Historical Development of Freedom of Speech : A Comparative Study

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Freedom of speech in HR documents :

Concepts of freedom of speech can be found in early human rights documents[1] and the modern concept of freedom of speech emerged gradually during the European Enlightenment[2]. England's Bill of Rights 1689 granted 'freedom of speech in Parliament' and the Declaration of the Rights of Man and of the Citizen, adopted during the French Revolution in 1789, specifically affirmed freedom of speech as an inalienable right[3]. The Declaration provides for freedom of expression in Article 11, which states that: "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law"[4].

In U.S.A

The U.S. Constitution and the European Human Rights Convention Law has played a decisively pervasive role in many countries, especially those whose political system is based on the rule of law. The constitutional law on freedom of expression epitomizes this. The First Amendment to the U.S. Constitution 'reaffirms the structural role of free speech and a free press in a working democracy'[5].

In a similar way, the European Convention on Human Rights[6] represents the vision of its forty-six contracting states for a democratic body politic in which protection of freedom of expression is the norm, not an exception. By its nature, law is more or less a process of evolution - rarely a revolution - if it reflects an emerging consensus of a democratic society. The constitutional history of the United States on free speech is a case in point. The European Convention on Human Rights history of Article 10 is similar to the U.S. Supreme Court's common law interpretation of the First Amendment. The European court's approach is 'an evolutive interpretation' that allows it to construe Article 10's variable and changing concepts in light of modern-day conditions. As an integrated analytical framework, this paper examines the judicial interpretations of the U.S. Supreme Court and the ECHR on freedom of expression from a historical perspective. It compares the historical development of free speech law under the First Amendment and Article 10 of the European Convention on Human Rights in the sense of 'orderly and natural long-term 'evolution"[7].

Throughout history men have fought for freedom of speech. Laws have been passed, wars have been fought, and lives have been lost over the right to express an idea publicly. Why should such a seemingly natural right have fomented controversy, even to the point of bloodshed? Why have societies, both past and present, found it necessary to restrict or even to prohibit the exercise of this right? Attitudes toward freedom of speech for the people have swung like a huge pendulum on the clock of time. Sometimes freedom of speech has been viewed as a privilege to be enjoyed. At other times it has been considered a problem to be dealt with by governments or religions. Since history is replete with accounts of those who struggled for the right to express an opinion publicly, which often led to their being violently persecuted or killed, a review of some of these events should give us insight into the problem. Students of history may well recall the Greek philosopher Socrates (470-399 B.C), whose views and teachings were seen as a corrupting influence on the morals of the youths of Athens. This caused great consternation among political and religious leaders of the Greek hierarchy and led to his death. His plea before the jury that eventually

convicted him remains one of the most eloquent defenses of freedom of speech: "If you offered to let me off this time on condition that I am not any longer to speak my mind in this search for wisdom, and that if I am caught doing this again I shall die, I should say to you, 'Men of Athens, I shall obey the God rather than you. While I have life and strength I shall never cease to follow philosophy and to exhort and persuade any one of you whom I happen to meet. For this, be assured the God commands . . .' And, Athenians, I should go on to say, 'either acquit me or not; but understand that I shall never act differently, even if I have to die for it many times". As time moved on, the early history of Rome saw the pendulum swing toward fewer restrictions, only to swing back to more restrictions as the empire expanded. This marked the beginning of the darkest period for freedom of speech.[8] During the reign of Tiberius (14-37 C.E.), no tolerance was shown toward those who spoke out against the government or its policies.[9] And it was not only Rome that opposed freedom of speech; it was at this time that Jewish leaders forced Pontius Pilate to put Jesus to death for his teaching and also ordered his apostles to stop preaching. These too were willing to die rather than stop. During most periods of history; civil rights granted by governments were often altered or withdrawn at will, which led to continued struggles for freedom of speech. Starting in the Middle Ages, some of the people demanded a written statement spelling out their rights, with limitations placed on government control of those rights. As a result, significant bills of rights began to be formulated. Among these was the Magna Carta, a landmark in the field of human rights.

Later came the English Bill of Rights (1689), the Virginia Declaration of Rights (1776), the French Declaration of the Rights of Man (1789), and the United States Bill of Rights (1791). The 17th, 18th, and 19th centuries heard the voices of leading figures of history speak out for freedom of expression. In 1644 the English poet John Milton, who may best be remembered for Paradise Lost, wrote the famous pamphlet Areopagitica as an argument against restrictions of freedom of the press.

In 1776, the Virginia **Bill** of Rights asserted -

"freedom of **the press is one of the great bulwarks of liberty, and can never be restrained** but by **despotic governments".**

This was followed by the federal Bill of Rights, incorporated into the Constitution of the United States by the First Amendment (1791)—

"Congress shall **make no law . . . abridging the freedom . . . of the press."**

The Constitution did not elaborate what was meant by 'freedom of the Press', but since the United States imported the common law from England, it is natural that the fathers of the Bill of Rights understood it in the Blackstonian sense of absence of prior restraint,[10] and that is evident from the very text of the First Amendment which was drafted in the negative sense, as a prohibition upon the legislative power.

At the same time, there was a current of opinion from the time of the First Amendment that it was intended to give the freedoms guaranteed by these Amendments a larger content than the negative meaning imputed in Great Britain, which was summarised by

In India

Ancient times :

When Europeans write on the history of the media, they refer to the Acta diurna of the Roman Empire as closely akin to the newspaper of today. In India the Rock Edicts of Emperor Ashok (c.273-236 BC) engraved on the rocks contain in abundance measures adopted and regulations issued by him. This is not very different from the news content of modern media. In that era when Ashok, the Great, used this technology for communicating his message throughout his vast empire, there is no reference to restrictions on communication imposed by law. However, the Arthashastra written originally in the reign of Chandragupta Maurya (c. 324-300 BC) by Kautilya mentions punishment for spreading false rumours. The Arthashastra and the Rock Edicts also speak of spies and reporters.[11]

Medieval times :

Akhbar is the word used for newspapers today in Hindi and Urdu languages and Babur

mentions it in such a way as if it is something routine. It was meant to communicate an official announcement by Babur that a tax would be waived on all Muslims if he won the battle and he himself had given up drinking and banned liquor in his dominions. However, there is no reference to any regulation on akhbar. The earliest mention of pre-typographic newspapers is to be found in a contemporary historical work (Muntakhals-ul-Lubab by Khafi Khan) of the later Mughul times.[12]

Since there were no fundamental rights in India prior to Independence, there was no guarantee of the freedom of expression or of the Press. The footing of the Press was explained by the Privy Council [13] to be the same as in England, namely, that of an ordinary citizen so that it had no privileges nor any special liabilities, apart from statute law[14]

Modern India :

The Constitution of India guaranteed [in Art. 19(l)(a)] the fundamental right of freedom of expression, and the Supreme Court lost no time in declaring that the freedom of the Press was included in that guarantee.[15] The result was that the Press could not be subjected to any restrictions by making a law unless that law itself was constitutionally valid, ***i.e.,*** consistent with CI. (2) of Art. 19.[16]

The immediate gain under the Constitution, in short, was that while in England, the Press could not claim any right or privilege that was denied by any statute, in India, the validity of that statute itself became open to challenge. Even subsequent punishment has been brought under constitutional check and judicial review,—which is clearly absent in the U.K. To this extent, we have departed from the English precedent and advanced towards the American.

Then arose the question as to the contents of this freedom of the Press which was derived from Art. 19(l)(a). It must be noted that from the beginning, the Supreme Court came to be influenced by the American decisions in the matter of interpreting Art. 19(1)(a)[17] even though while interpreting other provisions of the Constitution the Court expressed reluctance in importing American case-law.

In the result, the positive trend of American decisions, just stated, has been followed by our Supreme Court from the 1958 decision in the *Express Newspapers case*[18] down to *Bennett Coleman.*[19] In a democracy, freedom of speech opens up channels of free discussion on issues. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters.[20] A democratic government attaches great importance to this freedom because without the freedom of speech, appeal to reason, which is the basis of democracy, cannot be made.[21] Justice P.N. Bhagwati has emphasized on the significance of the freedom of speech and expression in these words: *"Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential"*[22]

Our Constitution is based on the principle of checks and balances. The Preamble expresses two ideas which complement each other, namely:

1. Rights of the individual which correspond to the duties of the State towards the individual, and
2. Duties of the individual towards the State which correspond to the rights of the society against the individual. The State is under an obligation not to infringe upon the rights of the individual. Similarly, the individual is obliged to contribute to the social welfare[23]

Conclusion

Freedom of speech, considered the basic freedom by most philosophical thinkers, consists of several facets, including the right to express one's opinion unhindered, unfettered by the fear of retribution. It is one of the most basic elements for a healthy, open minded democracy.[24] It allows people to freely participate in the social and political happenings of their country. Expression through speech is one of the basic guarantees provided by civil society. However

in modern world Right to freedom of speech and expression is not limited to express ones' view through words but it also includes circulating one's views in writing or through audiovisual instrumentalities, through advertisements and through any other communication channel. It also comprises of right to information, freedom of press etc. It is a right to express and self realization.[25]

(Endnotes)

1 *Smith, David (2006-02-05). "Timeline: a history of free speech". The Guardian (London). Available at, http://www.guardian.co.uk/media/2006/feb/05/religion.news accessed on 27/07/2016.*
2 *"The Enlightenment". Washington State University.*
3 *Timeline: a history of free speech" The Guardian. February 5, 2006.*
4 *http://www.hrcr.org/docs/frenchdec.html*
5 *The Bill of Rights: Creation and Reconstruction (New Haven, CT: Yale University Press, 1998), pg.21.*
6 *Drafted in 1950, came into force on 3rd Sept. 1953*
7 *Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel (Chapel Hill: University of North Carolina Press, 1986), pg. 9*
8 *Available at, http://www.britannica.com/EBchecked/topic/551948/Socrates/233637/The-Athenian-ideal-of-free-speech accessed on 27/07/2016.*
9 *Available at, http://books.google.co.in/ooks?id=Y-wrA3Zjzfc0C&pg=PA85&lpg=PA85&dq=Tiberius+and+freedom+of+speech&source=bl&ots=-jKQn7cI6sx&sig=i_poZ_dMKx38uHWFaPpcmeD-3p7U&hl=en&sa=X&ei=FYeFUq7hKMm8kQX-9q4DgAw&ved=0CC4Q6AEwAQ#v=onepage&q=Tiberius%20and%20freedom%20of%20speech&f=-false Accessed on 27/07/2016.*
10 *Patterson v. Colorado, (1906) 205 US 454 (462).*
11 *Supra note 1.*
12 *Ibid*
13 *ML Arnold v. Emp.. AIR 1914 PC 116.*
14 *Basu. D.D., Law Of The Press, LexisNexis Butterworths Wadhwa, Nagpur, 5th edition, 2010, pg. 19*
15 *Romesh Thappar v. State of M.P., AIR 1950 SC 124; Brijbhushan v. State of Delhi, AIR 1950 SC 129.*
16 *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139.*
17 *Express Newspapers v. Union of India, (1959) SCR 12 (121).*
18 *Express Newspapers v. Union of India, (1959) SCR 12 (121).*
19 *Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106 [Also see Indian Express v. Union of India, (1985) 1 SCC 641 (para 44)].*
20 *M.P. Jain, "Indian Constitutional Law" Wadhwa and Company Nagpur, New Delhi, 2003, p. 1152.*
21 *V.N. Shukla, "The Constitution of India" Eastern Book Company, New Delhi, 2004, . 105.*
22 *Menaka Gandhi v. Union of India AIR 1978 SC 597: (1978) 1 SCC 248.*
23 *V.S. Deshpande, "Right and Duties under the Constitution", 15 JILI (1973), p. 95.*
24 *Avaialable at http://www.lawctopus.com/academike/freedom-of-speech-and-expression/ accessed on 28/07/2016.*
25 *ibid*