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FREEDOM OF SPEECH IN INDIA- AN ANALYSIS

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Introduction:

The right to freedom of speech and expression is enshrined as a fundamental right under Article 19(1) (a) of the Constitution of India. Freedom of expression means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner. Such is the importance of this right in a democracy that without this right, the attempt to achieve democratic principles would be a hollow formality. Although this right has wide amplitude, our Constitution mandates that when seeking to uphold the larger interest of society, the rights of an individual must give way to some collective rights. It is for this purpose that the right to freedom of speech and expression under Article 19(1) (a) is qualified by "reasonable restrictions" under Article 19(2) of the Constitution. The Courts have stressed many times that the restriction has to be interpreted strictly and narrowly. Such restrictions are bound to be viewed as anathema, inasmuch as they are in the nature of curbs or limitations on the exercise of the right and are, therefore, bound to be viewed with suspicion, thereby throwing a heavy burden on the authorities who seek to impose them. In contrast to India, the American system places a much greater value on this right as the First Amendment to the U.S. Constitution does not permit any prior restraint, and the guarantee of free speech is absolute and unqualified.[2]

Indian Democracy and freedom of expression:

Voices of concordance and dissention have contributed to the medley and melody of the argumentative Indian life. Barring a few minor occasions, nor has it ever been suggested that an opinion contrary to that of the government is somehow inimical to national interest.

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[2] Life Insurance Corporation of India v. Prof. Manubhai D. Shah (1992) 3 SCC 637.

India's ability to express and simultaneously contain a million mutinies, has been a source of joy to its friends and of wonderment to its adversaries. A genuine desire to be heard, to differ and to mount a counter narrative are the traits that we value and cherish. The different views are allowed to be expressed by proponents and opponents not because they are correct or valid, but because there is freedom in this country to express differing views on any issue.[3] A democracy without a dissenter in it is impossible. Free men, in the exercise of free thought, will give vent in free speech. No matter how abhorrent the thought, or its manner of expression, a mature democracy will tolerate it, and even encourage its publication. It is better for an imperfect thought to be voiced and rejected in the marketplace of ideas, than for it to fester within the warehouses of inexpressible thought. After all there is no greater idea of democracy than free men, freely and voluntarily, committing to the requirements of citizenship of a free country. Only totalitarian regimes suppress dissent and dissidents. Only a country not yet rid of its colonial hangover of a government that commands and controls, labels dissent as seditious. A truly free nation will confidently view even its advocated destruction as a bad idea that will fail in the marketplace of ideas.[4] Dissent is not anti-national. This nation has been built on dissents expressed at crucial times in its history. Our Republic has seen its own share of dissenters whose discordant dissent of the day has led to the wisdom of the morrow. Indian free speech jurisprudence has two broad approaches: moral-paternalistic, a view that sees people as inherently corruptible and prone to violence and who cannot be trusted with too much freedom, and liberal-autonomous, an approach that sees people as individuals capable of making decisions on their own lives and one that allows only limited restrictions on what they can speak, see or hear.

Obviously Constitution does not guarantee us total freedom of speech and expression. If both freedom and its curtailment are in an everlasting delicate balance, what exactly is our free speech philosophy? Free speech is a means to the truth; an important means by which democratic self-governance is made possible. Its role in personal, social and political life inevitably brings it into conflict with the state, with diverse shades of opinions in

[3] The most precious of all freedoms, A. P. Shah, The Hindu, November 25, 2011.
[4] No freedom without dissent, Sanjay Hegde , The Hindu, March 04, 2016.

the marketplace of ideas and the ways in which free expression impacts the established order.[5]

The grounds that the Constitution of India provides in Article 19(2) ought to be reasonable. And what is reasonable is to be tested not on scrupulous standards. For example, it would be reasonable to constrain speech if it is absolutely apparent that such speech would incite the committing of an offence. Such a test was, in fact, devised by the U.S. Supreme Court in the famous Brandenburg v. Ohio[6] case: it is only speech that incites "imminent lawless action," the court held, which is constitutionally unprotected. The Constitution makers have left it open for the courts to interpret, by the standards of reasonable men, whether an expression is art, literature, satire, insult, ridicule or offence. While some felt that a reasonable fetter on Rights of Freedom will not destroy the liberties of the people. They asserted that freedom by its very nature implies limitations and restrictions. But a cautionary tone against imposing reasonable restrictions was also recorded. They felt that the checks should be very precise, clear and not couched in ambiguous language and left to the courts for decisions. Voices of apprehension to leave in the hands of the Legislature such vague 'wide powers' were also heard. Time and again, the constitutional courts have interpreted what a reasonable man is — an ordinary man of common sense - the man on the top of Clapham omnibus, and prudence and not an out-of-ordinary or hypersensitive man. All said, the courts have given mixed signals while struggling to strike a balance between free speech and restrictions on it. The Supreme Court's overriding concern, over the years, has been that free speech should not affect communal harmony. The ground rule has been that religious harmony cannot be sacrificed at the altar of free expression.[7]

The courts are being tested on a range issues concerning freedom of expression. Significant orders and rulings in the supreme court and high courts spanned the gamut of conflicts between state and media, state and artist, state appointed censor board and film makers, legislature and media, state and political opposition, and the conflict between societal censure and free expression- the right to free speech of a citizen versus another's right to take offence. Also, the challenges opening up on the digital front, with mobile internet bans for

[5] Gautam Bhatia, Offend, Shock, or Disturb: Free Speech under the Indian Constitution, Oxford University Press.
[6] 395 U.S. 444 (1969).
[7] The reasonable man vs. the hypersensitive man, Krishnadas Rajagopal The Hindu, January 18, 2015.

instance being imposed under section 144 of the Criminal Procedure Code. There have been issues, in the near past, of press freedom, freedom of expression, online freedom and personal freedoms have come together to produce an overall sense of shrinking liberty not experienced in recent years. The press cannot be truly free when facilitating freedoms such as the Right to Information and the Right to Internet, and the freedom of expression of the creative community, are shrinking. There was a spate of incidents in which media people were attacked physically and legally. The available data shows that law-makers, law-enforcers and law-breakers are the prime culprits in the attacks and threats on the media.

Majoritarianism and Free Speech:

Hate speech is an umbrella term that covers any form of expression that disparages people on the basis of social characteristics such as race, community, religion, gender and sexual orientation. The intentions behind laws governing such expression (for example, protecting minorities from abhorrent diatribes) are generally blameless. The problem, however, is that the laws are inherently vague and subjective. There is no objective way of distinguishing between unacceptable hate speech and an acceptable rant. There is no way of determining what will outrage the sentiments of someone. Our tendency is to often think of democracy as a form of majoritarianism, where the will of the greatest number ought to always prevail; we, therefore, seek to balance an individual's right with the supposed interests of the larger society. If restricting certain speech would make the majority of us happy, then such societal happiness, it is argued, would constitute good reason for restricting such speech. But this model for framing the purport of our moral rights is fundamentally flawed which suffers from an ingrained illegitimacy, where a person's right to free speech is limited by the majority's perceived levels of tolerance. If democracy were to be a truly legitimate form of government, it must contain certain inherent value. Democracy cannot be considered an end by itself, but must represent a means to attain justice. In order to be genuinely participatory it must treat certain fundamental rights as distinct and incapable of being transgressed purely on the caprice of the majority. Our greatest failing as a nation is to allow whimsical decisions of the majority to override the most fundamental moral rights that we enjoy as citizens. Free speech must unquestionably partake more than the ability of the

majority and wealthy to speak, and the state has an important role to play in achieving this goal. But the restrictions that the Indian government often places on speech have little to do with such concerns of equality. On the contrary, speech is limited in the supposed interest of the majority on a utilitarian assumption that such restriction benefits the interests of the larger society. Where the impact of a certain speech is uncertain, the benefit of doubt must be accorded to the speaker; any divergent, utilitarian argument would run counter to the theory of rights. Unfortunately, the Indian Supreme Court and concomitantly the courts below it allows our right to freedom of speech to wither at the first expression of an objection, where violence is implausible let alone being imminent. We have allowed hurt sentiment in this country to become a cover for aggressive moral vigilantism, an excuse to take the law into one's own hands, and to perpetrate violence in the name of emotional victimhood. Our artistic and cultural freedoms are threatened routinely by violence and vandalism — as during the controversies over M.F. Husain's paintings, Taslima Nasreen's novels and articles, Deepa Mehta's Fire and Water, Jaswant's Singh's book on Mohammed Ali Jinnah etc. The irony here is that these belligerent vigilantes usually belong to organisations that make a living out of promoting enmity between different communities and religious groups — the very thing they accuse artists, filmmakers, writers and journalists of doing. The laws operate in a manner that allows those who claim to be offended or insulted to lay down what constitutes hate speech. And in India, it assumes truly sinister proportions because of a dangerous cocktail of circumstances — a citizenry that takes offence much too easily and bureaucracy that are willing to entertain what are clearly frivolous petitions.

Hurt Sentiment and Free Speech:

It should be mentioned here, the judgment setting aside criminal complaints and the "settlement agreement" (midwifed by the government) which forced Perumal Murugan, who captured the attention of national media when he published an obituary for the writer in him after he was forced to apologise, to withdraw his book for allegedly hurting the sentiments of different castes and social groups in Tamil Nadu, by making certain statements in his award winning novel Mathorubhagan. The "settlement deed" and subsequent police complaints demanding criminal action against Murugan were first challenged in PILs before the Madras

High Court. The court was highly critical of government action. The court reasoned its arguments on lifting the ban on the book that Murugan's novel is backed by a long liberal Indian tradition where sex was openly discussed in erotic literature, along with the fact that the novel had a larger social purpose of sensitising people to the problems faced by childless couples. The Court applied the contemporary community standards test in concluding that there is nothing obscene in the novel. The Bench has instead reminded the authorities of their duty to secure freedom of expression and not pander to mob demands in the name of preserving law and order. Under the law, only the government can ban books and any such attempts by social groups to ban the book are not recognised under the law.[8] The law often takes the feelings of offended groups — religious fundamentalists, language chauvinists, caste formations — very seriously. The grounds that the Constitution of India provides in Article 19(2), as its text says, ought to be reasonable. And what is reasonable is to be tested not on the threshold of majoritarian will, but on larger, scrupulous standards. For example, it would be reasonable to constrain speech if it is absolutely apparent that such speech would incite the committing of an offence as is the case in USA. Offensive speech must satisfy at least two conditions to qualify as hate speech — it must be a "deliberate and malicious act" and it must pose a clear and present danger to society as opposed to something "remote, conjectural and far-fetched", in the Supreme Court of India's words.[9] It is universally accepted that some forms of harmful speech (defamation, plagiarism, etc.) must be prohibited. But mere offensiveness cannot be a ground for proscription. Only explicit and unequivocal incitements to violence are a valid ground for curbing free speech and expression. This is not to suggest that the Supreme Court has never upheld the right to free speech. There have been plenty of instances where the court has overturned bans on books, movies and other forms of expressions.[10]

One can see the shift from the original standard for obscenity - 'a tendency to deprave or corrupt' a person susceptible to prurient taste (Ranjit Udeshi, 1965) to more modern 'contemporary standards that reflect the sensibilities as well as the tolerance level of

[8] Prashant Reddy Thikkavarapu, The Hoot, 25/07/2016.
[9] The Republic of Hurt Sentiments, Mukund Padmanabhan, The Hindu, February 09, 2012.
[10] Democracy versus majoritarian will, Suhrith Parthasarathy, The Hindu, February 28, 2014.

the average reasonable person'.[11] The Bench's observations on the need to tolerate unpopular views in the socio-cultural space are significant. Free flow of opinions and ideas are essential to sustain the collective life of the citizenry. The threshold for placing reasonable restrictions on the freedom of speech and expression was indeed a very high one, and there should be a presumption in favour of the accused in such cases. It is a good idea to constitutionalise all forms of speech; that is, making as much of the law speech-protective as possible, and what little is incapable of protection must be curbed only in a manner allowed by the Constitution. To put it differently, if some restrictions are inevitable, their basis should be sought only within the values of the Constitution, or in constitutional morality and not in vague appeals to transient notions of social mores, decency and morality. For instance, a restrictive hate speech law or one that seeks to protect an oppressed community from insult need not derive its constitutionality from a mere content-based view of the 'feeling of hurt' caused by some words or images. Rather, it could be rooted in a notion of moral equality among citizens, and with reference to women, from the angle of prohibition of gender subordination. On the plethora of criminal complaints on the actor Kushboo over her statement, the Court held that notions of social morality were inherently subjective and criminal law could not be used as a means to interfere unduly with the domain of personal autonomy. The complainants, instead of resorting to legal means, should have contested her views through the news media or any other public platform. Law should not be used in a manner that had chilling effects on the freedom of speech and expression. The task of criminal law was not to punish individuals merely for expressing unpopular views. One should be mindful that the initiation of a criminal trial was a process that carried an implicit degree of coercion and it should not be triggered by false and frivolous complaints, which amounted to harassment of and humiliation to the accused, the Bench explained. The complainants against Khushboo might have lost the case in the Supreme Court, but they did achieve their purpose of harassing her with the case for five years and silencing her and others with similar views.

[11] Khushboo Vs. Kanniammal on 28th April 2010, Respondents WITH Criminal Appeal 914/2010 @SLP (Crl.) No. 6127 of 2008 Criminal Appeal.

Criminal Law and Free Speech:

In August 2016, however, the SC clarified that criticism did not constitute defamation. The Supreme Court pulled late CM of Tamilnadu, for using defamation as a political tool. It quashed a non-bailable warrant issued against DMDK chief Vijayakanth, and said that criminal defamation proceedings cannot be initiated for merely critiquing the government. The apex court expressed concern over the defamation law being misused and said during the hearing that calling a government corrupt or unfit cannot be grounds for a defamation prosecution. In a similar vein, a bench of Justices Dipak Misra and U Lalit noted while hearing a petition by Common Cause on the misuse of the sedition law on September 6, 2016 that a statement to criticise the government does not invoke an offence under sedition or defamation law. They have made it clear that invoking of section 124A[12] of IPC requires certain guidelines to be followed as per the earlier judgement of the apex court.

[12] Section 124A. Sedition.—

Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression "disaffection" includes disloyalty and all feelings of enmity.

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

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

However, the judgment in the case of Subramaniam Swamy & Others Vs. Union of India[13], challenging the constitutional validity of section 499[14] of the Indian Penal Code, 1860 is

[13] Subramaniam Swamy & Others Vs. Union of India, (W.P. (Crl) 184 of 2014).

[14] Section 499. Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

First Exception.—Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—Public conduct of public servants.—It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct.

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct.

Fourth Exception.—Publication of reports of proceedings of Courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings. Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

rather disappointing to proponents of superiority of fundamental rights over that of rights of individuals. This constitutional challenge to Section 499 was always a difficult case and it should not surprise anybody that the constitutionality of the provision was upheld. The essence of the constitutional challenge was whether the law imposed an unreasonable restriction on the fundamental right to free speech enshrined in the Constitution. The petitioners in this case argued that in order to be reasonable, a restriction on free speech is required to be proportional to the object and effect of the restriction. The restriction imposed by the law thro this section, the object of which is to safeguard the reputation of an individual is criminal imprisonment leading to a chilling effect on the fundamental right of speech and expression. However, the government argued that the 'Right to Reputation' is a fundamental right under Article 21 of the Constitution and so this case became one of balancing the fundamental right to reputation with the fundamental right to free speech under Article 19(1)(a). Balancing two fundamental rights against each other is a more complex endeavour; both are on an even keel and one cannot be subjugated to the other.[15] Prima facie the very

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Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person.

Sixth Exception.—Merits of public performance.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance.

Seventh Exception.—Censure passed in good faith by person having lawful authority over another.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Eighth Exception.—Accusation preferred in good faith to authorised person.— It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Ninth Exception.—Imputation made in good faith by person for protection of his or other's interests.—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

[15] Prashant Reddy Thikkavarapu, The Hoot, 17.5.2016.

concept of a fundamental 'Right to Reputation' is an absurd concept and is a result of the reckless judicial expansion of Article 21. But the Court concurred with the government argument of reputation being an inherent component of Article 21 and an individual should not be allowed to be sullied solely because another individual can have his freedom. Reputation of one cannot be allowed to be crucified at the altar of the other's right of free speech. It added that the legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate. It opined that it is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. It further defended constitutionality of Section 499 on the basis of fundamental duty and the doctrine of constitutional fraternity.

Section 66A[16] had attained particular infamy after the arrests by the Mumbai police in November 2012 of two women who had expressed their displeasure at a bandh called in the wake of Shiv Sena chief Bal Thackeray's death. Since then, several arrests have been made

[16] The Information Technology Act, 2000 was amended in 2008. The amended Act which received the assent of the President on February 5, 2009, contains section 66A.

Section 66A. Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication device,—

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.— For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.

by different State police, of various individuals, for the most benign dissemination of online content. The latest in the slew of pernicious cases reportedly booked under Section 66A was the arrest of a class 11 student in Uttar Pradesh for posting, on Facebook, "objectionable" comments apparently attributable to a State Minister. These arrests, aimed at checking even the most harmless cases of contrarianism and dissent, were made possible mostly by the sweeping content of the law. The Supreme Court, in Shreya Singhal versus Union of India,[17] has stepped to the fore with a delightful affirmation of the value of free speech and expression, quashing, as unconstitutional, Section 66A of the Information Technology Act, 2000. According to the petitioners in Shreya Singhal, none of these grounds contained in Article 19(2) were capable of being invoked as legitimate defences to the validity of Section 66A of the IT Act. They also argued that the provisions of Section 66A were contrary to basic tenets of a valid criminal law in that they were too vague and incapable of precise definition, amounting therefore to a most insidious form of censorship. Further, in the petitioners' argument, Section 66A produced a chilling effect that forced people to expurgate their speech and expressions of any form of dissent, howsoever innocuous. The court distinguished three forms of speech: discussion, advocacy and incitement, and holds that mere discussion or even advocacy of a particular cause, howsoever unpopular, is at the heart of Article 19(1) (a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. The court finds that not only does Section 66A interfere with the right of the public to receive and disseminate information, the provision fails to distinguish between discussion, advocacy and incitement. The Court observed that any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject matters set out in Article 19(2). The Court enlightened the scope of the right available to us to express ourselves freely, and the limited space given to the state in restraining this freedom in only the most exceptional of circumstances. In clarifying the balance between the right and its narrow constraints, the court has struck a vicious blow against the duplicitous stand taken by the state, which consistently represents the right to freedom of speech and expression as a fragile guarantee at best. Apart from rejecting the state's defences under Article 19(2), the court also holds Section 66A unconstitutional for its lack of exactness. It contained no immediate nexus with any of the constitutionally sanctioned exceptions to the right to free expression. The Court stressed that the liberty of

[17] Shreya Singhal versus Union of India, AIR 2015 SC 1523.

thought and expression is not merely an aspirational ideal. It is also a cardinal value that is of paramount significance under our constitutional scheme.[18] It is important to note that this is the first judgment in decades in which the Supreme Court has struck down a legal provision for violating freedom of speech, and in doing so, it simultaneously builds upon a rich body of free speech cases in India and paves the way for a jurisprudence of free speech in the 21st century.[19]

Media and Free Speech:

The media too has not escaped the fury from government and its agencies. In the year 2015, the para - military force Assam Rifles warned the newspapers in the North East not to report anything that projects the demands of the NSCN(K), a banned outfit, and thus by giving it publicity" could be construed as a violation of the Unlawful Activities (Prevention) Act, 1967. Although Section 13 of said Act provides for punishment of any person who 'advocates, abets, advises or incites the commission of an unlawful activity' (which is defined widely), it is necessary to understand that Indian courts have not always given such provisions of law a literal interpretation especially when such a literal interpretation would lead to an infringement of fundamental rights. For example in the case of Arup Bhuyan Vs. State of Assam[20], where a TADA court had convicted a person for being a member of the banned ULFA, the Supreme Court on appeal overturned the verdict. Justice Katju had held that even if the accused was a member of a banned organisation he would not automatically be convicted under TADA. A mere publication of the news should no way be considered a subversive activity. The media shouldn't get intimidated by such letters from the Assam Rifles because the law on the point is fairly settled.[21] The Madras High Court has given a similar ruling in Pugazendhi Thangaraj Vs. the Commissioner of Police[22]. Another shocking judgment by the High Court of Meghalaya amounts to gagging the press in the state from publishing any call for a bandh by a banned organisation. Any breach would be considered a contemptible offence, the court said. Such an order is completely illegal and unconstitutional

[18] The judgment that silenced Section 66A, Suhrith Parthasarathy The Hindu, March 26, 2015.
[19] Free speech Ver.2.0, Lawrence Liang, The Hindu, March 25, 2015.
[20] Arup Bhuyan Vs. State of Assam, (2011) 3 SCC 377.
[21] Guardians of the law attack free speech, Prasant Reddy Thikkavarapu, The Hoot,16/11/2015.
[22] Pugazendhi Thangaraj vs. the Commissioner of Police, W.P.NO.23467 of 2010.

because it imposes prior restraints on free speech. The Supreme Court earlier has made it clear that such 'prior restraints' are unacceptable under the law. It did so first in the Rajagopal Vs. State of Tamil Nadu case[23] and then again in the Sahara Vs. Sebi case. In the latter case, the Court had held that under its contempt powers, it could merely postpone, and not prevent, free speech in the reporting of sub-judice cases, but made it very clear that even such postponement orders were to be the exception and not the rule. The justification in Sahara case is that the publication may impair the rights of the accused to a fair trial. The Meghalaya High Court doesn't really discuss any of this case law or also nor provide any precedent to support its conclusion that publishing a call for a bandh is illegal under the law. In S. Sudin Vs. The Union Of India And Others[24] in the Kerela High Court on 29th October 2014 which has dealt with the question and concluded that the court, in exercise of writ jurisdiction, cannot issue any writ restraining from publishing/broadcasting any information regarding call of hartal/strike." It may be mentioned here that going by the judgment in Shreya Singhal Vs. the Union of India, by publishing the statements of various organizations calling for strikes and bandhs, the press in Meghalaya have not violated any of the parameters outlined in Article 19 (a) (2).

In a lawsuit by the NSE, National Stock Exchange, against Moneywise was instituted after the publication of a news report on the website of money life, the Bombay High Court refused to grant the NSE any interim orders. The new standard prescribed by Justice Patel, requires persons instituting defamation proceedings to now establish that the defendant published or spoke certain words with actual malice. A failure to establish malice will excuse the defendant from any liability. Such a standard is a far cry from the traditional strict liability standard followed for defamation in India, where intent behind the words is rarely ever looked into by the Court. If the 'actual malice' standard is upheld on appeal it will herald a new era for defamation law in India. Unfortunately, it may also lower the already pathetic levels of due diligence followed by the Indian media. The case is significant because it adds to a growing body of High Court jurisprudence on the relationship between defamation and the freedom of speech and expression. The constitutionalisation of defamation law, which began in the 1994 judgment of the Supreme Court in R. Rajagopal's Case, has enjoyed an

[23] Rajagopal Vs. State of Tamil Nadu, AIR 1995 SC 264, 1994 SCC (6) 632.
[24] S. Sudin Vs. The Union Of India And Others, WP(C).NO. 32529 OF 2007 (S).

uneven history over the last twenty years. The Bombay High Court's decision bucks an emerging trend of subjecting defamation law standards to rigorous constitutional scrutiny.[25]

Censorship and Free Speech:

In the largest democracy with the longest Constitution, films often become the target of public ire and of censorship. The recent controversies over the films like Padmavati and the Lipstick Under My Burkha have again ignited the debate between the liberals and the conservatives. Generally, films are banned for six reasons. The movies which depict the country in a bad light (Water (2005), BBC's documentary India's Daughter (2015), the movies which portray the life of our leaders in an unfavourable manner (Kissa Kursi Ka (1977), Aandhi (1975), movies which depict communal violence (Parzania (2005), Black Friday (2004), movies which hurt the religious sentiments of the people (The Da Vinci Code (2006), Sins (2005), movies on the ground of obscenity (A Tale of Love (1996), Gandu (2010) and movies which deal with tabooed subjects, such as lesbianism, and transsexuality (Fire (1996), gulabi Aaina(2002). A large number of such films have attracted the judicial imagination to the issues of censoring, and banning of films. In the case of K.A. Abbas Vs. Union of India and Another[26] the Hon'ble Supreme Court did not find pre-censorship as offending freedom of speech and expression. However, it went on to add that the censorship should be based on precise statement of what may not be subject-matter of film making and should allow full liberty to the growth of art and literature. In Ramesh Vs. Union of India and Others[27], the Court opined that the effect of exhibition of a film or of reading a book has to be judged from the standards of reasonable, strong-minded, firm and courageous men and not those of weak and vacillating mind, nor of those who scent danger in every hostile point of view. It further held that censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good and a balance has to be struck. No film that extols the social evil or encourages it is permissible, but a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil. At the same time,

[25] Indian constitutional law and Philosophy, 10.09.2105.
[26] K.A. Abbas Vs. Union of India and Another, (1970) 2 SCC 780.
[27] Ramesh Vs. Union of India and Others, (1988) 1 SCC 668.

the depiction must be just sufficient for the purpose of the film. In the case of S. Rangarajan Vs. P. Jagjivan Ram and Others[28] the Hon'ble Supreme Court proclaimed that if the film is unobjectionable and cannot constitutionally be restricted under Article 19 (2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. The ban on the ground of public order or obscenity, at times, might be justified. But the prohibition on the grounds which are not covered by Article 19 (2) like hurting the pride of the people, against ethos and culture are clearly untenable. The court observed that the right to restrict free expression should be exercised only if it acted like a "spark to a power keg" and not if the "anticipated danger is remote, conjectural or far-fetched."Such prohibitions adversely affect democracy and the rule of law. The Court has set aside the numerous cuts imposed by the Central Board of Film Certification (CBFC) as a pre-condition for the release of Bollywood movie Udta Punjab. Ideally, when the CBFC is citing Guidelines for Certification of Films for Public Exhibition" issued by the Central Government (which lack the binding force of the law) to censor movies, it should be under an obligation to explain how a particular scene violates the guidelines and the Cinematograph Act. Merely citing the serial number, doesn't meet the usual standard of a "speaking order" that is demanded of executive agencies while they are exercising their powers to curb freedoms of citizens. There are two levels of examination of a government order: the first is whether reasons have been provided and the second is whether the reasons can be substantiated in law. If the CBFC fails to meet even the first threshold, the order should be vacated right there because a citizen cannot be expected to defend himself from an order which is not providing any reasons – it's logically an impossible task! The burden of proof should always be on the bureaucrat demanding the curbing of a fundamental right and not the other way around. Coloured exercise of power permits the state to control the free flow of information, of thoughts, of creativity, and of speech and expression. While we worry about the sentiments of the few, we ignore the rights of the many. Thus, it becomes the tyranny of the minority over the rights of the majority.

[28] S. Rangarajan Vs. P. Jagjivan Ram and Others, (1989) 2 SCC 574.

Conclusion:

What encourages Indians who subscribe to different religious persuasions, speak different languages, and hold different conceptions of the good to believe that they are equal members of a democratic political community? Among other features the most important bond that welds disparate people into a political community is, arguably, constitutional democracy and the fundamental rights granted by the Constitution. Far too often we are deeply critical of our Supreme Court and its decisions. But, Courts often have come to the rescue of common man upholding the preponderance and dignity of constitutional rights against the excesses of the State. It has not only given a fresh lease of life to free speech in India, but has also performed its role as a constitutional court for Indians with considerable élan. That the court has defended the Constitution's ideals of tolerance with a sense of vivacity and integrity and it has provided the jurisprudence of free speech with an enhanced and rare clarity. A holistic reading of the current state of our constitutional jurisprudence would demonstrate that the right to free speech is firmly embedded in our constitutional scheme as a non-negotiable imperative that owes no apology to a myopic view of our republican charter. Indeed, considering the fundamental principles of the nation as "not rules for the passing hour, but principles for an expanding future", the apex court, as the ultimate arbiter of constitutional conscience, has given fundamental rights their meaning in new settings consistent with the aspirations of our people. This is so that we may have a 'living constitution' which can protect, preserve and defend sacrosanct libertarian values that remain the bedrock of the Republic and constitute the core of the constitution. One of the reasons for democracy to survive in India is the ability of Indians to accept diverse thoughts and philosophies, cultures and lifestyles within their fold. Sarvepalli Radhakrishnan, the former President of India asserts that the Indian civilisation is based on assimilation rather than on extermination. The former is the hallmark of Indian civilisation, the latter, of Western civilisation. Indeed, the Constitution of India is wedded to the concept of pluralism and inclusiveness. But extra-constitutional bans restrict the free flow of thoughts, of imagination, of creativity. Such bans are thus against the constitutional philosophy, against the rule of law, against democracy, and against our national interest.[29] Benjamin Franklin once said, "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither

[29] clamping down on creativity, R.S. Chauhan, The Hindu, March 30, 2017.

liberty nor safety". We do not need an American style First Amendment to achieve liberal ideals; what we require is a government that confirms to our own Constitution, which, when viewed in its finest light, affords us the right to freely express ourselves, to dissent and to oppose, to offend and to annoy, free of substantial interference from the state.