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INDIA'S CONSTITUTIONAL RESTRAINT: LESS EXPRESSION IN A LARGE DEMOCRACY

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I. INTRODUCTION: INDIA'S DEMOCRATIC PREFERENCES

India's constitution guarantees freedom of speech and expression in Article 19.¹ But Article 19 also provides broad "reasonable" exceptions to the promise of free expression to ensure the "security of the state."² However, Article 358 permits the government upon a "Proclamation of Emergency" to "make any law or to take any executive action" to abrogate free expression for "the security of India."³ Formally and practically, expression in India is *free* only if the government does not proclaim

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1. INDIA CONST. art. 19, § 1(a), *amended by* The Constitution (Forty-Fourth Amendment) Act, 1978.

2. INDIA CONST. art. 19, § 2 *amended by* The Constitution (First Amendment) Act, 1951.

3. INDIA CONST. art. 358, §1 *amended by* The Constitution (Forty-Fourth Amendment) Act, 1978.

an emergency or assert the Article 19 exceptions, an authority it exercises relatively regularly. While the amount and kind of expression permitted in India is far more limited than that in other democracies,⁴ Indians generally believe that they have a vibrant liberal democracy that is accompanied by an appropriate amount of expression.⁵ This article analyzes the utility of that perception from a comparative law basis.

The Indian government's asserted exceptions to expression, authorized by Article 19 of the constitution, usually restrict opinions about controversial topics within Indian society. Today, most government restrictions apply to mass communications, including newspapers and the Internet.⁶ Popular opinion may force changes in the government's censorship policies as Indians are more exposed to the world. But, only about 12.6% of Indians use the Internet⁷—or about 137 million of 1.2 billion people⁸—which, according to the World Bank, is a relatively low usage rate.⁹ In any event, India's approach to religion and politics—and to a lesser extent sex—has had the effect of inhibiting expressive freedom since the nation's founding in 1947.

II. THE INDIAN CONSTITUTION'S 'FIRST AMENDMENT'

India's first constitutional crisis arose only months after it adopted its Constitution in January of 1950. In *Romesh Thappar v. Madras*,¹⁰ an English journal entitled *Cross Roads* claimed that the Madras government was violating the free speech provision in the Constitution by declaring communist parties illegal, and by banning the circulation of *Cross Roads* in Madras “for the purpose of securing the *public safety* and the maintenance of *public order*.”¹¹ The free speech provision in the constitution, Article 19(1), provided that “citizens [have a]...right to freedom of speech and expression.”¹² In another case, *Brij Bhushan v. Delhi*,¹³ the chief

4. Compare INDIA CONST. art. 19, § 2 with U.S. CONST. amend. I.

5. Pratap Bhanu Mehta, *Passion and Constraint: Courts and the Regulation of Religious Meaning*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 311, 312 (Rajeev Bhargava ed., 2008).

6. See, e.g., The Information Technology (Amendment) Act, 2008, No. 10 of 2009, Gazette of India, section II(1) (Feb. 5, 2009).

7. *Internet Users (Per 100 People)*, THE WORLD BANK, http://data.worldbank.org/indicator/IT.NET.USER.P2/countries/1W?order=wbapi_data_value_2012%20wbapi_data_value%20wbapi_data_value-last&sort=asc&display=default (last visited Feb. 10, 2014).

8. *Top 20 Countries With Higher Number of Internet Users*, INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS (June 30, 2012), <http://www.internetworldstats.com/top20.htm>.

9. See *Internet Users (Per 100 People)*, *supra* note 8.

10. (1950) 1950 S.C.R. 594 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=1245>.

11. See *Romesh Thappar*, (1950) 1950 S.C.R. at 595 (emphasis added) (internal quotation marks omitted). See also Lawrence Liang, *Reasonable Restrictions and Unreasonable Speech*, 4 SARAI READER 434, 436–37 (2004) (emphasis added), available at http://preview.sarai.net/journal/04_pdf/56lawrence.pdf.

12. INDIA CONST. art. 19, § 1(a) amended by The Constitution (Forty-Fourth Amendment) Act,

commissioner of Delhi prohibited the *Organizer*, a weekly English newspaper, from printing inflammatory materials about Partition. In decisions on the same day, the Supreme Court of India found that the two states, Madras and Delhi, violated Article 19(1) of the constitution.¹⁴

The states had justified their actions on the grounds of *public safety* and *public order* to confront communism and limit violence between India and Pakistan.¹⁵ However, the state standards of public safety and public order were not grounds on which the constitution permitted restrictions on speech.¹⁶ Section 2 of Article 19 did authorize limitations on speech, but the limitations did not include *public safety* or *public order*.¹⁷ In both cases, the Supreme Court held the state actions unconstitutional.¹⁸ In one sense, the Supreme Court's decisions in *Romesh Thappar* and *Brij Bhushan* were narrow. With a new constitution and no judicial precedents, India's Supreme Court might have, not unreasonably, concluded that public safety and public order were subsumed within "security of the state," deferring to Madras and Delhi and upholding the restrictions on the newspapers.

While the Court found broad power to declare the state acts unconstitutional—an approach reminiscent of *Marbury v. Madison*¹⁹—the Court read the constitution narrowly, perhaps almost literally. The Court found that public safety and public order were not implied powers of the states.²⁰ The conclusion that the Supreme Court engaged in a literal reading of the Constitution is especially plausible, because "[f]reedom of the press does not occupy a preferred position in the Indian Constitution which does not recognise a hierarchy of rights."²¹ In 1951, and even today, the Court had little historical reason to side with newspapers in India.

Following the Court's decisions in *Romesh Thapar* and *Brij Bhushan*, the Prime Minister, Jawaharlal Nehru, implored the Constitution's primary proponent, Bhimrao Ramji Ambedkar, to advocate an amendment to the Constitution to enable the government to suppress subversive activ-

1978.

13. (1950) 1950 S.C.R. 605 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=1244>.

14. See *id.* at 620; *Romesh Thappar*, (1950) 1950 S.C.R. at 603 ("[C]lause (2) of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.").

15. See generally, *Brij Bhushan*, (1950) 1950 S.C.R. 605; *Romesh Thapar*, (1950) 1950 S.C.R. 594.

16. See *Romesh Thappar*, (1950) 1950 S.C.R. at 602–03.

17. *Id.*

18. *Id.* at 603; *Brij Bhushan*, (1950) 1950 S.C.R. at 608.

19. 5 U.S. (1 Cranch) 137 (1803).

20. See *Romesh Thappar*, (1950) 1950 S.C.R. 594 at 600;

21. Soli J. Sorabjee, *Constitution, Courts, and Freedom of the Press and the Media*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 334, 339 (B.N. Kirpal et al. eds., 2000).

ity.²² In 1951, Nehru formed a cabinet committee to explore an amendment. The Home Ministry recommended that “public order” constitute a basis on which to limit expression.²³ In 1951, Parliament adopted India’s first constitutional amendment to negate the precedents established in *Romesh Thapar* and *Brij Bhushan*—cases prohibiting censorship of newspapers.²⁴ The irony behind India’s First Amendment, which restricts speech, is that in a later case, *Express Newspapers v. Union of India*²⁵, the Supreme Court concluded that “Freedom of speech and expression includes within its scope the freedom of the press and it would be apposite here to refer to...passages from ‘freedom of the Press-A Framework of Principles’ (Report of the Commission on Freedom of Press in the United States of America)’”[describing the characteristics of a free press].²⁶

India’s first constitutional amendment limited expressive freedom and illustrated the unique, recurring Indian tension between state control and individual rights. While some tension between control and free expression exists in any nation, India’s huge, teeming, diverse democracy and independent states are not easily susceptible to regulation. Yet, under Article 19(2) of India’s Constitution,²⁷ as modified by the Constitution’s First Amendment, the government possesses broad authority at all levels to “impose[] . . . reasonable restrictions on the exercise of the right [to expression] . . . in the interests of the 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.”²⁸ Article 19(2) is the exception to the preceding section, Article 19(1), which appears to provide broad protection for expression:

All citizens shall have the right—(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (g) and to practise any profession, or to carry on any occupation, trade or business.²⁹

22. See Liang, *supra* note 13 at 437–38.

23. See, e.g., INDIA CONST. art. 19, §§ 2–3.

24. INDIA CONST. art. 19, § 2, *amended by* The Constitution (First Amendment) Act, 1951.

25. A.I.R. 1958 S.C. 578 (India), *available at* <http://judis.nic.in/supremecourt/imgs1.aspx?filename=570>.

26. *Id.* at 666–67.

27. INDIA CONST. art. 19, § 2, *amended by* The Constitution (First Amendment) Act, 1951, The Constitution (Sixteenth Amendment) Act, 1963.

28. *Id.* (footnote omitted) (brackets omitted).

29. INDIA CONST. art. 19, § 1, *amended by* The Constitution (Forty-Fourth Amendment) Act, 1978 (footnotes omitted) (brackets omitted).

Given what appears to be significant expressive freedom under 19(1), it has been argued that the restrictive clauses in Article 19(2) “appeared ‘to take away the very soul out of those protective clauses’”³⁰ in 19(1). Notably, section 19(1) does not contain protection for a free press.³¹

Not surprisingly, in 1950, with no historical press protection under the British Raj and no press provision in the Constitution, the government tried to regulate the contents of two newspapers, leading to the 1951 decisions in the *Romesh Thapar* and *Brij Bhushan* cases. In the original 1950 Constitution, Article 19(1) provided that citizens' rights to freedom of speech and expression could be modified, under authority of Article 19(2), by laws that prohibit “libel, slander, defamation, contempt of court or any matter which offend against decency, or morality or which undermines the security of the state or tends to overthrow the state.”³² After the Court's decisions, Parliament amended Article 19(2). It added language that provides that the government could now make any law that “imposes reasonable restrictions on the exercise of the right [of expression] in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, [and] public order, decency or morality.”³³ In sum, India's First Amendment added the following to Article 19(2): the addition of *reasonable* before *restrictions* and the addition of *friendly relations with foreign states* and of *public order* as justifications for restricting speech. Like the original 1950 Constitution, the 1951 amendment did not provide protection for the press.

III. CONTEMPORARY INDIA AND A LESS FREE PRESS: POLITICS, SEX, AND RELIGION

Press freedom today in India is limited relative to other democracies and even in comparison to almost all other nations. *Reporters Without Borders*, a media advocacy group, rated India 140 out of 179 nations in protection of press freedom in 2011-12.³⁴ Scandinavian and small European nations comprised most of the top ten nations.³⁵ Canada was ranked 10, the United Kingdom was 28, and Australia was 30.³⁶ The nations to

30. Subhradipta Sarkar, *Right to Free Speech in a Censored Democracy*, 7 U. DENV. SPORTS & ENT. L. J. 62, 72 (2009) (quoting 7 CONSTITUENT ASSEMBLY DEBATES at 731).

31. See INDIA CONST. art. 19, § 1, *amended by* The Constitution (Forty-Fourth Amendment) Act, 1978 (footnotes omitted) (brackets omitted).

32. Liang, *supra* note 13, at 434 (quoting INDIA CONST. art. 19, § 2, *amended by* The Constitution (Sixteenth Amendment) Act, 1963).

33. INDIA CONST. art. 19, § 2, *amended by* The Constitution (Sixteenth Amendment) Act, 1963 (footnote omitted) (brackets omitted).

34. *World Press Freedom Index 2013*, REPORTERS WITHOUT BORDERS, http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf (last visited Jan. 29, 2013).

35. See *id.*

36. *Id.*

which India looked for guidance when creating its constitution—Ireland and the United States—were 15 and 47, respectively.³⁷ Nations in the twenty spots ahead of India include the United Arab Emirates (112), Qatar (114), Brunei (125), and Jordan (128).³⁸

A. *Historical Limits on Press Freedom*

India's relatively low tolerance for press freedom is perhaps not unexpected. Britain controlled India from 1813 to 1947 and provided "liberal provision for emergency powers."³⁹ Even when India was founded in 1947 and its constitution was ratified in 1950, India's freedoms were tempered by some of its founders' preference for state security over individual rights. "The majority of the Founding Fathers did not accept the theory of absoluteness of any fundamental rights, including freedom of speech and expression."⁴⁰ Expression and liberty were less important than national integrity and political stability,⁴¹ which was a legacy of colonial rule.

Throughout Britain's reign, which introduced rule-of-law principles, civil liberties did not constitute the highest values. The Indian Councils Act of 1861⁴² allowed the Governor-General to make "'ordinances for the peace and good government' of India."⁴³ The Act was used during World War I to implement administrative detention.⁴⁴ From the end of the nineteenth century, demands for an enforceable Bill of Rights were repeatedly made by Indian nationalists and consistently rejected by the British Raj.⁴⁵ In 1919, the Imperial Legislative Council passed the Rowlatt Act,⁴⁶ which continued some wartime measures and restricted civil rights.⁴⁷ The Government of India Act of 1935⁴⁸ contained no Bill of Rights. The 1939 Defense of India Act was a harbinger for detention measures following independence in 1947.⁴⁹ In the 1940s, the Raj government banned books concerning erotica and religion.⁵⁰ Indian independence did not result in and has not led to a full application of the civil liberties India claims to recog-

37. *Id.*

38. *Id.*

39. VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE, 67 (2000).

40. Sorabjee, *supra* note 23, at 335.

41. GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 38 (Fourth Impression, 2000).

42. Indian Councils Act 1861, 24 & 25 Vict., c. 67, § 23 (Eng.).

43. IYER, *supra* note 43, at 68.

44. See NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY 88-89 (2003).

45. Anthony Lester, "The Overseas Trade in The American Bill Of Rights," 88 Colum. L. Rev. 537, 537-538 (1988).

46. Anarchical and Revolutionary Crimes Act, No. 1 of 1919 (Eng.).

47. HUSSAIN, *supra* note 48, at 126.

48. Government of India Act, 1935, 25 Geo. 5 c. 2 (Eng.), available at http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf.

49. HUSSAIN, *supra* note 48, at 139-40.

50. *Id.* at 139.

nize; “In fact, with British colonialism, the preceding legal order stipulates and produces the new one.”⁵¹ Indeed, in 1947, India’s Constituent Assembly decided to guarantee fundamental rights for everyone,⁵² but the depth of the rights turned out to be shallower than those in other democracies.

B. Political Limits on Press Freedom

Jawaharlal Nehru and Sardar Patel, India’s early Congress Party Leader, had been arguing with the British Raj for decades for greater freedom.⁵³ But, illustrating a preference for state control when press freedom was at issue, Patel, the Home Minister in 1951, “thought that the *Cross Roads* [Romesh Thapar] decision ‘knocked the bottom out of most of our penal laws for the control and regulation of the press.’”⁵⁴ Nehru and Patel promised that the powers of preventive detention in the Constitution would be used sparingly,⁵⁵ but “laws authorising preventive detention have been drafted with increasing laxity by successive administrations, and applied with alarming casualness to detain tens of thousands of people.”⁵⁶ This gap between right-sounding civil liberties and the Indian practice, as well as perhaps the legacy of “British prudery and paranoia,”⁵⁷ impelled the Nehru government to ban books on politics, religion, and the history of India.⁵⁸ The National Commission to Review the Working of the Constitution had recommended that the Constitution include in Article 19(1) protection for “freedom of press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas.”⁵⁹ Parliament did not accept the recommendations.⁶⁰

After the First Amendment was adopted, Parliament passed The Press (Objectionable Matter) Act,⁶¹ which prohibited “inciting” murder and overthrow of the government, among other things, and also “seducing” any member of the armed forces not to perform his duties.⁶² To some extent, the statute was little different from the United States’ use of the

51. *Id.* at 138.

52. Anthony Lester, *The Overseas Trade in The American Bill Of Rights*, 88 COLUM. L. REV. 537, 538 (1988).

53. Nilanjana S. Roy, In India, Free Speech with Limits, *N.Y. TIMES*, December 11, 2011, <http://india.blogs.nytimes.com/2011/12/11/in-india-free-speech-with-limits/>.

54. Liang, *supra* note 13, at 437.

55. IYER, *supra* note 43, at 79.

56. *Id.*

57. *Id.*

58. *Id.*

59. Sarkar, *supra* note 32, at 73 (internal quotation marks omitted).

60. See INDIA CONST. art. 19, § 1(a).

61. The Press (Objectionable Matter) Act, 1951, No. 56, Acts of Parliament, 1952 (India).

62. See *id.*; AUSTIN, *supra* note 45, at 49.

Espionage Act⁶³ to prosecute persons who argued against World War I. In 1919, 128 years after ratification of the First Amendment to the United States Constitution, the Supreme Court, in *Schenck v. United States*,⁶⁴ upheld a protester's conviction for distributing pamphlets that encouraged draft resistance and opposition to World War I.⁶⁵ Similarly, in 1951, India's security was precarious. Conflicts with Pakistan and China were on the horizon, and internal conflict was ever present.

India has always looked to the First Amendment of the U.S. Constitution as a model, but the U.S. balancing of freedom of expression with national security was evolving, and is still evolving. Thus, India relied on inconclusive American precedents. *New York Times Co. v. United States*,⁶⁶ finding a First Amendment right to publish the Pentagon papers because the government could not show a countervailing reason not to publish, had not yet been decided when India passed its First Amendment in 1951.⁶⁷ Even today, *New York Times Co.* does not decide whether the government may never prosecute a newspaper under the Espionage Act for disclosing classified information. In 1981, in *Bartnicki v. Vopper*,⁶⁸ the Supreme Court concluded that "*New York Times v. United States* raised, but did not resolve, the question 'whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"⁶⁹

It is true that the Indian approach will permit prior restraint in many more instances than the U.S. approach, but even *New York Times* and *Near v. Minnesota*⁷⁰ do not foreclose prior restraints in extraordinary circumstances. In *United States v. Progressive, Inc.*,⁷¹ for instance, a U.S. district court enjoined a magazine from publishing an article on how to build a hydrogen bomb.⁷² The U.S. government dropped the case after a newspaper published the information.⁷³

C. *The Modern Indian approach to Press Freedom: Historical Limits Apply*

The Indian government's approach to expression today is similar to what it was in 1951. Given the Indian observance of the U.S. Constitu-

63. Espionage Act of 1917, 18 U.S.C. §§ 792-99 (2012).

64. 249 U.S. 47 (1919).

65. *Id.* at 48-49, 53.

66. 403 U.S. 713 (1971).

67. The *New York Times Co.* case was not decided until twenty years later—in 1971. *See id.*

68. 532 U.S. 514 (2001).

69. *Id.* at 528 (*Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8. (1989)).

70. *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931) (prohibiting a prior restraint).

71. 467 F. Supp. 990 (W.D. Wis. 1979).

72. *Id.* at 997-1000.

73. *U.S. v. Progressive, Inc.*, 610 F.2d 819 tbl. (7th Cir., 1979).

tion, one might have expected a greater evolution of free expression. The government's grounds for censorship continue to be based on religion, politics, and sexual mores. India's censorship has affected all media. In 1970, the Supreme Court approved bans on movies in *K.A. Abbas v. Union of India*.⁷⁴ In 2006, the *Da Vinci Code*, a movie about the Catholic Church and the politics surrounding it, faced a nationwide ban in India despite the book on which the movie was based having been available throughout India since 2003.⁷⁵ The basis for the ban was that the movie disturbed the sentiments of a minority religious community—Christians.⁷⁶ The Censor Board eventually approved the movie, although seven states continued their bans.⁷⁷ Today, state censorship is “ubiquitous,” and Indian censors ban films, plays, and websites, and determine what falls within the national interest,⁷⁸ the justification for censorship being Article 19(2) of the Constitution.

In 1989, the Indian Supreme Court, in *Rangarajan v. P. Jagjivan Ram*,⁷⁹ upheld the showing of a movie that was critical of India's reservation policy—affirmative action;⁸⁰ B.R. Ambedkar, the proponent of India's constitution; and several Tamil personalities.⁸¹ However, the Court seemingly provided and withdrew free expression with the same hand. According to the Court, the standard of review in a censorship case “should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man.”⁸² But then in the next sentence the Court offered the Censor Board wide discretion:

We, however, wish to add a word more. The Censors Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation.⁸³

74. (1970) 1971 S.C.R. (2) 446 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=1321>.

75. Sarkar, *supra* note 32, at 65.

76. *Id.*

77. *Id.*

78. Anjali Monteiro & K.P. Jayasankar, *Resisting Censorship in India*, EAST ASIA FORUM (Mar. 2, 2012), <http://www.eastasiaforum.org/2012/03/02/resisting-censorship-in-india/>.

79. 1989 S.C.R. (2) 204 (India), available at www.indiankanon.org/doc/341773.

80. See INDIA CONST. art. 15, § 4 (“Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”).

81. Sarkar, *supra* note 32, at 76.

82. *Rangarajan*, 1989 S.C.R. (2) at 216.

83. *Id.* at 216–217.

Perhaps appropriately under this legal standard, in 2009 the Indian government banned an internet comic strip about a sexually-active housewife, Savita Bhabhi.⁸⁴ According to Sachin Pilot, an official in the Ministry of Communications and Information Technology, India's reasoning was that "[i]t's hard to justify pornography on the Internet."⁸⁵ Then, in 2011, as discussed below, the Ministry of Communications introduced an internet ban that was so broad it could encompass virtually all expression.

Despite 60 years of judicial review of Indian freedoms by the Supreme Court, the government's regulation of expression has perhaps intensified. In April of 2011, the Ministry of Communications and Information Technology issued expansive regulations on internet communications.⁸⁶ Under the regulations, computer users and internet providers may not "host, display, upload, modify, publish, transmit, update or share any information that . . . is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging . . . or otherwise unlawful in any manner whatever."⁸⁷ The restrictions are so obviously broad and vague (for example, "grossly harmful," "hateful," and "disparaging") that government censors could find that almost every opinion falls within one of the prohibitions.

The regulations have the patina of constitutional authorization in that in one section they mimic Article 19(2) of the Constitution.⁸⁸ The regulations prohibit computer users from threatening the "unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or caus[ing] incitement to the commission of any cognisable offence."⁸⁹ In nearly identical fashion, Article 19(2) provides that expression can be restricted "in the interests of the 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."⁹⁰

Also in 2011, one state, Gujarat, where Mohandas Gandhi was born, banned a book on Ghandhi by Joseph Lelyveld, a Pulitzer-prize winning

84. S. Mitra Kalita, *Savita Bhabhi: A (Sex) Symbol of Free Speech?* WALL ST. J., Jan. 14, 2010, http://online.wsj.com/article/SB126327347865425871.html?mod=WSJINDIA_hpp_MIDDLELSMini.

85. *Id.* (internal quotation marks omitted).

86. *See generally*, Information Technology (Intermediaries guidelines) Rules, 2011, Gazette of India, section II(3)(i) (April 11, 2011) [hereinafter Information Technology Rules], *available at* [http://deity.gov.in/sites/upload_files/dit/files/GSR314E_10511\(1\).pdf](http://deity.gov.in/sites/upload_files/dit/files/GSR314E_10511(1).pdf).

87. *Id.* at § 3(2)(b).

88. *See* INDIA CONST. art. 19, § 2, *amended by* The Constitution (Sixteenth Amendment) Act, 1963.

89. Information Technology Rules, *supra* note 91, at § 3(2)(i).

90. INDIA CONST. art. 19, § 2, *amended by* The Constitution (Sixteenth Amendment) Act, 1963 (internal brackets omitted).

journalist.⁹¹ The book, *Great Soul: Mahatma Gandhi and his Struggle with India*,⁹² describes the close relationship between Gandhi and a German architect and has been interpreted to imply that Gandhi was bisexual, which the author, Lelyveld, denies is the implication of his reporting.⁹³ Regarding a letter from Gandhi to the architect, the New York Times article stated: “Gandhi expresses great fondness and yearning for Mr. Kallenbach [the architect] in the letters, telling him that his was the only portrait on Gandhi’s mantelpiece, opposite the bed, and that cotton wool and Vaseline were ‘a constant reminder’ of him.”⁹⁴ Especially around sexual matters, the banning of the book on Gandhi, the *Times* indicates, illustrates India’s conservatism and “highlights India’s highly circumscribed right to free speech,” where “officials frequently ban and censor books, movies, art and other works,” although books are usually not banned nationally.⁹⁵

However, in the case of the Gandhi book, India’s law minister, M. Veerappa Moily, found that “the book denigrates the national pride and leadership” and officials will consider banning it nationally.⁹⁶ In the book, “[t]he crux of the controversy seems to be the intersection of two subjects on which Indians have strong views: sexuality and Gandhi.”⁹⁷ To those two topics, religion should be added. In 1988, for example, India joined Muslim countries in banning *The Satanic Verses*,⁹⁸ by Salman Rushdie, a native of India.⁹⁹ The 2011 regulations stretch almost to a snapping point “reasonable restrictions” on free speech,¹⁰⁰ as provided in Article 19(2) of the Constitution.

The regulations are based on an information technology law passed in 2008, after terrorists based in Pakistan killed 163 people in Mumbai.¹⁰¹ The regulations ease government monitoring of the Internet, which might assist in identifying terror threats. But they also prescribe the content that must be banned on the Internet, such as expression that is “grossly harm-

91. Vikas Bajaj & Julie Bosman, *Book on Gandhi Stirs Passion in India*, N.Y. TIMES, March 31, 2011, <http://www.nytimes.com/2011/04/01/books/gandhi-biography-by-joseph-leyveld-roils-india.html>.

92. JOSEPH LELYVELD, *GREAT SOUL: MAHATMA GANDHI AND HIS STRUGGLE WITH INDIA* (2011).

93. See Bajaj & Bosman, *supra* note 96.

94. *Id.*

95. *Id.*

96. *Id.* (internal quotation marks omitted)

97. *Id.*

98. SALMAN RUSHDIE, *THE SATANIC VERSES* (1988).

99. See Sheila Rule, *Iranians Protest over Banned Book*, N.Y. TIMES, Feb. 16, 1989, <http://www.nytimes.com/1989/02/16/world/iranians-protest-over-banned-book.html>.

100. Vikas Bajaj, *India Puts Tight Leash on Internet Free Speech*, N.Y. TIMES, April 27, 2011, http://www.nytimes.com/2011/04/28/technology/28internet.html?_r=1&scp=1&sq=vikas%20bajaj%20Internet%20india&st=cse.

101. *Id.*

ful, harassing, [or] blasphemous.”¹⁰² Such content restrictions are usually unrelated to actions against terrorism.

The general secretary of the People’s Union for Civil Liberties, a New Delhi-based advocacy group, objected to the rules. He said, “What are we, Saudi Arabia? . . . We don’t expect this from India. This is something very serious.”¹⁰³ However, to answer the civil libertarian and place the Indian regulations in context, *Reporters Without Borders* rates Saudi Arabia 158 and India 131 for press freedom, out of 179 nations.¹⁰⁴ While India is not Saudi Arabia, the nations are not far apart in the rankings for their lack of protection for media freedom. No western or democratic nation is rated below India regarding press freedom.¹⁰⁵

Indians and citizens of other democracies reach very different conclusions when viewing the same government actions. What seems like relatively little expressive freedom to citizens in western democracies seems like a lot to Indians. In a chapter within a book generally praising the Indian Supreme Court, one contributor, a former Attorney General of India, while placing high value on press freedom, summarizes what seems like a defense of India’s censorship.¹⁰⁶ The author’s commentary is quoted at length because it amply illustrates that Indians vastly overstate the expressive freedoms they possess. In creating a rationale for freedom of the press, the author writes:

We rightly prize press freedom and should be vigilant in repelling encroachments, direct or indirect, on the exercise of this precious freedom. Freedom of the press is undoubtedly one of the basic freedoms in a democratic society based on the Rule of Law. None the less, freedom of the press is not an end in itself. It is the means to the attainment of a democratic society in which law and order prevail, there is good governance, transparency in administration, enforcement of accountability of the wielders of power, and where human dignity and other human rights are respected. Whilst we must vigorously defend this freedom against onslaughts from fanatics, one should not be fanatical about it and forget that freedom of the press entails social responsibility. The public function which belongs to the press makes it an obligation of honour to exercise this function with the fullest sense of responsibility.¹⁰⁷

102. Information Technology Rules, *supra* note 91, at § 3(2)(b).

103. Bajaj, *supra* note 105 (internal quotation marks omitted).

104. REPORTERS WITHOUT BORDERS, *supra* note 38. China, Iran, Syria, Turkmenistan, North Korea, and Eritrea are at the bottom for press freedom at 174–79, respectively. *Id.*

105. *See id.*

106. Sorabjee, *supra* note 23, at 354–55.

107. *Id.*

In one sense, the commentator writes nothing remarkable. But his comments become more significant when observing, compared with other democracies, the restrictive Indian practices on expression that result from this position.

Neither the original Article 19 of the Constitution, nor the First Amendment that revised Article 19, contained language on press freedom.¹⁰⁸ Ambedkar wrote that it was unnecessary to include press freedom in the Constitution because “the press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity.”¹⁰⁹ Ambedkar’s point is generally the position of the U.S. Constitution. That is, the press and individuals have equal First Amendment protection.¹¹⁰ However, compared with the U.S. Constitution, the Indian constitution provides fewer protections to everyone.¹¹¹

Some Indians thought that freedom of expression, contained in Article 19(1)(a), included freedom of the press. However, when the Indian Supreme Court decided as much in the newspaper cases, *Romesh Thapar* and *Brij Bhushan*, Parliament amended the constitution.¹¹² India’s supreme court had found that the press and citizens could not be subject to censorship for political speech.¹¹³ In response, Parliament, by amending the constitution, simply said that everyone, including the press, could be subject to censorship.¹¹⁴ Parliament rebuked the Court by ratifying the first amendment and broadened the government’s authority to censor all expression through “reasonable restrictions” for the “security of the State.”¹¹⁵

In 1958, the Indian Supreme Court decided *Express Newspapers v. Union of India*.¹¹⁶ Despite the absence in the constitution of a provision providing for press freedom, the Court held that press freedom was inherent in the free-speech-and-expression clause of section 19(1)(a) of the Constitution.¹¹⁷ The Court cited with approval *Romesh Thapar* and *Brij Bhushan*, the cases that provided press freedom.¹¹⁸ However, while the Court held that the press, like every citizen, possessed a constitutional

108. See INDIA CONST. art. 19, amended by The Constitution (First Amendment) Act, 1951, The Constitution (Sixteenth Amendment) Act, 1963, The Constitution (Forty-Fourth Amendment) Act, 1978.

109. Sorabjee, *supra* note 23, at 335 (quoting the Constituent Assembly Debates, Vol. VII, pages 714-16).

110. *Id.*

111. Compare INDIA CONST. art. 19 with U.S. CONST. amend. I.

112. See INDIA CONST. art. 19, § 1, amended by The Constitution (First Amendment) Act, 1951.

113. See *Romesh Thappar v. Madras*, (1950) 1950 S.C.R. 594 (Ind.); *Brij Bhushan v. Delhi*, (1950) 1950 S.C.R. 605 (Ind.).

114. *C.f.* INDIA CONST. art. 19, §§ 2-6.

115. INDIA CONST. art. 19, § 2, amended by The Constitution (Sixteenth Amendment) Act, 1963.

116. *Express Newspapers v. Union of India*, A.I.R. 1958 S.C. 578 (Ind.).

117. *Id.* at 622.

118. *Id.* at 718, 726.

right to expression, the Court did not find that the government could not regularly censor the press and citizens.¹¹⁹

While India has moved toward becoming an economic and political power, its ambivalence over free expression continues to cause significant instability. To some extent, internet firms such as Google and eBay supported the 2008 law and 2011 regulations (mandating content restrictions) because they limited the firms' liability so long as the firms did not intentionally post content that was later found to have violated the regulations.¹²⁰ In April of 2011, the firms' representative said that the "new I.T. Act (2008) is, in fact, a large improvement on the old one."¹²¹ However, the companies' satisfaction with India's policies on expression was presumably short lived.

In early December 2011, the Indian Communications minister, Kapil Sibal, asked Internet companies and social media sites to screen content using human interceptors to remove "disparaging, inflammatory or defamatory content before it goes online."¹²² Such a task is virtually impossible and would once again make the companies liable for content that their users post. The Minister's request was so broad that Internet companies could not abide by it, even with technological filters, and would have to restrict perhaps most Internet information in an attempt to comply.¹²³ Worse for the Internet companies, in late December 2011, a court in Delhi ordered 22 of them to remove "anti-religious" and "anti-social" content from their sites.¹²⁴ The companies included Google and Facebook. The government's restrictions on the 22 internet companies were apparently spurred by one individual's complaint pursuant to his right to engage in public interest litigation.¹²⁵ On March 4, 2012, Google was in a Delhi court arguing that the government's "blanket ban and monitoring of material" violates the freedom of speech guarantee of Article 19 of India's Constitution.¹²⁶

119. *See id.* at 24.

120. Bajaj, *supra* note 105.

121. *Id.* (internal quotation marks omitted)

122. Heather Timmons, *India Asks Google, Facebook to Screen User Content*, N.Y. TIMES, Dec. 5, 2011, <http://india.blogs.nytimes.com/2011/12/05/india-asks-google-facebook-others-to-screen-user-content/>.

123. *Id.*

124. John Ribeiro, *Report: Indian Court Orders 22 Websites to Remove Offensive Content*, PC WORLD (Dec. 24, 2011, 10:40 AM) (internal quotation marks omitted), http://www.pcworld.com/article/246984/report_indian_court_orders_22_websites_to_remove_offensive_content.html.

125. *See* Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 837-50 (2008) (discussing a relaxed standing requirement in public interest litigation in India).

126. Press Trust of India, *Blanket Ban, Contents' Monitoring Against Indian Constitution: Google, GREATER KASHMIR* (March 5, 2012), <http://www.greaterkashmir.com/news/2012/Mar/5/blanket-ban-contents-monitoring-against-indian-constitution-google-50.asp>.

IV. CONSTITUTIONAL EXPRESSION IN INDIAN SOCIETY

With ninety-eight amendments in its sixty-two years¹²⁷ and a relatively flexible amendment process,¹²⁸ accompanied by Supreme Court decisions that are often impenetrable and vague, the Indian Constitution does not seem as though it is well positioned to provide a stable structure for expressive freedom. Nonetheless, the Constitution, albeit malleable, is a respected institution in India. The Court's decisions provide precedents, although the precedents, of course, are subject to the flexible constitutional amendment process. Whether the Constitution provides enduring legal precedents may be beside the point. Its foremost contribution might be that it is a force that exists outside India's religious, political, and caste systems. One commentator has described the Constitution as having three strands. They serve to "enhanc[e] national unity . . . establish[] the spirit of democracy, and foster[] a social revolution to better the lot of the mass of Indians."¹²⁹ Civil liberties were not included.

In another description, "the freedom of conscience, profession, practice, and propagation [in the Constitution] are balanced against concerns about social justice for women and lower castes," a constitutional balance that has been attributed to Ambedkar.¹³⁰ Still, Ambedkar, in shaping India's Constitution, was focused more on social justice and equality than on other constitutional values, such as civil liberties. When Ambedkar proposed a separate electorate because he did not trust that majorities would elect Dalits,¹³¹ Gandhi pledged to fast to death to resist.¹³² Ambedkar settled for greater Dalit representation, without a separate electorate. Thus, under another view, "Ambedkar's greatest impact on the **Constitution of India** was the allowance for positive, or compensatory discrimination in favor of the Dalits."¹³³ The argument between Gandhi and Ambedkar was over how to define Indian society, not over law or specific constitutional provisions.¹³⁴ That argument continues—the Indian Constitution is more an adjunct to it than it is a central component.

127. See THE CONSTITUTION (AMENDMENT) ACTS, <http://indiacode.nic.in/coiweb/coifiles/amendment.htm> (last visited Jan. 28, 2014).

128. See INDIA CONST. art. 368.

129. Liang, *supra* note 13, at 435.

130. Laura Dudley Jenkins, *Diversity and the Constitution in India: What Is Religious Freedom?*, 57 *DRAKE L. REV.* 913, 916 (2009).

131. Nicole Lillibridge *The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States*, 13 *WM. & MARY BILL RTS. J.* 1301, 1312 (2005).

132. Ammu Kannampilly, *Starving for Protest in India*, *YAHOO! NEWS: SINGAPORE*, June 15, 2011, available at <http://sq.news.yahoo.com/starring-protest-india-031849480.html>.

133. Lillibridge, *supra* note 136, at 1313.

134. *Id.* at 1312.

A. More Society and Less Constitution

Indian constitutional free speech developed within a social context. Despite the Supreme Court's literal reading of the Constitution in *Romesh Thapar* and *Brij Bhushan*, free speech under the Indian Constitution emanated from a social/cultural tradition and religion, including during the period before the adoption of the Constitution in 1950:

The voyage to safeguard free speech did not have an abrupt beginning with the Constitution of India. In the era of India's struggle for independence from the British rule, right to free speech was given enormous importance by the national leadership. . . . Political trends and groups otherwise critical of each other and often at opposite ends of political and ideological spectrum vigorously defended each others' civil rights. The Moderates defended the Extremist leader[']s . . . right to speak and write what he liked. Further, the Karachi Convention of the Congress in 1931, passed a resolution on Fundamental Rights which, *inter alia*, guaranteed right of free expression of opinion through speech and Press. Such an illustrious history ensured that freedom of expression became a fundamental right in the Constitution.¹³⁵

Another commentator, Sardar Hukum Singh, believed the restrictions in Article 19(2) made free expression dependent on one political party.¹³⁶

The dependency of the Constitution on politics was apparent from 1975 to 1977, during one State of Emergency, when Indira Gandhi imprisoned political opponents and restricted civil liberties and freedom of the press.¹³⁷ Although no censorship had been imposed during Emergencies in 1962 and 1971, one of Gandhi's censors determined: "Nothing is to be published that is likely to convey the impression of a protest or disapproval of a government measure."¹³⁸ In India, constitutional law was highly dependent on social conditions.

The structure of the original Indian Constitution makes the restrictions on expression more dependent on social and religious considerations than on legal interpretation. The Constituent Assembly wanted to select a constitutional structure based on the American or the Irish model.¹³⁹ The U.S. Constitution provided generally for civil rights and liberties, which

135. Sarkar, *supra* note 32, at 70–71 (footnotes omitted).

136. *Id.* at 72.

137. Sorabjee, *supra* note 23, at 344 (citing SOLI J. SORABJEE, *THE EMERGENCY CENSORSHIP AND THE PRESS IN INDIA, 1975–77* 13 (1977)).

138. Sorabjee, *supra* note 23, at 335.

139. See, e.g., Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 *BERKELEY J. INT'L L.* 216, 220–21 (2010).

would be “broadened or constricted by judges.”¹⁴⁰ The Indian Constitution contained a “proviso” approach, where rights would be more precisely limited through a constitutional provision.¹⁴¹ The proviso in the Indian Constitution—broad authority to restrict expression under Article 19(2)—contained only broad prohibitions on speech, such as restrictions to ensure “sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, [or] decency or morality . . . [and to avoid] defamation or incitement to an offence.”¹⁴² The government would be required to enact legislation to tell the citizens what specific expression fell within the broad restrictions of Article 19(2). And that is what the Indian government has done regularly since the ratification of the Constitution.

Consistent with a focus on a more complete social and cultural national structure, the Indian Constitution contains both positive and negative rights, including within Article 19, which governs speech and expression.¹⁴³ Ironically, negative rights obtain from the promise in Article 19(1)(a) that all citizens possess free speech and expression, a positive statement: “All citizens shall have the right . . . to freedom of speech and expression.”¹⁴⁴ Article 19(1)(a) is limited by 19(2), which contains the exceptions to expression possessed by the citizens (such as the need for state security).¹⁴⁵ More simply than India's Article 19, the First Amendment of the U.S. Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁴⁶

B. Expression within the Indian Conception

The distinctions between India's Article 19 and America's First Amendment illustrate immense differences in the nations' approaches to government. America and India start from two different premises. Americans distance themselves from government, prohibiting Congress from making any law abridging speech. In contrast, Indians' wait for the government to act before determining what speech and expression they possess. America's First Amendment operates under the presumption that Congress will do nothing to abridge freedom of speech. India's Article 19

140. *Id.* at 221 n.13.

141. *See id.* at 218–20.

142. INDIA CONST. art. 19, § 2, *amended by* The Constitution (Sixteenth Amendment) Act, 1963 (internal brackets omitted).

143. *See, e.g.,* INDIA CONST. art. 19, *amended by* The Constitution (First Amendment) Act, 1951, The Constitution (Sixteenth Amendment) Act, 1963, The Constitution (Fourth-Fourth Amendment) Act, 1978.

144. INDIA CONST. art. 19, § 1.

145. INDIA CONST. art. 19, § 2, *amended by* The Constitution (First Amendment) Act, 1951, The Constitution (Sixteenth Amendment) Act, 1963.

146. U.S. CONST. amend. I.

provides that citizens will have free expression only if in the first instance the government does not assert an exception to free expression. Indians accept what remains after the government has limited the avenues of expression.

The U.S. government has never sustained a prior restraint or punishment of a newspaper following publication (not including private actions, such as defamation).¹⁴⁷ The same result does not obtain in India. This is not necessarily to say that the American and Indian constitutions, specifically, are the reasons for the different results.

Essentially, the Indian Constitution includes both the social-aspirational vision of the Directive Principles, one of positive rights, against the Fundamental Rights, a set of negative rights or limits on government power. . . . The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights, and was modeled in great part on the American Bill of Rights.¹⁴⁸

The American and Indian Constitutions serve different national interests. Americans and Indians define free speech and expression differently, not only in their constitutions but also within their societies. Through their constitution, Americans want separation from the government. Through their constitution, Indians want a deeper connection to their government.

V. CONCLUSION: DEMOCRACY, BUT A DIFFERENT KIND OF FREEDOM

While at odds with the approach to expression of most democracies, the Indian Constitution's restrictions on speech may reflect not only societal preferences but also national identity. India views itself as a liberal democracy,¹⁴⁹ but it confronts religious, cultural, and social conflicts that might be more acute than those currently in other democratic nations. In many respects, India's approach to its conflicts is not aberrant. If America confronted the class, caste, and religious conflicts in India, the U.S. Supreme Court might find compelling governmental interests in addressing the social ills. In *Grutter v. Bollinger*,¹⁵⁰ for example, the Court reaffirmed affirmative action, although perhaps limiting its life to 25 or fewer years.¹⁵¹ India's social conflicts may be so well entrenched among so

147. See *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931); *New York Times v. U.S.* 403 U.S. 713 (1971).

148. Mate, *supra* note 146, at 224.

149. Mehta, *supra* note 5, at 312.

150. 539 U.S. 306 (2003).

151. *Id.* at 310.

many people that it is not possible to determine how long it will be before India is more like western democracies, if ever.

A. A Liberal Democracy and a Conservative approach to Constitutionalism

In striving for liberal democracy, Indian courts may decide cases using liberal, democratic language as they produce decisions that are not fully protective of expression or equality. One commentator suggests that:

[T]he justificatory foundations of the Indian Constitution, and the practices of interpretation that have grown up around it, are based on something of an illusion. . . . There has been an attempt, in official self-presentation, to minimize the potential conflict between the claims of various comprehensive doctrines in society (religions) on the one hand and the liberal and ameliorative aspirations of the Constitution on the other.¹⁵²

India's overriding sensitivity to religion has often made short shrift of free speech. Religion is protected against offensive speech.¹⁵³ Potential religious converts are protected from persuasive speech.¹⁵⁴ Voters are protected against speech that appeals to religion.¹⁵⁵ There is a myth in India "that there is very little conflict between vying comprehensive doctrines in civil society and the requirements of liberal constitutionalism."¹⁵⁶ For the moment, from the perspective of a liberal constitution or democracy, India's protection of religion, although *protection* might not be the proper characterization, cannot be squared with India's restrictions on expression. The protection for religion at the expense of expression is represented in India's Penal Code:

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.¹⁵⁷

152. Mehta, *supra* note 5, at 318.

153. *Id.* at 330.

154. *Id.*

155. *Id.*

156. *Id.* at 318.

157. Indian Penal Code § 295, No. 45 of 1860, INDIA CODE (2009), available at http://www.liiofindia.org/cgi-bin/disp.pl/in/legis/cen/num_act/ipc1860111/ipc1860111.html?stem=0&synonyms=0&query=295%20&%20penal.

Obviously broad, vague, and comprehensive, and covering all kinds of fundamental expression (“words” and “signs”), India’s Penal Code does not violate Article 19 of the Constitution, which promises “freedom of speech and expression.”¹⁵⁸ Because “most attempts to insult a religion have a tendency to disrupt public order; and since our Fundamental Rights to free expression under Articles 19 and 25 can be regulated on grounds of maintaining public order, any ‘insult’ to religion can therefore be regulated.”¹⁵⁹

In fact, most law in India must give way to religion. In providing what appears to be civil liberties—albeit not so many in practice—Article 25 is an adjunct to Article 19. Article 25 provides various liberties, but it permits the government to regulate religious practices to ensure that one person may not offend another person’s religious sensitivity:

- (1) Subject to public order, morality and health . . . all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
- (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
 - (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.¹⁶⁰

In the “Hindutva judgments,” comprising seven decisions dealing with criminal charges against political candidates for appealing to Hindutva,¹⁶¹ the Supreme Court upheld the constitutionality of a law that prohibited candidates from appealing to voters on religious grounds.¹⁶²

The Court made no attempt to reconcile its decisions with liberal democracy. In one of the seven cases, *Ramesh Yeshwant Prabhu v. Shri Prabhakar Kashinath Kunte*,¹⁶³ the Court wrote: “Under the guise of protecting your own religions, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories.”¹⁶⁴ In a companion case, *Manohar Joshi v. Nitin Bhaurao Patil*,¹⁶⁵ the Court

158. INDIA CONST. art. 19, § 1(a).

159. Mehta, *supra* note 5, at 331. Article 25 of the Indian Constitution grants freedom of conscience and free profession, practice and propagation of religion. INDIA CONST. art. 25.

160. INDIA CONST. art. 25, §§ 1-2(a).

161. RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT 22 (2010).

162. *See id.*

163. A.I.R. 1996 S.C. 1113 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=10197>

164. *Id.* at 14.

165. A.I.R. 1996 S.C. 796 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=10192>.

found that “[u]nder the guise of protecting Hindu religion/Hindutva the said cassettes attach [sic] other religions and whips [sic] up lowered instincts and animosities.”¹⁶⁶ The Supreme Court made no pretense of harmonizing the Indian Constitution and liberal democracy. In *Manohar Joshi*, the Court wrote: “*The concept of secular democracy is totally eliminated*. It generates powerful emotions by appealing to the Hindu voters to vote for the candidates of the alliance on a false impression given to voters that only the alliance and its candidates can protect Hindu religion.”¹⁶⁷

The Indian Constitution and Supreme Court recognize the value of free expression, but they do not provide as much protection for civil liberties as do of the institutions of other democratic nations. British colonialism may have led to respect for the rule of law,¹⁶⁸ but it did not lead to full implementation of the civil liberties usually associated with the rule of law in democracies. Through colonialism (1813–1947), the founding of India (1947), the ratification of the Constitution (1950), the Emergency Act of 1975–77, and relatively ample regulations on expression on the internet today, India has retained formal controls and ingrained in society the need to preserve security ahead of civil liberties. In that regard, India is perhaps like all nations, but its balancing leans heavily toward security.

B. Constitutional Evolution, but Similar Results

Indian constitutional values may be evolving, with greater emphasis on the substantive Fundamental Rights contained in the Constitution. However, the results might not be different from those in past decades. Including during the 1975–77 Emergency, the Supreme Court has been reluctant to value and compare security and civil liberties. But the Court may be breaking with that tradition and placing a slightly higher value on Fundamental Rights:

The Supreme Court's jurisprudence in terror-related adjudication, and in cases involving national security concerns more broadly, shows a consistent narrow conceptualization of its role, an approach of broad deference to the legislature, and a methodology of undertaking a limited scrutiny of provisions in testing them against Fundamental Rights. The Court prefers decision-making on statutory rather than constitutional grounds; and focuses on procedural compliance rather than substantive review. . . . This minimalist

166. *Id.*

167. *Id.* (emphasis added).

168. HUSSAIN, *supra* note 48, at 139.

conception of the Court's role, and its corresponding approach and method of adjudication are however at odds with the general adjudicatory practices of the Court with respect to Fundamental Rights review.¹⁶⁹

In 2007, for example, in *Anuj Garg v. Hotel Association of India*,¹⁷⁰ the Supreme Court was confronted with a challenge to a state law from 1914 that prohibited all women (and men under 25) from working in businesses that served liquor.¹⁷¹ That pre-constitutional law was preserved through Article 372 of the Constitution¹⁷² and was challenged under Articles 14,¹⁷³ 15,¹⁷⁴ and 19¹⁷⁵ of the Constitution. In deciding *Anuj Garg*, the Court borrowed its reasoning from *Frontiero v. Richardson*¹⁷⁶ and *U.S. v. Virginia* (“*VMI*”).¹⁷⁷ In *Frontiero*, the U.S. Supreme Court had invalidated an administrative rule that provided automatic benefits to wives, but not husbands, of soldiers.¹⁷⁸ In *VMI*, the Court invalidated a college admissions rule that prohibited female students from matriculating at an all-male military college.¹⁷⁹

Although *Frontiero* and *VMI* did not adopt the strict scrutiny standard in sex/gender discrimination cases,¹⁸⁰ the Indian Supreme Court in *Anuj Garg* concluded that strict scrutiny should be applied when “protective discrimination” is at issue.¹⁸¹ The Court considered whether the protective legislation, prohibiting all males under 25 and all females from working in places that sell liquor, could be justified on grounds of “security.”¹⁸² The Court said it could not.¹⁸³ Qualified males under 25, on whose behalf the case was brought, could work if they were at least 22.¹⁸⁴ According to

169. Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21(1) NAT'L L. SCH. OF INDIA REV. 51, 86–87 (2009).

170. *Anuj Garg v. Hotel Ass'n of India*, No. 5657 Civ. 12781 (June 12, 2007) (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=29971>.

171. *Id.*

172. INDIA CONST. art. 372 (“Continuance in force of existing laws and their adaptation”).

173. INDIA CONST. art. 14 (“Equality before law”).

174. INDIA CONST. art. 15 (“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”).

175. INDIA CONST. art. 19 (“Protection of certain rights regarding freedom of speech, etc.”).

176. 411 U.S. 677 (1973) (plurality opinion).

177. 518 U.S. 515 (1996).

178. *Frontiero*, 411 U.S. 677, 678–79.

179. *Virginia*, 518 U.S. 515, 519.

180. *See id.* at 555 (“[A]ll gender-based classifications today’ warrant ‘heightened scrutiny.’”) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994)); *Frontiero*, 411 U.S. at 682 (agreeing that “classifications based upon sex . . . are inherently suspect, and must therefore be subjected to close judicial scrutiny”).

181. *Anuj Garg v. Hotel Ass'n of India*, No. 5657 Civ. 12781 (June 12, 2007) (India).

182. *Id.*

183. *Id.*

184. *Id.*

one reading of the decision in *Anuj Garg*, the Court “held that in the hierarchy of norms, Fundamental Rights are of greater salience than social goals like providing security, which cannot be balanced against the former.”¹⁸⁵ While constitutional values in India may be evolving, the reach of *Anuj Garg* may not be long. The “security” at issue in *Anuj Garg* concerned working conditions and opportunities for younger Indians, not internal religious conflict or national conflict with Pakistan.

Formally, Articles 19 and 358 of the Constitution permit many exceptions to free expression, as well as laws that ban expression upon a “Proclamation of Emergency.”¹⁸⁶ Despite the Supreme Court’s estimation that civil liberties are protected by the Constitution—and they are generally recognized—the practices of Indian society are often different from the broad rules announced by the Indian Supreme Court. All expression in India, whether in newspapers, movies, or political advertisements, is subject to numerous limitations, mainly on grounds concerning security, religion, and chastity. From colonial times to the founding of the nation and the ratification of the Constitution, Indian society has been more comfortable favoring societal control over individual civil liberty, including freedom of expression.

185. Satish & Chandra, *supra* note 179, at 55.

186. INDIA CONST. art. 358 (allowing suspension of provisions of article 19—“Protection of certain rights regarding freedom of speech, etc.”—during emergencies).