

RETHINKING INDIA'S FREE SPEECH GUARANTEE

*Abeer Sharma**

ABSTRACT

It is considered a thing of common sense now that freedom of expression is an important right that any nation considering itself civilized is duty-bound to bestow upon its citizens. It is of no surprise, then, that nearly every democracy in the world has a free speech guarantee of some kind within its supreme law of the land – also known as a Constitution. However, the exact phrasing of the Constitutional Guarantee matters a lot, as governments can legally justify their encroachments upon this fundamental right by relying upon the written letter of the law. One needs only to look at the country of India to see how problematic this can become, considering that nearly every year there arises a huge controversy regarding questionable government practices, whether it be banning the consumption of pornography or arresting people for raising a voice of discontent against the ruling forces.

The following paper critically analyzes the free speech guarantee of the Indian Constitution – Article 19(1)(a). It evaluates the “reasonable restrictions” provided therein and, in the light of contemporary historical events and judicial verdicts, judges whether or not the current formulation of this free speech guarantee fulfills its intended purpose, recommending alterations where deemed necessary.

INTRODUCTION

Strange it is that men should admit the validity of the arguments for free speech but object to their being "pushed to an extreme", not seeing that unless the reasons are good for an extreme case, they are not good for any case.¹

These words by John Stuart Mill still ring true for the modern era, in a century where democracy remains not an exception, but a norm that every civilized society is morally obliged to strive for and achieve (lest it be potentially faced with censure, sanctions or invasion). The importance and advantage of having free

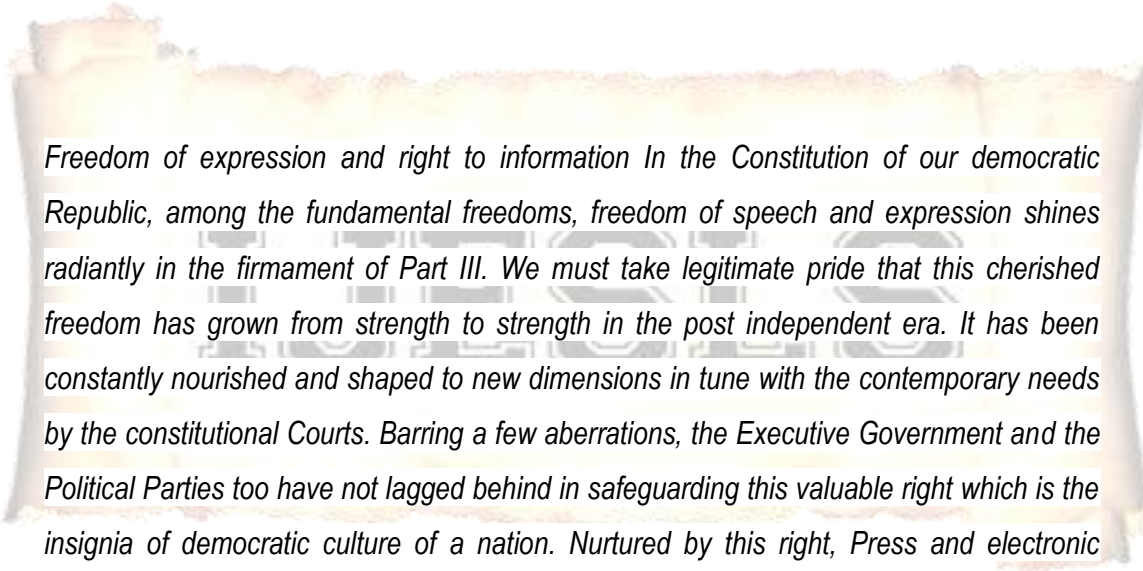
* Graduated from the Campus Law Centre, Delhi University. Now a professional based in Delhi

¹John Stuart Mill, *On Liberty* (1859) Ch. 2, Mill (1985). *On Liberty*. Penguin. pp. p. 108.

speech in a nation has become almost axiomatic, and anyone who disagrees with the notion that a state should actively enforce the rights of its citizenry and its press to express opinions is quickly dismissed as an individual with dangerous, regressive ideas that's completely out of touch with the times.

There's plenty of empirical evidence, too, that lends credence to the idea that freedom of speech must be aggressively safeguarded from encroachment by the state and other dominant groups. A 2012 study analyzing data from 161 countries, for instance, found that a free press is not only correlated to, but may also lead to higher levels of life satisfaction, environmental quality, and human development.²

Freedom of expression is the cornerstone of a democratic republican form of government. To quote Justice P. VenkataramaReddi in **People's Union for Civil Liberties vs. Union of India (2003)**:



Freedom of expression and right to information In the Constitution of our democratic Republic, among the fundamental freedoms, freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post independent era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the constitutional Courts. Barring a few aberrations, the Executive Government and the Political Parties too have not lagged behind in safeguarding this valuable right which is the insignia of democratic culture of a nation. Nurtured by this right, Press and electronic media have emerged as powerful instruments to mould the public opinion and to educate, entertain and enlighten the public. ³

Without the state actively securing a populace's liberty to generate information and exchange discourse, the very notions of political franchise or social change are rendered moot. For this reason most states around the world have been mindful to include some kind of "Free Speech Guarantee" or other in their

²Tandoc, E.C. & Takahashi, B. Soc Indic Res (2013) 113: 537. doi:10.1007/s11205-012-0109-6

³PUCL vs. Union of India &Anr. AIR[2003] SC 2363

constitutions. The very first such provision, which can be said to be the primary inspiration for all those that followed, was the First Amendment of the United States Constitution, which declares:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*⁴

The primary dispute in democracies of the current day is a much more subtle affair. The main question is not so much, "Should the government actively safeguard the right to free speech?" but rather it's more along the lines of, "What are the permissible limits of freedom of expression in a democracy? At what point is the government empowered to step in and silence an individual?"

This following paper will primarily be analyzing the ultimate constitutional foundation of free speech in India {Article 19(1)(a)} together with the "reasonable restrictions clause" {Article 19(2)} and noting what drawbacks and concerns have arisen from the current formulation of this hallowed right, along with highlighting certain matters that are in need of improvement or clarification. It will proceed by isolating each of the "reasonable restrictions" as laid down by Article 19 (2) and examining their nature and implications.

A brief history of the Free Speech guarantee in India

After being victimized by centuries of colonialism, the Indian constituent assembly was faced with the unenviable task of drafting a comprehensive Constitution that would hold the state accountable for its actions and, to quote the Preamble:

"to secure to all its citizens:

⁴U.S. Const. amend. I

JUSTICE, social, economic and political;

LIBERTY of thought , expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.”⁵

It is only natural, then, that the constituent assembly would come to the conclusion that the right and freedom of its citizens to convey their opinions would not be arbitrarily infringed upon by the State, save for specific instances where the resultant harm arising from a misuse of this freedom would need to be curbed.

The original formulation of the free speech clause and its restrictions in the Indian Constitution went as follows:

“19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(a) to freedom of speech and expression;”

“(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.”⁶

This particular formulation of Articles 19(1)(a) and 19(2), however, was a bit problematic for the ruling administration. Time and again the government would try to muzzle politically inconvenient voices, only for courts to step in and strike down such executive actions on the ground that they violated Article 19(1)(a).

⁵ <http://indiacode.nic.in/coiweb/coifiles/preamble.htm>

⁶“On Reasonable Restrictions and the First Amendment.”Indian Constitutional Law and Philosophy. 2016. Accessed August 12, 2016. <https://indconlawphil.wordpress.com/2016/06/27/on-reasonable-restrictions-and-the-first-amendment/>.

In March 1950, the government had tried to pre-censor the RashtriyaSwayamsewakSangh's mouthpiece, The Organizer, but this action had been overruled by the judiciary. The East Punjab Public Safety Act, 1949, under whose provisions the curbs were being applied, was deemed to be unconstitutional and struck down by the Supreme Court.⁷ To be fair, not all executive attempts at censorship had been for political motives. In one instance the government tried to restrict a violent pamphlet from being circulated. This order, however, was quashed by the Patna High Court, wherein one judge on the case stated *"if a person were to go on inciting murder or other cognisable offences either through the press or by word of mouth, he would be free to do so with impunity because he could claim freedom of speech and expression"*⁸

The final nail in the coffin was struck when Cross Roads, a leftist weekly journal in English published by RomeshThapar, was banned by the Madras State for publishing views that were critical of Nehruvian policies. Thapar contested this ban, with the Supreme Court ruling in his favour and declaring the Madras Maintenance of Public Safety Act, under which the ban was implemented, unconstitutional. The Communist Party at the time was intensely critical of the new dominion of India, insisting that this new-found freedom was fake, and in Telangana was directly opposing the army. Thapar, while not officially a member of the party, was seen as a communist sympathizer, and his victory in the Supreme Court had alarmed many in the establishment.

Following this ruling, both Prime Minister Jawaharlal Nehru and Home Minister Sardar Patel believed that this ruling would diminish the control and regulation of the government over the press. Law Minister Dr. B.R. Ambedkar, while less militant in his stance towards free speech than either of the two, regardless agreed with the need for curbs. Despite strong opposition from groups like the Hindu Mahasabha, Nehru managed to get the Constitution (First Amendment) Act, 1951 passed, though not before being forced to soften his stance a little and add the word "reasonable", much to the Home Minister's chagrin.⁹ According to the Statement of Objects and reasons of the First Amendment:

⁷"Why Nehru and Sardar Patel Curbed Freedom of Expression in India." Scroll.in. Accessed August 12, 2016. <http://scroll.in/article/700020/why-nehru-and-sardar-patel-curbed-freedom-of-expression-in-india>.

⁸1951 CriLJ 309

⁹Supra 7.

*"During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom."*¹⁰

The newly amended Article 19(2) was drafted as follows:

*"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."*¹¹

This was not to be the last alteration to the Constitutional scheme regarding the right to free speech, however. Twelve years later, the Constitution (Sixteenth Amendment) Act, 1963 was passed, adding the words "the sovereignty and integrity of India" to Article 19(2).¹²

¹⁰ <http://indiacode.nic.in/coiweb/amend/amend1.htm>

¹¹ Ibid.

¹² <http://indiacode.nic.in/coiweb/amend/amend16.htm>

Article 19(1)(a) – Is it comprehensive enough?

It must be noted that the provisions of Article 19 apply only to *citizens* and not all *persons*. This can be witnessed in contrast to Articles 21 and 22, which specify all *persons* as having the right to life and liberty or protection from arbitrary arrest and detention respectively. The necessary implication of such a formulation is that foreigners and corporations – which don't fall under the scope of the word "citizen" – can be freely muzzled by the executive with impunity.

In my view, such a constitutional limitation is quite undesirable for society, for just because someone is not a citizen should not mean that his right to express himself should not be secured. In fact, allowing a multitude of ideas to freely proliferate can only be ultimately beneficial for all stakeholders involved, as the resultant discourse increases the pool of intellectual diversity in a country. We must also begin to realize that the ability to express oneself is part and parcel of human existence, and putting arbitrary curtailments upon it based on someone's citizenship is cruel and unusual.

This same position has been proclaimed by the United States Supreme Court, which in one case has held:

*"The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority."*¹³

¹³Kwong Hai Chew v. Colding 344 U.S. 590 (1953)

It is even more important that the right of juridical persons to express themselves also be constitutionally secured. It does not make sense that a group of natural persons are not entitled to a right that individual natural persons are entitled to. In fact, in many instances, individuals tend to come together form a juridical person in order to further some important socio-political purpose – such as in the cases of NGOs or political parties. To protect their ability to express themselves in such cases becomes all the more necessary. In fact, more often than not, to effectively express himself, an individual may need to resort to the aid of an institution or group to communicate to a large enough audience. This same view has been taken by the Law Commission of India, which proposed an amendment to Article 19 in its 101st Report, stating:

“4.1 It does not need much elaboration to show that if right of freedom of speech and expression is to be effectively enjoyed, it should be available to corporations, institutions and other entities which are not natural persons. The present position limiting this freedom to natural persons has the effect of excluding a pretty large number of entities through whom the natural persons operate. These entities are (...) as much in need of a constitutional protection for the freedom of speech and expression as natural persons. Not to recognize this is, if we may say so, to disregard realities.”¹⁴

Reasonable Restrictions – Are they all necessarily reasonable?

Decency and morality

Speech is not limited to public speaking. It also extends to non-verbal modes of communication and behaviours, such as the way one dresses. The toil of governments to suppress “immorality” is as old as civilization itself. States have always had some strange attraction towards forcing their citizens to ascribe to some majoritarian notion of “decency,” – often on pain of death. Laws governing morality or decency are more often than not a device to enforce the ideals and values of dominant groups on the subjugated ones, a symptom of the idea that only one way to live life can be acceptable. By and large, societies evolve morality laws to penalize activities the dominant stakeholders find personally offensive, and they prefer to punish the culprits, rather than take the (for some reason) more difficult route of ignoring the concerned act. Every now and then proponents of such laws try to justify the latter’s existence by using the age-old “Think

¹⁴ <http://lawcommissionofindia.nic.in/101-169/Report101.pdf>

of the children!" argument. For instance, proponents of laws criminalizing homosexuality insist that public demonstrations of homosexual behavior will turn children gay, even though this has routinely been debunked by various psychological studies.¹⁵

Controls on speech due to decency and morality are pervasive throughout India's legal and administrative system. The Central Board of Film Certification (CBFC) is the statutory classification and censorship body, tasked with regulating the public exhibition of films under the provisions of the Cinematograph Act 1952.¹⁶ Instead of confining itself to rating movies, however, it routinely assumes to itself a ridiculously paternalistic mandate and refuses to pass films for public exhibition unless certain scenes it takes issue with are removed from said films. More often than not, these are extremely petty and ridiculous cuts intended to remove "obscene" and "objectionable" content, regularly making the CBFC the butt of ridicule and outrage. For instance, the 2015 James Bond film, Spectre, wasn't passed until the distributors agreed to edit and shorten a kissing scene because it was "too long."¹⁷

There is some hope for change, however. In a recent judgement regarding a dispute between the CBFC and the makers of the Bollywood film Udta Punjab, wherein the CBFC ordered an absurd amount of cuts (allegedly due to political motivations, as the Punjab Assembly elections were coming up and the film was viewed as damaging to the state ruling party, which was allied to the Centre¹⁸), the Bombay High Court announced that the job of the CBFC is to certify and not censor films.¹⁹ Unfortunately, this verdict doesn't seem to have changed the conduct of the CBFC, as only a few weeks later it refused to certify a film regarding the subject of homosexuality for "insulting Hinduism."²⁰

¹⁵Foley, Katherine Ellen. "The Science Is Clear: Children Raised by Same-sex Parents Are at No Disadvantage." Quartz. 2015. Accessed August 12, 2016. <http://qz.com/438469/the-science-is-clear-children-raised-by-same-sex-parents-are-at-no-disadvantage/>.

¹⁶ <http://cbfcindia.gov.in/>

¹⁷Perera, Ayeshea. "'Sanskari' James Bond: Indians Ridicule Cuts to Spectre Kisses." BBC News. Accessed August 12, 2016. <http://www.bbc.com/news/world-asia-india-34865129>.

¹⁸"Remove References to Punjab, CBFC Tells 'Udta Punjab' Makers." The Indian Express. 2016. Accessed August 12, 2016. <http://indianexpress.com/article/entertainment/bollywood/udta-punjab-controversy-cbfc-tells-makers-remove-references-to-punjab-2838039/>

¹⁹"'Your Job to Certify, Not Censor': Bombay HC Pulls up CBFC in 'Udta Punjab' Hearing - Firstpost." Firstpost Your Job to Certify Not Censor Bombay HC Pulls up CBFC in Udta Punjab Hearing Comments. 2016. Accessed August 12, 2016. <http://www.firstpost.com/bollywood/your-job-to-certify-not-censor-bombay-hc-pulls-up-cbfc-in-udta-punjab-hearing-2826752.html>.

²⁰Jyoti, Dhruvo. "LGBT Film in Kerala Refused Certification for 'insulting' Hinduism." <http://www.hindustantimes.com/>. Accessed August 12, 2016. <http://www.hindustantimes.com/regional-movies/lgbt-film-in-kerala-refused-certification-for-insulting-hinduism/story-Zh72uaTDpfAUXvWSZC5bIM.html>.

The publication, distribution and production of pornography is illegal in India²¹ despite the fact that in KamleshVaswani vs. Union of India, Chief Justice H.L. Dattu rightly observed that prosecuting an adult watching pornography in private is a violation of the Right to Life and Liberty as guaranteed by Article 21 of the Indian Constitution.²² There is immense value in keeping child pornography illegal, but the reasoning behind this should be that consumption of such articles contributes directly to the victimization of children, rather than on the basis of obscenity.

Plenty of times S. 294 of the IPC, which makes “obscene acts” illegal but doesn’t comprehensively define what an “obscene act” is, has been misused by authorities to harass innocent youths for kissing each other or dancing together.²³

The test used by the Indian judiciary to determine what is obscene and what isn’t is known as the “community standards test,” which was adopted by the Supreme Court in AveekSarkar vs. State of West Bengal:

“A picture of a nude/seminude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind (sic) and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.” (Paragraph 24)²⁴

²¹Rajak, Brajesh (2011) [2011]. *Pornography Laws: XXX Must not be Tolerated* (Paperback ed.). Delhi: Universal Law Co. p. 61.

²²“Can’t Stop an Adult from Watching Porn in His Room, Says SC.” *The Hindu*. 2015. Accessed August 12, 2016. <http://www.thehindu.com/news/national/cant-stop-an-adult-from-watching-porn-in-his-room-says-sc/article7400690.ece>.

²³“Loopholes in IPC Drive Moral Police - Times of India.” *The Times of India*. Accessed August 12, 2016. <http://timesofindia.indiatimes.com/india/Loopholes-in-IPC-drive-moral-police/articleshow/1341192.cms>.

²⁴*AveekSarkar v State of West Bengal* (2014) 4 SCC 257

However, even applying the community standards test becomes problematic, for the question invariably arises: "Which average person and which community's standards?"

India as a country is known for its immense cultural diversity, and trying to conceptualize uniform standards to apply outside of homogeneous rural areas is a nigh impossible task. The entire test becomes close to worthless when one tries to apply it to a case in metropolitan cities, where every neighbourhood will tend to have different "community standards."

There is no intrinsic value in criminalizing and penalizing obscenity. A civilized state is one which is not overly paternalistic and doesn't enforce strict moral values for its populace to live by. Especially in a globalizing world, where with pervading influences from other countries, increasing immigration, and a free international exchange of media it becomes difficult to insist that any particular moral system is the right one. Certain acts that should remain criminalized and are currently covered by laws concerning obscenity may still remain so without us needing to resort to legally calling them obscene. For instance, laws dealing with verbal sexual harassment and eve-teasing may still remain with the justification that they are targeted provocative psychological attacks on individuals. What is of utmost importance is that there should be a demonstrable direct harm arising to another individual because of certain speech. Putting blanket bans on obscenity is throwing the baby out with the bathwater, and therefore this provision should be deleted.

Friendly relations with foreign states

This restriction is by far the most ludicrous of them all, for it shifts the burden of maintaining friendly relations with foreign states upon each individual citizen. Such a limitation goes stark in contrast with the ideals of any rational state that seeks to cultivate healthy debate and dialogue amongst its citizenry. With regards to a country like India, which is so diverse that different cultural and ethnic groups will naturally have different attitudes regarding foreign states, such a restriction is an unjustified overreach. An example of how such a stipulation can be abused was seen in 2011, when the Central Board for Film Certification refused to clear the Bollywood film Rockstar because it featured banners with the words "Free Tibet!" in one song sequence. Eventually, the banners were blotted out despite opposition from the director and

protests from the Tibetan diaspora in several Indian cities.²⁵ Allowing such an encroachment by the State upon people's opinions goes starkly in conflict with all the ideals a free speech guarantee tries to enshrine. It sends out the message that individuals cannot freely criticize the policies and actions of foreign governments, even if such actions are grave human rights violations, such as is the case with the Chinese occupation of Tibet. Such a limitation on freedom of speech is undesirable, and this provision should be deleted.

Sovereignty and integrity of India

Unlike the other restrictions, which were introduced in the Constitution (First Amendment) Act, 1951, this restriction was introduced by the Constitution (Sixteenth Amendment) Act, 1963. Its primary motivation was to curb Tamil Separatism, as until then the Dravida Munnetra Kazhagam had the secession of south India as one of the prominent items on its agenda, which it then had to drop after the amendment.²⁶

This limitation is flawed to the extent that it deifies the idea of the nation-state beyond all reproach or criticism. It holds that the sovereignty and integrity of a political construct is more important than the feelings and values of the people residing within it. Any state that feels the need to curtail opinions or statements that attack some vague, subjective notion of its "integrity" is a flimsy state; one that has lost any justification to ethically validate its own existence. A progressive administration must realize that the needs of a political entity cannot overwhelm the desires of its citizens – indeed, it is of utmost need that we come to realize that a nation is made up of its people more than its borders. For instances of abuse of such a rule, one need not look any further than Section 124-A of the IPC, which states:

²⁵ "Tibetans Protest Removal of McLeodganj Scene with Tibetan Flags from Film - Times of India." The Times of India. November 8, 2011. Accessed August 09, 2016. <http://timesofindia.indiatimes.com/india/Tibetans-protest-removal-of-McLeodganj-scene-with-Tibetan-flags-from-film/articleshow/10650563.cms>.

²⁶ Supra 7

*[124A. Sedition.—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards,¹⁰² [***] the Government established by law in¹⁰³ [India], [***] shall be punished with¹⁰⁴ [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*

This law has been misused a great many times by the state to silence voices critical of the administration or its policies. Most recently, the BJP-ruled Centre sparked nationwide protests and international censure after it clamped down on Jawaharlal Nehru University, arresting and booking several students under the sedition law for protesting against the hanging of Afzal Guru and supporting Kashmir's right to self-determination.²⁷A few months later, a Kashmiri youth was arrested under the same provision for liking and sharing certain posts on Facebook that were considered "Anti-Indian".²⁸This constitutionally bestowed restraint too, should be deleted.

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Security of the State

Insofar as this constitutional limitation seeks to prevent people from leaking state secrets and strategic information (such as banking passwords, defense plans, etc), there is no need to remove or change it, for anything that unnecessarily and directly infringes upon the life of liberty of other citizens cannot be constitutionally protected. That being said, there is some need for stronger whistleblower protection laws in the country. Oftentimes whistleblowers have to divulge certain secrets to achieve a social good, and they shouldn't be punished merely because in the process of furthering that good they potentially compromised

²⁷Jha, Prem Shankar. "Something Extraordinary Is Going on in This Country' - The Wire." The Wire. 2016. Accessed August 09, 2016. <http://thewire.in/22822/something-extraordinary-is-going-on-in-this-country/>.

²⁸"Kashmiri Youth Arrested for Anti-National Facebook Posts." The Wire. 2016. Accessed August 09, 2016. <http://thewire.in/56643/kashmiri-youth-arrested-for-anti-national-facebook-posts/>.

with the security of the state. Taking cognizance of the fact that India lags considerably behind the world in terms of whistleblower protection, the Supreme Court itself has directed the Centre to set up an administrative mechanism that will safeguard whistleblowers.²⁹

Incitement to an offence

On the face of it, this restriction does seem reasonable. The basis of a free speech clause is to protect unpopular speech of the masses from being punished by an oppressive state; this does not imply the right to freely goad and coax people into committing offences. However, the Constitutional clause is in need of an explicit clarification in terms of the word "incitement." Supporting or advocating an offence, for example, cannot fall under the same category as an incitement. This same view was taken by the Supreme Court in **ShreyaSinghal vs. Union of India** wherein Justice Nariman observed:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between

²⁹"Set up System to Protect Whistleblowers: SC to Government - Times of India." The Times of India. Accessed August 12, 2016. <http://timesofindia.indiatimes.com/india/Set-up-system-to-protect-whistleblowers-SC-to-government/articleshow/50475061.cms>.

preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.”³⁰

Defamation

The Constitution provides for reasonable restrictions on free speech to prevent defamation. Defamation is nowhere defined in the Indian Constitution, and one must look towards the Indian Penal Code which gives a comprehensive definition:

499. Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of

³⁰ ShreyaSinghal v Union of India, AIR 2015 SC 1523, Supreme Court of India.

*that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.*³¹

The aforementioned section also goes on to provide several illustrations of what comprises defamatory speech, and more importantly, exceptions:

First Exception.—Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—Public conduct of public servants.—It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further. Illustration It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending a such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharges of the duties of which the public is interested.

Fourth Exception.—Publication of reports of proceedings of Courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings. Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

³¹Section 499, Indian Penal Code, 1860

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further. ³²

The thorough definition of defamation along with the exceptions seem quite reasonable, for nobody can claim the license to spread falsehoods and lies about people and claim to be protected by the free speech guarantee. People have a right to their reputation, and attempts to damage this reputation by malicious deceit should be strongly condemned and repelled. This restriction, therefore, can be considered reasonable.

Contempt of Court

The term “contempt of Court” has not been explicitly defined or clarified anywhere in the Indian Constitution. The definition must be looked up in Section 2 of the Contempt of Courts Act, 1971:

In this Act, unless the context otherwise requires –

(a) “Contempt of court” means civil contempt or criminal contempt”

(b) “Civil contempt” means willful disobedience to any judgement, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court.

(c) “Criminal contempt” means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-

³² ibid

(i) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or

(ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding , or

(iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

There stands little to dispute in the claim that there is nothing objectionable in the definition of civil contempt. Indeed, if people were allowed to flout orders and decrees of the court freely and with impunity, there would be no reason for a judicial system to exist at all. However, certain issues do seem to creep up when it comes to the definition of criminal contempt of court. The way certain words in the legislation have been used (i.e. “scandalize,” “lower the authority” etc.) are very broad and susceptible to abuse.

A clarification was issued in **Perspective Publications vs. State Of Maharashtra**, which clarified the position on the law and specified in which cases contempt would not be made out:

“21. It is open to anyone to express fair, reasonable and legitimate criticisms of any act of conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because ‘justice is not a cloistered virtue and she must be allowed to suffer scrutiny and respectful, even though outspoken, comments of ordinary men.

22. A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as contempt.

23. Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjee, J. ‘the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in

the minds of the people regarding the integrity, ability, or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.”³³

The irony in this judgement is however, that the Editor and Publisher who were being tried for contempt were still found guilty because their newspaper contained insinuations that a recent judgment delivered by one of the Judges was influenced by the fact that said Judge's brother was paid a loan of Rs 10 lakh by one of the interested parties to the case.³⁴

In another famous case, Chief Justice A.M. Bhattacharjee of the Bombay High Court went under the spotlight for receiving unjustifiably high payments for a book he had written, raising concerns that it was attached to shady dealings. A group of bar associations and bar councils came together in outrage to publicly demand his impeachment. Although due to pressure Justice Bhattacharjee ended up resigning, the concerned lawyers' groups were held guilty of contempt³⁵

The underlying problem with the contempt law that these two cases reveal is that it reveals that even criticisms of extreme misbehavior of judges can be considered contemptuous if they tend to lower some subjective notion of the “dignity of the court.” Such a law is unacceptable, for while no doubt the judicial structure aims to attain high ideals, the stark reality is that it fails at achieving those ideals quite regularly, and sometimes certain processes and decisions of the courts do deserve to be condemned with the harshest words possible.

For instance, in the case Tukaram vs. The State of Maharashtra, a bench of the Supreme Court reversed a Bombay High Court ruling that found two policemen guilty of intimidating and raping a teenage girl, based on the ground that she didn't cry out or struggle, and that there were no visible marks on her body. Publicly casting aspersions on the morality or mental capacity of the Supreme Court judges and demanding their

³³ Perspective Publications vs. State Of Maharashtra 1971 AIR SC 221

³⁴ Ibid.

³⁵ C. RavichandranIyervs Justice A.M. Bhattacharjee&Ors 1995 SCC (5) 457, JT 1995 (6) 339

impeachment would easily invite a contempt charge, even though any reasonable educated person would've considered this an extreme miscarriage of justice.³⁶

While no doubt the judiciary is one of the most important pillars of democracy and judges fulfill an extremely crucial role, coercing people to respect them with the threat of criminal prosecution is tyrannical. The judiciary must always actively work to deserve its respect, rather than demand it.

Similarly, allowing judges broad powers to charge media houses reporting on ongoing trials or issues with contempt is also unnecessary. Such a limitation actually belittles the capability and authority of a judge by implying that he can easily be swayed by sensationalist media. If a judge truly feels like he can't block out public discourse on a trial, perhaps he is simply not fit to be a judge. Bestowing broad powers of censorship upon judges is no better than allowing legislatures to routinely censor speech they dislike.

There is still some value in having contempt proceedings against reporting agencies that intentionally misrepresent facts or make irresponsible assumptions regarding ongoing legal trials, for such activities are malicious and fraudulent.

With this in mind, while there is no need to remove the "contempt of courts" clause from Article 19(2), the prevailing definition of "contempt of courts" should ideally be amended and its scope considerably reduced.

Public Order

"Public Order" is a term of art and has been judicially defined by the Supreme Court in **RomeshThaparvs State of Madras:**

Now "public order" is an expression of wide connotation and signifies that state of tranquility which prevails among the members of a political society as a result of the internal regulations enforced by the government which they have established.

³⁶*Tuka Ram And Others vs State Of Maharashtra* on 15 September 1979, Supreme Court of India (AIR 1979 SC 185

It can thus be seen that the ability to suppress free speech on the basis of public order is a wide net designed to prevent people from upsetting others to the extent that they start rioting. It must be emphasized that there is a subtle difference between restricting speech on the basis of “public order” and doing the same to muzzle “incitement to an offence.” The latter involves a clear-cut instigation from the speakers to others to commit offences. The former comprises of communication that might be considered objectionable by the listeners/recipients.

To view a good example of exactly how absurd such a restriction is, one need not look any further than the Indian blasphemy law (Section 295A of the Indian Penal Code):

295A. Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.—Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of²⁷³ [citizens of India],²⁷⁴ [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to 4[three years], or with fine, or with both.³⁷

This provision has been used innumerable times to censor and punish artists and performers who were merely exercising their talent. The legendary artist M.F. Hussain, for example, was booked under this section multiple times for paintings that featured hindu goddesses in the nude.³⁸It is a sign of sheer backwardness to penalize words or gestures that insult the fairy tales that other people subscribe to, not to mention that the existence of such laws actively undermines one of the constitutional fundamental duties as provided by Article 51A: “(h) to develop the scientific temper, humanism and the spirit of inquiry and reform”³⁹

³⁷Section 295A, Indian Penal Code, 1860

³⁸Jain, Madhu. "M.F. Husains 20-year-old Painting of Nude Deity Raises Questions about Artistic Freedom." M.F. Husain's 20-year-old Painting of Nude Deity Raises Questions about Artistic Freedom : SOCIETY & THE ARTS. Accessed August 12, 2016. <http://indiatoday.intoday.in/story/m-f-husain-20-year-old-painting-of-nude-deity-raises-questions-about-artistic-freedom/1/282509.html>.

³⁹Article 51A(h) Constitution of India

In **Anil Bhatia vs NCT**, at issue was the scope and extent of the Delhi Defacement of Property Act, which empowered the State to prohibit private individuals from putting up political posters upon their private property without prior permission of the municipal authorities. The petitioners argued that in light of Article 19(1)(a) of the Constitution, the Defacement Act could not apply to the act of them putting up posters on the walls of their own homes, and hence the legislation was unconstitutional to this extent. Even though the Court ultimately held that the regulation of posters on private property must be only on content-neutral grounds -and to that extent the judgement was fine - it also held:

"We are of the opinion that once unregulated putting up of posters /banners / hoardings even if on one's own property, is a public nuisance, a law regulating the same would be a law „in the interest of “public order within the meaning of Article 19(2). Just like requirement of taking permission for dharnas/rallies/processions has been held to be not unreasonable, similarly the requirement of taking permission for putting up posters / banners / hoardings even on one's own property but visible to others and affecting the view of and becoming an eyesore for others, cannot be said to be unreasonable.

"We cannot also be unmindful of the realities of today's life in the city as Delhi, where residents are on short fuse and altercations on issues, earlier treated as trivial, like parking, traffic accidents, often turn fatal. The possibility of unregulated political posters becoming a similar cause, cannot be ruled out.⁴⁰

It is time we started holding people accountable for their own actions rather than allowing them to easily shift the blame on others because they chose to feel outraged. Simply calling a nation diverse and using this diversity to silence people's opinions and cater to the whims and fancies of fascists and bellyachers is inexcusable. A state is supposed to inculcate values of responsibility in its citizens rather than allowing them to hold others hostage to their puerile emotions.

⁴⁰Anil Bhatia &Ors.vs Govt. Of NctOf Delhi &Ors.

Conclusion

The Cambridge Dictionary defines “Constitution” as: *the set of political principles by which a state or organization is governed, especially in relation to the rights of the people it governs.*⁴¹ This definition reveals the essence of constitutions – That they’re supposed to be the normative foundations that guide a nation forward. It becomes important, then, that we ensure that our constitution fulfills its stated purpose, that it becomes a gold standard of ethical conduct for the state and its various tools. A truly free state is one that allows its populace to flourish, to celebrate its artistic pursuits and continuously question established norms in order to progress and advance. All of this cannot happen adequately with the current attitude of the state and the legislative machinery which is decidedly anti-free speech.

This is not a case for having absolutely free speech with no limits whatsoever; no right can be absolute because such a formulation will simply tear apart the very fabric of cooperation that a society is built upon. If there need to be restrictions on speech, they must always be framed after examining whether or not the speech complained against leads to a direct, tangible harm to any individual or group of individuals. What we see now is that it’s all too easy for the government to forcibly silence someone on the ground that what they’re saying is “hurtful” or “offensive” or “anti-national” without making out a reasonable justification as to why it couldn’t just have ignored the offending speech instead. Much of this power comes from the Indian Constitution, which is the supreme law of the land. Therefore, Article 19(1)(a) and Article 19(2) should be suitably amended to be truly protective of the right of people to express themselves.

⁴¹"constitution" Cambridge Dictionary 2016. <http://dictionary.cambridge.org/dictionary/english/constitution> (13th August 2016)