

Protection of Freedom of Expression: An International Perspective*

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ABSTRACT

The importance of freedom of speech and expression enshrines the ability to think and speak freely and to obtain information from others through publications, public discourse and in cyber era to like, share and comment through audiovisual medium, without fear of retribution, restriction, or repression by the government. It is through free speech, people could come together to achieve political influence, to strengthen their morality, and to help others to become moral and enlightened citizens. This freedom is recognised as mother of all freedom at the national and international level in all the civil societies.

The present paper offers an overview on the protection of the freedom of speech and expression at international level and civil societies. The paper examines in detail the constitutional dimensions of the freedom of expression and the approaches of the States in curbing freedom of expression on reasonable grounds.

Key Words: *expression, democracy, international, development, restriction, UDHR, ICCPR, ACHR etc*

Introduction

***If we don't believe in freedom of expression for people we despise, we don't believe in it at all.”**
Noam Chomsky¹*

Freedom of expression is a fundamental human right and a central tenet of democracy of man, recognized and protected by the law of all modern States. This right is closely associated with freedom of speech and is a component of freedom of speech. Freedom of expression is an essential element international human right. It is essentially valuable and necessary for the healthy functioning of democracy and civil society and also for the achievement of other human rights such as fair administration of justice, opportunity, equality, education, adequate standard of living, development, human dignity, and the rights of women, peoples, and minorities etc. Freedom of expression places positive obligations on the state to provide access to information right to freely participation in education, work, and social life.

Jurisprudence of Freedom of Speech and Expression

The freedom of speech is regarded as the first condition of liberty. Therefore it secures an important position in the hierarchy of the liberty, in real sense it is the mother of all other liberties, as without freedom of speech and expression no freedom can be entertained. Freedom of Speech and expression means the right to express one's own views and opinions freely by words of mouth, writing, printing, pictures, symbols, signs or any other mode. In modern time it is universally accepted that the right to freedom of expression is the essence of free society and it must be safeguarded at all time. The first principle of a free society is an untrammelled flow of words in an open forum and liberty to express opinions and ideas without obstruction and especially without fear of punishment plays significant role in the development of society and the nation as well. It is one of the most important fundamental liberties guaranteed against state restraint or regulation.

Freedom of speech is guaranteed not only by the constitution or statutes of various states but also by various

¹ Abhishek Sudhir , “Restoring the judiciary's credibility” by The Hindu, available at <http://www.thehindu.com/opinion/lead/restoring-the-judiciarys-credibility/article6242504.ece>

international conventions like Universal Declaration of Human Rights, European convention on Human Rights and fundamental freedoms, International Covenant on Civil and Political Rights etc. These declarations expressly talk about protection of freedom of speech and expression.

Now at this point of juncture a prominent question comes in to mind that, why we need freedom of speech and expression?

The answer is that Freedom of speech offers human being to express his ideas to other, but this is not the sole reason; purpose to protect the freedom of speech. There could be more reasons to protect these essential liberties. These are-

1) **For the discovery of truth**– Freedom of speech and expression provide a tool in the discovery of truth. Therefore if restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion. It would defeat the progress of the society and the country as well.

2) **For self- fulfilment and development** – As instrument of each individual's right to self-development and self-fulfilment, freedom of speech is an integral aspect. Restriction on which will hamper our personality and its growth. It helps an individual to attain self-fulfilment.

3) **For expressing belief and political attitudes** - Freedom of speech provides opportunity to express one's belief and show political attitudes. It ultimately results in the welfare of the society and State. Thus, freedom of speech provides a mechanism to establish a reasonable balance between stability and social change hence helpful in the development of the Nation.

4) **For active participation in democracy** – In present time democracy is most important feature of today's world. Freedom of speech is there to protect the right of all citizens to understand political issues so that they can participate in smooth working of democracy. That is to say, freedom of speech strengthens the capacity of an individual in participating in decision-making. Thus it can be analysed that protection of freedom of speech and expression is very much essential, fundamental human right and a central tenet of democracy. Therefore it is protected by many United nations declarations, international conventions and national mechanism as well.

The literature on freedom of expression as an international human right tends to focus on cases and jurisprudence, with some attention paid to the roles of international human rights institutions. Regional and international civil society groups actively highlight current threats to freedom of expression, often in cases of threats to individuals, journalists, or small groups, but also more systematically via annual, country, regional, and thematic reports. Contemporary free expression issues arising under international law include commercial speech, hate speech, media, homosexuality, and religion. The two most rampant issues of the past decade have been anti-terrorism measures and the Internet. Increasing number of Mobile Phones, Tablets, Computers, mobile applications and social networking sites (e.g. *facebook, Netlog, Orkut, WhatsApp, Messenger etc.*) etc. has raised the easily use of internet facility and sharing of their ideas easily, which causes misuse of the facilities as well. Of course, the Internet has transformed communications, but it has also enabled unprecedented state and international surveillance that threatens privacy and freedom of expression alike.

International Protection of Freedom of Expression:

Freedom of speech and expression is protected by some declarations, conventions, and also by the Constitution's of many Countries. *Art. 19* of the **UDHR**, *Art. 10* of the **ECHR**, *Art.19* of the **ICCPR**. Despite of these some additional International mechanism such as *African Charter on Human and Peoples' Rights (ACHPR)*, the *American Convention on Human Rights (ACHR)*, the *Arab Charter on Human Rights (Arab Charter)* etc. also protects these rights. The reflection of these International mechanism can also be seen in the constitution of the some Countries e.g. *1st Amendment* of the **US Constitution**, *Art. 19* of the **Indian Constitution** and Constitution of the many other Countries have provided Freedom of Speech & Expression . Although freedom of expression is fundamental, it is not absolute, therefore these International mechanism and Constitutions of the different country provides some restrictions also, on the grounds of defamation, public order, morality, decency, national security, contempt of court etc.

The UNESCO

On the global scale, the UN Educational, Scientific and Cultural Organization (UNESCO)² is always on the forefront in pushing ahead the freedom of speech and the freedom of the press ; protecting the interests of the

² "INTERNATIONAL LAW ON THE RIGHT TO FREEDOM OF THE PRESS", available at < <http://siteresources.worldbank.org/INTVIETNAM/Resources/3-INTERNATIONAL-LAW-ON-THE-RIGHT-TO-FREEDOM-OF-THE-PRESS.pdf>>, accessed on 12/03/2016.

journalists. The UNESCO Convention (1945) points out the objectives of this organization as to “encourage the freedom of exchange of opinions by languages and images”, “freedom of exchange of opinions and intellect”... in order to enhance the understanding, making a contribution to consolidating solidarity in each society as well as the friendship among nations. The realities in the past 70 years of its existence show the close association in the activities of this Organization with *Article 19* concerning the praise of freedom of speech and the press.

The UDHR:

Drastic violation of human rights and failure of the League of Nation causes the emergence of the United Nations Organisation in 1945. The Universal Declaration of Human Rights (UDHR) is one of the most effective mechanisms for the protection of Human Rights. The United Nations Universal Declaration of Human Rights was adopted on October 24, 1945. Article 19 of the UDHR³ deals with the right to freedom of opinion and expression and provides that:

*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.*⁴

Technically, as a resolution of the *General Assembly* is not legally binding in its entirety on members of the *United Nations*. Furthermore, whereas some of its provisions are considered to form part of customary international law, there is dispute as to which. Freedom of speech is granted unambiguous protection in international law by the International Covenant on Civil and Political Rights which is binding on around 150 nations.

In adopting the United Nations Universal Declaration of Human Rights, Ireland, Italy, Luxembourg, Monaco, Australia and the Netherlands insisted on reservations to Article 19 insofar as it might be held to affect their systems of regulating and licensing broadcasting.⁵

The ICCPR⁶ :

Article 19 of the *ICCPR* deals with freedom of expression and provides restrictions that are essential to protect the rights or reputations of others, national security, public order, public health, or public morals. Any such restriction must be provided for by law and be proportionate. Article 19 runs as follows:

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 paragraph 2 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 rights or reputations of others;
- (b) For the protection of national security or of public order (order public), or of public health or morals.

The ECHR :

The European Convention on Human Rights (ECHR)⁷, signed on 4 November 1950, guarantees a broad range of human rights to inhabitants of member countries of the European Council, which includes almost all European nations. *Article 10*, entitles all citizens to free expression. Which provides that:

³ “Universal Declaration of Human Rights” available at < http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>, accessed on 11/03/2016.

⁴ *General Assembly of the United Nations (1948-12-10). "Universal Declaration of Human Rights" (pdf) (in English and French). pp. 4–5. Retrieved 2016-04-03.*

⁵ *Office of the United Nations High Commissioner for Human Rights. "List of Declarations and Reservations to the International Covenant on Civil and Political Rights".*

⁶ “International Covenant on Civil and Political Rights”, available at < <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>>, accessed on 12/03/2016.

⁷ “Convention for the Protection of Human Rights and Fundamental Freedoms”, available at < http://www.echr.coe.int/Documents/Convention_ENG.pdf>, accessed on 14/03/2016.

“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.

The Convention established the European Court of Human Rights (ECHR). Any person whose rights have been by a state party can take a case before the Court. Judgements finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgements, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.

The Convention also includes some other restrictions:

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For example, the Council of Europe *Explanatory Report of the Additional Protocol to the Convention on Cybercrime* states the "European Court of Human Rights has made it clear that the denial or revision of 'clearly established historical facts – such as the Holocaust – would be removed from the protection of Article 10 by Article 17' of the ECHR" in the *Lehideux and Isorni v. France* judgment of 23 September 1998.

Each party to the Convention must alter its laws and policies to conform to the Convention. Some, such as Ireland or the United Kingdom, have expressly incorporated the Convention into their domestic laws. The guardian of the Convention is the European Court of Human Rights. This court has heard many cases relating to freedom of speech, including cases that have tested the professional obligations of confidentiality of journalists and lawyers, and the application of defamation law, a recent example being the so-called "*McLibel case*".

Protection of Freedom of Speech in USA

United States of America is leader country as far as protection of freedom of speech and expression is concerned. It provides very wide interpretation of freedom of speech to its citizen. Freedom of speech, of the press, of association, of assembly and petition -- this set of guarantees, protected by the First Amendment, comprises what we refer to as freedom of expression. However, initially there was no provision for protecting freedom of speech in American Constitution, but very soon realizing the importance of freedom of speech it amended its constitution and pave way for protection of speech and expression. The first amendment of the American constitution specially provides that -

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

The above Amendment to the American Constitution is the part of the United States Bill of Rights. As per the Bill of Rights United States Congress has been prohibited from making laws, infringe the freedom of speech, infringe the freedom of the press, limit the right to peaceably assemble, etc. The sum total of the components of the law of the First Amendment provides a great deal of protection to freedom of speech .Although, as per the provision, the First Amendment only explicitly applies to the Congress, the Supreme Court of America has interpreted it as applying to the executive and judicial branches. The Supreme Court has interpreted the First Amendment's guarantee of freedom of speech very expansively, and the constitutional protection afforded to freedom of speech is perhaps the strongest protection afforded to any individual right under the Constitution.

We see then that in the United States freedom of speech receives a very high degree of constitutional protection. It is not untrue to say that the constitutional protection afforded to freedom of speech is perhaps the strongest protection afforded to any individual right under the American Constitution, and the value of freedom of speech generally prevails over other democratic values such as equality, human dignity, and privacy. American judiciary, too, has played very important role in broadening the scope of freedom of speech.

*Schenck v. United State*⁸s was the one of the first important case where Supreme Court was first requested to strike down a law violating the Free Speech Clause. It was a case related to Sedition Act of 1918 which criminalized "disloyal," "scurrilous" or "abusive" language against the government. Supreme court held in this case “ the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Thus in this case court evolved a new doctrine of “clear and present danger”.

⁸ 249 U.S. 47 (1919).

The "clear and present danger" test of *Schenck case* was upheld in *Debs v. United States*⁹ again by Justice Oliver Wendell Holmes. The case involved a speech made by *Eugene V. Debs*, a political activist. Debs had not spoken any words that posed a "clear and present danger" to the conscription system, but a speech in which he denounced militarism was nonetheless found to be sufficient grounds for his conviction. Justice Holmes suggested that the speech had a "natural tendency" to occlude the draft. The test of clear and present danger was further upheld by the court in *Dennis v. United States*¹⁰. It was observed by the court that "clear and present danger" test did not require the government to "wait until the putsch is about to be executed, the plans have been laid and the signal is awaited", thereby broadly defining the words "clear and present danger."

Thus, the Supreme Court effectively shaped the First Amendment in such a manner as to permit a multitude of restrictions on speech. Example such restriction is providing authority to state to punish words that "by their very nature, involve danger to the public peace and to the security of the state." Moreover, Lawmakers were given the freedom to decide which speech would constitute a danger.

Protection of Freedom of Speech and Expression in India

In Indian Constitution Freedom of speech enjoys special position. The preamble of constitution itself ensures to all citizens inter alia, liberty of thought, expression, belief, faith and worship. The constitutional guarantee of the freedom of speech consists in the Preamble of Constitution and is transformed as fundamental and human right in Article 19(1) (a) as "freedom of speech and expression". Which provides:

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

Explaining the scope of freedom of speech and expression in many cases the Supreme Court has said that the words "freedom of speech and expression" must be broadly constructed to include the freedom to circulate one's views by words of mouth or in writing or through audiovisual instrumentalities. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures 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 the like.

Furthermore, it is important to mention that liberty of one must not offend the liberty of others. Patanjali Shastri, J. in *A.K. Gopalan*¹¹ case, observed, that "*man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals*". It therefore includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this country therefore has the right to air his or their views through the printing and or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive generous support from all those who believe in the participation of people in the administration. We can see the guarantee of freedom of speech under following heads.

Conclusion

The potency and significance of the freedom of speech and expression in a civil society is well recognized at the national and international level. The European Convention on Human Rights (Article 10), the American Convention on Human Rights (Clause 13) of the African Charter on Human Rights and the rights of nations (Article 9) has acknowledged the rights to freedom of speech and expression. The Human Rights Charter of Asian National approved by the Association of Asian Parliaments for Peace (AAPP) in Pataya (Thailand) in November 2005, in Article 12, says "The freedom of opinion and the freedom of speech" provide quite concretely the right to freedom of speech, similar to the content already provided in the UN human rights documents.

Further, Indian Constitution under *Article 19(1) (a)* provides freedom of speech and expression includes within its ambit, freedom of press. However in modern world after the emergence of cyber revolution the right to freedom of speech and expression is not limited to express ones' view through words but it also extends to circulating one's views in writing or through audiovisual instrumentalities, through advertisements and through any other communication channel and even by sharing ones' view by social networking sites. It also comprises of right to information, freedom of press etc. It is a right to express and self realization. Two big democracies of world i.e. America and India have remarkably protected this right. As far as India is concerned, this important

⁹ 249 U.S. 211 (1919).

¹⁰ 341 U.S. 494 (1951).

¹¹ **A.K. Gopalan vs The State Of Madras**, AIR1950SC27.

right is declared fundamental right category as mentioned in Article 19(1) (a), of the Part III of the Constitution. Indian courts have always placed a broad interpretation on the value and content of Article 19(1) (a), making it subjective only to the restrictions permissible under Article 19(2).

The words “in the interest of public order”, as used in the *Article 19* include not only utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder. There should be reasonable and proper nexus or relationship between the restriction and achievement of public order. Originally, the American constitution has not provided directed protection of freedom of speech and expression, but it was inserted in the constitution vide first amendment of the constitution which does not contain any standard for determining permissible restrictions on freedom of speech. The restrictions that are permissible now are those that have been developed by the Supreme Court in its interpretation of the First Amendment.

The United States has a complex First Amendment jurisprudence that varies the protection offered free speech according to form. Similarly, India developed its own free speech jurisprudence that applies a “reasonable restrictions” test based on eight mentioned restrictions (i.e. affecting sovereignty and integrity of India and national security, friendly relation with foreign states, public order, decency or morality, in relation to contempt of court, defamation or incitement of offence). The real difference in freedom of speech enjoyed in the United States of America and India is a question of point. This difference in degree is attributable to the reasonable restrictions provision and the moral standard of the communities.

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