IN THE SUPREME COURT OF INDIA

I.A. No. 18 & 19

in

Civil Appeal No. 9813 OF 2011

Sahara India Real Estate Corp. Ltd.
Versus
Securities & Exchange Board of India

SUBMISSION BY

RAJEEV DHAVAN
FOR

In The Matter of
Foundation for Media Professionals
&
Editors Guild of India

I. PRELIMINARY

1.1 On 10.02.2012, the Supreme Court passed the following order:

> *"We are distressed to note that even 'without prejudice' proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested learned Counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate Orders could be passed by this Court with regards to reporting of matters, which are sub-judice.*
>
> *As far as the main matter is concerned, the same is adjourned to 2nd March 2012."*

1.2 Sahara India Real Estate Corporation and Sahara Housing Investment Corporation filed an IA seeking the following relief.

> *"(a) This Hon'ble Court may be please to grant leave to serve this application on Respondents No.3 to 7 to the present Application;*

(b) appropriate guidelines be framed with regard to reporting (in the electronic and print media) of matters which are sub-judice in a Court including public disclosure of documents forming part of Court proceedings;

(c) appropriate directions be issued as to the manner and extent of publicity to be given by the print/ electronic media of pleadings /documents filed in a proceeding in Court which is pending and not yet adjudicated upon, and

(d) Such other directions be given generally as may be considered appropriate by this Hon'ble Court in the larger interests of the administration of justice."

II. JURISDICTION

2.1 It is respectfully submitted that the powers of the court to grant *suo motu* injunctive relief or lay down guidelines without a *lis* is severely limited.

2.2 In the *Sahara* case issues of confidentiality of correspondence have to considered in the facts and circumstances of the case taking into account

(i) who leaked the information?
(ii) was it in the public domain?
(iii) what was the public interest involved?
(iv) what was the extent of prejudice?

It is difficult to draw general guidelines from the facts of *Sahara* case.

2.3 The general restrictions on the powers of court emanate from

(A) The requirement of law
(B) Powers of a court of record
(C) Common law limitation
(D) Inherent power under Article 142
(E) The need for fair trial under Article 21

(A) The Requirement of Law

2.4 All fundamental rights in Article 19 including Article 19(1)(a) can only be limited by reasonable restrictions in accordance with law

- Rai Sahib Ram Jawaya Kapur and Others vs. The State of Punjab **(1955) 2 SCR 225** at 238-40**;**
- Nirmal Bose v. Union of India **AIR 1959 Cal 506**
- In Re Berubari Union, (I)1960 (3) SCR 250
- Kharak Singh v. State of U.P.,**(1964) 1 SCR 332** at 350
- State of Madhya Pradesh and Others v. Thakur Bharat Singh **(1967) 2 SCR 454** at 459-60

- Satwant Singh Sawhney v. D. Ramarathnam, Asstt. Passport Officer,**(1967) 3 SCR 525** at 542
- Shiv Kumar Sharma v. Union of India **AIR 1969 Delhi 64**
- Maganbhai Ishwarbhai Patel etc v. Union of India and Another **(1970) 3 SCC 400**
- Bennet Coleman and Co. v. Union of India **(1972) 2 SCC 788** atpr.100
- Naraindas Indurkhya v. State of M.P., **(1974) 4 SCC 788,**at
- M/s Bishamber Dayal Chandra Mohan Etc. v. State of U.P. **(1982) 1 SCC 139** at pr.20-27 & pr.41-42
- Bijoe Emmanuel and Other v. State of Kerala **(1986) 3 SCC 615 at pr.16-17**

(B) <u>Court of Record</u>

Antecedency

2.5 In India, uncertainties about the Court's power as a Court of Record led to the Contempt of Courts Acts, 1926 and 1952.

<u>Note</u> the debates summarized from 1926 – 1971 in Dhavan's: Contempt of Court and the Press (1982) pg.66-88

Constituent Assembly

2.6 In the Constituent Assembly while there was some comment about judges being made 'super gods', there was no real discussion on the Court of Record and the Contempt Power. The discussion could be summarized as follows:

"The report of the Ad Hoc Committee of the Supreme Court (1947) makes no mention of the contempt power or the words 'Court of Record'. The Drafting Committee's Draft Constitution (1948) contains no reference to the court's 'contempt power'. But, both the Supreme Court and the High Courts are mentioned as courts of record. The Provincial Constitution contains no discussion on this subject. It is difficult to say where these provisions were introduced. The questionnaire of the Constitutional Adviser and the various responses do not discuss it. The phrase 'Court of Record' is used without any explanation or discussion in the Constitutional Adviser's Memorandum and Notes to the Union Constitutional Committee. Further discussions on the judiciary do not go into the question. The 'Court of Record' designation of the Supreme Court was not discussed in the Comments on the Draft Constitution even though Atul Chandra Gupta did suggest that the phrase be deleted from the High Court provisions because it was taken from "English legal history (which) has little meaning in Indian Constitution Law". Be that as it may, the phrase 'Court of record' was retained in the Constitution without any serious comment either in the preliminary discussion or on the floor of the Constituent Assembly. H.V. Kamath did suggest the

deletion of the phrase in the debate on the Supreme Court because the phrase 'is a borrowed phrase and we need not use it here'. At this stage, without any real discussion on this matter the Draft Articles (Article 108) was amended to read

> *The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.*

Similar changes were made in the provisions on the High Court – once again with no discussion on this matter."

[Taken from Dhavan's: Contempt of Court and the Press (1982) pg.71]

2.7 Somehow, it was assumed that the power of a 'Court of Record' overrode and limited the legislative power.

- Sanyal Committee (1960) at pg.58:

> *"Under the Constitution Parliament is competent to legislate on contempt of courts subject only to the limitations that it cannot (i) abrogate, nullify or transfer to some authority, the power of superior courts to punish for contempt, (ii) exercise its power so as to stultify the status and dignity of the superior courts, and (iii) impose any unreasonable restrictions on the fundamental right of the citizen to freedom of speech and expression."*

H.R. Gokhale in Rajya Sabha Debates 78 RSD (No.6) Col. 105-6, 108, 113 [See Dhavan: Contempt of Court and the Press (1982)]

2.8 Accordingly, Indian Courts accepted the independence and exclusivity of the Court's power as a Court of Record

- Sukhdev Singh Sodhi v. Hon'ble Chief Justice S. Teja Singh and The Hon'ble Judges of The PEPSU High Court of Patiala, ***1954 SCR 454* at pg.463-4**
- R.L. Kapur v. State of Madras, ***(1972) 1 SCC 651*, at pr.6**
- Delhi Judicial Service Assn. v. State of Gujarat, ***(1991) 4 SCC 406 at pr. 37-38***
- Also C.K. Daphtary v. O.P. Gupta, ***(1971) 1 SCC 626*, at pr.46-47, 58**

2.9 This is the reason why Krishna Iyer J. in Baradakanta Mishra v. Registrar of Orissa High Court, ***(1974) 1 SCC 374*, at pr.65:**

> *"A vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to publish regardless of truth and public good and permits a process of brevimanu conviction, may unwittingly trench upon civil liberties and so the special jurisdiction and jurisprudence bearing on contempt power must be delineated with deliberation*

and operated with serious circumspection by the higher judicial echelons. So it is that as the palladium of our freedoms, the Supreme Court and the High Courts, must vigilantly protect free speech even against judicial umbrage — a delicate but sacred duty whose discharge demands tolerance and detachment of a high order."

2.10 This unequal battle began with Justice Wilmot's 'judgment' in R. v Almon; ***(1765) Wilmot 243*** which arose out the Wilkes controversy and was never delivered but only published in 1802. The consequence of this case was that the new law of contempt

(a) required no trial
(b) entailed a summary procedure
(c) followed by unlimited punishment; and
(d) exercised *suo-motu* or, later, at the instance of the Advocate General

[See Dhavan: Contempt of Court and the Press (1982) pg.22-24]

Indian No-Clash Approach

2.11 Giving the vicissitudes of this jurisdiction, Indian courts have reconciled the Court of Record Power and the Contempt of Courts Act, 1971 as compatible with the latter providing a discipline to the former.

2.12 This is clearly the case in certain areas concerning limitation, consent of Attorney General and punishment.

- Pallav Sheth v. Custodian, ***(2001) 7 SCC 549,*** at pr.30-31[in matter of limitation prescribed by statute]

  "30. *There can be no doubt that both this Court and High Courts are courts of record and the Constitution has given them the powers to punish for contempt. The decisions of this Court clearly show that this power cannot be abrogated or stultified. But if the power under Article 129 and Article 215 is absolute, can there by any legislation indicating the manner and to the extent that the power can be exercised? If there is any provision of the law which stultifies or abrogates the power under Article 129 and/or Article 215, there can be little doubt that such law would not be regarded as having been validly enacted. It, however, appears to us that providing for the quantum of punishment or what may or may not be regarded as acts of contempt or even providing for a period of limitation for initiating proceedings for contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Article 129 or Article 215 of the Constitution.*

  31.*This Court has always frowned upon the grant or existence of absolute or unbridled power. Just as power or jurisdiction under Article 226 has to be exercised in accordance with law, if any, enacted by the legislature, it would stand to reason that the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood of conflict the provisions should be construed harmoniously."*

- L.P. Mishra (Dr) v. State of U.P., ***(1998) 7 SCC 379,*** at pr.12 pg.381[Court of Record's jurisdiction must be exercised according to law]**:**

  "12. ... *It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. It is in these circumstances the impugned order cannot be sustained."*

2.13 In Biman Basu v. Kallol Guha Thakurta, ***(2010) 8 SCC 673*** (proceedings without consent of Advocate General), the Court recounted similar cases [State of Kerala v. M.S. Mani, (***2001) 8 SCC 82*** and P.N. Duda v. P. Shiv Shanker, ***(1988) 3 SCC 167]*** and observed (at pr.23)

> ***"23.*** *It is settled law that the High Courts even while exercising their powers under Article 215 of the Constitution to punish for contempt, the procedure prescribed by law is required to be followed [see L.P. Misra (Dr.) v. State of U.P., (1998) 7 SCC 379, Pallav Sheth v. Custodian (2009) 7 SCC 549]. The High Court in the present case relied on the decision of this Court in C.K. Daphtary v. O.P. Gupta, (1971) 1 SCC 626 wherein this Court overruled the objection raised on behalf of the alleged contemner that the contempt petition filed in the Supreme Court without the consent of the Attorney General was not maintainable. The decision was rendered prior to the Act coming into force. There was no provision of law at the relevant time which prevented the courts from entertaining a petition filed by interested persons even without the prior consent in writing of the Attorney General or the Advocate General, as the case may be."*

(C) Common Law Limitations: No Power to pre-censor and Attorney General's Power

2.14 ***There is no common law power to postpone publication. It has to be granted by legislature.***

- In Independent Publishing Company Limited *v.* (1) The Attorney General;**(2005)1All E.R 499 at pr.66-69** (court passed prohibitory order to postpone publications. Held: beyond jurisdiction – no contempt) The Court observed

> *"66. The Phillimore Committee included at p60 of their 1974 report a footnote written before the court's decision in the Socialist Worker but after the publication of the blackmail victims' names:*
>
> > *"We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation ... should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial."*

67. Their Lordships likewise conclude that if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law. It is not for the Board to say whether or not such legislation is desirable. Sometimes, no doubt, an actual order rather than merely a warning may be judged necessary (as perhaps in this very case). There may, however, be fears lest the power be too readily invoked - always a concern with regard to prior restraint orders. If, moreover, legislation is to be enacted, it should include a right of appeal by those aggrieved (such as was added in the United Kingdom by section 159 of the Criminal Justice Act 1988).

68. Even without legislation, however, it remains open to the court (and is generally desirable, as indicated by Lord Edmund Davies in the Leveller - see para 42 above) to explain its concern and warn the press that they would be at risk of contempt proceedings were they to publish the matter in question. Such a warning would make it both less likely that a contempt would be committed and easier to punish if it were."

2.15 **English Law has recognized that the Attorney General can move the court to order non publication**.

There are various examples of this

- *Attorney-General v.* Times Newspaper, (1973) 3 All ER 54 [Thalidomide case]
- *Attorney-General v. Leveller Magazine,* (1979) 1 All ER 745 [Anonymity of witnesses case]
- *Attorney-General v.*MGN Ltd., (1997) 1 All ER 456 [Sensational report at trial]
- *Attorney-General v.* Guardian Newspaper, (1988) 3 All ER 545 [Spy catcher case]

2.16 Common Law has now been absorbed by statute in the Human Rights Act, 1998.

- In Re. S (a child) (2004) 4 ALL ER 683 (identification: restriction on publication), the court observed

"23. The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the ECHR. This is the simple and direct way to approach such cases."

(D) INHERENT POWER UNDER ARTICLE 142

2.17 Article 142 is limited in respect of the case before it and cannot be exercised contrary to law.

- Supreme Court Bar Assn. v. Union of India, ***(1998) 4 SCC 409*, at pr.48**

> ***"48.*** *The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" (see K. Veeraswami v. Union of India, (1991) 3 SCC 655but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."*

(E) RIGHT TO FAIR TRIAL

2.18 Article 21 includes the right to fair trial. It is however circumscribed by the Cr. PC and other legislation.

III. THE FREE SPEECH DISPENSATION

A. Constitutional Provision

3.1 Free speech is guaranteed fundamental right in Article 19(1) (a) subject to the limitations in article 19(2) of the Constitution

19. Protection of certain rights regarding freedom of speech, etc.—*(1) All citizens shall have the right—*

(a) to freedom of speech and expression;

19(2) *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests 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.

3.2 Apart from the general requirement of the existence of a law for the infringement of any fundamental rights, it has been clearly settled that, inter alia, the authority of law is required to infringe free speech and expression

- Bennett Coleman & Co. v. Union of India, ***(1972) 2 SCC 788,*** at pr.111 pg.831

> *"Hence, it is not even necessary for us to consider whether they are reasonable restrictions warranted by either Article 19(2) or Article 19(6) of the Constitution. They must first have the authority of some law to support them before the question of considering whether they could be reasonable restrictions on fundamental rights of the petitioners could arise."*

- Express Newspapers (P) Ltd. v. Union of India, ***(1986) 1 SCC 133,*** (land case) at pr. 76 pg.195

> ***"76.*** *In Bennett Coleman case the Court indicated that the extent of permissible limitations on this freedom are indicated by the fundamental law of the land itself viz. Article 19(2) of the Constitution. It was laid down that permissible restrictions on any fundamental right guaranteed under Part III of the Constitution have to be imposed by a duly enacted law and must not be excessive i.e. they must not go beyond what is necessary to achieve the object of the law under which they are sought to be imposed. "The power to impose restrictions on fundamental rights is essentially a power to 'regulate' the exercise of these rights. In fact, 'regulation' and not extinction of that which is to be regulated is, generally speaking, the extent to which permissible restrictions may go in order to satisfy the test of reasonableness"*

3.3 The Article 19 code cannot simply be overridden by the invocation of article 21. However, the expanded article 21 can be factored in as a part of reasonableness on the basis of law.

B. The requirement of Reasonableness

3.4 Although Indian jurisprudence can legitimately lay independent claims to the doctrine of proportionality, the requirement of reasonableness in public law is now well settled.

- Earlier cases:
  - State of Madras v. V.G. Row, ***1952 SCR 597*** at 607
  - Chintaman Rao v. State of M.P., ***1950 SCR 759***

- Application in right to press
  - Express Newspapers (P) Ltd. v. Union of India, ***(1959) SCR 12***

- Sakal Papers (P) Ltd. v. Union of India, ***(1962) 3 SCR 842***
- Bennett Coleman & Co. v. Union of India, ***(1972) 2 SCC 788***
- Indian Express Newspapers v. Union of India, ***(1985) 1 SCC 641***

No less well settled is the invocation of the doctrine of proportionality in respect of the exercise of legislative, administrative and statutory power – especially in relation to fundamental rights.

- Union of India v. G. Ganayutham, ***(1997) 7 SCC 463*** **pr.22-23, 28, 31**
- Om Kumar v. Union of India, ***(2001) 2 SCC 386*****, at pr.27, 30, 52**
- Teri Oat Estates (P) Ltd. v. U.T., Chandigarh, ***(2004) 2 SCC 130*****, at pr.40-53**
- Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Assn., ***(2007) 4 SCC 669***
- Jitendra Kumar v. State of Haryana, ***(2008) 2 SCC 161*****, at pr.61 –63**
- Chairman, All India Railway Recruitment Board v. K. Shyam Kumar, ***(2010) 6 SCC 614***

3.5 The doctrine of proportionality means taking the least invasive approach amongst the alternatives available.

The importance and priority of free speech

3.6 All terms of free speech are a gift to, and intricately wound up in, the processes of democracy.

In Maneka Gandhi v. Union of India ***(1978) 1 SCC 248***, Bhagwati, J. said:

> *"Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set up. 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."*

3.7 Despite some predilections that the power of the press is no more than that of an ordinary citizen (*MSM Sharma v. Srikrishna Sinha, (1959) 1 SCR 806 based on a 1914 case*), this imperial view has been systematically eroded by the due recognition of the press and media as possessed of institutional rights to ensure its effective functioning (see *Sakal* (1962) 3 SCR 842, *Bennett Coleman* (1972) 2 SCC 788, Express Newspapers (P) Ltd. v. Union of India, *(1959) SCR 12 Indian Express Newspapers v. Union of India,* (1985) 1 SCC 641, *Secy. Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Association of Bengal,* (1995) 2 SCC 161). The Supreme Court in the *Odyssey Communications Pvt. Ltd.*

v. Lok Vidyan Sangatana, (1988) 3 SCC 410 pr. 5 concerning the Honi-Anhoni film stated:

> *"Freedom of expression is a preferred right which is always zealously guarded by the court."*

It is fundamental to a democracy, as stated in *S. Rangarajan v. P. Jagjeevan Ram* (1989) 2 SCC 574, pr. 35, 36 and 39 that

> *"In a democracy it is not necessary that everyone should sing the same song..".*

3.8 Free Speech includes the right to circulate one's views. As early as 1950, in *Romesh Thapar* v. *State of Madras,* 1950 SCR 594, a case of pre-censorship of a newspaper, the court stated:

> *"Turning now onto merits, there can be no doubt that freedom of speech and expression includes the propagation of ideas and that freedom is assured by freedom of circulation".*

3.9 Such a right includes the freedom of circulation

> *"…(F)reedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation …"*

(*Express Newspaper* (1959) SCR 12 at pp. 121)

As was reiterated in the famous Newsprint case, Bennett Coleman (1972) 2 SCC 788, pr. 34

> *"Publication means dissemination and circulation"*

3.10 No less the right of free speech also includes the right of others to receive ideas. In the *Broadcasting case* (1995) 2 SCC 161, the court stated:

> *"The freedom to receive and to communicate information and ideas without interference is an important aspect of the freedom of free speech and expression." (pr. 36)*
> *"…The freedom of speech and expression includes right to acquire information and to disseminate it. …The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation."* (pr. 43)

3.11 This right to know is a recognized part of the remit of Article 21 protecting the freedom of life and liberty of every person. In *Reliance Petrochemicals case* (1988) 4 SCC 592 it was observed:

> *"We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy.*

Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform." (pr.34, pp.613)

3.12 In *Secy. Ministry of Information & Broadcasting, Govt. of India* vs. *Cricket Association of Bengal*, (1995) 2 SCC 161 the Supreme Court observed:

> *"… one-sided information, disinformation, mis-information and non-information will equally create an uniformed citizenry which makes democracy a farce … Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions." (pr.82, p. 229)*

3.13 In Dinesh Trivedi, M.P. and Ors. v. Union of India ***(1997) 4 SCC 306***, at pr.19 it had been observed:

> *"Democracy exacts openness and openness is concomitant of a free society and the sunlight is a best disinfectant".*

3.14 In State of Uttar Pradesh v. Raj Narain ***(1975) 4 SCC 428***, at pr.74 it had been observed:

> *"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security."*

C. BALANCING FREE SPEECH AGAINST THE RESTRICTIONS: PRIORITY OF FREE SPEECH

3.15 In the *Rangarajan case* (1989) 2 SCC 574 concerning the censorship of the film *Ore Ore Gramathile*, the court indicated how the balance is to be worked out at pr.45:

> *"There does indeed have to be a compromise between the interest of freedom of expression and special interests.* ***But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are***

> ***pressing and the community interest is endangered.*** *The anticipated danger should not be* ***remote, conjectural or far-fetched.*** *It should have* ***proximate and direct nexus*** *with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".*

3.16 One test that has been suggested is the "clear, present and imminent danger" test.

In *Reliance Petrochemicals case* (supra)

> *"We must see whether there is a* ***present and imminent danger*** *for the continuance of the injunction. … In the words of Mr. Justice Brandeis of the American Supreme Court concurring in* ***Charlotte Anita Whitney*** *v.* ***People of the State of California*** *(71 L Ed 1095), there must be reasonable ground to believe that the danger apprehended is* ***real and imminent****. This test we accept on the basis of balance of convenience. This Court has not yet found or laid down any formula or test to determine how the balance of convenience in a situation of this type, or how the real and imminent danger should be judged in case of prevention by injunction of publication of an article in a pending matter. In the context of the facts of this case we must judge whether there is such an imminent danger which calls for continuance of the injunction." (pr. 34, pp.613) (emphasis added)*

E. **Pre-Censorship**

3.17 This is the reason why the court has not permitted pre-censorship of printed and other material as early as 1950 in the Romesh Thapar (AIR 1950 SC 124) and Brij Bhushan (AIR 1950 SC 129) cases. In Virendra v. State of Punjab ((1958) SCR 308), where a time and place situation had arisen, the court permitted exceptional pre-censorship with temporal time, place and manner restraints.

3.18 Undoubtedly, a system of pre-censorship exists for films and is not unconstitutional. In most countries, this is set up voluntarily. In India this pre-censorship has been formalized under the Cinematograph Act 1952, the validity of which was upheld [K.A. Abbas v. Union of India (1970) 2 SCC 780].

3.19 Unfortunately an extensive use of pre-censorship has been made on aspects of content. In many TV cases, this has been critically disapproved by the court (see *Ramesh* v. *Union of India* 1988 (1) SCC 668, *LIC* v. *Manu Bhai D. Shah* (1992) 3 SCC 637, *Odyssey case* (supra). In the *Raj Kapoor-I* (1980) 1 SCC 43, *Raj Kapoor-II* (1980) 2 SCC and *Bandit Queen* [AIR 1996 SC 1846] due

deference being given to the existence of a highly qualified body of caliber and expertise being the censors. *In a sense, this model is one of media peers deciding under judicial supervision*. Within a statutory framework, the court, thus, insisted on the tolerance of a different viewpoint. *Ramesh Pimple* 2004 (5) Bom CR 214 (film 'Aakrosh' on Gujarat violence):

> *"From the above resume of the judgments it is evident that the freedom of free expression guaranteed by Article 19(1)(a) is of cardinal value in a democratic government.* ***Tolerance of a diversity of view point and the acceptance of freedom*** *of speech of those whose thinking may not accord a main stream, are the cardinal values, which* ***lie at the very foundation of democratic form of government****. Respect for and tolerance of a diversity of view point is what ultimately sustains a democratic society and government."* (pr. 17)

3.20 But once this process is over, the court has also insisted that it is the duty of the state to help propagate the film even in a law and order situation.

In Shankarappa (2001) 1 SCC 582 at pr. 8, pp. 585

> *"We fail to understand the apprehension expressed by the learned counsel that there may be a law and order situation. Once an expert body has considered the impact of the film on the public and has cleared the film, it is no excuse to say that there may be a law and order situation. It is for the State Government concerned to see that law and order is maintained. In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view, from that as taken by the Tribunal, and choose to express their views by unlawful means would be no ground for the executive to review or revise a decision of the Tribunal. In such a case, the clear duty of the Government is to ensure that law and order is maintained by taking appropriate actions against persons who choose to breach the law."*

3.21 Pre-censorship is peculiar to movie censorship, and otherwise not permissible in respect of free speech except where there is a clear and present danger requiring curtailment of free speech. However, this test is elusive and invoking the doctrine of proportionality is to be preferred.

F. The least invasive test

3.22 In a Canadian case *Dagenais* v. *Canadian Broadcasting Corp.* (1994) 3 SCR 835 concerning a docudrama, the court propounded a most important test consistent with securing the protection of free speech so that the least invasive approach is adopted.

"A publication ban should only be ordered when:

a. such a ban is necessary in order to prevent a ***substantial*** *risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and*

b. the salutary effects of the publication outweigh the deleterious effects to the free expressions of those affected by the ban"(emphasis added)

3.23 Such an approach is consistent with the doctrine of proportionality – accepted by our courts. The court rejected the clash model and opted for harmonious construction

[**See Dhavan Compilation – IV** pp.50-52 56-59]

3.24 To injure free speech is to injure democracy. This is not to say free speech is an invitation to chaos.

(iv) <u>Mechanical invocation of reasonableness</u>

3.25 It is necessary to add the India's courts have to take a dichotomous approach to the interpretation of Article 19(1) (a) and 19(2)

3.26 This approach implies that the court has assumed in most cases that if the law falls within any legislation relatable of the seven restrictions in Article 19(2), it is axiomatically presumed to be reasonable.

3.27 This mechanical approach appears to be:

(i) is there a nexus between the law and the restriction [see Brij Bhushan ***(1950) SCR 605***; Romesh Thapar ***(1950) SCR 594***]; and

(ii) if the activity falls within anyone of the seven the categories of Article 19(2), it must be reasonable

[Cases such as State of Madras v. V.G. Rao ***(1952) SCR 597*** are rare and the test eclectic]

3.28 In the law, the taxonomic approach seems to have been followed

- C.K. Daphtary v. O.P. Gupta,***(1971) 1 SCC 626*****, at pr.54 pg.640:**

"54. *The question whether the existing law of contempt is unreasonable within Article 19(2) of the Constitution has been the subject of decisions in some of the High Courts. They have all come to the conclusion that the restrictions imposed*

by this law are reasonable. S.K. Das, J., then a Judge of the Patna High Court, in Legal Remembrancer v. B.B. Das Gupta, AIR 1954 Pat 230 after referring to the arguments of Mr. Ghosh observed as follows:

> *"I think that the answer to the arguments of Mr. Ghosh is to be found in the words of Lord Atkin — 'Justice is not a cloistered virtue.' Any and every criticism is not contempt. One of the tests is, to use the words of Mukherjea, J., In Brahma Prakash Sharma v. State of Uttar Pradesh whether the criticism is calculated to interfere with the due course of justice or proper administration of law; whether it tends to create distrust in the popular mind and impair confidence of people in the Courts of law. These tests have been part of the meaning of the expression contempt of Court from before the Constitution and are still a part of its meaning — a meaning which the framers of the Constitution must have known when they used the expression. We are giving no wider connotation to it, and it is idle to contend that such a connotation imports any unreasonable restriction on freedom of speech and expression."*

In fact the approach of the High Court was that the law is reasonable because it is necessary for the administration of justice and necessarily an infringement of free speech without more

3.29 Likewise there are general allusions to reasonableness but not to test the constitutional validity of contempt of courts legislation or its application with rigour.

- Haridas Das v. Usha Rani Banik, ***(2007) 14 SCC 1*, at pr.12 pg.8**
- Hari Singh Nagra v. Kapil Sibal, ***(2010) 7 SCC 502*, at pr.20-23**

3.30 Consequentially, it has been too readily assumed that heavy reporting by the press necessarily affects the trial. In India little attempt has been made to balance media coverage except in the area of scandalizing the court with awkward results.

This lack of balance is illustrated in the two cases below.

IV. LACK OF BALANCE IN INDIAN CASES

4.1 Indian Courts seem to have struck the wrong balance in certain cases where by the contempt power was wrongly used to silence or pre-censor free speech.

4.2 In Re. P.C. Sen v., ***(1969) 2 SCR 649,*** a three judge bench of this court found a Chief Minister of West Bengal who made a speech explaining his policy

about milk control orders in the face of political agitation which was found by the High Court to be contempt (at 654(D)

> *If, therefore, the speech which was broadcast by the Chief Minister was calculated to interfere with the course of justice, it was liable to be declared a contempt of the Court even assuming that he had not intended thereby to interfere with the due course of justice.*

tried to make a faint attempt to distinguish Saibal Kumar Gupta ***(1961) 3 SCR 460*** (three judge) which while, deprecating trial by newspaper used some aspect of the intent test, to say

> *"We have looked into the record of this case and have no hesitation in saying that the appellants at no time intended to interfere with the course of justice and their conduct did not tend to interfere with the course of justice".*

4.3 In our respectful submission the P.C. Sen case should be overruled as not laying down the correct law and wrongly uses a strict liability test which is unreasonable in the light of the constitutional protection of free speech.

4.4 In Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers (Bom.) (P) Ltd., ***(1988) 4 SCC 592***, (two judge bench) an ad-interim order was passed in a case under Article 139A of the Constitution to protect a share issue court power using a *suo motu* power to injunct publication. (pr.32, 34, 38).

Seervai's Critique

4.5 Jurist Seervai in his Constitutional Law of India (1999, Fourth Edn.) states (at pr.10.133 pg.766)

> ***10.133*** *If advocates and judges are looking for a Supreme Court judgment which is a model of what a judgment should not be, it is submitted that they will find that model in the leading judgment of Sabyasachi Mukharji J. in Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers (Bom.) (P) Ltd. ("Petrochemicals"). As will appear hereafter, it is also a most distressing judgment which, it is submitted, must cause grave concern to those who value the rule of law and the proper working of the Supreme Court as the highest court in India.*

The gravamen of jurist Seervai's critique was that the court had usurped jurisdiction and infringed free speech without authority of law (ibid prs.10.140, 10.150 and 10.151) where special reference is made of the lack of balancing free speech with the right to trial.

It is respectfully submitted that the Reliance case, despite its clear and present danger test (at pr.34) should be overruled.

V. FAIR TRIAL, OPEN JUSTICE AND REMEDIES

A. Right to Fair Trial

5.1 In India, Article 21 has been accepted as including the right to fair trial according to due process aspects.

Generally it is stated that trials must be right, just and fair [Kartar Singh v. Union of India, (1994) 3 SCC 569] which have to be applied from case to case [Indrajit Barua v. State of Assam, AIR 1983 Delhi 513] with the burden of proof on the State [Bachan Singh v. State of Punjab, (1980) 2 SCC 684].

- In *Nirmal Singh Kahlon vs. State of Punjab*, (2009) 1 SCC 441, it was observed that the "*Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India.*" [pr.28]

- In *Noor Aga vs. State of Punjab* (2008) 16 SCC 417 it was held;

  "***113.*** *Justness and fairness of a trial is also implicit in Article 21 of the Constitution. A fair trial is again a human right. Every action of the authorities under the Act must be construed having regard to the provisions of the Act as also the right of an accused to have a fair trial. The courts, in order to do justice between the parties, must examine the materials brought on record in each case on its own merits. Marshalling and appreciation of evidence must be done strictly in accordance with the well-known legal principles governing the same; where for the provisions of the Code of Criminal Procedure and the Evidence Act must be followed. Appreciation of evidence must be done on the basis of materials on record and not on the basis of some reports which have nothing to do with the occurrence in question.*"

  …

  "***114.*** *Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial. Such rights are enshrined in our constitutional scheme being Article 21 of the Constitution of India. If an accused has a right of fair trial, his case must be examined keeping in view the ordinary law of the land.*"

5.2 But the court has concentrated on due process aspects such as speedy trial which has to be decided on a case to case basis [P. RamachandraRao v. State of Karnataka, (2002) 4 SCC 578 (7 Judges)], proper investigation [D.K. Basu,

(1997) 1 SCC 416], under-trial languishing in jail [Kedra Phadiya, (1981) 3 SCC 671].

In fact, the Ramachandra Rao (seven Judge bench) refused to lay down guidelines for speedy trial.

5.3 ***In fact, many lapses of justice have been brought to be light by the press. These include the Bihar Blindings case, Jessica Lal, Katara, Tandoor Murder case, BMW Case and so on.***

5.4. The extent of Section 4 of the Contempt of Courts Act 1971 has not been tested except on a case to case basis.

5.5 In the Black Friday Case, Justice Gokhale postponed the right to circulate the film 'Black Friday' till the trial was over. This killed a brilliant movie. Contrast the Zee News case (2003) 1 SCALE 113 at pr.6 (on the Navjot Sandhu trial)

5.6 What we need is an approach giving the press latitude but setting out broad limits. In effect, what we need are not guidelines but a clearer and more emphatic jurisprudence evolved on a case by case basis.

B. Open Justice

5.7 **A premium has to be placed on open justice**

- *Broadcasting Corporation of New Zealand v Attorney-General;* ***(1982) 1 NZLR 120*** at 122-3

  ".. The principle of public access to the courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurances that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purpose."

- *Diennet v. France* (1995) 21 EHRR 554, at para 33:

"The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ."

5.8 **It keeps individual idiosyncrasies in check:**

- Attorney-General v. Leveller Magazine Ltd.; ***(1979) 1 All ER 745***

"As a general rule the English system of administering justice does require that it be done in public: Scott v. Scott [1913] A.C. 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection parliament has made some statutory derogation from the rule"

5.9 **News to Inform the Public:**

- R v. Chief Registrar Friendly Societies, ex parte New Cross Building Society; (1984) 2 All ER 27

"No one nowadays surely can doubt that [the journalist's] presence in court for the purpose of reporting proceedings conducted therein is indispensable. Without him, how is the public to be informed of how justice is being administered in our courts"

- *Reynolds v Times Newspapers Limited* [1999] 4 All ER 609 at 622, Lord Nicholls of Birkenhead described the position as follows:

"It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

5.10 In fact, *Arlidge, Eady and Smith on Contempt* pg.393-4, mentions the new practice of ensuring that the press gets pleadings.

"One of the problems that has arisen in recent times is that cases have become more difficult for the casual observer to follow because of the concern to speed up litigation by adopting such methods as pre reading by judges, silent reading in court, and the conducting of argument largely through written submissions or skeleton arguments. The implications for open justice rapidly became obvious, and in 1989 the court of appeal made it clear that, for this reason, counsel ought to provide four copies rather than three of their skeleton arguments, so that one could be given to the court associate to be made available for the press." [emphasis supplied]

5.11 **Reporting of Criminal Trials**

- *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966, Lord Woolf MR explained (at 977):

"The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely . . . Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

5.12 **Public's right to comment**

- A-G v Times Newspapers Ltd (Lord Reid)(1973) 3 All ER 54 at 61

"Why would it be contrary to public policy to seek by fair comment to dissuade Shylock from proceeding with his action? Surely it could not be wrong for the officious bystander to draw his attention to the risk that, if he goes on, decent people will cease to trade with him. Or suppose that his best customer ceased to trade with him when he heard of his lawsuit. That could not be contempt. Would it become contempt if, when asked by Shylock why he was sending no more business his way, he told him the reason? Nothing would be more likely to influence Shylock to discontinue his action. It might become widely known that such pressure was being brought to bear. Would that make any difference? And though widely known must the local press keep silent about it? There must be some limitation of this general statement of law."

- ***Similarly in*** *Mohandas Karamchand Gandhi AIR 1920 Bom175*

"But there would seem to be some strange misconception in the minds of the respondents as to the legitimate liberties of a journalist before us. Otherwise the respondent Gandhi could hardly have contended as he in fact did –that if a son brought a suit against a father, and if a journalist thought that the sons action was wrong, the journalist would be justified in holding the soon up to public ridicule in the public press, notwithstanding that the suit was still undecided. I need hardly say that this contention is quite erroneous. It may however be that principles which are quite familiar in England are imperfectly known or understood in India, and that the respondents have paid more attention to the liberty of the press than to the duties which accompany that and every other liberty."

See also: Re S (2004) 4 All ER 683, Headnote and 696 ff

5.13 **Influence on the judicial mind*:***

- Attorney General v. BBC (1981) 3 All ER 161

"It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it."

5.14 Even so, the judicial mind as opposed to that of the jury is less vulnerable to the media. This is inevitable. However judicial discipline rather than pre censorship may be the answer.

C. Limitations on Media

5.15 At present there is a proliferation of media which includes

(1) Reporting
(2) Sensationalizing
(3) Investigative reporting
(4) Sting
(5) Social Media

Each impact in their own way.

5.16 It is submitted that the media must be warned that its reporting must;

(a) not be mala fide (e.g. paid news)
(b) stay within the *sub judice* time frame
(c) be fair and accurate; and
(d) not pre-judge a case to a point that a fair trial is necessarily vitiated. The prejudgment test is a guide but is not intended to be used to stifle the press.

D. Reporting Restrictions

5.17 The Norms of Journalistic Conduct (2010) of the Press Council of India mandates that the Press shall eschew "inaccurate, baseless, graceless, misleading or distorted material". It also contains guidelines on Trial by Media.

5.18 The News Broadcasters Association ("NBA") has formulated its own self regulatory code, which also contains specific guidelines on reporting court proceedings.

- IA No. 11 filed by NBA, pp. 35-37

5.19 In the UK, Reporting Restrictions in the Criminal Courts have been formulated jointly by the judiciary and representatives of the press in 2009. Apart from enumerating general guidelines it also functions as a checklist for both the media and the judiciary.

- See Dhavan Compilation, Vol. V, pp. 22-51

E. Statutory Limitations

5.20 The statutory provisions are clear in their inhibitory interdiction in the matter of publication.

5.21 These are supplemented by other statutory provisions

Parliament has indicated the limits to which open justice and publication of proceedings may not apply in specific cases or classes of cases and to the extent indicated.

a. For protecting vulnerables and socially sensitive persons or situations.

- Children Act, 1960 (**Section 36**)
- Information Technology Act, 2000 (**Section 67-B**)
- Family Courts Act, 1984 **(Section 11)**
- Hindu Marriage Act, 1955 **(Section 22)**
- Mental Health Act, 1987 **(Section 22)**
- Parsi Marriage and Divorce Act, 1936 **(Section 43)**
- Protection of Women from Domestic Violence Act, 2005 **(Section 16)**
- Special Marriage Act, 1954 (**Section 54**)
- Indian Penal Code, 1860 (**Section 228A**)

b. In sensitive areas of public order and security of state.

- Indian Penal Code, 1860 **(Section 505)**
- Information Technology Act, 2000 **(Section 66-F)**
- National Investigation Agency Act, 2008 **(Section 17)**
- Prevention of Terrorism Act, 2002 (**Section 30**)
- Terrorist Affected Areas (Special Courts) Act, 1984 (**Section 12**)
- Terrorist and Disruptive Activities (Prevention) Act, 1987 (**Section 16**)
- Unlawful Activities (Prevention) Act, 1967 (**Section 44**)

c. In areas of commercial sensitivity

- Banking Regulation Act, 1949 (**Section 36-AJ**)
- Insurance Act, 1938 (**Section 52-M**)
- State Bank of India (Subsidiary Banks) Act, 1959 (**Section 17**)

d. In general in the Civil and Criminal Procedure

- Code of Civil Procedure **(Section 153-B and Order 32A)**
- Code of Criminal Procedure (**Section 227, 237 and 265-B**)

5.22 **In the area of Contempt of Court, the Parliament has chosen to deal with matters on a case by case basis**

- Section 3. Innocent publication and distribution of matter not contempt
- Section 4. Fair and accurate report of judicial proceeding not contempt
- Section 5. Fair criticism of judicial act not contempt
- Section 7. Publication of information relating to proceedings in chambers or in camera not contempt except in certain cases

F. Common Law

5.23 As far as the Common Law restraints are concerned

(a) There is no wider power in the common law to *restrain* publication other than the contempt law

- Attorney-General v.Leveller Magazine Ltd. And Others;**(1979) 1 All E.R. 745** at pg.751

  So it does not seem to me to matter greatly in the instant case whether or not the magistrates were rightly advised that they had in law no power to give directions which would be binding as such upon members of the public as to what information relating to the proceedings taking place before them might be published outside the courtroom. What was incumbent upon them was to make it clear to anyone present at, or reading an accurate report of, the proceedings what in the interests of the due administration of justice was the result that was intended by them to be achieved by the limited derogation from the principle of open justice within the courtroom which they had authorised, and what kind of information derived from what happened in the courtroom would if it were published frustrate that result.

Broader aspects were left open.

(b) However, this aspect has now been conclusively decided in Independent Publishing Company (2005) 1 All E.R. 499 at pr.66-69.

There is no common law power to postpone publication. It has to be granted by legislature.

G. Right to approach court

5.24 An individual has the right to approach court to redress the grievance that his right of fair trial has been violated or infringed by particular media reports.

5.25 Anyone, be he accused or an aggrieved person, who genuinely apprehends an infringement of his rights under Article 21 to a fair trial and all that it comprehends, is entitled to approach an appropriate writ court asserting an individual right seek preventive relief, even against the media, relating to publication, and that court is entitled to grant the same, on a balancing of the right to fair trail and the right under Article (19)(1)(a), bearing in mind the

principles of reasonableness and proportionality, including the law laid down in Rajagopal's case (1994) 6 SCC 632, and taking into account that pre-censorship should generally be avoided and limited for as short a duration as possible and examining alternative, if any. This would perhaps satisfactorily answer the pertinent question put by the court within the constitutional framework.

VI. GUIDELINES & DIRECTIONS

A. Suo Motu Power

6.1 At the very outset, it is clear that the Supreme Court and the High Court have the power to take *suo motu* action, where a Fundamental Rights violation is brought to its attention.

> [See *Janata Dal* (1992) 4 SCC 305; *Bodhisattva Gautam* (1996) 1 SCC 490; *In re: Dowry Prohibition Act 1961* (1998) 5 SCC 570; *In re: News Item "Madhupur in a Tizzy over Pappu Visit"* (2004) 5 SCC 124; *Satya Narain Kapoor* (2004) 8 SC 630; *In re: Noise Pollution (v)* (2005) 5 SCC 733; *Delhi Judicial Services* (1991) 4 SCC 406]

B. <u>Issuing Guidelines</u>

6.2 At the very outset, it must be made clear that **guidelines** have to be within the law and cannot violate or amend the law.

- In *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294,the Supreme Court observed:

"…It is not possible for this court to give any directions for amending the Act or statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

> *However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted."* **(pp.307)**

C. Range of Guidelines

6.3 The court has issued directions in many cases.

- *Lakshmi Kant Pandey* v. *Union of India,* (1984) 2 SCC 244 [Guidelines for adoption of minor children by foreigners were laid down]
- *Vishaka* v. *State of Rajasthan,* (1997) 6 SCC 241 [Guidelines were laid down to set up a mechanism to address the issue of sexual harassment at the workplace]
- *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226 [Directions were laid down to ensure the independence of the Vigilance Commission]
- *State of W.B.* v. *Sampat Lal,* (1985) 1 SCC 317
- *K. Veeraswami* v. *Union of India,* (1991) 3 SCC 655
- *Union Carbide Corporation v. Union of India,* (1991) 4 SCC 584
- *Delhi Judicial Service Assn. v. State of Gujarat,* (1991) 4 SCC 406
- *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.,* (1996) 4 SCC 622;
- *Dinesh Trivedi, M.P. v. Union of India,* (1997) 4 SCC 306 [Corruption]
- *Common Cause* v. *Union of India*, AIR 1996 SC 929 [Directions were issued for revamping the system of blood banks in the country]
- *Supreme Court Advocates-on-Record Association v. Union of India;* (1993) 4 SCC 441 [Supreme Court laid down guidelines and norms for the appointment and transfer of High Court judges]

6.4 In this regard, it is respectfully submitted that *Prakash Singh* vs. *Union of India*, (2006) 8 SCC 1 is wrongly decided.

D. <u>Mandamus to enforce the law</u>

6.5 The situation in which a positive mandamus to do a particular act in a particular way, may be broadly classified in the following manner.

6.6 *First* are the *broad mandamus* cases where this court has held that the court may issue a positive mandamus to enforce the law (hard mandamus). Thus in *Vineet Narain's* case (1998) 1 SCC 226 at pr.58, detailed orders were passed for the investigation of the Hawala transaction cases. It is laid down that positive directions can be issued where there is a power coupled with a duty. The situations under which this can happen are numerous. [See: *Commissioner of Police* v. *Gordhandas Bhanji,* AIR 1952 SC 16 at pr.27, quoting from *Julius* v. *Lord Bishop of Oxford*, (1880) 5 A.C. 214 and Comptroller and Auditor General vs. K.S. Jagannathan, (1986) 2 SCC 679 at prs.18-20.]. Second, the court may simply remand a matter to be considered in the light of the judgment. (soft mandamus)

E. Mandamus through guidelines within the framework of a statute

6.7 The purpose of the guidelines in D.K. Basu was to effectuate a constitutional right within the framework of a statute.

> "*There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim salus populi suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.*" **(pr. 33)**

> "*In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of*

arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee." **(pr.34)**

On this basis, detention guidelines were issued **(See prs. 35-41).** In a sense, the guidelines in the *Vineet Narain* case (supra) also purported to be to enforce the statute – without more, even though the constitutional right to a corrupt free government under Article 21 was involved.

F. <u>Mandamus through guidelines where no statutory framework exists</u>

6.8 There are also several cases where guidelines may become necessary in the absence of a statutory framework.

6.9 The justification for this was given in Vishaka's case (1997) 6 SCC 241 at pr.14 and approved in *Vineet Narain's* case (supra) at pr.52:

> *"Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest"***(pr.8, *Vishaka*)**

> *"…The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Tech 128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary*

legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."

(pr.14, *Vishaka*)

In NilabatiBehera v. State of Orissa, (1993) 2 SCC 746, a provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity. **(pr.15, *Vishaka*)**

"*As pointed out in Vishaka it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.*" **(pr.52, *VineetNarain*)**

G. VACUUM AND PARTIAL VACUUM

(i) A vacuum exists and cannot be created.

6.10 Just because some statutes require **interpretation** does not mean that a vacuum exists.

6.11 Section 4 [to be read with Sections 3 & 7] of the Contempt of Courts Act, 1971 is as follows:

"4. Fair and accurate report of judicial proceeding not contempt.— *Subject to the provisions contained in Section 7, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding or any stage thereof.*

6.12 **The principle of individuation is not be confused with a vacuum**. In this, there can be no clear dividing line.

- *See extracts from Samaraditya Pal: Law of Contempt (4th Edn.) at pp. 146-157*
- *Extracts from Dhavan: Contempt of Court and the Press (1980) pp.147-152*
  These are in the same compilation
- *Extracts from first Dhavan compilation pp. 56-57*

H. THE RESTATEMENTS OR BROAD PROHIBITION AREAS APPROACH

6.13 The Restatement of American Law was a project by the American Law Institute incorporated and developed by former Chief Justice Taft, Justice Hughes, Judges Benjamin Cardozo and Learned Hand and others to (a) restate the common law and (b) adapt and develop it. The result was detailed and in some cases treated as authoritative (e.g. Llewellyn on Contracts)

6.14 The Indian Restatements are precise statements of law succinctly stated. They cannot work as guidelines in the present case.

6.15 The whole point of what have been called 'open textured' concepts is that there is a multiplicity of applications which have to be individuated to the facts of a situation.

6.16 Thus, it has been stated in *Attorney-General v. MGN Limited [(1997) 1 All ER 956]*

> *"A consequence of the need in contempt proceedings, in which respondents face imprisonment or a fine, to be sure and look at each publication separately and the need in trial proceedings to look at the risk of prejudice created by the totality of publications can be that it is proper to stay proceedings on the grounds of prejudice albeit that no individual is guilty of contempt. One may regret that situation or one may take the view that it is the best answer to a difficult problem."*

6.17 It will be seen that these situations cannot be forecast and require both factual and judgmental individuation. It is true that illustrations may be found in the Anglo-Indian Codes (e.g. Penal Code, Contract and so on. But such a detailed exercise cannot be attempted by the courts especially where concepts are to be differentially applied.

6.17A Guidelines cannot empower trial courts, should not invite contempt and are mere unenforceable dicta. See also: Dagenais para 98, pg. 66.

6.18. For draconian attempts to regulate - See Union's 2007 Bill - Nariman Committee Report. Compilation p. 110 ff.

VII. SELF REGULATION

A. Indian position

7.1 It is respectfully submit that the Nariman Committee's recommendations have been accepted by this court in Destruction of Public and Private Properties ***(2009) 5 SCC 212***at pr.30-32 pg.236-8

30. *So far as the role of media is concerned Mr. F.S. Nariman Committee has suggested certain modalities which are essentially as follows:*

(a) The Trusteeship Principle.—Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.

(b) The Self-Regulation Principles.—A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; and respect for privacy.

(c) Content regulations.—In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statutes. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self-restraint) goes to the root of censorship and is unsuited to the role of media in democracy.

(d) Complaints Principle.—There should be an effective mechanism to address complaints in a fair and just manner.

(e) Balance Principle.—A balance has to be maintained which is censorial on the basis of the principles of proportionality and least invasiveness, but which effectively ensures democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

31. *It is felt that the appropriate methods have to be devised (sic for) norms of self-regulation rather than external regulation in a respectable and effective way both for the broadcasters as well as the industry. It has been stated that the steps constitute a welcome move and should be explored further. The proposed norms read as follows:*

> *"NBA believes that media that is meant to expose the lapses in Government and in public life cannot obviously be regulated by the Government, else it would lack credibility. It is a fundamental paradigm of freedom of speech that media must be free from governmental control in the matter of 'content' and that censorship and free speech are sworn enemies. It therefore falls upon the journalistic profession to evolve institutional checks and safeguards, specific to the electronic media, that can define the path that would conform to the highest standards of rectitude and journalistic ethics and guide the media in the discharge of its solemn constitutional duty. There are models of governance evolved in other countries which have seen evolution of the electronic media, including the news media, much before it developed in India. The*

remarkable feature of all these models is 'self-governance', and a monitoring by a 'jury of peers '."

32. *The Nariman Committee has recommended the following suggestions:*

(i) India has a strong, competitive print and electronic media.

(ii) Given the exigencies of competition, there is a degree of sensationalism, which is itself not harmful so long as it preserves the essential role of the media viz. to report news as it occurs and eschew comment or criticism. There are differing views as to whether the media (particularly the electronic media) has exercised its right and privilege responsibly. But generalisations should be avoided. The important thing is that the electronic (and print) media has expressed (unanimously) its wish to act responsibly.

The media has largely been responsible and more importantly, it wishes to act responsibly.

(iii) Regulation of the media is not an end in itself; and allocative regulation is necessary because the 'air waves' are public property and cannot technically be free for all but have to be distributed in a fair manner. However, allocative regulation is different from regulation per se. All regulation has to be within the framework of the constitutional provision.

However, a fair interpretation of the constitutional dispensation is to recognise that the principle of proportionality is built into the concept of reasonableness whereby any restrictions on the media follow the least invasive approach. While emphasising the need for media responsibility, such an approach would strike the correct balance between free speech and the independence of the media.

(iv) Although the print media has been placed under the supervision of the Press Council, there is need for choosing effective measures of supervision—supervision not control.

(v) As far as amendments mooted or proposed to the Press Council Act, 1978 are concerned this Committee would support such amendments as they do not violate Article 19(1)(a), which is a preferred freedom.

(vi) Apart from the Press Council Act, 1978, there is a need for newspapers and journals to set up their own independent mechanism.

(vii) The pre-censorship model used for cinema under the Cinematograph Act, 1952 or the supervisory model for advertisements is not at all appropriate, and should not be extended to live print or broadcasting media.

(viii) This Committee wholly endorses the need for the formation of:

(a) principles of responsible broadcasting, and

(b) institutional arrangements of self-regulation.

But the Committee emphasised the need not to drift from self-regulation to some statutory structure which may prove to be oppressive and full of litigative potential.

(ix) The Committee approved of NBA model as a process that can be built upon both at the broadcasting service provider level as well as the industry level and recommend that the same be incorporated as guidelines issued by this Court under Article 142 of the Constitution of India, as was done in Vishaka case.

7.2 It should also be noted that in R.K. Anand v. Registrar, Delhi High Court, ***(2009) 8 SCC 106***, at pr.326-330 pg.204:

> ***326.*** *Having said all this we would say, in the end, that for all its faults the stings and the telecast of the sting programme by NDTV rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and R.K. Anand.*
>
> ***327.*** *We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old.*
>
> ***328.*** *We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they sometimes do not tend to trivialise highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In the quest of excellence they have still a long way to go.*
>
> ***329.*** *A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards of professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.*
>
> ***330. It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.***

B. Role of Courts

7.3 In Zee Telefilms [Zee News case (2003) 1 SCALE 113], the High Court of Delhi, injuncted the publication of a docudrama in exercise of its powers under Art. 226 of the Constitution.

7.4 Similarly, in Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers (P) Ltd., (1988) 4 SCC 592, the Supreme Court issued an order of injunction restraining all the six respondents mentioned therein from publishing any article, comment, report or editorial in any of the issues of the *Indian Express or* their related publications questioning the legality or validity of any of the consents, approvals. We have already submitted that the Reliance case was wrongly decided or permissions referred to in the Petitions before it.

7.5 Statutory Regulation is extremely harsh/ineffectual as is demonstrable from the recommendations of the Nariman Committee Report at page 110. It is presumably for this reason that the **Draft Broadcasting Services Regulation Bill, 2007** failed to culminate in law due to serious opposition from various sections of the media and the adverse it could have had on the Right to Freedom of Expression. This only goes to demonstrate that self regulation is perhaps the best solution to the balancing of Right to Freedom of Speech and Expression and the Right to fair trial. **[See Dhavan Compilation No.2 pp.18–24]**

C. INTERNATIONAL PRACTICE

7.6 Art. 6 and Art. 10 of the European Convention on Human Rights, 1952 recognise the Right to Fair Trial and the Right to Freedom of Expression as under:

"ARTICLE 6
Right to a fair trial
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

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

ARTICLE 10
Freedom of expression
1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. 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."

7.7 Art. 40 of the ECHR, provides that all judicial hearings shall be in public unless the Court, "*in exceptional circumstances"* decides otherwise.

7.8 In furtherance of its obligations under the ECHR, the United Kingdom has enacted the Human Rights Act, 1998 wherein the Right to Fair Trial as well as the Right to Freedom of Speech are specifically incorporated as a part of the domestic law. Additional protection has been given to the Freedom of Expression in S. 12 particularly in the context of judicial proceedings and the manner in which a court can exercise the power to curtail the right of publication is clearly set out. The power is clearly intended to be used only in exceptional circumstances.

VIII. SUGGESTIONS

8.1 It is suggested that this court may consider the following:

(a) Free speech and expression can only be infringed by a law which constitutes a reasonable restriction founded on the principle of the proportionality.

(b) It should be born in mind that free speech in Article 19(1)(a) is preferred right and pre-censorship is constitutionally frowned upon

(c) Article 21 rights (including the right to fair trial) must be reasonably founded on the basis of due process of law.

(d) No direct conflict between Article 19(1) (a) and the Article 21 fair trial provisions exists. Each operate in their own sphere. But Article 21 considerations are read into the concept of reasonableness and proportionality.

(e) The power of a court of record drawn from the common law in both India and England have been disciplined by statute and don't include the power to pre-censorship by suspending publicity.

(f) Neither Article 142 nor any inherent power to do complete justice can undermine guaranteed fundamental right or a statute.

(g) Anyone, be he accused or an aggrieved person, who genuinely apprehends an infringement of his rights under Article 21 to a fair trial and all that it comprehends, is entitled to approach an appropriate writ court asserting an individual right seek preventive relief, even against the media, relating to publication, and that court is entitled to grant the same, on a balancing of the right to fair trial and the right under Article (19)(1)(a), bearing in mind the principles of reasonableness and proportionality, including the law laid down in Rajagopal's case (1994) 6 SCC 632, and taking into account that pre-censorship should generally be avoided and limited for as short a duration as possible and examining alternatives, if any. This would perhaps satisfactorily answer the pertinent question put by the court within the constitutional framework.

(h) Guidelines without the authority of law on an area already covered by statute are undesirable and unconstitutional.

(i) Every "law" has to be <u>individuated</u> and this judicial task cannot be captured or substituted by pre-determined guidelines and have to be decided case to case.

(j) A free press has a duty towards the public and must devise guidelines, without the intervention of statute, based on the principle of self regulation.

(k) In this way a balance can be struck.

8.2 Attention is drawer to the document "Reporting Restriction's in the Criminal Courts" which was devised extra –judicially by cooperation between the bench, bar and press described by Lord Chief Justice Judge as follows:

"In May 2000 an event took place which would have seemed utterly remarkable to older generations of the judiciary and news editors and journalists. Their representatives worked closely together, each fully respecting the independence of the other, to address the misunderstandings and problems to which reporting restrictions both in the Crown Court and the magistrates' court can give rise. The results of their efforts were, I believe, immensely valuable both to judges and magistrates and to journalists and editors all of whom might be confronted, often unexpectedly, with areas of uncertainty for which no immediate answer could be found in the books likely to be available at court. No one wanted a jurisprudential disquisition and no one wanted delay while lawyers were instructed, nor indeed the consequent expense of doing so. The objective was to produce a practical guide which would provide rapid answers to immediate problems in a form to which both the judiciary and the magistracy and the media could refer with equal confidence for authoritative guidance. That objective was, I believe, to the overall advantage of the administration of justice."

See: Dhavan Compilation V, pp. 22-51, 84-107