MEDIA TRIAL AND RIGHT TO FREEDOM OF SPEECH AND EXPRESSION: AN ANALYSIS

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MASTER OF LAWS

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SUPERVISOR CERTIFICATE

It is to certify that Mr. Arunav Talukdar is pursuing Master of Laws (LL.M.) from National Law University, Assam and has completed his dissertation titled "Media Trial and Right to Freedom of Speech and Expression: An Analysis" under my supervision. The research work is found to be original and suitable for submission.

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DECLARATION

I, Arunav Talukdar, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled **"Media Trial and Right to Freedom of Speech and Expression: An Analysis"** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

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PREFACE

The right to freedom of speech and expression is very essential in a democracy and so is the freedom of the press. It creates an opportunity for free discussion of issues. There is always a need for these kinds of rights to be backed by law but there cannot be any freedom that is completely unrestricted or absolute. One cannot deny the importance of media as it keeps the public informed, educated and vigilant and at times it also behaves as a watchdog of the government functions and its abuses, by making them available to the public by way of various mediums like television, radio, newspaper, etc. But nowadays, it is seen that the media houses are acting as "public court" and are starting to interfere with the proceedings of the court which completely overlooks the vital gap between an "accused" and a "convict" keeping at stake the golden principles of "presumption of innocence until proven guilty" and "guilt beyond reasonable doubt". The research study focuses on the balance between both the freedom and the restrictions on such freedoms.

This dissertation is an attempt to analyse the impacts caused by the media trial and how it takes the cover of freedom of speech and expression to continue with the undue interference with the administration of justice. The dissertation also analyses the effect of media trial on right to privacy, right to reputation, right to be legally represented and right to a fair trial.

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1981 - Contempt of Courts Act

TABLE OF ABBREVIATIONS

1	AIR	All India Reporter
2	Anr	Another
3	CBI	Central Bureau of Investigation
4	ECHR	European Convention of Human Rights
5	ICCPR	International Covenant on Civil and Political Rights
6	IJHSS	International Journal of Humanities and Social Science
7	IJILLJS	International Journal of Law and Legal Jurisprudence Studies
8	IPC	Indian Penal Code
9	Ltd	Limited
10	MLR	Media Law Review
11	Ors	Others
12	PCI	Press Council of India
13	PIL	Public Interest Litigation
14	SAJMS	South Asian Journal of Multidisciplinary Studies
15	SCC	Supreme Court Cases
16	TRP	Television Rating Point
17	UDHR	Universal Declaration of Human Rights

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CHAPTER – I

INTRODUCTION

1.1 INTRODUCTION TO THE RESEARCH TOPIC

In the present scenario, it is often seen that media houses are acting as "public court" and are starting to interfere with the proceedings of the court which completely overlooks the vital gap between an "accused" and a "convict" keeping at stake the golden principles of "presumption of innocence until proven guilty" and "guilt beyond reasonable doubt". "By this way, it prejudices the public and sometimes the judges and as a result, the accused that should be assumed innocent is presumed as a criminal living all his rights and liberty unaddressed." The resolution of such problems is always a delicate matter. These issues are still not properly addressed and resolved which creates an urgent need to address this subject-matter.

Free speech or freedom of speech in simple words means the liberty to say what one feels like and is considered as the first condition of liberty. It is the expression of thoughts into words without any sort of restraints. It is considered to be an innate right; it is not the State or the Government that provides for this right but it is acquired by every people in its natural form. This does not mean that the Constitutions of various countries are not required to guarantee it. In a liberal democracy, guaranteeing of the right to free speech is of utmost importance. It creates an opportunity for free discussion of issues. Freedom of expression involves the communication of ideas irrespective of the medium used. There is always a need for these kinds of rights to be backed by law so that no person is deprived of it.

Back in the year 1689, Article 9 of the English "Bill of Rights" guarantees, "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." The Declaration of the Rights of Man and Citizen of 1789, a document of France Revolution, guarantees "The free communication of ideas and opinions is one of the most precious of the rights of man.

Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law." The First Amendment to the Constitution of U.S.A. runs as follows, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Also in case of India, the Constitution guarantees the "Freedom of Speech and Expression". Article 19 of the Constitution of India runs as follows "all citizens shall have the right to freedom of speech and expression". But this right is not unbridled and the State can impose "reasonable restrictions" based on several grounds such as "security of the state", "public order", "contempt of court", "defamation" etc as provided under Article 19 (2) of the Indian Constitution. "Freedom of Speech and Expression" is provided through various processes, however, this right is not completely unrestricted and as already mentioned certain "reasonable restrictions" can be imposed. Like the need for maintaining and preserving "freedom of speech and expression" in a democracy is important, it is also important to put some restrictions on that freedom for the purpose of maintaining the social order. J.S. Mill in "On Liberty" suggested that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others".[1] Article 19 of the ICCPR states that "everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". "The exercise of the rights provided for" in Article 19(2) "carries with it special duties and responsibilities" and "therefore be subject to certain restrictions" when required "for respect of the rights or reputation of others" or "for the protection of national security or of public order (order public), or of public health or morals" as provided under Article 19(3) of ICCPR. There cannot be any freedom that is completely unrestricted or absolute.

[1] Milton Sanford Mayer, TRADITION OF FREEDOM: SELECTIONS FROM THE WRITERS WHO SHAPED THE TRADITIONAL CONCEPTS OF FREEDOM AND JUSTICE IN AMERICA, 1957, p. 467.

If we look at the "First Amendment" of the Constitution of the U.S., there we can find a clear mention about the free press. The press keeps an extra check over the three branches of the government, i.e. legislative, executive and judiciary. Therefore, the "press" is commonly regarded as the "fourth estate". In India, this "freedom of the press" is not explicitly mentioned but is implied from the "freedom of speech and expression" guaranteed under Article 19(1)(a). The "freedom of the press" is regarded as a "*species of which freedom of expression is a genus.*"[2] Freedom of the press is vital in a democratic society, as because it serves the public interest by providing opinions and facts without any bias. It is expected from the press to impart news in a neutral manner so that the public gets access to the real issue without any influence or manipulation. The press is a powerful medium to make the government responsible to the people for their abusive acts. Just like the "freedom of speech and expression", the "freedom of the press" is also not unrestricted. "Reasonable restrictions" on the grounds as provided under Article 19 (2) of the Indian Constitution can be imposed on the "freedom of the press".

One cannot deny the importance of media as it keeps the public informed, educated and vigilant; it is considered as the "fourth pillar" of democracy. It behaves as a watchdog of the government functions and its abuses, by making them available to the public by way of various mediums like television, radio, newspaper, etc. But at the same time, there is another issue to be looked upon, i.e. the media also at times tries to sensationalize news and distort facts to grab the attention of the people to keep up with the competition in this field, which undermines the actual purpose of the media as a fourth estate. There are instances when media goes beyond its limits and instead of just letting the people have the knowledge about any facts, it acts as an institution that starts giving judgment on any issue by blatantly ignoring the principle "presumption of innocence". It can even act as a danger to the guarantee of "right to a fair trial". Because of these reasons, freedom of the press must act within a reasonable boundary like any other freedom.

Media limited to the imparting of information in a neutral manner to the society is considered to be preferable than conducting trials by media which may contradict with the fair trial. The difficult reaches its peak when there is extensive coverage by the media

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[2] *Sakal Papers v. Union of India*, AIR 1962 SC 305 : (1962) 3SCR 842.

of matters that are *sub judiced*, and publishes opinion and information that patently prejudice the interests of the parties in a case which is pending before a Court. The institution of the judiciary is capable of conducting a fair trial and the trials by media should be avoided or else it would lead to interference with the work of the judiciary. This issue of "media trial" is of serious concern and it needs to be addressed. Freedom of the press should not be such that it causes harm to the individual or the society at large. Media should be responsible in their conduct and thus its freedom, like any other freedom, cannot be absolute.

1.2 STATEMENT OF THE PROBLEM

"Freedom of speech and expression" is of utmost importance in a democracy and so is the "freedom of the press". But the freedom must be such that it does not harm another. Media trial tends to threaten the right to fair trial. Media trial is a very recent phenomenon which cannot be ignored as because it interferes with the proceedings of the court and it completely failed in understanding the essential gap between an "accused" and a "convict". This is a worldwide phenomenon and the media being a powerful institution through its trial can have a great influence on the public which may have a negative impact. "Trial by media" amounts to undue interference with the "administration of justice". This problem needs to be fixed so that social order is maintained, and no one is misled in the name of imparting information.

1.3 AIM

The aim of the study is to analyze the relation between "trial by media" and "freedom of speech and expression" in order to appreciate the importance of the reasonable restrictions.

1.4 OBJECTIVES

Following are the research objectives:

- To study the evolution of freedom of speech and expression in India and other countries.
- To study the law relating to freedom of the press in India.
- To look into the role played by media in a democracy.
- To understand the need for reasonable restrictions on the freedom of the press.
- To examine the consequence of trial by media and its conflict with the fair trial.

1.5 SCOPE AND LIMITATIONS

The scope of the study is to understand the effects of the trial by media on the interest of justice and to what extent the press freedom is to be exercised so that it does not prejudice the freedom of individual and society at large. The study is mainly limited to India and reference is drawn from other countries wherever felt necessary. The study mainly emphasizes the impacts trial by media is causing and not on neutral reporting by media.

1.6 LITERATURE REVIEW

- Durga Das Basu, "Shorter Constitution of India", Lexis Nexis, Haryana.

  The author in his book elaborately discusses the "freedom of speech and expression" under the Constitution of India. He also discusses the "freedom of the press" which flows from the "freedom of speech and expression". The author further points out the factors that constitute restrictions on the "freedom of the press" and the unreasonable restrictions upon the "freedom of the press". He also deals with the issue relating to the interference with the "administration of justice". These facets of freedom of the press are of great importance to the researcher for dealing with the subject of the study more effectively.

- D. S. Chopra and Ram Jethmalani, "Cases and Materials on Media Law", Thomas Reuters, New Delhi.

  The authors of the book have attempted in presenting the statutory laws and judgments dealing with media. They have mentioned about series of cases relating to freedom of press and permissible restrictions on that freedom. The authors also explained laws relating to defamation and contempt of court, which acts as one of the grounds to impose a restriction on freedom of the press. The book contains a chapter solely based on "trial by media" in which various cases are being discussed in details and also the effect of the media trial on those cases. Through these cases, the authors have criticized the indulgence of journalists in such trial by media. This has helped the researcher to take note of several cases dealing with media trial which contributes to the study.
- Juhi P. Pathak, "Introduction to Media Laws and Ethics", Shipra Publications, New Delhi.

  The author of the book has discussed the history of press laws in India and also referred to the U.S.A. and UK. The author also mentioned about the need and the developments of "freedom of the press" but at the same time criticized the press for affecting the "right to a fair trial", "right to privacy" and "defamation". The book put forwarded views relating to constitutional provisions, press freedom and law. This has simplified the task of the researcher in understanding various pros and cons revolving around the press freedom, which will help in developing an adequate conclusion of the study.
- Zehra Khan, "Trial-by-Media: Derailing Judicial Process in India", 1 MLR 91 2010.

  In this article, the author makes a brief discussion on the constitutional provisions relating to free speech in India. The author further discusses the immunity attached to pre-trial publications under the Contempt of Court Act of 1971, which will be addressed in the study by the researcher. The author also focuses on the ineffectiveness of the legal norms relating to journalistic conduct. The author also

raises the issue of media trial having an ability to influence the judges. The author also points out how media trial compromises with the fair trial. This has facilitated the researcher to have a thorough understanding of the subject, so as to make a further study on the issues.

- Prerna Priyanshu, "Media Trial: Freedom of Speech v. Fair Trial", 3 IJLLJS 284 2015.

  The author of this article points out the influence of media on the opinions of the people and the misuse of free speech by the media personnel. The author further makes detailed discussion relating to media trial and fair trial. The author also highlighted the impact of media trial on accused and subconscious of judges, and examines the justifications put forward by media. The author gives a brief idea on the seventeenth Law Commission recommendations. From the understanding of this article, the researcher will continue further studies on media trial and Law Commission recommendations which would be profitable for the research work.

- Kauser Hussain and Srishti Singh, "Trial by Media: A Threat to the Administration of Justice", 3 SAJMS 195 2016.

  The authors of this article start by describing the importance of media freedom and how media behaves as the "fourth pillar" of democracy. The authors also point out the media's role in a democratic society. On the later part, the authors attempt to analyze the impact of trial by media on judicial proceedings and for this purpose made reference to prominent cases. The authors of this article are not much in favour of curbing the media freedom but were more concerned with making the media accountable. They only focused on the idea to make media more careful and cautious at its conduct. The researcher will take account of this issue and also try to justify the importance of imposing reasonable restrictions when a situation demands.

1.7 RESEARCH QUESTIONS

- How do various countries protect the freedom of speech and expression?

- What role does the media play in a democratic society?
- Whether the freedom of the press should be completely unrestricted or absolute?
- Whether the trial by media affects the principle of the fair trial?

1.8 RESEARCH METHODOLOGY

The research methodology of the current study is carried by doctrinal method to find out the fact-situations and grounds related to the topic of the research. The methodology adopted in the preparation of the research report is mainly based on secondary sources. The study will be made by use of various secondary sources such as books, journals, newspaper articles, online sources, research articles, statutes etc which are available relating to the concerned study. The proposed research follows an Analytical Methodology. The Researcher will refer to various statutory laws and Law Commission Report of India in relation to the concerned topic to come to a certain conclusion relating to the study.

1.9 RESEARCH DESIGN

The researcher has divided the study into six chapters which are as follows –

The Chapter I titled "Introduction" deals with the introduction of the research topic. It also includes the statement of the problem, aim, objectives, scope and limitations, literature review, research questions, research methodology and finally research design.

The Chapter II titled "Historical Background of Freedom of Speech and Expression" will be focusing on the historical development of free speech in England, U.S.A. and India. This chapter will be more concerned with the origin of free speech and along the way, it will also deal with the freedom of the press.

The Chapter III titled "Media Trial and its impacts in contemporary period" will be focusing on describing media trial and fair trial. This chapter will deal with the role of media in a democratic state. This chapter will further deal with the various impacts of media trial.

The Chapter IV titled "Prejudicial publications by media in the light of laws relating to contempt of court" will be focusing on the several recommendations made by the Law Commission of India in relation to the prejudicial media publications and Contempt of Courts Act, 1971. This chapter will also focus on the various amendments proposed by the Law Commission report.

The Chapter V titled "An analysis of the effect of media trial on some prominent cases and developments in recent times" will be dealing with the effects media trial could cause or have caused in various situations and the Courts stand with respect to such matters.

The Chapter VI titled "Conclusion and Suggestions" deals with the concluding remarks relating to the study of media trial and freedom of speech and expression, and thereafter certain suggestions are being made.

CHAPTER – II

HISTORICAL BACKGROUND OF FREEDOM OF SPEECH AND EXPRESSION

2.1 FREEDOM OF SPEECH AND EXPRESSION IN ENGLAND

While discussing about free speech many writers start off with the signing of Magna Carta in the year 1215. A document guaranteeing certain rights to both noblemen and ordinary Englishmen was signed by the King John of England out of compulsion. This document came to be known as Magna Carta and was a result of a revolt by nobles. According to this document, everyone including the King should obey the law and is not above it. Although, this document did not mention about the freedom of speech but it created a platform for the future documents.

It is in the 17th century when the actual progress started. The Petition of Right, 1628 is an important document which indicated at least in theory that a person cannot be detained simply because he disagreed with the government. Through this document, certain rights and liberties were set out for the ordinary man as against the prerogatives of the Crown.

In 1606, Sir Edwar Coke declared that if the court thinks any words of thought tends to insult individual and government officials, then it would be punishable as a libel even if such words turns out to be true. In 1644, when Civil War was at its peak, John Milton's "*Areopagitica*" was published which is considered to be one of the most significant works relating to "freedom of speech". He himself participated in the Civil War and supported the Parliament using pamphlets. But on the contrary, "*Areopagitica*" turns out be an attack on the Licensing Order introduced by the Parliament in the year 1643. Licensing Order of 1643 was an "*Ordinance for the Regulating of Printing*" and allowed pre-censorships on publications. Milton's write up attacked the evils of censorship.

Milton put out various arguments against censorship. He even stated that censorship was never a part of ancient Greek or Roman society.

He disagreed with the "government censorship" and wrote that "*When as debtors and delinquents may walk abroad without a keeper, but unoffensive books must not stir forth without a visible jailer in their title.*"[3] One of the main arguments of Milton was that there should never be a prohibition on freedom of speech in advance and prohibition should be allowed only when offence has been committed. "*Marketplace of ideas*" was developed from his writings; Milton believed that in a free and fair fight in the "*marketplace of ideas*" truth will always prevail. At that time Milton's work did very less in stopping the practice of licensing, however in the later period it is recognized as a significant milestone which defended the press freedom eloquently.[4]

Seditious libel was widely restricted in England, where truth was not considered as a defense and King was protected from any form of criticism. Censorship was considered as King's Star Chamber product and got abolish in the year 1641. During the 1520s, the clergy was believed to introduce licensing which was then formalized in the year 1538 by King Henry VIII of England.[5]

Bill of Rights which was passed in the year 1689 when the monarchy was restored under King William III and Queen Mary II and the "Bill of Rights" restrained monarchy; it also guaranteed the members of Parliament free speech. But for the ordinary people right of free speech was more of a complex issue due to the law on libel.

It was still the year 1694, that the licensing publication system was continued and finally in that year this system came to an end. John Locke contributed "to the lapse of licensing Act in 1695, he believed censorship to be an improper exercise of power by government and freedom of expression is a natural right." Even during the 18th century, several libels were tried, in the case of John Wilkes during 1760s indicated that in England issues concerning freedom of speech were still not settled. A radical newspaper "*The North Briton*" which claimed to be written anonymously was closely associated with John Wilkes. The newspaper led to several controversies and also attacked the speech of King.

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[3] Richard Allsop, The Difficult History of Free Speech, LVI (1-2)| Quadrant| (2012) https://quadrant.org.au/magazine/2012/01-02/the-difficult-history-of-free-speech/, (01/01/2012).
[4] Kareen Sanders, ETHICS AND JOURNALISM, 1st ed. 2003, p. 66.
[5] *Supra* note 3.

As a result, John Wilkes was charged with libel and was imprisoned. He challenged his arrest and won the case. "*Wilkes and Liberty!*" became a popular slogan of "*freedom of speech*". Again Wilkes reprinted the issue for which he was charged and he was eventually expelled from the "House of Commons". He was declared guilty by the Court and was pronounced an outlaw due to his absence during the sentence. After a few years later in the year 1774, House of Commons accepted him and The North Briton issue became popular and was a win for "freedom of speech".

It is very vital to mention here about the Fox's Libel Act which was passed in the year 1792 provided that truth was to be considered as a defense for seditious libel and the jury regarding libel and guilt of the defendant.

During the 19th century, it was J. S. Mill who further developed the "freedom of speech" arguments in "*On Liberty*". He believed that the right of expression is vested in every individual until no other individual is harmed by him. Mill observed that "*if all mankind minus one, were of one opinion, and one, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.*"[6] An ideal society must try to achieve the greatest happiness for the maximum number of people. Mill applied this principle to the "freedom of expression" and asserted that silencing an opinion may "silence the truth".

At the time, when J. S. Mill was involved with writing, England reached the final stage of liberalizing its "freedom of speech" laws. Even after that, there were several other kinds of controls over the speech such as blasphemy, outlawing sedition, private libel and so on.

[6] *Supra* note 1, p. 473.

During the 1980s and 1990s, several courts of UK applied the principle of free speech in some of the common law cases and they consider it to be their duty to maintain free speech wherever possible.[7]

In the year 1948, when "Universal Declaration of Human Rights" (UDHR) was passed it guaranteed under Article 18 and 19 that "everyone has the right to freedom of thought, conscience and religion" and "everyone has the right to freedom of opinion and expression" respectively. Almost all the modern constitutions reflected those Articles of UDHR, but it was not the same case with the United Kingdom. After passing of many years, it was in 1998, that the United Kingdom joined the "European Convention of Human Rights" (ECHR) and incorporated Article 10 of ECHR which provides for the "freedom of expression" within its domestic law the Human Rights Act, 1998. Article 10(1) of the Convention runs as follows "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

But simultaneously the Article 10 further provides that "this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." This "freedom of expression" is not an unbridled or unrestricted right. There are many exceptions to this right such as restrictions on court reporting, defamation, incitement to religious hatred, behavior intending to cause harm or threatening, abusive or insulting words and so on. Article 10 (2) of the "Convention" provides that "the exercise of these freedoms, since it carries with it 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 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 or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[7] John Roberts, "The Development of Free Speech in Modern Britain", http://www.speakerscornertrust.org/5064/the-development-of-free-speech-in-modern-britain/ (April 20, 2018).

In the UK, defamation laws are one of the strictest laws where the defendant is imposed with a high burden of proof. In *Reynolds v Times Newspaper Ltd*[8], it was provided that defamatory statement could be published in the public interest. Again in *Jameel v Wall Street Journal Europe*[9], affirmed the Reynolds defence and was further used in several proceedings related to defamation. But eventually, this so-called Reynolds defence was abolished by the Defamation Act 2013 which reformed the law relating to defamation on the subject of "freedom of expression" and the protection of reputation.

With the guarantee of free speech comes the guarantee of the free press and this freedom is also not unrestricted. Article 6 of ECHR provides that "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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Since the United Kingdom joined the ECHR, the provisions dealing with the fair trial also applies in England and the freedom of the press can be curbed if it harms the interests of justice.

2.2 FREEDOM OF SPEECH AND EXPRESSION IN UNITED STATES OF AMERICA

In the colonial period, the regulations of English speech were very restrictive. The government was protected from being criticized and the criticism was protected by the English common law relating to seditious libel. A good opinion by the people about the government was very necessary and this was the reason behind such prohibition as explained by Chief Justice John Holt. There was this detailed licensing system in England till 1694 which required a government-granted license for any publication.

[8] (2001) 2 AC 127.
[9] (2006) UKHL 44.

There were different views regarding the free speech protection in the colonies. At the time of "English colonialism in America", prosecutions for "seditious libel" were fewer as compared to that of England but there were other controls on dissident speech. In the colonial period, blasphemy was regarded as one of the harshest controls on speech.

In the year 1735, John Peter Zenger, a New York "publisher" was tried for "seditious libel" of the Royal Governor of New York who was criticised through publication. Zenger was represented by Andrew Hamilton who argued that the "*truth shall be a defense to libel*" but the court did not agree with the argument put forward. However, the jury was persuaded by Hamilton to disregard the law on seditious libel and acquitted Zenger. Finally, the case led to the victory of "freedom of speech" and established the principle that "*truth is a defense to libel*" and a jury could decide whether a "publication" is seditious or defamatory.[10]

After the "*American war of Independence*", during the 1780s, debates took place regarding the adoption of a new "Constitution". This led to a conflict between "*Federalists*" and "*Anti- Federalists*". The former was more inclined towards a strong federal government, while the latter towards a weak federal government.

In the meanwhile, when the Constitution was being given formal consent and also after the process of such ratification was completed, "*Anti- Federalists*" and state legislatures were still holding the view that the federal government was vested with too much power under the new Constitution. After the suggestion made by "*Anti-Federalists*" like Thomas Jefferson, Representative James Madison introduced the "Bill of Rights" including the first ten amendments to the Constitution of United States of America. Individual liberties are constitutionally protected through the Bill of Rights. These amendments addressed the concerns raised by the "*Anti-Federalist*", by limiting the huge power vested in the federal government.

[10] Fire Staff, "The History of Free Speech", https://www.thefire.org/first-amendment-library/timeline/the-history-of-free-speech/ (April 22, 2018).

The “First Amendment to the Constitution of U.S.” runs as follows, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” It was adopted in the year 1791 and became a part of the Bill of Rights. Individual liberties are constitutionally protected through the “Bill of Rights”.

The “First Amendment” protects the right to “freedom of speech”. This amendment does not give any precise definition of “Freedom of Speech”. In simple words, it is the expression of an opinion, idea or information without any interference or restriction by the government.

President John Adam was upset due to the criticism of its administration and eventually, the Alien and Sedition Acts was successfully pushed by the President in 1798, which was used against the supporters of Thomas Jefferson to stop any form of criticism made against the President.[11] The section 2 of the said Act forbidden the publication of "false, scandalous, and malicious writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame...or to bring them...into contempt or disrepute; or to excite against them...hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States". However, the truth could be used as a defence in such cases.

In the Presidential election of 1800, these Acts were a major political issue and its opposition by Jefferson led to the victory of Thomas Jefferson in the election. Finally, the Sedition Act expired in the year 1800.

[11] Tom Head, “Freedom of Speech in the United States”, https://www.thoughtco.com/freedom-of-speech-in-united-states-721216 (April 22, 2018).

In the year 1868, the 14th Amendment was ratified to the Constitution of U.S., which requires that state shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[12]

An "anti-obscenity" statute was passed in the year 1873, known as the Comstock Act. It granted authority to the post office to "censor" mail containing "obscene, lewd and/or lascivious" material.[13] The law also aims at "any article or thing" in relation to contraception.

Desecration of the U.S. flag was banned in the year 1897 and the first states to do it were Illinois, Pennsylvanian and South Dakota. It took almost a century to lift the ban by the Supreme Court and finally, the ban was declared unconstitutional.[14]

The "Sedition Act" of 1918, which was an extension of the "Espionage Act" of 1917, prohibited various kinds of speech, including "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States ... or the flag of the United States, or the uniform of the Army or Navy". It targeted "anarchist", "socialists", etc who were against the participation of U.S. in the WW I. This Act finally got repealed on March 3, 1921.

In *Jacob Abrams, et al. v. United States*[15], Justice O. W. Holmes gave a dissenting opinion, "*the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.*" The "*marketplace of ideas*" metaphor doesn't assume that "truth" will appear immediately from the "free trade in ideas" instead assumes that "free trade in ideas" is the "best test of truth".

"The Alien Registration Act" or the "Smith Act" which was passed in the year 1940, aimed against any person who advocated the violent overthrow of the United States Government or becomes a member of any such group or society in favour of such

[12] *Supra* note 10.

[13] History Cooperative, "The Right to Speak Freely: The History of Free Speech", http://historycooperative.org/the-right-to-speak-freely/ (April 23, 2018).

[14] *Texas v Johnson,* 491 U.S. 397 (1989).

[15] 250 U.S. 616 (1919).

advocacy. Later in the year 1957, the Smith Act was weakened by the ruling of the Supreme Court in *Yates, et al. v. the United States*.[16]

"*The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression.*"[17] It is the right to speak one's mind defiantly, irreverently and robustly because it is one's mind. What is presumed is that freedom of speech is always protected, unless a particular exception applies.

"Freedom of speech" is extremely important in U.S.A., but it is not absolute. There may be certain limitations or restrictions on the First Amendment. And any conflicts relating to it are to be resolved by the courts. These exceptions to the "right of freedom of speech and expression", which makes the right limited, are recognized by the Supreme Court of the U.S.A.

In *Schenck v. United States*[18], Justice O. W. Holmes sets forth "clear-and-present-danger" test: "*whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent.*" Thus, the First Amendment is not absolute and all kinds of speech cannot be protected.

"False statement of facts" is another limitation on freedom of speech. One cannot escape the civil or criminal penalty, imposed by law, in case of a false statement of fact. It was in *Gertz v. Robert Welch, Inc.*[19], where the Supreme Court observed that there is "no constitutional value in false statements of fact".

Obscenity can also be used to limit the free speech and its standard is set by the "*Miller test*" in the case *Miller v. California.*[20] However, "reasonable ignorance" can be used as a defence in case one is charged with obscenity.[21]

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[16] 354 U.S. 298 (1957).
[17] *Procunier v Martinez*, 416 U.S. 396 (1974).
[18] 249 U.S. 47 (1919).
[19] 418 U.S. 323 (1974).
[20] 413 U.S. 15 (1973).
[21] *Smith v. California,* 361 U.S. 147 (1959).

In *Chaplinsky v. Hampshire*[22], the Supreme Court has explained "*fighting words*" as "*those which by their very utterance inflict injury or tend to incite an immediate breach of peace.*" The "First Amendment" guaranteeing "freedom of speech" does not protect the "*fighting words*".

2.2.1. FREEDOM OF PRESS IN THE U.S.A.

In America, the "First Amendment" to their Constitution protects the "freedom of the press". It basically limits the power of the government to interfere with the dissemination of information and opinion. It eliminates the fear of censorship by government or punishment while obtaining and publishing any information or opinion. This freedom is applicable to all kinds of broadcast and printed material, like books, magazines, newspaper, radio, television, etc.

In the U.S.A., no law can be passed by the government to publish any information in a newspaper against their will. The tax that is not levied on any business cannot be imposed on the press. Also, the journalist cannot be compelled to disclose their sources. The press is not prohibited from attending and informing any judicial proceeding to the public. The government cannot impose civil damages or criminal penalties in case of any truthful publication with respect to any matter of public concern. All these rights were developed by the Supreme Court and this "freedom of the press" is an evolving concept.

The main reason for the guarantee of the free press is related to the creation of a "*fourth institution*" outside the government as a supplementary check over the three organs of the government –legislature, executive and judiciary.[23] It is the main task of the "press" to furnish with complete and impartial information on all aspect of the "economic, political and social life of the country". The "press" acts as an important cure for any misuse of governmental power by its officials and it also acts as an instrument for making the elected officials accountable to the people who elected them.

The Free Press safeguards the individual's right to express themselves by way of publication and distribution of ideas, opinions and information without any intervention

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[22] 315 U.S. 568 (1942).

[23] Ruma Pal and Samaraditya Pal (rev.), M. P. Jain, INDIAN CONSTITUTIONAL LAW, 6th ed. 2010, p. 1085.

of the government. It is "*a fundamental personal right*" which is not limited to periodicals and newspapers.[24] "*Press*" as defined by CJ Charles Evans Hughes means "*every sort of publication which affords a vehicle of information and opinion*".[25]

While discussing freedom of the press, one of the landmark decision for which the Supreme Court is applauded, is the decision given in *Near v. Minnesota*[26], wherein the Court acknowledged the existence of free speech and rejected the prior restraint on publications. In this case, a statute was passed by the Minnesota legislature empowering the Courts to cease "*malicious, scandalous and defamatory newspapers*". The only defence that can be used is the "*defence of truth*" told with a good intention. Finally, the Court decided that the statute was unconstitutional and was not consistent with the First Amendment.

In another landmark case in the year 1971, *New York Times v. United States*[27], the Supreme Court did not allow the ban on "*Pentagon Papers*" and allowed it to continue with its publication. According to the Court, the main motive of the "First Amendment" is to "*prohibit the widespread practice of governmental suppression of embarrassing information.*" Through this case, it is established that there is almost complete "immunity" from "*pre-publication censorship*".

In *Miami Herald Publishing Co. v. Tornillo*[28], a state law required the newspapers that criticized the political candidates to give those candidates space in the newspaper for responding to the criticism. The state asserted that it was done to ensure journalistic responsibility. Finally, the Supreme Court declared the state law to be invalid and it is on the editor of the newspaper to decide what to print and what not to. The First Amendment is concerned with the freedom and not responsibility.

Restraint can be put on the broadcasters by the government on a "content-neutral" basis, i.e. "time, place and manner restrictions". In *Federal Communications Commission v.*

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[24] *Branzburg v. Hayes*, 408 U.S. 665 (1972).
[25] *Lovell v. City of Griffin*, 303 U.S. 444 (1938).
[26] 283 U.S. 697 (1931).
[27] 403 U.S. 713 (1971).
[28] 418 U.S. 214 (1974).

Pacifica Foundation[29], the Supreme Court validates the FCC's power to control "*indecent*" materials broadcast over the air. It is allowed because the "broadcast media" are a "*uniquely pervasive presence*" and easily reachable to children. But simultaneously the Court makes it clear that there cannot be an absolute ban on such speech.

In the year 2014, U.S. was ranked in the 30th position out of 197 countries in relation to freedom of the press by an organization called Freedom House. This report applauded the protections given by U.S. Constitution journalists and condemned the authorities for putting undue limits on investigative reporting undue limits in the name of "national security".

2.3 FREEDOM OF SPEECH AND EXPRESSION IN INDIA

In "The Constitution of India Bill" 1895, which was regarded as India's first articulated constitutional vision, comprised of the following provision relating to "freedom of speech and expression" – "Every citizen may express his thoughts by words or writings, and publish them in print without liability to censure, but they shall be answerable to abuses, which they may commit in the exercise of this right, in the cases and in the mode the Parliament shall determine." "There were also other constitutional antecedent documents such as Commonwealth of India Bill 1925, Nehru Report 1928, and States and Minorities 1945 containing provisions relating to this freedom."

Constituent Assembly Debates took place before the inclusion of this freedom within the Constitution. Almost all were in the favour of its inclusion as a right, but concerns were raised with respect to the restrictions to be imposed on this right. Finally, the Constitution of India, 1950 included the "right to freedom of speech and expression" with its permissible restrictions.

When it comes to the fundamental rights, personal liberty is the most significant of all. Under the Constitution of India, "six fundamental rights" in the form of freedom are guaranteed. Here we are concerned with only the "freedom of speech and expression".

[29] 438 U.S. 726 (1978).

Article 19 (1) (a) provides that "all citizens shall have the right to freedom of speech and expression." This freedom plays a pivotal role in generating "public opinion" regarding "economic, political and social matters". This freedom comprises within its ambit the "distribution of information", "freedom of propagation and exchange of ideas" that helps forming one's opinion and point of view and debates on matters of public concern. This freedom also includes the expression of opinions and views regarding any matter through any medium such as by "words of mouth", "writing", "picture", "printing", "movie" etc.[30]

In *Romesh Thappar v. State of Madras*[31], Justice Patanjali Sikri observed that:

"*Freedom of Speech and of the Press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government, is possible.*"

In *Maneka Gandhi v. Union of India*[32], Justice Bhagwati has highlighted on the importance of the "freedom of speech and expression" as under:

"*Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic setup. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.*"

But this "right of freedom of speech and expression" is not absolute. According to Article 19 (2) of the Constitution of India, nothing in Article 19 (1) (a) can "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." So, the Constitution of India guarantees this freedom under Article 19 (1)

[30] *Supra* note 23, p. 1079.
[31] AIR 1950 SC 124.
[32] AIR 1978 SC 597 : (1978) 1 SCC 248.

(a), but at the same time can impose "reasonable restrictions" on such freedom based on the grounds provided under Article 19 (2). One must exercise its right in such a manner that it does not harm another.

2.3.1. GROUNDS OF RESTRICTIONS:

- Security of the State –

  It is considered as one of the grounds based on which the "reasonable restrictions" can be imposed upon the "freedom of speech and expression". It is different from that of ordinary breaches of "public order" or "public safety" which may not threaten the "security of the State". "Security of the State" means "the absence of serious and aggravated forms of public order".
  Therefore, what endangers the State's security are the rebellious act against the government, crime of violence intended to overthrow the government,[33] external aggression, etc.

- Friendly relations with foreign states –

  Another ground based on which the "reasonable restrictions" can be imposed on the "freedom of speech and expression" is "friendly relations with foreign states". The reason for such restriction is to prevent any "malicious propaganda" against any foreign States having friendly relations with India. Such prohibitions are needed to maintain India's "friendly relations with foreign states" or else it may cause embarrassment to India. However, this ground of restriction cannot be used to suppress the fair criticism of foreign policies of Government.

- Public Order –

  The Constitution (First Amendment) Act, 1951, added this ground of restriction. In *Romesh Thappar v. State of Madras*[34], the Court held that minor breaches of public order were not considered as a ground for restricting the "freedom of

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[33] *Santokh singh v. Delhi Administration*, AIR 1973 SC 1091 (1093) : (1973) 1 SCC 659.
[34] AIR 1950 SC 124.

speech and expression" and restrictions can be imposed only on the grounds mentioned under Article 19 (2) of the Indian Constitution. As a consequence of this case, the expression "public order" was incorporated in the Article 19 (2) of the constitution as a ground of restriction.

"Public order" is similar to that of "public peace", "safety" and "tranquility".[35] But this is not always true and at times "public tranquility" and "public order" may not be similar. For instance, if a person is playing music very loudly at night may affect "public tranquility" but not "public order".

- Decency or morality –

There is no definite meaning for the terms decency or morality and keep on varying from time to time and society to society based on the "standards of morals" existing in the contemporary society.[36] The word "indecency" as found under the Constitution of India is similar to that of the word "obscenity" under English law.

In Ramesh Prabhoo[37], the Apex Court gave a wide meaning to "decency" and "morality". It was observed that "decency" or "morality" is not restricted to mean only "sexual morality". The Court cited an observation from an English case:

"…Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting or revolting…"

This ground of restriction is introduced to restrict any speech and publication that may disregard the public morals.

- Contempt of Court–

While exercising the "right to freedom of speech and expression", no one is allowed to obstruct the "due course of justice" or lessen the "prestige" or

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[35] A. R. Lakshmanan and V. R. Manohar (rev.), D. D. Basu, SHORTER CONSTITUTION OF INDIA, Vol. 1, 14th ed. 2009, p. 281.

[36] *Supra* note 23, p. 1109.

[37] *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*, AIR 1996 SC 1113 : (1969) 2 SCC 687.

"authority" of court. But at the same time, the Judges should not use it to uphold its own dignity. Judicial system and Judges cannot be criticized unless it impedes the "administration of justice".

"Both the Supreme Court and High Courts are empowered by Articles 129 and 215 of the Constitution of India respectively to punish its contempt." The "freedom of speech and expression" can be restricted in case it tends to infringe the statutory limits as set by the Contempt of Courts Act, 1971.

The Apex Court in relation to "contempt of Court" observed that:

"We wish to emphasize that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalize the Court and bring it into dispute or ridicule….Indeed, freedom of speech and expression is 'life blood of democracy' but this freedom is subject to certain qualifications. An offence of scandalizing the Court per se is one such qualification."[38]

- Defamation –

When a statement harms the reputation of a person, then it amounts to defamation. It is both crime as well as a tort. The manner in which every person possesses the "right to freedom of speech and expression", in the same manner, those persons also possesses a "right to reputation" which is regarded as a property.[39] Therefore, no one can use his freedom to injure the reputation of another. Section 499 of the IPC deals with "defamation" and it runs as follows, "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person."

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[38] *Narmada Bachao Andolan v. Union of India*, AIR 1999 SC 3345, 3347 : (1999) 8 SCC 308.
[39] *Supra* note 35, p. 286.

- Incitement of an offence –

  Having the "freedom of speech and expression" does not mean that it grants a lincence to incite people to commit offence. Incitement of a crime is punishable according to the general theories of criminal law. The Constitution of India does not define the term "offence". According to "General Clauses Act", the term "offence" means "any act or omission made punishable by any law for the time being in force."

- Integrity and Sovereignty of India–

  It was through the Constitution (Sixth Amendment) Act, 1963 that this ground was added to Article 19(2). "Restrictions" can be imposed on the "freedom of speech and expression" so as not to permit anyone to challenge the "integrity or sovereignty of India". It is therefore, one of the grounds based on which restriction can be imposed.

2.3.2. FREEDOM OF PRESS IN INDIA

The "freedom of the press" in India is not explicitly mentioned, but it is implicit in the "freedom of speech and expression". There is no such particular provision under the Constitution of India relating to the "freedom of the press". Like many other freedoms, this freedom also flows from the "freedom of speech and expression". The Indian Press Commission said that *"Democracy can thrive not only under the vigilant eye of its legislature, but also under the care and guidance of public opinion and the press is par excellence, the vehicle through which the opinion can become articulate."* This freedom of the press has not been given any special treatment and there is no such privilege attached to it which is different from that of the freedom of the citizens.

The Apex Court has emphasized in various cases about the significance of maintaining "freedom of the press" in a democratic society. The press tends to serve the "public interest" by making them aware of any facts and opinions by way of publications without which the general public cannot make responsible judgments. In the press, various articles and news are being published frequently which brings out the weak points of the

government. And as a result, the Government at times tries to suppress the "freedom of the press". *"It is, therefore, the primary duty of the Courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with the freedom of the press contrary to the constitutional mandate."*[40]

In *Printers (Mysore) Ltd. V. Assistant Commercial Tax Officer*[41], it has been restated by the Supreme Court that there is no express provision guaranteeing the "freedom of the press" as a "fundamental right"; it is implied from the "freedom of speech and expression". All the countries that are democratic cherish the "freedom of press" and rightly describe the press as the "fourth estate".

The "freedom of the press" is more for the benefit of the general public than for the press itself because the public has a right to be furnished with information and the government has a "duty to educate" the people within the limits of its resources.[42]

"Pre-censorship" or imposition of censorship on a newspaper before publication of any news would lead to the violation of the "freedom of speech and expression". In *R. Rajagopal v. State of T.N*[43]*.,* the Court held that there is no authority of the government under the law to impose "prior restraint" on defamatory publications against its official but after the publication of such defamatory material if proved to be based on false facts can take action for damages.

In *Brij Bhusan v. State of Delhi*[44], an order was issued by the Chief Commissioner of Delhi, in accordance to Section 7 of the East Punjab Safety Act, 1949, against the "printer", "publisher" and "editor" of the "Organiser", requiring them to submit in duplicates all news and communal matters relating to Pakistan for examining them.

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[40] *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*, AIR 1986 SC 515.
[41] (1994) 2 SCC 434.
[42] *Supra* note 23, p. 1086.
[43] (1994) 6 SCC 632.
[44] AIR 1950 SC 129.

But the order was struck down by the Court, observing: *"....the imposition of pre-censorship of a journal is a restriction on the liberty of the press which is an essential part of the freedom of the speech and expression declared by Article 19 (1) (a)."*[45] Similarly, newspapers cannot be prohibited from publishing its own perspective or the perspective of the correspondents with respect to any burning topic of the day or else it will amount to violation of the "freedom of speech and expression".[46]

In *Express Newspapers v. Union of India*[47], the Court held that pre-censorship imposed or circulation curtailed or newspaper prevented from starting under a law led to the violation of "freedom of speech and expression".

Any law forbidding a journal from entering or circulating within a State is not valid. In *Romesh Thappar v. State of Madras*[48], the petitioner was "editor", "printer" and "publisher" of a journal named "Cross Road". But this journal was prohibited by the Government of Madras, by exercising certain powers provided under the "Maintenance of Public Order Act, 1949", from entering or circulating in Madras. The Court said that "freedom of propagation of ideas" is included under the Article 19 (1) (a) of the Indian Constitution and this "freedom of propagation of ideas" is protected by the "freedom of circulation". The Court held that a law forbidding a journal from entering or circulating within a State is invalid. "Restrictions" can be imposed on "freedom of speech and expression" only when it falls within the scope of authorized restrictions under Article 19 (2) of the Indian Constitution.

In *Sakal Papers Ltd v. Union of India*[49], the petitioner challenged "The Newspaper (Price and Page) Act, 1956" and "The Daily Newspapers (Price and Control) Order, 1960" as unconstitutional on the ground that this Act and government order decided for the newspaper the "minimum price" and the "number of pages" it can publish, which was total infringement of the liberty of press. The petitioners were asked to raise the price without increasing the pages of the newspaper which in turn lessen the volume of

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[45] Ibid.
[46] *Virendra v. State of Punjab*, AIR 1957 SC 896.
[47] AIR 1958 SC 578.
[48] AIR 1950 SC 124.
[49] AIR 1962 SC 305.

circulation. The Supreme Court ruled it “invalid” as because its motive was to minimize the circulation of some newspapers by unattractively raising their price. It had an effect on the “freedom of speech and expression” because inherent in this freedom is the “right to publish and circulate the publication.” “Freedom of speech” can only be curtailed on the grounds referred in clause (2) of Article 19 of the Constitution.

In India, the order of the day is that freedom of the press cannot be restricted unless such restriction is a reasonable one and not excessive. It is necessary to preserve and maintain the freedom of the press in a democratic country but at the same time, it is also necessary to put some restrictions which are permissible on that freedom. These restrictions cannot be unreasonable and it can be imposed only on the grounds mentioned under the Article 19(2) of the Constitution, which are the grounds for imposing a limitation on the “freedom of speech and expression.”

CHAPTER – III

MEDIA TRIAL AND ITS IMPACTS IN CONTEMPORARY PERIOD

3.1 MEDIA TRIAL

Media in simple words is a means of communication. It involves publishing, broadcasting and the Internet. There are several ways through which general communication to the society can be made, such as radio, television, newspaper etc. It acts as a collective communication tool for storing and delivering information. In the contemporary world, media has developed a lot, making the dissemination of information easier than ever before.

Media plays a very important role in a democracy. It creates in the society a sense of awareness regarding the democratic and social obligations.[50] Media is considered as the "fourth pillar" of democracy and it brings to the people the information about the other three pillars, i.e. "executive, legislature and judiciary", by making their work transparent.[51] It is also commonly known as the "Fourth Estate", and keeps the people informed about the social, political and economic activities surrounding them.

Media is expected to provide impartial and unbiased news. It is the primary duty of the media to put out the facts rather than coming to any conclusion about any matter. It is the power on the hands of the media to influence the general public, which makes it necessary that they understand and perceive the huge responsibility attached to them and they must not in any way misuse it. Media has evolved over the years and has become very active. In today's world, media has a far-reaching effect and its need cannot be undermined. But what matters is its proper utilization to bring the positive changes in the society and this is possible only when the media remain independent and impartial.

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[50] Ruheela hasan, "Freedom of Media in India – (A Legal Perspective)", 3 IJHSS (2014), p. 191.

[51] Ayesha Khalid, Media as a Fourth Pillar of Democracy, VOJ Blog, https://www.voj.news/media-as-a-fourth-pillar-of-democracy/ (April 24, 2018).

However, media at times try to mould or bend the public opinion and have the capacity to change the viewpoint through which various events are perceived by the people. Media limiting itself to the dissemination of information in a neutral manner to the general public is more preferable than trial by media.

"Trial" in an ordinary sense means that a proceeding that takes place before a Court of justice. According to Black's Law Dictionary, "*trial*" means "*a formal judicial examination of evidence and determination of legal claims in an adversary proceeding*".[52] The term "*Trial*" is also defined under the Section 2 (7) of the Banker's Books Evidence Act, 1891 as "*any hearing before the Court at which evidence is taken*".[53] So, these definitions show that media is not the competent authority for conducting a trial. But "trial by media" is of colloquial origin indicating the role taken up by media virtually of a judicial forum and assigning itself the adjudicatory process.

To keep up with the increasingly competitive market, the media frequently distorts the facts and sensationalize news stories to grab the attention of the public. The media is frequently found publishing biased opinions and spreading prejudice in the name of "news". There are many incidences when the media is found conducting a trial of an accused and giving its own decision even before the court passed any judgment.

The Supreme Court of India has recorded on the consequence of media trial as under:

"the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial impossible but means that regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny".[54]

Media trial is not appreciated in a democratic society and there is judiciary to conduct such trial, which is considered as the competent institution for the administration of justice.

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[52] Justice V. Rajkumar, "Trial by Media", http://www.livelaw.in/trial-by-media/ (April 27, 2018).

[53] Ibid.

[54] R. *K. Anand v. Delhi High Court*, (2009) 8 SCC 106.

The Delhi High Court in a *suo motu* case[55] observed that the justice delivery system in India moves forward in a very slow manner and in that course of time if a person who is "innocent" is subjected to media trial then there is no real remedy for that person. Consequently, in a case of "trial by media" it is rare to see any person approaching a Court of law to claim relief either by way of an "injunction" or for "damages". The Court further said that there is a great responsibility of all the Courts to protect the individual's rights and reputation from an unwarranted "trial by media" by being more vigilant and pro-active. In a sense, the Courts have to energize the "rule of law". It is important to protect a citizen from being victimized by the media, even though it adds burden to the criminal courts. Suppose on the basis of a suspicion that a crime has been committed, a person is arrested then the person should not be declared as innocent or guilty by the media because it is not the function of media. This function comes under the domain of the judiciary. So, the "trial by media" affects the judgment of the Court and at the same time also harms the accused because the accused should be generally presumed as innocent until he is proven guilty.

3.2 FAIR TRIAL

One thing that the criminal administration system of every civilized nation should have in common is the minimum right to fair trial for every accused person regardless of their status. Both the accused and the society are benefited when the fair trial is conducted. One of the important features of democracy is the conducting of a fair trial.

Fair trial means a trial that takes place before a judge who is impartial, a prosecutor who is fair and in a calm judicial atmosphere. Every country that respects the "rule of law" considers the "right to fair trial" as an indispensable right. [56]

Article 10 of the UDHR runs as follows "Everyone is entitled 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 UDHR provides that "Everyone charged with a penal offence has the right to be presumed innocent until

[55] 2009 (1) KLD 133.

[56] *Zahira Habibullah Sheikh & Anr vs State of Gujarat*, (2004) 4 SCC 158.

proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Article 14 and 16 of "International Covenant on Civil and Political Rights" also protects the "right to fair trial" and it is binding on the member states.

When taking into consideration the Indian legal system, this international promise relating to the fair trial has its reflection in the constitutional scheme and procedural law. "Right to fair trial" in a "criminal prosecution" is impliedly mentioned under the "right to life" guaranteed by Article 21 of the Constitution of India.[57] There are two objects in view; it should be fair for both the prosecution and the accused.[58] The Supreme Court observed that *"if the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law"*.[59]

Fair trial involves independent judges, public hearing, the presumption of innocence, right to counsel and many other factors. The proceedings of a case are expected to be conducted by impartial, independent and competent Judges to ensure the fair trial.

Public hearing is another important component of the concept of a fair trial. Article 14 of ICCPR provides for "fair" and "public hearing", but the Article 14 also mentions that "The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

It is accepted under the common law that the principle of "presumption of innocence" is applied in a criminal prosecution and it is necessary that the guilt of the accused is proved beyond reasonable doubt. This principle has also been adopted by various other countries. In Indian legal system, it is one of the cardinal principles wherein it is presumed that the accused is innocent unless proved guilty in a criminal case.

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[57] Press Law Guide, "Fair Trial", http://www.thehoot.org/press-laws-guide/fair-trial-6286 (April 27, 2018).
[58] *T.H. Hussain v. M.P. Modkakar*, AIR 1958 SC 376.
[59] *K. Anbazhagan v. Superintendent of Police*, AIR 2004 SC 524.

The Supreme Court of U.S. held that the “sixth amendment” guaranteeing the “counsel” to “indigent defendants” was so “fundamental and essential to a fair trial” that the “due process clause” required States to provide “counsel” to all “indigent defendants” in felony cases.[60] In India, under the article 22 (2) of Constitution of India every person shall have “the right to consult, and to be defended by, a legal practitioner of his choice”. The Supreme Court of India observed that a procedure cannot be regarded as just and fair if an “accused”, who is very poor to afford a lawyer, is not provided with a lawyer at State’s expense.[61]

So, right to fair trial in a democracy is of utmost importance from proper administration justice. When a fair trial is denied to an accused, it is as much injustice to the “accused” as much as it is to the “victim” and the “society”.[62]

3.3 ROLE OF MEDIA IN DEMOCRATIC SOCIETY

The Supreme Court of India explained that the right of the people to know is the fundamental principle behind the “freedom of the press”. The Supreme Court stated, “The primary function, therefore, of the press is to provide comprehensive and objective information on all aspects of the country’s political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion”.[63]

The “freedom of the press” promotes the “right to know” by giving the access to the general public to all sources of information. It keeps the public aware about all the issues, so that when the time comes to make a reasonable decision on matters relating to the society at large, the people are ready. When it comes to investigative journalism two elements are most significant, firstly, “the subject should be of public importance for the

[60] *Gideon v. wainwright*, 372 U. S. 335 (1963).
[61] *Maneka Gandhi v Union of India*, AIR 1978 SC 597.
[62] Justice Y. Srinivasa Rao, “Fair Trial”, https://articlesonlaw.wordpress.com/2016/12/07/fair-trial/ (May, 2018).
[63] *In Re: Harijai Singh and Anr.; In Re: Vijay Kumar*, (1996) 6 SCC 466.

reader to know" and secondly, an endeavor is being made to conceal the truth from the public.[64]

The role of media in a democracy is to promote transparency. The media allows the general public to express their views on issues of public importance. In a celebrated case, Jeremy Bentham, a philosopher of the 19th century, observed that "*In the darkness of secrecy, sinister interest and evil in every shape are in full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial*".[65]

There is no doubt that powerful independent journalism still exists. In India, the press busted many big scams in the recent past. "A positive by product of changes stimulated by the media and addressed by the Courts is that more people in India are conscious of their constitutional rights than ever before." But the freedom of the press is required to be utilized for the good of the public rather influencing their mind, with the intention of grabbing maximum attention on news items which may not be of public interest, only for the purpose of excelling in the competition to be on the top.

3.4 MEDIA AND FREEDOM OF SPEECH AND EXPRESSION

The freedom relating to media does not find its mention anywhere in the Part III of the Indian Constitution. There is no such explicit guarantee under the Constitution of India about this freedom of media. This freedom is implied in Article 19 (1) (a) of the Constitution of India guaranteeing "freedom of speech and expression". Even if there is no such specific mention about this freedom, it created no such difficulty for the Courts in India to protect the freedom of media.

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[64] Zehra Khan, "Trial-By-Media: Derailing Judicial Process in India", 1 MLR (2010), p. 94.
[65] Anil B. Divan, "Making judiciary more transparent", http://www.thehindu.com/opinion/lead/making-judiciary-more-transparent/article6277602.ece (May 7, 2018).

In Constituent Assembly Debates, Dr. B. R. Ambedkar said that:

"*Press has no special rights which are not to be given or which are not to be exercised by the citizens in his individual capacity. The editor of a press or the manager is merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of the press.*"[66]

Freedom of media is not absolute and even committed liberals are of the view that free speech rights are not unconditional or unlimited but they are not sure about what are the limits that should be set.[67] Free press does not provide a license to publish and broadcast anything without any restriction. It is the duty of the media to make sure that the information received by the general public is accurate and does not in any way affects the rights of other. Thus, the Article 19 (2) sets out the grounds on which limits can be imposed upon the "freedom of expression". Those "limits" flow from the "right to privacy", "right to reputation", the law of "contempt of court" etc.

So, while criticizing a person if the press indulges in libel or slander then the press has to be answerable in law for such an offence. Similarly, by using "freedom of speech and expression" as a veil by the "press", it cannot infringe the privacy of an individual. Also, the press cannot take up parallel trials when a trial is going on before a court of law. This will amount into "contempt of court".

One of the most criticized and serious issues of the day is the coverage of sensational crimes by media and ignorance of the real issues in question. In the beginning, they take up the so-called "evidence" to bolster up a "scoop". Media is not acquainted with the traditional rules according to which evidence are to be cited and therefore, are not well versed to tell about the evidence that are substantial for declaring an accused as a convict. Thus, this frequently takes away from the victim the right to justice. This type of mockery of the right to justice is more evident when an ordinary criminal or accused is made equivalent to a seasoned criminal or a felony by the media, without conducting any appropriate investigation on the subject-matter. In most of the cases, media is least

[66] Dr. Ambedkar's Speech in Constituent Assembly Debates, VII, 980.

[67]Onora O' Neill, "A right to offend", https://www.theguardian.com/media/2006/feb/13/mondaymediasection7 (May 5, 2018).

bothered by the reputation of the accused and is more concerned with creating a "Breaking News Item".

Nowadays, it is very common to see that the accused is put on trial by media and is declared as convict without even giving an opportunity to the other side to be heard, which blatantly harms the natural justice principle. It is not only the reputation of the accused that is destroyed but also the family of the accused who suffers along the way and even after the accused is acquitted by the Court the ruined reputation is beyond retrieval. So, even after their acquittal, it becomes difficult for them to restore their former image in the eyes of the public. It seems that "media trial" has moved to "media verdict" which clearly indicates the misuse of freedom of speech.

After the introduction of Target Rating point (TRP) the competition has increased among the media houses which has created great amount of pressure on journalism. Before the introduction of this TRP, journalists used to work with braveness, integrity and impartially. But with the need of increasing TRP scales, the media war has become ruthless. For the purpose of regulating the media certain guidelines and norms are set by the Press Council of India.

Lately, the media is misusing its freedom in the garb of the "freedom of speech and expressing". "Freedom of expression" is allowed only to the extent to which it does not have any harmful effect on others.

3.5 TRIAL BY MEDIA AND ITS ILL-EFFECTS

Media is considered as the "fourth pillar" in a democracy. It helps the masses to gather all the information available with respect to socio, political and economic matters. Over the past decades, it has developed gradually into a key distributor of news by way of newspapers, magazines etc. Electronic media have increased the reach of the media because it has more impact on the general public and instantly influences their mind. Media has become a symbol of change and is not just merely a means for communicating

news, which has created a huge amount of responsibility for the media to be cautious while disseminating any information.[68]

There are instances where the media played a vital role in bringing the accused of heinous crime to justice, but the question arises that to what extent this principle of "free speech" can be expanded to subvert "fair trial".[69] Trial by media encourages the people to rely more on immediate media justice rather than waiting for the Court of law to give its verdict on any particular case.

"Every institution is liable to be abused, and every liberty, if left unbridled, has the tendency to become a license which would lead to disorder and anarchy."[70] Most of the times media fails to acknowledge the distinction between an accused and a convict and as a result it affects the principle of "*audi alteram partem*".[71] So, according to media, any person who is an accused on suspicion shall be declared as convict without even letting the law take its own course and at times the impatient public blindly believes the media cacophony.

In India, the media has transformed into a "*Populace Court*" or "*Janta ki Adalat*", trying by holding "*media trials*" not only to represent a biased opinion even before the declaration of a verdict but also generating a pressure on the courts to settle in accordance with their opinion.[72]

The trend that media trial has introduced into this contemporary world is that "public interest" is not important but "what the public is interested in" is more important.[73] With the growth of electronic media, the conduct of parallel trials by media outside the portal of Court has reached new peaks. The parallel trial conducted relating to *sub judice* matters hampers the ability of a judge to decide a matter on its merits. When any decision

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[68]Rashmi Rawat, Media trials: The Escalating Influence on Judiciary, MYADVO Blog, https://www.myadvo.in/blog/media-trials-the-escalating-influence-on-judiciary/ (May 1, 2018).
[69] Shabnam Saidalavi, "Media trial: freedom of speech v. fair trial", https://www.lawctopus.com/academike/media-trial-freedom-of-speech-v-fair-trial/ (May 2, 2018).
[70] Express Newspapers v. U.O.I., (1997) 1 SCC 133.
[71] Prerana Priyanshu, "Freedom Media Trial: Freedom of Speech v. Fair Trial", 3 IJLLJS (2015), p. 285.
[72] *Supra* note 68.
[73] *Supra* note 64, p. 90.

of the judge goes against this so-called "*media verdict*" then the media even try to term it as bias or corrupt. If the *sub judice* matters are constantly updated and scrutinized then a clouded environment is created then it leaves the case in a perilous situation.

Media possesses enormous powers to subconsciously affect any case and a question is frequently raised whether by way of participative journalism the media has turned out to be the "*voice*" of masses or the "*noise*", that subliminally influences the judge presiding over a matter, which has been publicly tried prior to the Court's conclusion.

3.5.1 MEDIA TRIAL AND ITS EFFECTS ON FAIR TRIAL

The problem with media trial is that it has created some sort of "tug of war" between "free speech" and "free trial". The justifications as given by media for the need of complete freedom of the press is that this freedom originates from the public's right to indulge with the issues of the day which in some manner affects them. It is evident in case of media trials that the media frequently takes up the role of a judge and tends to override the "justice delivery system" by prejudicing, sensationalising and twisting facts. Ultimately, resulting in a deviation from the "justice delivery process" and crushing the "right of the accused to fair trial". But the need is to bring a balance between the "right of the press to free speech" and the "right of the accused to fair trial" which is equally important. For the purpose of administering of justice, the guarantee of fair trial is of utmost importance. If there is any scope of bias or unfairness in a criminal trial then the "criminal justice system" would be at risk and the public confidence on the system will be shaken.[74]

The "United Nations Basic Principles on the Independence of the Judiciary", inter alia, provides that "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." There are also provisions in the ICCPR dealing with the fair trial.

According to Article 14 of ICCPR, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and

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[74] Deeksha Malik and Harsha Jeswani, Trial by media: perverting the course of justice, http://www.lex-warrier.in/2015/09/trial-by-media-perverting-the-course-of-justice/#identifier_7_6363 (May 3, 2018).

obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Like the principle of fair trial, the free press also gets its recognition in the International Charters such as the ECHR and ICCPR. But at the same time these International charters impose certain "duties" and "responsibilities" upon the press to be careful while disseminating information. Under the Constitution of India there is no such specific Article explicitly dealing with fair trial but can be found impliedly under Article 21 of the Constitution. Same is the case with "freedom of the press", which finds no clear and direct mention under the Constitution of India but can be found impliedly under Article 19 (1) (a) of the Constitution.

On several occasions, media is found to exceed its right through its publications which are considered to be prejudicial to the "right of the accused" to have a "fair trial". It tends to violate the principle of "presumption of innocence", on which the Indian criminal justice system relies, by conducting media trials. Media often forgets the fact that law is not governed by emotions. The significance of the right to fair trial can be understood from the fact the Article 21 of Constitution of India, which impliedly deals with fair trial, cannot be suspended even during an emergency.[75]

The Supreme Court of India reiterated that "*an accused has a right to fair trial. He has right to defend himself as part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India*".[76]

In the Indian system of "administration of justice" relating to criminal cases the fundamental principle that needs to be kept in mind is that a person brought before a court as an accused is to be presumed "innocent" unless the person is declared as guilty by the criminal court which is competent to declare that person guilty. It is the prosecution upon whom the burden is to prove the accused guilty in a criminal trial and there should not be any scope of doubt, i.e. it must be proved "beyond reasonable doubt". But during the trial by media no such criteria is adopted and for them the hearsay evidence or suspicion or alleged confession before the police by the accused, which is not

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[75] *Supra* note 71, p. 287.
[76] *T. Nagappa v. Y.R. Muralidhar*, (2008) 5 SCC 633.

even admissible as an evidence in a trial, are considered to be more than enough material to support and strengthen a "scoop" which is served as a "breaking news" item to the unsuspecting public.[77] These types of trials conducted by media have a deteriorating effect upon the principle of fair trial.

In the recent past, there have been certain considerations on the scope of the news agency or news reporter's right to interview persons facing any criminal charges. The right to interview persons facing any criminal charges is distinguished from those who are already being convicted of offences. In case of the person facing criminal charges, a careful and cautious approach has been adopted. It is because when a trial is pending any information regarding the innocence or involvement of an accused person in a crime may harm the trial. On the other hand in case of a person already convicted, the approach adopted is comparatively liberal and permission is granted to interview them which make the society appraise the feelings of the convict or the elements that resulted in his conviction.[78]

The Supreme Court of India on "trial by media" has observed that the law has established a procedure according to which the trial of an accused person is to be conducted and a trial by "electronic media", "press" or "public agitation" is contradictory to rule of law. This may result in miscarriage of justice. A judge should never get influenced by such pressures and strictly follow the rule of law. Once a judge finds out that the person is guilty of an offence then the question relating to the sentence to be awarded should be addressed by the Judge himself, and it must be according to the provisions of the law.[79]

The position was appropriately summarized by Justice H.R. Khanna as under:

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[77] *Supra* note 52.

[78] Kauser Hussain and Srishti Singh, "Trial by Media: A Threat to the Administration of Justice", 3 SAJMS (2016), pp. 202-203.

[79] *State of Maharashtra v. Rajendra Jawanmal Gandhi*, 1997 (8) SCC 386.

"*Certain aspects of a case are so much highlighted by the press that the publicity gives rise to strong public emotions. The inevitable effect of that is to prejudice the case of one party or the other for a fair trial. We must consider the question as to what extent are restraints necessary and have to be exercised by the press with a view to preserving the purity of judicial process. At the same time, we have to guard against another danger. A person cannot, as I said speaking for a Full Bench of the Delhi High Court in 1969, by starting some kind of judicial proceedings in respect of matter of vital public importance stifle all public discussions of that matter on pain of contempt of court. A line to balance the whole thing has to be drawn at some point. It also seems necessary in exercising the power of contempt of court or legislature vis-à-vis the press that no hyper-sensitivity is shown and due account is taken of the proper functioning of a free press in a democratic society. This is vital for ensuring the health of democracy. At the same time the press must also keep in view its responsibility and see that nothing is done as may bring the courts or the legislature into disrepute and make the people lose faith in these institutions.*"[80]

For the purpose of protecting this right to fair trial provisions are included in the Contempt of Courts Act, 1971 and under Articles 129 and 215 of the Constitution of India, which empowers the Supreme Court and High Courts respectively "to punish for contempt of itself". Therefore, liability for Contempt of Court may arise on the part of a journalist who publishes anything that may prejudice a "fair trial" or harms the impartiality of a Court to decide a cause on its merit.[81]

In *Saibal Kumar Gupta and Ors. v. B.K. Sen and Anr*[82], the Supreme Court held that:

[80] Ibid.

[81] Om Prakash, Right to Privacy in Sting Operations of Media, LXIX (10)| Odisha Review| 56, 59 (2013) http://magazines.odisha.gov.in/Orissareview/2013/may/engpdf/57-61.pdf, (05/05/2018).

[82] AIR 1961 SC 633.

"*No doubt 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 that investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution. There is no comparison between a trial by a newspaper and what has happened in this case.*"

Another disturbing ramification of media trial that goes unnoticed is the huge amount of pressure that the lawyer undergoes and thus compelling him not to take up the case of the accused which will eventually result in a trial without any "legal representation". The right to be legally represented is considered to be one of the essential components of the fair trial. Denial of being represented by a lawyer is denial of the "principles of natural justice". It is the right of every person to be legally represented in a trial and to place before the Court his points in relation to the case. No one can preclude the person from being represented by a lawyer in a trial.

There are many instances where the lawyer representing an accused was criticized by media. It was seen in the Jessica Lal Case when renowned lawyer Ram Jethmalani decided to appear for the accused Manu Sharma, his morality was questioned and one of the media houses also declared that Jethmalanii was trying to "defend the indefensible". Again in the 26/11 trial, where the main suspect Ajmal Kasab was represented by a lawyer named Abbas Kazmi, who claimed that he had gone through mental harassment by media and the Public Prosecutor which distressed him. These instances raise an important question that is the judiciary of India so weak to administer justice that the opportunity to be defended needs to be denied.[83]

There is only increase of the pressure upon the lawyers once they decide to take up a case of the accused in a sensational case and at the same time, his reputation is at stake. The "media verdict" of guilty directly impinges the "principle of fair trial" and there is a

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[83] *Supra* note 71, p. 289.

probability of the lawyers being intimidated which may result in refusal to take up such cases.

3.5.2 MEDIA TRIAL AND POTENTIAL EFFECTS ON THE SUBCONSCIOUS OF JUDGES

Another major issue that arises is whether the judges are influenced by the media. It is a serious matter to be worried about and there are allegations on the "media trials" having influence over the judges. The American view differs from that of the Anglo-Saxon view with respect to this matter. The former view is that "Jurors" and "Judges" are not subject to be affected by the publication of media, whereas the latter view is that there is a scope of judges getting influenced subconsciously though not consciously which makes the people think that such media publications have an influence upon the judges.[84] One of the most celebrated Judges of the 20th Century Lord Denning clearly specified in the Court of Appeal that Judges won't be guided by the "media publicity", but the House of Lords did not accept this view.

In *John D. Pennekamp v. State of Florida*[85], it was observed by Justice Frankfurter that "*No Judge fit to be one is likely to be influenced consciously, except by what he see 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*."

Any publication that intends to poison the minds of the judge should amount to contempt of court. Although, the reliance is made on the impartial and competent judges in a judicial system but still restraint must be put on media trial which may have potential influence on the judges subconscious.

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[84] 200th Law Commission of India Report, Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure (amendments to the Contempt of Court Act, 1971), 46 (2006), http://lawcommissionofindia.nic.in/reports/rep200.pdf (May 9, 2018).

[85] (1946) 328 US 331

The capacity of the media to influence conduct and formulations of biases and opinions cannot be precluded. In *In Re: P. C. Sen*[86], it was expressed that the genuine risk of prejudicial remarks made in newspapers or by any mass media which must be guarded against is the *"impression that such comments might have on the Judge's mind or even on the minds of witnesses for a litigant."*[87]

The fragility of the judicial system originates from the very fact that judges are human beings and the rational process of adjudication may be tainted by an undue influence of irresponsible expression.[88] In *Rao Harnarain v. Gumani Ram*[89], the Court deprecated the practice of "*trial by media*", wherein the Court observed that journalist cannot take up the role of an investigator during the pendency of a case and then try to influence the Court. Influence on the Judges by the media has been denied tacitly by the Judiciary of India. The Supreme Court observed that, "*the grievance relating to trial by press would stand on a different footing. Judges do not get influenced by propaganda or adverse publicity.*"[90] The judiciary has not directly accepted any influence of media trial on the judges but showed concern about the impact that the media might have on the trial which is pending before a court.

3.5.3 MEDIA TRIAL AND ITS EFFECTS ON RIGHT TO PRIVACY

Article 12 of the UDHR runs as follows "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." The "right to privacy" is declared as a "fundamental right" in India by the Apex Court.[91]

The law of privacy is a result of an increasing individualistic society wherein the attention has been moved from society to the individual. Every person has a right to be

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[86] AIR 1970 SC 1821.
[87] Ibid, para 18.
[88] *Supra* note 64, p. 97.
[89] AIR 1958 P H 273.
[90] *Balakrishna Pillai v. State of Kerala*, AIR 2000 SC 2778.
[91] *Justice K. S. Puttaswamy (Retd.) and Anr. V. Union of India and Ors.*, WRIT PETITION (CIVIL) NO 494 OF 2012.

left alone, along with a free and safe personal space without any injury or violation and it is recognized by the law of privacy.

The "right to privacy" and the "right to freedom of speech and expression" can be considered as the two sides of the same coin. A person's right to be left alone may be violated by the other person's right to be informed. With the evolution of the media, many issues relating to privacy has come into focus. There is always a risk of the private life of a person being brought to the public domain by media resulting in an invasion of privacy and space of a person.

The Apex Court of India in *R. Rajagopal v. State of Tamil Nadu*[92] observed that, *"a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."*

"In the famous Double Murder Case, the newspapers were completely filled with the transcripts of emails of the deceased girl and denigrated her character. Thus, violating the right to privacy of the parties involved in the case."

There is a conflict between "right to privacy" and "media trial". Therefore, the journalist should be careful to avoid the risk of being hauled up by the law for infringement of privacy. They have to act in good faith and in public interest. Journalists must not forget that they have no legal basis to keep their sources of information to themselves. In most cases, however, the law respects the confidentiality of the sources of a journalist unless public interests and justice are involved. All of these ill effects of media trial on the general public, lawyers, judges and administration of justice by way of having negative impacts on the right to fair trial, right to reputation, right to privacy, right to be legally represented provides that media trial can never be justified.

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[92] AIR 1995 SC 264.

CHAPTER – IV

PREJUDICIAL PUBLICATIONS BY MEDIA IN THE LIGHT OF LAWS RELATING TO CONTEMPT OF COURT

4.1 BACKGROUND OF LAW RELATING TO CONTEMPT OF COURT

The Constitution of India is based on the "Rule of Law" principle. Every civilized and democratic society is based on this principle. The task of guarding this principle is assigned to the judiciary; and for the purpose of making it easier to perform the duties and functions by the judiciary, the authority and dignity of the courts must be protected and respected. In India, the judiciary has been vested with the power to punish for its contempt.

The Contempt of Courts Act, 1926 was the earliest effort made for having a comprehensive legislation in relation to contempt of courts in India. But the Act of 1926 was not considered to be comprehensive enough and was replaced by the Contempt of Courts Act, 1952. However, the Contempt of Courts Act, 1952 was also not wide enough and did not even define "contempt". Both the Acts did not define civil and criminal contempt. Finally, the Contempt of Courts Act, 1971 came into being which defined both "civil" and "criminal" contempt. This Act regulates the powers and procedure to punish for contempt of the courts.[93]

Article 19 (1)(a) of the Constitution of India guarantees the "right to freedom of speech and expression", but 19(2) deals with various grounds on which this right can be restricted, including the law of contempt, provided that the restrictions are reasonable. Under Articles 129 and 215 of the Constitution of India, the Supreme Court of India and the High Courts of States respectively are empowered to punish people for their contempt.

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[93] Juhi P. Pathak, INTRODUCTION TO MEDIA LAWS AND ETHICS, 1st ed. 2014, p. 56.

4.2 SANYAL COMMITTEE REPORT

In the year 1961, a special committee was set up, under the chairmanship of Late H. N. Sanyal, who was the additional solicitor general at that time, and the committee was known as the Sanyal Committee. In the year 1960, a Bill was introduced in the House of the people to amend the law relating to the Contempt of Courts. It was set up for the purpose of examining the Bill. The committee conducted a detailed study of the law and the problems with respect to the contempt of courts in India and other foreign countries. While making recommendations, the committee gave attention to the significance given to the "freedom of speech" under the Constitution and the necessity of protecting the dignity and status of courts and the interests of "administration of justice". The committee submitted its report in the year 1963. The Contempt of Courts Act, 1971 is considered as the product of Sanyal Committee's report.

The committee recommended that in case of criminal matters, the date of "arrest" should be regarded as the beginning of "pendency" of a "criminal proceeding". It agreed that the starting point was not when the FIR is filed. In 1963, a Bill was formulated by the Sanyal Committee, where it was stated that if "criminal proceedings" were "imminent" then the "prejudicial publications" would be "criminal contempt". The committee intended in protecting the interests of the suspects in such situations where the "criminal proceedings" were "pending" or "imminent". If any person making any such publication can prove that there were no "reasonable grounds" for him to believe that the "criminal proceeding" was "imminent", then he would not be liable for the contempt of court. Further, it is to be presumed that if there has not been any arrest, then there are no grounds for believing that the proceedings are "imminent".

4.3 JOINT COMMITTEE OF PARLIAMENT (1969 – 1970)

The Joint Committee of Parliament (Bhargava Committee) reviewed the "Bill of 1963 which was prepared by the Sanyal Committee" and after discussing briefly, the reference to "imminent" proceedings was dropped by the decision of the Joint Committee. The reasons given for such decision ware firstly, the term "imminent" was vague and

secondly, an expression that vague may unreasonably restrict the "freedom of speech" if the law applied to "imminent" criminal proceedings. As a result, the Joint Committee recommendations led to the omission of all references to "imminent" proceedings or to "arrest" from being the commencement of a pending "criminal proceeding" under the Contempt of Courts Act, 1971.

4.4 CONTEMPT OF COURTS ACT, 1971

It is well known by now that the "right to freedom of speech and expression" guaranteed by the Constitution of India is "not absolute" and "reasonable restrictions" may be imposed on this right based on various grounds including "contempt of court". Under the Contempt of Courts Act 1971, if a publication interferes or in any way tends to interfere with the administration of justice, then it may result in criminal contempt and can only be prevented by imposing "reasonable restrictions" on the "right to freedom of speech and expression". There have been debates relating to the overriding effect of the law of contempt over the "fundamental right" to "freedom of speech". This piece of legislation does not tend to immune the court by keeping it above the law but to protect the "administration of justice" from being injured. Under the law of contempt, the punishment is imposed not with the object of protecting the Courts or the judges but to protect the "administration of justice".

Thus, this Act does not in any way give excess power to the judiciary. So far as "interference" with the "criminal law" is concerned, sections 2 and 3 of the Act of 1971 are relevant.

Section 2(c) of the said Act runs as follows: "Criminal contempt means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or

(ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or"

(iii)"Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

According to section 3 of the said Act, if a person publishes any matter without any reasonable ground to believe that the proceeding was pending and if the matter published is interfering with or obstructing the "course of justice" or tends to interfere or obstruct it, the person would not be liable for contempt of court. Further, this section provides that if the civil or criminal proceeding is not pending during any such publication then it will not amount to contempt of court.

It is evident after examining the Section 3 that the pre-trial publications are considered to be "immune" from the liability of "contempt of court". According to the Explanation to section 3, only after the filing of "charge-sheet" or "challan", or issuance of "summons" or "warrant" by the "criminal court", a criminal proceeding will be deemed to be pending, even though a person comes within the "protection of the court" after his "arrest", for he has to be brought before the Court within twenty-four hours under Article 22(2) of the Constitution of India. Much importance has not been given by the Act of 1971 to the "pre-trial period" as far as criminal contempt is concerned.

So far as the "criminal justice" is concerned there is very little restraint in the media. The Act immunises the media from prejudicial publications before a trial has been started. In a way, this gives media the freedom to publish and broadcast on such matters which may later turn out to be prejudicial to the trial that has not yet started. So, in the pre-trial stage, the publications made in the media affect the "right to fair trial" of an accused. It is evident in many cases where the media goes berserk and the media further speculates and point fingers even before a trial has been started. Such kind of publications often goes unchecked and therefore some form of legislative intervention is required to modify the word "pending" so that it also includes "arrest" as the time from when "pendency" of criminal proceeding begins.

4.5 200TH LAW COMMISSION REPORT

The "Seventeenth Law Commission" through its 200th report on "*Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure (Amendments to the Contempt of Courts Act, 1971)*" has made several recommendations with the view to address issues which are crucial in India so far as "criminal justice" is concerned. The Law Commission took this subject relating to media trial *suo motu*, after considering the large-scale coverage by the "print" and "electronic media" of crime and information relating to accused and suspects. With the increasing use of the television, there has been a change in the entire pattern of news publication and many of these publications have a prejudicial effect on the "accused", "suspects", "witnesses" and also on "judges" and mainly on the "administration of justice". According to the Indian legal system, a fair procedure is to be followed and accused or suspect must be presumed as "innocent" until the Court of law proves him guilty.

The "freedom of speech and expression" is guaranteed by the Article 19(1)(a) of the Constitution of India and "reasonable restrictions" may be imposed on this right based on various grounds including "contempt of court" as provided by Article 19(2). The "administration of justice" is not referred by the Article 19(2) but clear reference with respect to interference with the "administration of justice" is made in section 2 of the Contempt of Courts Act, 1971 defining "criminal contempt" and in section 3 as amounting to "contempt". According to the Act of 1971, if a publication interferes or in any way tends to interfere with the "administration of justice", then it may result in criminal contempt and can only be prevented by imposing "reasonable restrictions" on the "right to freedom of speech and expression".

After reading the section 3(2) of the said Act with the "Explanation", it is clear that complete immunity is given to the prejudicial publications interfering with the "course of justice" in a criminal case, when on the "date of publication" there is no "charge-sheet" or "challan" filed or no "summons" or "warrant" issued. It is only when a criminal proceeding is pending that the publications would be contempt. But the issue that arises is whether it should be allowed to remain as it is under the India Constitution or there is a

need to regulate such publications dealing with accused or suspects from the date of the arrests of the accused or suspects.

In the Law Commission Report, it has been pointed out that the Supreme Court and the House of Lords have accepted that the judges are affected subconsciously by the prejudicial publications relating to an accused or suspect. It may happen at a stage when bail is granted or refused or during the trial. Unlike the Contempt of Courts Act of 1971, the Acts of 1926 and 1952 did not define "civil" or "criminal" contempt. Until 1971, principles of "common law" were applied for treating the "prejudicial publications" which were made even before a person was arrested as contempt. Some of the Courts even treated prejudicial publications, made after a First Information Report (FIR) was filed, as "criminal contempt". In *Surendra Mohanty v. State of Orissa*, (Crl. App. 107/56 dt. 23.1.1961), the Apex Court held that in a criminal case the filing of an FIR could not be treated as the beginning of "pendency" of the case. [94] Based on this judgment, prejudicial publications got immunity from the law of contempt if such publications were made after the FIR is filed. In *A. K. Gopalan v. Noordeen*[95], the Supreme Court observed that a "prejudicial publication" about the accused or suspect which is made after a person is arrested then it could be treated as arrested.

According to the Law Commission, the Joint Committee's reasons for dropping the reference to "*imminent*" proceeding were flawed because the Committee's attention was not drawn to the decision in the A. K. Gopalan's case. After the judgment made by the Supreme Court, fixing the date of "arrest" to be the "starting point" of a "pending criminal proceeding", there was no ambiguity in the law. Through this case, the Apex Court balanced the rights of the accused and suspect and the rights of the media for publication. In this case, A. K. Gopalan was acquitted by the Court, who actually made a statement after the filing of an FIR but before an arrest was made, while the editor of the Newspaper and others were convicted for contempt because prejudicial publications were made after the arrest.

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[94] *Supra* note 84.
[95] 1969 (2) SCC 734.

According to the UK Contempt of Courts Act, 1981 the date of "arrest" is considered as the beginning of a pending criminal proceeding. The Law Commission Reports and the case laws in Australia, Ireland, Scotland also asserted that prejudicial publications would be criminal contempt if a person is "arrested" or the "criminal proceedings are imminent".

The landmark ruling in *Hall v. Associated Newspaper*[96] is the base of the provision in the Act of 1981 where "*arrest*" is fixed as the beginning of "pendency of criminal proceeding" and also followed in other jurisdictions. After a person gets arrested comes under the "care" and "protection" of the court as because the person is to be produced within twenty-four hours in the Court. Article 22(2) of the Constitution of India also guarantees the same.

The logic behind fixing "arrest" as the "starting point" is that once an arrest is made a publication about the person's "character", "previous conviction" or "confessions" etc may prejudice the case of that person even during the bail proceeding and it is possible that such publications could also have impact on the trial which would take place at a later period. On this basis, "*arrest*" and "*imminent*" proceedings are not treated as vague but are treated as sufficient in England and other countries.

In *Maneka Gandhi v. Union of India*[97], the Supreme Court held that the "*procedure established by law*" under Article 21 of the Constitution of India must be just, fair and reasonable. When the Joint Committee gave its report in 1970 and when the Contempt of Courts Act of 1971 was enacted, this was not the law.

According to the Law Commission Report, the starting point should be the date of "arrest" of a pending criminal proceeding and not the filing of charge-sheet. The Commission recommends for the amendment of the "Explanation" to section 3(2) of the Contempt of Courts Act, 1971, by adding a clause "arrest" in the "Explanation", making "arrest" the "starting point" to calculate "pendency" of a "criminal proceeding". This

[96] 1978 SLT 241.
[97] AIR 1978 SC 597.

amendment does not mean that all kind of publications is not permitted after arrest but what it means is that only the publications which are prejudicial are not permitted.

The Law Commission has further made a recommendation to use the word “active” rather than “pending” criminal proceeding in section 3 of the Act of 1971.

There are various other recommendations made by the seventeenth Law Commission. It has proposed section 10A, wherein subordinate Courts need not have to make a “reference” to High Court in case of “criminal contempt” of subordinate courts and the High Courts could be “approached directly without the Advocate General’s consent.”

The Commission also recommended that the Courts shall be empowered to pass “postponement orders” as to publication. Under UK Contempt of Courts Act, 1981, for the purpose of passing “postponement orders” special proof is required to be shown as to the “substantial risk of prejudice to the administration of justice”. The Commission has expressed in clear words that “real risk of serious prejudice” is to be proved before issuing any “postponement orders”. It has been proposed in section 14A of the Bill and the breach of such order will be contempt.

The Report of the Commission also mentioned the publications that would be prejudicial after arrests such as publications referring to confessions, previous convictions, character and this could be criminal contempt. Even the photographs published may make it difficult to properly indentify from the identification parade. There are other aspects which could be contempt like discrediting witness, deciding the “guilt” or “innocence” of the accused etc.

The Law Commission also recommended that it is necessary to train the journalist in some specific facets of law relating to “freedom of speech” under Article 19(1)(a) of the Constitution of India and also the restrictions permitted by the Article 19(2). The Commission made suggestions to even include those subjects in the curriculum for “journalism”, and special degree or diploma courses relating to “journalism” and law should also be started.

The Law Commission is of the view that for the purpose of remedying the interference with the due "administration of criminal justice" there is a need for the proper implementation of these recommendations. These recommendations of the Law Commission are believed to bring changes which will be beneficial for the country's criminal justice system.

CHAPTER – V

AN ANALYSIS OF THE EFFECT OF MEDIA TRIAL ON SOME PROMINENT CASES AND DEVELOPMENTS IN RECENT TIMES

5.1 JESSICA LAL MURDER CASE

In the year 1999, a murder of a model named Jessica Lal took place. The exact date was 29 April, 1999. On a Thursday night when Jessica Lal was working as a "bartender" at the "Tamarind Court" restaurant situated in Delhi was shot by a gun which resulted in her death. She was working with one of her friend named Shayan Munshi who was an actor. There were hundreds of people in that restaurant on that night including Manu Sharma, who is the son of Venod Sharma. Venod Sharma was a Minister at that time. Manu Sharma ordered a drink, to which Jessica Lal refused, and then Sharma even tried to offer her 1,000 rupees for a single drink, to which Lal refused again and when Sharma was repeatedly refused of serving a drink, he took out his revolver fired at the ceiling and then at her. She was then rushed to the hospital but died after some hours. Manu Sharma got out of that restaurant instantly after the firing the gun. She was then rushed to the hospital but died after some hours.

Many witnesses pointed Sharma as the culprit, including Shayan Munshi who was working as Bartender with Jessica that night. Police could not arrest Manu Sharma immediately because his friends helped him to hide and also destroyed the revolver. When he was finally arrested, he confessed the commission of murder during interrogation by police but was dismissed as evidence.

The trial finally began in the month of August, 1999 and the main witnesses became hostile. The key witness Shayan Munshi also claimed that he signed a statement which was in Hindi and he does not understand Hindi. Then in the year 2006, after many witnesses turning hostile, Manu Sharma was released by the trial court due to the failure on the part of the police to recover the weapon and also lacked evidence to establish that the cartridges which were found in the crime scene were fired from the same weapon.

As a consequence of the ruling, there was a huge public outcry and several protests were started taking place. The media actively started publishing and broadcasting the issue and also claimed that power was misused by Manu Sharma's father to influence the outcome.

On March, 2006, the police appealed the High Court of New Delhi on the case which was then admitted by the Court and on December, 2006, Sharma was declared guilty by the High Court. During that period, a magazine named "Tehelka" carried out sting operations which revealed that Shayan Munshi could understand Hindi and that Manu Sharma's father bribed the witnesses to keep them away from the case. These operations were later broadcasted on different news channels. The channels also persuaded the public to give texts and mails concerning their views about the trial.

There always remains a danger that "trial by media" may take place in order to satisfy a passionate public. It would be an understatement to say that in the free press sensationalism is not uncommon. There is every scope of responses being provoked which helps in the continuation of a story and the channels can reap the benefits from the attention of the viewers.

Manu Sharma's defence lawyer Ram Jethmalani argued in the Supreme Court that his client was maligned and targeted by the media "before and during the proceedings", which proclaimed him guilty even after the trial court acquitted Manu Sharma.[98] But the Supreme Court rejected this argument and was of the opinion that some news items and articles that appeared in the press soon after the occurrence of the crime created some form of confusion within the minds of the people with respect to the "description and number of the actual assailants/suspects". The Court further admitted that the accused was affected by the "trial by media" regardless of the fact that the impact was to a very limited extent, but believed that it had no effect on the High Court's decision.[99]

The Court also held on the role of the media that if the freedom of the media is unregulated and unrestricted then it may lead to a serious risk of prejudice by publishing

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[98] J. Venkatesan, "Supreme Court confirms life term to Manu Sharma", http://www.thehindu.com/news/national/Supreme-Court-confirms-life-term-to-Manu-Sharma/article16371172.ece (May 11, 2018).

[99] Ibid.

"photographs" of the accused or the suspects even before the identity parades are started or by publishing statements which may completely hold the accused or the suspect as guilty even before the Court has passed any order. In the present day, in spite of the importance of print and electronic media, it is expected from the persons responsible in this field to make sure that "trial by media" does not act as a hindrance to fair investigation and more significantly it does not cause any prejudice in any manner to the right of defence of the accused. If either of this leads to obstruction in the fair investigation and trial it will amount to the travesty of justice.[100]

5.2 NOIDA DOUBLE MURDER CASE 2008

This is a case where a fourteen-year-old girl Aarushi Talwar and a forty-five-year-old Hemraj Baanjade was murdered and the case remains unsolved till today. Aarushi was the only child of Dr. Rajesh Talwar and Dr. Nupur Talwar and Hemraj was their domestic worker who lived with them. On 16 May 2008, dead body of Aarushi was discovered and at that time main accused was the servant Hemraj who was missing. However, on 17 May, Hemraj was found dead on the terrace. Failure to secure the crime scene brought heavy criticism to the police. When Hemraj was found dead, the police considered Rajesh Talwar as the prime suspect and claimed that Rajesh after finding Aarushi and Hemraj in an "objectionable" position murdered them or because Rajesh's alleged extra-marital affair had led to his blackmail by Hemraj and a confrontation with Aarushi.

After that, the case was transferred to the CBI, which initially declared the parents innocent and suspected Krishna Thadarai who was compounder in Rajesh Talwar's clinic, Rajkumar who was a domestic help for Talwar's friends and Vijay Mandal who was also a domestic help of Talwar's neighbour. The suspicions were based on a narco-test but all the three men were released due to lack of solid evidence.

Again in the year 2009, the investigation was handed over to a new team by the CBI. But they recommended for the closing of the case because of critical gaps in the evidence.

[100] *Sidhartha Vashisht v. State (NCT of Delhi),* AIR 2010 SC 2352.

Rajesh Talwar was considered as the sole suspect based on circumstantial evidence but because of lack of solid evidence, they refused to charge Rajesh Talwar. The parents called the suspicion on Rajesh Talwar by the CBI as baseless and also opposed the closure. CBI Court also rejected the claim by CBI about the lack of evidence and proceedings were ordered against the parents. In the year 2013, the parents were declared guilty and were sentenced to life imprisonment. In 2017, they were acquitted by the Allahabad High Court, calling the evidence against Talwars as not satisfactory and they were given benefit of doubt.

There was huge media coverage of the case. Both the print and electronic media overloaded with the news of Aarushi Talwar's murder in the month of May 2008. It was very shocking to see the media's insensitivity while reporting about the incident. The media began simulating objectionable scenes of Aarushi and Hemraj together and Rajesh coming with a golf club and hitting them. They were trying to portray Rajesh as the murderer without any Court verdict. Many spoke about the character of the minor girl, who already died. Even some of the media houses stooped so low that they kept talking about wife swapping and how it lead to Aarushi's death because she came to know about the dark secrets about her parents. All of these severely affected the reputation of the minor girl, the family and also the people who were mentioned by the media to be involved in such wrongdoings.[101]

A PIL was filed by Dr. Surat Singh, an advocate, disappointed by the role played by the press in the case. The Supreme Court expressed its serious concern regarding the coverage of the Arushi Talwar's murder case by media. The Court said that the media, both print and electronic, while publishing any news relating to the case in question should be cautious because it may prejudice the "defence of the accused" or may damage the reputation of every person associated with the case.[102]

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[101] Shoma Chaudhury, "Arushi Talwar murder case verdict is a chance for cops, courts and media to say: never again", https://www.dailyo.in/politics/aarushi-talwar-murder-case-rajesh-nupur-talwar-hemraj-injustice-media-trials/story/1/20055.html (May 11, 2018).

[102] J. Venkatesan, "Apex court to lay down coverage norms", http://www.thehindu.com/todays-paper/Apex-court-to-lay-down-coverage-norms/article15284971.ece (May 11, 2018).

Justice Katju opined: "*We will lay down guidelines on media coverage. We are not concerned about media criticizing us. Let media say anything about us, we are not perturbed. Our shoulders are broad enough and we will ignore it [the criticism]. We are for media freedom. What we are saying is there is no absolute freedom. See what happened to Dr. Talwar [Aarushi's father], his reputation is tarnished.*"[103]

Again in the year 2010, Rajesh Talwar sought for "judicial intervention against media reports allegedly making scurrilous insinuations on the character and motives of the Talwar family." Talwar alleged that the media kept on publishing in spite of the "interim order" earlier passed by Supreme Court in the year 2008, requiring the media to be cautious while reporting a crime. The Supreme Court ordered restraint on "*published material which may interfere with the investigation process in respect of all cases.*"[104]

The sensationalized coverage by media of this case which included salacious allegations against Aarushi and the suspects were strongly criticised by many as "trial by media".

5.3 SUNANDA PUSHKAR DEATH CASE

Sunanda Pushkar, the wife of renowned politician Shashi Tharoor, was found dead in a hotel at Delhi on January 17, 2014. Then the Delhi police were informed by Shashi Tharoor about the death. The body was recovered by the police and was sent for postmortem. Initial reports claimed that it was a suicide but later reports mentioned that the reason of death was not natural and injury marks on the body were revealed in the preliminary autopsy report given by the AIIMS. They also made it clear that the cause of death may or may not be the injuries. Drug overdose was indicated as the reason of death by the autopsy report. Finally, an investigation was ordered by Sub-Divisional Magistrate to scrutinize the reason of poisoning and to find out whether it was a suicide or murder. By October 2014, the medical team examining Pushkar's death came to a conclusion that

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[103] Ibid.

[104] Express News Service, "Aarushi murder case: SC slams 'sensationalist' media", https://indianexpress.com/article/india/crime/aarushi-murder-case-sc-slams-sensationalist-media/lite/ (May 13, 2018).

the death was due to poisoning. Then the police on January, 2015 filed an FIR and the murder case was registered against an unknown person.[105]

On the very same day of the death of Sunanda Pushkar, without any delay, the media reached the scene and since then we have been witnessing the story of mysterious murder case dominated by the media. When the Delhi Police Commissioner was asked by the media houses about labeling Tharoor as the prime suspect, then he refused to label Tharoor and said that they were in no hurry to question Tharoor. But as the media always does, started with their media trial and declared Shashi Tharoor as the murderer.[106]

Disclosing of half-truths, cherry-picking of facts and twisting of statements were considered to be more preferable than trying to put forward the actual facts about the case. Some of the media houses were continuously showing a statement of some distant cousin of Pushkar claiming that it was a clear case of murder and Tharoor was the murderer.[107]

The media was blatantly narrating personal conversations maligning people, confidential medical reports etc. These journalists for the sole purpose of remaining in the competition were trying to play an autopsy surgeon, cop, scientist, investigator, forensic expert and most significantly trying to play the role of a judge, which as a result affects the proper administration of justice. This trial by media on Sunanda Pushkar's death case creates the necessity to have a formal entity to set out some norms and responsibilities to media about media ethics because they have miserably failed in their promise of self-regulation.[108]

In the year 2017, Shashi Tharoor filed a defamation suit in Delhi High Court against a well known media house. The Court observed that the "right to silence" of Shashi

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[105] Raj Shekhar, "Sunanda Pushkar was murdered: Delhi Police", https://timesofindia.indiatimes.com/city/delhi/Sunanda-Pushkar-was-murdered-Delhi-Police/articleshow/45775554.cms (May 13, 2018).
[106] Shehzad Poonawalla, "In defence of Shashi Tharoor", https://www.news18.com/news/politics/in-defence-of-shashi-tharoor-736044.html (May 14, 2018).
[107] Ibid.
[108] G. Pramod Kumar, "Sunanda Pushkar's death case: How reckless TV channels invite state control", https://www.firstpost.com/india/sunanda-pushkars-death-case-reckless-tv-channels-invite-state-control-2053661.html (May 14, 2018).

Tharoor must be respected by the Journalist and his channel during the pendency of the investigation in Sunanda Pushkar's death case. The Court further said that the Journalist and his channel are free to state facts in relation to the investigation but cannot announce Shashi Tharoor to be the murderer. The ground on which the suit was filed was that by incriminating Shashi Tharoor in the death of Sunanda Pushkar it risked prejudicing the investigation and any subsequent trial. The suit also raised the concern for a balance between free speech and media trial[109]

The Court was of the view that after the commencement of the criminal investigation media reporting needs to be sensitive to the uncertainty relating to the questions rose in the proceedings. The "press" cannot declare anyone convict or insinuate anyone guilty or make any kind of unsubstantiated claims. Care and caution must be taken by the press while reporting on pending trial or matter under investigation.[110]

Media is not restrained from informing about the facts of a case but is restrained from making any prior judgment because it is not competent to conduct a trial.

5.4 M. P. LOHIA v. STATE OF WEST BENGAL[111]

In this case, a suicide was committed by a young wife at her parent's house and her parents made allegations of demand of dowry but her in-laws pleaded that their daughter-in-law was suffering from mental illness. Then both the parties went through the creation of documents and evidence to support their arguments and the matter was *sub judiced*. Proceedings for grant of anticipatory bail were pending. In a magazine named "*Saga*" an article named "*Doomed by Dowry*" was published and the article was written by Kakoli Poddar. The writer wrote the article based on the interview of her with the deceased's family. This article gave the version of the tragedy of the deceased's family and quoted the deceased's father in detail regarding his version of the case. All the facts mentioned in

[109] Devika Agarwal, "Shashi Tharoor's 'right to silence': Balancing free speech and trial by media", https://www.firstpost.com/india/shashi-tharoors-right-to-silence-balancing-free-speech-and-trial-by-media-3922079.html (May 15, 2018).
[110] IANS, "Republic TV can report on Tharoor, can't compel him to speak on Pushkar death: HC", https://www.thenewsminute.com/article/tharoor-cant-be-compelled-speak-pushkar-death-hc-tells-republic-tv-72480 (May 16, 2018).
[111] AIR 2005 SC 790 : 2005 AIR SCW 767.

that article were materials that could have been used in the trial of that case. These kinds of article interfere with the "administration of justice". This type of practice is unacceptable and the editor, journalist and publisher responsible for that article were warned against getting involved in such "trial by media" when the issue was *sub judiced*.[112]

The Court was of the view that, "*The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who was responsible for the said article against indulging in such trial by media when the issue is subjudiced. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the other concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice.*"[113]

5.5 TARUN TEJPAL SEXUAL ASSAULT CASE

There is an accusation of committing a rape against the chief editor of "*Tehelka*" Mr. Tarun Tejpal on his colleague. The accusation was brought by a women journalist who worked with Tejpal and accused him of sexually assaulting her in an elevator in a five-star hotel in Goa during conference named "*ThinkFest*" which was organised by "*Tehelka*".

In June 2017, a trial court in Goa passed an order restricting from publishing the court proceedings. It held that the proceedings will take place *in-camera*. It was meant for preserving the dignity, privacy and respect for both the parties involved in the case.

On 28 May 2018, a renowned news channel showed a videotape depicting two persons whom the channel claimed to be Tarun Tejpal and his colleague who made an accusation against Tejpal. It was a CCTV footage and it was shown repeatedly in the channel's

[112] D. S. Chopra and Ram Jethmalani, CASES AND MATERIAL ON MEDIA LAW, 1st ed. 2012, p. 984.
[113] *M. P. Lohia v. State of West Bengal,* AIR 2005 SC 790 : 2005 AIR SCW 767.

prime time show. There was a lot of debate and discussion based on that videotape. The channel did not show any kind of respect for the "rights of the accused" or the "privacy of the complainant". It is one of the various evidence in the trial and basing on the body language of the persons in the video one cannot decide the innocence or guilt of a person which is a mere guesswork. Such a judgmental debate based on a single piece of evidence is in every way improper. Both the parties to the case were relying on that video and other evidence to support their contentions.

During a trial, a witness is discredited based on the statements and evidence given to the court and cross-examining the witness. In this case, cross-examination was not taken place when the channel improperly presented views which discredit the victim.[114]

Supreme Court lawyer Rebecca Mammen responded to such violations committed by the channel and said:

"*Section 327 (2) and (3) of The Code of Criminal Procedure makes it clear that Rape trials shall be conducted in camera. It further states that it shall not be lawful for any person to print or publish any matter in relation to such proceedings, except with the previous permission of the court. The footage that was aired yesterday is an exhibited document in the trial. In an ongoing trial, you cannot play any footage on your night show without the permission of the court. The court had not granted any such permission. On the contrary, it has prohibited public viewing of the footage*."[115]

This kind of debates and discussions done by the media always has the potential to manipulate the viewer's mind. It also becomes difficult to protect the judiciary from being influenced by the public pressure which may have been created by the media. As Justice Cardozo, who is considered as one of the great judges of his time in U.S. Supreme Court, observed that several forces subconsciously influence the judges. This parallel trial that the channel tried to conduct based on the video footage could change the public

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[114] Manu Sebastian, "Times Now's Parallel Trial in Tejpal Case blatantly interfered with Justice" https://thewire.in/media/times-now-parallel-trial-tarun-tejpal-case (June 2, 2018).

[115] Manu Sebastian, "Times Now's Parallel Trial in Tejpal Case: A clear case of interference in Administration of Justice", http://www.livelaw.in/times-nows-parallel-trial-in-tarun-tejpal-case-a-clear-case-of-interference-in-administration-of-justice/ (June 2, 2018).

perception with respect to the case, which eventually could act as an "unwarranted external force" on the judicial process.[116]

After the occurrence of all such controversies relating to that debate and criticism from many people, all the information and online videos of that debate was deleted from the website of the channel, perhaps because of fear of legal consequences. But this does not erase the wrong done by the channel which has affected the reputation of the parties involved in the case and may also eventually affect the trial.

[116] Ibid.

CHAPTER - VI

CONCLUSION AND SUGGESTIONS

The study began with a detailed description of the evolution of the free speech in England, United States of America and India, and how the concept of free speech developed in those countries. Alongside describing the free speech, the concept of the free press and its development is also dealt with. In the U.S.A., its Constitution has explicitly mentioned about the press freedom which is not the same in case of India where the "freedom of the press" is implied from the "freedom of speech and expression" guaranteed by the Constitution of India. In a democratic society, freedom is given to the press but that freedom is not unfettered. Restrictions that are reasonable can be imposed on press freedom if it harms the interest of justice. The "freedom of the press" does not give the freedom to conduct media trial. Through the study in different chapters, the ill effects of media trial have been discussed and also the need for restraining it.

Media being the means of communication helps in disseminating information and plays an important role in a democracy by keeping the public informed about the social, political and economic activities surrounding them. They are expected to deliver unbiased news and to put out facts rather than making any judgment. But at times media try to distort facts and give its judgment even before the court. This had been appropriately indicated in *R. K. Anand v. Delhi High Court*[117] where the Court was of the view that the impact which the media causes make a fair trial impossible. In *Express Newspaper v. Union of India*[118], the Court observed that there is every possibility of an unbridled liberty to become a license leading to anarchy and disorder. Therefore, the so-called media verdict emerging from media trial affects the administration of justice.

It is the fundamental principle in the Indian criminal justice system to presume that a person brought before a court as an accused is innocent unless the person is declared guilty by the competent criminal court. But during media trial, this notion is not being

[117] (2009) 8 SCC 106.
[118] (1997) 1 SCC 133.

followed and they tend to give judgments affecting this basic principle of the criminal justice system. Certain procedures are established by law for the purpose of conducting a trial in court, but no such criteria are adopted in the media trial. The Supreme Court in *State of Maharashtra vs. Rajendra Jawanmal Gandhi*[119] *al*so had the same view on this "trial by media" and observed that a trial by electronic media, press or public agitation is contradictory to rule of law.

Media trial has potential effects on the subconscious of judges which will further affect the proper administration of justice. Even in *In Re: P. C. Sen*[120], the genuine risk of prejudicial remarks by media was expressed and also raided the concern about the impacts such comments may have on the mind of the judges. It was in *Rao Harnarain v. Gumori Ram*[121], where the Court deplored the practice of media trial and observed that journalist cannot try to influence the judges. Though judiciary has not clearly accepted that the judges are influenced by media trial but has shown concern about its potential effects on the judge's subconscious.

The media trial also affects the "right to privacy". There is always a risk of the private life of a person being brought to the public domain by media resulting in an invasion of privacy and space of a person. Media trial also affects the reputation of the parties involved in a case. It not only affects the parties involved but also the family of the parties. It was very evident in the Double Murder Case where both the print media and electronic media violated the privacy of the entire family involved in that case and also affected the reputation of the minor girl, the family and also the people who were mentioned by the media to be involved in the case.

Trial by media also has other disturbing effects which go unnoticed like the pressure it creates on the lawyers taking up the case of an accused by compelling them to give up such case. This will result in a trial without legal representation which is against the idea of the right to fair trial. This has happened to Mr. Ram Jethmalani, a renowned lawyer in

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[119] 1997 (8) SCC 386.

[120] 1970 SC 1821.

[121] AIR 1958 P H 273.

India, whose morality was questioned by the media when he appeared for the accused Manu Sharma in a case.

There is no denial of the positive role played by the media in a democratic society. It helps in keeping the public informed and vigilant. It also keeps the government accountable for their acts, keeping the public informed about the activities of the government. Media promotes transparency and also puts up the views of the public on important public issues. And a powerful independent media helps in bringing positive changes in the society. To achieve all of these purposes freedom of the press is very important. But at the same time, it is also expected from the media that it does not derail from its path and get involved in sensationalizing news, distorting facts, damaging reputation, making judgments etc. So, the freedom cannot be unbridled because it may affect the administration of justice and harm any individual and society at large. It is more desirable that media limits itself to the dissemination of information in a neutral manner to the general public rather than trial by media. Thus, the freedom of the press should not be made absolute. The Constitution of India through Article 19(2) provides several "reasonable restrictions" on the "right to freedom of speech and expression" which also applies to the "freedom of press". In India, the Supreme Court and the High Courts have the powers to punish for their contempt under Articles 129 and 215 of the Constitution of India. On this ground, the freedom of media can be restricted if it obstructs the "due course of justice" or lessens the prestige or authority of the court. The Contempt of Courts Act, 1971 also provides that any prejudicial publications made by media during the pendency of criminal proceeding can be restricted by the Courts. The Seventeenth Law Commission has made certain recommendations for further improving the Contempt of Courts Act of 1971, so that it becomes more efficient in curtailing prejudicial media publications.

In India, media is evolving with every passing year and often gets involved with controversies for conducting media trial in the name of exercising the "right to freedom of speech and expression". Media is being criticized for prejudicial publications. With the growth of electronic media, the conduct of parallel trials by media outside the portal of

Court has reached new peaks. By holding media trials they tend to put up a biased opinion even prior to the verdict of the Courts. Trial by media is never appreciated.

The "freedom of the press" is necessary for shaping a healthy democracy and the "press" acts as the backbone of a democracy which at times also exposes the loopholes in a democratic system. This helps the government to fill the vacuums of loopholes and making the system more responsive, accountable and citizen-friendly. But the media trial, on the other hand, creates a situation where it contradicts with the administration of justice and in a way encroaches into the territory of the judiciary by holding such trials. Freedom of the press is beneficial for a democracy but if this freedom is interpreted by the media houses as a freedom to conduct trials then it leads to disorder in the society. "This simply means that something which was started to show to the public at large the truth about cases has now become a practice interfering dangerously with the justice delivery system." Responsive journalism is the need of the hour. Freedom of the press should not be such that it tends to harm any individual or society at large.

In short, media trial is a serious issue which needs to be properly addressed and if the circumstances demand strict restrains should be imposed on media to prevent them from indulging in such activities of media trial.

Following are some of the suggestions which may help in reducing the danger of trial by media –

First, for the purpose of preventing the media from making prejudicial publications and affecting the administration of justice, there is a need to make certain changes in the Contempt of Courts Act, 1971. The starting point of the "pendency of a criminal proceeding" should be made from the time of "arrest"; this will restrict the media from making prejudicial publications from the time of "arrest". The suggestion for a change in the "starting point" of the "pendency of a criminal proceeding" does not mean that all kind of publications is not permitted after "arrest" but what it means is that only the publications which are prejudicial are not permitted. It is also recommended by the 200th Law Commission Report. But this recommendation has not been implemented yet and

the researcher wishes to suggest the proper implementation of this recommendation at the earliest.

Second, the “Press Council of India” (PCI) which is a statutory body is concerned with improving and maintaining the standards of print media. The PCI has very limited powers under the Press Council of India Act 1978. Under section 14 of the said Act, the Council only has the power to “warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist” if the standards of “journalistic ethics” or public taste has been offended by a newspaper or a news agency, or any professional misconduct has been committed by the editor or a working journalist. A mere warning is not sufficient but some kind of fine should be imposed on the media houses for the harm caused by them. There is a need to amend the Act for making the PCI more powerful to take actions.

Third, the Press Council Act, 1978 only deals with the print media and the need for including the electronic media within its ambit has also arisen. The electronic media should be made responsible. Self-regulation of the broadcasting media cannot be the answer to solve the problem of media trial. Without the fear of punishment, it is not possible to control the media trials. If the broadcasting media is inserted into the said Act then there will be some form of external regulation.

Fourth, there should be a prescribed minimum standard to enter into the media profession. The media persons should be made known about the media laws and also about the restrictions on media. The syllabus of Journalism should include media laws and ethics. The syllabus should also deal with important laws from the media point of view, for instance, the laws relating to contempt of court and defamation. This will help them to be aware of their boundaries from the beginning of their professional life.

In addition to these suggestions, what is required is that the media as an institution should be careful while expressing their views and should know that trial by media is never appreciated. There is a need for the media to understand that “freedom of speech and expression” does not empower them to do and express whatever they want.