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Constitutional Regulation of Digital and Traditional Media: Scope of Article 19(2)

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ABSTRACT

The "freedom of speech and expression" guaranteed by Article 19(1)(a) The Constitution of India is one of the pillars of the democratic government, and the media is a vital tool for making people accountable and disseminating information. But this "freedom" is not unlimited and subject to the reasonable restrictions specified in Article 19(2). Although restrictions to media freedom were formulated with the context of print media and direct state censorship, the advent of digital media outlets, fact checkers and intermediaries by governments, internet shutdowns, algorithmic content filters, and online fact checking mechanisms have drastically altered the form and nature of the restrictions on media freedom. In this paper, the evolution of judicial understanding on "reasonable restrictions" under Article 19(2) and the fit of the current constitutional concepts for contemporary digital governance issues is critically assessed. The paper utilizes both doctrinal and comparative legal research methods to analyse constitutional precedents such as Romesh Thapar v. State of Madras, Shreya Singhal v. Union of India. In the paper it is argued that today's methods of media regulation are shifting to indirect and technologically mediated ways of control that do not fall under traditional judicial review, making the need for a more comprehensive system, based on the principle of proportionality, transparency and safeguards in the proper conduct of the processes, especially so important to defend constitutional freedoms in the digital age.

KEYWORDS

Article 19(2), Freedom of Speech and Expression, Media Regulation, Digital Constitutionalism. Reasonable Restrictions, Press Freedom.

INTRODUCTION

Free speech and freedom of expression is one of the basic tenets of constitutional democracy in India. This freedom is guaranteed under Article 19(1)(a)¹ of the Constitution, which encompasses not only the freedom of individual expression, but the freedom of the more comprehensive democratic interest of the free exchange of ideas, opinions and information. While the Constitution does not explicitly provide for the 'freedom of the press' directly, the Supreme Court has increasingly defined 'freedom of the press' as inseparable from the preamble to Article 19(1)(a) of the Constitution. *Romesh thapar v. state of madaras*. Thus, the media plays a vital role in the constitution in terms of promoting public discussion, political responsibility and informed participation in a democratic society.

Meanwhile, the Constitution doesn't give a thumbs-up to speech and expression in its absolute sense. **Article 19(2)**² allows the State to make reasonable restrictions on the basis of public order, security of the State, decency and morality, defamation, contempt of court and sovereignty and integrity of India. art. 19(1) of Libya 2. The balance between the desire to preserve individual liberty and the interest of the state is the constitutional issue. In response, Indian constitutional law, through judicial rulings, has developed over time, in a process of interpretation, to try to establish boundaries to constitutional protection of "reasonableness" and to the extent to which the government may regulate the media and expression.

India has witnessed a significant shift from print censorship to digital governance regarding the role of media. There is also a significant shift in the development of print regulation to digital governance in India. But the advent of electronic communications has led to new and more complicated regulatory structures such as intermediary liability systems, internet shutdowns, algorithmic content filtering, government-industry guidance and advice, and internet content regulation mechanisms. The judicial changes in *Shreya Singhal v. Union of India*, (2015) 5 SCC 1³, and *Anuradha Bhasin v. Union of India*,⁴, are reflective of the growing constitutional concerns

¹ INDIA CONST. art. 19, cl. 1(a).

² INDIA CONST. art. 19, cl. 2

³ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1

⁴ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637

relating to regulation of digital speech and procedural protections in digital environments. *Shreya Singhal v. Union of India* *Anuradha Bhasin v. Union of India*

These developments give rise to some interesting questions about the constitution in the context of reasonable restrictions as enshrined in Article 19(2) and earlier developed when dealing with print media, whether it is fit and proper to reduce it to suit the environment of digital media. As oracles are more and more coming to understand online communication as their brush with God, their growing power has magnified worries of overbreadth and chilling effects, procedural opacity and indirect abridgement of dissenting speech.

LITERATURE REVIEW

Since the very beginning of the Indian Constitution, the issue of constitutionally guaranteed freedom of media and State Regulations in Article 19(2) has been a topic of much debate and discussion amongst academics and judges alike. Previous scholarship has been short of a discussion on the interpretation of freedom of speech and expression in Article 19(1) (a), the parties to the constitutional review of restrictions placed under Article 19(2), and the judicial standards to frame the balance between civil liberties and the legitimate state interests. In the digital age, however, as the media landscape rapidly changes, the discussion today goes beyond traditional issues of censorship to embrace a host of new processes and policies involved in regulating intermediaries, in disrupting the internet and in algorithmic and executive fact-checking.

The concept of press freedom has originated from early constitutional literature which has adopted the perspective of democratic constitutionalism, press freedom concept as a fundamental element of public accountability and political participation. The principles of prior restraint and excessive state censorship have been laid down in the case of *Romesh Thapar v. State of Madras*⁵ and *Brij Bhushan v. State of Delhi*,⁶. These cases have been commented on in the academic arena broadly as early moves by the courts towards building a democratic discourse by restricting arbitrary executive intrusion into freedom of press.

⁵ *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.

⁶ *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129

Later scholarship has concentrated on the indirect effects that occurred by way of economic or regulatory controls over newspapers. The cases of *Express Newspapers (P) Ltd. v. Union of India*,⁷ *Sakal Papers (P) Ltd. v. Union of India*,⁸ and *Bennett Coleman & Co. v. Union of India* (1973) 2 SCC 788⁹ sparked heavy scholarly commentary on the constitutionality of economic rules on newspapers as restrictions on freedom of expression. Press associations -- such as Express, which included newspaper printers and papers, and Sakal and Bennett Coleman & Co., which consist of news editors -- challenge this definition, arguing that the Supreme Court significantly expanded the definition of press freedom in its Sakal and Bennett Coleman & Co. v Union of India judgments, which include circulation and dissemination of information as "triggers". In a similar way effects can be seen in the judiciary's shift away further from narrow textual reading to a more substantive constitutional interpretation of democratic communication as reflected in the existing literature.

The other significant theme of scholarship is on the concept of "reasonable restrictions" under Article 19(2). The concept of "reasonableness" has been the subject of widespread scholarly discussion, especially pertaining to proportionality, procedural protections and the "chilling effect" doctrine. The recent judgment in *Shreya Singhal v Union of India*, which added new constitutional principles to the vagueness and overbreadth principles in speech control, garnered significant scholarly remarks. *Shreya Singhal v. Union of India* Academic commentaries on the judgment forcefully argue that the Court has drawn a fine line between advocacy and incitement and that the vague language in laws can stifle freedom of speech guaranteed by the Constitution. Comparative constitutional law also shows that many jurisdictions that are democratic today are adapting this proportionality approach as a method to evaluate the value and limits of freedom of expression in relation to other state interests, like public order, national security, and the control of harmful online content.

The relationship of digital media and the regulation of online speech is a growing stream of research in recent years.

⁷ *Express Newspapers (P) Ltd. v. Union of India*, AIR 1958 SC 578

⁸ *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305

⁹ *Bennett Coleman & Co. v. Union of India* (1973) 2 SCC 788

Popular sharing-based media regulation has been revolutionized by the internet, where there are intermediary platforms, algorithmic moderation and executive monitoring in the constitution. In the era of digital constitutionalism scholars state that the limitations to the media are achieved not just directly through censorship, but also indirectly, through technological mediated ways in controlling visibility, accessibility and dissemination of information. In the recent times of the internet shutdowns, the debate on the same topic of internet shutdowns, national security, transparency, and accountability of the executive has been further stirred by the developments of judiciary in *Anuradha Bhasin v. Union of India and Madhyamam Broadcasting Ltd. v. Union of India*.¹⁰

RESEARCH METHODOLOGY

The research has been carried out by following doctrinal methodology and analytical approach in understanding the legal framework that is required for constitutionally sustainable reasonable restrictions in the sphere of media under Article 19(2) of the Constitution of India. Doctrinal research is an in-depth study and interpretation of the constitutional provisions, judicial precedent, statutory provisions and legal principles associated with freedom of speech and media regulation. The main aim of the methodology is to study the definition of media freedoms (under *Article 19(1)(a)*¹¹ and the constitutional tests of reasonableness (under Article 19(2)) that have been applied by Indian constitutional law.

The major sources of the study are authoritative legal sources, such as the constitution of India, landmark judgments of the Supreme Court, various statutes, delegated legislation, and regulatory frameworks related to digital communication and media. Key rulings on prior restraint, freedom of the press, proportionality, internet shutdowns and digital speech restrictions have been explored to pinpoint how the constitution has developed in the sphere of media restrictions. It also explores developments of new laws and regulations on intermediary liability, executive user intervention into online content, and new digital governance tools impacting freedom of expression.

¹⁰ *ibid*

¹¹ *Ibid*

The research is enhanced using secondary sources, such as scholarly articles in journals, constitutional commentaries, academic books, reports of the Law Commission and legal commentaries by experts in the field of freedom of expression, media regulation and digital constitutionalism. These secondary sources help to think about different ways in which interpretations and scholarly debates about reasonable restrictions as applied in digital environments have developed.

This is a qualitative research study, with no empirical techniques like surveys or interviews being used. The study delves instead on doctrinal interpretation, analysis of the judge, and the notion of critical constitutional developments in relation to the regulation of the media. This approach aims to examine whether the basic concepts of a constitution, which were paramount in the context of print, are still applicable to current issues relating to the control over digital media and technologically imposed limitations on freedom of expression under the umbrella of ‘judicious restraint’ under Article 19(2) of the Indian Constitution.

EVOLUTION OF MEDIA FREEDOM UNDER THE INDIAN CONSTITUTION

The freedom of press in India has developed mainly due to the interpretation of Article 19(1) (a) of the Constitution of India which provides for freedom of speech and expression. The issue of freedom of the press is not mentioned explicitly in the Indian Constitution; however, constitutional courts have recognized press freedom as a core element of democratic systems and political accountability. The term ‘freedom of the press’ is not in the explicit vocabulary of the Indian Constitution but constitutional courts have established press freedom as a fundamental pillar of democracy or political accountability. The judiciary, over time, evolved the view that democracy should not only require individual expression, but also free flow of ideas and access to information for the public. In *H.M. Seervai, Constitutional Law of India*^{12a} (4th ed. 1996).

However, constitutional jurisprudence evolved to provide a greater scope of protection for freedom of the media than simply against direct restrictions in freedom of expression, which also took in indirect forms of restriction involving the dissemination of information. Tax, licensing, other government restrictions on the print media and communication facilities, the impact of

¹² H.M. Seervai, *Constitutional Law of India* 1045 (4th ed. 1996).

such restrictions coming under the scrutiny of the constitution, came under scrutiny, *Express Newspapers (P) Ltd.*¹³. Judicial interpretation can further widen the constitutional coverage and the public's rights to "right to know" in the context of participatory democracy and accountability of government was one of such aspects. *State of Uttar Pradesh v. Raj Narain*¹⁴

Electronic and broadcast media altered this constitutional discourse about the freedom of expression. In the case of *Secretary Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal*¹⁵ Courts recognized the right of free speech as being extended to the freedom of the media, that included freedom of communication through electronic media like radio and television broadcasting. The constitutional framework also developed as internet-based communication and digital media took off and limitations often apply through intermediary controls, algorithmic moderation, online surveillance, digital monitoring systems and not through previous censorship.

Constitutional conflict today has transcended to address not just restrictions on visibility, access, and circulation in the form of hand-to-hand legislation, but also technologically mediated restrictions which can in turn impede these functions. Considering this, the digital governance machinery can have significant consequences for democratic processes, even in the absence of formal censorship regimes. *Gautam Bhatia, Offend, Shock, or Disturb: Free Speech Under the Indian Constitution*¹⁶. These have been increasingly drawn into court evaluations of restrictions under Article 19(2), such as when considering the concept of proportionality, of procedural fairness, or of constitutional necessity. *Modern Dental College & Research Centre v. State of Madhya Pradesh*¹⁷.

The trajectory of media freedom in India, therefore, has changed little from protection from the direct censorship of the executive to indirect and technologically mediated scrutiny now under the Constitution. But as digital governance continues to evolve constitutional issues around the power of government, intermediary responsibilities, and the constitution's protections in a digital world remain serious.

¹³ *Express Newspapers (P) Ltd.*, AIR 1958 SC 578

¹⁴ *State of Uttar Pradesh v. Raj Narain* (1975) 4 SCC 428.

¹⁵ *Secretary Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal* (1995) 2 SCC 161

¹⁶ *Gautam Bhatia, Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* 215 (2016)

¹⁷ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353

CONSTITUTIONAL DOCTRINE OF REASONABLE RESTRICTIONS UNDER ARTICLE 19(2)

The Constitution of India provides for fundamental right to freedom of speech and expression under article 19(1)(a), which is subject to restrictions as per article 19(2). The restrictions serve to promote the general welfare of the public and to prevent any deprivation of individual liberty which might be detrimental to the public order and the stability of the Republic. Article 19(2) allows a restriction when it's in the interest of sovereignty and integrity of India, the security of the State, public order, decency or morality, contempt of court, defamation and incitement to an offence. *Durga Das Basu, Commentary on the Constitution of India* ¹⁸

Now, the doctrine on “reasonable restriction” has gained considerable constitutional ground through judicial interpretation. Restrictions on freedom of expression have been emphasised over and over by the courts not to be arbitrary, excessive or disproportionate to the object to be achieved. The requirement of a constitutional validity under Article 19(2) therefore, must go beyond the existence of a legitimate governmental objective and the existence of a rational and proportionate connection between the restriction imposed and the purpose aimed at by the governmental action. *Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118*¹⁹. However, over a period, the courts have developed a concept of 'proportionality' and 'a fair procedure' to ensure that restrictions on freedom of expression serve a constitutionally legitimate purpose. *Modern Dental College & Research Centre v State of Madhya Pradesh*²⁰.

Proponents of early constitutional jurisprudence over the constitution-imposed restriction on political speech and press freedom in a narrow sense. Judicial interpretation showed vigilance to public criticism and political discussion as an important factor to keep democratic governance alive. Unrestrained public debate is the cornerstone of constitutional democracy and untrammelled and liberal liberty to express it provides a bedrock of democratic accountability, while over-drawn, unfettered executive discretion in regard to its exercise is likely to significantly inhibit democratic accountability. Unrestrained public debate is the basis of

¹⁸ *Durga Das Basu, Commentary on the Constitution of India* 2768 (8th ed. 2007)

¹⁹ *Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118*

²⁰ *Modern Dental College & Research Centre v State of Madhya Pradesh, (2016) 7 SCC 353*

constitutional democracy and anything short of it will not produce any bedrock of democratic accountability; on the other hand, broad executive discretion in the given matter, if not properly circumscribed, is bound to significantly destroy the accountability of democracy. It has also been recognized in judicial decisions that the government actions which impact on the circulation, dissemination and accessibility of information, can indirectly affect freedom of expression and democratic participation. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*²¹.

Vaguely drafted statutes or loose executive authority and judicial control can yield chilling effects in the realm of online speech regulation, especially when scrutinised by the constitution. The Courts have placed a comma in that regard and have insisted that any restrictions on speech must be precise, narrowly drawn and underpinned by procedural safeguards to prevent any arbitrary action by the State. *K.S Puttaswamy v. Union of India*²². As seen in Judicial review of Internet shutdowns and electronic surveillance mechanisms it is evident that the judiciary is trying to cope up with the rapidly changing technological world in the light of constitutional principles.

But there are still very serious constitutional issues as to how the executive runs the digital communication system. Instead of classic censorship, intermediary liability laws, online monitoring systems, algorithmic content aversion and digital surveillance are important methods of contemporary regulation that have indirect effects on democracy's communicative powers. Constitutional experts have pointed out that classifiable technological limitations can significantly impact issues of public discourse and public dissemination of information, as well as participation in democratic society. *Lawrence Liang, Privacy, Surveillance and the Constitution of the Digital Public Sphere*²³.

The constitutional principle of reasonable restrictions under Article 19(2) has thus undergone a significant transformation from the use it received to the previous regulation of traditional print media. Therefore, the constitutional doctrine of “reasonable restrictions”, under Article 19(2) has grown significantly from its previous application to traditional print media. However, the velocities of digital governance frameworks are still posing questions to conventional

²¹ *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*, (1985) 1 SCC 641

²² *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1

²³ *Lawrence Liang, Privacy, Surveillance and the Constitution of the Digital Public Sphere*, 4 *Indian L. Rev.* 122 (2020)

constitutional principles designed with the background of primary focus on direct censorship and print-based communication systems.

TRANSFORMATION OF MEDIA REGULATION IN THE DIGITAL ERA

Regulating media in India has undergone extensive changes with the swift evolution of digital communication infrastructure. Old debates on press freedom in the Constitution had centred on issues like control of newspapers, limiting circulation and government supervision of printing. But with the advent of the Internet, the form of democratic argumentation and the way restrictions on expression can be enforced has changed to a great degree.

Perhaps one of the largest changes in the digital age is the expanding number of intermediaries at play in regulating online communication. In modern society, dissemination and access to information has been largely achieved through social media, search engines, and digital intermediaries. Therefore, the government's intervention in the intermediaries directly impacts the freedom of speech and media activity on the internet. The regulatory regimes on intermediary liability and online content moderation were enacted to mitigate concerns of misinformation, illegal content and cyber security and there are worries that the excessive regulation of intermediaries would create “substantial chilling effects” on the expression and democratic participation on the internet.

Litigation against statutory controls of online speech has brought to the fore constitutional debates over vagueness, overbreadth and executive discretion in the constantly evolving field of digital governance. The freedom of communication on the Internet could also have negative consequences for democratic discourse and the free marketplace of ideas, a point increasingly recognized by courts in India. *Apar Gupta, Free Speech and Internet Regulation in India*²⁴. The other ten major concerns that were raised as part of the constitution have been raised in the digital age are internet shutdowns and restrictions on digital communication technology usage. These limits have a direct impact on the journalistic reporting, the dissemination of information, and the public's access to news and democratic debate. The Internet access as a part of freedom

²⁴ *Apar Gupta, Free Speech and Internet Regulation in India*, 8 NUJS L. Rev. 327 (2015)

of speech has therefore been made an essential part of freedom of speech and expression in contemporary constitutional democracies held in *Anuradha Bhasin v. Union of India*,²⁵.

In the digital age, there has also been an escalation in the level of governmental control over online content in the form of advisory bodies, digital monitoring systems, blocking orders and the removal of content. They are more often indirect and mediated types of regulation rather than direct censorship techniques, but nonetheless they do have a powerful impact on democratic communications and public discourse. But constitutional commentators have suggested that such indirect limitations through the digital infrastructure can be very difficult to subject to any constitutional analysis.

So, as the media landscape evolves in the present times, restrictions on speech are being enforced in ever more technological and indirect ways than through actual bans. Recognising free speech to be valid in the digital world, constitutional courts have sought to broaden the scope of the traditional definition of freedom of speech using proportionality in the assessment of regulation, fairness in regulation and accountability. However, several constitutional theories of prints and direct censorship continue to be tested in new models of online governance and technologically mediated democracy. Yet, several constitutional theories regarding print and direct censorship with their foundations remain undermined in the new models of online governance and technologically mediated democratic communication.

JUDICIAL RESPONSE TO CONTEMPORARY MEDIA RESTRICTIONS

The judiciary in India has been playing a significant role in framing the parameters of restriction of media and freedom of expression. The nature of media regulation changed from “press control” to “digital governance” methods, and constitutional courts started to consider questions related to internet regulations, online speech, executive decisions, and internalisation of cost restrictions on communication.

Constitutional challenges to blanket and excessive restrictions on online speech also have the effect of bolstering constitutional protections of political criticism and online dialogue. Analogously, constitutional challenges have grown in internet shutdown and digital

²⁵ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637

communication restrictions. The internet is very much seen by courts as intertwined with issues of democracy, access to information and journalism today.

Another key issue for judices is opacity and absence of procedural transparency of digital governance processes. Governmental moves against the media's activities came under increasing scrutiny for issues of procedural justice and accountability. But in modern judicial decisions, there are also areas requiring improvement for the ability to effectively resolve the increasingly complex digital regulatory context.

The judiciary, however, has been an important force in maintaining the balance of checks and limits against too much governmental enforcement of freedom of the media. Principles of proportionality, procedural accountability and the protection against the imprecision of restrictions have been used by constitutional courts to try and ensure the meaningfulness of freedom of expression in a constantly evolving technological context. But the multiplying complexity of digital governance mechanisms suggests that the traditional theories of constitutionalism, such as the one based on Article 19(2), need to be further developed to respond to the new modes of media governance.

DISCUSSION AND CRITICAL EVALUATION

The development of constitutional jurisprudence, post-freedom focusing on the freedom of the media, shows a piecemeal growth of protection against direct and indirect abridgements of freedom of expression. There has always been a strong emphasis placed on free speech and freedom of expression being fundamental cornerstones of democratic government and public accountability. Conventional constitutional principles of reasonable restrictions under Article 19(2) of the constitution have, however, encountered severe problems when seen in the light of the very rapid shifts of media regulation in the digital age.

First, the point of indirect censorship versus indirect technologically mediated regulation has become a prime constitutional problem today with digital governance. The earlier restrictions typically were carried out in one of three ways: pre-censorship, prohibition orders, and government regulation of circulation of print. However, the modern regime of regulations are being increasingly enforced using the so-called “intermediary liability” framework or via

systems of online surveillance, digital advisories and internet shutdowns issued by the executive. These mechanisms can have indirect, significant restrictions on speech because they restrict access to the speech, its visibility, and its dissemination, even if they do not outright ban speech.

This change involves significant constitutional issues, about the effectiveness of the current legal framework, based largely on traditional press control. Traditional common sense of Article 19(2) was geared primarily to direct restrictions by the state on newspapers and political publications. Today, however, the exercise of control over content is more likely to take indirect administrative or technological forms and may thus elude the constitutional review usually reserved for most explicit censorship regimes.

CONCLUSION

The constitutional framework around reasonable limits on the freedom of the media, based on Article 19 (2) is an ongoing attempt to find a balance between freedom of expression and legitimate state interests in a democratic society. Through the interpretation of the Constitution, judges have been at the very heart of expanding the definition of freedom of the media since the beginning of the Constitution, arguing that democracy requires freedom of political debate, information sharing and public scrutiny. The aim of all constitutional courts is that restriction of speech and media should not be arbitrary, excessive and disproportionate to the aim it aims to achieve.

The development of constitutional law reflects a shift in the standard of review for indirect constraints on opportunities for democratic communication from prior restraint and suppression to expanding law review. Under Article 19(1)(a) of the constitution, human rights provisions with respect to newspaper circulation, economic regulation of the media, online speech and internet access have been greatly broadened by judicial rulings. Concurrently, a digital communication technology revolution has changed the nature of media regulation and thrown new constitutional challenges at the 19(2) traditions.

Today, the restrictions on freedom of the media are increasingly mediated by using intermediaries, Internet shutdowns, algorithmic moderation and regulatory systems under the control of the executive branch. They can operate indirectly but make a significant difference in

visibility, dissemination and accessibility of information in the digital world as compared to conventional structures of censorship. These developments bring up constitutional issues of transparency, the accountability of proceedings, and the vastness of the Power Executive's new discretion over communication online.

The judiciary has tried to incorporate the principles of the Constitution in the doctrines of proportionality, procedural fairness and protection from vague restrictions, but there are lots of uncertainties in constitutional aspects of digital governance. The current legal norms, which have been established mainly in connection with print media, are possibly not fully relevant to encompass modern types of regulation that work through digital platforms and technologically mediated systems.