From *Sakal Papers* to *M.F. Hussain* and *Baragur Ramchandrappa*: The Implications for Free Speech

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The case of Sakal Papers v. Union of India, which was decided as far back as 1961, raised questions of far reaching constitutional importance which have yet not been satisfactorily answered. Three of the critical questions raised in that case have been addressed in this paper: first, the exact nature and scope of free speech has been analysed, and the competing viewpoints regarding the intrinsic and the instrumental nature of free speech have been compared. Secondly, the question of whether liberty for some can be curtailed to let others exercise their liberty has been analysed. Given the inapplicability of American First Amendment jurisprudence to the Indian context because of the presence of Article 19(2), both these issues have been examined within the sole framework of Article 19(1)(a). Lastly, the object and form test for finding out infringement of rights as evolved in Sakal and Bennett Coleman has been compared with the pith and substance test advocated by Mr. Seervai, and an attempt has been made to reconcile the two. The findings of this paper seem to point to a need for a development of Article 19(1)(a) jurisprudence in India; for unlike the well-traversed realm of Article 19(2), there is very little scholarship yet on the exact interpretation of the term "free speech and expression."

I. Introduction

The right to free speech and expression, its scope and ambit, and the circumstances under which a government can place restrictions upon the exercise of speech and expression, have been issues of controversy in almost all democratic societies in recent years. In India, the question has assumed specific significance because of a close link between free speech and communalism, highlighted by the

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series of high profile cases against the famous painter M.F. Hussain.[1] As recently as May 8, 2008, the Delhi High Court decided a case involving a criminal complaint for obscenity against Hussain, for personifying India ("*Bharat Mata*") in the nude.[2] Dismissing the charges against Hussain, the Court dwelt at length upon the values of democracy and tolerance, the importance of free speech and dissent, and the indispensability of Article 19(1)(a) of the Constitution towards developing a "*free and harmonious society*". During the course of the judgment, the Court made the pertinent observation that "*Courts have been grappling with the problem of balancing the individuals' right to speech and expression and the frontiers of exercising that right*". This article therefore seeks to analyse the development of free speech jurisprudence in India within the context of Article 19(1)(a) of the Constitution, and the constitutional scheme of fundamental rights.

The most recent Supreme Court decision dealing with the nature of free speech under Article 19(1)(a) is the case of *Sri Baragur Ramchandrappa v. State of Karnataka*.[3] A two-judge bench of the Supreme Court held that the freedom of speech and expression was not unfettered, that this freedom must be available to all, and that no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. The case in question involved certain inflammatory statements published in a book, and the forfeiture of that book under the relevant provisions of the Code of Criminal Procedure of 1973. While I take no issue with the conclusion reached by the Court, the decision neither bases itself on, nor expounds on, the theory of free speech that underlies the conclusion that the extent of the right in one individual is circumscribed by its existence for another. This paper seeks to provide that theoretical basis by examining free speech jurisprudence from different standpoints.

Before considering the nature of free speech generally, however, it is useful to note the development of the doctrine in landmark Indian decisions. The question as to the circumstances in which free speech can be curtailed, and the scope of State intervention in curtailing it, was raised as far back as 1962, in the case of *Sakal Papers v. Union of India*.[4] It is the analysis of this case, both because it raises some critical questions going into the very heart of the nature of free speech, as well as the clarity of the judgment, that shall constitute a major part of this paper. In *Sakal*, an order under Section 3 of the Newspaper Act of 1956 was

1 *S. C. Stays Trial Against M.F. Hussain*, CNN-IBN News, *available at* http://ibnlive.in.com/news/showbiz/05_2007/sc-stays-trial-against-hussain-39995.html.

2 Maqbool Fida Hussain v. Raj Kumar Pandey, Crl. Revision Petition No. 114/2007 [Delhi High Court].

3 (2007) 5 S. C. C. 11 [S. C.].

4 A. I. R. 1962 S. C. 305 [S. C.].

impugned. The order required newspapers to fix the prices in accordance with the number of pages, and also regulated the size of weekend supplements. It was the contention of the Petitioners that this violated their right of free speech and expression under Art. 19(1)(a). In this paper, three of those issues have been addressed: *first*, the nature and scope of free speech; *second*, whether in order to avoid the perpetuation of existing inequalities, the Government can impose restrictions on free speech; and *third*, the appropriate test to determine which fundamental right has been infringed, and what criterion of reasonableness is required to be met by the State in order to validate the impugned legislation.

A. The Nature and Scope of Free Speech

One of the principal contentions of the Respondents was that commercial advertisements are not covered within the ambit of Article 19(1)(a). The Court, however, evaded this issue by holding that advertisements generated revenue for the newspaper; further, that by curtailing advertisements revenue would go down, and that this in turn would lead to the newspaper being forced to raise its price. This finally would lead to either a decrease in circulation or the eventual closure of the newspaper, both of which were in violation of Article 19(1)(a). The important question, however, regarding the exact *scope* of free speech remained unanswered. That takes us back to the case of *Hamdard Dawakhana v. Union of India*,[5] where Kapur J. stated that "*a commercial advertisement… no longer falls within the concept of freedom of speech for the object is not propagation of ideas – social, political or economic – or furtherance of literature or human thought*". The words of Kapur J. provide us with an ideal starting point to inquire into the nature of free speech.

Within the liberal tradition[6] there are two sharply divided schools of thought on free speech: the *first*, which has been dubbed "*libertarian*",[7] has its roots in the Kantian belief that citizens are equal, rational and autonomous agents who must be sovereign in determining what to believe, and in formulating reasons for actions.[8] In order to exercise their autonomy and make a rational choice,

5 A. I. R. 1960 S. C. 554 [S. C.].

6 Liberalism as a philosophical tradition is so complex and diverse that it would be unwise to attempt a definition. Briefly, however, a "*liberal*" is somebody who believes that man is, by nature, free to order his affairs in a way of his choosing. Any entity that seeks to limit such freedom has the burden of justifying such limitation.

7 R. Moon, *Review: The State of Free Speech*, 48(1) U. Toronto L. J. 127 (1998).

8 Immanuel Kant was a late Enlightenment philosopher. The Kantian tradition has included philosophers such as Hegel, Karl Marx, Robert Nozick, John Rawls and Ronald Dworkin. The basic premise of Kant's theories was the primacy of the *individual.* He believed in the autonomy of the individual, and firmly argued that individuals must be treated *as ends in themselves*, and not as means to achieving some ends.

individuals' decisions must be fully informed. It therefore follows that *access* to ideas must also be free as far as possible. The State should not enter into the area of individual choice by denying access to others' views.[9] This school of thought believes in what Professor Ronald Dworkin calls the *constitutive value* of free speech – free speech is valuable because it is an essential and constitutive feature of a just political society, and not necessarily because it contributes to pragmatically useful ends.[10]

The other school of thought, led by Professor Owen Fiss, believes in the *instrumental* value of free speech – the purpose of free speech is to ensure that citizens are provided with the information and ideas they need to address public issues and to pursue their ends freely and fully.[11] Professor Fiss' concept of free speech, therefore, has a much narrower scope – it is restricted mostly to political speech, or to put it terms even more stark, speech that has a "*governing importance*".[12] Exactly what form of speech contributes to the public discourse, and to what extent, is to be determined by the State.

An important aspect in judging the desirability of a theory is the possible consequences that it entails. If one were to accept the principle of the libertarians, then *every* form of speech, including pornography and hate speech, would be permitted – in fact, Professor Dworkin admits as much.[13] In response, he makes a slippery slope argument to the effect that we cannot trust legislators and judges, with their own prejudices, their own love or fear of the new,[14] to draw distinctions between valuable and worthless political comments – and so, in order to protect serious newspapers discussing serious issues we must also protect Klansmen and Nazis spreading hate and causing pain.[15] The difficulty with this argument, however, is its apparent inconsistency with the tradition to which it belongs. State interference in the realm of *other-regarding* actions has been admitted even by the staunchest defenders of the libertarian tradition[16] – and the examples Professor

9 S. M. Easton, The Problem of Pornography: Regulation and the Right of Free Speech 1022 (Routledge, 1994). *See also,* The Cambridge Companion to Kant (P. Guyer ed., Cambridge University Press, 1992).

10 R. Dworkin, Freedom's Law: The Moral Reading of the American Constitution 199 (Oxford University Press, 1996).

11 *Moon*, *supra* note 7, at 125.

12 W.J. Brennan Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79(1) Harv. L. Rev. 14 (1965).

13 Dworkin, *supra* note 10, at 204.

14 R. Dworkin, A Matter of Principle 337 (Clarendon Press, 1985).

15 Dworkin, *supra* note 10, at 204.

16 J. S. Mill, On Liberty (Drover Publications, 2002).

Dworkin takes are certainly those of other-regarding actions.[17] In light of this, the idea that the value of free speech lies in its *instrumentality*, i.e. its contribution to democracy (democracy here being taken to mean not pure majoritarianism, but a government subject to conditions of equal status for all citizens)[18] seems to be the better alternative.

Transposing this argument to determine (as a matter of principle) what *should be* the scope of the phrase "*freedom of speech*" in Article 19(1)(a),[19] it is submitted that the decision in *Hamdard Dawakhana* was right. Commercial advertisements which play the most miniscule of roles in furthering democracy should not be given protection under Article 19(1)(a).

Not only does the instrumental nature of free speech seem stronger on principle, it has also been affirmed – albeit tacitly – by Indian courts. In *Romesh Thapar v. State of Madras*,[20] Patanjali Shastri J. observed that freedom of speech and of the press lies at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. This was affirmed in *Sakal*, where it was stated that the freedom of speech and expression of opinion was of paramount importance under a democratic Constitution which envisaged changes in the composition of legislatures and governments; and that this was the reason why it must be preserved. Moreover, in *Express Newspapers v. Union of India*,[21] Bhagwati J. cited with approval the American case of *Grosjean v. American Press Co.*,[22] where censorship of the press was viewed from the perspective of the

17 An other-regarding action, as opposed to a self-regarding action, is an action that affects entities other than the actor. J.S. Mill, of course, gave the most famous example of an other-regarding action, pointing out that the individual's freedom to extend his hand stops when it meets the nose of another. Legislative interference to curtail individual freedom of action when it impacts others was accepted by Kant himself. *See*, *infra* note 42. In the situation under discussion, therefore, if it can be shown that Nazi hate speech will result in direct harm to others (e.g. instigation of riots), then curtailing that form of speech would be justified. The nature and degree of the connection between the exercise of free speech and the harm, in order to justify curtailment (especially in the Indian context), will be discussed in § 1.3.

18 Dworkin, *supra* note 10, at 16. Professor Dworkin defines a "*democratic*" society as one where all members are treated with "*equal concern and respect*". Majoritarian institutions (such as elections) are "*democratic*", and worth supporting and preserving to the extent that they promote the principle of equal concern and respect. The root of Professor Dworkin's argument is that majoritarianism (i.e. the rule of the majority) is not something that is *intrinsically* worth supporting or preserving, and so should not be treated as an end in itself.

19 It will be subsequently argued that this interpretation of Article 19(1)(a) has also been accepted by the Indian judiciary.

20 A. I. R. 1950 S. C. 124 [S. C.].

21 A. I. R. 1958 S. C. 578 [S. C.].

22 [1935] 297 U. S. 233 [United States Supreme Court].

restraining influence of public opinion upon misgovernment. Mathew J. in his dissenting judgment in *Bennett Coleman v. Union of India*[23] addressed this question at some length, and although he did mention that free speech was necessary for self-fulfilment, that was immediately followed by a comparison between the intrinsic value of free speech, and its value as a social good, the former being subordinated to the latter.

A swift look at the Constituent Assembly Debates would also be useful. Although the question about the nature of free speech is not debated much, the few times that it does come up, it is described as "*the essence of civil liberty*"[24] with historical instances of the use of speech as a tool of dissent against the British being brought up.[25] Both of these are primarily instrumental justifications for the necessity of free speech.

The principal justification that Professor Fiss himself gives is that that self-realisation being the underlying value that the libertarians argue for, protection should not be given to *communication*.[26] This argument, however, is rather unpersuasive because freedom of thought is inextricably linked to freedom of speech and expression.[27] Professor Fiss' second argument is that there is no rationale for giving the liberty of speech and expression precedence over other liberties,[28] and this is the ideal starting ground from which to examine the second principal contention raised in *Sakal Newspapers*.

B. The Silencing Effect of Free Speech

The second major contention of the Government in *Sakal* was that price-per-page regulations were necessary as some big newspapers had cornered the market, and it was essential to allow smaller newspapers to get a foothold in the field. The Court rejected this contention, holding that Article 19(2) did not permit the Government to curtail the rights of someone in order to promote the welfare of others. It is submitted, however, that the Court once again failed to go to the heart of the issue. In certain situations, my exercise of free speech may (in ways explained below), restrict or prevent others from exercising *their* right of free speech (in *Sakal*, the monopolistic practices of the big newspapers were not allowing small newspapers to enter the marker). In such a situation, is the State justified in curtailing my freedom of speech in order to facilitate or allow others to exercise their right of free speech?

23 A. I. R. 1973 S. C. 106 [S. C.].

24 Constituent Assembly Debates, VII (2) 749 (Lok Sabha Secretariat).

25 *Id*., at 754, 761.

26 *Moon*, *supra* note 7, at 127.

27 Dworkin, *supra* note 14. *See also*, Mill, *supra* note 16.

28 *Moon*, *supra* note 7, at 128.

Professor Fiss argues that it should, citing the examples of pornography, hate speech and election campaign funding, which have an effect of *drowning out* the voices of others.[29] He further argues that the role of the State is to determine whether all views are being adequately presented and to decide which individuals or groups need to have their voices lowered so that the public can hear "*all that it should*".[30]

Although at first sight this appears to be a traditional liberty versus equality argument, such as the one raised by Mr. Seervai when he analyses *Sakal* (concluding that the doctrine of equality does not mean perpetuation of existing inequalities),[31] a crucial distinction needs to be made. The problem with equality arguments is that no justification is provided for *why* equality must take precedence over liberty. In the Indian context, it may for example be argued that as Article 14 refers to persons, and Article 19 only to citizens, the former must be given precedence over the latter. However, it is submitted that this argument is not required in the present context. For what Professor Fiss has done is to shift the goalposts: instead of a liberty versus equality argument, he is making a liberty versus *liberty* argument: that the liberties of some must be curtailed to let others enjoy *their* liberty. This also pre-empts objections from the moral independence theory of Professor Dworkin, as he admits that the right to moral independence takes no account of the impact of competing rights.[32]

From the libertarian strand, there have been a number of counters to this. According to Professor Robert Nagel, a crucial distinction must be made *agent-relative* and *agent-neutral* rights.[33] Professor Nagel argues that free speech is part of

29 R. Post, *Review: Equality and Autonomy in First Amendment Jurisprudence*, 95(6) Mich. L. Rev. 1519 (1997).

30 R. Amdur, *Review: The Irony of Free Speech*, 109(4) Ethics 906 (1999).

31 H. M. Seervai, Constitutional Law of India I 921 (4th ed., Universal Law Publishing, 1993).

32 Dworkin, *supra* note 14, at 353. Professor Dworkin defines the right to moral independence as:
[p]eople have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them *to lead their own lives* are ignoble or wrong.

33 T. Nagel, *Personal Rights and Public Space*, 24(2) Phil. & Pub. Aff. 91 (1995). Agent-neutral values are the values of certain occurrences or states of affairs which give everyone a reason to promote or prevent them, whereas agent-relative values are those which apply only to the actor. For instance, murder will be wrong in an agent-neutral sense if every person must not only *not* commit murder *himself*, but must also prevent murder from being committed by *others*. This, in turn, would mean that I am justified in murdering someone to prevent him from murdering two other people. On the other hand, murder would be wrong in an agent-relative sense if I am required not to commit murder *myself*, with no implications about what I must do to prevent murder by others. In such a situation, I would not be justified in murdering someone to prevent other murders.

the former, a right which tells us what not to *do* to other people rather than what to *prevent happening to them*.[34] For instance, I may not murder someone to prevent someone else from being murdered. Similarly, I may not silence one voice in order to let another be heard. Professor Nagel's theory, however, rests upon the premise – as he himself admits – that rights are intrinsic and not instrumental.[35] As had been already argued above, the instrumental theory – as far as free speech is concerned above, appears to be better. The instrumental theory, in turn, would support a conclusion whereby the voices of some are restricted or curtailed in order to let other voices be heard, and prevent an effective monopoly over free speech.

Professor Dworkin argues that there is no contradiction in insisting that every idea must be allowed to be heard. This extends to even those whose ideas, the voicing of which has the consequence that other ideas will be misunderstood, or given little consideration, or even not be spoken at all (as those who might speak them are not in control of their own public identities and therefore cannot be understood as they wish to be)[36]. Acts that have these consequences do not, for that reason, deprive others of their negative liberty to speak.[37] The last line is crucial, because Professor Dworkin assumes that free speech is a *negative liberty*.[38] In Professor Fiss' conception, however, free speech is a *positive liberty* as it is instrumental in strengthening democracy and the public discourse; and within this framework, it is quite plausible to admit that a restriction on the negative liberty of some might be needed in order to let others exercise their positive liberty.

The most cogent opposition to Professor Fiss comes from Professor Robert Post, who argues that when Professor Fiss states that a full and rich public debate

34 *Id*.

35 Nagel, *supra* note 33, at 99. Quite obviously, if the right to free speech was instrumental, i.e. serving a greater end such as democratic participation, an individual would be justified in curtailing somebody else's right of free speech so as to further the end of democratic participation. Thus, the right to free speech could not be agent-relative.

36 For example, victims of hate speech (say, a minority community) might be unable to make themselves heard, as one of the impacts of the hate speech may be that the society considers them inferior beings, and refuses to listen to them.

37 Dworkin, *supra* note 10, at 220.

38 The difference between a negative liberty and a positive liberty was first made by Kant, and most famously defended by Sir Isiah Berlin. At the risk of oversimplification, negative liberty simply means the absence of external restraints upon the actions of an agent. Positive liberty means a situation where the agent is *actively in control* of his actions, and is closely linked with the concepts of autonomy and self-determination.

requires that all voices be heard, most specially voices that it would otherwise be marginalised, he implies that that all ideas are equal. Professor Post contests this assumption, arguing that it is implausible to contend that ideas *qua* ideas must be treated with equal respect.[39] Certain ideas may no longer feasibly be part of the public discourse, as they are long dead or repudiated. He gives three examples: ideas about human sacrifice, the mythical element "*phlogiston*", and the *droit de signeur*. This, combined with the fact that the *number* of ideas is infinite, makes Professor Fiss' argument untenable.

While Professor Post's argument appears strong, four separate responses may be made. *First*, while there is admittedly no equality amongst ideas, there is nevertheless equality amongst the *persons* who bring forth these ideas, and it is *their* speech that is being given protection.[40] *Secondly*, Professor Post then ends up answering his own question when he concedes that what Professor Fiss might intend is to define that State's obligation to redress inequalities that occur among ideas because of social imbalances of power and influence.[41] *Thirdly*, even if Professor Post's argument was to be accepted, Professor Fiss' response is that it only casts a positive obligation upon the State to be called upon to determine *which* ideas are suitable for contribution to the public discourse (following from the instrumental nature of free speech), and to make sure that those ideas are not drowned out.[42] *Fourthly*, it is submitted that in any event Professor Post is arguing in a parallel debate in which the contention is between liberty and equality whereas, as already explained above, the goalposts have been shifted by Professor Fiss. Professor Post's critique does not apply to a framework in which liberty is being weighted against *liberty*.

Another very important contention from the libertarian viewpoint was first put forward by Oliver Wendell Holmes, when he argued that "*the best test of truth is the power of thought to get itself accepted in the competition of the market*".[43] However, this means that the members of the community are addressed as passive consumers of information and images rather than as citizens who must make judgments about complex public issues.[44] An objection has also been made that the *laissez faire* idea also fails to take into account that there is inequality in the power to communicate ideas just as there is inequality in economic bargaining

39 Post, *supra* note 29, at 1531.

40 R. Post, *Subsidised Speech*, 106(1) Yale L.J. 189 (1996).

41 Post, *supra* note 29, at 1532.

42 Post, *supra* note 40, at 190.

43 Dworkin, *supra* note 10, at 197.

44 Moon, *supra* note 7, at 148.

power (the exact question that came up in *Sakal*) and the marketplace of ideas view has rested upon the (fallacious) assumption that protecting the right of expression is equivalent to providing for it.[45]

The fundamental objections to Professor Fiss' theory; namely, the large role that might be offered to the State, thus leading to arbitrariness,[46] and the difficulty in judging *who* has been drowned out and to *what* extent in order to have fair redressal,[47] still remain. It is clear, however, that the problems of subjectivity in judgment, and of relativistic standards are problems that are faced by *any* agency making *any* form of value judgment.[48] Therefore, once it is conceded that interference with the freedom of speech is *justified* on certain well-defined grounds (grounds which flow from its instrumental value), the problem of the *precise* nature and extent of such interference must be left (along with the accompanying problems of subjectivity) to the entity which is responsible for such interference.[49] On the balance, therefore, it seems that Professor Fiss' instrumental theory, and the consequences flowing therefrom, is superior to the intrinsic theory of Professors Dworkin and Post. As Kant himself admitted, legislative interference is not impossible when the action of one has an effect on the freedom of action of others.[50]

Given the fact that it is difficult to apply First Amendment jurisprudence to Article 19(1)(a),[51] the only possible solution seems to lie in regarding free speech as a positive liberty,[52] and Article 19(1)(a) as a duty on part of the Government to

45 J. A. Barron, *Access to the Press: A New First Amendment Right*, 80(8) Harv. L. Rev. 1647 (1967).

46 Post, *supra* note 29, at 905.

47 Post, *supra* note 29.

48 To take a simple example: the determination of who exactly a "*reasonable man*" is, is fraught with subjectivity (and one might even say, arbitrariness). That, however, is a necessary consequence of the indeterminacies of language, as well as fundamental and inevitable disagreements between rational individuals.

49 It is clear that the only entity which has both the legitimacy and the authority to interfere with individual rights is the State.

50 The Cambridge Companion to Kant 345 (P. Guyer ed., Cambridge University Press, 1992).

51 The reason for this is that the First Amendment (and the cases decided thereunder) has no provision analogous to Article 19(2). The right to free speech is unfettered, and the restrictions have been evolved by the American judiciary over the years. This is why it has been held in a number of Supreme Court cases that First Amendment jurisprudence is of strictly limited relevance in interpreting Article 19(1)(a).

52 There are two very good reasons for regarding free speech as a positive liberty in the Indian context: *first*, Article 19(1)(a) is *positively worded*, inasmuch as it uses the language "*All citizens shall have the right to freedom of speech and expression*". *Secondly*, Indian Courts have adopted the instrumental idea of free speech in a number of judgments. Once it is accepted that speech must be free to serve certain *ends*, then it is no longer enough for a legislature to simply make sure that there is no hindrance in the exercise of free speech; rather, it becomes incumbent upon the legislature to take *positive steps* to ensure that freedom of speech is actually serving the ends that it is designed to serve.

provide it to all (hence pre-empting possible objections with respect to 19(2) being the only repository for restrictions).[53] However, a better argument has been made by Mr. Seervai, who has observed that laws under monopolies can be justified under Article 19(6) as reasonable restrictions on business.[54] This begs the question of how to determine which right, and consequently which restriction applies in the context of a particular legislation, and this is what is addressed in the next section. This question is also very important, as it was argued earlier in the paper that legislative curtailment is permissible, even in the libertarian tradition, in the realm of other-regarding actions. It, therefore, must be determined the nature and the degree to which the exercise of free speech will impact its listeners for it to be deemed "*other-regarding*."

C. Object and Form v. Direct Effect

In both *Sakal* and *Bennett Coleman*, the Court had to make a choice between the object and form test and the direct effect test, and in both cases the Court opted for the latter. This approach, however, has been heavily criticised by Mr. Seervai for the adverse consequences it might have on Articles 19(1)(a) and 19(1)(g). The criteria for reasonableness of restrictions in both these Articles are, however, different. Therefore, if the ban is in public interest, the Act would still be struck down as it would violate Article 19(1)(a) – thus robbing the Government of its right to regulate trade in the interests of the public. In the alternative, Mr. Seervai advocates the pith and substance test, which was also considered, though not articulated, by Mathew J. in his dissent in *Bennett Coleman*.

The foundation of Seervai's argument seems to be that an Act may directly affect more than one right under Article 19, and if this happens this will lead to problems. However, this need not always be the case, for, as Mr. Seervai himself admits, the situation in consideration is one where several fundamental rights are claimed by a person. It is submitted that as, in principle, the direct effect test is better than the object and form test, Mr. Seervai's pith and substance argument, although cogent and persuasive, should be the exception rather than the rule. As was rightly pointed out by Ray J. in *Bennett Coleman*, the correct approach should be to enquire what in substance is the loss or injury caused to the citizen, and not merely what manner and method has been adopted by the State in placing the restrictions.[55] Therefore, the solution seems to be that the general rule should

53 It may be argued that such an interpretation would render Article 19(2) otiose. However this is not the case, as Article 19(2) can still be used to prevent speech that violates public order, decency, morality and the other disabilities enumerated in the Article. All that this interpretation seeks to do is to afford an additional justification for the legislature to curtail free speech. This justification lies in Article 19(1)(a) and the idea of free speech itself, and works without prejudice to the operation of Article 19(2).

54 Post, *supra* note 29, at 916.

55 *Supra* note 22.

remain the direct effect test; if, however, the Court finds during the course of its investigations that the impugned legislation directly affects more than one right, *then* and only then should the Court go into the object and form test in order to determine the intent of the legislature and find out which right applies.

II. Conclusion

It is submitted, in conclusion, that when the Courts analyse accusations of State interference in the right to speech and expression, the yardstick that should be kept in mind is one of the instrumental nature of free speech and its contribution in promoting public debate and thereby democracy. It is also submitted that *Sakal* has been wrongly decided insofar as it rejects the prerogative of the State to interfere where the exercise of the right of free speech on the part of one party is preventing another party from exercising the same right. Lastly, the test evolved in *Sakal* and *Bennett Coleman* is correct, with the important *caveat* that in cases of the direct effect being on more than one right, Seervai's pith and substance test should be adopted as a further guide to interpretation.

In this context, it appears that the recent decision of the Supreme Court in *Baragur Ramchandrappa* is in line with the jurisprudence evolved in *Sakal*, *Bennett Coleman* and subsequent cases with respect to the instrumental nature of free speech. While that point now seems well-settled, both due to the existence of Article 19(2) of the Constitution, and a uniform tradition of case law, it is also submitted that there is a growing need for rules to be laid down governing the interpretation of Article 19(1)(a). Although the interpretation of Article 19(2) is virtually settled law, there is very little jurisprudence dealing with this area, and in this matter *Baragur Ramchandrappa* takes us no further. Thus, the issues raised in this article have been virtually unexamined so far; and it is hoped that the example of the burgeoning American jurisprudence on the subject can soon be emulated in the Indian context.

NOTES AND COMMENTS

Corporate Manslaughter and Corporate Homicide Act, 2007

Ananthi Bharadwaj*

Ever since corporations have emerged as major economic and social actors in our society, courts have been faced with a peculiar problem – that of subjecting them to the criminal law of the land. While corporations have regulated their own activities, their legal liability in criminal law was still debatable and over the years, a rich jurisprudence of corporate criminal liability has evolved. This article seeks to trace the sequence of events that led to the passage of the Corporate Manslaughter and Corporate Homicide Act, 2007. It further seeks to examine the provisions of the Act as regards the new offence of 'Corporate Manslaughter' and the promise it holds for the future of corporate criminal liability in England.

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