

JUDICIARY & MEDIA: NEED FOR BALANCE

**(Training programme for Bangladesh Judges and Judicial Officers)
National Judicial Academy, Bhopal**

**on
10.02.2023**

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On Freedom of Press & Media

“[I]n order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not abuse its power.”

- Lord Denning M.R.

In *British Steel Corporation v. Granada Television* [1981]

“...[I]n balancing the competing interests, the freedom of speech and of the press has priority... no professional judge would be influenced in the least by any criticism that appeared in the newspapers, even if he read them, or on the television, even if he watched it”.

- Lord Denning M.R.

In *Attorney General v. BBC* [1981]

All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of critic, nothing which is said by this person or that nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires provided that it is pertinent to the matter at hand. Silence is not an option when things are ill done.

-Lord Denning M.R.

As reported in R. v. Metropolitan Police Commissioner ex p. Blackburn (1968) 2 All England Reporter 319

“We must meet the challenge rather than wish it were not before us.”

William J. Brennan, Jr.

Former Justice of the US Supreme Court

International Conventions on Freedom of Media

- **UNGA Resolution 59(I)**, passed on 14th December 1946, states that *“[F]reedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread the knowledge without malicious intent.”*
- **Universal Declaration of Human Rights, 1948 : Article 19** states that *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”*.
- **Article 19 (2) International Covenant on Civil and Political Rights (ICCPR), 1966** states that “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. . . .”

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- The United Nations Educational, Scientific and Cultural Organisation (**UNESCO**) recognised the responsibility of nations to promote a free and balanced media in the **Mass Media Declaration of 1978**.
- The Declaration affirms the important role the media plays in the *“strengthening of peace and international understanding [and in] promoting human rights and to countering racialism, apartheid and incitement to war.”*

The Madrid Principles

- The Madrid Principles on the **Relationship between Media and Judicial Independence (1994)** was conceived by a group of 40 distinguished legal experts and media representatives from the International Commission of Jurists (ICJ) at its Centre for Independence of Judges and Lawyers (CIJL) and the Spanish Committee of UNICEF in Madrid, Spain.
- **The objectives of the meeting were:**
 - To examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Principles on the Independence of Judiciary.
 - To formulate principles addressing the relationship between freedom of expression and judicial independence.

Preamble to the Madrid Principles, 1994

- **Freedom of Media**, which is an **integral part** of **freedom of expression**, is essential in a **democratic society** governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of media as are authorised by the International Covenant on Civil and Political Rights, 1966 (*“International Covenant”*) [ICCPR] and are specified in precise laws.
- The media have an **obligation** to respect the **rights** of individuals, protected by the International Covenant, and the independence of the judiciary.
- These principles are drafted as minimum standards and do may not be used to detract from existing higher standards of protection of the freedom of expression.”

... Madrid Principle

The Basic Principle

- Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be **democratic**. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
- This principle can only be departed from in the circumstances envisaged in the ICCPR, as interpreted by the **1984 Siracusa Principles** on the Limitation and Derogation Provisions in the ICCPR.
- The right to comment on the administration of justice shall not be subject to any special restrictions.

CASES INVOLVING THE MEDIA IN INDIA

- Viewed as a lost opportunity for the judiciary to ensure a fair and free trial to every citizen and to provide fundamental guarantees against arbitrariness.
- Delhi High Court certainly did right by the public in holding both I.U. Khan (Special Public Prosecutor) and R.K. Anand (Defence Counsel) in contempt. However, it did not consider it necessary to discuss the role of NDTV or the question of NDTV's responsibility and liability under the Contempt of Courts Act, 1971.

- *R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106*

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“[W]hat we find completely inexplicable is why, at least at the beginning of the proceeding, the High Court did not put NDTV, along with the two appellants, in the array of contemnors.”

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Ref: R.K. Anand v. Registrar, Delhi High Court

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“The appellants might have taken the stand that not only the sting recordings but their respective responses shown by the TV channel were fake and doctored. In such an event the TV channel would have been required to be subjected to the strictest proof of electronic materials on which its programmes were based and, in case it failed to establish their genuineness and correctness, it would have been equally guilty, if not more, of serious contempt of court and other offences. By all reckoning, at the time of initiation of the proceeding, the place of NDTV was along with the appellants facing the charge of contempt. Such a course would have put the proceeding on a more even keel and given it a more balance appearance.”

Ref: R.K. Anand v. Registrar, Delhi High Court

- Suit filed by -the Plaintiff seeking compensation and damages from the Defendants for making defamatory remarks against the Plaintiff as well as for permanent injunction restraining the defendants from reporting any news or broadcasting any show related to the death of Mrs. Sunanda Pushkar till completion of the investigation and also to restrain the defendant from maligning and defaming the plaintiff in any manner.
- The Delhi High Court in this case was mindful of the need to strike a balance between the right to free speech against the right to fair trial. The Court held that **“the defendants have the right to air their stories and the same cannot be curbed, but it has to be tempered and balanced.”**
- The Court refrained from passing any further orders in the matter on the assurance by the defendant that he will show restraint in the future.

- Dr. Shashi Tharoor v. Arnab Goswami, (2018) 246 DLT 279

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“[I]t is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. In fact, presumption of innocence and a fair trial are at the heart of criminal jurisprudence and in a way important facets of a democratic polity that is governed by rule of law. Journalists are free to investigate but they cannot pronounce anyone guilty and / or prejudge the trial. The grant of the fairest of the opportunity to the accused to prove his innocence is the object of every fair trial. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from unfair trial is contrary to the concept of justice.”

Ref: Dr. Shashi Tharoor v. Arnab Goswami

Principles identified by the Delhi High Court on the media's freedom of publication versus an individual's **right to privacy**:

- *“Public or general interest in the matter published has to be more than mere idle curiosity.*
- *Public figures like public officials play an influential role in ordering society. They have access to mass media communication both to influence the policy and to counter criticism of their views and activities. The citizen has a legitimate and substantial interest in the conduct of such persons and the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.*
- *Right to privacy that rests in an individual may be waived by him by express or implied consent or lot by a course of conduct which estops its assertions. Such implication may be deduced from the conduct of the parties and the surrounding circumstances.*

- Indu Jain v. Forbes Incorporated, (2007) SCCOnline Del 1424



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- ***A public person or personage is one who by his standing, accomplishment, fame, mode of life or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs and character has so become a public figure and thereby relinquishes at least a part of his privacy.***
- *The standard to be adopted for assessing as to whether the published material infracts the right to privacy of any individual is that of an ordinary man of common sense and prudence and not an out of ordinary or hyper-sensitive man.*
- *Even though in this country, the freedom of press does not have presumptive priority as in some other jurisdictions including the United States of America, however the importance of a free media of communication to a healthy democracy has to receive sufficient importance and emphasis.*
- *In evaluating a relief to be granted in respect of a complaint against infraction of the right to privacy against freedom of press and the right of public to disclosure of newsworthy information. Such consideration may entail the interest of the community and the court has to balance the proportionality of interfering with one right against the proportionality of impact by infraction of the other.*

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Ref: - Indu Jain v. Forbes Incorporated

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The publication has to be judged as a whole and news items, advertisements and published matter cannot be read without the accompanying message that is purported to be conveyed to the public. Pre-publication censorship may not be countenanced in the scheme of the constitutional framework unless it is established that the publication has been made with reckless disregard for the truth, publication shall not be normally prohibited.”

Ref: - Indu Jain v. Forbes Incorporated

While highlighting the undue influence of the State on trial proceedings, the Supreme Court identified five basics of a fair and free trial – **impartial judge, fair prosecutor, atmosphere of judicial calm, no bias against the accused, victim or cause of the case**, and lastly, **witnesses should not be coerced, bribed, threatened or otherwise influenced in any way.**

It is a strong argument that media trials abandon all five of these basic elements, thereby capsizing the process.

- Zahira Habibullah Sheikh v. State of Gujarat (2004) 4 SCC 158

PROSECUTION OF JOURNALISTS FOR CRIMES OF INCITEMENT

Famous trials in International Criminal Law

The Nuremberg Trials (1947)

- The **International Military Tribunal** at Nuremberg, which was set up to hear cases of **war crimes** against the Nazi government officials of the Third Reich in Germany, conducted the first international trials on media-related incitement against two individuals, **Hans Fritzsche & Julius Streicher**, for their role in disseminating material that fuelled the Holocaust in **World War II Germany**.
- Hans Fritzsche was acquitted on account of his position. The Tribunal viewed him as a mere conduit to the press, a secondary figure in the Nazi leadership hierarchy.
- However, Julius Streicher, who was editor-in-chief of an anti-Semitic newspaper Der Sturmer, was **charged** with **incitement** of the persecution of the Jews for his numerous publications calling for the extermination of the Jewish race.

Prosecutor v. Nahimana (2003)

- This case is famously known as the **Rwandan Media Trial**. **Three** media executives were tried before the **International Criminal Tribunal** for Rwanda for their roles in managing RTLM, an influential Rwandan media station.
- RTLM regularly broadcasted hateful and genocidal content against the Tutsis with an intent to inflame the *Hutu* population.
- The executives were indicted on various charges of genocide, crimes against humanity, conspiracy to commit genocide, and most importantly, **“direct and public incitement to commit genocide”** for the part that they played in the **Rwandan 1994 genocide**.
- All three defendants were found **guilty** of genocide for the speech disseminated through their media outlets.

Why is a principled Media necessary?

- **Firstly**, judicial proceedings are an important state function where accurate reporting is the **only meaningful form of accountability**.
 - *Judges are independent of the Government and cannot be censored.*
 - *The Parliament is restricted by Article 121 from discussing the conduct of any judge of a constitutional court in discharging his duties.*
- **Secondly**, for the lay person, understanding formal court proceedings and judgments is a daunting task
- **Thirdly**, unlike other organs and private individuals, the judiciary cannot respond to erroneous reporting.

Therefore, it is essential that the media reports, court proceedings, in a fair, accurate and responsible manner.

Constitutional Position in Bangladesh

Constitution of Bangladesh

Article 39: Freedom of thought and conscience, and of speech

- (1) *Freedom of thought and conscience is guaranteed.*
- (2) *Subject to any reasonable restrictions imposed by law 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—*
 - (a) *the right of every citizen to freedom of speech and expression; and*
 - (b) ***freedom of the press,***

...

are guaranteed.

...

Interpretation of Article 39(2)

This means that any restriction on media reportage in Bangladesh must:

- (a) be reasonable,
- (b) be imposed by law, and
- (c) relate to one or more of the 7 grounds enlisted in article 39(2).

Article 108

The Supreme Court shall be a court of record and shall have all the powers of such a court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

The Supreme Court noted that freedom of press was explicitly recognised in the Constitution, and that the judiciary should exercise its power of contempt only in cases of bad faith or ill motive.

- **Saleem Ullah v. State, (1992) 44 DLR AD 309**

The expression freedom of speech and expression was defined by the Supreme Court as:

“[A] right to express one’s own opinion absolutely freely by spoken words, writing, printing or in any other manner which may be open to the eyes and ears. It thus includes expression of one’s ideas on any matter by any means including even gestures, postures, banners and signs. It appears to us that this freedom is wide enough to include expression of one’s own original ideas and also expression of one’s opinion in the form of comments, explanations, annotations, solutions and answers to questions on the ideas expressed by others.”

- Dewan Abdul Kader v. Bangladesh, (1994) 46 DLR 596

Statutory Provisions: perform two functions

Legislations which deal with the interface of freedom of press and court proceedings in Bangladesh perform two kinds of functions:

- regulating the manner in which court proceedings are conducted
- regulating the content that can be generated/ disseminated by the media

The Family Courts Ordinance, 1985

Section 11: Trial in camera

- (1) *A Family Court may, if it so deems fit, hold the whole or any part of the proceedings under this Ordinance in camera.*
- (2) *Where both the parties to the suit request the Court to hold the proceedings in camera, the Court shall do so.*

This Ordinance enables family courts to conduct in-camera proceedings, and obligates them to do so when the parties to the suit request it.

Code of Criminal Procedure, 1898

Section 352: Courts to be open

*The place in which **any Criminal Court** is held for the purpose of inquiring into or trying any offence shall be **deemed an open Court**, to which the public generally may have access, so far as the same can conveniently contain them:*

*Provided that the **Presiding Judge** or **Magistrate** may, if he thinks fit, **order at any stage of any inquiry into, or trial of, any particular case**, that the **public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.***

This provision provides courts with a wide discretion to prevent media reportage of particularly sensitive proceedings, for e.g., cases involving a child victim or even a juvenile accused.

Children Act 2013

Section 23: Persons allowed to remain present at any sitting of Children's Courts

Subject to the provisions of this Act, no person shall be present at any sitting of a Children's Court, except

- a) the concerned child;*
- b) the parents of the child or, in the absence of both of them, the caregiver or the authority in supervision of the child or legal or lawful guardian of the child or, as the case may be, members of the extended family;*
- c) the officers and employees of the Children's Court;*
- d) the parties to the case or proceeding before the Children's Court, the Child Affairs Police Officer or the concerned Police Officer, concerned lawyers of the case, and such other persons directly concerned in the case or proceeding including the Probation Officer; and*
- e) persons specially authorized by the Children's Court to appear or remain present.*

Section strictly controls who may be present in court, and does not permit the presence of individuals with no direct familial or official bearing to the case, without the explicit permission of the court.

Section 28: Confidentiality of proceedings of the Children's Court

(1) No photograph or description or news or report of a child, who is connected with a case or has testified as a witness before any Children's Court, shall be disclosed or published in any print or electronic media or on the internet which may directly or indirectly lead to identification of such child.

Section makes it a criminal offence to publish on any print or electronic media or online any information that directly or indirectly enables the identification of a child who is connected with the case or has testified as a witness.

...

...

28 (2) Notwithstanding anything contained in sub-section (1), if it appears to the Children's Court that the disclosure or publication of the photograph, description, news or report of a child shall not be harmful for the interest of the child, the court may give permission for publication of the photograph, description, news or report of the concerned child

Section enables the court to permit the publication of the report of the trial as well as the photograph of the child if it is not harmful to the interest of the child.

Section 36: Use of terminology when passing order

- (1) Notwithstanding anything to the contrary contained in the Penal Code, the Children's Court, when passing any order, apart from the terminologies used in this Act, shall not use the terms 'offender', 'convicted' or 'sentenced' as used in the Penal Code.*
- (2) For the purpose of sub-section (1), in the case of children, the Children's Court shall, instead of the terms 'offender', 'convicted' or 'sentenced', use 'a person found guilty of an offence', 'finding guilty' or 'an order of finding guilty', as the case may be, and such other synonyms of these words as the court deems appropriate.*

Section instructs the Children's Court to not use traditional terms such as 'offender', 'convicted', or 'sentenced', but instead, use terms such as 'a person found guilty of an offence, 'found guilty' and other more sensitive synonyms.

The Children Act, 2013

Section 23 - strictly controls who may be present in court, and does not permit the presence of individuals with no direct familial or official bearing to the case, without the explicit permission of the court.

Section 28(1) - makes it a criminal offence to publish on any print or electronic media or online any information that directly or indirectly enables the identification of a child who is connected with the case or has testified as a witness.

Section 28(2) - enables the court to permit the publication of the report of the trial as well as the photograph of the child if it is not harmful to the interest of the child.

Section 36 - instructs the Children's Court to not use traditional terms such as 'offender', 'convicted', or 'sentenced', but instead, use terms such as 'a person found guilty of an offence', 'found guilty' and other more sensitive synonyms.

The Penal Code, 1860

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 or such person, is said, except in the cases hereinafter excepted, to defame that person.

Digital Security Act, 2018

Section 28: Publication, broadcast, etc. of information in website or in any electronic format that hurts the religious values or sentiment

- 1) *If any person or group willingly or knowingly publishes or broadcasts or causes to **publish or broadcast** anything in **website or any electronic format** which **hurts religious sentiment or values**, with an intention to hurt or provoke the religious values or sentiments, then such act of the person shall be an offence.*
- 2) *If any person commits an offence under sub-section (1), he shall be punished with imprisonment for a term not exceeding 5 (five) years, or with fine not exceeding Taka 10 (ten) lac, or with both.*
- 3) *If any person commits the offence referred to in sub-section (1) for the second time or repeatedly, he shall be punished with imprisonment for a term not exceeding 10 (ten) years, or with fine not exceeding Taka 20 (twenty) lac, or with both.*

Digital Security Act, 2018

Section 29: Publication, transmission, etc. of defamatory information

- 1) *If any person publishes or transmits any defamatory information as described in section 499 of the Penal Code (Act XLV of 1860) in website or in any other electronic format, he shall be punished with imprisonment for a term not exceeding 3 (three) years, or with fine not exceeding Taka 5 (five) lac, or with both.*
- 2) *If any person commits the offence referred to in subsection (1) for the second time or repeatedly, he shall be punished with imprisonment for a term not exceeding 5 (five) years, or with fine not exceeding Taka 10 (ten) lac, or with both.*

It references section 499 of the Penal Code to define 'defamation'.

Draft of ‘*Regulation for Digital, Social Media and OTT Platforms, 2021*’

- New content governance framework for digital, social media and OTT platforms operating in the country.
- Legally limits intermediary liability protection
- Introduces traceability within end-to-end encrypted services offered by social media and messaging platforms.
- Intermediary is defined as:

“Any person who on behalf of another person receives, stores or transmits electronic records or provides any service with respect to such records and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes.”

-(Published by the Bangladesh Telecommunication Regulatory Commission on 3rd February, 2022)

The Official Secret Act, 1923

Section 5 (1)

If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract- ...

...

- a) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorized to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or
- b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or
- c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or
- d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information;

he shall be guilty of an offence under this section.

The Special Power Act, 1974

Implementation of this law was to stop people especially journalists and the media from discussing, publishing or printing reports on prejudicial events so that any concluding or misleading directional information is not sustained within citizens before the trial is effective.

The Press Council Act, 1974

- Press Council has authority to supervise the press of Bangladesh encouraging and improving the freedom of press along with the improvements of newspaper standards.
- Responsible for a code of conduct for the newspaper and news agencies guide the newspaper companies and journalist
- Section 13 of the Act which was to maintain standards and promote freedom for news agencies.

Rules of Business, 1975

Section 26 (1)

This Section prohibits government servants to communicate information, acquired directly or indirectly from official documents or relating to official matters, to the press to non-officials or even officials belonging to other government offices

The Government Servants (Conduct) Rules 1979

Rule 19

*Communication of official documents or information- A **Government servant shall not**, unless generally or specially empowered by the Government in this behalf, **disclose directly or indirectly** to Government servants belonging to other Ministries, Divisions or Departments, or **to non-official persons of the Press, the contents of any official document or communicate any information** which has come into this possession in the course of his official duties has been prepared or collected by him in the course of those duties; whether from official sources or otherwise.*

Other Statutory Provisions

- The Censorship of Films Act, 1963
- The Printing Press and Publication (Declaration and Registration) Act, 1973
- The Bangladesh Television Authority Ain, 2001
- The Draft Broadcasting Act, 2003
- The Right to Information Act, 2009

Contempt of Court

*“This Court has power to draw a contempt proceeding if any person undermines the authority or lowers the dignity of the Court, or if any person scandalizes the Court or any Judge interferes with the administration of justice, or if any person makes comments calculated to undermine public confidence in the Judges and the justice delivery system...**[A]ny publication during the pendency of any matter in any Court of law, which tends to interfere with the course of justice in any substantial or real manner by prejudicing the mind of the public against persons concerned in the case before the cause is finally heard, is also contempt.** In determining this effect, the intention of the printer or author in the publication is not of any consequence. What we are concerned with is that we should not permit any one to poison the fountain of justice. This would be a grave interference with the administration of justice.”*

- The State v. Mr. Swadesh Roy , 2015, 44 CLC (AD)

Contempt of Court Act, 1926

- In 2013, a new Act on contempt of courts was enacted and the 1926 Act was repealed.
- This new Act was soon challenged, and was struck down by the High Court division of the Supreme Court.
- Following this, the Government has filed an appeal before the appellate division of the Supreme Court, which is still pending.
- During the pendency of this appeal, the 1926 Act has been revived and is in use again.

Conclusion

From this discussion, the following points emerge:

- I. The Constitution recognises the freedom of press, and also enables legislators to make laws imposing reasonable restrictions on this freedom on the basis of certain enlisted grounds.**
- II. Several such laws have, in fact, been enacted.**
- III. The relevant laws which deal with media reportage and court proceedings appear to vest the Judiciary with a wide discretionary power to impose necessary safeguards on the freedom of the press as they deem fit and proper.**

In order to ensure that the freedom of the press, explicitly enshrined in the Constitution, is effectively guaranteed, the Judiciary must strive to exercise this power responsibly.

Thank You