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With this thought, we hereby present to you

LawPublicus The Legal Portal

Article 19 in the **Wake of Covid-19**

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Article 19 in the Wake of Covid-19

By: Maryam Beg

ABSTRACT

The health emergency faced by nations globally has manifested itself in the form of a citizenry stripped of its rights, freedom of speech and expression quashed to stop the rising tide of 'fake news' spreading rapidly through public platforms, most notably social media. UNESCO has termed the current dispensation as a "disinfodemic" — relaying that the pandemic's effects stretch themselves far beyond the arena of the collapse of our health systems. It is a term used for the collective spread of misinformation regarding Coronavirus, contributing to not just confusion but also alarming levels of vaccine hesitancy.

The purpose of this article is to highlight the other side of the coin. In times of upheaval, governments are allowed exceptional measures, and sometimes it becomes a necessity to take on a controlling role in leadership. Moreover, notwithstanding the fact that various governments are using the pandemic as an excuse to misuse their powers and in continuation to which repressive measures were taken by the government in the name of combating the 'disinfodemic'. As India continues to struggle against the brutal tide of the second wave of Covid 19 with more than 376,831 deaths on its accounts, this apocalyptic scenario has not only affected the emotional well-being and psychological mindset of the people who have suffered the loss of family, but also those who were unable to help those closest to them in these helpless times. Citizens in desperate need of survival tried to reach out for help, and social media proved to be a viable platform, and was utilized extensively for this purpose. But it was only a matter of time after which expressing concern over the shortage of basic medical facilities was not only suppressed but also criminalized with 'lawful arrest'. However, Article 19 of the Indian Constitution stands to challenge all who seek to diminish the right to free expression in the country.

ARTICLE 19 IN THE WAKE OF COVID-19

‘Freedom to air one’s views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship.’ – quoting the Supreme Court's ruling in LIC vs. Manubhai D Shah, 1992.¹

The right to freedom of expression is one of the vital fundamental rights inherited by every citizen of India under Article 19(1) of the Indian Constitution.

The aim of this right incorporates the notion that the opinions and thoughts of an individual are not only valued in a democratic society but are also freely communicated to others. An individual procures several other rights that stem from the freedom to express and propagate one’s ideas, such as the right to equality and cultural and religious rights.

Freedom of expression is a composite nexus entangled with liberties and rights. There are various facets to this right that makes it difficult to explain, similar to all the rights freedom of expression also comes with justified exceptions or reasonable restrictions. For the purpose of creating a society free of all the confines and is filled with inventiveness, imagination, expressiveness, vision, creativity, desires, an individual needs to form an opinion that helps in his character development and growth. It is the freedom that gives the society enough space to communicate views and judgments with each other without prejudice and intolerance, and together strengthen, secure and develop the democratic administration. The fact that the freedom and liberty of an individual should not be hampered with the liberty of another individual was witnessed in the case of A.K. Gopalan vs. The State Of Madras² where it was held that ‘man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals. It thus proclaims that all the citizens have the right to share their judgments and views through the medium of newspapers, radios or television.

¹ Life Insurance Corpn. Of India & Ors. v. Prof. Manubhai D. Shah Etc. Etc., (1992) 3 SC 637 (Full paragraph cited at the end of the article.)

² A.K. Gopalan vs. State of Madras [1950] 27. SCR 88 (SC)

FREEDOM ISN'T ABSOLUTE – THERE ARE ALWAYS LIMITATIONS IN REASONABLE SOCIETIES

The awareness about our rights and duties is something engraved in our minds but the awareness regarding the exceptions that come with it is where we lack behind. The restrictions imposed by Article 19 (2) of the constitution in order to preserve competing rights and maintain social balance among the people are summarized below:

- Safety and Security of the Nation – Speech and expression which incites or encourages hate and that which sabotages the security of the nation needs to be restricted and kept in check and balance.

An individual's freedom of expression ought not to hurt the opinions or sentiments of the society, as decency and morality are one of the grounds for reasonable restriction under Sections 292 to 294 of the Indian Penal Code. However, these sections also outlaw marketing or distribution or advertisement of salacious words or pictures in public places which result in social turmoil or could cause discomfort to a particular society or society altogether.

- Defamation – It is one of the major restrains or exceptions in the eyes of law, the reputation of an individual should not be tarnished while exercising this right.
- Contempt of court – Honorable courts are the most respected in terms of their orders which are always help the supreme and any irrational opinion and views transcends fair expression amounting to contempt of court comes under such exceptions to this right. In Indirect Tax Practitioners Assn vs R.K. Jain, it was held that “Truth based totally on the facts should be allowed as a valid defense if courts are determined to decide lawsuits regarding contempt related to a speech or an article or an editorial.”
- Incitement to an offense – This ground of restriction was added by the first Constitutional Amendment, 1951. According to this exception, no one has the right to instigate or provoke an individual or a group of people to commit any offense or act in an unlawful manner or encourage communal violence or disturbance in a civilized society.
- Sovereignty and Integrity of India – the right to freedom of expression does not give the freedom to rupture the laws to hamper the sovereignty and integrity of the nation. It is the prime duty of the government to maintain law and order and protect the integrity of the nation.

DIMINISHING FREEDOMS DURING HEALTH EMERGENCIES

The outbreak of coronavirus pandemic not only broke the medical machinery around the globe but also weakened the fundamental rights including the freedom of expression, the right of access to information, and the right to privacy. The repressive measures and laws adopted by many governments in order to fight disinformation were not always in line with international human rights law. Hence, it made it foreseeable that the judiciary system has to rule on cases and provide justice to people for their infringement of basic rights of speech, expression, privacy and safety.

In relation to the heightened legal challenges, UNESCO issued guidelines for judicial machinery that is for the judges and courts at national and regional levels that are in compliance with international law and human rights standards in order to protect basic rights and encourage freedom of expression.

“Freedom of expression can be limited for public health reasons inasmuch as the three-part test is respected”, said Joan Barata, from the Center for Internet and Society and the Cyber Policy Center (Stanford University) and the expert authoring the text. In other words, in order to legitimate the repressive measures taken by authorities, they need to comply with a three-part test which includes, “based on principles of legality, legitimacy, necessity and proportionality in a democratic society”.

The guidelines also underline the exigency to apply international standards of data protection and privacy in the development of health data collection tools (e.g. contact tracing apps) to track and follow up the outspread of the virus. Assortment and retention of health data can have wide-ranging ramifications on an individual’s personal data, resulting in future threats on right to privacy and mass surveillance.

According to Guilherme Canela, Chief of Section for Freedom of Expression and Safety of Journalists at UNESCO³ the concern about ‘disinfodemic’ must be dealt by a “free, independent and plural press”. During the pandemic, an excess of deceptions substance and fake news has been created and imparted with malicious intentions. The guidelines prescribe

³ UNESCO.org

principles to follow when managing the spread of falsehoods during the pandemic, including open communication by national authorities, advancement of free media and media proficiency, and due ingenuity with respect to social media organizations to battle disdain discourse.

IS IT A PANDEMIC OR A POLITICAL PLAYGROUND?

The alarming situation in India with the brutal hit of the second wave of Corona Virus began in mid-march 2021 and became uncontrollable by the first week of April sweeping away the country and waving a warning sign for the rest of the world.

The devastating sight continued as there was a shortage of not only oxygen and medical facilities but also cremation sites in all the major cities in the country including the capital city. Meanwhile, there was no strict lockdown or a mind map by the higher authorities in order to combat the virus and the government was giving lessons on how to use the time of crisis to become self-dependent. All this added up along with the instability and lack of efficiency from the medical staff created a sense of chaos and panic among the citizens and the grief of losing young lives was unmatched.

India's paralyzed medical machinery failed to entrust a sense of security among its citizens, and their desperate attempts to save the life of their loved ones landed them on social media platforms seeking help and information regarding medical facilities around the nation. These social platforms turned out to be real lifesavers in such times where physical contact was not even an alternative. People also needed a safe place to express their grievances and helplessness especially those who have been infected by the deadly virus. This led to a social media bombardment of real-life scenarios about ill-equipped medical staff, facilities, and hospitals along with criticism of the government and their inability to handle a crisis.

The apocalyptic sight did not stop people from indulging in black-marketing, increasing prices of basic medical needs, hoarding oxygen cylinders and medicines – these grave issues were set aside the major concern was that there has been an “attempt to tarnish governments image”, while the authorities fail to manage the emergency crisis in India instead of providing fully equipped medical facilities and staff to help breathe their dying country they started choking

and shunning the voices of their people by using emergency laws like Epidemic Diseases Act of 1897, The Disaster Management Act, 2005 and NSA Act, 1980 detaining and seizing properties of people spreading ‘rumors’ about the shortage of oxygen supply, this being the last thing the citizens have imagined or wanted from the government amid a pandemic, especially those whose families were struggling with the virus.

Saket Gokhale, a social activist, filed the letter petition, his petition also included some of the relatives appealing on social media too have been arrested recently.

“Filing criminal cases against families of critical patients issuing SOS calls for oxygen on social media is a gross misuse of the powers of the State and is illegal coercive action that is being taken to maintain the image of the government and to clamp down on any criticism of their handling of the Covid-19 pandemic and to present a fake picture that everything is hunky-dory in the state,” the petition says⁴. In one of the interviews, Gokhale said that family members of Covid patients are now afraid to seek help.

Around 25th April 2021 while the Covid patients were strangling to death the Uttar Pradesh Chief Minister Yogi Adityanath said “No oxygen shortage in any COVID hospital” and directed the officials to take action under the National Security Act and seize the property of individuals who spread “rumors” and propaganda on social media and try “spoil the atmosphere”⁵. However, we cannot ignore or set aside the fact that even today only 10% of the total world population⁶ is vaccinated against the novel Corona Virus whereas India has fully vaccinated only 3.6% of its 1.38 billion population till June 2021⁷.

When it comes to shunning the voices rising via social media this is not the only unfortunate attempt to strangle the rights of the citizens by the government, India being the only country with the highest record of internet shutdowns with at least 83 shutdowns in 2020 alone. The abrogation of article 370 of the Constitution saw one of the longest internet shutdowns in Kashmir, full 4G internet is not available there. The internet shutdown does not only affects the fundamental right to freedom of speech and expression under Article 19(1)(a) of the

⁴ The Telegraph Online.

⁵ The Hindu

⁶ ALJAZEERA

⁷ The Hindu

Constitution but also the right to carry on any trade or business under 19(1)(g) as along with rest of the things most of the business and trade functions via the internet. Hence, it reflects the light on the fact the government prefers to turn the clock back by many years and use repressive measures on the citizens rather than owning and acknowledging their inability and failure and taking measures to combat the ongoing crisis is undermining the very aim and idea of democracy resulting in the collapse of the whole system.

The gap created between laws and execution by the government is wide enough to swallow the fundamental rights and basic requirements of Indian citizens who often walk on the edge blindfolded by the whims and illusions created by the government in order to eclipse their notions. The laws and their exceptions have been weaponized by the government and many corporate bodies to attack content or behaviors sensitive to their agendas, and this is how the whole pandemic situation has been turned into a political playground.

MEDIA- THE VERY FOUNDATION OF FREEDOM OF SPEECH AND EXPRESSION

Media and journalists are closely entangled with freedom of speech and expression. Since the 1920s media has been used to widen the reach of communication and disseminate information across nations. Within few years print media became the most powerful source of freedom of expression expressing opinions and grievances if any against the government or their policies. After 2012 media took another big leap with the advancement of the internet, with every passing day online media became more popular and gained trust worldwide. Journalists and news reporters playing a huge part as a core resource of speech and expression and hence, freedom of press and safety of the journalists during the pandemic is one of the major concerns covering this domain, in order to get to the root reality,

A telephonic interview conducted for the purpose of this article features a journalist from a leading English daily, provides some important insights into the pandemic reportage and current media landscape:

Do you think that social media censorship today is infringing the right to expression of the citizens?

“Social media infringement works both ways because of course in liberal society there should be a lot more freedom to express your opinion especially if it’s a decent or criticism of the government because that’s what makes a democratic process look more fair and balanced. However, there are a lot of people who try and use this entire lenient freedom into saying things that might actually lead to violent or unstable actions and I think there needs to be a body or a third party check to see how misuse or misinterpreted social media right is. There is no absolute right in the constitution so any person who is trying to use it in a harmful aggressive way should be checked”.

What challenges as a journalist have you faced during Covid 19 while carrying your work? (Can add personal experience if any)

“The biggest problem as a journalist for me was to ensure my own safety and health because I have to go inside hospitals and meet Covid patients to track their story apart from that sometimes another challenge was to get data from the officials and DM offices and other government machineries because nobody is willing to talk about the stats the death rates and cases. Of course, there was communication but in depth, investigation was becoming slightly difficult because of the lack of availability. If you are talking to an officer and he isn’t comfortable with the story you are writing they don’t want to communicate so a lot of such problems existed especially because of the pandemic”.

Do you think that the media sector (especially the news sector) is not as independent as it was before? Do you suggest any changes that should be taken in order to remove any political control over this sector and increase the freedom of speech and expression?

Yes, the pattern has emerged in which it is visible that these organizations have come into either from the government or cooperate I think it is engorvernment upon themselves because the editorial calls are going to make will set narratives about the news that they present so I personally believe that if there are financial incentives from these organizations to work that are independent of political interfere then perhaps they can make choices which are not in line

with the pressure that they are facing because a lot of times these choices are made because government gives them adds which adds to the revenue so we need more robust media revenue model that can actually make them self-reliant and making adult calls and not give in to pressure”.

What opinion do you hold on the fact that the Indian government is trying to control over/ directing all the social media platforms today?

“To say that they are trying to control social media platforms would be an overreach but yes there is a blatant attempt to sort of silence the criticism down like on Twitter many accounts are suspended cause they are known to criticize the government and their policies it happens on a lot of basis FIRs are filed against journalists for publishing a story that does not goes well with government officials so more accurately we can say that government is using all tools at its disposal to reduce any sort of criticism against the work that’s they do”.

What opinion do you hold on the use of the Epidemic Act and NSA 1980 for detaining people spreading 'rumours' about oxygen shortage during Covid 19?

“Those cases need to be taken really thoroughly because there was an oxygen shortage people did not get cylinders hospitals ran out of oxygen people died because of it and to say that people are merely spreading rumours and it’s not reality is unethical to say that and it appears to be another attempt to clamp down the freedom of speech if you criticize the way the government handles things and yes doctors and so many people have come on record to say that so many people died due to oxygen shortage now to suddenly to even target a set of people saying that they are spreading rumours I think it is just one way to harvesting the narrative into your favour.”

“The epidemic act is a very broad aspect under which many cases are filed and that also impact freedom of speech because the moment you say something which is in line with say an allegation against a hospital or something the law and order can take cognizance and say that the statement you are making is spreading the disease or sort of misinformation I think when once the dust settles down and the cases have come down and there is a stability in the medical sphere these cases need to be revisited and I believe that there are a lot of innocent people who

wanted to make people aware of some fact or help something so I think those cases are important to look upon and provide justice”.

As a journalist do you believe that there should be more protection or any type of gratuity given from the side of the government as you are risking your life in such challenging times for your duty towards the nation?

“This wave was particularly very harmful for the journalist because hundreds of journalists died leaving their family and children behind I think there needs to be a fund that has to be set up that gives some sort of financial security in backing the families of the journalists who died in sort of life of duty because a lot of them landed contracting Covid because of the reporting that they were doing and that’s sort of financial backing will also incentivize the journalists to not be influenced by other things and be more objective in their reporting and also the government needs to bring more benefits for journalists as they are also considered as the frontline workers but they do not get the benefit of frontline workers they are not considered under that ambit at all whether in the legal aspect or the social welfare aspect”.

The conclusion drawn after the conversation was very much in line with reality and made it transparent for the general public to understand and relate their facts. Furthermore, in 2020 in the case of [*Jacob George v. The Secretary*](#), The High Court of Karnataka directed the central government to consider the representations made by the petitioners seeking compensation for media persons and newspaper delivery agents in case of death due to Covid-19. The petitioners contended that the media personnel was largely left out from the compensation schemes being announced by the government for medical and police personnel. After considering the crucial role being played by journalists and media personnel in disseminating and conveying information to the citizens about the impact of the pandemic by risking their own lives, the judge was of the opinion that the journalists were carrying out essential duties just like police, doctors and nurses and that their role in a democracy could not be underestimated or undermined.⁸

⁸ Global Freedom Of Expression Columbia University

Liberty once lost is lost forever

The Indian government was not successful in dealing with the pandemic which was the worst coronavirus surge in the world and made the citizens bear the cost of their lives. However, instead of lending their ears to the citizens and hold the accountability for their lapse, the authorities bent on forbidding people from revealing it or talking about it on social platforms. This tyrannical behaviour from the side of the ruling government is of grave concern that can rip off the balance between powers and freedom from our country.

The judiciary is the only shaft of light that discharge its duty to uphold the Constitution of India and keep the executive in check from arbitrary use of powers. In one of the recent judgments in the case where Madras High Court held the Election Commission of India responsible for the surge in Covid 19 cases in the country and fastened responsibility on its officials with the murder charge, the Supreme Court held that ‘No restriction on media from reporting on court proceedings. It is integral to freedom of speech and expression’. Moreover, in the case of [*Kush Kalra v. Union of India*](#), The Supreme Court of India on *December 9, 2020* held that neither the State Government nor the Union Territory could paste posters outside the residence of COVID-19 positive persons. The petitioner had contended that affixing posters outside the residences of COVID-19 positive patients violated fundamental rights, including the right to privacy and the right to life with dignity. The judges agreed that such a practice was unnecessary, counter-productive, and would lead to stigmatization of people and their treatment as ‘untouchables’.⁹

It was very much evident that the entire world knew the situation of Indian relation to coronavirus, yet some states including the northern states of Uttar Pradesh and Haryana took action against Covid patients or their families over appeals for help on social media platforms. Uttar Pradesh’s government was charging people under the pretext of spreading misleading information online to tarnish the government's image. Notwithstanding, we witnessed the supreme power of the apex court when it warned the state and federal governments against clamping down on citizens for airing grievances about deficiencies in health care during the Covid-19 pandemic. On 30th April, 2021 the court held, "Make it very clear that if citizens communicate their grievances on social media, then it cannot be said it is wrong information."

⁹ Ibid

“We don’t want any clampdown of information. We will treat it as a contempt of court if such grievances are considered for action. Let a strong message go to all the States and DGPs of States. Clampdown of information is contrary to basic precepts,” Justice Chandrachud made a categorical statement in court. Justice Rao reminded the States that this was a time of great crisis. The Bench said that empathy and action should be the rule of the day.¹⁰

With this, we need to understand the fact that this a warning bell for all the citizens, as the judiciary has to remind the executive of its duty of action and basic humanitarian principles, and prevent the government from taking any arbitrary action. We need to realize that our liberty can be taken away maybe forever. We need to be reminded about the relevance of the lines stated by the Supreme Court in its judgment in the case of LIC vs Manubhai D Shah, 1992.

“The words ‘freedom of speech and expression’ must, therefore, be broadly construed to include the freedom to circulate one’s views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one’s views through the print media or through any other communication channel eg. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The print media, the radio and the tiny screenplay the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one’s views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship.”¹¹

This case study is for information purpose only. Nothing contained herein shall be deemed or interpreted as providing legal or investment advice.

¹⁰The Hindu

¹¹ Life Insurance Corpn. Of India & Ors. v. Prof. Manubhai D. Shah Etc. Etc., (1992) 3 SC 637