

FREEDOM OF SPEECH AND EXPRESSION; INDIAN CONSTITUTION: AN OVERVIEW

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ABSTARCT

The Constitution of India gives a free democratic government to its people. Freedom of speech and expression is a sacred icon in the Constitution's inner sanctum, which has been provided to the people in the Fundamental Rights chapter. This freedom is a central tenet of India's constitutional faith.

The members of the constituent Assembly had seen the oppressive and discriminatory regime of the Britishers. They all valued Freedom and Liberty.

Textually, it is recognized in article 19 that also lists certain other fundamental freedoms that Indian citizens enjoy. Clause (1) (a) of that article protects free speech.

With the help of some early cases involving Freedom of Speech and Expression, my paper would try to emphasize the importance of Freedom of Speech and Expression in any society and political set up.

Prior restraint in the form of censorship is really a big challenge to the right of freedom of speech and expression, because in such a case, the creativity of the author may not see the light of the day.

My Paper would focus on the fact that, the freedom of speech is the first pre-requisite of liberty. It occupies a preferred and important position in the hierarchy of the liberty, it is truly said about the freedom of speech that it is the mother of all other liberties. Freedom of Speech and expression means the right to express one's own views and opinions freely by words of mouth, writing, printing, pictures or any other mode. In present times, it is widely accepted that the right to freedom of speech is the essence of free society and it must be protected at all time. The first principle of a free society is a free flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays a vital role in the development of that particular society and ultimately for that state. It is one of the most important fundamental freedom liberties guaranteed against state suppression or regulation.

KEYWORDS: Freedom, Liberty, Free Democratic

INTRODUCTION

The importance of freedom of expression and speech can be easily understood by the fact that preamble of constitution itself ensures to all citizens inter alia, liberty of thought, expression, belief, faith and worship. The constitutional significance of the freedom of speech consists in the Preamble of Constitution and is transformed as a fundamental and human right in Article 19(1) (a) as "freedom of speech and expression".

Freedom of speech and expression is a sacred icon in the Constitution's inner sanctum, the Fundamental Rights chapter. This freedom is a central tenet of India's constitutional faith. Textually, it is recognized in article 19 that also lists certain other fundamental freedoms that Indian citizens enjoy.

Clause (1) (a) of that article protects free speech and it reads:

All citizens shall have the right -- to freedom of speech and expression

In drafting this provision, India's founders were influenced by the First Amendment to the United States Constitution. That amendment says, "Congress shall make no law abridging the freedom of speech, or of the press¹." It assures, in relatively absolute terms, freedom of speech and press². But, under the Indian Constitution, this freedom is a lot more qualified. Article 19 (2) contains a list of various grounds that permit the government to impose reasonable restrictions on the freedom. These grounds are India's sovereignty and integrity, state security, foreign relations, public order, decency, morality, contempt of court, defamation, and incitement of offenses.

Constitutional History

During the constitutional debates, there was never any doubt whether the Constitution should explicitly protect free speech. Several members of the Constituent Assembly vividly recalled, and had even experienced, the colonial British administration's attempts to stifle the freedom movement using oppressive anti-sedition laws³. They strongly believed that the Constitution must explicitly recognize various fundamental freedoms, including free speech and expression⁴. However, there was considerable division about whether to include specific grounds that would enable the government to curtail or restrict these freedoms

Several members argued that including these grounds would significantly affect or even negate the general content of these freedoms. Others, however, favored incorporating them because they feared that absolute freedom would be dangerous given India's enormous poverty, illiteracy, and economic problems. Ultimately, it appears that many members voted to include the grounds influenced by the "needs of the time."

Early Cases Involving the Print Media

When India's Constitution was inaugurated in 1950, freedom of speech was a relatively novel concept. But the courts were quickly filled with cases in which citizens invoked the new freedom. Most actions involved newspapers or magazines. Plaintiffs were usually newspaper publishers or editors alleging that the government had restricted what they wanted to print or publish. Unlike the more recent South African Constitution, India's Constitution does not expressly recognize press or media freedom⁵. But this omission did not stop the Supreme Court from declaring that freedom of the press is an integral part of article 19 (1) (a).

¹ U.S. Constitution, amendment I.

² William O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjee* (Doubleday, New York, 1956) p. 307; (noting that, unlike the Indian Constitution, the First Amendment does not permit legislative innovations).

³ P.K. Tripathi, *Free Speech in the Indian Constitution: Background and Prospect*, pp.67 Yale L.J. 384, .391-393 (1957-1958) (discussing the importance of free speech to Gandhi and the Indian national movement).

⁴ See B. Shiva Rao, *Framing of India's Constitution: A Study* (Indian Institute of Public Administration, Bombay, 1968)pp. 222-223.

⁵ See South African Constitution, section 16 (1) (a) ("Everyone has the right to freedom of expression, which includes – (a) freedom of the press and other media[]").

Romesh Thappar V. Madras was the Court's first free speech decision⁶. It arose from a government order forbidding the circulation of a journal, Crossroads. The order was made under a state law enacted to protect public safety and public order. Thappar, Crossroads's editor and publisher, complained that the order violated his freedom of speech. The Supreme Court, which had barely opened for business, agreed. Writing for the majority, Justice Patanjali

Sastri ruled that free speech includes the right to propagate ideas, which is ensured by circulation⁷.

Public Order was not a constitutional basis to restrict free speech⁸. The law was declared unconstitutional and the order set aside.

On the same day as Romesh Thappar, the Court also decided **Brij Bhushan v. Delhi**, another free speech case⁹. At issue was an order requiring publishers to submit "all communal matter and news and views about Pakistan including photographs and cartoons" Relying on Romesh Thappar, Justice Patanjali Sastri had little hesitation in holding the order invalid. But, in more forceful language than his Romesh Thappar opinion, he wrote that liberty of the press is an essential part of article 19(1)(a)¹⁰.

The Supreme Court explored this theme again in **Express Newspapers v. Union of India**¹¹. The Court strongly emphasized the importance of media freedom. It held that the press could not be oppressed with laws that abridge free speech, curtail circulation, or undermine its independence by driving it to seek government aid; the Court reiterated this view in **Sakal Papers v. Union of India**, where it struck down the government's page and price limitations on newspapers¹². It emphasized that citizens have a fundamental right to propagate their views and to reach any class and number of readers they choose.

Relative Absence of Broadcasting from the Court's Free Speech Jurisprudence

Few, if any, of the Supreme Court's early free speech cases involved broadcasting. In large part, this was because the government tightly controlled radio and television services. Radio was the principal electronic media in India through

⁶ AIR 1950 SC 124: (1950) SCR 594.

⁷ Burt Neuborne, *The Supreme Court of India* 1 International Journal of Constitutional Law 476, 508 (2003) (Romesh Thappar anticipated the U.S. Supreme Court's over-breadth doctrine).

⁸ Romesh Thappar and certain other developments led to the First Amendment enacted in 1951. Among other things, this amendment retroactively broadened the scope of permissible free speech restrictions in article 19 (2). For an account of its legislative history, see Granville Austin, *Working a Democratic Constitution, The Indian Experience* pp.38-50 (Oxford University Press 1999).

⁹ (1950) SCR 605.

¹⁰The judge did not offer any reasons for this interpretation other than to cite Blackstone's commentaries. His opinion suggested that press freedom flows inexorably from the freedom of speech. During the Constituent Assembly debates, Dr. Ambedkar, chair of the drafting committee, was not in favour of including a separate provision. No special recognition was required, he declared, because individuals, such as editors and managers, run the press. These persons could express themselves freely when writing or publishing. Therefore, it was unnecessary to provide separate protection for the press. See 7 Constituent Assembly Debates 780 (Dec. 2, 1948). Apparently convinced by this explanation, the Assembly rejected a proposal to expressly include freedom of the press in the Constitution.

¹¹ (1959) SCR 12.

¹² AIR 1962 SC 395: (1962) 3 SCR 842.

the 1950s and 1960s¹³. Television services commenced in the early 1970s, and during the 1980s, they gradually emerged as an important communications medium. But, until the early 1990s, All India Radio, the government's radio monopoly, and Doordarshan, the state-run television entity, enjoyed exclusive control over all broadcast services. Very early in its history, the Supreme Court emphasized the importance of an independent press free from government interference. It had no hesitation in linking this concept to the freedom of speech. Yet, it is striking that, until the late 1980s and early 1990s, the Court never considered (or was never explicitly petitioned to consider) whether the same rationale should also extend to broadcasting, which remained completely dominated by the government¹⁴.

There could be several reasons for this phenomenon. First, state control of broadcasting was rather common even in many Western liberal democracies (excluding the United States). There seemed no compelling need for India to be different by allowing private ownership of broadcasting. Second, from the mid-1970s onward, there were significant political and legislative attempts to make broadcasting autonomous. The Court may have been content with leaving reform to the legislative and political process without interfering in a highly charged partisan battle.

Third, the Court may have been unwilling to take on the government on this important policy issue. During 1970s and 1980s, when the Congress party was in power, it adamantly opposed any autonomy for broadcasting¹⁵.

Facing no competition from the private sector, government bureaucrats generally decided what programs to broadcast on both All India Radio and Doordarshan¹⁶. They, in turn, were often influenced by their political superiors on important programming decisions, especially the content of news bulletins. Radio and television became full-fledged propaganda machines for successive Indian governments. Thus, in the first few decades following India's independence, free speech, as a means to ensure diversity of view-points, had little direct relevance to broadcasting¹⁷.

¹³ For an historical account of Indian radio, see Pon Thangamani, *History of Broadcasting in India: With Special Reference to Tamil Nadu 1924-1954* 223 - 228 (Ponnaiah Pathippagam 2000); and Sevanti Ninan, *History of Indian Broadcasting Reform 3 in Broadcasting Reform in India*.

¹⁴ Before deregulation began in the 1990s, government control over broadcasting was an issue in at least three cases. But the courts declined to interfere. See *Prakash Vir Shastri v. Union of India*, AIR 1974 Del. 1 (declining to issue direction that All India Radio avoid favouring ruling party in its coverage); *A. B. Shorawal v. L.K. Advani* AIR 1977 All. 426 (refusing independent candidate's petition challenging government decision to restrict election broadcasts to only those candidates fielded by political parties); and *P.L. Lakhanpal v. Union of India*, AIR 1982 Del. 167 (upholding government control over broadcasting).

¹⁵ Venkat Iyer, *Mass Media Laws and Regulations in India* (Asian Media Information and Communication Centre, New Delhi, 2000) p. 68; (Prime Ministers Indira Gandhi and Rajiv Gandhi argued that, as a developing country, India was not ready for independent broadcasting); David Page & William Crawley, *Satellites over South Asia* (Sage Publications 2001) p.63 (the Congress government consistently ignored recommendations to allow state governments (often controlled by opposition parties) to operate their own broadcasting services).

¹⁶ Lloyd I. Rudolph and Susanne Hoeber Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (University of Chicago Press, Chicago, 1987) p. 82 (noting complaint that, on account of frequent transfers and reassignments, Indian Administration Service officers lacked technical expertise to run Doordarshan).

¹⁷ Free speech was a major casualty during the infamous Emergency of the mid-1970s. Prime Minister Indira Gandhi's government misused radio and television to propagate its achievements, while censoring the newspapers that sought to carry alternative views or criticism. The courts tried to intervene in some newspaper cases, but they did not consider the government's blatant abuse of broadcasting.

Free Speech and Film Censorship

There was, however, one important exception to the general dominance of the print media in free speech matters: censorship cases involving films and documentaries. They involved film producers and directors who challenged government censorship of their productions. Film censorship usually takes place under the Cinematograph Act (No. 37 of 1952). This statute established the Board of Film Censors, which later became the Board of Film Certification, (the “Film Board”). Section 4 (1) requires every film scheduled for public screening to obtain a certificate from the Film Board. Section 5B (1) declares that a film shall not be certified if it violates certain provisions. These provisions are a word-for-word reproduction of the permissible restrictions on free speech under article 19 (2).

K.A. Abbas V. Union of India is the leading Supreme Court decision on film censorship¹⁸. It gave the Court its first opportunity to discuss constitutional protection for free speech in the media outside the traditional context of newspapers and magazines. Abbas, the petitioner, was an award-winning film producer. The Film Board refused unrestricted screening of his documentary, *A Tale of Four Cities*, because it included scenes from a Bombay red-light district. The board asked Abbas to edit certain scenes if the documentary was to qualify for a screening certificate.

Abbas refused and complained to the Supreme Court that the board was violating his freedom of expression¹⁹.

Chief Justice Hidayatullah wrote a well-reasoned and artful judgment for a unanimous constitution bench. Tracing the evolution of film censorship, the Chief Justice noted that the Indian film industry lacked a professional self-regulatory body like the Motion Picture Association of America. Therefore, if the content of films were to be regulated, only the government could do so. As a matter of practice, the Chief Justice noted, censorship existed all over the world in some form or the other²⁰. Although motion pictures in the United States generally enjoyed a significant degree of First Amendment protection, they were not completely free from restrictions. Restrictions could also be imposed on films in England²¹. Censorship, the Chief Justice concluded, is a valid exercise of power in the interests of public morality and decency. It is in society’s interest and does not violate freedom of speech and expression. The Chief Justice also upheld certain government-issued guidelines used by film censors to certify films²².

¹⁸ AIR 1971 SC 481: (1970) 2 SCC 780. There were a few film censorship cases before Abbas. But they did not produce any significant outcomes. See, e.g., *P.N. Films v. Union of India*, AIR 1955 Bom. 381 (declining to address validity of Cinematograph Act because court lacked jurisdiction to hear the matter).

¹⁹ At oral argument, the government made a dramatic concession. The film would receive a screening certificate without requiring any further edits. The case should have ended there. Instead, at Abbas’s request, the Court continued the proceedings to decide whether pre-censorship of films, itself, was constitutional. Justifying this unusual maneuver, the Court explained that film producers required clear guidance on censorship. H.M. Seervai, 1 *Constitutional Law of India* p.792 (N. M. Tripathi, Bombay, 1991) (criticizing this procedure because it resulted in the Court rendering an advisory opinion).

²⁰ The Chief Justice found, with some apparent satisfaction, that even Abbas, the petitioner, supported censorship having written in favour of it.

²¹ In any case, the Chief Justice wrote, American and British practices on film censorship are not decisive because India’s Constitution is different. It allows reasonable restrictions on the free speech.

²² But the Chief Justice complained that these guidelines did not contain anything that would preserve or promote art. To remedy this situation, he announced additional standards for censors to use so that films were not unreasonably edited. These directions were taken from an earlier Hidayatullah opinion in *Ranjit D. Udeshi v. State of Maharashtra*,

An important dimension of Abbas is Chief Justice Hidayatullah's suggestion that films can be treated differently from other mediums of expression. Cinema is a powerful media, Chief Justice Hidayatullah wrote, combining sound, light, and movement to create a powerful impact²³. For this reason, he readily upheld film censorship on the grounds of public morality, decency, and the interests of society. But he declined to consider whether censorship could also be imposed on other forms of expression.

The fact is that a balance has to be struck between freedom and restrictions. Freedom of expression is the lifeline of all the forms of art. Not only that, it's the lifeline of the nation. If that is curbed, then we will be treading dangerous zones. These protests are nothing but expression of oppression.

Freedom of expression constitutes one of the essential foundations of a society. It is one of the basic conditions for its progress and for the development of every man."²⁴ Freedom of expression provides the citizens the right to participate in common life as a supporter and ensures their capacity to contribute for public welfare.

CONCLUSIONS

For overall development of personality, freedom of speech and expression is highly essential.

Freedom of speech is also closely linked to other fundamental freedoms which reflect this portion of what it is to be human, i.e., freedom of religion, thought and conscience. The democratic value of Freedom of speech is the safeguard of democratic government. This freedom is crucial for the proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succor and protection to all other liberties. It has been truly said that it is the mother of all other liberties. In a democracy, freedom of speech and expression opens up channels of free discussion of issues. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. To ensure pluralism, Freedom of speech reflects and reinforces pluralism, ensuring that different types of life are validated and promoting the self-esteem of those who follow a particular lifestyle.

Thus, we can say that freedom of speech enables the discovery of truth, is crucial to the working of a democratic constitution, and is an aspect of human self-satisfaction or autonomy. It is in the speaker's interest in communicating ideas and information and equally in the interest of audience in receiving ideas and information.

REFERENCES

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2. William O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea* (Doubleday, New York, 1956) p. 307; (noting that, unlike the Indian Constitution, the First Amendment does not permit legislative innovations).

(1965) 1 SCR 63. In that case, these directions were formulated as a guide for prosecutors on obscenity in literature. They could also be used, the Chief Justice believed, to assess films.

²³ To illustrate, the Chief Justice helpfully volunteered his own reaction to suggestive content in different media. One could view erotic tableaux in ancient temples or read the Kamasutra, he declared, with relative equanimity. But he would consider abhorrent any documentary on these works that was a practical sex guide.

²⁴ *Handyside v. United Kingdom*, (App 5493/72) ECHR 7 December 1976.

3. P.K. Tripathi, *Free Speech in the Indian Constitution: Background and Prospect*, pp.67 Yale L.J. 384, .391-393 (1957-1958) (discussing the importance of free speech to Gandhi and the Indian national movement).
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19. At oral argument, the government made a dramatic concession. The film would receive a screening certificate without requiring any further edits. The case should have ended there. Instead, at Abbas's request, the Court continued the proceedings to decide whether pre-censorship of films, itself, was constitutional. Justifying this unusual maneuver, the Court explained that film producers required clear guidance on censorship. H.M. Seervai, 1 *Constitutional Law of India* p.792 (N. M. Tripathi, Bombay, 1991) (criticizing this procedure because it resulted in the Court rendering an advisory opinion).
20. The Chief Justice found, with some apparent satisfaction, that even Abbas, the petitioner, supported censorship having written in favour of it.
21. In any case, the Chief Justice wrote, American and British practices on film censorship are not decisive because India's Constitution is different. It allows reasonable restrictions on the free speech.
22. But the Chief Justice complained that these guidelines did not contain anything that would preserve or promote art. To remedy this situation, he announced additional standards for censors to use so that films were not unreasonably edited. These directions were taken from an earlier Hidayatullah opinion in *Ranjit D. Udeshi v. State of Maharashtra*, (1965) 1 SCR 63. In that case, these directions were formulated as a guide for prosecutors on obscenity in literature. They could also be used, the Chief Justice believed, to assess films.
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