

Research Article

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Freedom of Speech in Indian Context

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Abstract

Keywords

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The freedom to speak and to express oneself ranks high in the list of core human interests. Because, it is through speech and expression that we grow and develop as human beings, and create a meaningful life for ourselves. Through expression, we receive and impart ideas, construct our personality, and project it onto the world. This freedom of speech is not dependent only upon the laws of the nation. The dull compulsion of social relations and the compliance with laws unconsciously determine the limits of free speech to a much greater extent in the society.

1. Introduction

The freedom to speak and to express oneself ranks high in the list of core human interests. Because, it is through speech and expression that we grow and develop as human beings, and create a meaningful life for ourselves. Through expression, we receive and impart ideas, construct our personality, and project it onto the world. This freedom of speech is not dependent only upon the laws of the nation. The dull compulsion of social relations and the compliance with laws unconsciously determine the limits of free speech to a much greater extent in the society.

But, It is the laws that reinforce social sanctions and are the most visible guarantors of, as well as hindrances to personal freedoms. So, the wing of the state which is responsible for the interpretation of laws: The Indian Courts play an important role in regard to the state of free speech in India.

In the jurisprudence of constitutional courts all over the world, three arguments have found particular resonance:

1. Freedom of speech is essential for determining truth.
2. It is an integral part of self-fulfillment and self-determination.
3. It is important in sustaining a democracy.

Coming to the free speech jurisprudence in India, Article 19(1)(a) of the Constitution contains the right to freedom of speech and expression, while Article 19(2) permits the government to impose by law, reasonable restrictions upon this right, 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 a offence. [1]

The word 'Public Order' being a very vague term lead to different interpretations by the courts at different times and this lead to very different results.

This made Indian free speech jurisprudence broadly to cleave along two distinct and incompatible lines. One line is marked by a skeptical judicial attitude towards the claims that subversive speech will cause public disorder, a higher concern towards the freedom of expression and higher standards for curtailing free speech on public order grounds. The other, characterized by a higher prioritization of public order and the means necessary to achieve it, thereby giving free speech the shorter end of the stick.

Therefore, to critically view the standpoints of the courts on various issues related to free speech, it is imperative that we first try to understand what free speech means and what it represents.

2 Understanding Free Speech

Free Speech is understood and accepted as a crucial liberty to an individual, but the applications of it in concrete situations is always controversial and can be contested and argued upon. It is clear that not all forms of free speech and expression have to be protected upon by the laws, in the same way like all the laws that prevent murder, an action through which a nihilist 'expresses' his philosophy are justified. However, all the situations are not as clear as this situation.

So, in order to understand these situations let us look at what free speech is. Like we mentioned above, 3 arguments have resonated continuously among different jurisprudences across the world. Understanding what free speech and expression meant according to those arguments will be very useful in understanding free speech.

2.1 Free Speech as a means to Truth

One of the earliest defenses of free speech on a philosophical basis in the modern era is given by John Stuart Mill in his work "On Liberty". He argued that a free exchange of ideas and opinions was the only method of arriving at the truth. Suppression of the truth would only lead to the continuation of the existing wrongs in the society. He believed that even if the truth is suppressed many times it will continue to arise until it can withstand all the attempts made to suppress it.

But this argument is difficult to justify, as he believes the truth will eventually rise to the top. This is very light on evidence as 'eventually' would mean any timespan. If this time span is in the order of Hundreds of years, this argument is impossible to be justified or proven wrong.

We think that the idea of giving higher priority to the outcomes is not the best way to go about understanding free speech as a means to the truth because this way of understanding would not be enough when it comes to voicing out opinions against ideas like legitimate slavery. Mill would be happy with the final outcome though it takes many generations before this idea gets banned. This line of thought is flawed because many people's lives are at mercy of this wrong idea that exists until the idea is banned.

A different phrase was given by the Famous Judge Oliver Wendell Holmes that the best truth can only be found in the marketplace of ideas. He told that the best test of truth is the ability to get accepted among the various ideas that exist in the market.

This argument that free speech can be described in the language of a marketplace makes little sense given the resource determined entry of ideas into the market. The propagators of the idea are blocked from even taking their idea into the marketplace by these resource-determined entry barriers. These barriers include the economic infrastructure such as the access to the newspapers, television or the internet on which effective speech depends on heavily in this modern era. However, this idea of the marketplace makes it easier for the state to intervene to effectively curb speech. As free speech is a right which is often used to argue against what is currently going on, the intervention of the state effectively prevents these ideas from entering the marketplace itself.

However, we think Holmes argues that marketplace is the best (available) mechanism for arriving at truth and not that truth will necessarily emerge from the marketplace. It is better than the state deciding which ideas are good and ought to be promoted, and which are bad and ought to be curbed. In this line of thought, we find this thesis more interesting and stronger.

2.2 Free Speech as Individual Self-Fulfillment

Many free speech scholars built this argument on the line of thought that through speech and expression we grow and develop as human beings. So, for autonomous self-development, free speech and expression is a central necessity as it is core to human rationality.

But, this is not an argument for protecting speech, this extends to all activities that are related to self-fulfillment. An individual may get fulfillment from trading on the stock market, working in a profession, engaging in sexual activities and these can be no less protected in any way than protecting speech according to this thought. This can't be the alone argument for free speech as individual self-fulfillment. There need to be more specific arguments to augment this line of thought. The major ones are

1. Autonomy
2. Pluralism

2.2.1 Autonomy

An integral part of the freedom of speech and expression constitutes the right of the viewer to think autonomously while reacting to the speaker or the filmmaker, and to make informed choices, without being controlled by the state.

The autonomous man is presumed to apply his own canons of rationality and sense, and weigh up the evidence in order to come to his own conclusions about the desirability or undesirability of performing an act- the consequences of which he and not anybody else-is responsible for. [2]

In other words, it is, as Immanuel Kant states 'have the courage to use your own reason!'

Justification of the regulation of speech on the ground that the State knows and decides what is best for its citizens in any given area, without according them the opportunity to make their own minds about it is known as 'Paternalism'. [2] This is directly denying the autonomy of the citizens in regard to free speech.

To what extent are the courts willing to treat citizens as autonomous, morally responsible agents who can be trusted to listen to whatever speech or expression that they wish to, and be trusted to make up their own

minds about the content of what they hear? And to what extent are the courts willing to close off channels of communication because of the harm that they fear individuals might cause if they are allowed to hear, unrestricted, any speech that comes their way? The courts have struggled to find a workable balance between protecting the rights of the speaker and permitting the government enough latitude to maintain public order.

2.2.2 Pluralism

Though the argument from autonomy provides us with a great framework to think about a whole lot of free speech issues related to public order, sedition, hate speech etc., there are some cases where it fails miserably. For example, consider the situation of consumer protection laws, where the responsibility of providing the correct information about the products rests with the companies and nobody points out that it is the autonomy of the individual that should be considered and it is the customer's fault that he had bought the product. So, all relationships in a society are not based on autonomy, but there are some that are based on dependency (Like doctor-patient relationship). These aspects need a deeper principle to distinguish them as different scenarios in which autonomy cannot be brought as the sole basis of the relationship. This helps us to get an idea when some aspects of free speech should be governed on the basis of autonomy and when they should not.

One of the recent judgments handed down by the Supreme Court is the extension of the legal and constitutional protection to the members of the transgender community. Court pointed out that the community has a right to express their self-identified gender through words and action. This is an extension of the self-fulfillment argument but laid in the direction of pluralism. Pluralism means respect for diverse and often antagonistic sets of thoughts, beliefs, and ways of life and this is a core value in modern societies. Since public expression serves as a validation of the way of the life, it is important for its practitioners. This means the State banning the circulation of gay magazines which explores and discusses the way of life of the gay community is anti-pluralistic.

While Pluralism seems in line to the self-fulfilling argument, there is a crucial difference between the two. Pluralism is a social good, whereas self-fulfillment is centered around the individual. Strong

free speech protection, insofar as it protects the public expression of diverse ways of life, is integral to a pluralist society.

2.3 Free speech as a means of democratic self-governance

We understand democracy to be a political system in which ultimate governing power rests in the hands of the people. Where this power is exercised indirectly through representative government, that government must be chosen by the will of, and be accountable and responsive to, the people (for example, through periodic elections). Raja Rammohun Roy argued that without a free press, the citizens will not be able to inform the govt. about the injustice that any of its executive officers might be committing. By this, he essentially drew the line joining the connection between free speech and Responsive Government.

The democratic justification for free speech was drawn by Alexander Meiklejohn, who argued that democracy needs its citizens to judge for themselves the fairness of any policy made by the government. For this informed judgments have to be made which essentially require the acquaintance of people to all sides of the problem. Free speech is crucial to the dissemination and the propagation of the political information. For this informed choice, one should protect all communication from which people can derive knowledge and intelligence.

Jack Balkin takes this argument one step further saying that the purpose of free speech is to promote a democratic culture which is a culture in which individuals have a fair opportunity to participate in meetings that constitute themselves. Hence free speech is both individual and social.

Courts have often taken 'Public order' as a foundation for evaluating the free speech, but equality should be taken instead of public order. This is the foundational value that would give structure and shape to a right of free expression. The deep linkages between equality and free speech are no longer far-fetched.

3 Hate Speech

Over the years, the law has emerged as a weapon of choice for groups or constituencies claiming to be offended or hurt by the literary or artistic work. There have been many instances in recent times when people have been arrested for political satire or critique or

even liking others political critique on social media. There are also Prior sanctions to ensure the curtailing of speech even before it gets to the 'market' which is the society.

But If the entire reason for existence of free speech to advocate political, social and cultural change and free speech best serves its purpose when it induces a condition of unrest, creating dissatisfaction with the conditions as they are so that something better can be born out of it, then there are some problems with the present free speech law in India.

'Hate speech', broadly speaking, is derogatory towards someone else. Many countries have laws regulating hate speech. However, the difficulty comes in trying to set the bar as to when the speech is to be considered hate speech and to reconcile hate speech regulations with the free speech expression.

There have been many instances in the Modern history of India where many works have been curbed on the grounds that the work 'hurt' the feelings of a community. There are laws that grant power to the state to curb the work if it 'appears' as a threat to 'public order'. The terms 'hurt', 'appears' and 'public order' are very vague and this lead to many works being censored even though there is no such material that might be a real threat to public order.

Many times the state had to curb works because of the disruption caused to public order by some groups claiming to be hurt. This goes against equality as this leads to a situation where writing something which is offensive to a powerful group would get your work banned whereas writing the same work on a weak and peaceful group. This illustrates that mere subjective feelings of hurt or offense cannot be the ground for curtailing free speech.

So, the subjective feelings of hurt or offense cannot be at stake. The laws themselves make that clear as they use 'insult' instead of 'offence'. Insult is the objective component that goes beyond the subjective reaction of the target. But what is the objective part of 'insult' and hate speech that makes it necessary to be curbed is something that has to be answered. Regarding hate speech, the Canadian Supreme Court gave out its opinion as follows:

"Hate speech is an effort to marginalize individuals based on their membership in a group. Using the expression that exposes the group to hatred, hate

speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on [the] vulnerable that can range from discrimination to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."

These principles have been based on Equality rather than protecting people's feelings.

Hate speech damages two basic values that are underlying in a modern democracy. The first principle or value is inclusiveness. In a pluralist society, there are multiple groups living together and an inclusive society guarantees each person assurance that he can lead his life without hostility, violence, and discrimination both as an individual and as part of a group. This gives people a sense of security which hate speech undermines. In a society filled with hate speech against a group, its exclusion and insult becomes part of its very outlook and thus breaks down the guarantee of inclusiveness and equal respect that a democracy ought to extend to all its members.

The second value is Dignity. This can be understood as equal citizenship which is an affirmation of social understanding and dignity is a proper object of society's protection and concern. This Dignity can be separated from other elements in which free speech affects people. 'Offense' is limited to entirely 'subjective' feelings of hurt, shock or anger whereas 'Dignity' refers to a person's 'objective' standing in a society. The aim of hate speech codes is not to protect people from an 'effect on their feelings', but to preserve their 'decent treatment in society'.

3.1 Our View on Hate Speech

Coming to our view, we agree with the basic idea that the Hate speech legislation is not about hurt feelings or offended sentiments, but about maintaining the equality and dignity of all persons in pluralist and inclusive societies, is latent in free speech laws of other Jurisdictions. There has to be clear differences between offensive speech and hate speech and offensive speech should not be curtailed on the grounds that it is a threat to public order. Heckler's

veto cannot be used to suppress free speech. An example distinguishing the hate speech from offensive speech would be like follows:

A person attacking a Christian religious group saying 'how can people be so naive as to believe Jesus resurrected three days after his death' would be termed under offensive speech whereas 'Christians are scum' would be hate speech.

4 Film and Internet Censorship

One of the main issues for the expression of freedom is prior restraint. When it comes to films, the Cinematograph Act, and its guidelines establish a system of Prior restraint, which vests power in the government and its authorities to choke off the marketplace of ideas at its source. These guidelines are both Overbroad and vague. Apart from this Section 95 of the Indian Constitution places the burden on the artist to get his work to be legitimized, after it had been banned by the government without any judicial proceedings.

We think that this is a tremendous burden on the artist and many people don't have the resources to fight the case and get their works back. This prior restraint system is much more governmental involved in censorship than the post-restraint system. So, when the material involved is critical of the government, it would not allow the idea to reach the public and censors the work as it overestimates the threat that this work might produce to it.

This would be worse for a complete prior restraint system as it means some ideas would never reach public.

Why would the government adopt prior restraint and not leave it to the autonomy of the individuals?

This approach of the government takes back to when the country was ruled by British. The Archaic Colonial laws of the British government have transferred into the modern laws. This lead to the adoption of how British viewed the people of India into how the Govt. looks at Indian people. The British viewed Indians as 'excitable, irrational and underdeveloped people who are deficient in the sense of proportions'. In some sense, the Excitable natives have become the excitable citizens of India.

When we follow this approach, it means that Prior restraint is not only desired but it is also necessary.

4.1 Our View on the current state of censorship

We think that the prior restraint approach of the govt. is based on the fact that the government views its citizens as easily excitable and irrational. The government thinks that giving such people access to unrestricted or uncensored speech is a very big threat to the public order. This is especially true if the speech contains elements that are against some of the policies of the government. So, it overestimates the threat that will be upon the government and public order if such speech is circulated in the country unrestricted. Since colonial times this situation has been the same and the government is still not respecting the autonomy of the citizens.

But, we think that this is no longer the scenario in Indian society. Since the Independence, the society has gone through a lot of development. The Superstitions

that used to exist at that time are mostly curbed by 2017. The society also developed in literacy terms as literacy rate increased three-fold by 2011 when compared to 1951. This implies the notion that an average Indian is illiterate and is incapable of making a rational choice is no longer valid. Hence the government should realize this fact and when it realizes that the citizens can make rational choices, there is no need for this system of prior restraint. Then the free speech suppression would be to a much smaller extent and to a lesser ambiguous extent.

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