[7] the validity of the Madras Maintenance of Public Order Act, 1949, was challenged. Section 9 (1A) of the Act authorised the Provincial Government "for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale, or distribution in the Province of Madras or any part thereof of any document or class of documents." Under this provision, the Governor of Madras, being satisfied that "for the purpose of securing the public safety and the maintenance of public order" it was necessary to do so, prohibited by order the entry into and the circulation, sale and distribution in the State, of *the Cross Roads*, an English weekly published from Bombay.

In *Brij Bhushan* v. *State of Delhi*[8] a pre-censorship order against *"The Organiser"* an English weekly from Delhi, was challenged. The order directed the publisher and the editor of the weekly "to submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies." This order was passed under the powers granted by Section 7(1) (c) of the East Panjab Public Safety Act, 1949, which provided that the "Provincial Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety, or the maintenance of public order may, by order in writing, addressed to a printer, publisher or editor... (c) require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny."

In both the cases the decision of the Supreme Court centred on the constitutionality of the enabling statutes rather than the validity of the executive action taken. The Court held that the expressions "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" in the Constitution. The learned judges expressed the view that in many circumstances and on most occasions

[7] (1950) S.C.J. 418
[8] (1950) S.C.J. 425

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.

Patanjali Sastri, J., delivering the opinion of the majority of the Court in *Romesh Thappar's case* observed:

"The Constitution... has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgement of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of rights to freedom of speech and expression..."[9]

The Court found that it was impossible to apply the doctrine of severability and to save part of the statute by severing it from the other provisions which were declared *ultra vires*. "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limit, as it is not severable."[10]

Some of the High Courts interpreted the decision to mean that an impugned law restraining freedom of speech and expression would be invalid unless it was directed solely against speech or expression undermining the security of the State or tending to overthrow it. They came to this conclusion by putting special emphasis on the word "solely" in the following extract from the judgement in *Romesh Thappar's case*.

"We are therefore of the opinion that unless a law restricting freedom of speech and expression is directed solely against undermining the security of the State or the overthrow of it such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. It follows that Section 9(1A) which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of

[9] 1950 S.C.J. 418 at 423
[10] *id.* at 424

authorised restrictions under clause (2) and is therefore void and unconstitutional."[11]

The *ratio decidendi* of the judgement would seem to be that restrictions on the right to freedom of speech and expression could not be justified unless the danger that the exercise of the right was likely to create would be so serious as to undermine the security of the State or tend to overthrow it. In other words, what the Supreme Court held was that a statute seeking to restrict freedom of speech and expression for the purpose of maintaining public order or ensuring public safety could not be considered valid in as much as it purported to impose restrictions for a more comprehensive and wider purpose than contemplated by the constitutional provision which delimited the sphere of legislative abridgement by the words "undermines the security of, or tends to overthrow, the State."

Not only did some of the High Courts misread the *ratio decidendi*, but they went further and made strange deductions from the judgement. The decision of the Patna High Court in *In re Bharati Press*[12] is illustrative of the view taken by the High Courts. In that case a Special Bench of the Patna High Court considered the validity of section 4(1)(a) of the Press (Emergency Powers) Act, 1931, which sought to restrict the publication of any newspaper or other document inciting to or encouraging "the commission of any offence of murder or any cognizable offence involving violence." As the decisions of the Supreme Court are binding on the High Courts, Sarjoo Prasad and Ramaswami, J., felt that they had no alternative but to hold that the law was *ultra vires* the Constitution as it was not solely directed to the security of the State or the protection of its foundations. The way Sarjoo Prasad, J., read the *ratio* of the Supreme Court decision constrained him to observe, albeit reluctantly, that, "if a person were to go on inciting murder or other cognizable offences either through the press or through word of mouth he would be free to do so with impunity in as much as he would claim the privilege of exercising his fundamental right of freedom of speech and expression."[13]

The validity of the same provision of the Act was challenged before the Madras High Court in *Srinivas Bhatt* v. *State of Madras*,[14] twenty days after the judgement in the *Bharati Press case* had been handed down. Though its validity was upheld by a majority of two to one,

[11] *ibid.*
[12] A.I.R. 1951 Patna 12
[13] *id.* at page 21

Govinda Menon, J., commenting that "It is very difficult to postulate with any definiteness that the classes of offences mentioned in section 4(1) (a) will not undermine the security of State or may not tend to overthrow it,"[15] it is intriguing to see that Panchapagesa Sastri, J., expressed an opinion very similar to that of Sarjoo Prasad, J., in the *Bharati Press case.* "Publications which incite murder of some individuals or incite cognizable offences involving violence are not always such as may be described to undermine the security of or tend to overthrow the State."[16]

In another case[17] the Madras High Court declared void section 3 of the Press (Emergency Powers) Act, 1931, on the same grounds as in the Supreme Court decisions, as interpreted by the High Court.

The Panjab High Court declared invalid section 4(1) (h) of the same Act holding that the provision in the sub-clause was not solely directed to the security of the State or the protection of its foundations. Kapoor, J., who dissented from the majority view suggested that the observations of Patanjali Sastri, J., could be confined to the facts of *Romesh Thappar's* case.

The Saurashtra High Court also followed the lead given by the decision in the Patna case when the validity of a legislative provision authorising the Chief Secretary of the State to subject "any matter relating to the present disturbances in Rajkot" to precensorship was challenged before it. The Court observed:

"The words 'security of the State' are not to be found in the amended section 6-A, with the result that the two decisions of the Supreme Court shall apply, as there is no question of the security of the State being affected if the precensorship order were not made."[18]

The Court held that the provision would be *ultra vires* "because the words security of State are not there."[19]

It appeared that any legislative provision restrictive of freedom of speech and expression in the interests of public safety would be considered *ultra vires,* unless the words security of State were not incorporated in the text of the statute.

Alarmed by these deductions drawn by the High Courts from the Supreme Court judgement, the Law Minister of the Union Government

[14] A.I.R. 1951 Madras 70
[15] *idem* at p. 73
[16] *idem* at p. 78
[17] *Pattammal* v. *Chief Presidency Magistrate,* Egmore, A.I.R. 1951 Mad. 950
[17a] *Amarnath Bali* v. *The State,* A.I.R. 1951 Panjab 18
[18] *Indu Kumar Shankerlal Saherwala* v. *The State,* A.I.R. 1951 Saura. 9
[19] *ibid.*

hastened to propose an amendment to the Constitution without waiting to hear from the Supreme Court when the High Court decisions came to be considered by it in appeal.

When the decision in the *Bharati Press case* went up in appeal, the Supreme Court observed that "the decisions of this Court in *Romesh Thappar's case* and in *Brij Bhushan's case* have been more than once misapplied and misunderstood and have been construed as laying down the wide proposition that restrictions of the nature imposed by section 4(1) (a) of the Indian Press (Emergency Powers) Act, or of similar character are outside the scope of Article 19(2) of the Constitution in as much as they are conceived generally in the interests of public order."[20] The Court proceeded to observe that "It is plain that speeches or expressions on the part of an individual which incite to or encourage commission of violent crimes such as murder cannot but be matters which would undermine the security of the State and come within the ambit of law sanctioned by Article 19(2) of the Constitution."[21] Referring to the Madras Maintenance of Public Order Act, 1949, the Court said, "whatever ends the impugned Act may have been intended to subserve and whatever aims its framers may have had in view, its application and scope could not, in the absence of delimiting words in the statute itself, be restricted to *those aggravated forms of prejudicial activity which are calculated to endanger the security of the State* nor was there any guarantee that those authorised to exercise the powers under the Act would in using them discriminate between those who act prejudicially to the security of the State and those who do not."[22]

This interpretation would give constitutional validity to legislation restrictive of freedom of speech and expression in relation to incitement to aggravated forms of prejudicial activity or to commission of violent crimes like murder which would undermine the security of the State; but it could not help in pronouncing validity on restrictive legislation covering the large field of public order and incitement to crimes which are not of an aggravated nature and which may not undermine the security of the State. It would appear therefore that the Supreme Court decision in *Shailabala's case*[23] did not render an amendment of Article 19(2) unnecessary. It is worth mentioning in this connexion that the Supreme Court itself in that case finally relied on the retrospective

[20] *State of Bihar* v. *Shailabala Devi,* 1952 S.C.J. 465 at 467
[21] *id.* at 466–67
[22] *id.* at 467
[23] 1952 S.C.J. 465

effect given to the amendment in deciding upon the validity of the Press (Emergency Powers) Act, 1931.

When the Amendment Act was passed, not only public order, but two other subjects were introduced, namely, friendly relations with foreign states and incitement to an offence, as appropriate for restrictive legislation in relation to the right to freedom of speech and expression. It would appear therefore that the amendment enlarged the sweep of legislative abridgement of this basic right. But it added a qualifying word "reasonable" to the permissible legislative restrictions. The restrictions now are to be reasonable; and this means that the Courts will be entitled to examine whether the restrictions imposed by a law are reasonable or not.

Under the powers granted by the Amendment the legislatures in India if they so choose, may pass restrictive laws covering a much wider field than before, and the possibility of misapplication of legislative powers may be regarded as a clear danger. For instance, it would be possible, by the creation of an appropriate offence, to restrict freedom of speech and expression on a particular subject under the provision relating to "incitement to an offence." In such a situation the only saving feature appears to lie in the standard of reasonableness the Courts would adopt in relation to the restrictive piece of legislation.

One point deserving special notice in regard to the constitutional provision is that the general trend of judicial decisions points to the view that the categories enumerated in clause (2) are exhaustive.[24] It is regarded as a fundamental premise that the rights guaranteed under sub-clause (a) of clause (1) can be encroached upon only to the extent and for the objects permitted by clause (2). Desai, J., observes that whatever limitations exist on the freedom of speech in India "are those mentioned in sub-clause (2) of Article 19 and no other."[25] Since the exceptions to the absolute freedom of speech and thought are specifically and expressly laid down in the Constitution, there can be no other exceptions than those which are so specifically and expressly mentioned. If the liberty of a citizen is curtailed by any law, then it must be shown that the law falls within the four corners of these ex-

[24] A dissenting voice is occasionally heard, as, for example, that of Teja Singh, C. J., in *Jang Bahadur Santpal* v. *Principal, Mohindra College, Patiala,* (A.I.R. 1951 Pepsu 59) where he said that he was of the opinion that "apart from the qualifications enumerated in clauses (2) to (6) of the Article they (the fundamental rights) are also subject to the qualification that the exercise of these rights should not infringe the rights of others."

[25] *Ram Manohar Lohia* v. *Superintendant, Central Prison,* A.I.R. 1955 All. 193 at p. 203.

ceptions.[26] If in any particular case, observes the Supreme Court, the restrictive law cannot be shown to relate rationally to any of the specified grounds in clause (2), the law must be declared void.[27]

(ii) REASONABLENESS OF RESTRICTIONS

We have seen that the Constitution makes provision for the limitation of the scope of the guarantee of fundamental rights in Article 19(1) by means of the reasonable restrictions which may be imposed under clauses (2) to (6) of the article. This was an attempt made by the framers of the Constitution and of the First Amendment to help strike a proper balance between the freedoms guaranteed by clause (1) and the social control permitted by the other clauses of the article. The fact that the word "reasonable" precedes the word "restrictions" in the clauses (2) to (6) has not only limited the scope of legislative abridgement of these rights, but has also made the reasonableness of the restrictions a justiciable issue. "It is not disputed," observed Mukherjea, J., "that the question of reasonableness is a justiciable matter which has to be determined by the Court."[28] Mahajan, J., echoed the same sentiment when he said, "The determination of the legislature of what constitutes a reasonable restriction is not final or conclusive. It is subject to the supervision of this Court."[29] The Courts are thus empowered to determine whether a restrictive law comes under any of the purposes specified in the respective clauses and also whether the restrictions the legislature seeks to impose are reasonable.

We have had occasion to mention that by the Constitution (First) Amendment Act, 1951, the word "reasonable" was inserted before the word "restrictions" in clause (2). This brought the clause in line with the following clauses, all requiring certain standards of reasonableness in the restrictive enactment. But the standard of reasonableness considered applicable in one case in relation to one clause may not be applicable in another case relative to another clause. The observation made by Patanjali Sastri, C. J. in *The State of Madras* v. *V. G. Row*[30] is of interest in this context. He said, "... a decision dealing with the

[26] *ibid.*
[27] *Romesh Thappar* v. *State of Madras*, 1950 S.C.R. 594; *Sodhi Shamseer* v. *State of Pepsu*, A.I.R. 1954 S.C. 276; *Express Newspapers* v. *Union of India*, 1958 S.C.J. 1113.
[28] *N. B. Khare* v. *State of Delhi*, A.I.R. 1950 S.C. 211 at 217
[29] *Chintaman Rao* v. *State of Madhya Pradesh*, 1950 S.C.J. 571
'A.I.R. 1952 S.C. 196

validity of restrictions imposed on one of the rights conferred by Article 19(1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely, "reasonableness," as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case."[31]

Before we attempt to understand the standards of reasonableness adopted by the Courts, it is helpful if we appreciate the position of the judiciary in India. In *A.K.Gopalan* v. *State of Madras*[32] Das, J., clearly indicated its position when he said, "In India the position of the judiciary is somewhere in between the Courts in England and the United States. While in the main leaving our Parliament and the State Legislatures supreme in their respective legislative fields, our Constitution has by some of the articles put upon the legislatures certain specified limitations... in so far as there is any limitation on the legislative power, the Court must, on a complaint being made to it, scrutinise and ascertain whether such limitation has been transgressed and if there has been any transgression the Court will courageously declare the law unconstitutional, for the Court is bound by its oath to uphold the Constitution. But outside the limitations imposed on the legislative powers our Parliament and the State Legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or the policy of the law duly made by the appropriate legislature."[33] Bose, J., when explaining the fact that "in every case it is the rights which are fundamental, not the limitations," has pointed out what the duty of the Court is in regard to the guarantee of fundamental rights. "It is," says he, "our duty and privilege to see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms."[34]

The Constitution nowhere lays down what is and what is not a reasonable restriction. And for that matter it does not define what a fundamental right like, for example, the right to freedom of speech and expression, consists 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 particular legislative restrictions. How they have done it may be better said in their own words.

[31] *id.* at 200
[32] 1950 S.C.J. 174
[33] *id.* at 284
[34] *Ram Singh* v. *State of Delhi,* 1951 S.C.J. 374 at 383

"The phrase 'reasonable restrictions' connotes," said Mukherjea, J., "that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public... legislation which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed... and the social control permitted... it must be held to be wanting in reasonableness."[35]

It would appear that it is impossible to lay down absolute standards of reasonableness. "It is important," said Patanjali Sastri, C. J., "in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down 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 the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict.[36] 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 the 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 the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."[37]

It is only the reasonableness of a particular legislative restriction that comes under judicial scrutiny, and not the wisdom of the legislative measure. "I do agree that... the adjective 'reasonable' is predicated of the restrictions that are imposed by law and not of the law itself," said Mukherjea, J.[38]

In determining the reasonableness of a restrictive enactment, the Courts consider both the substantive and the procedural aspects of the

[35] *Dwarka Prasad Laxmi Narain* v. *State of Uttar Pradesh* A.I.R. 1954 S.C. 224 at 227.

[36] One is reminded of Mr Justice Holmes's observation in *Schenck* v *U.S.* (249 U.S. 52) "The character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech would not protect a man in falsely shouting "fire" in a theatre and causing a panic."

[37] *State of Madras* v. *V. G. Row,* A.I.R. 1952 S.C. 196 at 200

[38] *N. B. Khare* v. *State of Delhi,* A.I.R. 1950 S.C. 211 at 217

law challenged before them. This was handed down as a guiding principle by Kania, C. J., in *N. B. Khare* v. *State of Delhi*,[39] wherein he observed, "The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the 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 that if the law prescribes five year externment or ten year externment the question whether such term of externment is reasonable, being the substantive part is necessarily for the consideration of 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 for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted."[40]

The case law on the question of reasonableness tends to show that the Courts do not generally attempt to lay down general principles on the subject and are content with determining the reasonableness of the particular statute impugned before them. But they do give weight to certain general considerations like the ones the Madras High Court mentioned in *V. G. Row* v. *State of Madras*.[41] "In deciding on the reasonableness of the restrictions," the Court said, "it is not possible to think only in the abstract. Several circumstances must be taken into consideration, in particular (a) the purpose of the Act, (b) the conditions prevailing in the country at the time, (c) the duration of the restriction, (d) its extent and nature."[42] The evaluation of the several circumstances will vary from one judge to another, or to adopt Lord Seldon's phrase, it may vary with the length of the judge's foot, for some element of subjectivity is bound to enter into the judicial decision, in accord with the social philosophy and background of the individual judge. But the element of subjectivity may be more judiciously and scrupulously measured out in the decision if the circumstances mentioned by the Madras High Court are given due consideration. When Mukherjea, J., observed that "The reasonableness of a challenged legislation has to be determined by a Court and the Court decides such matters by applying some objective standard which is

[39] A.I.R. 1950 S.C. 211
[40] *id.* at 214; see also *State* v. *Baboo Lal*, A.I.R. 1956 All. 571
[41] A.I.R. 1951 Mad. 147
[42] *id.* at 179

said to be the standard of an average prudent man,"[43] he was probably pointing out what the Court intends to do rather than what it actually does. For the average reasonable man of judicial pronouncements is an extremely elusive figure; no one seems to know for certain what his standards are. It is not easy for the judge to undertake a psycho-analytical study of the mental workings of the man in the street or "on the Clapham omnibus" and come to a decision in relation to the reasonableness of a particular statute.

In their search for an objective test of reasonableness the judges are, however, able to rely for guidance on the directive principles of State policy enumerated in Part IV of the Constitution,[44] in matters relating to the objects enjoined by those principles, and on principles of natural justice in matters of procedure.

It is judicially recognised that the restrictive provision of law should have "rational connexion" with the respective sphere of social control contemplated in the Constitution.[45] If it is found that the language employed in the provision is wide enough to cover restrictions both within and without the bounds of permissible legislative action in relation to the right, the Courts will hold such provision void. Mahajan, J., said in *Chintaman Rao* v. *State of Madhya Pradesh*[46] that "So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out it (that is, the law) must be held to be wholly void."[47]

There may be circumstances in which restrictions may be permitted to the extent of total prohibition. The general current of judicial opinion in India seems to favour the view that total prohibition is not beyond contemplation as a possible means of permissible restriction. The Oxford Dictionary, it may be recollected, defines "restrict" to mean also "to restrain by prohibition."

In *A. K. Gopalan's case*,[48] when interpreting Article 21, Kania, C. J., and Das, J. distinguished restriction from prohibition and held the view that restriction did not mean extinguishment of the entire right. Patanjali Sastri, J., on the other hand, inclined to the view that in certain circumstances "restriction may reach a point where it may amount to deprivation." But he, however, thought that the word

[43] *N. B. Khare* v. *State of Delhi*, A.I.R. 1950 S.C. 211 at 217
[44] See *State of Bombay* v. *F. N. Balsara*, A.I.R. 1951 S.C. 318
[45] *Sodhi Shamser* v. *State of Pepsu*, A.I.R. 1954 S.C. 276
[46] A.I.R. 1951 S.C. 118
[47] *id.* at 120
[48] A.I.R. 1950 S.C. 27

"restriction" in Article 19 clauses (2) to (6) did not mean total prohibition or total deprivation.

In a later case[49] while upholding the provisions of the Ajmer Excise Regulation of 1915 which purported to regulate trade in liquor in all its various spheres, the Supreme Court observed, "It can also be not denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot he held to be illegal as enacting a prohibition and not a mere regulation."[49]

Another judicial observation, this time from a High Court, argues in favour of the view that restriction includes prohibition. Narasimhan, J., said in *Loknath* v. *State of Orissa*:[50]

"It is true that it was held in *Municipal Corporation* v. *Virgo*[51] that "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." But the words used in the 19th Article is restriction and not regulation. That the framers of the Constitution were aware of the distinction between the power to regulate and the power to restrict will be apparent from a scrutiny of subclause (a) of clause (2) of Article 25 where the words "regulating" and "restricting" occur in juxtaposition thereby indicating unmistakably that the framers of the Constitution intended to convey two different meanings by the two words. It will be noticed that Article 19 and consequently the expression "restriction" in Article 19(6) cannot be held to be synonymous with regulation. Restriction may be complete or partial and where it is complete it would imply absolute prohibition. The dictionary meaning of the word "restriction" includes prohibition also."[50]

Though the learned judge was referring to restrictions under clause (6) and not under clause (2) of Article 19, circumstances may arise in which the same interpretation would be relevant in relation to restrictions contemplated under clause (2).

The legislative abridgement of fundamental rights would be regarded

[49] *Barucha* v. *Excise Commissioner*, 1954 S.C.J. 246 at 249

[50] A.I.R. 1952 Orissa 42. See also the observations of Changez, J., of the West Pakistan High Court to the same effect: "Restrictions may be complete or partial. If, in the circumstances of a case, total prohibition of the exercise of a fundamental right is reasonable for achieving a purpose for which the imposition of restriction is permissible, then even the total prohibition of the exercise of such a right will be legal and valid." (*Abdul Hameed* v. *District Magistrate, Lahore*, P.L.D. 1957 (W.P.) Lahore 213 at 217)

[51] 1896 A.C. 88

as procedurally unreasonable if it seeks to restrict the right without complying with the principles of natural justice. "The essentials of procedure, in the minimum," observed Ray, C. J. of the Orissa High Court, "are essentials of notice, opportunities to be heard and a tribunal. Essentials of notice require to appraise the victim of the cause against him in order to afford him sufficient opportunity to prepare and make his answer. Opportunity to be heard is the second essential of procedure established by law. To condemn without hearing is repugnant to natural justice. Any procedure which does not guard against this requirement is no procedure by law. The essentials of such opportunities do not, however, consist in any particular form or method of hearing. All that is required is reasonable opportunity to be heard. The opportunity does not guarantee a person a right to an appeal. One hearing is all that is required. Tribunal as the third essential of procedure does not necessarily mean a judicial tribunal, any impartial tribunal would meet the requirement."[52] The High Courts of Calcutta, Madras, Rajasthan and Saurashtra expressed the same views as the learned Chief Justice in regard to the minimum requirements necessary for proper procedure.

It appears that the Supreme Court's answer to the question whether the restriction of a fundamental right could be made dependent on the subjective satisfaction of the executive would be that no absolute answer can be given to it. In 1950 the Court expressed its considered view in relation to the externment of a person under Article 19(5) in the following words:

"The subjective satisfaction of the authority was not unreasonable as the desirability of passing an individual order of externment against a citizen has to be left to an officer and no such provision could be made in the Act."[53]

After second thoughts in 1952 it put a gloss on the statement, probably feeling that it had left to the executive very wide discretionary powers which might lead them to temptation. In *State of Madras* v. *V. G. Row*[54] Patanjali Sastri, C. J. observed:

"The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional

[52] *Ismail* v. *State of Orissa*, A.I.R. 1951 Orissa 86
[53] *N. B. Khare* v. *State of Delhi*, A.I.R. 1950 S.C. 211 at 214
[54] A.I.R. 1952 S.C. 196

circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights."[55]

We have already noticed the views expressed by the Courts in regard to the standard of reasonableness of legislative restrictions. We shall now examine in some detail a few instances where they tested the validity of restrictive laws in the touchstone of reasonableness.

The question of reasonable restrictions on freedom of speech and expression in the interests of public order was considered by the Patna High Court in relation to a state statute in *State* v. *Ramanand Tiwari*.[56] Section 5 of the Bihar Essential Services Maintenance Act, 1948, enacted that "whoever intentionally causes or attemps to cause or does any act which he knows is likely to cause, disaffection towards the Government established by law amongst the persons engaged in any employment or class of employment to which this Act applies, or induces or attempts to induce, or does any act which he knows is likely to induce any person engaged in such employment or class of employment to withhold his services or to commit a breach of discipline shall, notwithstanding anything contained in any other law or anything having the force of law, be punishable with imprisonment which may extend to three years and shall also be liable to fine." The Court held that the restrictions imposed by the section on the right of freedom of speech and expression are reasonable restrictions and that clause (2) of Article 19 saves the section. Das, C. J., said, "Public order can be affected in ways other than incitement to violence or tendency to violence."[57] After holding the first part of the section which related to causing disaffection towards Government to be a reasonable restriction, he observed that "the other two parts which relate to withholding of services and committing a breach of discipline are also, in my opinion, reasonable restrictions in the interests of public order. If the members of an essential service withhold their services or if they are induced or encouraged to commit breaches of discipline, it is obvious that such action will paralyse Government and will affect maintenance of public order or the maintaining of services necessary to the life of the community. The contemplated and authorised use of section 5 is confined to causing disaffection towards Government established by law as distinguished from mere criticism or disappro-

[55] *id.* at 200
[56] A.I.R. 1956 Patna 188
[57] *id.* at 193

bation, including withholding of services and inducing commission of breaches of discipline in a member of an essential service, a service which is essential for securing the public safety, the maintenance of public order or for maintaining services necessary to the life of the community. Read in the context of section 3, section 5 of the impugned Act imposes an easily intelligible and reasonable restriction in the interests of public order on the right of freedom of speech and expression."[58] Section 3 stated that the Act would apply to any employment or class of employment under the State Government which the State Government being of opinion that such employment or class of employment was essential for securing the public safety, the maintenance of public order, or for maintaining services necessary to the community might, by notification, declare to be an employment to which this Act applied.

In *Virendra* v. *State of Panjab*,[59] to which reference has already been made, the Supreme Court declared void the following provision in the Panjab Special Powers (Press) Act, 1956:

"The State Government or any authority authorised by it in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may, by notification, prohibit the bringing into Panjab of any newspaper, periodical, leaflet or other publication."

The grounds for declaring it void were that the provision was unreasonable both from the substantive and the procedural points of view. It was held that it was substantially objectionable because no limitation was imposed either in regard to the duration of the prohibition authorised by the provision or to the subject matter of the publication. The prohibition applied to any publication and might be of indefinite duration. Procedurally it left the whole matter to the subjective determination of the State Government and there was no provision even for any representation by the party affected. It was therefore found to be against the rules of natural justice.

The Court upheld the validity of another section of the Act whose provisions met these objections. Section 2(1) (a) provided:

"The State Government or any authority so authorised in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of

[58] *id.* at 194
[59] 1958 S.C.J. 88

communal harmony affecting or likely to affect public order may, by order, in writing addressed to a printer, publisher or editor,

(a) prohibit the printing or publication in any document or class of documents of any matter relating to a particular subject or class of subjects for a specified period or in a particular issue or issues of a newspaper or periodical;

provided that no such order shall remain in force for more than two months from the making thereof;

provided further that the person against whom the order has been made may within ten days of the passing of this order make a representation to the State Government which may on consideration thereof modify, confirm or rescind the order."

To sum up, (a) it is for the Courts to determine the reasonableness of legislative restrictions.

(b) The restrictions should be such as would strike a proper balance between the guaranteed freedom and the permitted social control.

(c) It is the reasonableness of the restrictions which the Courts scrutinise and not the wisdom or the policy of the restrictive law.

(d) In determining the reasonableness of a restrictive law the Courts consider both the substantive and the procedural aspects of the impugned legislative provision. The consideration of such circumstances as the purpose of the impugned law, the conditions prevailing in the country at the time when the law was passed, the duration of the restriction, and its extent and nature, especially its rational connexion with the object in view, will tend to help the judge in visualising a reasonable standard to which he may safely refer as the standard of the average reasonable man. In considering the procedural aspect of the restriction, the judge takes into account whether provision has been made for certain minimum requirements. These requirements consist of (i) a notice to the person who would be affected by an order prescribing the restriction (ii) an opportunity for him to make a representation and (iii) some tribunal to consider the representation.

(e) There cannot be any absolute standard of reasonableness. The judge weighs in the balance the impugned restriction taking into account of what he considers to be the standard of the average reasonable man, which, it is submitted, is coloured by what Professor Laski calls "the inarticulate premises" of the individual judge.

(f) The restrictions may extend to the point of complete prohibition if the circumstances, especially the nature of the business, permit it.

(g) A restriction made exercisable on the subjective satisfaction of

the government may be judicially upheld, but only in very exceptional circumstances and within very narrow limits.

(iii) PRIOR RESTRAINTS

(a) Pre-censorship

Pre-censorship in normal times is regarded in most countries as an unwarranted restriction on freedom of the press. The Danish Constitution of 1915, for instance, prohibits "censorship and other preventive measures." The Greek Constitution of 1911 does the same in almost identical language. The Netherlands Constitution states: "No person shall require previous permission to publish thoughts or feelings by means of the printing press, without prejudice to every man's responsibility according to law." In England, freedom or the press, as Blackstone viewed it, was tantamount to the absence of pre-publication restraints. "Liberty of the press," he said in his Commentaries, "consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiment he pleases before the public; to forbid this is to destroy the freedom of the press."[60] In the United States also there is no pre-censorship in time of peace. In *Marsh* v. *Alabama*[61] the Supreme Court of the United States explained why it stood against censorship. "To act as good citizens, they (the people) must be informed. In order to enable them to be properly informed, their information must be uncensored."

There is no provision prohibiting prior censorship in the Constitution of India. But when the Supreme Court of India had to decide the question of validity of pre-publication censorship in *Brij Bhushan* v. *State of Delhi*[62] it followed common law principles and refused to uphold such censorship in the absence of grave emergencies like war or insurrection. The Court observed: "There can be little 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)."[63] and quoted Blackstone in support of the statement. But the observations of Fazl Ali, J., in his dissenting opinion are worthy of serious consideration. He said: "It must be

[60] 4 Commentaries 151
[61] (1945) 326 U.S. 501
[62] (1950) S.C.R. 605. The same opinion was expressed in *In re Venugopal* (A.I.R. 1954 Madras 901) and in *Trilokchand* v. *The State* (A.I.R. 1951 Ajmer 100).
[63] (1950) S.C.R. 605 at 608

recognised that freedom of speech and expression is one of the most valuable rights guaranteed to a citizen by the Constitution and should be jealously guarded by the Courts. It must be recognised that free political discussion is essential for the proper functioning of a democratic government, and the tendency of modern jurists is to deprecate censorship though they all agree that "liberty of the press" is not to be confused with its "licentiousness." But 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 opinion the law which is impugned (that is, the East Panjab Public Safety Act, 1949) is fully saved by Article 19(2)."[64]

It may be recollected from our discussion of the case that the Court had no occasion to determine whether the action taken by the government could have been taken under a statute otherwise valid, without unconstitutionally encroaching upon the citizen's right to freedom of expression. It would seem that if the impugned statute was one solely directed to the security of the State, the provision for pre-censorship would have been upheld under Article 19(2) as it then stood. It is doubtful whether precensorship would be regarded as an unreasonable restriction under the amended clause, especially because the trend in judicial opinion seems inclined to favour the view that restriction may include prohibition. If prohibition of the whole is a permissible restriction, there is no reason to suppose that prohibition of the part (the form which pre-censorship usually assumes) would be regarded as an unreasonable restriction.

In *Virendra* v. *State of Panjab*[65] the Supreme Court decided that section 2 of the Panjab Special Powers (Press) Act, 1956, "must be held to have imposed reasonable restrictions" on the exercise of the right to freedom of speech and expression. Section 2(1) (c) empowers the State Government or its delegated authority to impose pre-censorship. But the question for decision in the case was not the validity of section 2(1) (c), but of section 2(1) (a). No reference to pre-censorship is, therefore, to be found in the opinion of the Court.

(b) Other Prior Restraints

Apart from pre-censorship, there are other prior restraints like licensing provisions and bond requirements adopted by governments

[64] 1950 S.C.J. 425 at 431
[65] 1958 S.C.J. 88

to curtail or negative freedom of the press. Though in the United Kingdom freedom to publish without previous licence is regarded as a vital factor in the liberty of the press, such a licence is required in many colonies and protectorates of the United Kingdom. For example, in Aden, section 5 of the Press and Registration of Books Ordinance, 1939, provides: "It shall not be lawful for any person to print, publish or edit any newspaper within the colony unless authorised by a licence in writing granted by the Governor and signed by the Chief Secretary, which licence the Governor may, in his absolute discretion, grant, refuse or revoke." The licence when granted is valid for one year only. A newspaper is defined in such wide terms as to cover all periodical publications. Further, the Governor's decision will be final. In North Borneo the keeper of a printing press as well as the proprietor of a newspaper needs an annual licence which is to be obtained from the Registrar who has an absolute discretion to grant, refuse or revoke the licence or grant it subject to conditions. There is a right of appeal to the Governor in Council. In Malta the provision in the Press Ordinance, 1933, requiring the payment of a deposit prior to publication of a periodical was amended in 1946 so as to require a deposit to be paid only on conviction of certain offences under the Press Ordinance. The same was the position of the press in independent India under the Press (Objectionable Matter) Act, 1951, until its repeal in 1957.

In India, the Press and Registration of Books Act, 1867, is a legacy of the British Indian government. It has been amended a number of times. The Act, as amended, seeks to provide for the regulation of printing presses and newspapers, for the preservation of copies of every book and newspaper printed in India and for the registration of such books and newspapers.

Under section 3 it is provided that every book or paper printed within India shall have printed legibly on it the name of the printer and the place of printing and if the paper or book be published, the name of the publisher and the place of publication. Paper is defined to mean any document, including a newspaper, other than a book. Section 4 provides that no person shall keep in his possession a press for the printing of books or newspapers, unless he has made a declaration before a Magistrate to the effect that he has a printing press at a place named in the declaration. Section 5(1) lays down that every copy of a newspaper shall contain the name of the person who is the editor thereof printed on it as the name of the editor of that newspaper. It also provides that the printer as well as the publisher of every such

newspaper should appear in person or by agent before a District, Presidency or Sub-Divisional Magistrate and make a declaration that he is the printer or publisher (or printer and publisher) of the newspaper, giving the name of the newspaper and the name of the place of printing. This declaration as well as its authentication by the Magistrate is necessary "before the newspaper can be published."[65a] In case of cancellation on account of alleged contravention of the provisions of the Act or rules made thereunder, or for any of the other grounds specified in section 8B such as false representation or concealment of any material fact when making the declaration, there is provision made under section 8C for appeal to the Press and Registration Appellate Tribunal to be appointed by the Central Government.

Section 3 of the Act has been declared constitutionally valid by the Madras High Court.[66] A learned commentator[67] expresses the view that the statute does not impose any restriction upon the press any more than a law requiring registration of births and deaths does upon the individual.[68] In this connexion it is interesting to notice the fate of a similar requirement in the United States. In 1945 the Supreme Court of the United States declared unconstitutional a statute of the State of Texas which required that a labour organiser desiring to recruit members for a labour union must register in the State. Under this statute, a labour leader who had carried on his activities without such registration was convicted. The Supreme Court quashed the conviction. The majority of the Supreme Court found that there was a prior restraint on speech conflicting with the First and Fourteenth Amendments.[69] Rutledge, J., speaking for the majority observed that any attempt to restrict the liberties secured by the First Amendment must be justified by clear public interest threatened by clear and present danger. The four dissenting Justices expressed the view that this registration like any professional registration was only a precautionary measure.[70]

[65a] The Press and Registration of Books (Amendment) Act, 1960, section 2

[66] *In re Alavandar*, A.I.R. 1957 Madras 427

[67] D. D. Basu, Constitutional Protection of Civil Rights in India, *Journal of the International Commission of Jurists*, Vol. I. No. 2, p. 170.

[68] The comparison, it would seem, is not particularly apt. The registration of births and deaths is made after the event. The declaration under section 5 has to be made before publication.

[69] First Amendment: "Congress shall make no law... abridging the freedom of speech or of the press."
Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States" and it has been held that freedom of the press is among the foremost of these privileges.

[70] *Thomas* v. *Collins*, (1945) 323 U.S. 516

CHAPTER II

SEDITION AND RELATED OFFENCES

(i) THE LAW OF SEDITION IN INDIA

(a) Introductory Remarks

"Security and liberty, in their pure form, are antagonistic poles. The one pole represents the interest of the politically organised society in its self-preservation. The other represents the interest of the individual in being afforded the maximum sight of self-assertion, free from governmental and other interference."[1]

But it is impossible to extend to either of them absolute protection, as "absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."[2] It has, therefore, been considered necessary to strike a proper balance between the claims of liberty and those of security.

It is generally conceded that if freedom is to be maintained, some risks must be taken. This view was expressed by Sastri, J., of the Supreme Court of India: "Freedom of speech and that of the press lay at the foundation of all democratic organisations, for without free political discussion no public education so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse."[3] Sastri, J., was echoing the sentiments expressed by Madison: "It is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits."[4]

As security of the State and organised government are the very foundation of freedom of expression, which maintains the opportunity for free political discussion to the end that government may be responsive to the will of the people, it is understandable that the end should not be lost sight of in an overemphasis of the means. It has,

[1] B. Schwartz, *American Constitutional Law*, p. 240
[2] Frankfurter, J., in *Dennis* v. *U.S.* (1951) 341 U.S. 494 at 524
[3] *Romesh Thappar* v. *State of Madras* (1950) S.C.R. 594
[4] Quoted in *Near* v. *Minnesota* (1931) 283 U.S. 697 at 717–718

therefore, been judicially held in the United States that the right to freedom of expression does not prohibit punishment for utterances which threaten the overthrow of government by force or violence,[5] or the advocacy of a proletarian revolution by mass action,[6] or anarchy.[7] It has also been held that the State can prohibit[8] or punish utterances which obstruct war measures, such as inciting resistance to the participation of the State in a war,[9] or to conscription,[10] undermining the morale of the armed forces,[11] publication of information regarding war measures or movements of forces, which may help the enemy[12] and encouraging curtailment in the production of goods deemed necessary for the successful prosecution of war.[13]

A number of restrictions are imposed on the right of freedom of expression by statute in England.

The Treason Act, 1795, declares it treasonable to express, utter or declare, by publishing any printing or writing, an intention to commit or to incite another to commit such acts, among others, as causing the death or destruction of the Queen, levying war against her, or moving any foreigner to invade the realm. While the Incitement to Mutiny Act, 1797, penalises any endeavour to seduce the King's soldiers or sailors from their duty, and the commission of an act of mutiny or traitrous practice, the Incitement to Disaffection Act, 1934, declares it an offence to attempt to seduce any member of the armed forces from duty, or to be in possession of any document for this purpose, with intent to commit, abet or counsel the commission of such offence. An attempt to cause disaffection amongst the members of any police force or an attempt to induce any such member to withhold his services or to commit breaches of discipline is made an offence under the Police Act, 1919. It is provided by the Official Secrets Act, 1911, which was amended in 1920 and 1939 that it is an offence to communicate to any person any sketch, plan or other information calculated to be useful to an enemy.

Apart from these statutory provisions there is the common law offence of sedition in respect of which restrictions are imposed on freedom of expression. Sedition in England "embraces all those prac-

[5] *Gitlow* v. *New York*, (1925) 268 U.S. 652
[6] *Whitney* v. *California*, (1927) 274, U.S. 357
[7] *Stromberg* v. *California*, (1931) 283, U.S. 359
[8] *U.S.* v. *Burleson*, (1921) 255 U.S. 407
[9] *Schaefer* v. *U.S.* (1920) 253 U.S. 142
[10] *Debs* v. *U.S.* (1919) 249 U.S. 211
[11-12] *U.S.* v. *Macintosh*, (1931) 283 U.S. 605
[13] *Abrams* v. *U.S.* (1919) 250 U.S. 616

tices whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the government."[14] It covers any attempt to bring into hatred or contempt the Crown, the Houses of Parliament and the Constitution, to raise discontent among the people or promote hostility between the various classes of the people."[15]

But "an intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention."[16] A discussion on the plane of political science would not be held to-day to amount to sedition even though the words might technically bring the Government or the Constitution into contempt.

(b) Section 124 A of the Indian Penal Code

Though in the United Kingdom sedition is committed only if there is an intention to excite violence, when bringing into hatred or contempt, or exciting disaffection against the Government, in the dependent territories of the United Kingdom where sedition is a statutory offence, no such intention is necessary and therefore any criticism which may bring into hatred or contempt or excite disaffection against the Government is seditious, even if no violence is intended or results, subject only to a saving qualification in relation to the mere pointing out of errors or defects in the Government. Section 124A of the Indian Penal Code enacted by the British Indian Government may be cited as an example. It provides:

> Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
>
> Explanation 1. The expression "disaffection" includes disloyalty and all feelings of enmity.

[14] *R.* v. *Sullivan* (1868) 11 Cox C.C. 54
[15] Anson, *Law and Custom of the Constitution,* 1935, vol. II, p. 306
[16] *R.* v. *Burns,* (1886) 16 Cox C.C. 355

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

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

"As one looked at it, it was a formidable section," wrote a District Magistrate commenting on this section. "By a wink which attempted to bring the Government into contempt with those who saw the wink you might be committing sedition."[17] He further remarked: "A man was guilty if he tried to excite hatred against the Government, even if he failed to do so; nor was he innocent if in exciting hatred he had spoken against violence. It was enough if he meant his audience to feel contempt, and it was beside the point whether they felt it or not. Thus, a speech which imputed dishonesty to the Government might be seditious, and a speech which made use of such an imputation to advocate quite a legitimate policy might equally be seditious. In short the law was so wide that it left a great discretion to the executive. Under it they had the power to prosecute their political opponents."[18]

British Indian judges in general did not see any reason to interpret narrowly this very comprehensively worded section. The word "disaffection" was given a very wide interpretation. Petheram, C. J., in the *Bangobasi case*[19] interpreted it to mean "the contrary of affection," and Strachey, J., gave it a further expansion when he said in *Tilak's case*:[20] "I agree with Sir Comer Petheram in the *Bangobasi* case that disaffection means simply the absence of affection."[21] He observed interpreting the section. "If a man excites or attempts to excite feelings of disaffection – great or small – he is guilty under the section. It does not consist in exciting rioting or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial... if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under this section."[22] As explanatory of disaffection, he used

[17] Maurice Collis, *Trials in Burma* (1938) p. 112

[18] *id.* p. 213

[19] *Queen Empress* v. *J. C. Bose,* (1891) I.L.R. 19 Cal. 35

[20] *Queen Empress* v. *B. G. Tilak,* (1897) I.L.R. 22 Bom. 112

[21] *id.* at 134

[22] (1897) I.L.R. 22 Bom. 112. It may be noted that when Strachey, J., interpreted the section, the words "hatred" and "contempt" were not included in the definition of sedition; and Parsons, J., in *Queen Empress* v. *Ramchandra Narain* could not see how "hatred" could be included in the connotation of "disaffection". The learned judge

the word "disloyalty" as the general term, "comprehending every form of bad feeling to the Government."

In 1942 Sir Maurice Gwyer, C. J., reviewed the position and attempted to restrict the scope of the section by interpreting it according to the "external standard" applied by judges in England. He recognised the great change that had taken place in the concept of government since the days of the enactment of the section and since its interpretation in *Tilak's Case*. He felt that "bad feeling" towards government could no longer be regarded as the basis of sedition. He gave the section an interpretation appropriate to the modern concept of government by laying down that unless the acts or words had a tendency to create public disorder they could not be considered seditious, as sedition was essentially an offence against public order. The learned Chief Justice said: "This is not made an offence in order to minister to the wounded vanity of Governments, but because where Governments and the law cease to be obeyed and no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency"[23] This decision has great significance, though it was overruled by the Privy Council in *King Emperor* v. *Sadashiv Narayan*[24], the Judicial Committee observing that they would adopt the language of Strachey, J., as "exactly expressing their own view on the point."

The Federal Court decision indicated that it was possible to interpret the section differently from Strachey, J. The judgement of the Chief Justice specially emphasised the need for a dynamic interpretation appropriate to the changed circumstances of the country. The learned Chief Justice quoted with approval the observations of Lord Sumner in *Bowman* v. *Secular Society Ltd.*[25] wherein he said: "The words as well as the acts, which tend to endanger society, it has been observed, differ from time to time in proportion as society is stable or insecure

observed: "In my opinion the word disaffection used in the section under discussion (124A) cannot be construed to mean an absence of or the contrary of affection, or love, that is to say, dislike or hatred; but must be taken to be employed in its special sense as signifying political alienation or discontent, that is to say, a feeling of disloyalty to the Government or existing power which tends to a disposition not to obey but to resist and attempt to subvert that Government or power." (I.L.R. 22 Bom. 152 at 159)

[23] *Niharendu Dutt Mazumdar* v. *King Emperor*, (1942) 5 F.L.J. 47 at 57 (F.C.)

[24] L.R. 74 I.A. 89

[25] L.R. 1917 A.C. 406

in fact, or is believed by its reasonable members to be open to assault. In the present day meetings and processions are held lawful which 150 years ago would have been deemed seditious and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before."[26]

Sir Maurice drew the conclusion that "many judicial decisions in particular cases which were no doubt correct at the time when they were given may well be inapplicable to the circumstances of to-day."[27]

As the interpretation of Strachey, J., continued to be authoritative, because of the confirmation given to it by the Privy Council decision, it was necessary to consider the constitutional validity of the section when the question arose, previous to the First Amendment, in *Tara Singh Gopichand* v. *State of East Panjab*.[28] The Panjab High Court invalidated the section along with section 153-A of the Indian Penal Code and 24-A of the East Panjab Public Safety Act, on the ground that these provisions were not solely directed to safeguarding the security of the State or the prevention of its overthrow.

Weston, C. J., observed in the course of his judgement that section 124A had become inappropriate by the very nature of the change which had come about, namely, India becoming a sovereign democratic state. After the amendment, the Patna High Court[29] expressed the view that the section was covered by the words "in the interests of public order" in Article 19(2). "Disapprobation" in Explanation 3 of the section, the Court observed, became disaffection when there was a tendency to undermine the authority of the government. In an Allahabad case[30] it was, however, held that the section was *ultra vires* Article 19. The Court observed: "In view of the fact that it is not considered that a tendency to disorder, much less a calculated tendency, inheres in all utterances creating disaffection against the government and in view of the fact that even the mildest form of disaffection could be caught by section 124A of the Indian Penal Code, it would appear that the restrictions which that section imposes are far too wide and cannot be justified as being solely in the interests of public order"[31] within the meaning of Article 19(2). The question of the constitutionality of the section has not yet been brought before the Supreme Court.

[26] *id.* at 466.
[27] *N. D. Mazumdar* v. *King Emperor* (1942) 5 F.L.J. 47 at 56–57 (F.C.)
[28] A.I.R. 1951 Panjab 27
[29] *Debi Soran* v. *State of Bihar*, A.I.R. 1954 Patna 254
[30] *Ram Nandan* v. *The State*, A.I.R. 1959 All. 101
[31] *idem* at p. 114

It is interesting to see how the section was interpreted in Pakistan.[32] In 1957 the Lahore Bench of the West Pakistan High Court observed in *The State* v. *Abdul Gaffar Khan*[33] that if hatred and contempt were created against persons who exercised the powers of the executive government or attempts to that effect were made, the probable result would be breach of public order and on that ground the section would not become void by reason of Article 8 of the Pakistan Constitution[34] (which corresponded to Article 19 of the Indian Constitution) read with Article 4 (which corresponded to Article 13[35] of the Indian Constitution). The next year the Peshawar Bench of the same High Court gave the section an interpretation more appropriate to the changed circumstance of the State. In *Hussain Buksh Kausar* v. *The State*,[36] the Court observed: "Section 124A, whatever its significance and the scope of its application were before the Constitution, will have to be read in the light of the changed circumstances and subject to Article 8. It is permissible for a citizen to hold up the men who form the executive government to ridicule and contempt if they are guilty of maladministration. All that the accused had done was to give an exaggerated emphasis on the treatment meted out to a leader of a political party while under custody. It is not the criticism of the government, in whatever venemous and enraging words it is cloaked, which constitutes an offence under section 124A, but the adoption of methods for the attainment of a purpose, which encourage force and violence and which may lead to conflict with the authorities with the certainty that there will be serious loss of life. Short of that every criticism of government is permissible"[36a] This view seems to approximate generally to that taken by courts in the United Kingdom when dealing with cases involving seditious acts committed within the realm.

In Australia, where sedition is a jury matter, though the theoretical definition[36b] is as wide as in the Indian statute, in practice the juries

[32] As it was enacted by the British Indian government, the same section is found in the Pakistan Penal Code also.

[33] P.L.D. 1957 (W.P.) Lahore 142

[34] The reference is to the Pakistan Constitution which was abrogated in 1958.

[35] Article 13(I) declares all existing laws, in so far as they are inconsistent with the guaranteed fundamental rights, to be void to the extent of the inconsistency.

[36] P.L.D. 1958 (W.P.) Peshawar 15

[36a] *idem.* pp. 18–19

[36b] In the Commonwealth legislation a seditious document is defined as "one displaying an intention to bring the sovereign into hatred and contempt, to excite disaffection against the Sovereign, the government, constitution, Parliament of Britain, the Dominions, the Commonwealth, and the States; to advocate the alteration otherwise than by lawful means of any matter established by law; to promote feelings of ill will and hostility between different classes of people. But it is not seditious to show in

are unwilling to convict unless incitement to immediate violence is proved against the accused.

After the First Amendment of the Indian Constitution, which widened the field of permissive legistation, it is probable that section 124A could be brought within the ambit of Article 19 (2). It is equally probable that the Courts might find the section *ultra vires* the Constitution, in so far as it penalises mere exciting or attempting to excite feelings of hatred, contempt or disaffection to the Government without exciting or attempting to excite disturbance of public order. Mobilising public opinion against the government by expressing dissatisfaction with its activities with a view to changing the government is something that is accepted as part of the democratic way of life.[37] In so far as the section seeks to penalise such expression of dissatisfaction, it may be regarded as opposed to the concept of the freedom of the Press, apart from its being likely to be held *ultra vires* the Constitution.

The Press Commission, in view of the grounds stated above, recommended the repeal of the section.[38] They, however, expressed their view that it would be desirable to penalise expressions which incite persons to alter by violence the system of government with or without foreign aid.[39] This, they said, could be done by the insertion of a new section, 121B.[40]

(c) Section 505 of the Penal Code

Section 505 of the Indian Penal Code provides:

Whoever makes, publishes or circulates any statement, rumour or report

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of Her Majesty or in the Imperial Service Troops to munity or otherwise disregard or fail in his duty as such; or

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

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;

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

good faith that the sovereign has been badly advised, or that there are errors in established government and law or causes of ill will between classes of people which should be removed, nor to excite people to attempt to cure such defects, provided that only lawful means are chosen to make the criticism and only lawful steps advocated to cure the defect in question."

[37] A writer in *The New Statesman and the Nation* (December, 17, 1955, at p. 815) remarked in relation to the press in the United Kingdom that the proper function of the press "is to create trouble and uproar for those in authority when issues arise on which public opinion is deeply disturbed." Professor D. Holland commenting on this said, "That, to my mind, should be true of the press everywhere" (*Current Regal Problems*, Vol. 9 (1956) p. 204).

[38] *Report*, Part I paragraph 1054

[39] *ibid.*

[40] *ibid.*

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

Clearly the object of the section is to penalise reports calculated to produce mutiny and also inducements for one section of the public to commit offences against another. It would appear that the section is covered by Article 19(2); clause (a) would be covered by the provisions relating to the security of the state, clause (b) by those relating to public order, and clause (c) by those relating to incitement to an offence.

(d) Police (Incitement to Disaffection) Act, 1922

Section 3 of the Police (Incitement to Disaffection) Act, 1922, penalises any act which causes or is likely to cause disaffection towards the Government among the members of the Police Force or induces or attempts to induce any member of the Police Force to withhold his services or to commit a breach of discipline.

(e) Section 27B of the Post Office Act

Section 27B of the Post Office Act, 1898, enacts that any officer of the Post Office authorised by the Post Master General in this behalf may detain any postal article in course of transmission by post, which he suspects to contain any document of a seditious character, that is, any matter the publication of which is punishable under section 124A of the Penal Code. Any person interested in the article detained may apply for its release, but if the application is rejected, the applicant may, within two months, apply to the High Court for its release on the ground that the article does not contain any document of a seditious character.

(f) Sections 181A to 181C of the Sea Customs Act

Sections 181A to 181C of the Sea Customs Act, 1878, empower the government to detain and dispose of any package suspected to contain any newspaper or any document the publication of which is punishable under Section 124A of the Penal Code, when such newspaper or document is brought into, or taken out, of India across any customs frontiers.

(g) Section 108 of the Criminal Procedure Code

Section 108 of the Criminal Procedure Code enables the government to demand security both from private individuals and from those responsible for running, printing and publishing a newspaper if it is found that their intention is to disseminate or abet the dissemination of any matter which is punishable under section 124A or section 153A or any matter concerning a judge which amounts to intimidation or defamation. But in the case of newspapers, no proceedings can be started against the editor, proprietor, printer or publisher except under the authority of the state government or of some officer empowered by the State government in this behalf.

Under section 123 of the Criminal Procedure Code failure to give security will result in a sentence of imprisonment.

(h) Sections 99A to 99G of the Criminal Procedure Code

Section 99A of the Criminal Procedure Code empowers the State government to forfeit every issue of a newspaper or a book whenever it appears to them that it contains matter falling within the purview of section 124A, section 153 A or section 295A[41] of the Penal Code. Sections 99B to 99G make procedural provisions in relation to the forfeiture contemplated under section 99A. They respectively provide for application to the High Court for setting aside the order of forfeiture, for hearing of the application by a Special Bench, for the order of the Bench, for taking of evidence to prove the nature or tendency of the newspaper, for procedure in the High Court, and for bar of jurisdiction, otherwise than as provided under section 99B.

(ii) PROMOTING FEELINGS OF ENMITY BETWEEN DIFFERENT CLASSES

Section 153A of the Indian Penal Code supplements the law of sedition. It provides:

> 153-A. Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of His Majesty's subjects, shall be punished with imprisonment which may extend to two years, or with fine, or with both.
>
> Explanation: It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of His Majesty's subjects.

[41] See *infra*, p.52

It has been judicially held that the word "classes" in the section includes any definite and ascertainable class of citizens and that capitalists do not constitute a class within the meaning of this section.[42] It would appear that the section merely enacts the common law principle which was applied in England in the decision of *R.* v. *Leese and Whitehead*.[43] In that case it was held to be public mischief to print and publish scandalous and libellous sentiments concerning the Jewish subjects of the Crown with intent to create ill will between His Majesty's subjects of the Jewish faith and those not of the Jewish faith.

Before the First Amendment, following the decision of the Supreme Court in *Romesh Thappar's case*,[44] the Panjab High Court held that the section was void and unconstitutional in as much as it was not covered by Article 19(2).[45] After the amendment, the Court of the Judicial Commissioner of Ajmer upheld the constitutional validity of section 3(v) of the Press (Objectionable Matter) Act,[47] which corresponded to section 153A of the Penal Code. It was observed by Nigam, J. C., that "matters which are likely to promote feelings of enmity or hatred between different sections of the people of India are something which is likely to affect the interests of public order as it may lead to riot, commotion and commission of other offences"[48] and that therefore the impugned provision did not offend against Article 19(1) (a). The Lahore Bench of the West Pakistan High Court took the view that the explanation attached to the section[49] did not bar the drawing attention to objectionable matters which were promoting feelings of hatred or enmity in the minds of a group of people. The Court held that the restrictions imposed by the section on freedom of speech and expression were reasonable.[50]

From the trend of these decisions it would appear that there is no great likelihood of the section being held unconstitutional by the Supreme Court. Nevertheless, out of abundant caution, the Press Commission suggested legislation restricting the operation of the

[42] *Emperor* v. *Maniben Kara*, (1932) 34 Bom. L.R. 1642

[43] (1936) L.J. Newspaper 310

[44] 1950 S.C.J. 418; 1950 S.C.R. 594

[45] *Tara Singh Gopichand* v. *State of East Panjab*, A.I.R. 1951 Panjab 27

[46] *Tilok Chand* v. *The State*, A.I.R. 1954 Ajmer 19

[47] Section 3(v) of the Act enabled government to take action where matter likely "to promote feelings of enmity or hatred between different sections of the people in India" was published.

[48] *Tilok Chand* v. *The State*, A.I.R. 1954 Ajmer 19 at p. 20

[49] It may be recalled that the Penal Code enacted by the British Indian Government is the same in both India and Pakistan, except for a few amendments effected after the division of India into two Dominions.

[50] *State* v. *Abdul Gaffar Khan*, P.L.D. 1957 (W.P.) Lahore 142

section "to those cases where there is intention to cause disturbance of public peace or knowledge of likelihood of violence ensuing."[51] They endorsed the view of the Press Laws Enquiry Committee who recommended that a second explanation should be added to section 153A to the effect that it would not amount to an offence under this section "to advocate a change in the social or economic order, provided that any such advocacy is not intended or likely to lead to disorder or to the commission of offences."[52]

(iii) THE OFFICIAL SECRETS ACT, 1923

The Indian Official Secrets Act, 1923, is modelled on the British Official Secrets Acts, 1911 and 1920. Section 5 of the Indian Act which relates to the press provides:

> If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract (a) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or
>
> (b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or
>
> (c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or
>
> (d) fails to take responsible care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code, password or information,
>
> he shall be guilty of an offence under this section.

Because it is generally recognised that highly secret information concerning the vital interests of the State should not be allowed to be disclosed, there appears to have been no serious objection raised against the provisions of this Act. The Press Laws Enquiry Committee thought

[51] *Report*, Part I, paragraph 1055

[52] Press Laws Enquiry Committee, *Report*, paragraph 71

that the Government should be the sole judge in deciding which confidential information should be published in the public interest and without prejudice to the interests of the State and that the democratic government in India would make use of these provisions only when there would be genuine necessity and in the large interests of the State and the people.[53] The Press Commission endorsed the view of the newspaper men that merely because a circular or note was marked secret or confidential, it should not be allowed to attract the provisions of this Act, if the publication of it would be in the public interest.[54]

It is worth mentioning that between the years 1931 and 1946 there was only one prosecution under the Act throughout the whole of India, even through a foreign government was in power during the period.

(iv) ENDANGERING FRIENDLY RELATIONS WITH FOREIGN STATES

An explicit constitutional provision enabling the State to restrict freedom of expression in the interests of friendly relations with foreign states does not appear to be envisaged in any written constitution other than that of India.[54a] But by the comity of nations, many States punish libels published by their citizens against the heads of foreign States, foreign ambassadors and foreign diplomatic representatives on the ground that such libels will endanger peaceful relations with foreign countries and may lead to open hostilities. The proposal made by the Federal Republic of Germany to enact what the German journalists called "Lex Soraya" is a recent instance where a State considered it necessary to adopt measures in order to protect the repuation of the head of a foreign State or a member of his family. It was proposed to amend the German criminal law providing for punishment to any person who published a statement of a factual nature concerning the private or family life of the head of a foreign State or a member of his family and capable of endangering the external relations of the Federal Republic. The offender was to be liable to punishment irrespective of

[53] Report of the Committee, paragraph 64

[54] Report of the Press Commission, paragraph 1048. Article 3550 C of the Penal Law of the Federal Republic of Germany provides that any person who discloses the contents of "an official document labelled secret or confidential" is liable to punishment. This is a provision which German journalists regard with intense disfavour.

[54a] Article 4(7) of Chapter VII of the Press Law of Sweden, however, prohibits defamatory utterances in print against the Head or representative of a foreign power in the Kingdom if such utterances have been declared punishable by legislation. This Act forms part of the Constitution.

the truth or falsehood of the statement. The background of the proposed legislation, it was generally known, was the diplomatic protest from the government of Persia occasioned by the writings in the West German press on Soraya, the former Queen of Persia.

With a view to maintaining peaceful relations with other countries, in Syria and Turkey there are legislative provisions enabling the government to suspend temporarily any periodical publishing articles which are likely to compromise international relations. While Mexico protects only those States with which it has friendly relations penalising insults to such States, their heads, and their official representatives in Mexico, the laws of Belgium and France are more restrictive in that they punish "whomsoever shall, by any hostile acts, not approved by the government, have laid the State open to a declaration of war." A press campaign against a neighbouring State may be regarded as a hostile act likely to create hatred and lead to war; but as the chain of cause and effect would be difficult to establish, this provision of law in these two countries has never been applied. In England it is a misdemeanour at common law to publish any libel tending to degrade, revile, expose to hatred or contempt any foreign prince, ambassador or dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs.[55] But if the writing is a fair criticism on a matter of public interest[56] or if it is calculated to disturb only the government of a foreign country,[57] it is no offence. The Foreign Enlistment Act, 1870, seeks to preserve friendly relations with foreign States at peace with the United Kingdom by enacting that it would be an offence, if a British subject, without the King's licence, (i) accepts a commission or engagement in the armed forces of a foreign State at war with a friendly State, or leaves the country with intent to accept such engagement, or (ii) builds, equips or dispatches a ship knowing or having reasonable cause to believe that it will be employed by a foreign State at war with a friendly State, or (iii) prepares or fits out a naval or military expedition against the territory of a friendly State. Incitement to do any of the above acts is also declared an offence under the Act.

It is of interest to recall the view expressed by the British government when the Nazi government of Germany made a diplomatic protest against the tone of a large section of the British press which

[55] R. v. *Gordon* (1787) 22 St. Tr. 213
[56] Stephen, *Digest of Criminal Law,* Article 133
[57] *R.* v. *Antonelli,* 70 J.P. 4

was highly critical of the surrender made by Neville Chamberlain. The British government was of the view that the press in Britain was free and that the government could neither guide the press nor impose restrictions on the freedom of expression enjoyed by the press in the interests of friendly relations with foreign States.

There was considerable criticism when, by the First Amendment to the Indian Constitution, "friendly relations with foreign States" was introduced as one of the subjects in respect of which there could be reasonable restrictions on the right to freedom of speech and expression. It was pointed out that the words "in the interests of friendly relations with foreign States" were of very wide connotation and might conceivably be relied upon to support any legislation which might restrict even legitimate criticism of the foreign policy of the government. The same point was raised before the Indian Press Commission. The Commission while expressing themselves in favour of the Parliament having this reserve power, recommended that "whatever legislation might be framed in the interest of friendly relations with foreign States, it should be confined in its operation to cases of systematic diffusion of deliberately false and distorted reports which undermine relations with foreign States, and should not punish any sporadic utterance or dissemination of true facts although they may have the tendency of endangering the friendly relations with foreign States."[58] It may be recalled in this connexion that Article 2(j) of the Covenant on Freedom of Information and the Press prepared by the United Nations Conference at Geneva in 1948 provided for necessary legislative restrictions being placed with regard to the "systematic diffusion of deliberately false and distorted reports which undermine friendly relations between peoples or States." When the Commission on Human Rights was considering a draft which did not include a clause on the lines of Article 2(j) of the Covenant, the Indian representative suggested an amendment to add the words, "or for the prevention of spreading deliberately false and distorted reports which undermine friendly relations with peoples and States." But the suggestion was rejected. The representatives of the United Kingdom and the Philippines expressed their apprehension that, in an effort to eliminate the danger visualised by the Indian representative, all information regarding foreign countries might be made subject to censorship, thus destroying the very freedom which the Covenant sought to safeguard. As was pointed out in the note of dissent on press legislation expressive of the minority view of

[58] Press Commission of India, *Report*, Part I, Paragraph 993

the Indian Press Commission, "It will be seen, therefore, that the weight of international opinion is not in favour of placing any such restriction".[59]

Speaking of the proposed amendment to Article 19, Dr Ambedkar, the Law Minister, explained to the Parliament that the underlying principle of introducing "friendly relations with foreign States" in the subjects mentioned in subclause (2) was nothing more than the extension of the principle of defamation with respect to a foreign State. It would appear that the expression "defamation" in the subclause would cover defamation of heads of foreign States, their families and diplomatic representatives.[60] If matter published against a State is such as to imperil relations with that State to the extent of creating a likelihood of open hostilities, economic sanctions or any other grave consequences, it will be covered by the expression "security of State" in the subclause. It appears therefore that the addition of the words "friendly relations with foreign States" may, in the main tend to serve only the purpose that was apprehended; that is, that it would enable the government to deny the citizens the right to criticise the foreign policy of the government. If it was intended to protect Pakistan from hostile criticism by the Indian press, that purpose could not be served by the inclusion of this category. For Pakistan is not to be deemed a foreign State for purposes of the Indian Constitution. According to the Constitution (Declaration as to Foreign States) Order, 1950, the members of the Commonwealth of Nations are not foreign States for the purposes of the Constitution.[61] Hence restrictions contemplated under the category "friendly relations with foreign States" cannot, it would appear, be extended to adverse criticism of Pakistan.

It may be that in its pursuit of a policy of non-allignment and neutrality, the government of India who sponsored the amendment, do not appreciate any unfavourable criticism of a foreign State; if that

[59] *id.*, paragraph 1146

[60] Section 84 of the Civil Procedure Code provides: A foreign State may sue in any Court in India, provided the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.

[61] Article 367(3) of the Constitution of India provides: "For the purposes of this Constitution 'foreign State' means any State other than India, provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order." In *Jagannath Satha* v. *Union of India* (1960 S.C.J. 975) the Supreme Court of India observed that under the Order, for the purposes of Articles 18, 19(2), 102, 191 and any other Article where the expression 'foreign State' appears, "that expression would not cover a country within the Commonwealth unless Parliament enacted otherwise." (at p. 978)

be so, it is an aspect of the government's foreign policy. And if the inclusion of this subject in Article 19(2) tends to help the government in silencing or restraining criticism of their policy, the provision cannot be regarded as being in consonance with the concept of freedom of the press.

CHAPTER III

PUBLIC ORDER AND INCITEMENT TO AN OFFENCE

(i) PUBLIC ORDER

As the essential rights are subject to the essential need for order without which the guarantee of civil rights would be a mockery,[1] restrictions on freedom of expression are considered permissible in the interests of public order and in relation to incitement to an offence.

"Public order is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the government which they have established."[2]

According to the view expressed by the Supreme Court of the United States, the "offence known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot... When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace and order appears, the power of the State to prevent or punish is obvious."[3]

The decisions of the United States Supreme Court indicate that a variety of restrictions may be regarded as permissible in the interests of public order. In fact they cover most of the restrictions that are permitted under the various heads in Article 19(2) of the Indian Constitution. To cite a few instances, it has been held by the Supreme Court that the State may punish speeches and expressions of opinion tending to incite an immediate breach of the peace[4] or riot,[5] regulate the places and hours of public meetings and discussions,[6] and the use of public streets in relation to the exercise of the right to freedom of

[1] *United Public Workers* v. *Mitchell,* (1947) 330 U.S. 75 at 95
[2] *Romesh Thappar* v. *State of Madras,* (1950) S.C.R. 594 at 598
[3] *Cantwell* v. *Connecticut,* (1940) 310 U.S. 296 at 308
[4] *Chaplinsky* v. *New Hampshire,* (1942) 315 U.S. 568
[5] *Cantwell* v. *Connecticut,* (1940) 310 U.S. 296
[6] *Saia* v. *New York,* (1948) 334 U.S. 558

speech,[7] prohibit and punish the making of loud and raucous noise in streets and public places by means of amplifiers,[8] and even make provision for the expulsion of hecklers from public meetings.[9]

In England there are certain statutes which permit restrictions on freedom of expression in the interests of public order. The Theatres Act, 1843, empowers the Lord Chamberlain to prohibit the performance of any stage play whenever he has reason to believe that such performance would go against good manners, decorum or the preservation of public order. The Public Order Act, 1936, is mainly intended to prevent unseemly behaviour at public meetings. It prohibits, among other things, the use of threatening, abusive or insulting words or behaviour in any public place or at any public meeting with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused. Under common law blasphemous libel is punishable on the ground that the publication of such libel may cause a breach of the peace.[10]

In India under the provisions of Article 19(2) this wide concept of "public order" seems to have been split up under different heads. As observed by Subba Rao, J.,[11] all the grounds mentioned in the subclause can be brought under the general head "public order" in the most comprehensive sense. "But the juxtaposition of the different grounds," he said, "indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. Public order is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the (first) amendment, it can be postulated that "public order" is synonymous with public peace, safety and tranquillity."[12]

(a) Public order distinguished from security of State

We have already noticed in what circumstances the amendment to Article 19(2) came to be made. The wide interpretation given to the expression "public order" is not accepted by the Indian Courts when it occurs in Article 19(2). This may be seen from the dissenting judgement of Fazl Ali, J., in *Brij Bhushan's case*[13] where the learned Judge

[7] *Schneider* v. *Irvington* (1939) 308 U.S. 147
[8] *Kovacs* v. *Cooper*, (1949) 336 U.S. 77
[9] *idem*
[10] *R.* v. *Leese and Whitehead*, (1936) L.J. (Newspaper) 310
[11] *Superintendent, Central Prison* v. *Dr Lohia*, (1960) S.C.J. 567
[12] *idem*, page 574
[13] *Brij Bhushan* v. *State of Delhi*, (1950) S.C.R. 605

gave a wider meaning to the expression than that given by the majority. Fazl Ali, J., observed:

"... while 'public disorder' is wide enough to cover a small riot or an affray and other cases where peace is disturbed by, or affects, a small group of persons, 'public unsafety' (or insecurity of State) will usually be connected with serious internal disorders and such disturbances of public tranquillity as jeopardise the security of the State."[14]

The majority view elaborated in *Romesh Thappar* v. *State of Madras*,[15] emphasised that the Constitution, "in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental right enumerated in Article 19(1) had placed in a distinct category those offences against public order which aimed at undermining the security of the State or overthrowing it."[16] Patanjali Sastri, J. (as he then was), observed, that the Constitution "requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."[17]

The decision in these two cases established two propositions, namely, (i) that the maintenance of public order is to be equated with the maintenance of public tranquillity and (ii) that the offences against public order are to be divided into two categories, namely, (a) major offences affecting the security of the State and (b) minor offences involving breaches of the peace of a purely local significance. As we have seen it was to bring the second category of offences within the scope of permissible restrictions on the right to freedom of expression that the words "public order" were inserted in Article 19(2) by the Constitution (First Amendment) Act, 1951.

Thus "public order" as used in the Constitution, "is synonymous with public safety and tranquillity; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State."[18]

[14] *idem* at 612
[15] (1950) S.C.R. 594
[16] *idem* at page 600
[17] *idem* at page 601
[18] *Superintendent, Central Prison* v. *Dr Lohia,* (1960) S.C.J. 567 at 577

(b) Section 5 of the Indian Telegraph Act

There are some statutory provisions in India relating to the maintenance of public order. Section 5 of the Indian Telegraph Act, 1885, for example, provides that on the occurrence of any public emergency or in the interests of public safety, Government or any officer specially authorised by Government may (i) take temporary possession of any telegraph established, maintained or worked by any licensed person and (ii) order that any message or class of messages from any person or class of person or relating to any particular subject brought for transmission by or transmitted or received by any telegraph shall not be transmitted or shall be intercepted or detained or shall be disclosed to Government or the officer specially authorised. A certificate from the Central or State Government will be conclusive proof as to whether there is an emergency or whether any act done under the section is in the interest of public safety.

As the emergency contemplated under the section is not necessarily wartime emergency, the section in effect permits imposition of censorship on communication of news during peace time under certain conditions. Though Government seem to consider that a reserve of such powers is necessary in times of emergency and in the interest of public safety, Indian journalists in general point out that the powers under the section have been exercised under pressure from the local executive even when there has been no emergency and no threat to public safety.

The Press Laws Enquiry Committee, after considering the actual operation of the section, have made a sagacious suggestion to which the Press Commission have lent their support.[19] They have recommended that the Central and State Governments should continue to have the power of telegraphic interception for use on special occasions of the occurrence of a public emergency or in the interests of public safety provided the orders of the Minister in charge are invariably obtained, that delegations of this power should be sparingly made, that delegations, when made, should be for a specified and short period and not general, and that clear instructions should be issued by Government to specially authorised officers in order to ensure that the power is not abused. As an additional safeguard against the abuse of the powers by subordinate officers, the Committee have further recommended that provision should be made in the section itself, for example, by the addition of another subsection to the effect that the orders

[19] Press Commission of India, *Report*, Part I. paragraph 1067

passed by the specially authorised officers of Government shall be reported to the Central or State Government, as the case may be, in order to enable the responsible Minister to judge the proper exercise of the powers and the orders passed in individual cases.[20]

(c) Section 26 of the Post Office Act

Section 26 of the Post Office Act, 1898, is similar in its general purport to section 5 of the Telegraph Act. It enables Government or any officer specially authorised in this behalf, on the occurrence of any public emergency or in the interest of public safety or tranquillity, to direct, by order in writing, that any article in course of transmission by post should be intercepted or detained or disposed of in such manner as the authority issuing the order may direct. As under subsection 2 of section 5 of the Telegraph Act, a certificate from Government would be conclusive proof of the existence of an emergency or as to whether the act done under the section is done in the interest of public safety or tranquillity.

The remarks made about section 5 of the Telegraph Act are in general applicable to this section of the Post Office Act.

(d) Section 144 of the Criminal Procedure Code

Section 144 of the Code of Criminal Procedure, 1898, confers on experienced Magistrates summary powers to deal with local emergencies. This section enables them to deal temporarily with urgent cases of nuisance or apprehended danger. It enacts that whenever it appears to a District Magistrate, Sub-Divisional Magistrate or other Magistrate of the first or second class specially empowered under this section that immediate prevention or abatement of a public nuisance or speedy action to prevent an apprehended danger to the public is desirable, he can issue a written order setting forth the material facts of the case and served as a summons, directing any person to abstain from a certain act or to take specified order with certain property in his possession or under his management. Such a direction can be given to prevent obstruction, annoyance or injury to any person lawfully employed, danger to human life, health or safety, disturbance of the public tranquillity, or riot or affray. In cases of emergency the order can be passed *ex parte*. It can either be directed to a person individually or to the public generally when present in a particular place. The

[20] quoted in Press Commission's *Report*, Part I, paragraph 1065

Magistrate can rescind or alter the order either *suo motu* or on the application of the person aggrieved. On receipt of the application, the person is entitled to be heard. If the application is rejected, the reason for the rejection must be recorded. An order under this section will remain in force for two months only; but in special cases it can be continued longer by a notification of the State Government.

The power conferred upon a Magistrate under this section is an extraordinary power and he should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient to deal with the situation.[21] The existence of circumstances showing the necessity of immediate action is a condition precedent to the Magistrate's exercising the powers conferred by this section.[22] The question whether there is an emergency is *prima facie* for the Magistrate and it has been held that the High Court will not lightly interfere.[23]

Every order issued under this section, as mentioned above, expires at the end of two months, and the Magistrate cannot revive or resuscitate his order from time to time,[24] unless it can be justified by circumstances which have supervened since the original order; these must be set out in the subsequent order, and be *prima facie* sufficient to justify the subsequent order.[25]

Until 1923 a ban was placed upon the High Court's power of revision with regard to proceedings under this section. But by repeal of section 435(3) by the Code of Criminal Procedure (Amendment) Act, 1923, the High Court has been enabled to deal on revision with an order issued under it. In *P. T. Chandra* v. *The Emperor*[26] it has been held that the propriety of the order as well as its legality can be considered by the High Court in revision. It has been observed in the same case that the power conferred by this section is a discretionary one, and being large and extraordinary, it should be used sparingly and only where all the conditions prescribed are strictly fulfilled.

The validity of the section after the adoption of the Constitution was questioned in an Allahabad case. In *State* v. *Deadley Misra*[27] the High Court held that an order issued under the section by a District Magistrate for the maintenance of public peace and tranquillity, one

[21] *Sundaram Chetti* v. *The Queen* (1882) I.L.R. 6 Madras 203. Section 144 corresponds to section 518 of the Code of Criminal Procedure, 1872.

[22] *Kamini Mohan Das Gupta* v. *Narendra Kumar*, (1911) I.L.R. 38 Cal. 876

[23] *Emperor* v. *G. V. Mavlankar*, (1930) I.L.R. 50 Bom. 322

[24] *Govinda Chetti* v. *Perumal Chetti*, (1913) I.L.R. 38 Madras 489

[25] *idem*

[26] (1942) I.L.R. Lahore 510

[27] A.I.R. 1954 All. 738

of the clauses of which was that no one should arrange, organise or take part in any demonstration whatsoever from September 15, 1950 to October 31, 1950, must be taken as a reasonable order and not of an excessive nature beyond what was required in the interests of the public. The Court sustained the provisions of the section as valid, observing that having regard to the First Amendment there could be no two opinions that the section was never in conflict with Article 19 of the Constitution.

There seems to be general agreement in India that this section should not be applied to the press, though it is sometimes pointed out that in so far as it enables Government to act immediately in cases where there is a likelihood of disturbance of public tranquillity, it is not inconsistent with the concept of the freedom of the press or with Article 19(2) of the Constitution. In his report on the Calcutta police assault on press reporters, Mukherjea, J., expressed the view that reporters could not claim exemption from the operation of an order under section 144 prohibiting the assembly of more than a certain number of persons merely because of the fact that they were press reporters.[28] It is submitted with great respect that the learned judge is undoubtedly correct in his view; but there are practical difficulties which clamour for attention and solution. If a meeting is held in contravention of the order issued under this section, the very holding of the meeting as well as all that takes place at the meeting is news and it is the duty of the reporters to cover such news. It may be argued that they could cover the news by going in groups of less than the prohibited number of persons, but this procedure, if adopted, may prove risky in most instances, mainly because it may involve the likelihood of personal danger and also of being mistaken for members of the unlawful assembly. The Press Commission recommended that "when an order is issued prohibiting the assemblage of more than a certain number of persons the authority concerned may grant, in the order itself, special exemption to bona fide reporters. They should be asked to wear distinctive badges in token of the special exemption and carry the permit on their person."[29]

The recommendations made by the Press Laws Enquiry Committee in regard to the application of this section deserve special notice. They felt that it was not the intention of the framers of the Code that this section should be applied to the press. They doubted the propriety of

[28] cited in the Press Commission *Report*, Part I, paragraph 1062
[29] *ibid.*

applying the provisions of this section to newspapers and recommended that "Instructions should be issued by Government to Magistrates that orders in respect of newspapers should not be passed under this section. If Government consider it necessary to have powers for issue of temporary orders to newspapers in urgent cases of apprehended danger, Government may promote separate legislation or seek an amendment of section 144 for the purpose."[30] It may be mentioned that the Press Commission wholeheartedly supported the observations made by the Press Laws Enquiry Committee.[31]

(e) Section 295A of the Penal Code

Section 295A of the Indian Penal Code provides punishment for deliberately and maliciously outraging the religious feelings of any class of subjects by words either spoken or written or by visible representations, or insulting or attempting to insult the religion or religious beliefs of that class. The constitutional validity of the section was challenged before the Supreme Court in *Ramji Lal Modi* v. *State of Uttar Pradesh.*[31a] The Court upheld its validity as being covered by the provisions relating to public order in Article 19(2). The Court observed that the right to freedom of religion guaranteed by Articles 25 and 26 of the Constitution was expressly made subject to public order, morality and health, so that it could not be predicated that freedom of religion could not have any bearing whatever in the maintenance of public order or that a law enacting an offence relating to religion could not under any circumstances be said to have been enacted in the interests of public order. These two Articles (that is, 25 and 26) "in terms contemplate that restriction may be imposed on the rights guaranteed by them in the interests of public order."[31b] In this case the Court appears to have laid down a new rule in testing restrictions imposed on the right to freedom of expression in the interests of public order. It has held that a law might impose valid restrictions on expressions which have a *tendency* to cause public disorder but which may not actually lead to any breach of public order. If (to quote from the opinion of Das, C. J.) "certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restrictions 'in the interests

[30] quoted in Press Commission's *Report,* Part I, paragraph 1061
[31] *ibid.*
[31a] 1957 S.C.J. 522
[31b] *idem* at 526

of public order,' although in some cases these activities may not lead to a breach of public order."[31c] The learned Chief Justice has also pointed out that the impugned section "only punishes the 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).[31d]

It is submitted with great respect that the validity of the section may as well be sustained under the provision relating to morality in Article 19(2).

(f) Public Security Acts

In some of the States of India there are statutes which impose restrictions on freedom of speech and expression in the interests primarily of public order or public security. The West Bengal Security Act, 1950, the Madhya Bharat Public Security Act, 1953, and the Panjab Security of State Act, 1953, are examples of such statutes. Most of these statutes impose restrictions on all media of expression, but there are some enactments like the Panjab Special Powers (Press) Act, 1956, which are specially intended to apply to the press. We have seen that the Supreme Court invalidated one of the provisions of the Panjab Special Powers (Press) Act, as it was found to be unreasonable both from the substantive and the procedural points of view.[32]

It is of interest to notice the interpretation given by the Courts to some of the provisions of these Security Acts. Section 9 of the Panjab Security of State Act penalised the publication of any statement which "undermines the security of the State, public order, decency or morality or amounts to... defamation or incitement to an offence prejudicial to the security of the State or the maintenance of public order..." This Act was passed by the State legislature under its legislative power relating to public order. The appellants in *Kartar Singh* v. *State of Panjab*[33] were prosecuted under this provision for uttering abusive slogans against the Minister of Transport and the Chief Minister while taking out a procession to protest against the policy of the Panjab

[31c] *ibid.*
[31d] *ibid.*
[32] *Virendra* v. *State of Panjab,* 1958 S.C.R. 308
[33] (1956) S.C.J. 539

Government to nationalise motor transport. They were convicted on the ground that the slogans amounted to defamation, and undermined public order and also decency and morality. On appeal the Supreme Court found that the utterances in the circumstances of the case did not undermine decency or morality. As to defamation the Court held that defamation could be punished under the Act only when the defamatory statements were of such a character as to be prejudicial to the security of the State or the maintenance of public order. In the present case it was found that there was no evidence of the statements causing any reasonable apprehension of the breach of the peace. The Court observed: "These slogans were certainly defamatory of the Transport Minister and the Chief Minister of the Panjab Government, but the redress of that grievance was personal to these individuals and the State authorities could not take the cudgels on their behalf by having recourse to section 9 of the Act unless and until the defamation of these individuals was prejudicial to the security of the State or maintenance of public order."[34]

We have already seen that the Patna High Court upheld section 5 of the Bihar Essential Services Maintenance Act, 1949, observing that it was permissible for the State in the interests of public order to restrict or penalise utterances inducing persons employed in the essential services to withhold their services or to commit a breach of discipline.[35]

In a recent case the constitutional validity of section 3 of the Uttar Pradesh Special Powers Act, 1932, was successfully challenged before the Supreme Court.[36] The Act was passed in 1932 by the British Government as a temporary measure to be in force for one year in an attempt to offset the campaign for non-payment of taxes and other forms of agitation to which the Congress Party resorted. In 1940 when the State came under Governor's rule the Act was made permanent. After the adoption of the Constitution the enactment was retained, with certain adaptations, on the statute book. Section 3 of the Act provided:

"Whoever, by words, either spoken or written, or by signs or by visible representations or otherwise, instigates expressly or by implication, any person or class of persons not to pay or defer payment of any liability, and whoever does any act, with intent or knowing it to

[34] *idem* at 542
[35] *State* v. *Ramanand Tiwari*, A.I.R. 1956 Patna 188
[36] *Superintendent, Central Prison* v. *Dr R. M. Lohia*, (1960) S.C.J. 567

be likely that any words, signs or visible representations 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." Section 2 defined "liability" to mean "land revenue, or any sum recoverable as arrears of land revenue or any tax, rate, cess or other dues or amount payable to government or to any local authority, or rent of agricultural land or anything recoverable as arrears of or along with such rent."

Superintendent, Central Prison v. *Dr Ram Manohar Lohia*[37] arose out of Dr Lohia's making two speeches instigating the audience not to pay enhanced irrigation rates to the Government. The Uttar Pradesh 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 an unbearable burden on the cultivators.

Subba Rao, J., delivering the opinion of the Court quoted with approval the observations of Das, C. J., in *Virendra* v. *State of Panjab*[38] wherein the learned Chief Justice had said, referring to the words "in the interests of public order" in the amended subclause (2) of Article 19, that

"... the words 'in the interests of' are words of great amplitude and are much wider than the words 'for the maintenance of.' The expression 'in the interests of' makes the ambit of the protection very wide, for a law may not have been designed to directly maintain the public order or to directly protect the general public against any particular evil and yet it may have been enacted 'in the interests of' the public order or the general public as the case may be."[39] The learned judge stated that the observations of the Chief Justice did not indicate that any remote or fanciful connexion between the impugned Act and the public order would be sufficient to sustain its validity. He proceeded to state: "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 to be 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

[37] (1960) S.C.J. 567
[38] 1958 S.C.R. 308
[39] *idem* at page 317

connection between the Act and the public order sought to be maintained by the Act."[40]

Referring to the test of reasonableness to be applied to the impugned provision of law, the learned Judge observed that the "limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with public order."[41]

Under the impugned section any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to government, authority or land owner was made an offence. Even innocuous utterances were made punishable. The Court therefore found that there was no proximate or foreseeable connexion between such instigation and the public order sought to be protected under the section. The Court observed: "Unless there is a proximate connexion between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interests of public order."[42]

(g) Wide Powers of the Executive

Under the legislative provisions mentioned above the Executive is entrusted with very wide powers. For instance, both under the Telegraph Act and the Post Offices Act a certificate from the Government would be conclusive proof as to whether the act done under the relevant section is done in the interest of public safety. A large number of Magistrates are given extraordinary powers under section 144 of the Code of Criminal Procedure, though the High Courts are enabled to deal in revision with an order passed under the section. Under certain provisions like the one in section 2 of the Panjab Special Powers (Press) Act, 1956, the Executive is granted wide powers exercisable on its subjective satisfaction. In *Virendra* v. *State of Panjab*[43] the Supreme Court attempted to justify such grant of power. Referring to section 2 of the Panjab Act, Das, C. J., expressed the view that as the State Government was charged with the preservation of law and order in the State and as it alone was in possession of all material facts, it would be the best authority to investigate the circumstances and assess the

[40] *Superintendent, Central Prison* v. *Dr Lohia,* 1960 S.C.J. 567 at 576
[41] *idem* at page 575
[42] *ibid.*
[43] 1958 S.C.J. 88

urgency of the situation that might arise and to decide whether any, and if so, what anticipatory action must be taken for the preservation of threatened or anticipated breach of the peace. The Court, he said, "is wholly unsuited to guage the seriousness of the situation, for it cannot be in possession of materials which are available only to the executive government. Therefore the determination of the time when and the extent to which restrictions should be imposed on the press must of necessity be left to the judgement and discretion of the State Government."[44] The Court held that the conferment of wide powers to be exercised on the subjective satisfaction of the government or its delegate as to the necessity for their exercise for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order could not, in view of the surrounding circumstances and tension brought about or aided by the agitation in the press be regarded as anything but the imposition of permissible reasonable restrictions on the fundamental right. Quick decision and swift and effective action, the Court observed, must be of the essence of these powers and their exercise must, therefore, be left to the subjective satisfaction of the Government charged with the duty of maintaining law and order. The Court further observed: "To make the exercise of these powers justiciable and subject to judicial scrutiny will defeat the very purpose of the enactment."[45]

Das, C. J., gave a further reason why the exercise of the power could not be made justiciable. If it is so made, the Court would be substituting its satisfaction for that of the Executive and that is not what is intended under the legislative provision. To quote from his opinion: "If the State Government or its delegate is satisfied that for the purposes of achieving specified objects it is necessary to prohibit the publication of any matter,... then for the Court to say that so much restriction is not necessary to achieve those objects is only to substitute its own satisfaction for that of the State Government or its delegate."[46]

The Court was also of the view that no assumption ought to be made that the State Government or the officers to whom the State Government might delegate its authority would abuse the power granted. "Even if the officer may conceivably abuse the power, what

[44] *idem* at page 94

[45] *ibid.* It may be mentioned that even in his dissenting opinion in *Khare* v. *State of Delhi* (1950 S.C.J. 328) Mukherjea, J., conceded that in cases of this description certain authorities could be invested with power to make initial orders on their own satisfaction and not on materials which would satisfy certain objective tests.

[46] *idem* at page 97

will be struck down is not the statute, but the abuse of power."[47]

The general principle is that if a law sets out its underlying policy so that the order to be made under the law is to be governed by that policy and the discretion given to the authority is to be exercised in such a way as to effectuate that policy, the conferment of a discretion so regulated cannot be considered invalid.[48]

We may consider in passing how far the right to freedom of expression may be liable to restriction on the subjective satisfaction of the Executive under laws providing for preventive detention during time of peace.

It would seem that restrictive action based on the subjective satisfaction of the Executive can easily take the form of negation of freedom under the constitutional provisions permitting preventive detention. A newspaperman preventively detained will not be in a position to exercise his right to freedom of expression through the medium of the press. It would appear that there were instances where persons who might be prosecuted for instigating breaches of public order were, as a matter of convenience, detained under the Preventive Detention Act, 1951. To cite one instance: Sarju, a Communist leader was detained under the provisions of this Act. To quote from the opinion of the High Court in *Sarju* v. *Uttar Pradesh*,[49] he "was accused of having delivered a number of speeches... inciting people to violence and the District Magistrate therefore felt satisfied that it was necessary to make the detention order with a view to preventing the petitioner from acting in any manner prejudicial to the security of the State and the maintenance of public order."[50] Again, in *Ram Singh* v. *State of Delhi*,[51] it appears that on the allegations of fact made against the detainee, it would have been possible to prosecute him under section 153A of the Penal Code. If section 124A or section 153A of the Penal Code had become of doubtful validity on account of certain decisions and observations of the superior Courts, the remedy should have been an amendment of the relevant legislative provisions and not recourse to the Preventive Detention Act. It is inconceivable that the framers of the

[47] *idem* at page 95

[48] *Virendra* v. *State of Panjab*, 1958 S.C.J. 88 at 95

[49] A.I.R. 1956 Allahabad 589

[50] *idem* at page 591

[51] 1951 S.C.J. 374. See also *Jagannath Satha* v. *Union of India*, (1960 S.C.J. 975) where the main allegation against the detainee was that (to quote from the opinion of the Supreme Court) "he had been engaged in carrying on propaganda against the Government of India and the Government of the State of Jammu and Kashmir established by law and against the administration of that State in a manner calculated to bring into hatred and contempt the government of the State and the Government of India." (at p. 976)

Constitution ever intended the provisions regarding preventive detention included (ironically enough) in the chapter on Fundamental Rights should be resorted to as a facile alternative for prosecution under the criminal law of the land.

In *Ram Singh's case* the Supreme Court held that the detainee was not entitled to raise before the Court the question whether the speeches alleged to have been made by him were deserving of constitutional protection under Article 19, though avowedly it was to prevent his making such speeches that an order of detention had been made against him. This holding seems to have been a corollary to the position the Supreme Court had taken in *State of Bombay* v. *Atmaram Sridhar Vaidya*,[52] in which the Court observed that it would not consider itself authorised to scrutinize whether the grounds of detention stated by the Government were sufficient to justify detention, as such determination was a matter left entirely to the subjective satisfaction of the detaining authority.

The Courts appear to have also denied themselves the right to examine the factual correctness of the grounds of detention stated by the Government even when the detainee seeks to establish *mala fides* on the part of the Government in confirming the order of detention made by subordinate officers.[53]

Even assuming that the allegations made by the Government are irrefutable and that the Government's apprehensions about the probable future activities of the detainee are well-founded and their assessment of the adverse effect of such activities on public interest appears reasonable, it would appear that it is still open to the Court to examine whether the activity sought to be curbed by means of preventive detention is one that is entitled to constitutional protection. If this constitutional issue is to be left to the subjective satisfaction of the authority making the order of detention, or of the Government, the constitutional guarantee of fundamental rights, including the right to freedom of expression, may easily vanish into thin air.[54]

[52] 1951 S.C.J. 208. In Vaidya's case the activity sought to be prevented by detention was disruption of railway services, an activity which, by its very nature, could not possibly claim constitutional protection. But in Ram Singh's case the allegation was that he made speeches exciting communal disharmony between Hindus and Muslims in Delhi. This was a case where the quality of the activity sought to be prevented could be regarded as a matter for judicial scrutiny, involving as it did a constitutional issue vital to the maintenance of the balance between individual freedom and governmental authority, of which the Supreme Court is the final arbiter.

[53] *Muthuramalinga* v. *The State*, A.I.R. 1958 Madras 425

[54] This judicial abdication assumed by the Indian Courts, it may be noted, is not warranted by any constitutional provision.

(h) The Expression "in the interests of public order"

The note of dissent on press legislation submitted by four members of the Press Commission suggested an amendment to Article 19(2) substituting the words "in the interests of prevention of public disorder" for the words "in the interests of public order." The expression "public order," they said, was capable of a multiplicity of interpretations. It might extend from the observance of a municipal order regarding traffic lights to public tranquillity sought to be maintained by an order under section 144 of the Criminal Procedure Code. It is conceivable that the press might on some occasion consider it its duty to bring to public notice the unjustifiability or unreasonableness of an order in fairly strong language and this may be interpreted as an interference with public order. "As we view it," they said, "a certain element of risk has to be taken in the matter. The Press exists to reflect, as far as possible, public opinion and if there is an unjustifiable order, it may be called upon to condemn it in such terms as to compel the authorities to reverse it. Freedom of expression has always been taken to cover such cases."[55] They cited instances where the expression "prevention of public disorder" appears to have been preferred to phrases like "maintenance of public order" and "in the interests of public order." Such documents of international significance as the Covenant on Freedom of Information and the Press, the draft convention on freedom of information, and Monsieur Lopez's report to the Economic and Social Council refer to public disorder.

The majority of the Commission thought that it was "risky to substitute for the concept some new and perhaps vaguer terms,"[56] and cited in this connexion the view expressed by the representatives of the United States, France, Chile and Egypt in the sixth session of the Commission on Human Rights that the idea of public order was clearly understood in most countries of the world and its application was known to jurisprudence.[57] It is submitted with great respect that our discussion in the foregoing pages of this chapter would indicate that though the idea of public order is understood in most countries it is not understood in the same way and that though its application is known to jurisprudence, its interpretation is not identical in all countries. Further, as was pointed out by the representative of the United Kingdom at the session "maintenance of public order" may mean

[55] Press Commission of India, *Report*, Part I paragraph 1145
[56] *idem*, paragraph 988
[57] *ibid.*

acceptance of the existing social order. Though the majority of the Commission seemed inclined to follow the phraseology adopted in the Universal Declaration of Human Rights[58] it cannot be said that the view expressed in the dissenting note is of negligible value. It would appear that the words "in the interests of prevention of public disorder" are likely to be less amenable to ambiguity of interpretation than the phrase "in the interests of public order." Further the former appears to be more specific and therefore less liable to be given a wide connotation, a connotation which, if applied, may not be in consonance with the concept of the freedom of the press. In fact, it has already been judicially recognised, as previously stated, that the expression "public order" makes the ambit of the protection very wide and that "a law may not have been designed to directly maintain the public order ... and yet it may have been enacted 'in the interests' of the public order..."[59]

(ii) INCITEMENT TO AN OFFENCE

Most countries consider incitement to an offence to be an offence in itself irrespective of the results of such incitement. It is not easy in all cases to establish the clear connexion, the chain of cause and effect, between the incitement and the subsequent commission of the offence. It may possibly be because of this evidentiary difficulty that legislation in almost all countries penalises incitement to grave offences, irrespective of its results. For example, in England a person who solicits or incites another to commit a *felony* or *misdemeanour* is liable to indictment at common law, even though the solicitation or incitement produces no effect. Thus where the addressee does not read the letter containing incitement, the writer is held guilty of the offence of incitement. In the United States, incitement to commit a *crime* is punish-

[58] The words "public order in a democratic society" appear in Article 19 of the Declaration. The expression "public order" appears in Articles 16, 17, 18 and 19 of the Covenant also.

[59] *Virendra* v. *State of Panjab*, 1958 S.C.R. 308 at 317. The distinction sought to be drawn here is between "for the maintenance of public order" and "in the interests of public order." It may reasonably be assumed that when the difference between these two is considerable, much greater would be the difference between "in the interests of public order" and "in the interests of prevention of public disorder" when placed under the judicial microscope, with the result that it would be possible for the State to restrict freedom of the press to a considerable extent under the constitutional provision which permits such restrictions in the interests of public order (rather than in the interests of prevention of public disorder).

able. It has been judicially held that if the act (like speaking or circulating a paper), the tendency of the act and the intent with which it is done, are the same, there is no ground for saying that success alone warrants making the act a crime.[60] Belgium punishes any incitement to an act which the law regards as *crime*. Incitement to offences which are not regarded as crimes is punishable only if it actually leads to an illegal act, except in the case of certain specified offences like theft or destruction of property.

In India the amendment to Article 19(2) of the Constitution permits restrictive legislation on the right to freedom of speech and expression in relation to incitement to an offence. The fact that it is the word "offence" and not the expression "crimes of violence"[61] that finds a place in the subclause gives very wide scope to the permissible restriction. Under Article 367 of the Constitution the word "offence" has to be given the same meaning as is given to it in the General Clauses Act, 1897, wherein it connotes any act or omission made punishable by any law for the time being in force. And law would include Acts, regulations, rules and bye-laws. The result would be that a restriction curtailing freedom of expression in relation to incitement to disobey, for example, a bye-law made by a municipality would be constitutionally permissible. Again, it would be possible for the State to create a new offence with a view to curbing freedom of expression in relation to a particular subject or class of subjects, and then to enact that incitement to commit that offence shall in itself be an offence. In such cases, the only remedy would be to move the Courts to see whether they would uphold the piece of legislation as being a reasonable restriction on the fundamental right. In *State of Bombay v. Balsara*.[62] the Supreme Court upheld the validity of section 24(1) (b) of the Bombay Prohibition Act, 1949. The clause provides:

"24.(1) No person shall print or publish in any newspaper, news sheet, 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 of or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence,

[60] *Schenck* v. *U.S.* (1919) 249 U.S. 47
[61] This was suggested when the proposed amendment was discussed in the Parliament.
[62] 1951 S.C.J. 478

permit, pass or authorisation granted thereunder." But the Court declared invalid, among a few others, section 23(b) which provided that no person shall "incite or encourage any member of the public or any class of individuals or the public generally to commit any act which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder," on the ground that the words "which frustrates or defeats the provisions of this Act, or any rule, regulation, or order made thereunder" were so wide and vague that it would be difficult te define or limit their scope.

Circumstances may arise when a citizen would consider it desirable in the public interest to advocate the disobedience in a peaceful manner of an administrative order believed to be unjust with a view to drawing the attention of the authorities to the iniquity of the order and to creating public opinion in favour of its rescission. But, as we have seen, under the constitutional provision it is permissible for the Government to enact a legal prohibition against the advocacy of such disobedience.[63]

The Press Commission, while admitting that the connotation of the word "offence" is very wide and that it would be possible for the legislatures to create any kind of offence, and that "in that event, provision with regard to punishment for incitement to commit that offence would acquire constitutional validity"[64] seem to indulge in a short sermon on good behaviour when they say that "whatever may have been the justification for breaking laws when a foreign and irresponsible government was in power and no constitutional redress was feasible, things have considerably altered after independence when both the Central and State Governments are responsible to popular legislatures. When a law is enacted it must be regarded as an expression of the will of the people, and if the law is disliked by certain sections of the people, the remedy lies not in disobeying the law but in persuading the public to see the iniquity of it and getting it altered by legitimate and constitutional means."[65] It may be borne in mind that the incitement to disobey an iniquitous law ceases to be a legitimate and constitutional means of seeking the alteration of the law, only when such incitement is declared illegal by the State. Again, it is doubtful whether it can be asserted in relation to all laws that "when

[63] Justice Holmes drew a distinction between advocacy and incitement. He observed that there was a wide difference between the two and that if the advocacy would be immediately acted upon, causing a clear and present danger, it would be regarded as incitement. (*Whitney* v. *California*, 274 U.S. 357) It is doubtful whether this distinction is always maintained.

[64] Press Commission, *Report*, Part I, paragraph 996

[65] *idem*, paragraph 997

a law is enacted, it must be regarded as an expression of the will of the people." Under the Constitution, the President and the Governors of the States in India are empowered, during the recess of the respective legislatures, to promulgate ordinances which have, for a short period, the same force and effect as an Act of the legislature. If it is assumed that British constitutional conventions are strictly followed in India, it may be said that the promulgation of the ordinances has to be made on the advice of the Council of Ministers; according to a literal interpretation of the constitutional provisions, the President and the Governors, it would appear, are empowered to promulgate ordinances on their own initiative. If it be so, the will of the people does not seem to be very much in evidence in this particular legislative picture. It may be recollected that even though the President is indirectly elected, the Governors are appointed by the President (presumably on the advice of the Council of Ministers) and hold office during his pleasure.

The Press Commission appear to be apprehensive that if the words "incitement to an offence" are removed from the Article 19(2) there will be no constitutional authority for punishing any utterances which incite persons to commit offences and that the whole law of abetment contained in the Penal Code would be open to challenge in so far as the abetment consists in incitement to an offence, which is one of the forms of abetment. The apprehension of the Commission is probably justified in so far as it points to the need for making a constitutional provision permitting restrictive legislation in relation to incitement. The question is whether the provision should be in relation to any kind of offences or only in relation to incitement to crimes. We have seen that in England incitement to commit felonies and misdemeanours is punishable and in the United States, incitement to commit a crime is penalised. The European Convention for the Protection of Human Rights and Fundamental Freedoms states that freedom of expression may be subject to such "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society... for the prevention of disorder or *crime*."[66] One wonders whether in India legislation, restrictive of freedom of expression, should be permitted to cover incitement to all kinds of offences.

[66] Article 10(2), emphasis added

CHAPTER IV

OBSCENITY

Article 19(2) of the Indian Constitution permits legislative abridgement of the right to freedom of speech and expression in the interests of decency or morality. The expression "indecency" seems to be easily interchangeable with "obscenity,"[1] the word commonly used in English statutes.[2] When the word "indecent" occurs in English statutes, it seems to convey practically the same meaning as the word "obscene."

The word "morality" has a wider connotation than "decency." In Chapter XIV of the Indian Penal Code entitled "Of offences affecting... decency and morals," while sections 292–294 deal with obscenity, section 294A treats of "keeping lottery-office." The fact that the Supreme Court did not uphold a law penalising the "commending" of an intoxicant[3] may only indicate that such commending is not against morality as determined by contemporary community standards. It does not seem to signify that, because the word "morality" when it occurs in Article 19(2) connotes only sexual morality,[4] the commending of intoxicants is beyond the limits permitted for restrictive legislation. It may be safely assumed that the word can be made to cover much wider field than sexual morality and it would not be surprising if a law prohibiting advertisement of lotteries is sustained as valid in the interests of morality.

(i) WHAT IS OBSCENE?

We shall now turn our attention to the expression "decency" in the subclause. As noticed before, its opposite, "indecency" seems to have

[1] The Shorter Oxford English Dictionary defines "obscenity" as "indecency or lewdness (especially of language)"; and "indecency" as a "quality savouring of obscenity."

[2] For instance, the Obscene Publications Acts of 1857 and 1959. But see also the Indecent Advertisements Act, 1889.

[3] *State of Bombay* v. *Balsara,* (1951) S.C.R. 682

[4] In *re Bharati Press* (A.I.R. 1951 Patna, 12) the Patna High Court held that the expression "morality" in Article19(2) should be construed in the sense of sexual morality.

the same meaning as "obscenity." Though most English statutes dealing with the subject and several sections of the Indian Penal Code use the word "obscene," it has not been found easy to define what obscenity is. "No one seems to know," complained Professors Lockhart and McClure, "what obscenity is. Many writers have discussed the obscene, but few can agree upon even its essential nature."[5]

The Geneva Conference of 1923 on the Suppression of the Circulation of, and Traffic in, Obscene Publications admitted that they could not find a satisfactory definition of the obscene. In the United States, state legislatures in enacting statutes prohibiting obscene publications describe the obscene by using one or more of the following words: disgusting, filthy, indecent, immoral, improper, impure, lascivious, lewd, licentious, vulgar. Dr Samuel Johnson in his Dictionary defined it as "immodest, not agreeable to chastity of mind, causing lewd ideas." Havelock Ellis explained it to mean "whatever is off the scene" and not openly shown on the stage of life.[6] The obscene in this sense is found in the public exposure of naturalistic aspects of sexual and excremental processes. Some regard it as that which arouses sexual passion.[7] Father Harold C. Gardiner would argue for the acceptance of the idea that "even if it is not certain that such and such an object will arouse to sexual passion, nevertheless, if the probability swings in that direction, then the object is, for practical purposes, obscene."[8]

It would seem that "obscenity" has had no fixed meaning. It appears to keep changing its clothes, probably less frequently than fashions change in a modern metropolis. As Professor Gellhorn puts it, "It is a variable. Its dimensions are fixed in part by the eye of the individual beholder and in part by a generalised opinion that shifts with time and place."[9] Within living memory an editor deleted the word "chaste" in an article, because it was considered suggestive.[10] For a number of years Marie Stopes's *Married Love* was barred by the customs and banned from the mails in the United States on the ground of obscenity, until a Court in a case with the charming title *United States against*

[5] William B. Lockhart and Robert C. McClure, *Literature, the Law of Obscenity and the Constitution*, 38 Minn. L. Rev. 295 at 320 (1954).

[6] Revaluation of Obscenity, in *More Essays on Love and Virtue*

[7] Walter Gellhorn in *Individual Freedom and Governmental Restraints* refers to the principle that "if this object rouses to genital commotion, it is obscene." (page 58)

[8] Harold C. Gardiner, S.J., Moral Principles towards a Definition of the Obscene, 20 *Law and Contemporary Problems*, 560 at 569–570.

[9] Walter Gellhorn, *Individual Freedom and Governmental Restraints*, page 55

[10] mentioned by Curtis Bok, Censorship and the Arts, *Civil Liberties under Attack* (Ed. C. Wilcox) page 115.

Married Love[11] held that the book was an aid to conjugal success rather than a piece of obscene writing. While many literary classics have been challenged by law enforcement officers, these challenges have met with varying fates in the Courts. It is interesting to trace the gradual shift in judicial opinion in this field, culminating in the decision that D. H. Lawrence's *Lady Chatterley's Lover* is not to be regarded as obscene under the (British) Obscene Publications Act, 1959.

In 1868 Cockburn, C. J., in England attempted a definition of obscenity in the Hicklin case.[12] "I think," the learned Chief Justice said, "the test of obscenity is this, 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."[13]

In the United States Hand, J., adopted the Hicklin test in *U.S.* v. *Kennerley*,[14] but indicated his dissatisfaction with the harsh rule of the Hicklin case in these words: "I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time... I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interests of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature."

Nearly two decades later the Hicklin test was rejected in the two decisions on James Joyce's *Ulysses*,[15] and a new standard to determine

[11] 48 F. 2d 821 (S.D.N.Y. 1931)

[12] *Queen* v. *Hicklin* (1868) L.R. 3 Q.B. 360

[13] It is of interest to note Curtis Bok's comment on the Hicklin test: "Strictly applied, this rule would put an end to current literature, since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue." (Censorship and the Arts, op. cit. p. 112) One is reminded of what John Milton said in the Areopagitica (1644): "Wholesome meats to a vitiated stomach differ little or nothing from unwholesome; and best books to a naughty mind are not unapplicable to occasions of evil."

[14] 209 Fed. 119 (S.D.N.Y. 1913)

[15] *U.S.* v. *One Book called Ulysses*, 5 F. Supp. 182 (1933); *U.S.* v. *One Book entitled Ulysses*, 72 F. 2d 705 (1934)

what amounted to obscenity was substituted in its place. The Court observed that the proper test of whether a book was obscene was to consider its dominant effect.[16] In applying the test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics if the book is modern, and the verdict of the past if it is ancient, are persuasive pieces of evidence, for, in the opinion of the Court, works of art are not likely to retain a high position for long with no better warrant for their existence than their obscene content. Thus the Hicklin rule which ignored literary and other social values, judged a whole book or article by passages taken out of context and tested for obscenity by the tendency of such extracts to deprave and corrupt the minds of those open to such influence and into whose hands the book might fall, was definitely given up in the United States.

The Hicklin test seems to have retained its sway in England till 1954. As long as it remained, there was no restriction on the conviction of innocent publishers, no requirement that the publication should be viewed as a whole, and no point in arguing that the general literary or artistic merit of the publication should be taken into consideration to excuse passages which might have a tendency to deprave or corrupt. In 1954 a series of cases involving alleged obscenity came before the Courts.[17] They all disclosed a conflict in the minds of the judges and the jury in regard to what constituted an obscene publication. Should a jury direct their attention to the result of a publication falling into the hands of young people? Could a judge insist that the literary standards of the society should conform to the level of something that would be suitable for a well-brought up girl of fourteen? The crucial question appeared to be whether an intention to corrupt public morals was a necessary ingredient in obscenity. Till then there was no decision to indicate that it would be a defence if it could be proved that the publication of matter *prima facie* obscene was for the public good as being necessary or useful to religion, literature, science or art, provided the extent and manner of publication did not go beyond what the public good required. In *Regina* v. *Martin Secker and Warburg, Limit-*

[16] In *Commonwealth* v. *Gordon,* 66 Pa. D & C. 101 (1949) Curtis Bok, J., found objectionable any writing "whose dominant purpose and effect is erotic allurement – that is to say, a calculated and effective incitement to sexual desire. It is the effect that counts more than the desire and no indictment can stand unless it can be shown."

[17] for example, *Queen* v. *Reiter,* (1954) 2 Q.B. 16; *Queen* v. *Martin Secker and Warburg, Limited,* (1954) 34 Cr. App. R. 124. In *Queen* v. *Reiter* Goddard, C. J., observed: "(The Recorder) said, and this Court entirely agrees with him, that the law is the same now as it was in 1868." (at p. 19)

ed,[18] Stable, J., observed that Cockburn, C. J.'s view expressed in the Hicklin case in 1868 should be applied in accordance with present day standards taking into account prevailing attitude to sex. He pointed out that somewhere between the two extreme approaches, one that regarded sex as sin and tried to conceal everything about it, and the other that thought that only evil would flow from secrecy and concealment, the average, decent, well-meaning man or woman took his or her stand. He also stressed that "a mass of literature, great literature from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making these works available to the general public."[18a]

These judicial observations and the public opinion in favour of rejecting the harshness of the Hicklin test resulted in the enactment of the Obscene Publications Act in 1959.[19] The Act defines obscene publication as follows:

> For the purposes of this Act, an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[20]

The interests of science, literature and art are sought to be protected by that part of the definition which requires that the effect of the article should be taken as a whole before judging whether it tends to deprave or corrupt. Further, there is provision for the defence of public good. The price of the book or periodical, the place of sale, the circumstances of its publication are all matters to be taken into consideration before the test formulated in the definition is satisfied.[21]

As mentioned above, there is provision made in the Act for the

[18] (1954) All E.R. 683. In this case the prosecution was for the publication of a novel which stressed the relationship between the sexes while dealing with contemporary life in New York. In his charge to the jury Stable, J., observed: "If we are going to read novels about how things go on in New York, it would not be much of assistance, if we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes... You have heard a good deal about the putting of ideas into young heads. Really, is it books that put ideas into young heads, or is it nature?" (at page 687)

[18a] *id.* at p. 686

[19] The first case which came before the Courts under the Act was the one concerning D. H. Lawrence's *Lady Chatterley's Lover*: *R.* v. *Penguin Books, Ltd,* (1960).

[20] Section 1 (I)

[21] It has been observed in an Australian case (*R.* v. *Close,* (1948) V.L.R. 445) that a work made available in cheap editions for general circulation may be held obscene, when the same publication sold in a limited edition intended for adults only may no be so held.

defence of public good. If it is proved that the publication of the article is for the public good on the ground that it is in the interests of science, literature, art or learning or of other objects of general concern, no order for forfeiture and no conviction for an offence under the Act will be made. The opinion of experts is admissible in any proceedings under the Act, either to establish or negative the defence.[22]

In the United States in 1957 the Supreme Court laid down a standard to determine what is obscene. The test is whether, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[23]

In the absence of any statutory definition, the Indian Courts tended to apply the Hicklin test when called upon to determine whether a publication was obscene or not. In recent years, however, the trend is generally to mitigate the harshness of the Hicklin rule.[24] The application of contemporary community standards appears to be very much in evidence in the judicial verdict when the Supreme Court in *Virendra* v. *State of Panjab*[25] held that vulgar abuses indulged in by a group of Motor Union members during a procession did not offend against decency or morality. Bhagwati, J., delivering the opinion of the Court observed: "Indecent and vulgar though these slogans were as directed against the Transport Minister and the Chief Minister of the Panjab Government, the utterance thereof by the appellants who were the members of the procession protesting against the scheme of nationalised motor transport was hardly calculated to undermine decency or morality, the strata of society from which the appellants came being habituated to indulge freely in such vulgar abuses without any the slightest effect on the persons hearing the same."[26]

[22] Section 4

[23] *Roth* v. *United States*, (1957) 354 U.S. 476

[24] As early as 1940 in a Calcutta case (*Emperor* v. *Sree Ram Saksena*, I.L.R. (1940) I Cal. 581) it was observed that a picture of a woman in the nude was not *per se* obscene, when there was nothing in it which would shock or offend the taste of any ordinary or decent-minded person. Unless the pictures of nude women were an incentive to sensuality or excite impure thoughts in the minds of ordinary persons of normal temperament who might happen to look at them, they could not be regarded as obscene within the meaning of the provisions of the Penal Code. "For the purpose of deciding whether a picture is obscene or not, one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, the person into whose hands it is likely to fall, etc."

[25] 1956 S.C.J. 539

[26] *idem* at 542

(ii) STATUTORY PROVISIONS

(a) Sections 292 and 293 of the Indian Penal Code

There are a number of statutory provisions in India directed against obscene publications. The most notable of them are sections 292 and 293 of the Penal Code. These sections were inserted in the Code by the Obscene Publications Act, 1925, for the purpose of giving effect to the international Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, signed at Geneva in 1923. They prohibit the sale, distribution and exhibition of obscene literature. Section 292 provides:

> Whoever
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
> (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
> (c) takes part in, or receives profits from, any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
> (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
> (e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.
> *Exception:* This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Section 293 provides for enhanced punishment (that is, imprisonment for a term which may extend to six months) in cases where the obscene objects offered, sold, delivered or distributed are to persons under the age of twenty years.

The general conservative attitude to sex prevalent in the Indian society coupled with the assumption that they were expected to follow English judicial decisions wherever circumstances permitted, tended to make British Indian Courts apply the rigorous rule of the Hicklin case, save where the publication was covered by the exception enacted

in section 292 or where the publication was generally regarded as a work of art. Thus Indian Courts have held that a book may be obscene although it contains only one single obscene passage.[27] But a religious or classical work is not to be regarded as obscene, simply on account of its containing some objectionable passages, because the tendency of such publication is not to deprave or corrupt morals. If objectionable passages in a religious book are extracted and printed separately, the publication may not be justified, even though the passages form part of a religious book, in case the extracts deal with matters to be judged by the general standards of human conduct, as where they relate to the immoral conduct of human beings and the general tendency of the publication is to deprave and corrupt those whose minds are open to immoral influences.[28] If the detailed passages in a publication are of an obscene character, the author's liability in respect of them will not be avoided merely by reference to other passages which may contain excellent moral precepts.[29] It is no justification to say that the matter published is written by an eminent writer or written in a style not easily understood by all,[30] or that the publication is a medical one and sold only to a limited number of registered subscribers.[31] But three decades later, in 1947, it has been held that a book intended to give advice to married persons on how to regulate their sex lives to the best advantage will not come within the purview of the section.[32]

In a Calcutta case it has been held that if in fact a work is one which would certainly suggest to the minds of the young of either sex or even to persons of more advanced years thoughts of most impure and libidinous character, its publication is an offence, though the accused has in view an ulterior object which is innocent or even laudable.[33] The Bombay High Court has stressed the form of expression rather than the substance in a case involving a question of alleged obscenity and has said that the important point to look would be rather the form of expression

[27] See *Emperor* v. *Inderman* (1881) I.L.R. 3 Allahabad 837
[28] *Emperor* v. *Ghulam Hussain,* 18 Cr. L.J. 505 (1917)
[29] *Emperor* v. *Vishnu Krishna* (1912) 15 Bom. L.R. 307
[30] *Public Prosecutor* v. *Markandeyulu,* (1918) A.I.R. Madras 1195
[31] *Emperor* v. *Thakkar Datt* (1917) A.I.R. Lahore 288
[32] *Emperor* v. *Harnam Das,* (1947) A.I.R. Lahore 383. Falshaw, J, observed: "If such books are effectively to fulfil their intended purpose it is obvious that they must be written in fairly plain language in order to be understood, and I do not think it can be said that the publication of such books should be banned altogether because of the danger, against which it is undoubtedly very difficult to provide effective safeguards, that they may fall into wrong hands." (at p. 385) Chainani, J., of the Bombay High Court expressed a similar view in *Girdharlal Popatlal Shah* v. *State of Bombay.* (I.L.R. 1955 Bombay 932)
[33] *Emperor* v. *Kherode Chandra Roy Chaudhury* (1911) I.L.R. 39 Cal. 377

than the actual meaning, for the same meaning may be obscenely expressed by one form of language and yet by the use of another form of language may be couched in expressions free from reproach.[34]

Baker, J.'s description of what is obscene is as succinct as it is wide when he observed that anything "calculated to inflame the passions" is obscene.[35] The shade of Cockburn, C. J.'s hands, outstretched patronisingly, seems to spread over most of these decisions.

In a recent case,[36] Bhattacharya, J., of the Calcutta High Court has observed that the law as formulated in Hicklin's case remains practically unchanged. He has, however, added that though it is difficult to subscribe to the theory of eliminating altogether the effect of a publication on the minds of young persons, for they also constitute the public, "the effect produced by the publication on the ordinary member of the society has to be ascertained. Neither a man of wide culture or rare character nor a person with depraved mentality should be thought of as being the reader of literature in question."[37] Such an ordinary member of the society is expected to be of normal temperament. "The standard of the reader is neither one of exceptional sensibility nor one without any sensibility whatsoever."[37a]

It may be mentioned that section 521 of the Code of Criminal Procedure provides that on conviction the Court may order the destruction of all the copies of the article in respect of which the decision has been made.

(b) Sections 18 and 19A of the Sea Customs Act

Section 18(c) of the Sea Customs Act, 1878, prohibits "any obscene book, pamphlet, paper, drawing, painting, representation, figure or article" being brought into India. Section 19A (2) empowers the Central Government to make regulations respecting the detention and confiscation of goods the importation of which is prohibited and the conditions, if any, to be fulfilled before such detention and confiscation.

[34] *Emperor* v. *Vishnu Krishna,* (1912) 15 Bom. L.R. 307

[35] *Emperor* v. *Ambalal Paranngji,* Crim. App. Nos. 17 and 18 of 1929 (Unrep. Bombay.) It is interesting to compare this with Jerome J. Frank, J.'s remark in his concurring opinion in *Roth* v. *Goldman,* 172 F. 2d. 788 (C.A. 2, 1949) at 792: "... no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects, such as perfumes, for example, which notoriously produce that result."

[36] *C. T. Prim* v. *The State,* A.I.R. 1961 Cal. 177

[37] *idem* at 179

[37a] *ibid.*

(c) Section 20 of the Post Office Act[38]

While section 18(c) of the Sea Customs Act prohibits the importation of obscene articles into India, section 20 of the Post Office Act, 1898, seeks to prevent the transmission of such articles by post to any place within or outside the country. The section provides:

> No person shall send by post
> (a) any indecent or obscene printing, painting, photograph, lithograph, engraving, book or card, or any other indecent or obscene article, or
> (b) any postal article having thereon or on the cover thereof any words, marks or designs of an indecent, obscene, seditious, scurrilous, threatening or grossly offensive character.

(d) The Young Persons (Harmful Publications) Act

A recent statute of the Indian Parliament seeks to prevent the dissemination of publications harmful to young persons. It is not confined to obscene publications, but is concerned with all publications harmful to the young.

The Young Persons (Harmful Publications) Act, 1956,[38a] defines harmful publication as

> any book, magazine, pamphlet, leaflet, newspaper or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly (i) the commission of offences, (ii) acts of violence and cruelty or (iii) incidents of a repulsive or horrible nature, in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever.[39]

And a young person is defined as a person under the age of twenty years.

A person who sells, distributes, publicly exhibits or has in his possession for any of the above purposes or advertises any harmful publication may be punished with imprisonment extending to six months or with fine or with both. On conviction, the Court may order the destruction of all copies of the harmful publication. Thus the Act may be said to supplement the provision in section 293 of the Penal Code which is limited in its purview to obscene publications.

[38] By section 19A of the Post Office Act, inserted by the Post Office (Amendment) Act, 1958, it is prohibited to send by post any ticket or advertisement of a lottery or any other matter relating to a lottery which is calculated to induce persons to participate in the lottery. The prohibition does not extend to a lottery organised or authorised by government.

[38a] This Act is based on the (British) Children and Young Persons (Harmful Publications) Act, 1955.

[39] Section 2

The Act provides that the State Government, if it considers after consultation with the principal law officer of the State that any publication is a harmful publication, may declare by order every copy of the publication forfeit to the Government. The notification of forfeiture should state the grounds of the order. Any person aggrieved by an order of forfeiture may, within sixty days, apply to the High Court to set aside the order.[40]

Any Magistrate of the first class may, by warrant, authorise any police officer not below the rank of sub-inspector to enter and search any place where any stock of harmful publications may be or may be reasonably suspected to be, and such police officer may seize any publication found in such place if in his opinion it is a harmful publication.[41] If in the opinion of the Magistrate or Court such publication is a harmful publication, the Magistrate or Court may cause it to be destroyed.[42]

Any offence punishable under this Act is declared a cognizable offence,[43] that is, an offence for which a police officer may arrest without warrant.

If the constitutional validity of this Act is challenged before the Courts, it would appear that its provisions could be upheld as authorising the imposition of reasonable restrictions in the interests of "morality," giving the word "morality" the wide connotation to which it is entitled.[44]

This Act is a clear instance where reasonable interference by government has been found necessary to protect the interests of the community against any section of the press which may tend to become irresponsible.

(iii) PROBLEMS OF APPLICATION

In spite of all these laws directed against obscene publications, there is a considerable number of such publications in circulation in India. Their existence and popularity seem to be due mainly to two reasons. One is that there is a type of literature which may fall short

[40] Section 4
[41] Section 6 (2)
[42] Section 6 (4)
[43] Section 7
[44] See the following passages quoted in the Oxford English Dictionary to illustrate the meaning of the word: "The morality of the Gospel had a direct influence upon the politics of the age." Freeman; "Instances... of genius and morality united in a lawyer... are distinguished by their singularity." *Junius Letters.*

of what is legally punishable and may still defy the moral standards of a notable number of persons in the community, because there exists a wide gap between the legally punishable and the morally good. Another is that the banning of a publication in most instances will only tend to force its price up. It is not sold in open market, but it is sold nonetheless.[45] It would therefore appear that strict censorship is not the answer to the increasing production and circulation of obscene publications, for without community agreement censorship would be unworkable in a democracy, especially because members of the community would begin to disagree on what should be censored.[46] Further, minimal restraint appears to be the guiding principle in most modern democracies. As the American Catholic hierarchy puts it: "Our juridical system has been dedicated from the beginning to the principle of minimal restraint. Those who may become impatient with the reluctance of the State through its laws to curb and curtail human freedom should bear in mind that this is a principle which serves to safeguard all our vital freedoms – to curb less rather than more; to hold for liberty rather than for restraint."[47]

Even assuming that the principle of minimal restraint is abandoned in the interests of public good, one has to realise that there are limits to effective legal action. When laymen see that the law of the State does not prohibit all the vices, nor prescribe all the virtues, they are inclined to infer that the law is amoral, if not immoral. They seem to forget the fact that the law does not approve the vices which it refrains from prohibiting, nor does it discourage men from practising the virtues which it does not think it prudent to prescribe for the present. If the law does not come up to the expectations of the moralist, it is because it is conscious of its own limitations, and has to take account of the frailties of human nature and the prevailing influence of contemporary civilisation. Jurisprudence would cease to be prudent if it ignored the limits of practicability. At the same time it would not be just if it

[45] Whitney Griswold has said, "Books won't stay banned. They won't burn. Ideas won't go to jail. In the long run of history, the censor and the inquisitor have always lost. The only sure weapon against bad ideas is better ideas." (*Essays on Education*, page 96)

[46] A prominent censor is reported to have remarked, "I don't discriminate between nude women, whether or not they are art. It's all lustful to me." Commenting upon this Eric Larrabee has said that one man's sex may be another's psychoneurosis and that the remark casts much more light on the censor than it does on obscenity. (Eric Larrabee, Morality and Obscenity, in *Freedom of Book Selection*, Ed. F. J. Moscher, page 37)

[47] from a statement issued by the American Catholic Hierarchy in 1957, quoted in D. J. Thorman, Censorship, *The Sign*, December 1960, page 48.

failed to perform its function to the fullest extent possible within these limits.

These general considerations force us to the conclusion that the best way to prevent the production and circulation of objectionable publications is to give the members of the society an understanding of the problem involved in the dissemination of the contents of such publications and to educate the public in such a way as to raise community standards,[48] for the legislatures and the Courts would apply contemporary community standards in their functions. When once the community standard is raised and public opinion formed, the legislative and judicial agencies would take notice of the contemporary standard of public morality,[49] and if they do not, it would not be difficult to make it known to them. To quote the words of Charles H. Keating, Jr., founder of Citizens for Decent Literature: "When the public clearly shows that it considers filthy and revolting publications unfit for our society, the Courts are greatly aided."[50] One may add that the legislatures too are aided.

[48] Walter Gellhorn said that foolish reading could not be ended by force, but only by patient persuasion, by education rather than by edict. (Walter Gellhorn, *Individual Freedom and Governmental Restraints*, page 103)

[49] See *State* v. *Lerner*, (1948) 81 N.E. 2d 282 at 289, in which it was observed: "The community concept of what is 'obscene' literature is approximately ascertainable."

[50] quoted in D. J. Thorman, Censorship, *The Sign*, December 1960, page 47

CHAPTER V

CONTEMPT OF COURT AND OF LEGISLATURE

(i) THE LAW OF CONTEMPT OF COURT

"The Press," writes Lord Denning, "plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board. Any misconduct in a trial is sure to receive notice in the press and subsequent condemnation by public opinion. The press is itself liable to make mistakes. The watchdog may sometimes break loose and have to be punished for misbehaviour."[1] This is the reason for the law of contempt of court as applied to the press.

In *R.* v. *Gray*[2] Lord Russell attempted a summary of the law of contempt of court when he said, "Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. This is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as "scandalising a Court or a Judge." That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published, but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."[3]

A serious discussion of the correctness of judicial decisions is not

[1] A. Denning, *The Road to Justice*, p. 78

[2] (1900) 2 Q.B.D. 36

[3] *idem* at p. 40. The Hyderabad High Court adopted Lord Hardwicke's classification in *Read* v. *Huggonson*, (1772) 26 E.R. 683, when it said in *H.E.H. Nizam* v. *B. G. Keskar* (A.I.R. 1955 Hyderabad 264) that "there are three classes of contempt; one is committed by scandalising the Court, another by abusing parties who are concerned in the case and the third by prejudicing mankind against persons before the case is heard."

treated as contempt. But a suggestion that the judge was partial or prejudiced would be regarded as serious contempt deserving substantial punishment. In England a pamphleteer accused Lord Mansfield of acting "officiously, arbitrarily and illegally" and said that he had delayed the issue of a writ of *habeas corpus*. In writing his judgement in the case[4] which arose out of this comment, Sir Eardley Wilmot observed: "The arraignment of the justice of the judges... calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and be universally thought so, are both absolutely necessary..."

In 1928 the *New Statesman*, a London weekly, published a comment on a case tried by Avory, J. It was a libel action against Dr Marie Stopes, the well-known advocate of birth control. Commenting on the fact that she lost the action, the periodical said, "The serious point in this case is that an individual owning to such views as those of Dr Marie Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr Justice Avory – and there are so many Avorys." It was held that the comment constituted a contempt because it imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties.[5]

In India the Supreme Court held the Editor, Printer and Publisher of *The Times of India* guilty of gross contempt for having published an article, criticising a decision of the Supreme Court, in which it was stated among other things that "Politics and policies have no place in the pure region of the law; and Courts of law would serve the country and the Constitution better by discarding all extraneous considerations and uncompromisingly observing divine detachment which is the glory of law and the guarantee of justice."[6] The Court, though it dropped further proceedings in view of the unconditional apology tendered by the respondents, observed: "No objection could have been taken to the article had it merely preached to the Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and *bona fide* criticism, but had a clear tendency to affect the dignity and prestige of this Court. The article in question was thus a gross contempt

[4] *R.* v. *Almon*, Wilmot's *Notes*, p. 294. The judgement was written in 1765, but was not published until 1802.

[5] *R.* v. *Editor of the New Statesman*, (1928) 44 T.L.R. 301

[6] A Disturbing Decision, *The Times of India*, October 30, 1952

of Court. It is obvious that if an impression is created in the minds of the public that the judges in the highest court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined."[7]

As has been said above, the Courts are open to fair criticism. When some judges may be severe and others lenient in passing sentences on offenders, the press is entitled to point out the inequalities of sentences, without being guilty of contempt of Court. When a Trinidad Court held that this was contempt, the Judicial Committee of the Privy Council advised a reversal of the decision.[8] Delivering the opinion of the Judicial Committee Lord Atkin said: "No wrong is done by any member of the public who exercises the ordinary right of criticising, in good faith, in public or in private, the public act done in a seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice... they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[9]

Contempt of Court may be punished in England on indictment involving trial by jury. But in practice contempt cases are usually dealt with summarily and trial by jury is seldom permitted. In the case involving the comment on Lord Mansfield, it was argued that the judges ought not to determine the matter because they would be determining in their own cause and that it would be most proper for a jury to determine it. But the Court overruled the contention. Since the jury system is regarded as a safeguard for the liberty of discussion in England, it is doubtful whether summary procedure is desirable in contempt cases, except those of contempt in *facie curiae.*

In *Hira Lal Dixit* v. *State of Uttar Pradesh,*[10] as in *Aswini Kumar* v. *Arabinda Bose*[11] to which reference has been made above, the Supreme Court of India had to deal with a case involving contempt of that Court itself. A party to a pending appeal in the Supreme Court in which the State of Uttar Pradesh was the respondent distributed in the Court a leaflet containing, among other things, the folowing passage: "The

[7] *Aswini Kumar Ghose* v. *Arabinda Bose,* 1953 S.C.J. 38 at pp. 38–39
[8] *Ambard* v. *Attorney General for Trinidad and Tobago,* (1936) A.C. 322
[9] *idem* at p. 335
[10] 1954 S.C.J. 846
[11] 1953 S.C.J. 38

public has full and firm faith in the Supreme Court, but knowledgeable sources say that the Government acts with partiality in the matter of appointment of those Hon'ble Judges as Ambassadors, Governors, High Commissioners, etc., who give judgements against the Government, but this has so far not made any difference in the firmness and justice of the Hon'ble Judges." The leaflet also contained a strong denunciation of the State of Uttar Pradesh, a party to the appeal and petitioner before the Court, regarding the matter under consideration in the Court. The Supreme Court held the writer of the leaflet guilty of contempt on two grounds, (i) for an attempt to prejudice the Court against the State, one of the parties before the Court and (ii) for an attempt to interfere with the proper administration of justice. Das, J. (as he then was), in the course of his opinion observed: "... it is not necessary that there should in fact be an actual interference with the course of administration of justice, ... it is enough if the offending publication is likely or if it tends in any way to interfere with the proper administration of law. Such insinuations as are implicit in the passage in question are derogatory to the dignity of the Court and are calculated to undermine the confidence of the people in the integrity of the judges."[12]

The learned Judge proceeded to state that "the summary jurisdiction exercised by superior courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the Court and thereby affording protection to public interest in the purity of the administration of justice. This is certainly an extraordinary power which must be sparingly exercised, but where the public interest demands it, the Court will not shrink from exercising it and imposing punishment even by way of imprisonment, in cases where a mere fine may not be adequate."[13]

As constitutional and statutory provisions relating to the subject in India do not define "contempt of Court," the Indian Courts tend to adopt the English concept of contempt, as may be seen from the judgement of the Supreme Court in the above case. In spite of the persuasive influence of the pronouncements of the Supreme Court of the United States on Indian judicial decisions in recent years, especially in the field of constitutional law, there seems to be little likelihood that the Indian Judges would follow the more liberal trend in the United States

[12] *Hira Lal Dixit* v. *State of Uttar Pradesh,* 1954 S.C.J.846 at 850
[13] *idem* at pp. 850–51

in the matter of contempt of Court.[13a] No Indian Judge, for instance, would breathe a word in favour of so much freedom as a newspaper's crime investigator enjoys in the United States in publishing the results of his investigations.[14]

(ii) CONSTITUTIONAL PROVISIONS

The origin of the contempt jurisdiction of the High Courts in India has been explained by the Privy Council in the following words:

"Contempt of Court is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment or both. That part of the common law of England was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are superior Courts of Record, and the offence of contempt and the powers of the High Court for punishing it are the same there as in this country, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England."[15]

[13a] In *Bridges* v. *California* (314 U.S. 252) the argument based on the ground of undermining administration of justice was rejected by the Court, Black, J., observing, "We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." As to disrespect for the judiciary alleged in the case, the learned Judge said: "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." (at p. 271) Again, in *Craig* v. *Harney* (331 U.S. 367) the Supreme Court observed: "... the vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it enkindles must constitute an imminent, not merely likely, threat to the administration of justice. The danger must not be remote, or even probable; it must immediately imperil." (at p. 376)

[14] The Indian judges would follow the decision in *R.* v. *Evening Standard and others* (1924) 40 T.L.R. 833, in which Lord Hewart described the amateur detectives employed by the newspapers concerned as men "who bring to an ignorance of the law of evidence a complete disregard of the interests alike of the prosecution and the defence." Since the decision in this case there has been nothing in the nature of trial by newspaper in England. But there is still some danger of prejudicing a fair trial in the lawful publication of proceedings before Magistrates prior to the committal of the accused for trial, especially because the accused usually reserves his defence and therefore what is reported is only the case for the prosecution. The reports of coroner's inquests in cases involving murder or manslaughter may constitute a real and substantial danger, in as much as the trial jury may, from such reports before hearing the case form a preconceived opinion adverse to the accused; and these reports are of proceedings which are not restricted by the rules of evidence in force in a criminal court.

[15] *Surendranath Banerjea* v. *Chief Justice and Judges of the High Court of Bengal*, (1883) 10 Indian Appeals 171.

This inherent jurisdiction of the Courts of Record[16] has been given express recognition in the Constitution of India. Article 215 of the Constitution reads:

> 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.

Article 129 in identical terms confers the same powers on the Supreme Court.

As observed before, neither in the Constitution nor in the Indian statutes relating to the subject is the expression "contempt of court" defined. The Patna High Court thought that the founding fathers used the expression in the Constitution without defining it, because they had in mind the well-recognised interpretation given to it by the Courts.[17] From an analysis of case law it is not easy to define what amounts to contempt. Niyogi, J., of the Nagpur High Court expressed himself as follows:

"It is indeed difficult and almost impossible to frame a comprehensive and complete definition of contempt of Court. The law of contempt covers the whole field of litigation itself. The real end of a judicial proceeding, civil or criminal, is to ascertain the true facts and dispense justice... Anything that tends to curtail or impair the freedom of the limbs of the judicial proceedings must of necessity result in hampering the due administration of law and in interfering with the course of justice."[18]

After an analysis of some cases involving contempt, Mookerjee, J., stated:

"The principle deducible from these cases is that punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the tribunal be undermined or impaired."[19]

[16] A Court of Record is a Court whose acts and proceedings are enrolled for permanent memorial and testimony. These records are regarded to be of such high authority that their truth cannot be questioned in any Court, though the Court of Record itself may amend clerical slips and errors. A Court of Record has the power to fine and imprison for contempt of its authority, so that, according to Stephen, any Court possessing this power may be called a Court of Record. (Stephen, Commentaries, Vol. I, pp. 58–59)

[17] *Legal Remembrancer* v. *B. B. Das Gupta*, A.I.R. 1954 Patna 204

[18] *Talhara Cotton Ginning Company* v. *Kashinath Gangadhar Namjoshi*, I.L.R. (1940) Nagpur 69.

[19] *In re Motilal Ghose and others*, (1918) I.L.R. 45 Calcutta 169 at p. 233

We shall see in the following sub-sections of this chapter that while a few provisons in the Penal Code describe certain types of contempt, the Contempt of Court Act, the statute exclusively devoted to the subject, does not define the offence. In fact when an attempt was made to define it in the draft Bill which subsequently became the Contempt of Court Act, 1926,[20] the Select Committee, which considered the Bill, omitted the definition on the ground that the case law on the subject would prove an adequate guide.

When one considers that "the law of contempt covers the whole field of litigation itself" and that the procedure adopted in contempt cases is, in general, summary, one is inclined to think that it would probably be desirable to define the term as far as possible, indicating how far the right to freedom of expression may reasonably be curtailed in relation to contempt of Court.

(iii) STATUTORY PROVISIONS

Article 19(2) of the Constitution, according to the Orissa High Court, not only saves the statutory law, but the entire law of contempt of Court in India contained in the case law on the subject prior to the Constitution.[20a] Whether one agrees to this statement or not, there is no doubt that the constitutional provision has helped in the passing of the Contempt of Court Act, 1952.

(a) The Contempt of Court Act, 1952

The Contempt of Court Act, 1952, was passed to define and limit the powers of certain courts in punishing contempt of court.

Under the Act, "every High Court[21] shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to it as it has and exercises in respect of contempts of itself."[22] But a High Court is prohibited from taking cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Penal Code.[23]

Section 5 of the Act empowers a High Court to try offences committed or offenders found outside its ordinary jurisdiction. It provides

[20] This was repealed and replaced by the Contempt of Court Act, 1952

[20a] *State* v. *Editors and Publishers of Eastern Times and Prajatantra,* A.I.R. 1952 Orissa 318.

[21] For the purposes of this Act, "High Court" includes the Court of a Judicial Commissioner. (Section 2)

[22] Section 3 (1) [23] Section 3 (2)

that a High Court shall have jurisdiction to inquire into and try a contempt of itself or of any Court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction and whether the peıson alleged to be guilty of the contempt is within or outside such limits.

A contempt of Court may be punished with simple imprisonment for a maximum term of six months or with fine which may extend to two thousand rupees or with both.[24] The Act also provides that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.[25]

This Act repealed the Contempt of Court Act, 1926. Where the Act of 1952 broke new ground was in granting a High Court jurisdiction to try cases of contempt committed, and offenders found, outside its ordinary jurisdiction.

This Act, like the Act of 1926, does not define contempt of Court; nor does it lay down the procedure to be followed in contempt cases. It permits the Courts to follow the procedure which they previously followed. The Patna High Court rejected the contention that, because the Act does not define contempt, it was an unreasonable restriction on the fundamental right of freedom of speech and expression, and held that it was not void. The Court observed that the framers of the Constitution considered it unnecessary to define the term as it carried a meaning ascribed to it by judicial pronouncements of English and Indian Courts.[25a]

Section 2(3) of the Act of 1926 which is identical with section 3(2) of the Act of 1952 has been interpreted to mean that the High Court's jurisdiction under the Act is not barred if the offence is punishable under the Penal Code otherwise than as contempt. In *B. R. Reddy* v. *State of Madras*[26] the Supreme Court has held that the section excludes the jurisdiction of the High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of the Penal Code, but not where these acts merely amount to offences of other descriptions for which punishment has been provided for in the Penal Code.[27] The case arose out of

[24] Section 4
[25] *ibid.*
[25a] *Legal Remembrancer* v. *B. B. Das Gupta*, A.I.R. 1954 Patna 204
[26] 1952 S.C.J. 1937
[27] Courtney Turrell, C. J., observed in *Jnanendra Prasad Bose* v. *Gopal Prasad Sen* (I.L.R. 1932 Patna 172 at 177): "Courts of record have inherent power to punish contempts of their authority, whether committed in the face of the Court or whether committed vicariously upon the persons of their officers. It was, however, not thought

an allegation published in a newspaper article that a particular sub-magistrate was (to quote from the judgement) "known to the people of the locality to be a bribe-taker and to be in the habit of harrassing litigants in various ways." It was contended on behalf of the appellant that if a libel was published against a Judge in respect of his judicial functions, that would also constitute defamation, within the meaning of section 499 of the Penal Code, and as such libel constituted a contempt of Court, it might be said that libel on a judge would be punishable as contempt under the Penal Code. Rejecting this argument the Court observed: "A libellous reflection on the conduct of a judge in respect of his judicial duties may certainly come under section 499 of the Indian Penal Code and it may be open to the judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as a judge; but such libel may or may not amount to contempt of Court."[28] Quoting the Judicial Committee of the Privy Council with approval to show that "although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character,"[29] the Court proceeded to observe: "When the act of defaming a judge is calculated to obstruct or interfere with the due course of justice or proper administration of law, it would certainly amount to contempt. The offence of contempt is really a wrong done to the public by weakening the authority and influence of Courts of law which exist for their good... What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of Court."[30] The Court therefore held that if the defamation of a subordinate court amounted to contempt of Court, proceedings could certainly be taken under the Contempt of Court Act, quite apart from the fact that other remedy might be open

fit to give power of that character to subordinate Courts. The express provisions of section 228 (of the Indian Penal Code) set forth the contempt of inferior courts which are punishable under the Code and it was subsequently held that contempts, which would be certainly contempts of a Court of record, if they do not come within the provisions of section 228 or any other section, cannot be punished as offences of the character of contempt of Court. And it was further held that the High Courts of record cannot punish contempts of the inferior Courts. Subsequently the Contempt of Court Act (of 1926) was passed, which enabled the superior Courts to punish contempts of the inferior courts, notwithstanding that such contempt as is complained of is not an offence (as contempt) against any of the sections of the Indian Penal Code and the object is that as to contempts considered as contempts of the Court which are punishable by the Indian Penal Code they shall not be taken cognizance of by the High Court."

[28] *idem* at p. 141

[29] *Surendranath Banerjea* v. *The Chief Justice and the Judges of the High Court of Bengal,* (1883) 10 Indian Appeals 171

[30] *B. R. Reddy* v. *State of Madras,* 1952 S.C.J. 137 at 141

to the aggrieved judicial officer under section 499 of the Penal Code.

In another case[31] where the members of the executive committee of a Bar Association passed a resolution making allegations against two judicial officers and communicated it with a covering letter marked "confidential" to the official superiors of the officers concerned, the Supreme Court held that it could not be said that in ventilating their grievances they exceeded the limits of fair criticism. Even assuming that the portion of the resolution describing the officers as "thoroughly incompetent in law and whose judicial work did not inspire confidence" was defamatory, the contempt, if any, must be held, in the Court's view, to be of a technical character.

Mukerjea, J. (as he then was), delivering the opinion of the Court made the following observations:

"... there are two primary considerations which should weigh with the Court when it is called upon to exercise the summary powers in cases of contempt committed by scandalising the Court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt, if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not in stifling criticism that confidence in Courts can be created...

"In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is libel on the judge and what amounts really to contempt of Court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt."[32]

It may be mentioned in passing that the Supreme Court has held that the Commissioner appointed under the Public Servants (Inquiries) Act, 1850, is not a Court within the meaning of section 3 of the Contempt of Court Act, as he is a mere fact-finding authority and the report of his findings is merely the expression of his opinion and not a definitive judgement or a judicial pronouncement in as much as it is not binding and authoritative and lacks finality.[33]

[31] *Brahma Prakash Sharma* v. *State of Uttar Pradesh*, 1953 S.C.J. 521
[32] *idem*, pp. 525–26
[33] *Brajnandan Sinha* v. *Jyoti Narain*, 1956 S.C.J. 155

(b) Provisions in the Penal Code

There are a few provisions in the Indian Penal Code dealing with contempt of the lawful authority of public servants, including judicial officers. Section 228 is exclusively concerned with contempt of judicial officers. It provides:

> Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

It has been held that the whole sitting of a Court for the disposal of judicial work from the opening to the rising of the Court is a judicial proceeding, and the necessary interval between the conclusion of one case and the opening of another is a stage in a judicial proceeding.[34]

A number of offences punishable under the Code as contempt are set forth in Chapter X of the Penal Code entitled "Of contempts of lawful authority of public servants." Contempts of the lawful authority of courts of law, of revenue officers, of police officers and of other public servants are punishable under the various sections of this chapter. It may be mentioned that the powers under this chapter are in addition to the powers possessed by judges and other public servants to enforce their orders.

The more notable among these offences are those contained in sections 175, 178, 179 and 180. Section 175 penalises intentional omission to produce or deliver up to any public servant as such, or a Court of Justice, any document when legally bound to produce or deliver up such document. Section 178 provides for the punishment of any person who refuses to bind himself by an oath or affirmation to state the truth, when duly required so to bind himself by a public servant. The next section lays down punishment for any person who, being legally bound to state the truth on any subject, refuses to answer a public servant authorised to question on the subject. Section 180 declares that whoever refuses to sign any statement made by him when duly required to sign it by a public servant is liable to be punished.

(c) Provisions in the Code of Criminal Procedure

Section 480 of the Code of Criminal Procedure, 1898, provides that when any such offence as is described in sections 175, 178, 179, 180 and 288 of the Penal Code

[34] *Emperor* v. *Salig Ram*, (1898) 1 Weir 214

is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

The section enables the Court to resort to a summary remedy in cases of contempt offered to it in the view or in the presence of the Court. It is not obliged to hear any evidence. It can rely on its own opinion of what took place and can detain the offender in custody, take cognizance of the offence and sentence him.

The words "take cognizance" indicate that Civil and Revenue Courts are given additional powers to deal with offences falling under the sections of the Penal Code mentioned above.[35]

It is provided by section 481 that the remedy laid down in section 480 being of a summary nature, the record of the Court concerning the procedure should be in detail. The Court should record the facts constituting the offence, with the statement, if any, made by the offender, as well as the finding and the sentence. If the offence is one under section 228 of the Penal Code the record must further show the nature and stage of the judicial proceeding in which the Court was interrupted or insulted, and the nature of the interruption or the insult.

Section 482 makes provision for trial where a Court considers that an offence referred to in section 480 need not be tried summarily by it or requiries a heavier sentence. In such cases, the Court can, after recording the facts and the statement of the accused, forward the case to a Magistrate for trial in the ordinary way.

Even after the procedure prescribed either by section 480 or section 482 has been followed, the Court may, in its discretion, discharge the offender, or remit punishment on his submission to the Court order or on his apologising to the satisfaction of the Court.[36]

Section 485 provides for imprisonment or committal of persons for refusal to answer questions or produce documents. If a witness or a person called to produce a document or thing refuses either to answer questions or produce the document or thing, a Criminal Court may, for reasons to be recorded in writing, proceed summarily against him by sentencing him to simple imprisonment or by detaining him in the custody of an officer of the Court for a period of seven days. If the person relents in the meantime, he is to be set free; but if he persists,

[35] *Emperor* v. *Venkatrao* (1922) I.L.R. 46 Bombay 973
[36] Section 184

he may be dealt with under the provisions of section 480 or section 482. If the Court is a High Court, the offender will be deemed guilty of contempt of Court.

Section 486 makes provision for appeals in certain contempt cases. It enacts that any person sentenced by any Court under section 480 or section 485 may appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

Under section 195 cognizance of the offences mentioned above, among some others, is to be taken only upon complaint in writing by the Court or the public servant concerned. This section was enacted to prevent improper or reckless prosecutions by private persons for offences in connection with the administration of justice and those relating to the contempt of lawful authority of a public servant.

Section 487 provides another safeguard for the offender. It enacts in part:

"487(1). Except as provided in sections 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate, in the course of a judicial proceeding."[37]

The prohibition under the section has been interpreted by the Madras High Court as "a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged."[38]

It is of interest to examine in some detail the procedure adopted in contempt cases, as in most of them, especially those involving contempt of superior courts, the trial judge appears to be not only the judge, but also prosecutor, witness and jury.

(iv) PROCEDURE IN CONTEMPT CASES

The Courts have held that proceedings in contempt, though not criminal, are of a quasi-criminal nature[39] and that therefore in the case of criminal contempt, if there is any reasonable doubt, the person charged with contempt is entitled to the benefit of the doubt. In cases

[37] It is, however, provided by sub-section (2) that a Magistrate empowered to commit to the Court of Session or High Court from himself can commit any case to such Court.

[38] Anon. (1877) I.L.R., I Madras 305

[39] *Weston* v. *Editor, Printer and Publisher of "the Bengalee"*, (1911) 15 C.W.N. 771; *N. N. Choudhuri* v. *Bela Bala Devi*, A.I.R. 1952 Calcutta 702.

of what is known as civil contempt (that is, where the contempt charged with consists in a breach of an order of the Court), the Calcutta High Court has held that, as the liberty of the subject is involved, the Court has to be satisfied beyond all reasonable doubt that the notice of the Court's order had been received before the acts complained of were committed.[40]

But difficulties may arise because of two factors associated with contempt proceedings. One is the fact that the proceedings are generally summary. The second is that the trial judge is judge, prosecutor, witness and jury in these proceedings.

The Supreme Court has held that the power of the High Court to institute proceedings for contempt and punish where necessary is a "special jurisdiction" which is inherent in all Courts of record and that the Code of Criminal Procedure does not apply in matters of contempt triable by the High Court.[41] "The High Court can deal with it summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself."[42] In *Sukhdev Singh Sodhi's case*[43] a petition asking for the transfer of certain contempt proceedings from the Pepsu High Court to any other High Court, and in the alternative, asking that at least the matter should not be heard by two of the Judges of the High Court who were named, was dismissed on the ground that the Supreme Court had no power to grant the application. If the Code of Criminal Procedure does not apply, the Supreme Court has no power to transfer the proceedings for contempt from one High Court to another. Further, as the Constitution, by Article 215, confers on every High Court the power to punish contempt of itself, neither the Supreme Court nor the Legislature has any power to deprive a High Court of that constitutional power by ordering a transfer of contempt proceedings to another High Court. As to transfer from one judge to another judge, the Supreme Court has held that there is no original jurisdiction that it can exercise.

Bose, J., (as he then was) delivering the opinion of the Court, however, commented:

[40] *N. N. Choudhuri* v. *Bela Bala Devi,* A.I.R. 1952 Calcutta 702

[41] *Sukhdev Singh Sodhi* v. *Chief Justice and Judges of the Pepsu High Court,* 1954 S.C.J. 67

[42] *idem* p. 72

[43] *Sukhdev Singh Sodhi* v. *Chief Justice and Judges of the Pepsu High Court,* 1954 S.C.J. 67

"We wish... to add that though we have no power to order a transfer in an original petition of this kind we consider it desirable on general principles of justice that a judge who has been personally attacked should not as far as possible hear a contempt matter which, to that extent, concerns him personally. We do not lay down any general rule because there may be cases where that is impossible, as for example, in a Court where there is only one judge or two and both are attacked. Other cases may also arise where it is more convenient and proper for the judge to deal with the matter himself, as for example in a contempt *in facie curiae*. All we can say is that this must be left to the good sense of the judges themselves, who, we are confident, will comport themselves with that dispassionate dignity and decorum which befits their high office and will bear in mind the oft-quoted maxim that justice must not only be done but must be seen to be done by all concerned and most particularly by an accused person who should always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial by judges who have no personal interest or concern in his case."[44]

Commenting on contempt proceedings, the Press Commission of India said:

"Some of the peculiar features of this jurisdiction are contrary to the fundamental principles of criminal jurisprudence. There never has been any suggestion or attempt on the part of the judges and jurists to propound that the exercise of the special jurisdiction is in harmony or in conformity with the well-established rules of British criminal jurisprudence. But the exercise of this extraordinary power has been justified on the grounds of expediency."[45]

Quoting with approval, among many others, Bowen, L. J., who said, "The law has armed the High Court of Justice with the power and imposed on it the duty of preventing *brevi manu*, i.e., by summary proceedings, any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals, that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed.",[46] the Commission came to the conclusion that "... instances where it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised have been extremely rare, and we do not think that any

[44] *idem* at p. 73
[45] Press Commission, *Report*, Part I, paragraph 1078
[46] *In re Johnson*, (188)7 20 Q.B. 62 at 74

change is called for either in the procedure or practice of the contempt of Court jurisdiction exercised by the High Courts."[47]

In this connection it is of interest to note what Sir Sultan Ahmad said in March 1942 when speaking on behalf of the Government of India, in the Council of State, on a resolution moved by Mr H. N. Kunzru, to amend and consolidate the law of contempt of Court. He said: "While I find in certain sections of the Criminal Procedure Code that a Magistrate who has a personal interest in any ordinary trivial case even is disqualified to try it, it does seem a little odd that in a case where he himself has been scandalised, he should himself as a judge try that case."[48] When contempt was committed in the presence of the Court, Sir Sultan admitted, it must be dealt with by the Judge in whose Court the offence was committed.

In the course of his speech supporting the resolution, Mr P. N. Sapru (as he then was)[49] made the following suggestions:

"We are all human. We cannot help our subconscious processes. And when our interests are involved we are inclined to lose a proper sense of values and there is at times a tendency particularly on the part of the subordinate judiciary to lose sight of these elemental facts of human nature. Therefore I would suggest for the consideration of the Law Member that the law should be revised in this manner that the Judge who has been scandalised should not himself sit in his own cause."[50]

It is interesting to find that the power of the Federal Courts in the United States to punish for contempt by summary proceedings has been confined by Congress to "misbehaviour of any person in their presence or so near thereto as to obstruct the administration of justice." The argument that an accuser ought not to be judge in his own cause was advanced in *Nye* v. *U.S.*[51] for restricting the power of the Federal judges to punish summarily for contempt for such misbehaviour. The words "in their presence or so near thereto as to obstruct" were construed narrowly, as the terms employed were held to be geographical. The Courts may punish acts not within those terms. But then they should follow the usual pattern of criminal procedure, indictment, jury trial and trial before an impartial, disinterested judge.

Judges have repeatedly emphasised the necessity for contempt juris-

[47] Press Commission, *Report*, Part I, paragraph 1089
[48] quoted in K. L. Gauba, *Battles at the Bar*, p. 208
[49] Later he became a Judge of the High Court at Allahabad
[50] quoted in K. L. Gauba, *Battles at the Bar*, p. 207
[51] 313 U.S. 33

diction, with all that it it involves. For example, the Privy Council said:

"... this summary power of punishing for contempt... is a power which a Court must of necessity possess."[52] It is illuminating to read in this connection Edmonds, J.'s comment on this summary jurisdiction.[53] He wrote:

"The notion that contumacious publications have been subject to the summary power from time immemorial has been shown to be historically incorrect. Also, the experience of Pennsylvania and other jurisdictions where immunity of the press has long been maintained, conclusively proves that no such power is necessary to maintain either the existence or the respect for Courts.

"It is not necessary to the wholesome administration of justice in this state that judicial officers have uncontrolled discretion in passing upon alleged constructive contempts of Court. The opportunity for arbitrary punishment often provides the occasion for it. Noise, interruptions, violence of any kind in the course of judicial proceedings must be repressed... but indirect contempts, particularly publication in newspapers, are entirely different in their nature and consequences."[54]

If the law of constructive contempt of Court, as administered in India today, is challenged on the ground that reasonableness under Article 19(2) is required not only in the substantive provisions of the impugned law but also in the procedural provisions,[55] the Courts may take the view that the power to punish for contempt is granted to the Supreme Court and the High Courts by the Constitution and that from the case law prior to the Constitution, the founding fathers knew exactly what was being granted when provision was made for the exercise of this power.

(v) CONTEMPT OF LEGISLATURE

Contempt of legislature is not one of the categories of subjects mentioned in Article 19(2) in relation to which reasonable legislative restrictions are permissible. Does this mean that absolute freedom is

[52] *Parashuram Detaram* v. *Emperor*, (1945) 72 Indian Appeals 189

[53] This opinion was expressed in a case involving contempt proceedings against a labour leader for releasing to the press a copy of a telegram he sent to the Secretary of Labour protesting against a court decision favourable to a rival union.

[54] quoted in C. D. MacDougall, *Newsroom Problems and Policies*, p. 305

[55] *N. B. Khare* v. *State of Delhi*, A.I.R. 1950 S.C. 211

granted under the Constitution in regard to reports of proceedings of legislatures in India when such reports do not violate any of the laws falling within the purview of the sub-clause? The answer would appear to be in the affirmative, if Article 19(2) is deemed to exhaust the categories of permissible legislative abridgement. It is submitted with great respect that whether the list of categories should be regarded as exhaustive, is a point deserving further consideration.[55a] Another point is that Articles 105 and 194 do contemplate the grant of certain powers and privileges to the legislatures. These powers, one of which appears to be the power to prohibit the publication of its proceedings, may come in conflict with the fundamental right of the citizen to freedom of speech and expression. The Supreme Court had to deal with this issue in *M. S. M. Sharma* v. *Sri Krishna Sinha*.[56] Before we discuss the Supreme Court decision, it may be helpful to set out the provisions of Article 105 and Article 194. Article 105 provides:

> 105. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.
>
> (2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
>
> (3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.
>
> (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

Article 194 in identical terms makes similar provisions in relation to State legislatures.

The Indian Parliament has, to a certain extent, exercised its powers under Article 105(3) and passed the Parliamentary Proceedings (Protection of Publication) Act, 1956. The Act provides that no person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication of a substantially true report of any proceedings of either House of Parliament, unless the publication is proved to have

[55a] See *infra*, Chapter VII

[56] 1959 S.C.J. 925

been made with malice.[57] This provision, however, does not protect the publication of any matter, the publication of which is not for the public good.[58]

The State legislatures do not appear to have made any law under the provisions of Article 194. It would therefore appear that as long as they do not define their powers and privileges, they may enjoy greater powers and privileges than the Parliament, assuming that the House of Commons had on January 26, 1950, greater powers and privileges in relation to publication of its proceedings than are assumed by the Indian Parliament under the Parliamentary Proceedings Act, 1956.

The power of the State legislatures to prohibit publication of their proceedings was considered by the Supreme Court in *M. S. M. Sharma* v. *Sri Krishna Sharma,*[59] usually referred to as the *Searchlight* case. The facts of the case were that the editor of the *Searchlight* published in his newspaper an account of a speech made by a member of the Bihar Legislative Assembly on the floor of the House, including the portions of the speech which the Speaker had ordered to be expunged. The Privileges Committee of the Assembly issued a notice to the editor to show cause why appropriate action should not be taken against him for breach of privilege in respect of the Speaker and the Assembly itself committed by publishing a "perverted and unfaithful" report of the proceedings of the Assembly, including the expunged portions of a member's speech. The editor challenged the validity of the notice before the Supreme Court. It may be mentioned that it was not denied that what was reported in the *Searchlight* was actually said in the House; and no malice was pleaded or proved.

The question of law involved in the case was whether the powers and privileges of the legislatures exercisable under the latter part of clause (3) of Article 194 were subject to the fundamental rights guaranteed by the Constitution. Assuming that the House of Commons had on January 26, 1950 the power to prohibit absolutely the publication of its own proceedings, had a House of a State legislature in India under the provisions of sub-clause (3) power to order similar prohibition or were its powers in this regard limited by Article 19(1) (a) which guarantees to the citizen the right to freedom of speech and expression, including freedom of publication and circulation? The majority opinion

[57] Section 3 (1)
[58] Section 3 (2)
[59] 1959 S.C.J. 925

of the Supreme Court was to the effect that the State legislatures had the power of prohibiting absolutely the publication of their proceedings on the ground that Article 194(3) was not to be read as subject to Article 19(1) (a). Das, C. J., delivering the opinion of the majority said: "It must not be overlooked that the provisions of Article 105(3) and Article 194(3) are constitutional laws and not ordinary laws made by Parliament or the State Legislatures and that, therefore, they are as supreme as the provisions of Part III"[60] He quoted with approval the observations of Venkatarama Ayyar, J., in *Anantha Krishnan* v. *State of Madras*[61] to the effect that Article 13[62] "applies in terms only to laws in force before the commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to render any portion of the Constitution invalid."
and he proceeded to observe:

"Article 19(1) (a) and Article 194(3) have to be reconciled and the only way of reconciling the same is to read Article 19(1) (a) as subject to the latter part of Article 194(3)... In our judgement the principle of harmonious construction must be adopted and so construed, the provisions of Article 19(1) (a) which are general, must yield to Article 194(1) and the latter part of its clause (3) which are special."[63]

The learned Chief Justice referred to the decision of the Court in the *Blitz case*[64] in which it had been held that an arrest made in pursuance of an order of the U.P. Legislature was subject to the fundamental right embodied in Article 22(2) which required that an arrested person should be produced before a Magistrate within twentyfour hours and no further detention was permissible without the authority of the Magis-

[60] *idem* at p. 943
[61] 1952 S.C.J. 203
[62] Article 13 which forms part of Part III of the Constitution, dealing with fundamental rights, provides in part:
13. "(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires, – (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."
[63] *M. S. M. Sharma* v. *Sri Krishna Sharma*, 1959 S.C.J. 925 at 944
[64] *G. K. Reddy* v. *Nafisul Hasan*, A.I.R. 1954 S.C. 636

trate. Though the question was not elaborately considered by the Court, this decision might indicate that Article 194 is to be regarded as subject to Part III of the Constitution. But Das, C. J., said that the decision "proceeded entirely on a concession of counsel and cannot be regarded as a considered opinion on the subject."[65]

It is not contended that Article 194 is not valid. It is admitted that until the legislature defines its powers, privileges and immunities, they "shall be those of the House of Commons of the Parliament of the United Kingdom." But in the exercise of these powers and privileges, there is bound to be a difference between the Indian legislatures and the House of Commons, as their exercise by the Indian legislatures would appear to attract the operation of Article 13. For instance, the order of the Speaker of an Indian legislature committing a person to imprisonment is "law" under Article 13, a law made after the adoption of the Constitution. So if that order violates any of the fundamental rights, it would seem that it is to be considered invalid.

This interpretation would harmonise the provisions in the two parts of Articles 105(3) and 194(3). It would also bring them into harmony with the provisions in Part III. If the founding fathers thought that a law defining the powers and privileges of the legislature should be subject to the fundamental rights of the citizens, it is reasonable to assume that they wished that the exercise of the powers and privileges also should be subject to those rights.

Das, C. J., in the course of his judgement, made the observation: "... quite conceivably our Constitution-makers, not knowing what powers, privileges and immunities Parliament or the Legislature of a State may arrogate and claim for its Houses, members or committees, thought fit not to take any risk and accordingly made such laws subject to the provisions of Article 13, but that knowing and being satisfied with the reasonableness of the powers, privileges and immunities of the House of Commons at the commencement of the Constitution, they did not, in their wisdom, think fit to make such powers, privileges and immunities subject to the fundamental right conferred by Article 19 (1) (a)."[66] One is inclined to wonder why, if that be the case, they thought fit to enact the former part of Article 105(3) or Article 194(3). They could have simply enacted under clause (3) that "In other respects, the powers, privileges and immunities of each House of Parliament (or State Legislature), and of the members and committees of

[65] *M. S. M. Sharma* v. *Sri Krishna Sinha*, 1959 S.C.J. 925 at 944
[66] *idem* at p. 943

each House shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of the Constitution.

Subba Rao, J., in his dissenting opinion made the following illuminating comment:

"When the Constitution expressly made the laws prescribing the privileges of legislature of a State of our country subject to the fundamental rights, there is no apparent reason why they should have omitted that limitation in the case of the privileges of the Parliament of the United Kingdom in their application to a State Legislature... The contention also, if accepted, would lead to the anomaly of a law providing for privileges made by Parliament or a Legislature of our country being struck down as infringing the fundamental rights, while the same privilege or privileges, if no law was made, would be valid."[67]

In the majority opinion Das, C. J., attempted to meet these objections by observing:

"It is true that a law made by Parliament in pursuance of the earlier part of Article 105(3) or by the State Legislature in pursuance of the earlier part of 194(3)... if such law takes away or abridges any of the fundamental rights... will contravene the peremptory provisions of Article 13(2) and will be void to the extent of such contravention and it may well be that that is precisely the reason why our Parliament and the State Legislature have not made any law defining the powers, privileges and immunities just as the Australian Parliament had not made any under section 49 of the Constitution corresponding to Article 194(3) up to 1955... It does not, however, follow that if powers, privileges or immunities conferred by the latter part of these Articles are repugnant to the fundamental rights, they must also be void to the extent of such repugnancy."[68]

Are we justified in assuming that when they enacted the second part of these clauses the Constitution-makers in their wisdom did not know that power tends to perpetuate itself? Is it again reasonable to assume that the Constitution-makers who provided that a law made (in most cases) by two Houses of the Legislature and assented to by the Head of the State should not be repugnant to any of the fundamental rights, would contemplate the same fundamental rights being encroached upon and infringed by a single House of the Legislature? Did they contemplate that the freedom of expression guaranteed to the citizen

[67] *idem* at p. 955
[68] *idem* at p. 943

by the Constitution might be whisked away by a mere resolution adopted by a simple majority of a House of Legislature, which might be inclined to assume an exaggerated notion of its dignity or decorum?[69]

It is inconceivable that the founding fathers ever contemplated that the right to freedom of expression should be made subject to the fiat of a single House of Legislature, regardless of whether the fiat is covered by any of the permissible legislative restrictions enunciated in Article 19(2). If contempt of legislature is permitted to run amok,[69] any newspaperman who publishes a report of the proceedings of a House of Legislature or fair comments on them in the public interest, may be punished by imprisonment for contempt,[70] and such imprisonment would prove an effective deterrent to the exercise of his right to freedom of speech and expression.

The correct interpretation of clauses 2 and 3 of Articles 105 and 194 would seem to be that the publication of proceedings, reports, papers or votes, authorised by the legislature is privileged, while a publication not so authorised (say, a newspaper report) is subject to the ordinary law of the land passed in conformity with Article 19(2). But under clause (3) it is competent for the legislatures to exempt such publication from the operation of the ordinary law by investing it with qualified or absolute privilege. This is what has been done by the Parliament by the Parliamentary Proceedings (Protection of Publication) Act, 1956.

A harmonious interpretation of the relevant provisions of the Constitution would compel us to the conclusion that an order of the Speaker of a House of Legislature prohibiting the publication of proceedings must be founded on the reasonable restrictions in Article 19(2) and that the powers, privileges and immunities of the House of Commons as applied to the Indian legislatures should be interpreted subject to Indian conditions and the Indian Constitution. The Press Commission emphasised that "It is important to remember that in England which has no written Constitution, the privileges of the House of Commons were achieved by a long process of adjustment between the three bodies. In India, with its written Constitution and fundamental rights

[69] After citing a number of instances of contempt proceedings in India, the Press Commission observed: "Some of these cases, in our opinion, disclose oversensitiveness on the part of legislatures to even honest criticism. When the decisions of the High Court and the Supreme Court are liable to be criticised without any action being taken for contempt of Court, there appears no reason why legislatures should claim excessive immunity from criticism in Press or public." (*Report*, Part I, paragraph 1120)

[70] The decision in the *Blitz case* may not help him, in view of the observations of Das, C. J., about that decision in the *Searchlight case*. (*supra*)

of freedom of expression guaranteed by the Constitution, it may not be wholly appropriate to adopt bodily the basic concepts of the privileges of the House of Commons as they developed in England and greater caution is, therefore, necessary in adopting them, even though permitted by the Constitution, and in applying them consistently with the Indian Constitution and conditions. There is nothing sacrosanct about the procedure of the House of Commons and it is not imperative that the House of Commons practice should be followed in every detail."[71]

While expressing their considered view that it is desirable that the Parliament and the State Legislatures should define by legislation the precise powers, privileges and immunities which they possess in regard to contempt and the procedure for enforcing them, the Press Commission observed: "The Press, as a whole, is anxious to maintain and enhance the dignity and prestige of our courts and legislatures and recognises that within the precincts of the Assembly hall the presiding officer's ruling is supreme and the freedom of the members absolute. It is therefore all the more necessary that the legislators should respect the freedom of expression where it is exercised by the Press within the limits permitted by law, without imposing additional restrictions in the form of breach of privileges unless such restrictions are absolutely necessary to enable them to perform their undoubtedly responsible duties... The fact that there is no legal remedy against at least some of the punishments imposed by the legislature should make them all the more careful in exercising their powers, privileges and immunities."[72]

The Press Commission commended to the notice of the Indian Parliament and the State Legislatures a few of the observations made by the Committee of Privileges of the House of Commons in the *Daily Mail* case in April 1948. One of them which appears to be of special relevance in this context points out:

"Whilst recognising that it is the duty of Parliament to intervene in the case of attacks which may tend to undermine public confidence in and support of the institution of Parliament itself... the law of Parliamentary privilege should not be administered in a way which would fetter or discourage the free expression of opinion or criticism, however prejudiced or exaggerated such opinions or criticisms may be, and that... the process of Parliamentary investigation should not be used in a way which would give importance to irresponsible statements."[73]

[71] Press Commission, *Report*, Part I, paragraph 1093
[72] *idem*, paragraph 1120
[73] quoted in Press Commission's *Report*, Part I, paragraph 1120

CHAPTER VI

DEFAMATION

(i)

"Good name in man and woman, dear my lord," wrote Shakespeare,
"Is the immediate jewel of their souls;
Who steals my purse steals trash; 'tis something, nothing;...
But he that filches from me my good name... makes me poor indeed."

The Bhagavad Gita expressed the idea even more emphatically when it said, "For a man of honour defamation is worse than death." As it is thus considered a great evil, provision for reasonable legislative abridgement of the right of freedom of speech and expression in relation to defamation is made in Article 19(2) of the Indian Constitution.

Defamation, when viewed as a civil wrong, may be defined as the publication by the defendant to a third party of a false statement which tends to lower the plaintiff in the estimation of right-thinking members of the society generally or which causes him to be shunned or avoided by such members. It is thus essentially an injury to reputation. Prosser describes it as "an invasion of the interest in reputation and good name."[1] In the law of defamation social interest in freedom of expression is subordinated to the private interest of the person affected.

English law distinguishes between libel and slander. A defamatory statement is libel if made in some permanent and visible form, such as printing, writing or carving; it is slander if spoken or conveyed in some fugitive form such as, for example, gestures. Reading out a letter has been held to be libel, not slander.[2] Defamation by broadcasting for general reception is libel.[3] Libel gives rise to a cause of action without the necessity of proving actual damage. In slander, on the other hand, actual damage has to be proved, save in a few exceptional cases. The exceptions relate to (i) imputation of criminal offence which is not punishable by fine alone, (ii) imputation that the plaintiff is suffering

[1] Prosser, *Torts*, (2nd Ed.) p. 572
[2] *Forrester* v. *Tyrell* (1893) 9 T.L.R. 257
[3] The Defamation Act, 1952, section I

from an existing contagious disease of such a nature as to necessitate his exclusion from society, (iii) imputation of unchastity or adultery against a female, and (iv) statement made by the defendant which is calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication. If the publication of the same defamatory statement is made in the form of libel as well as slander there are two distinct wrongs and two separate causes of action.

English criminal law judges a defamatory statement from its tendency to provoke a breach of the peace.

In India civil liability for defamation is generally determined by the principles of English law,[4] but criminal liability is governed by the provisions of the Indian Penal Code and by them alone.

(ii) CIVIL LIABILITY[5]

At common law a man cannot recover damages in respect of injury to a character which he does not possess or a reputation to which he cannot have any reasonable claim. The truth of the imputation made is therefore a complete defence to an action for defamation. It is not that uttering the truth always carries its own justification, but that the law prevents the other party from getting redress which he does not deserve. Publication of truth concerning a person is not therefore actionable in damages. This rule of law may lead to the undesirable result of exposing to public gaze unsavoury details of private life long buried and forgotten. The French law strikes one as making a more helpful provision in that it protects a person's private life and does not permit truth as a defence except in matters in respect of officials and persons in public positions, for, in their case it is assumed that the truth ought to be known in the public interest.

At 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 opinion which are fair comment on matters of public interest. A number of occasions are privileged, some absolutely privileged so that no action can lie in any circumstances and some have qualified privilege so that no action can lie without proof of malice, that is, ill-will.

[4] In India, civil law relating to defamation is not yet codified.

[5] It is not proposed to deal with the civil wrong of defamation in detail as the Indian law on the subject is not substantially different from English law.

If libellous matter is published in a newspaper, the proprietor, the editor, the printer and the publisher are all liable to be sued either separately or together. In cases of joint publication each defendant is liable for all the consequent damage. The proprietor is civilly liable for any libel published in the columns of his newspaper though the publication is made in his absence, without his knowledge, or even contrary to his orders.[6]

The sale of each copy of a newspaper containing a libel is *prima facie* publication of the libel, rendering the distributor as well as the principal responsible for it. But the distributor is excused if he can prove (i) that he did not know that it contained any libel, (ii) that his ignorance was not due to any negligence on his part and (iii) that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter.[7]

It would appear that at common law the publication of one defamatory statement may be sued upon by several persons, even though none of them was actually in the defendant's mind. In an Australian case, a newspaper published defamatory statements about a "Detective Lee," under circumstances which it considered privileged. When the defence of privilege failed, the newspaper was held liable to a number of "Detective Lees" who showed that the statement could be taken to refer to any one of them.[8]

The effective guarantee of freedom of expression under English law lies in the fact that the principal matters (for instance, the question of "libel or no libel") are determined by the jury, both in civil and criminal cases involving defamation.

(iii) CRIMINAL LIABILITY

The definition of the offence of defamation adopted in the Indian Penal Code does not maintain the artificial distinction of the common law between libel and slander; nor does it postulate that the essence of the offence consists in its tendency to provoke a breach of the peace. As the authors of the Code put it, in India "the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the

[6] *Dina Nath* v. *Sayad Habid* (1929) I.L.R. 10 Lahore 816
[7] *Emmens* v. *Pottle,* (1885) 16 Q.B.D. 354
[8] *Lee* v. *Argus,* (1934) 51 C.L.R. 276

unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed."[9] They further observed: "It appears to us evident that between the offence of defaming and the offence of provoking to a breach of the peace, there is a distinction as broad as that which separates theft and murder. Defamatory imputations of the worst kind may have no tendency to cause acts of violence. Words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the deformation, considered as defamation, is by no means proportioned to its tendency to cause such acts: many circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence, considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace."[10]

There is a whole chapter devoted to defamation in the Penal Code. Section 499 defines the offence and states the exceptional circumstances in which the publication of a defamatory statement is legally justified. Section 500 provides for punishment for defamation, which is simple imprisonment for a maximum period of two years or fine or both. Section 501 lays down the same punishment for the printing or engraving of any matter by any person knowing or having good reason to believe that such matter is defamatory. This section makes the abetment of defamation a distinct offence, in as much as a person who prints or engraves defamatory matter abets the offence. Section 502 declares it an offence to sell or offer for sale any printed or engraved substance containing defamatory matter and visits the offender with the same punishment as for the aforementioned offences.

We shall consider in some detail section 499 which provides:

[9] Notes appended to the Draft Penal Code, 1836, p. 175
[10] *idem*, pp. 175–176

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

Explanation 1. It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

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

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

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

The section has incorporated in it ten exceptions, covering the occasions when a person is allowed to publish imputations about others which would be considered defamatory in ordinary circumstances. They provide that it is not defamation

(i) to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published;[11]

(ii) to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct and no further;

(iii) to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further;

(iv) to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings;

(v) to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further;

(vi) to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgement of the

[11] Whether or not it is for the public good is a question of fact.

public, or respecting the character of the author so far as his character appears in such performance, and no further.

While the seventh exception covers censure passed in good faith by a person in authority, the eighth exempts accusation preferred in good faith to such person. The ninth exception 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 interests of the person making it, or of any other person, or for the public good. The tenth and last exception declares it to be not defamatory to convey a caution in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

To constitute the offence under the section, the defamatory matter must be published, that is, communicated to some person other than the person defamed.[12] It is sufficient if the accused intentionally does an act which has the quality of communicating to a third person the alleged defamatory matter, as where the writer sends to an illiterate person a letter which is defamatory of the latter with the knowledge that as the recipient is illiterate, he will have to get it read to him by a third person.[13] In *Emperor* v. *Sukhdeo*,[14] a notice was issued by the President of a Notified Area Committee to the accused, who sent a reply containing defamatory allegations against the President. This reply was placed on the official file by the President and was read by the members of the Committee. It was held that there was publication of the defamatory allegations; for the placing of the reply on the official file was not a voluntary or gratuitous act on the part of the President, but it was his duty to do so and the accused knew or must have known that the contents of his reply would necessarily be communicated to the members of the Committee. If a number of persons meet and resolve not to associate with a person for good reasons, there is no defamation, nor does the sending of a copy of the resolution to the person concerned make it defamation.[15] If two persons conspire to draw up a document defaming a third person and leave the document with one of the two, there is no publication.[16] The mailing of a postcard

[12] The rule of English law that defamatory matter even if communicated only to the person defamed will support an indictment, provided it is likely to provoke a breach of the peace, is enacted in section 504 of the Code.

[13] *Emperor* v. *Kundanmal* (1943) 45 Cr.L.J. 105

[14] (1932) I.L.R. 55 All. 253

[15] *Emperor* v. *Nga On Thin* (1921) 23 Cr.L.J. 240

[16] *Doraiswami Naidu* v. *Kanniappa Chetti*, (1931) A.I.R. Madras 487

with defamatory matter written on it, it has been held, constitutes publication.[17]

As has been observed by the Kerala High Court,[17a] the exceptions 2,3 and 9 embody what is compendiously called "fair comment." They apply to expressions of opinion or imputation on character and not to assertions of fact. To justify the latter the facts must be true. Comment must be based on actual and not imagined conduct. Even if the accused person genuinely believed the imputed conduct to be real, it cannot be considered a valid defence. It is only the public acts of a public man which may lawfully be made the subject of fair comment or criticism, and not misconduct imputed to him by a reporter's fertile imagination. When the allegations of fact are in themselves defamatory and are not proved to be true, there can be no defence of fair comment.[17b] The press is permitted to disclose any matter which it is for the public good to publish, of which the editor has knowledge, even if it is defamatory of others, provided always that he can prove the truth of his statement.

In *Sanatan Daw* v. *Dasarathi Tah*[17c] the respondent had published an editorial in his weekly paper criticising the management of an electric company in which the appellant was the managing partner. It was found that the allegations made in the article were substantially true. The Court expressed the view that there was no want of care and caution in the publication of the editorial, that the publication was made for the public good and that the respondent acted in good faith. Referring to the use of the expression "black marketing" in the editorial in relation to the excessive profits the company made at the expense of the consumers, the Court observed: "It is a well-settled rule of interpretation that where a matter is of public interest, the Court ought not to weigh any comment on it in a fine scale. Some allowance must be made on even intemperate language provided however that the writer kept himself within the bounds of substantial truth and does not misrepresent or suppress facts."[17d]

The editor of a journal is in no better position than an ordinary citizen with regard to his liability for libel. He is bound to take due care and proper caution before he makes a libellous statement.[18]

The Rangoon High Court,[19] interpreting the section has held that

[17] *Emperor* v. *Sankara Narasimha Bharati* (1883) I.L.R. 6 Madras 381
[17a] *R. Sankar* v. *State,* A.I.R. 1959 Kerala 100
[17b] *ibid.*
[17c] A.I.R. 1959 Cal. 677
[17d] *idem,* at p. 679
[18] *Balasubramonia Mudaliar* v. *Rajagopalachariar,* (1944) A.I.R. Madras 484
[19] now in the Republic of Burma

a newspaper does not come within the term "person" and it is not therefore a criminal offence to defame a newspaper. But defamation of a newspaper may in certain circumstances involve defamation of those responsible for its publication. It might, for instance, amount to defamation of the person responsible for the newspaper, if it were said that its policy was dictated by a particular third person who was known to be disreputable.[20]

To hold the accused guilty of the offence, it is not necessary to prove that the complainant actually suffered from the alleged imputation; it is sufficient to show that the accused intended or knew, or had reason to believe, that the imputation made by him would harm the reputation of the complainant.[21] If the words used are not likely to harm the reputation, there is no defamation.[22]

(iv) DEFAMATION OF PUBLIC SERVANTS

A person who fills a public position is considered to render himself to public discussion. He must be prepared to accept an attack as a necessary, though unpleasant, appendage to his office.[23] It is difficult to set down a standard of fair criticism. If the statement of facts on which opinions are expressed is substantially correct and the opinions themselves are honestly held and their expression is devoid of malice a wide latitude in language is permitted.

Referring to the vulgar abuses hurled against the Chief Minister and the Transport Minister of the Panjab Government Bhagwati, J., said, "So far as the individuals were concerned, they did not take any notice of these vulgar abuses and appeared to have considered the whole thing as beneath their notice. Their conduct in this behalf was consistent with the best tradition of democracy... Public men in such positions may well think it worth their while to ignore such vulgar criticisms and abuses hurled against them rather than give an importance to the same by prosecuting the persons responsible for the same."[24]

Nearly a hundred years ago a similar view was expressed by Cockburn, C. J., when he said: "Those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would

[20] *Emperor* v. *Maung Sein* (1926) I.L.R. 4 Rangoon 462
[21] *Emperor* v. *Alex Pimento,* (1920) A.I.R. Bombay 339
[22] *Emperor* v. *Genda Ram,* (1936) A.I.R. All. 143
[23] *Kelly* v. *Sherlock.* L.R. (1886) I Q.B. 686
[24] *Kartar Singh* v. *State of Panjab,* 1956 S.C.J. 539 at 542

often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time."[25]

(a) Section 198B of the Code of Criminal Procedure

By the Code of Criminal Procedure (Amendment) Act, 1955, public servants have been afforded certain special facilities in the matter of instituting legal procedure in relation to alleged offences of defamation committed against them in respect of their conduct in the discharge of official duties. The amendment has added section 198B to the Code. The new section provides that when the offence of defamation is alleged to have been committed by any means other than spoken words against the President, the Vice-President, the Governor of a State, a Minister or any other public servant employed in connexion with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the Public Presecutor. The complaint by the Public Prosecutor has to be made in the case of alleged defamation against the President, the Vice-President, or the Governor of a State with the previous permission of any Secretary of the Government authorised in this behalf, in the case of a Minister with that of the Secretary of the Council of Ministers, if any, or of any Secretary to the Government authorised in this behalf by the Government concerned, and in the case of any other public servant with that of the Government concerned.

The Court of Session will try the case without a jury. The person who is alleged to have been defamed will be examined as a witness for the prosecution, unless the Court otherwise directs for reasons to be recorded.

In order to discourage vexatious or frivolous prosecution, it is provided that if the Court discharges or acquits the accused and is of the opinion that the accusation was false and either vexatious or frivolous, the Court may order the person who is alleged to have been defamed (other than the President, the Vice-President, or the Governor of a State) to show cause why he should not pay compensation to the accused. After considering the matter, it may order payment of com-

[35] *Seymour* v. *Butterworth* (1862) 3 F & F 372 at 376–77

pensation up to a maximum of one thousand rupees to the accused. A person ordered to pay compensation will not, by reason of such order, be exempted from criminal or civil liability in respect of the complaint made against the accused. But the amount paid to the accused under this section will be taken into account in awarding compensation in any subsequent civil suit relating to the same matter. The person ordered to pay compensation may appeal from the order, in so far as the order relates to the payment of the compensation, as if he had been convicted in a trial held by the Court of Session.

(b) Press Commission's Views

The Press Commission recommended a substantially similar procedure in cases of alleged defamation of public servants. While recommending it they said they looked at the problem of defamation of public servants "not from the point of giving a favoured treatment to public servants, but from the point of view of public interest." They thought that it would not be an unreasonable discrimination to make some special provision with regard to them considering their peculiar position.[26] The Commission observed, "The dilatory procedure in the Courts, the inconvenience caused in having to leave their legitimate duties and to attend courts on the numerous days to which the case is adjourned, the labour involved in collecting evidence for the purpose of prosecution, the reckless allegations often made against them in the course of the cross-examination which is aimed at besmirching the character of the complainant in order to prove that he had no reputation to lose and finally the tendency of the Courts to impose nominal fines – all these make it hardly worthwhile for a public servant to undertake such a prosecution."[27] The Commission recognised that most of these difficulties were common to public servants and private persons who were defamed, except for the difficulty created by the Government Servants' Conduct Rules in the case of Government servants. But in view of the public interest involved in alleged defamation of public servants, the majority of this commission recommended a special procedure for them.

The four members of the Commission who dissented from the majority in this matter expressed themselves strongly against making

[26] If they are Government Servants they are precluded by the Government Servants' Conduct Rules from making a rejoinder to any allegations made against them. They are liable to be posted anywhere in India and, for that matter, anywhere in the world, if they belong to the Foreign Service.

[27] Press Commission, *Report*, Part I, paragraph 1131

any discrimination in favour of the public servant. They said: "It is in the public interest that public servants should accept the obligations that should be common to all citizens in cases of defamation, which is an offence relating to the person. Any other course would be a fetter on the press in the discharge of its responsibilities and would lead to undermining of public confidence in the administration."[28]

If the difficulties encountered by public servants and private persons are nearly the same in the matter of instituting prosecution for defamation, it would be worth while to consider the adoption of some procedure which would be suitable for both, thus helping to eliminate the charge of discrimination in favour of public servants.

(c) Suggested Procedure

The Pakistan Press Commission in their Report published in 1959 have laid down in some detail a procedure which appears suitable for adoption. "Any defamed person" (to quote from the Report) "may make an application to a District Magistrate that he should order the Public Prosecutor to file a complaint on behalf of the State in respect of that offence. If the District Magistrate is satisfied that an offence has been committed and the imputation is not trivial or commonplace, or in the case of newspaper, a contradiction has not been published which he considers satisfactory, he may order the Public Prosecutor to file a complaint. He may also, if necessary, require the police to further investigate the complaint... When the Public Prosecutor has filed the complaint, the case will proceed on behalf of the State."[29] They also suggested that neither this procedure nor the District Magistrate's refusal to order the Public Prosecutor to file a complaint should detract from the right of the defamed person to institute legal proceedings on his own.

Both the Indian and the Pakistan Commissions have recommended an amendment to section 499 of the Penal Code by laying down that every person has reputation and that it is irrelevant for the purpose of the section whether that reputation is high or low. Such a provision, in their view, would serve to stop cross-examination directed merely to show that the person has either no reputation or that his reputation is so low that it cannot be lowered further.[30]

[28] Press Commission, *Report*, Part I, paragraph 1160

[29] Pakistan Press Commission, *Report*, p. 24

[30] Pakistan Press Commission, *Report*, p. 23; Indian Press Commission, *Report*, Part I, Paragraph 1137. The Patna High Court in *D. Sastri* v. *K. B. Sahay* (1953) 32

It would appear that the main reason which inhibits a person from instituting prosecution for defamation is the discursive cross-examination aimed at establishing that the person has no reputation to lose. If the principle that the defamed person's reputation is irrelevant in a prosecution is incorporated in the section, "there will be no need in most cases to examine the person defamed as a witness."[31] Thus many of the difficulties enumerated above in relation to a prosecution for defamation would be obviated.

(v) SUGGESTED CHANGES IN THE LAW OF DEFAMATION

The Press Commission recommended the adoption of the provisions of section 4 of the (British) Defamation Act, 1952, as a general law for India and not merely for application to newspapers. This section which concerns unintentional defamation was enacted on the recommendations of the Porter Committee which expressed the view that where a statement defamatory of the plaintiff was published by the defendant who was not aware that it would be understood to refer to the plaintiff and was not aware of the circumstances which would make the statement defamatory of him, the plaintiff's remedy should be limited to requiring the defendant to publish an explanation and an apology and if such explanation and apology were published, damages should not be recoverable. The section provides that a person publishing words alleged to be defamatory of another person and claiming that they were published by him innocently, may make an offer of amends, instead of paying damages. If the offer is accepted by the aggrieved party, no proceedings for libel or slander may be taken or continued against the offeror. If the offer is not accepted, it may nevertheless afford a defence in such proceedings. The offer must be clearly expressed to be made under this section and be accompanied by an affidavit of the facts relied on to show that the publication was innocent. It must be an offer to publish a suitable

I.L.R. 276 at 302 observed: "The fact is that everyone has reputation and the only question that can arise regarding it is whether it is high or low. The question is... irrelevant in a prosecution for defamation. The law does not contemplate that any person's reputation is so low that it cannot fall lower by the publication of fresh defamatory matter relating to him." As the Indian High Courts are not unanimous on this point, an amendment by way of an additional explanation to section 499 to this effect has been suggested.

[31] Pakistan Press Commission, *Report*, p. 24

correction and apology and also to notify any person to whom copies of the original publication have been given by or with the knowledge of the offeror. If the offer is accepted, its fulfilment may be determined by the High Court, in the absence of agreement between the parties. Publication is deemed innocent only where the publisher, his servants, and his agents took all reasonable care and either did not intend to refer to the party aggrieved or know of circumstances suggesting a defamatory reference to him, or, where the words were not defamatory on the face of them, did not know of circumstances suggesting a defamatory reference to him. The section would not apply in cases where the author wrote the words maliciously and the onus is on the publisher to show that the author wrote without malice.

Another provision of English law which deserves notice in this connexion is section 7(2) of the same Act. This subsection declares various categories privileged subject to explanation or contradiction. It states that in an action for libel in respect of the publication of any statement which is privileged subject to explanation or contradiction,[32] the defence of qualified privilege will not be considered valid, "if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances."

These two provisions seem to be the nearest approach in English law to *droit de réponse,* which, generally speaking, grants the persons who have been attacked or have been the object of incorrect statement in a periodical the right to a prompt rectification or explanation. These provisions are very limited in their scope; section 4 deals with unintentional defamation only and section 7(2) is confined to reports of proceedings of certain public bodies and associations. Though the adoption of these provisions may be considered welcome, it would seem more desirable for the Indian legislator to lay down as part of the law of the land rules similar to those covered by the right to reply and the right to correction obtaining in many countries following the romanist legal system. The statutes relating to these rights do vary in

[32] A list of such statements is given in Part II of the Schedule to the Act. It enumerates various categories of public bodies and associations, the reports of whose proceedings are privileged subject to explanation or contradiction. Part I of the Schedule enumerates the categories of statements which are privileged without explanation or contradiction. The privilege in both cases is qualified privilege.

their contents in different countries,[33] but the main purpose served is generally the same. The adaptation of such provisions from these statutes as are found suitable to Indian conditions may unhesitatingly be recommended, for "the use of this particular method in no way encroaches upon the right to free expression but, on the contrary, tends to uphold it, because it increases the volume of information, adds to its sources, and promotes healthy controversy."[34] Further, this has been found to be the best means of combating the diffusion of false information.

If legislative recognition is given to the right of reply and that of correction, and if the procedure recommended by the Pakistan Press Commission is adopted in defamation cases, two benefits, at least, may accrue to the public. One is that defamatory statements in the press will tend to be less offensive and less frequent, as the publishers and editors may incline to be more careful in publishing defamatory allegations for fear of legal proceedings and the obligation to publish the aggrieved party's reply or correction. The second is that the public will be afforded ample opportunity to get at the truth, by judging for themselves the veracity of statements in the original publication and in the reply.

A provision of law on the general lines of the following may probably be found suitable for adoption. "The responsible editor or sub-editor shall insert in the periodical, in full and free of charge, replies, corrections or statements by persons to whom actions, ideas or pronouncements have been attributed which impugn their dignity or which they consider misrepresent them.[35]

"The insertion of a reply, correction or statement may be refused, if its contents are contrary to law or public morals, if it contains insulting language or expressions foreign to the general tone of the publication, if it mentions offensively or maliciously a person not involved in the discussion at issue or if it has no direct bearing on the original article or report which provoked it.[36]

"The insertion referred to in the preceding paragraph may be made within three days in the case of a daily newspaper and in the issue next

[33] Besides reply and correction, various expressions such as elucidation, explanation' declaration, answer, explanatory statement, notice, rectification, refutation, defence' denial, contradiction, and *réplique* are found in statutes reflecting, in some measure' the difference in contents of these rules.

[34] F. Terrou and L. Solal, *Legislation for Press, Film and Radio*, p. 340

[35] See Article 8 of the Italian law of February 8, 1948

[36] See Article 16 of the Vaud (Switzerland) law of December 14, 1947 and Article 27 of the Mexican Press Law of 1917.

following in the case of other periodicals, in the same edition, page and column of the periodical and in the same type as the original article or report was printed.[35]

"The correction, reply or statement may not be of greater length than the article or report to which it refers. It may, however, be of twenty lines if the article or report is of lesser length.

"Refusal to meet the above obligations shall be punishable with imprisonment for a term which may extend to six months, or fine which may amount to one thousand rupees or with both.

"An abstract of the sentence shall be published in the periodical. The Court may, if desirable, also order publication of the reply or correction or statement which was refused publication."[35]

As its effect would be more telling and immediate, such a provision of law, more than fear of possible legal proceedings for libel, may help newspapermen bear in mind the golden rule: "Write of others as you think they could fairly write of you."

CHAPTER VII

CONCLUSION

In the preceding pages we have noticed the constitutional provisions in relation to freedom of expression in India and their application as envisaged in statutes and implemented in judicial decisions. While it may, in general, be said that the constitutional provisions are in keeping with the concept of freedom of the press as described in the Introduction,[1] it may be a matter of doubt whether all the statutory provisions and judicial decisions are in harmony with this concept. In the following pages it is not intended to review the constitutional or legislative provisions already noticed or to re-state the views already expressed. The purpose of this chapter is merely to spotlight a few provisions which seem to call for repeal or amendment.

It has been said that "the press is an institution developed by modern civilisation to present the news of the day, to foster commerce and industry, to inform and lead public opinion and to furnish that check upon government which no Constitution has ever been able to provide."[2] It is in its attempts to furnish that check that the press runs up against governmental authority and the result is a struggle for freedom of expression on the part of the press against the imposition of restraints by government. In evidence of this, it may be seen that "when a regime moves toward autocracy, speech and press are among the first objects of restraint or control."[3]

The problem of balancing liberty with order, so that neither rights nor powers would be abused or tend to be excessive, has been and still is a significant problem bristling with difficulties. As Lord John Russell puts it, "... whichever way the balance is overthrown, the interests of the community suffer and freedom itself is impaired, for a free man

[1] An exception may be made about the provision regarding "friendly relations with foreign states" in Article 19 (2).

[2] R. R. McCormick, quoted in C. D. Mac Dougall, *Newsroom Problems and Policies*, p. 54.

[3] Commission on the Freedom of the Press in the United States, *A Free and Responsible Press*, p. 107.

ought to be able to do all that is not forbidden by the laws and to be enabled by those laws to do all that is not absolutely necessary for the welfare of society he should be restrained from doing."[4]

As no civil liberty is an absolute right, the freedom of expression guaranteed by the Constitution of India is not an absolute but an ordered freedom. The question is how far it is ordered and whether such ordering is necessary to serve the purpose of the community. It is possible that the guaranteed freedom may be subject to such far-reaching qualifications that they empty the guarantee of meaningful content.[5]

Again, while assessing community interests, it is worth while bearing in mind that "there are quite a few thousand men who would rather have the freedom of speech than a new pair of clothes, and it is these that form a nation."[6]

It can be asserted without fear of contradiction that freedom of the press in India increased rather than diminished during the years following the achievement of independence and especially after the adoption of the Constitution. The Press (Objectionable Matter) Act, passed in 1951 after the first amendment of the Constitution turned out to be only a temporary measure. The Newspaper (Price and Page) Act, 1956, which, according to the preamble, is intended to prevent unfair competition among newspapers so that newspapers may have fuller opportunities of freedom of expression, is of an experimental nature and meant to be of short duration.[7] The Press and Registration of Books (Amendment) Act, 1955, by which a few restrictive provisions were inserted in the principal Act was repealed in 1960. The provision inserted by the amending Act of 1960 to the effect that a declaration in respect of a newspaper should be made before the newspaper is published seems to have been enacted on the basis of the recommen-

[4] John, Earl Russell, *An Essay on the History of the English Government and the Constitution*, in *England is Here*, Ed. by W. L. Hanchant, p. 131.

[5] for example, Article 77 of the Turkish Constitution of 1945 which provided that the press was "to enjoy freedom within the framework of the law." See also Article 23 of the Constitution of Afghanistan which states: "Such publications and newspapers in Afghanistan as are not anti-religious are under no restrictions beyond those provided by the special law relating to them."

[6] Chief Justice Kayani of the West Pakistan High Court in reference to the sacrifice of fundamental civil liberties to the gods of order and progress. *The Times*, London, July 12, 1960.

[7] It is to be in force for five years from September 7, 1956. It provides, *inter alia*, that the Central Government may, from time to time, make an order providing for the regulation of the prices charged for newspapers in relation to their maximum or minimum number of pages, sizes or areas, and for the space to be allotted for advertising matter in relation to other matters therein. section 3 (I).

dations made by the All India Newspaper Editor's Conference.[8]

It is, however, possible to present a dismal picture of press freedom in India. Under the provision relating to "friendly relations with foreign states" included in Article 19(2), it would be possible to place substantial restraints on the discussion of the foreign policy of the government. Under the recently-inserted section 198B of the Criminal Procedure Code, it has become easy for public servants to prosecute newspapermen for alleged defamatory statements. It is therefore probable that newspapermen may be wary in criticising public servants with the result that the public may be denied the opportunity of being informed of many facts about the public acts of public men which they ought to know. Under the Telegraph Act telegraphic messages may be intercepted in the interests of public safety. In case the government are not confident that legal proceedings, if instituted against a newspaperman in a particular case, will succeed, they can have recourse to the provisions of the Preventive Detention Act. It would be hard to prove *mala fides* on the part of the government, especially if evidence to that effect is not permitted to be produced. It is not unusual for the executive to resort to preventive detention as a line of least resistence and for easy implementation of their policy, for preventive detention is a matter left to the discretion of the executive subject to certain not very effective safeguards. The courts do not propose to substitute their discretion for that of the executive who are in possession of all material facts concerning particular cases. Further, it would not be difficult, in Indian conditions, to cause the postponement of the publication of a newspaper for a considerable time by delaying to authenticate a declaration required under the provisions of the Press and Registration of Books Act, 1867.[9]

What is set out above is merely the possibility of governmental action, if the government choose to suppress opposition to their policy through the medium of the press. In practice, however, the Indian press can compare well with the press in many other democratic countries in its freedom from governmental interference.[10] But the fact

[8] See the memorandum submitted by the Conference in December 1947. (Appendix B in the *Report* of the Press Laws Enquiry Committee, p. 43 at p. 44.)

[9] Most Magistrates in India, while being members of the judiciary, are also executive officers. A separation of these functions is contemplated under the directive principles of state policy declared in the Constitution.

[10] The restrictions judicially held permissible in the United States may be considered for purposes of comparison. They may be broadly classed under the following heads: protection of the State from external aggression, *Schenck* v. *United States*, (1919) 249 U.S. 47; protection of the State against internal disorder, *Chaplinsky* v. *New Hampshire*,

remains that there is a sword of Democles hanging over the press in the statutory provisions, if not, to any considerable extent, in the constitutional provisions. One wonders whether the presence of this threatening weapon is necessary or justified. It may be that its presence would prove an effective factor in inducing self-restraint on the part of the newspaperman to such an extent that he would deny himself the right to communicate ideas beneficial to the community rather than risk a probable prosecution. It may be that the average newspaperman is too wary, and that probably explains why there is not a multitude of prosecutions launched against the press.

As has been already observed, the present position is not so much due to the absence of constitutional provisions safeguarding the right as to the considerable number and effectiveness of statutory provisions affecting the press.

(i) ARTICLE 19(2) OF THE CONSTITUTION

Most important of the provisions tending to restrict press freedom is the constitutional provision enshrined in Article 19(2) which permits reasonable legislative abridgement of the right to freedom of speech and expression. No one would be inclined to find fault with the founding fathers for incorporating that provision in the Constitution. For, as Daniel Webster puts it, "Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have."[11] Montesquieu expressed a similar view when he said, "Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power."[12]

One might even be justified in inclining to the view that the categories of subjects listed in the subclause are not exhaustive and that it would be inadvisable to treat them as exhaustive. In the course of the debate on the First Amendment, Premier Nehru remarked: "There

(1942) 315 U.S. 568; or against overthrow of its orderly government by force, *Cox* v. *New Hampshire*, (1941) 312 U.S. 569; protection of individuals from defamation, *Near* v. *Minessota*, (1931) 283 U.S. 697; protection of the community against the dissemination of obscenity, *Reynolds* v. *United States*, (1887) 98 U.S. 145; protection from interference with the administration of justice, *Bridges* v. *California*, (1941) 341 U.S. 252; incitement to crime, *De Jonge* v. *Oregon*, (1937) 290 U.S. 516;. What is conspicuous by its absence is maintenance of friendly relations with foreign states. The significant difference between incitement to crime and incitement to an offence may also be noted.

[11] D. Webster, *Works*, Vol. II, p. 393

[12] Montesquieu, *The Spirit of the Laws*, *Book* III, Chapter 3

are a hundred and one restrictions that limit individual freedom if you live in society. Clause (2) which covers libel, slander, morality, decency and the security of the State is not an exhaustive list of such restrictions. Others are either understood or implied."[13]

In a pre-Amendment case, Teja Singh, C. J., of the Pepsu High Court felt constrained to hold that apart from the qualifications enumerated in clauses 2 to 6 of Article 19, fundamental rights were subject to a further qualification, namely, that the exercise of these rights by a citizen should not infringe the rights of others.[14]

Mack, J., of the Madras High Court observed that if two fundamental rights came into conflict and one was sought to be extended to extreme, though logical, ends at the expense of the other, the Courts would be extremely slow to recognise and uphold such an extension of one fundamental right.[15] While upholding most of the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954, the Supreme Court seemed inclined to cling to its oft-repeated view that the list was exhaustive. The Court sustained the validity of the provisions on the ground that the Act was directed against self-medication and that commercial advertisements intended to further a private individual's business had no relevance to the concept of freedom of the press.[16]

As new situations arise, there will be occasions when the Courts may have to sustain laws directed towards beneficial social goals. They will have to accommodate such situations by enlarging the scope of the given categories, as they have indicated their reluctance to add to the categories themselves. When situations arise that are defiant of the ordinary connotation of words used in the subclause and the Courts

[13] J. Nehru, *Speeches 1943–53* (Publications Division, Government of India) p. 504.

[14] *Jang Bahadur Santpal* v. *Principal, Mohindra College.* (A.I.R. 1951 Pepsu 59) The case involved the question whether rustication by a Principal of a student who circulated a handbill containing serious defamatory allegations against College authorities infringed the student's fundamental right to expression of opinion. The learned Judge observed that the truth of the allegations could not be a defence in a case of this kind, because if the student believed that he had a genuine grievance, the proper course for him was to approach the higher educational authorities and the government rather than to bring out a handbill. In these circumstances an order of the Principal rusticating him for one year, the Court held, was justified and did not violate the fundamental right of expression of opinion guaranteed by Article 19 (1) (a).

[15] *In re Vengan,* A.I.R. 1952 Madras 95, Mack, J., negatived the right of the members of the Dravida Kazhakam to picket shops in South India owned by North Indians. Here the right to freedom of speech squarely came in conflict with the right to reside and settle down in any part of India.

[16] It would seem that the same may be said of any of the categories mentioned in the subclause, for instance, defamation. Compare Brennen, J.'s observations in *Roth* v. *United States* (354 U.S. 476) wherein he said, "We hold that obscenity is not within the area of constitutionally protected speech or press." (at p. 485)

will prefer not to deny legislative power for the adoption of restrictive measures in such situations, it would appear to be gracious to say that the list of categories is not exhaustive, but only illustrative. If this is not done, it may be desirable to effect an amendment adding to the categories a few subjects like public health, privacy and contempt of legislature. It may be recollected that the founding fathers, in their wisdom, have provided for a process of constitutional amendment which is not particularly difficult.

It would be desirable to include "public health" among the categories, so that statutes directed against publications encouraging self-medication or other practices injurious to health may not be impugned. In this connexion it is of interest to note Article 16(3) of the draft Covenant on Civil and Political Rights which provides that the exercise of the right to freedom of expression may be subject to certain restrictions, but these shall be only such as are provided by law and are necessary (1) for respect of the rights or reputation of others, and (2) for the protection of national security or of public order, or of *public health* or morals.

Contempt of Legislature, as we have seen from our discussion of *the Searchlight case,* is a thorny problem. It would facilitate in ensuring and clarifying the rights of the citizen if "contempt of legislature" is included among the categories in Article 19(2) and the latter part of subclause (3) in Articles 105 and 194 is repealed by an amendment. As long as the list of categories is considered exhaustive, it may be argued that, if contempt of legislature is not included in subclause (2) of Article 19 and if the latter part of subclause (3) of Articles 105 and 194 is repealed,[17] a law passed by a legislature defining its powers and privileges should be in conformity with Article 19(2) in so far as it affects the freedom of expression of the citizen. As contempt of legislature is not one of the categories in Article 19(2), the order of the Speaker of a House of Legislature, for instance, prohibiting the publication of the proceedings of the House will have to be covered by any of the categories enumerated in the subclause.

It would seem necessary to give recognition to the right to be left alone, as has been done in many States in the United States of America. There seems to be no protection under the present law against publications such as printing and circulating to the public the picture of one's deformed child or publishing one's name to the public as a debtor.

[17] It would seem that the framers of the Constitution intended this provision to be made use of by the legislatures for a short period only.

If a law directed against such revelations of privacy is passed, it has to be covered by any of the permissible restrictions under Article 19(2). It would be hard to bring under any of the enumerated categories the types of publications mentioned above. It would be helpful if "privacy" is included in the subclause.

It is well worth remembering that if "judicial discretion is kept within narrow limits because the Constitution specifies with great particularity the circumstances in which guaranteed rights may be abridged, the Constitution may become ... rapidly unsuited to changing conditions."[18]

(ii) THE PRESS AND REGISTRATION OF BOOKS ACT, 1867

It would appear that there is no prohibition against prior restraints in the Constitution, as long as the prior restraints enforced are in relation to the categories of subjects mentioned in Article 19(2). The observations of Patanjali Sastri, J., about pre-censorship in *Brij Bhushan's case* are *obiter*.[19] It may be that the Indian Courts following common law tradition would regard prior restraints including pre-censorship as an unreasonable restriction.[19] If the Courts incline to do so, it would be difficult to uphold the constitutional validity of section 5 (rule 2c) of the Press and Registration of Books Act, 1867, which provides for a declaration to be made and authenticated before a newspaper can be published.[20] If the purpose of the provision is to furnish the government with information regarding the newspaper, that purpose may be more conveniently served by providing that the publisher of a newspaper should send in a statement containing the required information to a Magistrate within, say, three days after the publication of the first number of the newspaper.[21] It is of interest in

[18] S. A. de Smith, Fundamental Rights in the Commonwealth, *International and Comparative Law Quarterly*, January 1961, p. 83 at 88.

[19] It may be pointed out that what Patanjali Sastri, J., said in *Brij Bhushan's* case was that pre-censorship was a restriction, not that it was an unreasonable restriction. But then this was said before the First Amendment, which inserted the word "reasonable" to qualify "restrictions" in Article 19 (2).

[20] The Madras High Court sustained the validity of section 3 of the Act only in *In re G. Alavandar* (A.I.R. 1957 Madras 427).

[21] Under the (British) Newspaper Libel and Registration Act, 1881, which is intended "to amend the law of newspaper libel and to provide for the registration of newspaper proprietors," no registration is necessary when a newspaper commences publication. Thus if a newspaper commences publication in August 1961, no registration of its proprietors need be made until July 1962, as the returns under the Act are to be made in the month of July in each year.

this connection to recollect the observations of Kayani, C. J., of the West Pakistan High Court. If the citizen, he said, "is required to fulfil a condition before actually expressing himself, the restraint will be of a preventive nature and that kind of restraint is not contemplated by Article 8"[22] (of the abrogated Constitution of Pakistan, which corresponded to Article 19 of the Indian Constitution).

Rutledge, J., of the United States Supreme Court was forthright in his criticism of prior registration in relation to the constitutionally guaranteed freedom of speech. He said: "As a matter of principle, a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers."[23]

(iii) SECTION 124A OF THE PENAL CODE

The Press Commission of India recommended the repeal of section 124A of the Indian Penal Code and the enactment of another section penalising expressions which incited persons to alter by violence the system of government with or without foreign aid. Until the law is amended on the lines indicated, it would seem that the freedom of criticising the government is partly safeguarded by the forbearance of the executive to prosecute. This would be too precarious a position for the citizen if a basic and precious right like freedom of expression is to be safeguarded to any extent by the patience or sufferance of the executive, especially because of the fact that what is constant about the attitude of the executive is its changeability, as the executive itself is subject to periodical changes in a democracy. If the law remains unamended and if section 124A is held constitutionally valid, a judge would be justified in giving it a literal interpretation. He may give expression to a view similar to that expressed by the Lord Chancellor

[22] *Mahmud Zaman* v. *District Magistrate, Lahore,* (P.L.D. 1958 W.P. (Lahore) 651). Though these observations were made in relation to the provision for demanding security before publication enacted in the Press (Emergency Powers) Act, 1931, (repealed in India) they are equally pertinent to the question of making a declaration before publication.

[23] *Thomas* v. *Collins,* (1945) 323 U.S. 516 at p. 539,

in *Wallace-Johnson* v. *The King:*[24] "The fact remains that it is in the Criminal Code of the Gold Coast Colony and not in English and Scottish cases that the law of sedition in the Colony is to be found. It must therefore be construed... free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or Scotland." One may recollect with profit the observations of the Judicial Committee of the Privy Council in *King Emperor* v. *Sadashiv Narayan:*[25] "The offence under section 124A of the Indian Penal Code should be construed with reference to the words used in that section."

If the circumstances of the country have changed, it is for the legislatures to amend the provision to suit the present circumstances rather than for the Courts to mitigate the severity of the law by giving it a liberal interpretation where the purport of the words is clear and unambiguous. It has been judicially observed that "A change in the spirit of the time cannot justify a change in a principle of law by judicial decision, though changes in public opinion may lead to legislative interference and substantive alteration of the law."[26]

(iv) SECTION 292 OF THE PENAL CODE

It would be desirable to incorporate in section 292 of the Indian Penal Code the provision of law enacted in section 4(1) of the (British) Obscene Publications Act, 1959, which stipulates that a publication is not to be deemed obscene if it is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning or of other objects of general concern.

It would undoubtedly prove helpful if the press and the public would care to remember in this connexion what the Royal Commission on the Press in England observed in their report: "The failure of the press to keep pace with the requirements of society is attributable largely to the plain fact that an industry that lives by the sale of its products must give the public what the public will buy. A newspaper cannot, therefore, raise its standard above that of its public and may anticipate

[24] 1940 A.C. 231. Section 326 (8) of the Criminal Code of the Gold Coast Colony (1936 Revision) provided that "seditious words are words expressive of a seditious intention" and seditious intention was defined as an intention "to bring into hatred or contempt... the government of the Gold Coast as by law established."

[25] A.I.R. 1947 P.C. 82

[26] Das, J., in *Debi Soran* v. *The State*, A.I.R. 1954 Patna 254

profit from lowering its standard in order to gain an advantage over a competitor. This tendency is not always resisted as firmly as the public interest requires. The press does not do all it might to encourage its public to accept or demand material of higher quality."[27]

(v) SECTION 295A OF THE PENAL CODE

It is difficult to agree with the Indian Press Commission when they suggest that section 295A of the Penal Code (which refers to deliberately and maliciously outraging the religious feelings of any class of citizens or insulting or attempting to insult the religious beliefs of that class) should be limited in its operation to those cases where there is intention to cause violence or knowledge of likelihood of violence ensuing. Considering conditions in India, it would seem to be advisable to leave the provision as it is, because it is necessary to avoid not only violence, but also ill-feeling between religious communities or groups. While a discussion of religious tenets or practices in decent and temperate language, with no malicious intent, but with a view to inducing conviction, improvement or correction can be permitted,[28] an attempt to vilify or degrade a religion has to be brought within the purview of restrictive legislation.[29] Such a restrictive provision, it is submitted, will be covered by "morality" in Article 19(2). Reviewing the events that led to the partition of India in 1947, it is arguable that the provision could be thought of as being covered by "security of the State" in the subclause.

(vi) CONTEMPT OF COURT

It is desirable to give statutory definitions of *all* acts of contempt liable to be punished. As criminal contempt is a vast uncharted territory, one cannot overlook the possibility that the contempt juris-

[27] Royal Commission on the Press, *Report*, (Cmd. 7700), pp. 176–177

[28] Blackstone said: "Contumely and contempt are what no establishment can tolerate; but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship." 4 *Commentaries* 51

[29] Similar statutory provisions are found in some other countries, for example, Article 173 (3) of the Turkish Penal Code provides: "Every one who publishes any contemptuous or scurrilous matter relating to any religion or any sect of religion will be liable on conviction to imprisonment of not less than one and not more than six months."

diction may be extended to situations yet unknown.[30] It would therefore appear to be necessary to define what constitutes contempt, especially when one accepts the principle *nulla poena sine lege*. It would again be desirable to give statutory basis to the procedural law of contempt.

When Courts punish summarily for minor offences of contempt committed *in facie curiae*, there should be statutory provision to limit the punishment, say, to a fine of one hundred rupees or simple imprisonment for one month.[30] Direct contempts of a more serious nature deserving severer punishment and all cases of constructive contempt should be tried in the ordinary manner and by a Judge or Court other than the one against whom the contempt was alleged to have been committed.

Under Article 136 of the Constitution the Supreme Court may, in its discretion, grant special leave to appeal from any decision made by a Court in India. This provision may be regarded as sufficient to remind other Courts that the contempt jurisdiction should be exercised sparingly and in serious cases only. No other provision for appeal may, therefore, be necessary.[31]

These remarks on the contempt jurisdiction of the Courts may be concluded by two quotations, the first from J. C. McRuer, Chief Justice, Ontario, who said:

> ... the law of contempt of court is not a law for the protection of judges or to place them in a position of immunity from criticism. It is a law for the protection of the freedom of individuals. Everyone in a well-ordered community is entitled to the protection of a free and independent administration of justice... it is for the press to enlighten the public on what has been done in this branch of government, fairly and firmly to criticise what has been done where criticism appears to be warranted, but never to attempt to influence the courts of justice or to undermine the faith of those who live under the protection of the law and the impartial authority of the courts.[32]

and the second from Hugo Fischer:

[30] In *United States* v. *Dennis* (1950) 183 F. 2d. 201 (U.S.C.A. 2nd Cir.) counsel for the defence were imprisoned for contempt of court for having, among other things, "persisted in making long, repetitious and unsubstantiated arguments... working in shifts." See also the observations of Varadachariar, J., in *K. L. Gauba* v. *Chief Justice and Judges, Lahore.* (1941) F.L.J. (F.C.) 33.

[31] Professor Alan Gledhill remarks: "In India the right of special appeal to the Supreme Court should be sufficient to prevent abuse." (A. Gledhill, Contempt of Court, *S.V.L.C. Journal*, Mysore, 1960, p. 1 at p. 7)

[32] J. C. McRuer, Criminal Contempt of Court Procedure, 30 *Canadian Bar Review*, (1952), pp. 243–244.

A judge hearing a case must not be exposed to fears or apprehensions, litigants must be protected against the possibility that their case will be influenced by matters extraneous to the litigation in which they are engaged, and an accused must not be exposed to attempts to arouse public opinion against him. If this is the true purpose of the protection granted to the courts, the dignity of the court is no longer identical with the prestige of the individual judge or the bench. The protection is designed to ensure freedom from unlawful interference with the due process of law. If this is accepted, we may come to a further conclusion, namely, that the suppression of constructive criticism itself constitutes an interference with the due administration of justice.[33]

(vii) CONTEMPT OF LEGISLATURE

It may not be irrelevant to refer to the subject of contempt of legislature again. It would appear to be necessary that the law or custom relating to contempt of legislature be subject to the fundamental rights set out in the Constitution. As has been observed by the Press Commission, instances where legislatures have shown oversensitiveness have not been too rare, while cases where the misapplication of the law of contempt of court has been clearly evident have been few. It is worth bearing in mind that the majority of the members of a House of Legislature may not be possessed, to any remarkable degree, of a judicial mind, the possession of which generally makes a judge's approach to a contempt case very different from that of the legislature. Contempt of legislature therefore, has to be made subject to the fundamental rights by repealing the latter part of clause 3 in Articles 105 and 194, if the decision in the *Searchlight case* continues to be the authoritative pronouncement about the law on the subject.

It might tend to prevent significant abridgement of freedom of expression if the members of the legislatures in India recollect what the Attorney General of England, after having filed an information for an alleged libel upon the House of Commons said in stating the case to the jury. He said:

> This information... comes before you in consequence of an address from the House of Commons. This... I do not mention as in any degree to influence the judgement which you are by and by to give upon your oaths; I state it as a measure which they have taken thinking it in their wisdom... to be the fittest to bring before a jury of the country, an offender against themselves, and against their honour, avoiding thereby what sometimes indeed is unavoidable, but which they wish to avoid, whenever it can be done with propriety... the acting both as judges and accusers; which they must necessarily have done, had they resorted to their

[33] H. Fischer, Civil and Criminal Aspects of Contempt of Court, 34 *Canadian Bar Review* (1956), p. 161.

powers, which are very great and very extensive, for the purpose of vindicating themselves against insult and contempt, but which, in the present instance, they have wisely forborne to exercise, thinking it better to leave the defendant to be dealt with by a fair and impartial jury.[34]

Finally, it may be said that freedom of the press in India will be doubly assured as the citizen of free India develops more and more an instinct for liberty and for justice and a practical good sense to balance freedom with order, rights with responsibilities and powers with safeguards. Until the average citizen develops these qualities, it is for those at the helm of affairs in the Republic to encourage him to cultivate them, rather than assume the role of petty sovereigns clothed in a little brief authority.

[34] *R.* v. *Stockdale,* (1788) 22 St. Tr. 238

BIBLIOGRAPHY

Anson, W. R. *Law and Custom of the Constitution.* Oxford, 1935

Barns, M. *The Indian Press*, London, 1940

Barth, A. *The Government and the Press.* Minneapolis 1953

Basu, D. D. Constitutional Protection of Civil Rights in India, *Journal of the International Commission of Jurists*, Vol. I. No. 2

– *Commentary on the Constitution of India*, Third Edition, Calcutta, 1955

Becker, Carl C. *Freedom and Responsibility in the American Way of Life*, 1955

Blackstone, W. *Commentaries on the Laws of England*, 14th Edition, London, 1803

Bok, C. Censorship and the Arts, *Civil Liberties under Attack* (Edited by C. Wilcox) Philadelphia, 1951

Castberg, F. *Freedom of Speech in the West.* Oslo, 1960

Chafee, Z., Jr. *Free Speech in the United States*, Cambridge, Mass. 1946

– *Government and Mass Communications*, Chicago, 1947

Chand, Tek and Sarin, H. L. *The Law of Contempt of Court and of Legislature*, Second Edition, Allahabad, 1949

Collis, M. *Trials in Burma*, London, 1938

Commission on Freedom of the Press in the United States. *A Free and Responsible Press*, Chicago, 1947

Cushman, R. E. *Civil Liberties in the United States*, New York, 1956

Dawson, T. *The Law of the Press*, Second Edition, London, 1947

Denning, A. *The Road to Justice*, London, 1955

– *Freedom under the Law*, London, 1949

– *The Changing Law*, London, 1953

Dicey, A. V. *Introduction to the Study of the Law of the Constitution*, 10th Edition, London, 1959

Ebb, L. F. (Ed.) *Public Law Problems in India*, Stanford, 1957

Eek, H. *Freedom of Information as a Project of International Legislation*, Uppsala, 1953

Ellis, H. Revaluation of Obscenity, *More Essays on Love and Virtue*, 1931

Emerson, T. I. and Haber, D. *Political and Civil Rights in the United States*, New York, 1952

Fischer, H. Civil and Criminal Aspects of Contempt of Court, 34 *Canadian Bar Review* 1956

Fox, Sir John. *The History of Contempt of Court*, Oxford, 1927

Gardiner, H. C. Moral Principles towards a Definition of the Obscene, 20 *Law and Contemporary Problems*

Gatley, C. C. *Libel and Slander in a Civil Action*, 5th Edition, London, 1960

Gauba, K. L. *Battles at the Bar*, Bombay, 1956

Gellhorn, W. *Individual Freedom and Governmental Restraints*, Louisiana, 1956

Ghose, H. P. *Press and Press Laws in India*, Calcutta, 1930

Gledhill, A. *Fundamental Rights in India*, London, 1955
– Contempt of Court, *S.V.L.C. Journal*, (1960) Mysore, India
Griswold, W. *Essays on Education*, Yale University Press, 1954
Hand, Learned. *The Bill of Rights*, Cambridge, Mass., 1958
Herd, Harold. *The March of Journalism*, London, 1952
Hocking, W. E. *Freedom of the Press*, Chicago, 1947
Holland, D. C. Freedom of the Press in the Commonwealth, *Current Legal Problems*, Vol. IX (1956), London
International Press Institute. *Improvement of Information*, Zurich 1952
– *The Flow of the News*, Zurich 1954
– *Government Pressures on the Press*, Zurich 1955
– *The Press in Authoritarian Countries*, Zurich 1959
Larrabee, Eric. Morality and Obscenity, *Freedom of Book Selection*, (E. S. Moscher, Ed.) 1954
Lasswell, H. D. *National Security and Individual Freedom*, 1950
Lockhart, W. B. and McClure, Robert C. Literature, the Law of Obscenity and the Constitution, 38 *Minn. L. R.* (1954)
McDougall, C. D. *Newsroom Problems and Policies*, New York, 1941
Martin, Kingsley. *The Press the Public Wants*, London, 1947
McRuer, J. C. Criminal Contempt of Court Procedure, 30 *Canadian Bar Review* (1952)
May, T. Erskine. *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 14th Edition, London, 1946
Milton, J. *Areopagitica*, (1644)
Montesquieu, *The Spirit of the Laws*
Natarajan, J. *History of Indian Journalism* (Part II of the Report of the Press Commission) Delhi, 1955
Nehru, J. *Speeches 1943–1953*, Publications Division, Government of India, Delhi
O'Connor, J. J. *Philosophical Concept of Communication*, Washington, 1953
Pakistan Press Commission, *Report*, Karachi, 1959
Press Commission of India. *Report*, Part I, New Delhi, 1954
Press Laws Enquiry Committee, *Report*, New Delhi
Prosser, W. L. *A Handbook of the Law of Torts*, 2nd Ed. St Paul, Minn. (West), 1955
Rothenberg, I. *The Newspaper*, London, 1946
Royal Commission on the Press, *Report*. Cmd. 7700, London, 1947–49
Russell, Earl John. An Essay on the History of the English Government and the Constitution, *England is Here* (W. L. Hanchant, Ed.)
Schwartz, B. *American Constitutional Law*, Cambridge, 1955
Shipley, P. Obscene Publication Prohibition, 40 *Nebraska Law Review* (1960)
de Smith, S. A. Fundamental Rights in the Commonwealth. 10 *International and Comparative Law Quarterly* (1961)
Stephen, J. *A Digest of the Criminal Law*, Eighth Edition, London, 1947
St. John-Stevas, N. *Obscenity and the Law*, London, 1956
Stouffer, S. A. *Communism, Conformity and Civil Liberties*, New York, 1955
Terrou, F. and Solal A. L. *Legislation for Press, Film and Radio*. Paris, 1951
Webster, D. Works, Vol. II, Boston, 1851

INDEX

Ahmad, Sir Sultan, 93
Ajmer Excise Regulation, 1915, 19
Ambedkar, Dr, 43
Amendment (First) Amendment to the Indian Constitution, *see* Constitution (Amendment) Act, 1951.
Anson, W. R., 30
Atkin, Lord, 80

Baker, J., 73
Basu, D. D., 27
Bhagavad Gita 102
Bhagawati, J., 70, 109
Bhattacharya, J., 73
Bihar Essential Services Maintenance Act, 1948, 21, 54
Black, J., 82n
Blackstone, 24, 126n
Bok, Curtis, 67, 68
Bombay Prohibition Act, 1949, 62
Bowen, L. J., 92
Brennen, J., 121

Chamberlain, N., 42
Changez, J., 19
Children and Young Persons (Harmful Publication) Act, (British) 1955, 74
Civil and Political Rights, Covenant on, 122
Cockburn C. J., 67, 69, 109
Code of Civil Procedure, 1908, 43
Code of Criminal Procedure, 1898
  Section 144 – 49ff, 56, 60
  Section 195 – 90
  Section 198B – 110f, 119
  Section 480 – 88, 90
  Section 481 – 89
  Section 482 – 89
  Section 485 – 89, 90
  Section 486 – 90
  Section 487 – 90
Code of Criminal Procedure (Amendment) Act, 1955, 110
Collis, M., 31
Constitution (Amendment) Act, 1951, 7, 8, 13, 14, 35, 38, 42, 47, 120
Constitution (Declaration as to Foreign States) Order, 1950, 43
Constitution
  of Afghanistan 118
  of Australia 99
  of Denmark 24
  of Greece 24
Constitution of India
  Article 13 – 34, 97, 98, 99
  Article 19 – 2, 4, 6ff, 25, 33, 36, 44, 46, 53, 59, 60, 62, 65, 94, 97, 100, 119, 120, 122, 124, 126
  Article 21 – 18
  Article 22 – 97
  Article 25 – 52
  Article 26 – 52
  Article 105 – 95, 97, 98, 99, 122, 128
  Article 136 – 127
  Article 194 – 95, 96, 97, 98, 99, 122, 128
  Article 367 – 62
Constitution
  of the Netherlands, 24
  of Pakistan (abrogated in 1958), 34, 124
  of Sweden, 46
  of Turkey, 118
  of U.S.A. 2, 5, 7
Contempt of Court, 78ff, 126
  civil contempt, 91
  constructive contempt, 94
  criminal contempt, 90
  procedure in contempt cases, 90ff
    in India, 90ff
    in U.S.A., 93

Contempt of Court Act, 1926, 84, 85
Contempt of Court Act, 1952, 84, 85, 87
Contempt of legislature 94ff, 122, 128
Court, bona fide criticism of, 79, 80
Court of Record, 83

Das, C. J. (Supreme Court of India), 15, 52f, 55, 56f, 81, 97f, 99
Das, J. (Patna High Court), 21f, 125
Defamation, 86, 102ff
  of public servants, 109ff
Defamation Act, 1952, (British), 100, 113f
Denning, Lord, 78
Desai, J., 13
Directive Principles of State Policy, 18
Droit de rėponse, 114ff
Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, 121

East Panjab Public Safety Act, 1949, 8, 25, 33
Edmond, J., 94
Ellis, H., 66

Falshaw, J., 72n
Fazl Ali, J., 24f, 46, 47
First Amendment (Constitution of India) *see* Constitution (Amendment) Act, 1951
First Amendment (U.S. Constitution), 27
Fischer, H., 128
Foreign Enlistment Act (British) 1870, 41
Foreign States, friendly relations with, 7, 40ff
Fourteenth Amendment (U.S. Constitution), 27
Frank, Jerome K., J., 73n
Frankfurter, J., 5
Freedom of Information and the Press, Covenant on, 60
Freedom of the Press, concept of, 1ff, 117
Fundamental Rights, 6, 59, 101

Gardiner, H. C., 66
Gellhorn, W., 66, 77
General Clauses Act, 1897, 62
Gledhill, A., 127
Goddard, C. J., 68
Govinda Menon, J., 11
Griswold, W., 76n
Gwyer, C. J., 32f

Hand, J., 67
Hardwicke, Lord, 78
Hewart, Lord, 82n
Holland, D. C., 5, 35
Holmes, J., 16, 63
House of Commons, Privileges of the, 96, 101
Human Rights, Commission on, 42, 60
  Universal Declaration of, 61
  European Convention for the Protection of, 64

Incitement to Disaffection Act (British), 1934, 29
Incitement to Mutiny Act (British), 1797, 29
Incitement to offence, law as to,
  in Belgium, 62
  in England, 61
  in the United States, 61f
Incitement to offence, constitutional provisions in India as to, 7, 62ff
Indecent Advertisements Act (British), 65
Indian Penal Code, 1860, 64, 70, 88, 103
  Section 124A – 30ff, 33, 34, 36, 37, 38, 58, 124
  Section 153A – 33, 37, 58
  Section 175 – 88
  Sections 178–180 – 88
  Section 292 – 65, 71, 72, 125
  Section 293 – 74, 75
  Section 294A – 65
  Section 295A – 37, 52f, 126
  Section 499 – 86, 105ff
  Sections 500 – 502 – 105
  Section 504 – 107

Johnson, Dr Samuel, 66
Joyce, James, 67
Judicial Committee of the Privy Council, 33, 80, 86, 125

Kania, C. J., 17, 18
Kapoor, J., 11
Kapur, J., 5
Kayani, C. J., 118, 124

Keating, C. H., Jr., 77
Kunzru, H. N., 93

Larrabee, E., 76
Lawrence, D. H., 67, 69
'Lex Soraya', 40
Libel, 102, 104, 108
Lockhart, W. B., and McClure, R. C., 66

Mack, C. J., 121
McCormick, R. R., 117
McRuer, J. C., 127
Madhya Bharat Public Security Act, 1953, 53
Madison, 28
Madras Maintenance of Public Order Act, 1949, 8ff, 12
Mahajan, J., 18
Mansfield, Lord, 79, 80
Milton, John, 67
Montesquieu, Charles de, 120
Mookerjee, J., 83
Mukherjea, J., 16, 17, 57, 87
Narasimhan, J., 19
National Labour Relations Act (U.S.), 4
Nehru, Jawaharlal, 120
Newspaper Libel and Registration Act (British), 1881, 123
Newspaper (Price and Page) Act, 1956, 118
Nigam, J. C., 38
Niyogi, J., 83

Obscenity, 65ff, 121
  connotation of, 65f, 77
  Hicklin test as to, 67ff
  contemporary community standards as to, 70
Obscene Publications Act, 1925, 71
Obscene Publications Acts (British), 65, 69, 125
Obscene Publications, Geneva Conference on, 66, 71
Official Secrets Act, 1923, 39
Official Secrets Acts (British), 1911, 1920, 1939, 29

Panchapagesa Sastri, J., 11
Panjab Security of State Act, 1953, 53
Panjab Special Powers (Press) Act, 1956, 53, 56
Parliamentary Proceedings (Protection of Publication) Act, 1956, 95f
Parsons, J., 31f
Patanjali Sastri, C. J., 1, 2, 11, 16, 20, 28, 47, 123
Penal Code, *see* Indian Penal Code
Petheram, C. J., 31
Police Act (British), 1919, 29
Police (Incitement to Disaffection) Act, 1922, 36
Post Office Act, 1898, 36, 49, 56, 74
Pre-censorship, 24f, 123
Press Commission
  of India, 1, 35, 38, 40, 42, 49, 51, 60, 63, 64, 92, 101, 111, 124, 126, 128
  of Pakistan, 112, 115
  in the United Kingdom, 125f
  in the United States, 1, 4, 117
Press (Emergency Powers) Act, 1931, 10, 11, 12, 13, 124
Press Laws Inquiry Committee, 48, 51, 119
Press and Registration of Books Act, 1867, 26, 27, 118f, 123
Press and Registration of Books (Amendment) Act, 1955, 118
Press and Registration of Books (Amendment) Act, 1960, 118
Press and Registration of Books Ordinance (Aden), 26
Press (Objectionable Matter) Act, 1951, 26, 118
Press Ordinance (Malta), 26
Preventive Detention Act, 1951, 58f, 119
Public mischief, 38
Public order 7, 21, 45ff
Public Security Acts, 53
  Madhya Bharat Public Security Act, 1953, 53
  Panjab Security of State Act, 1953, 53, 54
  Panjab Special Powers (Press) Act, 1956, 53, 56, 57
  Uttar Pradesh Special Powers Act, 1932, 54ff
  West Bengal Security Act, 1950, 53
Public Servants, Defamation of, 109ff
Public Servants (Inquiries) Act, 1850, 87

Ramaswami, J., 10
Ray, C. J., 21

Restrictions on freedom of expression, Reasonableness of, 14ff
Roberts, J., 5
Russell, Earl John, 118
Rutledge, J., 27, 124

Sarjoo Prasad, J., 10
Sapru, P. N., 93
Sea Customs Act, 1878, 36, 73
Security of State, Constitutional provisions as to, 7, 46, 47
Sedition, the law of,
- in Australia, 34f
- in England, 29, 30, 34
- in India, 28ff
- in Pakistan, 34

Shakespeare, 102
Solal, A. L., and Terrou, F., 115
Staatsregeling, 1798, 5
Stable, J., 69
Stephen, Sir James, 83n
Stopes, Marie, 79
Strachey, J., 31, 32, 33
Subbha Rao, J., 45, 55, 56, 99
Sumner, Lord, 32
Sutherland, J., 5n

Teja Singh, C. J., 13, 121
Telegraph Act, 1885, 48, 49, 56, 119
Terrou, F., and Solal, A. L., 115
Treason Act (British), 1795, 29
Turrell, Courtney, C.J., 85n

Uttar Pradesh Special Powers Act, 1932, 54ff

Varadachariar, J., 127
Venkatarama Ayyar, J., 97

Webster, D., 120
West Bengal Security Act, 1950, 53
Weston, C. J., 33
Wilmot, Sir Eardley, 79

Young Persons (Harmful Publications) Act, 1956, 74f