Analysis of ‘Freedom of Speech and Expression’ in American and Indian Constitution: A Comparative Study

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The ‘Freedom of Speech and Expression’ is an important fundamental right which helps to preserve the ethos of democracy. United States and India are culturally contrast democracies, which have their own diverse heritage to protect. Both the democracies however have similar law safeguarding the right to speak, criticise and move forward amalgamating the manifold variant citizens. Freedom of speech comes with a responsibility to protect the interest of the nation. The children who are the future of tomorrow safeguarding their interests are the conscientious effort of both the countries. Judiciary has upheld the spirit of liberalization of press on multiple occasions.

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1. Overview

America and India are the two powerful democracies of the world. For any democracy ‘Freedom of speech and expression’ is the foundation to establish the
structure of democracy. The ‘Freedom of speech and expression’ extends to the
freedom of the Press. The provision with regard to this freedom is quite similar in
both legal systems, that being said, the ‘Freedom of the Press’ of the US constitution
has two positive features, that is:

- Freedom of speech without any restrictions and
- Freedom of press.

With respect to India, the Apex Court of India does not specifically ensure
freedom of press; it is regarded as an expression which makes the freedom a genus.
Therefore, there are no specific restrictions which can be levied on any common
citizen, but he can’t even claim any special privilege (unless directed specifically by
law), different from any other citizen.

Justice Bhagwati stated in the landmark case of Express Newspapers (Private) Ltd. v. Union of India¹,

[T]hat the fundamental right to the freedom of speech and expression
enshrined in our constitution is based on (the provisions in) Amendment I of
the Constitution of the United States and it would be therefore legitimate and
proper to refer to those decisions of the Supreme Court of the United States of
America in order to appreciate the true nature, scope and extent of this right
in spite of the warning administered by this court against use of American
and other cases.

Even though both the United States and Indian republic have similar
approach for the ‘Freedom of speech’ and have separate set of jurisprudence to
guarantee the same based on the acceptance, tolerance and needs of their citizens.
To add to that, they also differ in what actually includes and is accepted as free
speech. The premier difference among the systems is the extent of the freedom, the
US legal system gives the press absolute freedom whereas in India it more of a right
which extends to certain levels and the restrictions are well defined. This difference
is subject to the reasonable restrictions and moral standard of the respective
communities. In India the system of control is more authoritarian which makes the
legislature armed with the real power to ensure the ‘Rule of Law’ in the country.
On the other hand US has a more liberal approach.

Free speech is of no use if there is no adequate space to breathe. Any incorrect
statement which is repeated again and again will also appear to be true and a part
of speech and expression. This view of a famous US case New York Times v
Sullivan² was applied by the supreme court of India. Accordingly, “statements
made against persons in the public eye cannot be considered defamatory unless
they were made with ‘actual malice’. The reason is any democratic governance
mandates a strict scrutiny of the public official duties.”³

The result of the extent of the Freedom in the US constitution is that ideas or
expression which may be offensive or hurtful or even racial but can be expressed
freely. The other side of the coin suggests that it leads to healthy debate on public
issues and such. The government is not allowed to take any decisions when the ideas are expressed with the ideas that may not be expressed. The freedom of expression guaranteed by First Amendment of the Constitution means the freedom of expression in the fullest sense.

With regard to India, the debate of whether the freedom should be inserted into the Constitution as an individual right was heavily discussed by the Constituent Assembly. Dr. B.R. Ambedkar, Chairman of the Constituent Assembly’s Drafting Committee concluded that such a provision was not necessary. He based his arguments on:

[T]he press is merely another way of stating an individual or a citizen. 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. The editor of a press or the manager is all citizens and therefore when they choose to write in newspapers, they are merely exercising their right of expression and in my judgment therefore no special mention is necessary of the freedom of the press at all.4

Although the Constitution shows has no special provision to safeguard the rights of the press, the Judiciary has taken up the role and confirmed that the rights of the press are implicit in the guarantee of freedom of speech and expression under Article 19(1)(a) of the Constitution. In fact, multiple judgments of the Supreme Court of India have struck down laws that abridge the freedom of the press and have echoed the sentiment expressed in the First Amendment of the US constitution

Ramesh Thappar v. State of Madras5, was one amongst the earliest cases to be decided by the Supreme Court and “it involved a challenge against an order issued by the Government of Madras under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 imposing a ban on the entry and circulation of the journal, Cross Roads, printed and published by the petitioner. The Court struck down Section 9(1-A) holding that the right to freedom of speech and expression was paramount and that nothing short of a danger to the foundations of the State or a threat to its overthrow could justify a curtailment of the right to freedom of speech and expression”. Similarly in Brij Bhusan v. State of Delhi6, the Court quashed “a pre-censorship order passed against the publishers of the organiser. The Court held that Section 7 (i)(c) of the The East Punjab Public Safety Act, 1949 authorized such a restriction on the ground that it was necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order and did not fall within the purview of Article 19 (2)”.

2. History of the Freedom of Press

The similarity of the history of this right in the Indian and US legal system ends with the point that the both jurisdiction was ruled by the British Crown.
United States legal systems adopted freedom of the press as retaliation to the history of press in England. Much before the invention of the printing press in the fifteenth century, government and church leaders in England regularly banned handwritten books that threatened their power. A complete surrender to the British was evident in the early times.

After the invention of the printing press, the government stated that there was a requirement that all printers are required to get a license the government before they try to publish anything. The control of power was so grave that anyone who criticised the British government was liable to be punished.

Queen Elizabeth I of England in 1585 had enacted certain laws with the intention to control the press of her country. This included the permission to print only in pre-approved press such as Oxford, Cambridge, and London. The content had to be approved by Archbishop of Canterbury or the Bishop of London. Violators of this rule were severely penalized and faced imprisonment or destruction of their printing equipment.

However these arbitrary laws expired by 1695, but the British government continued enforcing these laws on sedation and enforced them even much later. No one was allowed to criticise the government even on a known fact.

The 1948 Universal Declaration of Human Rights stated:

[E]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and impart information and ideas through any media regardless of frontiers. Freedom of the press is the right to circulate opinions in print without censorship by the government. In the American Legal system they enjoy freedom of the press under the First Amendment to the Constitution, which states: ‘Congress shall make no law...abridging the freedom of speech or of the press’.

In India, the right extends from Article 19(1)(a) of the Constitution of India which is a fundamental right of the citizens of India. The provision of Freedom of the Press is also placed under this section. Further, it also includes the right of free propagation and free circulation without any previous restraint on publication.

The freedom of the press protects the right to publish information and to express the ideas through various media. It is an important right for a free society. To make sure government is running properly, citizens need to be informed about the policies and the programs undertaken. Due to time constraint it is however difficult for the people to watch everything the government does. The press serves the function by investigating and reporting the government’s activity. Moreover if the citizens do not like any policy of the government then they can raise opinion through the social media. Spreading information to one and all is done much faster by the electronic mode of communication.
3. **Media Independance : Protection of Children**

United States has always exemplified a culturally advanced nation who has seen extremes of Digital media. The young generation has high dependability on electronic gadgets for its information, entertainment and communication. An average child spends maximum hours viewing these mediums for its social survival. It is a fast moving society which needs to keep pace for survival. The parents however find electronic gadgets as the last and only resort for upbringing their child. Lack of time makes them dependant on electronic media for recreation and entertainment.

The concern for protecting the children from exploitation can also be sensed for digital arena. The Child Exploitation and Obscenity Section (CEOS) serve a unique and critical function in the enforcement of federal laws in protecting children from exploitation and prohibiting the distribution of obscenity. To view summaries of the federal laws that pertain to CEOS’s subject areas, click the links below survival.

- Federal Law on Child Sexual Abuse.
- Federal Law on Obscenity.
- Federal Law on the Prostitution of Children.
- Federal Law on Sex Offender Registration.

The concept of ‘freedom of the press’ in the Constitutional framework has been developed by serious historical debates. William Blackstone ‘Bill of Rights’ is purported to embrace the notion that has been derived after drafting and ratifying the same. A press cannot be said to be free if it is licensed by the sovereign, or otherwise restrained in advance for publication. The debate concerning the same is not yet settled. The Apex court reviewed in the matter of New York Times Co. v Sullivan and concluded that the “central meaning of the First Amendment embraces as well rejects the law on sedition.” The definition of freedom of the press in US primarily comes to shape by a spree of Supreme Court decisions. Starting with the case Cohen v. Cowles Media Co and ending on the matter. During this period, the Court ruled “at least 40 cases involving the press and fleshed out the skeleton of freedoms addressed rarely in prior cases. In contrast, the Court considered the First Amendment claims of political dissidents in the early part of the last century with some frequency; it took 150 years after the adoption of the Bill of Rights, and the First Amendment, for the Court to issue its first decision on the freedom of the press”.

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In leading cases such as Near v. Minnesota\(^{14}\) and the ‘Pentagon Papers case’ New York Times Co. v. United States\(^{15}\), the Court came with the ruling that “freedom of the press on publication is nearly absolute, incorporating the right to publish information that a president concluded would harm the national security, if not the movements of troopships at sea in time of war”. In Miami Herald Publishing Co. v. Tornillo\(^{16}\), “the Court embraced the analogous proposition of the government that it has virtually no power to compel the press to publish what it would prefer to leave on the proverbial cutting room floor”.

The American Supreme Court’s 1979 decision has formulated “the Daily Mail principle”, which was held in Smith v. Daily Mail Publishing Co.\(^{17}\) In this matter the Court established that “a newspaper cannot be liable for publishing the name of a juvenile offender in violation of a West Virginia law declaring such information to be private. The protections against subsequent punishments for reporting the truth afforded by the Daily Mail principle are not absolute, but the barriers to such government regulation of the press are set extremely high”.

The 1978 decision in the case Zurcher v. Stanford Daily\(^{18}\), the Court held that “the First Amendment did not protect the press and its newsrooms from the issuance of valid search warrants”. In another case of 1979 Herbert v. Lando\(^{19}\), the Court observed that “when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff’s reputation, there is no privilege under the First Amendment’s that will guaranty freedom of speech and freedom for the press. The plaintiff can inquire into the editorial processes of those who are responsible for the publication and the inquiry can produce evidence material for the proof of a critical element of the plaintiff’s cause of action”.

In 1991 in Cohen v. Cowles Media Co,\(^{20}\) the Court effectively concluded “the treatise on the freedom of the press which had began in Sullivan; it did so when it emphasized that the press is properly subject to liability under the ‘generally applicable’ law of contracts not to disclose the identity of the victim, even in order to report truthful information about the source’s involvement in a matter of public concern”. “In the 21st century, the debate was broken to revisit the extent to which a ‘generally applicable’ law such as the federal wiretap statute can constitutionally impose criminal penalties and civil liability on the dissemination by the press. The contents of unlawfully recorded telephone conversations, even when the information so disseminated is the truth about a matter of public concern cannot be permitted”.

It was in the year 2001 tha the court decided in Bartnicki v. Vopper\(^{21}\), that, “when a statute that is directed towards a deterring unlawful conduct by not penalizing the content of press reports, will constitutes a ‘naked prohibition’ on the dissemination of information by the press. It is ‘fairly characterized as a regulation of pure speech’ in violation of the First Amendment. The Court ushered in a new century of First Amendment jurisprudence by reaffirming both the Daily Mail”.

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4. **Freedom of the Press and Censorship**

In the United States, ‘Freedom of speech’ is not absolute. The Supreme Court of the United States has recognized several categories of speech which are excluded from the freedom, and has recognized that governments may enact reasonable restrictions on speech depending upon time, place, or manner. Censorship involves the suppression of speech or other public communication, raises issues of freedom of speech, which is constitutionally protected by the First Amendment to the United States Constitution. The First Amendment (Amendment I) to the United States Constitution prohibits the making of any law abridging the freedom of speech. It was adopted on December 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

The first amendment to the US constitution in fact gives the duty on the State not to create any censorship, that is to say, it cannot control what is to be published and what not to be. In the 1931 case of Near v. Minnesota, the US Apex court formally dictated that the first amendment prohibits the government from using prior restraint. Also, In Grosjean v. American Press Co, the Supreme Court also outlawed taxes that apply only on the press and not to businesses generally. Such taxes act as a form of prior restraint by making it more difficult for the press to report the news. The above has been done with an effort to value in the flow of information in society. The government has the power to ban the circulation of material which could harm national security. For example, “the government cannot consider the right of censorship as absolute. The Supreme Court has also acknowledged a number of immunities to the rule against censorship. The Court however has stated that the government can ban the printing of obscene material, which is sexual material that is offensive and the Court went on to say that obscenity is not protected by the First Amendment. It is also during wartime, the government may prevent publishers from revealing information such as the location of U.S. troops and their battle plans”.

In Richmond Newspapers, Inc. v. Virginia the Court held “the true meaning of immunity on censorship. The First Amendment affords the press and public affirmative rights of access to government proceedings. This right, however, is not absolute and is routinely balanced against other competing interests articulated by the proponents of secret proceedings”.

5. **The Federal Communication Council**

The US has incorporated an independent government agency to regulate the scope of broadcasting. “The Federal Communication Council or FCC deals with the electronic media in United States”. The necessity to have FCC was felt to safeguard the general public especially the children from the uncontrolled use of Freedom of Speech and expression. “FCC was formed by the US code.” The Federal Communications Commission (FCC) has to take care of formulating
regulations for commerce which happening interstate or between foreign countries though the wireless medium. It also has a responsibility to protect the citizens of US from any discrimination happening on the basis of, colour, religion, national origin, or sex etc. For the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, whose focus will be to execute and enforce the interest of the larger population.

“The FCC commissioners and staff are mainly engaged in activities like renewal of licenses for the country’s more than 10,000 broadcasting stations, as well as paperwork related to the transferring of ownership for individual stations.”

The FCC incorporated in the Federal structure of US. Electronic media is a part of the US Code that controls all the states in the US.

The Federal Communications Commission (FCC) regulates “indecent” free-to-air broadcasting (both television and radio). Satellite, cable television, and Internet outlets are not subject to content-based FCC regulation. It can issue fines if, for example, the broadcaster employs certain profane words (not relating to that which is sacred or religious; secular). Federal Communications Commission v. Pacifica Foundation is a landmark case of the United States. The Supreme Court defined “the power of the Federal Communications Commission (FCC) over indecent material as applied to broadcasting”. “The U.S. Supreme Court accepted the government’s decision for the interests of children in:

- Shielding children from potentially offensive material, and
- Ensuring that unwanted speech does not enter one’s home.

The Court stated that the FCC had the authority to prohibit such broadcasts during hours when children were likely to be among the audience, and gave the FCC broad leeway to determine what constituted indecency in different contexts”.

6. United States Obscenity Law

The obscenity law of United States prohibits sale and distribution of anything which is obscene. The Laws on obscenity revolve around pornography and censorship of objectionable exhibitions. But it also raises issues of ‘freedom of speech’ and of the press that are protected by the first amendment to the US Constitution. The States are independently also responsible for the protection of public morality and laying down the punishment for producing and selling obscene materials. The laws of the state however have limitations of jurisdiction to be restricted within each state. In such circumstances the federal government can also control the state in any incidence of distribution, publication, and broadcasting of obscene material.
A comprehensive, legal definition of obscenity has been difficult to establish. Yet key components of the current obscenity test stem from a District Court case tried in 1933. United States v. One Book\textsuperscript{29} called “Ulysses by James Joyce” determined that a work investigated for obscenity must be considered in its entirety and not merely judged on its parts.

The cases in US are majorly on obscenity. The movies and games which have overdose of obscenity have to be screened out. “The most infamous is novel ‘Fanny Hill’ from the 18\textsuperscript{th} Century.”\textsuperscript{30} This case Crafts the necessity to give a legal definition for obscenity have the civil liberties enact censorship laws to combat obscenity and restrict freedom of expression.

“All obscene material cannot be sold and distributed. The Federal Law expressly prohibits the since 1873.”\textsuperscript{31} In most of the American states distribution has been prohibited since the early 19\textsuperscript{th} century. Anthony Comstock had specifically worked for implementing the Federal level adoption of obscenity laws in the United. He created the New York Society for the Suppression of Vice. It was due to Comstock’s intense lobbying that the Comstock Act was passed the statute on anti-obscenity. It made sale and distribution of anything which is obscene a crime. Anthony Comstock was made the postal inspector to supervise the implementation of the Law. The statute does not define obscenity it leaves it on the courts to define on the basis of facts of any particular case.

7. Parents Television Council

A very interesting censorship exists in the United States “Parents Television Council” (PTC).\textsuperscript{32} “It is a censorship advocacy group that is founded by a conservative Catholic activist L. Brent Bozell III in 1995.”\textsuperscript{33} It is a unique concept used in a digitally advanced country to protect the children from the uncensored overflow of content that has the potential of causing harm. The group publishes research reports, articles and issues warnings for various programs which are available online and the apprehended harm they can cause to the child. It also tries to offload all content that can be dangerous to the young citizens of the country.

The objective of PTC is to protect the children and families from graphic sex, violence and profanity in the media, because of their proven long term harmful effects. The vision is to provide a safe and sound entertainment media environment for children and families across America.

The members of the Council make a conscious effort to discourage any program which is not part of healthy entertainment. Programs need to be family friendly and the children have to be protected from the vices of obscenity violence and vulgarity. It is a volunteer work done by the members of PTC to view all content and ascertain the limits of what should be permitted for viewing and what should not be permitted. The PTC has a board which comprises of technically sound people, politicians and social activists to assist the team. The aim is to protect the children from effects of media.
8. Conclusion

The ‘freedom of the speech and expression’ is important as it protects the right to publish information and to broadcast them through any media. It is an important right for a progressive society. The press enables the policies and programs of government to be scrutinized and citizens become aware of all changes happening. It is the press which tries to remind the citizens of their duty by highlighting the work of the government. Any regulation which tries to restrict the scope of press can be dangerous to mankind. The freedom given to press also needs to be implemented properly. It is a very responsible role which does not have to be taken for granted by the people behind the scenes. Even though the intention of Law framers is the same but conditions for application are very different in India and the United States.

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19. 532 U.S. 514 (2001)
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