

## **CENSORED: LOSS OF FACE OR PREPONDERING SOCIAL PURPOSE?**

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### **Introduction and Background**

“Where it left to me to decide whether we should have a government without newspaper, or newspapers without a government, I should not hesitate a moment to prefer the latter<sup>1</sup>”

----Thomas Jefferson.

There is a prevalent confusion regarding the concept media as a business’ under Article 19(1) (g) of the Constitution of India or it is an activity protected under Article 19(1)(a) as the right to freedom of speech and expression. This critical confusion is the determination of the standards applicable to the conduct of many media as the fourth estate of the Indian democracy. India being one of the biggest democracies in the world enjoys a great deal of freedom and when it is threatened the response becomes vociferous. Nevertheless there should always be parity between the rights granted and the responsibilities attached to the enjoyment of such rights<sup>2</sup>. This right is however equated with the necessity to overtake the media as a business which is fundamentally flawed. Freedom of speech and expression includes freedom of circulation to the extent of propagation of one’s inherent right to the freedom of speech and expression. The democratic credentials of a state is judged by the activeness of press which in turn provides the ordinary citizen right to an effective democracy, participation on the political life and an informed decision making procedure.

Article 19(1) (a) draws its inspiration from the First Amendment to the United States Constitution which states: “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

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<sup>1</sup> Thomas Jefferson, President of United States of America, 1801-1809.

<sup>2</sup> Anahita Mathai, Media Freedom and Article 19, ORF Issue Brief, Issue 53 April 2013 ORF.

Government for a redress of grievances.” The Hon’ble Supreme Court of India had observed that the six freedoms contained under Article 19 (1) deals with those great and basic rights which are recognized and guaranteed as the natural right inherent in the status of citizen of a free country. But the freedoms guaranteed under Article 19 are illustrative and not exhaustive. If we turn to the Halsbury’s Laws of England, we can find that freedom of expression incorporates both right to receive and to express ideas and information and the secrecy of private communications and freedom of expression incorporates the freedom of the press<sup>3</sup>, as the liberty of the press originates from the guaranteed freedom of speech and expression under Article 19 (1) (a)<sup>4</sup>. In *Sakal Papers* the Supreme Court observed that the freedom of speech and expression is of paramount importance under the democratic constitution and it must be preserved. But such a freedom knows no boundary of geographic limitations. Thus the media has same rights, no more-no less than any individual to write, publish, circulate or broadcast in a pre-independence case Privy Council held that:<sup>5</sup>

The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, apart from the statute law, his privilege is no other and no higher.... No privilege attaches to his position.

### **Developing a Workable Path to Find the Press**

The freedom of press is a democratic right because it is the primary duty of all the national courts to uphold the freedom of press and invalidate all laws and administrative actions which interfere with such freedom against the constitutional mandate<sup>6</sup> while highlighting the importance of freedom of the press in a democracy. All major constitutional democracies recognize the important role of free speech in preserving the democratic value specially India being the country of strong traditional judicial review and constitutionally protected rights preserved by the Supreme Court<sup>7</sup>.

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<sup>3</sup> D.J. De, *Fundamental Rights*, 432 (Eastern Law House: 2000).

<sup>4</sup> *Sakal Papers v. Union of India*, AIR 1962 SC 305.

<sup>5</sup> *Channing Arnold v. Emperor*, AIR 1914 PC 116.

<sup>6</sup> *Indian Express Newspaper v. Union of India*, AIR 1986 SC 872.

<sup>7</sup> Khagesh Gautam, *Obscenity, Internet, Free press and Free Speech: Constitutions of India and United States*.

The right to speak offers human being to express his feeling but this cannot be the only reason for which safeguard is provided by the constitution, there are four main justifications behind such right they are<sup>8</sup>:

1. For the discovery of truth- restrictions to freedom of speech if tolerated by the society it means they want to perjure to oneself.
2. Freedom of speech and expression is an aspect of self-fulfillment and development - Freedom of speech provides for an integral right to one's self-development whereby an individual attains self-fulfillment.
3. An opportunity to express one's belief and show political attitudes - which ultimately results as the welfare of the society and state. Thus freedom provided under Article 19(1)(a) provides for a mechanism to establish a reasonable balance between stability and social change.
4. Active participation of democracy- India enjoys the position of the largest democracy in the world. Freedom of speech is there to protect the right of all citizens to understand the political values and so that each individual can participate in the smooth working of the democracy. Freedom of speech strengthens the capacity of an individual in participating in decision-making process. Freedom of expression has always been emphasized as an essential basis for the democratic functioning of a society. The reasons for this are: the right of an individual to self-fulfillment, which right requires the communication of thought; the importance of constantly attempting to attain the truth, an attempt which is frustrated if information is suppressed or comment blocked; the inherent democratic right to participate in decision-making<sup>9</sup>.

### **The Media is Different: The Significance**

In the opinion Jefferson<sup>10</sup>, 'newspaper is the media which are essential for the democratic government' and he would go to the extreme and say that 'he would prefer a country with newspapers without a government rather than to have a government without a newspaper'<sup>11</sup>. The founding fathers of the constitution of India appear

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<sup>8</sup> India Law Journal, [http://www.indialawjournal.com/volume3/issue\\_4/article\\_by\\_dheerajendra.html](http://www.indialawjournal.com/volume3/issue_4/article_by_dheerajendra.html) (last updated on 24th March, 2015).

<sup>9</sup> PUCL, <http://www.pucl.org/from-archives/Media/freedom-press.htm> (last updated 25th March, 2015).

<sup>10</sup> Supra n. 1

<sup>11</sup> Thomas Jefferson Inaugural Address, Washington, 4<sup>th</sup> March, 1801 cited in 'Speeches that changed the world', Quercus Publishing Plc. London, 42 (2008).

to have understood the importance of freedom of speech and expression. Dr. Ambedkar, the chairman of the drafting Committee asserted the non-absolute character of the rights in his speech in the constituent Assembly<sup>12</sup> when the members charged that the freedoms guaranteed under Article 13 of the draft constitution were fettered by provisos. According to Ambedkar, the main purpose of the provisos was to prevent endless litigation and the Supreme Court having rescue parliament. Alladi Krishna Swami Iyer, a member shared his view and observed that it was better to provide for the limitations in the constitution itself rather than 'leaving it to the courts to read the necessary limitations and exceptions'<sup>13</sup>. Therefore the constituent assembly accepted this view and finally when the constitution was adopted Article 19(2) was kept as a proviso to Article 19(1) (a). Article 19(1) (a) of the constitution of India declared in positive terms that 'All citizens shall have the right to freedom of speech and expression'.

### **Censoring: Media is for Social Purpose**

"I am very much afraid of definitions, and yet one is almost forced to make them. One must take care, too, not to be inhibited by them."<sup>14</sup>

The genealogy of the approach to censorship has been settled with huge disparity which belongs a threat to the constitutional rights to the citizens. The research questions are hereby settled that Why the Court been so reluctant to breathe life into the Press Clause yet so willing to foster the Speech clause? One argument in favor of this restrained Press Clause approach is that while the Speech Clause protects speakers, the Press Clause protects technology. The term press can refer to both those individuals who gather and convey news as well as to the device originally used to print text onto paper (the printing press). The Article 19 of International Covenant on Civil and Political Rights, 1966,<sup>15</sup> epitomizes that: "everyone shall have the right to hold opinions without interference" and the "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."<sup>16</sup> Then too this ambiguity has

<sup>12</sup> Constituent Assemble Debates, Vol. VII, 40-41.

<sup>13</sup> Indian Bar Review, Vol. XLI (1) 2014, Media Freedom- Dimensions.

<sup>14</sup> Letter from Robert Delaunay, French Artist to August Macke, German Artist (1912) archived at <http://perma.cc/W56K-RQRD> (last updated 24th March, 2015).

<sup>15</sup> International Covenant on Civil and Political Rights, 1966, Article 19 Mar. 23, 1976.

<sup>16</sup> Article 19 of the International Covenant on Civil and Political Rights, 1966:

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

led some to argue that the intent of including constitutional press freedoms was to protect the latter, the printing press or its modern equivalents.<sup>17</sup>

India's relation to the film censorship in post colonial India has a special clause on the Central Board of Film Certification as the principle of "don't watch it, don't like it" principle comes in India with the judgment of Hon'ble Supreme Court of India. The new internet regime has come up with the unprecedented twist on the nations' protection of free speech. The new accommodation of laws in the sphere of information technology has kept the speech of a nation's citizens under certain amount of restriction as it puts a check on the content portion. The debates however questions on the front portion of freedom and making it questionable that whether the international conventions will have a tinge of influence. The act of internet protection along with its enforceability marks the basic failure to the failure of organs to accommodate differing speech freedoms. In domestic jurisdiction the publishers can restrict their viewpoint as it is within the country itself to limit the applicability on the basic laws. The set of principle are the need in order to craft the basic code of internet regime to make up the failure of nations to accommodate the differing the basic freedoms. Until what time the mode of suppression will be handled by the control of ideas and public communications is at stake? The freedom of speech has been guaranteed by the Constitution of India which can only be suppressed by the public policies enshrined under Article 19 itself. But however the edge of offensive communication has been different for different nations by their Governments. Several of the limitations are pressed in and against censorship. However it is the need for the balancing of necessary conflicting rights in order to determine the threshold for what can and cannot be censored.

### **The Press Clause versus the Speech Clause**

The symmetry between freedom and restriction of media activism is

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through any other media of his choice.

3. The exercise of the rights provided for in paragraph 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 (ordre public), or of public health or morals.

<sup>17</sup> Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 *Hous. L. Rev.* 1371.

pertinent to recognize the role of media vis-à-vis the judiciary. According to George Gerbner: “Popular entertainment and news via mass media represent the convention cultural pressures of the social order. The judicial process, however, represents an effort to adjudicate individual cases according to law.” The nostrum of social development by media revolves around the mantra ‘feed what the public is interested in’ and not ‘what is in public interest’ which has been detailed in the later chapters. The Andhra Pradesh High Court in *Labour Liberation Front v. State of Andhra Pradesh*<sup>18</sup>, observed that “once an incident involving prominent person or institution takes place, the media is swings into action, virtually leaving very little for the prosecution or the Courts.”<sup>19</sup> The media clamor created in the *Jessica Lall and Priyadarshini Mattoo* cases would be illustrations of the “Sinful rich type” and “Abuse of power trial”. However, this freedom comes as a proviso as per the phrase that exercise of this right comes with “special duties and responsibilities” and are subject to “the rights or reputations of others. Although the freedom of press is not separately guaranteed right in India unlike the United States of America, however the Supreme Court of India has recognized freedom of press under the canopy right of freedom of speech and expression as envisaged under Article 19 (1) (a) of the Constitution of India in the plethora of cases.

The case of *Shreya Singhal v. Union of India*<sup>20</sup> as adjudicated by the Hon’ble Supreme Court of India regarding the immediate cause for concern in the petition under Section 66A of the Information Technology Act of 2000. The Constitutionality check of this provision was under Article 19 (1) (a) as the impugned provision stated that the punishment for sending offensive messages through communication service or basically a computer resource which is a false and for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such communication device. It is basically a penal provision highlighting imprisonment as well as fine upon the person committing such crimes. The abovementioned impugned provision has been brought into the legislation with the foot prints of Section 10 (2) (a) of the U.K. Post Office (Amendment) Act of 1935 which made it an offence to send any message by telephone which is grossly offensive. This provision was however replaced by Section 43 of the British Telecommunication Act, 1984 in U.K. It was vehemently posed by the petitioners that the cause of annoyance, inconvenience, danger, obstruction, insult, injury,

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<sup>18</sup> 2005 (1) ALT 740.

<sup>19</sup> *Id.* at para 14.

<sup>20</sup> W.P. (Criminal) No. 167 of 2012 adjudicated on 24<sup>th</sup> March, 2015.

criminal intimidation, enmity, hatred or ill-will are outside the purview of Article 19 (2). The enforcement of the impugned provision would be an insidious form of censorship which impairs a core value as per Article 19 (1) (a). The pose of an “intelligible differentia” as per Article 14 and 21 as per the person between those who use the internet and those who by words spoken or written use other mediums of communication. In order to penalize a person because he uses a particular mode of communication is itself discriminatory and would fall foul of Article 14 in every case. The referred ambit of “market place of ideas” concept which stratifies the American laws as it had been highlighted by Justice Holmes in his dissenting opinion in the case of *Abrams v. United States*<sup>21</sup> that “the ultimate good desired is better reached by free trade in ideas that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”

The ratio behind the argument was that the fear of serious injury cannot be a justified by censorship of the free speech. In order to justify such free speech there must be with a reasoned ground in order to state that the danger is imminent. It is the citizen’s right to know which has been affected by Section 66A. Therefore, it is the right of people that is curbed down by the Section 66A of the Information Technology Act, 2000 as it creates an offence against persons who use the internet and annoy or cause inconvenience to others very clearly which does affect the freedom of speech and expression whereby the “clear and present danger” is not affected. As per the recent judgment of *Aveek Sarkar v. State of West Bengal*<sup>22</sup> this Court has moved away from the Hicklin test and applied the contemporary community standards test. Therefore, Section 66A is bound to get imputed from the legislation of Information Technology.

The globalization of the media aggravated the legal setbacks as a communication can be made through one publication circulating in different jurisdictions of the world.<sup>23</sup> Although all the branches of media tries to exercises considerable authority required to distort the truth and harm on individuals still it disappoints the crave for justice.<sup>24</sup> It is accepted that a free press is vital to the maintenance of a liberal democracy the sole reason being it provides the citizen with

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<sup>21</sup> 250 U.S. 616 (1919).

<sup>22</sup> 2014 (4) SCC 257.

<sup>23</sup> Eric Barendt, *Freedom of the Press* 92 (Ashgate Publishing Limited 2009).

<sup>24</sup> John Rawls, *A Theory of Justice* 95 (Third Indian Reprint, Universal Law Publishing Co. Pvt. Ltd. 2008).

the information and a diversified opinion necessary for them to argue on political and social perspective in order to make their government accountable.

The first amendment to the US Constitution provides that: "Congress shall make no law...abridging the freedom of speech or of the press."<sup>25</sup> Newspapers certainly enjoy the same rights to freedom of speech and expression unlike individuals but the meaning of the press clause must be more than what is expressly written otherwise it will become redundant. According to Stewart the purpose of the media provision is to establish an institution, 'The Fourth Estate', the main purpose would be to act as a check on the activities of all the three organs of the society.<sup>26</sup> To avoid glitches associated with legal control self-regulation is one of the methods. Commonly the councils consider and issue formal adjudications on complaints by members of the public about press misconduct focusing on erroneous or misleading complaints.

The Hon'ble Supreme Court of India has censored the coverage of court proceedings as matters sub judice by stating the purpose of postponement is fair and dispassionate judicial consideration untainted by media approach. The parameters of postponement for censorship should be the real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice, a necessity or proportionality to balance the litigating party's right to achieve justice.<sup>27</sup>

### **Media Trial: Government Weapon of a Ban**

Do the media influence the judiciary in a subconscious mode? The pre-trial and the onslaught of verdicts by the media in matters which are sub-judice definitely have a certain mode of impact on the administration of justice and also on the human beings who work in judiciary. Media works regardless of any sort of jurisdictional matters but the effect gets on to the media influencing the judges.<sup>28</sup> Media attributes make a certain kind of disparity amongst the reality and the viewer's knowledge of such instances. Even if one lifts up the bias, at times as the reliance of the reporting's done by the press and the accuracy do come under the scanner. The doctrine of dependency upon the media suggests that the masses have little or no experience with certain phenomenon to rely more heavily on the media for the

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<sup>25</sup> Geoffrey Robertson, *Media Law* 204 (Fifth Ed., Penguin Books Publication 2000).

<sup>26</sup> *Supra* note 16 at 15.

<sup>27</sup> *Sahara India Re C.A No. 9813 of 2011 and C.A. No. 9833 of 2011.*

<sup>28</sup> *Attorney General v. BBC* 1981 A.C. 303 (HL).



picture of reality.<sup>29</sup> The people should move into the research which might exhibit, irrespective of the bias, the media goes wrong on several occasions to provide the exact data to keep the populace communicated.

To begin with, however, the media comes up as a directive instrument against the abuse and violations of human rights. The usual social contract society is now the Stone Age where we have already withdrawn ourselves and kept in a universe of networking. There are some societies which enjoy various forms of social, political, economic, and cultural developments. The free media was harnessed as the force effective execution of the human rights in the constant struggle. The initiation of the mass arousal in the December, 2013 *Nirbhaya* issue<sup>30</sup> till the issue of women empowerment which cropped up interestingly where media activism struck as the no - entry mode to the denial of justice. It removes the constraints of any kind of disabilities that obstructs in the utilization of the women folk, not only in India but throughout the world. One of the basic tenets is that the media can come to the rescue for the citizens who are denied of fair trial by powerful interests. Suppose in the view of the fact that a revolutionary change has been joining hands with the constant growth and development of society. The role of media in protection to the human rights cannot be brushed aside. Media, the watchdog of the society is no more bound to the activities of the Press but has expanded unprecedentedly.<sup>31</sup>

The question of expression by the media is sometimes posed before the Judiciary as whether there is any sort of limitations upon the right of media in respect of the matters in the public domain.<sup>32</sup> Whether the investigative journalism undermines the issue of a legal wrong? Are they entitled to the Government documents which need secrecy? Shall they not be liable for espionage or defamation for which the Court of Law should summon them on this account? The media on several occasions investigated the Pre-trial prisoners in jail, the opinion polls and in cases of terrorism where Ajmal Kasab or Mohammed Afzal<sup>33</sup> where the right to fair trial has been compromised. The issue of justice crept up but it was no failure by moving upon the pathway discovered

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<sup>29</sup> Susanna R. Barber, *Televised Trials: Weighing Advantages against Disadvantages*, 10 *Just. Sys. J.* 279, 284 (1985).

<sup>30</sup> *State v. Ram Singh &Anr.* SC W.P. 114 of 2013.

<sup>31</sup> Lord Justice Denning, *The Road to Justice* 76 (Sweet and Maxwell 1988).

<sup>32</sup> Dr. Saroj Bohra, *Role of Media in Protection of Human Rights*, XII (4) *Nyayadeep* (The Official Journal of NALSA), 89 (October 2011).

<sup>33</sup> *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru* AIR 2005 SC 3820.

by the media.<sup>34</sup> To facilitate the limits of the media, the engagement of the attention of law-makers shall also seek to make broader guidelines on such evolving issues to ensure that the line should not be crossed.

Now off hand it might seem that the posture of the freedom of press is perhaps a necessity to make a passing reference to the major national dailies and blogs. The line has been on a peg down mode as in there are two modes of lanes in the society, the northward and the southward ones. The two lanes are two facets of the same coin. One acts in a live theatre called life and the other makes such acts accountable.<sup>35</sup> The importance of media cannot be underestimated in the life of nation building. The media or the fourth pillar should not bend itself as taking up the sectional interest like that of “Page 3” or being the publicity partner of the industrial magnates who does have interest in financial stakes or become the microphone of the press barons. It is definitely important that they should not be run just for the sake of their outspokenness.<sup>36</sup>

## Conclusion

The status of media has been traced out from the distinguished U.S. Appellate Court Judge Learned Hand observed, The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country.”<sup>37</sup> In evaluating the media, it seldom does not focuses only the “non-issues” but definitely tries to divert the attention of people to bring in opinions and view point which is the basic feature of a democratic setup. The rise of smaller voices shall help to achieve justice and the necessary achievement of justice undoubtedly seen to be done.<sup>38</sup>

In *the Indian Express Newspaper* case<sup>39</sup>, the Court pointed out that: “In today’s free world, the freedom of press is supposed to be the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world... the purpose of the press is to advance the public interest by publishing

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<sup>34</sup> John Rawls, Justice as Fairness, A Restatement 84 (First Indian Reprint, Universal Law Publishing Co. Pvt. Ltd. 2004).

<sup>35</sup> Michael Froomkin, *The Metaphor is the Key: Cryptography, The Clipper Chip, And the Constitution* University Pennsylvania Law Review, 19 (January 1995).

<sup>36</sup> H.R. Khanna, *Freedom of Expression with Particular Reference to Freedom of the Media*, 2 SCC (Jour.) 1 (1982).

<sup>37</sup> Gary A. Hengstler, *The Media’s Role in Changing the Face of U.S. Courts* 37 (Diane Publishing Company).

<sup>38</sup> *R. v. Sussex Justices :Exparte McCarthy* 1924 (1) KB 256.

<sup>39</sup> *Indian Express Newspapers (Bombay) Private Ltd. &Ors. v. Union of India & Ors.*, AIR 1986 SC 515.

facts and opinions without which a democratic electorate cannot make responsible judgments.” The virtue of publicizing the important elements of the society is the frame of justice. The soul permits the keenest spur to gain assurance against all kinds of Machiavellianism. It definitely keeps the Hon’ble Justice himself free from all bias during the trial.

The warning against secrecy in the administration of justice, through media the world evidences today as well. The open court principle is however a constitutional significance in many countries including Canada<sup>40</sup>, the United Kingdom<sup>41</sup>, the United States<sup>42</sup>, Australia<sup>43</sup> and New Zealand<sup>44</sup> which India does not follow. But the blatant commercialization of media, the trivialization of the content and sensationalism might create a great disconnect between the media and the people which should be checked to assure the fair trial mechanism.

Thereby the modus operandi behind the argument was that the Government in its justification of banning elements in order to provide a classification of the information in the public domain with the tinge of censorship in the element of free speech. The Hon’ble Supreme Court of India with the judicial activism methods are however creating leverage by stating the new contemporary tests in order to focus upon the right of people that is curbed down by the several ban as it creates an offence against persons whose inconvenience is caused. The Cinematograph Act is also riddled with colonial traits which encourages political censorship.

These anachronisms are incompatible with the spirit of the Indian Constitution, which was inspired by the huge upheaval of the westernized approach that political speech must be suppressed. The suggestion is to the Judiciary and also to the Legislature is that by adopting a functionalist liberal ideology of J.S. Mill, a state of political criticism should be allowed in order to keep the Government on the right track along with the rights of the people as it is enshrined in the Indian Constitution. The legislature should think that: “What about the impact of political censorship on citizens?” Therefore media should be allowed to discuss these evils boldly as they can surely help cure

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<sup>40</sup> AG (Nova Scotia) v. MacIntyre [1982] 1 SCR 175.

<sup>41</sup> Scott v. Scott [1913] A.C. 417.

<sup>42</sup> Richmond Newspapers Incorporated v. Virginia 448 U.S. 555 (1980).

<sup>43</sup> Russell v. Russell (1976) 134 CLR 495.

<sup>44</sup> Claire Baylis, *Justice Done and Justice Seen to be Done – The Public Administration of Justice* 21 Wellington Law Review 177 (1991).

some of them in order to earn a little extra on the side of justice and equality in the society.

