

LAW COMMISSION OF INDIA

200TH REPORT

ON

TRIAL BY MEDIA

**FREE SPEECH AND FAIR TRIAL UNDER
CRIMINAL PROCEDURE CODE, 1973**

AUGUST 2006

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Dear

I have great pleasure in presenting to you the 200th Report of the Law Commission on “Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)”. The subject was taken up suo motu having regard to the extensive prejudicial coverage of crime and information about suspects and accused, both in the print and electronic media. There is today a feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have prejudicial impact on the suspects, accused, witnesses and even Judges and in general, on the administration of justice. According to our law, a suspect/accused is entitled to a fair procedure and is presumed to be innocent till proved guilty in a Court of law. None can be allowed to prejudge or prejudice his case by the time it goes to trial.

Art. 19(1)(a) of the Constitution of India guarantees freedom of speech and expression and Art. 19(2) permits reasonable restrictions to be imposed by statute for the purposes of various matters including ‘Contempt of Court’. Art. 19(2) does not refer to ‘administration of justice’ but interference of the administration of justice is clearly referred to in the definition of ‘criminal contempt’ in sec. 2 of the Contempt of Courts Act, 1971 and in sec. 3 thereof as amounting to contempt. Therefore, publications which interfere or tend to interfere with the administration of justice amount to criminal contempt under that Act and if in order to

preclude such interference, the provisions of that Act impose reasonable restrictions on freedom of speech, such restrictions would be valid.

At present, under sec. 3(2) of the Contempt of Courts Act, 1971 read with the Explanation below it, full immunity is granted to publications even if they prejudicially interfere with the course of justice in a criminal case, if by the date of publication, a chargesheet or challan is not filed or if summons or warrant are not issued. Such publications would be contempt only if a criminal proceeding is actually pending i.e. if chargesheet or challan is filed or summons or warrant are issued by the Court by the date of publication. Question is whether this can be allowed to remain so under our Constitution or whether publications relating to suspects or accused from the date of their arrest should be regulated?

Supreme Court and House of Lords accept that prejudicial publications may affect Judges subconsciously:

The Supreme Court and the House of Lords have, as pointed out in Chapter III of our Report, observed that publications which are prejudicial to a suspect or accused may affect Judges also subconsciously. This can be at the stage of granting or refusing bail or at the trial.

Supreme Court holds prejudicial publication after ‘arrest’ can be criminal contempt:

Under the Contempt of Courts Acts of 1926 and 1952, unlike the Act of 1971, there was no specific definition of ‘civil’ or ‘criminal’ contempt. Further before 1971, the common law principles were applied to treat prejudicial publications made even before the ‘arrest’ of a person as contempt. In fact, some Courts were treating as ‘criminal contempt’, prejudicial publications even if they were made after the filing of a First Information Report (FIR). But the Supreme Court, in Surendra Mohanty v. State of Orissa (Crl. App. 107/56 dt. 23.1.1961) however, held that filing of an FIR could not be the starting point of pendency of a criminal case. Because of that judgment, a prejudicial publication made after the filing of the FIR gained immunity from law of contempt. But in 1969, the Supreme Court held in A.K. Gopalan v. Noordeen 1969 (2) SCC 734 (15th Sept., 1969) that a publication made after ‘arrest’ of a person could be contempt if it was prejudicial to the suspect or accused. This continues to be the law as of today so far as Art. 19(1)(a), 19(2) and Art. 21 are concerned.

Sanyal Committee's (1963) proposal accepting 'arrest' as starting point dropped by Joint Committee:

In the meantime from 1963, efforts were made to make a new law of contempt. The Sanyal Committee (1963) which was appointed for this purpose, while observing that our country is very vast and publications made at one place do not reach other places, however, recommended that so far as criminal matters are concerned, the date of "arrest" is crucial, and that should be treated as the starting point of 'pendency' of a criminal proceeding. It conceded that filing of an FIR could not be the starting point. The Sanyal Committee prepared a Bill, 1963 stating that prejudicial publications could be criminal contempt if criminal proceedings were 'imminent'. But thereafter, nothing happened for six years.

The Bill of 1963 prepared by the Sanyal Committee was reviewed by a Joint Committee of Parliament (1969-70) (Bhargava Committee) and after some brief discussion, the Joint Committee decided to drop reference to 'imminent' proceedings. This was done for two reasons (1) that the word 'imminent' was vague and (2) such a vague expression may unduly restrict the freedom of speech if the law applied to 'imminent' criminal proceedings. The recommendations of the Joint Committee resulted in the 1971 Act which omitted all references to 'imminent' proceedings or to 'arrest' as the starting point of pendency of a criminal proceeding.

Joint Committee's reasons are flawed:

The attention of the Joint Committee was not drawn to the decision of the Supreme Court in A.K. Gopalan v. Noordeen (1969 (2) SCC 734) dated 15th September, 1969 when it gave its Report on 23rd February, 1970. Once the Supreme Court judgment fixed the date of 'arrest' as the starting point for treating a criminal proceeding as pending, there remained no vagueness in the law. In that case, the Supreme Court has also balanced the rights of the suspect and accused on the one hand and the rights of the media for publication. In fact, in A.K. Gopalan's case, the editor of the Newspaper and others who made prejudicial publication after arrest were convicted for contempt, while Mr. A.K. Gopalan who made the statement after FIR but before arrest was exonerated by the Supreme Court.

Apart from the declaration of law and fair balancing of the competing rights as above by the Supreme Court in A.K. Gopalan v. Noordeen (1969), the date of arrest is the starting point under the UK Contempt of Court Act,

1981 and the Bill of 2003 prepared by the New South Wales Law Commission. Case law in Scotland, Ireland, Australia or the Law Commission Reports of those countries have also declared that if a person is arrested or if criminal proceedings are imminent, prejudicial publications will be criminal contempt. The leading judgment in Hall v. Associated Newspaper, 1978 SLT 241 (Scotland) has been followed in other jurisdictions and is the basis of the provision in the UK Act of 1981 for fixing ‘arrest’ as the starting point of pendency of a criminal case.

The 24 hour rule:

According to Hall, once a person is arrested, he comes within the ‘care’ and protection of the Court as he has to be produced in Court in 24 hours. In India, this is a guarantee under Art. 22(2) of the Constitution. The reason for fixing arrest as the starting point is that, if a publication is made after arrest referring to the person’s character, previous conviction or confessions etc., the person’s case will be prejudiced even in bail proceedings when issues arise as to whether bail is to be granted or refused, or as to what conditions are to be imposed and whether there should be police remand or judicial remand. Such publications may also affect the trial when it takes place later. Basing on this, in England and other countries, “arrest” and “imminent” proceedings are treated as sufficient and are not treated as vague. In this context, we have referred to the comparative law in several countries where the Constitutions guarantees protection to freedom of speech as also the liberty of suspects or accused.

Another important point here is that, in the year 1978, the Supreme Court in Maneka Gandhi v. Union of India, AIR 1978 SC 597 has altered the law as it stood before 1978 to say that so far as liberty referred to in Art. 21 is concerned, ‘procedure established by law’ in Art. 21 must be a fair, just and reasonable procedure. This was not the law in 1970 when the Joint Committee gave its report nor when the 1971 Act was enacted.

Hence, the Joint Committee’s observations and its omitting the word ‘imminent’ and its not treating ‘arrest’ as starting point, do not appear to be constitutionally valid.

Starting point of pendency should be ‘arrest’ and not filing of chargesheet:
Explanation to sec. 3 to be amended:

In view of the changes in the constitutional law of our country as declared by the Supreme Court in A.K. Gopalan v. Noordeen (1969 (2) SCC 734) in so far as Art. 19(1)(a) and Art. 21 are concerned and Maneka Gandhi case (AIR 1978 SC 597) in so far as Art. 21 is concerned, the two reasons given by the Joint Committee in 1970 for omitting the word 'imminent' and for not treating 'arrest' as the starting point, are no longer tenable. Sec. 3(2) of the Act and Explanation below sec. 3 as of now, treat a criminal proceeding as pending only if a chargesheet or challan is filed or if summons or warrant is issued and the time of 'arrest'. This has to be rectified by adding a clause 'arrest' in the Explanation below sec. 3 as being the starting point to reckon 'pendency' of a criminal proceeding as in the UK Act of 1981 and as proposed by other Law Reform Commission proposals in other countries. Further, when such an amendment is made, it is not as if that no publications are permitted after arrest. Only those which are prejudicial publications are not permitted. In addition, publications made without knowledge of arrest, or filing challan or without knowledge of summons or warrant, remain protected.

In this Report, we have also exhaustively discussed the Sunday Times judgment of the European Court 1979 (2) EHRR 245 which related to prior restraint of publications relating to a "civil" case and there the restraint was absolute and not temporary. That case is not a precedent in the present context.

The above amendment as to 'arrest' as being starting point is proposed by using the word 'active' criminal proceeding in sec. 3, rather than 'pending criminal proceeding' and inserting the word 'arrest' in the Explanation below sec. 3.

High Court to be approached directly than by reference from subordinate Court:

Again, as at present, if there is criminal contempt of subordinate Courts, the subordinate Courts have to make a reference to the High Court. This procedure applies to scandalizing the Judges (sec. 2(c)(i)) as also to publications interfering with administration of justice under sec. 2(c)(ii) and (iii). So far as contempt of prejudicial publications is concerned, a procedure of reference by the subordinate Court to the High Court is cumbersome and time consuming. We have, therefore, proposed sec. 10A

that so far as criminal contempt of subordinate Courts under sec. 2(c)(ii) and (iii) by way of publication is concerned, there is no need for a reference by the subordinate Courts, but that the High Court could be approached directly without consent of the Advocate General. This is provided in sec. 10A of the Bill.

High Court to be empowered to pass 'postponement' orders on the lines of sec. 4(2) of the UK Act, 1981:

In addition, there is need to empower the Courts to pass 'postponement' orders as to publication. While Courts have held that conditions for passing orders of prior restraint should be permitted only under stringent conditions, it is, however, accepted that temporary postponement of publication can be passed. This is accepted in several jurisdictions across the world. For passing of 'postponement orders', the UK Act of 1981 requires special proof of 'serious risk of prejudice' to be shown. We have proposed clearer words that 'real risk of serious prejudice' has to be proved before any 'postponement' orders are issued. We have proposed this in sec. 14A. Any breach of a postponement order will be contempt under sec. 14B. Such a procedure exists in UK too.

Enumeration of publications in the media which could be prejudicial stated in Ch. IX of the Report:

The Report also mentions in Chapter IX what publications can be prejudicial if made after a person is arrested. It is recognized in several countries and also in India that publications which refer to character, previous convictions, confessions could be criminal contempt. Publishing photographs may hinder proper identification in an identification parade. There are various other aspects such as judging the guilt or innocence of the accused or discrediting witnesses etc. which could be contempt. We have referred to these aspects as a matter of information to the media. We have also discussed the recent phenomenon of media interviewing potential witnesses and about publicity that is given by police and about investigative journalism.

We have also annexed a Draft Bill.

Journalists to be trained in certain aspects of law:

We have also recommended that journalists need to be trained in certain aspects of law relating to freedom of speech in Art. 9(1)(a) and the restrictions which are permissible under Art. 19(2) of the Constitution, human rights, law of defamation and contempt. We have also suggested that these subjects be included in the syllabus for journalism and special diploma or degree courses on journalism and law be started.

The Report is important and is also exhaustive on the issues which today are crucial in our country so far as criminal justice is concerned and we are of the view that, as at present, there is considerable interference with the due administration of criminal justice and this will have to be remedied by Parliament.

Yours sincerely,

(M. Jagannadha Rao)

Shri H.R. Bhardwaj

Union Minister for Law and Justice
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Chapter I

Introductory

The subject of 'Trial by Media' is discussed by civil rights activists, constitutional lawyers, judges and academics almost everyday in recent times. With the coming into being of the television and cable-channels, the amount of publicity which any crime or suspect or accused gets in the media has reached alarming proportions. Innocents may be condemned for no reason or those who are guilty may not get a fair trial or may get a higher sentence after trial than they deserved. There appears to be very little restraint in the media in so far as the administration of criminal justice is concerned.

We are aware that in a democratic country like ours, freedom of expression is an important right but such a right is not absolute in as much as the Constitution itself, while it grants the freedom under Article 19(1)(a), permitted the legislature to impose reasonable restriction on the right, in the interests of various matters, one of which is the fair administration of justice as protected by the Contempt of Courts Act, 1971.

If media exercises an unrestricted or rather unregulated freedom in publishing information about a criminal case and prejudices the mind of the

public and those who are to adjudicate on the guilt of the accused and if it projects a suspect or an accused as if he has already been adjudged guilty well before the trial in court, there can be serious prejudice to the accused. In fact, even if ultimately the person is acquitted after the due process in courts, such an acquittal may not help the accused to rebuild his lost image in society.

If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the “administration of justice”, calling for proceedings for contempt of court against the media. Other issues about the privacy rights of individuals or defendants may also arise. Public figures, with slender rights against defamation are more in danger and more vulnerable in the hands of the media. after the judgment in R. Rajagopal v. State of Tamil Nadu :AIR 1995 SC 264.

The UN Special Rapporteur on Freedom of Expression and Opinion received a submission from the British Irish Watch against a very sustained attack by the press on Mrs. Bernadette and Mr. Michael McKevitt who had been advocating national sovereignty for Ireland and who were claiming

the Irish people's right to self-determination through a Committee. It was the media which started linking these two persons to the Omagh bombing of 15th August, 1998 which killed 29 people. The media attack started even before the police questioned these two persons. The contents of the representation to the U.N. Rapporteur by the British Irish Watch quoted below, fits well into what is happening with the media in our own country. The representation stated:

“Guilt by association is an invidious device. In the case of Bernadette and Michael McKevitt, the media have created a situation where almost no one in Ireland is prepared to countenance the possibility that they may be innocent, notwithstanding the fact that neither of them has even been questioned by the police in connection with the Omagh bombing. They have demonized, such media campaigns are self-defeating. If the media repeatedly accuses people of crimes without producing any evidence against them, they create such certainty of their guilt in the minds of the public that, if these persons are even actually charged and tried, they have no hope of obtaining a fair trial. When such trials collapse, the victims of the crime are left without redress. Equally, defendants may be acquitted

but they have lost their good name”.

(see *The Blanket, Journal of Protest and Dissent*, November 2000).

The observations of Mr. Andrew Belsey in his article ‘Journalism and Ethics, can they co-exist’ (published in *Media Ethics : A Philosophical Approach*, edited by Mathew Kieran) quoted by the Delhi High Court in Mother Dairy Foods & Processing Ltd v. Zee Telefilms (IA 8185/2003 in Suit No. 1543/2003 dated 24.1.2005) aptly describe the state of affairs of today’s media. He says that journalism and ethics stand apart. While journalists are distinctive facilitators for the democratic process to function without hindrance the media has to follow the virtues of ‘accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people’. These are all part of the democratic process. But practical considerations, namely, pursuit of successful career, promotion to be obtained, compulsion of meeting deadlines and satisfying Media Managers by meeting growth targets, are recognized as factors for the ‘temptation to print trivial stories salaciously presented’. In the temptation to sell stories, what is presented is what ‘public is interested in’ rather than ‘what is in public interest’.

Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Police are presented in poor light by the media and their morale too suffers. The day after the report of crime is published, media says 'Police have no clue'. Then, whatever gossip the media gathers about the line of investigation by the official agencies, it gives such publicity in respect of the information that the person who has indeed committed the crime, can move away to safer places. The pressure on the police from media day by day builds up and reaches a stage where police feel compelled to say something or the other in public to protect their reputation. Sometimes when, under such pressure, police come forward with a story that they have nabbed a suspect and that he has confessed, the 'Breaking News' items start and few in the media appear to know that under the law, confession to police is not admissible in a criminal trial. Once the confession is published by both the police and the media, the suspect's future is finished. When he retracts from the confession before the Magistrate, the public imagine that the person is a liar. The whole procedure of due process is thus getting distorted and confused.

The media also creates other problems for witnesses. If the identity of witnesses is published, there is danger of the witnesses coming under pressure both from the accused or his associates as well as from the police. At the earliest stage, the witnesses want to retract and get out of the muddle. Witness protection is then a serious casualty. This leads to the question about the admissibility of hostile witness evidence and whether the law should be amended to prevent witnesses changing their statements. Again, if the suspect's pictures are shown in the media, problems can arise during 'identification parades' conducted under the Code of Criminal Procedure for identifying the accused.

Sometimes, the media conducts parallel investigations and points its finger at persons who may indeed be innocent. It tries to find fault with the investigation process even before it is completed and this raises suspicions in the minds of the public about the efficiency of the official investigation machinery.

The print and electronic media have gone into fierce competition, that a multitude of cameras are flashed at the suspects or the accused and the police are not even allowed to take the suspects or accused from their

transport vehicles into the courts or vice versa. The Press Council of India issues guidelines from time to time and in some cases, it does take action. But, even if apologies are directed to be published, they are published in such a way that either they are not apologies or the apologies are published in the papers at places which are not very prominent.

Apart from these circumstances, basically there is greater need to strike a right balance between freedom of speech and expression of the media on the one hand and the due process rights of the suspect and accused. Art 19(1)(a), 19(2), Art 21 and Art 14 of the Constitution play a very important role in striking an even balance. As we shall be showing in the ensuing chapters, the present Contempt of Court Act, 1971 requires some changes in view of the law that has been declared by the Supreme Court at least in two leading cases, one is A.K. Gopalan vs. Noordeen 1969 (2) SCC 734 and the other is Maneka Gandhi vs. Union of India AIR 1978 SC 597. These judgments have struck a balance between competing fundamental rights which were not noticed or available at the time when the Joint Parliament Committee (1969) made some drastic changes in the Bill prepared by the Sanyal Committee (1963). These issues fall for consideration.

In addition, we have the judgment in Sunday Times case decided by the European Court on prior restraint on press publications, the (UK) Contempt of Court Act, 1981 and the Reports of Law Commissions in Canada, Australia, New Zealand and other countries which have tried to strike an even balance between competing fundamental rights.

It is in the light of the problems mentioned, the drastic changes in the interpretation of Arts 14, 19, 21 of the Constitution of India that have come about on account of judgments of the Supreme Court and the reforms brought in or proposed in other jurisdictions, that we have taken up the subject suo motu.

We shall be discussing a number of important issues relating to the freedom of speech and expression and the right to due process for a fair trial under the criminal law, in the ensuing chapters.

(In this Chapter and in the ensuing Chapters, wherever we use the word 'due process' for fair trial in a criminal proceeding, we mean a procedure established by law under Art 21 which is fair, just and reasonable and not

arbitrary or violative of Art 14 of the Constitution of India as decided by the Supreme Court in (Maneka Gandhi's case above referred to).

CHAPTER II

Human Right Conventions, Madrid Principles, Indian Constitution and Contempt of Courts Act, 1971

Our criminal law and criminal jurisprudence are based on the premise that the guilt of any person charged in a court of law has to be proved beyond reasonable doubt and that the accused is presumed to be innocent unless the contrary is proved in public, in a court of law, observing all the legal safeguards to an accused. Not only that, the accused has a basic right to silence. That right stems from the constitutional right of the accused common to several constitutions that the accused cannot be compelled to incriminate himself. That is also the reason why confessions to the police are inadmissible in a court of law.

The right to silence has been considered in detail in our 180th Report, (2001) titled “Art 20(3) of the Constitution of India and the Right to Silence”. At the outset, it is necessary to go into some fundamental concepts relating to human rights as contained in International Conventions,

the Madrid Principles and our Constitution and Contempt of Court Act, 1971.

Universal Declaration of Human Rights (1948)

There are certain rights of suspects and accused which are basic human rights. They are expressly referred to in various articles of the Universal Declaration of Human Rights (1948).

Article 3 of that Declaration states that everyone has right to life, liberty and security of person.

Article 10 deals with the right of an accused “in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him”.

Article 11 of the Universal Declaration deals with the right to be presumed innocent and reads thus:

“Article 11(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to

law in a public trial at which he has all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that is applicable at the time the penal offence is committed.”

Article 12 deals with the person’s privacy rights and reads thus:

“Article 12: No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference and attacks.”

Besides these, Article 9 states that “No one shall be subjected to arbitrary arrest, detention or exile.”

So far as freedom of expression is concerned, Article 19 of the Universal Declaration of Human Rights reads:

“Article 19: Everyone has the right to freedom of opinion and expression : this right includes freedom to hold opinions

without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, 1966 (ICCPR) was ratified by India in 1976 and it states in Article 14(2) as follows:

“Article 14(2) : Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

Article 14(3) clause (g) refers to the important right of a person “Not to be compelled to testify against himself or to confess guilt”.

In a criminal trial, there are a number of other safeguards listed apart from the above clause (g) in Article 14(3) of the ICCPR:

“Article 14(3) : In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) to be tried without undue delay;
- (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay it;
- (e) to examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) to have free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) not to be compelled to testify against himself or to confess guilt.”

Article 4 refers to the special rights of juveniles and states:

“Article 4 : In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”

Article 15 requires that “no person shall be punished for an act which was not an offence when it was committed”.

European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 declares in Article 10(1), the same right as to freedom of expression, on the lines of Article 19 of the Universal Declaration. But, Article 10(2) deals with the restrictions:

“10(2) : The exercise of these freedoms, since it carries duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interest of national security territorial integrity or public safety ,for the prevention of disorder or crime ,for the protection of health or

morals for the protection of reputation of others , for preventing the disclosure of information received in confidence, or for maintaining the authority and in particular of the judiciary”.

The above right in Article 10(1) as to freedom of expression has to be read along with the following Articles of that Convention:-

(a) Article 2: Right to Life : (1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.

(b) Article 5: Right to Liberty and Security : (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with as prescribed by law: Clause (a) refers to lawful detention of a person after conviction by a competent court. Clauses (b) to (f) deal with manner of arrest and detention.

Article 5(2) deals with the right of the person arrested to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Article 5(3) to (5) refer to rights incidental to arrest and detention.

(c) Article 6: Right to Fair Trial : It reads:

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

... ..

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence.
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed
(2)”

Article 8: Right to Respect for Private and Family Life :

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(1) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of the rights and freedom of others.”

There are similar provisions in the American Convention on Human Rights, 1969 and the African Charter of Human Rights and People’s Rights, 1981.

The Madrid Principles on the Relationship Between the Media and Judicial Independence (1994)

A group of 40 distinguished Legal Experts and Media representatives, convened by the International Commission of Jurists (ICJ), at its Centre for the Independence of Judges and Lawyers (CIJL) and the Spanish Committee of UNICEF met in Madrid, Spain between 18-20, January 1994. The objectives of the meeting were:

- (1) to examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Principles on the Independence of Judiciary.
- (2) To formulate principles addressing the relationship between freedom of expression and judicial independence.

The group of media representatives and jurists while stating in the 'Preamble' that the 'freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society governed by the Rule of Law and that it is the responsibility of the Judges to recognize and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorized by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise law, emphasized that :

“The media have an obligation to respect the rights of individuals, protected by the International Covenant and the independence of the judiciary”.

It refers to the principles which are drafted as “minimum” standards of protection of the freedom of expression.

The Basic Principle :

- (1) Freedom of expression (as defined in Article 19 of the Covenant), including the freedom of the media – constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
- (2) This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the **1984 Siracusa Principles** on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (U.N. Document E/CN/4/1984/4).
- (3) The right to comment on the administration of justice shall not be subject to any special restrictions.

Scope of the Basic Principle : (deals with media rights during investigation into a crime)

- (1)
- (2)
- (3)

(4) The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even when investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press, information about the investigation or the circumstances being investigated.

(5) The Basic Principle does not exclude the holding in camera of proceedings intended to achieve conciliation or settlement of private disputes.

(6) The Basic Principle does not require a right to broadcast or record court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

Restrictions :

- (7) Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised by a Judge.
- (8) Where a Judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media(as well as any other person affected) shall have the right to be heard for the purpose of objecting to the course of that power and, if exercised, a right of appeal.
- (9) Laws may authorize restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of minors and members of other groups in need of special protection.
- (10) Laws may restrict the Basic Principle in relation to the criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society:
- a. for the prevention of serious prejudice to a defendant;
 - b. for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a Jury or a victim.
- (11) Where a restriction of the Basic Principle is sought on the grounds of national security, this should not jeopardize the rights of the parties, including the rights of the defence. The defence

and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.

- (12) In civil proceedings, restrictions of the Basic Principle may be imposed if authorized by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.
- (13) No restriction shall be imposed in an arbitrary or discriminatory manner.
- (14) No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction. Moreover, the order to restrict shall be subject to review by a Judge.

Strategies for Implementation :

Para 1 states that the Judge should receive guidance in dealing with the press and the Judge shall be encouraged to assist the press by

providing summary of long or complete judgment of matters of public interest.

Para 2 says that Judges shall not be forbidden to answer questions from the press etc.

Para 3 is important and states:

“3. The balance between independence of judiciary, freedom of the press and respect of the rights of the individual – particularly of minors and other persons in need of special protection – is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups; legal recourse, Press Council, Ombudsman for the Press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

Siracusa Principles : (referred to in Para 2 of Basic Principle of Madrid Principles)

The following are extracts from the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights. (UN Document E/UN4/1984/4)

The principle refers to Limitation Clauses, under several headings dealing with the method of interpretation, the meaning of ‘prescribed by law’, ‘a democratic society’, ‘public order’, ‘public health’, ‘public morals’ ‘national security’, ‘public safety’, ‘rights and freedom of others’ or ‘rights or reputation of others’, which are used by the ICCPR.

So far as the media and criminal law is concerned the following item ‘restrictions on public trial’ is relevant. It says:

“(IX) Restrictions on Public Trial :

38. All trials shall be public unless the Court determines in accordance with law that:

- (a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open Court showing that the interest of private lives of the parties or their families or of juveniles so requires; or
- (b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.”

Constitution of India: Rights of suspects and accused and freedom of speech:

Our Constitution does not separately refer to the freedom of the press or of the electronic media in Part III but these rights are treated by the law as part of the ‘Freedom of speech and expression’ guaranteed by Article 19 (1)(a) of the Constitution of India. The guarantee is subject to ‘reasonable restrictions’ which can be made by legislation to the extent permitted by Article 19(2). The Article reads thus:

“Article 19(1): All citizens shall have the right
(a) to freedom of speech and expression;
(b)
(g)

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

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

‘Contempt of Court law’ deals with non-interference with the “administration of justice” and that is how the “due course of justice” that is

required for a fair trial, can require imposition of limitations on the freedom of speech and expression.

Article 20, clause (1) of the Constitution states that no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence and not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Art 20, clause (2) states that no person shall be prosecuted and punished for the same offence more than once. Art 20, clause (3) is important and it deals with the right against self-incrimination. It states:

“Art 20(3): No person accused of any offence shall be compelled to be a witness against himself.”

Art 21 is the crucial article which guarantees the right to life and liberty. It reads:

“Art. 21: No person shall be deprived of his life or personal liberty except according to procedure established by law’.

Article 22(2) requires that a person who is arrested has to be produced before a Magistrate within 24 hours of the arrest.

The Supreme Court in Maneka Gandhi’s case (AIR 1978 SC 597 has interpreted the words ‘according to procedure established by law’ in Art

21as requiring a procedure which is fair, just and equitable and not arbitrary.

The Supreme Court of India, in Life Insurance Corporation of India v. Manubhai D. Shah (1992 (3) SCC 637) has stated that the “freedom of speech and expression” in Article 19(1)(a) means the right to express one’s convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner.

In Romesh Thapar v. State of Madras : 1950 SCR 594, it was held that the freedom includes the freedom of ideas, their publication and circulation. It was stated in Hamdard Dawakhana v. Union of India : 1960 (2) SCR 671, that the right includes the right to acquire and impart ideas and information about matters of common interest.

The right to telecast includes the right to educate, to inform and to entertain and also the right to be educated, be informed and be entertained. The former is the right of the telecaster, while the latter is the right of the viewers (Secretary, Ministry of Information & Broadcasting v. Cricket Association of West Bengal : 1995(2) SCC 161. The right under Art 19(1)

(a) includes the right to information and the right to disseminate through all types of media, whether print, electronic or audio-visual : (ibid).

The Supreme Court has held that a trial by press, electronic media or by way of a public agitation is the very anti-thesis of rule of law and can lead to miscarriage of justice. A Judge is to guard himself against such pressure (State of Maharashtra v. Rajendra Jawanmal Gandhi : 1997 (8) SCC 386.

In Anukul Chandra Pradhan vs. Union of India, 1996(6) SCC 354, the Supreme Court observed that “No occasion should arise for an impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial”

Contempt of Courts Act, 1971:

So far as interference with criminal law is concerned, Sections 2 and 3 of the Contempt of Courts Act, 1971 are relevant. Section 2(c) defines ‘Criminal Contempt’ as:

“Section 2(c): ‘Criminal contempt’ means the publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which

- (i)
- (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 manner”.

Section 3(1), however, exempts the following:

“innocent publication, if the publisher had no reasonable grounds for believing that the proceeding was pending”.

We shall refer to the provisions of sec 3 in extenso.

“3. Innocent publication and distribution of matter not contempt.- (1) A person shall not be guilty of contempt of Court on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends

to obstruct, the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceedings which is not pending at the time of publication and shall not be deemed to constitute contempt of Court.

(3) A person shall not be guilty of contempt of Court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section(1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

provided that this sub-section shall not apply in respect of the distribution of –

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in Section 3 of the Press and Registration of Books Act, 1867;

(ii) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in Section 5 of the said Act.

Explanation.- For the purposes of this section, a judicial proceedings-

(a) is said to be pending –

(A) in case of a civil proceeding, when it is instituted by the filing of a plaint or otherwise;

(B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898, or any other law-

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed , or when the Court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the Court takes cognizance of the matter to which the proceeding relates, and

in the case of a civil or criminal proceedings,

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

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

Section 4 of the Act protects fair and accurate reporting of judicial proceedings.

Section 7 states when publication of information relating to proceedings in chambers or in camera is not contempt, except in certain cases which are enumerated in that section.

Pre-trial publications granted immunity under sec 3(2) &

Explanation:

It will be seen from the Explanation below sec 3, the starting point for deeming a criminal proceeding as pending, it is sufficient if a charge sheet or challan is filed or Court summons or warrant are issued. Thus so far as criminal contempt is concerned, the ‘pre-trial’ period has not been given the required importance under the Court of Contempts Act, 1971. ‘Pendency’ under the Explanation to sec 3 starts, in a criminal case, only from the time when the charge sheet or challan is filed or summon or

warrant is issued by the criminal Court and not even from date of arrest, even though from the time of arrest, a person comes within the protection of the Court for he has to be brought before a Court within 24 hours under Art 22(2) of the Constitution of India. If there are prejudicial publications after arrest and before the person is brought before Court or his plea for bail is considered, there are serious risks in his getting released on bail.

Certain acts like publications in the media at the pre-trial stage, can affect the rights of the accused for a fair trial. Such publications may relate to previous convictions of the accused, or about his general character or about his alleged confessions to the police etc.

In the context of a parallel investigation which was undertaken pending arrest and trial in the court, the Supreme Court referred to 'trial by press'. This was, of course, before 1971 Act was enacted. In Saibal v. B.K. Sen (AIR 1961 SC 633) it said:

“It would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because, trial by newspapers, when a trial by one of the regular tribunal is going on, must be prevented.”

The basis for this view is that such action on the part of the newspaper tends to interfere with the course of justice”.

The words “tends to interfere with the course of justice” used by the Supreme Court in the above case are quite significant.

In the light of the human rights concepts referred to above and the provisions of our Constitution and the Contempt of Courts Act, 1971, the question arises whether any publication of matters regarding suspect or accused can amount to contempt of Court not only when it is made during the pendency of a criminal case (i.e. after the charge sheet is filed) but before that event, e.g. once a person is arrested and criminal proceedings are “imminent”. This issue requires a very detailed examination and will be considered in the ensuing chapters.

Chapter – III

Do publications in the media subconsciously affect the Judges?

There is then a nice question whether a media publication can ‘unconsciously’ influence Judges or Juries and whether Judges, as human beings are not susceptible to such indirect influences, at least subconsciously or unconsciously ?

The American view appears to be that Jurors and Judges are not liable to be influenced by media publication, while the Anglo-Saxon view is that Judges, at any rate may still be subconsciously (though not consciously) influenced and members of the public may think that Judges are influenced by such publications and such a situation, it has been held, attracts the principle that ‘justice must not only be done but must be seen to be done’. The Anglo-Saxon view appears to have been accepted by the Supreme Court as can be seen by a close reading of the Judgment in Reliance Petrochemicals v. Proprietor of Indian Express : 1988(4) SCC 592. If one carefully analyses that judgment, in the light of an earlier

judgment of the Court in P.C. Sen (in Re) :AIR 1970 SC 1821, this view of the Supreme Court appears to be clear.

In P.C. Sen in re the Supreme Court observed: (p 1829)

“No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges.”

It appears that it was accepted by the Supreme Court that Judges are likely to be “subconsciously” influenced . That was also the view of Justice Frankfurter of U.S. Supreme Court (in his dissent) and of Lord Scarman and Lord Dilhorne of the House of Lords. We shall presently refer to these views.

P.C. Sen (in Re) (AIR 1970 SC 1821) was, no doubt, a case where a civil action by way of a writ was pending in the High Court. There was a broadcast by the Chief Minister of West Bengal, who had knowledge of the challenge to the West Bengal Milk Products Control Order, 1965 in a Writ Petition that was pending in the Calcutta High Court, and the High

Court held him to be guilty of contempt for justifying the Control Order in his radio broadcast but let him off without punishment.

On appeal, the Supreme Court agreed that the speech of the Chief Minister was ex facie calculated to interfere with the administration of justice. In the course of the judgment, it was stated that no distinction can be made on the ground whether a case is triable by a Judge or Jury. If an action tends to influence the Jury, it may also tend to influence a Judge.

In Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express 1988(4) SCC 592, an order of prior restraint was passed by the Supreme Court initially while a civil case was pending adjudication. There there was a public issue of the commercial company, the company started the public issue after obtaining sanction of the Controller of Capital Issues. The sanction was under challenge by various parties in different High Courts and the company filed a transfer petition in the Supreme Court to bring all the matters before the Supreme Court.

In that case which related to transfer of all similar cases to one Court, initially, at the instance of Reliance Petrochemicals, the Supreme Court passed an order restraining the Indian Express Newspapers from publishing any article, comment, report or editorial on the subject of

public issue by the company. The Indian Express applied for vacating the order and while vacating the order, the Supreme Court considered the case law pertaining to publications which could be prejudicial and referred to the exceptions.

The Supreme Court referred to Article 19(1)(a) which deals with freedom of speech and expression and the restrictions stated in Article 19 (2). It pointed out that the American Constitution does not contain any provision for imposition of reasonable restrictions by law.

It adverted to the absolute terms in which the U.S First Amendment dealing with freedom of speech and expression is couched and to the theory of ‘real and present danger’ which was evolved by the U.S Courts as the only inherent limitation on that right in that country. The Supreme Court in Reliance case stated that the position in India was different, here the right of freedom of speech and expression was not absolute as in USA. The Court observed (see para 10, p.602):

“Our Constitution is not absolute with respect to freedom of speech and expression as enshrined by the First Amendment to the American Constitution.”

The Court again stated (see para 12, p.603,) that it was not dealing with a case of publication by press affecting ‘judicial administration’ in the context of Contempt of court but was examining the question of publication as a matter relating to ‘public interest’. After referring to the First Amendment to the US Constitution which is in absolute terms, the Court stated (p.605, para 15):

“In America, in view of the absolute terms of the First Amendment, unlike the conditional right of freedom of speech under Article 19(1)(a) of our Constitution, it would be worthwhile to bear in mind the ‘present and imminent danger’ theory”.

The Supreme Court then referred to the observations of Justice Frankfurter in John D. Pennekamp v. State of Florida (1946) 328 US 331) to the effect that ‘the clear and present danger’ concept was never stated by Justice Holmes in Abrams v. U.S : (1919) 250 US 616 to express a technical doctrine or convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken out from its context. The Judiciary, according to Justice Frankfurter could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court. The judiciary is not independent unless Courts of Justice are enabled to

administer law by absence of pressure from without, or the presence of disfavour.

There is yet another celebrated passage in the said judgment of Justice Frankfurter (not quoted by our Supreme Court) to which we may refer:-

“No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function – indispensable in a free society – that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the

Constitution hardly meant to create the right to influence Judges and Jurors.”

The Supreme Court next referred to Nebraska Press Association v. Hugh Stuart : (1976) 427 US 539 where the American Supreme Court vacated a prior-restraint order passed by the trial Judge in a multiple murder case while that case was pending, on the ground that the view of the trial Judge that Jurors are likely to be influenced by the press publications, was speculative. The US Supreme Court stated that the trial court should have resorted to alternative remedies such as – change of venue, postponement of trial, a searching voir dire of the Jury panel for bias, and sequestration of jurors – before passing a restraint order. After referring to Nebraska, our Supreme Court observed that (p.607, para 21):-

“We must examine the gravity of the evil. In other words, a balance of convenience in the conventional phrase of Anglo-Saxon Common Law Jurisprudence would, perhaps, be the proper test to follow.”

After thus referring to the US First Amendment as being absolute and to the test of ‘real and present danger’ evolved in US and after holding that the position in India was different because here Article 19(1)(a) granted only a conditional right, the Supreme Court turned to the Anglo-Saxon Jurisprudence and examined the English cases.

The Supreme Court referred to Attorney General v. BBC : 1981 A.C 303 (HL). In that case the Attorney General had brought proceedings for an injunction to restrain the defendants from broadcasting a programme dealing with matters which related to an appeal pending before a Local Valuation Court on the ground that the broadcast would amount to contempt of court. In that context, (though the House of Lords held that contempt law did not apply to the Valuation Court), Lord Scarman observed that 'administration of justice' should not at all be hampered with. Lord Denning in the Court of Appeal had observed that professionally trained Judges are not easily influenced by publications. But, disagreeing with that view of Lord Denning, Lord Dilhorne stated (pp 335) in yet other oft-quoted passage as follows:

“It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman

experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it. It is the law, and it remains the law until it is changed by Parliament, that the publications of matter likely to prejudice the hearing of a case before a court of law will constitute contempt of court punishable by fine or imprisonment or both".

No doubt, as stated above, Lord Denning M.R stated in the Court of Appeal that Judges will not be influenced by the media publicity (Att Gen v. BBC : 1981 AC 303 (315) CA), a view which was not accepted in the House of Lords in Att Gen vs. BBC 1981 AC 303 (HL).

In fact, Borrie and Lowe in their Commentary on Contempt of Court (3rd Edn, 1996) state that Lord Denning's view is "more a statement of policy rather than literal truth".

Cardozo, one of the greatest Judges of the American Supreme Court, in his 'Nature of the Judicial Process' (Lecture IV, Adherence to Precedent. The Subconscious Element in the Judicial Process) (1921) (Yale University Press) referring to the "forces which enter into the conclusions of Judges" observed that "the great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by".

The full text of the passage in the above essay of Cardozo reads thus:

“Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotion and habits and convictions, which make the man, whether he be litigant or Judge There has been a certain lack of candor in much of the discussions of the theme or rather perhaps in the refusal to discuss it, as if Judges must lose respect and confidence by the reminder that they are subject to human limitations”

Cardozo then stated in a very famous quotation,

“None the less, if there is anything of reality in my analysis of the Judicial Process, they do not stand aloof on these chill and distant heights; ... The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the Judges by”.

The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on ‘Contempt by Publication’ stated (see para4.50) that most

law reform bodies “tended to take the view that Judicial officers should generally be assumed capable of resisting any significant influence by media publicity. Despite this, they have not gone so far as to exclude altogether as a possible ground of liability for sub-judice contempt, the risk of influence on a Judicial officer. The justification for this approach is two-fold : first, it is always possible that a Judicial officer may be subconsciously influenced; and secondly, it is just as important to protect the public perception of Judges’ impartiality as to protect against risk of bias”. The Discussion Paper notes that in UK, the Phillmore Committee noted that Judges are generally capable of putting extraneous matter out of their minds but, in its recommendations, the Committee did not exclude influence on Judicial officers as a ground for liability.

The NSW Law Commission referred to an article by S. Landsman and R.Rakos “A Preliminary Inquiry into the effect of potentially biasing information on Judges and Jurors in Civil Litigation” (1994) (12 Behavioral Sciences and the Law 113), which concluded that there is no empirical data to support or refute the assertion that Judicial officers are not likely to be significantly influenced by media publicity. We cannot forget the Common Law rule laid down in R v. Sussex Justices : Exparte McCarthy : 1924(1) KB 256 that

“Justice should not only be done, it should manifestly and undoubtedly be seen to be done”.

The Irish Law Commission in its Consultation paper (1991) (p 115) on Contempt of Court observed similarly. The Canadian Law Reform Commission also took the view that, while Judges may generally be impervious to influence, the possibility of such influence could not be ruled out altogether, and that in the case of Judicial officers, the sub-judice rule served an important function of protecting public perception of impartiality (see Canadian Law Reform Commission, Contempt of Court : Offences against Administration of Justice {Working Paper 20, 1977, p 42-43} and Report 17 (1982) at p 30).

In Union of India v. Naveen Jindal : 2004(2) SCC 510, it was clearly held that the US First Amendment is in absolute whereas the right under Article 19(1)(a) can be restricted as permitted in Article 19(2)(a), echoing what was stated in Reliance Petrochemicals.

In M.P. Lohia v. State of West Bengal : 2005(2) SCC 686, the facts were that a woman committed suicide in Calcutta in her parents' house but a case was filed against the husband and in-laws under the Indian Penal Code for murder alleging that it was a case of dowry death. The husband (appellant in the Supreme Court) had filed a number of documents to prove that the woman was a schizophrenic psychotic patient. The parents of the

woman filed documents to prove their allegations of demand for dowry by the accused. The trial was yet to commence. The Courts below refused bail.

The Supreme Court granted interim bail to the accused and while passing the final orders, referred very critically to certain news items in the Calcutta magazine. The Court deprecated, two articles published in the magazine in a one-sided manner setting out only the allegations made by the woman's parents but not referring to the documents filed by the accused to prove that the lady was a schizophrenic. The Supreme Court observed:-

“These type of articles appearing in the media would certainly interfere with the course of administration of justice.”

The Court deprecated the articles and cautioned the Publisher, Editor and Journalist who were responsible for the said articles against

“indulging in such trial by media when the issue is sub-judice.”

and observed that all others should take note of the displeasure expressed by the Court.

The Punjab High Court in Rao Harnarain v. Gumori Ram : AIR 1958 Punjab 273 stated that ‘Liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and

not the adjudication of cases.’ The Orissa High Court in Bijoyananda v. Bala Kush (AIR 1953 Orissa 249) observed that –

“the responsibility of the press is greater than the responsibility of an individual because the press has a larger audience. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.”

In Harijai Singh v. Vijay Kumar : 1996(6) SCC 466, the Supreme Court stated that the press or journalists enjoy no special right of freedom of expression and the guarantee of this freedom was the same as available to every citizen. The press does not enjoy any special privilege or immunity from law.

Summarizing the position, it will be seen that the right to free speech in US is absolute and no restraint order against publication is possible unless there is ‘clear and present danger’ to the right itself.

But, the position in India is different. The right to free speech is not absolute as in US but is conditional and restricted by Article 19(2). Treating a publication as criminal contempt under Section 2(c) of the Contempt of Courts Act, 1971 where the Court comes to the conclusion that

the publication as to matters pending in Court ‘tends’ to interfere {vide Section 2(c)(iii)} with the administration of justice, amounts to a reasonable restriction on free speech. The view obtaining in USA that trained Judges or even jurors are not influenced by publication in the media as stated by the majority in Nebraska (1976) 427 US 539) was not accepted in England in Attorney General v. BBC 1981 AC 303 (HL) by Lord Dilhorne who stated that Judges and Jurors may be influenced subconsciously and Judges could not claim to be super human was quoted by the Supreme Court in Reliance Petrochemicals. In what manner they are so influenced may not be visible from their judgment, but they may be influenced subconsciously. Even in US, Justice Frankfurter has accepted that Judges and Jurors are likely to be influenced. The view of the Indian Supreme Court even earlier in P.C. Sen In re : AIR 1970 SC 1821 was that Judges and Jurors are likely to be influenced and that view in the Anglo-Saxon law appears to have been preferred by the Supreme Court in Reliance case. That Judges are subconsciously influenced by several forces was also the view of Justice Cardozo and of the various Law Commissions referred to above.

CHAPTER IV

How ‘imminent’ criminal proceedings came to be excluded from the Contempt of Courts Act, 1971: A historical and important perspective

Section 3(2) of the Contempt of Court Act, 1971 read with the Explanation below the section (see Chapter II of this Report) excludes from criminal contempt, all publications made, before the filing of charge sheet or challan in court or before issue of summons or warrant, even if such publications interfere or tend to interfere with the course of justice.

In King v. Mirror 1927(1) KB 845, the accused was arrested on January 9, and within 24 hours, brought before the Court on January 10 and investigation started and on January 13, an identification parade was held. Offending photographs were published on January 17. It was held that proceedings have begun. But the question of imminence of criminal proceedings was not decided.

In King v. Parke : (1903) 2 KB 432, it was held that there would be contempt of the assize Court even though no committal had taken place and a bill had been filed. What possible difference can it make, whether a particular Court which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created, be it at the moment in session or even actually constituted or not? It was in this case that Wills J. made the famous observation:

“It is possible very effectively to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.”

(See Law of Contempt of Court by K.J. Aiyer, 6th Ed, 1983 for the above analysis of Indian case law. But, today this is not good law, the date of arrest rather than the filing of first information report, is the starting point of ‘pendency’ as per judgment of our Supreme Court.)

Question is whether such exclusion amounts to over-protection of freedom of expression and dilution of the protection of due process for fair criminal trials?

It is first necessary to go into the historical basis of the exclusion of prejudicial publications made prior to filing of charge sheet or challan from

the purview of Contempt of Court Act, 1971. A historical perspective will lay bear how such exclusion, as stated above, from contempt liability come into being and whether such exclusion was justified?

Law prior to 1971:

Under both the Contempt of Courts Act, 1926 and 1952, there was no definition of civil contempt and criminal contempt. Further, Courts did apply contempt law to publications which interfered or tended to interfere with administration of justice if criminal proceedings were “imminent” and the person ‘knew or should have known’ that a proceeding was imminent (see Subrahmanyam in re : AIR 1943 Lah 329 (335); Tulja Ram v. Reserve Bank : AIR 1939 Mad 257; State v. Radhagobinda : AIR 195 4 Orissa 1. State v. Editor etc. of Matrubhumi : AIR 1955 Orissa 36; Le Roy Frey v. R. Presad : AIR 1958 Punjab 377; Emperor v. Kustalchar : AIR 1947 Lah 206).

In Smt. Padmavati Devi v. R.K. Karanjia AIR 1963 MP 61, it was held that to attract the jurisdiction of contempt, it was not necessary that the trial of the accused must be imminent in the sense that committal proceedings must have been instituted. The filing of the first information report was sufficient. At any rate, by the production of the arrested person before a Magistrate for remand, the criminal case was actually pending in a

criminal court competent to deal with it judicially. In criminal cases, such a step could be taken in the case of a non-cognisable offence, by the filing of a complaint in the Court and in the case of a cognisable offence by the making of a first information report. Arrest of the accused by the police during investigation could, therefore, be “during” the pendency of the cause. It may be that thereafter the investigation may prove abortive, the prosecution may be dropped or the accused may be released and orders may be passed granting protection to the prosecution and to the accused from unjustified attacks as long as the investigation has not ended. There is no justification for distinction between the English law and the Indian law on the point. In England also, a person may be arrested without warrant and after an arrest, the prosecution may be dropped for paucity of evidence but that has never been considered to be a good reason for not considering the criminal cause as pending.

This is so far as ‘arrest’ is concerned even where a charge sheet or challan was not filed before the 1971 Act.

But, before the 1971 Act, it has been held in Smt. Padmavathi Devi’s case and in the following cases that as soon as a complaint is lodged in the police station and an investigation is started, the matter becomes sub-judice

attracting the judicial power of the Court to punish for contempt. (Diwanchand v. Narender : AIR 1950 East Punjab 366, Rao Narain Singh v. Gumani Ram : AIR 1958 Punjab 273; Emperor v. Chowdhary : AIR 1947 Cal 414; Mankad v. Shet Pannalal : AIR 1954 Kutch 2; State v. Editor etc., Matrubhumi : AIR 1955 Orissa 36; R.K. Garg v. S.A. Azad : AIR 1967 All 37.) But this is not good law in view of the decision in A.K. Gopalan vs. Noordeen (1969) referred to below.

A.K. Gopalan vs. Noordeen: (1969)

In A.K. Gopalan v. Noordeen : (AIR 1969(2) SCC 734) (decided on 15th September, 1969 before the 1971 Act), the Supreme Court held that a criminal proceeding is imminent only when an arrest had taken place. In that case, a person lost his life in an incident and first information report was lodged on the same day. About a week later, Mr. A.K. Gopalan (appellant) made a statement and three days later, the respondent and his brother were arrested and remanded to police custody. The statement was published in a newspaper after the arrest. The respondent moved the High Court for contempt against the appellant, editor, printer and publisher of newspaper. The High Court held them all guilty of contempt of Court as the statement on publications were after the filing of the first information

report. The Supreme Court allowed the appeal of Mr. A.K. Gopalan but dismissed the appeal of the editor. The Court held:

- (i) Committal for contempt is not a matter of course. It is a matter of discretion of the Court and such discretion must be exercised with caution. The power must be exercised with circumspection and restraint and only when it is necessary.
- (ii) The publication to constitute contempt must be shown to be such that it would substantially interfere with the due course of justice.
- (iii) On the date on which the first appellant made his statement, it could not be said that any proceedings in a criminal court were imminent merely because a first information report has been lodged. The accused were not arrested till after his statement is made and there was nothing to suggest imminence of proceedings, and there was nothing to show that the first appellant was instrumental in getting the statement published after the arrest.
- (iv) The fundamental right to freedom of speech will be unduly restrained if it is held that there should be no comment on a case even before an arrest had been made. In fact, in cases of public scandals involving companies, it is the duty of free press to comment on such topics and draw the attention of the public.
- (v) As regards the editor, the proceedings in the criminal court were imminent, because by the date the statement was published, the accused was arrested, and remanded by the

magistrate, which shows that proceedings in a court were imminent. The possibility of the accused being released after further investigation is there, but is remote. Even though the name of the accused was not mentioned, it was indicated that the person who committed murder was acting in pursuance of a conspiracy, and that would certainly put the public against the accused.

(The dissenting Judge Mitter J, held that even the first appellant was guilty of contempt of court.)

We have earlier referred to Smt. Padmavatti Devi v. R.K. Karanjia, AIR 1963 MP 61, and other cases where it was held that the law of contempt should be available in cognisable offences from the time when the first information report is filed. This view should be regarded as having been superseded by the Supreme Court decision in A.K. Gopalan v. Noordeen to the extent it said that the criminal proceedings must be treated as imminent from the date of filing of first information report and even before any arrest is made.

The Supreme Court judgment in A.K. Gopalan is quite important in that it decides –

- (1) that criminal proceeding must be deemed to be imminent if the suspect is arrested;
- (2) that if a prejudicial publication is made regarding a person who has been arrested by the police, then the right to freedom of speech and expression under Article 19(1)(a) must give way to the right of the person to a fair trial to be conducted without any prejudice and any prejudicial publication in the press after arrest may cause substantial prejudice in the criminal proceedings which must be taken to be imminent, irrespective of whether the person is released later.

The Sanyal Committee, 1963: date of arrest should be starting point:

Long before the 1971 Act was passed, the Government appointed the Sanyal Committee to go into the 1952 Act and suggest changes. The Sanyal Committee gave its Report in 1963. It did not have the benefit of the Supreme Court judgment of 1969 in A.K. Gopalan's case.

The Sanyal Committee has observed in chapter VI "Contempt in relation to imminent proceedings" as follows:

“(1)

(2) Precise statement of the law and reform:

The conclusion we have arrived at raises the immediate question whether it is possible to state the law relating to

imminent proceedings in precise terms and how far it can be clarified or modified. Courts have, by and large, tried to exercise their powers in this respect in such a way that the law of contempt does not seriously interfere with freedom of speech because they have themselves realised that it is extremely difficult to draw the lines between cases where proceedings may be said to be imminent and cases where they may not be. For instance, the mere filing of a first information report may not be conclusive that proceedings are imminent although stern logic may demand that the line should be drawn at that point. Even where an arrest has taken place, it may not always be followed up by a judicial proceeding. The only guidance that we obtain from decided cases is that the question will depend upon the facts of each case (Foot Note 1 extracted below). Are we to leave the law in this unsatisfactory and imprecise state, particularly as fundamental rights are involved?

(3) Civil cases:
..

(4) Criminal cases: In respect of criminal matters, however, a slightly different approach is necessary. As in the case of pending

proceedings, if a person is able to prove that he has no reasonable grounds for believing that the proceeding is imminent, it should completely absolve him from liability for contempt of court, perhaps such a defence is already available to an alleged contemnor, but we would prefer to give a statutory expression particularly as under English law, from which our law of contempt is derived, lack of knowledge would not excuse a contempt though it may have a bearing on the punishment to be inflicted. We would also like to go a little further and provide certain additional safeguards. It has been observed in several cases that once a person is arrested, it would be legitimate to infer that proceedings are imminent (see Foot Note 2 extracted below). But in actual fact that result may not invariably follow. We have already said that it should be a valid defence for an alleged contemnor to prove that he had no reasonable grounds for believing that a proceeding was imminent. To this, we would like to add that where no arrest has been made, a presumption should be drawn in favour of the alleged contemnor that no proceedings are imminent (Foot Note 3 extracted below).”

We shall refer to the Footnotes 1, 2, 3 now:

Foot Note 1: “See the decision of the Supreme Court in Surendra Mohanty v. State of Orissa: (CrL App. No.107/56 dated 23.1.1961. In Smt. Padmavathi Devi v. R.K. Karanjia AIR 1963 MP 61, it appears to be suggested that the law should

extend its protection, in the case of cognisable cases, where the first information report is made because in the Courts' view, the interest of justice would be better served by giving protection as long as the investigation has not ended. This proposition appears to be widely stated. For example, the First Information Report may contain no names.

Foot Note 2: In fact the cases relied on are cases where arrests have taken place.

Foot Note 3: R v. Oldham Press Ltd.: 1957 (1) QB 73; the law in England has already been modified by the Administration of Justice Act, 1960].

It is clear that the Sanyal Committee accepted that in criminal matters, date of arrest could be treated as starting point of pendency for the purpose of contempt law.

To that extent, the Sanyal Report of 1963 is consistent with the judgment of the Supreme Court in A.K. Gopalan's case decided in 1970.

Bill of 1963 prepared by Sanyal Committee refers to ‘imminent’ proceedings:

In the Contempt of Courts Bill, 1963 annexed to the Report of the Sanyal Committee, section 3 deals with “Innocent publication and distribution of matter not contempt” and refers to “any criminal proceeding pending or imminent” at the time of publication which is calculated to interfere with the course of justice.

Section 3 in that Bill reads thus:

“Section 3: Innocent Publication and distribution of matter not contempt:

- (1) A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with
 - (a) any criminal proceeding pending or imminent at the time of publication, if at the time he had no reasonable grounds for believing that the proceeding was pending or, as the case may be, imminent;
 - (b) any civil proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

- (2) Notwithstanding anything contained in any law for the time being in force, a person shall not be guilty of contempt of court on the ground that he has published any such matter as is mentioned in subsection (1) in connection with any civil proceeding imminent at the time of publication, merely because the proceeding was imminent.
- (3) A person shall not be guilty of Contempt of Court on the ground that he has distributed a publication containing any such matter as is mentioned in subsection (1), if at the time of distribution he had no reasonable grounds for believing that it contained any such matter as aforesaid or that it was likely to do so.
- (4) The burden of proving any fact to establish on defence afforded by this section to any person in proceedings for Contempt of Court shall be upon that person.

Provided that, where in respect of the commission of an offence no arrest has been made, it shall be presumed until the contrary is proved that a person accused of Contempt of Court in relation thereto had no reasonable grounds for believing that any proceeding in respect thereof was imminent.

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

- (a) is said to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or where no

appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired.

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

Thus, the Sanyal Committee specifically protected the interests of the suspect where criminal proceedings were pending or imminent, if the person who made the publication had no reasonable grounds for believing that the proceeding was pending or imminent. Under subsection (3), if he had reasonable grounds for believing that the publication did not contain any matters as aforesaid calculated to interfere with the course of justice, there was no contempt. The proviso to section 3(4) stated that if no arrest has been made, it shall be presumed that there are no reasonable grounds for believing that proceedings are imminent.

But this position, as to date of arrest, was given up by the Joint Committee of Parliament in 1968-70.

Joint Committee of Parliament (1968-1970): drops the word ‘imminent’ and requires actual ‘pendency’ in Court

The Joint Committee of Parliament (the Bhargava Committee) gave its Report on 23.2.1970. It prepared a draft Bill and published it in the Gazette in February, 1968 and invited responses. After receiving responses, the Bill was finalized. It provided any definition of ‘contempt’ but in clauses 3 to 7 stated what will not be contempt. The Report stated in para 15 as follows:

“15

The Law of Contempt of Courts touches upon citizens’ fundamental rights to personal liberty and to freedom of expression and therefore, it is essential that all should have a clear idea about it. The Committee were, however, aware that it would be difficult to define in precise terms the concept of Contempt of Court, nevertheless, it was not beyond human ingenuity to frame or formulate a suitable definition thereof. The Committee have, therefore, after giving a very anxious and elaborate thought to this aspect in the Bill, evolved a definition of the expression ‘Contempt of Court’ in clause 2 of the Bill. While doing so, the Committee have followed the well-known and familiar classification of contempts into ‘civil contempt’ and ‘criminal contempt’ and have given essential indications and

ingredients of each class or category of contempt. The Committee hopes that the proposed definitions will go a long way in enabling the public to know what contempt of court means so that they could avoid it; and the courts would find it easy to administer it. The proposed definition would also, the Committee trust, remove uncertainties arising out of an undefined law and help the development of the law of contempt on healthier lines.”

But in para 16, the Committee referred to the “other principal changes by the Committee in the Bill”. They said that reasons therefor are set out in the “succeeding” paragraph and that reads as follows:

Clause 3

“

Paragraph (1) (original): The Committee felt that the word ‘imminent’ in relation to an impending proceeding is vague and is likely to unduly interfere with the freedom of speech and expression.

The Committee are of the view that it is very difficult to draw a line between cases where proceedings may be said to be imminent and cases where they may not be, especially in criminal cases. The Committee have, therefore, deleted the reference to imminent

proceedings from the clause and sub-clause (1) has been suitably modified’.

Sub-clause (2) (Original): The sub-clause has been omitted consequent on the deletion of the reference to imminent proceedings as mentioned earlier.

Sub-clause (2) (New): The Committee have added a new sub-clause to make it clear that no publication of any matter should be deemed to constitute contempt of court if it is made in connection with any proceeding which is not pending in a court at the time of publication.

Sub-clause (3):

Sub-clause (4) (Original): The proviso to this sub-clause relating to the burden of proof in imminent proceedings have been omitted consequent upon deletion of the reference to imminent proceedings from sub-clause (1). In view of this, the Committee felt that this sub-clause which otherwise reproduces the rule in section 105 of the Evidence Act, 1872 is unnecessary and the Committee have, therefore, deleted the sub-clause.

Explanation to clause (3): The original Explanation pertaining to pending judicial proceeding covered the period of time upto which a proceeding is said to be pending without laying down the time from which proceeding is said to commence. The Committee are of the

view that the stage or stages from which pendency starts should also be provided in the Explanation, and a proceeding should be deemed to be pending when the case actually goes before a Court and it becomes seized of the matter. The Committee has, therefore, redrafted paragraph (a) of the Explanation and indicated therein the steps after taking which a civil or a criminal case should be deemed to commence.”

Question is whether the changes made by Joint Committee in 1970 are consistent with law declared by Supreme Court in A.K. Gopalan v. Noordeen & Maneka Gandhi case ?

The validity of the changes brought about by the Joint Committee in 1970, in the draft Bill prepared by the Sanyal Committee in 1963, by dropping the word ‘imminent’, and by excluding all publications made before the date of filing of the charge sheet or challan, even if the person had been arrested by the date of publication, will have to be considered in the light of due process of law as decided in Maneka Gandhi’s case 1978 (1) SCC 248 and the fundamental right to life and liberty declared in Article 21, and in the light of the view expressed in A.K. Gopalan v. Noordeen, AIR 1970 SC 1694 as to how liberty and freedom of expression require to be balanced.

The first reason given by the Joint Committee for omitting the word ‘imminent’ is that that word is ‘vague. This aspect will be considered in Chapter V.

The second reason given by the Joint Committee is that if imminent criminal proceedings are to be taken into account for considering the question of prejudice, then freedom of expression may be unduly restricted. This will be considered in Chapter VII.

Chapter V

Whether Joint Committee of Parliament was right in stating that the word 'imminent' is vague?

In this Chapter, we shall deal with the view of the Joint Committee (1969) that the word 'imminent' used by the Sanyal Committee in the 1963 is 'vague'.

Before going into the aspect whether the Joint Committee of Parliament was right in stating that the word 'imminent', as used by the Sanyal Committee in 1963 was vague, we shall refer to another statement by the Sanyal Committee that India is a vast country and what is published in one part is not accessible to people in another part of the country.

Whether publications in one part of India do not reach other parts, as stated by Sanyal Committee (1963):

Though the Sanyal Committee, in its Report of 1963, was in favour of the date of arrest being the starting point for defining 'pendency' of a criminal case, and used the word 'imminent' in the Bill, still it made some

observations that publication made in one part of the country by the media do not reach other parts of the country, because our country is so vast. That was the position in 1963.

But, in our view, this observation is no longer tenable today in view of the revolutionary changes that have come about in media publications in the last two decades. The new technology has ushered in the television, and cable services, and internet which are today accessible by millions of people in cities, towns and villages. Print media and the radio services too have tremendously increased. News in internet is available globally. Dissemination of news by the electronic media and internet is so fast that the moment a crime of some significance is alleged to have been committed and somebody is suspected, every News Channel rushes to the place and covers the item within minutes. The suspect is shown on the television or in the internet and almost a parallel inquiry starts. Most newspapers publish their daily newspaper summaries on the web.

By 2002, there have been in India, about 49,000 newspapers of which about 20,000 are in Hindi, over 130 million (13 crores) combined circulation of newspapers all put together, 120 million (12 crores) radio

sets with 20% of population regularly listening, 65 million television sets of whom 50% regularly watch the channels, over 35 million households with cable television connections, 21% of population covered by FM radio, nearly 35 million telephones, over 10 million mobile phones, over 5 million computers and internet subscribers. (see article by Dr. Jaya Prakash Narayan in 2002 National Press Day Souvenir published by Press Council of India). in the last 4 years, these figures have galloped further higher.

It is reported in Hindu (30th August, 2006) that according to National Readership Study (NRS 2006), as on 2006, there are 203.6 million readers of daily newspapers, and together with magazines, it touches 222 million readers. Satellite television has 230 million viewers and television has reached 112 million Indian homes. The number of houses having cable and satellite television has gone up to 68 million. Internet use has reached 9.4 million and has touched 12.6 million in the last three months. Radio reaches 27% of the one billion population.

A new development today is that the suspect goes before a TV channel or to the Press and makes statements of his innocence and this is obviously intended to prevent the police from claiming that the suspect has

voluntarily surrendered and confessed to his guilt. Similarly, victims and potential witnesses are also interviewed by the news channels. These technological developments in the media and types of behaviour were not there when the Sanyal Committee in its Report in 1963 stated in one para that our country is so vast that events relating to a crime in one part of the country do not get spread to other parts of the country. This reasoning is no longer tenable. Some of the television channels are national and some are local, in the sense they publish news in local languages but are part of the same cable network and these channels are accessible in other parts of the country too. Today, cable TV system displays regional TV channels in vernacular languages in various states to cater to the customers who hail from the particular region speaking that local language. In Punjab, you can see news from Kerala or Andhra Pradesh or Tamil Nadu, from language channels which cater to those who hail from these states and vice-versa. National channels pick up news from regional channels and regional channels pick up news from National channels. Newspapers too have increased circulation than what was in 1970 and another feature is their coverage of news from the states in National dailies and the coverage of District news in local State newspapers. Above all newspapers publish their news items on the world wide web. Hence, the observations of Sanyal

Committee are no longer valid.

Why the Joint Committee in its Report 1111(1969-70) is not correct in stating that the word 'imminent' used by Sanyal Committee in the Bill of 1963 is 'vague':

The reasoning of the Joint Committee (1969-70) that the word 'imminent' criminal proceeding used by the Sanyal Committee in its draft Bill of 1963 is "vague" and is likely to lead to uncertainty is no longer acceptable. In fact, by the date the Committee submitted its Report, Supreme Court had decided in A.K. Gopalan v. Noorudin AIR 1970 SC 1694: (1969(2) SCC 734) that the word 'imminent' meant the time when a person was arrested, though pendency was not to be reckoned from the time when a first information report was filed. That starting point was fixed by the Supreme Court for the purpose of balancing the freedom of speech and expression in Article 19(1)(a) (read with Article 19(2)) on the one hand and liberty of the person under Article 21 which guarantees due process. There is express reference to the freedom of speech and expression in that judgment. Therefore, the argument of the Joint Committee as to 'vagueness' is no longer available and perhaps the attention of the Committee was not invited to the judgment of the Supreme Court which was already there by the date of its Report. It appears that the last sitting of the

Committee was on 5th October, 1969 while the Report was submitted on 20th February, 1970. The judgment in Gopalan's case was delivered on 15th September, 1969.

Further, the fact that the word 'imminent' is not vague is clear from what has been done in other countries. In several countries, date of arrest which may be anterior to first information report, is treated as the starting point for treating a criminal proceeding as 'pendency' even if no charge sheet or challan is filed by the police in the court.

(a) United Kingdom: date of arrest accepted as starting point:

Section 1 of the U.K. Contempt of Court Act, 1981 introduces the 'strict liability rule' which means that "the rule of law whereby conduct may be treated as a contempt of court as tendency to interfere with the course of justice in particular legal proceeding regardless of intent to do so". Section 2(1) states that any publication, including broadcast, cable programme or other communications in whatever form", which is addressed to the public at large or any section of the public, will be contempt if it –

“creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced”.

Sub-section (3) states that the strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of publication. Sub-section (4) of section 2 is important and it states:

“Section 2(4): Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section.”

Schedule 1 (clause 3) states that ‘criminal proceedings’ are active from the relevant initial step specified in paragraph 4 until concluded as described in para 5. Clause (4) refers to the initial steps in criminal proceedings as follows:

- “(a) arrest without warrant;
- (a) the issue, or in Scotland the grant of a warrant for arrest;
- (b) the issue of summons to appear, or in Scotland, the grant of a warrant to cite;
- (c) the service of an indictment or other document specifying the charge,
- (d) except in Scotland, oral charge.

Clause 5 refers to conclusion of criminal proceedings as follows:

- (a) by acquittal, or as the case may be, by sentence.

- (b) by any other verdict, finding, order or decision which puts an end to the proceeding;
- (c) by discontinuance or by operation of law.

Clause 11 states that criminal proceedings which become active on the issue of grant of a warrant for his arrest cease to be active at the end of the period of twelve months beginning with the date of the warrant unless he has been arrested within that period, but become active again if he is subsequently arrested.

In UK, more recently, Lord Hope stated in 'Montgomery v. H.M. Advocate' (2001 (2) WLR 779) (PC) as follows:

"The right of an accused to a fair trial by an independent and impartial tribunal is unqualified. It is not to be subordinated to the public interest to the detection and suppression of crime. In this respect, it might be said that the Convention right is superior to the common law right."

- (b) Australia: (New South Wales) : Date of arrest as starting point.

The Report of the New South Wales Law Reform Commission (Report 100) 2003 (issued after Discussion Paper 43 (2000) on 'Contempt

of Court’ contains a Draft Bill which refers to potential jurors, potential witnesses and potential parties and applies criminal contempt to “active” criminal proceedings.

Prejudice to ‘imminent’ proceedings by publication is part of the law in New South Wales (Australia). The publication must have a tendency to prejudice the framing of proceedings. Sections 7(d), 8(d), 9(c) of the Bill annexed to the Report require that the publication creates substantial risk, according to the circumstances at the time of publication, that juror, witnesses or parties or potential jurors or potential witnesses or potential parties may be influenced.

Schedule 1 describes when criminal proceedings are active and reads as follows:-

“Ch.1. Part 1

1. When is a criminal proceeding active?

(1) A criminal proceeding is active for the purposes of section 7:

(a) from the earliest of the following:

- (i) the arrest of a person in New South Wales or in another State or Territory,
- (ii) the laying of a charge,

- (iii) the issue of a court attendance notice and its filing in the registry of the relevant court,
- (iv) the filing of an ex-officio indictment,
- (v) the making of an order in a country other than Australia that a person be extradited to New South Wales for the trial of an offence.

(c) New Zealand: Case law accepts date of arrest as starting point.

Under the New Zealand Bill of Rights, 1990, section 25(a) protects the right to a fair and public hearing by an independent tribunal and section 25(c) the right to be presumed innocent until proved guilty according to law. Section 24(e) protects the right of an accused charged with an offence to a trial before a jury when the penalty for the offence may be imprisonment for more than three months. Section 138(2) of the New Zealand Criminal Justice Act, 1985 empowers the courts to make orders precluding the press from reporting on criminal proceedings when it is considered that the interests of justice, public morality, the reputation of the victim of a sexual offence or extortion, or the security of New Zealand require such order to be passed.

There are several cases which refer to date of arrest as the starting point to consider the question of prejudice by publications. It is stated that it

is incidental to the right to trial by jury that “a person accused of a crime is entitled to have the cases presented to such a jury with their minds open and unprejudiced and untrammelled by anything which any newspaper, for the benefit of its readers, ... takes upon itself to publish before any part of the case has been heard” (Attorney General v. Tonks : 1934 NZLR 141 (149) (FC). In that case it was held that publication of photographs before trial of person who is arrested will be prejudicial if identification was likely to be an issue, and would amount to contempt. Blair J. observed:

“If a photograph of an accused person is broadcast in a newspaper immediately he is arrested, then such of the witnesses who have not then seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw. The fact that a witness claiming to identify the accused person, has seen a photograph of him before identifying him, gives the defence an excuse for questioning the soundness of the witness’s identification.”

Tonks decided in New Zealand in 1934 was recently followed by the Australian Court in Attorney General (NSW) v. Time Inc. Magazine Co. Ltd. (unrep.CA 40331/94 dated 15th September 1994) in a case arising from the publication of the photo of one Ivan Milat, the accused in the backpacker serial murders’ case. The weekly magazine ‘Who’ had

published Milat's photo on its front page following his arrest. Referring to the danger such actions created, Gleeson CJ observed:

“One of the particular problems about identification evidence is the difficulty that exists where a person, before performing an act of identification of an accused, has been shown a photograph of the accused. If for example, prior to identifying an accused person in a police line-up, a witness had been shown by a police officer a photograph of the accused, then it would be strongly argued that the identification in the line-up was useless, or at least of very limited value. It would be argued that, because of what is sometimes described as the displacement effect, there was a high risk that at the time of the line-up, the witness was performing an act of recognition, not of a person who had been seen by the witness on some previous occasion, but of the person in the photograph.”

In New Zealand, publicity given to confessions allegedly made to the police can create serious prejudice to a suspect or accused. The confession may later be ruled inadmissible, in which case, recollection by a juror of a report of a confession could be highly prejudicial. Reports of the psychiatric history of an accused tending to show a person as dangerous could similarly affect the trial.

In Solicitor General v. Wellington Newspapers Ltd.: 1995(1) NZ LR 45, Gisborne Herald and two other newspaper publishers had been convicted of contempt for reporting the previous convictions of John Giles at the time of his arrest in Gisborne on charges of attempted murder of a police constable.

In Solicitor General v. Television New Zealand : 1989(1) NZ LR page 1 (CA), the Court of Appeal rejected the defence that the court could not grant an injunction to prevent prejudice to imminent court proceedings. It observed:

“In our opinion, the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely, the court has inherent jurisdiction to prevent the risk of contempt of court by granting an injunction. But, the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial (Cooke J)

On facts, no action was taken as the publication did not contain details. In Attorney General v. Sports Newspapers Ltd. : 1992 (1) NZLR 503, the NZ Divisional Court held that criminal proceedings must be pending or imminent. In Television New Zealand case, instead of basing the judgment on whether the criminal proceedings were imminent, the court laid down the test of ‘real likelihood of a publication of material that will seriously prejudice the fairness of the trial’.

(d) Australia: Case law and Law Reform Commission prejudice on account of ‘imminent’ proceedings: accepted in Australia:

Western Australia has a provision in section 11A of the Evidence Act, 1906 which authorises a Judge to restrict publication of evidence in any proceeding where the Judge considers that publication may tend to prejudice any prosecution that has been or may be brought against a person.

The Law Reform Commission of Australia issued a number of discussion papers addressing the issues of contempt by publication in 1986, 1987 and 2000. These papers assert that contempt arises when there has been publication of prejudicial material, regardless of whether or not there was an intention to interfere consciously with an imminent or ongoing court case. Typical examples of prejudicial publicity include publication of a

prior criminal record of an alleged offender, or insinuations of the offender's guilt or innocence, and reporting a confession (Australian Law Reform Commission, 1987; Pearson, 1997) (as quoted by Keylene M. Douglas in his article "Pre-trial publicity in Australian print media : Eliciting bias effects on Juror decision making (2002)").

We shall next refer to the peculiar case of Glennon in Australia. Glennon's case related to pending criminal proceedings but it is relevant in the present context.

Summary

We are, therefore, of opinion that the word 'imminent' criminal proceedings is no longer vague in as much as the Supreme Court in A.K. Gopalan v. Noordeen AIR 1970 SC 1694 has stated that publications made after 'arrest' of a person and before the filing of a charge sheet, can be the starting point of 'pendency'. Any publications which are prejudicial to the suspect who has been arrested before filing of charge sheet/challan can be contempt under section 3 if they interfere or tend to interfere with the cause of justice. In our view, the word 'imminent', if it is so defined, cannot be

said to be any longer vague. In fact, in UK, in New South Wales, date of arrest is treated as the starting point while in Australia and New Zealand, the fact that criminal proceedings are 'imminent' is a sufficient consideration.

For all these reasons, we are firmly of the view that though section 3 (2) may be retained so as to exclude from contempt certain publications, the Explanation below section 3 requires to be modified, so far as clause (B) relating to criminal proceedings is concerned, so as to include the arrest of a person in addition to filing of charge sheet or challan or issue of summons or warrant against the accused.

CHAPTER VI

Does ‘A.K. Gopalan v. Noordeen’ (1969)(SC) make ‘imminence’ relevant only in respect of arrests for serious offences ? What is the effect of the 24 hour rule?

In this Chapter we shall deal with an editorial comment in the SCC report of A.K. Gopalan vs. Noordeen: 1969(2) SCC 734 where it is observed that that case held criminal proceedings are imminent because it was a case of arrest in a murder case. If the offence is not serious, arrest does not mean criminal proceedings are imminent.

We propose to discuss this view critically. We have, as will be seen at the end of this Chapter, come to the conclusion on an exhaustive discussion, that there can be no question of criminal proceedings being ‘imminent’ after arrest only in case of ‘serious’ offences. No such distinction between ‘serious’ and ‘less serious’ offences can be recognized nor has been recognized in any country for deciding if criminal proceedings are ‘imminent’ after an arrest.

We start our discussion with the two Supreme Court judgments dealing with the word ‘imminent’.

The first case on the subject is Surendra Mohanty v. State of Orissa (Criminal Appeal No. 107 of 1956 : Judgment dated 23.1.1961) and the second one is A.K.Gopalan v. Noordeen 1969(2) SCC 734 to which we have already referred..

(a) In the first case in Surendra Mohanty, (unreported, quoted in extenso in A.K. Gopalan’s case) the Supreme Court examined the question as to whether the prejudicial publication of a statement in the media at a time when the only step taken was the recording of first information report under Section 154 of the Code of Criminal Procedure,1898, could be contempt of court. Kapur, J observed:

“Before the publication of the comments complained of, only the first information report was filed in which though some persons were mentioned as being suspected of being responsible for causing the breach in the Bund, there was no definite allegation against any one of them. In the charge-sheet subsequently filed by the police these suspects do not appear amongst the persons accused. It was, therefore, argued that by the publication there could not be any tendency or likelihood to interfere with the due course of justice. The learned Additional Solicitor-General for the State submitted on the other hand that if there is a reasonable probability of a prosecution being launched against any person and such prosecution be merely imminent, the publication would be a contempt of court.

The Contempt of Courts Act (1952) confers on the High Courts the power to punish for the contempt of inferior courts. This power is both wide and has been termed arbitrary. The courts must exercise this power with circumspection, carefully and with restraint and only in cases where it is necessary for maintaining the course of justice pure and unaffected. It must be shown that it was probable that the publication would substantially interfere with the due course of justice; commitment for contempt is not a matter of course but within the discretion of the court which must be exercised with caution. To constitute contempt is not necessary to show that as a matter of fact a judge or jury will be prejudiced by the offending publication but the essence of the offence is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings will have to go on and a tendency to interfere with the due course of justice or to prejudice mankind against persons who are on trial or who may be brought to trial. It must be used to preserve citizen's rights to have a fair trial of their causes and proceeding in an atmosphere free of all prejudice or prepossession. It will be contempt if there is a publication of any news or comments which have a tendency to or are calculated to or are likely to prejudice the parties or their causes or to interfere with the due course of justice.

As to when the proceedings begin or when they are imminent for the purposes of the offence of contempt of court must depend upon the circumstances of each case, and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

The filing of a first information report does not, by itself, establish that proceedings in a court of law are imminent. In order to do this various facts will have to be proved and in each case that question would depend on the facts proved.”

Kapur J further observed:

“In the present case all that happened was that there was a first information report made to the police in which certain suspects were named; they were not arrested; investigation was

started and on the date when the offending article was published no judicial proceedings had been taken or were contemplated against the persons named in the information report. Indeed after the investigation the suspects named in that report were not sent up for trial. At the date of this offending publication was made, there was no proceeding pending in a court of law nor was any such proceeding imminent.”

A reading of the above observations shows that the date of filing of a first information report under Section 154 of the Code of Criminal Procedure Code cannot be the starting point for treating a criminal proceeding as pending, still there could be contempt if criminal proceedings are ‘imminent’. In that case in the charge sheet, some of the names referred to in the first information report were not included. In order that publications are in contempt, they must be such as would “substantially” interfere with the due course of justice. It is not necessary to show that as a matter of fact a Judge or Jury will be prejudiced by the offending publication but the essence is whether the publication was calculated to produce an atmosphere of prejudice in the midst of which the proceeding will have to go on and has a tendency to interfere with the due course of justice or to prejudice mankind against persons who are on trial or who may be brought to trial. It must be used to preserve citizens’ right to have a fair trial of their causes and that the proceedings are carried in an atmosphere

free of all prejudice or prepossession. It will be contempt if there is a publication of any news or comments which have a tendency to or are calculated to or are likely to prejudice the parties or their cause or to interfere with course of justice. As to when proceedings begin or when they are imminent must depend upon the circumstances of each case. It was felt that the exact boundaries do not fall for decision in the case. Apart from the facts in information report, various other facts have to be proved. In the above case, the first information report alone was there but, it was stated, that none was arrested as on the date of the publication. Nor was any proceeding pending in Court.

(b) In the second case in A.K. Gopalan v. Noordeen 1969(2) SCC 734 already referred to, an investigation was going on against a person into a charge of murder. We have referred to the case earlier but, we shall discuss the judgment in greater detail in the context of the editorial note in SCC in that case.

The accused was arrested on September 23, 1967. While the statement of Mr. A.K. Gopalan about the arrested person was made on 20th September 1967, the first information was lodged on 11th September 1967 but the accused was not arrested while by the date of publication in the newspaper, they were arrested. The Supreme Court held that Mr. A.K. Gopalan was not guilty of contempt and so far as the printers and publishers

were concerned, the Court took the view that the question was whether proceedings in a court were imminent? The Court “referred” to arrest in a serious cognizable case i.e. one of alleged murder, and stated that ‘arrest’ means that the police was prima facie on the right track. It also referred to the fact that the accused must have been produced before a Magistrate within 24 hours of the arrest in accordance with Article 22 of the Constitution and the Magistrate must have authorized further detention of the accused.

The Court stated “In these circumstances, it is difficult to say that any proceedings in a court were not imminent”.

Not only that, the Supreme Court stated further:

“The fact that the police may have, after investigation, come to the conclusion that the accused was innocent does not make the proceedings any the less imminent”.

Why publication could subvert the course of justice was:

“because it would tend to encourage public investigation of a crime and a public discussion of the character and antecedents of an accused in detention.”

The Court also observed that it is not in every case when a person is arrested, a proceeding in a court can be said to be imminent because there

could be delay in the scrutiny of accounts may take time. If it is a case against a company, a large number of accounts may have to be investigated by the police and criminal proceedings may not be imminent in spite of arrest. On that ground the Court said :

“as observed by this Court, it is difficult to lay down any inflexible rule”.

It then said :

“But, as far as an investigation of a charge of murder is concerned, once an accused has been arrested proceedings in Court should be treated as imminent”.

(Mitter, J however, held even Mr.A.K. Gopalan guilty of contempt.)

It is the above observations that appear to be the basis of the editorial comment in SCC.

However, it appears to be the law declared by the Supreme Court in A.K. Gopalan's case that the fact that an arrest under Section 41 of the Cr.PC has been made may be prima facie proof that criminal proceedings are 'imminent'.

But, it is true the Court made an observation that there can still be exceptions where notwithstanding an arrest, criminal proceedings may not be imminent such as where a mass of accounts of a company are to be scrutinized or investigated before charge sheet is filed under Section 173. Those observations deal with a delayed time factor but that does not, in our opinion, mean that in the case of (say) arrest of a company's Director, there can be prejudicial publications because of delay in the filing of charge-sheet. This requires a proper meaning being given to the word 'imminent'.

In our view, the word 'imminent' does not mean merely that the charge sheet must be filed in Court "immediately" after arrest. 'Imminent' here means the 'reasonable likelihood' of the filing of charge sheet whether immediately or in a reasonable time. If the word 'imminent' should mean "immediate", then in all cases where there are delays in investigation such as when investigation is entrusted to the CBI or the ACB in the States, there could be a free licence to issue prejudicial publications. That cannot be the law. 'Imminence', in our view, really means 'reasonable likelihood' of filing of charge sheet.

But we are not saying that once arrest is made, the media is obliged to make no publications at all. What the law requires is that they should not, while making publications, prejudice the case of the suspect by referring to his character, prior convictions, confessions, photographs (where identity is in question) or describe him as guilty or innocent (see Chapter IX). Further, sec 3 grants immunity to publications made without knowledge of the pendency of the criminal proceeding.

Nor is the editorial note correct in suggesting that the word ‘imminence’ requires a person who wants to make a prejudicial publication to go to the police station or to somehow find out if the police had come to a preliminary conclusion to file a charge sheet. Such an interpretation of the word ‘imminent’ is a highly unreasonable one and impracticable. We do not see any problem in understanding that ‘imminence’ in respect of a person who is ‘arrested’ means that he is “most likely” to be charge sheeted.

Further, as stated below, ‘arrest’ is important in another sense because of the 24 hour rule which we shall presently discuss. This is a constitutional requirement that a person arrested has to be produced before a magistrate within 24 hours of the arrest. Today, the word ‘imminent’ is understood as

being a stage when a person comes within the constitutional protection of a Court after arrest. (see heading 'B' below).

(A) Prejudice to the suspect means prejudice irrespective of whether offence is a serious one or nor:

In A.K. Gopalan's case, no doubt, the Court uses the words 'serious' offence of murder. But, in our opinion, when we are considering the prejudice to the suspect, then prejudice may occur whether offence is a serious one or not. Prejudice must be viewed from the point of view of the personal right of the suspect for a fair trial when he is arrested and not from the point of view whether the arrest was for a serious offence. Prejudice is in relation to a person and is not in relation to the offence with which the person is charged.

No country has made a distinction between a serious offence and a non-serious offence, for judging whether a publication regarding the offence has caused prejudice to the suspect or accused.

(B) Care and protection of Court under Article 22(2) of the Constitution and Sections 57 & 76 of the Code of Criminal Procedure are sufficient to show court proceedings are imminent:

The entire argument based on possible delay in filing charge sheet after arrest is without basis for it ignores Art 22(2) of the Constitution under

which soon after arrest, a person comes under the protection of the Court. This according to Court judgments and other authorities is the proper meaning of the word 'imminent'. Whether a person is arrested in a cognizable case by the police without warrant on the basis of 'reasonable suspicion' or by a warrant from the Court in the case of non-cognizable case where the Magistrate applies his mind as to whether arrest is necessary and under Sections 57 and 76 of the Code of Criminal Procedure, 1973, a person arrested has to be brought before a Magistrate within 24 hours of the arrest. That is imperative under Article 22(2) of the Constitution of India. Once arrest is made, the person arrested comes within the care and protection of the Court and such a relationship with the court has been treated as sufficient to show that 'court proceedings' are 'imminent'. This is clear from the decision in Hall v. Associated Newspapers : 1978 SLT 241 decided by the Court in Scotland (to which we shall be referring hereinbelow). That, according to Borrie and Lowe, (Contempt of Court) (3rd Ed) (1996) (p 247, 256), is the basis of the UK Act, 1981 for treating a criminal proceeding as 'active' from the time of arrest (see discussion below). That is also the view of other leading authorities.

It is, therefore, not correct to think that prejudice to the suspect starts only after the charge sheet or challan is filed under Section 173(2) of the

Criminal Procedure Code, 1973, when the police come to the conclusion that “an offence appears to have been committed”.

(C) UK – Hall vs. Assorted Newspapers: “24 hour rule”:

The crucial decision which is the basis for the UK Act of 1981, according to the authors Borrie and Lowe (1996, 3rd Ed, (page 247, 256) is Hall v. Associated Newspapers : 1978 S.L.T 241 (248). In that case, the Scotland Court referred to the test as to whether proceedings have reached the stage when it can be said “that the court has become seized of a duty of care towards individuals who have been brought into a relationship with the court”. Applying that test, it was held (at page 247 of Hall) that contempt applied “from the moment of arrest or (obiter) from the moment when a warrant for an arrest has been granted. With regards to arrest, it was felt that, at that time, the person arrested is within the protection of the court since he is vested with rights (for example he must be informed of the charge and must be brought before a magistrate within 24 hours) which he can invoke and which the court is under a duty to enforce.”

(D) New South Wales (Australia): 24 hour rule applied:

The above judgment of the Scotland Court was followed by A.G for NSW v. T.C.N.Channel Nine Pty Ltd : (1990)20 NSWLR 368 in which a

film of an arrested man being led around the scene of the crime by the police was shown on television with a commentary which clearly implied that he had confessed to a number of murders (which was indeed the case). At the time of the broadcast, the man had been arrested and charge had not yet been brought before the court. The New South Wales Court of Appeal thought that as held in Hall v. Associated Newspapers, “from the moment of arrest, the person arrested is in a very real sense under the care and protection of the court”. The N.S.W.Court concluded that the critical moment for contempt was the time of arrest from that moment : (p 378)

“The process and procedures of the Criminal Justice system, with all the safeguards they carry with them, applied to him and for his benefit, and Publications with a tendency to reduce those processes, procedures and safeguards to impotence are liable to attract punishment as being in contempt of court.”

and applied the principle in R v. Parke : 1903(2) KB 432 which stated that ‘fountain of justice’ can be polluted at its source.

Thus, the Australian position appears also to be that contempt law applies from the stage of arrest whether the offence is a serious one or not, because the arrested person comes within the protection of Court.

(E) New Zealand: Case law refers to ‘arrest’ or ‘imminent’ stage:

In New Zealand, in Television New Zealand Ltd v. S.G (1989) 1 NZLR 1, the Court of Appeal initially granted an injunction at the instance of the Solicitor General, to prevent a television news broadcast which included comments and opinions about the man-hunt for a named man but no charge had yet been laid for his arrest. The court later rescinded the order on the ground that the material sought to be published did not have prejudicial content. The court said:

“In our opinion, the law of New Zealand must recognize that in cases where the commencement of criminal proceeding is highly likely, the Court has inherent jurisdiction to prevent the risk of contempt of court by granting injunction.”

We have already referred, in the previous Chapter, to a number of decisions of the New Zealand Courts where either ‘arrest’ or ‘imminence’ of criminal proceedings was treated as sufficient to grant protection against publications. (Attorney General vs. Tonks: 1934 NZRL 141 (FC): Solicitor General vs. Wellington Newspapers: NZRL 45; Attorney General vs. Sports Newspapers 1992(1) NZRL 503.

(F) Canada: 'arrest' is given importance

In Canada, according to Stuart M. Robertson, Courts and the Media (1981) Butterworth, Toronto) p 48 (quoted by Borrie and Lowe, 3rd Ed, 1999, p 249) it is stated that the 'sub judice' rule begins to apply when the court obtains jurisdiction over the matter

“and in criminal cases, that is when information is sworn before a Justice of the Peace upon which either a summons or warrant is issued or where a person is arrested by a police officer.”

Canadian Law Reform Commission : refers to 'arrest':

The Canadian Law Reforms Commission (1977, Working Paper, No.20, p 44 & 1982 Report No.17, p 44, 54-6) was also impressed by the need for certainty but it too rejected the Phillmore Committee recommendations and proposed instead that the sub judice period must begin at the moment an information is laid (i.e. first information report). The Australian Law Reforms Commission (Report No. 35, para 296) recommended that contempt should apply from the time when a warrant for arrest has been issued, a person has been arrested without warrant, or charges have been laid, whichever is the earliest. However, it also recommended that if a person 'implicated' in a publication at an earlier point acted with the intention of prejudicing the relevant trial, so as to

amount to an attempt to prevent the course of justice, he should be liable to be prosecuted for that offence under Section 43 of the Crimes Act, 1914) (Cmth). This has echos of the position reached in the United Kingdom after Contempt of Court Act,1981.

We have already referred to the views of the New South Wales Law Commission in the previous Chapter.

(G) Irish Law Reforms Commission: refer to ‘imminent or virtually certain’:

The Irish Law Reforms Commission(1991, July, p 321) has commended two tests. The first, which would apply in ‘normal’ cases, namely to ‘active’ proceedings as defined in the UK Contempt of Court Act of 1981. The second would apply contempt to ‘the rare case where, in relation to proceedings which are not active but are imminent, a person publishes material when he is actually aware of facts which, to his knowledge, render it certain, or virtually certain, to cause serious prejudice to a person whose imminent involvement in criminal or civil legal proceedings is certain or virtually certain’.

(H) Borrie & Lowe

Borrie and Lowe (pp 253, 254) refer to the need for a definite point of time and refer to the views of Law Commissions in UK, Canada, Australia and Ireland as to the need for fixing a definite point of time and as to when proceedings can be said to be “imminent” so that the vagueness concept built up by the Phillmore Committee (1974) could be easily surmounted and they say that finally, the UK Act of 1981, by giving the criteria in Sch 1, para 4, (i.e. date of arrest etc.) virtually adopting the Scotland decision in Hall v. Associated Newspapers Ltd 1978 SLT 241, the ‘vagueness’ obstacle has indeed been surmounted. The authors say that confining the contempt law to publication made only after filing a charge in court, results in an unjust superior position being granted to freedom of speech and expression as against liberty. The above views of the authors are quite important and we shall refer to the crucial paragraphs from that book.

The authors say under the heading “Proposals for Reform”, as follows (pp 253,254):

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Starting Point :

The Phillmore Committee (1974, Cmnl 5794, para 113) could see no case for retaining the concept of ‘imminence’ since it defies definition and could apply arbitrarily depending on the chance of outcome of events. As the Committee said, the vagueness of

‘imminence’ has ‘an inhibiting effect on the freedom of the press which is out of all proportion to any value there may be in preserving it.’

Moving away from the concept of ‘imminence’ does not resolve the difficulty of deciding when contempt ought to begin to apply. There remains the problem of selecting a starting point that is both sufficiently certain and early enough to afford real protection to any ensuing trial. The Phillmore Committee (paras 123, 216) recommended that for criminal proceedings, the starting point should be (a) in England and Wales, when the accused person is charged or a summons served and (b) in Scotland, when the person is publicly charged on petition or otherwise or at the first calling in court of a summary complaint. Had this recommendation been implemented, it is suggested that it would have tipped the balance too far in favour of freedom of speech. Quite simply, the suggested starting point would have been late to afford real and necessary protection to the accused.”

The authors say that a subsequent Government Discussion Paper (1978, (Cmnd 7145, para 14) seemed to take a similar view. As it said:

“charges often follow shortly after a serious crime becomes known; and indeed, from the point of view of an accused person, it may be as important to have protection from prejudicial comment during the period immediately before he is charged, when media and public interest in the crime is strong, as it is after a charge has been formally laid”.

The Government Discussion Paper concluded that on that footing, “there is ground for the view that the Phillmore recommendation goes too far in allowing prejudicial publication before a formal charge is made, so endangering the fair trial of accused persons”.

The authors Borrie and Lowe say (see p 254) that the UK Law was reformed with an earlier starting point than the one recommended by Phillmore.

In the Schedule I, para 4, of the UK Act of 1981 so far as criminal proceedings are concerned, it is stated that the criminal proceedings become ‘active’ upon

- “(a) arrest without warrant;
- (b) the issue of summons to appear, or in Scotland, the grant of a warrant;

- (c) the service of an indictment or other document specifying the charge;
- (d) except in Scotland, oral charge.”

Borrie & Lowe state (p 256) that para 4 of Sch. 1 “is a virtual enactment of the starting point in Scotland as laid down by Hall v. Associated Newspapers Ltd (1978 SLT 241) and in any event, closely corresponds to what the Common Law in England and elsewhere understand as ‘pending’ proceedings.”

However, under Section 3 of the UK Act, a publisher can defend himself stating that at the time of publication, he had taken all reasonable care but he neither knew nor suspected that the relevant proceedings were active and (probably) that he published in good faith. Borrie and Lowe state (p 258) that Section 3 might not provide a complete answer but it goes a long way to meet the fears of the Phillimore Committee.

It is significant that in A.K. Gopalan vs. Noordeen (1969(1) SCC 734 at page 741 the Supreme Court indeed referred to the 24 hour rule and observed, while stating the facts, as follows:

“Arrest means that the police was prima facie on the right track. The accused must have been produced before a Magistrate within 24 hours of the arrest in accordance with Art 21 (Art 22) of the

Constitution, and Magistrate must have authorized further detention of the accused.”

But from Hall, it is clear that coming under care of the Magistrate is sufficient and it is not necessary that Magistrate must have authorized arrest.

The following observations of Borrie & Lowe (see p 258) are quite important in the context in India of balancing Article 19(1)(a) and Article 21. The authors say:

“The timing provisions under para 4 are not as generous to the news media as the Phillimore Committee recommendations, which was that the sub-judice period should begin only when the person was charged or a summons served. However, despite the difficulties adverted to above, it is submitted that the Act gets the timing about right. Paragraph 4 strikes a reasonable compromise between the Phillimore Committee’s proposals, which would not have protected a trial from the real risk of prejudice that publicity prior to the charge can cause, and the undesirable uncertainty of the Common Law position. Indeed, it was the extraordinary publicity which followed the arrest of Peter Sutcliffe in January,

1981, which began even before he had been charged with the ‘Yorkshire Ripper’ murders, which doomed any attempt in the later stages of the Bill to ease the sub-judice provision and follow the Phillimore recommendation. Paragraph 4 should have had the advantage of creating a uniform and reasonably certain starting point applicable to England and Wales, Scotland and Northern Ireland. However, as we have seen, this statutory certainty has been undermined by the continuing operation of the Common Law, with its concept of ‘imminent’ for intentional contempt.”

Summary: Editorial Note in 1969(2) SCC 734 is not correct:

The above discussion of the meaning of the word ‘imminent’ leads us to the conclusion that the time of arrest can be reasonably taken as starting point, whether the offence is a serious one or otherwise. The moment an arrest is made, the person comes within the protection of the Court for he has to be produced in Court within twenty four hours. This reason is given by the Scotland Court in Hall’s case (1978) as above stated

and is the basis of Schedule 1 of the UK Act of 1981. This reason is also accepted by the New South Wales (1990).

We do not, therefore, accept the editorial comments given below A.K. Gopalan's case in 1969(2) SCC 734 that that case treats 'arrest' as the starting point of 'imminence' in a criminal case when publications are made in relation to 'serious' offences like 'murder' and that only in such case there is likelihood of charge sheet being filed. In our view, from the point of the person arrested, whether the arrest is for a serious offence or not, the prejudicial publication affects the process of a fair trial.

CHAPTER VII

Freedom of expression, Contempt of Court,

Due Process to Protect Liberty

The Chapter deals with the second reason given by the Joint Committee of Parliament for rejecting the word ‘imminent’ as used in the Bill by the Sanyal Committee. The Joint Committee felt that the word ‘imminent’ was vague and would unduly restrict freedom of expression. We have already stated that now, after A.K. Gopalan’s case, the word ‘imminent’ is not vague. It remains to consider whether freedom of expression is unduly restricted if the date of ‘arrest’ is treated as starting point.

Article 19 and Art 14, 21: Balancing rights of free speech and due process:

In Express Newspapers vs. Union of India 1959 SCR 12, the Supreme Court exhaustively dealt with freedom of the press but stated that it can not be unbridled. Like other freedoms, it can also suffer reasonable restrictions.

The subject of ‘trial by media’ or prejudice due to ‘pre-trial’ publications by the media is closely linked with Article 19(1)(a) which guarantees the fundamental right of ‘freedom of speech and expression’, and the extent to which that right can be reasonably restricted under Article 19(2) by law for the purpose of Contempt of Court and for maintaining the due process to protect liberty. The basic issue is about balancing the freedom of speech and expression on the one hand and undue interference with administration of justice within the framework of the Contempt of Courts Act, 1971, as permitted by Article 19(2). That should be done without unduly restricting the rights of suspects/accused under Article 21 of the Constitution of India for a fair trial.

There is no difficulty in stating that under our Constitution, the fundamental right of freedom of speech and expression can, by law, be restricted for purposes of contempt of Court. However, this can be done only by law passed by the Legislature and the restrictions that can be imposed on the freedom must be “reasonable”. If the restriction imposed by any law relating to contempt of Court is unreasonable, it is liable to be struck down by the Courts on the ground that the restriction is not proportionate to the object sought to be achieved by the restriction.

As at present, the provisions of Section 3 of the Contempt of Courts Act, 1971 restrict the freedom of speech and expression – which includes the freedom of the media, both print and electronic – if any publication interferes with or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding which is actually ‘pending’ (i.e. when charge-sheet or challan is filed, or summon or warrant is issued). Further Section 3(1) protects the publication, if the person who made the publication had no reasonable grounds for believing that the proceeding was pending.

In our view, the provisions of sec 3(2), now allow totally unrestricted freedom to make publications, granting full immunity even if criminal contempt is committed, even if they interfere or tend to interfere with the criminal proceeding, if such proceedings are not actually ‘pending’ in a Court at the time of the publication. The Explanation below sec 3 defines ‘pendency’ of a judicial proceeding. So far as a criminal proceeding is concerned, we have to refer to sub clause (B) of clause (a) of Explanation which reads:

“(B) In the case of a criminal proceeding, under the Code of Criminal Procedure, 1898 (5 of 1898) or any other law –

- (i) where it relates to the commission of an offence, when the charge-sheet or challan is filed; or

when the court issues summons or warrant, as the case may be, against the accused, and

- (ii) in any other case, when the court takes cognizance of the matter to which the proceedings relates
.....”

Therefore under sec 3 of the Act, the starting point of the pendency of the case is only from the stage where the court actually gets involved when a charge-sheet or challan is filed under Section 173 of the Code of Criminal Procedure,1973 or when the criminal court issues summons or warrant against the accused. Any publication before such events if it interferes or tends to interfere with rights of suspects or accused for a fair trial, is not contempt because Section 3(2) starts with the words,

“Notwithstanding anything to contrary contained in this Act or any other law for the time being in force”.

Two questions arise for consideration:

- (1) Whether the provisions of Section 3 (2) of the Contempt of Courts Act,1971 read with the Explanation below that section are in violation of due process as guaranteed by Article 21 of the Constitution of India, in so far as they grant immunity to prejudicial publication made before the filing of the charge sheet/challan ?

(2) If the answer to Question No.1 is in the affirmative, whether the Explanation to Section 3 has to be and can be modified by shifting the starting point of “pendency” of a criminal proceeding to the anterior stage of arrest, and whether such a change in the law would amount to an unreasonable restriction on freedom of speech guaranteed under Article 19(1)(a) of the Constitution ?

So far as the first Question is concerned, as already stated, as at present, if a publication which is made before the filing of a charge sheet or challan, interferes or tends to interfere with the course of justice in connection with a criminal proceeding, the rights of a person who has been arrested and in respect of whom the prejudicial publication is made, are not protected by the law of Contempt of Court. But, if such publications are prejudicial to the suspect or accused, will they not offend the principle of due process rights of a suspect or an accused as applicable in criminal cases and as declared by the Supreme Court in Maneka Gandhi v. Union of India : AIR 1978 SC 597 ?

Article 21 guarantees that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. As is well known, overruling the earlier view in A.K.Gopalan v. State of Madras : AIR 1950 SC 27, the Supreme Court held in Maneka Gandhi’s case that the “procedure established by law” must be a law which is fair, just and

equitable and which is not arbitrary or violative of Article 14 of the Constitution of India.

If indeed a publication is one which admittedly interferes or tends to interfere or obstructs or tends to obstruct the “course of justice” in a criminal proceeding, in respect of a person under arrest (see Section 3[1]), but the law gives it immunity under sec 3(2) because the publication was made before the filing of the charge sheet/challan, is such a procedure fair, just and equitable ?

In several countries, U.K, Australia, New Zealand etc, any publication made in the print or electronic media, after a person’s arrest, stating that the person arrested has had previous convictions, or that he has confessed to the crime during investigation or that he is indeed guilty and the publication of his photograph etc, are treated as prejudicial and as violative of due process required for a suspect who has to face a criminal trial. It is accepted that such publications can prejudice the minds of the Jurors or even the Judges (where Jury is not necessary). The impact on Judges has been elaborately discussed in Chapter III of this Report. The Supreme Court of India has indeed accepted, in more than one case, that Judges may be ‘subconsciously’ prejudiced against the suspect/accused. We have indeed referred to some opinions to the contrary expressed by Courts

in USA where the freedom of speech and expression is wider than in our country. In USA the restrictions are narrow, they must only satisfy the test of ‘clear and present danger’.

In India restrictions can be broader and can be imposed, if they are “reasonable”. Restrictions intended to protect the administration of justice from interference can be included in the Contempt Law of our country under Art 19(2), if they are ‘reasonable’ It is even accepted in our country that actual prejudice of Judges is not necessary for proving contempt. It is sufficient if there is a substantial risk of prejudice. The principle that “Justice must not only be done but must be seen to be done” applies from the point of view of public perception as to the Judges being subconsciously prejudiced as has been accepted in UK and Australia.

In view of the above, such a publication made in respect of a person who is arrested but in respect of whom a charge sheet or challan has not yet been filed in a Court, in our view, prejudices or may be assumed by the public to have prejudiced the Judge, and in that case a procedure, such as the one permitted by Section 3(2) read with Explanation of the Contempt of Courts Act,1971, does not prescribe a procedure which is fair, just and equitable, and is arbitrary and will offend Article 14 of the Constitution of India.

Contempt law which protects the ‘administration of justice’ and the ‘course of justice’ does not accept undue interference with the due process of justice and the due process includes non-interference with the rights of a suspect/accused for an impartial trial. Thus, Contempt of Court law protects the person who is arrested and is likely to face a criminal trial. No publication can be made by way of referring to previous convictions, character or confessions etc. which may cause prejudice to such persons in the trial of an imminent criminal case. Such a procedure, therefore, would interfere or tend to interfere or obstruct or tend to obstruct the course of justice.

Once an arrest is made and a person is liable to be produced in Court within 24 hours, if, at that stage, a publication is made about his character, past record of convictions or alleged confessions, it may subconsciously affect the Magistrate who may have to decide whether to grant or refuse to grant bail, or as to what conditions have to be imposed or whether the person should be remanded to police custody or it should be a judicial remand. Further, if after a publication, a bail order goes against the arrested

person, public may perceive that the publication must have subconsciously affected the Magistrate's mind.

The Contempt of Courts Act, 1971 can therefore be validly amended to say that such prejudicial publication made even after arrest and before filing of charge sheet/challan will also amount to undue interference with administration of justice and hence would be contempt and such a restriction is 'reasonable' and proportionate to the object, protection of rights of the arrested person and the administration of justice.

So far as Question 2 is concerned, if the contempt law in Section 3 is to be amended, as proposed above, so as to treat publications of the manner referred to above made even after arrest and but before filing of charge sheet or challan, as liable to contempt by redefining the Explanation (B) to deem that a criminal case is "pending" from the stage of arrest, then will such a law unreasonably restrict the right to freedom of speech and expression guaranteed under Article 19(1)(a) and will it fall outside the reasonable limits permissible under Article 19(2).

If a restriction on the freedom of speech and expression is intended by the legislature to protect the administration of justice or the course of justice which requires to be meted out to a subject under arrest, and if but for the immunity granted for such publication, it would admittedly interfere or tend to interfere with the course of justice, then from the point of view of

the person under arrest, in our opinion, such a restriction cannot be said to be unreasonable within Article 19(2). Such a restriction on freedom of speech and expression under Article 19(2) cannot be said to be violative of Article 19(1)(a). It is reasonable because, in fact, it is absolutely necessary as per fair due process after Maneka Gandhi, for the purpose of protecting the administration of justice which includes protection of the rights of a person under arrest who is entitled to a procedure which is fair, equitable and just under Article 21 and which is consistent with Article 14. The restriction is reasonable if intended to prevent prejudice on the part of the Judge, or intended to prevent any impression of prejudice in the minds of the public as to prejudice in the mind of Judges. This is a straight answer.

Art 19(2) raises a question of 'proportionality' of a restriction that may be imposed bylaw such as the Contempt of Courts Act, 1971.

The provisions of the Contempt of Court Act, 1971, if they treat as contempt, publications made after the filing of a first information report, then in view of Surendra Mohanty vs. State of Orissa (1961)(quoted in A.K. Gopalan vs. Noordeem 1969(2) SCC 7341 such a provision would be an unreasonable restriction on freedom of publications. But, if the proposal is that that the prejudicial publications made after the date of arrest is contempt, that, according to A.K. Gopalan vs. Noordeen is not an unreasonable restriction on the freedom of publication.

Secondly, it is now well settled that the right to freedom and expression under Article 19(1) is not absolute. The Constitution itself permits in Article 19(2) restrictions to be imposed on that right if they are reasonable. Article 19(2) says:

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

The Indian Supreme Court has repeatedly held that this freedom is not absolute. Even in USA, it has been so accepted. The difference only is that in USA, the principle is of ‘clear and present’ danger while our Constitution permits ‘reasonable’ restrictions.

A restriction on the right to due process which requires that no such prejudicial publication can be made, after arrest of a person, which would interfere or tend to interfere or obstruct or tend to obstruct the course of justice, must be treated as reasonable, for it is not a permanent or absolute restriction.

New Zealand: freedom of expression and liberty have to be balanced in such a way that there is no prejudice to the suspect or accused:

We next come to the case in Gisborne Herald Ltd. v. Solicitor General: 1995(3) NZLR 563 (CA). Now, the New Zealand Bill of Rights, 1990 referred to in Article 14 to Freedom of expression: “Everyone has the right to freedom of expression, includes the freedom to seek, receive and impart information and opinion of any kind or any form.” Article 8 refers to right to life not to be deprived of life except on such grounds as are established by law and are consistent with the principle of fundamental justice; Article 25(a) which deals with minimum standards of criminal procedure refer in clause (a) to the right to a fair and public hearing by an independent and impartial court; clause (c) to be presumed innocent until proved guilty according to law. Article 5 speaks of ‘justified limitations’ and says that the rights and freedom in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Court of Appeal in the above case of Gisborne Herald refused to follow the law in USA which was based on the principle of ‘clear and present danger’ to the administration of justice (Bridges v. California : (1941) 314 US 252. It refers to the law in Canada in Dagenais v. Canadian

Broadcasting Corp. : 1994 (3) SCR 835 that a publication ban should only be ordered if ‘necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk’ and if the court is of the opinion that ‘the salutary effects of the publication ban outweigh the deleterious effect to the freedom of those affected by the ban’. The Canadian Supreme Court relied on the Canadian Charter Article 2(b) which deals with freedom of expression, Article 11 with fair trial, 11(d) which deals with presumption of innocence till proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; Article 1 of that Charter permits limitation on Rights and Freedoms only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.

After refusing to follow the law in USA and Canada, the New Zealand Court of Appeal stated in Gisborne Herald Ltd. v. Solicitor General: 1995 (3) NZLR 563 (CA):

“We are not presently persuaded that the alternative measure suggested by Lamer CJ in Dagenais should be treated as an adequate protection in this country against the intrusion of potentially prejudicial material into the public domain. Resort to any of those

measures has not been common in New Zealand. Change of venue application are infrequent and usually follow sensationalized localised publicity of a particular crime. Venue changes are inconvenient for witnesses and many of those others directly involved. They are expensive. Further, we have always taken the view that there is a particular interest in trying cases in the community where the alleged crime occurred. Next, challenges for cause are rare. And for the reasons indicated in the contemporaneous judgment of this court in R v. Sanders 1995 (3) NZLR 545, cross-examination of prospective jurors about their views and beliefs is generally undesirable. Sequestration of jurors for the duration of trials has not been a practice in New Zealand. Clearly it would add to the pressure on jurors and affect their ordinary lives. Adjournment of trials as a means of reducing potential prejudices occasioned by pretrial publicity runs up against the right to be lived without undue delay.”

The Court of Appeal stated:

“So far as possible, both values should be accommodated. But, in some cases, publications for which free expression rights are claimed may affect the right to a fair trial. In those cases, the impact of any

intrusion, its proportionality to any benefits achieved under free expression values and any measures reasonably available to prevent or minimise the risks occasioned by the intrusion and so simultaneously ensuring protection of both free expression and fair trial rights, should all be assessed.”

It is, however, commented (see <http://www.crownlaw.govt.nz/uploads/contempt.pdf>) that there appears to be slight shift in the Court of Appeal in Gisborne in respect of balancing both rights. In the court below which heard the case against Gisborne New Herald and other papers in Solicitor General v. Wellington Newspapers Ltd., 1995 (1) NZLR 45, stated (at p.48):

“In the event of conflict between the concept of freedom of speech and the requirements of a fair trial, all other things being equal, the latter should prevail.”

and in that case it was also said:

“In pretrial publicity situations, the loss of freedom involved is not absolute. It is merely a delay. The loss is an immediacy; that is

precious to any journalist, but is as nothing compared to the need for fair trial.”

In the appeal, in Gisborne Herald Ltd. v. Solicitor General, there appears to have been a shift that both rights be balanced. The Court of Appeal also stated in Gisborne:

“The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to any democratic system. The assurance of a fair trial by an impartial court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the courts invokes both these values. It calls for free expression of information and opinions as to the performance of these public responsibilities. It also calls for determination of disputes by courts which are free from bias and which make their decisions safely on the evidence judiciously brought before them. Full recognition of both these indispensable elements can present difficult problems for the courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act, 1990.”

Finally, the Court of Appeal stated –

“The present rule is that where on the conventional analysis, freedom of expression and fair trial cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media express so as to guarantee a fair trial.”

In other words, while the trial Judge said fair trial rights override media rights, the Court of Appeal said both must be balanced and the Court may impose a temporary ban.

Australia

Glennon & Hinch cases: freedom of speech and liberty have to be balanced. But a conviction for contempt due to likelihood of interference with administration of justice need not result in setting aside the conviction of an accused: Is it correct?

Glennon was a Roman Catholic priest who, in 1978 was convicted of indecently assaulting a girl under 16. Seven years later, he appeared as a

Crown witness in an assault case against his nephew and another person who had allegedly assaulted him (i.e. Glennon). Counsel for the youths cross-examined Glennon about the 1978 conviction and accused him of indecently assaulting the two youths. Extensive media coverage was given to those allegations.

Glennon was subsequently charged with other sexual offences and he appeared before the Magistrate's Court on 12th November, 1985. In three separate broadcasts, one Mr. Hinch, speaking on a popular Melbourne radio station, alleged severe criminal conduct and sexual impropriety on Glennon's part. Hinch specifically spoke about Glennon's prior conviction. Hinch was convicted for contempt and the same was affirmed in the High Court in Hinch v. Attorney General (Victoria) (1987 164 CLR 15). The High Court observed:

“Clearly, the three broadcasts on a popular Melbourne station, in a context where specific reference was made to the pending criminal proceedings against Glennon in a Melbourne Court, constituted one of the most severe cases of contempt of court involving the public pre-judgment of the guilt of a person awaiting trial to have come before the courts of this country.”

Dean J stated (at p.58) that:

“The right to a fair and unprejudiced trial is an essential safeguard of the liberty of the individual under the law. The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of the criminal law. Indeed, it is a touchstone of the existence of the rule of law.”

The High Court of Australia held that although the trial might not take place until some two years after the first broadcast by Mr. Hinch, the trial courts were entitled to reach the conclusion that there was ‘a substantive risk of serious interference with the fairness of trial’. In sensational cases, jurors were prone to remember the publication in spite of lapse of time. The broadcasts of Hinch were not saved by the ‘public interest’ defence.

But when Glennon was later convicted and he raised a question that his trial was vitiated on account of unfair publicity about his past character and conviction. He relied on the judgment punishing Mr. Hinch for his publication. But the High Court of Australia rejected his plea in R.V. Glennon: (1992) 173 CLR 592 and restored the conviction of Glennon for sexual offences against young people. The Court made a distinction

between preventing prejudicial publicity rather than minimising its impact at trial. It stated that different tests were applicable in contempt proceedings and on the one hand to criminal convictions. Contempt proceedings are concerned with potential prejudice, which must be assessed as at the time of publication. Actual prejudice is not an element of contempt charge. By contrast, before a conviction is set aside, a court of appeal is concerned with the extent of actual prejudice and, in particular, whether a miscarriage has occurred. There was no inconsistency in upholding the convictions of Glennon and punishing Hinch for contempt. Community's expectations, it was observed, must be fulfilled. It stated that in such a situation, the quashing of convictions may indeed open 'flood-gates'.

But the Judgment in Glennon has been criticised.

Allam Ardik, in the Faculty of Griffith University (2000), *Alternative Law Journal*, page 1, says that the appellate judge restored the conviction on account of 'fear of public outrage'.

Prof. Michael Chesterman (1999) *NSW Unit of Tech*, (Sydney Law Review p.5 refers to statistics to say that 11 cases out of 20 cases since 1980 in Australia, where there was 'convergence' in the sense that the trial was

aborted and the contemnor convicted. Out of the remaining 9 ‘divergent’ cases, seven were either where the jury did not encounter publicity or the trial Judge made no such finding as to whether the jury encountered publicity. Only in three cases, the jury trial was aborted but contempt proceeding failed on the ground of superior public interest. The NSW Law Commission has recommended in 2003 for amendment of the Evidence Act, 1995 and Crimes Act, 1900 to allow courts to pass ‘suppression’ orders in civil and criminal cases.

We shall next refer to the Reports of the Law Commission on this question of balancing both fundamental rights.

New South Wales (Australia) : balancing of expression and due process in criminal trials :

In Australia, the New South Wales Law Commission had prepared a comprehensive Discussion Paper, Paper No.3 (2000) on ‘Contempt by Publication’ and a Final Report 100 (2003) (See www.lawlink.nsw.gov.au/tra.nsf/pages/dp43 toc and Lawlink NSW). In the Discussion Paper, in Ch 1 (para1.20), it is stated:

“Competing Public Interests:

1.20. Because it imposes restraints on the publication of information, the sub judice rule may be seen to limit

both access to information about matters before the courts and freedom of discussion in our society. The Courts justify these limitations on the basis that the public interest in protecting the proper administration of justice, particularly in criminal cases, should generally outweigh the public interest in access to information and freedom of speech. Critics of the sub judice rule have sometimes questioned the balance which is struck between the competing public interests. The Commission examines these criticisms in Chapter 2”.

In Chapter 2 of the Discussion Paper (NSW) (2000) there is a full discussion of the subject and it is stated as follows:-

“Freedom of Speech v. Due Process of Law

2.4 : There is no doubt that freedom of expression is one of the hall-marks of a democratic society, and has been recognized as such for centuries. (Numerous great political and intellectual figures, Burke, Paine, Jefferson and Mill, to name a few – have been associated with this principle.) Freedom of public discussion of matters of legitimate public concern is, in itself, an ideal of our society : Hinch v. Attorney General : (1987)

164 CLR 15(57) Deane J). Justice Mahoney, in Ballina Shire v. Ringcanol : (1994) 33 NSWLR 680 (720) spoke of the ends which are achieved by the capacity to speak without fear and reprisal and the importance of these ends in a free society : “ideas might be developed freely, culture may be refined, and the ignorance or abuse of power may be controlled”.

2.5 : However, freedom of speech cannot be absolute. In legal, political and philosophical contexts, it is always regarded as liable to be overridden by important countervailing interests, including state security, public order, the safety of individual citizens and protection of reputation.

2.6 : One such countervailing interest is due process of law. Freedom of speech ought not to take precedence over the proper administration of justice, particularly in criminal trials where an individual’s liberty and/or reputation are at stake, and where the public have an interest in securing the conviction of persons guilty of serious crime. Indeed, the belief that the public interest in a fair trial will always outweigh the public interest in freedom of expression, generally goes unchallenged. Therefore, a discussion of how to reconcile these competing public interests proceeds on the basis of acceptance of this

notion. The question to resolve, then, is whether justice can be done, as well as seen to be done, in the absence of sub-judice liability. If the answer is no, then, sub judice rule is essential to achieving the proper balance between the competing interests, the question must then be asked whether the operation of the sub judice rule restricts freedom of speech more than necessary to ensure a fair trial”.

The Commission then refers (in para 2.7) exclusively to the case law relating to the ‘Legal Protection of Expression’ – Theophanous v. Herald Weekly Times Ltd : (1994) 182 CLR 104, Lange v. Australian Broadcasting Corpn : (1997) 189 CLR 520 in which it was stated that while freedom of expression was basic, it was not absolute. In Attorney General v. Time Inc Magazine Co Pte Ltd : (NSW Appeal 40,331/94 dated 15.9.1994) the NSW Court of Appeal observed that the Common Law principles have been established as a result of a balancing of competing interests, namely, the public interest in freedom of expression and the public interest in the administration of justice. The NSW Court also stated that freedom of expression is not unconditional. “Expression can, for legally relevant purposes, be free even though it is subject to other legitimate interests” (ibid, Gleeson, CJ).

The Commission referred (see paras 2.13 to 2.15) to Article 19(2) of the International Covenant of Civil and Political Rights which permits restriction on freedom of speech and expression for various purposes and stated:

“Furthermore, Article 19 of the ICCPR is made subject to Article 19(1) which guarantees the right to individuals to a ‘fair hearing by a competent, independent and impartial tribunal’..

The Commission referred (see paras 2.16 to 2.19), to the ‘Principle of Open Justice’ which again is not absolute and it stated (see para 2.18) that “media can effectively perform this ‘watch dog’ role, promoting discussion of courts and the justice system, ‘without publishing the most obviously prejudicial material specifically relevant to a case’.

The Commission dealt with (see paras 2.20 to 2.22) the Rules of Evidence, about the presumption of innocence until proven guilty beyond reasonable doubt as a basic tenet of criminal procedure. Rules of evidence exclude opinion evidence, allegations as to the general character or credibility of an accused, confessions which are not established as voluntary, prior conviction or prior conduct. Such inadmissible evidence cannot be introduced through the back door.

The Commission referred (see paras 2.23 to 2.26) to the principle that ‘Justice must be seen to be done’. Due process of the law encompasses

not only the right to a fair trial, but also the preservation of public confidence in the administration of justice. ‘Justice should not only be done but must be seen to be done’ R v. Sussex Justices; Ex Parte Mc Carthy : (1924) 1 KB 256 (259). In this way, public confidence in the administration of justice is maintained. If the media publishes prejudicial material or wages a campaign, not only it may affect criminal adjudication but if it does not, public may see and the accused may believe that justice is not done. Such material can also influence witnesses.

It referred (see para 2.27) to ‘time limits’ and stated that a publication will constitute a contempt under the sub judice rule, if it relates to proceedings which are current or pending. For example, material concerning a particular crime, which is published before anyone has been arrested or charged with the crime, will not constitute a contempt, even if it later turns out to be prejudicial to the trial of the accused.

The Commission referred (see para 2.30) to several points raised by critics of prohibition of publication after arrest or after charge is filed on the ground that there is no empirical evidence of influence on Jurors or that some publications fade away in public memory when there are delays in the trial; that people mistrust what is published in the media etc. (In some countries like US, potential jurors are initially examined in large number to elicit if they admit they have already been influenced by the media publicity

and if they admit, they are excluded.) There can be conscious or unconscious influence based on appearance, race, religion, sect, cultural attributes, or by publicity as to prior convictions, alleged confessions etc.

The Commission stated (see para 2.35):

“However, what the sub judge rule seeks to do is to filter out the most damaging of prejudicial effects so that views formed prior to the trial or from extrinsic sources during the trial, are not held strongly that they cannot be displaced by the evidence which is presented and tested in the courtrooms, as well as by judicial directions and instructions on the law and submissions by counsel on that evidence. It seeks to suppress only that material which, in accordance with the present Common Law test, has a real and definite tendency, as a matter of practical reality, to prejudice legal process or on a reformulated test, creates a substantial risk that the fairness of the proceedings would be prejudiced. Furthermore, suppression is for a limited time only and liability for contempt is only sheeted home where any of the grounds of exoneration (discussed below) are not available.”

Under the head of defences, are the following:

that the person who published did so bona fide without knowing or believing it is prejudicial or after becoming aware, took steps to prevent publication or that they had taken reasonable care. There can be matters of public interest which require publication. Public safety could also be a reason.

The Commission gave specific examples of media publicity (see para 2.45) which can cause prejudice :

- (i) a photograph of the accused where identity is likely to be an issue, as in criminal cases;
- (ii) suggestions that accused had previous convictions, or has been charged for committing an offence and/or previously acquitted, or has been involved in other criminal activity;
- (iii) suggestions that the accused has confessed to committing the crime in question;
- (iv) suggestions that the accused is guilty or involved in the crime for which he or she is charged or that the Jury should convict or acquit the accused; and
- (v) comments which engender sympathy or antipathy for the accused and/or which disparage the prosecution or which make favourable

or unfavourable references to the character or credibility of the accused or a witness.

Each of these is discussed in detail (see paras 2.46 to 2.54) though the Commission refers (see para 2.52) to the Common Law assumptions that (while Jury may be influenced), Judicial Officers are not. (A view which has not been accepted in India, as detailed in Chapter III of our Report and also not accepted by the House of Lords also as stated elsewhere.)

Final Report of NSW Law Reforms Commission (2003) :

In the Final Report of the NSW Law Reforms Commission, it was stated in (Chapter 2 para 2.5) (Freedom of Speech vs. Due Process of Law) that “measures which are necessary for due process of the law take precedence over freedom of speech”. It referred to Brennan J in R v. Glennon: (1992) 173 CLR 592 and stated that while the two rights have to be balanced, the integrity of the administration of criminal justice is fundamental.

Other Law Commission Reports referred to by the NSW Law Commission.

The NSW Law Commission also referred to the Report of the New Zealand Law Commission (Preliminary Paper 37 on Juries in Criminal Trials, Part II [Vol 1, p.289]) that:

“When a conflict arises between fair trial and freedom of speech, the former prevailed because the compromise of fair

trial for a particular accused will cause them permanent harm
.... whereas the inhibition of media freedom ends with the
conclusion of legal proceedings”.

and to Michael Kirby J’s observations in John Fairfax Publications Pty Ltd v. Doe : (1995) (37 NSWLRC 81) that it would be unthinkable to allow destroying the essential power and duty to protect fair trial of persons accused of crimes.

In Chapter 4 the NSW Law Commission dealt with prejudice in criminal proceedings and in Chapter 7 with time limits and ‘imminence’

In relation to criminal proceedings, it recommended (see para 7.12) that “sub judice period commences from the time the process of law has been set in motion for bringing an accused to trial. It stated that issue of warrant need not be the starting point because arrest may be delayed and that it is sufficient to say ‘arrest of the accused’ rather than ‘arrest without a warrant’. Recommendation 13 was as follows:

“13. Legislation should provide that, for purposes of sub judice rule, criminal proceedings should become pending and the restrictions on publicity designed to prevent influence on juries, witnesses or parties should apply, as from the occurrence of any of these initial stages of the proceedings:

(a) the arrest of the accused;

- (b) the laying of the charge;
- (c) the issue of a court attendance notice and its filing in the registry of the relevant court; or
- (d) the filing of an ex officio indictment.

Schedule 1 (clause 4) of the NSW Bill, 2003 incorporates this provision.

Australian Law Commission: On balancing the rights :

In Australia, the Australian Law Reform Commission (See ALRC Report No. 35 at page 247) looked at whether reform of the law governing contempt by publication was desirable and if so, in what respects. It concluded that –

“the right of citizens to a fair trial in criminal proceedings before a Jury would be significantly jeopardized if there were no restrictions whatsoever of freedom of publication relating to the trial”.

While it attached considerable importance to the principle of Open Justice, which is promoted by reporting of what goes on in Australian Courts, it concluded that –

“prohibition currently imposed by contempt law on publications relating to current or forthcoming trials should not be completely dismantled”.

It recommended, however, that prohibitions should be ‘confined to the minimum necessary to eliminate substantial risk of prejudice’.

That would mean that to the extent, the freedom of speech and expression must be subordinated to due process in protecting liberty.

Canadian Law Reform Commission: on balancing the rights:

In Canada, the Canadian Law Reforms Commission (Report No. 17 at p.9) referred to section 1 of the Canadian Charter of Rights which guarantees rights subject only to reasonable restrictions as can be demonstrably justified in a free and democratic society; to section 2 which refers to freedom of speech and expression and to section 11(a) which speaks of the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. After referring to the duty of the State to see that ‘the administration of justice is impartial and fair’, the Commission argued that the State could not tolerate an individual attempting to influence unduly the outcome of a trial before a jury. The purpose of the sub judice rule is to preserve the impartiality of the judicial system by protecting it from undue influence which might affect its

operation, or at least might appear to do so. While there must be competition between different rights, there is need to retain the sub judice rule.

Irish Law Reform Commission: on balancing the rights :

In Ireland, the Law Reforms Commission (Report 47, 1994 para 6.4) stated that press, radio and television had a powerful effect on the people and if it is not subjected to reasonable safeguards, there could be potentially serious effects for the proper administration of justice and may result in long imprisonment of innocent people. In contrast, the public interest in the free flow of information is by no means wholly interrupted by a careful observance of the sub judice rule, since, at worst, the inhibition of unrestricted comment and publication of allegedly relevant facts is of a temporary nature only. It rejected the argument that the sub judice rule offends against the guarantee of freedom of expression (Art 40.6.1). Juries could be affected by prejudicial publications affecting fairness in adjudication and other alternatives would not be sufficient.

Thus all these Law Reforms Commissions in NSW, Australia, Canada and Ireland supported the sub judice rule and observed that for that purpose freedom of speech could be restricted.

United Kingdom & the Sunday Times Case :

The competing rights of freedom of expression and fair administration of justice came up for consideration in Attorney General v. Times Newspapers : 1973(3)All ER 54 (HL). The result was in favour of the administration of justice and against the newspapers. The further petition before the European Court of Human Rights resulted in an opinion in Sunday Times v. United Kingdom (1979) (2) EHRR 245 that the injunction granted by the Court in U.K. against publication was in absolute terms and without time limit and was very wide and violated the European Convention and that the contempt law in UK (i.e. before 1981) was vague and difficult to comply with. The facts were as follows:

Sunday Times published a series of articles to bring pressure on the Distillers Ltd to settle several pre-trial civil cases which were filed by or on behalf of those affected by thalidomide drug administered during pregnancy to women. The Attorney General commenced proceedings for injunction restraining the newspaper from publishing one in the series which was about to be published. Injunction was granted. But, the Court of Appeal vacated the injunction granted by the Divisional Court. The House of Lords allowed the appeal and restored the injunction. It was held that when the civil cases were pending, it was contempt of court to publish articles pressurizing the Distillers to settle the matters as that would affect the administration of justice. Some of the Law Lords held that it was likely to prejudice the mind

of witnesses, jury or magistrates. Some stated that it can be assumed that it would not affect a professional Judge. Injunction was restored.

On petition by Sunday Times, the European Court in Sunday Times v. U.K 1979(2) EHRR 245 dealt with the matter on the basis of Article 10 of the European Convention (freedom of speech and expression) and posed a preliminary question “Was the interference prescribed by law ?” as required by Article 10(2). It came to the conclusion that the interference was by law since ‘law’, under that Article covered not only statute law but also ‘unwritten law’ and the publishers had sufficient notice of the existence of such a law.

The next question the Court posed was “Did the interference have aims that are legitimate under Article 10, para 2 ?”. Under Article 10(2), restrictions were permissible if they were “necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of judiciary”. The majority in the European Court held that ‘authority’ of the judiciary did cover its adjudicative functions as well as its powers to record settlements. Here, it went by the Phillimore

Report. The contempt of court law provided the guidance. The interference was legitimate with Article 10(2).

The next question the Court posed was whether interference was ‘necessary in a democratic society’ for maintaining the authority of the judiciary ? This question was more factual because the point was whether public interest required publication of the evil effects of thalidomide. ‘Necessary’ in Article 10(2) was not synonymous with ‘indispensable’. ‘Necessary’, the Court said, was not as flexible as the words ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’. It implied a ‘pressing social need’ or one which was ‘proportionate to the legitimate aim pursued’. The general injunction granted by the Court did not meet this standard as it was in very wide terms, further, there was not much pressure on the Distillers Ltd for settlement since the issue was also debated in Parliament. But the House of Lords’ view that ‘trial by newspaper’ was not permissible was a concern in itself ‘relevant’ to the maintenance of the ‘authority of the judiciary’. The European Court accepted that :

“If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in courts’

and that

“Again, it cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media in the long run have nefarious consequences for the acceptance of the Courts as the proper forum for the settlement of legal disputes”.

But, the European Court held on facts, that the proposed article by Sunday Times was “couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a Court could arrive”. It said “There appears to be no neat set of answers ...” to the effects of Thalidomide. Therefore, the effect of the article on readers was likely to be ‘varied’ and hence not adverse to the ‘authority of the judiciary’. As the settlement was in progress over a long period, there was not much prospect of a trial of the (civil case) coming through. But it agreed:

“Preventing interference with negotiations towards settlement of a pending suit is a no less legitimate aim under Article 10(2) than preventing interference with a procedure situation in the strictly forensic sense”.

But, here the negotiations were prolonged and at the time of publication, they did not reach a final stage of trial.

The Court then emphasized the role of the press and of the Courts but said it was not a matter of balancing competing interests but going back to Article 10(2) to find out if the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it. The thalidomide disaster was a matter of public concern and under Article 10, public had a right to be informed about the drug. Having regard to all the circumstances, the interference complained of did not correspond to a social need sufficiently pressing to outweigh public interest in freedom of expression within the meaning of the Convention. The restraint was not 'proportionate' to the legitimate aim pursued and was not necessary in a democratic society for maintaining the authority of the judiciary.

The Court stated that the law must be certain and that in U.K it remained uncertain if the question of balancing rights was left to be decided in individual cases.

In our view, the decision of the European Court has no application to publications which may prejudice the rights of a person who has been arrested and where such arrest indicates that a trial could more likely follow by the filing of a charge sheet. Sunday Times related to a civil case, it concerned Article 10(2) of the European Convention which uses the words

‘necessary’. The Court itself admitted that ‘necessary’ was more narrow than the word ‘reasonable’, a word used in Article 19(2) of our Constitution.

One other important point to be noted here is that while it is open for U.K citizens to approach the European Court for relief on the ground of violation of the European Convention, the judgment of the European Court does not amount to overruling the opinion of the House of Lords. In fact, in Sunday Times case itself, the European Court pointed out:

“Whilst emphasizing that it is not its (European Court’s) function to pronounce itself on an interpretation of English law adopted in the House of Lords”,

Borrie and Lowe state clearly (p 102, 3rd Ed, 1999) that “although the Convention is not directly applicable to U.K domestic law and the decisions of the European Court are not binding precedents”, nevertheless it was to be presumed and it was necessary that U.K is reminded of its international obligations assumed under the Convention. “Even in other Common Law jurisdictions outside Europe, the European Court’s decision is not totally irrelevant although it may not be regarded as persuasive as the House of Lords decisions”. (See Commercial Bank of Australian Ltd v. Preston : 1981(2) NSWLR 554).

But, after Sunday Times' case, the UK law was no longer vague in view of the Contempt of Courts Act, 1981, which prescribed the date of arrest as the starting point.

Our Conclusion

It is, therefore, permissible to amend the Explanation in Section 3 of the 1971 Act in such a way that prejudicial publications made even after arrest are brought within the fold of contempt law. It is sufficient, if upon arrest, the person comes within the protection that the Constitution and the laws give him, that he must be produced in a Court within 24 hours.

Here, we have considered cases of bailable offences, where the police have to and may themselves grant bail within 24 hours of arrest, without producing the person in Court. But even so there can be cases where a person is not able to satisfy the conditions imposed by the police and then he may have to be produced in court within 24 hours. As stated earlier, according to the judgment in Hall, decided by the Scotland Court in 1978 referred to above, the test is whether a person has come within the fold of protection of the Court and not whether, if the offence is bailable, he is able to satisfy the conditions and get released within 24 hours by the police. The moment an arrest is made, the person comes within the protection of Court

and that is sufficient to state that Court proceedings are imminent, for the person has to be produced in Court within 24 hours.

Chapter VIII

Postponement of Publications by Court: Whether ‘substantial Risk of prejudice as in UK inappropriate?’

The issue of orders by the Courts, - postponing publications to prevent prejudice to a suspect in an impending or pending criminal case is of great importance. The punishment of a person who makes publication amounting to undue interference of course of justice under sec 3 of the Contempt of Court Act, 1971 is not always sufficient nor does it in any way help the suspect or accused. Question is whether such prejudicial publications may be directed to be postponed by a general or specific order.

Prior restraint and subsequent punishment are distinct

There is a well recognized distinction between prior restraint and subsequent punishment. In Constitutional Law (4th Ed)(1991) by John E. Nowah & Ronald D. Rotunda, while referring to the position in USA it is stated: (p 970)

“While it is no longer true that the first amendment means only freedom from prior restraint, prior restraint is still considered to be more serious than subsequent punishment”.

Mr. A. Bickel states that a ‘criminal statute ‘chills’ while prior restraint ‘freezes’ (see the Morality of Dissent, p 61 1975). In our view, if it is ‘prior restraint’ but only ‘postponement’ of publication, there is no ‘freezing’ at all.

Stringent conditions have to be imposed if postponement of publications by Court is to be permitted:

While subsequent punishment may deter some speakers, prior restraint limits public debate and knowledge more severely and prior restraint must be subjected to stringent conditions, whether it is permanent or temporary.

Under English law, sec 4(2) requires proof of ‘substantial risk of prejudice’ has to be proved if a postponement order has to be passed by Court. We have to examine what kind of restrictions can be imposed under our law to postpone publications which are likely to prejudice trial.

In fact, we have seen in the last Chapter the peculiar case of Glennon in Australia, - to which we have already referred to in Chapter IV, where the person who made the prejudicial publication was punished for contempt on the ground of likelihood of prejudice to the accused but later on, the Court refused to quash the accused's conviction when a plea was raised by the accused relying on the judgment in the contempt case, that the trial was vitiated. The Court required proof of actual prejudice for quashing the trial and said that likelihood of prejudice which is relevant for contempt, was not relevant for quashing a conviction. This judgment has, as already stated, been severely criticized.

It is, therefore, necessary to see if there can be prevention of prejudice rather than take serious measures after prejudice has occurred. Of course, this has to be limited to extreme cases because it amounts to 'prior restraint' on publications which it is accepted as being a serious encroachment on the freedom of speech.

In the United States where the only exception is 'grave and present' danger, prior restraint procedures are very narrow. We have pointed out

that there is considerable difference between the American law which does not contain any provision like Art. 19(2) of the Constitution of India which permits 'reasonable' restrictions on the freedom of speech and expression for certain exceptional purposes and contempt of Court is constitutionally recognized as one which the exceptions.

The Sunday Times case discussion in Chapter VII was also a case of a restraint order. But, we have pointed out that that case is distinguishable because the Court's order of prior restraint related to the publication of prejudicial matter affecting settlement in a batch of civil cases. Several civil actions were filed against a company which sold thalidomide to pregnant women who filed cases against the company on account of the probable after-effects of the drug on their children to be borne. The publications criticized the drug and the company when settlement proceedings were pending. We pointed out that that case did not relate to publications affecting suspect or accused in a pending or imminent criminal law.

Yet another point we had noted was that the European Court while deciding Sunday Times case held that in order to grant an injunction it was incumbent on the party affected to prove 'necessity' because Art. 1 of the

European Convention requires that the restriction to be imposed on the freedom of speech was ‘necessary’ in a democratic society. The European Court specifically pointed out that the Convention did not use the word ‘reasonable’ but used the word ‘necessary’. Our Constitution uses the words ‘reasonable restriction’ and permits a law to be made imposing ‘reasonable restrictions’. Further, the European Court commented on the ‘absolute nature of the injunction’ granted by the UK Courts and said that while such a permanent ban on publication was not necessary, an order postponing the publication for some time was permissible even under the Convention.

Therefore, US precedents and Sunday Times case are not precedents in our country.

In the Indian context, where an injunction was granted and vacated in Reliance Petrochemicals case, we have pointed out in Chapter III that the injunction in that case related to a civil case and that that case is also not relevant so far as restraints on publications to prevent prejudice in criminal cases, particularly, after arrest.

While there are these differences between the American and Strasbourg jurisprudence and Reliance case on the one hand and the Indian constitutional provisions, it is still incumbent for us to decide whether serious interference with the freedom of speech and expression guaranteed by our Constitution in Art. 19(1) can be prevented by an injunction order of a temporary nature. We have also to decide what conditions have to be imposed.

The provision for postponement orders in sec. 4(2) of the (UK) Contempt of Courts Act, 1981: Substantial risk of serious prejudice:

The provisions of sec. 4(2) of the UK Act, 1981 were brought in after the Sunday Times case was decided in 1979 by the European Court. The subsection was drafted in the light of the comment by the European Court that UK law of contempt was vague. It reads:

“sec. 4(2): In any proceedings, the Court may, if it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any

report of the proceedings or any part of the proceedings, be postponed for such period as the Court thinks necessary for that purpose”

The section applies to prejudice in civil and criminal proceedings.

The important words in this provision are the words ‘necessary’ and ‘substantial risk of prejudice’. The other words ‘pending or imminent’ refer to proceedings ‘imminent’ as enumerated in the Schedule 1 to that Act, which includes the ‘date of arrest’.

In this connection, we may point out that there is an exhaustive discussion of what words should be used while enabling Courts to pass ‘suppression’ orders. The New South Wales Law Reform Commission, in its Discussion Paper 43 (2000) on ‘Contempt by Publication’ devotes a full chapter for ‘Suppression Orders’ (Chapter X). In the Final Report of 2003, the subject is again discussed in Chapter X, ‘Suppression Orders’. We shall report to these Reports.

The Discussion Paper of the New South Wales Law Reform Commission (2000):

In the Discussion Paper, the following aspects are discussed – (i) the concept of open justice, (ii) the qualifications to the principle of open justice, including hearings in camera, concealment of information from those present in Court, power to forbid publication of proceedings heard in open Court, (iii) existing powers to suppress publication of proceedings in New South Wales including common law powers, statutory powers to issue suppression orders, legislative provisions with a prescription of non-publication, legislative provisions with a broad discretion to impose suppression orders, (iv) Suppression Orders in New South Wales under the headings: issues and options, including the question of conferring general power on Courts to direct non-publication necessary for administration of justice, background (prejudice to a fair trial), specific statutory provisions in Australia, fair trial as an element of proper administration of justice, law reform options, the Commission’s tentative view, a broad power and ‘substantial risk’, power to suppress names as well as evidence, power to apply to both civil and criminal proceedings, legislative provisions for standing and appeals.

The proposal 21 refers to the ‘substantive risk of prejudice’ principle with a further provision enabling the media to apply to the Court for

variation or revocation of such an order, after hearing the applicant who obtained the suppression orders.

Final Report of the New South Wales Law Commission (2003):

In the final Report, the NSW Law Commission considered the following aspects (i) statutory suppression orders including why they are needed, who is subject to a suppression order, knowledge of the existence of a suppression order, existing statutory regulation of publication, (ii) recommendations under the sub-titles, standing, interim suspension orders, a strict liability offence, material to which suppression orders apply and finally gave its Recommendations as follows:

“A new provision should be introduced into the Evidence Act, 1995 (NSW) which provides that any Court in any proceedings, has the power to suppress the publication of reports of any part of the proceedings (including documentary material), where this is necessary for the administration of justice, either generally or in relation to specific proceedings (including proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence and oral submissions, as well as the material that would lead

to the identification of parties and witnesses involved in proceedings before the Court. The new section should not replace the common law, and should operate alongside existing statutory provisions that restrict publication unless a successful application has been made rendering such a provision inapplicable in the circumstances. However, sec. 119 of the Criminal Procedure Act, 1986 (NSW), together with any other provisions contained in other statutes which give Courts discretion if grounds are affirmatively made out to impose suppression orders, should be repealed.

A section should be introduced into the Crimes Act, 1900 (NSW) making breach of an order a criminal offence. The offence created by this section should be one of strict liability.

The Evidence Act, 1995 (NSW) should also expressly provide that a person with a sufficient interest in the matter should be eligible to apply to the Court for the making, variation or revocation of a suppression order. The application for a suppression order, together with the media and anyone else regarded by the court as having a sufficient interest may be heard on the application. The same categories of persons should also be able to appeal in relation to a suppression order. Such a person, if heard previously on the original

application, should be entitled to be heard on the appeal. Any other person with a sufficient interest may seek leave to be heard.

An appeal against a decision should be heard by a single Judge of the Supreme Court, except where a suppression order was made in the Supreme Court, in which case, an appeal should be to the Court of Appeal.

The Court should also be empowered to make an interim suppression order, having a maximum duration of seven days, before proceeding to a final determination. The Court should have the power to grant subsequent interim suppression orders.”

The Commission prepared a draft Bill to enable ‘suppression orders’ to be passed by Court. We shall refer to it in detail later on.

Other Law Reform Commissions:

We shall also briefly refer to the views of other Law Reform Commissions on “suppression” orders.

The Australian Law Reform Commission in its Report on Contempt and Prejudice to Jury (Report No.35, 1987) accepted the risk that reports of legal proceedings may contain material that could prejudice a jury trial. It

recommended that a Court should have power to postpone publication of a report of any part of proceedings if it is satisfied that the publication could give rise to a substantial risk that the fair trial of an accused for an indictable offence might be prejudiced because of the influence which the publication may have on jurors (para 324). In para 327 it recommended ban on media reports of committal proceedings.

The Law Reform Commission of Victoria (Australia) was of the same opinion as the Law Reform Commission of Australia (Law Reform Commission of Victoria, Comments on the Australian Law Reform Commission Report on contempt No.35 (unpublished, 1987).

The Commonwealth Government (Australia) also recommended the implementation of its 1992 Paper (Australia, Attorney General's Dept, The Law of Contempt: Commonwealth Position Paper (1992)) and prepared a Bill on that basis for the consideration of a Standing Committee of Attorney General. The Bill of 1993 was called the Crimes (Protection of the Administration of Justice) Amendment Bill, 1993 (cth).

In Canada, it is not permissible to pass a suppression order on the basis of speculative possibility of prejudice to a fair trial but the publication must be of such as would create 'real and substantial risk' of prejudice to a fair trial (Dagenais v. Canadian Broadcasting Corpn: (1994) 120 DLR (4th) 12.

The Irish Law Reforms Commission has recommended stricter provisions of a ban on reporting of preliminary proceedings of indictable offences, such as committal proceedings. (Irish Law Reform Commission, Contempt of Court, Report No.47, 1994, para 6.37to 6.42 and Consultation Paper (1991) 343-350). In fact, that was the position under sec. 17 of the (Ireland) Criminal Procedure Act, 1967 (which of course did not apply to bail proceedings) and the Commission felt that that provision has never been questioned in Ireland. Such a procedure would ensure that media did not report matters which a criminal court could treat as 'inadmissible' later.

There are several statutes such as the Code of Criminal Procedure, 1973, the Terrorist and Disruptive Act, 1985 (1987), the Prevention of Terrorism Act, 2002, and the Unlawful Activists (Preventive) Act, 1967as

amended in 2004. These Acts contain a number of exceptions to the principles of open justice.

Indian statutes have created some exception to open justice:

In our 198th Report on ‘Witness Identity Protection and Witness Protection Programmes’ (2006) and in the Consultation Paper (August 2004) which preceded it, there was an exhaustive discussion of these statutes which are exceptions to the principle of open justice which is also part of our law. We have referred to the statutes dealing with sexual offences and terrorists where witness identity protection or in camera proceedings are held as valid exceptions to the principle of open justice. We have pointed out that right from the time when Scott v. Scott was decided in 1913 AC 417 (463), ‘open justice’ has been the law in our country. We have also referred to the decisions which stated that that principle of open justice has exceptions where the exception can be justified by yet another ‘overriding’ principle. The needs of a fair trial in the administration of justice is one such. We have also referred elaborately in the said Reports that the right to freedom of speech is also not absolute in

our country. We do not propose to refer to all that literature and to comparative law to which we have referred in those Reports.

Suffice it to say that just as there is need to protect fairness in criminal proceedings by bringing in provisions for ‘witness identity protection’, there is also need to protect the rights of the accused for a fair criminal trial.

Draft Bill attached to the Report (2003) of NSW Law Reform Commission:

The New South Wales Bill, 2003 appended to their Final Report (2003) is more elaborate than the UK Act, 1981. We shall refer to the provisions in that Bill.

Under sec. 3 of the Bill ‘criminal proceeding’ is defined as follows:

“criminal proceeding: means a proceeding in a court relating to the trial or sentencing of a person for an offence and includes

- (a) a proceeding for the committal of a person for trial, and
- (b) a proceeding for the sentencing of a person following conviction,
and
- (c) a proceeding relating to bail (including a proceeding during the trial or sentencing of a person), and

- (d) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act, 1900, and
- (e) a proceeding preliminary or ancillary to:
- (i) a prosecution for an offence, or
 - (ii) a proceeding for committal of a person for trial, or
 - (iii) a proceeding relating to bail, or
 - (iv) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act, 1900, and
- (f) a proceeding by way of an appeal with respect to the trial or sentencing of a person.”

Clause (e) of sec. 4 obviously includes the stage when a person has been ‘arrested’.

Sec. 7 to 10 of the Bill is important and deal with the ‘substantial risk’.

Sec. 7 deals with ‘Contempt because of risk of influence on jurors and potential jurors’ and applies to civil as well as criminal proceedings. Sec. 8 deals with ‘Contempt because of risk of influence on witnesses and potential witnesses’ and applies to civil and criminal proceedings; sec. 9 deals with ‘Contempt because of pressure on parties or prospective parties to civil proceedings’; sec. 10 deals with ‘Contempt because of pressure on

parties or prospective parties to criminal proceedings’. The clauses of these sections are all similar with minor differences. Some sections have extra clauses. We shall refer to sections 7, 8 and sec. 10 which are more relevant for us:

Sec. 7: ‘Contempt because of risk of influence on jurors and potential jurors’

(1) A person is guilty of subjudice contempt proceeding against a person if:

- (a) the person publishes matter or causes matter to be published, and
- (b) a criminal or civil proceeding is active at the time of the publication of the matter, and
- (c) the proceeding is one that will be, may be or is being tried before a jury, and
- (d) the publication of that matter creates a substantial risk, according to the circumstances at the time of publication, that a juror in the proceeding or a person who could become a juror in the proceeding (a potential juror) will become aware of the matter, and
- (e) there is a substantial risk, according to the circumstances at the time of publication, that the juror or potential juror will recall the matter at the time of acting as a juror in the proceeding, and

(f) because of the risk that the juror or potential juror will recall the matter at that time, there is a substantial risk, according to the circumstances at the time of publication, that the fairness of the proceeding will be prejudiced through influence being executed on juror or potential jurors by the published matter.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to prejudice the fairness of the proceeding.

(3) Part 1 of Schedule 1 applies for determining the times at which a proceeding is active for the purposes of this section.

(4) This section extends to the publication of matter outside New South Wales.

Sec. 8: Contempt because of risk of influence on witnesses and potential witnesses:

(1) A person is guilty in a subjudice contempt proceeding against the person if

- (a) the person publishes matter or causes matter to be published, and
- (b) a criminal or civil proceeding is active at the time of the publication of the matter, and
- (c) the publication of that matter creates a substantial risk, according to the circumstances at the time of publication, that a witness in

the proceeding or a person who could be a witness in the proceeding (a potential witness) will become aware of the matter, and

(d) there is a substantial risk, according to the circumstances at the time of publication, that a witness will recall the contents of the matter at any stage of the proceeding or of any official investigation in relation to the proceeding, and

(e) because of the risk that the witness will recall the matter at that time, that the fairness of the proceeding will be prejudiced through influence being executed on witnesses or potential witnesses by the published matter.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to prejudice the fairness of the proceeding.

(3) Part 2 of Schedule 1 applies for determining the times at which a proceeding is to be treated as active within the meaning of this section.

(4) This section extends to the publication of matter outside New South Wales.

Sec. 9: Contempt because of pressure on parties or prospective parties to civil proceedings:

(1) A person is guilty of subjudice contempt proceeding against the person if:

- (a) the person publishes matter or causes matter to be published and
- (b) the matter contains unfair comment or material misrepresentation of fact that incites hatred towards severe contempt for, or severe ridicule of a person in his, her or its character as a party or prospective party to a civil proceeding and
- (c) because of the publication of the matter, there is substantial risk, according to the circumstances at the time of publication, that a person of reasonable fortitude in the position of a party or a prospective party to the proceeding would make a different decision in relation to the instituting, maintaining, defending, continuing to defend or seeking to settle the proceeding then he, she or it would otherwise make.

(2) A person can be found guilty as referred to subsection (1) whether or not the person intended to give rise to a risk such as described in subsection (1)(c).

(3) This section does not apply to or in respect of a publication of matter concerning a party or prospective party to a civil proceeding after the conclusion of any appeal in the civil proceeding and the expiry of any period permitted for appeal or further appeal (whichever is later).

(4) This section extends to the publication of matter outside New South Wales.

(5) In this section, prospective party, in relation to a proceeding, means

(a) any person who, there are reasonable grounds for believing, could be or become a party in the proceeding, and

(b) any person who is or may be in a position to institute the proceeding, whether or not actually minded to do so.

Sec.10: Contempt because of pressure on parties or prospective parties to criminal proceeding:

(1) a person is guilty in a subjudice contempt proceeding against the person if:

(a) the person publishes matter or causes matter to be published.

(b) The matter contains unfair comment or material misrepresentation of fact that incites hatred towards, serious contempt for, or severe ridicule of a person in his, her or its character as a party or prospective party to a criminal proceeding, and

(c) because of the publication of that matter, there is a substantial risk, according to the circumstances at the time of publication, that a person of reasonable fortitude in the position of a party or prospective party to the proceeding will make a different decision

in relation to instituting, maintaining, defending, pleading guilty in or accepting a plea of guilty in the proceedings than he, she or it would otherwise make.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to give rise to a risk of the kind described in subsection 1(c).

(3) This section does not apply to or in respect of matter concerning a party or prospective party to a criminal proceeding after the conclusion of any appeal proceeding instituted in the criminal proceeding and the expiry of any period permitted for appeal or further appeal (whichever is the later).

(4) This section extends to the publication of matter outside New South Wales.

(5) In this section,

Part III of the Bill refers to factors in making a finding of criminal subjudice contempt and sec. 11 states pre-existing publicity does not prevent finding of contempt. Sec. 12 states that ‘Evidence relating to discharge of jury following publication is admissible in contempt proceedings’.

Part IV of the Bill refers to ‘Defences in subjudice contempt proceedings: Sec. 13 bears the title “Defence if conduct is innocent or if no relevant knowledge or control”, sec. 14 bears the title ‘Defence if no editorial control over the content of publication’.

Part 5 refers to exclusion of liability in subjudice proceeding. Sec. 15 refers to ‘exclusion of liability when publication relating to a matter of public interest’ but the exclusion is not available if the benefit does not outweigh the harm caused to the administration of justice by risk of the influence on jurors, potential jurors, witnesses, potential witnesses or parties or potential parties. Sec. 16 refers to exclusion of liability when publication is necessary to protect public safety.

Part 6 refers to ‘suppression orders’ if there is actual or threatened criminal contempt.

“Sec. 17: Restraint of actual or threatened contempt of Court:

(1) Any person having a sufficient interest may bring a proceeding in the Supreme Court for an order to restrain a contempt of Court by publication of matter (whether within or outside the State) that has a tendency to prejudice the fairness of another proceeding in a court of the State.

- (2) An application must not be made under this section unless the Attorney General and the parties to the other proceeding (if any) have been notified of the application.
- (3) The Director of Public Prosecution does not have to comply with subsection (2).
- (4) A proceeding under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its Committee or other controlling or governing body), having like or common interests in that proceeding.”

Part 7 refers to ‘costs of trial discontinued because of contemptuous publication’. Sec. 18 deals with this aspect.

Sec. 19 states that the Attorney General may apply for an order under sec. 18 for the benefit of the accused, or the State or any person or persons of a class.

Sec. 20 deals with calculation of costs. Sec. 21 with nature of costs.

Sec. 22 with certification of costs; sec. 23 with nature of order; sec. 24 with enforcement of order; sec. 25 with recovery; sec. 26 ‘procedure’.

Part 8 refers to criminal contempt generally:

Sec. 27 states that any person may commence proceeding for criminal contempt; sec. 28 states that mere prejudging issues in proceeding is not enough to constitute contempt.

Schedule 1: Part 1 (sec. 7, 8) states when a criminal proceeding is active. It says:

“1(1) A criminal proceeding is active for purposes of section 7:

- (a) from the earliest of the following:
 - (i) the arrest of a person in New South Wales or in any other State or Territory,
 - (ii) the laying of a charge,
 - (iii) the issue of a Court attendance notice and filing in the registry of the relevant Court,
 - (iv) the filing of an ex officio indictment,
 - (v) the making of an order in a country other than Australian that a person be extradited to New South Wales for the trial of an offence.
- (b) until
 - (i) the verdict of a jury in the proceedings, or

- (ii) the making of any order, or any other event, having the effect that the offence or offences charged will not be tried before a jury, or at all.

(2) If a retrial before a jury is ordered, a criminal proceeding is active from the time the order for retrial is made.

Part 2 of Schedule 1 deals with meaning of the word ‘active’ for purposes of risk of influence on witnesses and potential witnesses.

Sec. 4 states:

(1) A criminal proceeding is active for the purposes of sec. 8

(a) from the earliest of the following:

- (i) the arrest of a person in New south Wales or in any other State or Territory,
- (ii) the laying of a charge,
- (iii) the issue of a Court attendance notice and its filing in the registry of the relevant Court,
- (iv) the filing of an ex officio indictment,
- (v) the making of an order in a country other than Australian that a person be extradited to New South Wales for the trial of an offence.

(b) until the later of the following:

- (i) the conclusion of any appeal proceedings;
 - (ii) the expiry of any period permitted for appeal or further appeal.
- (2) If a retrial is ordered in a criminal proceeding, the criminal proceeding is active again from the time the order for a retrial is made, until
- (a) the conclusion of any appeal proceedings, or
 - (b) the expiry of any period permitted for appeal or further appeal whichever is late.

Appendix by the Report refers to a Bill on suppression order and prevention of examination of records.

We have referred to the various provisions of the UK Act, 1981 and the Bill attached to the N.S.W. Law Reforms Report (2003) which deal with suppression orders and the ‘substantial risk of prejudice’.

Considerations for proposals for postponement orders: ‘substantial risk of prejudice’:

If we propose a provision in the proposed Bill for amendment of the Contempt of Courts Act, 1971, it is not merely sufficient to amend sec 3 and its Explanation as stated earlier, but it is necessary to introduce a provision enabling courts to pass ‘postponement’ order as in sec 4(2) of the UK Act,

1981, that sub section uses the words ‘substantial risk of prejudice’.

Question is whether we should use similar words in the proposed provision.

Interpretation of the words ‘Substantial risk’ of prejudice to administration of justice by Courts in UK creates problems:

Section 4(2) of the U.K. Act states that a restraint order may be passed by a Court if there is ‘substantial risk’ of prejudice to the administration of justice. These words have come up for interpretation in a number of cases in U.K. It will be seen that the Draft Bill (2003) of New South Wales (Australia) also uses the word ‘substantial risk’ in Sections 7,8 & 9 follows the UK provision.

It is necessary to refer to the views expressed by Courts and other commentators

(A) as to the meaning of the words ‘substantial risk of prejudice’ and

(B) as to why these words are defective.

(A) Meaning of ‘substantial risk of prejudice’ in Section 4(2) :

In Attorney General v. Newgroup Newspapers : 1986 (2) AllER 833

Sir John Donaldson MR stated (p 841) as follows:

“There has to be substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

This is a double test. First, there has to be some risk that the proceedings This is a double test. First, there has to be some risk

that the proceedings in question will be affected at all. Second there has to be a prospect that if affected, the effect will be serious. The two limbs of the test can overlap, but they can be quite separate. I accept the submission of counsel for the defendant that substantial as a qualification of risk does not have the meaning of ‘weighty’ but rather means ‘not insubstantial’ or ‘not minimal’. The ‘risk’ part of the test will usually be of importance in the context of the width of publication.”

Again in Ex parte the Telegraph Group and Others 2001(1) WLR 1983 (CA) (Longmore, LJ, Douglas Brown & Eady JJ), after referring to Section 4(2), the Court of Appeal stated that in order to decide if the suppression order is ‘necessary’ in the context of Arts 6 and 10 of the European Convention, a three pronged test must be satisfied:-

“the first question was whether reporting would give rise to a non insubstantial risk of prejudice to the administration of justice in the relevant proceedings and if not, that would be the end of the matter; that, if such a risk was perceived to exist, then the second question is whether a Sec 4(2) order would eliminate the risk, and if not there could be no necessity to impose such a ban and again that would be the end of the matter; that, nevertheless, even if an order would achieve the

objective, the Court should still consider whether the risk could satisfactorily be overcome by some less restrictive means, since otherwise it could not be said to be 'necessary' to take the more drastic approach; and that thirdly even if there was indeed no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made and the Court might still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage, value judgment might have to be made as to the priority between the competing interests represented by articles 6 and 10 of the Convention".

In that case, an order of postponement of reporting the case until after the conclusion of another trial arising out of the same closely related facts was passed and upheld by the Court of Appeal. The order was made during trial of a charge of murder against a police officer, Christopher Sherwood. The same Judge was to preside over another trial of 3 more senior police officers criminally charged in respect of the same incident with 'misconduct in public office', who were all under suspension.

The Court of Appeal agreed that all the three tests were satisfied. It rejected a plea that a Jury may not be prejudiced if properly directed by the Judge or on account of delay that may take place before the other trial. It stated that in high profile cases, the impact is substantial. It referred to Kennedy LJ's observation in Attorney General v. Associated Newspapers : (31st October, 1977, unreported) which were as follows:

“With potential Jurors receiving information in so many different ways, high profile cases would become impossible to try, if Jurors could not be relied on to disregard much of the information to which they may have been exposed, but that does not mean that they can be expected to disregard any information, whenever and however it is received, otherwise there would be no point in withholding from them any relevant information however prejudicial in content or presentation, hence the need for the Law of Contempt which we are required to enforce.”

That was a case where the Evening Standard revealed potentially damaging information about the past records of IRA activists who were currently being tried inter alia for breaking prison. It was held that a one-sided picture cannot be allowed to be presented by the press. The Court of Appeal there observed as follows:

“The Court needs, therefore, to be very careful about sanctioning any course that would lead to information about a

criminal trial being presented to the public in a way that actually distorted what was taking place, rather than merely summarising it. This might be a significant factor for the Court to weigh in a case where partial restriction was being contemplated as a realistic option”.

(B) Defects in the language of Section 4(2) of the U.K. Act

In the Discussion Paper 43 (2000) on “Contempt by Publication” (Ch.10), (para 10.80) of the NSW Law Reform Commission, it was stated:
“The breadth of the U.K. provision has meant that the section has proved controversial, attracting criticism that it is applied inconsistently, routinely and unnecessarily”.
(quoting CJ Millers, Contempt of Court (1989), pp 332-338 and A Arlidge & T. Smith, on ‘Contempt’ (1999) (pp 413-459)).

In the Final Report, Ch 10, the Commission observed in para 10.18 as follows (as to Section 4(2)):

“10.18 : One of the difficulties with the ‘substantial risk of prejudice’ formulation is that while the risk must be great, the prejudice need not be (N. Lowe and B. Sufrin, The Law of Contempt, 1996, p 286). Eady and Smith express the opinion that it seems strange that a Court could impose an order restraining publication where the prejudice in contemplation is less than severe (A. Arlidge and T. Smith on Contempt of

Court (1999) (para 7.133). Even the meaning of ‘substantial risk’ is more elusive than might at first appear. In one English case, for example, the Master of Rolls accepted counsel’s interpretation of ‘substantial’ as not meaning ‘weighty’ but rather ‘not substantial’ or ‘not minimal’ (Att.Gen v. English 1983(1) A.C 116 (142) (HL)). Another problem encountered in England, where the formula ‘substantial risk of serious prejudice’ is employed (i.e. in Section 2) to determine liability under sub-judice principle, is that determining the degree of risk may require a Judge to assess the susceptibility of a particular Jury to influence from the publication, (C. Walker et al (1992) 55 Modern Law Review 647 at 648), as opposed to making an objective assessment of the prejudice to justice likely to result from the publication.

Borrie & Lowe, the Law of Contempt, (1996) (3rd Edn) (see p 287) refers to the observation of Lindsay J in MSN Pension Trustees Ltd v. Bank of America National Trust and Savings Association : 1995(2) All ER 355. Considering both Section 2 (strict liability) which uses the words ‘substantial risk’ and the words ‘seriously impeded or prejudiced’ and Section 4(2) which, for the purpose of granting postponement order uses the words ‘substantial risk of prejudice’, Lindsay J stated that ‘substantial’ meant ‘not insubstantial’ and this would lower the threshold for the operation of Section 4(2) than the legislature intended. However, he

assumed in favour of the Serious Fraud Office which was applying for the postponement order, that substantial meant ‘not insubstantial’ or ‘not minimal’.

Therefore, it is for consideration whether we should use the words ‘substantial risk of prejudice’ in the proposed provision enabling postponement orders.

Power of Court to order postponement of publication is not inherent but has to be conferred by statute :

A question has arisen whether a court has inherent power to pass ‘postponement order’ as to publication ? In R v. Clement (1821) 4 B & Ald 218 there are observations that the Court has inherent power but this view has recently been not accepted by the Privy Council in Independent Publishing Co Ltd v. Attorney General of Trinidad & Tobago : (2004) UKPC 26 (see <http://www.bailie.org>) and it was held that there is no inherent power and power to postpone publication must be conferred by statute.

Likewise, the NSW Law Reform Commission, in its Discussion Paper 43 (2000) (Ch 10) (see paras 10.22 to 10.27) has held that the authority of Clement as to inherent power to restrain publication is shaken in Australia in cases such as John Fairfax Ltd v. Police Tribunal : (NSW) 1986 5 NSWLR 465. In this connection, it may be noted that Borrie &

Lowe in their 'Law of Contempt' (see p. 279) say that the point has become academic in view of Section 4(2) of the UK Act of 1981.

In view of the criticism of the words, we do not want to use the words 'substantial risk of prejudice' in the new provision whereby power should be vested in the Court to pass orders for postponement of publication.

As to what words have to be used in our statute for the purpose of postponement order, we shall deal with that in Chapter X.

CHAPTER IX

What categories of media publications are recognized as prejudicial to a suspect or accused?

We feel it necessary as a matter of information to the media and to the public to refer to the categories of publications in the media which are generally recognized as prejudicial to a suspect or accused.

There is a full discussion of the subject in Borrie and Lowe, 'Law of Contempt', 3rd Ed (1996)(Ch 5)(pp 132 to 179) as to what publications are accepted as resulting in prejudice to criminal proceedings. We shall refer to the cases quoted there. (Article by Ms Vismai Rao, on Trial by Media, 5th Year, USLSS, Indraprastha University, 2006).

(1) Publications concerning the character of accused or previous conclusions:

Pigot CB stated in R v. O'Dogherty (1848) 5 Cox C.C 348 (354) (Ireland) that

“Observations calculated to excite feelings of hostility towards any individual who is under a charge amount to a contempt of court.”

Borrie and Lowe state (p 132):

“Publications which tend to excite ‘feelings of hostility’ against the accused amount to contempt because they tend to induce the Court to be biased. Such ‘hostile feelings’ can be most easily induced by commenting unfavourably upon the character of the accused.” These also can be influenced on the Jury. “Such publications amount to gross contempt because they bring to the notice of the Jury facts very damaging to the accused, which they are not entitled to know, and which have a tendency to create bias against the accused.”

Publication of past criminal record is recognized as a serious contempt, satisfying the ‘substantial risk of serious prejudice’ test used in Section 4(2) of the U.K Act of 1981 as well as under Common Law. The above authors quote Moffit P in AG(NSW) v. Willisee : (1980) (2) NSWLR 143 (150) that there is

“popular and deeply rooted belief that it is more likely that an accused person committed the crime charged if he has a criminal record, and less likely if he has no record”.

See also Gisborne Herald Co. Ltd. vs. Solicitor General 1995(3) NLLR 563 (569) (CA).

The need to prevent prejudice caused by past criminal record is one of the ‘most deeply rooted and zealously guarded principles of the criminal law’ (Per Viscount Sankey in Maxwell v. DPP (1935) AC 309(317) and such evidence will have to be treated as inadmissible. But still it may affect the adjudicator subconsciously, as stated in Chapter III of this Report.

In the famous case R v. Parke : (1903) (2) KB 432, after an accused was arrested and remanded on a charge of forgery, the Star published articles that he had admitted an earlier conviction for forgery and that he had been sentenced to imprisonment. Wills J held that that was “unquestionably calculated to produce the impression that, apart from the charges then under enquiry, he was a man of bad and dissolute character”.

Again in R v. Davis : (1906) 2 KB 32 a woman was arrested on a charge of abandoning her child and the publication in a newspaper that she was convicted of fraud on more than one occasion, was treated as highly prejudicial.

In Solicitor General v. Henry and News Group Newspapers Ltd : 1990 COD 307, a person was arrested for robbery and an article was published that he had a previous conviction of rape and it was held to be contempt even under the strict rule in Section 2 of UK Act, 1981 as creating

a 'substantial risk of serious prejudice' and the newspaper was fined 15,000 Pounds.

In another case reported in Times (31st March,1981), the Guardian Newspaper was fined 5,000 Pounds for revealing, during the middle of a long fraud trial, that the two accused had previously been involved in an escape from custody.

Borrie & Lowe refer (pp 135-136) to A.G of New South Wales v. Truth and Sportsman Ltd. : (1957) 75 WN (NSW) 70 where a newspaper was held to be in contempt for publishing an article describing a person charged for possessing a pistol without licence, as a 'notorious criminal'.

In R v. Regal Press Pty Ltd : (1972) VR 67 (Victoria), the newspaper was held to be in contempt for publishing that the accused, who was arrested and charged for driving under influence of alcohol, was earlier convicted of murder. The argument of the publisher that the public already knew about it was rejected on the ground that public might have forgotten it and the publication would bring it back to their memory.

In Solicitor General v. Wellington Newspapers Ltd : 1995 NZLR 45, Gisborne Herald and two other newspapers were convicted for contempt for reporting the previous conviction of John Giles at the time of his arrest in Gisborne on charges of attempted murder of a police constable. The argument that the prejudicial statement was casually made in a general

discussion was rejected in Hinch v. AG (Victoria) : (1987) 164 CLR 15 and in AG(NSW) v. Willesee : 1980 (2) NSWLR 143.

In Canada, it was stated in Re Murphy and Southern Press Ltd (1972) 30 DLR (3d) 355 that ‘Except in the most unusual circumstances, the press should refrain from publishing criminal records of any accused person, alleged co-conspirator or witness’. Report of previous conviction was held to be contempt in Re AG of Alberta and Interwest Publications Ltd : (1991) 73 DLR (4th) 83.

R v. Thomson Newspapers Ltd, ex parte AG 1968(1) ALLER 268, a person awaiting trial under the Race Relations Act, 1965 was, according to the press publication, stated to be of bad character as he was a brothel keeper and property racketeer. The comment was held to amount to contempt.

In AG v. Times Newspapers Ltd, (1983) Times 12th Feb, several newspapers which published comments on the merits of the charges concerning Michael Fagan, who had intruded into the Queen’s bedroom in the Buckingham Palace, were fined.

(2) Publication of Confessions :

Though a confession to police is inadmissible in law still publications of confessions before trial are treated as highly prejudicial and affecting the

Court's impartiality and amount to serious contempt. In R v. Clarke, ex p Crippen : (1910) 103 LT 636, Crippen was arrested in Canada but not formally charged, but a publication appeared in England in Daily Chronicle, as cabled by its foreign correspondent, that "Crippen admitted in the presence of witnesses that he had killed his wife but denied the act of murder". The publication was treated as contempt. Darling J observed that "Anything more calculated to prejudice the defence could not be imagined".

In Fagan's case referred to above also, a publication that Fagan confessed to stealing wine was held to create 'very' substantial risk of serious prejudice.

Captain Alfred Dreyus, a Jewish officer in French Army, was charged in 1894 with high treason for allegedly passing military secrets to the German Embassy in Paris. The anti semetic media immensely highlighted his untold confessions, unfounded charges and illusory events. He was prosecuted and sentenced to imprisonment on Devil's Island. Twelve years after his imprisonment, the truth was discovered and he was exonerated and readmitted into the army (Media, The Fourth Pillar by Miss Vismai Rao, V year, University School of Law & Legal Studies, Indraprastha University).

In New South Wales, a police officer was found guilty of contempt in AG (NSW) v. Dean (1990) 20 NSWLR 650, when, in the course of police

media conference following the arrest of a suspect in a murder inquiry, he answered a journalist's question with a statement which suggested that the person confessed to the police. He was held to be in contempt but was let off without fine.

(3) Publications which comment or reflect upon the merits of the case :

This is indeed the extreme form of 'trial by newspaper' since the newspaper usurps the function of the Court without the safeguards of procedure, right to cross-examine etc. Such publications prejudge the facts and influence the Court, witnesses and others.

It is, however, permissible to publish the fact of arrest and the exact nature of charge as in R v. Payne 1896(1) QB 577 and that is not contempt.

Assertions of guilt or innocence of the person are treated as serious contempt. In R v. Bolam, ex p Haigh : (1949) 93 Sol Jo 220, Haigh was described as a 'vampire' and that he had committed other murders and the publication gave the names of victims. Lord Goddard sent the editor to jail and fined the proprietors of Daily Mirror calling it "a disgrace to English journalism". In R v. Odham's Press Ltd ex p AG : 1957 (1) QB 73, the paper described the person who was accused for brothel keeping that he was 'in the foul business' of 'purveying vice and managing street women'. That

was held to be contempt. In AG v. News Group Newspapers Ltd : 1988(2) ALLER 906 it was held that the publication of guilt amounted to contempt.

Assertion of guilt by ‘innuendo’ was also held to be contempt in Thorpe v. Waugh : (1979) CA Transcript 282, R v. McCann : (1990) 92 Cr App Rep 239, AG v. English: 1983 (1) AC 116.

In Shamim vs. Zinat: 1971 CrL L5 1586 (All), an article was published in a magazine pending an appeal against conviction for murder expressing opinion on the merits of the case. The High Court held that it amounts to contempt of court because it is an interference into the course of justice.

(4) Photographs :

Apart from publication of photographs interfering with the procedure of identification of the accused, there is also the likelihood of such publication giving a colour of guilt with added emphasis. In AG v. News Group Newspapers Ltd : (1984) 6 CrL App Rep (S) 418, the Sun Newspaper published, on the second day of trial, a photograph of a man who was charged with causing serious injuries to his baby and the baby’s mother was also accused of the offences. The caption was “Baby was blinded by Dad”. This allegation was not part of the Crown’s allegations. Stephen Brown L.J said that “the juxtaposition of the photograph undoubtedly carried with it

the risk that the accused, who had pleaded not guilty, might be regarded in a very unpleasant light by those who saw this particular photograph and headline”. Sun admitted contempt and was fined 5000 Pounds.

In New Zealand (see Chapter V of this Report), in Attorney General v. Tonks : 1934 NZLR 141 (FC), it was held that publication of photographs of an accused before trial if the identification was likely to be in issue would amount to contempt. Blair J observed:

“If a photograph of an accused person is broadcast in a newspaper immediately after he is arrested, then such of the witnesses who have not then seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw. The fact that a witness claiming to identify the accused person, has seen a photograph of him before identifying him, gives the defence an excuse for questioning the soundness of the witness’s identification”.

We have also referred (see Chapter IV) to the NSW case from Australia in Attorney General (NSW) v. Time Inc Magazineco Ltd : (Unrep. CA 40331/94 dated 15th September 1994) where the weekly magazine ‘Who’ published the photo of Ivan Milat, accused in a serial murder case, in the front page after his arrest and Gleeson CJ observed that this would seriously interfere with identification by witnesses when the person is lined up with others. It could be strongly argued for the accused that

“that the identification in the line-up was useless, or atleast of very limited value. It would be argued that, because of what is sometimes described as displacement effect, there was a high risk that at the time of the line-up, the witness was performing an act of recognition not of a person who had been seen by the witness on some previous occasion but of the person in the photograph”.

In R v. Taylor : (1994) 98 Cr App Rep 361, there was a charge of murder against two sisters for the murder of the wife of the former lover of one of them. Some newspapers obtained a copy of the video made at the deceased's wedding and froze a frame from the sequence of guests emerging from the church, kissing first the bride and then the groom, so that it appeared that the 'peck' on the cheek given by the accused to the groom, her former lover, was a mouth-to-mouth kiss. This photograph was accompanied by the headline 'Cheats Kiss' and 'Tender Embrace – the Lovers share a kiss just a few feet from Alison'. On account of the prejudicial publication, the Court of Appeal quashed the convictions and did not order a retrial.

(5) Police activities :

We have already referred to AG (NSW) v. Dean : (1990) NSWLR 650 (under the heading publication of confessions) how a disclosure by police of an alleged confession after arrest was held to be contempt.

Borrie & Lowe (1996, 3rd Ed p 151) refer to activities of police which can also amount to contempt. They say “It can be perfectly proper to publish references to police activity surrounding a crime, such as the various searches, questioning of suspects and any arrest that may be made but it should not be thought that there is an automatic immunity in so doing
.....”

In an Australian case, R v. Pacini, (1956) VLR 544, for example, a radio station was held to have committed a contempt by broadcasting, at a time when the accused was awaiting trial, an interview with a detective who had been concerned with the arrest of the accused, in which it was intimated that the detective’s investigation had been brought to a successful conclusion with the accused’s arrest, the implication being that the accused was guilty.

In AG (NSW) v. TCN Channel Nine Pty Ltd : (1990) 20 NSWLR 368, in the case of a murder of two women and a child at two distant locations, the suspect surrendered to the police, was interviewed, confessed and was then taken to the scenes of the crimes by the police where he demonstrated various significant matters to them. On these visits, the police

and the suspect were accompanied by a journalist including television crews. At one point, the television crew travelled in the same aircraft with the suspect and the police, to the scene of the crime. The police held a press conference at which it was announced that the suspect had confessed. These matters were all broadcast on television news. The NSW Court of Appeal stated that the tendency of this publication was to create a risk of prejudice to the accused at the trials (which did not take place ultimately since the accused committed suicide while in custody) and was not lessened because of the very strong evidence against the accused. The Court of Appeal observed (p 382):

“A notion that the rules relating to contempt of court somehow apply with less rigour to the case of a person against whom there is a very strong case would reflect a fundamental misunderstanding of the nature and purpose of those rules”.

The contempt was not also lessened because of the role of the police in encouraging the publicity. The Court of Appeal said (p 381):

“... as a general rule, we regard it grossly offensive to the principles embodied in this aspect of the law, and to the proper administration of justice, for police to display for the benefit of the media, persons in the course of being questioned or led round the scene of a crime”.

Borrie and Lowe refer to R v. Carochhia : (1973) 43 DLR (3d) 427 (Quebec CA) from Canada where a police officer was held guilty of contempt for issuing a press release to charges that had been brought against a particular company and stating that more charges were to come and generally linking the accused company with organized crime.

The authors say that these cases are ‘a salutary warning’ to the police both with respect to their press releases and to the access they give to the media. In England, there have been occasions in which the police have overstepped the mark of prudence (though no prosecution has even been brought), the most notorious example being the ‘euphoric’ press conference held by the police following the arrest (on other charges) of Peter Sutcliffe who was later charged with being the so called ‘Yorkshire ripper’. There was much concern over the treatment of Sutcliffe’s arrest but it was the press, rather than the police themselves, who bore the brunt of the criticism, no doubt because of the subsequent behaviour of the press over the case. The authors say that “Irrespective of the responsibility that lies on the police, the media themselves have a responsibility that reliance on a police press release will not be a defence to charges of contempt brought against them, if their publication is held creative of real risk of prejudice” (as in AG (NSW) v. TCN Channel Nine News Pty Ltd (1990) 20 NSWLR 368).

The authors refer to a Scottish case for highlighting the facts which the press has to take into account in describing police operations. In HM Advocate v. George Outram & Co Ltd : 1980 SLT (Notes) 13 (High Court of Justiciary), the Glasgow Herald was fined 2000 Pounds for publishing the headline “Armed Raids Smash Big Drugs Ring in Scotland”, giving a detailed account of the arrest and police operations. In holding the article to be contempt, the newspaper was said to have published alleged evidence of highly incriminating character tending to suggest that the guilt of the accused might be presumed.

It may not be contempt if the publication is intended to warn public at the instance of the police that a notorious criminal had escaped and public have to be careful or watch out for him. (see p 170 of Borrie & Lowe)

(6) Imputation of innocence :

The authors refer to decisions which show that direct imputations of the accused’s innocence can be considered as contempt as was done in R v. Castro Onslow’s and Whelley’s case (1873) L.R 9 Q.B 219 where the claimant to succession to property was awaiting a trial on charges of perjury and forgery and a public meeting was held and two M.Ps who were present alleged that the accused was not guilty but was the victim of a conspiracy. Both MPs were held guilty of contempt by Cockburn CJ.

This reminds us of the famous statement in Ambard v. AG of Trinidad and Tobago (1936) A.C. 322 of Lord Atkin in the context of criticism of Judges:

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

The border line between fair criticism and contempt may be thin. The path of criticism is a public way and the wrong headed are permitted to err therein but may yet take the risk of contempt.

In Australia in DPP v. Wran : 1986 (7) NSWLR 616 (NSW CA), the premier of NSW was held to be in contempt for saying, in response to a journalist’s question, that he believed in the innocence of a High Court Judge who had been convicted of charges concerning the perversion of the course of justice when he said that a retrial could result in a different verdict. The Premier and the newspaper were held guilty of contempt.

(7) Creating an atmosphere of prejudice:

Borrie and Lowe (ibid, p 154) refer to the following cases.

In R v. Hutchison , ex p McMahon: 1936 (2) All ER 1514, a news film whose caption implied a charge which was more serious than the actual charge was held to be contempt. When a man was arrested and charged with unlawful possession of a firearm when it was discovered whilst the king was riding in a procession in London, the news film showed the man's arrest under the title 'Attempt on King's life'. It was held to be contempt. Swift J warned the proprietors that:

".... if they want to produce sensational films, they must take care in describing them not to use any language likely to bring about any derangement in the carriage of justice"

In another case, where the publication described an act of the accused as 'murder', when the issue before the jury was whether the car in question got burnt due to some reason or whether it was intentionally set fire by the accused to kill the occupant, it was held likely to mislead the jury. In fact, the case of murder related to another person who had died when a car was burnt. R v. Daily Herald ex p Rouse (1931) 75 Sol Jo 119.

In USA, in Sheppard vs. Maxwell: (1965) 381. US 532, Dr. Sheppard was tried for murder of his wife. The coroner inquest was held in a school with live broadcasting. Later, in the Courtroom, three to four benches were assigned for accommodation of media, a press table was erected inside the bar of the Court, so close to the accused that he could not even consult his lawyer without being overheard. The jurors were subjected to constant publicity. The Supreme Court of US set aside the conviction appalled by the prejudice the accused suffered.

In M.P. Lohia vs. State of West Bengal AIR 2005 SC 790, to which we have earlier referred, the Supreme Court seriously deprecated a one-sided article in a newspaper in which the allegations made by the parents of the wife in an alleged dowry death case were published but the record filed by the accused that his wife was schizophrenic were not published. These publications create a pressurised atmosphere before the Judge.

(8) Criticism of witnesses:

The same authors refer to the following cases (ibid p 155):

Witnesses may be deterred if they become the object of public criticism. In R v. Bottomley, (1908) Times, 19th Dec., one Horatio Bottomley, a Member of Parliament, was on trial for conspiracy to defraud. He was the editor of a newspaper. The newspaper of the accused described

the cross-examination as ‘relentless cross-examination’ and commented on the prosecution witness. It was held that the article interfered with a fair hearing because it held up the witnesses for the prosecution to ‘public opprobrium’ if the witness was described as “an unhappy man, writhing in the of their relentless cross-examination”. Such comments tended to prejudice the prosecution case and also deter future witnesses.

As a general rule, adverse comment upon a witness should be avoided since such comment can only add to the general reluctance of witnesses to appear in Court (R v. Castro Onslow’s and Whalley’s case, (1873) LR 9 QB 219) (R v. Daily Herald ex p Bishop of Norwich, 1932 (2) ICB 402).

Discrediting witnesses is also prejudicial to a trial. In Labouchere, ex p Columbus Co. Ltd. (1901) 17 TLR 578, an article was published in Truth which attacked a certain witness and even discredited the character of the witness. Bruce J stated:

“Looking at the whole of the article in question, he could not doubt that it was calculated to imply that Cowen was not a witness to be relied upon, that it held him up as a person whose conduct was to be condemned and that it might prejudice the mind of any jurymen against Cowen, who happened to read it”

In another case, there was a publication that a witness was being paid by a national newspaper, the amount being contingent upon the final

outcome of the case. Contempt prosecution followed: see AG v. New Statesman and Nation Publishing Co.Ltd. : 1980 (1) All ER 644.

(9) Premature publication of evidence:

Borrie and Lowe (ibid p. 156) state that a newspaper conducting its own private investigation and publishing the results before or during the trial is perhaps the most blatant example of ‘trial by newspaper’. Such publications hinder the Court’s determination of facts and might otherwise be ‘prejudicial’. There is no guarantee that the facts published by the newspaper are true, there being no opportunity to cross-examine nor to have the evidence corroborated. There is no guarantee that the published facts will be admitted at the trial, if it amounted to hearsay. In R v. Evening Standard, ex p DPP (1924) 40 TLR 833, the Court found that certain newspapers ‘had entered deliberately and systematically on a course which was described as criminal investigation’. The defence of the newspaper was that they had a duty to elucidate the facts. This defence was rejected by Lord Hewart CJ (p. 835) as follows:

“While the police or the Criminal Investigation Department were to pursue their investigation in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or of the

defence, it had come to be somehow for some reason the duty of newspapers to employ independent staff of amateur detectives who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence....

”

To publish results of such investigations could prejudice a fair trial and will therefore amount to contempt. In that case, the proprietors of Evening Standard were fined 1000 pounds and two other papers, 300 pounds each.

The authors, however, point out (pp 157-158) that today the position has changed with ‘investigative’ journalism. Cases such as Watergate etc. the Thalidomide case were the work of journalists.

But, in our view, assuming investigation journalism is permissible, if that is continued after criminal proceedings become ‘active’ and a person has been arrested, and if by virtue of the private investigation, the person is described as guilty or innocent, such a publication can prejudice the courts, the witnesses and the public and can amount to contempt.

(10) Publication of interviews with witnesses:

Borne and Lowe state (ibid p. 158) that in principle, it can amount to contempt to publish the evidence which a witness may later give in Court. That is not to say that no statement of a witness can be published pending trial.

Statement of witnesses, which have not suffered cross-examination case, in our opinion, present a one-sided picture of the matter.

It may be that some 'bare facts' be mentioned as stated by the above authors to satisfy public curiosity, even if charges are pending in Court. But in-depth interview with a witness can create problems.

In this behalf, certain pertinent aspects were referred by the Salmon Committee (Committee on the Law of Contempt as it affects Tribunals of Inquiry under the chairmanship of Salmon CJ, 1969 Cmnd Leo 78, para 31). The Committee said that a witness could be bullied or unfairly led into giving an account which was contrary to truth or which contained a start. The witness could, in a television interview, commit himself to a view due to tension by an inaccurate recollection of facts. When later they have to give evidence, they may feel bound to stick to what they have said in the media interview. The Phillimore Committee also accepted the above view

and were worried about television interview of witness, the authors pointed out: (see 1974 Cmnd 5794, para 55). That Committee stated:

“Television interview import added dangers of dramatic impact. For example, the ‘grilling’ on television of a person involved in a case can seem to take the form of a cross-examination in Court. It could obviously create risk of affecting or distorting the evidence he might give at the trial. Such an interview could be regarded as ‘trial by television’.”

The Committee, no doubt, agreed that interviews make a useful contribution to public information.

The authors say that the absence of prosecution for contempt may elucidate that such interviews have not been treated as contempt. But, the authors, say there are dangers as in AG(NSW) v. Mirror Newspapers Ltd. (1980) (1) NSWLR 374 (CA). There was a coroner’s inquiry into the death of seven people during a fire accident at an amusement centre. One witness, who had already given evidence, was widely reported as saying, in effect, that an attendant had allowed two children to go on a ‘ghost train’ into the fire. The Daily Telegraph, believing that the attendant would not be giving evidence, published a detailed account by him in which he sought to defend himself from the previous witnesses’ allegations. Part of that

article stated that the publication in Daily Telegraph may sound that he (the attendant) had sent the two kids to death. But, he said, it was not so. He even had to wrestle with one young lad who was determined to follow his mates into the fire and that he had to tear him from the car. The Court of Appeal held that the publication interfered with the course of justice and was contempt and fined the proprietors in a sum of 10,000 Australian dollars.

The authors say that the conducting of interview, with a view to publication of ‘background’ material after the trial is generally regarded as legitimate practice, but would amount to contempt if it could be shown to have been of a ‘bullying’ kind such as to deter witnesses from giving evidence.

Payments to witnesses in current legal proceedings for their stories is contrary to clause 8 of the (UK) Press Complaints Commission Code of Practice. (The authors provide a detailed discussion on ‘Payments to Witnesses’ pp. 408 to 410). But the authors say (p. 409) that “such an arrangement could amount to contempt since it seems to provide an inducement to the witness to ‘tailor’ his evidence so as to ensure the more financially lucrative result”

In the trial of Jeremy Thorpe, there were allegations (the authors pointed out) there were allegations that the Sunday Telegraph agreed to pay

a fee to Peter Bessel, a leading witness, for his revelations as a future witness for a fee being reportedly contingent on a verdict of guilty. This was condemned by the Press Council. Earlier, on a similar issue, the Attorney General promised to make changes in the law, but no such changes were made probably because of action by the Press Council.

Borrie and Lowe (p. 409-410) state that “the practice of paying witness’s fee, the amount of which is contingent upon a particular verdict, is undesirable as it is likely to create a risk of prejudice. As we know from the revelations published by the New Statesman (see AG v. New Statesman and Nation Publishing Co.Ltd.: 1980 (1) All ER 644), the jurors in the Thorpe trial were greatly influenced by the agreed payments to Bessell and in any event, such agreements seem obvious inducements to witnesses to embellish and tailor their evidence”.

In the post-consultation Report of the Lord Chancellor’s office, (March, 2003), it was felt that legislation was not necessary and the media agreed that a self-regulation procedure could be evolved which must incorporate well-settled principles. By February 2003, the proposals made by the media were accepted by Government.

NSW Law Commission in its Discussion Paper 43 (2000) in para 2.45 has enumerated a long list of publication which may be prejudicial to a suspect or accused.

- (i) a photograph of the accused where identity is likely to be an issue, as in criminal cases;
- (ii) suggestions that accused had previous convictions, or has been charged for committing an offence and/or previously acquitted, or has been involved in other criminal activity;
- (iii) suggestions that the accused has confessed to committing the crime in question;
- (iv) suggestions that the accused is guilty or involved in the crime for which he or she is charged or that the Jury should convict or acquit the accused; and
- (v) comments which engender sympathy or antipathy for the accused and/or which disparage the prosecution or which make favourable or unfavourable references to the character or credibility of the accused or a witness.

India:

There are also a large number of decisions of the Indian Courts falling under these very headings. We do not want to add to the bulk of this Report by referring to them.

In our country, lack of knowledge of the law of contempt currently shows that there is extensive coverage of interviews with witnesses. This is highly objectionable even under current law, if made after the charge sheet is filed.

This Chapter is, in fact, intended to educate the media and the public that what is going on at present in the media may indeed be highly objectionable. Merely because it is tolerated by the Courts, it may not cease to be contempt.

CHAPTER X

Recommendations for amending the provisions of the

Contempt of Court Act, 1971

In this Chapter we shall refer to our recommendations for amendment of the Contempt of Courts Act, 1971 on the basis of what we have discussed in the earlier Chapters.

(1) It is initially necessary to define “publication” as including publication in print and electronic media, radio broadcast and cable television and the world-wide web by insertion of an Explanation in clause(c) of Section 2 of the principal Act, to enlarge the meaning of the word ‘publication’ as stated above. This proposal is contained in Section 3 of the Bill.

2 (a) We have pointed out in the earlier Chapters that it is necessary to create a just balance between the freedom of speech and expression guaranteed in Article 19(1)(a) and the due process of criminal justice required for a fair criminal trial, as part of the administration of justice.

Though Article 19(2) does not refer to the imposition of reasonable restrictions for the purposes of administration of justice, the reference in Article 19(2) that restrictions can be imposed for purpose of the Contempt of Courts Act clearly indicates that the Contempt of Courts

Act, 1971 (sections 2, 3) take care of the protection of the administration of justice and duecourse of justice.

Our recommendation must naturally be intended to bring the provisions of Section 3, particularly, the Explanation to Section 3, into conformity with the decision of the Supreme Court in A.K.Gopalan v. Noordeen :1969(2) SCC 734 wherein, after referring to freedom of speech and expression, the Supreme Court held that publications made after the arrest of a person could be criminal contempt if such publications prejudice any trial later in a criminal court. As the Explanation now stands, ‘pendency of a criminal proceeding’ is defined in clause (B) as starting from the filing of a charge sheet or challan or issuance of summons or warrant by a criminal court. The Supreme Court in the above case held that publication made even after arrest and before filing of charge sheet could also be prejudicial. If so, that guarantee must be implied in the ‘due process’ under Article 21 as explained in Maneka Gandhi’s case and to that extent, it is permissible to regulate publications by media made after arrest even if such arrest has been made before the filing of the charge sheet or challan.

We have seen that in U.K and several countries, a criminal proceeding is treated as “active” if an arrest is made. This is to accommodate the principle decided by the Scotland Court in Hall (see Chapter VI) that a person arrested comes immediately within the protection of a Court for he has to be produced before a Court within 24 hours of the arrest. Taking “arrest” as starting point, any restriction on prejudicial publications will be reasonable if they have to satisfy the due process requirement under Article 21 which, after Maneka Gandhi’s case AIR 1978 SC 597, as that judgment requires that the procedure protecting liberty must be fair, just and reasonable and not arbitrary or violative of Article 14.

Therefore, in our view, the word ‘pending’ used in Section 3(1),(2) and Explanation clauses (a) and (b) at different places must be substituted by the word ‘active’ because the word ‘pending’ gives an impression that a criminal case must be actually pending. The word ‘active’ used in the U.K Act,1981 and in the Bill annexed to the Report of the NSW Law Commission, 2003 in our opinion, is more apt and under the above Act and Bill, a criminal proceeding is defined as being ‘active’ from the date of arrest.

We, therefore, recommend that the word ‘pending’ in Section 3(1), (2) and Explanation, used at different places must be substituted by the word ‘active’.

(b) Further, the revised definition of the word ‘active’ must be applicable not only for purposes of Section 3 but for the purposes of the entire Act. In fact, the word ‘pending’ has not been used in any other section of the Act except sec 3. Some of the new provisions which we propose, use the word ‘active’ and hence the definition of the word ‘active’ must be applicable to “all provisions of the Act” and not merely to sec 3.

These changes are proposed in Section 4 of the Bill.

3). So far as breach of sec 3, as proposed, when even a prejudicial publication is made after arrest or after a charge sheet is filed, or summons or warrant is issued, at present, if there is criminal contempt of subordinate courts, those courts have no power to punish for contempt but can only make a reference to the High Court under sec 15(2). This provision is good except that in the special case of contempt by publication offending provisions of sec 3(2) and Explanation (or rather even the existing section 3 (2) and Explanation), the procedure is cumbersome and time consuming. Much damage by publication can result if the contempt power has to be

exercised by the High Court for purposes of sec 3(2) violations through a reference to the High Court.

We are of that view, that a separate section has to be inserted (section 10A) for the purpose of enabling the Court to punish for criminal contempt by publication under sub clause (ii) and (iii) of sec 2(c), so that action can be taken directly in the High Court in the manner stated under sec 15(1) either suo motu or as the application of any person – such as accused or suspect or others affected by the prejudicial publication. We are referring to clause (1) of sec 2 here, and restricting the sub clauses (ii) and (iii) and clause © which deal with publications. We are not here concerned with clause (i) of sec 2© for which sec 15(2) procedure by reference or motion by Advocate General will continue to apply.

Further once we refer to clause (ii) and (iii) of sec 2©, it will take in all criminal contempt as to publication falling under those sub clauses (ii) and (iii) which are not protected by the various sections of the Act. In addition we provide that consent of the Advocate General as specified in sec 15(1).

(4) The next question is to provide something akin to Section 4(2) of the U.K Act or Sections 7,8, 9 of the Bill attached to the NSW Report (2003). We shall first refer to these provisions.

(a) Section 4(2) of UK Act, 1981, permits the Court to pass orders postponing publication of reports of criminal cases which are active, if such publication would create a “substantial risk of prejudice” to such a proceeding or any imminent proceeding. Section 4(2) is applicable to civil as well as criminal proceedings which are ‘active’. Our recommendations here are confined only to publications affecting active criminal proceedings.

(b) We are not happy with the provision postponing ‘reporting’ of court proceedings which are active as contained in Section 4(2) of the U.K Act. We are, in fact, concerned with publications which prejudice a fair trial.

(c) Sections 7,8,9 of the NSW Bill deem publications as amounting to contempt if they create substantial risk of prejudice. They do not relate to postponement orders. The Bill is in Annexure A to that Report of the NSW Law Commission (2003). But, Appendix B to that Bill contains another draft Bill giving powers to court to regulate access to court records or reports and contains a provision for passing

‘suppression orders’ but the sections as proposed there do not refer to substantial risk of prejudice by publications.

(d) In our view, firstly, the section to be proposed by us must vest powers in Court to pass postponement orders as to prejudicial publication of any matter relating to an active criminal proceeding and not merely to reporting about the case as in Section 4(2) of the U.K Act.

(e) Further, in view of the interpretation of the words ‘substantial risk of prejudice’ by English Courts as where ‘there is no substantial risk’ or ‘no remote risk’ and the absence of any adjective governing the word ‘prejudice’, we are of the view that instead of the words ‘substantial risk of prejudice’ in Section 4(2) of the U.K Act, in the proposed section giving powers to the Court to pass ‘postponement’ orders, we should use the words:

“real risk of serious prejudice”

so that the emphasis is not only on the word ‘risk’ but also on the word ‘prejudice’.

(f) A question may be asked as to why we are not using these words (significant risk of serious prejudice) in Section 3 which deals with ‘interference’ or ‘tending to interfere’ with the administration of justice in sec 2 or the words ‘course of justice’ in Section 3.

The reason is that the words used in sec 2© and 3 define what publication may be ‘criminal contempt’ but the question of restricting freedom of speech by passing an order of ‘prior restraint’ as in sec 4(2) of the UK Act, 1981 requires more stringent conditions. That is why, for purposes of passing postponement orders as to publication, it is necessary to use the words “significant risk of serious prejudice”. Prior restraint as pointed by the Supreme Court in Reliance Petrochemicals is a serious encroachment on the right of the press for publication under Art 19(1)(a) and cannot be interfered with merely because the publication interferes or tends to interfere with the course of justice as stated in sec 2(c) or sec 3. Prior restraint requires more stringent conditions.

(g) The next question is as to which Court should pass postponement orders. In our view, such powers cannot be vested in the subordinate courts where the criminal proceedings are ‘active’. This is because under the 1971 Act, the subordinate courts have no power to take action for contempt. Under Section 15(2), they can only make a ‘reference’ to the High Court.

Further, the balancing of the rights of freedom of speech and the due process right of the suspect/accused as explained in Maneka Gandh’s case

can be done more appropriately by the High Court which is a Constitutional Court.

The High Court for the purpose of passing postponement orders will be a Bench of not less than two Judges.

(h) Postponement of publication does not mean result in an absolute prohibition. Initially, an order of postponement must be temporary, and can be passed ex parte and but must be made for a week enabling the media to come forward for variation or cancellation. Of course, the initial order of restraint must be published in the Media, so that the media will have an opportunity to know about the passing of the order and have the order varied/cancelled.

(i) There is, however, danger of the postponement order lapsing at the end of one week, if no application is filed for variation or modification by the media and no variation/cancellation is granted in a week. Hence, it is necessary to provide for its automatic extension by law, in case no application is filed within one week or where the order is not varied or cancelled within one week. Of course, after such automatic extension also, the media can apply for variation or cancellation.

(j) We, therefore, recommend insertion of Section 14A as stated in sec 6 of the Bill annexed.

(4) We also propose Section 14B under which any breach of a postponement order i.e. where the media makes a publication in breach of the postponement order, it will amount to contempt of court for which the High Court may take action according to law for criminal contempt. (This is also contained in Section 6 of the Bill):

We are using the word ‘according to law’ for the High Court may take action under the Contempt of Court Act r under Art 215 of the Constitution

(5) We have proposed Section 14A and 14B as above for the purpose of passing postponement orders in respect of publications, and breach of such an order. But, as stated in our discussion under sec above, a more important need is the punishment for criminal contempt of a subordinate court where criminal proceedings are active as stated in subsection (2) of section 3.

(6) As far as applicability of the amending Act is concerned, it shall apply to publications amounting to criminal contempt in respect of active criminal proceedings within subsection (2) of section 3, made after the commencement of the amending Act. This is contained in sec 7 of the Bill.

A Draft Bill on these lines is herewith annexed.

(7) Media persons to be trained in certain aspect of law:

The freedom of the media not being absolute, media persons connected with the print and electronic media have to be equipped with sufficient inputs as to the width of the right under Art 19(1)(a) and about what is not permitted to be published under Art 19(2). Aspects of constitutional law, human rights, protection of life and liberty, law relating to defamation and Contempt of Court are important from the media point of view.

It is necessary that the syllabus in Journalism should cover the various aspects of law referred to above. It is also necessary to have Diploma and Degree Course in Journalism and the Law.

We recommend accordingly.

(Justice M. Jagannadha Rao)
Chairman

(R.L. Meena)
Vice-Chairman

(Dr. D.P. Sharma)

Member-Secretary

Contempt of Court (Amendment) Bill, 2006

An Act to amend the provisions of the Contempt of Courts Act, 1971 (70 of 1971).

BE it enacted by Parliament in the fifty-seventh year of the Republic of India, as follows:

Short title and commencement

- 1.(1) This Act may be called THE CONTEMPT OF COURTS (AMENDMENT) ACT, 2006.
- (2) It shall come into force on such date as may be notified by the Government of India in the Official Gazette.

Definitions

2. In this Act, the words 'Principal Act' shall mean the Contempt of Courts Act, 1971.

Amendment to section 2

3. In section 2 of the Principal Act, an Explanation shall be inserted below clause (c) of section 2:

“Explanation: publication includes publication in print, radio broadcast, electronic media, cable television network, world wide web.”

Amendment to section 3 of the Principal Act

- 4.(a) In section 3, subsection (1) of the Principal Act, for the words

“any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending”

the following words shall be substituted, namely,

“any civil or criminal proceeding active at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was active”

- (b) In section 3, subsection (2) of the Principal Act, for the words

“any civil or criminal proceeding which is not pending”

the following words shall be substituted, namely,

“any civil or criminal proceeding which is not active”

- (c) In the Explanation below subsection (3) for the words “For the purposes of this section”, the words “for the purposes of this Act” shall be substituted.
- (d) In the Explanation, in clause (a),
 - (i) for the words, “is said to be pending” occurring before the bracket and the word (A), the words “is said to be active”, shall be substituted.
 - (ii) for the words, “Code of Criminal Procedure, 1898” occurring in clause B, the words “Code of Criminal Procedure, 1973” shall be substituted.
 - (iii) for clause (B)(i), the following clause (B)(i) shall be substituted, namely,
 - “(i) where it relates to the commission of an offence, when a person is arrested or when the chargesheet or challan is filed or when the Court issues summons or warrant, as the case may be, against the accused, whichever is earlier, and”.
 - (iv) for the words, “shall be deemed to continue to be pending” occurring after the subclause (B)(ii) and the words “in the case of a civil or criminal proceeding”, the words “shall be deemed to continue to be active”, shall be substituted.
- (e) In the Explanation, in clause (b),

for the words, “deemed to be pending” occurring after the words “which has been heard and finally decided shall not be”, the words “deemed to be active”, shall be substituted.

Insertion of section 10A

5. The following section shall be inserted after section 10, namely,

“Cognizance of criminal contempt of subordinate court by publication.

10A. Notwithstanding anything contained in subsection (2) of section 15, in respect of criminal contempt of courts subordinate to the High Court arising out of publications falling within sub-clauses (ii) and (iii) of clause (c) of section 2, the High Court may take action on its own motion or on a motion made by the persons referred to in subsection (1) of section 15.

Provided that it shall not be necessary to obtain the consent of the Advocate General or of the Law Officer notified by the Central Government in the Official Gazette as stated in subsection (1) of section 15.”

6. **Insertion of sections 14A and 14B**

The following sections shall be inserted after section 14 of the Principal Act, namely -

Orders of High Court for postponement of prejudicial publications by the media

14A(1) In any criminal proceedings which are active, the High Court may issue a general direction *ex parte*, whenever it appears to it to be necessary, that any matter the publication of which may cause real risk of serious prejudice to the cause of such proceeding or to the administration of justice in those proceedings or in any other criminal proceedings or any part of such proceeding, active or imminent, shall not be published by the media or any person for an initial period of seven days from the date of its order or that such matter shall be published subject to conditions and the High Court may direct publication of such an order.

- (2) An order under subsection (1) may be passed by the High Court upon an application by
 - (a) the Advocate General or by a law officer referred to clause (c) of subsection (1) of section 15, or
 - (b) by a person who has been arrested or who being an accused in such criminal proceeding, a chargesheet or challan has been filed or summons or warrant has been issued by the Court against him, or
 - (c) by any person who is interested in the avoidance of the risk and prejudice referred to subsection (1).
- (3) An order of postponement of publication, with or without conditions, passed under subsection (1), may be varied or cancelled by the High Court at the instance of the representatives of the media or by any other person interested in such variation or cancellation, by the filing

of an application therefor in the High Court within the period of seven days referred to in subsection (1) or after the period of extension of such order as provided in subsection (4).

- (4) If no application is filed for such variation or cancellation within the period of seven days as stated in subsection (2) or if filed, has not been modified within the said period of seven days, the order passed under subsection (1) shall stand extended beyond seven days unless varied or cancelled in an application filed within the seven days or filed after the seven days aforesaid.

Explanation: For the purposes of this section and section 14B, the High Court shall mean a Bench of the High Court of not less than two Judges.

Action for criminal contempt for violation of an order passed under section 14A

14B. Where any person violates any order of postponement of publication or the conditions laid down in orders passed under section 14A, the High Court may initiate proceedings for criminal contempt in the High Court, in accordance with law and pass such order as to punishment as it may deem fit.

Applicability of the Act

“7. The provisions of the Principal Act as amended by this Act shall apply to publications by any person in connection with a

criminal proceeding which is active as stated in subsection (2) of section 3 of the principal Act or to criminal proceedings which are active or imminent as stated in section 14A of the principal Act.”