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Freedom of Expression in India

Soli J. Sorabjee, SC

Throughout India's freedom struggle there was a persistent demand for a written Bill of Rights for the people of India which included the guarantee of free speech. Understandably, the Founding Fathers of the Indian Constitution attached great importance to freedom of speech and expression and the freedom of the press. Their experience of waves of repressive measures during British rule convinced them of the immense value of this right in the sovereign democratic republic which India was to be under its Constitution. They believed that freedom of expression and the freedom of the press are indispensable to the operation of a democratic system. They knew that when avenues of expression are closed, government by consent of the governed will soon be foreclosed. In their hearts and minds was imprinted the message of the Father of the Nation, Mahatma Gandhi, that evolution of democracy is not possible if one is not prepared to hear the other side. They endorsed the thinking of Jawaharlal Nehru who said, "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".[1] No wonder that members of the Constituent Assembly hailed the guarantee of free speech as the "most important", "the charter of liberties", "the crux of fundamental rights", and in similar eulogistic terms.[2]

Part III of the Indian Constitution guarantees a wide spectrum of judicially enforceable fundamental rights which broadly corresponds to the civil and political rights guaranteed by the International Covenant on Civil and Political Rights 1966 (ICCPR). Freedom of speech and expression is guaranteed as a fundamental right by Article 19(1)(a) of the Constitution.[3]

Freedom of expression, like other fundamental rights guaranteed by the Indian Constitution, is not absolute. It can be restricted provided three distinct and independent prerequisites are satisfied.

> (1) The restriction imposed must have the authority of law to support it. Freedom of expression cannot be curtailed by executive orders or administrative instructions which lack the sanction of law.

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1 Nehru's speech on 20 June 1916 in protest against the Press Act 1910.

2 B. Shiva Rao (ed), *The Framing of India's Constitution: A Study* (New Delhi: Institute of Public Administration, 1968) p 222.

3 Article 19 - Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right - (a) to freedom of speech and expression ...

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, 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 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.

(2) The law must fall squarely within one or more heads of restrictions specified in Article 19(2), namely, (a) security of the state, (b) sovereignty and integrity of India, (c) friendly relations with foreign states, (d) public order, (e) decency or morality, (f) contempt of court, (g) defamation, or (h) incitement to an offence. Restriction on freedom of expression cannot be imposed on such omnibus grounds as "in the interest of the general public"[4] which is permissible in the case of fundamental rights like freedom of trade and business.

(3) The restriction must be reasonable. In other words, it must not be excessive or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.[5] The validity of the restriction is justiciable. Courts in India exercising the power of judicial review have invalidated laws and measures which did not satisfy the above requirements.[6]

One of the curiosities of the Indian Constitution is that freedom of the press has not been specifically guaranteed as a fundamental right. During the framing of the Constitution questions were raised about this omission and there were demands for incorporating freedom of the press as a distinct fundamental right. According to the constitutional adviser, Dr B.N. Rau, it was hardly necessary to provide for it specifically, because freedom of expression would include freedom of the press.[7] In a series of decisions, the Supreme Court of India has affirmed this view and ruled that freedom of the press is implicit in the guarantee of freedom of speech and expression. Consequently freedom of the press by judicial interpretation is one of the fundamental rights guaranteed by the Constitution of India.[8]

Freedom of the press does not occupy a preferred position in the Indian Constitution which does not recognize a hierarchy of rights. Nonetheless freedom of the press has received generous support from the judiciary and a categorical assurance that as long as "this Court sits", newspapermen need not have the fear of their freedom being curtailed by unconstitutional means.[9] There are dicta of the Supreme Court describing this freedom as "the Ark of the Covenant of Democracy",[10] "the most precious of all the freedoms guaranteed by our Constitution".[11]

The Supreme Court has ruled that newspapers have to be left free to determine their pages, their circulation and the new editions which they can bring out within the quota of newsprint allotted to them. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would adversely affect press freedom and any provision or measure which requires newspapers to reduce their size would be compelling them to

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4 *Sakal Papers (P) Ltd v Union of India*, AIR 1962 SC 305.

5 *Chintaman Rao v State of Madhya Pradesh*, AIR 1951 SC 118 at 119; *State of Madras v V.G. Rao*, AIR 1952 SC 196 at 199, 200; *Tikaramji v State of Uttar Pradesh*, AIR 1956 SC 676 at 711; *Express Newspapers v Union of India*, AIR 1958 SC 578 at 621; *State of Bihar v R.N. Mishra*, AIR 1971 SC 1667.

6 Sakal Papers, *supra*, n 4; *Bennett Coleman and Co v Union of India*, AIR 1973 SC 106.

7 *Supra*, n 2, pp 219-20.

8 *Brij Bhushan v State of Delhi*, AIR 1950 SC 129; *Express Newspapers Ltd v Union of India*, AIR 1958 SC 578; *Sakal Papers Ltd v Union of India*, *supra*, n 4; *Bennett Coleman and Co. v Union of India*, *supra*, n 6.

9 *Express Newspapers Ltd v Union of India*, AIR 1986 SC 515 at 538.

10 Bennett Coleman, *supra*, n 6, at 129.

11 *Supra*, n 4, at 315.

restrict their dissemination of news and views and thus directly affect freedom of the press and it is unconstitutional.[12]

An interesting case arose in the State of Andhra Pradesh. The proprietor of a Telugu daily, *Eenadu*, complained that the government had withdrawn advertisements from its paper on account of extraneous reasons, and this had adversely affected the revenue and circulation of the paper. This action of the government was challenged as unconstitutional. The High Court did not accept the contention that a newspaper has a constitutional right to obtain advertisements from the government. It however ruled that the government cannot exercise this power or privilege "to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press, or as a weapon to punish newspapers which criticize its policies and actions. It has to use the funds in a reasonable manner consistently with the object of the advertisement, viz., to educate and inform the public about the activities of the government."[13]

In a case in which a steep levy of customs duty on newsprint was challenged, the Court observed that whilst newspapers did not enjoy any immunity from payment of taxes and other fiscal burdens, the imposition of a tax such as customs duty on newsprint is an imposition on knowledge. The Court accepted the plea that a fiscal levy on newsprint would be subject to judicial review because in the case of ordinary taxing statutes, the laws may be questioned only if they are openly confiscatory or a colourable device to confiscate. "But in the cases before us the Court is called upon to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul. Therefore, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness clearly and directly attributable to the tax."[14] The Court did not strike down the levy because all the relevant materials were not placed before it. The government was directed to reconsider the matter afresh and fix the import duty on newsprint in the light of the principles enunciated in the judgment.

There is no provision in the Indian Constitution proscribing censorship, unlike, for instance, the Japanese Constitution (Article 21) and the German Constitution (Article 5) whereunder pre-censorship is prohibited. Similarly, the American Convention on Human Rights (San José) 1969 expressly states in Article 13(2) that freedom of expression "shall not be subject to prior censorship".

Barely four months after India became an independent republic, the Supreme Court of India in May 1950 had to resolve the tension between freedom of expression and censorship in *Brij Bhushan v The State of Delhi.*[15] Section 7(1)(c) of the East Punjab Safety Act 1949 provided for submission of material for scrutiny if the government was satisfied that such action was necessary for the purpose of preventing or combating any activity prejudicial to public safety or the maintenance of public order. The Court declared the statutory provision in question unconstitutional on the ground that the restrictions imposed were outside the purview of Article 19(2) as it then stood, which did not include

12 *Supra*, n 4.

13 *Ushodaya Publications (P) Ltd v Govt of Andhra Pradesh*, AIR 1981 AP 109.

14 *Supra*, n 9 at 540.

15 AIR 1950 SC 129.

public order as a permissible head of restriction. The Court did not rule that prior censorship is *per se* unconstitutional. Indeed, in 1957 the Court upheld censorship imposed for a temporary period under the Punjab Special Powers (Press) Act 1956, which provided for a right of representation to the government.[16] Judges are human, and contemporary events cast their shadow on judicial thinking. The Court in the Punjab case was much influenced by the tension that had arisen between the Hindus and the Akalis, a Sikh group, over the question of the partition of the State of Punjab which they feared "might flare up into communal frenzy and faction fight disturbing the public order of the State which is on the border of a foreign State".[17] It is noteworthy, however, that another statutory provision imposing censorship without any time limit and without providing any right of representation was struck down by the Court in a judgment delivered on the same day.[18]

India's worst brush with censorship occurred during the state of emergency declared by the government of Prime Minister Indira Gandhi on 25 June 1975. Censorship of the press was imposed for the first time in independent India by the promulgation of a Central Censorship Order, dated 26 June 1975. No censorship was imposed during two previous declarations of emergency, in 1962 and 1971, when the nation was fighting a war. Under the Indian Constitution during an emergency, fundamental rights, including freedom of speech and expression and the freedom of the press, stand suspended. Censorship, which in normal times would be struck down, becomes immune from constitutional challenge. Taking advantage of the emergency, numerous repressive measures were adopted in the form of executive non-statutory guidelines, and instructions were issued by the censor to the press. One of the instructions of the censor was the following: "Nothing is to be published that is likely to convey the impression of a protest or disapproval of a government measure".[19]

Consequently anything that smacked of criticism of governmental measures or action was almost invariably banned, even if the criticism was sober and moderate. The censor's scissors were applied arbitrarily and in a few cases his decisions bordered on the farcical. Quotations from Mahatma Gandhi, Tagore and Nehru were banned. A statement by the Chairman of the Monopolies and Restrictive Trade Practices Commission criticizing the working of public sector undertakings was blacked out. Other ludicrous instances were the bans imposed on news about a member of a former royal family, Begum Vilayat Mahal, squatting at New Delhi railway station; a report about junior lawyers marching to the Delhi High Court; a London report of the arrest of a famous Indian actress for shoplifting; and the news about a meeting of the Wild Life Board, which considered the grant of a hunting licence to a certain maharajah's brother.[20] These bans had nothing to do with the security of the state or preservation of public peace and order but reflected the capricious working of the censoring authorities.

Some of the censor's directives were sinister, like the ones prohibiting any reference to the transfer of state high court judges; banning publication of judgments of high courts which ruled against the censor; "killing" news of the opposition of certain state governments to

16 *Virendra Kumar v State of Punjab*, AIR 1957 SC 896.

17 Ibid, at 900.

18 Ibid, at 903 (petition of K. Narendra, heard together with this case).

19 Sorabjee, *The Emergency, Censorship and the Press in India 1975-77* (London: Writers and Scholars Educational Trust, 1977), p 13.

20 Ibid, pp 31, 27, 29.

proposed constitutional amendments; banning reports of alleged payoffs made during the purchase of Boeing aircraft; and suppressing criticism of family planning programmes.[21] The object was not merely withholding of information but manipulation of news and views to legitimize the emergency and make it acceptable. One tragic consequence was that inhuman practices like forcible sterilization of young men and other excesses of over-enthusiastic family planning officials came to light much later after the events, by which time family planning had become an anathema to the rural masses. An urgent and important programme suffered a serious setback thanks to suppression of freedom of expression by the censor.

The Indian judiciary, especially the state high courts, displayed commendable courage in striking down the censor's orders and upheld the right of dissent even during the emergency. The High Court of Bombay in the landmark judgment of *Binod Rao v Masani*[22] delivered on 10 February 1976 declared:

> "It is not the function of the Censor acting under the Censorship Order to make all newspapers and periodicals trim their sails to one wind or to tow along in a single file or to speak in chorus with one voice. It is not for him to exercise his statutory powers to force public opinion into a single mould or to turn the Press into an instrument for brainwashing the public. Under the Censorship Order the Censor is appointed the nurse-maid of democracy and not its grave-digger. ... Merely because dissent, disapproval or criticism is expressed in strong language is no ground for banning its publication."[23]

The Court, however, cautioned that the voice of dissent cannot take the form of incitement of revolutionary or subversive activities, for then instead of serving democracy it would subvert it.[24]

The State High Court of Gujarat in its judgment in *C. Vaidya v D'Penha* castigated the censorship directives for imposing upon the people "a mask of suffocation and strangulation". In construing the expression "prejudicial report", the Court observed:

> "To peacefully protest against any governmental action with the immediate object of educating public opinion and the ultimate object of getting the ruling party voted out of power at the next general elections is not a prejudicial report at all. Such a public education is the primary need of every democracy."[25]

During the 1975-77 state of emergency the Police Commissioner refused permission to hold a public meeting to be addressed amongst others by retired judges of the High Court and the Supreme Court at which there was likely to be criticism of the emergency as well as the measures taken under it. The High Court of Bombay courageously stuck down the order. Justice Tulzapurkar in his concurring judgment held:

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21 Ibid, pp 32, 36-8.

22 (1976) 78 Bom LR 125.

23 Ibid, at 169.

24 Ibid, at 169.

25 *C. Vaidya v H. D'Penha* in Sp CA 141/1976, 22 March 1976 (unreported).

> "Even during the emergencies that are currently in operation it is legitimate for any citizen to say that the proclamations of emergency, which are legislative acts on the part of the President, are unjustified or unwarranted; it is legitimate for any citizen to say that these emergencies are being kept alive for suppressing democratic dissent and criticism and that these should be ended."[26]

These judgments were delivered at a time when "inconvenient" judges were transferred from one state to another in India. Notwithstanding this, the high courts rose to the occasion. Indeed it was their finest hour.

A potent source of restriction on freedom of expression in India is its criminal law, which deals with offences against religion and punishes certain kinds of expression which may be loosely called "hate speech". Speech or writings which promote enmity, hatred, ill-will or disharmony between different religious, racial or linguistic groups or castes or communities are prohibited by Section 153A of the Indian Penal Code (IPC). A related provision, Section 153B, proscribes the making or publishing of imputations or assertions which imply that

> "any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India".

Speech which intentionally and deliberately wounds the religious feelings of any person is punished by Section 298. Speech and writings which "with deliberate and malicious intention" insult the religion or the religious beliefs of any class of citizens are prohibited and punished by Section 295A.[27] Writings covered by the above categories can by a notification be declared to be forfeited to government and thereupon every copy of such book or writing can be seized. The aggrieved party can apply to the High Court to set aside the declaration of forfeiture.[28]

These sections, which were enacted by the British during colonial rule, were not inspired by any antipathy to free speech as such. The rationale underlying the provisions is the maintenance of public peace and tranquillity in a country like India where religious passions can be easily aroused and inflamed. The British did not want a religious riot on their hands and were not really concerned about the religious tenets of those who professed them. Therefore, any speech or writing, whether true or false, which deliberately and intentionally insulted a religion or outraged the religious feelings of a class or community was prohibited. At the same time it was realized that there cannot be a total ban on religious discourse or debate. Christianity and Islam are proselytizing religions; conversion was legal, provided it was not brought about by force or fraud. Indeed, there were strong objections by Christian missionaries when those provisions were in the draft stage that, unless the requirement of deliberate intent was incorporated, it would be very difficult to preach the gospel and spread the light amongst the "natives" of India.

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26 *N.P. Nathwani v Commissioner of Police*, (1976) 78 Bom LR 1 at 72.

27 "295A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

28 Section 94, Criminal Procedure Code 1973.

The background and history of Section 295A which punishes insult to religion are interesting. It was enacted in 1927 after the judgment of the Lahore High Court in what is popularly known as the *Rangila Rasool* case.[29] A tract, *Rangila Rasool*, was published in which there were offensive references to the Prophet Mohammed's personal life. The High Court took the view that the prosecution which was launched under Section 153A was not legally sustainable because the writing could not cause enmity or hatred between different religious communities though it was certainly offensive to the Muslim community. There was an outcry from the Muslims. Apart from the unreasonable demand about sacking Justice Dalip Singh who had delivered the judgment (incidentally, he was a Christian) there was a plea for a change in the law.

The report of the Select Committee in connection with the enactment of Section 295A in the IPC is significant. The Select Committee emphasized that the essence of the offence is "that the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention".[30] The Committee

> "were impressed by an argument to the effect that an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made. We have therefore amplified the words 'with deliberate intention' by inserting reference to malice, and we think that the section which we have now evolved will be both comprehensive and at the same time of not too wide an application."[31]

Thus Section 295A was enacted to punish "insults to religion or religious beliefs of any class", if done with deliberate and malicious intention.

The constitutionality of Section 295A was questioned before the Supreme Court in the case of *Ramji Lal Mody*.[32] The Supreme Court upheld its validity on the ground that the restriction imposed on freedom of expression by the section was reasonable and was covered under the head of "public order". The reasoning of the Court was that the section did not penalize any and every act of insult to religion or the religious beliefs of a class of citizens, but was directed to acts perpetrated with the deliberate and malicious intention of outraging the religious feelings of a class of citizens. In the words of the Supreme Court: "The calculated tendency of this aggravated form of insult is clearly to disrupt the public order".[33]

In India religious feelings are easily ruffled by attacks on religious beliefs or practices. There have been instances where the publication of a book condemnatory or severely critical of a particular religion or its founder has led to riots and widespread disturbances. The man who wrote *Rangila Rasool*, which portrayed the Prophet as an immoral person, was murdered in court. Writings in India have to be judged in the context of the conditions existing in the country, the light in which they will be viewed by the people who read them, and their reactions, depending upon the intensity of the beliefs and sentiments of the

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29 *Raj Paul v Emperor*, AIR 1927 Lahore 590.

30 Select Committee Report, Gazette of India, Part V, 251 (17 September 1927).

31 Ibid, at 251-2.

32 AIR 1957 SC 620.

33 Ibid, at 623.

people whose religious tenets and practices are criticized. There is an English saying that hard words break no bones, but in certain situations in India hard words will break mosques and temples. At the same time it must not be forgotten that India is a secular democratic state which guarantees not merely the freedom to preach, practise and propagate religion but also freedom of conscience. The religious person and the atheist both have been guaranteed fundamental rights under the Indian Constitution. Religion may be extolled by the devout. Equally it may be condemned by the atheist or scorned by the Marxist as the opium of the people.

Courts in India have tried to balance the values underlying freedom of expression with the maintenance of peace and order. The trend of the decisions is that criticism of a religion and religious beliefs is permissible provided it does not descent to vile or vituperative abuse of any religion or its founder. One may legitimately criticize the tenets of a particular religion and characterize them as illogical or irrational or historically inaccurate. But it is not permissible to condemn the founder of a religion or the prophets it venerates as immoral persons or frauds and charlatans. Courts would in such cases probably infer a "deliberate and malicious intention" to insult the religion, particularly if the language is abusive or vituperative.[34] Ultimately it depends upon the approach of the judges. Do they attach more weight to freedom of expression or are they more concerned with preservation of peace and order?

There are other statutory provisions in India which also prohibit or restrict freedom of expression in certain circumstances. For example, the Indian Telegraph Act 1885 and the Post Office Act 1898 prohibit certain categories of writings, namely obscene or subversive ones. The Cinematography Act 1952 empowers the Government to ban films which could harm public peace or morals. The Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 prohibits, in the interest of public health, advertisements relating to magical cures, self-medication, etc. Under Section 11 of the Customs Act 1962, by the issue of a notification the importation of books can be prohibited *inter alia* on the ground of maintenance of public order or of standards of decency or morality or because they contain matter which is likely to prejudicially affect friendly relations with any foreign state or is derogatory to national prestige. Various state public security Acts also authorize the imposition of restrictions on the ground of public order or public security.

The main difficulty with these laws is in their enforcement. Most statutory provisions confer wide powers on the executive. In practice the enforcement authorities have proved to be insensitive to constitutional values. At present they have become almost paranoid in their over-anxiety to prevent riots and disturbances and the axe has fallen on many writings which are critical of some religion or its founder and prophets but which would not be covered at all by the governing statutory provisions. The authorities deem it prudent to play it over-safe. The tendency is to ban a book or a play if there is the slightest possibility of demonstrations and disturbances, to forfeit it and drive the aggrieved person to court to obtain a judicial verdict. If there is any breach of the peace on account of the judgment striking down the ban, the executive can then safely disclaim responsibility and put the ball

34 *Shiv Ram v Punjab State*, AIR 1955 (Pun) 28; *State of Mysore v Henry Rodrigues*, (1962) 2 Cr LJ 564; *T. Parameswaran v Dist Collector, Ernakulam*, AIR 1988 Ker 175.

in the court of the judiciary.

What is worse is that some of these provisions have been selectively enforced at the behest of different religious groups on different occasions and their implementation in some cases has been on account of political manipulation. The ban on Salman Rushdie's book, *The Satanic Verses,* is a classic instance. There are cases where books which are critical of some Hindu religious figure or leader have been banned, again on account of sectarian pressure, irrespective of the nature and content of the book. A recent instance is the unofficial ban on Rushdie's novel, *The Moor's Last Sigh,* which was perceived by some Hindu fanatics belonging to a political party, the Shiv Sena, to be a caricature of its autocratic leader, Bal Thackeray. Such action on the part of the authorities is perceived by Muslims and others as an instance of the government yielding to Hindu pressure.

This was precisely the objection to the enactment of Section 295A expressed by five dissenting members of the Select Committee. They had perceptively observed:

> "It's a regrettable concession to fanaticism, it will on the contrary, make the situation worse; each side will accuse the other of publishing writings which are against their religion, and government will again be seen siding with one party or the other."[35]

It is remarkable that one member of the Select Committee, P. Ananda Charlu, had in 1886 described the enactment of Section 153A

> "as a dangerous piece of legislation and has been impolitic (among other reasons) by necessitating government to side with or to appear to side with one party as against another. In my humble judgment it will only accentuate the evil which it is meant to remove. Far from healing the differences which still linger, or which now and then come to the surface, it would widen the gap by encouraging insidious men to do mischief in stealth."[36]

His objection was not only perceptive but prophetic.

Experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression.[37] Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.

Laws designed ostensibly to protect the security of the state and public order are another source of suppression of expression. Under this pretext, the axe has fallen on several innocent publications whose only crime was to strongly dissent from government policy and criticize the current rulers for their lapses. The offence of sedition exists in several countries and its abuse is rampant and persistent. In the heyday of British colonialism

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35 *Supra,* n 30, at 253.

36 Select Committee Report, Gazette of India, Part V, 15 (5 February 1898).

37 *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury,* [1991] 1 QB 429.

sedition was construed by the Privy Council in the case of *Tilak*,[38] *Wallace-Johnson*[39] and *Sadashiv Narayan*[40] to include any statement that caused "disaffection", namely, exciting in others certain bad feelings towards the government, even though there was no element of incitement to violence or rebellion. The Supreme Court of India in the case of *Kedar Nath*[41] dissented from the Privy Council decisions. It held that the gist of the offence of sedition under Section 124A of the Indian Penal Code is incitement to violence or the tendency to create public disorder by words spoken or written, and does not cover mere criticism of government, however strong or vigorous. Otherwise the section would be violative of the fundamental right of freedom of expression guaranteed by the Constitution.

Unfortunately, the talismanic invocation of the mantra of "national security" by the executive not infrequently generates timorousness in our judicial sentinels leading to an attitude of undue deference to governmental claims. Fortunately, those judges who are more sensitive to the value and function of free speech in a democratic society, adopt a different approach and make due allowance for the emotive invectives which are the stock in trade of the demagogue or the passionate preacher provided there is no tendency to disrupt public order.

It is not suggested that courts should lightly dismiss considerations of national security. The point is that judges should not regard the executive's *ipse dixit* and the oft-repeated bald assertions of danger to national security as papal dogmas of infallibility, but should view them with searching scepticism because history and experience have shown that these concerns tend to be highly exaggerated and in some cases are non-existent.

Exhibition of movies has often been banned or restricted by the authorities under the Cinematograph Act 1952 on the ground of obscenity or indecency or vulgarity. Prior restraint has been upheld by the Supreme Court with regard to the exhibition of motion pictures in *K.A. Abbas v Union of India.*[42] According to the Court,

> "... it has been almost universally recognized that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture."[43]

The Court, however, emphasized the necessity for a corrective machinery in the shape of an independent tribunal and also a reasonable time-limit for the decision of the censoring authorities. In laying down certain guidelines for the censor, the Court was at pains to point out that the

> "standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for ourselves must make a substantial allowance in favour of freedom".[44]

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38 25 Indian Appeals 1.

39 [1940] AC 231.

40 AIR 1947 PC 82; 74 Indian Appeals 89.

41 AIR 1962 SC 955.

42 AIR 1971 SC 481.

43 Ibid, at 492.

44 Ibid, at 498.

In subsequent cases the Supreme Court has emphasized that standards must be of "reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view".[45] In *S. Rangarajan v P. Jagjivan Ram*,[46] the Court approved the observations of the European Court of Human Rights that freedom of expression protects not merely ideas that are accepted but also

> "those that offend, shock or disturb the State or any sector of the population. Such are the demands of the pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[47]

The Court laid down an extremely important principle:

> "If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threats of demonstrations and processions or threats of violence. That would be tantamount to negation of the rule of law and surrender to blackmail and intimidation. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people."[48]

This judgment has far-reaching implications. Its wholesome effect and timeliness cannot be over-emphasized in view of the rising intolerance witnessed of late in India. Tranquillity ought not to be maintained in all cases by sacrifice of liberty. In order to prevent a threat to order, the state should not suppress fundamental rights, and particularly freedom of expression, which it is the duty of every democratic state to uphold.

In its recent judgment concerning the movie *The Bandit Queen*,[49] the Court ruled that neither nudity nor vulgarity can necessarily be equated with obscenity. It endorsed the observations in its previous decision in *Samaresh Bose and Another v Amal Mitra and Another*[50] in the context of a novel, that "if a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and will have to read books which are purely religious". With reference to the objected brief scene of frontal nudity of Phoolan Devi, the Bandit, the Court observed:

> "Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film 'Schindler's List' was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive".[51]

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45 *Ramesh v Union of India*, 1988 (1) SCC 668, at 676.

46 *S. Rangarajan v P. Jagjivan Ram*, 1989 (2) SCC 574, at 598.

47 *Handyside v United Kingdom*, (1979-80) 1 EHRR 737, para 49.

48 *Supra*, n 46, at 598.

49 *Bobby Art International v Shri Om Pal Singh Hoon*, JT (1996) 4 Supreme Court 533.

50 1985 (4) SCC 289.

51 *Supra*, n 49.

Defamation is one of the heads of restriction permitted by the Constitution of India. Libel laws can have a chilling effect on freedom of expression. Every inaccurate statement about government officials or public figures should not be actionable unless it is made with malice, that is, with actual knowledge of the falsity of the statement or with reckless and utter disregard of the true state of affairs. This is because erroneous statements are unavoidable in free debate in a democracy and must be tolerated if freedom of expression is to have "the breathing space it needs to survive". These principles were enunciated by the United States Supreme Court in its landmark decision in *New York Times v Sullivan*[52] and have been endorsed by the House of Lords in the *Derbyshire County Council* case. The Lords recognized that threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech and enunciated a very salutary principle, namely, that "it would be contrary to public interest to permit institutions of government to sue for libel because that would place an undesirable fetter on freedom of speech".[53]

The Supreme Court of India in its path-breaking judgment in *R. Rajagopal v State of Tamil Nadu and Others*,[54] approved of *Sullivan* and *Derbyshire County Council* and *inter alia* laid down that the remedy of action for damages is not available to public officials with respect to their acts and conduct relevant to their official duties,

> "... even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages".[55]

The Court has applied the same principles in the case of public figures because "public figures like public officials often play an influential role in ordering society ... [they] have access to mass media communication both to influence the policy and to counter criticism of their views and activities".[56] The Court further held that neither the government, nor the officials who apprehend that they may be defamed, had the right to impose a prior restraint upon the publication of the autobiography of Auto Shankar, a convict serving sentence of death in jail and whose publication by his wife was likely to reveal a nexus between criminals and high ups in the police. "The remedy of public officials/public figures, if any, will arise only after the publication".[57]

An important question regarding use and control of electronic media and airwaves and frequencies was decided by the Supreme Court in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*.[58] The Court ruled that "the right to communicate

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52 376 US 254 (1964).

53 *Derbyshire County Council v Times Newspapers Ltd and Others*, [1993] AC 534.

54 1994 (6) SCC 632.

55 Ibid, at 646.

56 Ibid, at 646.

57 Ibid, at 649.

58 1995 (2) SCC 161.

includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. ... This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach".[59] At the same time the Court recognized that "since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies".[60] It directed that "the central government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves".[61]

Guarantee of freedom of speech also guarantees the right not to speak. That is the effect of the landmark decision of the Supreme Court of India[62] which upheld the claim made by three students of the Jehovah's Witnesses faith that they were forbidden by their religious beliefs to sing the national anthem of any country. The students were expelled by the educational authorities because of their refusal to sing the Indian national anthem, even though they respectfully stood up in silence when the anthem was sung. The Court held that expulsion was violative of their fundamental right of freedom of expression. The Court concluded with a ringing note: "Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it".[63]

The Supreme Court of India recently had to deal with a case which concerned the issue of the right of reply. Professor Manubhai Shah published a study paper which was strongly critical of the working of the Life Insurance Corporation (LIC). A reply to Professor Shah's article was published in *Yogakshema*, a magazine of the LIC. Shah's request that his article should also be published in the same magazine was refused. The Supreme Court applied the fairness doctrine and held that LIC's refusal was "unfair because fairness demanded that both viewpoints were placed before the readers".[64] The attention of the Supreme Court was not drawn to the advisory opinion of the Inter-American Court of Human Rights delivered on 29 August 1986, and consequently the Supreme Court had no occasion to consider the social dimension of the right to reply based on the important premise that "the formation of public opinion based on true information is indispensable to the existence of a vital democratic society".[65]

The Supreme Court has held that commercial speech is within the guarantee of Article 19(1)(a) and commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.[66]

One of the heads on which freedom of speech and expression can be restricted under the

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59 Ibid, at 213.

60 Ibid, at 226.

61 Ibid, at 252.

62 *Bijoe Emmanuel v State of Kerala*, AIR 1987 SC 748.

63 Ibid, at 758, per Chinnappa Reddy J.

64 *Manubhai Shah v Life Insurance Corporation of India*, 1992 (3) SCC 637.

65 *Enforceability of the Right of Reply or Correction*, Advisory Opinion OC-7/86 of 29 August 1986, 7 HRLJ 238 (1986).

66 *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*, 1995 (5) SCC 139 at 154; *Supra*, n 9 at 548, 549.

Indian Constitution is "decency or morality". D.H. Lawrence's book, *Lady Chatterley's Lover,* fell foul of the Indian Supreme Court justices in the case of *Ranjit Udeshi,* decided on 19 August 1964.[67] The Supreme Court adopted the nineteenth-century *Hicklin* test laid down by courts in England and came to the surprising conclusion that the book was obscene judged "from our community standards and there is no social gain to us which can be said to preponderate".[68] This judgment may well be regarded as an aberration. The average English-speaking Indian has free and easy access to books in libraries and bookshops in whose company *Lady Chatterley's Lover* would blush like a tomato. Two decades later, in 1985, the Supreme Court adopted a less illiberal approach in *Samaresh v Amal Mitra*[69] and held that the Bengali novel, *Prajapati,* was not obscene. Unfortunately, the Court did not discard the outdated *Hicklin* test but emphasized that vulgarity was not synonymous with obscenity. The Court concluded that the novel was not obscene "merely because slang and unconventional words have been used in the book in which there has been emphasis on sex and description of female bodies".[70]

Onslaughts on freedom of expression can emanate also from groups or individuals who demand the banning of a book or a movie which appears offensive or hurtful to them. In the recent past, freedom of expression was severely threatened by militant groups in the northern Indian states of Punjab and Jammu and Kashmir which dictated to the press and to All India Radio, run by the government, what should or should not be printed or broadcast. Non-compliance with these directives entailed bodily harm, and even death, to the disobedient. The government's failure to take stern action against militants led to severe self-censorship imposed by media persons in Punjab and other parts of India.

Freedom of expression has on the whole received solicitous protection from the Indian judiciary. The Supreme Court has endorsed the approach and thinking of Madison in regard to the freedom of the press that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".[71]

The real protection to freedom of expression would lie in creating a temperament of tolerance, mutual understanding and respect for the beliefs and points of view of others. This requires a sustained effort to change the attitudes of persons and to sensitize them to the value of free speech and the importance of dissent, and to impress upon them that no group has the monopoly of truth and wisdom, about which there may be genuinely different perceptions.

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67 *Ranjit D. Udeshi v State of Maharashtra,* AIR 1965 SC 881.

68 Ibid, at 891.

69 *Supra,* n 50.

70 *Supra,* n 50.

71 *Romesh Thappar v State of Madras,* AIR 1950 SC 124 at 129.