

PRE-CENSORSHIP AS A FACET OF FREEDOM OF SPEECH

Introduction

There existed the system of prior licensing with respect to print media in Britain during the reign of the Henry VIII. The Concept of freedom of press emerged as an opposition to prior licensing. John Milton was against the concept of prior licensing. His important work *Aeropagitica* in which he criticized the concept of prior licensing. He held that, "Free men must have liberty to know, to utter and to argue freely according to conscience above all liberties." A Later there was strong opposition against prior licensing and finally it was expired in the year of 1695. But there was no judicial contribution to the freedom of press. Court made first contribution towards the freedom of press in the case of *R.v. Dean of Asath* (1784). The court held that liberty of press consists in printing without any previous license subject to any consequences of law. The first constitutional recognition of the freedom of press was in Virginia Bill of Rights in 1776. The freedom of press was incorporated in the American Constitution by the First Amendment in 1791, which provided that congress shall make no law abridging freedom of speech or press. During that time many scholars were of the opinion that opined freedom of press meant absence of prior restraints and nothing more than that.

Pre censorship in India

In India, the concept of the pre censorship existed from early British era. The first regulation relating the censorship was brought into force in May 1779 by Lord Wellesley. Regulation required every newspaper to carry the name of its printer, editor and the proprietor who were to declare themselves to the Secretary to the government and submit all materials published in the newspaper to his prior scrutiny. Breach of these rules was liable to be punished with immediate deportation. The Secretary thus became the censor. Guidelines were prescribed for the censor which included a ban on any news or comment on the finances of the East India Company, troop movements, shipping news, naval or military preparations, movement of supplies, extracts from European newspapers which were likely to affect the image of the British rulers in India, any material that could convey information to the enemy or statements with regard to the probability of war or peace with an Indian power. But the editors were not

always prompt in submitting their proofs for pre-censorship. The regulations were flouted and military information was widely published. In 1807, the government issued fresh instructions upbraiding the editors for neglecting the regulating. In 1813, the new Governor General Hastings issued instructions requiring all printing presses to submit proofs of newspaper supplements, extra publications and notices to the Chief Secretary for scrutiny. Hastings had abolished press censorship but had thrown the responsibility of excluding material likely to injure the public interests or affect the authority upon the shoulders of the editors. Adam's Regulation, 1823 or the first press ordinance required that every newspaper, journal, pamphlet or printed matter in any language obtain a license authorizing publication from the Governor- General in Council. This license was liable to be cancelled after the notice by the authorities. Magistrates were given the power to attach and dispose of an unlicensed press as well as a press which continued to function after notice of recall. So this regulation also contributed to the concept of pre-censorship. Lord Canning reintroduced the licensing under the Act of 1857. It prohibited the newspapers both European and Indian from publishing observations and statements impugning the motives or designs of the British Government either in England or in India or in any way tending to bring hatred or contempt, excite disaffection or act unlawful to its orders or to weaken the lawful authority or the authority of its civil and military servants. Various other legislations like Indian Penal Code, Vernacular Press Act, Criminal Procedure Code, Official Secrets Act, Newspapers (Incitement of Offences) Act, Indian Press Act etc. tried to regulate the law relating to freedom of press and reasonable restrictions on the freedom.

Special protection is enjoyed by the press after the commencement of the Indian Constitution. Fundamental right of the freedom of speech and expression embodied in the Article 19 (1) (a) also includes the freedom of press due to various judicial interpretations. After the independence and coming into force of the Indian Constitution, the pre-censorship which was imposed during the British era on the press is now regulated according to the constitutionally provided reasonable restrictions provided under Article 19 (2). Now pre-censorship exists in its full swing in the field of films where Central Board of Film Certification has to provide certificate to the films for their public exhibition. The law governing this is the Cinematograph Act. Pre-censorship was again imposed by the government during the period of emergency in the year of 1975.

Censorship on Freedom of Speech and Expression

To censor is to act so as to change or suppress speech or writing that is condemned as subversive of the common good. But it has been abused a lot by ruling regime to hide their misconduct. One such example is execution of Socrates in 399 B.C. on charges that he corrupted the youth and that he did not acknowledge the god that the city did but other new divinities of his own. In China in 231 B.C. blatant oppressiveness, and an attempt to stamp out the influence of Confucius and other sages, could be seen in the wholesale destruction of books. With the passage of time people became aware of their rights and new principles of liberty and democracy emerged. The result was more and more freedom to people to express their views and freedom of press. But still the state can impose certain restriction on these freedoms.

In India, freedom of speech and expression is a constitutional right guaranteed under Art 19(1)(a) of the constitution. These rights can be restricted only on the grounds enumerated under Art 19(2) of the constitution. The grounds enumerated under Article 19(2) are very wide. Here, my endeavor will be discussing them one by one in lucid manner followed by other legislations which provides for restriction on freedom of speech and expression.

A. Public order and Security

The concept of 'public order' is wider than 'security of state. Public order is virtually synonymous with public peace, safety and tranquility. The term 'public order' covers a small riot, an affray, breaches of peace or acts disturbing public tranquility. In *Virendra v. State of Punjab*¹. The law impugned was the Punjab Special Power (Press) Act, 1956. It provides for:

1. Prohibition of printing or publication of any article, report, news item, letter or any other material relating to or connected with 'save Hindi' agitation;
2. The imposition of ban against the entry and circulation of the said papers published from, New Delhi in the State of Punjab.
3. Authorizing the State Government or its delegate to impose pre censorship.

¹ AIR 1957 SC 896.

The Supreme Court struck the order about ban on entry and held that it was unreasonable because there was no time limit for the operation of an order made against a paper and also because there was no provision made for any representation being made to the State Government. Das. C.J. observed: “If as newspaper is prevented from publishing its own view or the views of its correspondents it is certainly a serious encroachment on the valuable and cherished right of freedom of speech and expression.” Pre-publication ban even under a court injunction can be justified in the interest of justice only when there is a clear and imminent danger to the administration of fair justice and not otherwise.²

B. Defamation

According to Winfield: “Defamation is the publication of statement which reflects on a persons reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him. Defamation under Indian Penal Code has been made an offence. Even freedom of the press does not permit to publish defamatory matter. Similarly section 5B of the Cinematograph Act, 1952 prohibit exhibition of a film which is defamatory. Defamation under Indian Penal Code has been made an offence. In *R. Rajagopal v. State of Tamil Nadu*,³ the Supreme Court held that neither the Government nor the officials had any authority to impose a prior restraint upon publication of a material on the ground that such material was likely to be defamatory of them. The right to publish the life story of a condemned prisoner, in so far as it, appears from the public records, even without his consent or authorization has been held to be included in the freedom of the press guaranteed under article 19(1)(a). No prior restraint upon such publication can be imposed .Of course, if someone is guilty of defamation, then subsequent penal sanction can be imposed. It is submitted that penal sanction is better than prior restraint because the former chills while the later freezes. An order not to publish material means that it can never legally see the light of day, while a publisher faced only by the prospect of a criminal prosecution may decide to take the risk and release the work, speculating either that he will not be prosecuted or that a jury may acquit.

² *Reliance Petrochemicals Limited v. Proprietors, Indian Express Newspaper Bombay Pvt. Ltd.* 1988 INDLAW SC 642.

³ (1994) 6 SCC 632.

C. Decency or Morality

One of the exception to the fundamental right to free speech and expression guaranteed under Article 19(1) (a) of the constitution is in favour of laws which impose restrictions in the interest of “decency or morality”. “Decency” and “Morality” are vague and rather elastic notions that evolve with time and social change and vary vastly among different cultures. Used often in the context of “decency” and “morality” is the term “obscenity” which is expressly prohibited by Sec. 292 of the Indian Penal Code. Court came out in various cases with certain tests to determine obscenity. It includes Hicklin’s test, Likely audience test, Aversion Defence, National and Contemporary standards, Reasonable man’s test etc.

D. The Indecent Representation of Women (Prohibition) Act, 1986

This is an Act to protect the dignity of women. Section 3 of the Act prohibits advertisements containing indecent representation of woman. Similarly sec. 4 of the Act prohibits publication or sending by post of books, pamphlets etc. containing indecent representation of women. If someone violates the provisions then for the first offence he can be sentenced up to 2 years and a fine up to two thousand rupees may be imposed upon him. For the subsequent offence the imprisonment may be not less than 6 months which may be extended up to five years and a fine may be imposed which shall not be less than ten thousand rupees but which pay be extended up to one lakh rupees. Thus, if authorities find that some one is producing, selling ore circulating indecent material under the Act then they can take recourse of sec. 4 of the Act and impose restriction on publication, circulation of such material. It is submitted that the Act does not contain unreasonable provisions because exception can be made under proviso to sec. 4 of the Act in favour of book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which is in the interest of science, literature, public good etc.

E. Press Council of India Act, 1978

Under this Act, the Press Council was reconstituted (after 1976) to maintain and improve the standard of newspaper and news agencies in India. Section 13 of the Press council Act, 1978 specifies the objects and functions of the council. Section 13 (2)(c) states to ensure on the part of newspapers, news agencies and journalist, the maintenance of high standards of public

taste and foster a due sense of both the rights and responsibilities of citizens. Sec 14(1) empowers the council to warn, admonish or censure the newspaper, the news agency or the journalist if a complaint is found true against him. On 1.6.2006 under clause 18(d), an advertisement policy was issued by the directorate of Audio Visual publicity under the Central Government Advertisement Policy stating that the newspapers will be suspended from empanelment by DG, DAVP with immediate effect if it indulged in unethical practices or anti-national activities as found by the press council of India. Although on one hand, the constitution confers the fundamental right of freedom of the press, Article 105(2) provides certain restrictions on the publication of the proceedings in Parliament. In famous searchlight case, the Supreme Court held that, the publication by a newspaper, of certain parts of the speech of members in the House, which were ordered to be expunged by the speaker constituted a breach of privilege.

F. The Press (Objectionable Matters) Act, 1951

This enactment provides “against the printing and publication of incitement to crime and other objectionable matters.

G. Advertising Standards Council of India

Advertising communication is a mix of arts and facts subservient to ethical principles. In order to enforce an ethical regulating code, the advertising standards council of India was set up. Its function is:

- To ensure the truthfulness and honesty of representation and claims made by advertisements and to safeguard against misleading advertising.
- To ensure that advertisement are not offensive to generally accepted standards of public decency.
- If the council finds an advertisement misleading it can impose restriction on publication of such advertisements

H. The Cinematograph Act, 1952

The Cinematograph Act, 1952 has been passed to make provisions for certification of cinematograph films for exhibition and for regulating exhibitions by means of

cinematographs. Under the Act there is provision for constitution of a Board called the Board of Film certification by the central Government. The function of the Board will be to sanction the films for public exhibition. The board may after examining the film with the help of advisory panels at regional centers either sanction the film for unrestricted public exhibition, or may sanction the film for public exhibition restricted to adults only, or it may sanction the film for public exhibition restricted to members of any profession or any class of persons keeping into account the nature, content and theme of the film. The Board can also direct the applicant to carry out such excisions or modification in the film as it thinks necessary before sanctioning the film for public exhibition. The Board can even refuse to sanction the film for public exhibition.

Board of film certification is having very wide powers with regard to sanctioning of a film for public exhibition. In fact if it refuses to sanction a film for exhibition then such film can't see the light of the day. It is a serious blow to the freedom of speech and expression but there are certain safeguards also in the Act to minimize the misuse of the Act. While examining the film the CBFC can refuse to certify a film on the grounds enumerated under Sec.5B(1) of the Act.⁴³ Further under S. 5B(2) of the Act, the central government is empowered to issue such directions as it think fit to guide the authority competent to grant certificate. Consequently the Central Government issued following guiding principles:

(a) The objectives of film certification will be to ensure that:

- the medium of film remains responsible and sensitive to the values and standards of society;
- artistic expression and creative freedoms are not unduly curbed.

(b) In pursuance of the above objectives, the Board of Film Certification shall ensure that:

- Scenes -

(c) showing involvement of children in violence as victims or as perpetrators or as forced witness to violence, or showing children as being subjected to any form of child abuse;

- human sensibilities are not offended by vulgarity, obscenity or depravity;
- scenes degrading or denigrating women in any manner are not presented.
- Visuals or words contemptuous of social, religious or other groups are not presented.
- Visuals or words involving defamation of an individual or a body of individual or contempt of court are not presented.

(d) The Board of Film Certification shall ensure that the film:

- is judged in the entirety from the point of view of its overall impact; and
- is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience.

The provision and guidelines have been drafted carefully to minimize the abuse of the powers conferred to CBFC. But still the Act is not free from criticism. For example section 7-F of the Act provides for bar of legal proceedings against the central government, tribunal, the Board, advisory panel or any officer or member of the above mentioned bodies in respect of anything which is done in good faith or intended to be done in good faith under the Act. Taking benefit of this provision the authorities may misuse and harass the film procedures.

Similarly S. 13 of the Act empowers central Government of local authority to suspend the exhibition of a certified film without giving opportunity of being heard to the aggrieved party and from that date the film shall be deemed to be uncertified film. It is gross violation of principles of natural justice. When a films exhibition is challenged under the Cinematograph Act, 1954 then the courts have to keep in mind following considerations:

- Judging the work as whole

Clause 3(i) of the guidelines issued under sec 5-B of the Cinematograph Act provides that: “the Board of film certification shall ensure that the film is judge in its entirety from the point of view of the overall impact.”

- Contemporary / National Standards

While issuing certificate to the film the Board shall ensure that the film is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided the film does not deprave the morality of the audience.

- Test of ordinary Man

The test for judging a work should be that of an ordinary man of common sense and prudence and not an “out of the ordinary or hypersensitive man”.⁴ As, Hidayatullah, C.J. remarked in *K.A. Abbas vs Union of India*,⁵ “if the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's leg in everything, it cannot be helped”.

⁴ *S. Rangarajan v. P. Jagivan Ram*, 1989 INDLAW SC 549

⁵ (1970) 2 SCC 780.

I. THE INFORMATION TECHNOLOGY ACT, 2000

The Information Technology Act, 2000, has been enacted to prevent publication, transmission of obscene material in the electronic form through internet. Section 67 of the I. T. Act, 2000 provides punishment up to 5 years and a fine which may extend up to Rs. One Lakh for publishing or transmitting material, which is lascivious or appeals to the prurient interest. For subsequent conviction, the imprisonment may be extended up to ten years and the fine may also be imposed up to Rs. two lakhs. Similarly, Section 69 empowers the controller to intercept any information transmitted through any computer resource, if it is against the sovereignty and integrity of India, public order or incite for the commission of a cognizable offence. Section 75 of the act provides for prosecution of offenders who have committed the offence outside India, if such act involves a computer or computer network located in India. It shall be applicable to any person, irrespective of his nationality. Thus, the IT Act up to a great extent brought within its purview the offenders who are from outside India.

CONCLUSION

Freedom of speech and expression is the mother of all liberties and freedom of press can be regarded as the very business of a democratic form of government. Richard M. Schmidt has rightly said "our freedom depends in large part, on the continuance of a free press, which is the freedom of speech and expression of individual or press". But it is not unfettered. Such freedoms are subjects to reasonable restrictions and one such restriction is censorship. Article 19 (2) of the constitution of India provides basis for imposition of restrictions in the form of censorship. Consequently so many laws have been enacted which provides for censorship viz. the Press Council of India Act, 1978, the Press (Objectionable Matters) Act, 1951, the Indian Cinematographic Act, 1952 etc. These laws are of such a nature that if they will not be used with caution, may lead to total deprivation of freedom of speech and expression. Thus, it becomes incumbent upon the judiciary to strictly scrutinize restrictions in the form of censorship and allow such restrictions only in a situation where there is no other option left with the Courts. Often the grounds on which censorship is imposed are of vague in nature. So, Courts should give narrow interpretation to those terms. By doing so it may be able to protect such a noble and cherished value like freedom of speech and expression.