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TRIAL BY MEDIA AND THE TEST IDENTIFICATION PARADE: CLOSING THE “PENDENCY GAP” IN INDIA’S CONTEMPT LAW

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I. ABSTRACT

A Test Identification Parade (TIP) is dependable only when a witness’s memory remains insulated from external influence. Yet Indian investigative practice often exposes arrested suspects through press briefings, custody walks, leaked photographs, and viral social-media circulation before any parade occurs. This paper examines whether the Contempt of Courts Act, 1971, adequately protects identification evidence from such prejudicial publicity. Using a doctrinal-comparative method, it analyses the Bharatiya Sakshya Adhiniyam, 2023; the Bharatiya Nagarik Suraksha Sanhita, 2023; the Contempt of Courts Act, 1971; the Information Technology Rules, 2021; comparative United Kingdom and United States law; and the Law Commission of India’s 200th Report. It argues that the Act’s “pendency” requirement, linked to the filing of a charge sheet or the issuance of summons or warrant, leaves the investigation stage substantially unregulated, even though pre-trial publicity may irreversibly contaminate witness memory before a TIP is held. The paper further shows that the Press Council of India and the News Broadcasting and Digital Standards Authority cannot fill this gap because their sanctions are non-coercive, fragmented, and largely post-facto. Drawing on the United Kingdom’s arrest-triggered strict-liability model and the Supreme Court’s proportionality reasoning in Sahara India Real Estate Corp. Ltd. v. SEBI (2012), the paper proposes two targeted reforms: redefining pendency from the point of arrest where identification is genuinely in issue, and creating a binding, platform-neutral co-regulatory framework covering print, broadcast, digital news, and social-media republication. By locating trial-by-media harm in the evidentiary contamination of TIPs rather than only reputational prejudice, the paper

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contributes a narrower and more operational account of fair-trial protection in Indian contempt law.

II. KEYWORDS

Test identification parade; trial by media; Contempt of Courts Act, 1971; pendency gap; fair trial.

III. INTRODUCTION AND THESIS

Few phenomena in Indian criminal justice attract as much public commentary, and as little structural correction, as “trial by media.” From the extensive pre-trial coverage of the Jessica Lal and Priyadarshini Mattoo cases in the early 2000s, through the Aarushi Talwar investigation, to the saturation coverage of the Sushant Singh Rajput case in 2020, Indian television and, increasingly, social media have repeatedly converted ongoing criminal investigations into public spectacles complete with reconstructed timelines, leaked forensic details, and confident on-air verdicts delivered long before any court has heard the evidence.

Commentary on this phenomenon has tended to treat its harm as primarily reputational or psychological, the presumption of innocence eroded in the court of public opinion. This paper argues that the harm is also, and more concretely, evidentiary: unrestrained pre-trial publicity can permanently destroy the reliability of a specific piece of evidence, the Test Identification Parade, on which a conviction may substantially rest.

A TIP depends entirely on a witness identifying a suspect from memory of the crime, uncontaminated by any intervening exposure to that suspect’s image. Once a photograph is broadcast, printed, or shared online, that precondition is irreversibly lost, and any subsequent “successful” identification proves only that the witness recognised a face from the news, not from the crime scene. Indian courts, from *Kanta Prasad v. Delhi Administration*³ through *Malkhan Singh v. State of Madhya Pradesh*⁴ to a

³ *Kanta Prasad v. Delhi Administration*, AIR 1958 SC 350.

⁴ *Malkhan Singh & Ors. v. State of Madhya Pradesh*, (2003) 5 SCC 746.

string of recent appellate rulings, have consistently held that such prior exposure vitiates the parade and, with it, any conviction resting substantially on it. Yet the very mechanism through which this exposure typically occurs an investigating agency's press briefing, a television channel's "exclusive" custody visual, an image forwarded thousands of times on social media within hours of arrest happens at a stage of the criminal process where India's principal statutory tool against prejudicial publication, the Contempt of Courts Act, 1971, has essentially no purchase.

The scale of this exposure has grown considerably since the phenomenon was first studied. India has among the highest smartphone and social media penetration rates in the world, and a photograph released at a single press briefing can reach millions of potential witnesses within hours through WhatsApp forwards, Instagram reposts, and short-form video aggregation well before any newspaper corrigendum or television retraction could plausibly catch up with it.

Where earlier trial-by-media scholarship, including the Law Commission's own 2006 study, was principally concerned with the reach of twenty-four-hour cable television, the marginal cost of republication today is effectively zero, and the audience for a single viral post can exceed that of a national broadcast. This has narrowed, rather than widened, the practical window within which any restraint on publication could still be meaningful, making the timing of the legal trigger for restraint more, not less, important than it was when the Commission last examined the question.

This paper's thesis is that the law's structural response to this harm has failed to keep pace with its own diagnosis. The Contempt of Courts Act, 1971 restrains publications prejudicing a "pending" judicial proceeding, but its Explanation to Section 3 deems a proceeding pending only from the filing of a charge sheet or the issue of a summons or warrant, not from arrest. Because a TIP is typically conducted within days or a few weeks of arrest, the single period of greatest evidentiary risk falls into a regulatory vacuum that this paper terms the "pendency gap."

Self-regulatory mechanisms, whether print-focused or broadcast-focused, cannot substitute for statutory reform, since their sanctions are voluntary, fragmented across media, and largely blind to digital republication. Nor does the newer Information

Technology Rules, 2021 regime, aimed at digital news publishers, close this specific gap, since its machinery addresses grievance redressal and content classification rather than pre-publication restraint tied to pending identification evidence. The paper argues that India should adopt an arrest-triggered, narrowly scoped postponement power modelled on the United Kingdom's Contempt of Court Act, 1981, rather than the trial-centred American model built around jury management, because the harm at issue here is completed before trial, at an investigative stage no amount of later jury management can cure.

A. Research Objectives

This paper seeks to achieve the following objectives:

1. To examine whether the Contempt of Courts Act, 1971, adequately protects Test Identification Parade evidence from prejudicial pre-trial publicity during the investigation stage.
2. To analyse the evidentiary consequences of exposing an arrested suspect's image before a Test Identification Parade is conducted, with reference to Indian statutory provisions and judicial precedent.
3. To comparatively evaluate the United Kingdom's arrest-triggered contempt model and the United States' trial-centred model for addressing prejudicial publicity.
4. To propose narrowly tailored statutory and co-regulatory reforms for closing the "pendency gap" in Indian contempt law while preserving legitimate press freedom.

B. Research Questions

This paper addresses the following research questions:

1. Does the present "pendency" requirement under the Contempt of Courts Act, 1971, leave identification evidence insufficiently protected during the investigation stage?

2. How does pre-parade publication of an arrested suspect's image affect the reliability and evidentiary value of a Test Identification Parade under Indian criminal law?
3. What statutory and institutional reforms can India adopt to prevent prejudicial publicity from contaminating identification evidence without imposing a disproportionate restraint on press freedom?

C. Research Methodology

This paper adopts a doctrinal-comparative methodology combining statutory interpretation, case-law analysis, and comparative legal study. Primary Indian sources include Section 7 of the Bharatiya Sakshya Adhiniyam, 2023 (successor to Section 9 of the Indian Evidence Act, 1872), Section 54 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (successor to Section 54A of the Code of Criminal Procedure, 1973), the Contempt of Courts Act, 1971, and Part III of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Indian case law including *Kanta Prasad v. Delhi Administration*, *Malkhan Singh v. State of Madhya Pradesh*, *State of Maharashtra v. Sukhdev Singh*, *State (Delhi Administration) v. V.C. Shukla*, *Lal Singh v. State of U.P.*, *Anukul Chandra Pradhan v. Union of India*, *State of Maharashtra v. Rajendra Jawanmal Gandhi*, *Zahira Habibullah Sheikh v. State of Gujarat*, *Sahara India Real Estate Corp. Ltd. v. SEBI*, *Raj Kumar @ Bheema v. State (NCT of Delhi)*, and *Raj Kumar & Ors. v. State of Chhattisgarh* was accessed through SCC Online, Manupatra, and Indian Kanoon. Comparative material draws on the United Kingdom's Contempt of Court Act, 1981 and the House of Lords/Court of Appeal jurisprudence in *Attorney General v. MGN Ltd* (1997) and *HM Attorney-General v. MGN Ltd* (2011), together with the United States Supreme Court's decisions in *Sheppard v. Maxwell* (1966) and *Nebraska Press Association v. Stuart* (1976).

Secondary sources include the Law Commission of India's 200th Report (2006) and its unenacted draft Contempt of Court (Amendment) Bill, along with institutional material on the Press Council of India and the News Broadcasting and Digital Standards Authority. Because this is a doctrinal exercise rather than an empirical one,

the paper does not independently measure the frequency of pre-parade publicity across a case sample; its claims rest on the pattern visible in reported appellate decisions and secondary commentary, which is acknowledged as a limitation.

IV. DOCTRINAL ANALYSIS: STATUTORY FRAMEWORK AND THE EVOLUTION OF JURISPRUDENCE

A. The Evidentiary Architecture of the TIP

A TIP has never been treated by Indian courts as substantive evidence of identity. Under Section 7 of the Bharatiya Sakshya Adhiniyam, 2023, and its predecessor Section 9 of the Evidence Act, identification facts are relevant, not conclusive; Section 54 of the Bharatiya Nagarik Suraksha Sanhita empowers a court to direct identification where necessary for investigation, but neither provision makes a parade mandatory or its result decisive. The Supreme Court clarified in *Kanta Prasad v. Delhi Administration* (1958) that failure to hold a TIP does not itself render court identification inadmissible.

This position was elaborated in *State of Maharashtra v. Sukhdev Singh*⁵ and reaffirmed decisively in *Malkhan Singh v. State of Madhya Pradesh* (2003), where the Court held that identification parades belong to the investigation stage, are governed procedurally akin to statements recorded during investigation, and are not themselves substantive evidence; the substantive evidence, the Court held, is the identification a witness makes in court, with the TIP serving only to lend, or withhold, assurance to that later identification. *Vijay @ Chinee v. State of Madhya Pradesh*⁶ confirmed the same principle. The entire structure therefore rests on one fragile assumption: that the identifying witness has not seen the accused, in person or in image, between the offence and the parade because it is precisely that gap between crime and parade that the exercise is designed to test.

⁵ *State of Maharashtra v. Sukhdev Singh*, AIR 1992 SC 2100

⁶ *Vijay @ Chinee v. State of Madhya Pradesh*, AIR 2011 SC 940

This fragility is not merely a doctrinal artefact of Indian procedure; it reflects a well-documented feature of human memory that the law of evidence has long tried, imperfectly, to accommodate. Eyewitness identification is reconstructive rather than photographic: a witness's memory of a stranger's face, often glimpsed briefly and under stress, is highly susceptible to post-event information, a phenomenon extensively documented in the psychological literature on suggestibility and source-monitoring error.

Where a witness is later exposed to a photograph purporting to be the offender, that photograph can become integrated into the witness's memory of the event itself, so that the witness sincerely, but mistakenly, "recognises" the accused not because of what was seen during the offence but because of what was seen afterwards in a newspaper or on a phone screen. The TIP procedure exists precisely to guard against this risk by testing recognition under controlled conditions, with persons of similar appearance arrayed together, before any such contamination can occur; media publicity that pre-empt the parade defeats the entire evidentiary rationale for holding one at all.

B. How Pre-Parade Publicity Vitiates Identification

Indian courts have repeatedly held that this assumption fails once a suspect's image reaches the witness through any channel. In *State (Delhi Administration) v. V.C. Shukla*⁷, the Supreme Court treated identification unsupported by a properly conducted prior parade with considerable caution; in *Lal Singh v. State of U.P.*⁸, it held squarely that exposing a suspect to identifying witnesses before the parade seriously compromises its integrity. This reasoning continues into recent years.

In *Raj Kumar @ Bheema v. State (NCT of Delhi)*⁹, the Supreme Court (Nath and Mehta, JJ.) set aside a conviction that had kept the appellant in custody for roughly fifteen years, holding that a sole eyewitness's identification made in court nearly eight years

⁷ *State (Delhi Administration) v. V.C. Shukla & Anr.*, AIR 1980 SC 1382

⁸ *Lal Singh & Ors. v. State of Uttar Pradesh*, AIR 2004 SC 299

⁹ *Raj Kumar @ Bheema v. State of NCT of Delhi*, 2025 INSC 1322 (Supreme Court of India, decided Nov. 17, 2025).

after the incident, and unsupported by any TIP conducted without prior exposure to the accused could not sustain a conviction; once that identification was discarded, the Court found, no substantive evidence remained to connect the accused to the offence.

In *Gireesan Nair & Ors. v. State of Kerala*, 2022 INSC 1199; (2023) 1 SCC 180, the Supreme Court placed the burden squarely on the prosecution to establish that a TIP was conducted fairly and that all necessary safeguards were observed before the parade. The Court further reaffirmed that, from the day of arrest, the accused must be kept “baparda” to rule out any possibility of being seen by identifying witnesses, and that prior exposure of the accused, whether physically, through photographs, or through media publication, seriously vitiates the evidentiary value of the TIP.

This line of authority reflects a consistent doctrinal requirement, applied across decades: the prosecution must affirmatively show that the accused was kept “baparda” (veiled) between arrest and parade, ruling out any opportunity for the witness to have seen the accused’s face beforehand, whether in person or through a photograph. This decades-long consistency, reflected in authorities such as *Lal Singh v. State of U.P.*, *Shaikh Umar Ahmed Shaikh v. State of Maharashtra*, and *Gireesan Nair & Ors. v. State of Kerala*, confirms that the vitiating effect of pre-parade publicity is settled doctrine rather than a marginal defence tactic.

The mechanism of harm is direct rather than incidental: a television channel’s custody visual, a leaked mugshot at a press briefing, or a viral social media post produces the same forensic consequence as an improperly conducted, suggestion-laden parade, because in both cases the witness’s identification ceases to test memory of the offence and instead tests recognition of an image already seen elsewhere.

C. The Constitutional Foundation: Balancing Article 21 and Article 19(1)(a)

The right to a fair trial has been read into Article 21’s guarantee of a fair, just and reasonable procedure since *Maneka Gandhi v. Union of India*¹⁰ expanded the scope of

¹⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

“procedure established by law.” The Supreme Court has applied this guarantee directly against prejudicial publicity on several occasions.

In *Anukul Chandra Pradhan v. Union of India*¹¹, decided amid intense press coverage of the hawala transactions cases, the Court held that no occasion should arise for an impression that publicity surrounding a matter has diluted the essentials of a fair trial or the presumption of innocence of an accused who has not yet been found guilty. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*¹², the Court went further, describing “trial by press, electronic media or public agitation” as “the very antithesis of rule of law” and capable of causing a miscarriage of justice, holding that a judge must guard against such pressure and be guided strictly by law.

*Zahira Habibullah Sheikh v. State of Gujarat*¹³ The Best Bakery case illustrated the converse danger that intense public and media pressure, whether prejudicial to the accused or to the prosecution, can compromise a fair trial and justified the Court’s unusual step of retrial outside the original state. These cases collectively establish that Article 21’s fair-trial guarantee can, in appropriate circumstances, justify restricting the Article 19(1)(a) freedom of the press, since Article 19(2) expressly permits reasonable restrictions in relation to contempt of court. What none of these cases resolve, however, is the specific evidentiary problem this paper addresses: they speak to the general atmosphere of prejudice a fair trial requires, not to the narrower, more concrete question of when publicity destroys the reliability of a specific evidentiary exercise conducted at the investigation stage.

D. Trial by Media Distinguished from Legitimate Reporting

The Law Commission of India’s 200th Report (2006) described “trial by media” as press coverage that effectively projects a suspect as already guilty before any court has pronounced on the matter, a substitution of editorial judgment for judicial process. This differs from legitimate crime reporting, which is a constitutionally valuable

¹¹ *Anukul Chandra Pradhan, Advocate, Supreme Court v. Union of India & Ors.*, AIR 1997 SC 2814.

¹² *State of Maharashtra v. Rajendra Jawanmal Gandhi*, AIR 1997 SC 3986.

¹³ *Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.*, AIR 2004 SC 3114.

exercise of the press freedom recognised under Article 19(1)(a); the public has a genuine interest in knowing about crime, investigation, and the administration of justice, and investigative journalism regularly exposes wrongdoing that might otherwise go unaddressed.

The distinguishing markers identified in the literature include timing (reporting facts of arrest and charge versus pre-empting guilt at the FIR or arrest stage), sourcing (attributed claims distinguished from allegation versus unverified “police sources” repeated as fact), visual conduct (a bare arrest report versus circulating a mugshot, staging a custody “walk,” or airing a dramatized reconstruction before any parade or trial), and tone (descriptive neutrality versus adjudicatory labelling “the killer,” “the mastermind” that pre-judges the very issue a court has yet to decide).

The Aarushi Talwar and Sushant Singh Rajput investigations, among others, are frequently cited as illustrations of coverage that crossed from the former into the latter category. Publishing an accused’s photograph in a manner that contaminates a pending identification exercise sits squarely on the media-trial side of this line, since it is investigative theatre with a concrete evidentiary cost rather than reporting.

E. The Contempt of Courts Act, 1971 and the Pendency Gap

Section 2(c) of the Contempt of Courts Act, 1971 defines criminal contempt to include any publication that prejudices, interferes with, or tends to interfere with the due course of a judicial proceeding, or obstructs the administration of justice. Section 3 supplies a defence of innocent publication where the publisher had no reasonable grounds to believe a proceeding was pending, and the Explanation to that section is the crux of the difficulty this paper examines: a criminal proceeding is deemed “pending” only from the time a charge sheet or challan is filed, or the court issues summons or a warrant not from arrest or the registration of an FIR.

Because the interval between arrest and charge-sheet filing in India can extend from weeks to several months, and because a TIP is ordinarily conducted early within that interval, the period of maximum evidentiary risk to identification evidence falls entirely outside the Act’s operative trigger.

Publications during this window, however prejudicial, escape contempt jurisdiction as presently framed. Courts retain an inherent, discretionary power under Articles 129 and 215 to issue postponement orders in individual matters, and have occasionally done so, but this is exceptional, after-the-fact relief rather than a systemic safeguard calibrated to the investigation stage where the risk is concentrated. The result is a structural mismatch: contempt law is designed to protect “the trial,” while the most consequential prejudice to a fair trial, including contamination of identification evidence, typically occurs before the statutory trigger for liability arises at all.

A further, related point of statutory design deserves note. India is not without precedent for a publication restraint pegged to something other than trial pendency: Section 228A of the Indian Penal Code, 1860 (and its successor provision under Section 72 of the Bharatiya Nyaya Sanhita, 2023) already criminalises the disclosure of the identity of victims in specified offences, irrespective of whether any proceeding is formally “pending” at the time of disclosure.

That provision demonstrates that Parliament has already accepted, in a cognate context, that a publication restraint can validly attach to a stage of the criminal process earlier than charge-sheet filing, where the evidentiary or dignitary harm of publication is concentrated at that earlier stage. The reform this paper proposes in Section 5 is best understood as an extension of that same legislative logic, timing the restraint to where the harm occurs to the specific evidentiary risk a TIP presents, rather than as a novel departure from it.

F. Law Commission of India, 200th Report: Findings and Recommendations

The Law Commission, chaired by Justice M. Jagannadha Rao, took up this subject suo motu in view of the intensifying prejudicial coverage of crime enabled by the growth of twenty-four-hour television and cable news, submitting its report, *Trial by Media: Free Speech vs. Fair Trial Under Criminal Procedure*, in August 2006. The Commission found that the pattern of news publication had fundamentally changed with the growth of continuous broadcast media, generating a volume and immediacy of coverage the 1971 Act, drafted in a print-dominated era, could not adequately address; that the existing pendency trigger left a substantial gap during which prejudicial

publication escaped regulation even though this period often coincided with maximum media intensity; and that comparative practice in the United Kingdom, Australia, and New Zealand already treated publication of a suspect's photograph, alleged confession, or previous convictions after arrest as prejudicial and impermissible a stricter and earlier-triggered standard than India's.

On this basis, the Commission recommended four substantive reforms, to be given legislative form in a single draft Contempt of Court (Amendment) Bill, 2006: redefining "pendency" to run from arrest, rather than from charge-sheet filing; prohibiting publication of material likely to prejudice a fair trial expressly including a suspect's photograph where identification was or might become an issue from the point of arrest; empowering High Courts with an explicit statutory power to postpone publication where a real and substantial risk of serious prejudice existed; and extending the Act's machinery explicitly to electronic and cable media, which its 1971 drafting predated.

Two decades later, none of the Commission's central recommendations has been enacted; the Act remains substantively unamended on the point of pendency, and the gap identified in 2006 persists even as digital and social media have made pre-parade circulation of an accused's image faster and harder to contain than in the cable-television era the Commission was addressing.

G. The Information Technology Rules, 2021 and Digital News Publishers

The growth of digital-first news outlets and social media amplification since 2006 has not gone entirely unaddressed. Part III of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 establishes a three-tier grievance-redressal structure: self-regulation by the publisher, an industry self-regulatory body, and an oversight mechanism within the Ministry of Information and Broadcasting for digital news publishers and OTT platforms, and requires adherence to journalistic norms of conduct comparable to those the Press Council of India applies to print.

However, this framework, like its print and broadcast predecessors, is oriented toward post-publication grievance redressal rather than pre-publication restraint tied

to a specific, time-sensitive evidentiary risk. It offers no mechanism analogous to a postponement order capable of restraining publication of an arrested suspect's photograph before a TIP is conducted, and its complaint-driven, tiered process is, by design, slower than the days-long window within which a parade is typically held. The 2021 Rules therefore extend the reach of content regulation to a wider set of publishers without closing the specific pendency gap this paper identifies.

It is also worth noting that this gap sits alongside, rather than within, India's newer data-protection framework: the Digital Personal Data Protection Act, 2023 regulates the processing of personal data, including a photograph, but is calibrated to informational privacy rather than to the evidentiary integrity of a pending identification exercise, and offers no purpose-built mechanism to restrain publication for that distinct reason.

H. The Limits of Self-Regulation: The Press Council of India and the NBDSA

The Press Council of India, a statutory but quasi-judicial body under the Press Council Act, 1978, issues Norms of Journalistic Conduct that specifically caution against identifying an accused before conviction in a manner amounting to pre-judging guilt, and against publishing photographs likely to prejudice identification.

Its Section 14 powers, however, are limited to warning, admonishing, or censuring a newspaper, news agency, editor, or journalist; it cannot impose a fine, award compensation, or direct retraction with binding effect, and its jurisdiction is confined to print, leaving television the medium most implicated in pre-parade photograph circulation entirely outside its remit.

The News Broadcasting and Digital Standards Authority (NBDSA) performs an analogous function for television and digital news. It was established by the News Broadcasters Association (since renamed the News Broadcasters and Digital Association) and became operational in October 2008 under the name News Broadcasting Standards Authority, being renamed and extended to digital publishers in 2021; it administers a Code of Ethics that similarly prohibits pre-judging guilt and identifying an accused in a manner prejudicial to a fair trial.

Its authority, however, is entirely voluntary and contractual, binding only member broadcasters, with sanctions limited to warnings, directions to broadcast a correction, and monetary penalties too modest to offset the commercial value of sensational coverage. Neither body's adjudication carries independent legal consequence; both act only after an image has already circulated nationally and, increasingly, gone viral on social media platforms over which neither body has any jurisdiction at all, and digital-first outlets and individual social media accounts that republish or amplify the same images fall outside both regimes entirely.

V. CRITICAL EVALUATION

A. A Structural Mismatch Between Contempt Law and Evidentiary Harm

The core defect in India's framework is not the absence of a fair-trial guarantee under Article 21, as elaborated in *Anukul Chandra Pradhan* and *Rajendra Jawanmal Gandhi*, supplies that but the mistiming of the mechanism meant to enforce it. Contempt law is calibrated to protect "the trial," yet the evidentiary harm this paper examines occurs, and is completed, at the investigation stage: once a witness has seen a suspect's photograph, no subsequent trial-stage safeguard can restore the witness's untainted memory.

The Section 3 "innocent publication" defence compounds this structural problem, since a publisher acting before charge-sheet filing can credibly claim that no proceeding was yet "pending," even where the very photograph published is the one that later vitiates the TIP and, potentially, the conviction built upon it. The result is a regime that accurately diagnoses the problem at the appellate stage: Indian courts, as shown in Section 3.2, routinely discount TIP evidence contaminated in exactly this way without possessing any matching preventive tool at the stage where prevention would actually matter.

This mismatch is compounded by the commercial structure of Indian crime reporting itself. Television ratings and digital engagement metrics reward speed and sensationalism over accuracy and restraint. A competitive twenty-four-hour news environment creates strong incentives for the first channel to broadcast an arrested suspect's image, or the first outlet to publish a "breaking" custody photograph,

regardless of any downstream evidentiary consequence to a pending investigation. Self-regulatory codes issued by the Press Council of India and the NBDSA formally discourage exactly this conduct, yet neither body's sanctions are calibrated to offset the commercial value such coverage generates. A modest monetary penalty, or a published correction arriving weeks or months after the fact, does not meaningfully alter the incentive structure that produced the publication in the first place.

Where the underlying legal regime imposes no cost at all during the pendency gap, and the self-regulatory regime imposes only a nominal one after the fact, the rational commercial actor has little reason to withhold a photograph that a competitor is equally likely to publish first. This is not a claim that individual journalists or editors act in bad faith; it is an observation that a regulatory design relying on voluntary restraint, in a commercially competitive market for attention, is unlikely to succeed without a binding external constraint tied to the moment of greatest risk.

B. Comparative Evaluation I: The United Kingdom's Preventive Model

The United Kingdom addresses the same underlying problem through a preventive, strict-liability model. Section 2 of the Contempt of Court Act, 1981 creates a "strict liability rule" under which a publication may constitute contempt if it creates a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced, irrespective of any intent to prejudice on the publisher's part.

Critically, Schedule 1 of the Act fixes the point at which proceedings become "active," and for criminal matters this is the point of arrest, not the filing of a formal charge or the commencement of trial, precisely the reform the Indian Law Commission's 200th Report sought to import. In *Attorney General v. MGN Ltd*¹⁴, the Court of Appeal, per Schiemann LJ, laid down the governing principles for assessing this risk: each case is decided on its own facts; risk is assessed at the time of publication rather than with the benefit of hindsight; the risk must be not merely present but substantial; and the prejudice threatened must be not merely substantial but serious. This is a standard that requires courts to look carefully at what a publication actually communicated to

¹⁴ *Attorney-General v. MGN Ltd*, 1997 1 All ER 456; 1997 EMLR 284.

an ordinary reader at the moment it appeared, rather than accepting a “fade factor” defence that risk diminishes by the time of trial.

The practical operation of this model is illustrated by *HM Attorney-General v. MGN Ltd.*¹⁵ Two national newspapers were fined for contempt after publishing material about Christopher Jefferies, a man arrested and later released without charge, entirely innocent in connection with a murder investigation. The court held that the coverage had created a substantial risk of serious prejudice regardless of the fact that Jefferies was never ultimately tried, underscoring that the UK’s preventive model operates from arrest and does not wait for a charge sheet before treating prejudicial publication as unlawful.

This is precisely the point in the Indian timeline after arrest, before a charge sheet, at which a TIP is typically conducted, and where the “pendency gap” currently leaves publishers unregulated. Notably, the UK regime is not absolute: Section 5 of the 1981 Act provides a defence where a publication is made as, or as part of, a discussion in good faith of public affairs or matters of general public interest, and any risk of prejudice to particular proceedings is merely incidental to that discussion.

This defence allows continued reporting on matters such as policing policy, systemic failures in an investigation, or broader public debate touching on an active case, while still restraining the specific, targeted act of publishing an arrested suspect’s photograph or asserting guilt precisely the distinction this paper argues an Indian reform should preserve between legitimate accountability journalism and identification-contaminating publicity.

Illustrative Comparison: Timing of Restraint Across Jurisdictions

The divergence between the three regimes examined in this paper can be summarised along a single axis: the point in the criminal process at which the law’s restraint on prejudicial publication becomes operative, and the nature of the remedy once triggered. Under the Indian Contempt of Courts Act, 1971, restraint becomes

¹⁵*Attorney-General v. MGN Ltd & News Group Newspapers Ltd*, 2011 EWHC 2074 (Admin).

operative only from the filing of a charge sheet or issue of summons, and the remedy is exclusively punitive, addressed after publication.

Under the United Kingdom's Contempt of Court Act, 1981, restraint becomes operative from arrest itself, and the remedy includes both punitive contempt proceedings after the fact and a genuinely preventive postponement order available in advance. Under the American constitutional approach exemplified by *Sheppard v. Maxwell* and *Nebraska Press Association*, there is, in substance, no publication-stage restraint at all; the entire burden of managing prejudice is shifted to trial-stage jury-management tools that presuppose a jury system India does not have.

Mapped against the moment a TIP is typically conducted within days of arrest, well before any charge sheet, only the UK model provides a restraint that is both timely and preventive rather than merely punitive and retrospective, which is the central reason this paper recommends it, in modified and narrowed form, as the template for Indian reform.

C. Comparative Evaluation II: Why the US Trial-Centred Model Fits India Poorly

The United States takes a markedly different route, shaped by the primacy accorded to the First Amendment. American doctrine treats prior restraints on publication as presumptively unconstitutional and subject to the most exacting scrutiny; rather than restricting what the press may publish, American law instead concentrates on procedural safeguards designed to insulate the trial process from the effects of publicity that has already occurred.

The foundational authority is *Sheppard v. Maxwell*¹⁶, in which the Supreme Court overturned a murder conviction because the trial court had failed to protect the accused from the "carnival-like" pretrial and trial publicity that saturated the case, holding that trial judges must actively manage this risk through change of venue, continuance of the trial until publicity subsides, sequestration of the jury, searching

¹⁶ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

voir dire to identify and exclude prejudiced jurors, admonitions to disregard extraneous publicity, and control of media conduct in and around the courtroom.

*Nebraska Press Association v. Stuart*¹⁷ reinforced the very heavy burden required to justify any prior restraint, confirming that gag orders remain a last resort. This model is reactive and trial-centred rather than preventive and publication-centred: it largely permits the media to publish a suspect's photograph immediately upon arrest and instead places the burden on the judiciary to secure an impartial jury despite pervasive publicity. The difficulty in transplanting this model to the present problem is structural rather than merely a matter of degree: India has no jury system, so none of *Sheppard*'s central tools sequestration, voir dire, jury instructions have any application at all, and even where they did, none of them can retroactively un-expose an eyewitness who has already seen a suspect's photograph before a TIP.

The American toolkit is well suited to curing juror bias that accrues before and during a jury trial; it is simply the wrong instrument for a harm that is completed during the investigation, before any judge is managing a courtroom, and that damages the reliability of evidence rather than the impartiality of a factfinder. The UK's arrest-triggered, preventive model addresses the timing of the harm directly; the US model, however protective of press freedom, does not.

D. Rebutting the Press-Freedom Objection

The strongest objection to reform along UK lines is that an arrest-triggered contempt standard, however narrowly framed, risks reintroducing prior restraint into Indian media law, chilling the investigative journalism that exposes custodial abuse and policing failures precisely when public scrutiny of the police is most valuable, and sitting uneasily with the weight Indian courts have historically placed on Article 19(1)(a).

This objection has genuine force against a blanket rule banning all reporting of arrests, but it does not hold against the specific reform this paper proposes.

¹⁷ *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

The Law Commission's own draft did not propose a blanket ban; it proposed a targeted postponement power over specific prejudicial material, exercisable by a court on a showing of real and substantial risk, closely paralleling the "substantial risk of serious prejudice" standard Schiemann LJ articulated in *Attorney General v. MGN Ltd.*

The Supreme Court has already accepted precisely this kind of narrowly tailored, proportionate restriction in the Indian context: in *Sahara India Real Estate Corp. Ltd. v. SEBI*¹⁸, the Court upheld the constitutional propriety of postponement orders restraining publication of specific matter for a limited period, holding that such orders represent a proportionate, necessity-tested balance between Article 19(1)(a) and Article 21, not a general licence to gag the press.

Indian law, moreover, already accepts a publication restraint pegged to a stage earlier than trial pendency in a cognate context: Section 228A of the Indian Penal Code (and its Bharatiya Nyaya Sanhita successor section 72) restrains the identification of victims in specified offences without waiting for a charge sheet, precisely because the harm of disclosure is concentrated earlier than that.

The reform proposed here extends that same logic, rather than departing from it. Nor does the UK's continued operation of a vigorous, adversarial press under precisely this arrest-triggered regime suggest that such a standard is incompatible with a healthy fourth estate; the Jefferies prosecution targeted coverage that asserted guilt and disclosed prejudicial material about a specific suspect, not investigative reporting about police conduct generally.

An identification-specific postponement power restraining only the publication of an arrested suspect's identifiable image or description while a TIP is pending and identification is genuinely in issue, not commentary on the arrest itself, the underlying offence, or police conduct, extends this already-accepted proportionality logic to the investigation stage rather than creating a new category of censorship. The press-

¹⁸ *Sahara India Real Estate Corporation Ltd. v. Securities & Exchange Board of India*, AIR 2012 SC 3829.

freedom objection, properly understood, counsels careful drafting of the reform, not its abandonment.

E. Rebutting the Investigative-Necessity Objection

A second, more practical objection is that restraining publication of an arrested suspect's photograph would hamper legitimate investigative needs: police often release images to solicit tips from the public, identify additional victims or witnesses in serial-offence cases, or trace an absconding accused, and a rigid prohibition could impede these functions. This objection, however, conflates two distinct investigative moments with different evidentiary consequences.

Where a suspect is still at large, publishing a photograph to solicit information from the public is a wholly different act from publishing an already-arrested suspect's photograph before a specific eyewitness's TIP; the former seeks new witnesses whose identification is not later going to be tested by the very TIP the publicity might taint, while the latter directly poisons the pool of witnesses who's in-court identification the prosecution will subsequently rely upon.

A narrowly drafted reform can and should preserve the former while restraining the latter, for instance, by permitting public appeals for information about an absconding or unidentified suspect while restraining, once a suspect is in custody and a TIP is contemplated, publication of material that would reach the specific witnesses expected to attend that parade.

Investigating agencies can further mitigate any residual tension by conducting the TIP promptly after arrest and before any press briefing disclosing the suspect's image, a sequencing change that costs the investigation little but preserves the parade's evidentiary value entirely. The investigative-necessity objection, like the press-freedom objection, therefore supports a carefully scoped reform rather than defeating the case for one.

F. Interim Judicial Safeguards Pending Legislative Reform

Legislative amendment of the kind proposed in Section 5 below is, by its nature, slow, and the two decades since the Law Commission's 200th Report counsel realism about

how quickly Parliament is likely to act. This does not mean the judiciary must wait passively. Trial and sessions courts already possess, and periodically exercise, an inherent power under Articles 129 and 215 of the Constitution to protect the integrity of proceedings before them, the same power the Supreme Court invoked, in effect, when it accepted the propriety of postponement orders in *Sahara India*.

Nothing in principle prevents a magistrate, upon remanding an arrested person to custody, from directing the investigating agency not to release the arrested person's photograph to the media pending completion of any contemplated TIP, or from directing that a parade be conducted within a fixed, short period after arrest precisely to minimise the window during which such exposure could occur. Such directions would not require new legislation; they would simply apply, systematically and at the point of remand, an inherent protective power that appellate courts already exercise years later, after an image has been published and a parade compromised.

A practice direction from the High Courts standardising this approach at the remand stage could meaningfully narrow the pendency gap even before Parliament acts on the structural reform this paper recommends, and would provide a valuable evidentiary record of compliance or non-compliance for appellate courts later assessing whether a TIP was, in fact, conducted without prior exposure.

It is also worth noting that the costs of the present gap are not evenly distributed. An accused who is ultimately acquitted after years of sensationalised coverage, as in the *Jefferies* case in the United Kingdom, bears reputational damage that no verdict can undo, and Indian law currently offers such a person even less protection than English law does, since no equivalent strict-liability regime exists to deter the initial publication in the first place.

Conversely, a genuine victim or complainant may find that a prosecution collapses on appeal not because the identification was factually wrong but because the process meant to verify it was contaminated by publicity no party to the case controlled, a result that serves neither the accused's interest in a fair process nor the complainant's interest in accurate adjudication. A reform that closes the pendency gap therefore does not simply protect defendants; it protects the reliability of the fact-finding process

itself, which is a systemic interest distinct from, and in principle shared by, both sides of any given criminal case.

VI. SUGGESTIONS AND RECOMMENDATIONS

On the basis of the foregoing analysis, the paper proposes the following reforms:

- 1. Amendment of the “pendency” trigger under the Contempt of Courts Act, 1971:** Parliament should amend the Explanation to Section 3 of the Contempt of Courts Act, 1971, to deem a criminal proceeding pending from the time of arrest, at least where identification is genuinely in issue and a Test Identification Parade is contemplated. This would align the statutory trigger with the stage at which evidentiary contamination actually occurs. The amendment should also create an express, narrowly scoped power for magistrates and High Courts to postpone publication of an arrested person’s identifiable image or description until the TIP is conducted or formally waived. Such a postponement power should be modelled, in limited form, on the United Kingdom’s Section 4(2) postponement framework and assessed against a standard of substantial risk of serious prejudice. It should be confined to identification-relevant material and should not prevent legitimate reporting on the arrest, the nature of the offence, policing failures, custodial abuse, or broader questions of public accountability. This would preserve the proportionality approach recognised by the Supreme Court in *Sahara India Real Estate Corp. Ltd. v. SEBI* while addressing the specific evidentiary harm caused by pre-parade publicity.
- 2. Binding, platform-neutral co-regulation of prejudicial publication:** The Press Council of India and the News Broadcasting and Digital Standards Authority should be brought within a unified statutory co-regulatory framework with binding and proportionate sanctions. Such a framework should extend beyond subscribing print and broadcast members to digital news publishers and social-media republication where the publication of an arrested suspect’s image is likely to contaminate pending identification evidence. In addition, investigating agencies should be required, through binding standing orders,

not to release an arrested suspect's photograph or custody visuals to the press before a TIP is conducted or formally waived. This would directly address the press-briefing leak and custody-walk practices that frequently create the risk of evidentiary contamination.

3. **Interim judicial safeguards pending legislative reform:** Pending statutory amendment, High Courts should consider issuing practice directions requiring magistrates, at the stage of first remand, to direct investigating agencies not to release an arrested suspect's photograph where a TIP is contemplated. Magistrates may also direct that the TIP be completed within a short, fixed period after arrest, so that the window for prejudicial exposure is minimised. This interim safeguard would rest on the court's inherent power to protect the integrity of criminal proceedings and would narrow the pendency gap until Parliament undertakes formal legislative reform.

VII. CONCLUSION

Indian courts have correctly and consistently recognised, from *Kanta Prasad* to later authorities on identification evidence, that a Test Identification Parade loses much of its evidentiary value once the identifying witness has previously seen the accused. The constitutional guarantee of a fair trial under Article 21 supplies the doctrinal foundation for preventing such contamination, while Article 19(1)(a) requires that any restraint on publication remain narrow, proportionate, and time-bound.

The central difficulty lies in the timing of India's contempt framework. The Contempt of Courts Act, 1971, becomes fully operative only after formal pendency, while the greatest risk to TIP evidence usually arises immediately after arrest and before charge-sheet filing. Self-regulatory bodies and the IT Rules, 2021, do not adequately address this gap because their remedies are fragmented, delayed, and insufficiently preventive.

The paper therefore concludes that the "pendency gap" is not merely a procedural defect but a direct threat to the reliability of criminal adjudication. Closing it through targeted statutory reform, platform-neutral regulation, and interim judicial

safeguards would protect both press freedom and the integrity of identification evidence in Indian criminal trials.

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