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Liberty under Indian constitution regarding speech and expression: A bird's eye view

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Abstract

The freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom, it is the well spring of civilization and without it liberty of thought would shrivel. Public decency and morality is outside the purview of the protection of free speech and expression and thus a balance should be maintained between freedoms of speech and expression and public decency and morality.

Keywords: Indian constitution, liberty, freedom of speech and expression

Introduction

Indian constitution says that all citizens have the right to freedom of speech and expression, freedom of speech and expression is the basic of all freedom granted to the citizens of India. J. Patanjali Shastri has said in the case of Romesh Thaper Vs state of Madras, that freedom of speech and that of the press lay at the foundation of a democratic society, for without free political discussions no public education is possible, which is so important for the proper functioning of the government. Freedom of speech and expression means the right to express one's own convictions and opinions freely by words of AIR 1950 SC 1246 Mouth, writing printing or any other mode. It thus includes the expression of one's idea through any communicable medium or visible representation, such as gesture signs and like.

The fundamental rights help not only in protection but also the prevention of gross violations of human rights. They emphasise on the fundamental unity of India by guaranteeing to all citizens the access and use of same facilities, irrespective of background. Some fundamental rights apply for persons of any nationality where as other are available only to the citizens of India. The right to life and personal liberty is available to all people and so is the right to freedom of religion. On the other hand freedom of speech and expression and freedom to reside and settle in any part of the country are reserved to citizens alone including non-resident Indian citizens. Protection of certain rights regarding freedom of speech(1) All citizens shall have right (a) to freedom of speech and expression, (b) to assemble peaceably and without arms, (c) to form associations or unions, (d) to move freely through the territory of India, (e) to reside and settle in any part of the territory of India, and (f) to practice any profession, or to carry on any occupation trade or business. (2) Nothing in sub clause (a) of clause(1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the sub clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence (3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause (4)Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause (5) Nothing in sub clauses (d)and(e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law Imposing, reasonable restrictions on the exercise of any of the rights conferred by the said

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sub-clauses either in the interests of the general public or for the protection of the interests of any scheduled tribe(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing. In the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to, (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business or (ii) the carrying on by the state, or by a corporation owned or controlled by the state, of any trade, business, industry or service.

Article 19(1) (a) of the Indian constitution provides “that the citizens shall have the right to freedom of speech and expression Article 19(2) as originally enacted said that nothing in sub-clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the state from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the state”. This sub-Article was retrospectively amended by the constitution(first Amendment) Act, 1951 which says that “nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence”. Since the first Amendment to the U.S Constitution has been referred to by our supreme court in considering Article 19 (1) (a) the relevant part of that Amendment is mentioned as follows: “congress shall make no law.. abridging the freedom of speech, or of the press”. Since Article 19 (1) (a) does not write the freedom of the press it was early settled by judicial decisions that freedom of speech and expression includes freedom of the press and circulation. For example in Romesh Thapper state of madras ^[1] it was decided that “... there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation, the publication, the publication would be of little value”.

Further, Justice Bhagwati in Express Newspapers (private) Limited v. Union of India observed that there was a paucity of authority in India on the nature, scope and extent of the fundamental right to the freedom of speech and expression and he added”... the fundamental right to the freedom of speech and expression enshrined in... our constitution is based on (the provisions in) Amendment I of the constitution of the United state and it would, therefore, be legitimate and proper to refer to those decisions of the supreme court of the United state of America in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by the court against use of American and other cases ^[2].

It is argued that the provision of the two constitutions concerning freedom of speech and expression are essentially

different the difference being made by provisions in our constitution for preventive detention which have no counterpart in the United States constitution. The first Amendment to the United States constitution enacts an absolute prohibition, so that a heavy burden lies on anyone transgressing it to justify such transgression. Further, since the Amendment provides no exception, it is not surprising that exceptions have had to be evolved by judicial decisions which have limited the scope of such exceptions with increasing stringency. But the position in India is different. The right to the freedom of speech and expression, and the limitations on that right, are contained in Article 19 (1) (a). It has been rightly observed that to say that a thing is constitutional, is not to say that it is desirable ^[3]. Hence, to opine that restraints on the freedom of speech and expression are permissible under our constitution is not to say that any particular restraint is desirable or ought to be imposed. The freedom of thought and expression, and the freedom of the press, are not only valuable freedoms in themselves, but are basic to a democratic form of the government which proceeds on the theory that problems of Government can be solved by the free exchange of thought and by public discussion. An argument for freedom of thought, speech and expression is not necessary, nor is it necessary to refer to classic pleas for the liberty of thought to show that restraint on the freedom of thought “hinders and retards the importation of our richest merchandise truth”. The high value attached to this freedom in the Indian constitution can, therefore, be taken as the basis of any discussion the subject. But the “innovation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people”, ^[4] a dilemma which has produced a sharp conflict of judicial opinion in the United States, as will presently appear. The Indian constitution has resolved this dilemma by providing that even freedom of speech must yield to public order.

The freedom of speech guaranteed by Article 19(1)(a) is subject to reasonable restrictions in the interest of decency or morality. Indecent exposure and indecent publications are misdemeanours at common law ^[5] section 292 of the penal code make it an offence the possess obscene publications for purposes of sale or to sell such publication. It was introduced by the obscene publications Act, 1 to give effect to Article of the International convention for the suppression of Traffic in obscene publications signed by India in 1923 at Geneva. In the supreme court section 292 was impugned as villating Article 19 (1) (a) by one Ranjit D. Udeshi who was convict under it for being in possession for purposes of sale “Lady Chatterley’s Louer” (Unexourgated ediction) and for selling a copy of it. In rejecting his argument ^[6] the court approved the test laidown in Hicklin’s case and observed that section 292 was valid as did not go beyond “obscenity” which fell directly within the words “public decency or morality” written in Article 19(2). On the same ground section 3(6) press (objectionable matter) Act, 1951, in so far as it includes words which may be grossly indecent, scurrilous or obscene and sections 4 and 6 were upheld as falling under Article 19(2) ^[7] Likewise, in shanker & co. v. state of madras ^[8] (objectionable matter) Act, 1951, was observed not to violate Article 19(a) and (g) the court adopting the test of obscenity laiddown in Hicklin’s case.

Further, the freedom of speech is subject to reasonable restrictions imposed on such freedom by law relating to defamation. In view of this express provision contained in

Article 19 (2) it is no surprising that section 499 of the penal code, which defines the offence of defamation, has been held not to violate Article 19 (1) (a). In *M.B. Kanwar v. state* [9] It has also been ruled that the freedom of the press, which is no higher than that of a citizen, cannot be used to infringe the law relating to defamation.

New dimensions of freedom of speech and expression

Government has no monopoly on electronic media: The Supreme Court widened the scope and extent of the right to freedom of speech and expression and held that the government has no monopoly on electronic media and a citizen has under Art. 19 (1) (a) a right to telecast and broadcast to the viewers/listeners through electronic media television and radio any important event. The government can impose restrictions on such a right only on grounds specified in clause (2) of Art. 19 and not on any other ground. A citizen has fundamental right to use the best means of imparting and receiving communication and as such have an access to telecasting for the purpose. Commercial Advertisements: The court held that commercial speech (advertisement) is a part of the freedom of speech and expression. The court however made it clear that the government could regulate the commercial advertisements. Which are deceptive, unfair, misleading and untruthful. Examined from another angle the court said that the public at large has a right to receive the "commercial speech". Art. 19(1)(a) of the constitution not only guaranteed freedom of speech and expression. It also protects the right of an individual to listen. Read, and receive the said speech. Telephone Tapping: Invasion on right to privacy: Telephone tapping violates Art. 19 (1)(a) unless it comes within grounds of restriction under Art. 19(2). Under the guidelines laid down by the court, the Home Secretary of the center and state governments can only issue an order for telephone tapping. The order is subject to review by a higher power review committee and the period for telephone tapping cannot exceed two months unless approved by the review authority. The freedom of speech and expression can be studied under two heads: 1) Freedom of press 2) Right to information.

Freedom of speech-right of voters, antecedents of candidates

The foundation of a healthy democracy is to have well-informed citizen - voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favor he should cast his vote. It is his choice whether to elect a candidate against whom criminal cases, for serious or non-serious charges were filed but is acquitted or discharged. For the first time the right to know about the candidate standing for election has been brought within the sweep of article 19(1) (a). There is no doubt that by doing so a new dimension has been given dictated by the need to improve and refine the political process of election.

Conclusion

Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as decency and morality. Flying of national flag is a symbol of expression coming within the preview of Art 19(1) a. A voter's speech or expression in case of election would include casting of votes, that is to

say, a voter speaks out or expresses by casting vote. Right to information is an integral part of freedom of expression, particularly a voter's right to know the assets of a candidate contesting election. Right to speak implies the right to silence. It implies freedom, not to listen, and not to be forced to listen.

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2. SCR 1952, 1112-1120.
3. Dennis. United States 1950, P 341.
4. Justice per Jackson Dissenting in *Terminiello V Chicago* 1948, P 337.
5. *Hallsbury* 10, P 666.
6. *Ranjit D Udeshi. V State of Maharashtra* 1965 A.S.C. P 881.
7. *Krishna Sharma. V State* 1954, P 28.
8. *MLJ* 1955;2:319.
9. *A Punjab* 1963, P 201.