"Our freedom depends in large part, on the continuation of a free press, which is the strongest guarantee of a free society."

- Richard M. Schmidt[130]

CHAPTER III

MEDIA & OTHER ESTATES

1. Media & Legislature

Print and Electronic media has to report the proceedings of the Parliament and State Legislatures. In the process they may confront the privileges of the parliamentarians. Any defiance of legislative order or any scandalization of legislative conduct can be viewed as contempt of House for which House has authority to punish.

The Constitution provides several privileges to the parliamentarians. The Black's law dictionary defines privilege as, "a special legal right, exemption or immunity granted to a person or a class of persons, an exception to a duty."

Powers, privileges and immunities of Parliament

According to Sir Thomas Erskine May, parliamentary privileges maybe defined as "The sum of the peculiar rights enjoyed by each house collectively is a constituent part of the High Court of Parliament, and by members of each house of parliament individually, without which they cannot discharge their functions, and which exceed those possessed by other bodies or individuals. Even though a part of the law of the land, it is to a certain extent, an exemption from the ordinary law of the land. " A more contemporary definition of parliamentary privilege is one that has been developed by the report of Joint Committee on Parliamentary Privileges in the United Kingdom, according to which, "Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum

[130] See. Herbert Lee Williams, Newspaper *Organization and Management,* 5th Edn., page 347.130

for expressing the anxieties of citizens would be correspondingly diminished"[131].

Article 105(1) provides freedom of speech in Parliament with an assurance that there would be no legal action for defamation even if what was said was not relevant to the business of the House. There will be no liability for anything said or any vote given by him in Parliament or any Committee thereof. Under Article 105(2), there will be no liability in respect of publication of any report, paper, votes or proceedings by/or under the authority of either House. The publication without authority is not protected and may incur the contempt liability. Article 194 provides similar privileges for legislators of State Assemblies. The freedom of speech within the legislative house is subject to provisions of the Constitution.

Articles 208 and 211: Article 208 prescribes rules of procedure for legislature and 211 says that a member cannot raise discussion about the conduct of the Judges.

Parliament may define powers, privileges and, immunities until so defined shall be those of that House and its members and committees immediately before the coming into force of Section 15 of 42nd Amendment Act 1976. (Precedents from House of Commons)

List of Privileges drawn from the precedents of House of Commons:

1. Freedom of speech (subject to Articles 118 and 121) (Article 118 prescribe rules of procedure for regulating the conduct of its business). Article 121 says that there shall be no discussion in parliament with respect to conduct of judges of Supreme Court or High Court, except upon a motion for presenting an address to the President praying for the removal of judge.
2. Publication of proceedings.
3. Freedom from Arrest in civil cases. In case of arrest, the Magistrate must send information to Speaker, immediately.
4. Right to exclude strangers
5. Right to prohibit publication of debates.
6. Right to regulate its own Constitution.
7. Right to regulate its own proceedings.

[131] Erskine May, *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament* (now popularly known as *Erskine May: Parliamentary Practice* or simply *Erskine May*) see http://www.sarai.net/publications/readers/04-crisis-media

8. Right to punish for contempt.

The important privileges of each house of parliament, its members and committees may be further explained to be:

i. Freedom of speech in parliament[132].
ii. Immunity to a member from any proceedings in any court in respect of anything said or any vote given by him in parliament or any committee thereof[133].
iii. Immunity to a person from proceedings in any court in respect of the publication by or under the authority of either houses of parliament of any report, paper. Votes or proceedings[134].
iv. Prohibition on the courts to inquire into the proceedings of parliament[135].
v. Freedom from arrest of the members in the civil cases during the continuance of the session of the house and 40 days before its commencement and 40 days after its conclusion[136].
vi. Exemption of the members from liability to serve as jurors;
vii. Right of the house to receive immediate information of the arrest, detention, conviction, imprisonment, and release of a member[137].
viii. Prohibition of the arrest and service of legal process within the precincts of the house without obtaining the permission of the speaker[138].
ix. Prohibition of the disclosure of the proceedings or decision of a secret sitting of the house[139].
x. Members or officers of the house are not to give evidence or produce documents in courts of law, relating to the proceedings of the house without the permission of the house.
xi. Members or the officers of the house are not to attend as witnesses before the other house or a committee thereof or before a house of state legislature or a committee thereof without the permission of the house and they can't be compelled to do so without their consent.
xii. All parliamentary committees are empowered to send for persons, papers, and records relevant for the purpose of the inquiry by a committee. A witness may be summoned by a parliamentary

[132] Art.105 (1) of the Constitution of India
[133] Art. 105(2) of the Constitution of India
[134] Art. 105 (2)
[135] Article 122
[136] Section 135A of the Code of the Civil Procedure
[137] Rules of 220 and 230 of the rules of Procedure and Conduct of Business in Lok Sabha
[138] Rules of 232 and 233 of the rules of Procedure and Conduct of Business in Lok Sabha
[139] Rules of 252 of the rules of Procedure and Conduct of Business in Lok Sabha

committee who may be required to produce such document as are required for the use of a committee[140].

xiii. A parliamentary committee may administer oath or affirmation to a witness examined before it[141].

xiv. The evidence tendered before a parliamentary committee and its report and proceedings cannot be disclosed or published by anyone until these have been laid on the table of the house[142].

Immunity

Do the privileges assume the form of immunity and extend to any activity of members of legislature? Does the media have the right to publish the investigation reports which reveal that MPs are corrupt or could courts prosecute the MPs for bribery?

In July 1993, though the Government was short of majority, it could defeat the no confidence motion 265-251. In February 1996, Ravindra Kumar filed a complaint with the Central Bureau of Investigation (CBI) alleging criminal conspiracy and bribing MPs in 1993 to defeat the no-confidence motion. In March 1996, the CBI registered first information reports (FIRs) against four Jharkhand Mukti Morcha (JMM) MPs. On complaint, the Delhi High Court ordered the CBI in May 1996 to register a fresh FIR to include the name of former Prime Minister P V Narasimha Rao. The former Prime Minister and others alleged to have bribed the four members filed leave petitions in the Supreme Court seeking constitutional immunity under Article 105(2), which provides: "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."

In this case, *P.V. Narasimha Rao vs State*[143], the Supreme Court, in a three-two verdict ruled: "Therefore the bribe taker MPs who have voted in Parliament against no-confidence motion are entitled to protection of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement." It also ruled: "To the bribe giver MPs, the protection under Article 105(2) is not available." The apex court says that the MPs are also under the purview of the Prevention of Corruption Act. Since no prosecution could be launched under the Act without the

[140] Rules of 269 and 270 of the rules of Procedure and Conduct of Business in Lok Sabha
[141] Rules of 272 of the rules of Procedure and Conduct of Business in Lok Sabha
[142] Rules of 275 of the rules of Procedure and Conduct of Business in Lok Sabha
[143] AIR 1998, SC 2120

sanction of the competent authority and as there was no such authority in the case of MPs, the Supreme Court said that Parliament should name the competent authority with due expedition. However, no action was taken by Parliament in this regard.

Thus in this case it was held that the privilege of immunity from courts proceedings in Article 105(2) extends even to bribes taken by the Members of Parliament for the purpose of voting in a particular manner in Parliament. The majority (3 judges) did not agree with the minority (2 judges) that the words in respect of in Article 105 (2) mean arising out of and therefore would not cover conduct antecedent to speech or voting in Parliament. The court was however unanimous that the members of Parliament who gave bribes, or who took bribes but did not participate in the voting could not claim immunity from court proceeding's under Article 105 (2).

The National Commission for Review of Working of Constitution recommended in 2002 that Article 105 be amended to clarify that "immunity enjoyed by Members of Parliament under parliamentary privileges does not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Corrupt acts would include accepting money or any other valuable consideration to speak and/or vote in a particular manner. For such acts, they would be liable for action under the ordinary law of the land."

Media's sting leading to expulsion of MPs

On December 12, 2005, eleven MPs, ten from the Lok Sabha and one from the Rajya Sabha belonging to mainstream political parties (six from the Bharatiya Janata Party (BJP), three from the Bahujan Samaj Party(BSP), and one each from the Congress and the Rashtriya Janata Dal) were shown in a sting operation on a private TV channel (Aaj Tak) being paid for raising a question in parliament. When Lok Sabha expelled its members, such a member challenged the action before Supreme Court, which served a notice to the lok sabha speaker on January 16, 2006. The court also referred the matter to a constitutional bench of five judges. The then Lok Sabha speaker, Somnath Chatterjee called an all-party meeting on January 20, 2006. It was unanimously decided in the meeting that it was the privilege of the house to take disciplinary action against its own member. Expulsion from the house was very much within that disciplinary action. It was further held that the speaker of the Lok Sabha was the sole custodian of the rights and privileges of the house and, hence, not answerable to the judiciary for his

role in that capacity. In January 2007 the Supreme Court upheld[144] the Parliament's authority to expel the members for their wrongful conduct. The five-judge bench headed by Chief Justice Y K Sabharwal rejected the contention that Parliament had no constitutional power to expel its members.

Media and Privilege Issues:

During the anti-corruption agitation by Anna Hazare in September 2011, Film Actor, Mr. Om Puri described India's Parliament as largely made up of "uneducated bumpkins". Former Indian Police Service officer, Kiran Bedi dwelt on the duplicity of politicians in a manner that would have done a professional stand-up comic proud. Both speeches were widely telecast by news channels. Some furious MPs demanded that Puri and Bedi be charged under powers vested in Parliament by Article 105(3) of the Constitution with breach of privilege—a potentially punishable offence where Parliament is both the accuser and the judge. Disagreeing with this demand Swapan Das Gupta, MP, has narrated several past incidents of critical remarks against Parliamentarians[145]. 'In 1981, the Times of India was referred to the Privileges Committee for an article in which the author claimed that "Dacoits, smugglers and bootleggers are now honoured members of legislatures." The publication escaped censure and possible punishment because the Rajya Sabha Chairman cleverly noted that the claim was not a libel of any particular MP or any House but "a libel in gross". In August 1986, MPs were agitated by the assertion of Acharya Rajneesh (Osho) that "MPs are mentally under-developed. If investigations are made they would be found to have (a) mental age of 14." The Rajya Sabha Chairman deflected the problem by stating that "It is inconsistent with our dignity to attach any importance to the vituperative outbursts or irresponsible statements of a frustrated person." God men, he said by way of a parting shot, should leave good men alone'[146].

The privileges are the weapons in the hands of legislature against any interference from any estate including the fourth estate. The law of privileges affects the press and media. They may be either liable for breach of privilege or contempt of House. The media persons may confront the following problems.

1. Violation of any of the rules of procedures framed by the House.

[144] http://indiankanoon.org/doc/1459279/ Rajaram Pal v Hon'ble Speaker of Loksabha

[145] see The Telegraph, September 2, 1981 http://swapan-dasgupta.blogspot.in/2011/09/fiercely-on-guard-parliamentary.html

[146] Ibid.

2. Breach of any privileges of legislators
3. Publication of comments or other statements which undermine dignity of the House or shake the confidence of the public in legislature, which can be punished as contempt of house.

Parliament has right of prohibition or expunction of any words, of the publication of proceedings. Under Rules 380-1 of the House of People and Rules 221-2 of the Council of States the Presiding Officers have been given power to expunge objectionable words or unparliamentary expressions.

Article 105(2) as discussed above provide absolute immunity to legislators to speak in the House, the media has a qualified privilege to report or publish the same under protection from Article 361A, which was added in 1978. If the report was fair and accurate, though brief, the reporting of parliamentary proceedings is protected by this Article. Such protection was earlier available under Parliamentary Proceedings (Protection of Publication) Act 1956, which was repealed during Emergency. This Act provided protection if a report published on the proceedings of the Legislature is substantially true, is for public good and is not actuated by malice. Orissa state provided such a protection by 1960 Act[147]. As Mrs Indira Gandhi repealed the 1956 Act, the protection was removed. The Janata Party Government amended the Constitution and added Article 361A to give Constitutional protection to publication of proceedings of Parliament or any state legislature. Immunity offered by Article 361A would be available to the press even if the speech or other material forming part of the proceedings in the House is liable under sedition, under Official Secrets Act, or conspiracy to deceive, or defamation or any other offence under the Indian Penal Code. If a member's speech in the legislature scandalizes the functioning of court of law, no proceedings for contempt of court can be initiated by the Supreme Court or High Court because of the expression 'any proceedings in any court in Article 105(2) or 194(2) would confer immunity from 'proceeding' for contempt of court as well. Such immunity cannot be available if such a speech is published outside the House.

Article 361A provides qualified privilege to media for publishing the brief, accurate and fair reporting of the proceedings, but it will not immune the media from the liability under contempt of House in case of breach of privilege by the media. Article 361A is not an exception to the immunity guaranteed to the legislators under Article 105(3) and 194(3).

[147] Orissa Legislative Assembly (Protection of Publication) Act, 1960

In case of *MSM Sharma v S,K.Sinha*[148], (known as Searchlight case) the editor of Search Light newspaper published an expunged remark from the proceedings of Bihar Assembly for which a notice for breach of privilege was issued. The Editor approached the Supreme Court under Article 32 contending that the notice of action under breach of privilege violates his fundamental right under Article 19(1)(a) and also interferes with the his personal liberty under Article 21, if arrested in pursuance of the privilege motion. The Supreme Court with majority opinion ruled that the Assembly had the right to claim the said privilege under Article 194(3) of the Constitution as was enjoyed by the House of Commons. The Supreme Court also held that the provisions of clause (2) of Article 194 indicate that the freedom of speech referred to in clause (1) is different from the freedom of speech and expression guaranteed under Article 19(1)(a). Both Articles 105(3) and 194(3) are constitutional law and not ordinary law made by the Parliament or State legislatures and that therefore, they are as supreme as the provisions under Fundamental Rights. In case of conflict between Part III and Articles 105(3) and 194(3), one has to read that Article 19(1)(a) is subject to the latter part of Articles 105 or 194. The provisions of Article 19(1)(a) are general in nature and have to yield to the special provisions of the Constitution under Articles 105 and 194. Thus the Editor lost the case and privileges of the Parliament was held supreme compared to the fundamental rights of a citizen. Justice Subbarao expressed his dissent in this case and stated that House of Commons had no privilege to prevent the publication of the correct and faithful reports of its proceedings save those in the case of secret sessions haled under exceptional circumstances and had only a limited privilege to prevent malafide publication of garbled, unfaithful and expunged reports of the proceedings.

Thus in this *Searchlight* case, free speech was subordinated to the privilege power over the powerful dissent of Justice Subba Rao.

If the press makes any comments casting aspersions on the character or proceedings of a house, it could be a breach of privilege and contempt of house. The Hindustan, a Hindi daily, in its issue dated 2nd June 1967 made an editorial comment on the discussion held in Rajya Sabha over the Hazari Report. The caption of editorial was "Baseless, Meaningless and Improper". The Editorial took objection to certain allegations made against Birlas on the floor of the house while discussing the Hazari Report, tabled on the floor. The comment in

[148] AIR 1959 SC 395

Editorial reads as follows: "The question is whether the absurdity, venom, character assassination and thoughtlessness which was given vent to on the floor of Parliament by making Hazari Report as the basis thereof, was in accordance with the dignity of the Parliament and its members". The Privilege Committee of Parliament took the view that the said editorial contained reflections on the character and proceedings of the Parliament and on the conduct of the House. The editor tendered an unqualified expression of regret and thus no action was taken by the Committee[149].

Casting aspersions on the Committee of the House also can be taken as contempt of House. The Financial Express, Bombay wrote an article casting aspersions on the committee of the Public Undertakings of Lok Sabha, which was held to be a breach of the privilege of the House[150].

The Blitz was involved in a Breach issue for its comments in the newsweekly dated 15th April 1961 ridiculing the speech of Sri J. B. Kripalani, a member of Lok Sabha. The comment was published along with the photograph of Kripalani, under which the caption was "Kripaloony". The report called him "senile" and a "bazar baffoon". The Delhi Correspondent of the News weekly Mr A Raghavan, dispatched a report characterizing speech of Kripalani as "lousiest and cheapest speech ever made since he was elected to Parliament". The Committee of Privileges took a serious note of these comments and issued notice to the Editor and Delhi correspondent. The journalists did not turn up. The Editor wrote to the Committee claiming that the comment was 'fair'. The Committee viewed it as personal attach on the individual member and there was casting of an aspersion on the member based on his speech and conduct in the house and disagreed with the contention that it was a fair comment. The Committee held both the editor and the Correspondent guilty of committing breach of privilege and contempt of house.[151]

There can be some more instances of breaches of privilege. They are

1. Publishing any reflection upon a member relating to his capacity as a member of the House.
2. Premature publication of motions tabled before the house
3. Premature publication of proceedings of a committee of a House.

[149] XII, Privileges Digest, No. 2 p 105 (1967)
[150] XII, Privileges Digest, No.2 p 35-36.
[151] Jain M.P. Parliamentary Privileges and the Press, 1984, pp 66-67

4. Publication of document of paper presented to a Committee before the Committee's report is presented to the House.
5. Report or the conclusions arrived at by a Committee ought not to be published, disclosed or referred to the press before the same are presented to the concerned house.
6. Misreporting or misrepresenting the proceedings of the House
7. Misreporting or misrepresenting the speech of a member of the house.
8. Comments diminishing the dignity of the House or undermining the foundation of the parliamentary system of government.
9. Casting aspersions on the impartiality of speaker.
10. Reporting proceedings of secret session of legislature
11. Publication of expunged portions of speech.

Privilege Committee sits and adjudicates the complaints or notices referred to it by the House, when members raise or bring it to the notice of Speaker or Chairman by way of notices. If those notices are admitted by the Speaker or Chairman, they will be referred to the Privileges Committee which conducts an inquiry into it and gives a report of decision. The newspapers generally raise the criticism that the principles of natural justice are not followed in ascertaining whether there is in fact the breach of privilege or not. The Privilege Committee can impose various kinds of punishments for breach of privilege and Contempt of House. They are:

1. Admonition and Reprimand: In admonition, the offender is asked to attend at the Bar of the House, and then he is rebuked by the speaker. In Reprimand the offender is brought to the House by force and admonished. Blitz editor Karanzia was reprimanded[152].
2. Apology: An unconditional apology of the offender may convince the Committee and exempt the offender from contempt.
3. Exclusion from Press Gallery: If the contemner is the accredited journalist with a card to attend the press gallery, he can be excluded from the gallery.
4. Imprisonment: If the offenders refuse to tender unconditional apology or do not respond to summons to attend the Bar of the House, the Committee may resort to impose imprisonment. Keshav Singh in 1965 and Ramoji Rao in 1984 were awarded the imprisonment. But the Supreme Court intervened and protected the fundamental rights of these 'offenders' who were held liable for breach of privileges and contempt of House.

[152] Basu DD, Law of Press in India, 1980, p 200

The Press Council of India and Second Press Commission recommended that the House should exercise this authority for imposing punishment on media persons or citizens who aired their criticism against the legislators, very sparingly in exceptional circumstances where it is satisfied that such a comment obstructed the proceedings of the house and finds it essential to provide reasonable protection to the members.

Fair defence

The Committee of Privileges and on its recommendation the legislative House exercises an adjudicatory function in deciding whether a particular person or his comment would be construed as contempt of House or not. Thus it is implied that whenever a penal power is exercised the due process and other principles of natural justice have to be followed. It has a special obligation to discharge its functions with a judicial approach and in a non-political or non-partisan manner because the committee is acting as a judge in its own cause. The procedure of the committee ought to conform with the canons of natural justice. It is essential to give a full and fair opportunity to defend oneself and explain to the person who is arraigned before the committee for breach of parliamentary privilege. Such decisions cannot be taken at the behest of the mentors or at their whims and fancies. The Courts have power to look into whether natural principles of justice were followed before imposing imprisonment or not.

Reasonable Opportunity

The Second Press Commission expressed a well considered opinion in the following terms: 'We are of the view that the rules of business of the House of Parliament and State Legislature in India dealing with the procedure for taking action against alleged breaches of privilege etc, should be reviewed and necessary provisions incorporated therein to provide for a reasonable opportunity to alleged contemnors to defend themselves in the proceedings for breach of privilege…". In the absence of codification of privileges, such defences are not made available to journalists and political rivals in the incidents similar to Tamil Nadu Assembly's recent sentencing process.

The Press is often called an extension of Parliament. It conveys to the people the substance of Parliamentary legislation and discussion and keeps the people informed of what is happening in the Parliament.

Though what appears in the Press may influence the Members and provide them with necessary background, the material itself does not

form an authentic record of facts and exclusive reliance cannot be placed by a Member of Parliament on the matter as reported. Thus, it has been ruled by successive Presiding Officers that questions, motions and other notices which are merely based on Press reports may not be admitted. The Member may be required to produce some other primary evidence on which his notice is based.

Freedom of the Press has not been expressly provided for in the Constitution, but is implicit in the fundamental right of the "freedom of speech and expression" guaranteed to the citizens under Article 19(1)(a) of the Constitution. It has been settled by judicial decisions that freedom of speech and expression includes freedom of the Press.

The draw back is that no journalist, be it the editor, reporter or columnist, can function in isolation. The political support is always there. The media has become the mouthpiece of the political party and the weapon to get over another.

When Homi Mistry of the Blitz was ordered to be arrested by the legislature, the Supreme Court issued an injunction against arresting him. The Court held that constitutional due process was not followed in this case[153].

Sanjeeva Reddy Case:

The speaker of Lok Sabha, Mr N. Sanjeeva Reddy[154] has criticised the observations of Tej Kiran, who was the follower and admirer of Jagadguru Shankaracharya Swamy of Goverdan Peeth Puri. It was reported that Shankaracharya supported untouchability and walked out while National Anthem was played. On this, Mr Sanjeeva Reddy, Y B Chawan and others made some strong remarks, which were complained to be defamatory by Tej Kiran. The High Court rejected the plaint of Tej Kiran claiming Rs 26,000 as damages from Sanjeeva Reddy and others for making defamatory remarks. The Supreme Court ruled that parliament has complete immunity to make fearless remarks on any matter and the courts had no say in the matter.[155]

Ramoji Rao's Case:

The Editor of Eenadu, daily Newspaper was summoned by the Andhra Pradesh Legislative Council for reporting a proceedings of the

[153] Homi D. Mistry vs Shree Nafisul Hussan on 16 November, 1956, (1958) 60 BOMLR 279, http://indiankanoon.org /doc/790712/?type=print

[154] Tej Kiran Jain v.N. Sanjiva Reddy (1970) 2 SCC 272:AIR 1970 SC 1573

[155] AIR 1970 SC 1573

Legislative Council under a heading "Peddala Galabha" (=Elders Commotion suggesting that the elder members of council behaved in a strange manner) on March 9, 1983. Considering this as a breach of privilege and contempt of House, Mr. Ramoji Rao, Editor was asked to attend the Bar of the House to receive admonition. The Editor approached the Supreme Court on the show cause notice issued by Legislative Council. The Supreme Court directed interim stay on the operation of the show cause notice. The Chairman of the Council directed the Commissioner of Police to produce the editor before the House. The Supreme Court issued another direction restraining the Commissioner of Police from causing arrest. Instead of arresting the Editor, the Commissioner of Police handed over Council Secretary's communication. The Chairman directed its office not to receive any communication, notice or summons from Supreme Court. The Council was dominated by the Congress members, while in the Assembly the Telugu Desham was having majority and in power. The Chief Minister N.T.Ramarao asked the President to refer the issue to the Supreme Court for advise as the Legislature and Judiciary were on confrontation. The Council passed another parallel resolution requesting the President to ignore the letter of the Chief Minister. The Governor prorogued the Legislative Council to avoid further confrontation between two constitutional estates on the issue concerning fourth estate. Meanwhile the Legislative Assembly of the Andhra Pradesh resolved to abolish the Legislative Council even before the controversy was settled in a different manner.

Assembly's order of Imprisoning Journalists in Tamil Nadu

A Tamil Nadu case on this subject is important. On the 7th November 2003, the Tamil Nadu legislative assembly accepted the findings of its Privileges Committee that the newspaper's editorial of 25th April 2003 affected the entire functioning of the assembly besides amounting to contempt of the House, and therefore sentenced the newspaper's editor, executive editor, publisher, chief of bureau and the writer of that editorial to 15 days simple imprisonment. Another journal 'Murasoli's' editor and others were also similarly charged and ordered to be imprisoned for criticising the Chief Minister and ruling party members. On 10th November 2003 Supreme Court stayed the arrest of the journalists.

Arguments before Supreme Court

This controversial attitude of Tamil Nadu Assembly has ensued interesting arguments before the Supreme Court. Referring to the extent and scope of judicial review, Senior Advocate Harish Salve argued that the question here was whether the power of the legislature under Article

194 (3) could be higher than the powers conferred on citizens under Article 19 (1) (a) and whether the legislature could enforce penal powers on the citizens without giving them sufficient opportunity to be heard. He cited various decisions of the apex court that had clearly held that the power of privilege of the Legislature would have to be harmonised with the fundamental rights of citizens. He argued that the powers of the State Legislatures under Article 194 of the Constitution must be read in harmony with fundamental rights as envisaged in Article 19(1)(a) (freedom of speech and expression) and Article 21 (protection of life and personal liberty) and could not be construed as authorising any authority of the State to arrest and detain a person.

Mr. Salve contended that the resolution was based on a complete misreading of law and facts by the House, however widely one were to construe the privilege of the House. He submitted that no person who had understood constitutional law correctly could ever come to a conclusion that the articles and the editorial were intemperate and amounted to lowering the dignity or breach of privilege of the House. He argued that the articles merely described the utterances of Chief Minister Jayalalithaa inside the House and these in no way interfered with the proceedings of the House, warranting any punishment for the journalists. Mr. Salve argued that the adjectives used by media could not be a breach of privilege. Appearing for Murasoli Selvam, senior advocate Kapil Sibal contended that his client's newspaper had merely reproduced the editorial that appeared in *The Hindu* and this could not be construed as interference with the proceedings of the House.

"If it is a criticism of a political party, it does not amount to breach of privilege," he said. On the question of cancellation of passes to cover the proceedings in the Assembly for the newspaper as a whole, Mr. Sibal said that the House could not do it as it would be in violation of the fundamental right to equality guaranteed under Article 14.

The Chief Minister, Jayalalithaa, has filed defamation case against *The Hindu* for an article that appeared in its issue dated April 13, 2003 under the caption "People's Court only way out for Opposition". This is the same article for which a privilege issue was raised in the Assembly. Although the Privileges Committee recommended seven days simple imprisonment, the issue was not pressed because Ms. Jayalalithaa told the Assembly that as the matter concerned her, she did not want to insist on any action.

Rajiv Dhavan's Analysis

One Lok Sabha member took part in proceedings of the Maha Moorkh Mandal (Super Stupid Collective) in 1966. Other members felt it was insulting. When they wanted to issue privilege notice, the Lok Sabha refused. Rajiv Dhavan, senior advocate and columnist, in his article[156] said: The Constitution of 1950 gives legislatures (i) virtually unlimited speech powers, (ii) immunity from anything said and done or spoken in legislative proceedings, including, after the Supreme Court's decision in the Jharkhand MPs' case (1998), for accepting bribes for voting, (iii) such privileges as those in 1976. The third category of privileges theoretically includes unlimited, uncodified privileges. Faced with a privilege case, courts do not interfere; and, in any event, do not sit in judgment over any irregularity where the legislature exercises this awesome power ignoring even its own procedure. Parliament must have internal autonomy over its own proceedings, protect its own free speech and possess the power to discipline members and others who directly interfere with its working. The problem arises when legislatures act arbitrarily against outsiders, including the Press and other media, who criticise what is said and done in the legislatures. Scenes such as those in the Uttar Pradesh Assembly and other legislatures, where microphones were thrown about, are painful testimony to what actually takes place. No sane public can ignore what happens in India's legislatures. Responsible media or Press cannot but discuss and comment on these legislative happenings.

He wrote that when Sir John Eliot was penalized in 17th Century by the Court of King's Bench for seditious speech in House of Commons, the concept of privilege originated. The House of Lords reversed the conviction on the ground inter alia that the words spoken in Parliament should be judged therein. The emergence of privilege was in the context of conflict for supremacy between the royal dynasty and people's representative houses in historic phase of evolution of rule of law in Great Britain.

The Indian socio-cultural backdrop is totally different. The Nationalist movement fought against the British rule was for emergence of a free country, where the conflict was between the fight for independence and foreign rule. The privilege that was necessitated in UK crept into the Constitution under Article 105(3) as a temporary measure, till the Parliament codified the privileges. Until so defined, the privileges

[156] Rajiv Dhawan, Privilege Unlimited, November 14, 2003, http://www.hindu.com/thehindu/2003/11/14/stories/2003111401321000.htm

'shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty Fourth Amendment) Act, 1978'. To understand what exactly the privileges prevalent at the commencement of 44th Amendment were, we need to look back to 1950, where in the Constitution it referred to privileges of the House of Commons in UK at that time. Even if this temporary provision which was to survive until the parliament decided its privileges only is considered strictly, the privileges prevalent at that time in UK only would apply. The House of Commons stopped using the power to commit people to prison for contempt of House in 1880. The Joint Parliamentary Committee recommended in 1999 that Parliament's power to punish people with imprisonment should be abolished. The power not used for more than 123 years even in the House of Commons was used against a newspaper established 125 years ago, through the interpretation of Article 105(3). It is totally illogical and undemocratic and hence unacceptable especially when the current opinion in England is not even in favour of retaining the word 'privilege'.

NCRWC recommends delimiting privileges:

The National Commission to Review the Working of the Constitution, in 2002 recommended that the members of Parliament have the same rights and privileges as ordinary citizens except when they perform their duties in Parliament. The privileges do not exempt the members from their normal obligations to society. (Report Para 5.15.2, Page 112). Parliament did not find time to codify its privileges and immunities into law. When this was debated in 1994, most MPs opposed to codification.

Canada, Australia and New Zealand, whose parliamentary privileges also could be rooted to the Bill of Rights (1689) have enacted laws defining parliamentary privilege. In the United Kingdom, report by a Joint Parliamentary Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead, has become the de-facto rule book on the subject. The Nicholls Report defined parliamentary privilege as "the rights and immunities which the two Houses of Parliament and their members possess to enable them to carry out their parliamentary functions effectively." It did not list privileges. Instead, it specified the functions legislative privilege sought to achieve—passing laws, holding the executive accountable and voicing the concerns of ordinary citizens. Protecting the reputation and dignity of Parliament was missing from the list. It is significant to note that the Nicholls Report suggested doing away with the right of the House to punish non-members. It suggested that disputes could be heard by the High Court under existing laws of libel

and defamation. Long before this report was published, the UK stopped using Parliamentary privileges to the detriment of journalists and other ordinary persons. It was last used when a non-MP was committed by the order of the Commons in 1880.

The conflict between the judiciary and the Parliament would continue so long as the uncertainties and vagueness prevail over the parliamentary privileges. In the process, the media and their freedom will suffer and wherever the claims or grounds of the editor or publisher are legitimate, the judiciary has come to the rescue of freedom of press using its power of judicial review. Interference with the freedom of citizen, either for expression of opinion or criticism should be bare minimum. Freedoms are more fundamental than the privileges of Parliament.

"It does not require much reflection to see that it is through courts that a Government establishes its authority and it is through schools that it manufactures clerks and other employees. They are both healthy institutions where the government in charge of them on the whole just, they are deathtraps when the Government is unjust."

- Mahatma Gandhi

2. MEDIA & JUDICIARY

Contempt of Court

The Media freedom can be curtailed when it tends to insult the state under Sedition which is a crime under I.P.C., if it results in loss of reputation of an individual i.e., defamation, and when it generates contempt of judiciary i.e., the contempt of court. Thus the Constitution incorporated grounds on which reasonable restrictions can be imposed on the fundamental rights of citizen under 19(2) which includes Contempt of Court. Among the varied classes of contemnors, the editors, reporters or writers, publishers and printers of newspapers frequently fall foul of the law. The fact that needs to be realised is that the press has no privilege, whatsoever, to scandalize any person in any manner without making itself accountable to the law. "The Liberty of the Press, says Lord Mansfield,[157] "consists in printing without any previous license, subject to the consequence of law". In the case of ***District Magistrate, Kheri v. M. Hamid Ali Gardish,***[158] the Division Bench of the Oudh Chief Court observed:

"The special privilege of the press is a time-worn fallacy and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the court against any person".

We might say further that so far from there being any special privilege of the press we are of opinion that there is on the other hand a special responsibility affecting that editor of a newspaper, namely that he is duty bound always bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of public as to prejudice the course of litigation[159].

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[157] *R.V. Dean of ST Asaph*, 3 T.R. 431

[158] 1940 Oudh 137

[159] *Hakim Aari Nasir Ahmad v. anis Ahmad Abbasi*, 1941 Oud

The Media should have freedom to criticize the activities of public men belonging to one party or the other. But the matter would still be open as to the extent the courts can go to curb the freedom of criticism in the summary proceeding for contempt. If there is a freedom of criticism it has to be real and, indeed, to be encouraged within, of course, the permissible limit of fairness. It should inevitably be so done as a deterrent to political levity[160].

There is no doubt that the Media is free to criticize a system. A free Media stands as one of the great interpreters between the government and the people. However, in the garb of criticism, the press cannot commit contempt of court[161].

Meaning:

The simple literal meaning of contempt is disgrace, scorn or disobedience; whereas, in law, it means an offence against the dignity of a court, or a legislative body. The purpose of the contempt proceedings is to safeguard the dignity of the court and the administration of justice. It is quasi criminal in nature. It can also be said to be partly civil, where the object is to force the contemnor to do something for benefit of the other party, and partly criminal by way of punishment for a wrong to the public at large as the contemnor interfered with the majesty of the court, rather than to an individual. At the same time the journalists or people have the following rights with reference to the courts activity.

1. The right to information about court proceedings.
2. The right to participate in respect of matters and issues before the courts.
3. The right to free speech irrespective of pending proceedings.
4. The right to evaluate and criticize the working of the courts.

It may not be possible for a journalist to know or conscious of committing the wrong he might be charged with. Inadvertent mistakes and innocent distribution also could invoke the charge of contempt of court. A pressure group in England could ably demonstrate that the law of contempt was being used against journalists who made inadvertent mistakes and innocent distributors who had no cause to believe that the material which constituted contempt of court lay hidden in some of the magazines and newspapers distributed by them[162].

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[160] *State v. Editors etc. of Matrubhumi & Krishak*, AIR 1954 Orissa 149.
[161] *In re Hiren Bose* 1967-68 Cal. W.N. 62
[162] *R.V. Griffith Ex. p. Att. Gen*. 1957 2 A.B. 192.

Generally the journalists think that they can protect the sources of information without disclosing their names and addresses. It is just professional ethics and necessity. There is no legal authority for a journalist to withhold the sources of information. Journalists were also punished for contempt because they refused to reveal the source of their information to tribunals of enquiry. In fact the Code of Criminal Procedure imposes a duty to inform whatever a person knows about a cognizable offence and assist the law enforcing authority.

Sunday Times newspaper brought out the difficulties of children born with congenital deformities as their mothers had taken a harmful drug called thalidomide during pregnancy. When newspaper viewed it as a matter of public interest, the courts and contempt power considered it as stifling discussion on matters of public concern, especially when courts were seized of that matter.

Kinds of Contempt:

There are many kinds of contempt. The chief forms of contempt are insults to judges, attacks upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of courts, witnesses or the parties, abusing the process of the Court, breach of duty by officers connected with the Court and scandalizing the judges or the Courts. The contempt occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disrepute. In this conduct are included all acts which brings the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single judge or a single court but may, in certain circumstances, be committed in respect of the whole of the judiciary or judicial system[163].

Definition:

Section 2 (a) of the Contempt of Court Act, 1971 deals with civil contempt and criminal contempt.

Section 2 (b) – 'Civil Contempt' means willful disobedience to any judgment, decree, order or other process of a Court or willful breach of an undertaking given to a Court.

[163] *E.M.S. Nambudripad, v. T.N. Nambiar,* AIR 1970 SC 2015.

Section 2 (c) The "criminal contempt" means the publication (Whether by words, spokes or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which

i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of any court; or
ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or
iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner Civil contempt consists of disobeying the orders and criminal contempt is about obstructing the administration of justice. There is some degree of overlap between these two kinds of contempt.[164]

Criminal contempt is again of three kinds-

1. Contempt in the face of court, i.e., directly interfering with court proceedings;
2. Contempt in relation to specific, imminent or pending proceedings by doing something which interferes with the due administration of justice;
3. Contempt by scandalizing the judges: Regarding the functions of contempt law there can be further reclassification –

    1. Contempt to interfere with the administrative efficacy of the courts "administrative contempt".
    2. Contempt which seek to influence the mind and activities of lawyers, litigants, juries and judges – 'persuasive contempt'.
    3. Contempt which seek to pre-judge an issue and which usurp the adjudicatory function of the courts- 'usurpatory contempt'.
    4. Contempt which seek to scandalize judges or the working of courts- "scandalizing contempt.

It is in the areas of 'persuasive', 'usurpatory' and 'scandalizing' contempt that most of the problems of the press arise. Contempt jurisdiction may not just prevent the press from criticizing the judges and courts, but create different problems for the press.

What is Scandalizing?

Generally the press or media gets into trouble with their comments which scandalize the court or the judicial officer. There are

[164] H. Fisher "*Civil and Criminal Acts of Contempt*", 1956 34 Can. B.R. 121.

several judgments which explained the contempt of scandalization which media is supposed to know so that it can avoid it. Eminent Advocate Fali S Nariman traced the origin of the concept of scandalization. "The origin of the branch of law known as "scandalising the court" was as controversial as was its introduction into British India. It originated from a celebrated dictum of one Justice Wilmot in his judgment of the vintage year 1765 in the Wilkes Case - a judgment which was never actually delivered, but meant to be delivered and later published by Justice Wilmot's son when his father's papers were edited! It was a judgment reserved after argument and when ready to be delivered it was discovered that the writ against John Wilkes was incorrectly titled and since at that time an amendment of the writ, unless consented to, could not be permitted, the case had to be abandoned! This is the somewhat dubious ancestry of that part of the law of contempt known today as "scandalising the court". It is based on a judgment never delivered in a case - a case which had already abated! And remember it was a case against a journalist: the bete noire of all judges all over the world. Our Constitution makes freedom of speech and expression a fundamental right, and the exception to it is the law of contempt, not any law of contempt, but only reasonable restrictions in public interest in such a law. The Contempt of Courts Act does not say that truth cannot be a defence but courts have categorically said, "No, it cannot be a defence." Judges have the last word as to who or what "scandalises" them[165].

Justice Roy has listed them in his book on Contempt of Court.

1. Imputing dishonesty to a judge by stating that he controlled the hearing and manipulating in getting erroneous Judgment from another judge of the same Bench[166].
2. Publishing scandalous matter respecting the court after adjudication calculated to lower the authority of the court and sense of confidence of the people in the administration of justice[167].
3. Allegation that 'justice is sold' or 'justice is auctioned'[168].
4. To say that a judge is a prejudiced judge[169].
5. Reply to a show-cause notice stating that the respondent's experience of court affairs in India is worse and that instead of

[165] Fali S Nariman: A Judge above Contempt, the Indian Express, August 5, 2012.
[166] C.K.Daphtary Vs. P.Gupta AIR 1971 SC 1132: (1971) 1 SCC 626.
[167] B.K.Lala v R.C.Dutt AIR 1967 Cal 153: 1967 Cr LJ 350.
[168] Umed v. Bahadur Singh 1981 Cr LJ NOC 85 (Raj).
[169] B.K.Lala v R.C.Dutt AIR 1967 Cal 153: 1967 Cr LJ 350.

finding his fault, the court should try to find whether it adopted an 'abnormal' course of justice[170].

6. Notice imputing malice, partially and dishonesty to the judge[171].
7. An attack on a judge ascribing to him favouritism in his judicial or official capacity[172].
8. Newspaper article proceeding *inter alia* to attribute improper motives to the judges, having a clear tendency to affect the prestige and dignity of the court[173].
9. Allegation that a particular judge gives judgments or orders always in favour of the clients of a particular advocate[174].
10. Aspersions against magistrate in transfer application about conspiracy to implicate the accused in a false case of theft and acceptance of bribe by him[175].
11. Unwarranted and defamatory allegations touching the character and ability of the judge in an application for transfer of a civil proceeding[176].
12. Allegations against judge in transfer application which are scandalous, scurrilous and made with determined effort to lower the authority of the court[177].
13. Scandalous allegations against Supreme Court judges in affidavit without any basis[178].
14. Charging the judiciary as 'an instrument of oppression' and the judges as 'guided by class hatred, class interests and class prejudices, instinctively favouring the rich and against the poor', since it was clearly an attack upon judges calculated to raise a sense of disrespect and distrust of all judicial decisions, weakening thereby the authority of law and law courts[179].

With regard to civil contempt also willful act alone would be punished. A simple disobedience to a order of the court would not constitute contempt unless it is willful. In a decision of the Calcutta High Court in a Letters Patent Appeal in *Dulal Chandra bher v. Sukumar*

[170] State v Ram Dass AIR 1969 Cr LJ 1380.
[171] Rachapudi v Advocate General AIR 1981 S 755: (1981)2 SSC 577: 1981 Cr Lj 315.
[172] Mohd. Vamin v Om Prakash 1982 Cr LJ 322 (Raj).
[173] Aswini Kumar Ghosh v Arabinda Bose AIR 1953 SC 75: 1953 Cr LJ 519.
[174] State v Naranbhal 1982 Cr LJ 1982 (Guj).
[175] State v Ravishankar AIR 1959 SC 102
[176] State v Chandrakant 1985 Cr LJ 1716 (MP) (DB): (1985) 2 Crimes 208.
[177] Court v Ajit 1986 Cr LJ 590 (Punj).
[178] Amrik Singh V State (1971) 3 SCC 215
[179] E.M.S. Namboodripad V T.Narayanan Nambiar AIR 1970 SC 2015: (1970)2 SSC 325: 1970 Cr LJ 1670.

Banerji [180], a Division bench held that a contempt is merely a civil wrong where there has been disobediences of an order made for the benefit of a particular party, but where it consisted in setting the authority of the courts at naught and has had a tendency to invade the efficiency of the machinery maintained by the State for the administration of justice, it is public and consequently criminal in nature. A fine distinction was made between civil and criminal contempt in this case as follows:

> The line between civil and criminal contempt can be broad as well as thin. Where the contempt consists in mere failure to comply with or carry out an order of a Court made for the benefit of a private party. It is plainly civil contempt and it has been said that when the party, in those interest the order was made, moves the Court for action to be taken in contempt against the contemnor with a view to enforcement against the contemnor with a view to enforcement of his right, the proceeding is only a form of execution. In such a case there is no criminality in disobedience and the contempt, such as it is, is not criminal. If, however, contemnor adds defiance of the Court to disobedience of the order and conducts himself in a manner which accounts to obstruction to or interference with the course of justice, the contempt committed by is of a mixed character, partaking as between him and the Court of the State, of the nature of a criminal contempt. In a case of this type, no clear distinction between civil and criminal contempt can be drawn and the contempt committed cannot be broadly classed as either civil or criminal contempt. There is, however, third form of contempt which is purely criminal and which consists in conduct tending to bring the administration of justice to scorn and to interfere with the course of justice as administered by the courts. Contempt of this class is purely criminal, because it results in an offence or a public wrong, whereas contempt consisting in disobedience of an order made for the benefit of a private individual results only in a private injury.

Constitutional aspects of Contempt of Court:

The power to punish the contempt was been inherent in the Courts of Record from a long time. This power is recognized by Article 129 (power of Supreme Court to punish for contempt) and Article 215 (power of High Courts to punish for contempt) of the Constitution of India.

In *Vijay kumar v. D.I.G. of Police*[181], it is observed: "…so far as superior courts are concerned, the power to punish in contempt action is inherent in them by the very nature of the functioning of the court itself. This principle is reflected in the edage that every court of record has

[180] AIR 1958 Cal. 474, at 477.
[181] 1987 Cr.,L.J. 2018 Kerala High Court

inherent power to punish the contempt of it. This principle has been rigorously and consistently recognized and followed from times immemorial by the common law of England."

In yet another significant case, *Sukhdev Singh v. Chief Justice S. Teja Singh and Judges of Pepsu High Court* [182], it was said: "…Contempt jurisdiction springs not from any enactment as such nor from the provisions of the Contempt of Courts Act, 1971, but is a necessary adjunct of all the Courts of Records which has been consistently so held by judicial precedents and finally recognized by the constitutional provision in Article 215 and the statutory provision in Contempt of Court Act 1971."

Contempt of Court is covered by Entry 77 of List I (Union List) and Entry 14 of List III (concurrent list) of Schedule VII of the Constitution. Entry 77 is set out as follows:

> 77: Constitution, organization, jurisdiction and powers of the Supreme Court (including Contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court. Entry 14 is set as follows: 14 : Contempt of Court, but not including contempt of Supreme Court This is no applicable to state of Jammu and Kashmir, over which only Supreme Court has jurisdiction).
>
> Article 129: "The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself".

The object of this power to punish is not the protection of the Judges personally from imputations to which they may be exposed as individuals,[183] but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired even on the ground of interference with the due course of justice the Court does not proceed by way of contempt "unless there is real prejudice which can be regarded as substantial interference" as distinguished from a mere question of propriety".[184]

> Article 215: Every High Court shall be a court of record and shall have all the powers to punish for contempt of itself.

[182] AIR 1954 SC 186

[183] *Brahma Prakash v. State of U.P.* 1953 SCR 1169 AIR 1954 SC 10.

[184] *Rizwan-ul-Hasan v. State of U.P.* 1953 SCR 581.

> Article 211: No discussion shall take place in the Legislature of a State with respect to the conduct of my judge of the Supreme Court in the discharge of his duties.
>
> Article 212: 1.The Validity of any proceeding in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure. 2. No officer or member of the legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him those powers.

As the independence of judiciary is a basic characteristic of the constitutional structure in India, the provisions of Article 211 are to the effect that no discussion shall take place in the Legislature of a State with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his official duty.

Upholding dignity of courts:

It is relevant to quote here the observation of the Press Commission. "The Indian Press as a whole has been anxious to uphold the dignity of courts and the offences have been committed out of the ignorance of law relating to contempt than to any deliberate intention of obstructing justice or giving affront to the dignity of courts. As stated before instances when it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised have been extremely rare and we do not think that any change is called for either in the procedure or in the practice of the contempt of court jurisdiction exercised by the High Courts.[185]

According to Section 2(c) of Contempt of Court Act, following activities be considered as criminal contempt.

1. Publications which are intended to or are likely prejudice fair trial or conduct of criminal civil proceedings.
2. Publications which prejudge issues in pending proceedings.
3. Publications which scandalize or otherwise lower the authority of the court.
4. Acts which interfere with or obstruct persons having duties to discharge in a court of justice.
5. Acts which interfere with persons over whom court exercises a special jurisdiction.

[185] Report of the Press Commission (1954), I 408-488.

6. Acts in abuse of the process of the court.
7. Acts in breach of duty by the persons officially connected with the court or its process. Hurling shoes at a Judge to overawe him is held to be criminal contempt in *R.K. Garg, Advocate v. State of Himachal Pradesh.* [186]

Elements constituting criminal contempt.

In case any passage in any article in a newspaper or pamphlet is alleged to have been seized by the court and the charge was against the editor reporter or author, it must in fact refer to the court or the judge. If it does not it is not a criminal contempt. In *Guruvayur Devaswom Managing Committee v. Pritish Nandy*[187], Pritish Nandy wrote

> ….but, when sleuths descended on Guruvapur, they found that the wily high priest had tapped his political connection to secure anticipatory bail.

It was held that on the plain and proper reading of the passage it could not be said that the passage had any reference to a judge or court. The passage certainly puts the wily priest and his political connections in bad light but it does not scandalize the court or a judge, the court held.

Defamation of a judge is not contempt. It is to be noticed that mere level of defamation on a judge, other than defamatory attack calculated to interfere with the due course of justice is not contempt. Only when a publication is calculated to interfere with due course of justice or proper administration of law, it is punishable as contempt.

The press and contempt of court:

As the media generally involves in reporting, writing, criticizing, analyzing the activity of every system including the judiciary, it is necessary to deal with the contempt regarding the press publications. The freedom of the journalist is an ordinary party of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but apart from the statute law, his privilege is not other and no higher. The responsibilities which attach to his power in dissemination of the printed matter make him more careful. But the range of his assertions, his criticism or his comments, is as wide as, and no wider than that of any other subject. No privilege attaches to his position. [188]

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[186] AIR 1981 SC 1382.
[187] 1987 Cr.L.J., 192. D.B.,
[188] *State v. Editors etc., of Matrubhumi and Krushak* AIR 1954, Orissa 149.

Scandalizing the court, commenting on the proceedings of a pending criminal case reflecting on the judge, the parties, their witnesses, or writings affecting the proceedings of a pending case which has a tendency to prejudice the public, criticism of the conduct of a judge are some of the publications which amount to contempt. In cases of speeches, sermons or photographs also these principles are applicable. Here are some of the examples:

"*The Bengalee*" case: Writing for Independence

In our country, one of the early cases of contempt was against Surendranath Banerjee, owner and publisher of a paper called 'the Bengalee'. An article appeared in his paper containing the following remarks against Mr. Justice Norris:[189]

"The judges of the High Court have hitherto commanded the universal respect of the community. Of course, they have often erred and have often grievously failed in the performance of their duties, but their errors have hardly ever been due to impulsiveness or to the neglect of the commonest considerations of prudence or decency. We have now, however, amongst us a judge who, if he does not actually recall to mind the days of Jeffreys and Scroggs, has certainly done enough within the short time that he has filled the High court Bench to show how unworthy he is of his high office, and how by nature he is unfitted to maintain those traditions of dignity, which are inseparable from the office of the judges of the highest court in the land. From time to time we have in these columns adverted to the proceedings of Mr. Justice Norris, but the climax has now been reached, and we venture to call attention to the facts, as they have been reported in the columns of a contemporary. The Brahmo Public Opinion is our authority, and the facts stated are as follows:

> Mr. Justice Norris is determined to set the Hugli on Fire. The last act of Zubburdusti on His Lordship's pat was the bringing of a *Salagram* (a stone idol) into Court for identification. There have been very many cases both in the late Supreme Court and the present High Court of Calcutta regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged onto court. Our Calcutta Daniel looked at the idol, and said it could not be a hundred years old. So Mr. Justice Norris is not only versed in law and medicine, but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of

[189] *Surendranath Banerjee v. The Chief Justice and Judges of the HIgh Court of Bengal*, 10 Cal. 109 (P.C.).

> Calcutta will tamely submit to their family idols being dragged into court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of justice.
>
> What are we to think of a judge, who is so ignorant of the people and so disrespectful to their most cherished convictions, as to drag into court and then to inspect an object of worship which only Brahmins are allowed to approach after having purified themselves according to the forms of their religion? Will the Government of India take no notice of such a proceeding? The religious feelings of the people have always been an object of tender care with the Supreme Government. Here, however, we have a Judge, who in the name of justice, sets those feelings at defiance, and commits what amounts to an act of sacrilege in the estimation of pious Hindus. We venture to call the attention of the Government to the facts here started, and we have no doubt due notice will be taken of the conduct of the Judge.

It was held that it was a most scandalous and wholly indefensible attack upon Mr. Justice Norris. The Chief Justice thought, that the imposition of a fine would not be sufficient and, therefore, he sentenced Surendra Nath Banerjee to two months simple imprisonment. The printer on account of his imperfect knowledge of the English language was discharged. It was stated that had it not been for the unsatisfactory and qualified nature of the apology and the absence of candid avowal of his guilt, the Court might have imposed a more lenient sentence. However, the journalists like Banerjee and Gandhi wrote with the spirit of nationalism and in support of independence movement. They deliberately questioned the British authority and defied their law. The colonial law was unreasonable and Contempt law being part of that was draconian because it was used to silence the criticism against British Raj.

'Search light' case: Unfair conclusion

The disputed Article was the "Recommendations of Law Commission" by an advocate which criticized judicial administration of Patna High Court with occasional reference to recommendations of Law Commission. The tone of article is observed to be far from respectful. The comments were also made on standard of judges and influence of executive on judiciary. The procedure followed by administration of writ applications and appeals was called "Stultification of justice" and "amusing". The Full Bench held the article being calculated to lower judiciary in public eye and derogatory to judicial independence and

impartiality of High Courts, therefore it amounted to contempt of Court but on apology the editor and printer were discharged.[190]

"The Hindustan Times" case: Misconceived as contempt

Judicial Officers who claimed that they were raising subscription for war work as they were asked to do so by the new Chief Justice, the Editor, the Printer, the Publisher and the correspondent of the Hindustan Times were convicted by the High Court of Allahabad for having committed contempt. The disputed passage was:

> …The judicial officers all over the Province have been, I reliably learn, asked by the new Chief Justice of the Allahabad High Court, who, it is understood, has been requested by His Excellency the Governor for co-operation in war efforts, to raise subscriptions for the was fund…

The above allegation that the new Chief Justice had sent any circular was untrue. The High Court found the respondents guilty of having committed its contempt on the ground that the implication of the newspaper report was that the Chief Justice had done something which was unworthy of a person holding that high office, and that as the head and representative of the High Court he had committed the gross impropriety of forcing. Judicial officers to ask for war contributions from litigants, who notwithstanding that the giving of donations was ostensibly voluntary, were not in a position to refuse.

The Privy Council allowed the appeal and held that the publication did not amount to Contempt of Court. It was observed:

> When the comment in question in the present case is examined it is found that there is no criticism of any judicial act of the chief justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice. It can hardly be said that there is any criticism of him in his administrative capacity, for as far as their Lordships have been informed the administrative control of the subordinate courts of the Province whatever it is, is exercised not by the chief justice, but by the court over which he presides[191].

Lord Atkin further remarked:

> No doubt it is galling for any judicial personage to be criticized publicly as having done something outside his judicial proceedings which was ill-advised or indiscreet. But judicial personages can afford not to be too

[190] In the matter of *Basanta Chandra Ghosh*, AIR 1960 Pat. 430 (F.B.)

[191] *Debi Prasad Sharma v. E.,* 1943 p.c. 202 (204: 70 I.A. 216 : 210 I.C. 111:1943 A.L.J. 527 : 48 C.W.N. 44:46 Bom. L.R. 11:1944 M.W.N. 20: ILR 1944 A11.32.

> sensitive. A simple denial in public of the alleged request would at once have allayed the trouble. If a judge is defamed in such a way as not to affect the administration of justice he has the ordinary remedies for defamation if he should feel impelled to use them. Their Lordships cannot accept the view taken by the court as stated above of the meaning of the comment: The words do not support the innuendo. In the opinion of their Lordships, the proceedings in contempt were misconceived, and the appellants were not guilty of the contempt alleged.

Young India case: Gandhi for public criticism

This is yet another case where authorities used contempt power against the freedom fighters. In this case[192] Gandhi published certain documents in a pending case and also commented on certain civil dissent cases. Gandhi made it a point to argue that the press had a right to discuss questions of public importance and to indulge in public criticism. It is here that the fact that the contempt process was a summary process affording practically no defenses became a convenient advantage for the rulers. Truth was no defense and fair comment was not a permissible plea. Gandhi refused to apologize, though law provided for sever punishment the Judge took a 'political decision' to let off Gandhi with a warning saying that he probably did not know what he was doing. The judges were very keen to silence the comments on pending cases. Gandhi wanted the press to have the right to express matters in public interest.

Gandhi made an apt comment on authority of government as manifested through courts. "It does not require much reflection to see that it is through courts that a Government establishes its authority and it is through schools that it manufactures clerks and other employees. They are both healthy institutions where the government in charge of them on the whole just, they are death – traps when the Government is unjust."[193]

Procedure:

Section 14, Contempt of Court Act 1971 provides for procedure when the offending conduct has been indulged in the presence or bearing of the Supreme Court or High Court. Contempt in the face of the court means a contempt which the judge sees with his own eyes; so that he needs no evidence of witnesses. He can deal with it himself[194]. Section 15 provides how the Supreme Court or the High Court may take action in

[192] In re Mohandas Karamchand Gandhi, AIR 1920 Bom. 175.
[193] M.K. Gandhi, *The Law & The Lawyer*, p. 123.
[194] Lord Denning, *Due Process of Law*.

the case of a criminal contempt, other than a contempt referred in Section 14. Such action in terms of the section, may be taken by the court –

1. On its motion or
2. On a motion made by
   (a) the Advocate-General, or
   (b) any other person with the consent in writing of the Advocate General, and
   (c) in relation to the High Court for the Union Territory of Delhi, the specified law officer or with his consent in writing by any other person.

This section prescribes modes for taking cognizance of criminal contempt by the High Court or Supreme Court for taking action for contempt of its subordinate courts. Supreme Court held that even if the High Court is moved directly by a petition by a private person feeling aggrieved not being the Advocate General, the High Court can refuse to entertain the same to take cognizance on its own motion on the basis of information supplied to it in that petition.

Shiv Shankar Case

In *P.N. Duda v. P. Shiv Shankar*[195]. Duda, an advocate of Supreme Court, drew the attention of the court to a speech made by P. Shiv Shankar, who was Minister of Law, Justice and Company Affairs. The speech delivered before a meeting of the Bar Council of Hyderabad was reported in the newspapers. According to Sri Duda, statements in the speech were made against the Supreme Court, which were derogatory to the dignity of the court attributing to the court with partiality towards economically affluent sections of the people and using language which was extremely intemperate, undignified and unbecoming of a person of his stature and position. After having read the speech in the newspapers, Duda approached the Attorney General and Solicitor General of India for obtaining their consent for initiating a contempt proceeding. Such consent was, however, declined. The court, as it appears, refused to exercise it suo motu powers and dismissed the application.

A non-Congress Chief Minister of Kerala Mr Nambudripad was punished for contempt of court and a Law Minister Shivshankar was left out by the court for almost similar, if not, serious comments against judiciary.

[195] AIR 1988 SC 1208.

Apology:

Section 12(0) deals with the punishment for contempt of Court. It contains a proviso "that the accused may be discharged or the punishment awarded may be remitted upon an apology being made to the satisfaction of the court. An Explanation to this section says "An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bonafide. Thus, in order to be affective, the apology made should be (i) to the satisfaction of the court and should be (ii) bonafide. In Mulk Raj Anand v. State of Punjab [196] it was held that apology being an act of contrition; it should be offered at the earliest opportunity and in good grace. If it is offered at a time when the contemner finds that the court is going to impose punishment, it ceases to be an apology and becomes an act of a cringing coward.

In re Vinay Chandra Mishra[197] is a case where a senior advocate in open court resented the questions asked by a High Court judge, used insulting language and threatened him with transfer and impeachment. He was hauled up for contempt of court by the Supreme Court and found guilty. Court refused to accept the apology tendered by the contemner.

Punishment:

Section 12 prescribes the punishment for contempt of court with simple imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both. In *Narayanan Nambiar v. E.M.S. Namboodripad*[198] it was held that the measure of punishment should depend upon the facts and circumstances of each case. When a statement amounts to scandalizing the court itself, the questions of malice, bonafide, and good faith do not arise. They are all circumstances to be taken into account in the mitigation of punishment. The liberal approach of the Court is to be clearly seen in its appraisal of the total effect of the speech at seminar by then Union Minister for Law and Justice, Mr. Shiv Shankar, who commented:

> "Mathadhipatis like Keshavananda and Zamindars like Golaknath evoked a sympathetic chord nowhere in the whole country except the Supreme Court of India… Anti-social elements, i.e., FERA violators, bride burners and whole horde of reactionaries have found their heaven in the Supreme Court.

The Court said that though at places a little intemperate, the speech does not denigrate the dignity and authority of the Court nor interfere with the

[196] AIR 1972 SC 1197
[197] (1995) 2 SCC 584
[198] ILR (1968) 1 Ker. 384 (FB).

administration of justice. Trying to explain and, perhaps, distinguish EMS Nambudripad's conviction for even less pointed attacks on the apex court, the Supreme Court pointed out that "we must recognize that times have changed in the last two decades" and "there have been tremendous erosion of many values."[199]

Vasudevan Case: Enforcing the Order:

The contempt law became a convenient method to enforce the orders of the court. The Vasudevan case enlightened this fact. During September, 1995 half a dozen senior civil servants of the IAS cadre were convicted for contempt by different courts, three in Tamilnadu, one in Kerala and one in Karnataka Government alone. In *T.R. Dhanjaya v. J. Vasudevan* case Supreme Court sentenced Mr. J. Vasudevan, Secretary to the Karnataka Government in charge of Housing and Urban Development, to one month's simple imprisonment. There were 25 writ petitions and contempt petitions against the Government filed by an engineer of the Bangalore City Corporation over a period of 16 years. Not only the litigant but the Court also felt exasperated at successive attempts by the State Government to deny the engineer what was declared by the Court to be his legitimate right in an order passed two years ago. Invoking inherent powers under Constitution Supreme Court held him guilty of willful disobedience.[200]

Penalizing some one in authority for not implementing the orders of the court is one aspect and trying the persons for commenting and criticizing the judiciary is totally a different aspect. Interfering with the court proceedings directly or writing to influence the minds of judges by what is called the "trial by the press" are some of the other areas for cases of contempt of court. Contempt by scandalizing the judges is the third aspect.

The conviction of Arundhati Roy for her remarks in an affidavit submitted to the Supreme Court in a contempt case regarding her opposition to the judgment in Narmada Bachao Andolan case, has brought forth the issue of media and contempt of court to a central discussion point. The judgment was assailed by the media and need for free discussion over the performance of judiciary was favoured.

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[199] *Shiv Shanker* AIR 1988 SC 1208; *EMS Namboodripad Case* AIR 1970 SC 2015.
[200] N. Madhav Menon, 'Vasudevan's Case', *The Hindu*, Sept. 10 & 11. 1995.

Substantial interference

Section 13 of Contempt of Court Act 1971 says: Notwithstanding anything contained in any law for the time being in force no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it ***substantially interferes***, tends substantially to interfere with the due course of justice". This reflects the intention of the Parliament to provide a special safeguard to accused contemners, at a stage where their act or criticism amounted to 'contempt' of court strictly within the definitions under Section 2. This is the yardstick which they have to use before 'sentencing'. It is very clear and specific that unless it substantially interferes it is not contempt and they should not be punished. This question has to be examined in every case where the contemnors are proposed to be sent to jail on the ground that their comments 'substantially' interfered with 'due process' of 'justice'.

Truth or Justification

The Contempt of Courts Act 1971, as such, do not specify any defenses for the contemner. A Special Bench of the Calcutta High Court in *Aditya Vikram Birla v. Parmanand Agarwal* [201] observed "an impression has gained ground that in matters relating to contempt by scandalizing the court, truth or justification is no defense. But the Supreme Court in Perspective Publications Ltd v. State of Maharashtra[202] the three judge bench ruled that, in the law of contempt there are hardly any English or Indian Cases in which a defense has been recognized". In *C.K. Daphtary v. O.P. Gupta*[203] also the exclusion of any such evidence was approved and upheld on the ground that "if evidence was to be allowed to justify allegations amounting to contempt of court, it would tend to encourage disappointed litigants. One party or the other to a case is always disappointed to avenge their defeat by abusing the judge. However, the Calcutta High Court in above referred case observed that "since the Contempt of Courts Act 1971 expressly provides in Sec. 17 (5) that the contemner has a right to file affidavit in support of his defense and the court may determine the matter of the charge either on the affidavits or after taking such further evidence as may be necessary", the earlier rule excluding evidence in justification, would require serious re-thinking."

[201] (1994) 1 CHN 254
[202] AIR 1971 SC 211.
[203] AIR 1971 SC 1132.

In *Baradakanta v. Registrar, Orissa*[204] the Court observed that "it is not open to any contemner to take the plea that truth of the allegations is a justification. When the court tries a contempt application if it were to permit the contemner to establish the truth of the allegation, it would have to act as an appellate court and then decide the allegation, and that is not the function of the court trying a petition for contempt".

2006 Amendment: Truth

The Contempt of Court Act, 1971 originally did not provide any defences. However, the Contempt of Courts (Amendment) Act, 2006 which has introduced a new Section 13(b) which states: "The court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide." The Statement of Objects and Reasons to the Bill states that the amendment "would introduce fairness in procedure and meet the requirements of Article 21 of the Constitution."

When the provisions of the Bill were discussed in the Lok Sabha, Law Minister H.R. Bharadwaj said "Suppose, there is a corrupt judge and he is doing corruption within your sight, are you not entitled to say that what you are saying is true? Truth should prevail. That is also in public interest."

The National Commission to Review the Working of the Constitution (NCRWC) headed by the distinguished former Chief Justice of India, M.N. Venkatachaliah, in its report stated "Judicial decisions have been interpreted to mean that the law as it now stands, even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law. … A total embargo on truth as justification may be termed as an unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto 'Satyameva Jayate' in the High Courts and 'Yatho dharmas tatho jaya' in the Supreme Court, the courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change."

The Supreme Court took the view in 1993 Pritam Lal case that its power of contempt cannot be restricted and trammeled by any ordinary legislation, including the Contempt of Court Act. The High Courts and the Supreme Court have exercised contempt powers despite the limitation of one year prescribed by the Contempt of Courts Act, the report said.

[204] 1974 Cr.L.J. 631.

The Attorney General, whose views were sought by the Parliamentary Committee on the issue of Constitution amendment, had observed "amendment of the Constitution will be a lengthy and time-consuming affair. If the (Contempt) Act is suitably amended to provide the defence of truth in a contempt action, the same would introduce fairness in procedure and meet the requirement of Article 21. "It is unlikely that the Supreme Court and the High Courts will act in disregard of a statutory provision which, in essence, sub-serves the requirement of fairness and reasonableness," the Attorney General opined. The Committee hoped that "the higher judiciary will give due regard to this statutory provision by maintaining the principles of fairness and reasonableness, they are known for".

But the problem lies with serious nature of the law and its immediate intervention with the liberty of the people. The definition of 'contempt of court' as provided in the Contempt of Court Act of 1971 makes even 'tendency' to scandalize and interfere with justice system a contempt act. There are no norms, guidelines or criteria for establishing the tendency, which is almost invisible and opinionated. If any court infers 'tendency' of scandalisation, the commentator would become contemner and lose his liberty. Within hours of their writings or utterances a severe punishment is handed down.

Mid-day Journalists Case

Sensational jailing of journalists stirred up debate on truth as defence to contempt allegation. Four journalists belonging to *Mid Day*[205] including Resident Editor Vitusha Oberoi and City Editor MK Tayal were sentenced to four months jail on contempt of court charges on September 20, 2007[206], because of a report they had published with allegations against the ex-Chief Justice of India, Y. K. Sabharwal. Whether the allegations and critical statements made in the report were true or not was not considered in arriving at the decision.

Many in the legal community feel that in the 2006 Delhi sealing drive[207], Justice Sabharwal may have had a conflict of interest since his sons own a firm with relations to the Delhi real estate. Former Solicitor

[205] ***Mid Day*** (stylised as **MiD DAY**) is an afternoon daily Indian compact newspaper. Editions in various languages are published in Mumbai, Bangalore, Delhi and Pune

[206] "4 journos get jail term for scandalising ex-CJI". *IBNLive* (CNN). 21 September 2007, updated 22 September 2007. Retrieved 23 September 2007.

[207] "Shock, anger at Sabharwal's mall-aa-mall". Mid Day. 12 June 2007. Retrieved 4th August 2012.

General K K Sud had called this behaviour "the height of indiscretion." The High Court, however, sentenced the journalists without considering the veracity of the reports, and this led to considerable controversy[208].

The defence of truth was not made available in Mid-day journalist's case, as there was no opportunity to plead and prove truth as a defence. Where the court acts on its own, i.e., in suo moto proceedings, the court is the complainant, prosecutor and also the adjudicator. It is difficult to remove the possible professional bias in prosecution when the three key players are not separate.

Though the truth is made a defence, it is possible to prove the allegation as true only in a full-fledged trial and not in summary proceedings that is generally adopted by higher courts in holding contemnor guilty. It is made only a qualified defence, i.e., it could be invoked only if it is stated in public interest. The amendment gave wide discretionary powers to the court that hears the complaint of contempt of court. Newly introduced Section 13(b) says court may permit, which means it may not permit. It also says that only when court is satisfied that it is in public interest and the request for invoking it is bona fide. Whether the request is bona fide or not, whether it is in the public interest or not is totally left to the opinion of the presiding officer of the court. Virtually there is no change in the position. Truth is not a statutory defence even now. It might become a defence if the courts feel so.

Mysore Episode

In 2002, there were adverse comments widely reported in the print media in Karnataka regarding the private behaviour of some sitting judges of the High Court. The High Court suo motu commenced contempt proceedings against several publications for scandalising the Court and lowering its authority. The matter reached the Supreme Court and an agonised Chief Justice Khare while criticising the media for not disclosing their sources stated that "I will reward the media if they come out with the truth"… "I personally believe that truth should be a defence in a contempt case."

Pleading truth to be a valid defence, Fali S Nariman, said: If it is part of the law as is now understood that a person commits contempt even if he truthfully publishes a fact that a particular judge (God forbid and only hypothetically speaking) has accepted a bribe for giving a

[208] "Legal fraternity condemns conviction of journos by HC". *Indiantelevision.com*. Retrieved 4th August 2012

judgment in a party's favour - then I would submit that such a law would be void as imposing unreasonable restrictions on the freedom of speech and expression: the judge who took the bribe would be false to his oath, to do justice without fear or favour; and it would be absurd to say that although Article 124(4) provides for the removal of a judge for "proved misbehaviour", no one can offer proof of such misbehaviour, except on pain of being sent to jail for contempt of court. This is a glaring defect in our judge-made law that needs to be remedied -hopefully by the judges themselves; if not, reluctantly, then by Parliament[209].

Anil Divan, senior advocate, referred to International standards and laws of other democracies that would be informative and enable us to arrive at the right standards. Professor Michael Addo of the University of Exeter has collected the views of many European experts in "Freedom of Expression and the Criticism of Judges." In his article, Anil Divan further said: Truth was treated as an 'untouchable' while exercising contempt jurisdiction for scandalising the Court. Parliament has now opened the doors of the temple of justice for the erstwhile untouchable. In the case of Veeraswami, a former Chief Justice of Madras High Court, the Supreme Court observed: "A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system." The contest is between truth and its suppression. The choice then is between the plea of truth to expose judicial misconduct and the attempt to stifle such publication by the use of the contempt power. The Delhi High Court through its "Mid-day" judgment has catapulted the issue nationally and internationally[210].

In the U.K., the offence of scandalising the court has become obsolete. The judiciary was vigorously criticised by the English press in the Spy Catcher case. Peter Wright a former intelligence officer wrote his memoirs but the Court of Appeal injuncted the publication of the book in England. The House of Lords, by a majority of three against two confirmed the interim injunction and enlarged it. The Times of London came out with a blistering editorial which said: "Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it. But yesterday afternoon the law was still an ass ... In the hands [of] Lords Templeman, Ackner and Brandon (the majority who ruled for the gag

[209] Fali S Nariman: A Judge above Contempt, the Indian Express, August 5, 2005

[210] Anil Divan, Contempt of Court and the Truth, the Hindu, October 29, 2007. http://www.hindu.com/2007/10/29/stories/2007102956041000.htm

order) it had become unpredictable and wild seemingly responsive only to autocratic whims."

The Daily Mirror came out with a front page caption "You Fools" and published the photographs of Lords Templeman, Ackner, and Brandon upside down.

In the United States, contempt power is used against the press and publication only if there is a clear imminent and present danger to the disposal of a pending case. Criticism, however virulent or scandalous after final disposal of the proceedings, will not be considered as contempt. The U.S. Supreme Court observed — "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For 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."

Amend Contempt Court Law

Press Council of India (PCI) chairman and retired Supreme Court Justice Markandey Katju in April 2012 advocated amendments to the Contempt of Court Act, 1971 to enable the media to write about court happenings. "This law was made during the British rule. In a democracy, people are superior and have the right to criticise the court as even the judiciary is here to serve the people. The Contempt of Court Act needs to be drastically amended to enable journalists to perform their duties," said Katju. He suggested that a reporter covering the Supreme Court must have a law degree and at least seven years of experience[211].

[211] Contempt of Court Act needs to be amended for media: Katju, Indian Express, April 26, 2012 http://www.indianexpress.com/news/contempt-of-court-act-needs-to-be-amended-for-media-katju/941725/0

"If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter."

-George Washington

3. MEDIA & EXECUTIVE

Official Secrets Act

The Executive in Indian Democracy is shielded by a special power to keep the information secret under the Official Secrets Act. Traditionally the system of governance in India has been opaque, with the state donning the mantle of colonial secrecy. It is being continued by retaining the Official Secrets Act as well as the administrative structure which was designed to distance the masses from governance. In addition to that there is a traditional feudal mindset which presupposes a distance between the 'rulers' and the 'ruled' and makes the former a privileged class. As a result, this information sharing as a culture was neither consciously developed nor reflected in major legal changes until a few years ago when the requirements for public hearings or mandatory disclosures under laws like the Environment Protection Act or the Consumer Protection Act were put into place. Though the Constitution speaks about freedom of speech and expression, it provides a form of the oath of secrecy imposing an obligation on the constitutional office holders not to reveal information which they come to know during the course of official functioning. The public servants and officers are under a constitutional and contractual obligation to keep administrative affairs as secret, even without taking the aid of Official Secrets Act.

Apart from these regulatory measures, the information generally does not flow from any administrative office. The executive decisions touching upon the rights and interests of the public in general are also kept secret as a matter of routine practice and then as a matter of policy too. It is impossible to get a copy of GO even, which is normally supposed to be made available. The officers can be prosecuted either for leaking the information or actively assisting in transmitting the information, even if it was not classified as secret. For example any speculation about the budget, annual financial statement by the State or Center cannot be published. If any speculative budget publication is based on any leaked budget document, a journalist may attract two penal provisions, one - breach of privilege of parliament or two - violation of Official Secrets Act, both the provisions have penal consequences.

The Public Servants - the political executives occupying the constitutional positions like Prime Minister, member of Council of Ministers or Member of Legislature -are prevented from revealing information under the threat of breach of Oath of Secrecy which can be treated as an Unconstitutional act of those office holders, who can be even sacked from it for the revelation. The Civil Servants or the bureaucratic personnel are under a contractual and statutory obligation to not reveal according to civil service rules and the Official Secrets Act.

In contrast, the press or any other media organization or the people in general need the information and suffer by the secrecy policy as they cannot form any opinion regarding any aspect of public importance and interest. This principle was even more clearly enunciated in a case[212] where the court remarked, "The basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is *the people's right to know."*

The problems for the media in accessing information are many. In the absence of an open information regime, balanced reporting is very often not possible. Substantiating facts becomes very difficult and the directive to journalists to double check with a second source is difficult to follow with the 'source' very often being some government official who refuses to talk about the issue, howsoever mundane. This has also created a regime of garnering information through illegitimate means such as bribing and pandering to the whims of various government officials to eke out information. "Investigative journalism has become nothing but collecting basic information".[213] This syndrome has been aptly termed as 'co-opting and corrupting' by a senior journalist[214]. The system first 'co-opts' the media and then 'corrupts' it, making it fall in with its own requirements for giving necessary slants to news, for suppressing or distorting it and for blunting criticism. For the media, therefore, the right to information will act as a life giving elixir and will help it to deal with many of its own constraints in acting as the 'fifth estate'. A former Chairman of the Press Council of India remarked in a seminar organized by the media in 1987[215], "…important information is at times sought to be withheld by the authority in power on the plea of the bar of the Official Secrets Act even in matters where the Act may not have

[212] Indian Express Newspapers(Bombay) Pvt. Ltd.vs India, 1985) 1 SCC 641
[213] N.R.Mohanty, Regional Editorial Chief for a leading English daily.
[214] Prabhash Joshi, senior media person, Consultant Editor, '*Jansatta*' a popular Hindi daily.
[215] Gujarat Newspapers Association, Ahmedabad.

any application at all, causing great deal of harassment to journalists and imposing improper curbs on the freedom of the press……..I feel that appropriate legislative measures should be adopted in our country not only for the right of the Press to information but also for proper implementation of this right."[216]

The Official Secrets Act

The Official Secrets Act of 1923, a colonial relic readily adopted by the new political and bureaucratic class of independent India, clearly comes out as the main culprit in setting the tone for the culture of secrecy in the country. Experience has verified the fears of one of India's foremost statesmen and Jurists when he said in the Central Legislative Assembly: "Your provisions are so wide that you will have no difficulty whatever in running in anybody who peeps into an office for some, it may be entirely innocent enquiry as to when there is going to be the next meeting of the Assembly or whether a certain report on the census of India has come out and what is the population of India recorded in that period."[217]

The Official Secrets Act, 1923 is a replica of the original British Official Secrets Act. While the latter has been watered down to a great extent, the former has been retained almost in its original form, with minor amendments in 1967.

It states clearly that any action which involves helping an enemy state against India is punishable. It also states that one cannot approach, inspect, or even pass over a prohibited government site or area. According to this Act, helping the enemy state can be in the form of communicating a sketch, plan, model of an official secret, or of official codes or passwords, to the enemy. The disclosure of any information that is likely to affect the sovereignty and integrity of India, the security of the State, or friendly relations with foreign States, is punishable by this act.

The catch all Section 5 of the OSA is seen to be responsible for most of the state responses in clamping down on all sorts of information, even to the extent of curtailing people's fundamental rights. A case in point often quoted is the use of the Act in the Narmada Valley[218] to prevent activists and journalists from going there. The cumulative effect of

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[216] Quoted by A.G.Noorani in his article "The Right to Information"in "Corruption in India-An Agenda for Change", Ed. S.Guhan and Samuel Paul. Excellent reference book on the issue and relied upon in this study for the analysis of the OSA.

[217] Sir Hari Singh Gour, quoted by A..G.Noorani,

[218] Where a large dam being constructed on the Narmada river is being resisted for the huge displacement it will cause.

the wide Sections 3 and 5 of the OSA is to choke the flow of information, howsoever innocuous.

The relevant sections of the **Official Secrets Act, 1923** read as under:

Penalties for spying: Section 3 (1) If any person for any purpose prejudicial to the safety or interest of the state-

(a) approaches, inspects, passes over or is in the vicinity of, or enters any prohibited place; or

(b) makes any sketch, plan, model, or note which is calculated to be or or might be or is intended to be, directly or indirectly, useful to an enemy; or

(c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the state or friendly relations with foreign states;

He shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the navel, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years.

(2) On a prosecution for an offence punishable under this section it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the state, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interest of the state; and if any sketch, plan, model, article, note, document or information relating to such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or from his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the state, such sketch, plan, model, article, note, document information, code or password shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interest of the state.

Wrongful communication, etc., of information

5. (1) If any person having in his possession or control any secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or related to anything in such a place, or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the state or friendly relations with foreign states 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 who 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) willfully communicates the code or password or any sketch, plan, model, article, note, document or information to any person other than the to whom he is authorized to communicate it, or a court of justice or a person to whom it is, in the interest 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 manner prejudicial to the safety of the state; or
c) retains the sketch, plan, model, article, note, document or information 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 willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or
d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or pass word or information;

He shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or password or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, password, sketch, plan, model, article, note document, or information is communicated in contravention of this Act, he shall be guilty of an offence under this Section.

(3) If any person having in his possession or control, any sketch, plan, model, article, note, document or information, which relates to munitions of war, communicates it, directly or indirectly, to any foreign power or in any manner prejudicial to the safety or interest of the state, he shall be guilty of an offence under this section.

(4) A person found guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both.

The main critics of these provisions have been the Press Commissions. However, their stand has varied over the years. While in 1954, the First Press Commission remarked, "In view of the international tensions and consequent need for ensuring that secret policies are not divulged, they did not recommend modification of the provisions of the Act".[219] However, the same body in 1982 felt that the provisions of the Act have 'a chilling effect on the press" and that "section 5 as it stands can prevent any information from being disclosed to the public and there is widespread public opinion in the country that the Section has to be modified or replaced and substituted by a more liberal one."

A. G. Noorani summarises his critique of the OSA to say that it is in breach of the fundamental right to freedom of speech and expression[220], as well as of the right to life and liberty[221] . An allegation of an offence under the Act must be put to strict proof and the defence of 'public interest' must be available.

Besides the OSA, the **Central Civil Service Conduct Rules, 1964** also prohibit government servants from 'unauthorised communication of information'. Rule 11 reads as under:

> 11. **Unauthorised communication of information**. No government servant shall, except in accordance with any general or special order of the Government or in the performance in good faith of the duties assigned to him, communicate, directly or indirectly, any official document or any part thereof or information to any Government servant or any other person to whom he is not authorized to communicate such document or information.
>
> Explanation- Quotation by a government servant (in his representation to the Head of Office, or Head of Department or President) of or from any letter, circular or office memorandum or from the notes on any file, to which he is not authorized to have access, or which he is not authorised to keep in his personal custody or for personal purposes, shall amount to unauthorized communication of information within the meaning of this rule.

Moreover, the **Manual of Office Procedure** lays down that only Ministers, Secretaries and other officers specially authorized by the

[219] Quoted in A.G. Noorani, "The Right to Information" in "Corruption in India-An Agenda for Change" Ed.S.Guha and Samuel Paul.
[220] Article 19 (1) (a) of the Constitution of India
[221] Article 21 of the Constitution of India

Minister are permitted to meet representatives of the Press and give information. The **Manual of Office Procedure** reads as under:

Section 154. Communication of information to the Press: Information to the Press should normally be communicated through the Press Information Bureau by an officer authorized to do so.

Section 155. Functions of Information Officer: Information Officers of the Press Information Bureau are attached to every ministry of the Government of India. It is the duty of an information officer, on the one hand, to arrange to give due publicity to the activities of the Ministry to which he is attached and on the other, to keep the ministry informed of the popular reactions thereto. In order to discharge his duties properly, the Information officer will maintain a close liaison with the Ministry to which he is attached and the latter will give him the necessary facilities.

Section 161. Communication of Information to the Press. Only Ministers, Secretaries or other officers specially authorized by the Minister may give information to or be accessible to the representatives of the Press. Any other officer, if approached by a representative of the Press, should refer him to the Principal Information Officer of Government of India.

The Indian Evidence Act 1872, grants privilege to certain types of official records.

Section 123. Evidence as to affairs of State - no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Section 124. Official Communication- No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

No Leakage of Official Secrecy

The questions of official secrecy and access to government information assume a great significance. With regard to official secrecy, we are still governed by an Act, which was enlaced by the colonial rulers during the days of laissez-faire. The Act is known as the Official Secrets Act 1923 and more or less it is the exact replica of the English Official Secrets Act 1911.

The Act is an omnibus and catch-all legislation covering all kinds of official secret information whatever be the effect of disclosure, and its violation subjects the individual to heavy penalties including imprisonment. It is not merely confined to espionage, spying activity or such disclosures, which may affect national security or public interest. It acts as Damocles sword on the head of the press, hampering it from bringing to public light the secrets of the government whose disclosure may be in the public interest. The question of amending the Act has been examined by several committees and commissions such as the Press Law Enquiry Committee 1948, The Press Commission 1954, Law Commission 1971 and Second Press Commission 1982. These committees did not make deeper study of the problem. The Indian Law Institute made an in-depth and comprehensive study in collaboration with the Press Council of India. They recommended some drastic amendments in the Act. The study recommended that the catch-all provision should be deleted and the Act should specify the information which needs to be protected. According to the study, the following kinds of information need protection from disclosure:[222]

1. Information concerning defense or security of the nation,
2. Foreign relations.
3. Cabinet proceedings and documents(protection here is necessary in the interest of collective responsibility of the cabinet)
4. Monetary policy and foreign exchange policy, and economic plans and policies where premature disclosure may harm the national interests.
5. Maintenance of law and order, i.e., information which is
    a. likely to be helpful in the commission of offences,
    b. likely to be helpful in facilitating an escape from legal custody or acts prejudicial to prison security; and
    c. likely to impede the prevention or detection of offences or the apprehension or prosecution of offenders.
6. Private information given to the government in confidence.
7. Trade secrets.
8. Information which, through premature disclosure, can provide opportunities for unfair financial gain by private interests.

Further, to prevent the government from abusing the prosecuting powers under the Act, the study has made recommendation that if the

[222] Official Secrecy and the Press, Indian Law Institute and Press Council of India, 1982, p 27

government proposes to prosecute the press under the Official Secrets Act, it should be done only with the approval of a committee consisting of the Attorney-General, Chairman of the Press Council of India and one member of the council nominated by it. The jurisdiction of the committee is not to extend to prosecutions for espionage or spying i.e., prosecution under S.3 of the Act.

Amendments and Army Information:

The Press Council has recommended that the Official Secrets Act be amended for greater transparency with regard to defense related matters also. In its recent report, the council has asserted that this was not merely desirable, but possible without detriment to national security. The Press Council had at the instance of the Army in 1990, inquired into media reports alleging various kinds of excesses by its personnel in Jammu and Kashmir. Subsequently in 1992 the Council received a letter from senior defense correspondents expressing apprehension that the proposed new guidelines for defense coverage might choke the flow of information on defense and national security.

The other recommendations of the committee are: The Officials Secrets Act should be amended and a privacy law enacted. The Council report entitled "Crisis and Credibility[1] on Jammu and Kashmir made some recommendations concerning media-military relations. They remain valid today, especially as they pertain to situations of low intensity conflict and the need to give wide publicity to the findings of court martial proceedings so as to silence baseless propaganda to send out a strong message that wrong doing by any member of the armed forces will be swiftly punished.

A more liberal and transparent defense information policy will also mean that the public relations machinery of the defense ministry will have to be overhauled.[223] However, the Right to Information Act, 2005 made it possible to reveal the information of the military or protected agencies of the state with reference to corruption and human rights violation. Without amending the Official Secrets Act, the new enactment offers the information in a limited way, which is a significant step forward protecting the free speech and expression, right to know and right to live a liberated, free and emancipated life.

[223] Times of India. July 11,1993, Indian Express, July 12, 1993 quoting PTI

Secrecy of Executive, Hussainara Khatoon cases I-VII

It is very difficult for the media to work for disseminating the information amidst so many laws creating iron veils of secrecy. The series of Hussainara Khatoon[224] cases related to the illegal and prolonged custody of poor undertrials in the state of Bihar. In dealing with various aspects of bail, the Supreme Courts stressed the need for free legal aid to the poor and needy who are not either not aware of the procedures or not in a position to afford lawyers, and therefore unable to avail of the constitutional guarantees of legal help and bail. The Court said that it is the legal obligation of the judge or the magistrate before whom the accused is produced to inform him that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to free legal aid.

Access to places of custody and prisons, Prabha Dutt Vs. Union of India [225]

Media's access to the prisons is within the hands of executive. Administrators of Jails generally resist the media's requests to interview the prisoners on extraneous excuses. The Court held in this case that excepting there being clear evidence that the prisoners had refused to be interviewed, there could be no reason for refusing permission to the media to interview prisoners in death row. The right to acquire information includes the right to access sources of information.

Informing the accused

Accused must have the right to information about his charges. The framing of charges against a person cannot be a secret as to that person. Repeated violations of civil rights by the police and other law enforcement agencies have compelled the courts to give, time and again, directions to the concerned agencies for ensuring transparency in their functioning in order to avoid violations like illegal arrests and detention, torture in custody and the like.

Sheela Barse Vs. State of Maharashtra

In this case Petitioner, a journalist[226], approached the courts to bring out the condition of women prisoners in jails in the state of Maharashtra. These cases had come to her notice in the course of interviewing women inmates in Bombay Central Jail. The court gave certain directions to the State Government, including that pamphlets on the legal rights of arrested persons, in English, Hindi and Marathi (the

[224] 1980 1 SCC 81, 1980 1 SCC 91, 1980 1 SCC 98, 1980 1 SCC 108, 1980 1 SCC 115, 1995 SCC (5) 326
[225] AIR 1982 SC 6
[226] (1983) 2 SCC 96

regional language of Maharashtra) should be printed in large numbers and circulated as well as affixed in each cell in a police lock up. Further, the Legal Aid Committee is to be immediately informed of the arrest. There should be surprise visits to the police lock ups by a City Session Judge. The relative or friend of the arrested person should immediately be informed upon the arrest. The magistrate before whom an arrested person is produced should enquire from the arrested person whether he has any complaint of ill treatment or torture in police custody and inform him of his right under the Criminal Procedure Code, to have a medical examination.

D.K.Basu Vs. State of West Bengal[227]

The information about Arrest and Custody can no longer be the official secrets. And this kind of culture of secrecy makes the jail cells and lock up cells of police stations the centers of torture and violation of civil rights of the people in general, about which the media has to write. In spite of earlier attempts by the Courts to check violation of rights in custody, instances of violations continued. The court reiterated in this case, filed by the Chairperson of the Legal Aid Committee of the state of West Bengal, that there should be complete transparency in the procedure for arrest. The court said, "Custodial violence, including deaths and torture in the lock ups, strikes a blow at the rule of law…..Transparency of action and accountability perhaps are the two safeguards which this court must insist upon."

Directions were again given to all state governments in the country to prominently display and publicise the directions on arrest and custody. Failure to follow the directions would be treated as contempt of the Supreme Court. Most of these directions translate into the right of the accused or his kin to have access to information regarding his arrest and detention such as preparation of a memo of arrest to be counter-signed by the arrestee and a relative or neighbor, preparation of a report of the physical condition of the arrestee, recording of the place of detention in appropriate registers at the police station, display of details of detained persons at a prominent place at the police station and at the district headquarters, etc.

Battle against Official Secrets Act

The battle for a right to information has been fought on two main planks-firstly, the removal of the Official Secrets Act 1923 and second, for a legislated right to information.

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[227] 1997 1 SCC 216

Objections to the Official Secrets Act have been raised ever since 1948, when the Press Laws Enquiry Committee said that "the application of the Act must be confined, as the recent Geneva Conference on Freedom of Information has recommended, only to matters which must remain secret in the interests of national security."[228]

In 1977 a Working Group was formed by the Government of India to look into required amendments to the Official Secrets Act to enable greater dissemination of information to the public. This group recommended that no change was required in the Act as it pertained only to protect national safety and not to prevent legitimate release of information to the public. In practice, however, using the fig leaf of this Act, the executive predictably continued to revel in this protective shroud of secrecy.

In 1989, yet another Committee was set up, which recommended restriction of the areas where governmental information could be hidden, and opening up of all other spheres of information. No legislation followed these recommendations. In 1991 sections of the press[229] reported the recommendations of a task force on the modification of the Official Secrets Act and the enactment of a Freedom of Information Act. The Prime Minister favoured a Right to Information to combat undue secrecy in the government. The concept of social audit as an instrument of greater accountability was emphasised.

The second Administrative Reforms Commission has suggested that the Official Secrets Act (OSA) of 1923 should be repealed, saying it is incongruous with the regime of transparency in a democratic society. The commission chaired by M. Veerappa Moily submitted its first report on "Right to Information - Master key to good governance" to Prime Minister Manmohan Singh and suggested that suitable safeguards for the security of state should be incorporated in the National Security Act.

There is a need for clear definition as to what constitutes official secrets and then exempt them from the public domain. Though the Official Secrets Act appears to be a piece of legislation meant to prevent leakage of information that would endanger the security and sovereignty of India, it is in reality a legislative attempt to render governance opaque.

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[228] Source: Corruption in India: an Agenda for Change", Ed. Guhan and Paul

[229] The Hindu, 13th December,1991

The sweeping generalisations contained in Section 5 of the Act were criticized as an artefact of oppressive colonialism on what comprises official secret bears that out. The government needs to not only abolish the OSA now, but consolidate the post-RTI transparency regime, by bringing in a duty to publish law.

The inter-ministerial group in 2008 has proposed that the 1923 Official Secrets Act (OSA) be amended to not only bring it in conformity with the transparency regime ushered in by the Right to Information Act but also ensure that prior sanction is obtained from the Home Ministry before prosecution of an OSA accused.

In the Official Secrets Act Section 6, information from any governmental office is considered official information; hence it can be used to override Right to Information Act 2005 requests.

It was understood that a majority of the recommendations of the H D Shourie Committee of 1997 on definitions to be included in Section 5 of the OSA will be included in the amendments. The Shourie Committee had criticized the section for its catch-all provisions and absence of a clear definition of official secrets. Recognising the sweeping changes brought about by the RTI Act, the amended OSA will categorize and classify information which is now available in the public arena as against confidential national secrets. From the earlier vague instruction of the Home Department giving an authorization for charge-sheeting an OSA accused (objected to by the Supreme Court), an amendment is proposed wherein prior sanction will be needed for which an application of mind and, thereby, a scrutiny of investigation will be required. The amendments will take into account the availability of confidential/secret documents and information now in electronic format thanks to the use of computers and internet. Several procedural and technical amendments are also proposed, especially in view of the difficulties in investigations highlighted by officials of the CBI and Delhi Police. For instance, OSA provisions will be made compatible with amendments made over the years to the Criminal Procedure Code.

But the Government has turned down this recommendation of the second Administrative Reforms Commission for scrapping the Officials Secrets Act, saying that it was the only act that dealt with cases of espionage. While replying to written questions, minister of state for personnel Suresh Pachouri told Rajya Sabha in November 2008 that the OSA was the only law on the statute book to deal with cases of espionage and wrongful possession and communication of sensitive information

detrimental to the security of the state. The government claimed that "The law has stood the test of time. Therefore, it is neither desirable nor necessary to repeal this law."

Iftikhar Gilani case

Charged with violation of Official Secrets Act, 1923, a journalist, Iftikhar Gilani, Delhi bureau chief of the Jammu-based daily *Kashmir Times* was, arrested in June 2002. He was charged under the OSA, along with a case of obscenity. The first military report suggested that the information he was accused of holding was "secret" despite being publicly available. The second military intelligence report contradicted this, stating that there was no "official secret". Even after this, the government denied the opinion of the military and was on the verge of challenging it when the contradictions were exposed in the press. The military reported that, "the information contained in the document is easily available" and "the documents carry no security classified information and the information seems to have been gathered from open sources". On January 13, 2003, the government withdrew its case against him to prevent possibility of two of its ministries giving contradictory opinions. Gilani was released the same month.

For seven months, Iftikhar was imprisoned without bail under the draconian and much-abused Official Secrets Act (OSA). His crime — possessing out-of-date information on Indian troop deployments in "Indian-held Kashmir" culled from a widely-circulated monograph published by a Pakistani research institute.

The IB officials who trawled his hard drive came across a file with the heading, 'Fact Sheet on Indian Forces in Indian Held Kashmir'. Sensing that they had finally found something potentially useful, the officials manually replaced all references to Indian Held Kashmir – a Pakistani term used to refer to those parts of Jammu and Kashmir not under their control – with the words 'Jammu and Kashmir', to suggest the file was extracted from an official Indian document. They then added the words, 'Only for Reference. Strictly not for publication or circulation', to heighten the suggestion of secrecy[230].

Giving above details in his foreword for My Prison Days by Iftikhar Gilani, S Varadarajan, a Senior Journalist of the Hindu said: The

[230] Siddhartha Varadarajan, My foreword to Iftikhar Gilani's book "My Prison Days" 1 February 2005 http://svaradarajan.blogspot.in/2005/02/my-foreword-to-iftikhar-gilanis-my.html

shocking story that this book tells is not just an indictment of the capriciousness and arbitrariness of power, or a grim chronicle of the sheer viciousness of the Indian State. It is also a depressing account of how all the so-called estates of society – including the Fourth – came face to face with an obvious injustice and were found wanting[231]. This shows the tendency of executive to misuse the law against the media men.

Santanu Saikia Case

A journalist is charged in 1999 under the crime of Official Secrets Act for just reporting critically against divestment policy by publishing contents of a Cabinet note. A Delhi court has ruled in 2009 that the publication of a document merely labelled "secret" shall not render the journalist liable under Official Secrets Act. Additional Sessions Judge, Delhi District Court, Inder Jeet Singh discharged accused journalist Santanu Saikia in a case booked against him by the CBI 10 years ago for divulging contents of a Cabinet note on divestment policy. The CBI case against Saikia, under OSA, had raised eyebrows because it was not uncommon for the media to do stories on the basis of Cabinet papers despite their being a classified secret.

[231] Ibid.