



Freedom as Promise, Restriction as Practice: Free Speech and Constitutional Interpretation in India

Shahrukh Ansari

Research Scholar, Department of Political Science, Manipur University.

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ABSTRACT

The Indian Constitution enshrines freedom of speech as an inalienable fundamental right under Article 19(1)(a). However, the realization of this freedom remained deeply contingent on institutional interpretation of the restriction clause under Article 19(2) which is often politically mediated. This paper examines the persistent gap between the constitutional promise of free speech and its actual realization in India. It traces the evolution of free speech jurisprudence from the transformative vision of the constituent assembly. The paper explores the constitutional vision, constituent assembly debates, judicial doctrines, early judicial practice and amendments, the role of laws and institutions, procedural ambiguities and contemporary institutional weakening in protection of free speech. The paper concludes that the erosion of free speech is the result of interpretive and institutional failure that obscures constitutional morality and argues for reorientation of the institutional commitment in operation of the reasonable restriction.

Constitutional Vision and Founders

The Indian constitution was not formed incidentally. It was a culmination of years of longing for political freedom and just social order shaped under colonial rule. According to Madhav Khosla, the constitution was the response of the founding fathers in 'direct terms' to the question of democracy and its precondition that India needed, refuting the narrative that the Indian Constitution is a mere colonial



inheritance. India's founders constructed a transformative constitutional framework aimed at forging democracy in a society deemed "essentially undemocratic" (Khosla, 2020). India's founding is a unique "historical node at which democracy, constitutionalism, and modernity occurred simultaneously." Compared with the West where these elements emerged at a different point of time and at a different pace, the Indian experience is an experience of democracy unseen before, offering a 'new paradigm of...democracy creation in the modern world.' (Khosla, 2020).

The transformative face of the constitution is secured by the liberal order liberty as an inalienable right. However, the unique political necessities of nation building demanded adaptations against unqualified replication of liberal norms. While Article 19 secured rights to freedom speech and expression among others restrictions were internally introduced within the constitution as safeguards. The constitutional assembly debate clearly reveals that the rationale behind these restrictions were not suppressive or defaults rather instruments to be utilized only when extraordinary circumstances.

Calling Indian Constitution as 'cornerstone of the [new] nation' Granville Austin observes that liberty, which entails freedom of speech, is not merely liberty from interference but an instrument for "social revolution" in the new nation. The framers stressed securing liberty to usher in an egalitarian social order aimed to break the entrenched caste-based social hierarchy and cast a new society based on justice, rights and equality. Nehru saw "freedom as a means to an end and not an end in itself". Thus, liberty was not imagined strictly in the classical liberal tradition of absence of state interference but a condition for emancipation (Austin, 1966). The Constituent Assembly debate reveals how this adapted imagination was encoded in texts within the constitutional provisions.

Constituent Debates on Restrictions

Austin documents that consensus was achieved with difficulty on inserting restriction clauses under the right to freedom (Art 19). Assembly members A. K. Ayyar and K. M. Munshi advocated balancing freedom with state security and public order. Their concern was prescient and the post-independent unrest visible during the period of Constitutional debate added evidence and gravity to their suggestions (Austin, 1966).

Other members, particularly Raja Gopalachari, demanded restrictions on free speech that promote class or communal hatred, but this demand was rejected by the drafting committee, claiming Indian Penal Code incorporated this caution. asserting that the concern is addressed in the IPC. This position informs that freedom within the constitutional text was chosen to be maximised.



Ambedkar defended the insertion of 'restriction' clause drawing from the jurisprudence of American experience. He pointed out that each limitation can be found in the US Supreme Court judgement. In the USA, these limitations were well established as time-tested necessity in collective exercise of liberty and secondly, that explicitly clarifying the frames of limit in exercise of freedom was thought to reduce future litigations. While restrictions were indisputably conceived as necessity, the varied viewpoints demanded a compromise. Eventually, in the case of the right to freedom of speech, restriction was made subject to public order, morality, health, and public interest (Austin, 1966). Thakur Das Bhagwan suggested adding 'reasonable' as a qualifying word before restriction, and this was accepted. However, the word reasonable was not added in Art. 19(2), which lists the reasonable restrictions pertaining to freedom of speech under Art 19(1a). It was added only in the First Constitutional Amendment Act of 1951 (Austin, 1966). This later inclusion indicates the error of omitting 'reasonable' in the original constitution in that restriction to speech is a politically convenient route that necessitates a test of 'reasonability'. The first amendment also expanded the lists subject to which freedom of speech can be restricted. These additions were necessitated by emergent conditions the details of which digress from the core intention of this paper.

Nevertheless, from the constitutional text it is evidently clear that divergent opinions and intense debate culminated in constitutional texts that emphasized freedom over restrictions. However, the text is embedded with tension between broad ideas of liberty and grounds for constraint on the enumerated grounds. The activation of these grounds and variance of interpretation of 'freedom of speech' has shaped the free speech jurisprudence from the Nehru Era to contemporary times.

Doctrinal Interpretations

Constitutional interpreters frame the tension between free speech and 'reasonable restriction' differently. D. D. Basu constructed a balanced doctrinal interpretation of articles 19(1)(a) & 19(2). He identifies freedom of speech as "the matrix, the indispensable condition of every other form of freedom, and asserts that "liberty without it would shrivel" (Basu, 1989). Defending the "reasonable restrictions" he affirms that "absolute individual rights cannot be guaranteed by any state." Basu demonstrates the need for striking a balance between individual liberty and social control. Laying out the framework for interpreting "reasonable restriction", he contends that restrictions that are arbitrary or excessively fail the test of reasonableness. In testing reasonableness, liberty is interpreted within the relationship with the 'collective object', advancing the idea that exercise of liberty must not bypass collective interests (Basu, 1989).



Granville Austin sees the constitutional texts from the grand vision embodied by the Constituent Assembly. Observing the multifarious objectives, he calls the Indian Constitution a "seamless web," a web of the threads of national unity and integrity, democracy, and social transformation (Austin, 1999). This perspective also rationalises the 'reasonable restrictions'. The doctrinal legitimacy of conditional restriction of freedom is hardly disputed. It is on the interpretation of constitutional morality of freedom and the contextual and contingent activation of these restrictions that creates tension in the free speech jurisprudence in India.

Judicial Practice and Early Landmark Cases

Analyzing the legal history in parallel to the political history of India, Austin demonstrates the evolution of the constitutional framework from an initial absolutist approach (along the lines of the American First Amendment tradition) to a more restrictive one. In the early years after the adoption of the constitution, the Supreme Court embraced a broader interpretation of Article 19(1)(a), robustly defending the exercise of this freedom against arbitrary executive pressure. In two prominent cases: *Romesh Thapar vs. State of Madras* (1950) and *Brij Bhusan vs. State of Delhi* (1950), the court upheld the right to freedom of speech in a broad sense. In the first one, the Court asserted that freedom of speech and expression includes the freedom of circulation, and in the second, the Court advanced the idea that pre-censorship of a newspaper was a direct infringement on the freedom of the press (Austin, 1999).

In 1951, the First Constitutional Amendment expanded the restriction clause under Art 19(2). Austin hints that after this amendment, the judiciary started yielding to the executive priority of order over liberty. For a nascent country, as India was, the compulsion of national consolidation, this shift was understandable because early years post-adoption of the Constitution gave the Constitutional prescription a reality check viz-a-viz Indian reality. Institutional adjustment was warranted to converge towards a national goal of stability. Critics, however, argue that the national goals are instrumentalized for suppression of freedom hiding administrative convenience and political reasons under the pretext.

Austin's tracing of historical evolution of Indian constitutional provisions and its operation indicates that the constitutional commitment to freedom of speech does not operate in a vacuum. The realization of freedom enshrined in the constitution is contingent on the commitment of the institutions that interpret, enforce, and operationalize constitutional meaning. Legislative outcome, executive restraint and judicial responsibility defines the contours of freedom exercised by the people over the constitutional promise.



Law, Institutions, and Doctrinal Safeguards

In a liberal polity laws define the limits of exercise of freedom. Laws are purportedly neutral and the supremacy of law supposedly ensures predictability and avoids arbitrary interference in the exercise of freedom. The Courts are positioned as the guardian of rights from arbitrary infringement. The reasonable restrictions in the constitution of India underpin the restrictive laws such as Official Secrets Act, UAPA, Surveillance Laws etc. The Supreme Court, as the guardian of the constitution and embodies rights, checks the limits of constitutional amendments. According to Dhavan, Golak Nath and Kesavananda Bharati judgments, established the primacy of the judiciary making laws subject to judicial review to protect fundamental rights, including free speech, from being weakened by Parliament. The Court's introduction of the "basic structure" doctrine created a safeguard against changes that infringe on freedom. The introduction of this doctrine strengthened the courts' role in upholding the fundamental rights including freedom of speech (Dhavan, 1976). Yet, the very introduction of 'basic structure' doctrine does not guarantee its consistent deployment for the operation of this doctrine. This is indicated by the contrast between moments of assertive judicial review and periods of restraint. This inconsistency in judicial action demonstrates the contingent nature of judicial protection of free speech. Judicial abdication, on the surface, advances separation of power informing its decisions, often arguing the exclusive legislative competence of the parliament and the disturbance of this doctrine in intervention. Such reasoning however masks laws that can be good in following constitutional frames yet intrusive of freedom in intent and execution. As a result, can hide the power dynamics, suppressive intent under the guise of security, public order or morality. Judicial abdication can entrench such laws when it rubber stamps the executive's rationale without rigorous analysis.

The limitations of the legal regime in the liberal system has been well studied. Duncan Kennedy argues that legal reasoning is often influenced by political choices, which serve the socio-political interests of the elites. This occurs under the rhetorical facade of rights and justice (Kennedy, 1983). Highlighting the elasticity of the concepts like freedom, he contends that legal rights like freedom of speech, association doesn't carry a single objective meaning. It can be expanded and shrunk in interpretation. Kennedy claims that the interpretation changes with the change of power structure. The first amendment of the Indian Constitution expanding restriction of freedom of speech evidentially demonstrates this claim. Further, it informs the divergence of constitutional promise of freedom of speech and the actual practice in Indian polity under legislations such as UAPA, NSA, etc. Kennedy claims that legal systems are structured through certain legal doctrines which he calls "semi-autonomous", yet function ideologically



to maintain the status quo. This claim is validated in the Indian judiciary's cautious, often evasive posture in free speech cases involving national security or dissent. This posture reflects the suppression of freedom contingent to the prevailing political scenario abdicating adherence to the thick constitutional promise.

According to Roberto Unger, laws and their interpretation can pass through the hidden ideological layers. Similar speech faces restriction in some context and exemption on others depending on region, identity and politics. The basic liberal doctrine of legal 'formalism' and 'objectivism' hides the contingent nature of legal execution. These doctrines assume that legal doctrines are free from political influence and judicial rationale are free from any ideological influence. In practice, legal reasoning is instrumentally used as a strategic tool in "legislative jostling" without pursuing the socio-political context in which it is applied. The "deviationist doctrine" creates dominance of debate over values in freedom restricting legislation (Unger, 1986). Exercise of democratic rights, thus, is constrained when rigid rules are framed without considering them as adaptable entitlements. These rigid rules remain intrusive when the judiciary fails to check the adaptability to intrusive intent. The Indian free speech jurisprudence showcases this dynamic. Without stable interpretation, based on the underlying constitutional morality, interpretation oscillates between protection and suppression. Doctrines like reasonable restrictions, public order, and proportionality lack stable meaning and expand or contract in response to political context. (Bhatia, 2016; 2019).

The interpretation of laws is shaped by the political temperament of the judicial actors as well. According to Upendra Baxi, the Supreme Court is a "centre of political power". The decision of the court influences political action and vice versa. The contest between Parliament and the judiciary shapes interpretation of article 19 more than the immutable principle of freedom. Interpreting the constitution is, thus, a political act that involves political will (Baxi, 1983). The suppression of free speech through arrests and press censorship, during the 1975–77 Emergency period, reflects the political interpretation of the right to freedom and the judicial abdication reflects that courts can legitimise suppression when interpretation is politically mediated ignoring constitutional ideals. Baxi contends the Supreme Court ultimately "yielded in substance to the regime's demand in the interests of self-preservation" in the habeas corpus case (Baxi, 2006).

The institutional fragility in the protection of speech is compounded by ambiguities both in constitutional text and laws. Textual ambiguities and procedural shifts further enable suppression.



Ambiguities, Amendments, and Procedural Shifts

After the first Constitutional Amendment Act, 1951, which expanded the restriction clause under Art 19(2) in the right to freedom of speech under Art 19(1)(a), the judiciary started to yield to the executive priority of order over liberty (Austin,1999).However, ambiguities persist as permanent feature especially in sensitive terms like public order, security, etc. Like other freedom, the suppression of freedom of speech can emerge from the ambiguities in the legal text. For instance, the ambiguities in Part XVIII of the Constitution, particularly Articles 352 and 356, often enables the taking away of rights .These parts of the article become a dangerous subject to the political scenario of the nation limiting the exercise of liberty (Sagar, 2016). When the judiciary's commitment to exposition of constitutional morality fades, ambiguity normalises legislative and executive infringement. The gradual shifting of the judiciary's role from a liberty oriented view of criminal law to a public order oriented one creates deeper consequences in the protection of freedom. Despite the Constituent Assembly's intent to use criminal procedure as a shield against State excess, courts now often treat procedural rights like protection from double jeopardy or self-incrimination as technicalities (Chandra and Satish, 2016). This deviation from the constitutional intent emerges partly from the conditional nature of Article 19(1)(a). Unlike the US First Amendment's protection of free speech, the claim to freedom in Indian jurisprudence remains conditional. While the judiciary post-Emergency upheld free speech as central to democracy, protection has not become a norm. This conditional right unmasks the colonial tendencies implicit under Article 19(2). In practice, the colonial division between the rational speaker and the infantilised native continues in the postcolonial Indian state (Liang,2016)

Jurisprudence, Tests, and Chilling Effects

Article 19 (1) and its essence is increasingly lost due to interpretation that is state centric on the one hand and on the other hand the judiciary remains conservative. For instance, the court's "tendency to public disorder" test (e.g., Ramji Lal Modi) often prioritises the anticipatory public order and administrative rationale over protection of speech, giving the state very broad and sweeping powers to restrict dissent. Adoption of alternative tests Brandenburg standard of "imminent lawless action" ,which was done briefly in Arup Bhuya, offers better protection but the reversal to the earlier test in latter judgments highlights that protecting speech is not a norm but occasional (Bhatia,2016). Another example is the Hicklin's test with vague standards used for regulation of film and digital media. The ambiguous standards have caused 'chilling effect' and 'prior restraint' (Bhatia,2016; Chandrachud,2017) limiting artistic free expression.



The restriction to speech is further emboldened by suits of defamation, privacy which often hamper investigative journalism (Bhatia,2016)

According to Chandrachud, after independence, the free speech scenario has not changed much as compared to colonial times. The constitution brought change more on rhetoric while practically the change is not substantive (Chandrachud, 2017). Colonial era laws have not only continued but gained new currency making the climate of free expression politically mediated. In India cultural and religious sentiments often override the right to freedom of speech in India (Chandrachud,2017).

There is persistence of sedition law and its suppressive consequences despite constitutional freedom that protects free speech. Sedition remains a classic case example of the colonial era law continuing suppression of freedom. India reveals a "moment of contradiction", where the colonial-era sedition law (IPC 124A) remains in force and is frequently invoked by the executive despite constitutionally secured freedom and unfettered by judicial limitations (Singh,2018). Sedition is an outdated tool used to silence people who opposed the oppressive colonial rule. The equivalent law has been either repealed or sidelined in other democracies (UK, Australia). Although the Supreme Court in the Kedar Nath case bounded sedition only to cases involving violence, this law is still misused today against journalists, students, and activists (Sinha,2019). Sedition's legitimacy is no more defensible because democratic country like India does not need protection from peaceful speech yet it is lively in India.

Contemporary Political Context and Institutional Weakening

Suppression of speech is politically shaped as well. When the judiciary's commitment weakens, the state policy determines the contour of free speech. Freedom of speech was mercilessly suppressed during the Emergency Era. Yet when critically compared, suppression of freedom of speech in contemporary time with that of the emergency era of 1975–77, the Narendra Modi-led Bharatiya Janata Party (BJP) government represents the "most serious challenge to the Indian Constitutional order" since Indira Gandhi's Emergency (Narain, 2022). Critics highlight the impact of declining the quality of parliamentary deliberations and reduced accountability of executive's action. Fewer sessions and frequent disruptions harms thoughtful law-making which in turn cause limiting free speech and democratic accountability. (Khosla and Padmanabhan, 2018). There is a growing tendency of instrumental use of criminal law to deal with dissent. The widespread use of the Unlawful Activities (Prevention) Act (UAPA), particularly in cases like the "Bhima Koregaon 16" (BK-16) arrests as a tool to suppress opposition and create a "climate of fear" (Narain,2022). This instrumentalisation of laws for



suppression of freedom is checked partially because the crucial democratic institutions such as the judiciary and the media have been weakened. On one hand Judiciary has shunned its responsibility while on the other the media has become largely conformist (Narain,2022). Further, due to structural factors (like Judicial Pendency and burden) the Supreme Court has moved away from focusing on core constitutional issues and is now too involved in popular public interest litigations, which weakens its role in protecting rights (Khosla and Padmanabhan, 2018).

Conclusion

The free speech jurisprudence in India reveals a persistent gap between constitutional promise and citizens realization. While constitutional promise remains embedded in the texts, free speech erosion occurs when these texts are interpreted narrowly prioritising administrative convenience over liberty. Restrictions initially conceived as safeguards have been routinely used as default enablers of suppression.

Recovering the constitutional ideal of free speech does not require abandoning concerns of order or security. It requires precise operation of the reasonable restriction clause conditioned by constitutional morality. This demands responsible legislation, balanced administrative action and rigorous judicial intervention. The reorientation of these institutions toward their foundational role as facilitators of democratic contestation rather than managers of dissent is paramount. The future of Indian democracy depends not merely on constitutional text, but on whether institutions can reclaim the normative courage underlying these texts.

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