

FREEDOM OF EXPRESSION AND THE PRESS

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TO preserve the democratic way of life it is essential that people should have the freedom to express their feelings and to make their views known to the people at large. The press, a powerful medium of mass communication, should be free to play its role in building a strong viable society. Denial of freedom of the press to citizens would necessarily undermine the power to influence public opinion and be counter to democracy.

Freedom of the press is not specifically mentioned in Art. 19(1) (a) of the Constitution¹ and what is mentioned there is only freedom of speech and expression. In the Constituent Assembly Debates² it was made clear by Dr. Ambedkar, Chairman of the Drafting Committee, that no special mention of the freedom of the press was necessary at all as the press and an individual or a citizen were the same so far as their right of expression was concerned.

The framers of the Indian Constitution considered freedom of the press as an essential part of the freedom of speech and expression as guaranteed in Art. 19(1) (a) of the Constitution. In this respect the Indian Constitution followed the law of England where it is recognised that the law of the press was merely a part of the law of libel³.

1. Art. 19 runs as follows:

- (1) All citizens shall have the right--
 - (a) to freedom of speech and expression...
- (2) Nothing in sub-clause (a) of clause (1) shall affect 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 right conferred by the said sub-clause 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.

2. Vol. VII No. 17, pp. 712-716; No. 18, p. 780.

3. See Dicey, *Law of the Constitution* (9th ed.) p. 241; *Arnold v. King Emperor* A.I.R. (1914), P.C. 116.

In *Romesh Thapar v. State of Madras*⁴, and *Brij Bhushan v. State of Delhi*⁵, the Supreme Court took it for granted the fact that the freedom of the press was an essential part of the right to freedom of speech and expression. It was observed by Patanjali Sastri J. in *Ramesh Thapar* that freedom of speech and expression included propagation of ideas, and that freedom was ensured by the freedom of circulation.⁶

It is clear that the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and other views with complete freedom and by resorting to all available means of publication.

The right to freedom of speech and expression is not absolute and its exercise is subject to the limits permissible under Cl. 2 of Art. 19 of the Constitution; these limits apply equally to freedom of the press. The Union Parliament or State Legislatures may validly pass a law which places restrictions on the right to freedom of speech and expression provided such restrictions are related to one or more of the purposes mentioned in Cl. (2) of Art 19.

The courts in India, have no discretion to evolve new limits as exceptions to this constitutional freedom, and the constitutionality of a law abridging this freedom has to be tested only by reference to the permissible limits.⁷

The right to freedom of the press includes the right to propagate ideas and views and to publish and circulate them.

II

The extent of this right came up for discussion recently before the Supreme Court in *Sakal Papers v. Union of India*.⁸ Justice Mudholkar, speaking for the court, observed: "The right to propagate one's ideas is inherent in the conception of freedom of speech and expression...every citizen is entitled to do so

4. A.I.R. (1950) S.C. 124

5. A.I.R. (1950) S.C. 129

6. A.I.R. (1950) S.C. 124, 127

7. For a critical analysis of the right to freedom of speech and expression as provided in Art. 19 of the Constitution see P.K. Tripathi, *India's Experiment in Freedom of Speech: The First Amendment and thereafter*, Supreme Court Journal (1955), 106; Cf. *Express Newspapers v. Union of India* A.I.R. (1958) S.C. 578, at pp. 615, 616. Also refer to P.K. Tripathi; *Free Speech in the Indian Constitution: Background and Prospect* 67 Yale Law Journal (1957-58) 385. *Srinivasa v. State of Madras* A.I.R. (1951) Madras 70; *M.S.M. Sharma v. Srikrishna Sinha* A.I.R. (1959) S.C. 395, at p. 415.

8. A.I.R. (1962) S.C. 305.

either by word of mouth or by writing... In other words, the citizen is entitled to propagate his views and reach any class and number of readers as he chooses subject of course to the limitations permissible under a law competent under Art. 19(2).”⁹

In *Sakal Papers* a matter of far reaching importance affecting the freedom of the press was raised by questioning the constitutionality of the Newspaper (Price and Page) Act, 1956, and the Daily Newspaper (Price and Page) Order, 1960. Their effect was to regulate the number of pages of a newspaper according to the price charged, prescribe the number of supplements to be published and prohibit the publication and sale of newspapers in contravention of any Order made under S. 3 of the Act; the Act also provided for regulating the sizes and area of advertising matter in relation to other matters contained in a newspaper. The petitioners, the owners of *Sakal* newspaper argued that the Act and the Order were designed to curtail the freedom of the press, and as such were violative of the right guaranteed under Art. 19(1)(a) of the Constitution. In reply it was submitted that the legislation was to prevent unfair competition amongst newspapers and to prevent monopolistic combines so that newspapers might have fair opportunities of freer discussion. The Order was said to promote and encourage healthy journalism. The Court accepted the argument of the petitioners.

The Supreme Court held: Firstly, as the Act regulated the allocation of space to advertisements the area for advertisements was curtailed and the price of the newspaper was to be forced up in order to make up the loss. That would directly affect the freedom of circulation.

Secondly, the advertisement revenue of a newspaper was proportionate to its circulation. If a newspaper raised its price, its circulation would drop with loss of advertisement revenue. The newspaper had either to close down or to raise its price.

If the price was raised it would bring down the circulation ultimately resulting in the closure of the newspaper. If the space for advertisement was reduced, the earnings of the newspaper would go down again resulting in the closure of the paper. Either way the legislation would be a direct interference in the right to freedom of speech and expression.¹⁰

The activity of newspapers has two aspects—freedom of speech and expression and freedom of trade and profession,

9. *Ibid.*, at p. 310.

10. *Ibid.*, at pp. 312, 313.

and they are inextricably mixed. The aspect of dissemination of news and views can be restricted only within the permissible limits as provided in Cl. (2) of Art. 19. The commercial aspect may be restricted in the 'interest of general public' a ground set out in Cl. (6) of Art. 19.

Such restrictions may be regarded as unconstitutional from the point of view of regulating the news and views aspect. Mudholkar J. explained that under Art. 19 a citizen was entitled to enjoy each and every one of the freedoms together and Cl. (1) did not prefer one freedom to another. He believed that the legislation was an encroachment on the right to freedom of the press; a device to encroach on the right to freedom of the press under the guise of placing restrictions on the commercial aspect of the newspaper activity.¹¹

One way of approaching the problem may be to examine it from the citizen's point of view.¹² The freedom which provides greater scope for the citizens' activities should be preferred to one which provides for greater regulation of the citizens' right. The impugned legislation was perhaps too drastic a step to meet the crisis of 'unfair competition' in the newspaper industry. The concept of the 'interests of the general public' is fairly extensive so as to give a lever to the State to control and regulate the freedom of the press to a great extent, so much so that the newspaper establishments may even be asked to close down.^{12a}

An example of a regulation interfering with the commercial aspect of the activity of newspapers may be found in *Express Newspapers v. Union of India*.¹³

In that case certain provisions of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, whose object was to secure the amelioration of conditions of the working journalists and other persons employed in newspaper establishments, was challenged as interfering with the right of the freedom of the press. It was urged that the provisions had

11. *Ibid.*, at p. 313, 314.

12. The provisions in the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred; *Dwarkadas Shrinivas v Sholapur Spinning and Weaving Co.* A.I.R. (1954) S.C. 119, at p. 138; *Hamdard Dawakhana v Union of India* A.I.R. (1960) S.C. 554, at p. 566.

12a. See *W.N.S., E.N. Pvt. Ltd., v E.N. Ltd.* A.I.R. (1961) Madras 331; *Arunchala v. State of Madras* A.I.R. (1959) S.C. 300; *Narendra v. Union of India* A.I.R.(1960) S.C. 430; *Rahman v. State of A.P.* (1961) S.C. 1471.

13. A.I.R. (1958) S.C. 578.

the effect of imposing a direct and preferential burden on the press and had a tendency to curtail circulation and thereby narrow the scope of dissemination of information.

This contention was not accepted by the Court.¹⁴

Here again the Court was faced with the problem of choosing between the two competing freedoms—freedom of the press and freedom of trade and profession.

Perhaps the Court was convinced that the working conditions in the newspaper industry were not satisfactory, and the lot of working journalists had to be improved. The closing down of the marginal newspaper establishments was noticed only as a *possible* eventuality and its impact on the right to circulate was a remote consequence. This gives to the problem involved here a turn different from the one involved in *Sakal Papers*.

It is arguable whether the impugned legislation in *Sakal Papers* would have passed the scrutiny of the Supreme Court if it had provided only for the regulation of advertisements. An advertisement is a form of speech, but every advertisement is not a matter dealing with the freedom of speech or the expression of ideas.

In *Hamdard Dawakhana v. Union of India*¹⁵, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, whose object was to prevent self-medication and self-treatment, and to prohibit advertisements commending certain drugs, and medicines, was held as not abridging the freedom of speech and expression under Art. 19(1)(a). The advertisement concerned formed a part of the business activity and had no relationship with the essential concept of freedom of speech and expression.

III

The freedom of the press means *principally* the right to publish without any previous licence or censorship.^{15a} Prohibition of entry and circulation or pre-censorship of a newspaper or a journal may mean a restriction on the freedom of the press.

In *Romesh Thapar v. State of Madras*¹⁶ an Order issued

14. *Ibid.*, p. 620.

15. A.I.R. (1960) S.C. 554.

15.a. *Virendra v. State of Punjab* A.I.R. 1957) Punjab 1.

16. A.I.R. (1950) S.C. 124.

under Section 7A¹⁷ of the Madras Maintenance of Public Order Act, 1949 banning the entry and circulation of a journal *Cross Roads* in the State of Madras, was held as imposing an unconstitutional restriction on the freedom of the press as guaranteed in Art. 19(1)(a) of the Constitution. It was observed by Patanjali Shastri J. that "there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation".¹⁸ Also in *Brij Bhushan v. State of Delhi*¹⁹ an Order issued under S.7(1)(c)²⁰ of the East Punjab Public Safety Act, 1950, imposing pre-censorship of a journal *Organiser* was held unconstitutional. Patanjali Shastri J. reiterated that there could be little doubt that

17. It authorises the Government "for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof of any document or class of documents" is a "law relating to any other matter which undermines the security of or tends to overthrow the State".

The Order runs as : "In exercise of the powers conferred by S. 9(1-A). Madras Maintenance of Public Order Act, 1949 (Madras Act XXIII of 1949), His Excellency the Governor of Madras, being satisfied that for the purpose of securing the public safety and the maintenance of public order it is necessary so to do, hereby prohibits, with effect on and from the date of publication of this order in the Fort St. George Gazette in the entry into or the circulation, sale or distribution in the State of Madras or any part thereof of the newspaper entitled *Cross Roads* an English weekly published at Bombay."

18. A.I.R. (1950) S.C. 127.

19. A.I.R. (1950) S.C. 129.

20. It provides as: "The Provincial Government or any authority authorised by it in his behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny."

The Order runs as: "Whereas the Chief Commissioner, Delhi, is satisfied that ORGANIZER, an English weekly of Delhi, has been publishing highly objectionable matter constituting a threat to public law and order and that action as is hereinafter mentioned is necessary for the purpose of preventing or combating activities prejudicial to the public safety or the maintenance of public order.

Now therefore in exercise of the powers conferred by S. 7 (1) (c), East Punjab Public Safety Act, 1949, as extended to the Delhi Province, I, Shankar Prasad, Chief Commissioner, Delhi, do by this order require you Shri Brij Bhushan, Printer and Publisher and Shri K.R. Malkani, Editor of the aforesaid paper to submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies, viz., Press Trust of India, United Press of India and United Press of America to the Provincial Press Officer, or in his absence, to Superintendent of Press Branch at his office at 5, Alipur Road, Civil Lines, Delhi, between the hours 10 a.m. and 5 p.m. on working days."

the imposition of pre-censorship on a journal was a restriction on the press which was an essential right to freedom of speech and expression declared by Art. 19(1)(a).

An examination of the opinions delivered in *Romesh Thapar* and *Brij Bhushan* cases disclose that the impugned Acts were held unconstitutional not because prohibition of entry and circulation, and pre-censorship, *ipso facto* made the Acts bad but because they could not be related to one of the purposes mentioned in Art. 19(2).

The impugned legislation in both the cases referred to “security of the public safety or the maintenance of public order”.

“Public Order” is of wide connotation and implies the orderly state of society or community in which citizens can peacefully pursue their normal activities of life.²¹ It may not necessarily be restricted to the aggravated forms of prejudicial activity which are calculated to endanger the security of the State or overthrow it.

Art. 19(2), as it was then worded, gave protection to a law relating to a matter which undermines the security of, or to overthrow, the State, and not relating to ‘public order’. Art. 19(2) has since then been amended by the Constitution (First Amendment) Act, 1951, so as to extend its protection to a law imposing “reasonable restriction in the interest . . . public order . . .” The consequence is that the mention of different grounds in Cl. (2) which could be brought under the general head ‘public order’ in its most comprehensive sense, indicates that they must be ordinarily intended to exclude each other. In this context ‘public order’ would be understood in the limited sense excluding all other purposes and synonymous with public peace, safety and tranquillity.²²

Art. 19(2) in its original form did not have the word “reasonable” before the word “restriction”, and it was inserted by the Constitution (First Amendment) Act, 1951. What is ‘reasonableness, has been explained’ by the Supreme Court in *State of Madras v. V.G. Row*.²³

21. *Superintendent Central Prison v. Ram Manohar Lohia*, A.I.R. (1960) S.C. 633, at p. 637.

22. *Ibid.*, at p. 637.

23. A.I.R. (1952) S.C. 196, at p. 200.

“It is important in this context to bear in mind that 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.

“The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, and entry into the judicial verdict.”

Concept of ‘reasonableness’ implies that the restraint that may be placed on the right of the individual should not be arbitrary or of excessive nature and the proper balance has to be drawn between the freedom guaranteed by Art. 19(1)(a) and the protective provisions of Art. 19(2).

All citizens are guaranteed the right to freedom of the press. However, the press has the potentialities of being abused or used for anti-social purposes. It is for this reason that certain restraints on the exercise of this right are provided in Cl. 2 of Art 19.

In *Virendra v. State of Punjab*,²⁴ the Supreme Court was faced with the question whether pre-censorship of a newspaper could be justified as a reasonable restriction on the right to freedom of speech and expression in the interest of public order.

Secs. 2²⁵ and 3²⁶ of the Punjab Special Powers Press Act,

24. A.I.R. (1957) S.C. 896.

25. It runs as: “2(1) The State Government or any authority so authorised in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may, by order in writing addressed to a printer, publisher or editor:

(a) prohibit the printing or publication in any document or any class of documents of any matter relating to a particular subject or class of subjects for a specified period or in a particular issue or issues of a newspaper or periodical;
Provided that no such order shall remain in force for more than two months from the making thereof;
Provided further that the person against whom the order has been made may within ten days of the passing of this order make a representation to the State Government which may on consideration thereof modify, confirm or rescind the order.”

26. It runs as: “3(1) The State Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may, by notification, prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication”.

1956 were challenged as unconstitutional because they infringed the right of the petitioner under Art. 19(1)(a) and were not saved by the protective provisions of Cl. 2 of Art. 19.

A notification²⁷ under Section 2 Cl. 1(a) was issued against the editor, printer and publisher of *Daily Pratap* published from Jullundur prohibiting him from printing and publishing any article etc. relating to or connected with the 'Save Hindi Agitation' for two months.

Another notification²⁸ was issued under Sec. 3 against the editor, printer and publisher of *Daily Pratap* and *Veer Arjun* published from Delhi, prohibiting the bringing into Punjab of the newspapers printed and published in Delhi.

It was argued that the restrictions were not reasonable. The problem was whether the prevailing circumstances required some restrictions to be placed on the right to freedom of the press and to what extent. The impugned statute was enacted for preserving the safety of the State and for maintaining the public order.

The Supreme Court held Sec. 2 as imposing reasonable restric-

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27. It runs as: "Whereas I, Ranbir Singh, Home Secretary, Punjab Government, authorised by the said Government under section 2(1) of the Punjab Special Powers (Press) Act, 1956, on examination of the publications enumerated in the annexure relating to the "Save Hindi Agitation" have satisfied myself that action is necessary for combating the calculated and persistent propaganda carried on in the newspaper the 'Pratap' published at Jullundur to disturb communal harmony in the State of Punjab:

And whereas the said propaganda by making an appeal to communal sentiments has created a situation which is likely to affect public order and tranquillity in the State;

And therefore in pursuance of the powers conferred under sub-clause (a) of clause (1) of section 2 of the said Act, I prohibit Shri Virendra, the printer, publisher, and the editor of 'Pratap' from printing and publishing any article, report, news item, letter or any other material of any character whatsoever relating to or connected with 'Save Hindi Agitation' for a period of two months from this date.

28. It runs as: "Whereas, I Ranbir Singh, Home Secretary, to the Government, Punjab, authorised by the said Government under section 3 of the Punjab Special Powers (Press) Act, 1956, have satisfied myself that it is necessary to combat and prevent the propaganda relating to "Save Hindi Agitation" carried on in the Pratap with the object of disturbing communal harmony in the State of Punjab and thereby affecting public order;

Now therefore, in exercise of the powers conferred by section 3(1) of the said Act, I do hereby prohibit the bringing into Punjab of the newspaper printed and published at Delhi, from the date of publication of this notification."

tions on the exercise of the rights guaranteed by Art. 19(1)(a) in the interest of public order.

It was noticed that it was not an unfettered or uncontrolled discretion that was given to the government as it could only be exercised for a purpose mentioned in the Act.

Further the notification to be issued under S.2. (1)(a) could remain in force for only two months, and the aggrieved person was given an opportunity to make a representation to the government.

The absence of those safeguards would have rendered S.2 (1)(a) unconstitutional. Such safeguards were not provided in S. 3, and it was, therefore, held to be an unreasonable restriction.

Censorship being an extreme form of restriction may be justified only if there is disorder of a serious nature and when all means short of censorship have been found inadequate to meet the situation.²⁹

Before the impugned statute was enacted Akali Party had started a campaign of hatred threatening the peace. There was a strong opposition to that proposal and it was likely that Hindus would have indulged into counter propaganda.

Amidst this ideological war between the Hindus and Akalis it was found necessary to pass the Act to prevent and combat any possible activity prejudicial to the maintenance of communal harmony. Censorship should be resorted to only when the fabric of society is in jeopardy. Such circumstances did not seem to prevail at the time of the passing of the impugned Act so as to have warranted such a drastic step.

IV

The judgment in *Sakal Papers* might have been somewhat disappointing to those who took the cause of small newspapers. The Newspaper (Price and Page) Act, 1956, gives an impression that the regulation of price and pages of a newspaper was not properly related to meet the crisis of 'unfair competition' prevalent in the newspaper industry.

It did not seem certain whether the proposed measures would

29. 'Preventive detention' is not suggested here as an alternative: Cf. *Ram Singh v. State of Delhi* (1951) S.C.R. 451.

have achieved the desired results. Perhaps, if the Court was convinced that the activity of newspapers was faced with an acute crisis vitiating the growth of free journalism in the country, its attitude might have softened down in favour of the press. It is for the Courts to say what is "public order", and to what extent the freedom of speech and expression may be subjected to "reasonable" restrictions in the interests of "public order."³⁰ It is true that the fundamental rights set out in Art. 19 should be interpreted so as to subserve the interests of citizens, but they are subject to limitations which are for the general welfare of all citizens as a whole, and, therefore, in the interests of general public.

The Enquiry Committee on Small Newspapers suggested an amendment to Art. 19 as one of the ways to get over the decision in *Sakal Papers*.

The tendency to amend the Constitution simply to get over legal difficulties created by a judgment of the Supreme Court is not a very happy one. The process should be invoked only in extreme cases. Such matters should be left to the judiciary which might give a second thought to the problem, and it is likely that it may change its opinion.

Much depends on the problem approach, but the Courts should be aware of all socio-economic-political aspects of the problem in a proper perspective.

In an emerging and developing democracy like India the press has a special role to play. Its function is to collect news and disseminate it, and to provide a forum for free discussion and comments. Because of its special role and also its future power potential it may have to be subjected to restraints which may not be either necessary in the case of individuals. However, Art. 19 of the Constitution gives the same status for both. They are subjected to the same kinds of limitations. It is agreed that the right to freedom of speech and expression of an individual has to be zealously guarded against any encroachment which goes strictly beyond the limitations permissible by Cl. 2 of Art. 19. But the same treatment need not necessarily be accorded to the press which may, within the framework of Cl. 2 of Art. 19, be recognised as an institution having a role different from that of an individual.

30. Similar observations may be noticed in the exposition of another purpose "obscenity" provided in Cl. (2) of Art 19 by Hidayatullah J's opinion in *Ranjit D. Udeshi v. State of Maharashtra* A.I.R. (1965) S.C. 881, at p. 887.