Page 1766 - 1774 **DOI:** *https://doij.org/10.10000/IJLMH.112696*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 1

2022

An Analysis of the Restrictions on the Freedom of Press in India

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ABSTRACT

This paper focuses on analyzing the nature of state-imposed restrictions on the freedom of the press in India. The author has understood and demarcated the nature of restrictions imposed on the said freedom in three categories, namely the censorship approach, the forced-price hike approach, and the legislative approach. The paper also delves into the nature of judicial decisions whenever the liberties of media are curtailed by the state by employing the above-stated approaches. Judiciary has come to the aid of media in several cases where censorship, imposition of taxes, and duties on newspapers or statutes limiting the freedom of the press have been held as unconstitutional. The author has finally classified the approach taken to curtail media in two categories, namely overt and covert categories. The overt approach encompasses methods to directly and ostensibly regulate the freedom of the press, for instance, through censorship method and the covert approach encompasses the methods to indirectly and discreetly permit the state to regulate the press, such as the law relating to defamation that can be used to impose fetters on the media. The piece concludes with certain suggestions to strengthen the institution of media in India.

I. FREEDOM OF PRESS VIS-À-VIS OTHER FUNDAMENTAL RIGHTS

Justice Venkataramaiah once made a very popular statement that *"as long as this Court sits, newspapermen need not have a fear of their freedom being curtailed by unconstitutional means."*

A statement like this forces us to ponder if there are any possible reasons why freedom of the press should receive primacy over other fundamental rights guaranteed under our constitution. The first part of this paper delves into this question before we study the state-imposed restrictions on freedom of the press.

Freedom of the press refers to the innate liberty of the media to bring local, national, international information to the public at large in an unbiased and reliable manner.

The Indian constitution does not recognize any fundamental right over another; however, the

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freedom of the press has been safeguarded by the Indian judiciary and given primacy over several other considerations (such as public order, obscenity, religious sentiments) given its necessity in a functioning democracy. The same will be studied further in the next section of this paper. The Supreme Court went on to call freedom of the press "the ark of the covenant of democracy"[2].

A possible reason why freedom of the press is more valuable than other fundamental rights is that democracy, which is the bare minimum necessity for ensuring the enforcement of other fundamental rights, is itself dependent on the freedom of the press for its survival since it is the press which holds the government answerable to the general public.[3]

Freedom of the press is all-encompassing liberty that includes not only the right of the journalists to perform their duty or that of the newspaper proprietors to carry on their business but also includes the right of the community to be informed – it represents a collective right to information[4]. Therefore, it encompasses the freedom to carry on a professional right to information, amongst other rights.

The public is completely dependent on the press to access information about the working of the national institutions, and in this regard, the press acts as the custodian of public trust[5]. A good media report would present a wide spectrum of views to the public enabling the public to form informed opinions. The freedom of the press, unlike other fundamental rights, is a community fundamental right more than being an individual right.

An interesting question that arises at this juncture is that if we hold the freedom of the press dear because of the public service that it renders, then does the liberty of the press deserve the same protection even when it is not discharging the said public purpose?

Media serving as a mouthpiece of the government or the opposition is certainly not the role we envisaged the media to play. If we agree to disentitle the media to this precious freedom, then who would constitute the authority to determine if such an unfortunate occasion has arisen?

In this paper, it is opined that such instances of biased media should be rather ignored than creating further possibilities of stripping the press of its freedom in the guise of penalizing the biased, undeserving media. The benefits and necessity of free media outweigh the cons of consequences caused by biased media.

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[2] Bennett Coleman case, (1972) 2 SCC 788.
[3] Soli Sorabjee, *Freedom of Press, its contents and facets*, Vol. 13, India International Centre Quarterly, The right to be Human 173-184 (December 1986).
[4] Sorabjee, Ibid.
[5] Sorabjee, Ibid.

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II. Analyzing the pattern of state restrictions on freedom of the press and examining the judicial approach to it

The purpose of this section is to figure out the pattern in the various approaches taken by the state to curb the freedom of the press and examine the judicial response to them. The paper has divided the approach taken by the state to restrain free press into the following categories for better analysis:

- Censorship method
- The "forced price hike" approach
- The legislation approach

(A) The Censorship approach:

Censorship implies the supervision by the state authorities over the content that media distributes via newspapers, television news reporting, and various other mediums. However, a controversial concept due to its conflict with free speech, some sort of pre or post-censorship is employed in most modern-day states where the state views itself as not only material but also the moral custodian of the well-being of citizens. The Indian Constitution guarantees a set of crucial fundamental rights, one of which is the right to free speech and expression under Article 19(1)(a) subject to reasonable restrictions listed in Article 19(2). The pre-censorship of movies and other dramatic works under statutes such as the Cinematograph Act 1952 is often justified on the ground of their potential to arouse explosive and calamitous sentiments; however, pre-censorship of the press is a far more contentious issue. There is a unanimous consensus over the fact that censorship and prior restraint amount to curtailment of the liberties of the media. First, we try to understand the approach taken by the Indian judiciary towards the prior censorship of the press.

In *Romesh Thappar v. the State of Madras*[6] and *Brij Bhushan v. the State of Delhi*[7], the facts were so similar that in the majority judgment of the Brij Bhushan case, the court quashed the order of the Delhi Government by simply referring to the reasons stated in the Romesh Thappar case. In the Brij Bhushan case, the impugned state legislation empowered the state government to make special provisions for the purpose of ensuring "public safety and maintenance of public order", and as a result, restrictions on distribution and censorship was imposed on the *Organizer* journal, which allegedly carried insensitive material that could have led to public

[6] 1950 SCR 124.
[7] AIR 1950 SC 129.

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safety disruption and breach of public tranquillity. The court quashed the government order in the Brij Bhushan case while holding that the invaluable freedom of the press can be restricted only on the ground of serious public order concerns such as the threat to the security of the state and not on unwarranted grounds such as insignificant breaches of the peace. We hail the bold approach taken by our judiciary in a then-newly born nation to safeguard the democracy that we fought for. Similarly, in the case of *Virendra v. State of Punjab*[8], the apex court held that denying the right to a newspaper to publish the opinions, thoughts and sentiments on current events amounted to unwarranted infringement of free speech.

As a result of these path-breaking decisions of the apex court, the task of gaging the media became even more cumbersome, and consequently, the government carried out the First Amendment to the constitution in 1951 to introduce additional grounds to restrict the freedom of the press, such as public order, friendly relations with foreign states, and incitement to an offence. Public order as a ground for imposing restrictions on the free press has far-reaching repercussions given its potential for causing the disproportionate consequence of a curtailed freedom of the press even in cases of trivial breaches of public order.

Prior censorship may be the more effective method of maintaining public order due to its character of nipping the objectionable material in the bud itself before any harm is caused due to its dissemination; however, it also bestows immense discretionary power upon the executive to determine what content deserves wider proliferation and the state can easily prevent the circulation of content detrimental to its interests.

In India, the trend of regulating objectionable material in the press inclines towards post-censorship, where the publishers are penalized for circulating what is seen as objectionable material. An example can be seen in the case of *Ramji Lal Modi v. State of Uttar Pradesh,*[9] where the publisher of *Gaurakshak*, a journal devoted to cow protection, was charged under section 295A of IPC for disseminating material hurtful to religious sentiments. The constitutionality of section 295A was challenged for violation of freedom of speech and expression; however, the court denied the argument on the ground that it was the malicious intent that led to the culpability under the said section.

(B) The "Forced Price-Hike" approach:

Another approach that has often been witnessed to curb freedom of the press is to somehow increase the cost of production and distribution of the newspapers, journals, etc., to curtail its

[8] 1958 SCR 308.
[9] AIR 1957 SC 620

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circulation due to their unattractive high price. We take the case of *Sakal Papers v. Union of India,*[10] where the constitutionality of the Daily Newspaper Order, 1960, for regulating the pages and prices of newspapers was challenged. Under the impugned order, the number of pages, supplements, space devoted to advertisements was sought to be regulated, which would have resulted in unattractively high prices of the newspaper rendering the circulation of newspapers adversely affected. The Supreme Court held the said order to be unconstitutional for violating the freedom of the press in an unsanctioned manner.

In *Bennett Coleman & Co. v. Union of India*[11], an import policy was challenged, which provided for the quota of newsprint for different newspapers. The Supreme Court declared the said import policy to be unconstitutional, stating that the government cannot be permitted, in the garb of saving precious foreign exchange, to regulate the proliferation and circulation of the newspapers. At the end of the day, the newspapers have to be self-regulators when it comes to determining their number of pages and extent of circulation.

A similar attempt to cripple the freedom of the press by increasing the custom duty imposed on varied categories of newspapers, thereby increasing their financial burden, was rejected by the Supreme Court in *Indian Express Newspapers Pvt. Ltd. v. Union of India*[12] holding such an endeavour to be an unconstitutional means of curbing the circulation of the newspapers.

In *Hindustan Times v. the State of U.P*[13], the bill payable to newspapers for publication of government advertisements if the newspaper had a circulation of more than the stipulated number of copies was sought to be reduced by 5% to facilitate payment of pension to journalists. It is conventional for newspapers to earn the major chunk of their revenue through advertisements and commercials; therefore, this was an implicit attempt to trim the capacity of the press to circulate its content. The apex court held it to be ultra vires the constitution.

(C) The Legislation approach:

Attempts to constrain the free press were made by the British as well during our colonial nightmare, and a familiar approach was followed in the post-colonial era as well. Statutes such as *Press (Objectionable) Matters Act, 1951* couldn't escape the comprehensive sweep of judicial review[14]. Another disputable piece of law was the *Prevention of Publication of Objectionable Matters Ordinance 1975.* The year of this ordinance reflects the exasperating

[10] (1962) 3 SCR 842
[11] (1972) 2 SCC 788.
[12] (1985) 1 SCC 641.
[13] (2003) 1 SCC 591.
[14] The said Act was challenged in Srinivas v. State of Madras, AIR 1951 Mad. 70.

times that we as citizens were facing, and such uninvited curbs on freedom of the press epitomize the traditional suppressive tools which the government employed to crush dissent and prevent diversity in opinion. The ordinance essentially sanctioned pre-censorship of the press; however, the short-lived statute saw its last after the Janata government came to power post the defeat of Indira Gandhi in general elections in 1977[15]. Although not directly aimed at regulating the press, statutes of general nature such as the Official Secrets Act, 1923 could also be employed for regulating the content of media.

III. FINDINGS/ANALYSIS

We have witnessed the various approaches which are employed by the state to curtail the freedom of the press and classify them in different categories such the pre and post censorship, the escalation of the financial burden to result in the price hike of newspapers, the direct application of statutes and legislation to regulate the free press.

There is a set pattern of different kinds of restraints being imposed on the media, and this paper suggests their further division in the following two categories:

- **Overt** approaches- the approach to ostensibly regulating media through methods such as censorship and statutory measures which directly regulate the press, for instance, the Press (Objectionable) Matters Act, 1951.
- **Covert** approaches- the approach which although does not directly target the press but indirectly regulates it, for instance, by engendering such circumstances in which the financial burden of circulating media content increases, leading to a price hike and less marketability of the newspapers or the general statutes which might be used to restrain media such as the Official Secrets Act, the law relating to defamation and contempt of court, incitement to commit an offence etc.

These overt and covert means of overseeing the media content have repeatedly been challenged before the judiciary, and the courts have time and again come to the rescue of the press in safeguarding their priceless freedom. There have been instances where the restraint on the free press has been sustained; however, this paper does not intend to argue that the press should be left unregulated to become absolutist. Press is a powerful weapon capable of moulding the public opinion and determining who such public will elect to power; therefore, the judicial approach to sustain certain restraints is also appreciated and respected.

[15] K.D.Gaur, *Constitutional Rights and Freedom of Media in India*, Vol. 36(4) Journal of the Indian Law Institute 429-454 (October-December 1994).

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We have witnessed several judgments on media trials such as *Sunil Baghel v. the State of Maharashtra*[16] and the *Sahara Real Estate Case*[17] ; however, we take the recent example of the media trial in the Sushant Singh Rajput case where the brutal and ruthless approach taken by certain media outlets led to a broad consensus that the accused was without a doubt, guilty and there was no need for a judicial pronouncement to that effect. Without getting into the merits of the case, such reporting would certainly lead to irreparable harassment, agony to the accused and irreversible damage to his reputation. The aftermath of the sensational media reporting saw the Bombay High Court directing the media to avoid prejudicial reporting during an ongoing investigation or trial. For instance, the media should avoid scrutinizing the accounts of witnesses and reporting on the character of the accused or the victim[18]. Interestingly, when Delhi High Court was approached for guidelines to regulate the reporting of criminal investigations, it refused to pass such guidelines while sticking to the adjudicatory role of the judiciary rather than usurping the legislative functions[19].

The Bombay High Court criticized the media reporting leading to inter-community hatred in the Tablighi Jamaat matter. The negligent media reporting was, at best, propagandist and uncalled for in a pluralistic society.[20]

Another instance where the right to free press can be reasonably restricted is to safeguard the right to privacy. The right to privacy has been explicitly recognized as a fundamental right[21] , and the right to be forgotten is also recognized by the Indian Courts[22] , which makes up for an inherent aspect of the Right to Privacy. Once reported in the media, a matter becomes ingrained in the public memory for years to follow; hence a reasonable balance between privacy and reporting has to be achieved. In this paper, we take the view that if the press is restricted to prevent it from unwarranted and prejudicial reporting for the purpose of viewership, then such restriction would not amount to being unreasonable.

[16] 2018 Cri LJ 4298.
[17] (2012) 10 SCC 603.
[18] Public Interest Litigation (ST) No. 92252 of 2020 with Interim Application no. 95156 of 2020.
The judgment was passed in a case where a bunch of public interest litigation cases was clubbed together such as Nilesh Navlakha v. Union of India, Mahibub shaikh v. Press Council of India.
[19] Mohd. Khalil v. Union of India, 7th October 2021.
[20] Konan Kodio Ganstone and Ors. v. State of Maharashtra clubbed with other writ petitions, Criminal Writ Petition No. 548 of 2020.
[21] Puttuswamy v. Union of India, (2017) 10 SCC 1.
[22] "Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd.", 2019 SCC OnLine Del 8494.

IV. Conclusion- recommendations to strengthen the institution of the press in India

In this paper, we have analyzed the pattern of restrictions imposed on the freedom of the press and also looked at the judicial approach taken towards such restrictions. We observed that irrespective of the kind of restriction imposed on the free press, the judiciary has often come to the aid and assistance of the media to ensure that the "fourth pillar of democracy" does not collapse.

We have also delved into the question of whether the preferential position of freedom of media over other fundamental rights can be justified based on any of the arguments.

One apparent conclusion of this paper is that freedom of the press is an essential requirement for the sustenance of democracy and must be protected at all costs despite the need for reasonable curtailment in certain cases such as media trial, right to privacy, hate speech, etc.

In this part of the paper, we try to analyze the possible amendments in the constitution and other changes which can assist in making the institution of the press stronger and more secure in discharging its societal duties.

- The first change proposed is an amendment to the constitution to explicitly recognize the freedom of the press as a fundamental right. It is well known that numerous judgments have recognized the right to free press as a fundamental right within the ambit of free speech and expression; however; a constitutional recognition would also open doors to providing limited grounds for restricting freedom of the press, such as security of the state or to prevent media trials. Currently, there are several grounds available for restricting freedom of speech, and grounds such as public order friendly foreign relations can result in the press being gagged for insignificant reasons. Direct recognition of the right to free press in the constitution would result in a limited number of grounds for its restrictions given the community service rendered by an unbiased press.

When Section 99A of Cr. P.C was challenged on the ground that it allowed the state to seize and forfeit books and newspapers if they allegedly carried any "seditious" material; the court rejected the challenge on the ground that exceptions pertaining to public order or morality listed in Article 19(2) would save such a provision[23]. With all due respect to the honourable High Court, the view taken by the High Court is not found agreeable in this paper. Such a provision

[23] Veerabrahman v. State, AIR 1969 AP 572.

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clearly amounts to prior censorship of the press and potentially deprives citizens of accessing important information about the working of their democracy.

Such instances are the reasons why this paper advocates free press to be recognized as a separate fundamental right in the constitution as opposed to being subjected to the same restrictions applicable to general free speech. A free press is a very valuable aspect of free speech, and although we view it on the same footing as the general free speech, however, given the collective public good served by the free press, additional protection of its freedom may be desirable.

- Secondly, the judiciary needs to step into its shoes of being the custodian of the fundamental rights and issue guidelines to prevent the press from sensationalizing the news for the sake of viewership which results in infringement of other fundamental rights such as the right to privacy and the right to dignity. It is agreed that in this paper, arguments are made to give primacy to freedom of media over other fundamental rights; however, an absolutist, reckless media arbitrarily infringing the fundamental rights of citizens is nowhere advocated. The judiciary has stepped into its activist role in the past as well and issued guidelines to prevent sexual harassment in the workplace, and the same zeal for the public good is again desired from the judiciary on this issue as well.
- Thirdly, regulations have to be made to bring about more transparency in the funding of press agencies and also to regulate the flow of direct funds from political parties, which renders the news agencies as mere mouthpieces of the government or the opposition.

The paper concludes by saying that we sleep at night knowing we would wake up in a democracy because we trust our media to be the watchdogs and never-resting guards of our democracy.

In the words of Albert Camus, “A free press can, of course, be good or bad, but, most certainly without freedom, the press will never be anything but bad.”

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 [ISSN 2581-5369]