

Constitutional Law and Public Administration in India

Prof. (Dr) Sairam Bhat

Centre for Environmental Law, Education, Research and Advocacy (CEERA)

National Law School of India University, Bengaluru

Week- 05

Lecture-02

Right to Freedom – II

Freedom of Speech and Expression

Article 19 freedoms are considered essential freedoms because they protect the private rights of citizens and there is always a legitimate expectation of citizens that some of these rights are not alienable. Rights under Article 19 are supreme rights, and they cannot be sacrificed, given away or bailed off. Freedom of speech and expression occupies the top place among these rights because it is a matter of liberty of thought process and expression that is integral to anyone's personality, especially the personality of an individual who resides in any democratic society or in any democratic process. Justice Krishna Iyer has said that this freedom is essential because the power of the state to censor must be regulated. If there is no limit on this power, it would go against the will of the people and against democratic principles. Hence, the freedom of speech and expression is the core of how the government is supposed to behave and states when the government can intervene and when it cannot, especially on the speech and expression provisions.

It is to be understood that freedoms are important and a healthy process in any democratic institution or legal system. The protection of these freedoms is the test of the legal system. The moral and intellectual life of an individual are only enhanced when these freedoms are protected, nurtured, and valued in any legal system. Exercising some of these freedoms helps the citizens to discover truth and that can bridge the trust deficit that exists between the government and its citizens. It ensures pluralism and democratic value, and it creates a sense of self-fulfillment among citizens whenever they exercise their freedom of speech and expression themselves or through print or social media.

India has always nurtured democratic values and been a sovereign nation that has protected the republic's democratic structure; and freedom of speech and expression is the foremost of human rights. It is important to understand when and how the freedom of speech and expression gets infringed and when the courts will have to come into the picture. For example, in *Bennett Coleman Co. v. Union of India*, the Supreme Court has held that newspapers are an integral part of the process of freedom of speech and expression under

Article 19. They exercise the freedom of the press. It is the press which reaches people with information about what is regionally, nationally, and internationally; and if there are any kind of restrictions on the freedom of the press, it violates citizen's freedom of speech and expression. In *Bennett Coleman*, there was a constitutional challenge to the validity of an order passed by the government called the Newspaper (Price and Page) Act of 1956, which empowered the government to regulate the allocation of space for advertisement in newspapers because advertisements were consuming a huge part of the newspaper publication. However, newspapers argued that they sell newspapers at a very subsidized cost and through the revenue of advertisement, they cover the cost of publication of the newspaper. The court held that it would directly impact circulation, because newspapers would then be expensive which in turn would affect the freedom of speech and expression of individuals expecting information from this newspaper.

Another relevant case is *Indian Express Newspaper v. Union of India* of 1985 which looked into the constitutionality of the Newsprint Control order which regulated the supply and distribution of newsprint in the country. This was indirectly attempted to control the press. It was held by the Court that, the Directive Principles of State Policy under Article 39B and 39C requires the state to ensure that the ownership and control of material resources, which includes newsprint as well, are subservient to the common good and it is best served to the common good being reasonable in this restraint. Sometimes the government can justify the interference in newspapers, but interference vis-a-vis the content and circulation of newspapers would violate Article 19(1)(a).

In *Secretary, Ministry of Information and Broadcasting v. The Cricket Association of Bengal*, the Supreme Court held that broadcasting is a means of communication and a medium of speech and expression within the meaning of Article 19(1)(a). This case involved the right of the Board of Control for Cricket in India to grant telecast rights to an agency of its own choice. It was held that the right to entertainment and to be entertained, in this case through broadcasting media, is an integral part of Article 19(1)(a) and if it is exclusively granted to only one agency, it would affect the freedom of speech and expression.

Freedom to assemble peacefully and without arms.

The freedom to assemble is a part of the citizen's social structure and fabric. One can exercise this right peacefully without arms. Time and again, the police may call an assembly that violates the condition of non-violence as an unlawful assembly under Section 144 of the CrPC. The police have the right to intervene in certain matters, but this right takes away the colonial mindset that you need permission every time to assemble.

Freedom to move freely across the territory of India

The freedom to move freely across the territory of India, is a very essential freedom that and any kind of restrictions on assembly, associations and movement are to be evaluated under the constitutional provisions as well. For example, a person suffering from AIDS can be restricted from his movements in the interest of public health. These are called the reasonable restrictions that can be imposed on your freedom. None of these freedoms are available absolutely. Whether an AIDS patient has this risk and vulnerability of spreading the disease of AIDS and therefore restrictions be imposed on his movement? The answer is yes, as decided in the case of *Lucy R. D'souza v. State of Goa*, by the Bombay (Mumbai since 1995) High Court in the year 1990.

According to the Court, movement of AIDS patients is a potential risk for the public community and in public interest such kind of movement can be regulated. Any policy that is laid down that takes away any of these freedoms, will be very reasonable and not arbitrary. The pertinent question is, among all these freedoms, can the political parties call a bandh as a part of their freedom of speech and expression, as a part of assembly, peacefully association union or even movement freely across the territory of India? Bandhs and industrial strikes are entirely different concepts. Industrial strike is a collective refusal by employees under certain working conditions as a part of a collective bargaining process. After giving due notice an industrial strike becomes a legal strike which is permitted.

Bandh on the other hand is political in character and nature and usually tends to shut the public spaces and sometimes essential services. There is a general lockdown of the city or the village or a municipal area. It has a larger impact, and it is assumed that calling of these political bandhs becomes a very frequent practice for the political parties to show their protest. Whether freedom of speech and expression has the element of right to protest? The answer is positive and affirmative. Freedom of speech and expression includes the freedom of protest. But the protest must be peaceful, without arms. However, a bandh with such elements the legislature as well as police would also regulate a bandh which prevents someone from getting gainful employment or gainful work or affects the rights of students to study, it can be held to be illegal. These are aspects of bandh where in the public interest of other citizens of peacefully staying in a society over the political parties right to call a bandh will always be regulated. None of your freedoms can violate things like the guidelines that are issued from time to time in contempt of court.

Contempt of court means causing disrepute to the majesty of the court or the majesty of justice or the institutions of justice. And in case one exercises any of his freedoms unreasonably and arbitrarily and shows or causes contempt of court, then he could be punished for the same. It is important to understand that the freedom of speech and expression includes the right to criticize. A fair comment or a fair criticism is permitted under the constitution. However, if the criticism is of the judge and not the judgment, and if the criticism lowers the dignity of the institution or causes or instigates people from

having faith in the institution of the judiciary, then such kind of matters can be held to be contempt of court.

While the judges are not very hypersensitive, they are amenable to public opinion and if anyone oversteps and criticizes the institution of the judiciary, it may amount to contempt of court. According to one of the reasonable restrictions in Article 19(2) one's freedom of speech and expression cannot be exercised so as to cause contempt of court. Article 19(2) is an important provision, according to which if one exercises freedoms that result in preventing the administration of justice or amounts to obstruction of justice, such kinds of confusion, word or reporting should be avoided. One's personal freedoms cannot be used to defend any kind of obstruction to public justice. Hence it is inevitable to know the reasonable limits in exercising some of these freedoms and only then the constitution stands on your side to protect some of these rights.

It has often been asked whether the freedoms under Article 19 namely, these freedom of speech and expression, assembly, association, resident movement, and profession is available to convicts, accused or under trials. Convicts are not excluded from enjoying these rights, but there are certain kinds of restrictions or guidelines within which the convicts or the under trial or those who are in jail will be forced to exercise. In the popular *Auto Shankar* case it was held that a convict has the right to write a book within a jail as a matter of freedom of speech and expression, wherein *Auto Shankar* was, a criminal, a convict on death row who wanted to write a book whether he has the right to do the same. Such a right may not be restricted by any actions of the state.

Under Article 19, while it is said citizens have the right, whether it includes a corporate citizen is to be considered. Corporate citizens are also an important and integral part of the Constitution of India. A literal construction of the word citizen though may not include corporations, corporations through their shareholders can exercise the freedoms or rights under Article 19. The shareholders of a corporation can go to the court on the grounds of violation of their fundamental rights, and they may attach the company along with them as well. Though a company is not a citizen per se, through the elements of the shareholders, the companies can be brought about within the structure of Article 19.

The freedom of movement is critical and important because what is spoken of here is movement across the territory of India. However, certain kinds of restrictions on movement are imposed in places like the Centennial tribal islands in the Andamans and in places like the Northeast, which is a tribal region and a tribal community so as not to disturb such people and community. Another's personal liberty cannot be infringed while you are exercising the freedom of movement. Nevertheless, for a legitimate purpose, such exercise of right is possible. The judiciary does not impose any restrictions on the physical or tangible aspects of your freedom of movement. The executive may have certain justifications to impose restrictions at some point of time, especially to protect scheduled

areas or scheduled tribe areas or areas that are occupied by the army. They are sensitive areas in terms of scientific and technological explorations. Under the Official Secrets Act of 1943, sometimes some of these areas are declared as restricted and prohibited areas and people are not required to go to these places as a matter of their right.

The freedom of the profession or the freedom to practice any profession or carry on any trade or business is also a right under Article 19 (1)(g) is an important fundamental right, especially in terms of the business houses. Citizens have the right to carry on business, earn their income, livelihood and flourish their business in this country which is an integral part of the constitution process. But there could be a process of licensing certain kinds of trade or profession which may be required from you by the state as well as some registration processes. The state cannot prevent a citizen from carrying on any business, but it can impose reasonable restrictions on the ground of public interest. Businesses that are generally dangerous, immoral, or inherently hazardous will not be permitted by the state. For instance, the state of Karnataka recently banned the business of lotteries. Business of lotteries is thought not to be in public morality and has a tendency of promoting gambling or spending a person's savings. And those are the reasons why the business of lottery seems to be a regulated or prohibited activity currently in Karnataka, though it was permitted at some point of time in certain states. So, the right to business is not always allowed at all places and hence, place and time-restriction also can be imposed by the state. And a citizen may be compelled to do business within those times prescribed by the state, to protect public order.

In the famous case of *M/S Ivory Traders and Manufacturers v. Union of India*, the courts did intervene on this matter and held that ivory traders did not have a fundamental right to trade in ivory. As ivory is a protected commodity or product, you had to stop poaching of elephants or tuskers. Otherwise, the ivory trade was a flourishing trade. The Ivory trader's association members argued that the ban on killing tuskers or poaching was going to adversely affect their business and right under Article 19 (1)(g). But the court refused to listen to the Ivory Traders Association, and they said that the trade needs to be closed and suggested shifting to some other trade. So, restrictions on these kinds of trades that are dangerous, immoral and against public interest are those that the government can impose from time to time. And that is something that the courts may be permitted to appeal as constitutionally valid as well. One should understand that Article 19 is an all-encompassing freedom and any kind of restriction on the freedom should be through the process of a law and not just merely by an executive fiat.

The courts have held that it is in the legislature's wisdom to impose reasonable restrictions, but it should not be done in a routine manner. So, the process of lawmaking can be the process of imposing reasonable restrictions. One such case of a law trying to restrict freedom under Article 19 came by the Information Technology Act of 2000. In the case of

Shreya Singhal v. Union of India the two Judge Bench of the Supreme Court in 2005 looked at the regulation imposed by the IT Act on online speech and intermediary liability. Offline speech and online speech have two different connotations; online speech has a larger basis of reaching and you have your constitutionally protected right.

Section 66A of the Information Technology Act of 2000, sets to impose a restriction on these kinds of online content or online speech. Under Section 66A, it would be a punishable offence if a person sends grossly offensive information through a computer resource, which he knows is false, will annoy or cause inconvenience or danger, insult, injury, or criminal intimidation or arouse enmity, hatred, or ill will towards any kind of community. According to section 66A In circumstances in which electronic mail messengers are carried on misleading, deceive, cause vagueness and arbitrary kind of messages, which are sent usually by people, both out of personal ventures and political vendetta, then that online speech can be a punishable offence under Section 66A of the Information Technology Act. Shreya Singhal challenged this and the Supreme Court in a judgment delivered by Justice Nariman struck down Section 66A stating that any kind of standards on the freedom of speech and expression can be imposed only as per Article 19(2) of the Constitution.

No new reasonable restrictions or standards can be imposed by a new law. The new law must be in consonance with the constitutional principle and not against it. Online and offline speech have the right of equal protection under Article 14. Online speeches cannot be treated differently, and online speech cannot be an offence whereas an offline speech on the same matter is something that is not taken cognizance of. According to Justice Nariman such a distinction cannot be made, and in the judgement, he read down Section 66A. Despite this significant judgment in Shreya Singhal's case, the content of fake news, fake messages or trying to instigate a community through online is becoming a major problem in today's times and the courts are dealing with this issue in a slightly different manner. It must be remembered that the *Shreya Singhal* case was only on the point that offline and online speeches cannot have two different standards of restrictions; but must be same and similar and only then there can be an interruption regarding your freedom of speech and expression. So, IT Act, though a law Section 66A that tended to impose restriction on freedom of speech and expression was held to be not valid per se to the extent that it was not equal in terms of offline and online speeches. This was an important intervention by the Supreme Court in which the constitutionality of 66A was tested and the same was set aside.

Trial by media today is a very common process of the freedom of the press which obviously has to some extent been misused and abused by the media. Media end up deciding the guilt of an accused before even a court of law can do the same. We are in 24 into 7 news in the audio-visual content space. There is a lot of appetite for online content, online media and the media tends to sensationalize criminal cases. There is a lot of public curiosity and there is only an upsurge of that curiosity. It is noticed that people would want to predict the

outcome of a case even before the courts can. The journalists are harping on to such kinds of news and making their conclusions and making their final prediction of their outcome. This thirst of sensationalizing news is a major problem right now, though sometimes sensationalizing is a normal human nature and a character or a human desire and sometimes such kinds of media trials are justified under the name of investigative journalism. But do these kinds of media trials have the potential risk of damaging the following? First, a media trial has a huge element that can damage the reputation of an individual who is an accused who is innocent until and unless proven guilty. Media trial essentially infringes the privacy of an individual and it can amount to contempt of court because it has an element of influencing the judge and the outcome of the case simply by what is being reflected in the media ad because everyone is in tune with the media.

Everyone is open to media scrutiny and media trials. Currently, the Press Council of India has come up with certain guidelines so that the trial by media does not affect the reputation, privacy, and amount to contempt of court. These are the guidelines that are issued to the press so that while they exercise their freedom, they do not actually violate the rights of others. It is very important that the media acts with responsibility, with a sense of duty and purpose towards the constitution, legal system and towards the rights of other individuals. So, media, has been prohibited from naming the victim of sexual assault and is required to have sensitivity in calling for opinion of individuals and people.

If any media person attempts to influence administration of justice, they could be liable for contempt of court as well. That has been a very recent outcome of the misuse and abuse of Article 19 as well. Finally, if one looks at the aspects of reasonability, one will notice that all freedoms must be exercised in a reasonable manner. The term reasonableness is used on several occasions by the court of law wherein tests and guidelines have been set by the Supreme Court from time to time in saying what should be the state policy in terms of protecting these freedoms as well as imposing restrictions on the freedom. One should notice that your freedom of speech and expression will stop as soon as someone's right to reputation begins.

Your freedom of assembly will stop as soon as it turns violent. Your freedom to form association or union is okay until that kind of an association becomes unlawful. You can reside and settle anywhere in India unless you are infringing on the sensitive cultural heritage of certain tribes in the country or certain state communities in the country. Your practice to any profession or trade or occupation is existing so far, it does not affect public order, public interest, and the prevailing conditions for regulating those kinds of trade. Ultimately the evil of misuse or abuse of your freedom ought to be checked from time to time; there ought to be some kind of restriction from time to time. It is the state which has a right to intervene in both regulating your substantive freedom and the procedural aspects to exercising these kinds of freedom as well. That is the cornerstone of Article 19 of the Constitution of India.