OBSERVATIONS

P. K. TRIPATHI

The provisions in the Constitution of India relating to freedom of speech and expression are based on the American law as it was understood to be in the years 1947-49 when the Indian Constitution was being drafted.

Apart from non-political matters such as morality, defamation or contempt of court, the principle provision in clause 2 of Article 19 permitted restrictions on freedom of speech in regard to any matter "which undermines the security of, or tends to overthrow, the State". The courts were to judge.

Since not the overthrow, nor the attempt, but *tendency* to overthrow the State was made the test, it could have been possible for the courts to evolve judicial tests for distinguishing permissible restraint on freedom of speech from restraint which must constitutionally be struck down.

As I had the occasion to explain in one of my articles[1] written about a decade ago, the amendment of clause 2 of Article 19 of the Constitution was unnecessary and was the result of lack of experience of government and courts.

The Supreme Court in the *Romesh Thapar* case[2] appeared to adopt an attitude similar to that of a chemist in a laboratory who would decide the nature of a compound on the basis of colour matching. The court held that since the phrase 'public order' occurring in the impugned legislation was different from and wider than the expression 'security of state' provided in the Constitution, the legislation must be declared invalid.

Nowhere in the *Romesh Thapar* opinions does one read any description of what the *Cross Roads* had been publishing

1. P.K. Tripathi, *India's Experiment in Freedom of Speech : The First Amendment and thereafter*, 1955, Supreme Court Journal, Madras, P. 106.

2. A.I.R. 1950 S.C. 124.

and whether the matter it was publishing did have a tendency to undermine the security of the State or to overthrow it.

Attempts on the part of the legislature to go on adding category after category of public interests to be balanced against freedom of speech are bound to prove futile because it is not possible to give an exhaustive list of such public interests.

Also, in the effort to give such an exhaustive list dangerous exceptions may be stated in the Constitution lending themselves to abuse.

The decision in the *Ram Manohar Lohia* case[3] illustrates how futile it is to rely upon an exhaustive list of categories of public interests in clause 2 of Article 19.

The formal constitutional requirement of incitement to an offence can be easily satisfied by first creating a certain act to be an offence and then prohibiting its advocacy.

Such a law which on considerations of substance and constitutional policy should be regarded obnoxious, will, nevertheless, be entitled to protection under clause 2 of Article 19 if only formal logic were applied.

Constitutional amendments should not be made in a rush; the courts and the society should be given time to appreciate the various implications of the provisions of the Constitution.

There is evidence already of a greater appreciation by the courts of their role in this regard. They have, lately, shown a tendency not to be hidebound.

In the *Searchlight* case[4], as it is known, the Supreme Court recognised the privileges of the Parliament as constituting a legitimate social interest to which freedom of speech and expression must give way.

The Court was not impressed by the argument that clause 2 of Article 19 is exhaustive and freedom of speech and expression of the individual could not be restricted for any purpose not expressly specified in that clause.

Recently in the *Chamarbaugwala* case[5] the Court has held

3. A.I.R. 1955 All. 1935; also see, A.I.R. 1960 S.C. 633.
4. A.I.R. 1959 S.C. 395.
5. A.I.R. 1957 S.C. 628.

that the protection of Article 19 does not extend to betting and gambling because gambling is not 'commerce', it being 'res extra-commerciam'.

On the analogy of that argument it is hoped the court will also see that incitement to offence or abetment through the spoken words is a 'res' which is outside the scope of Article 19(1)(a) and, therefore, there is no relevance of the exception mentioned in Article 19 in clause 2 in the case of such utterances.

I do not believe that it is possible for a court to treat the facts of the *Sakal Newspaper*[6] case as attracting only the right to 'business' and not affecting freedom of speech and expression.

Such a view if ever entertained by court will be an unfortunate attempt at hoodwinking the Constitution. It is important to discern a vital difference between legislation affecting the price, advertisements, and number of pages of a newspaper such as was involved in the *Sakal Newspaper* case, and legislation merely affecting the wages payable to employees of a newspaper.

Legislation involved in the *Sakal Newspaper* case had the delicate element of choice on the part of the government as to which newspapers should have more circulation than what they actually have and which should have less.

The making of such a choice has a direct impact of freedom of speech and of the press and on the advocacy of political and social ideas and programmes. The State here was trying to achieve a preference through regulating the price.

Perhaps the only way open to the State when, moved by sympathy towards the less provided newspapers, is to give adequate financial assistance to these favoured newspapers. If the State does not have finances to do so that does not give it a right to achieve the same result by curbing the constitutional rights of others.

The State here was not encouraging newspapers on the basis of their views and perhaps that is the only saving grace in the kind of legislation involved in the *Sakal Newspaper* case.

Freedom of the press is not expressly mentioned in our Constitution. If it is thought that the press needs some special protection because it is in a position different from that of an

6. A.I.R. 1962 S.C. 305.

individual, there is nothing to prevent the courts from reading that special protection for the press in the existing provisions of the Constitution.

The courts are free to accord the press such freedom as is appropriate to its special status and peculiar needs. But again, no purpose will be served by rushing any amendment to the Constitution.