

EMERGENCY LAWS AND THE PRESS

P. PARAMESWARA RAO

SOME countries such as the U.S.A. guarantee freedom of the press as a legally enforceable right, others such as Goebbels of Nazi-Germany believe, that the press must be the piano on which the government can play.¹ The Constitution of India, like the American Constitution, begins with an eloquent preamble. The two preambles subscribe to a similar political philosophy.² Art. 19 of the Indian Constitution guarantees to all citizens the right to freedom of speech and expression which includes the freedom of the press.

Clause (1) (a) of Art. 19 guarantees the right to freedom of speech and expression, but clause (2) *now* enables the State to impose by law reasonable restrictions on the right in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. The First and Sixteenth Amendments to the Constitution have greatly enlarged the power of the State to impose restrictions on the right.³

The High Courts and the Supreme Court have the power to declare a law void if it takes away or abridges any of those rights. So far as the right to freedom of the press guaranteed by Art. 19(1) (a) is concerned, the Courts can examine a law to ensure that the restrictions imposed are rationally related to at least one of the grounds specified in Cl. (2) and that the restrictions are reasonable.

It is difficult to formulate an unfailing test of reasonableness. Patanjali Sastri C.J., speaking for the Court in *State of Madras v. V.G. Row*⁴ observed:

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1. Encyclopaedia of Social Sciences, Vol. XII, p. 332.
 2. Justice William Douglas of the American Supreme Court, Tagore Law Lectures (1956) p. 6.
 3. The First Amendment Act was passed in June 1951 whereas the Sixteenth Amendment was passed in October 1963.
 4. (1952) S.C.R. 597 A.I.R. 1952 S.C. 196.

“The test of reasonableness wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases”.

In *Narendra Kumar v. Union of India*⁵ the Supreme Court declared that the word ‘restriction’ was intended to include cases of ‘prohibition’, but if a restriction reached the stage of prohibition, the Court would take special care to see that the test of reasonableness was satisfied.

The State has considerable power to control the press under the ordinary laws. Dr. (Mrs.) Durgabai Deshmukh describes the extent to which the freedom of the press could be interfered with under these laws. She says: “under the provisions relating to ‘friendly relations with foreign States’ included in Article 19(2), it would be possible to place substantial restraints on the discussion of the foreign policy of the government. Under the recently-inserted section 198-B of the Criminal Procedure Code, it has become easy for public servants to prosecute newspapermen for alleged defamatory statements. It is therefore probable that newspapermen may be wary in criticising public servants with the result that the public may be denied the opportunity of being informed of any facts about the public acts of public men which they ought to know. Under the Telegraphic Act, telegraphic messages may be intercepted in the interests of public safety. In case the government are not confident that legal proceedings if instituted against a newspaperman in a particular case, will succeed, they can have recourse to the provisions of the Preventive Detention Act⁶”.

The freedom of the Press implicit in Art. 19(1)(a) thus appears to be adequately fenced in India, and the fence is strong enough to contain the press even during a national crisis.

The need to impose restrictions on the freedom of speech and expression in the interests of national security is universally recognised⁷. No State can afford to risk irresponsible or inflammatory utterances in a national crisis.

5. A.I.R. 1960 S.C. 430.

6. Human Rights in the United Nations Development Decade (Freedom of opinion and Press), *Justitia* Vol. X (1964-65) at pp. 118-119.

7. All the three Draft conventions on Freedom of Information and the Press prepared at the instance of the U.N. contained a clause to this effect. See the Indian Press Commission Report (1954) Part I paras 974-979.

Part XVIII of the Constitution of India contains the Emergency provisions. Only the first of the three emergencies affects the fundamental rights.

Emergency may be proclaimed by the President, and "satisfaction" that it is necessary remains in his discretion though it has to be laid before Parliament or it ceases to operate⁸.

While an Emergency is in force Parliament automatically acquires under Art. 250 a paramount power to legislate even with respect to matters enumerated in the State List⁹.

Thus the first fetter on the power of Parliament breaks down in emergency and a law made by Parliament affecting the freedom of the press cannot be challenged on the ground of legislative incompetency, and the right to freedom of the press remains automatically suspended for the Emergency.

The suspension of the right to freedom of the press under Art. 358 during an Emergency is total and no "Indemnity Act" is needed when it is lifted to justify acts taken while that Emergency is in force.

So long as the Emergency is in force there is no constitutional protection to the freedom of the press in India.

Clause (2) of Sec 3 of the Defence of India Act, 1962, deals with:

Prohibiting the printing or publishing of any newspaper, containing matters prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, the

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8. If the two Houses are sitting at the time it is two months. If, on the other hand, the House of the People has been dissolved or the dissolution takes place during the period of two months then till the expiration of 30 days from the date of its first sitting after its reconstitution [Art. 352(2)]. A period of six months shall not intervene, according to Art. 85, between the last sitting of a House in one Session and the date appointed for its first sitting in the next session. It is therefore theoretically possible for a Proclamation of Emergency to continue in force without the approval of the House of the People for a maximum period of nine months approximately.
 9. According to Art. 353 while a Proclamation of Emergency is in operation, the executive power of the Union extends to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. In view of Art. 365, failure on the part of a State to comply with the directions given by the Union may lead to President's rule in that State,

efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community¹⁰.

Demanding security and forfeit of copies if any newspaper contains matter referred to above¹¹.

Closing down any press or any premises used for printing or publishing any newspaper¹².

Prohibiting or regulating the use of postal, telegraphic or telephonic services¹³.

Regulating the delivery otherwise than by postal or telegraphic service of postal articles and telegrams¹⁴.

The Defence of India Rules provide for the control of telegraphs¹⁵ and postal communications¹⁶, the imposition of censorship of postal articles including letters, post-cards, newspapers¹⁷, and censorship of materials relating to specified subjects¹⁸. The rules also prohibit publication of prejudicial reports.¹⁹

It is hard to conceive an act that does not fall within the ambit of this dragnet provision. If all available powers were invoked they could paralyse any press or newspaper.

Lord Denning has observed: "The trouble about it is that an official, who is the possessor of power, does not realise when he is abusing it. Its influence is so insidious that he may believe that he is acting for the public good when in truth, all he is doing is to assert his own brief authority. The Jack-in-office never realises that he is being a little tyrant²⁰." India faced two war-emergencies, one in 1962 and the other in 1965, but in law there has been only one Emergency since the Chinese aggression.

No sensible person will ever say that the State should not be given adequate powers to effectively deal with an emergency,

10. Sec. 3(2) (7) (a).

11. Sec. 3(2) (7) (b).

12. Sec. 3(2) (7) (d).

13. Sec. 3(2) (21).

14. Sec. 3(2) (22).

15. R. 19.

16. R. 22.

17. R. 23.

18. R. 46.

19. R. 41.

20. Sir Alfred Denning. *Freedom under the Law* (1949) p. 100.

but the question arises: Does the Constitution provide adequate checks against the abuse or misuse of emergency powers?

With the American and British systems before them Indian Constitution-makers tried to reconcile the two irreconcilables; individual rights and illimitable authority.

The political safeguard in the shape of enlightened and vigilant public opinion is not as effective as it ought to be in a democracy. Mass illiteracy and general economic backwardness are great impediments to the speedy growth of democracy, and there is virtually a one-party rule throughout the country.

When parliamentary and judicial safeguards are either absent or ineffective, the only safeguards are an enlightened public opinion, a free and vigilant press. It is imperative that the freedom of the press should be preserved.

When there is freedom it is likely to be abused. The temptation to report sensational news is great in an emergency. Abuse of the freedom at such times may be disastrous. Bismark has been quoted as saying that the peace of Europe could be preserved by hanging a dozen editors²¹.

More recently, the late Sir Nevile Handerson, British Ambassador to Berlin complained that the British Press had handicapped his attempts to improve the Anglo-German relations and would have succeeded had Hitler not been so unreasonably sensitive to the criticism of British newspapers.²² In the U.S.A. and the U.K., by and large, the press had voluntarily observed exemplary restraint during the war. We can expect the same sense of responsibility from the Indian Press. According to the Press Laws Enquiry Committee, the Indian Press has gained enormously in power and prestige.²³

The Press Commission Report says: "There is, however, no doubt that a large section of the Indian Press is sober and responsible."²⁴

The International Commission of Jurists have suggested four principles²⁵:

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21. Quoted by Robert W. Desmond, *The Press and World Affairs* (1937) p. 374.
 22. "Failure of a Mission" (1940): quoted by Mr. H.A. Taylor 'The British Press' p. 42.
 23. Report of the Press Laws Enquiry Committee (1948) para 32.
 24. Report of the Press Commission (1954), Part I para 1015.
 25. *The Dynamic Aspects of the Rule of Law in the Modern Age* (1965), p. 42.

1. A state of Emergency should be declared only where circumstances make it absolutely necessary to do so in the interests of the nation.

2. The period of emergency should not be prolonged further than is absolutely necessary.

3. Restrictions placed on fundamental rights and freedoms should be only such as the particular situation demands.

4. The legality of emergency legislation and emergency orders should be subject to review by the ordinary courts of the land.

The need to observe in India each one of these principles is indeed very great today. Resurrection of the freedom of speech and expression seems to require the repeal of Art. 358.

In India the Constitution-makers, conscious of the problems of a modern emergency, were constrained to confer enormous powers on the State to enable it to face any emergency, but they did not incorporate any legal safeguards in the Constitution against the possible abuse of those powers.

The normal powers of the State are now wide-enough to justify all necessary restrictions which are generally imposed in an emergency on the freedom of the press.

So long as Arts. 358 and 359 are in operation, the fundamental rights remain at the mercy of the Executive.

Laws generally come late, and try to live longer than they should. The more repressive a law is the greater its spillover tendency.

During the fighting in 1962 and in 1965, the press in India on the whole rose to the occasion and discharged its duty of organising and reflecting public opinion with ability and a high sense of responsibility. With the emergence of a Press Council under the new Act, the country can confidently hope that the risks of abuse of freedom by the press would be less.

That the dragnet provisions of the Defence of India Rules have not been freely used against the Press is gratifying.

But there is no justification for allowing a Sword of Damocles to hang over the press indefinitely. Existence of power has a psychological effect on those against whom it may be used.