PART II

Constitutional Foundation Of
Freedom Of Press
CHAPTER - IV

FREEDOM OF SPEECH AND EXPRESSION UNDER
INDIAN CONSTITUTION

1.1 CONSTITUTIONAL PROVISION:

The written Constitution of India in its part IIIrd and in key Art.19 declares fundamental freedoms of the citizens which include right to freedom of speech and expression. Art.19 reads as follows:-

"Art.19 - Right to freedom - Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right -
   (a) to freedom of speech and expression;
   (b) to assemble peaceably and without arms;
   (c) to form association or unions;
   (d) to move freely throughout the territory of India;
   (e) to reside and settle in any part of territory of India; and
(f) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of Clause (1) shall effect 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 integrity of India, the security of State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) ... to ... (6)"

It may be noticed that under Art.19(1)(a) as above, Indian Constitution guarantees right to freedom of speech and expression. There is no provision in the Constitution to guarantee freedom of the Press as such, nor does Art.19(1)(a) specifically mention the
press.¹ Unlike the First Amendment to the U.S. Constitution, Indian Constitution does not mention freedom of the Press separately.² But even in the earliest decisions of the Supreme Court of India, it is held that freedom of speech and expression includes freedom of Press.³ While doing so Indian Supreme Court has adopted the approach of the Judicial Committee of the Privy Council,⁴ which laid down as under:

"Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of Journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range or his asser-
tions, his criticisms or his comments is as wide as, and no wider, than that of any other subject. No privilege attaches to his position."

Supreme Court of India referring to the freedom of Press, said,\textsuperscript{5}

"Being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stands on no higher footing than the freedom of speech and expression of a Citizen and that no privilege attaches to the press as such, that is to say, as distinct from the freedom of the citizen. In short, as regards our citizens running a newspaper the position under our constitution is the same as it was when the Judicial Committee decided.... in Arnold V.R., and as regards non-citizens the position may even be worse."

Thereafter Supreme Court of India has consistently held that freedom of speech and expression includes freedom of press. This position is constant till this day.
On this fundamental right under Art.19(1)(a) reasonable restrictions can be imposed by law on the ground and for the reasons mentioned under Art.19(2) as above. Thus the scope of guarantee of this fundamental right has been defined by limitations contained in Art.19(2). Thus an attempt is made by the framers of Constitution to strike a proper balance between the freedoms guaranteed by clause (1) and social control permitted by clause (2). This is again unlike United States Constitution, which does not specify the exceptions but guarantees absolute right to freedom of press. The difference between the First Amendment to U.S. Constitution and the corresponding Article under Indian Constitution was noted by Dougles, J. of the United States who while holding that all pre-censorship of Cinema films was constitutionally void observed,

"If we had a provision in our Constitution for reasonable regulation of the Press, such as, India has included in hers, there would be room for argument that censorship in the interest of morality would be permissible."
In one of its early decisions the Supreme Court of India said that the guarantee of free speech in the Indian Constitution is based on Amendment I of the Constitution of United States.

It is submitted that few provisions of United States Constitution have had a strong impact on India's Constitutional spirit, as the Bill of Rights, and fundamental rights more particularly the first amendment in the Bill of rights and first fundamental right in the guaranteed freedoms under Art. 19(1).

Our Constitution followed the American precedent and enacted fundamental rights in the Constitution itself. But it met a part of the objection against fundamental rights by providing effective means for their enforcement. This was done by arming the Supreme Court, and the High Courts, with power to issue writs of habeas corpus, mandamus, prohibition, certiorari and quo warranto whose efficacy in securing the liberty of the subject, the performance of public duty, the due administration of justice by inferior
tribunals or courts and the holding of a public office by lawful authority had long been proved in England. The Constitution went further and by Art.32 made the right to move the Supreme Court for an appropriate writ for the protection of fundamental rights, itself a fundamental right. Thus in our Constitution rights and remedies go together.

1.II DISCUSSION DURING MAKING OF THE
INDIA'S CONSTITUTION:

When the Indian Constitution was in making, an attempt was made to have special mention of the freedom of press in Art.19(1)(a). Constituent assembly had appointed an advisory Committee⁷ to report on fundamental rights to be enshrined under the Indian Constitution. This committee was under the Chairmanship of Mr. Vallabhai Patel and was known as Patel Committee. This committee submitted an interim report on 23rd April 1947 and made two principle recommendations as under:
"i) It pointed out in the title itself that the fundamental rights shall be justiciable.

ii) Rights of freedom were to be made subject to (a) Public Order, (b) Morality."

Under Clause No.8 of its report, this Committee further recommended rights to freedom which was as follows:

"Clause 8: There shall be liberty for the exercise of the following rights subject to public order and morality, or to the existence of grave emergency declared to be such by the Government of Union or the Unit concerned whereby the security of the Union or the Unit, as the case may be threatened;

'(a) The right of every citizen to freedom of speech and expression provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable'".
But this proviso recommended by the Committee was dropped by the mover Sardar Vallabhai Patel himself. However, it becomes clear from the above report that 'freedom of publication' was considered to be an integral part of freedom of speech and expression. In the proviso to sub-clause (a) of Clause 8 of the report, words 'publication or utterance' were used and it was proposed to enable the State to restrict certain publications. Before submission of the report Mr. Ajit Prasad Jain, member of the Committee on fundamental rights, had proposed amendment to clause eight by complete omission of all the provisos to the sub-clause (a), (b) and (c). Mr. Patel had no objection to it and had omitted the provisos accordingly.

During debates in the constituent Assembly an attempt was made to have special mention of the freedom of press in the Constitution. It was an attempt by Mr. Somnath Lahiri, to move an amendment in the form of adding a new sub-clause (a) and (b) to Clause 10 after Clause 8 in the draft Constitution. Mr. Lahiri urged for an amendment which runs as under:
"10(a): Liberty of the press shall be guaranteed subject to such restrictions as may be imposed by law in the interests of public order or morality.

(b) The press shall not be subject to censorship and shall not be subsidised. No security shall be demanded for the keeping of a press or the publication of any book or other printed matter."

The amendment suggested by Mr. Lahiri was not adopted. Another attempt was by Prof. K.T. Shah, who was the member of Constituent Assembly and moved an amendment on 1/2/1948 seeking specific mention of freedom to press in Art.13(1)(a) (as it then was). Prof. Shah suggested to insert after word 'expression', the words 'of thought and worship; of press and publication'. While moving this amendment Prof. Shah expressed his amazement at the omission of these very essential and important items of Civil liberties. Prof. Shah said "Freedom of the press as is very well
known is one of the items round which the greatest, the bitterest of Constitutional struggles have been waged in all Constitutions and in all countries where liberal Constitutions prevail. They have been attained at considerable sacrifice and suffering. They have now been achieved and enshrined in those countries. Where there is no written Constitution, they are in well established conventions or judicial decisions. In those which have written Constitution they have been expressly included as the freedom of press...... why our draftsmen have omitted that, I find beyond me even to imagine......to omit it altogether....would be a great blemish which you may maintain by the force of the majority, but which you will never succeed in telling the world this is a progressive liberal Constitution, if you insist on my amendment being rejected." After full discussion on Art.13 (as it then was) amendment No.421 moved by Prof.K.T.Shah was put to vote on 2/12/1948 and it was negatived. Despite of his passionate appeal his proposed amendment was rejected.Dr.Babasaheb Ambedkar, Chairman of the Constituent Assembly, while speaking in the Assembly, addressed that:
"The press is merely another way of stating an individual or a citizen. The press has no special rights which are not to be given to or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are all citizens and therefore, they are exercising their right of expression, and in my judgement, therefore, no special mention is necessary of the freedom of the press at all."

Thus Dr. Ambedkar made clear the intention of Constitution makers in not mentioning specifically right to freedom of press. It is submitted that freedom of press has been considered as part of freedom of expression. Amendments moved were turned down. No speaker has spoken against right to freedom of press, but the Constituent Assembly did not think its specific mention necessary.

1. III RIGHT TO FREEDOM OF SPEECH AND EXPRESSION:

It is now well settled that word expression in Art.19(1)(a) has a meaning of propagating ideas.
It gives right to express one's own opinions and to seek receive and impart information and knowledge either orally or by written or printed matter or by legally operated visual and audio devices. It included freedom to acquire knowledge to read books and periodicals etc. Thus it is freedom to communicate one's ideas through any medium. The expression of one's views can be in different forms. viz., spoken words, written words, printed matter, gestures, singing songs, dramatic or other art performances. So also it may be even by silence. e.g., in India in the year 1975 there was Declaration of Emergency and imposition of precensorship. It was greeted by the press by leaving blank space in the place of editorials. It was communicated to the people that editors had something to speak but are not not allowed to authorities have had to ban leaving of blank space in the newspapers.11

Word Speech in Art.19(1)(a) does not merely cannote a narrow meaning of the spoken word but also is applicable to the speech communicated to others through mechanical device like loud speaker. In
Rajnikant vs the State,\textsuperscript{12} Allahabad High Court held that the use of mechanical instruments like loudspeaker and amplifiers was not covered by the guarantee of freedom of speech and expression. In result a municipal bye-law requiring permit for use of the loud-speaker did not infringe Art.19(1)(a). However, in Indulal vs State\textsuperscript{13}, Gujrat High Court took different view in which it was conceded that the right to freedom of speech and expression extends to mechanical devices which amplify speech. But reasonable restrictions could be placed on the use of such devices as regards the time place and manner of using them and, therefore, law providing for such reasonable restrictions is valid. This decision of the Gujrat High Court is similar to that of the U.S. Supreme Court in Saia vs New York,\textsuperscript{14}. In this case U.S.Supreme Court invalidated an ordinance forbidding the use of loud-speakers without previous permission of Police. The Court found that loud-speakers had become indispensible means of effective public speech and the only permissive regulation may be about its time and place.
Art.19(1)(b) of the Indian Constitution guarantees right to assemble peaceably. In Kameshwar Prasad vs State of Bihar, the Supreme Court struck down part of the Rule (4-A) of Bihar Government servants Conduct Rules 1956 laying down that the Government servant shall not participate in a demonstration in connection with any matter pertaining to his condition of service. Supreme Court held that it violated both the freedoms under Art.19(1)(a) and Art.19(1)(b). It was observed by their Lordships that a person does not loose his fundamental rights by joining Government service. It was also mentioned whether the restriction imposed by Bihar Rule is a reasonable restriction or not is another point not relevant for considerations in this case. It was said that, however, the fundamental rights of Government servants other than those mentioned in Art.33 cannot be abrogated or abridged. It may be pointed out that demonstrations on the properties belonging to others was disapproved by the Supreme Court. This was held in Railway Board New Delhi vs N. Singh. Thus, freedoms guaranteed under Art.19(1)(a), (b) and (c) did not include right to exercise them on properties belonging to others. It
is interesting to note that by the Supreme Court of United States Right to demonstrate has been considered as a part of right of speaking. In one case17 thirty two students demonstrated on the grounds of a county jail to protest against the racial segregation, Supreme Court upheld the convictions for malicious trespass but Justice Douglas leading four dissenting judges opined that the majority judgement is improperly terming a legitimate protest into a trespass case. He observed "those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceful, as these were."

Indian Supreme Court has considered expression through Dramatic and Art performances in State vs Baboo Lal18. Question involved in this case was whether Sections 3 and 4 of Dramatic Performance Act, 1876 violated Art.19(1)(a) and whether prohibitory order issued under Sec.3 was void? It was held that
there is distinction between written and spoken words. Written word can be confiscated before it causes any harm where as spoken word could do great harm as soon as it is uttered. Therefore, it is necessary in the interest of public order and the security of the state and the state should have power to deal with spoken words in an emergent manner. Therefore, power to prohibit performance of plays containing scandalous or dematory matter may impose a reasonable restriction. As such substantive provisions of the impugned Act were reasonable. It was further observed that to forbid a play because it represented an ideology different from that of ruling party cannot possibly regarded as a reasonable restriction on freedom of speech.

2.1 FREEDOM 'OR OF THE PRESS' UNDER US CONSTITUTION:

2.1.1 CONSTITUTIONAL PROVISION:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the
freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."\textsuperscript{19}

So reads the first article of amendment to the United States Constitution, the first one in the Bill of Rights. With this amendment a revolutionary document came into existence by which freedoms of the citizens as fundamental rights came to be recognised by the Constitution of a nation in the history of the world for the first time.\textsuperscript{20} The above constitutional provision prevented Congress i.e., Federal Legislature of the United States from making any law abridging the freedom of speech or of the Press. The Bill of Rights thus made Natural Rights Civil Ones. Their incorporation in the constitutional document made them legal from Civil or Political ones and entitled citizens to look to the courts for their protection.\textsuperscript{21} True that absence of declaration of the freedoms in the constitution does not mean absence of their existence in the society, still their express mention in the statute books makes them justiciable. It authorises
judicial review of the Legislative enactment to examine whether such enactment encroaches upon the rights guaranteed as above is an absolute guarantee having no limitations or restrictions in the interest of social control. It is important to note that "freedom of the press" is for the first time recognized in the above amendment as a fundamental right of people. Its numerical position is significant being first in amongst first then amendments to the U.S. Constitution which indicates primacy of freedom of speech, and of the press while measuring the scale of other rights.\textsuperscript{22}

2.1.II A DRIVE FOR BILL OF RIGHTS:

The Constitution of United States of America was drawn on 17th September 1787, when Thirynine delegates from Thirteen States in the federal convention at Philadelphia signed the draft of the first written constitution of the World. It was ratified in the year 1789 and accordingly new federal government was formed.\textsuperscript{23} At that time it had no statement regarding fundamental freedoms of the citizens. At
the time of finalising the draft constitution at Philadelphia in 1787\textsuperscript{24} there occurred a great compromise and agreement regarding enumeration of powers to federal government, in respect of representation of members of different States to the National Union etc. It may be that the federal government was considered to be of enumerated powers, not specifically given to it, special mention of rights of the people was thought unnecessary as it would be making exceptions to powers not granted to the federal government. As mentioned by Thomas M. Cooley\textsuperscript{25} it might have been also thought that the bills of rights, however, important under a monarchical government, were of no moment in an instrument from by the people for their own government, by means of agencies selected by the popular choice, and subject to frequent change by popular action. He further relies upon Federasit. No.84 while mentioning that "it has been several times truely remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of rights not surrendered to the prince. Such was magna Charta, obtained by the
barrons, sword in hand, from king John. Such were the subsequent confirmations of that charter by Charles the First, in the beginning of his reign. Such also was the declaration of Rights presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament, called the Bills of Rights.... Here, in strictness the people surrender nothing; and, as they retain every thing, they have no need of particular reservations. 'WE THE PEOPLE OF THE UNITED STATES, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America'. This is better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our States bills of Rights, and which would sound much better in a treatise of ethics than in a constitution of government. However, it is not ....that no member delegate of the constitutional convention thought about encorporation of Bill of Rights. It is interesting to note remarks of the member delegates in this regard. George Mason 26 remarked that he "wished the plan had been prefaced
by a Bill of Rights", because it would quite public
fears. However, Mason made no stirring speech for
Civil Liberties; he did not even argue a need for a
Bill of Rights or move the adoption of one but he
offered to second a motion if one were made.

Elbridge Gerry moved for a committee to
prepare a Bill, Mason seconded, and without debate
the delegates voting by states defeated the motion
10-0.27 A motion to endorse freedom of the press was
also defeated and Roger Sherman declared "it is
unnecessary. The power of congress does not extend
to the press"28 Not a delegate to the convention
opposed bill of Rights in principle. The overwhelm-
ing majority believed "It is unnecessary". Alexander
Hamilton asked, "Why declare that things shall not be
done which there is no power to do?" congress had no
power to regulate the religion or press. However, lack
of bill of rights in the U.S.draft constitution
proved to be the strongest argument of the opponents
of ratification of constitution, as new national
government would act directly on the people and be
buttressed by an undefined executive power and
national judiciary to enforce laws made by congress and congress had the authority to define crimes and prescribe penalties for violations of its laws. It is interesting to note that there was a demand for bill of rights. A number of states which ratified the constitution did so only with the assurance that a top priority of the first congress would be the approval of a bill of rights to be added to the constitution.

Thomas Jefferson who drafted the declaration of Independence was of the view that a special mention of Bill of Rights was necessary in the constitution for number of reasons one amongst which was that a Bill of Rights could do so harm, enumerated powers could be abused. While writing to James Medison, Thomas Jefferson wrote:

"... I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislature. I like the organisa-
tion of the Government into Legislative, Judiciary and Executive.

There are other good things of less moment. I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press....a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference....".

Thomas Jefferson, who was architect of Bill of Rights, convinced James Madison of Virginia, to move Bill of Rights before House of Representatives of the first Congress.

On June 8, 1787 Madison introduced about a dozen constitutional amendments in the House of
Representatives in the First Congress. In his speech before the House Madison proposed for bringing out amendments to the Fifth Article of the Original Constitution. From amongst twelve in all ten amendments were approved by the House. Madison described it as 'we act the part of wise and liberal men to make these alterations'.

The first eight of these amendments form the Bill of Rights which was ratified by different states on 15th December 1791, since then it is part of the constitution. Madison expected the federal courts to play a major role in implementing their guarantees:

"Independent tribunale of justice will consider themselves in a peculiar manner the guardians of those rights; they (the courts) will be an impenetrable bulwark against every assumption of power in the Legislative or Executive they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."32
And thus James Medison is known as the father of Bill of Rights. It may be pointed out that Chief Justice Earl Warren noted that the provisions of Bill of Rights do not guarantee novel rights, but do "summarize in a striking and effective manner the personal and public liberties which Americans (of that time)... regarded as their due and as being properly beyond the reach of any government."\(^3\)

He further continued "the men of our first Congress.... knew.... that whatever form it may assume, government is potentially as dangerous a thing as it is a necessary one. They knew that power must be lodged some where to prevent anarchy within and conquest from without, but that this power could be abused to the detriment of their liberties."\(^4\)

2.1.III GUARANTEE OF FREEDOM OF PRESS WHAT IT MEANS?:

First amendment guarantee is an absolute guarantee in the sense that no exceptions are provided expressly by the constitution to these freedoms. The constitution does not explicitly given the federal
government power over speech and the press. Congress however has an implied power over the subject if it is necessary for the exercise of other express powers given to the United States, as power in connection with war etc. Guarantee of rights of individual and their protection by an independent judiciary entrusted with the power of judicial review is the most significant feature of the U.S. Constitution.

Thus the absolute guarantee of freedom of press, as in the first amendment, would mean, at least, the guarantee from prior restraint or censorship. At the most, the guarantee also means that governments may not punish the press for what it publishes. This guarantee may be to perform an affirmative as well as a negative function.

2.2 U.S. SUPREME COURT ON FIRST AMENDMENT:

Till 1833 i.e. about 130 years of incorporation of Bill of Rights it seems that no necessity was felt, as very little occasions arose to look into the first ten Amendments Guarantee. It was in Barron vs
Baltimore, Chief Justice Marshall concluded that Congress, in approving the bill of Rights, did not intend them to protect the individual against the State action but only against action of federal officials. Therefore, the Bill of Rights was adopted to secure individual rights against the "apprehended encroachments of the general government - not against those of the local governments; Chief Justice Marshall explained his reasonings:

"The constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgement dictated.... (The Bill of rights and the provisions of constitution) are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes."
If these propositions be correct fifth amendment must be understood as restraining the power of the general (federal) government, not as applicable to the States.\textsuperscript{36}

This finding of Supreme Court of United States stands unreversed till this day. This finding is of immense importance as it postulated two constitutional doctrines one is of Judicial Review and another necessity to bring out further constitutional amendment so as to overcome restriction put forth by Barron case in applying Bill of Rights as limitation to the State Legislatures and State officials.

2.3 **DOCTRINE OF JUDICIAL REVIEW:**

The power of judicial review is not explicitly granted to the Supreme Court by the federal constitution. But it is there impliedly, as has been expected by James Madison while amending the constitution by First amendment\textsuperscript{37} for incorporation of Bill of Rights. No doubt in United States a controversy was going on
whether the constitution-makers intended that the Supreme Court may have the power to judge upon the validity of acts of Legislature. An eminent writer E.F. Wright is worth reproducing:

"It is clear that the federal constitution included no clause expressly conferring this power upon the courts. There is, nevertheless, evidence of adequately demonstrating that a number of the framers assumed that the power of review would be exercised by federal as well as States Courts, and over congressional as well as State Legislation. The number is not large and many a statements relied upon as evidence of a belief in judicial review are of an equivocal character."

Apart from constitutional provision and intention of the framers of the constitution as above, the doctrine of judicial review in the sense understood in America is founded on Judicial decisions. In Marbury v Madison, Chief Justice Marshall commandably mentioned as under:
"...The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to
alter it. If former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the later part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution. ....It is emphatically the province and duty of the judicial department to say what the law is".

To consider the case like Barron's the court had to claim its power to look at the acts of Congress or State Legislatures and the actions of the executive branch in light of the constitution and if action was found to be beyond limits, to declare it unconstitutional and therefore void. For the first time the
act of the congress was overturned by the United States Supreme Court in Hylton v United States. In this case United States Supreme Court ruled on the constitutionality of a carriage tax. However, judicial review had been a practice in several states. And further principles laid down in Marbury case as above have become basis of judicial review in United States.

2.4.1 INCORPORATION OF FOURTEENTH AMENDMENT:

In the historic judgement of Barron v. Baltimore Chief Justice Marshall ruled that congress, in approving the Bill of Rights, did not intend them to protect the individual against the State action but only against action by federal officials. And thus a restriction is put in applying and extending bill of rights against state action. It is in this situation that the federal congress thought about to overcome said restriction by constitutional amendment. And further after civil war, in all three constitutional amendments, popularly known as civil war amendments, were approved by the congress and ratified by the States. From amongst these three is the
Fourteenth amendment which was adopted in the year 1868 which includes total five sections. From amongst five, sections one is relevant for present purpose which is reproduced below:

"Article XIV. Sec.1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Above amendment may be said to be revolutionary in some of its aspects. It may be noted that above section gives definition of citizenship for the first time. Further it forbids states to abridge by law any privilege or immunity of U.S. Citizens. It does not make separate mention of freedom of press. Because
right to liberty having found place in this section, enumeration of specific liberties might have been thought unnecessary. This amendment for the first time guarantees equal protection of laws to the citizens of United States. The most important feature of this amendment is that it forbids states to deprive any person of life, liberty and property, 'without due process of law'. This clause occupies heart place position as it is the most litigated one in the future events. It has also proved to be a limitation upon the powers of the government.

2.4. II AMBIT OF LIMITATIONS:

Both the state and federal government have the power to limit freedom of speech and of the press except so far as the constitutional guarantee limits governmental power. The crucial question is then a problem of interpreting this constitutional limitation. Further what is the scope of limitation found in 'due process' clause of the Fourteenth Amendment? These limitations do not create any rights or privileges of personal liberty. They only protect those
which people already have so far as they are protected at all, by giving them immunity against governments.\textsuperscript{43} So far as the first amendment is concerned it may be said that neither intrinsic of free expression nor its "social function" result in the first amendment's operating as an absolute ban on all official restrictions on speech or press. More clear is the position of 'due process' clause, which protects personal liberty only if it is of more importance than any other competing social interest. Thus the collective good, the nations or public safety warrants some restriction on individual's freedom to publish or to express. It has been task of the courts to balance the communities interest against individual's rights, to determine that when order and safety demanded that limits be set to individual freedom. The judicial role, as expected by the framers of the constitution, in implementing first amendment guarantee, started in its real sense after the fourteenth amendment was encorporated. The task before the court was firstly to define due process, then to decide the extent of the rights to which this clause applies and further the most important one was to determine whether 'due process' clause can be extended to give protection to first amendment guarantees.
2.4.III: EXTENTION OF 'DUE PROCESS'
TO FIRST AMENDMENT:

Early judgements of Supreme Court of United States show a trend to extend the protection of due process clause to the property rights only and for some time the court was reluctant to extend the protection to all freedoms guaranteed by the bill of rights amendment. But course of the judicial decisions seems to be uneven. The first sound of change to extend due process to other rights of the bill of rights than right to property is noticed in the judgement of Justice Mc Kenna\(^44\) in Vilbert v Minnesota\(^45\). When he said "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and enjoy property". The first judicial pronouncement clearly extending the due process clause to freedom of press came in 1925\(^45\). Gitlow, a member of the socialist party was convicted of the New York State statutory crime of Criminal anarchy. His conviction under Act of 1902 was challenged by him in the Supreme Court. The allegation was that he circulated pamphlets urging workers
to revolutionary mass action and dictorship of the prolectarian. Gitlow argued that he is deprived of the liberty without due process of law. Though the court ruled against Gitlow and maintained his conviction but the argument advanced on his behalf that protection of due process clause is available to freedom of press was judicially accepted. Justice Sanford said:

"For present purposes we may and do assume that freedom of speech and of the press - which are protected by the first Amendment from abridgement by Congress - are among the fundamental personal rights and "Liberties" protected by the due process clause of the Fourteenth Amendment from impairment - by the States."

However the Court per majority held that the New York Criminal Anarchy Act, 1902, as applied to Gitlow did not unduly restrict freedom of speech or of the press. In this regard Mr. Justice Sanford observed:
"It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the constitution, does not confer an absolute right to speak or publish, without responsibility. Whatever one may choose, or upon unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom...."

And by 7-2 decision the majority had upheld the constitutionality of the New York State's criminal Anarchy law 1902 under which Gitlow was sent to prison. However, in this judgment justice Holme's view that a person's liberty cannot be deprived unless there is a clear and present danger based on Shenck v United States\(^{46}\) was not accepted by majority. This aspect of the judgement of this case is studied in the other part of this thesis.

In a later judgement Near vs Minnesota\(^{47}\) Supreme Court held that the impugned statue in effect restrain
on the freedom including censorship. Petitioner Jay M. Near was publishing a periodical namely Saturday Press. Several issues of this periodical contained violent attacks on various public officials. An action to enjoin publication was instituted under a State Law of 1925.

Near was forbidden to publish any paper which included attacks of public officials. In response to said order of prohibition, Near challenged the public Nuisance Law of 1925 to be declared as unconstitutional. In appeal to Minnesota Supreme Court said Statute was upheld and injunction order was confirmed. The final appeal of Near against said confirmation of injunction was also rejected by the State High Court. Being aggrieved by the order of Minnesota High Court matter came up before Supreme Court of United States in Near v Minnesota wherein the Central issue of conflict was that, was the injunction a prior restraint against future publications or was it merely punishment? Was Minnesota statute constitutional? And by majority of 5 to 4 the State Law was declared to incompetent and unconstitutional on the basis of protection of due process of law under Sec.1 of the
Fourteenth Amendment. Justice Hughes recited his opinion:

"It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by State action."

Chief Justice Hughes summed up his judgement on Minnesota Law to be unconstitutional mentioning that "This is of the essence of censorship". In his judgement Chief Justice has mentioned at length the richly developed principle of English law and English scholar William Blackstone who insisted that libel laws, and not suppression, were the proper solution to false accusations and defamation and quoted with approval Blackstone's observation that:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications and not in freedom from censure for
criminal matter when published...."

While examining history and connotation of concept of freedom of press and spirit behind constitutional First Amendment guarantee of freedom of press Chief Justice quoted James Madison:

"Some degree of abuse is inseparable from the proper use of every thing, and in no instance this is more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding proper fruits."

with such celebrated observations Mr. Justice Hughes made out a clear position that right to criticise public officials was one of the bulwarks of the nation. However, Justice: Hughes acknowledged that
there could be limitations. Barrowing from Holmes in 1919 free speech case of Schenck v United States, Chief Justice Wrote that even the protection against prior restraint is not "absolutely unlimited" and recognised that when a nation is at War no one would question but that a government might prevent actual obstruction to its orderly affairs, such as recruiting service or the number of location of troops on the similar grounds, the primary requirements of decency may be enforced against obscene publications. While reading for minority pierce Butler commented majority judgement:

"It gives to freedom of the press a meaning and a scope not heretofore recognised and construes 'liberty' in the due process clause of the Fourteenth Amendment to put upon the State a federal restriction that is without precedent."

It is submitted that this case was followed as precedent in later judgements and laid a foundation
stone of law of the press in United States. It decided the faith of the press as well as that of readers of U.S. This case has undoubtedly declared that all the rights acknowledged by the first amendment have been covered by the due process clause in section 1 of the Fourteenth Amendment and that citizens are entitled to receive protection by the courts against any action encroaching them by the States or the National Government. As a result of these and other cases of similar import all the rights of First Amendment have been absorbed into the due process clause of the fourteenth amendment, and now receive protection in federal courts against adverse action by the States or the national Government.

3. SUMMARY:

To sum up it is stated that Indian constitution guarantees right to freedom of speech and expression under Art.19(1)(a). There is no provision in the constitution to guarantee of freedom of the press as such, nor does Art.19(1)(a) specifically mention the press. But since the earliest decisions
of the Supreme Court of India it is held that freedom of speech and expression includes freedom of press. Thereafter Supreme Court has consistently held that freedom of speech and expression includes freedom of press. This position is settled till this day. It is therefore submitted that right to freedom of press is a fundamental right included in right to freedom of speech and expression under the Indian Constitution. It follows that provisions as regards reasonable restrictions as contemplated under Art.19(2) are applicable while exercising right to freedom of press, and limitations put therein also limit the right to freedom of press to that extent. Further fundamental rights are justiciable, under Art.32 of the Indian Constitution, right to move the court has been guaranteed as a fundamental right. Thus right and remedies go together. Higher judiciary is armed with power to issue writs in case of violation of fundamental liberties. Thus enforcement of right to freedom of press is also guaranteed under our constitution.

Guarantee of free speech and expression under Indian Constitution is based on Amendment 1st of the
United States Constitution. However United States Constitution guarantees right to freedom of press expressly, which is unlike Indian Constitution which does not mention freedom of press separately. It is submitted that freedom of press is for the first time guaranteed as a fundamental right under United States Constitution. Indian Constitution has borrowed provisions regarding fundamental rights from the Bill of Rights by First Amendment to United States Constitution.

Under United States Constitution no limitations are put forth upon right to freedoms as such. Thus constitutional guarantee is in absolute terms. However, some limitations are evolved by judicial pronouncement, by which theory of absolute rights is discarded. Thus under both Indian as well as United States Constitutions theory of absolute rights is discarded.

Under Indian Constitution fundamental rights are justiciable. Under United States Constitution though there is no express provision as to the power of judicial review, it is there impliedly. Doctrine
of judicial review has been evolved and now settled is founded on judicial decisions.

It is further submitted that in our constitution no rights are reserved to the people. We have no provision like the 10th Amendment to U.S. Constitution which expressly reserves to the people powers not delegated under the constitution or denied to the States. It, therefore, follows that under our constitution, once the theory that the legislatures are the delegates of the people is given up, then the theory that in delegating certain powers to the legislatures, the people reserved fundamental rights to themselves lacks any foundation.

The historical and political developments in India made it inevitable that a Bill of Rights or fundamental rights should be enacted in our constitution. The British Indian Delegation which attended the Round Table Conferences in England had pressed for such inclusion in the Bill which was to become the G.I.Act 1935.
While Constitution of U.S. was in making the Bill of Rights was considered with top most priority for inclusion which consisted of right to freedom of press. However, it was actually inserted in the U.S. Constitution by First Amendment, by the first one among the total eight amendments in the first Amendment, expressly providing for freedom of press. While Indian Constitution was in making, specific mention of freedom of press was considered by the members to be included in the fundamental rights. However, Dr. Babasaheb Ambedkar, Chairman of the Drafting Committee, has very clearly stated reasons for inclusion of right to freedom of press in the right to freedom of speech and expression. It is submitted that view of Dr. Babasaheb Ambedkar is correct one in non mentioning separately freedom of press like United States Constitution. It is important to point out that no member of the Constituent Assembly spoke against right to freedom of press. It is submitted that while making of United States as well as Indian Constitutions fundamental right to freedom of press has been considered as a symbol of being the written constitutions progressive and liberal.

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REFERENCES


2. Relevant part runs as "Congress shall make no law.... abridging the freedom of speech or of the press", Discussed in detail in Chapter No. IV of this thesis.


19. Amendment I from the first ten amendments ratified on Dec.15, 1791 to Article V of U.S. Constitution.


24. As per Articles of Confederation from 1776 to 1787 there were limits on commerce between the States; each of the Thirteen States was free to set up trade barriers; each State could issue its own currency. Merchants and businessmen wanted a system that could open the channels of trade and commerce and develop-manufacture.


27 & 28 Ibid Note No. 26, p. 113.


30. Declaration of Independence was written largely by Thomas Jefferson. It was adopted on July 4, 1776 by second continental congress, meeting in Philadelphia at the Pennsylvania State House.


36. Ibid. at page 247.

37. See Spra Note No.32.


39. 1 Cranch 137 (1803).


41. 3 Call.171 (1795).

42. Ibid Note No.35.

44. 254 U.S. 325 (1920).


46. 249 U.S. 47 (1919).

47. 283 U.S. 697 (1931).

48. Xth Amendment to U.S. Constitution runs as under:
"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."


50. See Supra Note No.10.

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