

Freedom of Expression

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At the outset some fashionable fallacies need to be dispelled. Freedom of expression is not an exclusive western value nor is it a luxury of the affluent. Thanks to the constitutional guarantee of freedom of expression and the freedom of the press in India, numerous under-trial prisoners languishing for years in jails, several inmates of asylums and care homes, labourers working under horribly unhygienic conditions in stone quarries and brick kilns and countless children forced into hazardous employments, have obtained some ameliorative relief and were not consigned to the oblivion.

Freedom of expression is necessary for the attainment of truth, for individual fulfilment, for maintaining the balance between stability and change in society and for successful functioning of democracy. Indeed it is one of the most cherished values of a free democratic society whose basic 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. Hence the necessity for adequate information and discussion, aided by the widest possible dissemination and reception of information and opinions from diverse and antagonistic sources.¹ Right conclusions are more likely to emerge from a multitude of voices than through one voice authoritatively preaching the official gospel.

Courts have recognised the vital importance of freedom of expression for the effective functioning of democratic parliamentary institutions. The Supreme Court of Canada in 1938, when there was no Charter of Rights in Canada, deduced freedom of discussion from the preamble of the British North America Act which stated that the Canadian Constitution was "similar in principle to that of the United Kingdom". The Court reasoned that since the United Kingdom is a parliamentary democracy the right of free discussion of public affairs which is "the breath of life for parliamentary institutions" was available to Canadian citizens as it was to the citizens of the United Kingdom".²

A similar judicial exercise has been done recently in 1992 by the High Court of Australia. There is no judicially enforceable Bill of Rights in Australia and freedom of expression is not a constitutionally guaranteed freedom. None-the-less the High Court spelt out freedom of expression as a constitutional right by implication from the provision in the Australian Constitution which provides for a system of responsible and representative government. Chief Justice Mason, speaking for the majority, held that in the absence of freedom of expression and communication representative government would fail to achieve its purpose, namely, "government of the people through their elected representatives", because government would cease to be responsive to the needs and wishes of the people.³

The Supreme Court of India in striking down the restrictions placed on the press by the mechanism of levy of steep import duty on newsprint observed in the celebrated case of *Bennett Coleman*:⁴ "Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today when the weapons of propaganda are so strong and so subtle".⁵

Freedom of expression if it is to be meaningful must have a capacious content. It cannot be limited to ideas and doctrines which are accepted and acceptable but must extend to those that "offend, shock or disturb the State or any sector of the population".⁶ It must accord to the thought we hate an accommodation as hospitable as that it assures to the orthodoxies of the day. This precept is easy to preach but one of the most difficult to practice.

Freedom of expression undoubtedly is one of the most basic human rights and is essential for safeguarding and promoting other human rights. But, if I may venture to add, it is not an end in itself, it is the means to attainment of a society in which law and order prevails and where other human rights and human dignity are respected. Whilst we must vigorously defend this precious freedom against onslaughts from fanatics we should not be fanatical about it. We must recognise that freedom of expression cannot be absolute and unlimited. There are situations which may warrant withholding of news and information for a temporary duration. For example: movements of military forces during a war;⁷ or details of a rescue operation to free hostages held captive by terrorists; or reports of communal or racial carnage whose publication at a particular point of time is certain to aggravate tension between the concerned races or communities and result in violent conflict.

Regional and international human rights instruments recognise the need for curtailment of freedom of speech and expression in certain cases. Article 10 of the European Convention on Human Rights 1950 (ECHR) which protects the right to freedom of expression permits restrictions as are prescribed by law and are necessary in a democratic society. The heads of restrictions are: interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Quite a long list of restrictions!

Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR) also recognises that freedom of expression may be subject to certain restrictions such as are provided by law and are necessary for respect of the rights or reputations of others and for the protection of national security or of public order (*ordre public*), or of public health or morals.

The American Convention on Human Rights 1969 (ACHR) which guarantees freedom of expression by Art 13 also provides for restrictions on the exercise of free speech in order to ensure (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.

Article 9 of the African Charter on Human and Peoples' Rights, (Nairobi, 1981) guarantees to every individual the right to receive information as also the right to express and disseminate opinion within the law. This freedom along with others "shall be exercised with due regard to the rights of others, collective security, morality and common interest". (Art 27(2)).

The ICCPR (Art 20) and the American Convention (Art 13(5)) expressly prohibit any propaganda for and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Freedom of speech and expression is guaranteed as a fundamental right by Art 19(1)(a) of the Constitution of India (see Appendix A). In a series of decisions, the Supreme Court of India has ruled that Freedom of the Press is implicit in the guarantee of freedom of speech and expression, which like other fundamental rights guaranteed by the Indian Constitution, is not absolute. It can be restricted provided the restriction has the authority of law to support it, falls within one or more heads specified in Art 19(2) and is not unreasonable. In other words, the restriction must not be excessive or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.⁸ Validity of the restriction imposed by a law is justiciable. Courts in India exercising the power of judicial review can and have invalidated laws and measures which do not satisfy the above requirements.⁹

Once it is accepted that speech can in some cases be restricted some form of censorship is inevitable. The real problem is about the permissible limits of restriction on freedom of expression, in striking the right balance between preservation of free speech and the legitimate interests of society. The difficulty is not in formulating this proposition conceptually, but in translating it into practice because there are varying perceptions about the function of free speech and there is no uniformity about the societal values and community interests which need to be protected from the "onslaught" of free speech.

Besides, what impels censorship is a complicated network of causes, one of which is psychological viz., the compulsive need to prevent unpalatable utterances and images. Another is political or religious vested interest in preserving the status quo. There is also the social and moral factor motivated by a fervent desire for the preservation of a "clean" society. Last but not the least of the grounds for censorship is the phantom of national security.

Under the shield of laws ostensibly designed to protect the security of the State countless sins of repression have been committed. The axe has fallen on several innocent publications whose only crime was to strongly dissent from government's policy and criticise the current rulers for their lapses.

The offence of sedition exists in several countries and its abuse is rampant and persistent. In the hey day of British colonialism sedition was construed by the Privy Council in the case of *Tilak*¹⁰, *Wallace-Johnston*¹¹ and *Sadashiv Bhalerao*¹² to include any statement that caused "disaffection" namely, exciting in others certain bad feelings towards the government even though there was no element of incitement to violence or rebellion. The Supreme Court of India in the case of *Kedar Nath*¹³ dissented from the Privy Council decisions. It held that the gist of the offence of sedition under s. 124A of the Indian Penal Code is incitement to violence or the tendency to create public disorder by words spoken or written and does not cover mere criticism of government however strong or vigorous. Otherwise the section would be violative of the fundamental right of freedom of expression guaranteed by the Constitution.

The same liberal trend is reflected in some judgments of courts in Africa. The Court of Appeal (Enugu Division) in Nigeria invalidated the relevant sections of the Criminal Code dealing with seditious publications because they did not provide for a defence of truth and could lead to a conviction even in the absence of any evidence that the publication was likely to lead to a break-down in public order. In the memorable words of Olatawura JCA: "We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. . . . To retain s. 51 of the Criminal Code, in its present form, will be a

deadly weapon to be used at will by a corrupt government or a tyrant . . . Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose".¹⁴

In Uganda, the editor and the writer of an article which alleged that the failure to appoint indigenous African Ugandans to the High Court bench was essentially based on tribal prejudice were charged with sedition and detained under emergency regulations. The Chief Magistrate, Mohammed Saied, held that the law of sedition does not "encourage the creation of a servile press, but a press which possesses perfect freedom of speech so long as it does not deliberately deteriorate into a malignant abuse . . .".¹⁵ He pointed out that all of the judges, other than the Chief Judge, were non-African drawn from different parts of the Commonwealth, and since the policy of Africanisation was a matter of public concern the delay in its implementation gave rise to a reasonable grievance. He ruled that although the language used may be objected to if redress is sought *bona fide* that would not be seditious and courageously acquitted the accused.

The High Court of Peshawar in 1958¹⁶ struck down the conviction of the accused for inciting disaffection by calling the government a "government of thieves" because such criticism could not be construed as encouraging the use of force or violence. The Court emphasised the importance of public discussion of the misdeeds of government officials in a democratic society.

The Privy Council, in a recent decision from the Caribbean,¹⁷ displayed a robust approach in allowing the appeal of the editor of a local newspaper in Antigua who was convicted because his article was said to have the effect of undermining public confidence in the conduct of public affairs. Under the Constitution of Antigua freedom of expression could be restricted, *inter alia*, under the head of public order. In the opinion of the Privy Council, a statutory provision which criminalised statements likely to undermine public confidence in the conduct of public affairs, as distinct from undermining public order, was to be viewed "with utmost suspicion" because any attempt to stifle or fetter criticism of those who hold office in government and are responsible for public administration "amounts to political censorship of the most insidious and objectionable kind".

Unfortunately the talismanic invocation of the mantra of "national security" by the executive not infrequently generates timorousness in our judicial sentinels leading to an attitude of undue deference to governmental claims. Fortunately, judges who are more sensitive to the value and function of free speech in a democratic society, adopt a different approach. They believe with the great Sir Maurice Gwyer that "hard words break no bones"¹⁸ and make due allowance for the emotive invectives which are the stock in trade of the demagogue or the passionate preacher provided there is no tendency to disrupt public order.

It is not suggested that courts should lightly dismiss considerations of national security. The point is that judges should not regard the executive's ipse dixit and the oft-repeated bald assertions of danger to national security as papal dogmas of infallibility but should view them with searching scepticism because history and experience have shown that these concerns tend to be highly exaggerated and are non-existent in some cases. Take the case of the wholesale evacuation and relocation of American citizens of Japanese descent on the West Coast in the USA during World War II.

Fred Korematsu, a native born American citizen of Japanese ancestry was convicted for being in a place from which all persons of Japanese ancestry were excluded pursuant to an Exclusion Order issued by Commanding General J L DeWitt. The constitutionality of the action was upheld by the United States Supreme Court and Korematsu's conviction was affirmed.¹⁹ Korematsu petitioned United States District Court, ND California in 1984 for a writ of *coram nobis* to vacate his 1942 conviction on the grounds of governmental misconduct. During the hearing of the case some horrific facts were brought out.

The Commission of Wartime Relocation and Internment of Civilians established in 1980 by an act of Congress unanimously found that military necessity did not warrant the exclusion and detention of ethnic Japanese and there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt. The Commission, which was composed of former members of Congress, the Supreme Court and the Cabinet as well as distinguished private citizens, concluded that "broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership". As a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry". In the course of the hearing it was established that several Department of Justice officials had pointed out to their superiors and others the "wilful historical inaccuracies and intentional falsehoods" contained in the DeWitt Report. Worst of all, government "knowingly withheld information from the courts when they were considering the critical question of military necessity" and provided misleading information in papers before the court. Significantly the government acknowledged its concurrence with the Commission's observation that "today the decision in Korematsu lies overruled in the court of history".

Judge Patel memorably concludes: "Korematsu remains on the pages of our legal and political history. . . . As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect citizens from the petty fears and prejudices that are so easily aroused".²⁰

This caution should always be uppermost in judicial minds when the court is confronted with formidable and imperious claims of national security.

It also must not be forgotten that at times security of the State is equated with the security of the ruler or the leader. It happened in India in June 1975 when a fraudulent emergency was declared by Mrs Indira Gandhi. Under the Indian Constitution one of the grounds for declaration of emergency is threat to the security of India. Somehow those at the helm of affairs read or construed security of India as "security of Indira". The consequence was temporary demise of democracy in India till emergency was revoked in March 1977 by the succeeding Morarji Desai government.

Danger to national security should not be in the realm of hypothetical possibilities. To justify suppression of freedom of expression and other associated freedoms what is required is a real likelihood of danger, a strong probability.

This is not a quixotic prescription. For example, the Israeli judiciary has not permitted freedom of expression to be held hostage to claims of national security despite the fact that Israel faces a real and continued threat to its security. In the landmark case of *Schnitzer* decided in 1988 the Court nullified the chief military censor's order prohibiting the publication of an article which criticised the Director of the Israeli Intelligence Service, Mossad. The Court ruled: "In publishing criticism of the functioning of the Director no proximate certainty had been created of a serious threat to state security; it might have been a remote possibility, but this is not the standard to be considered in our legal system. . . . A free society cannot exist without a free press. Thus, the press must be allowed to fulfil its role; publication of newspaper articles should be prohibited only where there is proximate certainty that state security is under serious threat".²¹

Another vexed question is whether hate speech can be suppressed and criminalised. The answer to this question would depend upon our understanding of what hate speech means. Broadly speaking hate speech is any expression that stigmatises a person as lacking in integrity or ability, unworthy of respect and dignity and unfit for a place in society because of the person's race, religion, creed or colour. There can be no denying that words can hurt badly, the injury caused by them can be very severe and painful. The European Commission of Human Rights in *Gay News v United Kingdom*²² recognised the need to protect the right of citizens not to be offended in their religious feelings by publications.

Should this protection take the form of proscription of expression and its criminalisation? I think not. Hurt or injury to feelings is a highly subjective matter. Whose feelings are to be taken into consideration? No doubt, judicial decisions have emphasised that in judging the effects of a speech or a writing the standards to be employed must be of reasonable human beings of ordinary common sense and sensibilities and not of those who scent hurt, humiliation and hostility in every adverse and critical point of view. But in practice how is one to distinguish a fanatic from the ardent believer and the devout? Indeed the more one is convinced of the everlasting truth of his or her beliefs, the greater is the hurt that will be felt.

A Christian is sure to be offended if he is told that Jesus was not divine or that the Revelation did not end with him but there is a later messenger of God, "Mahomet". A Muslim is bound to be outraged by the doctrine that Mahomet was only one in the line of the prophets and has been succeeded by another prophet viz Bahauulla who is a later manifestation of God and the founder of the Bahai religion. Likewise a Bahai would be most hurt if in the course of a religious debate Bahauulla who claims to symbolise the second return of Christ is described as a deluded person. The feelings of Catholics will be certainly injured if the doctrine of papal infallibility and their belief in the Immaculate Conception was portrayed as fairy tales. And Protestants would be no less hurt if Henry VIII is described as an over-sexed monarch rather than the Defender of the Faith. And what about atheists and agnostics? Are their feelings not injured if they are described as wicked persons for whom a special place has been reserved in Dante's eternal inferno?

Furthermore, in any movement for religious or social reform, feelings of the persons who are keen to maintain the existing order and orthodoxies are bound to be hurt. Many practices supposed to be sanctioned by religion such as untouchability, sati (burning of widows in the funeral pyre after their husband's death), stoning to death as a punishment for adultery, would be rightly condemned by reformers. It must be remembered that to bring about reforms and

changes, especially where deep-rooted practices and prejudices are prevalent, it may be necessary to administer a shock by having recourse to expression which is not only trenchant but may be insulting. That would certainly be injurious to the feelings of those who adhere to these practices but certainly would not be a legitimate ground to proscribe such expression because otherwise it would be impossible to effect any reforms.

Laws designed to prevent expression which is hurtful would suffer from vagueness and the tests for their application would usually be lacking in precision. Freedom of expression cannot be made dependent upon such subjective elements which would play a dominant role in the law's enforcement. There would be serious difficulties in enforcing such laws. The ineffective implementation of the Prevention of Incitement to Racial Hatred Northern Ireland Act of 1970 is an instance in point.

Moreover, criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression.²³ Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.

Besides, there is a grave danger of minority regimes misusing hate speech laws against the majority. This has happened in India during the British colonial rule and also in South Africa where these laws were invoked by the minority white regime to suppress the protests and dissent of the majority population.

On balance, advocacy of objectionable doctrines however strong and vigorous but which lacks the ingredient of incitement to violence cannot legitimately be prohibited and criminalised. If a person wants to propagate the scientifically false and discredited theory of superiority based on race and colour the response should be one of ridicule contempt and effective response. To overreact and prohibit such racist nonsense is to do too great an honour to the expression in question and may confer upon the speaker or the writer the halo of a martyr. If we are true to the ideals of democracy and genuinely cherish freedom of expression we must grant a fair field and an honest race to all the infinite variety of cranks and fanatics and the self-appointed saviours of humanity provided their voice is not one of incitement to violence. If ideas and doctrines are false they should be countered with true and sound ideas. To be afraid of ideas is to be unfit for democracy.

This aspect was emphasised in a judgment of the Gujarat High Court which struck down the ban on a book which expounded and extolled Mao-Tse-Tung's works and philosophy. In the words of Chief Justice Bhagwati (as he then was): "If the people want to adopt the philosophy of Communism as expounded by Mao-Tse-Tung, confiscation of a book like this is not going to stop them from doing so. The reasons for their choice would be much deeper and if the Government wants to repel the onslaught of Communist ideology, it is to an elimination of these reasons that the Government may well address itself rather than proscribe a book like this which propagates the principles and practice of Communism as expounded by one of its chief exponents, with a view to their academic study by the people".²⁴

It is essential to bear in mind the vital distinction between mere dissemination and advocacy of obnoxious ideas and doctrines which cause injury to feelings without more, and speech which incites persons to violence. For example, it is one thing to say that migrant workers belonging to certain communities are lazy, dirty and dishonest and should be deported. It is quite another to portray them as a grave threat to the community and advocate their liquidation. Hate speech may be proscribed in the category of cases where expression from its very nature or manner of expression and time and place considerations would in all reasonable likelihood lead to imminent commission of an offence or result in unlawful action because preservation of public peace and order is a matter in which all citizens have a vital stake no less than in the preservation of freedom of expression.

There is another class of cases which may warrant proscription of hate speech, namely, systematic vilification of individuals or groups by reason of their colour, race, religion or beliefs and which is likely to evoke extreme feelings of opprobrium and subject the targeted class to discrimination and social and economic disabilities, especially in matters of housing and employment. Persistent propagation of hate propaganda can undermine the dignity and self-worth of target group members, lead to erosion of tolerance and mutual respect that must flourish in a multi-cultural society and result in tensions which can erupt into violent conflicts between different groups in the community. Besides the victims of virulent hate propaganda generally are vulnerable groups who do not possess the resources to defend themselves and their protection can be the legitimate concern of any democratic society committed to the ideal of equality.

In such cases hate speech may be regulated or restricted provided the statutory provisions are drawn narrowly and with precision and the restrictions imposed are not arbitrary or disproportionate.

Besides it must be ensured that expression is not restricted on the basis of vague apprehensions and far-fetched concerns of mischief. There should be a real, rational and proximate nexus between the expression and its potential for imminent violence and unlawful action.

However it cannot be overemphasised that expression which does not constitute incitement to imminent violence cannot be suppressed on account of threats of violence by persons who find the expression deeply offensive. Freedom of expression cannot be held to ransom by fanatics and bigots who are so utterly convinced of the infallibility of their beliefs that they resent any unfavourable comments on their Faith. The duty of a government in such cases would plainly be to put down violence, punish the law breakers, rather than penalise the writer or the speaker and suppress expression. A pluralistic society can hardly survive if a religious or an ethnic group demands not merely equality and the vote, but a violent veto on policies or doctrines which do not accept its tenets and moral judgments. Tranquility ought not to be maintained in all cases by sacrifice of liberty. In order to prevent threat to disorder, the State should not suppress rights, and particularly freedom of expression, which it is the duty of a democratic state to uphold.

This approach was adopted by the Supreme Court of India in a recent judgment²⁵ in which the court rejected the Tamil Nadu government's plea that it was necessary to stop the exhibition of a movie because there were threats from certain sections that the cinema theatre

which would exhibit the film would be burnt down. The court declared "If the film is unobjectionable and cannot constitutionally be restricted under Art 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would be tantamount to negation of the rule of law and surrender to blackmail and intimidation. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people".²⁶ This judgment has far-reaching implications. Its wholesome effect and timeliness cannot be over-emphasised in view of the rising tide of intolerance of late witnessed in India.

Defamation is one of the heads of restriction permitted by ECHR, ICCPR, ACHR, and several national Constitutions including the Constitution of India. Libel laws can have a chilling effect on freedom of expression. This is especially so in countries whose legal systems or jurisprudence do not permit sufficient latitude to criticism of government and the conduct of public functionaries. Every inaccurate statement should not be actionable unless it is made with malice, ie with actual knowledge of the falsity of the statement or with reckless and utter disregard of the true state of affairs. This is because erroneous statements are unavoidable in free debate in a democracy and must be tolerated if freedom of expression is to have "the breathing space it needs to survive". These principles were enunciated by the United States Supreme Court in its landmark decision in *New York Times v Sullivan*.²⁷ It is heartening to note that the House of Lords has taken a significant step forward for the protection of free speech in its recent judgment in the *Derbyshire County Council case*. The House of Lords held that the Council, being a local authority, could not sue for libel because it is a governmental body and it is of the highest public importance that any governmental body should be open to uninhibited public criticism. Furthermore, the Lords recognised that threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech and enunciated a very important, and to my mind a salutary principle, namely, that "it would be contrary to public interest to permit institutions of government to sue for libel because that would place an undesirable fetter on freedom of speech".²⁸

One of the heads on which freedom of expression is restricted is public health or morals, more specifically, "decency" or "obscenity". Restrictions on these grounds have created a host of problems which at the end of the day seem insoluble. The reason is that sin, as Pascal reminds us, is geographical. "Obscenity", "indecent", "immorality" are equivocal and relative concepts. Standards of morality and decency vary from time to time in the same society and from person to person and there is no uniform test of community standards of tolerance. Opinions honestly held by reasonable people, including judges, will vary widely depending upon their background and standards of decency.

It is interesting to note that the sixth international Congress for suppression of traffic in women and children which took place in the summer of 1924 at Gratz, Austria, unanimously resolved, agreeing with the view of the official Congress on obscene publication, that "it is undesirable to define the word obscene".

The Federal Court of Appeal in Canada held that the words "immoral" and "indecent" are highly subjective and emotive in their content. The court ruled that uncertainty and vagueness are inherent in the very concept of immorality and indecency and therefore are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. Consequently prohibition of importation of matters of "immoral or indecent character" was

held to be not a reasonable limitation upon the freedoms guaranteed by s. 2(b) of the Charter.²⁹ The House of Lords has not helped matters by ruling in 1973 that indecency is not confined to sexual indecency but includes anything that an ordinary man or woman finds to be shocking, disgusting and revolting.³⁰

It is obvious that subjectivity plays a crucial role in any decision about banning expression on these grounds. The history of the books which have been banned at different times - some of which are now regarded as classics - demonstrates the utter unfeasibility of censorship under these heads especially when the power is entrusted to officials who lack the requisite qualifications and outlook. D H Lawrence's, *Lady Chatterley's Lover*, fell foul of the Indian Supreme Court justices in *Ranjit Udeshi's case*.³¹ Indian Customs authorities held up the importation of Nabakov's *Lolita* which was permitted after the intervention of Prime Minister Nehru who found nothing objectionable in it. The same book was branded indecent in 1961 by a New Zealand Court in a majority decision.³²

The oft-repeated judicial admonition not to dwell upon a stray passage or a few words here and there torn out of the context without regard to the general nature and tendency of the publication is often ignored. The Censor is like the lady who complained to Dr Johnson about the presence of objectionable words in a book and was roundly reprimanded: "Madam, you must have been searching for them."

Judges, despite valiant efforts, have failed to evolve a satisfactory definition of obscenity. The judicial impotence has been vividly summed up in the lament of Justice Stewart of the United States Supreme Court who confessed that he could not define obscenity but recognised it when he saw it.³³

The least unsatisfactory workable test would be to confine obscenity or indecency laws only to publications which are patently offensive and whose expressive content is worthless and of *de menis* value to society in terms of art, literature or any other discipline. This might reduce the role of subjectivity but cannot altogether eliminate it.

Tension between freedom of expression and censorship from the very nature of things is inevitable because freedom of expression and censorship have conflicting purposes and pull in different directions. Real protection to freedom of expression would lie not so much in enacting laws as in creating a temperament of tolerance, fostering mutual respect and understanding of the beliefs and practices of others. This requires a sustained effort to change the attitudes of persons and to sensitise them to the value of free speech and the importance of dissent. There must be realisation that no group has the monopoly of truth and morality about which there may be genuinely different perceptions.

In situations where some form of limitation on expression is unavoidable the perennial problem is of performing the delicate balancing act. This involves weighing all relevant factors for determining whether expression of a particular kind should or should not be permitted at a particular time and in a particular place. No doubt freedom of expression is a universal value. However its protection and promotion cannot be strait jacketed by any universal prototype. Different countries have their distinctive cultures and values, different ethical perceptions, different problems and reactions. Publications which pass muster in America may be quite unacceptable in India or in South Africa.

There can be no hard and fast rule, except one. When in doubt, resolve it in favour of expression rather than its suppression. And always remember the memorable words of that indomitable fighter for free speech, Charles Bradlaugh: "Better a thousand fold abuse of free speech than denial of free speech. The abuse dies in a day, but the denial slays the life of the people and entombs the hopes of the race."³⁴

Appendix A

Article 19 - Protection of certain rights regarding freedom of speech, etc

- (1) All citizens shall have the right -
 - (a) to freedom of speech and expression . . .
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause 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.

Endnotes

1. Terminiello v City of Chicago, 93 L ed 1131 at 1134; Himat Lal v Police Commissioner, Ahmedabad, AIR (1973) SC 87
2. In Re Alberta Legislation, (1938) 2 SCR 100, 132-133; 145-146
3. Nationwide News Pty Ltd v Wills (1992) 66 AJLR 658; Australian Capital Television Pty v Commonwealth of Australia, (1992) 66 AJLR 695
4. AIR (1973) SC 106
5. Ibid, 150
6. Handyside v United Kingdom (1976) 1 EHRR 737
7. Near v Minnesota 283 US 697 (1931)
8. Chinataman Rao v State of MP AIR 1951 SC 118 at 119; State of Madras v V G Rao AIR 1952 SC 196 at 199, 200; Tikaramji v State of UP AIR 1967 SC 676 at 711; Express Newspapers, AIR 1958 SSC 578 a 621; State of Bihar v R N Mishra AIR 1971 SC 1667
9. Sakal Papers, supra n 6; Bennett Coleman & Co v Union of India AIR 1973 SC 106
10. ILR 22 Bom 112
11. 1940 AC 231
12. AIR 9147 PC 82
13. AIR 1962 SC 955
14. Chief Arthur Nwanko v the State FCA/E/111/83 (Fed CA: Enugu), (1985) 6 NCLR 228
15. Uganda v Rajat Neogy & Abu Mayanja (The Transition Case), 1 Feb 1968, reported in Transition, No. 38 (1972) 47, 48
16. Hussain Bakhsh Kasuar v The State, PLD 1958 (WP) Peshawar 15
17. Hector v Attorney General of Antigua and Barbuda (1990) 2 AC 312, 315 (PC)
18. Niharendu Dutt Majumdar v Emperor AIR (1942) FC 22
19. Korematsu v United States 323 US 214 (1944)
20. Korematsu v United States 584 F Sup 1406 (1984)

21. Meir Schnitzer and Ors v Chief Military Censor, HC 42 (4) PD 611 (1988); 24 Israeli L Rev 304
22. 5 EHRR 123 (1983)
23. R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury (1991) 1 QB 429
24. Manubhai v State of Gujarat 12 Guj L R 968, 979
25. Rangarajan v Jagjivan (1989) 2 SCR 204
26. Ibid, 230
27. 376 US 290 (1961)
28. Derbyshire County Council v Times Newspapers Ltd & Ors, (1993) AC 534
29. Re Luscher and Deputy Minister, Revenue, Canada, 17 DLR (4th) 503
30. Reg v Knuller (Publishing, etc) Ltd (HL (E)), 1973 AC 435 at 458
31. AIR (1965) SC 881
32. In Re Lolita, (1961) NZLR 542
33. Jacobellis v Ohio 12 L ed 2d 793, 804 (per Justice Stewart)
34. Soli J Sorabjee, "The Law of Press Censorship in India" p 6