ABSTRACT

India declared herself as a democratic country where free and frank expression of ideas are as important as the democracy itself. The best medium through which this object can be achieved is the press. In a true democracy, therefore, the importance of freedom of press can not be denied. Blackstone rightly says, 'liberty of 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 or from criminal matter when published'.

Unlike U.S. Constitution which provides (through First Amendment) that Congress shall make no laws, abridging the freedom of speech or of the press....., 'the Indian Constitution despite, guaranteeing the same freedom under Article 19(1)(a), does not specifically mention the word press. Again unlike U.S. Constitution where the restrictions have been evolved through judicial pronouncements, the aforesaid freedom in India is directly subject to the limitations provided under Article 19 (2) because no individual right however vital by itself can be an absolute dogma. The individual good must at times give place to social good.

Since the aforesaid freedom is not absolute and reasonable re-

strictions may be imposed upon the press, the government, therefore, always try to keep some control over the press under different laws justifying them under Article 19(2). Successive governments have levelled the press as dangerous nuisance. The government raises the follwing charges;

1) Press is a source of much tension, it is a nuisance for the working of the state and various public sectors of the civil society.
2) Another popular charge against the press is that it is monopolistic. The first Indian Press Commission has aired such charges with more emphasis,
3) The third charge against the press is its failure to contribute to developmental goals.

In the light of above stated facts the freedom of press comes under the shadow of suspicion. The reason is that on the one hand the freedom of press is guaranteed as a fundamental right under the freedom of speech and expression but on the other hand the government always tries to keep the press dancing upon her tune.

In the present work, therefore, an attempt is made to find out that whether the press enjoys the freedom as envisaged under the Constitution. And what has been the role of the Supreme Court in protecting such freedom as the enforcing authority of fundamental rights.

The freedom of press is basically the freedom of individuals to express themselves through the medium of press. This freedom is fun-

damental to the life of an individual in a democratic polity. In India freedom of press is regarded as a species of which freedom of speech and expression is a genus. The jurists, various commissions on Press and the courts all have expressed their view to explain the meaning of a free press which according to them has three essential elements:

a) freedom of access to all sources of information,

b) Freedom of publication; and

c) freedom of circulation.

A free press thus, means freedom from any governmental, social, financial, internal or external pressure. The government, therefore, may neither adopt any measure which curtails the circulation or volume of a newspaper nor it may resort to any punitive action against the press.

The importance of the press in modern society is second to none. A free press is not only a necessary adjunct of democracy; it is the sine qua non for the proper functioning of a democratic society.

The importance of press has increased many folds with the development of press as an instrument of mass communication which has been recognised time and again by the various Press Commissions in U.K., U.S.A. and India alike as democracy can thrive only under the care and guidance of public opinion developed through the press.

The judiciary too, has acknowledged the importance of the press. According to U.S. Supreme Court the importance of the press stands as one of the greatest interpretors between the Government and the people. To allow it to be fettered is to fetter ourselves.

The Supreme Court of India following the U.S. Supreme Court cautioned to be vigilant in guarding the freedom of press as one of the most important freedom because it is of paramount importance under a democratic constitution. It constitutes one of the pillars of the democracy and is the heart of the social and political intercourse and has acquired the role of public educator.

Despite the acknowledgement of its importance in modern times from every segment of the society, the press does not enjoy any specific rights or privileges essential for its effective functioning either in U.K., U.S.A or in India. It is subject to same laws and regulations as are applicable to any other citizen. It does not enjoy any exemption from disclosing any information before a court of law, received by it [Sec.15(2) of Press Council Act forms an exception in any proceeding before the Press Council). Therefore, the approach of law is that where there are no exceptions the general rule of duty to disclose should be followed. Nevertheless under exceptional circumstances some additional rights have been conferred upon the press as a public institution.

In India the origin of the newspaper in its present form may be

traced to Aurangzeb's regime but the first newspaper 'Bengal Gazette' was started by James Hicky in 1780. He was extremely critical of East India Company and inturn faced the consequences when his newspaper was closed. Some other newspapers started during that period also met with the same fate.

Lord Wellesly was instrumental in imposing press censorship upon the press in 1799. Printing the name of the editor was also made obligatory upon the press. In 1813 Lord Hastings lifted the censorship of the press and adopted liberal attitude towards it but simultaneously framed new rules prohibiting it from reporting any matter regarding the proceedings of Board of Directors in London relating to India, having tendency to create any suspicion among native population.

The first Indian newspaper 'Vengal Gazette' in Bengali was started in 1821 by Ganga Kishore Bhattacharya. The next few years were turbulent for the press when it was subjected to many restrictions. It took a sigh of relief and enjoyed maximum freedom in the British India during the period of Lord William Bentinck and Sir Charles Metcalf. The Bengal Press Regulation, and Bombay Press Regulation, 1925 and 1927 respectively were repealed by the Act of 1835.

Lord Auckland did not follow his predecessors policy towards the press and an ordinance similar to that of 1823, was issued. In 1857, he introduced the Act XV to deal with the press. In the coming years several newspapers were started after passing of India Council Act, 1861.

Even then the press was not left free and in 1867, Press and Registration of Books Act was passed to regulate it. The Criminal Law Amendment Act, 1870 inserted sec. 124-A in I.P.C to curb the publication of seditious matters. The section was amended twice during 1894-1898. The Vernacular Press Act was also enforced with the intention to eliminate the seditious writings.

By the early 20th century the spirit of independence had reached to its zenith. More stringent easures, therefore, were adopted by the government to crush the press. Consequently the newspapers (Incitement to offences) Act, 1908, Official Secret Act, 1923 the Indian Press Act, 1910, Indian Press (Emergency Powers) Act, 1931 and the press (Special Powers) Act, 1947 were passed to tackle the situation. These enactments conferred wide powers upon the magistrates including demand of security deposit and seizure of the press.

When India achieved her independence a Press Laws Enquiry Committee was constituted which recommended to repeal certain enactments but advised to retain Official Secret Act, 1923. After independence few enactments including Young Persons (Harmful Publication) Act, 1954, Parliamentary Proceedings (Protection of Publication) Act, 1956 Working Journalists Act, 1955, The Newspaper (Price and Page) Act, 1956 and the Press Council Act, 1965 were passed. These enactments were instrumental in regulating the press but they were not harsh comparing to earlier enactments.

The promulgation of Emergency brought back the bitter memories of pre-independence era to the press. Several journalists were sent to jail and foreign correspondents were thrown out of the country. The Press Council Act, 1965 and Parliamentary Proceedings (Protection of Publication) Act, 1956 were repealed. Prevention of Publication of Objectionable Matter Act, 1976 was passed and used with Defence of India Act and Maintenance of Internal Security Act.

In 1977 when the Janata Party's Government took charge of the country, the repressive laws enacted during emergency were repealed and pre-emergency position was restored. The Press Council Act, 1978 was passed with certain improvements and under certain circumstances the Constitutional protection was provided to the press by inserting Article 361-A into the Constitution. Since then despite some flutter on rare occassions there has been no significant development relating to the press or the press laws in India.

In Constituent Assembly when the provision relating to freedom of speech and expression was being discussed, several members wanted a seperate provision guaranteeing the freedom of the press. They however, could not succeed as Dr. Ambedkar, the Chairman of the Drafting Committee declared that the freedom of press is included within the freedom of speech and expressiosn guaranteed under Article 19(1)(a) of the Constitution.

The aforesaid view of Dr. Ambedkar was affirmed by the Supreme

Court in Romesh Thappar and Brij Bhushan Cases when it held that freedom of speech and expression includes the freedom of press. It can neither be subjected to pre-censorship nor the government can stop the circulation of any newspaper or the publication of any matter.

The press though does not enjoy any immunity from the laws of general taxation but the same can not be levied upon it in such manner which adversely affects the freedom of the press. The government can not take any action to eliminate the unfair competition between the big and small newspapers in the guise of Press Commission recommendation by implementing newsprint policy. Similarly it can not take any punitive action to muffle the voice of the press.

The press on the rule of balance of convenience may be stopped form publishing any matter if it comes in conflict with other's fundamental right. Even in those cases considering the importance of press, it can not last beyond the period than actually required under the circumstances of a particular case. It is not that only the press can claim its freedom against the state as a fundamental right but under exceptional circumstances even an individual may claim the publication of his views in a magazine maintained out of public funds to enable the readers to have a complete picture upon which his opinion is formed.

The advertisements have always been a major source of revenue for the newspapers. They not only bring down the price of a newspaper but also fulfill the economic needs guided by information disseminated through print media. Consequently the publication of any advertise-

ment (commercial speech) can not be denied. However, this freedom (of press) is not absolute and the Constitution of India expressly provides certain grounds under Article 19(2) upon which reasonable restrictions may be placed upon the press.

The press, therefore, has no freedom to publish any material which may endanger the sovereignty and intergrity of the country neither it may be allowed to carryout any matter which is likely to put the security of the country at risk. But only the public disturbances of unmanagable magnitude and not of purely local significance may pose any risk to the security of the state. Press, may also be restrained from acting in such a manner which may disturb the public peace.

Reasonable restrictions may also be placed on the press to prevent it from publishing any material which taken as a whole may debase and debouche the minds of young and adolescent readers. Taking this plea however, the publication of any matter which is vulgar may not be denied and whenever the Court is confronted with an issue of obscenity, the opinion of experts though not binding plays a dominant role where the Court is not conversant with the language used in the work alleged to be obscene.

If the press has a duty to comment upon the day to day affairs and keep the people informed the courts too, have the pious duty to impart justice and, therefore, press is not at liberty to publish any mat-

ter which put the creditability of the courts under suspicion. However, like any other public institution the courts also are subject to public scrutiny. Any matter therefore, published with an honest intention of pointing out the shortcomings and seeking their improvement amounts fair comment and does not constitute the contempt of court.

Any person if on account of any publication is defamed, the press could not escape from the liability. It does not, however mean that the state or its officials if apprehend their defamation by any publication may prohibit it by an order having no force of law. In their individual capacity, however, such officials have equal freedom like others in matter relating to defamatory statements. It is also universally recognised principle that freedom of press may not extend to a limit where it amounts the incitement to an offence and therefore, it may be subjected to reasonable restrictions on the aforesaid ground. But taking this plea there could be no restriction upon the press if it advocates any change in the existing circumstances through peaceful means.

During emergency promulgated under Article 352 on ground of external aggression and war the freedom of speech and expression remains suspended under Article 358 of the Constitution. The press under such circumstances may be subjected to pre-censorship and could not claim the freedom as a fundamental right. But it may be restrained only in respect of aims and objects intended to be achieved under the censorship order and not beyond that.

To curtail the freedom it is not sufficient that restrictions should be based on any of the grounds enshrined under Article 19(2), but it is also essential that the restriction must be reasonable. The Constitution nowhere lays down what is and what is not a reasonale restriction ? and for that matter it does not define what a fundamental right eg. the right of freedom of speech and expression consist in or may or may not include. Hence it has been left to the courts to determine the standard of reasonableness to be adopted in judging the validity of a particular legislative restriction. Whether a particular restriction is reasonable or not will depend upon the facts of a particular case because no abstract standard can be laid down as applicable to all cases. Infact the very purpose would be defeated if it is tried to formulate a general standard to the words 'reasonable restriction'.

The phrase 'reasonable restriction' connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. A legislation which arbitrarily or excessively invades the right can not be said containing quality of reasonableness. It is essential that a restriction to be reasonable it must fulfill substantive as well as procedural aspect of reasonableness.

The substantive reasonableness require that the Court looks not to mere form but to the substance of things and it enters into an inquiry whether the legislature has transgressed its powers by imposing unreasonable restrictions. Accordingly the Court does not go by the name and description which the legislature may have choosen itself but its

real character and its reasonable and substantial effect on the right involved in the light of its practical application and for that it takes into consideration the object, purpose, and the real intention of the enactment as a whole.

Procedural reasonableness is concerned with the machinery for enforcement of restrictions. In examining the reasonableness of procedure, the Court insists that procedure must be such as may yield an objective and fair decision by the authority administering the law and does not result into arbitrary curtailment of individual freedom. Accordingly the Court has given due importance to the principle of natural justice in scrutinising the procedural reasonableness of a restriction.

The study of the cases clearly demonstrate that the Supreme Court has given a differential treatment to the restrictions under different circumstances by applying different standard of reasonableness. It has evolved following principles to ascertain the reasonableness of restriction.

1) The restriction must strike a proper balance between the freedom guaranteed and permitted social control.

2) It is only the reasonableness of restriction and not the policy of restrictive law which the Court exmine.

3) The restriction may extend to the point of complete prohibition for a limited period if the circumstances in a particular case require.

4) A restriction made exercisable on the subjective satisfaction of government may be judicially upheld but in exceptional cases

within narrow limits.

5) The restriction must have a proximate nexus with the object intended to be achieved under the law.

6) In determining the reasonableness of a restrictive law, both substantial and procedural aspect of the impunged legislation should be taken into consideration.

7) Where the conflicting rights are claimed the reasonableness of restriction is determined on the balance of convenience.

8) Reasonableness of a restrictiion demands an equality of opportu nity and beside Article 19, may be tested under Article 14 of the Constitution.

9) Different vires may be adopted under a taxing statue depending upon the nature and importance of the services being rendered by the concerned institution.

Privileges are the special rights enjoyed by the Parliament, its Committees and the individual members. The purpose of such privilege on the one hand is to enable the Parliament to function smoothly and to vindicate its authority, prestige and power and on the other hand ensure, that members may play their role in a meaningful manner. Therefor, the privileges are enjoyed individually as well as collectively.

The privileges being enjoyed by Parliament under Article 105 of the Constitution are identical to the House of Commons which it enjoyed at the Commencement of the Constitution. In India, the apex court

may decide the existence or non-existence of a particular privilege but once the existence of a privilege is established, only the Parliament is empowered to decide whether a particular act or omission amounts the breach of privilege or not.

The parliamentary privileges are not subject to Article 19(1)(a) of the Constitution and, therefore, press can not publish any matter which has been deleted from the record of proceedings. Nevertheless Article 21 may still be invoked on the grounds that the act of legislature

is malafide, capricious or against the principle of natural justice. Thus the exclusion of the application of rule of natural justice in M.S.M. Sharma's and Keshav Singh's Cases is no more a good law.

The non-codification of parlimentary privileges despite a constitutional directive has created a lot of confusion and generate controversies regarding the existence or non existence of a particular privilege. The Parliament is not sure of its privileges; the press has its own doubts and misgivings.

Parliamentary Proceedings (Protection of Publication) Act, 1977 which has now been accorded the constitutional recognition under Article 361-A of the Constitution provides a guarantee to the press from any liability Civil or Criminal before any court of law. But the immunity though available against any individual or authority can not be claimed against the Parliament itself if there is any breach of privilege. Simi-

larly the press is not immune from the contempt proceedings before apex court or the high courts as these Courts themselve possess the power to commit any one for their contempt under Article 129 and 215 respectively.

The judicial attitude since the very begining seems to be based on balancing approach. On the one hand it acknowledged the importance of press in modern society and struck down any action on the part of the government which prevents or puts any unreasonable curbs upon the press on the other hand it did not overlook national interest and declined to support any attempt by print media to keep itself immune from the laws of general application alleged as violative of Article 19(1)(a) in the guise of unreasonable restrictions. A law may be struckdown as ultravires to Article 19(1)(a) of the Constitution only if it is enacted with the sole purpose of curtailing the freedom and not covered under Article 19(2) of the Constitution. To ascertain whether the freedom of press has been encroached upon or not, the apex court formulated various tests ie. direct and inevitable effect, arbitrariness of action, imminent danger by holding that reasonableness of any restriction may be tested independently of Article 19(2) after taking into consideration the facts and circumstances of a particular case.

The Supreme Court never overlooked the ground realities when pronouncing any verdict on freedom of speech and expression. In respect of law and order the judicial attitude when the Constitution come into force was visited with a broad approach when it expressed the view

that freedom of press can not be curtailed for a more comprehensive and wider purpose than included in the constitutional provision. Later on this broad approach was side lined through a restrictive approach on the ground that there may be the situations when the authorities are supposed to act promptly. They are in the best position to assess the situation and the consequences to follow. Any drastic step, therefore, taken by the administration with certain safeguards is not bad in law. Regarding other restrictions provided under Article 19(2) of the Constitution it has tried to struck a balance. Consequently in cases relating to obscenity while following the Hicklin's test which overlooks the interest of adult and mature readers, the due weightage is being given to the expert opinion by the Court. In contempt cases the Court has not been very rigid and on most occassions contemners have been let off after a sincere apology is forwarded but while asserting its authority the Court also admitted that it is not beyond public scrutiny itself and fair comment may be passed upon its performance.

Regarding the impact of emergency on the press the judicial approach has been very positive. Any law which was itself illegal when enforced does not acquire legitimacy on account of promulgation of emergency subsequently. Moreover, the press though can not claim the freedom as a fundamental right during emergency yet it does not mean that censor can exercise his powers arbitrarily or beyond the purpose set out in the censorship order.

On the matters relating to Parliamentary privileges the attitude of

the Court has been very restrained and confined only to the point of deciding the existence or non-existance of a particular privilege and declined to interfere merely to correct the mistakes of judgement by House. The Court however, has made it amply clear that though Parliamentary privileges are not subject to Article 19 yet any committal for contempt is subject to Article 21 of the Constitution.

The discussion shows that the press in India to a large extent despite the fact that the laws if frequently used are powerful enough to be a threat to the freedom, is enjoying it as guaranteed under the Constitution. Nevertheless, it is haunted many times by the successive governments either under one pretext or the other whenever its actions do not find favour or criticised by the press. However, the Supreme Court has not taken kindly to restrictions on freedom of press until some interest considered equally vital was also involved. In cases where restrictions on the press have been upheld the maintenance of communal harmony, working conditions of journalists etc. were to be promoted. Thus it has always been aware of protecting this cherished freedom and has been sticky enough not to let the executive get away with much by bailing it out on most occassions but while doing so it has not overlooked its own authority.