

'Fourth Estate' in the Constitutional Ambit- Analyzing Free Speech under Democracy

Prateek Shanker Srivastava¹

Introduction

The strength and importance of media in a democracy is well recognized. Article 19(1)(a) of the Indian Constitution, which gives freedom of speech and expression includes within its ambit, freedom of press. The existence of a free, independent and powerful media is the cornerstone of a democracy, especially of a highly mixed society like India. Media is not only a medium to express one's feelings, opinions and views, but it is also responsible and instrumental for building opinions and views on various topics of regional, national and international agenda. The pivotal role of the media is its ability to mobilize the thinking process of millions. The criminal justice system in this country has many lacunae which are used by the rich and powerful to go scot-free. Figures speak for themselves in this case as does the conviction rate in our country which is abysmally low at 4 percent. In such circumstances the media plays a crucial role in not only mobilizing public opinion but bringing to light injustices which most likely would have gone unnoticed otherwise.

Blackstonian concept of freedom of press which was expressed as early as in 1769 contained four basic points² Which still form the crux of the concept of press freedom . They are as follows:

1. Liberty of the press is essential to the state.
2. No previous restraints should be placed on the publications.

¹ B.A. LLB. (Hons) IIInd Year, Dr RML National Law University, Lucknow.

² Press and the Law (1990) by Justice A.N.Grover; pg 7 para 2

3. That does not mean there is press freedom for doing what is prohibited by law.

4. Every freeman has the undoubted right to lay what sentiment he places before the public, but if he publishes what is improper, mischievous or illegal he must take the consequence of his own temerity.

It cannot be denied that it is of practical importance that a precarious balance between the fundamental right to expression and the right to one's privacy be maintained. The second practice which has become more of a daily occurrence now is that of Media trials. Something which was started to show to the public at large the truth about cases has now become a practice interfering dangerously with the justice delivery system. The following observations of the Supreme Court in *R. Rajagopal and Another v. State of Tamil Nadu and Others*³ are true reminiscence of the limits of freedom of press with respect to the right to privacy

But the legal implications arising out of the concept of 'press freedom' are many and hence they are not confined to the constitutional provisions alone. The different aspects of it infringe *inter alia* on criminal law, law of contempt, Copyright Act, Official Secrets Act, Freedom of Information Act, Law of torts, Prevention of Insults to National Honour Act etc, to name a few.

These laws deal with different issues like those of decency or morality, the issue of privacy Vs right to information, defamation etc. Issues arising due to investigative reporting are also dealt with by these laws. There are also exclusive press laws like Working Journalists Act, Press Councils Acts, Newspapers Act, Press and Registration of Books Act etc. The Press Councils Act created the quasi-judicial body- Press Council of India. Basic issues relating to Article 19 (1)(a) personal liberties and the principles of natural justice need to be settled. Existing privilege laws are a bit too ambiguous and expansive in nature as it doesn't define

³ (1994) 6 SCC 632

what exactly constitutes a breach of privilege or Contempt of House. Hence the need to codify privileges.

Recommendations have also been made with the intentions to protect journalists and professionals, from being compelled to disclose information received in confidence except when required in public interest and also against a charge of contempt of Court by permitting truth as a defense.

At this juncture , as we are approaching the sixth decade of our freedom , lets keep in mind the pertinence of freedom of press and what our former Prime Minister Rajiv Gandhi had said about press freedom:

"Freedom of Press is an Article of Faith with us , sanctified by our Constitution, validated by four decades of freedom and indispensable to our future as a Nation."

The Historical Perspective

The chapter on Fundamental rights, Part III in the Indian Constitution, was not incorporated as a popular concession to international sentiment and thinking on human rights in vogue after the conclusion of the Second World War. The demand for constitutional guarantees of human rights for Indians was made as far as way back as in 1895 in the Constitution of India Bill, popularly called the Swaraj Bill, which was inspired by Lokmanya Tilak, a lawyer and a great freedom fighter. This bill envisaged for India a Constitution guaranteeing to every citizen, among other freedoms, the freedom of press.

To a certain extent one can say that the debut of press in India was made with commercial interests in mind. It was the contribution of the first British MNC -The East India Company. It was one of those instruments of the British, which was later manipulated by the Indians to serve their interests ; as the role of the press underwent a major change and it soon turned out to be one of the most effective weapons Indians had at their disposal during their struggle for

freedom from the British. The press was always under the control of the company, but after its press role reversal the necessity to clamp harsh curbs became imminent. Repressive laws were passed and judgments were given curbing press freedom.

The 'Founding Fathers and Mothers' of the Indian Constitution attached great importance to freedom of speech and expression and the freedom of the press. Their experience of waves of repressive measures during British rule, when the nationalist press was bludgeoned by sedition trials and forfeiture of security deposits, convinced them of the immense value of this right in the sovereign democratic republic which India was to be under its Constitution. They believed that freedom of expression and the freedom of press are indispensable to the operation of a democratic system. They believed that central to the concept of free press is freedom of political opinion and at the core of that freedom lies the right to criticize the Government. They endorsed the thinking of Jawahar Lal Nehru who said, "*I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed and regulated press*"⁴."

The Indian Constitution provides for this freedom in Article 19(1)(a) which guarantees right to freedom of speech and expression. It has been held that this right to freedom also includes press freedom. It is an implied or deduced right. The economic and business aspects of the press are regulated under Article 19(1)(g) which provides for freedom of profession , occupation, trade or business which is restricted by Article 19(6) which includes provisions for public interest, professional and technical qualifications and state nationalization- total or partial.

According to the constitutional advisor, Dr. B.N. Rau, it was hardly necessary to provide for the freedom of the press specifically, because freedom of expression would include freedom

⁴ Nehru's speech on 20th June 1916 in protest against the press Act, 1910

of the press⁵. The views of Dr Ambedkar and Dr B.N. Rau have been vindicated by the Supreme Court. In a series of decisions from 1950 onwards the Apex court has ruled that the freedom of press is implicit in the guarantee of freedom of speech and expression. Consequently freedom of press is one of the fundamental rights guaranteed by the Constitution of India⁶

One of the heads of restrictions on the freedom of speech and expression in the draft Constitution was 'sedition', aptly described by Gandhiji as the 'Prince of the Indian Penal Code'. It was frequently invoked to crush the freedom movement and incarnate freedom fighters, including prominent leaders like Tilak etc. in the heyday of British colonism sedition was construed by the privy Council in the cases of *Tilak*,⁷ *Wallace-Johnson*⁸ and *Sadashiv Bhalerao*⁹ to include any statement that was liable to cause 'disaffection' , namely, exciting in others certain inimical feelings towards the government, although there was no element of incitement to violence or rebellion. To restrict speech under the head of 'sedition' was galling to the framers of the Constitution.

K.M Munshi assilated the inclusion of 'sedition' as a head of restriction on freedom of expression and moved an amendment for its deletion. Almost all the members supported K.M. Munshi's amendment and sedition did not disfigure the Indian Constitution.

⁵ B. Shiva Rao, *The Framing of India's Constitution: A Study*, pp. 219-20

⁶ *Brij Bhushan v State of Delhi*; AIR 1950 SC 129

⁷ 25 IA 1

⁸ 1940 AC 231

⁹ AIR 1947 PC 82

The Meaning and scope of Art 19 (1)(a) and its Evolvement over the years for the Press

Freedom of speech and expression means the right to express one's own convictions and opinions freely by means of mouth, writing, printing pictures or any other mode. It thus includes the expression of one's ideas through any communicable medium or visible representation, such as gesture, signs and the like¹⁰. The expression connotes also publications and thus the freedom of press is included in this category. Free propagation of ideas is the necessary objective and this may be done on the platform or through the press. The freedom of propagation of ideas is secured by freedom of circulation. Liberty of circulation is essential to the freedom as the liberty of publication. Indeed without circulation the publication would be of little value¹¹.

Freedom of expression has four broad purposes to serve:-

1. It helps an individual to attain self-fulfillment
2. It assists in the discovery of truth
3. It strengthens the capacity of an individual in participating in decision making
4. It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change

In the *Romesh Thappar* case the court laid down an important principle:-

So long as the possibility of the law being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, Clause 2 of Art 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an

¹⁰ *Lowell v Griffin*, (1939) 303 US 444

¹¹ *Romesh Thappar v State of Madras*, AIR 1950 SC 124

enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be unconstitutional and valid to any extent¹².

Art 19(2) was subsequently amended by the Constitution (First Amendment) Act, 1951, which was enacted with retrospective effect on 18 June, 1951.¹³ Art 19(2) was subsequently amended by the Constitution (Sixteenth Amendment) Act, which was enacted with prospective.

Thus by way of judicial pronouncements over the years there had been a paradigm shift in the application of this article and it became somewhat press friendly although imposing restrictions by way of amendments.

The Resultant position

The current scenario is that freedom of press is not absolute. It can be restricted provided three distinct and independent prerequisites are satisfied.

- 1) The restriction imposed must have the authority of law to support it. Freedom of the press cannot be curtailed by executive orders or administrative instructions which lack the sanction of law

¹² Ibid

¹³ The new article was as follows-

(2) “Nothing in sub clause (a) of clause (i) shall effect the operation of any existing law or prevent the state from making any law, in so far as such law imposes **reasonable** restrictions on the exercise of the rights conferred by the said sub clause in the interest 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”

- 2) The law must fall squarely within one or more heads of restrictions specified in Art 19(2). Restrictions on freedom of speech and expression cannot be imposed on such omnibus grounds as 'in the interest of the general public',¹⁴
- 3) The restrictions must be reasonable and must not be excessive. The validity of restrictions imposed is justifiable and open for Judicial review by the Indian courts

Liberty has got to be limited in order to be affectively possessed. For liberty of one must not offend the liberty of others. Patanjali Shastri, J. in *A.K. Gopalan's*¹⁵ case, observed, " *man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals*". The guarantee of each of the above right is therefore restricted by the Constitution itself by conferring upon the State a power to impose by reasonable restrictions as may be necessary in the larger interest of community. The restrictions on these freedoms are provided in clauses 2 to 6 of Art 19 of the Constitution.

'The Liberty of the press as defined by Lord Mansfield, "consists in printing without any license subject to the consequences of law". Thus the liberty of the press means liberty to print and publish what one pleases, without previous permission. It includes newspapers, periodicals and even pamphlets.¹⁶

Freedom of press does not occupy a preferred position in the Indian Constitution which does not recognize a hierarchy of rights¹⁷. There are however dicta of the Supreme Court describing this freedom as '**the Ark of the Covenant of Democracy**'¹⁸. The most precious of all freedoms guaranteed by our Constitution.

¹⁴ *Sakal Papers(P) Ltd v Union of India* AIR 1962 SC 305

¹⁵ AIR 1951 SC 21

¹⁶ *Lowell v Griffin*, (1939) 303 US 444

¹⁷ *Supra* n. 16, *Madhu Limaye*, at 2493

¹⁸ *Bennett Coleman & Co. v Union of India* AIR 1972 SC 106

In *Prabhu Dutt v Union of India*¹⁹ the Supreme Court has held that the right to know news and information regarding administration of the Government is included in the freedom of press. But this right is not absolute and restrictions can be imposed on it in the interest of the society and the individual from which the press obtains information. They can obtain information from an individual when he voluntarily agrees to give such information.

In its landmark judgment in the case of *Sakal Papers*²⁰ the Supreme Court ruled that Art 19(2) of our Constitution permits imposition of reasonable restrictions under the heads specified in Art 19(2) and on no other grounds. Freedom of the press cannot be curtailed, like the freedom to carry on business, in the interest of the general public.

In another celebrated decision, *Bennett Coleman & Co. v Union of India*²¹ the Supreme court again came to the rescue of the press. It held that freedom of press entitles newspapers to achieve any volume of circulation and freedom lies both in its circulation and content. Freedom of press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate²²

In the case of *Tata Press Ltd v Mahanagar Telephone Nigam Ltd.*²³ The issue was that whether a commercial speech is protected under Art 19(1)(a). the court after an extensive review of the judgments of the US Supreme Court and previous Supreme Court held that Commercial advertisements are entitled to the protection of Article 19(1)(a).

¹⁹ AIR 1982 SC 6

²⁰ *Sakal Papers(P) Ltd v Union of India* AIR 1962 SC 305

²¹ AIR 1972 SC 106

²² See also *In Re Harijai Singh*, AIR 1997 SC 73

²³ (1995) 5 SCC 139 at 154

The Censor Scissor

There is no provision in the Indian Constitution permitting or proscribing censorship. The sting of censorship lies in prior restraint which affects the heart and soul of the freedom of press. Expression is snuffed out before its birth. Suppression by a stroke of the pen is more likely to be applied by the censoring authorities than by suppression through a criminal process, and thus there is far less scope for public appraisal and discussion of the matter. This is the real vice of the prior censor.

In *Express Newspapers v Union of India*²⁴ the Supreme Court held that a law which imposes pre-censorship or curtails the circulation or prevents newspapers from being started or require the Government to seek Government aid in order to survive was violative of Art 19(1)(a).

The Bombay High Court in its landmark judgment in *Binod Rao v Masani*²⁵ declared that “*Merely because dissent, disapproval or criticism is expressed in strong language is no ground for banning its publication*”

The Guwahati High court in a path breaking judgment laid down that the representation to any Government was not adequate because censorship was often invoked against its own policies and in such a situation an appeal to the government would be nothing short of an appeal from Caesar to Caesar.

²⁴ AIR 1958 SC 578

²⁵ 1976 78 Bom. L.R. 125

The concept of Media Trials- :Pre Judging the ‘Sub-judice’

This concept has been floated only in the recent years where the media having the freedom of speech and expression under Art 19(1)(a) uses the power of their communication medium to reach out to the masses and criticize and at times pre-judge a case under judicial consideration in the court of law which at times amounts to Defamation or Contempt of Court. The recent example could be the ‘Arushi Double Murder case’ where media virtually convicted the person accused. Several recommendations have been made on this issue in the 200th report of the Law Commission of India.

The ever-increasing tendency to use media while the matter is sub-judice has been frowned down by the courts including the Supreme Court of India on the several occasions. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*, the Supreme Court observed:

“There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law.”

At the same time, the right to fair trial, i.e., a trial uninfluenced by extraneous pressures is recognized as a basic tenet of justice in India. Provisions aimed at safeguarding this right are contained under the Contempt of Courts Act, 1971 and under Articles 129 and 215 of the Constitution of India. of particular concern to the media are restrictions which are imposed on the discussion or publication of matters relating to the merits of a case pending before a Court. A journalist may thus be liable for contempt of Court if he publishes anything which

might prejudice a 'fair trial' or anything which impairs the impartiality of the Court to decide a cause on its merits, whether the proceedings before the Court be a criminal or civil proceeding.

The Stigma of Sting operations

Many argue that it no doubt brings transparency in the system but still it is an invasion into the 'right to privacy' of a person. The carrying out of a sting operation may be an expression of the right to free press but it carries with it an indomitable duty to respect the privacy of others. The individual who is the subject of a press or television 'item' has his or her personality, reputation or career dashed to the ground after the media exposure. He too has a fundamental right to live with dignity and respect and a right to privacy guaranteed to him under Article 21 of the Constitution.

The movement towards the recognition of right to privacy in India started with *Kharak Singh v. State of Uttar Pradesh and Others*²⁶, wherein the apex court observed that it is true that our constitution does not expressly declare a right to privacy as fundamental right, but the said right is an essential ingredient of personal liberty. After an elaborate appraisal of this right in *Gobind v. State of Madhya Pradesh and Another*²⁷, it has been fully incorporated under the umbrella of right to life and personal liberty by the humanistic expansion of the Article 21 of the Constitution.

²⁶ AIR 1963 SC 1295

²⁷ AIR 1975 SC 1379

The domain of Art 19(2) of the Constitution

Clause (2) of Art 19 contains the grounds on which restrictions on the freedom of speech and expression can be imposed. Some of them as discussed hereunder-

a) Decency and Morality

One of the heads on which freedom of the press can be restricted under the Constitution of India is 'Decency and Morality'. In matter of morality and obscenity courts do not always reflect contemporary standards and perceptions though they purport to do so. 'Obscenity', 'indecenty' and 'immorality' are equivocal concepts. The standards set for these vary from one society to another. Judges despite valiant efforts, have failed to evolve a satisfactory definition of obscenity. Apparently, obscenity, like beauty lies in the eyes of the beholder. Sections 292 to 294 of the IPC deal with this restriction.

In India vulgarity and strong erotic language are often treated as inter-changeable with obscenity. In its recent judgment concerning the movie, *The Bandit Queen*²⁸, the court ruled that neither nudity nor vulgarity can necessarily be equated with obscenity.

b) Defamation

A statement which injures a man's reputation amounts to defamation. In India Sec 499 of the IPC contains the criminal law relating to defamation. The civil law on the point is largely uncodified. Libel laws can have chilling effect on the freedom of the press. The United States Supreme Court in its landmark decision in *New York Times v Suvillian*²⁹ ruled that every inaccurate statement should not be actionable unless it is made with malice. This is because

²⁸ *Bobby Art International v Om Pal Singh Hoon*, (1996) 4 SCC 1

²⁹ 376 US 254

erroneous statements are unavoidable in free debate in a democracy and must be tolerated if freedom of expression is to have 'the breathing space it needs to survive'

The Supreme Court of India too has taken a similar stand in *R. Rajagopal v State of TN*³⁰ (Auto Shanker Case)

c) Contempt of Court

Contempt is another head of restriction on freedom of expression and freedom of the press. The Supreme Court has upheld the constitutionality of the Contempt of Court Act, 1952 on the grounds that the Act did not impose unreasonable restriction on the right to freedom of speech and is saved under Art 19(2)³¹. Courts have frowned upon comments made in the press upon pending cases. The Punjab High Court ruled that 'liberty of the press is subordinate to the proper administration of justice'. The plain duty of a journalist is the reporting and not the adjudication of cases.³²

Today the law of contempt is such that in India, the country which proclaims '*satyameva jayate*', truth is no defence to an action of contempt.³³ This is a serious anomaly.

Art 361-A of the Constitution also deals with contempt which was inserted after the Forty Fourth Amendment Act, 1978³⁴

³⁰ (1994) 6 SCC 632 at 649

³¹ *C.K. Daphtary v O.P Gupta*, AIR 1971 SC 1132

³² *Rao Harnarain v Gumori Ram*, AIR 1958 Punj. 273

³³ *Bijoyananda v Bala Krishna* AIR 1953 Ori 249

Conclusion

The ground realities are that a citizen is largely dependent on the press for the quality, proportion, and the extent of news. He can seldom obtain for himself the information necessary for the intelligent discharge of his political duties and responsibilities. In disseminating news, the press therefore acts as a representative or, more appropriately, as the custodian of the public. It serves public interest in pluralistic democracy by permitting expression and opinions of all persons. Hence freedom of the press has a dimension and range that is vastly different from the ambit and content of other individual freedoms. Press freedom embodies the principle of accountability and thus enables press to be an instrument of democratic control. Protection and promotion of free press is substance sub serves and strengthens democracy, an essential feature of the Constitution.

Freedom of press is undoubtedly one of the basic freedoms in a democratic society based on the Rule of law. None the less freedom of press is not an end in itself. The public function which belongs to the press makes it an obligation of honour to exercise this function with the fullest sense of responsibility.

Joseph Pulitzer pointed out that 'commercialism has a legitimate place in a newspaper'. Acc. to him, 'without high ethical ideals a newspaper is not only stripped of its splendid possibilities for public service, but may become a public danger to the community'.³⁵

Press freedom will depend not only on the state of the laws or the provisions of the Constitution but on the integrity and independence of the press. 'Over the years, Governments of the different parts of the world have used diverse methods to keep press under control. They have used carrot and stick methods'.³⁶

³⁵ Gerald Gross (ed.), *the Responsibility of the Press*, Clarion Books, New York, 1966, pp.39-40

³⁶ *Indian Express Newspapers v Union of India*, (1985) 1 SCC 641

In the ultimate analysis, the reality of press freedom will be realised by the will and determination of its champions and defenders to assert their rights and to defend their cherished freedom, remembering at all times the spirit of Benjamin Franklin's word to his compatriots:

“ They who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety”³⁷

³⁷ Referred to in Soli J. Sorabjee, *supra* n. 50 at p.25