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TOPIC: THE EXTEND AND SCOPE OF THE RIGHT TO FREEDOM OF SPEECH IN A DEMOCRATIC.

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I. ABSTRACT:

Freedom of expression¹ is a derivative of a basic human right and is considered as one of the most fundamental of all freedoms which encompasses freedom of speech and media, freedom of thought, culture, and intellectual inquiry. The richness of democratic life is based on the richness in exercise of freedom of speech and expression. Speech is a means of participation, the vehicle through which individuals debate the issues of the day, cast their votes, and actively join in the processes of decision-making that shape the polity. It serves the individual's right to join the political fray, to stand up and be counted, to be an active player in the democracy, not a passive spectator. Thus, freedom of speech is the live wire for sustaining a democracy in its true sense. The following essay focuses on the extent and scope of free speech in a democratic state with specific reference to India.

¹ The author shall use the terms speech and expression interchangeably.

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II. INTRODUCTION:

The Concept of Democracy

The term democracy has been derived from the Greek words 'demos', (the demos referring to the poor) and 'kratos', meaning power, or rule. Democracy thus literally means 'rule by demos'. Abraham Lincoln, in his famous Gettysburg address (1863) referred to democracy as the Government 'of the people, by the people and for the people.'

Today, most conceptions of democracy are based on the principle of 'government *by* the people'. This implies that in effect people govern themselves that they participate in making the crucial decisions that structure their lives and determine the fate of their society.

The justification of democracy commonly proceeds along both instrumental and intrinsic dimensions. The latter dimension focusses on values like those of equality and freedom of political participation of citizens, and in the former the emphasis is on the consequences that democracy enables or that are created in a democratic polity.

III. FREEDOM OF SPEECH: THE QUINTESSENTIAL OF A DEMOCRATIC STATE-

Free speech enables citizens to engage in a host of productive social, economic, cultural and political activities from exchanging views, opinions, and information to protesting against all forms of injustice; from criticizing government actions and policies in influencing and shaping public discourse. In the case of Praveen Bhai Thogadia², Arijit Pasayat, J, observed that freedom of speech and expression must be broadly construed to include freedom to circulate one's views by words of mouth or in writing or through audio-visual. Thus, it includes right to propagate one's

² State of Karnataka v. Dr. Praveen Bhai Thogadia Appeal (Crl.) 401 of 2004

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views through any communication channel *Justice Harlan in Cohen v. California*³ has noted that the Constitutional Right of free speech is a powerful medicine in a diverse and populous society. It is intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Safeguarding this interest is especially important in a democracy, which is primarily a rule by the majority, where the minority groups are less powerful and often suffer from limited political influence. This poses a strict obligation on the government of a democratic nation to defend this right.

IV. ARTICLE 19(1)(a) OF THE CONSTITUTION OF INDIA:

One of the main objectives of the Indian Constitution as envisages in the Preamble, is to secure liberty of thought and expression to all the citizens.

Freedom of speech has been guaranteed as a fundamental right under Article 19(1)(a) available to all citizens, subject only to restrictions which may be imposed by the State under clause (2) of that Article. Article 19(1)(a): All citizens shall have the right of freedom of speech and expression. Article 19(2): Nothing in sub clause (a) of clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as such law imposed reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of Sovereignty and Integrity of India, the Security of the State, Friendly relations with foreign States. Public order, Decency or Morality, or in relation to Contempt of court, Defamation or Incitement to an offence.

This right has been extended to bring under its ambit a wide range of rights through a liberal interpretation of the words enshrined in the aforesaid Article through judicial activism or judicial

³ 403 US 15 (1971)

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creativity. In the case of *Maneka Gandhi*⁴ Bhagwati, J, observed that the extent of freedom of speech has not been limited to the territory of India but includes right to express oneself in abroad as well.

In the PUCL case,⁵ it was observed that voter's right to know antecedents of candidates is based on A19(1)(a). The old dictum of 'let the people have the truth and the freedom to discuss it and all will go well with the government should prevail' was cited.

In the *Naveen Jindal case*⁶ right to fly national flag was declared a fundamental right under A19(1)(a) being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation.

In the *Shreya Singhal case*⁷ Section 66A of the Information Technology Act, 2000 was struck down being violative of Article 19(2)⁸. It was observed that here are 3 concepts which are fundamental in understanding the reach of this most basic human right:- a) discussion b) advocacy c) incitement. Mere discussion or advocacy of a cause howsoever unpopular is at the heart of A19(1)(a) and it is only when such discussion or advocacy reaches level of incitement that A19(2) kicks in.

V. REASONABLE RESTRICTIONS:

The Constitution does not define the expression "Reasonable Restrictions." The following are some of the principles relating to restrictions which the Supreme Court of India has affirmed in *Narottamdas case*.⁹ 1. limitation imposed upon a person in the enjoyment of a right should not be arbitrary 2. Court should see both to the nature of the restriction and procedure prescribed by the statute for enforcing the restrictions on the individual freedom. 3. It has to be determined from the

⁴ 1978 SCC (1) 248

⁵ W.P.(CrI) No. 199 of 2013

⁶ (2004) 2 SCC 510

⁷ (2013) 12 SCC 73

⁸ Constitution of India

⁹ AIR 1964 SC 1667.

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standpoint of the interests of the general public and not from the point of view of persons upon whom the restrictions are imposed 4. The court is called upon to ascertain the reasonableness of the restrictions and not of the law which permits the restriction. 5. It also includes cases of prohibition and the State can establish that a law, though purporting to deprive a person of his fundamental right, under circumstances amounts to a reasonable restriction only. 6. The test of the reasonableness of the restriction has to be considered in each case in the light or the nature of the right infringed, the purpose of the restriction and the prevailing social and other conditions at the time. 7. A restriction that is imposed for securing the objects laid down in the Directive Principles of State Policy may be regarded as reasonable restriction. 8. If a restriction is not imposed by legislation but is the result of a contract freely entered into by the citizen, he cannot complain of the reasonableness of the law. 9. The conferment of wide powers exercisable on the subjective satisfaction of the Government cannot be regarded as reasonable restriction because the Government is the best authority to judge and take anticipatory action for preventing a threat to the breach of the peace. 10. The retrospective operation of legislation is a relevant factor in deciding its reasonableness, but it is not always a decisive test.

VI. CONFLICTING FREEDOMS: DEFINING THE AMBIT OF FREE SPEECH IN INDIA-

(1) Right to criticize.

Freedom of speech covers the right to criticize Government, the requisite of a healthy democracy. In *Kedar Nath* case¹⁰ there arose a constitutional challenge to Sections 124-A and 505 of Indian Penal Code, 1860 which penalizes attempts to excite disaffection towards the Government by words or in writing and publications which may disturb public tranquility. The Supreme Court dismissed the challenge but classified that criticism of public measures or comment on

¹⁰ AIR 1962 SC 955.

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Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. In *Anand Chintamani case*¹¹ a full bench of the Bombay High Court, upheld the right to criticise and held that tolerance of diversity of viewpoints and the acceptance of the freedom to express of those thinking's may not accord with the mainstream are cardinal values which lie at the very foundation of a democratic form of Government. Popular perceptions, however strong cannot override value which the constitution embodies as guarantees of freedom in what was always intended to be a free society.

(2) Copyright versus the freedom of expression.

The law of copyright is indeed to prevent plagiarism and unfair exploitation of creative work. It is a natural extension of the freedom of speech and expression protected under Article 19(1)(a) of the constitution. If an individual enjoys the freedom of speech and expression, he must also be guaranteed protection of the intellectual property in his expression. Absence of such protection would demoralize creative artists and have a chilling effect on creative activity. The right of free expression or free trade cannot be stretched to mean that a person can be entitled to benefit from another's property or the fruits of another's labour. This is vital public interest in copyright protection.

(3) Defamation.

The law of defamation is a culmination of a conflict between society and the individual. On one hand lies the fundamental right to freedom of speech and expression enshrined under Article 19 (1) (a) of the Indian Constitution, on the other is the right of the individual to have his reputation intact. The law of defamation seeks to attain a balance between these competing freedoms and is a reasonable restriction under Article 19 (2) on the fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a). The wrong of defamation consists in the publication of a false and defamatory statement about another person without lawful justification or excuse. A

¹¹ (2002) 2 Mah LJ 14.

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statement is said to be defamatory when it injures the reputation of the person to whom it refers and exposes him to hatred, ridicule and contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.¹² The right to preservation of one's reputation is acknowledged as a right in rem, a right good against all the world. It constitutes an actionable wrong and give rise to the civil remedy of damages. It also constitutes a criminal offence under Section 499 of Indian Penal Code, 1860.

(4) Right to report legislative proceedings.

This right has often been curtailed in the name of legislative privilege available to both Parliament and the State assemblies. Legislative privilege refers to special rights conferred by the constitution on parliament and state legislatures to ensure freedom of speech for legislators, to enable them to discuss and debate matters of importance without the fear of inviting liability of any sort.¹³ In *Tej Kiran Jain case*¹⁴ the Supreme Court held that "It is the essence of parliamentary system of Government that people representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the rules of parliament, the good sense of members and the control of proceedings by speaker. The courts have no say in the matter and should really have none."

(5) Contempt of Court.

The Constitutional right under Article 19(1)(a) does not allow a person to contempt of court. The expression contempt of court has been defined in Contempt of Courts Act, 1971.¹⁵ The term

¹² Nevill v. Fine Arts and General Ins., (1897) AC 68.

¹³ The Constitution of India, 1950, Articles 105, 194

¹⁴ (1970) 2 SCC 272

¹⁵ Section 2(c) 'Criminal Contempt' means the publication, whether by words, spoken or written, or by signs, or by visible representations, or otherwise, of any matter on the doing of any other act whatsoever which – (i) Scandalises or tends to scandalize or (ii) Prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) Interferes, or tends to interfere with, or obstructs, or tends to obstruct, the administration of justice in any other manner.

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contempt of court refers to civil contempt or criminal contempt under the Act. The law of contempt of court is for keeping the administration of justice pure and undefiled while the dignity of the court is to be maintained at all costs, the contempt jurisdiction which is of special nature should be sparingly used.¹⁶ The court has the duty of protecting the interest of the community in the due administration of justice and, so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the court against insult or injury but, to protect and vindicate the right of the public so that the administration of justice is not prevented, prejudiced, obstructed or interfered with.¹⁷

In Narmada Bachao Andolan¹⁸ case, C J Anand (as he then was) observed that the cover of freedom of speech and expression cannot be taken to take a license to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has tendency to scandalise the court and bring it into disrepute or ridicule.

(6) Security of the State and public order.

Law and order is a wider term that includes within its ambit public order and security of State. In *Madhu Limaye* case,¹⁹ the Supreme Court held that public order includes the absence of all acts which are a danger to the security of the State and also the acts described by the French as *Ordre Publique*, that is, the absence of insurrection, riot, turbulence, or crimes of violence. But it does not include acts which disturb only the serenity of others.

In *Shailabla Devi* case²⁰ the Supreme Court held that any speech or expression which incites or encourages the commission of violent crimes such as murder, undermines the security of the State and falls within the ambit of Article 19(2).

¹⁶ *Shukuntala Sahadevram Tewari v. Hemchand M. Singhania*, (1990) 3 Bom CR 82 .

¹⁷ *Delhi Judicial Service Assn. v. State of Gujarat* 457 (1991) 4 SCC 406

¹⁸ 1999 Supp (4) SCR 5

¹⁹ (1970) 3 SCC 746

²⁰ AIR 1952 SC 329

LEX RESEARCH HUB JOURNAL [VOLUME I ISSUE I]**(7) Freedom of Press.****a) Right to Circulate**

The right to free speech and expression includes the right not only to publish but also to circulate information and opinion. Without the right to circulate, the right to free speech and expression would have little meaning. The freedom of circulation has been held to be as essential as the freedom of publication.²¹

In *Sakal Papers v. Union of India*²² the Supreme Court held that the State could not make laws which directly affect the circulation of a newspaper for that would amount to a violation of the freedom of speech. The right under Article 19(1)(a) extends not only to the matter which the citizen is entitled to circulate but also to the volume of circulation.²³ This case arose out of a challenge to the newsprint policy of the Government which restricted the number of pages a newspaper was entitled to print. Likewise, in *Bennett Coleman & co. v. Union of India*²⁴ the Supreme Court held that newspaper should be left free to determine their pages and their circulation. This case arose out of a constitutional challenge to the validity of the Newspaper (Price & Page) Act, 1956 which empowered the Government to regulate the allocation of space for advertisement matter. The court held that the curtailment of advertisements would fall foul of Article 19(1)(a), since it would have a direct impact on the circulation of newspapers. The court held that any restriction leading to a loss of advertising revenue would affect circulation and thereby impinge on the freedom of speech. In *Indian Express Newspapers v. Union of India*,²⁵ a challenge to the imposition of customs duty on import of newsprint was allowed and the impugned levy struck down. The Supreme Court held that the expression, “freedom of the press” though not expressly used in Article 19 was

²¹ Romesh Thappar v. State of Madras, AIR 1950 SC 124; Virendra v. State of Punjab, AIR 1957 SC 896; Sakal Papers v. Union of India, AIR 1962 SC 305.

²² AIR 1962 SC 305

²³ Ibid., p. 313.

²⁴ (1972) 2 SCC 788; AIR 1973 SC 106.

²⁵ (1985) 1 SCC 641.

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comprehended within Article 19(1)(a) and meant freedom from interference from authority which would have the effect of interference with the content & the circulation of newspapers. In *LIC v. Manubhai Shah*²⁶ the Supreme Court held that the freedom of speech and expression“ must be broadly construed to include the freedom to circulate one’s views by word of mouth or in writing or through audio visual media. This includes the right to propagate one’s views through the print or other media. The honourable court observed: Freedom to air one’s view is the lifeline of any democratic institution and any attempt to stifle or suffocate or gag this right would sound a death knell to democracy and would help user in autocracy or dictatorship. The court held that any attempt to deny the right to circulation and propagation of ideas must be frowned upon unless it falls within the mischief of Article 19(2).

(8) Sovereignty and Integrity of India.

Sovereignty and integrity of India“ as a ground under Article 19(2) for restricting the freedom under Article 19(1) (a) was added by amendment.²⁷ This was as a reaction of the tense situation prevailing in different parts of the country. Chinese incursions have started in the north-east in 1960. Also around this time, there were strong demands led by Master Tara Singh for a separate Sikh homeland. The Dravida Munnetra Kazhagam (DMK) had called for an entity separate from India called Dravida Nadu comprising Madras, Mysore, Kerala and Andhra. The Law Minister Ashoke Kumar Sen introduced a bill in the Lok Sabha on 21st January, 1963 describing its object as giving „appropriate powers to impose restrictions against those individuals or organisations who want to make secession from India or disintegration of India as political purposes for fighting elections“. The object of the amendment was to confer on Parliament specific power to legislate on this subject without having to face a constitutional challenge on the ground that the legislation was inconsistent with Article 19(1) (a). The amendment enabled the enactment of laws such as the Criminal Law Amendment Act, 1961 and the Unlawful Activities (Prevention) Act, 1967 which

²⁶ (1992) 3 SCC 637

²⁷ Inserted by the Constitution (Sixteenth Amendment) Act, 1963, Section 2.

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made punishable the act or words of any individual or association intending or supporting „the cession of any part of the territory of India or the secession“ of the same.²⁸

(9) Friendly relations with foreign states.

Restrictions under this category would include not only libel of foreign dignitaries but also propaganda in favour of rivals to authority in a foreign state after India has recognised a particular authority in that state, or propaganda in favour of war with a state at peace with India. At present there is no specific legislation on this subject. However, a variety of statutes contain restrictions on forms of expression which would have an adverse impact on friendly relations with foreign states. Laws regulating media are enshrined in these statutes include the Cinematograph Act, 1952,²⁹ the Cable Television Networks (Regulation) Act, 1995,³⁰ and the Right to Information Act, 2005.³¹

(10) Incitement to an offence.

Mr. Soli J. Sorabji in his “the law of Press Censorship in India” 181-190 (1976) quoted the unreported judgement³² in which Gujarat High Court struck down the order of closure of Bhumiputra, a Gandhian journal, simply for reporting the proceedings of the Civil Liberties conference criticizing the Government. The Court held that the only circumstance under which the right to free speech could be denied was when there was a real likelihood of violence and breach of public order.

The Word „offence“ is not defined in the Constitution. According to the general Clauses Act, 1897 it means „any act or omission punishable by any law for the time being in force.“³³ In order to

²⁸ In People’s Union for Civil Liberties v. Union of India, (2004) 9 SCC 580, the supreme Court dismissed a challenge to the Prevention of terrorism Act, 2002 on the ground, inter alia, that Parliament was competent to legislate on the subject of terrorism which was a threat to the security and sovereignty of the nation. This Act was subsequently repealed with effect from 21st September, 2004.

²⁹ The Cinematograph Act, 1952, Section 5-B (1)

³⁰ The Cable Television Rules, 1994, Rule 6(1)(b).

³¹ The Right to Information Act, 2005, Section 5(1)(a), Section 8(1)(f).

³² C. Vaidya v. H.D., Penha Special Civil Application No. 141 of 1976, Judgement delivered on 22nd March 1976 as quoted in Sorabjee’s book.

³³ General Clauses Act, 1897, Section 3(38)

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qualify as a reasonable restriction under Article 19(2), the law imposing a restriction relating to „incitement to an offence“ must relate to pre-existing offence i.e. the incitement must be of an act which is, at the time, a punishable offence under an existing law.³⁴ Further, the legislation must be in respect of a definite offence. Mere approval of or admiration for an act of murder or violence does not automatically come within the scope of this restriction unless the publication itself has a present tendency to incite or encourage the commission of the offence. The court must look to the circumstances in each case in judging such a tendency, the purpose of the work, the time at which it was published, the class of the people who would read it, the effect it would have on their minds, the context of the words and the interval between the incidents narrated and the publication of the work.³⁵

VII. CONCLUSION:

Freedom of expression is more essential in a democratic setup of State where people are the Sovereign rulers. Iver Jennings said, “Without freedom of speech, the appeal to reason which is the basis of democracy cannot be made³⁶” In the words of Krishna Iyer, J. “This freedom is essential because the censorial power lies in the people over and against the Government and not in the Government over and against the people”.

It has been truly said that it is mother of all other liberties. But this right can be curtailed via justified or unjustified limitations that may prevail in a democratic country like India, as was observed through this paper. Thus, it is the duty of the citizens and the Government of a democratic State to ensure that the limitations to this eminent and fundamental right are put only to the extent of justified restrictions that are essential for maintaining the democratic structure of a country.

³⁴ Supdt., Central Prison v. Ram Mahohar Lohia, AIR 1960 SC 633.

³⁵ State of Bihar v. Shaialabala Devi, AIR 1952 SC 329.

³⁶ Cited in Dr. Madhabhusi Sridhar, The Law of Expression, An Analytical Commentary on Law for Media 18 (Asia Law House, Hyderabad, 18, (2007)