CHILLING EFFECTS ON FREEDOM OF SPEECH AND EXPRESSION

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Content

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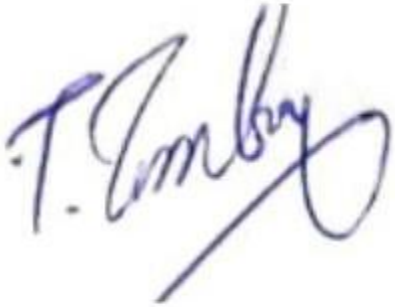
CERTIFICATE

This is to certify that DEBASMITA ACHARJEE has completed his/her dissertation titled "THE CHILLING EFFECTS ON FREEDOM OF SPEECH AND EXPRESSION" under my supervision for the award of the degree of ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.



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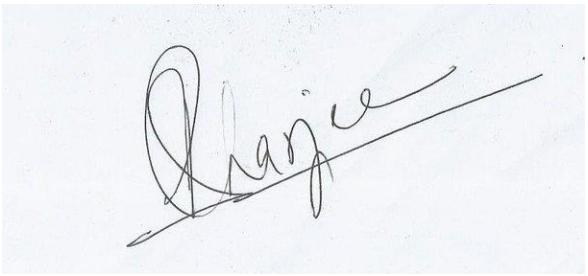
DECLARATION

I, DEBASMITA ACHARJEE, do hereby declare that the dissertation titled "CHILLING EFFECTS ON FREEDOM OF SPEECH AND EXPRESSION" submitted by me for the award of the degree of ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.



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List of Cases

1. A.K. Gopalan v. State of Madras.
2. Anuradha Bhasin v UoI
3. Babul Parate v. State of Maharashtra
4. Balwant Singh v. State of Punjab
5. Bennet Coleman & Co. v Union of India
6. Brij Bhushan v and Anr v State of Delhi
7. Chintaman Rao v State of Madhya Pradesh
8. Collector of Customs v. Sampathu Chettty
9. Express Newspapers v. Union of India
10. Kanhaiya Kumar v State of NCT, Delhi
11. Kasturi Lal v. State of Jammu & Kashmir
12. Kedar Nath v State of Bihar
13. L.R. Frey v. R. Prasad
14. M.S.M Sharma v. Sri Krishna Sinha
15. Niharendu Dutt Majumdar v King
16. Ramji Lal Modi v. State of U.P
17. Ram Nandan v State of Uttar Pradesh
18. Ranjit Udeshi v. State of Maharashtra
19. Re: Prashant Bhushan and Anr
20. Rex v. Basudev
21. Romesh Thappar v. State of Madras
22. Safdar Hashmi Memorial Trust v. Government of NCT of Delhi
23. Sakal Papers (P) Ltd. v. Union of India
24. Sanskar Marathe v State of Maharashatra and Ors
25. Shiv Kumar Mishra v. State of Uttar Pradesh
26. State (Delhi Admn) v Shrikant Shastri
27. State of Bihar v. Shailabala Devi
28. State of Madras v V.G Row
29. State of Uttar Pradesh v. Lalai Singh Yadav
30. Subramanian Swamy v. Union of India

31. Supdt., Central Prison v. Ram Manohar Lohia
32. Tara Singh Gopi Chand v. The State
33. Virendra v. State of Punjab

INTERNATIONAL PROUNCEMENTS

1. Bethel School Dist No 403 v Frazer
2. Brandenburg v Ohio
3. Cohen v California
4. Handyside v U.K
5. Hustler Magazine Inc v Falwell
6. Kusherbaev v. Kazakhstan
7. Marques de Morais v. Angola
8. Mavlonov v Uzbekistan
9. New York Times Co v Sullivan
10. R.A.V v St Paul
11. Ross v. Canada
12. Shenck v U.S
13. Village of Skokie v Nationalist Socialist Party of America
14. Virginia v Black
15. Özgür Gündem v. Turkey

List of Statutes

Indian Laws

INDIAN PENAL CODE, 1860

CONSTITUTION OF INDIA

CONTEMPT OF COURTS ACT, 1971

International Instruments

UDHR 1948

ECHR, 1950

ICCPR, 1966

ACHR, 1969

ACHPR, 1987

List of Abbreviations

&- And

ACHPR- African Charter on Human and Peoples' Rights

ACHR- American Convention of Human Rights

Art- Article

CoC- Contempt of Court

COI- Constitution of India

ECHR- European Convention on Human Rights

ECtHR- European Court of Human Rights

EU- European Union

FA- First Amendment

FR- Fundamental Rights

FR21- Freedom Report 2021

FOP- Freedom of Press

FOSE- Freedom of Speech and Expression

HC- High Court

HR- Human Rights

HRC- Human Rights Commission

IAtCHR- Inter-American Court of Human Rights

ICCPR- International Code of Civil and Political Rights

IPC- Indian Penal code

SC- Supreme Court

UDHR- Universal Declaration of Human Rights

UK- United Kingdom

UN- United Nations

CH 1- INTRODUCTION

1.1 Introductory Note

The freedom of speech is under attack[1]and the current situation has caused an increased threat to the whole system. The increased tension in the states has allowed the government to use it as an opportunity to justify violence rather than taking measures to solve the trauma[2]. Freedom of speech and expression is one of the most cherished of all freedoms ever bestowed to mankind. No state can call itself a democracy if there is an unlawful or illegitimate denial of this freedom. Liberty of free speech is man's greatest reason that has caused him to take out marches and protests.

With developments in technology and the emergence of social media, freelance journalism and awareness, the concept of free speech is taking new turns every single day. What and what ought not to be the restrictions on this freedom is a debate has changing facets ever since old times.

This freedom was not won at once. The state started being more threatened about people expressing different opinions that new restrictions started emerging. Also, it is a universally accepted idea that man is supposed to live in a way which does not hurt his fellow beings. But, a lot of times, it is the intolerance of man that causes a huge gap in the exercise of this freedom[3]. Therefore, we like to understand that we have the right to

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[1] Amal Cloony and Philippa Web, "The right to Insult in International Law", (2017) 48(2), Columbia Human Rights Law Review

[2] "Covid19 Triggers Wave of Free Speech Abuse" (Feb 11, 2021) available at https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse accessed 10 July, 2021

[3] *L Rghumani Singh vs District Magistrate, Imphal West, District, Manipur* is the recent case where a Manipuri activist was arrested under provisions of the National Security Act, 1980 for a post in his facebook that criticized the Bhartiya Janta Party for advocating cow dung and cow urine as cures for Covid19. See Debayan Roy, "Father of Manipur activist moves SC; claims son under preventive detention for criticising BJP leaders advocating Cow dung as COVID cure" (28 June, 2021), Bar & Bench available at https://www.barandbench.com/news/litigation/father-manipur-activist-erendro-leichombam-preventive-detention-bjp-leaders-cow-dung-covid accessed 19th July, 2021.
The court on 19th July stated ordered the release of Manipuri activist. A Bench of Justices DY Chandrachud and MR Shah said that the person cannot be kept in jail even for a day for such an act. It was also stated that any further detention would violate his right to life and liberty enshrined under Art 21 of the Indian Constitution. See "Supreme Court Orders Release of Manipur Activist Held Over Facebook Post", *The Hindu*, (19th July, 2021), available

speak but others don't have the right to speak against us. The effect of this freedom on our daily use has caused a lot of abuse already and I belief that it is safe to state that the effect of free speech in our day to day life has caused a lot of riots too. India is a land of a thousand believes and ten thousand thoughts, emerging out from young minds, experienced souls and tragic incidents. The streets of our country have witnessed not just the marches for freedom but the youth being beaten up for voicing their opinion. The prisons did not just see people wishing to break the shackles of a foreign rule but also the Indian youth, seeking freedom from the government to criticize the government. recent times have seen how various journalists and authors, professors and activists had to face the restrictions on their freedom because they tried to state something that had the capacity to scare the authorities. You see, pen is mightier than words!

The researcher in this paper tries to examine the freedom of speech and expression, not only as a fundamental right but also as a human right accepted by most democratic nations. The researcher analyses the various international bodies and their roles in protecting this freedom and how the freedom of speech has been protected under the Indian Constitution. The researcher also gives example of various court pronouncements to justify that this freedom is of an exceptional importance in the Indian democracy. Next, the researcher tries to answer the condition of media and press in and around the world and the importance of free press that has the ability to question the government, which keeps the administration in its place and helps form an informative decision in electoral process. The researcher then goes on to understand the concept of hate speech and the war with free speech and examines the law of sedition. Finally, the researcher gives a minor attempt to understand if there is a right to offend under the right to free speech, and it must be kept in mind that the right to offend is not insult laws that are present in most countries but is the grey area of speech that does not have any capacity to cause any imminent lawless action but has the slight character to hurt an individual.

Freedom of speech is the most cherished freedom and if, a law unjustifiably denies this right, then that law must be questioned. And if the State makes any such law for sheer benefit of power that Government must definitely be questioned.

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https://www.thehindu.com/news/national/supreme-court-orders-release-of-manipur-activist-held-over-facebook-posts/article35403402.ece accessed 19 July, 2021.

1.2 Statement of Problem

A law achieves its objective when it is used in a way which only benefits the society. However, when a law is misused or abused with the intention to shut another person's opinion only because we disagree to the same, it creates tension. Though the freedom of speech and expression is protected in the constitution and is an accepted human right which is very important for any democracy, it comes with certain restriction. However, these restrictions are only meant to check the abuse of this freedom. But recently, these restrictions are used by the state and political leaders to suppress the opinions of the mass, creating a visible division of ideological groups. Though the domestic and international courts have come up with various instances to protect this fundament mental freedom, we as a country have to walk a long way in accepting and implementing this. There are no sufficient protection given to the journalists in carrying their work, tools of sedition and various other laws under the Unlawful Activities Prevention Act and the National Security Act are used in various instances to stop people from gathering and protesting or criticizing the steps of the government. There are still proper measure that the legislature should take to protect this freedom.

1.3 Aims and Objectives

The aim of this dissertation is to analyse the factors contributing to the protection of the freedom of speech and expression, the restrictions that are lawfully necessary in the exercise of this freedom and to examine the abuses on this freedom by the State and other parties.

To achieve these objectives, the researcher has endeavored the following objectives:

- Understand the Freedom of Speech and Expression as protected under the constitution and various other international instruments.

- Learn about the restrictions on the absolute freedom of speech and understand the situations when such restrictions can be posed with the help of various judicial pronouncements.
- Analyse the situations regarding the abuse of the Freedom
- Examine the position of press freedom in India and explain its defects through other international court judgments.
- Analyze the meaning of hate speech and the various provisions that are considered to be hate speech under the Indian System
- Examine the sedition law in our country and if the law is placed properly and determine the necessity of the draconian law in the current times.
- Analyze if there is a right to offend and whether it falls within the scope of the right to speech.

1.4 Scope and Limitations

The research is an extensive study on the developments in the freedom of speech and expression and how its restrictions make a bargain by taking away the same freedom. There have been several steps taken by international bodies and the judiciary but the problem still remains in the exercise of this freedom. The researcher gives emphasis on recent incidents that have taken place and attains a liberal approach in determining the heart wrenching abuse of this right.

The major limitation that the researcher faced was due to the global pandemic that has hit us, leading to lack of availability of resources.

1.5 Research Questions

For the purpose of the scope of this dissertation and attaining the research objectives, the researcher has formulated the following RQs :

- How is the Freedom of Speech Protected under law and what are the reasonable restrictions?
- What is the position of India with respect to civil liberty and freedom of expression?
- Is there a free press in our country when compared to the position of other nations?
- What is hate speech and what is included in hate speech?

- How is the state abusing the freedom of speech and expression through security laws like sedition? Is sedition important even after 70 years of independence?
- Do we have the right to offend protected under the freedom of speech? Should steps be taken by the judiciary in support of the right to offend?

1.6 Research Methods

In writing this dissertation, the researcher has used doctrinal method to analyse the scope of the freedom of speech and expression and its protection under various bodies and examine the reasonable restrictions under this freedom.

The researcher has relied on different international pronouncements and instruments to explain the legal approach of the right and has used various recent incidents as reported in national and international news channels to substantiate her arguments.

1.7 Source of Data

The researcher has utilized both primary and secondary sources in writing this dissertation.

The Primary Sources include international instruments, national legislations and various judicial pronouncements.

The Secondary Sources include books, articles published in journals, magazines and news reports and other internet sources.

1.8 Mode of Citation

A uniform mode of citation is used throughout the dissertation. The Oscola (4th Ed) has been used as the method of citation in this dissertation.

1.9 Chapter Summary

Chapter 1 Introduction

The chapter includes a brief background to the topic of dissertation and explains the research objectives, questions and research method used. It provides a structure to the rest of the dissertation.

Chapter 2 Freedom of Speech and Expression and Civil Liberty

This chapter performs to explain the protection of the right in various bodies, position of the freedom in the Indian context and connects it with civil liberty with the help of the Freedom Report of 2021.

Chapter 3 Media: An Exceptional aspect of Free Speech

This chapter analyses freedom of press around the globe and the position in India.

Chapter 4: Hate Speech: A bluff on Freedom

This chapter talks about the major concern of freedom of speech in India- hate speech. It tries to explain the definition of hate speech and understand what all it includes through various judicial pronouncements and ultimately addresses the issue of the sedition law in our country.

Chapter 5: Conclusion & Suggestions

This chapter tries to analyze what is the right to offend and if it should fall within the freedom of speech. It also brings out a conclusion on the whole dissertations and the suggestions that can be taken up for the stronger protection of this freedom

CHAPTER 2- Freedom and Liberty_The Dos and Don'ts

"*If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind"*

_John Stuart Mill[4]

Imagine a state of absolute peace- no protests, no demands and no regrets from the political angles. Ideal? Also, hard to achieve. The role played by the civil liberty movements is vast and immense in development of a society. Man, his freedom and his liberty are priced possessions. Most of the times, it did not come free. There were wars and revolutions that we study in our history books, narrating the stories of great protests and achievements. Imagine if people did not voice against the discrimination based on skin color or, an easier example, if we did not fight against the British for our independence. Can we believe that the world would still be the same?

Stories, battles and revolutions- these are the necessary steps that change time and politics. Man must always be free to think and what he thinks, he must be free to express. He must have his own opinions and his own views. Such views can be argued to or disagreed with but such views should not be on the verge of being unreasonably curbed, curtailed or stripped off[5]. After all, we can agree or disagree but we can't shut someone due to our discomfort[6].

2.1 International perspective and Protection of the freedom

Speech and expression has been the most effective and important of all freedoms in a working democracy. The ability of the people to have an opinion and to express that opinion is of great importance. Recent history shows how this very fundamental right has been stepped upon, numerous times, on several legitimate grounds. The irony of this right is that we all feel this is very important and we all must be allowed to enjoy it

[4] John Stuart Mills, *On Liberty*, (Penguin Books Ltd) (1974)

[5] See Nicholas Shackle, 'The Fragility of Freedom of Speech', May 2013, Vol 39 No5, Journal of Medical Ethics, available at https://www.jstor.org/stable/43282716?read-now=1&refreqid=excelsior%3Adc25916eee21694cbfc2a6c1b4bb89a7&seq=1#page_scan_tab_contents, last accessed 02.07.2021 "freedom of speech must include the freedom to say something that can be detestable or it is not freedom at all. Such freedom imposes a very important duty on others and that is the obligation to tolerate the expression of what we find detestable. The freedom of speech is not up for any legal determination and it absolutely does not matter on what the law says because of a law cannot conform with freedom, then that law is wrong. In any case, we have the option of either arguing back or shutting up but we definitely don't have the right to shut others up".

[6] Ibid.

only when it concerns us. For the rest of the world, we don't mind seeing this right with its restrictions.

Due to its utmost importance and recognition as one of the most crucial freedoms, the right has been accepted, defined and protected by various international instruments. It is stated by the UDHR that "everyone has this right to freedom of opinion and expression, including the right to seek and receive information through any media"[7].

Art 19 of ICCPR declares the same but also poses a certain restriction on the ground that such restrictions are necessary and provided by law. It specifically mentions that the FOSE carries with itself a specific responsibility and it is only because of this responsibility that the right is supposed to restricted to the extent that it does not hurt someone's reputation, or disturb "national security, public order, public health or morality". For a clear understanding, Art 19 of ICCPR has been produced as under:

> Art 19 of ICCPR[8] states that
>
> "1. Everyone shall have the **right to hold opinions without interference**.
>
> 2. Everyone shall have the **right to freedom of expression**; this right shall include **freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers**, either **orally, in writing or in print, in the form of art, or through any other media** of his choice.
>
> 3. The exercise of the rights provided for in the above of this article carries with it special duties and responsibilities. It may therefore be **subject to certain restrictions**, but these shall only be **such as are provided by law and are necessary**:
>
> (a) For respect of **the right or reputations of others**;

[7] See Art 19 of UDHR, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" available at https://www.un.org/sites/un2.un.org/files/udhr.pdf last accessed 20 July, 2021.

[8] International Covenant on Civil and Political Rights available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx last accessed 20 July 2021

(b) For the **protection of national security or of public order, or of public health or morals**."

Art 19 of ICCPR involves various features to it. Firstly, it talks about opinions and in spite of opinions not meaning exactly an expression, it definitely assumes that one might have the most evil of onion and unless that is put into action, it still enjoys the provisions of the Art. Again, such protection is given without any discrimination on the ground "*such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*[9]. Therefore, in securing this freedom, no distinction can be made which has the potential to discriminate one over another. It can't be a biased right. This right is 'allowed' and 'open' for the enjoyment of every individual. ICCPR also states that such expressions include the freedom to give and receive information or ideas. Therefore, it protects the right of the speaker as well as the listener or receiver.

Art 9 of ACHPR ensures that every individual shall have the right to receive information and "**express and disseminate his opinions within the law"**[10]. The 169th Resolution on Repealing Criminal Defamation Law in Africa by the ACHPR[11], on 24th Nov 2010 underlined the following:

a. "criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith"
b. "Commending States Parties to the African Charter (States Parties) that do not have, or have completely repealed insult and criminal defamation laws";
c. "Calls on States Parties to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments";
d. "Also calls on States Parties to refrain from imposing general restrictions that are in violation of the right to freedom of expression";

[9] Art 2(1), ICCPR
[10] See Art 9 of ACPHR available https://www.achpr.org/legalinstruments/detail?id=49 last accessed July 20, 2021
[11] 168 Resolution on Repealing Criminal Defamation Laws in Africa- ACHPR/Res 169 (XLVIII)10 available at https://www.achpr.org/sessions/resolutions?id=343 last accessed 20 July 2021

This above declaration was a sturdy step taken towards abolition of insult laws for the better work of the journalists as freedom of press was an important idea.

Another important international instrument which played a very strong role in protection of this freedom is the European Convention of Human Rights and Fundamental Freedoms. The ECHR states that everyone has the right to freedom of expression including receiving or imparting of information without any interference of the public authorities. However, this right too comes with certain restrictions. The article has been produced as under[12]:

> **"Art 10- Freedom of Expression**
>
> "1. **Everyone has the right to freedom of expression**. This right shall include **freedom to hold opinions and to receive and impart information and ideas without interference** by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of **national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"**

The ACHR also propagates the similar principles as ICCPR and ECHR. The restrictions imposed by the Art is also similar, circling around reputation of others, national security, public health and morality. However, the convention goes on to state that no restrictions can be imposed by indirect methods that abuses the right. Also, it is stated that censorship of public entertainment can only be for moral protection of

[12] ECHR available at https://www.echr.coe.int/documents/convention_eng.pdf last accessed 20 July 2021

childhood and adolescence. Four our convenience, Art 13 of American Convention of Human Rights[13] has been produced as under:

> "1. Everyone has the **right to freedom of thought and expression**. This right includes freedom to **seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice"**.
>
> "2. The exercise of the right provided for in the foregoing paragraph **shall not be subject to prior censorship but shall be subject to subsequent imposition of liability**, which shall be expressly established by law to the extent necessary to ensure:
>
> (a) Respect for the **rights or reputations of others**;
>
> (b) The protection of **national security, public order, or public health or morals"**.
>
> "3. The **right of expression may not be restricted by indirect methods or means**, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions".
>
> "4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the **moral protection of childhood and adolescence".**
>
> "5. Any **propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence** or to any other similar action against any person or group of persons on any grounds including those of

[13] ACHR "Pact of San José, Costa Rica", Signed at San José, Costa Rica, on 22 November 1969 available at https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf last accessed 20 July 2021.

race, colour, religion, language, or national origin shall be considered as offenses punishable by law."

Therefore, from the above provision we can see that the ACHR goes a long way in the protection of the freedom of expression with a very reasonable restriction and also mentions it explicitly that the restrictions can't be imposed with the view to curb the exercise of the freedom. Therefore, the freedom of speech and expression, the right to have one's own opinion and the right to receive or give information are important ingredients of liberty and is protected by various international instruments, which all narrow down to the point that any restriction that can be posed against this freedom has to be a reasonable one and not with the intention to curb this right.

2.2 Freedom of Speech and Expression under the Indian Constitution

The philosophy behind freedom of speech can be understood from the Preamble[14] and Art 19 finds a very significant place in the constitution and comes with several restrictions. We all understand that the Constitution of India was not an overnight process. It required huge debates and discussions before finding a final spot in the mother document. Art 19, which can be found in Art 13 of the draft constitution, went on for discussions and debates for 3 days, 2 of which happened in the month of December 1948 and one in the month of January 1949.

Shri Damodar Swaroop Seth, very boldly debated the faults with the provision and wished to substitute the same in a different way[15] where he wished to substitute Art 13 with the following

"That for article 13, the following be substituted:

13. Subject to public order or morality the citizens are guaranteed-

(a) Freedom of speech and expression;

b) Freedom of the press;

(c) Freedom to form association or unions;

(d) Freedom to assemble peaceably and without arms;

(e) Secrecy of postal, telegraphic and telephonic communications."

According to Mr. Seth, the problem with this article was that the rights guaranteed under this provisions were cancelled by the same provision and placed at the mercy of the legislature. He also states his problems with the phrase, "In the interest of the general public", which is a very broad term and such terms make this freedom virtually ineffective. Also, where the President enjoys the power to issue proclamations of emergency, it allows him to take away this very fundamental civil right[16].

[14] Guarantees to Secure to all its citizens- Liberty of Thoughts, Expression, Belief, Faith and Worship.
[15] See Constituent Assembly of India Debates (Proceedings) Vol VII (1.12.1948) available at http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C01121948.pdf, pg 2, last seen on 06.07.2021
[16] Ibid

This provision was seeking a lot of new modifications, which were of course not added to the final draft. Demands for freedom of press, freedom to worship and follow a personal law and inclusion of personal liberty were raised. Of course, the inclusion of such would have given a wider aspect to this article. However, we now have the following freedoms guaranteed under Art 19(1) of the constitution *[it is important to mention here that only Clause (1) and (2) have been traced hereunder]*:

> "**19. Protection of certain rights regarding freedom of speech, etc._** (1) all citizens shall have the right-
>
> a. To freedom of speech and expression
> b. To assemble peacefully without arms
> c. To form associations or unions or co-operative societies
> d. To move freely throughout the territory of India
> e. To reside and resettle in any part of the territory of India and
> f. (omitted by the 44th Amendment)
> g. To practice any profession or carry on any occupation, trade or business.
>
> (2) Nothing in sub-clause (a) of Clause (1) shall effect the operation of any existing law[17], 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 interest of the sovereignty and integrity of India, 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."

From the above given provision, it is very important to peruse the fact that the state can only make laws effecting this freedom on the grounds of reasonable restrictions. But what are these restrictions, is the actual debate that has taken our nation at grasp in the recent times. A careful reading allows us to see that where 19(1)(a) gives the freedom

[17] While this article guarantees the freedoms, the guarantee itself should not affect any existing law or does not prevent the state from making any such law in the general interest of the public, see Shri Damodar Swaroop Seth, CAD Vol VII, pg 2

of speech and expression, Art 19(2) provides the walls beyond which such rights can't be exercised[18].

It is also important to note that the article allows state to restrict this right reasonably only when such reasonableness is exercised for '**sovereignty and integrity of the country', 'security of the state', 'friendly relations with foreign states', 'public order', 'decency or morality', 'contempt of court', 'defamation' or 'incitement of an offence'.** This is an irony as to how the very freedom which is supposed to be used for all these purposes have been curbed on the ground of the same purpose. Let's take, for example, decency as a ground for restriction of this fundamental right. So, it becomes very easy for the state to restrict our freedom of expressing love and passion for one another on the grounds of decency and morality[19]. Therefore, the researcher finds it very hilarious to even put to words the fact that tomorrow, the state can ask us not to display any affection towards anyone in public because of decency- affection, love, emotions being one of the most natural of any expression that human beings can ever have. It is difficult to justify the stand of the state on this ground as it takes away very humane gestures away from us and no law should be justified if it can take away our most natural freedom. Also, the term 'public order' also is very wide to understand the ambit of it. A restriction can fall within 'interest of public order' if the connection between such a restriction and public order is directly linked. If such a connection is not real or direct, it would not fall under the ambit of "in the interest of public order"[20]. Therefore, it is rightly pointed out in Chintaman Rao v State of Madhya Pradesh that the legislature's decision on what constitutes a reasonable restriction is no final and it should be upon the courts o decide the same.

[18] See Express Newspapers v UOI, AIR 1958 SC 578 (If any limitation on the exercise of fundamental right under Art 19 (1) (a) does not fall within the four corners of Art 19(2), the same can't be upheld.

[19] See Faiz Rahman Siddiqui, 'Bajrang Dal Activists thrashed, Humiliated several young couples on Valentines Day', *The Times of India* (15.02.2015) available at https://timesofindia.indiatimes.com/city/kanpur/bajrang-dal-activists-thrashed-humiliated-several-young-couples-on-valentines-day/articleshow/46249364.cms, last accessed on 05.07.2021

[20] Rex v. Basudev, AIR 1950 SC 67

2.3 What restrictions are Reasonable Restrictions

The freedom of speech is restricted because of the responsibilities we have or the duties that come along with it as our existence in this society. We are clearly not allowed hurt someone's reputation or cause any lawless action, because we are a part of the society and such duties are responsible for harmonious existence.

Mills in his book, 'On Liberty' discusses about the authoritarian limit of the society over an individual. He explains that though there is no explicit contract but if someone is living in the society, he owes something back in return. The society and the individuals therefore, are bound to observe a conduct towards the rest which does not injure the interests of one another. When an act of an individual is hurtful to others or violates any constituted rights, the offender may be justly punished and as soon as a person's conduct affects the interests of others, the society gets jurisdiction over it. However, this should happen only when the interest of another person is hurt and the same can't be applied when such conduct affects nobody else but the person himself or need not affect others unless they like. In such cases, there must be perfect freedom, legal and social, to do the action and stand the consequences[21].

It is important to understand that though restrictions are important in formalizing a peaceful society[22] but it is mandatory that such restrictions have a balance[23] and does not act in a way which further leads to the demolition of a democracy. The reasonableness of a restriction has to be judged by the amount of evil which the restriction aims to eliminate[24].

In the landmark case of State of Madras v V.G Row[25] on the aspect of 'test of reasonability' under Art 19(4) of the constitution, the court stated that it should consider the factors such as duration and extend of restrictions as well as the circumstances and manner such restrictions are imposed. It is also important to bear in

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[21] John Stuart Miil, *On Liberty*, (Ed and Introduction by Gertrude Himmelfarb), Penguin Classics (1985), 142.

[22] See *A.K. Gopalan v. State of Madras*. Das, J., had opined that reasonable restrictions are imposed on the "enjoyment of fundamental rights due to the fact that in certain circumstances, individual liberty has to be subordinated to certain other larger interests of the society". Shastri, J., had observed that "in civil society, man's actions, arising out of his exertion of the fundamental rights conferred upon him, have to be controlled and regulated so as to reconcile the conflicting exercise of the civil rights by other people".

[23] Chintaman Rao v State of Madhya Pradesh

[24] Collector of Customs v. Sampathu Chettty, AIR 1963 SC 316 (para 35)

[25] (1952) AIR 196

mind that the test of reasonableness must be applied individually and no pattern can be laid that which would be applicable in all scenarios.

To measure if there is a reasonable restriction, we must first try to assess if there is a breach at all. The exact idea of what actually interferes with the freedom of expression is very wide. The ECHR refers to formalities or restrictions or penalties in this right and so mentions it in its provision that has been mentioned before. It is also important to understand what exactly does interference with this freedom mean. UNHRC stated that firing someone for racial comments outside the work is interference to his freedom expression[26].

The most important condition of restriction is that it must be prescribed by law. An advisory Opinion was issued by the IACtHR in 1986 to explain the meaning of "law" under art 30 of ACHR. The following has been produced as below:

> *"The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.[27]"*

Art 19(2) provides the reasonable restrictions on the grounds of the following:

a. **Sovereignty and integrity of India**: This ground ensures that no speech or expression is made to the extent that can harm the territorial integrity of the nation.
b. **Security of states**: The security of the state includes violence that can intend to overthrow the government or cause a war or any internal aggression and the likes. The grave or provoked forms of public disorder are within the expression of "security of state". However, not every disorder can be called as a threat to the security of the state. In *Romesh Thapar case*[28], the Supreme Court pointed

[26] Ross v. Canada, 1 May 1996, Communication No. 736/1997
[27] See Art 30 of ACHR "Pact of San José, Costa Rica", Signed at San José, Costa Rica, on 22 November 1969 available at https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf last accessed 20 July 2021.
[28] Romesh Thappar v. State of Madras, AIR 1950 SC 124

out that "the expression does not refer to ordinary breaches of public order which do not involve any danger to the state itself".

c. **Friendly relations with Foreign States**: The State can impose reasonable restrictions on the freedom of speech in the interest of friendly relations with foreign states. Te justification is valid as it ensures that international relations are well maintained.

d. **Public Order**: The defense of public order is another ground for the restrictions imposed upon this freedom. The expression "public order" is similar to that of 'public peace', 'safety' and 'tranquility'[29]. Art 19(2) makes provision "in the interests of public order" and not "for the maintenance of public order" which can mean that a law may not be imposed only to directly maintain public order but still, it is enacted in a way that has a similar interest. Also, anything that has the tendency to lead to such disorder would fall within the ambit of this expression[30]. Therefore, a law punishing any utterance with the intention to hurt religious sentiments would be valid because it imposes a restriction on the right to free speech in the interest of 'public order' since such a kind of speech or writing has the tendency to disturb public order even though, a lot of times, such might not even be the intention or result and would not lead to the breach of peace[31]. In the case of *Virendra v. State of Punjab*[32] the following safeguards were provided:

- There must be a positive requirement and the authorities must be satisfied completely for making any such restriction.
- The State Government was required to determine the necessity to pass any such orders.
- Such an order would only remain active for two months from the date of its making
- The party which is aggrieved should be provided with their righ to make any representation

e. **Decency and morality** – Decency and morality are two of the important grounds that can entail the state to put restrictions on the right to free speech

[29] Supdt., Central Prison v. Ram Manohar Lohia, AIR 1960 SC 633.
[30] Ramji Lal Modi v. State of U.P., AIR 1957 SC 620
[31] Ibid
[32] AIR 1957 SC 896

and expression. Decency can be explained as anything that is not obscene. And obscenity is considered to be a reasonable restriction in various international instruments as studied above. This is an important restriction as it values freedom to the limit that such freedom doesn't start polluting our morals or societal opinions. And it is true that no right can be used to corrupt the community or the society. However, what is a corrupt thought and what is not remains a huge debate. And though the researcher accepts the point that freedoms can't overstep the boundaries of decency and morality, it should also be kept in mind that such restrictions not only allow the abuse of the freedom but also, in various circumstances, restrict ourselves to grow. The society has come forward a long way from the time where awareness about various instances are available at hand and expression of those instances are done or circulated within seconds. And this time changing fact must be kept in mind before deciding if anything is obscene or not, and let's keep in mind that once upon a time, not long ago, homosexuality was obscene too.

In Ranjit Udeshi v. State of Maharashtra[33], the SC laid down the test to determine obscenity. The facts were that the appellant, who was a bookseller at Bombay, was charged under Sec 292 of IPC for selling a book called *Lady Chatterly's Lover* written by D.H Lawrence. The court held that the book was obscene and therefore, could not be distributed or sold and therefore, sentenced the appellant. The court held that it had the "right to restrict the freedom on the grounds of decency and morality".

The researcher's argument of the development of society over time can easily be justified now- from an era where an erotica was banned on the ground of it being obscene to the era of *Fifty Shades of Grey* being a bestselling novel, we all have come a long way. But, do you remember watching this movie in the Indian theaters? Well, you can't because it was deemed 'provocative' for the Indian audience[34]. Therefore, audience all around the world are not exposed to these unreasonable provocation but Indians are. We may read the book in a

[33] AIR 1976 SC 881

[34] Ben Child, "Fifty Shades of Grey Banned In India despite Removal of Nudity", *The Guardian* (5 March, 2015) available at https://www.theguardian.com/film/2015/mar/05/fifty-shades-of-grey-banned-in-india-despite-removal-of-nudity accessed 20 July, 2021

flight journey but it is not 'fit' for Indian theater. It is a conflicting and hilarious denial of the freedom.

f. **Contempt of Court**: The constitutional right to freedom of speech does not prevent the courts from punishing for their contempt spoken or printed words or any other expression calculated to have that effect[35]. The expression "contempt of court" is now defined in Section 2 of the Contempt of Courts Act, 1971 as under:

> **" a)** Contempt of court means civil contempt or criminal contempt;
>
> **b)** civil contempt means willful disobedience to any judgment, decree, direction, order, writ or any 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 representations, or otherwise) of any matter or the doing of any other act whatsoever which
>
> i) Scandalizes or tends to scandalize or lowers or tends to lower the authority of any court
>
> ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceedings
>
> iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.**"**

In the landmark case of Re: Prashant Bhushan and Anr[36], the court enshrined the principles of free speech vis-à-vis contempt laws, the Court stated that though fair criticism is permissible, a person can't abuse it to the extent where it scandalizes the institutions. It stated that free speech is essential to a democracy but it can't denigrate an institution of a democracy[37]. However, the court was of

[35] L.R. Frey v. R. Prasad, AIR 1958 Punj 377
[36] SUO MOTU CONTEMPT PETITION (CRL.) NO.1 OF 2020
[37] Ibid, Para 31

the view that an apology by the contemnor may be given "if he so desires" and in spite of holding the principles of Art 19(1) of the constitution, the court went on to state that it finds the contemnor 'adamant' and 'failed to show regret' to the tweets he made. The court found that Adv Bhushan had tried to degenerate the institution of justice and therefore, committed a very serious offence. But the court shows its magnanimity and imposes a fine of Re 1 for the Contempt. Though a penalty of Re 1 might not be much of a deal, a lot of us fail to see that this conviction had the ability to paralyze our right to criticize the judiciary and its opinions. The court stated that a fair criticism was permissible. What is fair would again be decided by the court.

g. **Defamation**: Defamation has been defined under Section 499 of the Indian Penal Code (IPC) as "*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 to defame that person".* Defamation can be slander (which is made in verbal form) or libel (published in written form)

   However, there are certain requirements for a sentence to be called 'defamation'. The defamation law was challenged in India by Subramaniyam Swamy in the landmark case of Subramanian Swamy v. Union of India[38]. The court was of the view that Sec 499 IPC was not an excessive restriction under Art 19(1) of the CoI. It stated that the society was a collection of individual and both of these subjects affect each other equally. Therefore, it was valid to treat defamation as a reasonable restriction because protection of individual dignity is also a fundamental right. Thereby, the court upheld the constitutional validity of defamation law in India.

h. **Incitement of offence**: The freedom of speech and expression cannot be used as a licence to incite people to commit an offence. During the debate in the parliament for the inclusion of this clause it was argued that the phrase "incitement to violence" should be used instead as the word "offence" has a very wide meaning and can include any act which is punishable under the

[38] (2014) 12 SCC 344

Indian Penal Code or any other law. However, this suggestion was rejected. In *State of Bihar v. Shailabala Devi*[39], the Supreme Court held that incitement to murder or any other violent crime would generally endanger the security of the state; hence a restriction against such incitement would be valid law under Article 19(2).

The fundamental rights guaranteed under Article 19(1) are not absolute. They are subject to restrictions placed in the subsequent clauses of Article 19[40]. However, these restrictions are not deemed to make law only and only for placing restrictions on this freedom. The test of reasonableness mentioned under Art 19 should be applied according to case to case and situation to situation and no uniform standard can be applied for all the cases. "The reasonableness of the restraint would have to be judged by the magnitude of the evil which it is the purpose of the restraint to curb or to eliminate"[41].

Therefore, for arestriction to be constitutionally valid, it must satisfu two tests: a) it must be made for the purpose mentioned under 19(2)-19(6) and b) it must be a reasonable restriction.

The Supreme Court has come up with principles regarding reasonableness of restrictions in various cases:

- **Proper balance**: It must be kept in mind that the restrictions imposed can't be arbitrary or excessive. It must not abuse the right. Any law which poses arbitrary restrictions can't be called 'reasonable'. It must strike a balance between the freedoms guaranteed and the social control permitted. With regards to proportionality, it is important to note that there must always be a tilt towards the rights, more so if such a right is a fundamental right in nature[42]. The direct, real and most inevitable effect of such restrictions on FR must be considered[43].
- **Reasonableness can be substantive or proportional**: The nature of a restriction and the process prescribd for implementation of such restrictions

[39] AIR 1952 SC 329
[40] Babul Parate v. State of Maharashtra, AIR 1961 SC 884 (para 24).
[41] Collector of Customs v. Sampathu Chettty, AIR 1963 SC 316 (para 35).
[42] Re: Prashant Bhushan case
[43] Express Newspapers v. Union of India, AIR 1958 SC 578

must be considered by the court while determining if a restriction is a reasonable. Substantive as well as Procedural provisions must result into such reasonableness[44].

- **Reasonability of a restriction has to be determined in an objective manner**. Such restrictions must come from the point of view of the general public. The courts are restricted to bring their own personal biases in judging such reasonableness.
- The Court must assess the reasonableness of the restriction and not the reasonableness of the law. A law may be reasonable but it does not mean that the restrictions imposed are also same.
- It is also important to consider the DPSPs to determine the reasonableness on an FR. If a restriction promotes DPSP, it is a reasonable restriction. The SC in *Kasturi Lal v. State of Jammu & Kashmir*[45], "Any action taken by the Government with the view to giving effect to any one or more of the Directive Principles would ordinarily qualify for being regarded as reasonable."
- Lastly, **it is the court and not the legislature which should judge the reasonableness of the restriction**.

At this junction, it is important to discuss the Romesh Thapar case[46] without which, the freedom of speech and expression shall remain a big void. The petitioner in this case was the publisher and printer of a newly launched English weekly Journal called "Crossroad" which was circulated in Bombay. The government of Madras issued an order[47] whereby it banned the print and circulation of the journal. The order read as under:

"His Excellency the Governor of Madras, being satisfied that for the purpose of securing the public safety and the maintenance of public order, it is necessary so to do, hereby prohibits, with effect on and from the date of publication of this order in the Fort St. George Gazette the entry into or the circulation, sale or distribution in the State of Madras or any part thereof of the newspaper entitled Cross Roads an English weekly published at Bombay."

[44] Chintamani Rao v. State of M.P., AIR 1951 SC 118
[45] 1980 SCR (3)1338
[46] Romesh Thapar v State of Madras (1950 AIR 124, 1950 SCR 594)
[47] Under the Madras Maintenance of Public Order Act (hereinafter referred to as the impugned Act)

Thereby, the petitioner contended that the said order breached his fundamental right of freedom of speech and expression under Art 19(1) and also challenged the validity of Sec 9(1) of the impugned Act.

The court went on to hold certain very important principles which are given as under:

- freedom of speech and expression includes the freedom to propagate of ideas and such freedom also includes the freedom of circulation.
- The Government of Madras would be in violation with the petitioner's fundamental rights unless sec 9(1) is not saved by the provisions mentioned under Art 19(2). Therefore, a careful reading was given to the order which mentioned "….for the purpose of securing the public safety and the maintenance of public order… the entry into or the circulation, sale or distribution in the State of Madras or any part thereof of the newspaper entitled Cross Roads an English weekly published at Bombay" and if it had the tendency to be a "…law relating to any matter which undermines the security of or tends to overthrow the State."
- Public order has a wide meaning and also signifies the regulations ae necessary to establish tranquility in the society.
- Among the different criteria of restrictions that the Constitution has imposed on Art 19(1), it makes a separate category fot the offences against public order which aim at threatening the security of the state. Prevention of such restrictions would mean justification for legislative synopsis of freedom of speech and expression, that is to say, "**nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression"**
- criticism of the Government or expressing any disaffection should not be tagged under a reasonable ground for restricting the freedom of expression and of the press, unless it has the character to undermine the security or overthrow the State.
- Freedom of press is the foundation of every democracy as a lack of any political discussion will lead to inefficiency of the government and finally disrupt the political stability of the state. However, a freedom of this magnitude will of course bring its own risks and abuses.

- Unless a restriction is solely against a law which has its only interest in overthrowing the government or threatening the security of the state, such restriction will not fall within the scope and ambit of Art 19(2)
- Art 19(2) is applied to situations where the danger of the state is involved and if there is no such danger, there can not be any such restrictions.

- Entry of a seditious document can be prohibited as sedition is a subject that threatens the security of a state. However, if such a document is only a disturbance to public tranquility or safety, such prohibitions may not be allowed.

The court came up with the concept of a difference between public order and public interest and went on to state that any restriction that is not covered under Art 19(2) can't be termed as a reasonable restriction. Therefore, we see that there are certain grounds alone which permits the state from making a law that can curb the freedom of speech and expression. It is also important to keep in mind that such restrictions must be with a *bona fide* interest, that is, it must be for a lawful and reasonable purpose and should not be made alone to take away or breach the fundamental rights of a citizen.

2.4 FREEDOM OF EXPRESSION AND CIVIL LIBERTY IN INDIA: A PERSPECTIVE FROM THE FREEDOM REPORT 2021

To understand the condition of civil liberty in present day India, we take the help of the recent Freedom Report of 2021 which characterized the country from a democracy to a 'Partly-democratic' country.

A recent report by Freedom House caused a huge pandemonium, not just in India but around the world.[48] This is very important to explain and understand the test conducted by the Freedom House. 'Freedom in the World' is a report published by Freedom House every year based on political rights and civil liberties, by a team comprising of in-house and external analysts and experts. The recent report included such a team of 125 analysts to ascertain such rights for 195 countries and 15 territories[49].

India scored a total of 67/100 with 34/40 in Political rights and 33/60 in Civil liberties. India received a 2/4 on the ground of free and independent media[50]. It was stated that there were incidents of attack on press freedoms under the Modi government. The use of security, defamation, hate speech and contempt of court charges have seen a steep rise. In 2020, journalists critically reporting the government's measures of Covid19 pandemic faced arrest and there was thus a huge pressure on the media houses to praise the government actions.

Also, the report claimed that there is a significant downfall of academic freedom as political right wing students union have been seen engaged in attacks on campuses around the nation. Such incidents were reported not just by the Indian media but by international media houses like the New York Times. A Jan 10, 2020 article goes on to report the attack in the Jawaharlal Nehru University (JNU) campus by masked men,

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[48] "India is now only 'Partly Free' under Modi: Says Report" *BBC News* (3 March, 2021) available at https://www.bbc.com/news/world-asia-india-56249596 accessed 20 July, 2021

[49]Freedom in the World Research Methodology by *Freedom House* available at https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology accessed 20 July 2021

[50] Freedom in the World, 2021 by Freedom House available at https://freedomhouse.org/country/india/freedom-world/2021 last accessed 20 July 2021

alleged from Rashtriya Swayamsevak Sangh (RSS), a primary Hindu organization and the parental body of the now Bhartiya Janta Party (BJP), the ruling political party[51].

The report went on to change the status of the nation from 'Free' to 'Partly Free' owing to the Hindu nationalists and the Hindutva politics that has caused tremendous challenge to the Muslim population of the country. It stated reasons such as the death of more than 50 Muslims during the January 2020 protest related to the Citizenship Amendment Act, 2019 and imposing the draconian sedition law and over 2000 IT Act cases for opposing the same. It also stated the pandemic which lead to the lockdown imposed in March 2020, making numerous laborers unable to go to their hometown, accessing basic supplies and also deprived of wages. Construction of Ayodhya Temple at the disputed cite and the decision of the Special Court for releasing accused from the 1992 Ayodhya case in September, 2020 were also deemed to be reasons enough to state that reason for calling India a 'Partly free' country. India's score for Internet freedom was 57/100 which is a huge concern regarding the ability of people to post their opinions online and still be respected.

We shall now look into the criteria of civil liberty as per the report and the justification behind the score allotted to the nation.

Freedom of Expression and Belief

a. Is there a free and independent media?

The country scored 2/4 based on several assertions. The attacks on freedom of the press have suffered huge blow during the time of the Modi government. Reporting has become a tool to charge the journalists on defamation, sedition, hate speech as well as Contempt of Court charges, with the ambition to shut the opposition from voicing their opinion. A lot of misinformation and false news are spread across social media and the usage of the word 'anti-national' is heard more often. Close relationship with business tycoons and lobbyists have resulted the declining trust of the public on the media.

A recent example of misinformation can be given with respect of the news of a 72 year old Muslim man named Shamad Saifi, being beaten up and his beard being chopped off by some alleged people asking him to chant 'Jai Shree Ram' and 'Bharat Maata ki Jai'

[51]Kai Schulz and Suhasini Raj, "Behind Campus attack in India, some see a far right Agenda" *The New York Times*, (10 Jan, 2020) available at https://www.nytimes.com/2020/01/10/world/asia/india-jawaharlal-nehru-university-attack.html accessed 20 July 2021

as a proof of his nationality. The video was surfaced in various social media handles and became viral with huge criticism, stating that the country is slowly losing its secular character. However, the police had a different version to offer according to which, though the crime committed was heinous but the fact that he was asked to chant slogans were untrue and the involvement of another Muslim man in the list of accused causes serious troubles in accepting this as a communal crime[52].

An FIR was registered, making Twitter.inc a party for not being able to remove the video on time. The communal angle of the case was removed due to the involvement of another Muslim man in the list of accused. It is important to mention here that other media houses have different claims, stating that the clarifications given by Gaziabad police was not even taken into considerations.

It is critical to argue here that the problem encountered with the Indian media is the fact that different news channels are providing different opinions and one can't be held to be particularly true. the media is divided into two segments- the channels or agencies comprising of people who are not satisfied with any step taken by the government and will criticize it on every issue, which the researcher here terms as the *'Pseudo-Liberals'* and people who have closed their eyes and shut their conscience to support actions that are questionable, even for a lay man and the researcher terms this category of audience as *"Andh Bhakts*". The more important issue is that it is difficult to find prudency among the audience, thanks to the shape the Indian media has taken.

Are individuals free to practice and express their religious faith or non-belief in public and private?

India, as the preamble of the constitution states, is a secular country. People have the right to practice and profess and religion they wish to. However, it is stated in the FR21 that number of Hindu nationalist organizations and media outlets promote anti-Muslim views and the Modi government has only encouraged this practice. The stand of the government on Beef Ban and politicizing this whole stature is evident enough of the previous statement. According to nonprofit group 'IndiaSpend', there were a total of 45 killing by cow vigilant between 2012-18. More than 120 cases of cow-related violence,

[52] Aishwarya S Iyer, "Elderly man thrashed in Loni: Conflicting versions emerge in case" *The Quint* (16 June, 2021) available at https://www.thequint.com/news/india/after-abdul-samad-saifi-muslim-thrashed-in-loni-ghaziabad-conflicting-versions-emerge#read-more accessed 20 July 2021

including lynching, have been reported since Modi came to power. Also, the Tabliqi Jamaat case, which blamed a whole religion for the spread of covid19 pandemic in India, is also cited as an example. The Report provides a score of 2/4 on the ground of freedom of religion.

It is important to point out that where on one hand the Constitution guarantees the freedom of religion, on the other hand it also points out that the state shall "prohibit the slaughter of the cows and calves and other milch and draught cattle"[53]. Therefore, this beef ban is not completely against the constitutional philosophies. The next argument posed on this regard is that food is a personal choice and if that is so, China must be relieved from all the assertions of spreading a deadly pandemic. In spite of the accusation that beef ban is an attack on a particular religion, another argument posed is that it is step taken towards safeguarding belief of another. Logically speaking, if one religion believes in the kill and the other believes in the protection of an animal, isn't it only fair to choose the lesser evil?

Is there academic freedom, and is the educational system free from extensive political indoctrination?

Offering a 2/4, it is stated in the report that academic freedom has lost its strength, citing examples of students, professors and institutions over religious issues. Right wing Hindu Nationalist parties have been involved in violence across various institutions. There is a pressure by the government on these bodies to not profess ideologies that are deemed sensitive to the government, especially the Kashmir issue.

The researcher would like to point out that perhaps, where restrictions on the freedom of speech and expression include those which can threaten the sovereignity and integrity of the nation and such restrictions are not just as per the Constitution of the country but is recognized in international bodies as well, as seen in the previous section. Therefore, the validity of allowing a speech that threatens the national perspective to the extent of letting a segregation of a state is perhaps questionable and debatable.

Are individuals free to express their personal views on political or other sensitive topics without fear of surveillance or retribution?

[53] See Art 48 of the CoI

Though personal expression and private discussions have been open and free, the report states that draconian law like that of sedition is imposed to penalize criticisms against the government and activists, Muslims and members of other minority groups face this issue the most.

The sedition cases saw a surge in 2020, due to the introduction of the Citizenship Amendment Act, 2019. Also, the ArogyaSetu app that allows checking the covid19 cases, were also deemed to be against human rights.

Though the law of sedition is a huge concern, it is also important to understand how far a speech can go to ensure that national sentiments are not hurt. Restrictions of all kind can be debated but that of nationality and patriotism remains an integral part of the citizens and violation of which does not only hurt a particular community but mass majority at large. Also, this faith of patriotism and nationalism should not be taken advantage of by the government only to bring in laws or prohibit people from safely addressing their opinions.

CH 3: MEDIA: AN EXCEPTIONAL ASPECT OF FREE SPEECH

I think we all can agree that a free media means a true democracy. I will explain why I say so. We all like to believe that democracy is the best form of Government because it is governed by the will of the people. Have we ever wondered where does this will get a shape? Man and his impressive inventions could not cause that much of fire as the invention of print did, and slowly, the government became answerable to the people[54]. Probably, this has made the freedom of press such a humongous aspect of free speech and expression because this kind of freedom forms questionable thoughts, opinions, believes in the mind of the governed. And we see the role played by the press in shaping our political vies every single day.

Though we can understand that the freedom of expression is primarily negative in nature as it provides with the state's ability to limit that expression, it still has a very positive dimension which requires the same state to incorporate measures to protect this freedom. This falls under two categories, one where the State is under a positive obligation to take actions against interference with this freedom by any other private person and second, which can be understood as a direct positive measure whereby the state is also supposed to guarantee that it does not obstruct the free flow of the freedom itself.

It is not a lie to state that the government fears the press, mainly for having the ability to change or shape or even form the opinions of the masses and if it was about ages back, development could have been blamed but the recent case of Apple daily, the largest pro-democracy newspaper in Hong Kong was shut down for publishing reports that breached their new national security laws. People gathered outside the office in a rainy night and turned their flash light on as a tribute to the democratic media. The staff of Apple daily climbed on the balcony with their flash lights on, thanking the people of Hong Kong. It marked the end of an era and a new tension for the death of freedom of speech[55].

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[54] Jos. R. Long, 'The Freedom of the Press', (Jan, 1918), Vol5 No 4, Virginia Law Review, available at https://www.jstor.org/stable/pdf/1063583.pdf?ab_segments=0%252Fbasic_search_gsv2%252Fcontrol&refreqid=excelsior%3A88d0f85f9399961c01b4402cb35f5f04 accessed 02.06.2021

[55] . See "*Apple Daily: Hong Kong Bids Emotional Farewell to Pro-Democracy Paper"* BBC News (China, 24 June, 2021) https://www.bbc.com/news/world-asia-china-57591069 accessed 24 June, 2021.

Various methods are undertaken to stop this ‘opinion cleansing’ method, the easiest of them being banning or censorship, charge journalists on the grounds of sedition or hate speech or come out with another news and provide a contrasting theory. The News lobbies, the publishing houses and art, of all the important things, will be burnt into ashes if there is even a slight restriction on this freedom. Imagine literature, which shapes the minds of the society or even reveals the truth of the society, is shunned by the government for revealing the truth of the society. This is an irony and definitely, not a well rejoiced freedom.

But because the media is bestowed with the gift of shaping the thoughts and opinions of the people at large, it is also under the obligation of acting responsibly and any over stepping of this media is a breach to the proper functioning of the system. Probably, that is where we need the regulations. But how far have the media worked responsibly or how appropriately and for reasonable reasons have it been shunned remains a question to be answered in this chapter.

3.1 International Protection of Freedom of Press

It will not be untrue to state that the freedom to encounter a fearless media has been the most tedious task in the history of all freedoms. No democracy can function in its true spirit if the information required to educate the nation does not reach due to various obligations, restrictions or attacks on the freedom of press. Therefore, this freedom has been given a very important position, not just in a country but also globally.

The ECtHR, in the case of Özgür Gündem v. Turkey[56], the ECtHR has discussed the freedom of press nad media in length. In this case, the applicant alleged that there was an assault on his freedom of expression due to a campaign that targeted various journalists involved in Özgür Gündem. The applicant also claimed that there have been viokent incidents including that of arson and attacks against the journalists. The court was also satisfied with the fact that there have been such violations and oppressions against the press from 1992-94 and therefore held that "*the key importance of freedom of expression as one of the preconditions for a functioning democracy*". The court stated that any genuine and effective exercise of this freedom is not dependednt on the state's power to interfere but it also requires positive protections of such rights. "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention"[57].

Distinguishing the freedom of press from other freedoms of expression is very crucial at this stage. Art 19 ICCPR and other international instruments choose to define the role of free and fearless journalism within a larger ambit of freedom of expression.

The SC of the US did not give any separate meaning to the Press Clause of the First Amendment and though the FA explicitly mentions a separate clause FOP, various court cases did not rely on that separate meaning and always considered it broadly under FOSE. The US SC since the early twentieth century considered, "that freedom of speech and of the press is rights of the same fundamental character"[58]. But the recent events seen in the U.S, especially during the tenure of Trump and the infamous

[56] CASE OF ÖZGÜR GÜNDEM v. TURKEY, App No 23144/93 (ECHR, 16 March, 2000)
[57] Ibid at Para 43
[58] New York Times Co v Sullivan, 376 U.S 254 (1964)

Facebook scandal of privacy, it is strongly believed that freedom of speech be seen as a separate freedom altogether.

The UN Human Rights Committee went to great lengths in 2013 to outline the role of independent journalism to seek and disseminate truth in the public interest. This can be understood from the Kazakhstan instance[59] where a journalist named Almas Kusherbaev alleged that his freedom of press was violated by the authorities and though the state had not sanctioned the ICCPR Protocols, the Committee still took the opportunity to discuss the role of journalism at length. The said journalist worked at an independent newspaper in Almaty called Raszhargan, which published an article in 2008 about the position of Kazakhstan in the global economy and state's decision to ban grain exports. The article also focused on parliamentarian named Romin Madinov who in turn, claimed that the article defamed him. The court ordered Kusherbaev to give him $ 200,000 as damages, but the HRC still went on to discuss the role of free media and sated as under:

> "International courts have emphasized that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance. There is very little scope for restrictions on political debate."

One of the most important issues that was left un-discussed by the committee was about the protection to the journalists who acted independently to discover the truth and report it to the public. The Committee based its assertion and only stated that it's not an acceptable norm to debar a journalist for expressing critical reports.

In another case, The Committee held that Angola violated Art 19 of a journalist named Rafael Marques de Morais when government officials jailed without informing him of any formal criminal charges against him, for a period of 40 days or so. The journalist was tried and convicted of defamation for his news articles which alleged corruption by the then President of Angolan, José Eduardo dos Santos. The conviction stated to be improper under international law, according to the UNHRC. In their decision,

[59] Kusherbaev v. Kazakhstan (Communication No. 2027/2011)

Committee members emphasized that "a free and uncensored press or other media" is of "paramount importance . . . in a democratic society"[60].

The Addis Abada Declaration[61] on "Journalism and Elections in Times of Disinformation" took a very strong step and called on the member states to take the following actions:

- Create/strengthen/implement a stronger legal framework to in line with the international standards to guarantee freedom of expression and privacy and to have a diverse and independent media sector
- To indulge a transparent and effective system to protect the journalists so that they can carry on their role efficiently, even during times of election.
- To remove vague legal obstacles that put any unreasonable restriction on the freedom of expression.
- Refrain from imposing Internet or other general communications shutdown or any other means that can block the transfer of information.
- Invest in media and information literacy
- Avoid circulation of disinformation or any statement that undermine the credibility of journalists and media or label them as enemies, liars or opposition

The Declaration of Table Mountain[62] on "Abolishing Insult Laws and Criminal Defamation in Africa and Setting a Free Press Higher on the Agenda" called on the African governments to abolish all such laws that restrict press freedom, free journalists who have been jailed for their professional activities, and promote ethical journalism. It seeks to condemn activities that poses restriction on newspapers or other such information channels. It also states that the greatest scourge on press freedom are the imposition of insult laws.

International Declaration on the Protection of Journalists is a leading global effort to protect journalism from the attack of government. It provides for useful measures to ensure the safety and protection of the journalists by stating that all the media personals

[60] Marques de Morais v. Angola (Communication No. 1128/2002)

[61] UNESCO, Addis Abada Declaration on World Press Freedom Day 2019, available at https://en.unesco.org/sites/default/files/wpfdaddisdecl3_may.pdf accessed July 21, 2021

[62] Declaration of Table Mountain, "Abolishing "Insult Laws" and Criminal Defamation in Africa and Setting a Free Press Higher on the Agenda", (2007) available at http://www.blog.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain accessed 20 July, 2021.

and journalists shall have full enjoyment of international human rights law[63]. It goes on to state that the journalists have the right to life and shall be protected from the violation of the same[64]. Item 3 goes on to state that "All journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians. Journalists shall not be prevented from interviewing civilians and combatants, taking pictures, filming and making audio recordings in times of conflict for the purpose of publication"[65]. The declaration instructs the state to host safe and enabling environment for the journalists[66]. It provides rights to the journalists to access information and hold authorities accountable[67] and also encourages that the journalists must be aware of their national and international rights[68].

Mavlonov v Uzbekistan[69] discussed about denial of re-registration of a newspaper. The case involved issues of right to information and FOP and the restrictions required there under. The Committee observed that the restrictions under art 19 of ICCPR must be only that what is provided by (a) for respecting the rights and reputations of others; and (b) for the protection of national security, public order, morality and public health. It

[63] See Item 1 of the International Declaration on Protection of Journalism "…All journalists, media professionals and associated personnel have the right to the full enjoyment of the rights enshrined in international human rights law and international humanitarian law while exercising their right to seek, receive and impart information and ideas, regardless of frontiers" available at https://ipi.media/international-declaration-on-the-protection-of-journalists/ accessed 20 July, 2021

[64] Ibid Item 2 , "All journalists and media professionals have the right to life and shall be protected from all human rights violations and abuses. Journalists, media professionals and associated personnel whose fundamental rights and freedoms have been violated must be granted legal, medical and psychological aid in case such violations occur"

[65] Ibid, Item 3

[66] Ibid, Item 4 "States shall promote a safe and enabling environment for journalists to perform their work independently and without undue interference.
States shall take appropriate steps to prevent violence, threats and attacks against journalists and media workers and shall ensure accountability for crimes committed against journalists, media professionals and associated personnel. In particular, all states should adopt, adequately fund and ensure the successful functioning of specific mechanisms to guarantee the safety of journalists working within their borders.
Through the conduct of impartial, speedy, thorough, independent and effective investigations into all alleged or threats of violence falling within their jurisdiction, states shall bring perpetrators including, inter alia, those who command, conspire to commit, aid and abet or cover up such crimes, to justice. States shall ensure that victims and their families have access to appropriate remedies".

[67] Ibid, Item 6

[68] Ibid Item 11 "…Journalists should be informed about their rights and duties under international laws as well as the national laws of the countries in which they operate. Journalists should not be obliged against their will to cover dangerous assignments that involve serious recognizable risk"

[69] Communication 1334/2004 decided by HRC of ICCPR

recalls that "the right to freedom of expression is of paramount importance in any society, and any restrictions to the exercise of must meet a strict test of justification". It also stated that FOSE under article 19 of the Covenant including publishing a newspaper (right to impart) and receiving such information (right of the listeners) has been violated. The Committee noted that the audience has the right to receive such information as much as there is the right of the journalists to impart the same. It theregore considered that the right of the receiver of the information was violated by the non-registration of the newspaper.

This above case shows the international acceptance of the freedom of media on the ground that it is not just a right to publish or circulate an opinion or a report but it is also a right to listen or read those opinions. Where we are stuck with the concept of the attack on media as a threat to the journalists alone, it is important to understand that these attacks are also to a class of people who depend on these channels for their information and receiving such an information is a human right, as considered under Art 19 of ICCPR and so discussed in the previous chapter.

Even still, irrespective of such global acceptance and protection, we are not quite free from the attacks on the media. The freedom of press and media is under a lot of threat, not only because of the suppression of the same but also because of putting the idea of causing major harm to the people who engage in bringing out the truth about the government, the state and the administrative actions.

Can freedom of expression persist without the freedom of press? An interesting story can be cited from that of the Russian press and media circus and the attacks by the government on various journalists. To recall a few, 7th Oct, 2006, Journalist Anna Politkovskya[70] was assassinated in the elevator of her apartment in broad day light in Moscow, Russia. 2008, Mikhail Beketov[71], the editor of a local newspaper was brutally beaten for reporting against the government. 2009, human rights lawyer Stanislav Markelov and freelance journalist, Baburova were killed in broad daylight after leaving

[70] Shaun Walker, 'Murder that killed Free Media in Russia' *The Guardian* (Moscow, 5 Oct, 2016) available at https://www.theguardian.com/world/2016/oct/05/ten-years-putin-press-kremlin-grip-russia-media-tightens accessed 13 July, 2021.

[71] Miriam Elder, 'Russian Journalist mourn fallen colleague five years after attack' *The Guardian* (Moscow, 11 April, 2013) available at https://www.theguardian.com/world/2013/apr/11/russian-journalists-mourn-mikhail-beketov accessed 13 July 2021

a news conference in Moscow. In 2009, Natalia Estimirova[72], a human rights activist and a freelance journalist who contributed publications to important media houses like the *Novaya Gazeta*, was abducted and found dead after few hours. The sad part is that none of these murders were properly investigated and they remain unsolved. Another interesting incident is that of journalist Natalia Morar who reported on high ranking officers siphoning huge sums of money abroad via various Moscow banks. Taking advantage of the fact that she was not a Russian national, she was barred from entering Russia since 2007[73]. Maria Lipton[74], in her article, points out that the freedom of press is not quite dead in Russia though there is a serious threat to the same. Though, there are various independent news reporting agencies[75] which forecast a different set of opinions, Russian media is dominated by three major television channels. The problem is that the reach of these independent news reporting agencies are very minor when compared to the national TV access which is seen, heard and spoken by millions of people. When Putin came into power, he weakened all the forces that could threaten the government action and authority of the Kremlin. These three channels act as the mess cleaner of the government's action and therefore, projects a very important role in shaping popular belief of the masses.

Government controls over the press poses significant challenge to the freedom of expression[76]. And when these controls turn volatile, leading to the murder and abduction of journalists, it further accentuates the fact the somewhere, the government is under a lot of fear to be exposed. After all, it is not for any other reason that the Media is called to be the fourth pillar of democracy.

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72 Tom Parfitt, 'Vital Leads ignored ignored' in Natalya Estemirova murder investigation'*The Guardian* (Moscow, 14 July, 2010) available at https://www.theguardian.com/world/2010/jul/14/leads-ignored-natalya-estemirova-russia accessed 13 July, 2021.

73 Graham Stack, "'Twitter Revolution' Moldovan Activist goes into Hiding', *The Guardian*(Chisinau, 15 April 2009) available at https://www.theguardian.com/world/2009/apr/15/moldova-activist-hiding-protests accessed 13 July, 2021

74 Maria Lipman FREEDOM OF EXPRESSION WITHOUT FREEDOM OF THE PRESS, (2010). *63*(2), 153-169 *Journal of International Affairs*, http://www.jstor.org/stable/24384340 accessed 13 July, 2021

75 *Novaya Gazeta, Kommersant, Vedomosti* to name a few. Ehko Moskvy (meaning Echo of Moscow) is a highly interactive political talk show which broadcasts diversity of opinion.

76 UNHRC held that "the refusal of the Uzbek authorities to register a newspaper was a denial not only of the freedom of expression rights of the editor, but also of the right of a reader of the newspaper to receive information and ideas". See *Mavlonov v. Uzbekistan*, 27 April 2009

3.2 Freedom of Press under the Indian Constitution

In spite of repeated requests o include the 'freedom of press and media' exclusively under the constitutional protection[77] of Art 13 of the then draft constitution, the constituent assembly still failed to incorporate the same. According to Dr. B.R Ambedkar, the press editors and managers are all citizens and when they write in newspapers, they are thereby exercising their right to expression. It is intriguing to ask that if the freedom of press was so much included in the freedom of speech and expression, why is it difficult to add another clause to the provision and mention it explicitly. The researcher does not understand the harm that it can encounter but only the true benefit that there is a freedom of press and media protected by the constitution itself. It is important to see it as a separate provision altogether because of the action and importance that it bestows in forming a true democracy. However, it is important to mention here that the right of press is such an important right that the courts agree that even if all the other recourses are not exhausted, the Supreme Court being the guardian for protection of the fundamental rights, can't deny to entertain such issues[78]

However, the Indian judiciary has taken serious measures to imply the freedom of the press and the media. "*Freedom of speech and expression is that cherished right on which our democracy rests and is mean for the expression of free opinions" was stated by Justice Hidayatullah in the case of* Ranjit D. Udeshi v. State of Maharashtra[79]. It would be difficult to deny the truth and validity of this sentence, especially in the world where information is accessed at the click of a button. Also, it is to be substantiated with the argument that the freedom of expression includes the freedom to impart information as well as receive it. As we understand that this freedom of press and media flows from Art 19(1)[80] and there is no explicit mention of the same, the Indian judiciary has done a tremendous job to ensure that this freedom is protected. Therefore, the freedom of press does not only include the right to write and publish but also to

[77] Shri Damodar Swaroop Seth argued in the Constituent Assemble as "…at present worded, appears to have been clumsily drafted. It makes one significant omission and that is about the freedom of the press. I think, Sir, it will be argued that the freedom is implicit in clause (a), that is, in the freedom of speech and expression. But, Sir, I submit that the present is the age of the Press and the Press is getting more and more powerful today. It seems desirable and proper, therefore, that the freedom of the Press should be mentioned separately and explicitly." See CAD Vol VII available at http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C01121948.pdf

[78] Romesh Thapar v State of Madras AIR 1950 SC 124

[79] AIR 1965 SC 88I : (1965) I SCR 65

[80] *Indian Express Newspapers (P) Ltd. V. Union of India and Brij Bhusan And Anr v State of Delhi*

carry on business and circulate[81]. It includes the freedom to access all sources of information[82]. Romesh Thapar[83] case provides some very intrinsic ideas about the freedom of press as stated under:

- FOSE includes freedom of propagation of ideas including freedom to circulate
- Any criticism of Government expressing disaffection towards can't be stated as a reasonable ground for restricting the FOP, unless it has the tendency to threaten the internal security of the state or overthrow the government
- freedom of speech and of the press lies at the heart of every democracy, "for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible".

The philosophy and importance behind the Freedom of press under the Indian constitution has been discussed very wisely in the case of Indian Express Newspapers v Union of India and Ors[84], decided on 6th December, 1984 where it has been stated that the 'freedom of press' is though not mentioned explicitly, it is included under Art 19(1)(a)[85]. The court discussed about its absence from the provision and seeks help from the Constitutional Assembly Debates where it was mentioned that "*the freedom of Press is one of the items around which the greatest and the bitterest of all constitutional struggles have been waged in all countries where liberal constitutions prevail"*.

The case also quotes, "the right of freedom of speech is secured, the liberty of the press is expressly declared to be beyond the reach of this Government". The case mentions Pandit Jawaharlal Nehru stating that "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press"[86]

It has been stated in the case that in today's world, freedom of press is the heart of social and political intercourse. The press is playing the role to educate the public in a large scale. It is the duty of the press to publish information for the benefit of the public

[81]Romesh Thapar (n 2)
[82] M.S.M Sharma v. Sri Krishna Sinha, AIR 1959 SC 395
[83] Romesh Thapar (n 2)
[84] 1986 AIR 515, 1985 SCR (2) 287
[85] Also, Brij Bhushan v and Anr v State of Delhi and Bennet Coleman & Co. v Union of India
[86] Quoted from Mankekar: Press under Pressure (1973) in the case

at large, without which a democracy can't work properly. The articles published require the authors to be critical of the action of the government in order to expose its weakness. And when these articles become a threat to the government, it takes steps to suppress such publications. It has been stated again and again that the role of the press is to expose the malice or ill practice of the government and "the primary duty of all the national courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it, contrary to the constitutional mandate".

In Sakal Papers (P) Ltd. v. Union of India[87], a law that placed a fixed number of pages and sizes of the newspaper was challenged[88]. It was contended by the state that such was a reasonable restriction on the ground of "in interest for public order". The Court struck down the Order and held that "the right to freedom of speech cannot be taken away, with the object of placing restrictions of the business activities of a citizen". The court also mentioned that *"*a free press cannot mean a press composed of a few powerful combines and that in order to ensure freedom of press, it is necessary to secure full scope for the full development of smaller newspapers".

Again in Bennett Coleman v. Union of India the SC explained that FOSE is not only about the volume of circulation but is also about the views and the news. The press must have the right to free circulation without any restrain. The court stated that "If a law was to single out the press for laying down prohibitive burden on it that would restrict the circulation, penalize the freedom of choice as to be personnel, prevent newspaper from being started and compel the press to sick government aid, this would violate Article 19(I)(a) and would fall outside the protection".

At this junction, I believe it is necessary to mention that the idea of calling my research "chilling effects" came from the 2020 case of Anuradha Bhasin[89] and it was an important case regarding freedom of expression and also discussed press freedom. One of the contentions of the petitioner in this case was that the restrictions imposed by the authority was a 'chilling effect' on the freedom of speech nad expression. This court discussed that this concept of chilling effect is a recently introduced concept. However, its reference can be seen in U.S Judiciary in Weiman v. Updgraff. The court states that the use of this concept is adopted for an impugned action of the state which, though can

[87] AIR 1962 SC 305

[88] Daily Newspapers (Price and Pages) Order, 1960

[89] Anuradha Bhasin v UoI (Writ Petition (Civil) No. 1031/2019)

be constitutional, but still imposes a great burden on freedom of speech. If this principle is not tempered judicially, it would result into a 'self proclaiming instrument'.

The court in this case tried to understand when a provision stops imposing on free speech. The court sought to see whether the impugned restrictions had a restrictive effect on similarly placed individuals during the same period. The petitioner contended that she wasn't able to publish her news paper but no evidence was put forth. Though the court denied to indulge in the issue, it held that responsible governments rae supposed to respect the freedom of press at all times and "There can be no justification for allowing a sword of Damocles to hang over press indefinitely".

Therefore, we can understand that though the legislature has not stepped forward to put up a separate provision for the freedom of press under the constitution, the judiciary has very well understood the importance of the same and has taken immense measures to protect this right, as any moment the right to press is under threat, the democracy of the country slowly starts losing its breath. Press plays a very fundamental role in shaping the ideologies, opinions, believes of the public and though it may be different or diversified, it still can't be restricted. We see a number of small news channels that have come up, thanks to the reach of internet. The people need not just depended on daily news papers or TV channels watching the slaves of the government argue at the top of their voices but there are independent channels like The Quint, the Wire etc which brings out a varied opinion on an issue.

But in spite of the dedicated effort of the Indian judiciary to protect the freedom of press, India still ranks 142/180 countries as per the World Press Freedom Index of 2021[90]. It is also considered to be a dangerous country for journalists[91]. There is a threat to the freedom of expression everywhere. Countries like Nepal, Sri Lanka and Myanmar before the military coup ranked at 106, 127 and 140, respectively. In spite of various trolls on the Pakistani media, they still lie at 145, not much far from our rank. The reason substantiated for labeling the country "bad" in its journalism part is because

[90] World Press Freedom Index available at https://rsf.org/en/ranking/2021 accessed 9th July, 2021. Also see Sobhana K Nair "India again placed at 142nd in Press Freedom" (New Delhi, April 21, 2021) *The Hindu* *https://www.thehindu.com/news/national/india-again-placed-at-142nd-rank-in-press-freedom/article34377079.ece* accessed 9th July, 2021.

[91] 'Dangerous Country for Journalists', India's Press Freedom Rank is 142, IT Rules Make it Worse' *The Wire* (20 April, 2021) available at https://thewire.in/media/dangerous-country-for-journalists-india-ranks-142-on-world-press-freedom-index accessed 9th July, 2021.

of the Modi government and its Hindutva policies which does not sigh away from tagging any journalist speaking against the government as 'anti-national' or 'anti-state'. The UNESCO observatory of Killed Journalists has stated that there were 6 journalists who were killed in the year 2020 in India[92].

Reporters Without Border (RSS) also called upon the Uttar Pradesh Police to investigate the case of three journalists who could be jailed for 9 years for reporting a video of a Muslim man's beard being chopped in Twitter[93]. Harassment caused to the reporters reporting the Farmers Protest in New Delhi is also an attack to the freedom of press in India. Charges were brought against almost 10 journalists for covering the protest. Various Twitter accounts of several journalists were suspended, at the behest of the orders of the Home Minister. Mandeep Punia, a freelance journalist who writes for *The Chronicles* was charged with sedition for publishing an article, reporting about the protest and was kept in detention for 14 days without giving him any opportunity to meet his lawyer. The Wire's founding editor, Siddhar Varadarajan was also charged for inciting hate during the same time[94]. All these are nothing but sheer evidence of the gross human rights violation that takes place in India for reporting incidents that can threaten the chairs of the politicians. However, journalism in its own course is a little insignificant in the present day and one example that can be cited is the difference of report. **Conducting a study in 2019, it was found that more than 200 serious attacks were seen on journalists just from the tenure of 2014-19. These cases have not even been investigated. It is reported that there were around 40 killings of journalists between 2014-19[95]. However, UNESCO has another story to offer and according to the UNESCO Observatory of killed Journalists: India, there are only 23 killings reported from 2014 to 2019[96].**

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[92] 'UNESCO Observatory of Killed Journalists- India' available at https://en.unesco.org/themes/safety-journalists/observatory/country/223728 accessed 9th July, 2021.

[93] Three Journalists Could Be Jailed For 9 Years For Tweet Against A Video, (17 June, 2021) *Reporters Without Borders* *https://rsf.org/en/news/three-indian-journalists-could-be-jailed-nine-years-tweets-about-video* accessed 9th July, 2021.

[94] "Journalist Siddharth Varadarajan booked in UP for report on farmer's death on R-Day" (Jan 31, 2021) *The Newsminute* *https://www.thenewsminute.com/article/journalist-siddharth-varadarajan-booked-report-farmer-s-death-r-day-142492* accessed 9th July, 2021.

[95] Over 200 Serious Attacks on Journalists in India Between 2014-19: Report (26th Dec, 2019) *The Wire* available at https://thewire.in/media/journalists-killed-attacked-india-report accessed 9th July, 2021.

[96] UNESCO Observatory Killings of Journalist available at https://en.unesco.org/themes/safety-journalists/observatory/country/223728

Therefore, it's safe to state that though the judiciary has tried to protect the freedom of press in its best interest, the actions in the recent times show that it is not sufficient. New laws and policies have to be adopted by the legislature for the protection of the journalists in their journey of perusal to the truth.

CH4: Hate Speech- A bluff on Freedom

India, a country not made in a single night. There were wars and battles, small boys building major empires, the coming up of the Sultanate in the 13th Century and introduction to Islam, then the British and their missionary schools which opened the gates of Christianity, the land of Buddha and Mahavir himself, the land that witnessed a rise of a whole new religion of Sikhism. If you are still wondering what argument the researcher wants to pose, well its very simple- the very foundation of the country was not meant for a single religion. We are a population of 1.33 billion, witnessing various religions, races, castes, sex and discriminating anyone on these grounds have been mandatorily prohibited by the constitution itself. One can hardly see a country so embedded in religious practices with a Preamble declaring it a 'secular' country and offering every citizen the right to practice and propagate his own religion. Aren't we a class in ourselves!

However, over time we can witness that man's greatest strength has turned him weak. Yes, I am concerned about the ability of man to talk and voice his opinion, to express himself and to allow people to accept him in that regard.

In today's world, the major attack that is placed on the freedom of speech and expression is when it goes to the extent of speaking something against the government or the state or it can incite hate. In this chapter, we will try to understand the concept of hate speech and its various allies that has the power to restrict the freedom of expression, including the draconian law of sedition that has prevailed in the country has taken a toll on the freedom of speech. We will also see how the provisions of hate speech have ignited a fire upon this freedom. These provisions allow serious injury to the rights that are seen necessary for any democracy. Where sedition does not allow people to overthrow the state or the government, the concept of the same has been taken in a very malicious way to curb the ability of various people to pose their opinion.

4.1 HATE SPEECH AND FREE SPEECH: THE TUG OF WAR

We, as a country of diversity, face day to day issues on regard of different social and political standards. This is not only contained to our nation but actually is a concern around the world. With rising incidents of violence and hate, there have been more and more political upsurge and intolerance[97]. Attempts to curb the freedoms of the press have been on a rise, more than ever[98]. The progress of people's intolerance to hate has seen a sudden rise, thanks to implementation of such hurtful policies into politics in the name of national security[99]. The leaders of the country also see this hate as a great opportunity for gaining votes and therefore, use this intolerance as their political ideologies, making nations a zone of intolerance. Examples like whether *hijaab* can be worn by Muslim school girls or Turbans by Sikh school boys in France gave rise to debates between religion and politics or the Dutch Parliament implementing measures

[97] Samuel Patty, a teacher in France was killed by his Muslim pupil for showing cartoon photos of the Prophet, causing great disturbances all over France. 7 people have been charged for his murder. See 'France teacher attack: Seven charged over Samuel Paty's killing' *BBC News* (Europe, 22 Oct 2020) https://www.bbc.com/news/world-europe-54632353 accessed 24 June, 2021.

[98] With number of journalists like Mandeep Punia and Pranjoy Guha being arrested, 3 journalists from 'Frontier Manipur' charged under the dangerous UAPA, India recorded a total of 5 arrest cases of Journalists just within 2 months of 2021, which is already the highest since 1992. See Vignesh RadhaKrishnan, Sumant Sen *'Five Journallists arrested in January 2021, highest in any year since 1992'* The Hindu (13 Feb 2021) https://www.thehindu.com/data/data-five-journalists-arrested-in-january-2021-the-highest-in-any-year-since-1992/article33830579.ece accessed 24 June, 2021.

Recently, Apple daily, the largest pro-democracy newspaper in Hong Kong was shut down for publishing reports that breached their new national security laws. People gathered outside the office in a rainy night and turned their flash light on as a tribute to the democratic media. The staff of Apple daily climbed on the balcony with their flash lights on, thanking the people of Hong Kong. It marked the end of an era and a new tension for the death of freedom of speech. See "*Apple Daily: Hong Kong Bids Emotional Farewell to Pro-Democracy Paper"* BBC News (China, 24 june, 2021) https://www.bbc.com/news/world-asia-china-57591069 accessed 24 June, 2021.

[99] The recent Citizenship Amendment Act, 2019 which created great chaos and turmoil in various parts of the country on the grounds of being the first law to be based on religion and speculating the news of being able to strip off the status of citizenship from various Muslims based on NPR and NRC. See Report published by Human Rights Watch which is an International Organization with offices in over 40 countries. See *'Shoot the Traitors' Discrimination against Muslims under India's New Citizenship Policy* available at https://www.hrw.org/sites/default/files/report_pdf/india0420_web_0.pdf last accessed 28.06.2021

to favor the ban of *burqa* in public show us how hate is incited in people against cultures, communities and most importantly, religion for political agendas[100].

Before indulging any further, we can agree that there is no universally accepted definition of what is hateful or hate speech. The Council of Europe's Committee of Ministers to Member States on Hate Speech has defined 'Hate Speech' as: …

> "the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin"[101].

To understand if there is any test to conclude what constitutes 'hate speech', we have to look at the Report published by the Law Commission in the year 2017 on Hate Speech[102]. The Report takes note of foreign laws to analyze what constitutes hate speech and answers it in three parts:

Firstly, the limitation has to be prescribed by the law. The limitation must be prescribed by the statute and must be precise so that the citizens can regulate their conduct in accordance with the law.

Secondly, the restriction aimed at the speech must be proportionate to the legitimate aim that is pursued.

Thirdly, whether the limitation was required to protect the social need and the principles and values under Art 10 of ECHR.

The United Nations have taken a step to identify what it could mean and attempted to define it as under:

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[100] Rajeev Dhavan and Aparna Ray, 'Hate Speech Revisited: the Toon Controversy', (2006) Vol 2, Socio Legal Review, Pg 3 available at http://docs.manupatra.in/newsline/articles/Upload/D3B83AD3-653A-4A41-B1C9-4F8578921FB5.pdf last accessed on 28.06.2021

[101] RECOMMENDATION No. R (97) 20, OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON "HATE SPEECH" available at https://rm.coe.int/1680505d5b accessed 26 June, 2021.

[102] Report No 267, Hate Speech (2017), Law Commission of India, available at https://lawcommissionofindia.nic.in/reports/Report267.pdf accessed 10 July, 2021.

> *"any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor"*

With regards to this definition, it is important to clarify that the UN also states that any hate speech which does not reach the threshold of incitement need not be prohibited by the state. It also assures that even if a speech is not prohibited, it can still be harmful[103]. It states that addressing hate speech is in no way curbing the freedom of speech but only ensuring that speech does not escalate into something so dangerous, discriminatory or violent which is surely prohibited under the international law[104].

According to the meaning given to hate speech by the UN itself, it is clear that the speech should have certain characteristics. Firstly, the speech must use pejorative (derogatory) or discriminative language. Secondly, such speech must refer to a person or a group based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. Based on these factors, if a speech is made with the intention of hurting that person or the group, it has the characteristic of being a hate speech.

If we look at the western developments, especially in the case of America, the First Amendment protected varied character of speech including distasteful[105], profane[106], anti-American as well as hate speech. The courts assumed that the First Amendment prevents the government from prescribing orthodoxies in speech. It is not justified to regulate speech on the ground of its disagreement or because the society finds that speech offensive.

In R.A.V v St Paul[107], the petitioner was charged for burning a cross at the lawn of a black family under the St. Paul, Minnesota, Bias-Motivated Crime Ordinance. This ordinance prohibited the display of any symbol which can "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The U.S SC

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[103] United Nations Strategy and Plan of Action on Hate Speech, 2019, pg 2 available at https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf, last accessed on 27.06.2021

[104] Ibid at pg 1

[105] Hustler Magazine Inc v Falwell, 485 U.S 46, 55 (1988) [involving a parody of a pastor getting drunk and fornicating with his mother]

[106] Cohen v California [Issue regarding a slang used on jacket]

[107] 505 U.S 377, 1992

reversed the decision of the lower court which upheld the constitutionality of the ordinance and held that "the St. Paul statute was meant to prohibit only expressions that served to cause outrage, alarm, or anger with respect to racial, gender, or religious intolerance. Other expressions designed equally to arouse anger or outrage on other bases was not prohibited". The ordinance therefore was unconstitutional. It was also stated that it was not reasonable for the ordinance to affirm that "content-specific discrimination was necessary to achieve a narrow and compelling end".

However, in 2003, the Court had a different point of view in the case of Virginia v Black[108]. In this case, the SC upheld a Virginia statute which made it illegal to burn a cross in public with the intent to intimidate others. To distinguish this case from *R.A.V. v. St. Paul* (1992) which held that "a local ordinance that banned cross burnings inspiring hatred based on "race, color, creed, religion or gender" amounted to constitutionally impermissible content discrimination", Justice O'Connor held that cross burning was "a particularly virulent form of discrimination." Therefore, it fell into an exception established under *R.A.V.* that let states ban extreme forms of a given type of speech without banning other, less severe forms.

Now, let's look at the provisions contained in the Indian laws that have the characteristic of being called "hate speech".

Firstly, we have the provision of sedition, which is exclusively debated in the next segment of this chapter. The problematic aspect of sedition and the researcher is very simple- the misuse of the law. Also, there are various other provisions that can be tagged under National Security Laws and a draconian law like this, only to show off Hindutva vis-à-vis patriotism is not a proper idea of free speech. Sedition is often associated with people being called Anti-National or Anti-State. Denying to chant "Bharat Mata ki Jai" should not make the researcher an anti-national[109] as freedom of speech also includes the freedom not to speak[110]. But again, a group raising slogans in support of Afzal Guru is also not supposed to be taken in a way that won't outrage the sentiments of the vast majority. Nationalism, patriotism and respect for the country is a

[108] 538 U.S 343, 2003

[109] Antara Dev Sen, "Thinking Allowed: Feeling Seditious or Patriotic" *Deccan Chronicles* (22 March, 2016) available at https://www.deccanchronicle.com/opinion/op-ed/220316/thinking-allowed-feeling-seditious-or-patriotic.html accessed 9th June, 2021.

[110] Bijoe Emmanuel v. State of Kerala 1986 3 SC 615

very important aspect of being a citizen and there can be no debate, whatsoever, that a person can have the right to speak about things that can hurt the national pride. But this does not and at least, should not extend to the limit of not allowing a person to criticize the government.

Sec 153A[111] punishes people for cases where a person has, by words (either spoken or written) or signs causes or incites hate or ill will between different religious, linguistic or regional groups. Such speech must have the effect of bringing disharmony or disturb public tranquility. To constitute this, it is important to make such a speech with the intention of promoting hate. If there is no such purpose or even part purpose, such a speech will not attract this provision[112]. Vide this section, one is restricted to make any speech which has the tendency to deliberately cause enmity between group or disrupt public harmony. Another important feature of this section is that it will not attract any other groups (like for example capitalists and labour class or democratic and totalitarians) except for the ones that are mentioned because it only involves groups based on religion, race, caste, sex, place of birth, language, residence and no other[113].

The Delhi High Court decision in Trustees of Safdar Hashmi Memorial Trust v. Government of NCT[114] of Delhi

> "Absence of malicious intention is a relevant factor to judge whether the offence is committed. It can be said to be promoting enmity only where the written or spoken words have the tendency or intention of creating public disorders or disturbances of law and order or affect public tranquillity. Mens rea has to be proved for proving commission of the offence".

The standard prescribed by Section 153A requires a tendency or intention of creating a disturbance of public order and tranquility[115]. Speech acts which are purely political

[111] 153A(1) of IPC: "Promoting Enmity between different groups on grounds of religion, race, place of birth, residence, language etc and doing acts prejudicial to maintenance of harmony"
[112] State (Delhi Admn) v Shrikant Shastri, 1987 CrLJ 1583.
[113] Ratanlal & Dhirajlal Indian Penal Code, 321 (Justice K T Thomas and M.A Rashid, 35th Ed, 2017
[114] 2001 CriLJ (Delhi) 3689
[115] Balwant Singh v. State of Punjab, (1995) 3 SCC 214

comments, which do not promote enmity between classes or communities, do not fall within the law[116].

Section 153A has been subject to several constitutional challenges. The first instance of such a challenge was decided by the Punjab and Haryana High Court in Tara Singh Gopi Chand v. The State[117]. The Court held that "Sec 153A was overbroad, as it criminalized speech that tends to overthrow the state as well as speech may not 'undermine the security or tend to overthrow the state'". Therefore, it found Sec 153A unconstitutional. However, Article 19(2) of the Indian Constitution was amended to and now includes the exception of 'public order' and so the ruling does not stand valid.

Sec 153B of IPC talks about **Imputation, assertions prejudicial to national integration** whereby it punishes a person for words (Spoken or written), visible representation or signs that signifies that any class of person can't bear true faith or allegiance to the constitution of India or uphold its sovereignty and integrity by reason of being a member of a religion, race, language, region, caste or community and they be denied the rights of citizenship of the country or causes disharmony or feelings of enmity or ill-will between these communities. On one hand, the penal code punishes people for causing an offence as this and on the other hand, the legislature comes out with its very infamous Citizenship Amendment Act of 2019 which pursues to give citizenship to various religious groups except Muslims, barely on the ground of religious persecution.

Under 295A of IPC, a person can be punished for deliberate and malicious acts intending to outrage the religious feelings of any class, by insulting its religion or religious beliefs. This is very similar to Sec 153A, the difference being that this section primarily focuses on religion alone.

If a person utters any word or sound in the hearing of a person, a gesture in the sight of a person or places any object in the sight of a person with the intention to wound the religious feelings of that person, is punishable under Sec 298 of IPC. It is understood that nobody should be allowed to deliberately hurt the religious sentiments of another but a warm expression dropped in the heat of a controversy not for the purpose of

[116] Shiv Kumar Mishra v. State of Uttar Pradesh

[117] 1951 CriLJ (Punjab and Haryana) 449

insulting or annoying but in good faith vindicating his own will can't fall within the ambit of this provision[118].

Sections 95 of the CrPC[119] authorizes the state to ban any 'book or newspaper or document which has the character of falling within Section 124A, Section 153A, Section 153B, Section 292, Section 293, and Section 295A of the IPC. As a result, it allows the state government to censor such publications on the ground of being 'hate speech'.

The State of Uttar Pradesh v. Lalai Singh Yadav is a landmark judgment which discussed the forfeiture of a book titled 'Ramayan: A True Reading'. The case discussed about the powers of the state at length, and the SC laid down guidelines that the state government should abide by before issuing any order that can forfeit the publications. These guidelines specify that "the state must be of the opinion that the publication contains matter punishable under Sections 153A and 295A and should also state the grounds for its opinion".

Section 196[120] of the CrPC acts as a procedural safeguard against the provisions for 'hate speech' offences, such as those under Sections 153A, 295A, 505 and 153B of the IPC.

Hate speech can be explained as an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them. In an article by J Sorabjee, it is said that advocacy of objectionable doctrines lacking the characteristic of inciting an offence can't be legitimately criminalized. If the ideas are false, they must be countered with true and sound ones. It is unfit in a democracy to be afraid of ideas. Hate speech can be prohibited in limited cases where such expression would definitely leading to the commission of an offence or result in unlawful action or evoke extreme feelings of hate or discrimination against them[121].

When questioned if these provisions are necessary, the courts in various instances have observed the statement in assertive. But, there have been immense pain undertaken to

[118] Ratanlal pp 505

[119] Power to declare certain publications forfeited and to issue search warrants for the same

[120] Prosecution for offences against the State and for criminal conspiracy to commit such offence

[121] Soli Sorabjee, J "'Hate Speech' Dilemma." *Fortnight*, no. 318, 1993, *JSTOR*, available www.jstor.org/stable/25554070 accessed 18 June, 2021.

promote the view that speech, of any manner, shall not be censored on its content alone. It must, rather, be justified to refer it to the impact such as its likelihood to cause an imminent lawless action[122].

The Indian legal framework has worked hard enough to curb hate speech. From our perusal of the laws present, as seen previously, it is clear that certain kind of speeches can provide punishments to the speaker. Most of these provisions remain cognizable and non-bailable. This makes the whole situation much dramatic. Also, such restrictions infringe a lot of work of people in the television and media industry. Banning of books, seizing magazines and the government telling us what not to read is a deep concern for the exercise of this freedom of expression. However, all these procedures speak for itself that no matter how many legislation you put across, a natural phenomenon of speech can't be absolutely regulated.

With the increased activity in social media, hate speech has become a true concern and no matter how much we advocate the freedom of speech and the protection of all kinds of speech, there are all the time various kinds of expressions in these platforms which can bring in nothing but disrespect and disregard, not just by a an individual but by a whole community. We have earlier, in the court discussions, seen that it is very important for a speech to have a certain character of causing imminent danger to be termed as hate speech. Also, hate speech is more focused in attacking a group, rather than an individual and many a times, at least in India, this groupism is based on religion.

Therefore, we enter the loophole again to answer- how exactly can we ensure to regulate hate speech?

Counter-speech, which can be explained as a response to hate speech, is a very effective call to address this violence. It is definitive and aims at undoing the damage brought by hate speech. This is also one aspect that is heavily followed in social media platforms to respond to extremists and hateful comments. It can take various forms, like memes, image of that comment or cartoons. This does not mean that legal recourses

[122] A.G Noorani, "Hate Speech and Free Speech" (Nov 14, 1992) 24(46) Economic And Political Weekly https://www.jstor.org/stable/4399116?read-now=1&refreqid=excelsior%3A2f9626b8c937f2e08e4fb129413baac6&seq=1#page_scan_tab_contents accessed 9th July, 2021.

should not be available but it is only a step in the primary stage that can be taken to put on our grounds whenever a speech circulates with the tendency to create hate.

This method has its own consequences too, like it can create an environment of discussion or it can spread more hate. It is very important to educate people about the fact that a democracy needs more discussions and debates rather than hate, and a speech can be one that we disagree to but that does not give us the right to fire bullets for that speech. A healthy discussion is always a better method to explain stands rather than seeing an evening of opposites parties entering college campuses with the intention of creating an environment of injury, hurt and extreme disgrace.

4.2 SEDITION: A NEED OR A TOOL

Sedition can be understood as an action of speech (whether spoken or written) expressing dissatisfaction or bringing hate against the government. It is a comprehensive term and expresses all the practices which can disturb the tranquility of the state[123].

Sedition law is present in different states with different names, ultimately with the same intention of intolerance of any speech capable to insult the authorities. For example, in many Arabian states, it's a crime to instigate hate or disrespect against the current regime. In china too, incitement of subversion of state power is a criminal offence. Many European states make it a crime to insult the head of the state or political figure. Cyprus makes it a crime to insult the army or a foreign head of state. In Denmark, attacking any public official with insults, abusive language or other offensive words or gesture is punishable by up to 6 months. Defaming the President in Germany can offer a prison term of up to 5 years[124]. A Maylasian Cartoonist who goes by the name Zunar, has been arrested for publishing 9 cartoons in Twitter on the Prime Minister of the state and the punishment is for a term of 46 years and he has been arrested under this same law for 9 other times[125]. In spite of such huge debates on the freedom of expression, accepted and seen to be a serious issue not just by nations but by international forums too, Malaysia still thinks that the sedition law must be made stricter, a move that has

[123] Ratanlal & Dhirajlal Indian Penal Code, 270 (Justice K T Thomas and M.A Rashid, 35th Ed, 2017

[124] Amal Clooney and Philippa Webb, "Right to Insult in International Law", (48,2) (2017) *Colombia International Law Review*

[125] Agence France-Presse, "Malaysian Cartoonist Arrested for criticism of Prime Minister Najib Razak", *The Guardian* (27 Nov, 2016) available at https://www.theguardian.com/world/2016/nov/27/malaysian-cartoonist-arrested-for-criticism-of-prime-minister-najib-razak accessed 9 July, 2021.

been highly disregarded and been called "Black Day for Democracy"[126]. The researcher fails to understand the logic behind this act.

Sedition law in India has its roots attached in the colonial history. The provision was not a part of the code irrespective of being present as Sec 113 in Macaulay's Draft Penal Code, the punishment for which was life imprisonment. Later on, the provision was added as Sec 124A of IPC to control the huge masses who were going against the colonial rule, in seek of their freedom. Therefore, many freedom fighters and nationalists called it a tool to curb the freedom of the masses. This look at history poses a very interesting question- if freedom fighters and nationalists considered this law as a tool to control the masses and prohibit them from exhibiting their opinions, how is it valid to have the same law in the nation after it gained independence, an independence based on mass protest and revolts? How is expressing one's disagreement or opinion against the government sedition now and a tool for the Crown 72 years ago? Rather, the position must have been altered.

With recent development and the new government, we see that there is an upsurge in the cases of sedition[127]. From 2016-2019, the number of cases filed under sedition has seen an increase of 160% but only 3% have been convicted[128]. Also, the debate on the requirement of this law has surfaced again[129]. In a democratic country, the validity of this law has been challenged quite a number of times and recently, it is evident that the judiciary is also of the same mentality that the time for this provision has passed[130] and does not hinder to talk and express about the same. Though the

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[126] Malaysia Toughens Sedition Law Punishmennts, 2015 available at https://www.dw.com/en/malaysia-toughens-sedition-law-punishments/a-18373204 accessed 9 July, 2021.

[127] Rahul Tripathi, "Arrests under sedition charges rise but conviction falls to 3%", *The Economic Times* (17th Feb, 2021) available at https://economictimes.indiatimes.com/news/politics-and-nation/arrests-under-sedition-charges-rise-but-conviction-falls-to-3/articleshow/81028501.cms?from=mdr accessed 9th July, 2021.

[128] Ibid

[129] Krishnadas Rajagopal, "Sedition Law|Supreme Court sends Stromg Message To Government" *The Hindu* (15th July, 2021) available https://www.thehindu.com/news/national/sedition-law-supreme-court-sends-strong-message-to-government/article35348364.ece at accessed 15th July, 2021

Chief Justice N.V Ramanna has sent a clear message to the government about the fact that the Supreme Court is convinced that the provision for sedition is used only to injure the freedom of speech and expression

[130] Debayan Roy, "Supreme Court Should Be Vigilant, Take Leaf Out Of Allahabad High Court's Book: Legal Experts on Sedition Remark by Justice D.Y Chandrachud" *Bar & Bench*(31 May 2021), available at https://www.barandbench.com/news/litigation/justice-dy-chandrachud-remark-sedition-supreme-court-section-124a accessed 9th July, 2021.

content and punishment of the offence is described under 124A of the IPC, we hardly find a clear definition of the law. A number of words such as discontent, insurrection, separatist, anti-national, disturbing etc., have been associated to the meaning of sedition, the statute fails to explain what is sedition but it definitely tells us what constitutes sedition, and here lies the biggest loop in the law.

The current trend of our morning newspapers and the huge debate on the necessity of the law, in spite of having various other legislations on national security, has come up as a huge concern to many political communities. With the Citizenship Amendment Act, 2019 and the North-East Delhi riots and several people putting across their opinions on social media and the like platforms have faced severe repercussions for the same. Then, the question of a person's right to criticize the Government in a free and democratic country appears. The ground of Free Speech and Expression faces a major blow, the reason being the exception to such a fundamental right. Hence, how much right of free speech is too much right of free speech, what are the solid grounds to establish that a person has hurt the national sentiments or incited hate and the validity of a law that restricts a citizen of a country believing in the concepts of freedom, democracy and liberty to put forth an opinion are few areas of thought that people enter into.

Sedition law is covered under sec 124A of the Indian Penal Code. The text of the code is given as under:

"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 the government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or imprisonment which may extend to three years, to which fine may be added, or with fine".**

"Explanation 1: **The expression 'disaffection' includes disloyalty and all feelings of enmity.**

Explanation 2: **Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.**

Explanation 3: **Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."**

Sedition is an offence against the state. The word has its roots in the Latin term *'seditio'* which means going aside. The fundamental principle behind this law is that the government must have the power to punish the people who jeopardize the safety of the state or brings hate or discontent against the government or disrupts the public order[131].

There is a thin line of difference between treason and sedition, especially when we see English law. Any act that leads to the death of the King or anything that poses a slight harm or causes a risk to his life is enough to constitute the offence of treason. However, sedition under English Law is a wrong done by words spoken or written with the intention to excite hate or disaffection towards the sovereign, government, constitution of the kingdom, either houses of the Parliament, the judiciary or exciting hostility or ill feelings between different classes.

Simple reading of the section shows us that the section is attracted only when the accused attempts to bring hatred or contempt or cause disaffection against the government of India. The drastic change that is seen in the cases of sedition is worrisome to the people at large. It is, by various means, ensured that people do not get to deliberately voice their opinions about the government in open platforms. Though sedition must be seen as a kind of speech that has the capacity to overthrow the government, recent trends show that it is merely used, just for the sake, to control the public opinions and protests and enable the government from enjoying a power over the mass.

According to the National Crime Records Bureau report[132], in the year 2019 (the latest report as a 2020 report has not yet been published), 7869 cases were registered as offences against the state as compared to 8536 in 2018 and 9013 in 2017. Out of these 7569 cases, only 93 cases (highest cases were reported in Karnataka with 22 cases followed by Assam with 17 cases) are that of sedition (Sec 123A) which is only 1.22%

[131] K.A Pandey, *B.M Gandhi's Indian Penal Code*,(4th ed, 2017).

[132] Ministry of Home Affairs, Government of India, *Crime in India Statistics (2019)*, available at https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%202.pdf , last seen on 2 July, 2021

of the total cases registered under Chapter VI of IPC. We are not even considering the total number of cases reported under IPC in India in the whole year of 2019.

The number of cases of sedition for investigation was 229 out of 827 total offences against state. These 229 cases include 135 pending previous cases and 1 reopened case. There were two cases which were disposed on the ground of 'false report' and 6 such cases were disposed as 'mistake of fact or law or civil dispute'. 21 cases were disposed as true cases but without sufficient evidence. A final report was made of only 29 cases and a charge sheet was prepared for a total of 40 cases including 11 cases from previous years. The data clearly shows that a total number of 70 cases were disposed of by the police and 159 cases are still pending investigation.

There were 116 total cases for trial out of which 76 were pending trials from previous year. However, only 1 out of this lot faces conviction. The rate of conviction in this case is just 0.8%. However, if we go through Table 10A.5 page 4/4, we can see that the bureau has taken the rate of conviction as a percentage of the total cases disposed of divided by total conviction, which brings us to a rate of 3.3%. But we cannot forget that the total number of cases for trial was 116, though 86 cases were pending trial for the next year.

The clash between sedition and the freedom of speech is not a recent concept but has developed ever since the constitution was drafted. We find the traces when we go through the Constitution Assembly Debates[133]. In the draft constitution, where Art 19 was placed as art 13, sedition found a place in clause 2 of the same, as a reasonable restriction. However, there was a huge debate for removing it from the same.

According to Shri Damodar Swaroop Seth, the rights guaranteed by the article was cancelled by the same and other sections like defamation and sedition in IPC, and the fundamental right was placed at a mercy of the legislature. Therefore, the constitution could not guarantee any greater freedom of the press than the country earlier enjoyed under the Colonial Rule and there can be no means to get a sedition law invalidated, even if it was violative of civil rights.

[133] Constituent Assembly Debates on Dec. 1, 1948 available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-01 (last visited 22.06.2021)

According to Shri K. M. Munshi, the object is to remove the word 'sedition' was because of its doubtful nature and varying import and to introduce words which are now considered to be the gist of an offence against the State[134]. According to him, the term is doubtful because it has a very curious affect and things like holding an opinion or even a meeting or a procession against the government could also be termed as sedition. Now that we have a democratic government, there should be a line between criticism of the government and incitement which can overthrow the same. Therefore, sedition must be omitted as the essence of democracy is criticism of the government.

In a democratic country, the advocacy to a new government should be seen as a strong pillar and opinion of the masses. According to K.M Munshi, the object to remove 'sedition' from clause 2 has two folds- firstly the Federal Court in the case of Niharendu Dutt Majumdar v King made a clear distinction in the usage of sedition in 124A of IPC and what it started to mean in the year of 1942. He elaborates on the judgment where it was observed that when the Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder is therefore the result of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.

It was stated in the debates that sedition in clause 2 would mean that an erroneous impression would be created perpetuate 124-A of the IPC or its meaning which was considered good law in earlier days.

In Kedar Nath's case, the Supreme Court was of a view that any law which is enacted in the interest of public order may be saved from the voice of constitutional invalidity.

When we read Sec 124A, we see the term "government established by law" which represents a stable condition of a state. Therefore, any act which has the capacity to subvert the established government by bringing contempt or hatred or creating disaffection towards it would attract the provision of sedition as it clearly shows disloyalty towards the government, and the state. This in turn can disrupt peace and cause public disorder and unrest.

[134] Ibid

The abuse of sedition law in India can be seen in the recent upheaval caused due to dissenting opinion. On 9th Feb, 2016, a protest in the premiere institution of Jawaharlal Nehru University was carried on by student communities for Afzal Guru (convicted for attack on our Parliament) and Kashmiri separatist, Maqbool Bhat. The protest saw clashes between several students groups and four days after the protest, the President of the Students Union Kanhaiya Kumar along with Umar Khalid and Anirban Bhatacharya, was arrested under 124A of IPC. The protest received mass support and many were of the view that the BJP Government was trying to suppress the opinions of the youth. This led to further protest from different universities including Aligarh Muslim University, Punjab University, Jadavpur University etc. investigations suggested that there was not a clear evidence of the anti-India slogans coming from these students. Kanhaiya Kumar was released on bail and but further investigation was instructed to be made on Umar Khalid. Later, Khalid and Anirban were rusticated from the university.

The court in Kanhaiya Kumar v State of NCT, Delhi[135] observed that the petitioner belonged to an intellectual class and he might have a political ideology or an affiliation and he free to exercise his freedom of speech and expression but that has to be within the boundary of the law and must be within the framework of the constitution. Freedom of speech and expression is always subject to reasonable restrictions.

Though interim bail was granted to him, the Delhi government recently gave a green signal of prosecuting Kumar for the 4 year old offence[136]. It is important to note here that Kumar is an active member of Communist Party of India and contested the 2019 elections from the Begusarai constituency, Bihar. Tough a trial is important and more so, when the courts were of the view that there was an evidence to show that few slogans were in fact given by the JNUSU members and it is not saved by the fundamental rights to hold up a protest for a person responsible for the attack on the Indian Parliament, the current circumstance seems to be more political than national.

Aseem Trivedi, who is an Indian cartoonist was detained for a drawing which spoke about corruption in India. One cartoon compared the Indian Parliament to the

[135] Writ Petition (Criminal) No. 558/ 2016

[136] Delhi Govt gives nod to prosecute Kanhaiya Kumar, *The Print*, https://theprint.in/india/delhi-govt-gives-nod-to-prosecute-kanhaiya-kumar-in-2016-sedition-case/373067, last seen on 04/07/2021

lavatory. This gained huge debates and protests all round the nation and sought the government could not handle any criticism[137].

These are instances which clearly show how sedition law is used by the executives to curtail the power bestowed to the people by the constitution itself and refrain or prohibit them from showcasing their opinion on the government.

The Indian Judiciary has time and again tried to explain the existence of fundamental right of freedom of speech guaranteed under Art 19 of the Constitution and the law of sedition.

The Court in **Tara Singh Gopi Chand v State**, which was the first case to deal with the constitutional validity of 124A of IPC, held that the section was ultra vires to the constitution and observed that the law of sedition, which was important in the times when the country was under a colonial rule, is no longer needed because of the change in the government and is inappropriate in a democratic state. In the first case of sedition itself, the court was satisfied with the fact that the new India will and shall not require such a law, which was exactly what the freedom fighters fought against.

In **Ram Nandan v State of Uttar Pradesh**[138], it was held that 124A imposed restriction on freedom of speech and expression and it is unconstitutional as it breached Art 19(1) of the constitution. The Allahabad High Court also observed that the government is formed by the people of the nation and therefore, it requires a strong opposition to balance the powers vested in it. This opposition is not just in the parliament but also in the strong approval or disapproval of the people at large. Criticism of the government is an important policy in a democracy. The section was considered to be ultra vires because it restricted free speech and had the tendency to *strike the very root of the constitution, which is freedom of speech and expression.*

In **Kedar Nath v State of Bihar**[139], the judgemnet delivered by the Allahabad High Court was challenged and the Supreme Court went on to observe that unless the speech delivered has the tendency to incite people and lead to violence, the speech will not attract the provision of sec 124A of IPC and is not seditious. The Supreme Court

[137] Jason Bruke, Indian Cartoonist Aseem Trivedi jailed after arrest on sedition charges, The Guardian (10.09.2012), https://www.theguardian.com/world/2012/sep/10/indian-cartoonist-jailed-sedition, last seen 04.07.2021

[138] AIR 1959 All 101

[139] AIR 1962 SC 955

accepted that 124A cannot be justified under Art 19 of the constitution but it still did not remove the position. The case upheld the constitutional validity of 124A IPC and observed that it is a visible symbol that ensured stability of the government. Removing this section would put the state into danger and jeopardy.

The court in Kedar Nath also observed that the security of a state is dependent upon the maintenance of law and order due to which such legislations come up with the view to punish offences against the state. However, such legislations have the duty to protect the freedom of speech and expression. The court, which is the custodian of fundamental rights, have a duty to strike down any legislation if it challenges or abridges the fundamental rights enshrined in the constitution. The court observed that people have a right to express their opinion about the government as along as such opinions don't cause public disorder. The court opined that the section was a balance between individual fundamental right and public order.

The Supreme Court held that 124A is not unconstitutional and opined that only when it is construed in the words which have the tendency or intention to create public disorder or disturbance of law and order. The law steps in to prevent such activities in the interest of public.

Balwant Singh v State of Punjab[140] discussed the applicability of sections 124A. The Supreme Court observed that raising casual slogans a couple of times without any other overt act and without intention to create disorder or to incite people to violence, does not attract sections 124A and 153A. However, if public disorder, with intent to incite violence is given way, then such slogans attract the provisions of 124A.

In **Sanskar Marathe v State of Maharashatra and Ors**[141], the High Court of Bombay observed that the "*security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punishing offences against the State, is undertaken. The Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression. But the freedom has to be guarded against becoming a license for vilification and*

[140] (1995)3 SCC 214
[141] Cri.PIL 3-2015

condemnation of the Government established by law, in words, which incite violence or have the tendency to create public disorder.

However, provisions of 124A cannot be invoked to penalize criticism of the persons for the time being engaged in carrying on administration or strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal."

We see how well it has been explained by the Indian courts that sedition should not be imposed only to penalize people for expressing mere discontent against the government. This is because criticism is a fundamental feature of a democracy. If the government comes up with anything as unfavorable as this, the nation will never see development. Plethora of judgments is of the view that unless the speech causes dissent or hatred or disrupts the public order, we can't call that speech seditious in nature. However, to ensure that the law is not abused by the political elites, certain steps can be taken. Firstly, 124A can be made a bailable and non-cognizable offence so that it is easier for people to take bail and the strict nature of the law dissolves down. This will also ensure that the executives don't use this law as a trick to suppress the opinions of the masses. Also, this will limit the gross abuse of the law. Strict steps and measures must be taken against arbitrary use of the law.

We have seen it from the 2019 report a very negligible percentage of the cases actually go for trial. This also proves how the law is used as a political agenda and not on its merits. In a diverse country like ours, it is common to witness a political disagreement with the ruling government. This shows a stronger democracy, where the opinions of the mass is respected. It is important that the government is strong enough to understand the faults and have the capacity to correct them. If the people are stopped, at the very first instance of expressing their opinion, the democratic condition of the nation is being poisoned and slowly, it will die.

The reason why sedition is the most dangerous of all kind of restrictions on free speech is because of its utter usage, that does not just deny a fundamental freedom but also angers the citizens. This has become a common card that can be easily played by the government every time it thinks that there is a proposed threat against it. With recent

trends of the around hundreds of farners facing sedition charges and the infamous case of Aseem Trivedi, it is quite legit and extremely important to ask- Is India made of Porcelain[142]?

[142] Shekhar Gupta, "Is Ibdia made of Porcelain: Question CJI Ramanna Should Ask Modi at next Sedition Hearing". *The Print* (17.07.2021) available https://theprint.in/national-interest/is-india-made-of-porcelain-question-cji-ramana-should-ask-modi-govt-at-next-sedition-hearing/697684/ accessed 17.07.2021

CHAPTER 5: CONCLUSION & SUGGESTIONS

This research has been a journey of events that I, otherwise, would not have come across. It is very easy to imagine that we all live in a rainbow world where everything is fine and the law must be right because it has been imposed with certain belief. It is also easy to think that our freedoms have to be limited because there can't be an absolute exercise of such rights as it will hinder the harmonious existence of people in the society. The freedom of expression is that of a gun- the government can't ask us to not own one but we, at the same time, can't fire shots because we are having a bad day. Where on one hand, we have protected the freedom of expression, on the other hand we also have to understand that the right to life and liberty includes the right to live with dignity and our freedom of speech can't be justified when it goes beyond its limit to hurt another fundamental right. This is the area where the question of right to offend arrives. The right to free speech must include the right to offend and we must keep in mind that a right is not a duty. It needs to fall within that category because it is important to allow that expression to flow. Rather than learning about restrictions and how often we can get hurt, it is important to learn about tolerance and how well we can counter argue. Everyone likes their own human rights but it is others that tend to be a bit problematic. This freedom of speech and expression is a freedom that our ancestors have paid for, in blood and in struggle, not to make us comfortable but to liberate us and make us free.

What will be your reaction if I tell you that I wish to publish and circulate a book for children, which will contain helpful instructions and suggestions for sexual relationships and will give them proper guidance on various issues including homosexuality and birth control? Well, probably widened eyes, right after I associated a manual acting as a guide to sexual health and children together. Again, what will your reaction be if I tell you that this is not the first time someone has done it? Shocked? Disturbed? Well, sorry not sorry! In this chapter, the researcher takes a study on speech that is shocking or disturbing but is not anything that can cause imminent violence or danger. The researcher is not talking about speeches against a religious community, or Modi Ji for that matter. I am talking about a kind of speech that is neither protected nor

unprotected- speech that just has the potential to cause a little shock, probably like the way I started this chapter.

It is the relationship of man with his society that urges him to have a limit on the absolute exercise of free speech. The society and its relationship with man has entangled him into various obligations- one which states that he is not allowed to offend anyone or hurt anyone. This calls for the credibility of society and man and strictly reminds me of J.S Mills. Mills says that a person who can't live within moderate means and takes pleasure in hurting others must expect to be lowered in the opinions of others and has no right to complain about the same unless he has done good to his office and is not affected towards his own demerits[143]. However, rather than treating someone as an enemy to the society, we must encourage that person to avoid the evils that his conduct can bring. Is a man bound to act according to the society? Mills says no- because though one is completely allowed to be punished for causing injury to another, we still have the right to act upon our unfavourable opinion of anyone, not to the oppression of his individuality, but in the exercise of ours. We are not bound to seek his society; we have the right to avoid it as we have the right to choose the society most acceptable to us[144].

Here, let's discuss the landmark case of Handyside[145] and the Little Red School Book, which was a case that was decided by the ECtHR and is considered to be one of the leading cases on freedom of speech. In this case, the applicant was a book publisher who published a book called "The Little Red Schoolbook", which was directed for the age group of 12-18. The book covered mature topics like sexual objects, pornography, masturbation etc. the copies of this book were seized by the British authorities and destroyed under the Obscene Publication Acts. The applicant approached the ECtHR alleging that his rights under Art 10 of ECHR has been violated. In considering if such actions actually breached the FOSE of the applicant, the Court stated that the government's actions were reasonable on the ground of 'protecting the rights of others'. The court considered whether the document had the "tendency to deprave and corrupt" to understand if there was actually a reasonable breach. It concluded that the Schoolbook was obscene as "it was intended for children passing through a critical

[143] J.S Mills, "On Liberty"page 144

[144] Ibid, 142-144.

[145] Handyside v U.K (App No 5493/72) (7 Dec, 1976) available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22 accessed 28 May, 2021.

stage in their development and included material that would undermine the relationships of students with individuals and institutions such as their parents, teachers, churches and youth organizations". Furthermore, the book also encourages various illegal activities, including underage sex and drug abuse.

Regarding the issue of freedom of expression, the Court noted that "Freedom of Exoression constitutes one of the essential foundations of such a democratic society" and is "one of the basic conditions for its progress and for the development of every man." However, the Court ruled that "Mr. Handyside, in exercising his freedom of expression, did not undertake the 'duties and responsibilities' attached to freedom of expression in a democratic society".. This case is often cited for the next paragraph which is very important to be reproduced as follows:

> *"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a democratic society. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (of the ECHR), it is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference,* ***but also to those that offend, shock or disturb the State or any sector of the population****. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society. This means, amongst other things, that every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued."*[146]

The court takes a step further explain that whoever exercises his freedom also undertakes his responsibilities and the court can't overlook such duties for the proper conduct and protection of morality that is necessary for harmonious co-existence in a society.

It will not be wrong to take away from this case that morality is always a ground for restriction of speech. The act of this book outraged the society because of its access to

[146] Ibid, see Para 49

the children between 12-18 years and though it was a very informative means, it was still against the morals of the society to bring in such a concept for children. Therefore, it will be safe enough to state that the book should have been an accepted one if it was directed to another age group. Though the book would remain as shocking it disturbing because the society is never comfortable on topics as discussed in this book, but it would not be against morality, or so as I presume.

The fight for free speech has not been easy and includes various conflicts of interests- one being how far an individual can go in exercising his freedom. We have already seen that freedom of speech is not absolute and can be curtailed in various instances and the state can make laws to suppress the same provided that those restrictions are reasonable. Even the International organizations recognize this freedom of expression, only to that extent where it does not fly on to hurt others. Offence, to the researcher, is a very subjective term. It depends on person to person and the degree of offence change according to situation. There is a very fine grey area between freedoms of speech and hate speech, an area unexplored and very controversial, which is merely the right to offend. At this junction, the researcher has one question- will you permit me to express my opinions or to filter my opinions? You see, expressing opinions is not similar to projecting it in a manner cautious enough to ensure that I don't hurt you. But, isn't it obvious that I should be allowed to express myself in the most natural of all ways, and you are allowed to dislike me for the same?

This course of freedom and offence has not been easy anywhere. Of course, we all admire the freedom of speech and expression absolutely, but only for ourselves! The moment it slips into the shoes of another, we start recognizing it with the various bundles of restrictions that it comes up with.

However, there has been quite a transformation in accepting this freedom. For example, in 1919, the U.S Court set a very bad example of its failure to protect the rights under the First Amendment of the US Constitution, which deal with this freedom of speech. This was the time when court upheld the conviction of one Charles Schenck and Elizabeth Baer for violation of the Espionage Act, the offence being distribution of one page leaflet urging men who were accepted for military to not serve. The court went on to state that it was a socialist and anarchist radicals advocating for the opposing participations in the war. The justification laid in this case was that in normal situation,

it would not have faced a conviction but the circumstances of war has made the situation very dangerous[147].

Again, another example can be taken from the times of the cold war. By the 1950s, various lawyers and judges in America started to believe that every speech is protected under the shield of the First Amendment, even speeches that could be disagreeable. Fun fact, Americans also believed that Communist Party was a threat to the country and could overthrow the existing government. therefore, top leaders of the American Communist Party were indicted for conspiring against the government and the defendants were convicted for the same offence, even without any trace of evidence that could prove their attempt to overthrow or threaten the government. the Supreme Court upheld the decision of the trial court and again, the justification that was posed was that of the existence of the Cold War[148].

Basically, the American Judiciary was of the view that speech could be curbed in the times of war. The decision of the judiciary was heavily criticized. *Perilous Times: Free Speech in War Time From Sedition Act of 1798 to War on Terrorism* by Professor Geoffrey Stone showed the failure of American Judiciary to protect the freedom of speech in the times of war[149].

However, there was a drastic step taken by the judiciary in the year 1969 with the case of **Brandenburg v Ohio**[150] which is considered to be a landmark case in the history of free speech. Brandenburg, who was the leader of the Ku Klux Klan held a rally, burnt a Klan Cross and made racist speeches and remarks including anti-semantic statements like, “Personally I believe the Nigger should be returned to Africa and the Jews to Israel”[151]. He was later convicted under the Ohio laws which made illegal advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The Court's opinion held that the Ohio law violated Brandenburg's right to free speech. The Court used a two-pronged test to evaluate speech acts: (1) speech

[147] Shenck v U.S 249 U.S 47 (1919)
[148] Dennis v U.S [341 U.S 494 (1951)]
[149] David Goldberger, “Protecting Speech we Hate” (2006) Vol 32 (2), Litigation available http://www.jstor.org/stable/29760552 accessed 26th June, 2021.
[150] 395 U.S 444(1969)
[151] See David Goldberger n(146)

can be prohibited if it is "directed at inciting or producing imminent lawless action" and (2) it is "likely to incite or produce such action." The Court also stated that constitutional guarantee of free speech and free press do not permit a state to forbid or proscribe advocacy or use of force or law violations except where such advocacy is directed to incite imminent lawless action.

Though the case clearly shows that there was an outrage of racist comment, the court still went on to protect the freedom of speech over the restrictions. This was definitely not a case against the political authorities of a state and maybe, the American judiciary is under a lot of political pressure but everything aside, we can clearly look at the opinion given by the court which is a clear rescue to the right to offence, unless you are doing anything that can cause imminent actions. This case went on to inspire and attract many more decisions. One such case was that of 1978 in Village of Skokie v Nationalist Socialist Party of America[152]. This is often regarded as the first hate speech case and one of the first decisions in what would become an ongoing debate over the constitutionality of limiting hate speech. The issue arose when the National Socialist Party of America (NSPA) requested permission to hold a demonstration in the community of Skokie. The NSPA was a group devoted to inciting racial and religious hatred, primarily against people of the Jewish faith and non-Caucasians. Skokie was home to some 70,000 people, of whom 40,500 were Jews, and of those 5,000–7,000 were survivors of Nazi concentration camps. Because of the high population of Jews, village leaders sought to enjoin the demonstration, but the Illinois Supreme Court ruled that the NSPA had a First Amendment right to demonstrate in Skokie. The court first established that "*public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers*." In other words, the listener's feelings could not be considered valid reasons for prohibiting speech.

In the *Skokie case,* we see the step taken by the court to offer the open ground of freedom of speech and expression. Irrespective of Skokie being a place highly inhabited by people rescued from the holocaust and provocative speech including depiction of the *swastika,* that could offend the sentiments of the survivors of Nazi Germany, it was still believed that the NSPA had its right to speech protected under the shield of the First Amendment.

[152] **373 N.E.2d 21 (Ill 1978)**

Another interesting case was that of Bethel School Dist No 403 v Frazer[153]. The case arose after school officials at Bethel High School in Pierce County, Washington, disciplined junior Matthew N. Fraser for delivering a speech laced with sexual references before a student assembly. After school officials suspended Fraser, he sued in federal court. A federal district court and federal appeals court ruled in Fraser's favor, finding that school officials violated his First Amendment rights.

The school appealed to the U.S. Supreme Court and prevailed by a 7-2 vote. The majority opinion was authored by Chief Justice Warren E. Burger. Fraser contended that he had a First Amendment right to political speech under the principles of *Tinker,* which protects the vast majority of student speech that does not create a substantial disruption. However, school officials argued that they had a duty to protect younger students from inappropriate and sexual speech.

The Court sided with school officials. Burger noted a "marked distinction" between the political speech in *Tinker* and Fraser's sexual speech. "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior," Burger wrote. "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." Justice William J. Brennan Jr. concurred, writing that school officials could discipline Fraser because they could reasonably forecast that his speech would be disruptive.

Justices Thurgood Marshall and John Paul Stevens authored dissenting opinions. Marshall wrote that school officials failed to present evidence that Fraser's speech was disruptive. Stevens began his dissent by quoting the famous line from *Gone With the Wind,* "Frankly, my dear, I don't give a damn." Stevens wrote that "if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and ... the Due Process Clause ... combine to require this conclusion.

[153] 478 U.S. 675 (1986)

This case remains an important decision where the court stated that a student can be punished for using profane speech. Though this can come in our minds whether the court is free and at liberty to take such decisions when there are less state authorities involved or when such speech is not against the government, then the answer is probably in positive. But in this chapter, we are not concerned with seditious speech or speech that has the power to overthrow the government but we are dealing with speech that has the ability to hurt the sentiments of a community or a listener. Is there such a liberty bestowed upon us which allows us to express ourselves without thinking about the sentiments of another, and being sure that it does not call for a legal consequence. Because time and again, it has been mentioned by the researcher that taking offence is purely subjective in nature and there is no proper guarantee of what another will call "offensive". Of course defamation or obscenity does not fall within this ambit of 'offensive speech', which is also considered in the *Skokie Case*.

But, the major question that we face is what, exactly, is the right to offend? It is not hate speech or speech leading to violence nor is it those expressions regarded as obscene or offensive to moral attitude of the community. This right to offend is intends to guarantee participation in democratic process through public debates and to strengthen this process, the protection offered can be extended to which the expression can be linked to direct the functioning of democracy. If this is the view that we accept, we need an illustration. A cartoon depicting the truth about the petrol price rise or a meme in the social media- these are expressions that are- a. not an imminent danger causing a lawless action to the society, b. does not intend to overthrow the government, c. does not show anything immoral or unaccepted to the society, d. is not violent in nature, r. is not against any religion/race/caste/sex/place of birth- this kind of an expression can come under the umbrella of 'offend' as it is targeting a democratic process by participating in it. But, this illustration in many countries would be punishable.

The second question that comes is the right to offend whom or what? This is a critical question. As I was going through a debate that was conducted by the Times Of India[154], Mr Kanan Gopinath, an IAS Officer who resigned from his post after the protest for

[154] "Complete transcript of Face off on Right to Offend" (Feb 18, 2021) available at https://timesofindia.indiatimes.com/india/complete-transcript-of-face-off-on-the-right-to-offend/articleshow/81095345.cms accessed 28 June, 2021.

Jammu & Kashmir issue, stated that the who question can be answered in three parts- if it's the right to offend the state, it is curtailed by sedition laws, if it is right to offend the judiciary- it falls under contempt of court, if it's the right to offend a community- it falls within 153A of IPC and if it's the right to offend a religion, it falls within 295A of IPC. All in all, if it's the right to offend a person, it falls within the scope of defamation. Therefore, in a progressive society which has evolved out of debates and discussions and disagreements, the right to offend is not protected by the freedom of speech. It is not a doubt that our constitution was formed after huge rounds of debate and discussions and imagine if they thought about restrictions on freedom of speech due to disagreements!

We have seen how, irrespective of protection to the freedom of speech and expression, there are too many restrictions acting as string, disallowing its proper functioning. It is important to realize what steps can be taken to ensure a healthier enjoyment of this freedom. The researcher lists down the following suggestions:

a. Freedom of the Press requires a separate statute. Therefore, new amendments can be a welcome gesture. In the times of the modern world, it is not just news papers or televisions that we are talking about but we also see various independent news channels that have become quite popular over the internet. However, the issue of journalists being attacked for their work is a concern for any functioning democracy. Though the freedom of press, undoubtedly is protected under Art 19(1)(a), a separate provision would just ensure an explicit constitutional guarantee. Freedom of the press cant be confused to be like freedom of any speech or expression as it is about the work of men on politics and society. Media is not just journalism but it is also an art form. However, various art works like books and magazines are restricted on the ground of "public order" or "obscenity". It is important to understand that literature is nothing but the mirror of the society. Proper steps should be taken up by the legislature to punish not the ones who are showing the truth but the ones who are attacking them. It is important to build a nation that is not a threat to the journalists. Also, more protection of speech must be provided under this provision to ensure more liberty.
b. The legislature must come up with proper definition of hate speech. A mere logical understanding can't be a legal argument. A speech that does not have the

potential to cause imminent lawless action should remain out of the scope of hate speech. Mediation and counter arguments can be accepted as initial methods to respond to a hate speech rather than taking an immediate legal action.

c. Sedition must be struck down by the courts as it is an old draconian law that is only a tool to curb the freedom of speech. This is the same law which has punished freedom fighters like Baal Gangadhar Tilak and Mahatma Gandhi. Nelson Mandela was charged under sedition. We have to understand that this law is not required any longer in the country and it should have gone long back, right on the day we tasted freedom. The government can't use this law as a tool to suppress protests or diversified political opinions. It is harsh to apply this section onto students, who are the future of the nation. Our country is built on the platform of loyalty and patriarchy, on the bench of nationalism but our identity should not be criteria to curb our freedom. It is important for a democratic nation to be able to seek answers and ask questions, to bring out the negatives and to debate on politics of the current government. Any restriction on this can only damage our democratic values. Therefore, it is high time that we do away with sedition law. If a government is so sheer that questing it can threaten its power, probably we don't have the right form of government.

d. The courts need to see the provisions of free speech under the light of necessity of any restriction. When there is no immediate reaction to such speech, it must be left open. No expression should be curbed on the fear of uncomforting the society. Lastly, it is very important to educate our youth to learn the spirit of this freedom and use it appropriately because it is easier to teach tolerance than to teach hate.

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