

IN THE SUPREME COURT OF INDIA
WRIT PETITION (CRIMINAL) NO. 113 OF 2016

IN THE MATTER OF:
Kaushal Kishor

VERSUS

...Petitioner

State of Uttar Pradesh

...Respondent

INDEX

S. No.	Particulars	Pages
I.	Brief Background and broad submissions	1-4
II.	Distinction between free speech guarantee in India and in the US: explicit restrictions versus implicit restrictions	4-15
III.	History and Background: Constitutional restrictions on the freedom of speech and expression	16-23

WRITTEN SUBMISSIONS BY MADHAVI DIVAN, ASG ON
BEHALF OF THE UNION OF INDIA

PART I

I. Brief Background and broad submissions

1. The present petition relates to the unsavoury public comments made by the then Uttar Pradesh Cabinet Minister, Mr Azam Khan in the context of an alleged gang rape that took place on July 30, 2016 on the Noida-Shahjahanpur National Highway NH 91. The Minister in question termed the allegations of rape as a "political conspiracy" drawing public ire. The incident was widely reported in the media.
2. By an order dated 24.10.2019, the Hon'ble Supreme Court formulated the following questions to be decided in the captioned matter:
 - (i) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?
 - (ii) Can a fundamental right under Article 19 or 21 of the Constitution of India be claimed other than against the 'State' or its instrumentalities?
 - (iii) Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?

Can a statement made by a Minister, traceable to any affairs of

State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of

Collective Responsibility?

-) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part Three of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'Constitutional Tort'?

The above questions present significant issues relating to the scope of the freedom of speech and expression in India particularly in respect of speech made by an individual holding a public office in relation to a heinous crime against women.

4. The freedom of speech has been held to be the mother of all liberties and occupies a preferred position in the hierarchy of liberties.¹ Public discourse and criticism is regarded as a political duty because public criticism is essential to the working of institutions. For this reason, freedom of speech is regarded as the Ark of the Covenant of Democracy.²

5. In response to Question No. 1 posed by the Court for determination, the following broad propositions are made and elaborated in the paragraphs that follow:

- (1) The framers of our Constitution made a conscious choice to permit restrictions on the freedom of speech only by law on expressly identified grounds and no further. This is in sharp contradistinction with the First Amendment under the US Constitution which does not

¹ *Ramlila Maidan Incident*, 2012 5 SCC 1.

² *Shreyas Singhal v. Union of India*, 2015 5 SCC 1.

spell out express grounds of restriction but has been interpreted by the US Supreme Court to envisage "implicit" restrictions.

- (2) The carefully crafted grounds under Article 19(2) under which the freedom of speech under Article 19(1)(a) may be restricted are grounds which represent "societal interest" or public interests, which include the liberties of others. These exceptions under Article 19(2) are subject matters on which the State may make law, in order to protect individual and societal interests. In other words, Article 19(2) strikes a balance between individual liberties and larger societal interests.
- (3) The interests represented by the grounds expressly defined in Article 19(2) are generally compatible with various facets of Article 21, the right to life and personal liberty.
- (4) However, restrictions on the freedom of speech under Article 19(1)(a), not contemplated in or having no basis whatsoever in Article 19(2) are not contemplated under the scheme of our Constitution.
- (5) To read into the freedom of speech under Article 19(1)(a) read with Article 19(2), restrictions beyond or unfounded in Article 19(2) would amount to opening up the floodgates for new avenues of infraction on the freedom of speech under our Constitution and render Article 19(2) redundant.
- (6) Any restriction on freedom of speech and expression must meet the following tests:
 - (i) It must be a law (and not a mere executive instruction) under any of the right specified grounds under Art. 19(2). (see *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615.)
 - (ii) It must be a reasonable restriction, which is to say, it must be proportionate or least invasive. It should not suffer from over-

expansiveness or vagueness. (see *Shreya Singhal v. Union of*

India, (2015) 5 SCC 1)

If one were to resort to other fundamental rights to restrict the right under Art. 19(1)(a), particularly rights whose meaning can be elastic and ever-expanding (such as the right to life under Art. 21, it would end up not only eroding the freedom of speech and expression, it would also be achieving indirectly what cannot be done directly. In other words, what does not pass muster under Art. 19(2) would so do by resorting to another fundamental right.

- (7) There can be no law which directly restricts one freedom even for securing the better enjoyment of another freedom. The State cannot directly restrict one freedom by placing an otherwise permissible restriction on another. (see *Sokal Papers (P) Ltd. v. Union of India* (1962) 3 SCR 842))

II. Distinction between free speech guarantee in India and in the US: explicit restrictions versus implicit restrictions- a clear indicator that Article 19(1)(a) was to be restricted reasonably only on grounds under Article 19(2)

1. The fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India is qualitatively different from its US counterpart. The corresponding provision in the US

Constitution is the First Amendment which reads as follows:

Amendment I
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. (emphasis supplied).

- (i) sovereignty and integrity of India
- (ii) security of the State
- (iii) friendly relations with foreign States
- (iv) public order
- (v) decency and morality
- (vi) contempt of court
- (vii) defamation
- (viii) incitement to an offence
(emphasis supplied)

5. However, although on the face of it, the First Amendment appears to confer on citizens and on the Press an absolute right to freedom of speech, in practice this is not quite the case for the reason that the US Supreme Court has read into these freedoms certain implicit restrictions.⁵ This position has been acknowledged in several judgments of this Hon'ble Court, referred to in this note.

6. During the Constituent Assembly Debates, in response to the charge that fundamental rights were "riddled with so many exceptions that the exceptions have eaten up the rights altogether" and that the American Bill of Rights in comparison guaranteed "real" rights because they are not subject to limitations or exceptions, Dr. Ambedkar emphasized that to describe fundamental rights under the US Constitution as absolute was a misnomer:

[i]t is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United

⁵ *Ministry of Information & Broadcasting v. Cricket Association of Bengal*, (1995) 2 SCC 161 (paragraph 22); *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

States Supreme Court. It would be sufficient to quote one such judgment of the Supreme Court in justification of the limitation on the right of free speech contained in Article 13 of the Draft Constitution. In *Gitlow Vs, New York* in which the issue was the constitutionality of a New York "criminal anarchy" law which purported to punish utterances calculated to bring about violent change, the Supreme Court said: "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom." It is therefore wrong to say that the fundamental rights in America are absolute, while those in the Draft Constitution are not.⁶

7. The Supreme Court of India has, on a number of occasions, underlined the distinction between the freedom of speech under the US Constitution on the one hand and the Constitution of India on the other as also, the "implicit restrictions" in the First Amendment in contradistinction to the "explicit restrictions" in Article 19(1)(a) read with 19(2). The following judgments are noteworthy:

- i) In *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788, this Hon'ble Court observed:

46. [...] The First Amendment of the American Constitution enacts that the Congress shall make no law ... abridging the freedom of speech of the press. The American First Amendment contains no exceptions like our Article 19(1) and (2) of the Constitution. Therefore, American decisions have evolved their own exceptions. Our Article 19(2) speaks of reasonable restrictions. Our Article 13 states that the State shall not make laws which abridge or take away fundamental rights in Part III of the Constitution.

99. The extent of permissible limitations on freedom of expression is also indicated by our Constitution which contains the fundamental law of the land. To that law all Governmental policies, rules and regulations, orders and directions, must conform so that there is "a Government of laws and not of men", or, in other words, a Government whose policies are based on democratic principles and not on human caprice or arbitrariness. Article 19(2) of the Constitution requires that Governmental action which affects freedom of speech and expression of Indian citizens

⁶ Constituent Assembly Debates, Vol. VII, (Nov. 4, 1948) 1459

should be founded on some "law" and also that such "law" should restrict freedom of expression and opinion reasonably only "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, [...]" (emphasis supplied)

ii) In *Ramliia Maidan Incident, In re*, (2012) 5 SCC 1, this Hon'ble

Court observed:

5. Even in the United States there is a recurring debate in modern First Amendment jurisprudence as to whether First Amendment rights are "absolute" in the sense that the Government may not abridge them at all or whether the First Amendment requires the "balancing of competing interests" in the sense that free speech values and the Government's competing justification must be isolated and weighted in each case. Although the First Amendment to the American Constitution provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of the constitutional Government to survive. If it is to survive, it must have power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts. Freedom of speech, thus, does not comprehend the right to speak on any subject at any time.

In the above case, this Hon'ble Court referred to the ruling of the

US Supreme Court in *Schenck v. United States*, 249 US 47 (1919).

In *Schenck*, at pages 473 to 474, the Court recognized the "implicit restrictions" in the First Amendment, an example of which is the "clear and present danger" test. It was held in that case:

... the character of every act depends upon the circumstances in which it is done. ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. ... The question in every case is 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 a right to prevent. (emphasis supplied)

In the *Ramlila* case, the Indian Supreme Court clarified that the *Schenck* principle could not be imported into the Indian Constitution:

7. In contradistinction to the above approach of the US Supreme Court, the Indian Constitution spells out the right to freedom of speech and expression under Article 19(1)(a).....Article 19(2) empowers the State to impose reasonable restrictions on exercise of the right to freedom of speech and expression in the interest of the factors stated in the said clause.....

8. In face of this constitutional mandate, the American doctrine adumbrated in *Schenck case* [63 L Ed 470 : 249 US 47 (1919)] cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the above noticed restrictions. Thus, the position under our Constitution is different.⁸

In other words, the “implicit restrictions” applicable to the First

Amendment of the US Constitution are not applicable to the Indian Constitution, under which the freedom of speech under

Article 19(1)(a) is subject to “explicit restrictions” specifically identified in Article 19(2).

iii) In *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, this Hon'ble Court underlined the vital differences between the free speech provisions in the Indian and US Constitution⁹:

15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment—Congress shall make *no law* which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to “expression”, Article 19(1)(a) speaks of freedom of speech and expression without any reference to “the press”. Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters—that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the US Supreme Court has never given literal effect to the

ration that Congress shall make no law abridging the
dom of speech. The approach of the Court which is
inedly stated in one of the early US Supreme Court
gments, continues even today. In *Chaplinsky v. New
mpshire* [86 L Ed 1031 : 315 US 568 (1942)], Murphy,
who delivered the opinion of the Court put it thus: (L Ed
. 1035)

“Allowing the broadest scope to the language and
purpose of the Fourteenth Amendment, it is well
understood that the right of free speech is not absolute
at all times and under all circumstances. There are
certain well defined and narrowly limited classes of
speech, the prevention and punishment of which have
never been thought to raise any constitutional
problem. These include the lewd and obscene, the
profane, the libelous, and the insulting or ‘fighting’
words—those which by their very utterance inflict
injury or tend to incite an immediate breach of the
peace. It has been well observed that such utterances
are no essential part of any exposition of ideas, and
are of such slight social value as a step to truth that
any benefit that may be derived from them is clearly
outweighed by the social interest in order and
morality. ‘Resort to epithets or personal abuse is not
in any proper sense communication of information or
opinion safeguarded by the Constitution, and its
punishment as a criminal act would raise no question
under that instrument.’ *Cantwell v. Connecticut* [310
US 296 : 60 S Ct 900 : 84 L Ed 1213 : 128 ALR 1352
(1940)], US pp. 309, 310 : S Ct p. 906.”

17. So far as the second apparent difference is concerned,
the American Supreme Court has included “expression” as
part of freedom of speech and this Court has included “the
press” as being covered under Article 19(1)(a), so that, as a
matter of judicial interpretation, both the US and India
protect the freedom of speech and expression as well as
press freedom. Insofar as abridgement and reasonable
restrictions are concerned, both the US Supreme Court and
this Court have held that a restriction in order to be
reasonable must be narrowly tailored or narrowly
interpreted so as to abridge or restrict only what is
absolutely necessary. It is only when it comes to the eight
subject-matters that there is a vast difference. In the US, if
there is a compelling necessity to achieve an important
governmental or societal goal, a law abridging freedom of
speech may pass muster. But in India, such law cannot pass
muster if it is in the interest of the general public. Such law
has to be covered by one of the eight subject-matters set out
under Article 19(2). If it does not, and is outside the pale of
Article 19(2), Indian courts will strike down such law.

18. Viewed from the above perspective, American
judgments have great persuasive value on the content of
freedom of speech and expression and the tests laid down
for its infringement. It is only when it comes to subserving

the general public interest that there is the world of a difference. This is perhaps why in *Kameshwar Prasad v. State of Bihar* [1962 Supp (3) SCR 369 : AIR 1169-70, para 8], this Court held: (SCR p. 378 : AIR pp.

"As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United States reading 'Congress shall make no law ... abridging the freedom of speech ...' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications, etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Article 19(1)(a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision."

19. But when it comes to understanding the impact and content of freedom of speech, in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], Venkataramiah, J. stated: (SCC p. 671, para 44 : SCR pp. 324F-325A)

"While examining the constitutionality of a law which is alleged to contravene Article 19(1)(a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19(1)(a) and of Article 19(1)(g) of our Constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19(1)(a) and Article 19(1)(g) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made."

[...]

24. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In *Sakal Papers (P) Ltd. v. Union of India* [(1962) 3 SCR 842 : AIR 1962 SC

305] , this Court said: (SCR p. 863 : AIR pp. 313-14, para 37)

"It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

[...]

32. In fact, this aspect was considered in *Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal* [(1995) 2 SCC 161] in para 37, where the following question was posed: (SCC p. 208)

"37. The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media."

This question was answered in para 78 thus: (SCC pp. 226-27)

"78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other

agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by

manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media.”

8. The “fighting words” doctrine is indicative of the implicit restrictions read into the First Amendment. The doctrine imposes restrictions on speech based on its value. This is explained in *Chaplinsky v. New Hampshire* [86 L Ed 1031: 315 US 568 (1942)] in the following manner:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

9. There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libellous and insulting or “fighting words” – those which by their very utterance inflict injury or tend to incite immediate breach of peace.
10. It may be seen that the fighting words doctrine is an implicit restriction read into the First Amendment inasmuch as “speech” which constitutes “fighting words” is of such slight social value (on grounds of order and morality) that it cannot be called speech within the meaning of the First

Amendment, that is, speech that is protected.⁹ The need for the US courts to create this 'sieve' within the text of the First Amendment was because of its sheer expanse, shorn of any equivalent of Article 19(2). Under the Indian Constitution, specific areas of exception were prescribed under Article 19(2) based on which the Legislature may impose reasonable restrictions on free speech. On the other hand, because of the absence of explicit restrictions to free speech in the US Constitution, impugned speech is subject to restrictions read into the First Amendment. However, in India, Article 19(2) already serves as an adequate sieve to regulate/restrict the freedom of speech. Therefore, it would be not only excessive but also dangerous to read into Article 19(1)(a) any further restrictions that throttle speech at its very source. The fall out of such an interpretation would be that not only is there a danger of expanding the areas of exception which justify reasonable restrictions under Article 19(2) which were carefully crafted by the Constituent Assembly (and later amended by Parliament),¹⁰ rendering the same redundant, but also the danger of pre-censoring speech.

⁹ The doctrine has been progressively limited by subsequent cases of the US Supreme Court. See *Terminiello v. Chicago*, 337 US 1 (1949); *Cohen v. California*, 403 US 15 (1971); *Gooding v. Wilson*, 403 US 518 (1972); *Hess v. Indiana*, 414 US 105 (1973); in *New York Times v. Sullivan*, 376 U.S. 254 (1964), a stricter standard was adopted and it was held that until and unless a malicious intent to defame with utter disregard to the truth was proved on part of the author of the speech, the speech could not be considered a violation of the First Amendment.

¹⁰ By the Constitution (First Amendment) Act, 1951.

III. History and Background: Constitutional restrictions on the freedom of speech and expression

1. It is necessary to appreciate the history behind the crafting of the exception to Article 19(1)(a), and the careful deliberation which preceded its expansion into the current form.
2. During the Constituent Assembly Debates, several members expressed concern over the existence of Article 19(2) (then draft article 13(2)) in the draft Constitution, as well as its scope:

Damodar S. Sethi

[...] While the article guarantees all these freedoms, the guarantee is not to affect the operation of any existing law or prevent the State from making any law in the general interests of the public. Indeed, Sir, the guarantee of freedom of speech and expression which has been given in this article, is actually not to affect the operation of any existing law or prevent the State from making any law relating to libel, slander, defamation, sedition and other matters which offend the decency or morality of the State or undermine the authority or foundation of the State. It is therefore clear. Sir, that the rights guaranteed in article 13 are cancelled by that very section and placed at the mercy or the high-handedness of the legislature. These guarantees are also cancelled. Sir, when it is stated that, to safeguard against the offences relating to decency and morality and the undermining of the authority or foundation of the State, the existing law shall operate. This is provided for in very wide terms. So, while certain kinds of freedom have been allowed on the one hand, on the other hand, they have been taken away by the same article as I have just mentioned. [...] ¹¹ (emphasis supplied)

3. During the Debates, an amendment was moved to remove the phrase “subject to the other provisions of this article” from draft article 13(1). In this context, Mr KT Shah proposed that the Article be made subject to the rest of the Constitution. It is pertinent to note that his suggestion was not accepted. Mr. KT Shah observed:

[...] I suggest therefore that instead of making it subject to the provisions of this article, we should make it subject to the

¹¹ Constituent Assembly Debates, Volume VII, December 1, 1948.

provisions of this Constitution. That is to say, in this Constitution this article will remain. Therefore if you want to insist upon these exceptions, the exceptions will also remain. But the spirit of the Constitution, the ideal under which this Constitution is based, will also come in, which I humbly submit, would not be the case, if you emphasise only this article. If you say merely subject to the provisions of this article, then you very clearly emphasise and make it necessary to read only this article by itself, which is more restrictive than necessary. I am aware it might be said that, under the rules of interpretation, the whole Constitution will have to be read together and not only one clause of it. If so, I ask where is the harm in then saying, as you have said in many other articles, "*subject to the provisions of this Constitution*" and "*subject also to the laws in force at any time and the laws there under*"? Those laws which have not been abrogated or abolished under this article or any other article will be enforced. Those new laws which you make in accordance with this article will also be enforced, so that all the safeguards that you wish to introduce, and which you may wish to maintain against any abuse of the freedoms guaranteed or granted by this Constitution, will be available.

Why then should we draw attention and emphasize only this article, which is more full, I repeat, of exceptions and delimitations of freedom than of freedom itself? The freedoms are curly enumerated in 5, 6 or 7 items in one sub-clause of the article. The exceptions are all separately mentioned in separate sub-clauses. And their scope is so widened that I do not know what cannot be included as exception to these freedoms rather than the rule. In fact, the freedoms guaranteed or assured by this article become so elusive that are would find it necessary to have a microscope to discover where these freedoms are, whenever it suits the State or the authorities running it to deny them. I would, therefore, repeat that you should bring in the provisions of the whole Constitution, including its preamble, and including all other articles and chapters where the spirit of the Constitution should be more easily and fully gathered than merely in this article, which, in my judgment, runs counter to the spirit of the Constitution. [...]¹²

4. The Constituent Assembly also discussed as to who should have the authority to limit the freedom of speech and expression. It was observed in this context:

K. Hanumanthaiya

The question next arises whether this limiting authority should be the legislature or the court. That is a very much debated question. Very many people, very conscientiously too, think that the legislature or the executive should not have anything to do with laying down the limitations for the operation of these fundamental rights, and that it must be entrusted to courts which are free from political influences, which are independent and which can take an impartial view. That is the view taken by a

good number of people and thinkers. Sir, I for one, though I appreciate the sincerity with which this argument is advanced, fail to see how it can work in actual practice. Courts can, after all, interpret the law as it is. Law once made may not hold good in its true character for all time to come. Society changes; Governments change; the temper and psychology of the people change from decade to decade if not from year to year. The law must be such as to automatically adjust itself to the changing conditions. Courts cannot, in the very nature of things, do legislative work; they can only interpret. Therefore, in order to see that the law automatically adjusts to the conditions that come into being in times to come, this power of limiting the operation of the fundamental rights is given to the legislature. After all, the legislature does not consist of people who come without the sufferance of the people. The legislature consists of real representatives of the people as laid down in this Constitution. If, at a particular time, the legislature thinks that these rights ought to be regulated in a certain manner and in a particular method, there is nothing wrong in it, nothing despotic about it, nothing derogatory to these fundamental rights. I am indeed glad that this right of regulating the exercise of fundamental rights is given to the legislature instead of to the courts. I will give one more instance. Every seven years, it is the custom in Chota Nagpur to have what they call. Era Sendra, Janishikar. Every seven years, the women dress as men and hunt in the jungles--dressed as men, mind you. That is the occasion when naturally women like to show masculine prowess. They arm themselves like men with bows and arrows, lathis, belas and so forth. Now, Sir, according to this particular article in the Constitution, the Government might interpret that women every seven years were getting together for a dangerous purpose. I urge the House to do nothing that is going to upset the simple folk. They have been among the most peaceful citizens in our country and we should be very very cautious in doing anything which might be misunderstood by them and lead to trouble.¹³

5. In the very first year of the Indian Constitution coming into force, the case of *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 impelled the introduction of the first amendment to the Constitution. In Madras, the State Government banned the entry into the State of the journal, *Cross Roads* under Section 9 (I-A), Madras Maintenance of Public Order Act, 1947. This action was challenged in the *Romesh Thappar* case. The Supreme Court struck down Section 9(I-A) on the ground that only an act serious enough to constitute a danger to the foundations of the State or a threat to overthrow it, could justify

¹³ Constituent Assembly Debates, Volume VII, December 2, 1948.

curtailment of the right to freedom of speech and expression. It was held that Section 9(1-A) which authorised the imposition of restrictions for the wide purpose of securing public safety and public order fell outside the scope of reasonable restrictions permitted under Article 19(2). The provision was held to be unconstitutional. This ruling was a path-breaker and the then Home Minister, Sardar Patel remarked to Prime Minister Jawaharlal Nehru that this decision "knocks the bottom out of most of our penal laws for the control and regulation of the press".¹⁴ Prime Minister Nehru was disturbed by these developments and wrote to the Law Minister, Dr. B.R. Ambedkar, who had been the Chairman of the Constituent Assembly's Drafting Committee, expressing a need to amend constitutional provisions pertaining to law and order and subversive activities.¹⁵ At the time the Constitution of India came into force in 1950, Article 19(2) read as follows:

Nothing in sub- clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

6. In Punjab, the State Government imposed pre- censorship on an English language weekly in the name of protecting public safety and order. The impugned legislation, the East- Punjab Public Safety Act, 1949, was struck down by the Supreme Court in *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129, on the ground that pre- censorship was an unjustifiable restriction on the liberty of the press. Provisions of the Act which authorize such a restriction for the purposes of public safety and order, were held not to fall within the purview of Article 19(2).

¹⁴ Patel-Nehru letter dated 3-7-1950. Durga Das, *Patel's correspondence*, Vol. 10, 358.

¹⁵ Granville Austin, *Working a Democratic Constitution*, (1999), 42.

7. Contemporaneously, the First Amendment to the Constitution was passed in June, 1951, retroactively empowering the Government to impose "reasonable restrictions" on the freedom of expression "in the interests of the security of the State"¹⁶, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence". "Defamation" replaced the words "libel" and slander" in Article 19(2), and the introduction of "incitement to an offence" was a response to the *Brij Bhushan* case. A redeeming feature of the amendment was the inclusion of the word "reasonable" before the word "restrictions". Although Prime Minister Nehru was anxious to outlaw certain kinds of speech and the language of the amendment ostensibly made prosecution easier, the qualification of the restrictions by the addition of the word "reasonable" empowered the citizen to turn to the courts for judicial review. Article 19 (2) as amended by the Constitution (First Amendment) Act, 1951 (First Amendment Act), is reproduced below:

(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 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.

The relevant portion of the Statement of Objects and Reasons of the Constitution (First Amendment) Act, 1951 is reproduced below:

During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of

¹⁶ Replacing the words "tends to overthrow, the State".

violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. The citizen's right to practise any profession or to carry on any occupation, trade or business conferred by article 19(1)(g) is subject to reasonable restrictions which the laws of the State may impose "in the interests of general public". While the words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake, it is desirable to place the matter beyond doubt by a clarificatory addition to article 19(6). Another article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up.

The main objects of this Bill are, accordingly to amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. the opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that may arise. [...]

8. The second amendment to Article 19 came in 1963 by way of the

Constitution (Sixteenth Amendment) Act, 1963, conferring upon the government the power to place restrictions on the freedom of speech and expression in the interests of "the sovereignty and integrity of India". The qualifier, "reasonable", in Article 19(2), remained in place.

The relevant portion of the Statement of Objects and Reasons of the Constitution (Sixteenth Amendment) Act, 1963 is as follows:

The Committee on National Integration and Regionalism appointed by the National Integration Council recommended that article 19 of the Constitution be so amended that adequate powers become available for the preservation and maintenance of the integrity, and sovereignty of the Union.

The Committee were further of the view that every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union and that forms of oath in the Third Schedule to the Constitution should be suitably amended for the purpose.

It is proposed to give effect to these recommendations by amending clauses (2), (3) and (4) of article 19 for enabling the

State to make any law imposing reasonable restrictions on the exercise of the rights conferred by sub-clauses (a), (b) and (c) of clause (1) of that article in the interests of the sovereignty and integrity of India. [...]

The above history of Article 19(2) has been highlighted only to show that the restrictions on the freedom of speech were very carefully thought out and were intended to be confined to the specifically identified grounds and no further. In addition, there is a further safeguard: that even regulating speech under the identified grounds of Article 19(2) must be "reasonable" and "least invasive".¹⁷

9. According to H.M. Seervai, the limitations to the freedom of speech and expression as set out under Article 19(2) are as fundamental as the right itself:

10.16. Two further questions of a general nature arise in connection with the "restrictions" permitted by Art. 19(2) to (6). First, how are the restrictions related to the right which they restrict? It has been said that "it is the rights which are fundamental, not the limitations". Such observations, it is submitted, are misleading, for they overlook the fact that what is granted is not an absolute right but a right subject to permissible restrictions. That the rights conferred by Art. 19(1) are not absolute is obvious from the nature of those rights. In England, where several of them have been enjoyed for centuries, they have been subject to well-recognised limitations. Thus freedom of speech does not mean the freedom to say whatever one likes, but freedom of speech subject to the laws of libel, sedition, blasphemy and the like. Again, the right of assembly is subject to the assembly being peaceful and not causing a breach of the public peace. In the United States where the English colonists had carried those rights with them, they were embodied in the Bill of Rights, and for a long time the U.S. Sup. Ct. treated them as subject to the limitations recognised in England, although, as we shall see, the form in which the First Amendment embodied the right to the freedom of speech led to a departure from the English law. In India, the well-recognised limitations on the rights embodied in Art. 19(1)(a) to (g) are expressly incorporated in Art. 19(2) to (6). The rights represent the claims of the individual, the limitations protect the claims of other individuals and the claims of society or the State; to say that the rights are fundamental and the limitations are not is to destroy the balance

¹⁷ The "least invasive" approach was discussed and adopted in *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1; *Ranjit Lalit v. Union of India*, (2017) 5 SCC 1 (paragraphs 28, 44 and 58); *Destiny of Public & Private Properties v. State of A.P.*, (2009) 5 SCC 212 (paragraphs 30 and 32)

which Art. 19 was designed to achieve. To say this is not to belittle fundamental rights but only to say that the rights are not absolute and can be enjoyed only in an orderly society.¹⁸

IV. Article 19(1)(a) can be restricted reasonably only by law on grounds set out under Article 19(2)

1. It is well settled that the right under Article 19(1)(a) can be restricted reasonably only by law on grounds specifically set out under Article 19(2). The Supreme Court has discussed this in the following case law:

i) In *Bennett Coleman v. Union of India*, (1972) 2 SCC 788:

46. [...] The First Amendment of the American Constitution enacts that the Congress shall make no law ... abridging the freedom of speech of the press. The American First Amendment contains no exceptions like our Article 19(1) and (2) of the Constitution. Therefore, American decisions have evolved their own exceptions. Our Article 19(2) speaks of reasonable restrictions. Our Article 13 states that the State shall not make laws which abridge or take away fundamental rights in Part III of the Constitution.

[...]

99. The extent of permissible limitations on freedom of expression is also indicated by our Constitution which contains the fundamental law of the land. To that law all Governmental policies, rules and regulations, orders and directions, must conform so that there is "a Government of laws and not of men", or, in other words, a Government whose policies are based on democratic principles and not on human caprice or arbitrariness. Article 19(2) of the Constitution requires that Governmental action which affects freedom of speech and expression of Indian citizens should be founded on some "law" and also that such "law" should restrict freedom of expression and opinion reasonably only "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. [...]"

100. Permissible restrictions on any fundamental right, even where they are imposed by duly enacted law, must not be excessive, or, in other words, they must not go beyond what is necessary to achieve the objects 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. The term "regulate" has come up for

¹⁸ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, Volume I, pp. 702-703.

interpretation on several occasions before American Courts which have held that the word "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restrictions; to subject to governing principles or laws." (See: *Words and Phrases*, Vol. 36, p. 687 by West Publishing Co.). I do not see any reason to give a different meaning to the term "regulation" when we use it.

- ii) In *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, it was observed:

169. The law is however well settled that the State cannot travel beyond the contours of clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by clause (1), since the article guarantees an absolute and unconditional right, subject only to reasonable restrictions. The grounds specified in clauses (2) to (6) are exhaustive and are to be strictly construed. The Court, it may be noted, is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement, and whether the law has overstepped the constitutional limitations. The right guaranteed under Article 19(1)(g), it may be noted, can be burdened by constitutional limitations like sub-clauses (i) and (ii) of clause (6).

- iii) In *LIC v. Manubhai D. Shah (Prof)*, (1992) 3 SCC 637, this Court observed:

10. From the above resume of the case-law it is evident that this Court has always placed a broad interpretation on the value and content of Article 19(1)(a), making it subject only to the restrictions permissible under Article 19(2). Efforts by intolerant authorities to curb or suffocate this freedom have always been firmly repelled. More so when public authorities have betrayed autocratic tendencies.

- iv) In *Odysey Communications (P) Ltd. v. Lokvidayan Sanghatana*, (1988) 3 SCC 410, it was observed:

5. It can no longer be disputed that the right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a) of the Constitution of India which can be curtailed only under circumstances which are set out in clause (2) of Article 19 of the Constitution of India.

- v) In *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574, this

Court held:

53. We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.

- vi) In *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399, this Court observed:

38. As stated above, this Court has held that Article 19(1)(a) which provides for freedom of speech and expression would cover in its fold right of the voter to know specified antecedents of a candidate, who is contesting election. Once it is held that a voter has a fundamental right to know the antecedents of his candidate, that fundamental right under Article 19(1)(a) could be abridged by passing such legislation only as provided under Article 19(2) [...]

82. Freedom of speech and expression, just as the equality clause and the guarantee of life and liberty, has been very broadly construed by this Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right.

- vii) In *State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools*, (2014) 9 SCC 485, this

Hon'ble Court observed:

36. The word "freedom" in Article 19 of the Constitution means absence of control by the State and Article 19(1) provides that the State will not impose controls on the citizen in the matters mentioned in sub-clauses (a), (b), (c), (d), (e) and (g) of Article

19(1) except those specified in clauses (2) to (6) of Article 19 of the Constitution. In all matters specified in clause (1) of Article 19, the citizen has therefore the liberty to choose, subject only to restrictions in clauses (2) to (6) of Article 19. [...]

42. Therefore, once we come to the conclusion that the freedom of speech and expression will include the right of a child to be educated in the medium of instruction of his choice, the only permissible limits of this right will be those covered under clause (2) of Article 19 of the Constitution and we cannot exclude such right of a child from the right to freedom of speech and expression only for the reason that the State will have no power to impose reasonable restrictions on this right of the child for purposes other than those mentioned in Article 19(2) of the Constitution.

viii) In *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1, this Hon'ble

Court held:

25. In spite of there being a general presumption in favour of the constitutionality of a legislation under challenge alleging violation of the right to freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation being made out, the onus shifts upon the State to show that the legislation comes within the permissible restrictions set out in clauses (2) to (6) of Article 19 and that the particular restriction is reasonable. It is for the State to place on record appropriate material justifying the restriction and its reasonability. Reasonability of restriction is a matter which squarely falls within the power of judicial review of the courts. Such limitations, therefore, indicate two purposes; one that the freedom is not absolute and is subject to regulatory measures and the second that there is also a limitation on the power of the legislature to restrict these freedoms. The legislature has to exercise these powers within the ambit of Article 19(2) of the Constitution.

35. The obvious result of the above discussion is that a restriction imposed in any form has to be reasonable and to that extent, it must stand the scrutiny of judicial review. It cannot be arbitrary or excessive. It must possess a direct and proximate nexus with the object sought to be achieved. Whenever and wherever any restriction is imposed upon the right to freedom of speech and expression, it must be within the framework of the prescribed law, as subscribed by Article 19(2) of the Constitution.

2. The upshot of the above analysis is that the freedom of speech and expression guaranteed under Article 19(1)(a) is not hemmed in by any inherent and implicit restrictions but only those under Article 19(2).

V. Balancing competing fundamental rights

1. The Courts have often been presented with the challenge of balancing competing fundamental rights, very often, one person's right under Article 19(1)(a) against another's right under Article 21 (for example, the right to reputation, the right to a fair trial, the right to freedom from noise etc.). However, it appears from an analysis of judgments on the subject that even while balancing these two competing interests, the Courts have been careful not to resort to Article 21 in a manner that expands the avenues of restriction so carefully defined under Article 19 (2). Very often, the interests sought to be protected under Article 21, for example the right to reputation and dignity or the right to a fair trial without unwarranted or interfering publicity can be harmoniously reconciled with the interests sought to be protected under Article 19(2) and therefore, no conflict arises. In determining whether a legislation impacted fundamental rights, the Supreme Court adopted the direct or incidental effect test. The following cases of the Supreme Court discuss the balancing of competing fundamental rights:

Sahara case

- i. In the Sahara Guidelines case, *Sahara India Real Estate Corpn Ltd. v. SEBI*, (2012) 10 SCC 603, a Constitution bench of this Hon'ble Court held, that in order to protect the individual's right to a fair trial under Article 21, media reporting could be restricted by issuing temporary postponement orders. However, the Court made express reference to its power to so direct under the law of contempt, i.e., to protect any unwarranted interference with the administration of justice. Since,

State of U.P. & Ors

“law in relation to contempt of court” is an express area of restriction under Article 19(2), the said measures could not be said to be beyond the scope of Article 19(2). The following passages from the judgment show that the Court was acutely conscious of the framework of Article 19(1) read with permissible restrictions under Article 19(2). It is within the framework of Article 19(2) that the court balanced the right to a fair trial under Article 21. The court held:

33. [...] Thus, courts of record under Article 129/Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness. The judgments in *Reliance Petrochemicals Ltd.* [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] and *Mirajkar* [AIR 1967 SC 1] were delivered in civil cases. However, in *Mirajkar* [AIR 1967 SC 1], this Court held that *all courts* which have inherent powers i.e. the Supreme Court, the High Courts and the civil courts can issue prior restraint orders or proceedings, prohibitory orders in *exceptional circumstances* temporarily prohibiting publications of court proceedings to be made in the media and that such powers do not violate Article 19(1)(a). Further, it is important to note, that, one of the heads on which Article 19(1)(a) rights can be restricted is in relation to “contempt of court” under Article 19(2). Article 19(2) preserves the common law of contempt as an “existing law”. In fact, the Contempt of Courts Act, 1971 embodies the common law of contempt. At this stage, suffice it to state that the Constitution Framers were fully aware of the *institution of contempt* under the common law which they have preserved as “existing law” under Article 19(2) read with Article 129 and Article 215 of the Constitution. The reason being that contempt is an offence *sui generis*. The Constitution Framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to the criminal process and provides a sanction. Other civil courts have the power under Section 151 of the Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In *Mirajkar* [AIR 1967 SC 1], this Court referred to the principles governing courts of record under Article 215 (see AIR para 60). It was held that the High Court is a superior court of record and that under Article 215 it has all the powers of such a court *including* the power to punish contempt of itself. At this stage, the word “including” in Article 129/Article 215 is to be noted. It may be noted that each of the articles is in two parts. The first part declares that the Supreme Court or the High Court “*shall be a court of record and shall have all the powers of such a court*”. The second part says “*includes the powers to punish for contempt*”. These articles save the pre-existing powers of the Courts as courts of record and that the power *includes* the power to punish for contempt (see *Delhi Judicial Service Assn. v. State of Gujarat* [(1991) 4

SCC 406] and *Supreme Court Bar Assn. v. Union of India* [(1998) 4 SCC 409]. As such a declaration has been made in the Constitution that the said powers cannot be taken away by any law made by Parliament except to the limited extent mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to contempt of court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that "the administration of justice is not perverted, prejudiced, obstructed or interfered with". To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court/High Court to prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts. In view of the judgment of this Court in *A.K. Gopalan v. Noordeen* [(1969) 2 SCC 734], such statements which could be prohibited temporarily would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under Article 21 from the time when the criminal proceedings in a subordinate court are imminent or where the suspect is arrested. This Court has held in *Ram Autar Shukla v. Arvind Shukla* [1995 Supp (2) SCC 130] that the law of contempt is a way to prevent the due process of law from getting perverted. That, the words "due course of justice" in Section 2(c) or Section 13 of the 1971 Act are wide enough and are not limited to a particular judicial proceedings. That, the meaning of the words "contempt of court" in Article 129 and Article 215 is wider than the definition of "criminal contempt" in Section 2(c) of the 1971 Act. Here, we would like to add a caveat. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice [see Nigel Lowe and Brenda Sufin, *Law of Contempt* (3rd Edn., Butterworth, London 1996)]. Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice (see Nigel Lowe and Brenda Sufin, *Law of Contempt*, p. 5 of 4th Edn.). According to Nigel Lowe and Brenda Sufin (p. 275) and also in the context of second part of Article 129 and Article 215 of the Constitution the object of the contempt law is not only to punish, it includes the power of the courts to prevent such acts which interfere, impede or pervert administration of justice. Presumption of innocence is held to be a human right. (See *Ranjitsing Brahmajetsing Sharma v. State of Maharashtra* [(2005) 5 SCC 294 : 2005 SCC (Cr) 1057].) If in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, the courts of record suo motu or on being approached or on report being filed before it by the subordinate court can under its inherent powers under Article 129 or Article 215 pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided that he is able to displace the presumption of open justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.

34. The above discussion shows that in most jurisdictions there is power in the courts to postpone reporting of judicial proceedings in the interest of administration of justice. Under Article 19(2) of the Constitution, law in relation to contempt of court, is a reasonable restriction. [...]¹⁹

Further, at paragraph 34, this Hon'ble Court clearly held:

[...]The applicant who seeks order of postpone of publicity must displace the presumption of open justice and only in such cases the higher courts shall pass the order of postponements under Article 129/ Article 215 of the Constitution.

It may be further noted that in paragraph 35 of the judgment, after an analysis of the Contempt of Courts Act, 1971, this Hon'ble Court concluded:

Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents *possible contempt* by the media.

Further it is held at paragraph 42:

Thus, balancing of such rights or equal public interest by order of postponement of publication or publicity in cases in which there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial and within the above enumerated parameters of necessity and proportionality would satisfy the test of reasonableness in Articles 14 and 19(2). Ultimately such orders of postponement are only to balance conflicting public interests or right in Part III of the Constitution. They also satisfy the requirements of justification under Article 14 and Article 21.²⁰

It is very clear from the above that the restrictions recognised in the *Sahara case* flowed not from Article 21 alone but from an express ground of restriction under Article 19(2) itself. It is respectfully submitted that to read the *Sahara* judgment as opening up new

¹⁹ (2012) 10 SCC 603

²⁰ *Id.* at para 42, page 725

restrictions on the freedom of speech, not contemplated under Article 19(2) is incorrect.

ii. *Noise Pollution case*

In *Noise Pollution (V)*, *In re*, (2005) 5 SCC 733, the Court invoked Article 21 to protect citizens against noise pollution. The Court held that Article 19(1)(a) could not be a shield to use loudspeakers or disturb the peace of mind of others. However, what is important for the purposes of the present argument is that the right to silence and freedom from noise was read into Article 19(1)(a) itself on the ground that the right under Article 19(1)(a) is broad enough to encompass both speech and the converse of speech which is the right to silence. The court borrowed from a judgment of the Kerala High Court, *P.A. Jacob v. Supdt. of Police* [AIR 1993 Ker 1] wherein it was observed:

The right to speech implies, the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends freedom to be free from what one desires to be free from. Free speech is not to be treated as a promise to everyone with opinions and beliefs, to gather at any place and at any time and express their views in any manner. The right is subordinate to peace and order. A person can decline to read a publication, or switch off a radio or a television set. But, he cannot prevent the sound from a loudspeaker reaching him. He could be forced to hear what, he wishes not, to hear. That will be an invasion of his right to be let alone, to hear what he wants to hear, or not to hear, what he does not wish to hear. One may put his mind or hearing to his own uses, but not that of another. No one has a right to trespass on the mind or ear of another and commit auricular or visual aggression. A loudspeaker is a mechanical device, and it has no mind or thought process in it. Recognition of the right of speech or expression is recognition accorded to a human faculty. A right belongs to human personality, and not to a mechanical device. One may put his faculties to reasonable uses. But, he cannot put his machines to any use he likes. He cannot use his machines to injure others. Intervention with a machine, is not intervention with, or invasion of a human faculty or right. No mechanical device can be upgraded to a human faculty. A computer or a robot cannot be conceded the rights under Article 19 (though they may be useful to man to express his faculties). No more, a loudspeaker. The use of a loudspeaker may be

State of U.P. & Ors

incidental to the exercise of the right. But, its use is not a matter of right, or part of the right.

iii. *National Anthem case (Bijoe Emmanuel)*

Likewise, in *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615, this Hon'ble Court upheld the right of school children to refrain from singing the national anthem. Such a right flowed not only from the right to religion under Article 25 (1) but also from the right to free speech under Article 19 (1) (a). In other words, one cannot restrict or curtail the enjoyment of one right in furtherance of another.

iv. *Sakal Papers*

In *Sakal Papers v. Union of India*, AIR 1962 SC 305, the Supreme Court held that the Newspaper (Price and Page) Act, 1956 directly violated the guarantee of speech and expression by placing a restraint on an essential aspect of that freedom- the right of a newspaper to publish any number of pages or to circulate it to as many persons as it can. The Court held that although one of the objects of the Act, to protect small or newly started newspapers, was desirable but to attain such an object, the State could not make inroads on the rights guaranteed under Article 19(1)(a). In paragraphs 34 and 36, this Court held:

34. [...] The right to freedom of speech and expression is an individual right guaranteed to every citizen by Article 19(1)(a) of the Constitution. There is nothing in clause (2) of Article 19 which permits the State to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail, or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19. It is admitted that

State of U.P. & Ors

the impugned provisions cannot be justified on the grounds referred to in the aforesaid clause.

[...]

36. It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom.²¹ (emphasis supplied)

v. *Express Newspaper case*

Express Newspaper (P) Ltd. v. Union of India, AIR 1958 SC 578, arose out of a challenge to the validity of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 and the decision of the wage board constituted under the Act, on the ground that its provisions violated the fundamental rights guaranteed under Article 19 (1) (a), 19 (1) (g), 14 and 32. The Supreme Court came to the conclusion that the Act was enacted for the amelioration of the conditions of those employed in the newspaper industry and that any impact of the legislation on the right to

²¹ (1962) 3 SCR 842, para 34, 36

was far too remote and incidental to warrant a striking down of the legislation. Unless the legislation *directly or inevitably impinged* the freedom guaranteed under Article 19 (1) (a), it would have to be upheld as being constitutional. The Court held:

31. It is obvious that the enactment of this measure is for the amelioration of the conditions of the workmen in the newspaper industry. It would not be possible for the State to take up all the industries together and even as a matter of policy it would be expedient to take the industries one by one. Even in regard to the workmen employed it would be equally expedient to take a class of employees who stand in a separate category by themselves for the purpose of benefiting them in the manner contemplated. This circumstance by itself would therefore not be indicative of any undue preference or a prejudicial treatment being meted out to that particular industry, the main object being the amelioration of the conditions of those workmen. It could not also be said that there was any ulterior motive behind the enactment of such a measure because the employers may have to share a greater financial burden than before or that the working of the industry may be rendered more difficult than before. These are all incidental disadvantages which may manifest themselves in the future working of the industry, but it could not be said that the legislature in enacting that measure was aiming at these disadvantages when it was trying to ameliorate the conditions of the workmen. Those employers who are favourably situated, may not feel the strain at all while those of them who are marginally situated may not be able to bear the strain and may in conceivable cases have to disappear after closing down their establishments. That, however, would be a consequence which would be extraneous and not within the contemplation of the legislature. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such. All the consequences which have been visualized in this behalf by the petitioners viz. the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid; the imposition of penalty on the petitioner's right to choose the instruments for exercising the freedom or compelling them to seek alternative media etc, would be remote and depend upon various factors which may or may not come into play. Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned.

vi. *The Bennett Coleman Case*

In *Bennett Coleman v. Union of India*, (1972) 2 SCC 788, the Supreme Court struck down the Newsprint Control Order, 1962 on the ground that the newsprint policy was not a reasonable restriction within the ambit of Article 19(2) and abridged the fundamental rights of the petitioners under Article 19(1)(a). The Court held that the tests of pith and substance of the subject-matter and the direct or incidental effect of the legislation (as applied in the *Sakal Papers* case), are relevant to questions of legislative competence but are irrelevant to the question of infringement of fundamental rights. It held:

39. [...] The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject-matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject-matter may be different. A law dealing directly with the Defence of India or defamation may yet have a direct effect on the freedom of speech. Article 19(2) could not have such law if the restriction is unreasonable even if it is related to matters mentioned therein. Therefore, the word "direct" would go to the quality or character of the effect and not to the subject-matter. The object of the law or executive action is irrelevant when it establishes the petitioners' contention about infringement of fundamental right. In the present case, the object of the newspaper restrictions has nothing to do with the availability of newsprint or foreign exchange because these restrictions come into operation after the grant of quota. Therefore the restrictions are to control the number of pages or circulation of dailies or newspapers. These restrictions are clearly outside the ambit of Article 19(2) of the Constitution. It, therefore, confirms that the right of freedom of speech and expression is abridged by these restrictions.

43. [...] The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect is the restriction upon circulation of newspapers. The direct effect is upon growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed.

On the issue of balancing interest, the Court held:

Versus
...Respondents
State of U.P. & Ors

Constitutional challenge to criminal defamation law

In *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221, this Hon'ble Court upheld the criminal defamation law as enshrined in sections 499 and 500, IPC. The Court balanced the conflict between the right to reputation under Article 21 on the one hand, and the freedom of

speech and expression under Article 19(1)(a) on the other. The Court held:

144. The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. The submission is that continuance of criminal defamation under Section 499 IPC is constitutionally inconceivable as it creates a serious dent in the right to freedom of speech and expression. It is urged that to have defamation as a component of criminal law is an anathema to the idea of free speech which is recognised under the Constitution and, therefore, criminalisation of defamation in any form is an unreasonable restriction. We have already held that reputation is an inextricable aspect of right to life under Article 21 of the Constitution and the State in order to sustain and protect the said reputation of an individual has kept the provision under Section 499 IPC alive as a part of law. The seminal point is permissibility of criminal defamation as a reasonable restriction as understood under Article 19(2) of the Constitution. To elucidate, the submission is that criminal defamation, a pre-Constitution law is totally alien to the concept of free speech. As stated earlier, the right to reputation is a constituent of Article 21 of the Constitution. It is an individual's fundamental right and, therefore, balancing of fundamental right is imperative. The Court has spoken about synthesis and overlapping of fundamental rights, and thus, sometimes conflicts between two rights and competing values. In the name of freedom of speech and expression, the right of another cannot be jeopardised. In this regard, reproduction of a passage from Noise Pollution (5), In re [Noise Pollution (5)], In re, (2005) 5 SCC 733 would be apposite. It reads as follows: (SCC p. 746, para 11)

“11. ... Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. We need not further dwell on this aspect. Two decisions in this regard delivered by the High Courts have been brought to our notice wherein the right to live in an atmosphere free from noise pollution has been upheld as the one guaranteed by Article 21 of the Constitution. These decisions are Free Legal Aid Cell Shri Sugan Chand Aggarwal v. Govt. (NCT of Delhi) [Free Legal Aid Cell Shri Sugan Chand Aggarwal v. Govt. (NCT of Delhi), AIR 2001 Del 455 : (2001) 93 DLT 28 (DB) : 2001 SCC OnLine Del 713] and P.A. Jacob v. Supt. of Police [P.A. Jacob v. Supt. of Police, AIR 1993 Ker 1 :

1992 SCC OnLine Ker 170]. We have carefully gone through the reasoning adopted in the two decisions and the principle of law laid down therein, in particular, the exposition of Article 21 of the Constitution. We find ourselves in entire agreement therewith."

We are in respectful agreement with the aforesaid enunciation of law. Reputation being an inherent component of Article 21, we do not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person's right to go to court and state that he has been wronged and abused. He can take recourse to a procedure recognised and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech. The legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate.

It is therefore clear that any restriction on the freedom of speech must be grounded in the restrictions enumerated in Article 19(2) and backed by law. This does not mean that the fundamental right under Article 19(1)(a) is a watertight compartment that must be read in isolation with other fundamental rights. However, while balancing competing fundamental rights, the competing interest must find some place in Article 19(2) in order to constitute a justifiable restriction on the freedom of speech.

VI. Impact of "overlapping" fundamental rights post *Maneka Gandhi*

1. In *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, this Hon'ble Court discussed the inter-relationship between Articles 14, 19 and 21. It observed:

5. [...] The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in *A.K. Gopalan v. State of Madras* [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cr LJ 1383] and the observations made by Patanjali Sastri, J., Mukherjee, J., and S.K. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to

confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in *Kharak Singh v. State of U.P.* [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 CrLJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in *R.C. Cooper v. Union of India* [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in *R.C. Cooper case* [(1970) 2 SCC 298 : (1971) 1 SCR 512] a little later when we deal with the arguments based on infringement of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the Full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in *A.K. Gopalan case* [AIR 1950 SC 27 : 1950 SCR 88 : 51 CrLJ 1383] gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to the protection of distinct rights, but this theory was overturned in *R.C. Cooper case* [(1970) 2 SCC 298 : (1971) 1 SCR 512] where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in *A.K. Gopalan case* [AIR 1950 SC 27 : 1950 SCR 88 : 51 CrLJ

Versus

Respondents

1383] that certain articles in the Constitution exclusively deal with specific matters — cannot be accepted as correct". It was held in *R.C. Cooper case* [(1970) 2 SCC 298 : (1971) 1 SCR 512] — and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjee, J., and S.R. Das, J., in *A.K. Gopalan case* — that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). [...] We may point out even at the cost of repetition that this Court has said in so many terms in *R.C. Cooper case* [(1970) 2 SCC 298 : (1971) 1 SCR 512] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. [...]

2. The above position, that fundamental rights do not exist in isolation, and that there may be cases of overlap of rights across Part III, was also reiterated in *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1 (paras 22 onwards, 30 to 31 and 62), as also in *KS Puttaswamy v. Union of India*, (2019) 1 SCC 1 (paras 115-116, 979-980, 1268 to 1269, 1275). However, it is to be noted that in the present matter, the question before us does not entail an overlap of fundamental rights but involves a case of conflict between two fundamental rights claimed by different people.
3. In any case, as explained in the above provisions, even in case of an overlap between Articles 21 and 19(1)(a), a restriction may be imposed only by law which passes the muster of Article 19(2). This is explained clearly in *KS Puttaswamy v. Union of India*, (2019) 1 SCC 1 (para 115):

115. Concededly, fundamental rights are not absolute. The Constitution itself permits State to impose reasonable restrictions on these rights under certain circumstances. Thus, extent and scope of the right to privacy and how and when it can be limited by the State actions is also to be discerned. As noted above, Nariman, J. has led the path in K.S. Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1] by observing that "when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed" (SCC p. 601, para 526). Therefore, examination has to be from the point of view of Articles 14, 19 and 21 for the reason that right to privacy is treated as having intimate connection to various rights in Part III and is not merely related to Article 21. Looked at from this angle, the action of the State will have to be tested on the touchstone of Article 14. This judgment clarifies that the "classification" test adopted earlier has to be expanded and instead the law/action is to be tested on the ground of "manifest arbitrariness". This aspect has already been discussed in detail under the caption "Scope of judicial review" above.

When it comes to examining the "restrictions" as per the provisions of Article 19 of the Constitution, the judgment proceeds to clarify that a law which impacts dignity and liberty under Article 21, as well as having chilling effects on free speech which is protected by Article 19(1)(a), must satisfy the standards of judicial review under both provisions. Therefore, such restriction must satisfy the test of judicial review under: (i) one of the eight grounds mentioned under Article 19(2); and (ii) the restriction should be reasonable. This Court has applied multiple standards to determine reasonableness, including proximity, arbitrariness, and proportionality. Further, the reasonable restrictions must be in the interests of: (i) the sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, (v) decency or morality, or (vi) in relation to contempt of court, (vii) defamation, or (viii) incitement to an offence.

VII. Laws under which a speech derogatory of a rape victim may be prosecuted

a. Defamation

1. Section 499 of the Indian Penal Code, 1860 (IPC) criminalizes defamation and section 500 provides the punishment for the same.

Section 499, IPC is reproduced hereinbelow:

Section 499. Defamation.—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 case hereinafter expected to defame that person.

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

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

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

First Exception.—Imputation of truth which public good requires to be made or published – It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—Public conduct of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth Exception.—Publication of reports of proceedings of Courts – It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings. Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned – It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Sixth Exception. —Merits of public performance – It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be substituted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Seventh Exception.—Censure passed in good faith by person having lawful authority over another – It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with mat other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates. Eighth Exception.—Accusation preferred in good faith to authorised person – It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Ninth Exception.—Imputation made in good faith by person for protection of his or other's interests – It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Tenth Exception.—Caution intended for good of person to whom conveyed or for public good – It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

2. Under Article 19(2), defamation is one of the grounds on which speech can be restricted. At the core of the provision is the notion of a person's reputation which may be caused harm by someone's speech. Proceedings under this section can be initiated only by an aggrieved person.
3. In *Subramaniam Swamy v. Union of India*, (2016) 7 SCC 221, this Hon'ble Court upheld the constitutionality of sections 499 and 500 of the IPC. In paragraph 25, the Court observed that "reputation" is a "universal value" and is a "cherished constituent of life". The Court further cites international covenants and discusses facets of "reputation" in the following paragraphs:

31. Various international covenants have stressed on the significance of reputation and honour in a person's life. The *Universal Declaration of Human Rights, 1948* has explicit provisions for both, the right to free speech and right to reputation. Article 12 of the said Declaration provides that:

"12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of

2. The *International Covenant on Civil and Political Rights* (ICCPR) contains similar provisions. Article 19 of the Covenant expressly subjects the right of expression to the rights and reputation of others. It reads thus:

"19. (1) Everyone shall have the right to hold opinions without interference.

(2) 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.

(3) The exercise of the rights provided for in Para (2) of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (order public), or of public health or morals."

34. The reference to international covenants has a definitive purpose. They reflect the purpose and concern and recognise reputation as an inseparable right of an individual. They juxtapose the right to freedom of speech and expression and the right of reputation thereby accepting restrictions, *albeit* as per law and necessity. That apart, they explicate that the individual honour and reputation is of great value to human existence being attached to dignity and all constitute an inalienable part of a complete human being. To put it differently, sans these values, no person or individual can conceive the idea of a real person, for absence of these aspects in life makes a person a non-person and an individual to be an entity only in existence perceived without individuality.

4. In paragraph 80 of *Subramaniam Swamy*, the Court discusses the importance of reputation in society:

Individuals constitute the collective. Law is enacted to protect the societal interest. The law relating to defamation protects the reputation of each individual in the perception of the public at large. It matters to an individual in the eyes of the society. Protection of individual right is imperative for social stability in a body polity and that is why the State makes laws relating to crimes. A crime affects the society. It causes harm and creates a dent in social harmony. When we talk of society, it is not an abstract idea or a thought in abstraction. There is a link and connect between individual rights and the society; and this connection gives rise to community interest at large. It is a concrete and visible phenomenon. Therefore, when harm is caused to an individual, the society as a whole is affected and the danger is perceived.

b. Impact on the right to a fair trial: Applicability of Contempt of Courts Act, 1971 and Article 129/215 of the Constitution

Drawing unfair and unwarranted conclusions about crimes against women can impede women's access to justice. This would be an immediate violation of the right to a fair trial, a right recognised under Article 21.²² In addition to this, it could impact the fairness of the investigation and thus be tantamount to contempt of court.

6. Irresponsible comments by a public person in a pending case can also have the effect of trial by media – it may result in influencing witnesses etc. and thus may impact the fairness of the trial. It is not only witnesses who can be influenced but as this Hon'ble Court remarked in *P C Sen, re*²³ “it would be an overstatement to assert that a Judge may not be influenced even ‘unconsciously’ by what he has read in newspapers.” They can be no denying that the media, especially the electronic media and social media have a profound impact on public perceptions and sensationalization of issues can not only distort public perceptions but also erode the confidence of the public in the judicial system. Individuals holding public office have a high degree of duty of care and responsibility towards the system, as they are integral to the system of governance and public order. Such individuals also have the privilege of a public pulpit from which they can disseminate political communication. Therefore, given that they have a wider public reach,

²² Contempt of court, as defined under section 2(c) is punishable under section 12 of the Contempt of Courts Act, 1971 read with Articles 129 or 215 of the Constitution of India.
²³ 1969 2 SCR 649

the ability to impact public opinion. On the one hand, such particularly by a person holding public office have the general of trivialising crimes against women when such crimes ought to be taken with utmost seriousness. Such remarks coming from a public figure convey callousness towards women and the message that misogynistic discourse is an acceptable norm, while the need of the hour is to altogether eradicate such discourse from society. Trial by media must be condemned in the strongest terms if we are to have a sufficient and fair justice delivery. In *Mamta Sharma v. State (NCT of Delhi)*²⁴, para 298 – 99 and 301.

298. Despite the significance of the print and electronic media in the present day, it is not only desirable but the least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.

299. In the present case, certain articles and news items appearing in the newspapers immediately after the date of occurrence, did cause certain confusion in the mind of public as to the description and number of the actual assailants/suspects. It is unfortunate that trial by media did, though to a very limited extent, affect the accused, but not tantamount to a prejudice which should weigh with the court in taking any different view. The freedom of speech protected under Article 19(1)(a) of the Constitution has to be carefully and cautiously used, so as to avoid interference with the administration of justice and leading to undesirable results in the matters sub judice before the courts.

* * *

301. Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution. [*Anukul Chandra Pradhan v. Union of India* [(1996) 6 SCC 354 : 1996 SCC (Cri) 1338].] It is essential for the maintenance of dignity of the courts and is one of the cardinal principles of the rule of law in a free

democratic country, that the criticism or even the reporting particularly, in sub judge matters must be subjected to check and balances so as not to interfere with the administration of justice.

In the *Sahara* case, the Supreme Court justified the use of neutralizing techniques to suspend/ postpone reporting of pending matters in order to preserve the sanctity of powers under the Contempt of Courts Act, 1971.

c. **Section 509, IPC – Insulting the modesty of a woman**

7. Section 509 of the Indian Penal Code, 1860 (IPC) makes it an offence to utter words, make gestures or act in a way so as to insult the modesty of a woman. The said section is reproduced below:

509. Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

8. In order to establish this offence it is necessary to show that the modesty of a particular woman or a readily identifiable group of women has been insulted by a spoken word, gesture or physical act.²³

9. Section 509, IPC embodies a restriction on free speech on the grounds of decency and morality. By casting aspersions on the claims of rape made by the prosecutrix, Respondent no. 2 has affronted her dignity and personhood.

²³ *Khushboo v. Kamiammal*, (2010) 5 SCC 600

d. "Hate Speech" – 267th Report of the Law Commission of

India

10. The Supreme Court, in the case of *Pravasi Bhalai Sangathan v. Union of India*, AIR 2014 SC 1591, observed that the issue of hate speech deserved deeper consideration by the Law Commission of India. Consequently, the Law Commission of India, in its 267th Report, titled "Hate Speech", suggests amendments to the IPC and the Code of Criminal Procedure, 1973 (CrPC) by adding new provisions on "Prohibiting incitement to hatred", following section 153B IPC and "Causing fear, alarm, or provocation of violence in certain cases" following section 505 IPC, and accordingly amending the First Schedule of the CrPC. The said provisions form part of the draft amendment bill, namely, the Criminal Law (Amendment) Bill, 2017, annexed as Annexure-A to the said report and are reproduced hereinbelow:

2. Insertion of new section after section 153B.-

In the Indian Penal Code, (45 of 1860) (hereinafter referred to as the Penal Code), after section 153B, the following section shall be inserted, namely:-

Prohibiting incitement to hatred-

"153 C. Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe –

- (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or
- (b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence 52 shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs 5000, or with both."

2. Insertion of new section after section 505.- In the Penal Code, after section 505, the following section shall be inserted, namely:-

Causing fear, alarm, or provocation of violence in certain cases.

"505 A. Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place

of birth, residence, language, disability or tribe uses words, or displays any writing, sign, or other visible representation which is gravely threatening, or derogatory;

- (i) within the hearing or sight of a person, causing fear or alarm, or;
- (ii) with the intent to provoke the use of unlawful violence, against that person or another, shall be punished with imprisonment for a term which may extend to one year and/or fine up to Rs 5000, or both".