

## FREEDOM OF SPEECH AND CENSORSHIP: A CONCEPTUAL ANALYSIS

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“Not many can speak and write with power”- **Justice V.R. Krishna Iyer**

The paper analyzes the theoretical foundation for the international human right to freedom of speech and expression and the limitations in the form of censorship imposed thereon. Between the two opposing sides of absolute freedom and absolute stringency (both formal and non-formal), the paper attempts to discuss ways and means by which the fundamental principles that freedom of speech gives to society can be maintained, although not at the cost of social disintegration. To this end, it analyzes different sociological theories on democracy, and how these theories would sometimes react conflictingly to current disputes where the use or non-use of censorship as a form of control would become important. It also provides a comparative and contextual study of the examples of repression from different parts of the world, discussing certain control and domination problems in the process.

### INTRODUCTION

According to Benjamin Cardozo, “history in illuminating the past illuminates the present and in illuminating the present, illuminates the future.” Therefore, in order to understand what the current and future of freedom of speech is and before pitting the freedom of speech against fake news, it is pertinent to understand the concept. Free Speech can be considered as one of the constitutional guarantees of a liberal democracy. A right that is identified by all international human rights documents opportunities is an amalgamation of the right to freedom of conscience. Censorship, on the other hand, is a process of imposing checks, direct or indirect, governmental or apart from the exercise of one's right to free speech. Apparently, this phenomenon can be perceived as an unwanted curb on one's fundamental right to liberty, but on a closer examination, it can be looked at in the form of a necessary evil a limitation on one's human rights in order to uphold the community's human rights. Searching for freedom of speech in the domain of parliamentary privileges is inconsistent as the privileges have often been used to curb the freedom of speech.

Freedom of speech and censorship, pull in different directions. Their aims and purposes are conflicting. For ten people who wish to speak and spread the truth as they see it, there are a thousand people who do not want to hear it and do not want others to listen to it, especially if

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what is said or written challenges conventional dogmas and practices. Freedom of expression is necessary for the attainment of truth, for individual fulfilment, for participation by members of society in political or social decision making, and for the effective functioning of democracy. Indeed, it is one of the most cherished values of a free democratic society, whose fundamental postulate is that government shall be based on the consent of the governed. Consent should not only be free but should also be well informed by debate and discussion.

### **ORIGIN OF FREEDOM OF SPEECH**

The history of the concept of freedom of speech lies in the prerogatives possessed by the representatives of the House of Commons in England. In 1215, the abuses by King John caused the nobles to revolt and compelled him to execute and recognize the rights of both noblemen and ordinary Englishmen known as the Magna Carta. “It established the principle that no one, including the king or a lawmaker, is above the law.”<sup>2</sup> Through the Magna Carta, the nobles and lords of England procured a promise out of King John that the Crown will not to levy taxes without their consent. This led to the termination of the Curia Regis and the constitution of the House of Lords.<sup>3</sup> In 1295, the representatives of the hundreds, i.e., the districts within counties were added to the body. Though their foremost objective was taxation, later, they took up the function of petitioning the King regarding matters pertinent to the people they represent. The law-making power, which was preliminarily vested with the King and the Lords, gradually devolved upon this body, which was known as the House of Commons, and the petitions took the form of Bills.<sup>4</sup>

The House of Commons now entrusted with the responsibility of drafting the letter of the law considered it mandatory to have discussions and debates. The deliberations and discussions often comprised criticism of the crown or its ministers. Therefore, it became a customary procedure for the Speaker to begin the session by imploring the forgiveness of the Crown. This traditional practice was later claimed as a right. However, the formal recognition of this claim happened during the time of Henry VIII when Strode, a representative of the House of Commons, was imprisoned for introducing specific bills by the Stannary Court.<sup>5</sup> This led to the ratifying of a statute declaring the proceedings against him to be void and further saying

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<sup>2</sup> The Magna Carta (The Great Charter).org.<https://constitution.org/eng/magnacar.pdf>

<sup>3</sup> George B. Adams & F. W. Maitland, 14 The Constitutional History Of England The American Historical Review 338 (1909).

<sup>4</sup> David S. Bogen, The Origins of Freedom of Speech and Press, 42 MARYL. LAW REV. 429–465 (1983).

<sup>5</sup> Adams & Maitland, Supra N.2

in a general way that any actions against any member of the present Parliament or any of the future Parliaments for anything spoken inside the Parliament shall be declared void. Thus, freedom of debate was acknowledged. However, the concept of freedom of speech in Parliament crystallized after the Glorious Revolution of 1689. The English Bill of Rights enacted in 1689 stated: “The freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament”.<sup>6</sup>

The colonies, however, not only successfully included the concept of freedom of speech in the local assemblies but also ratified it as a fundamental value of the society. The Massachusetts Declaration of Rights in 1780 stated:

“The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever”.<sup>7</sup>

The Articles of Confederation stated that: “Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress ...”

Searching for freedom of speech in the domain of parliamentary privileges is inconsistent as the rights have often been benefited to curb the freedom of speech. Citizens were punished for questioning the legislatures in the garb of rights. This posed a challenge to the freedom of the citizens to question their governments both in England and in America. This protection, which was offered to the legislators against public criticism, was against the idea of popular sovereignty. Thus, when the US Constitution was enacted, the preamble commenced with the words “We the People of United States,” indicating that the legislators should act in obedience to the instructions of the electorate in specific matters. This marked a reposition from the dominance of the rights of the legislators to popular sovereignty. This led to a wide opening of the opportunity from the legislators to the citizens in the form of the right to freedom of speech through the First Amendment, which stated that Congress should not enact any laws that took away or abridged the freedom of speech. The idea of the right to freedom of Speech of the society was thus crystallized.

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<sup>6</sup> Ibid

<sup>7</sup> Declaration Of Rights, Para. Xxi (Mass. 1780), Reprinted In I B. Schwartz, The Bill Of Rights: A Documentary History 343 (1971).

## CENSORSHIP

The word 'Censorship' is originated from the Latin word 'cernere,' which means "to estimate, rate, assess, to be of opinion".<sup>8</sup> The Webster Dictionary elucidates censorship as an act of suppressing speech or writing that is considered subversive of the common good.<sup>9</sup> According to the Oxford Dictionary, the word 'Censor' denotes an official who examines books, films, news, etc., that is about to be published and suppresses any parts that are considered obscene, politically unacceptable or a threat to security.<sup>10</sup> Censorship, therefore, is a formal act of suppressing the speech that is morally or ethically unacceptable.

Kathleen Sullivan defines censorship as "the restriction of speech by the Government".<sup>11</sup> According to Eric Barendt, the definition only includes the state-imposed prior legal restraints on speech.<sup>12</sup> Harold Laswell's description of censorship also flows from the same notions, but is more broad-based:

The policy of restraint the public expression of ideas, opinions, conceptions, and impulses that have or are believed to have the capacity to undergo the governing authority or the social and moral order that authority considers itself bound to protect.<sup>13</sup>

Therefore, it can be assumed that there are two kinds of censorship one is political censorship, and the other one is moral censorship. Political censorship is primarily concerned with limitations on speech that undermines sovereignty, the relation between states, the safety of persons, etc., while moral censorship relates to obscenity, prevailing norms.

There are different modes through which the censorship mechanism works. Censorship can broadly be classified into the following types<sup>14</sup>-

1. Autonomous - Self-censorship is a concept brought about by conscious or unconscious intentions, which makes an individual whether to refrain from expressing his or her views or alter the same.
2. Social - Discouragement of the statement of specific ideas, either through socialization or sanctions, which lead to the development of taboos.

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<sup>8</sup> David Tribe, *Questions Of Censorship* (1973)

<sup>9</sup> See *Censorship*, available at <http://www.merriam-webster.com/dictionary/censorship>.

<sup>10</sup> *Censor* available at <http://www.oxforddictionaries.com/definition/english/censor>

<sup>11</sup> Catherine Sullivan, *The First Amendment Wars*, 207 *NEW REPUBLIC* 35, 38 (1992)

<sup>12</sup> Eric Barendt, *Freedom Of Speech* 151-153 (Oup, New York, 2005)

<sup>13</sup> Harold D. Laswell, "Censorship" In *Encyclopaedia Of The Social Sciences* 290 (1930).

<sup>14</sup> Paul O'higgins, *Censorship In Britain* 12-13 (1972).

3. Legal - Enforcement of restraint by authorized institutions such as the government, police, and the courts. This can involve both prior censorships, where the material has to meet specific approved previous standards, or penal censorship, where no such approval is needed, but the punishment must be there for violation of legal limits.

4. Extra-legal – Telephone tapping, limited release of details about the defendant at trial.

5. Voluntary - When an individual or a company, with no legal support, imposes upon other limitations on what they might say or do without sanctions. This may be exercised by the institutions such as the Press Council or by an employer who is usually based on a shared code of beliefs.

6. Subterranean - When an individual or institution uses powers to set aside for the further purpose of imposing censorship without direct government involvement

Therefore, censorship is not as formal, as always. There are informal methods by which censorship can be accomplished.

Censorship is needed in a contemporary democratic society as no society can survive with absolute freedom. The conventional view on censorship is that free speech can be abused when it undermines traditional values and social stability, and censorship derives its justification from the dominant social need to prevent such occurrences. However, the liberal position is that free speech should be entitled even when it attacks conservative principles, and censorship should be used only in extraordinary cases.

Western liberal theorists have principally taken resort to two primary schools of thought in their outlook towards problems in connection with free speech and censorship – the deontological progressive attitude and the functionalist liberal perspective.<sup>15</sup>

The deontologists like Thomas Scanlon and Ronald Dworkin place the rights and dignities of the speaker as the theories rather than looking at the cognitive issues which are calculable sensibly, to protect the individual's autonomy the state should necessarily detest censorship in any form.

On the other hand, functionalist liberals took a consequentialist approach. They support free speech because it is useful to society. John Stuart Mill's theory of 'Marketplace of Ideas' states that "if we suppress an opinion, it might turn out to be true. To assume otherwise is to

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<sup>15</sup> Tucker, Law, Liberalism And Free Speech 1 -63 (1985).

assume that we are infallible, which is not the case<sup>48</sup>". Mill firmly has a feeling that the mental well-being of mankind was dependant on permitting freedom of speech and that even erroneous opinions should not be concealed. It was only if the speech could be harmful to others, something of the nature of hate speech, that Mill would advocate forceful proscriptions of such speech or expression

### **CENSORSHIP IN LIBERAL VIEW**

In a liberal view on the issue of censorship is that free speech should be allowed even when it attacks traditional values, and censorship should be used only in extraordinary cases. Their main arguments are as follows

**Democracy:** Censorship is devastating to the democratic process it is most often Used to suppress and oppress the voice of the minority and the underprivileged ones. Censorship thus concludes in being an act of intolerance towards those whose voices need to be heard the most. As a result, the process of governing is done by a small circle of people and not by democracy. For democracy to function correctly, we need an environment in which the broadest range of ideas from vast sources which are freely expressed and debated.<sup>16</sup>

**Discovering truth:** Censorship support the effort to find innovative facts and ideas, thus contribute to the overall societal development by expanding society's knowledge base.

**Personal autonomy:** Censorship strikes at the very core of our human character restricting our instinct towards self-expression

### **CENSORSHIP IN LIGHT OF FREEDOM OF SPEECH**

If we look into the above thoughts that are censorship and freedom of speech, we can say that the utility of censorship in a liberal democratic society is illustrated through divergent views which is suitable. On the other hand, if we think in the context of classical theories, the outcome will be immensely intriguing and thought-provoking. Censorship is undignified because it suggests that the speaker or writer is not worthy of equal concern as a citizen, or that his ideas are not worthy of equal respect; that censorship is insulting because it denies the

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<sup>16</sup> See Ginzburg vs United states, 383 U.S. 463 (1966)

speaker an equal voice on politics and therefore denies his standing as a free and equal citizen; or that censorship is grave because it inhibits an individual's development of his personality.<sup>17</sup> these words are quoted by Ronald Dworkin a deontologist. In the other hand if we come to functionalist liberals, they took a consequentialist view that made to support free speech because it beneficial to society. "if we suppress a point of view, it may turn out to be true. To assume otherwise is to assume that we are infallible, which is not the case" this was the words of John Stuart Mill in the theory of marketplace of ideas.

Though the Marketplace of Ideas rationale for freedom of speech has been attacked by intellectuals because it is wrong to presume that the assertion that all ideas will enter the marketplace of ideas, and even if they do, some ideas may drown out others merely because they enjoy dissemination through other outstanding resources." The theory is also attacked for its presumption that truth will necessarily triumph over falsehood. It is visible throughout history that people may be swayed by emotion rather than reason, and even if truth ultimately prevails among the falsehood.

If anyone finds a continuing effect in this functionalist liberal theory, it will be in judicial pronouncements, especially in the United States from the times of World War I. According to Holmes "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. .."<sup>18</sup> Anyways Mill firmly believed mental welfare of mankind was dependant on freedom of speech, and that even erroneous opinions should not be concealed It was only if the speech could be harmful to others, something of the nature of hate speech, that Mill would advocate forceful proscriptions of such speech or expression.

### **PRE-CENSORSHIP**

Pre-Censorship on publicizing of any news or views, unless justified under clause (2) violates the "freedom of speech and expression" lay down under Article 19(1)(a). The Hon'ble Supreme Court in the case of Brij Bhushan v. State of Delhi<sup>19</sup> struck down an order issued under Section 7(1)(c) of the East Punjab Safety Act, 1950, directing the editor and publisher of a newspaper for the submission of all matters and news and views about Pakistan including photographs and cartoons for scrutiny before publicizing. The Court held that the liberty of the press is an essential part of the "freedom of speech and expression preserved

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<sup>17</sup> See Ronald Dworkin, *A Matter of Principle* 386 oup Cambridge 1985

<sup>18</sup> *Abrams v. US* 250 US.616(1919)

<sup>19</sup> AIR 1950 SC 129

under Article 19(1)(a)” and therefore there could be little doubt that the imposition of pre-censorship is a restriction on the freedom of speech and expression

Das CJ., in *Virendra v. State of Punjab*,<sup>20</sup> observed that when newspapers are prevented from publishing its own view or the view of its correspondents, it will amount to a severe encroachment on the right to freedom of speech. Therefore, banning a publication in any newspaper of any matter relating to a particular subject or class of subjects would be against the right to freedom of speech. The Hon’ble Apex Court has also held that “pre-publication bar, even under a court injunction, can be justified in the concern of justice only when there is a precise and imminent danger to the administration of justice and not otherwise.”<sup>21</sup>

### **CONCLUSION**

.It's tough to conclude the aspects and interrelation between censorship and freedom of speech as it is broad in its own sense. Modern constitutions try to bring a equilibrium in free speech and censorship. In order to guarantee that every individual can exercise freedom of speech, there should be the restriction of freedom of some. When speech has the ability to persuade and can affect the autonomy of individuals through manipulation and coercion, the requirement of censorship is an important aspect that needs to be looked into. With the technological advancement in the modern era which led to the rapid expansion of press and media along with the entry of social media where ideas can be exchanged at very minimal cost, there needs to be an effective balance that ought to be struck. In a social system, free speech can be viewed from different perspectives, i.e., the creator, the platform and the audience. The constitutional provisions relating to freedom of speech and expression and the limitations that can be imposed on speech will be analyzed in the light of these three perspectives.

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<sup>20</sup> AIR 1957 SC 896.

<sup>21</sup> *Reliance Petrochemical Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.* AIR 1989 SC 190, 202