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*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

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*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



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## Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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# CENSORSHIP: AN ISSUE OF THE INTERNATIONAL HUMAN RIGHTS<sup>1</sup>

Authored By-1. Malvika Gupta  
2. Rajat Singh

## 1. Introduction

The assignment discusses an inherently important value that Free Speech carries in a society where Human Rights are sacrosanct from various international and regional human rights perspectives and conventions. Censorship is the control of speech and other forms of human expression. In many cases, it is exercised by governing bodies. The visible motive of censorship is often to stabilize or improve the society that the government would have control over. It is most commonly applied to acts that occur in public circumstances, and most formally involves the suppression of ideas by criminalizing or regulating expression. Furthermore, discussion of censorship often includes less formal means of controlling perceptions by excluding various ideas from mass communication. While discussing the documents on human rights, the much noted debate on universalism<sup>2</sup> versus cultural relativism<sup>3</sup> a proposition that any act of censorship to be a reflection of the norms of a particular society and necessarily has to be culturally specific.

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<sup>1</sup> Malvika Gupta, LL.M, Maharaja Agrasen University, Baddi & Rajat Singh, Faculty, Raj Malhotra's IAS Chandigarh.

<sup>2</sup> According to Bhikhu Parekh, "Different societies throw up different systems of moral beliefs depending on such things as their history, traditions, geographical circumstances, and views of the world. We have no means of judging them for there are no objective and universal criteria available for the purpose, and even if there were, we would be too deeply conditioned by our own society to discover them". See Bhikhu Parekh, *Non-ethnocentric universalism*, in T. Dunne and NJ Wheeler, *HUMAN RIGHTS: GLOBAL POLITICS*, (Cambridge University Press, 1999) at p. 128.

<sup>3</sup> "While human rights are universal in character, it is now generally acknowledged that their expression and implementation in the national context should remain the competence and responsibility of each government. This means that the complex variety of problems of different economic social and cultural realities and the unique value systems prevailing in each country should be taken into consideration". See Peter R. Baehr, *GUIDE TO HUMAN RIGHTS PRACTICE*, (Transnational Publishers, 1999) at p.14.

## **2. FREE SPEECH AS AN INTERNATIONAL HUMAN RIGHT: INTERNATIONAL AND REGIONAL CONVENTIONS**

Article 19 of the Universal Declaration of Human Rights,<sup>4</sup> the *Magna-Carta* of International Human Rights Law, states the general normative template that is largely followed by both regional and international human rights systems, specifically on the relevance of freedom of opinion and expression.

It states that:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 19 of the International Covenant on Civil and Political Rights<sup>5</sup>, which sets the globally accepted normative pattern derives its basis from the UDHR, but also brings down several grounds that authorize states to put restraints on freedom of expression. It states that,

1. *“Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - a. *For respect of the rights or reputations of others;*
  - b. *For the protection of national security or of public order (ordre public), or of public health or morals.”*

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<sup>4</sup> UN GAOR 217 (III) dated 10 December 1948, available at <http://daccess-ddsny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>, last visited on 24.07.2022.

<sup>5</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last visited on 24.07.2022

The American Convention on Human Rights<sup>6</sup> looks at the issue of prior restraints in a manner that is completely different as compared to the other human rights conventions. It speaks of a model where there is absolutely no prior restraint except in extreme cases such as to protect the children and the adolescents, and to prevent racial and other forms of hate speech. Article 13 of the ACHR states that:

- 1) *“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*
- 2) *The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:*
  - a. *respect for the rights or reputations of others; or*
  - b. *the protection of national security, public order, or public health or morals.*
- 3) *The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions*
- 4) *Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.*
- 5) *Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”*

Article 10 of the European Convention on Human Rights<sup>7</sup> is largely based on the model of the

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<sup>6</sup> Signed at the Inter-American Specialized Conference on Human Rights, San Jose, 22 November 1969, entry into force 18 July 1978, available at [http://www.oas.org/dil/treaties\\_B32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights.htm), last visited on 24.07.2022.

<sup>7</sup> Signed at Rome, 4 November 1950, entry into force 3 September 1953, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), last visited on 24.07.2022.

ICCPR. This Article states that:

- 1) *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

The African Charter of Human and People’s Rights,<sup>8</sup> one of the latest regional human rights conventions, states in Article 9(2):

*“Every individual shall have the right to express and disseminate his opinions within the law.”*

The Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa,<sup>9</sup> while explaining the scope and ambit of the Article, extends it to sectors of immense contemporary relevance and significance like telecommunications and broadcasting, both in the public and in the private sectors, and casts a very modernist, pragmatic look into the need for regulation of speech and expression in the contemporary Africa. It states that:

*“Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy... No one shall be subject to*

<sup>8</sup> Signed at Nairobi, 28 June 1981, entry into force 21 October 1986, available at [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf), last visited on 24.07.2022

<sup>9</sup> Adopted by The African Commission on Human and Peoples’ Rights, meeting at its 32nd Ordinary Session, Banjul, 23rd October 2002, available at [http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32\\_freedom\\_of\\_expression\\_eng.pdf](http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf), last visited on 24.07.2022

*arbitrary interference with his or her freedom of expression... Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society... Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.”*

### **3. A Comparative Analysis Of The Constitutional Developments In The United States And India**

This section compares the constitutional evolution of the This part analyzes the established advancement of the freedoms, especially the rights relating to free discourse, and the limitations on the liberated utilization of such rights with regards to the Constitutions of India and the United States of America. The motivation behind this activity is to take a look at how, in the two greatest vote based systems of the world, freedom of thought and articulations attending thereto, something that can be taken as a characteristic subordinate, didn't find it simple to acknowledge such parts in the constitutions to begin with. It shows that through a continuous, orderly plan, the shapes of these teachings have taken the state of how they exist today.

#### **3.1 FIRST CONSTITUTIONAL AMENDMENT OF THE UNITED STATES OF AMERICA<sup>10</sup>**

The American Constitution can be traced back to July 4, 1776 when the Continental Congress declared its independence from England. It is very interesting to note that during the constitution-making process, people's liberties and democracy were looked at by the members with complete unanimity.<sup>11</sup> Thus, when George Mason, the author of the Virginian Bill of Rights, moved a plan 'to preface the constitution with a declaration of the liberties of the people',<sup>12</sup> his plan did not

<sup>10</sup> Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, (University of North Carolina Press, 1998). *See also*, David P. Currie, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861*, (University of Chicago Press, 2005), Richard B. Bernstein, Richard B. and Kym S. Rice, *ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION*, (Harvard University Press, 1987).

<sup>11</sup> It is said that Alexander Hamilton had even gone on to say later, 'your people is a great beast'. *See* Anonymous, *Alexander Hamilton and Thomas Jefferson, Hamilton Versus Jefferson on Popular Rule*, available online at <http://www.pinzler.com/ushistory/hamjeffpopsupp.html>, last visited on 24.07.2022

<sup>12</sup> Stephan A. Schwartz, *George Mason: Forgotten Founder: He Conceived the Bill of Rights*, available online at <http://www.smithsonianmag.com/history/george-mason-forgotten-founder-heconceived-the-bill-of-rights-64408583/>, last visited on 25.07.2022

have a significantly large number of takers. In fact, it has been documented that when members

like Roger Sherman had mentioned to him that the states have their respective bills of rights anyways and therefore, there was no need for a constitutional assertion of a centralized bill of rights, Mason had countered by stating that since the constitution was providing for powers on the national government to override the states' powers in any case, a clear constitutional assertion of the Bill of Rights is an absolute necessity, because only then would the rights of people be kept secure<sup>13</sup>. However, this argument was not accepted by the majority and the motion to appoint a committee to draft a Bill of Rights was defeated<sup>14</sup>.

It is because of this tirade between these two groups of constitution makers that from the text of the original US Constitution, inalienable natural rights like liberty remained conspicuous by their absence, apart from a cursory reference in the Preamble stating '*and secure the blessings of liberty to ourselves*'. This raised a lot of criticism in the states, some of whom refused to ratify the Constitution. To appease them, promises were made that amendments respecting and protecting the rights of individuals would soon be brought in. Only after these assurances, the states promised to ratify the Constitution. Thus, respecting the promises made and bringing in the Bill of Rights became more of a political than a constitutional necessity<sup>15</sup>. Committee of the Whole was decided to be set up to look into the issue of these amendments. On July 21, when Madison pressed for the issue again because the Committee had not yet been set up, it was decided by a majority (predominantly on suggestions of Fisher Ames, Theodore Sedgwick and George Partridge, who constituted the anti-Madison group in the House) that the matter be referred to a select committee<sup>16</sup>. The Select Committee Report submitted on August 13, 1789 suggested a number of amendments, including one that said that

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<sup>13</sup> *ibid.*

<sup>14</sup> It is not completely correct to say that the Constitution in its original form did not contain any assertion of the civil liberties. There are provisions that talk about prohibitions on *ex post facto laws*, right to jury trial in federal criminal cases, prohibition of the suspension of the writ of *habeas corpus* etc. *See generally*, C.K.N. Raja, FREEDOM OF SPEECH AND EXPRESSION UNDER THE CONSTITUTIONS OF INDIA AND THE UNITED STATES, (Karnatak University, 1979) at p. 17.

<sup>15</sup> Bernstein and Rice, *supra* 12. *See also*, Milton R. Konvitz, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE, (Transaction Publishers, 2003). Interestingly, states like North Carolina and Rhode Island had not ratified the Constitution for this precise reason till as late as 1789 and 1790 respectively. *See Anonymous, Teaching With Documents: The Ratification of the Constitution*, available online at <http://www.archives.gov/education/lessons/constitution-day/ratification.html>, last visited on 25.07.2022

<sup>16</sup> The Select committee members were James Madison, Roger Sherman, Nicholas Gilman, Benjamin Goodhue, Elias Boudinot, George Gale, George Clymer, Egbert Benson, Ednus Burke and John Vining. *See Konvitz, supra* 23.

*“The freedom of speech and of the press and the right of the people peacefully to assemble and consult for their common good and to apply to the government for redress of grievances shall not be infringed.”<sup>17</sup>*

On the basis of this Select Committee Report, The Committee of the Whole agreed to most of the amendments and decided to incorporate these amendments as a supplement to the Constitution, as opposed to Madison’s suggestion that they be incorporated in the body of the Constitution itself. This was confirmed by the House of Representatives who referred it to a three-member committee to arrange the amendments and make a report. The House also resolved to submit these amendments for consideration of the state legislatures. This resolution was sent to the Senate, who agreed to most of the amendments. After making necessary alterations to the tenor of the amendments, they were sent to the states for ratification by at least three-fourths of them, as per the requirements set forth in the Constitution. Out of the twelve amendments that were sent for ratification, two failed to meet the requisite number of ratifications. The remaining ten, duly ratified, became the symbols of the indomitable human spirit and thrust towards the principles of liberty and notions of democracy – the Bill of Rights.<sup>18</sup> The first of these amendments is the repository of the right of free speech and the free press. The First Amendment states:

*“Congress shall make no law...abridging the freedom of speech or of the press...”*

### **3.2 ARTICLE 19(1) (A) AND 19(2) OF THE CONSTITUTION OF INDIA**

The development of the law governing free speech and censorship in India has, just like its American counterpart, undergone a series of twists and turns in different stages of its evolution. From the Constituent Assembly to the text of Article 19(1) (a) and 19(2) that we see today, this law has seen everything –

Supreme Court decisions declaring significant executive decisions as illegitimate, constitutional amendments coming in response and several such interesting events. This part of the chapter tries to briefly encapsulate this chequered evolution of the free speech law in India.

In the Constituent Assembly, the Advisory Committee on Fundamental Rights under the

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<sup>17</sup> See Ibid.

<sup>18</sup> Interestingly enough, one does not find the existence of the term ‘Bill of Rights’ anywhere in the American Constitution. However, according to Konvitz, “The appearance of the amendments together in one place, rather than in scattered provisions throughout the Constitution, made it easy to refer to them as a single document under the designation ‘Bill of Rights’”

chairmanship of Sardar Vallabhbhai Patel, in its interim report dated 29th April, 1947, referred to the expressional freedoms along with the restrictions thereon in clause 8, which states<sup>19</sup>:

*“There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the government of the union or the unit concerned, whereby the security of the union or the unit, as the case may be, is threatened.*

*(a) The right of every citizen to freedom of speech and expression: provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable.*

Other members like Somnath Lahiri and N.G. Ranga also had significant problems with clause 8. Subsequently, when the Constitutional Adviser B.N. Rau prepared the draft constitution, the expressional freedoms found their place in Section 15. One could make out that this section was significantly different in its content and ambit from clause 8. The part of section 15 that is pertinent for the instant discussion reads<sup>20</sup>:

*“15. (1) There shall be liberty for the exercise of the following rights subject to public order and morality, namely,*

*(a) The right of every citizen to freedom of speech and expression...*

*(2) Nothing in this section shall restrict the power of the state to make any law or to take any executive action which under this Constitution it has power to make or take, during the period when a Proclamation of Emergency issued under Sub-section (1) Section 182 is in force, or in the case of a unit during the period of any grave emergency declared by the Government of the unit whereby the security of the unit is threatened.*

*(3) Nothing in this section shall affect the operation of any law which in the interests of the public including the interests of minorities and special tribes imposes restrictions on the exercise of any of the rights conferred by this section.”*

Hukum Singh decided the scope of legislative interference that Article 13(2) provided for, when

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<sup>19</sup> 3 CAD 441 (April 29, 1947) [Annexure on Fundamental Rights].

<sup>20</sup> B. Shiva Rao (ed.), THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS, Vol. III, (Indian Institute of Public Administration, 1967), pp. 7-9.

he observed:<sup>21</sup>

*“But as has been aptly remarked, “If the danger of executive aggression has disappeared, that from legislative interference has greatly increased, and it is largely against this danger that the modern declarations of fundamental rights are directed, as formerly they were directed against the tyranny of autocratic kings.”*

*The very object of a Bill of Rights is to place these rights out of the influence of the ordinary legislature, and if, as under clauses (2) to (6) of article 13, we leave it to this very body, which in a democracy, is nothing beyond one political party, to finally judge when these rights, so sacred on paper and glorified as Fundamentals, are to be extinguished, we are certainly making these freedoms illusory. If the other countries like the U.S.A. have placed full confidence in their Judiciary and by their long experience it has been found that the confidence was not misplaced, why should we not depend upon similar guardians to protect the individual liberties and the State interests, instead of hedging round freedom by so many exceptions under these sub-clauses?”*

However, this criticism of the presence and the viability of the restrictions was met with a passionate resistance by a number of members. Algu Rai Shastri said that

*“Freedom of speech does not mean that we can give expression to whatever comes to our mind without observing any limitation or rule in this respect. In legislatures we have to follow certain rules and regulations. We are here as the representatives of the sovereign people but even then there are hundreds of restrictions upon us. Freedom by its nature implies limitations and restrictions.”<sup>22</sup>*

According to another prominent member T.T. Krishnamachari,

*“I have no doubt in my mind that... in this article, the Drafting Committee has chosen the golden mean of providing a proper enumeration of those rights that are considered essential for the individual, and at the same time, putting such checks on them as will ensure that the State and the Constitution which we are trying to bring into being today will continue unhampered and flourish.”<sup>23</sup>*

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<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> B. Shiva Rao (ed.), THE FRAMING OF INDIA’S CONSTITUTION: SELECT DOCUMENTS, Vol. III,

B.R. Ambedkar was however clear in his mind that the provisos to every Fundamental Right including Article 13 was brought in based on some experience that the US Constitution had faced, that had to be necessarily resolved judicially by the Supreme Court<sup>24</sup>. Therefore, according to Ambedkar, a certainty in the interpretation of these provisos would help in getting rid of endless litigations and instil a degree of certainty to the interpretation of the rights themselves.

Finally, when the Constitution was enacted on 26th November, 1949 and came into force on 26th January, 1950, it became quite evident that Draft Article 13 was more or less replicated in Article 19, with some alterations like dropping 'sedition' from the list of grounds based on which the state could impose restrictions through law. This new Article 19 read:

*“19(1) All citizens shall have the right – (a) to freedom of speech and expression....*

*(2) Nothing in sub-clause (a) shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the state.”*

However, after the government suffered major jolts from the Supreme Court in two significantly high-profile cases of that era,<sup>25</sup> cases in both of which the government tried to suppress dissident voices, that of the Communist Party in the first case and the Rashtriya Swayamsevak Sangh in the second case, by their interpretation of 'security of state' in Article 19(2) to mean 'public safety'. The government's arguments on this aspect and the court's strong reactions are very appropriately summarized by Lawrence Liang, when he writes<sup>26</sup>:

*“The government argued that the expression “public safety” in the Act, which is a statute relating to law and order, means the security of the Province and, therefore, “the security of the State”. Within the meaning of Article 19(2), “the State” has been defined in Article*

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(Indian Institute of Public Administration, 1967), pp. 7-9.

<sup>24</sup> Ibid

<sup>25</sup> *Romesh Thapar v. State of Madras* AIR 1950 SC 124, *Brij Bhushan v. State of Punjab* AIR 1950 SC 129.

<sup>26</sup> Lawrence Liang, *Reasonable Restrictions and Unreasonable Speech*, available online at <http://infochangeindia.org/agenda/freedom-of-expression/reasonable-restrictions-and-unreasonablespeech.html>, last visited on 25.07.2022

*12 as including, among other things, the Government and the Legislature of each of the erstwhile Provinces. The court, however, stated that the phrase “public safety” had a much wider connotation than “security of the state”, as the former included a number of trivial matters not necessarily as serious as the issue of the security of the state. It concluded that “unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. It follows that Section 9(1-A), which imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order, falls outside the scope of authorised restrictions under clause (2), and is therefore void and unconstitutional.”*

These judgments, according to Sardar Patel, “knocked the bottom out of most of our penal laws for the control and regulation of the press”<sup>27</sup>. As a result, the government almost immediately decided to bring in a Constitutional Amendment to change the tenor of the restrictions.

Constitution (First Amendment) Act, 1951 significantly altered the wordings of Article 19(2) by bringing in the word ‘reasonable’ before ‘restrictions’ and changing a few grounds of imposition of restrictions from the original article. This newly amended Article 19(2) now read:

*“Nothing in sub-clause (a) shall affect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”*

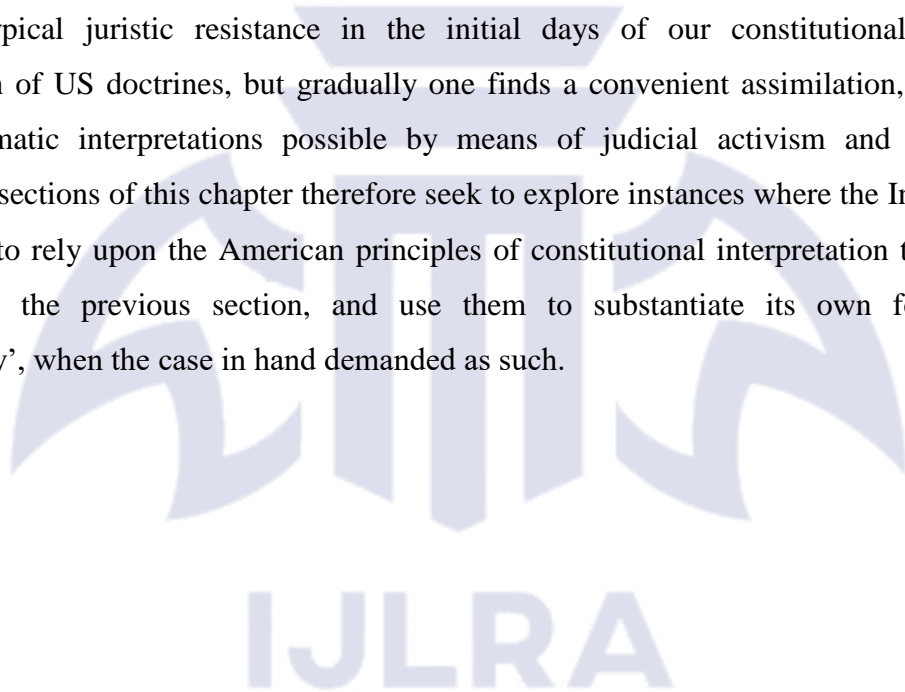
The Constitution (Sixteenth Amendment) Act, 1963, further amended Article 19(2) by adding the words ‘sovereignty and integrity of India’ as another ground of imposition of reasonable restrictions.

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<sup>27</sup> Granville Austin, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE, (Oxford University Press, 1999) at p. 42.

## **4. Imprints In India**

It is interesting to note in this context that although the Indian Constitution has looked at the issues of freedom of speech and expression and reasonable restrictions in a way that is distinctly dissimilar to the US, at least etymologically if not anything else, we can find distinct imprints of the guiding constitutional legal principles from the US in India. Not so surprisingly, one always notices a typical juristic resistance in the initial days of our constitutional existence to incorporation of US doctrines, but gradually one finds a convenient assimilation, in a way that makes pragmatic interpretations possible by means of judicial activism and the like. The forthcoming sections of this chapter therefore seek to explore instances where the Indian judiciary has decided to rely upon the American principles of constitutional interpretation that have been discussed in the previous section, and use them to substantiate its own formulation of 'reasonability', when the case in hand demanded as such.



## 5. Conclusion

If one tries to critically locate the value of free speech in the realms of human rights laws and the constitution, one clear and cogent fact gets underlined every time – free speech is intrinsic to a democratic existence, and any kind of intervention on this hallowed premise, whether by the state or otherwise, needs to pass the siphons of the strictest scrutiny by the judiciary.

A careful perusal of the different International Human Rights conventions would by and large unequivocally point out towards one fact – unless considered to be absolutely necessary in the interest of territorial integrity or the like, there should not be any prior restraint of any nature on freedom of speech or expression. The General Comment to the ICCPR, when it extends the blanket protection even to ‘deeply offensive’ speech and expression, is kind of symptomatic of the fact that the ‘marketplace of ideas’ should be resilient enough to accept the acceptable and reject the rubbish. But the moment the state starts interfering in the sacrosanct domain of creativity through broadly worded laws which are easily vulnerable to draconian interpretations, it leads to an atmosphere of fear and distrust, a ‘chilling effect’<sup>28</sup>. Thus, the broad consensus in the International Human Rights arena is towards imposition of *post facto* liability if the speech or expression has actually led to clear and tangible damages<sup>29</sup>.

The same degree of reverence to the intrinsic values of an unfettered freedom of speech and expression is distinctly noticeable in the Constitutions of many countries. Article 5 of the German Basic Law,<sup>30</sup> Article 29 of the Constitution of the Russian Federation<sup>31</sup> and Article 21 of the

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<sup>28</sup> ‘Chilling Effect’ as a term was first referred to in the case of *Wieman v. Updegraff* 342 US 183 (1952). It became the centrepiece of Brennan, J.’s concurring opinion in *Lamont v. Postmaster General*, 381 US 301 (1965). For a more detailed discussion on this doctrine, See Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the Chilling Effect*, 58 Bost. Univ. Law Rev. 685 (1978). See also, Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 Vand. Law Rev. 1473 (2013). In the Indian context, the Supreme Court in the *Shreya Singhal* case makes ample references to this Chilling Effect.

<sup>29</sup> Even in case of the European Convention on Human Rights which appears as more conservative than the Inter-American system, insofar as issues pertaining to impositions of restraints on expression for protection of morals etc. enumerated in Article 10(2) are concerned, jurisprudence emerging out of the European Court of Human Rights has clearly underlined the fact that strict adherence to standards of proportionality are to be ensured before any such imposition with a significant amount of margin of appreciation to the imposing state, and as far as possible, *post facto* impositions of liabilities should be resorted to rather than pre-censorship. On this point, See e.g. ECtHR *Müller* (1991) 13 EHRR 212, ECtHR *Observer* (1992) 14 EHRR 153, ECtHR *Thorgeirson* (1992) 14 EHRR 843, ECtHR *Wingrove* (1997) 24 EHRR 1, ECtHR *Otto-Preminger-Institut* (1995) 19 EHRR 34.

<sup>30</sup> Article 5 [Freedom of expression, arts and sciences]

<sup>31</sup> ARTICLE 29

1. Everyone shall be guaranteed freedom of thought and speech.

Japanese Constitution<sup>32</sup> are glittering examples in this regard. Quite significantly, one of the most recent constitutions, the Constitution of Egypt that came into force as late as in 2014 after a referendum, also significantly restricts the scope of the state to censor the mass media.<sup>33</sup>

If one looks to the US Constitutional Law and its approach towards the issue of censorship of free speech, a similar pattern is clearly observable. Through clearly articulated tests like 'Clear and Present Danger' and 'Imminent Lawless Action', the Judiciary in the US has imposed a tremendous burden on the state to satisfy before imposing any prior restraint on free speech and expression.

India, on the other hand, has had a chequered history so far as the limits of the judicial scrutiny are concerned. The reluctance to incorporate 'Free Press' and 'Due Process of Law' in Articles 19 and 21 respectively could lead one to believe that the Indian Constitution makers were not so serious about the democratic values, but in reality, that has never really been the case. The Constitution makers had their own well-defined reasons of wording the articles of the constitution as they did.

As gradual threats on the democratic fabric were felt in the mid-1970s, the Judiciary, hitherto rigorously positivistic and strict observant of the Westminster model of Separation of Powers, did not hesitate a single moment and became activist, activist to the point that by interpretation, they have incorporated principles akin to Due Process in the Indian Constitutional rubric.

Naturally, non-arbitrariness and reasonableness of state action have become the biggest testing points for the vigilant judiciary, based on which the judiciary can exercise a strict scrutiny over all state action. Consequently therefore, the doctrines like 'Clear and Present Danger' found their space in the rubric of the interpretational space. But, all this churning has been happening at a time when India has still not done away with pre-censorship from all realms of speech and expression. Inasmuch as some forms of expression are only amenable to *post facto* impositions of liability, there are sectors like Cinema which are still subject to stringent, and often curiously

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2. Propaganda or agitation, which arouses social, racial, national or religious hatred and hostility shall be prohibited. Propaganda of social, racial, national, religious or linguistic supremacy shall also be prohibited.

3. Nobody shall be forced to express his thoughts and convictions or to deny them.

4. Everyone shall have the right freely to seek, receive, transmit, produce and disseminate information by any legal means. The list of types of information, which constitute State secrets, shall be determined by federal law.

(5). The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.

<sup>32</sup> Article 21

Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

<sup>33</sup> ARTICLE 71. FREEDOM OF PUBLICATION It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way. Exception may be made for limited censorship in time of war or general mobilization.

subjective, censorship norms and practice. Some of this censorship is extensively in order to preserve 'public order' or 'territorial integrity', but some of them are to preserve the vague precincts of 'decency and morality'. Thus the judicial interpretation of the laws of obscenity becomes the basis of imposition of prior restraint on the medium.

