

INDIAN CONSTITUTIONALISM AND PRESS FREEDOM IN INDIA SINCE INDEPENDENCE

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ABSTRACT

Press freedom plays a very crucial role in any democratic structure. It not only bridges the gap between the ordinary people and the government rather it also exposes the corrupt practices of the executives before the public. It is the biggest source of information any citizen can avail. This paper would try to locate the idea of press freedom in India under the framework of Indian constitutionalism. It would map the journey of press freedom in India and how over the period of time press freedom gone through several changes. In the light of various judicial pronouncement and different political regimes press freedom, press freedom in India became more resilient. With the introduction of social media which brought revolution in terms of information exchange, new kind of problems start arising such as the issue of fake and hate news. All these above-mentioned factors have impacted the very idea of press freedom and demand a comprehensive analysis of the subject matter. This paper has tried to include a few recent developments in order to catch the reality of the contemporary time. What this paper does not do or intend to do is any set of strict regulation as what should be done to overcome the obstacles coming in the way of ensuring press freedom in India. I firmly believe that this can only be done by calling all the stockholders on a common platform where they can deliberate upon the issue in length.

KEYWORDS : *Press Freedom, Constitutionalism, Social Media, Indian Judiciary.*

Before it proceeds, I want to make it very clear that in what sense I am relating constitutionalism with the idea of press freedom and the problem of fake news. This is true that constitutionalism has a very complex meaning and it is open to so many ideas and constitutional values such as rule of law, democracy, equality, commitment to constitution and limits of the arbitrary power of government, etc. In this paper, I would be using the idea of limitation on government, inclusive democracy, freedom and liberal values largely from the border canvas of the idea of constitutionalism. Constitutionalism also has a prescriptive role to play in the sense that it prescribes things on the matters where the constitution is silent or such things are not mentioned in the constitution originally. Freedom of the press is one such thing which does not find any explicit mentioning in the Indian constitution as a subject matter. Freedom of the press is an integral part of democracy anywhere in the world. In India and elsewhere, we call it the fourth pillar of the government. Such is the importance we confer to freedom of the press in contemporary times. Though freedom of the press is not protected by any legal statute as such or mentioned in the Indian constitution explicitly, however, it is implied under article 19 (1) (a) of the constitution.

A question which is asked many a time that is why does us need freedom of the press in any country. The answer

is not easy and we cannot make the generalization, however, there are few things which are common in so many countries and therefore we can make the generalization to a limited extent while answering this question. Most of the countries around the world have preferred democracy and representative institutions in different forms. This is precisely because they all believe that this is the best possible way through which we can ensure the empowerment of ordinary people along with their participation in deciding the fate of their country. In a democracy, information plays a very crucial role. India has the largest democracy in the world and therefore the role of the press becomes very crucial in the sustenance of democracy. A free press not only disseminates the information but also exposes the corrupt practices and malfunctioning within the government. There are end numbers of examples we have across the world where the free press has come down very heavily on the wrong and corrupt practices of the government.

The Watergate scandal is one of the famous incidents in the history of America. The Watergate scandal was uncovered by two young journalists for *The Washington Post*, Bob Woodward, and Carl Bernstein. This was a major turning point for the field of journalism, one where America realized just how powerful the media could be, serving as not only a news outlet but as a watchdog for the American people. In India also be it commonwealth scam, 2G scam or Panama

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Papers, press and media has played a very crucial role in terms of keeping a check on the executive as well as informing the people about their representatives' actions. Unless people don't possess information, they would find it very difficult to make any decision. Not only their choices would be restrictive but the overall development would also be hampered. Press has also worked to alleviate the voices of those who are placed on margins and their voices are unheard so far. Those who cannot make their representation in the government often find press very instrumental in order to make their demands, plight, and voices before the government and society at large. In a very succinct remark, we can certainly argue the press does play a very significant role in our day to day life for various reasons we have discussed above. It is precisely for this reason; we need a free press to have an inclusive, healthy and robust democracy.

This paper would try to trace the journey of freedom of the press in India since Independence primarily. This paper would try to find out how under different political regimes, freedom of the press also undergone several changes. At the same time, the responses coming from the judiciary regarding the same would also be taken care off in this paper. Judiciary in India has recognized the importance of the free press. Independent judiciary and independent media are the heart and soul of constitutional democracy, and when these two pillars are strong, the citizens feel empowered and their rights secured. These are the words of the former chief justice of Supreme Court of India, Justice R.M Lodha. Through several judicial pronouncements, we would try to analyse the attitude of the India judiciary towards this fourth important pillar (The Weak, accessed on 07 Mar 2019).

Media trial is a by-product of unaccountable and unresponsive journalism. Justice Sikri, who is a sitting judge in the Supreme Court of India, goes on to extent, where he said that social media has now gained such powers that it can potentially influence the outcome of the judgment and judges of the lower judiciary might get influenced by such media trials and the amount of emotion social media unleashes. At the same time, a counter-narrative that has gain momentum in our common parlance is that social media has been very inclusive in the sense that anyone can place its view before the audience. The mercy of news publishing house to cover a story is no more required and more and more information can be extracted from social media. In fact, social media has brought the revolution in the field of press and journalism.

This paper also tries to investigate the growing concerns of Fake news in contemporary times. We have so far discussed the potential of the free press and media and its positive contribution towards the society, however, the menace

of fake/irrelevant/bias/partial/unaccountable reporting is growing very rampantly and doing more harm to the society than the contribution of responsive journalism does. India has witnessed many lynching and riots just because fake and provocative news was allowed to roam free in the market. With the introductions of social media where one touch of your finger can spread the news without even being checked or authenticated, government hands appear to be tied. What kind of legal safeguard do we have with us and what are the lacunas that constrain the legal outreach in terms of preventing the spread of fake news in India would also be discussed in this paper. In reality, as we know, fake news goes much beyond hate speech. It is high time that we have some direct provisions to govern fake news and rumours. At the time when the Indian Penal Code (IPC) was enacted, these problems did not exist; hence the current laws are inadequate.(Livermint, accessed on 7 mar 2019)

While framing any normative sets of rules and regulation by the government to curb the menace of fake news might actually end up with suspending the free and fair journalism. This legitimate fear has created an atmosphere of scepticism around. Any step regarding the same usually raises the eyebrows of many people who think that by doing so the government actually wants to control the freedom of the press. Therefore, these whole things are entangled in a very complex web and need a careful pragmatic vision to deal with. We not only have to maintain the autonomy and freedom of the press but we also need a fair mechanism to hold the agency responsible if it is found in the business of perpetuating lies and falls things. The responsible press has become the need of the hour in today's world. In India at least, the government has already set the process in motion already. A comprehensive regarding this menace has already been submitted by the union home secretary to a group of ministers which in turn will submit it to the Prime Minister office. It is estimated that in a couple of years, about 40 persons are lynched or killed by the mob on various fake news circulation such as child theft, cow smuggling. This whole range of burning issues requires serious attention and an interdisciplinary approach to deal with.

In short, this paper will make honest attempts to look at various dimensions regarding press freedom in India. It will also explore the various elements of Indian constitutionalism and how they are close links to press freedom in India.

METHOD

Regarding the methodology, I would undertake the qualitative methodology under which I would basically use secondary sources such as online news articles, journals, and blogs. I would also use a few important judgments of various

high courts and Supreme Court and commentaries on such judgments. Besides all this, I would also draw examples and cases all across the world regarding this subject in order to make this paper theoretically rich.

Before we proceed further to discuss the different dimensions of Press freedom and the new emerging challenges, it would be plausible to first have a general idea about what the press is all about? And why do we need to free it from the encroachments coming from various agencies?

Press actually acts as an instrument or medium to express the thoughts and opinions of an individual or group of people before the public. The concept of the free press was discussed by William Blackstone in 1769 where he said, "The liberty of the press, is indeed essential to the nature of a free state; but this consist in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of press; but if he publishes what is improper, mischievous, or illegal he must take consequence for his own temerity. To subject the press to the restrictive power of licensor..... Is to subject all freedom of sentiments to the prejudice of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and Government. But to punish..... Any dangerous or offensive writings, which published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency is necessary for the preservation of peace, of Government and religion, the only solid foundation of liberty."

The similar view was also reaffirmed by A.V Dicey where he says; "The freedom of press means the right of a person to publish what he pleases in books or newspapers but the law of England do not recognize any special privilege attached to the press." (Dicey,239-242)

Since there is no written constitution in England, freedom of the press was understood as a part of freedom of speech and expression like in India. In India, though we have a written constitution press does not find any explicit mention or protected by any law or statute. However, the supreme court of India, in its various pronouncements has read freedom as Press with article 19 (1) (a).

As mentioned already, freedom of the press does not find any explicit or special mentioning in the entire constitution of India, however, it implied under various articles. When we read the debates in the constituent assembly, we do find people raising voices for freedom of speech to be incorporated under fundamental rights. B.N. Rau championed the idea that freedom of expression would include freedom of

the press. The same view was echoed by Ambedkar as well. He went to say that no special mention is necessary for the freedom of the press at all. He further observed – "*The press has no special rights which are not to be given or which are not to be exercised by the citizens in his individual capacity. The editor of a press or the manager is all citizens and therefore when they choose to write in newspaper, they are merely exercising their right to expression, and in my judgment, therefore, no special mention is necessary of the freedom of the press at all.*"(Noorani, 1991)

The same thing is reiterated by the Supreme Court of India as well on several times. The court observed that press freedom is implicit in the guarantee of freedom of speech and expression. The court observed that press freedom is nothing but an aspect of free speech and expression which is already protected by the constitution of India under the fundamental right, article 19(1) (a).

In the assembly debates, we find that although, the members were convinced that in order to build a society based on democratic ethos and values, press freedom was essential. However, they saw press freedom as a mere instrument to ensure a free society. Press freedom was never envisaged as an end itself to maintain a free society. They were well aware of the fact that if not disciplined and entrusted with responsibility, the same press freedom might turn into a privilege of few elite and become a threat to freedom of the society.

One important thing to note here is that whenever we talk about press freedom, we separate press from the public as a distinct identity. We perceive that whether the press is given freedom or its liberty is being curtailed by the government is it going to affect them only. However, any impact on the freedom of the press has two sides. The public is equally affected by any development that is taking place regarding the freedom of the press. We have the right to know the functioning of the government and public institutions. It is only through the press, most of the time that we get such information. Thus, in short, press freedom encompasses the collective right of the community.

Any government can only draw legitimacy when it holds itself accountable in the eyes of the people. Accountability can only be measured by the people when they have information about the functioning of the government and its day to day affair. Thus, information plays a very crucial role, which is, disseminated through the press about the government and working of the government institutions at large.

Whenever we talk of government control over press freedom, we generally refer to actions such as censorship,

seizure on account of any irregularity in the eyes of executive, or cancellation of license, etc. However, there are several other ways open before the executive through whom it can flex its muscles and control or influence the freedom of the press.

In the case of *Bennett Coleman & Co. & Ors. v. Union of India* complained that government had withdrawn advertisement from its newspaper on account of extraneous reasons, and this had adversely affected the revenue and circulation of the newspaper. This action of the government was challenged before the court as unconstitutional.

What is interesting here to note is that although the honourable High Court did not accept the plea, it ruled very categorically that the government cannot act in such an arbitrary manner. The court observed *“to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press, or as a weapon to punish newspaper which criticizes its policies and actions. It has to use the funds in a reasonable manner consistent with the objective of the advertisement, viz. to educate and inform the public about the activities of the government.”* (*Bennett Coleman & Co. & Ors. v. Union of India* 1973 2 SCR 757)

Though the government has resorted to various ways several times in order to contain the press to make it work in its favour, the most scathing attack came during the proclamation of emergency.

Pre-censorship was imposed by executive order and certain instructions were issued by the executives which were binding in nature. One such instruction reads, “Nothing is to be published that is likely to convey the impression of a protest or disapproval of a government measure.” All such actions which may likely to cause the criticism of the government or actions of the government were put under the blanket ban.

Minoo Masani was the first to challenge such an arbitrary and unconstitutional action of the executive before the court. He himself was aggrieved because his monthly journal, *Freedom First* was censored by executive order. The matter was placed before the Bombay High court and the court came down heavily on the executive by striking down censorship order. The court ruled that even during the emergency, the right to dissent cannot be snatched away. One thing that emerges from this whole debate is that independence of the judiciary is equally important in order to maintain the freedom and sanctity of press. In fact, both are the essential component for the building of a society based on free and democratic ethos.

Had the case of Press freedom would have gone before the Supreme Court of India, the result might have been different. Many scholars believe so because the way supreme court allowed the suspension of Habeous Corpus provision, which is a fundamental right, even if the order of executive is malafide in prima facie, during the emergency, it was not expected from the supreme court that any positive judgment would come regarding the freedom of the press during the emergency, because press freedom was certainly low order right in comparison to article 32 of the Indian constitution.

There is end number of cases available before us and response of the Indian Judiciary has been very positive barring few exceptions. The court has the press freedom, at the same time it has also, directed the media houses to refrain from the spreading of fake or provocative news. So far, we have only talked about things before globalization or at least before the time where social media has expanded itself very rapidly.

As mentioned above lower judiciary or sometimes even the high courts in India are found in the business of using the power of contempt of court to censor something without any substantial rationale. Meghalaya High court sentenced two women journalists to sit in a corner of the court merely because these two journalists were involved in an article titled, *“When judges judge for themselves.”* The same contempt of court was later got a stay from the Supreme Court of India. The journalist questioned the rationale behind the order passed by justice Sudip Ranjan Sen that allowed the perks and Z category and Y category security provided to the retired former chief justice of Meghalaya High court, Justice Uma Nath Singh and Justice T.K.N Singh respectively.¹

In this section, we would try to explore the attitude of Indian Judiciary towards the press freedom in India. This section would also cover the increasing menace of fake news, its adverse impact on the society at large and the development which is taking place in the field of law to curb this problem. There are end numbers of judicial pronouncements which are related to the freedom of the press in India. We cannot afford to discuss all the judgments here in this paper and therefore, I have picked up judgments of both natures. At one hand we can safely argue that by and large Indian judiciary has been very vocal and supportive for securing the freedom of the press in India but there are several other instances which show that press freedom did receive some jolts also.

First, I shall discuss the landmark judgments which have given the boost to the idea of press freedom, in India.

In the *Sakal Papers* case, the Newspaper (Price and page) act 1956 and the Daily Newspaper (Price and page) order 1960 regulated the number of pages of a newspaper

according to the price charged. It also had a provision to regulate the allocation of space for the purpose of advertisement.(1962 AIR 305, 1962 SCR (3) 842)

The matter came before the Supreme Court and the court declared the above law unconstitutional because it was in violation of article 19 (1) (a) of the Indian constitution.

The court said that by prescribing the maximum number of pages for a particular price charged, Newspaper price and page act 1956 and Daily Newspaper price and page 1960, forces the newspaper company to either reduce the number of pages or raise the price if they decide to increase the number of pages. It has a twofold implication. On the one hand, it limits the circulation of news and views, on the other hand, if the price is raised, it would also cut down the circulation of that newspaper significantly. The court ruled that such acts not only infringe the right of the person who owns a newspaper company it also infringes upon the right of an ordinary person in the sense that it would also limit the information available to him.

The menace of fake and objectionable contents on social media forced the government to take initiatives. The government amended the Information Technology Act 2000, enacted section 66A of the Information Technology Act, which made it a punishable offense for any to “send, by means of a computer resource or a communication device.

The legal provision under this section empowered the government agencies to arrest a person for posting “offensive” content online.

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

The law was challenged before the Supreme Court of India for being misused by the government and arbitrary arrest of a person under this section.

The government intends to curb the unchecked, fake and provocative contents through the amendment in the Information and Technology Act 2000 could not convince the

honorable supreme court of India and section 66A was declared unconstitutional. The honorable court called it unconstitutional and an infringement on citizens’ fundamental right to know.

As I already discussed in the beginning, any intent of government to regularize the unchecked flow of contents on social media or anywhere else, easily attract skepticism against the government will and intent. There is a valid reason for such skepticism. The attempt of different government in the past to control the freedom of the press in a different form is a well-known fact. The civil society does not want to let its effective weapon that is press, slip by Modi government also tried to regulate online media. In April, the Modi government constituted a committee to frame rules to regulate news portals and media websites. The committee was to comprise secretaries of the ministries of information and broadcasting, electronics and information technology, home affairs, legal affairs and the department of industrial policy and promotion as members but had no representatives from the digital media space.(The Wire, accessed on 7 mar 2019)

Its letter dated April 4, 2018, seeking to establish content regulations for the Internet modeled on those applicable for traditional media like print and TV clearly triggered an intense debate among people from civil societies, journalists, professionals, and others.

What is the way out? Interesting to note that one of the major concerns that emerged against the government letter dated April 4, 2018, did not incorporate any stakeholder from the media fraternity. The committee was highly bureaucratic in nature and therefore the concerns of people of social media were largely unrepresented(Kumar, 2016). This was a major reason why government order drew a lot of criticism before the law could even be realized. When the print and electronic media ownership is concentrating in the hands of few, it only the social media where each individual can express his thoughts in the public domain. Information is no longer the slave of mere print or electronic media rather social media like Facebook, Twitter, WhatsApp and others have indeed taken over the conventional methods of news dissemination. If any action of the government attempts to throttle even that platform then resistance is obvious to come.

Mapping the growth of press freedom in India under the normative framework of Indian constitutionalism, we can safely argue that, press freedom as an idea that was envisaged by the founding father of the Indian constitution has certainly got more strength over a period of time. Judiciary baring few exceptions have emboldened its position on press freedom and respected its freedom as the fourth pillar of Indian democracy.

Despite a few odd days in the journey of press freedom, the idea is becoming more and more resilient. Despite the onslaught by different government, the idea gained more and more currency due to its importance in the daily life of an ordinary individual.

NOTES

¹Issuing the order, a Division Bench headed by Chief Justice Mohammad Yaqoob Mir said that Ms. Mukhim and Ms. Chaudhuri would have to undergo six months of simple imprisonment and the newspaper would be banned if they fail to deposit the amount within a week. "In exercise of the power vested on us by Article 215 of the Constitution of India, we sentence both the contemnors to sit in the corner of the courtroom till the rising of the court and impose a fine of 2 lakh each which is to be deposited with the Registry within a week and then to be deposited in the welfare fund of this high court," the Bench said.

²This law was challenged before the court by Shreya Singhal, in 2012 after Thane Police in Maharashtra used this law to arrest two young women for critical comments against the shutdown of Mumbai on social media during the funeral of Shiv Sena leader Bal Thackeray. In her petition, the petitioner challenged that the law infringes upon the fundamental right of freedom of speech and expression.

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