2ND JUSTICE J.S. VERMA MEMORIAL LECTURE

ON

"FREEDOM OF EXPRESSION: EVOLUTION IN SEVEN DECADES OF INDEPENDENCE"

BY

HON'BLE SHRI TIRATH SINGH THAKUR
CHIEF JUSTICE OF INDIA

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I consider it a matter of great honour to have been invited to deliver the 2nd Justice Verma Memorial Lecture, 2016. I am grateful to the organizers for giving me this opportunity to pay homage to the memory of Justice J.S. Verma who was a great judge, a jurist and a visionary par excellence.

Acknowledged for his ingenuity, humanism and judicial novelty, Justice J.S. Verma authored many landmark judgments, which judges, jurists and lawyers shall value for a long time. Nilabati Behera v. State of Orissa1, the Second Judges Case i.e. Supreme Court Advocates-On-Record Association & Ors. v. Union of India2, which laid the foundation for the collegium system for the appointment of judges in the higher judiciary in India, S. R. Bommai v. Union of India3, Jamaat-e-Islami Hind v. Union of India4, Vishakha and others v. State of Rajasthan5 are all landmark on the judicial landscape. T. N. Godavarman Thirumulpad v. Union of India and Ors.6 and Vineet Narain & Ors v. Union of India7 were similarly path breaking pronouncements of the Supreme Court. The country will treasure Justice Verma's judgment in the famous Vishakha case which for the first time in history laid down guidelines for prevention of harassment of women at work. The bench declared that sexual harassment at work place violates a woman's fundamental right to equality and that establishments were duty bound to take steps to prevent any such harassment.

Contributions of Justice J.S. Verma, both on and off the Bench continue to act as philosophical stimulus for individual liberty, group rights, secularism, equality, judicial ethics and righteousness. It was his contribution to the human rights jurisprudence, which led the government to appoint him as the Chairman of National Human Rights Commission, the apex body for the protection of human rights. NHRC under his able leadership set the stage for a new regime of human rights interventions. The contribution of NHRC in Orissa cyclone in 1999, Gujarat earthquake in 2001 and Gujarat communal disturbances in 2002 were based on a broader import visionary of human rights given by Justice Verma.

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[1] (1993) 2 SCC 746
[2] (1993) 4 SCC 441
[3] (1994) 3 SCC 1
[4] (1995) 1 SCC 428
[5] (1997) 6 SCC 241
[6] (1997) 2 SCC 267
[7] (1998) 1 SCC 226

His stand as the Chairman of National Human Rights Commission on the issue of Dalits at the World Conference on Racism at Durban in 2001 and in opposing the stringent provisions of the Prevention of Terrorism law in assertion of human rights were remarkable contributions to the development of human rights jurisprudence in the world.

Immediately after the brutal gang rape of a medical student in a moving bus in Delhi which shook the nation's conscience, Justice Verma was requested by the Government to prepare a blueprint of the changes in law relating to rape. As the Chief Architect of new anti-rape law, 80 years old Justice Verma submitted his 630-page report in a record 29 days' which was remarkable in the infamous history of prolonged commissions that go on in this country.

Justice Verma was a strong supporter of the Right to Information. At the 52nd anniversary of the adoption of the Universal Declaration of Human Rights, Justice Verma said: "In a democracy, participatory role in governments can be realized only if the right to information exists so that the public can make an informed choice". The theme of 2nd memorial lecture viz. "Freedom of Expression in Seven Decades" is therefore well chosen topic.

SILENCE is also at time eloquent: to Sherlock Holmes, for example, a dog's failure to bark during the night was significant and suspicious. The failure of American courts and legal scholars to discuss more than a century of the history of freedom of speech and freedom of the press is also a cause for suspicion. In United States, scholars have analyzed freedom of expression from colonial times to the battle over the Sedition Act of 1798, yet for the period after the expiration of that statute in 1801, there is little but silence. Freedom of speech and expression is the hallmark of a democratic society. Voltaire legendarily observed- "I disapprove of what you say, but I will defend to the death your right to say it."

John Stuart Mill provided the Philosophical Justification for the freedom of expression when he said "If all mankind, minus one, were of one opinion, and only one person was of the contrary opinion, mankind would no more be justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

If the opinion is true, then by suppressing it, humanity is deprived of the truth and will not progress. If the opinion is false then also humanity loses, because if the

opinion is false it will be shown to be so, but its expression is useful, for it forces us to restate the reasons for our beliefs. Mill argues that true knowledge can only be acquired by gaining a full understanding of both sides of the argument, because "[h]e who knows only his own side, knows little of that." Merely listening to contrary viewpoints is not enough; they must be put forward as convincingly as possible so that the listener can place himself "in the mental position of those who think differently." Challenges to beliefs also keep them "alive" because they force a person to learn the grounds of his or her opinions. Though Mill believes reason should have the last word in the selection of beliefs, he recognizes that holding a conviction is not just a rational affair; deeply held beliefs are felt, as well as known, and come to be part of one's identity, especially when those beliefs are under attack.

Another immaculate defense of free speech is found in Justice Holmes's dissenting opinion in **Abrams v. United States8**, which contended that a dissenting speech plays a critical role in a collective truth-seeking endeavor, and they are often grouped together as advocating for a **"marketplace of ideas**," a metaphor that has become a fixture in American Constitutional Law.

It is undeniable that freedom is like oxygen. We know its value only in its absence. Sunlight is said to be the best disinfectant. In the unforgettable words of 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." Closer home Sahir Ludhiyanvi put the importance of the freedom of expression aptly when he said:

Ley dey key apney paas faqat ik nazar to hai
Kyon dekhen zindagee ko kisee kee nazar sey ham.
I have nothing but only a vision of my own,
Why to view life with someone else's vision.

Indian Constitutional Scheme: Our freedom fighters had long cherished aspirations and dreams during the arduous course of freedom struggle. Upon realization of this dream of independence, they were passionate about making a fresh start in the form and system of our government substantially different from that of the alien rulers. Consequently, the arrival of political freedom gave impetus to the drafting of our own constitution which was objectified on January 26, 1950.

[8] (1919) 250 US 616.

Constitution of India is not just a mere set of fundamental laws that form the basis of governance of our country; it personifies and reflects certain basic ideals, philosophy and goals that were cherished. It's one of the most cherished objectives was to ensure liberty of thought and expression and a provision in that regard was made in Article 19(1) (a) of the Constitution. This provision was designed to afford to the people of India the kind and measure of liberty available to the individual in the United Kingdom or in the United States of America. The Indian Constitution does, indeed, depart from the American and British Systems in major points of form, technique and method—even as these two differ from each other. But the deviation from the British and the American patterns do not derogate from underlying principles of individual liberty; these principles permeate the form and practice of the Indian scheme—as they do in any true democracy.

Freedom of speech was thus put on a more impregnable footing than the other freedoms guaranteed in Article 19- as these freedoms were subject to reasonable restrictions to be put in the interest of "the general public" or of "public order" or similar comparatively wide purpose. Apart from the specific and more or less well-defined categories of legal restriction covered by libel, slander, defamation, contempt of court, and decency or morality the general test to be applied was whether the matter sought to be inhibited undermines the security of or tends to overthrow the state. Courts have made it clear that an impugned law would sustain if it is related to matters undermining the security of state or tending to overthrow the state notwithstanding the fact that it is in restraint of freedom of speech and expression. But impairment of that freedom for less serious purposes would be unconstitutional because it was presumed that those purposes could be achieved by means less desperate than enforced silence. The court also provided that if free speech is to be restricted on the specific ground of public order, the law placing such a constraint has to satisfy the test of clear and present danger, a test that has been used by American Courts for almost a century to determine the speech, the government may restrain. Justice Oliver Wendell Holmes writing for the Court in Schenck v. United States[9] asked whether "the words create a clear and present danger that they will bring about substantive evils Congress has a right to prevent?"

[9] (1918) 249 US 47

Facets of Freedom of Speech and Expression: Freedom of speech and expression under Article 19(1)(a) is a concept with diverse facets, both with regard to the content of the speech and expression and in the means. Over the seven decades, Indian Judiciary has expanded the horizons of freedom of expression.

The Supreme Court has from **Romesh Thapar10** and **Brij Bhushan's11** cases in 1950 right at the commencement of the Constitution till **Shreya Singhal12** and **Subramanian Swamy's13** cases in 2016 accorded the highest value to this freedom and secured it for the citizens, while balancing the other societal concerns and larger public interest. Freedom of thought and expression takes within it the freedom of propagation of views and ideas which is ensured by freedom of publication and circulation for dissemination of information. As Justice Holmes elegantly put it, the best test of truth is the power of thought to get itself accepted in the competition of the market. And freedom of thought is not only freedom for the thought we like but also for the thought we hate. Freedom of thought and expression including dissent is an important constitutional value which underpins a free and harmonious society. Justice Cardozo has famously observed that freedom of speech is the matrix, the indispensible condition of nearly every other form of freedom. It is the wellspring of civilization. Without it the liberty of thought would shrivel. The end result would be that the spirit of man would be mutilated and enslaved. I am reminded of the words of Faiz Ahmed Faiz when he said :

matā-e-lauh-o-qalam chhin ga.ī to kyā ġham hai
ki ḳhuun-e-dil meñ Dubo lī haiñ uñgliyāñ maiñ ne
zabāñ pe mohr lagī hai to kyā ki rakh dī hai
har ek halqa-e-zanjir meñ zabāñ maiñ ne

[10] AIR 1950 SC 124
[11] AIR 1950 SC 129
[12] (2015) 5 SCC 1
[13] (2016) 7 SCC 221

Solitude has come today, like an old friend,
To be my cup-bearer as the light declines,
We are waiting together for the moon to rise
And beneath each shadow your reflection shines.

Freedom of Press: Though Article 19 does not expressly provide for freedom of press but in the famous **Sakal Papers v. Union of India14** the Supreme Court observed the importance of press very aptly and held that it is implicit in the freedom of speech and expression and held that the State could not make laws which directly affect the circulation of a newspaper for that would amount to a violation of the freedom of speech.

The basic principle of democracy being that in government the deliberative forces shall prevail over the arbitrary, public discussion becomes a political duty. Public criticism is essential to the working of democracy as the Supreme Court pointed out in **Bennett Coleman & Co. v. Union of India15**. Chief Justice Hughes held the view that the very foundation of constitutional government lies in the belief that changes, if desired, may be obtained by peaceful means and hence the greater the importance of safeguarding the community from incitements to the overthrow of institutions by force or violence, the more imperative is the need to preserve inviolate the constitutional right of free speech, free press and free assembly in order to maintain the opportunity for political discussion. It has been rightly said that fear breeds repression, repression breeds hate, hate menaces stable government; the path of safety lies in the opportunity to discuss supposed grievances and proposed remedies. All this has been accepted and held to be applicable in the context of the freedom of the Press in **Express Newspaper's16** case which is one of the early pronouncements of Supreme Court.

In **LIC v. Manubhai Shah17** the Supreme Court held that the freedom of speech and expression must be broadly construed to include the freedom to circulate one's views by word of mouth or in writing or through audio visual media. This includes the right to propagate one's views through the print or other media. The Court observed: Freedom to air one's view is the lifeline of any democratic institution and any attempt to stifle or suffocate or gag this right would sound a death knell to

[14] AIR 1962 SC 305
[15] (1973) 2 SCR 757
[16] 1985 (1) SCC 641
[17] 1992 (3) SCC 637

democracy and would help usher in autocracy or dictatorship. The court held that any attempt to deny the right to circulation and propagation of ideas must be frowned upon unless it falls within the mischief of Article 19(2). In **R. Rajagopal v. Tamil Nadu18**, Justice Jeevan Reddy reiterated the indispensability of freedom of press in our Constitutional scheme.

Freedom of the media is in essence freedom of the people. It is not so much the media's right to publicise-print, publish, televise- as it is the right of the citizens to know. This right to know and to obtain information flows from the constitutional guarantee of free speech and the concept of open government inherent in a democratic system. The media has a legitimate claim for a share in the transformation brought about by the socio-economic and political gifts of democracy. An alert media can and does push governments and societies more and more into the open. But, let us not forget that if the media wants to be free, it must be fair, for it will soon cease to be free if it does not remain fair. And the only way to ensure this freedom and fairness is to treat the power of media as a public trust. While freedom of the media is extolled as one of the great bulwarks of liberty, it is not an end in itself. It entails social responsibility. The media is not free to ruin a reputation or to breach a confidence or to muddy the course of justice or to do anything unlawful. The constitutional guarantee does not extend to the media enjoying absolute immunity from unlawful conduct any more than other persons. We need to remind ourselves that freedom caries within it responsibility even for the media. There is no freedom from responsibility for the media under the constitutional scheme. It is axiomatic that in the performance of its functions and the discharge of its duties as it perceives them media will almost inevitably cross the path of other democratic institutions. There are, therefore, bound to arise potential areas of conflict. For instance, the conflict between the media and privacy, media publicity versus fair trial, media publicity versus national security. The freedom of the media has to be reconciled with the no less valuable rights like the right to privacy, right to the presumption of innocence until proved guilty, the right to a fair trial all of which are recognised human rights. These are serious challenges facing the media and have to be squarely met in the larger public interest.

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Mere prying sensationalism and the public wish to be entertained cannot claim any constitutional protection. Anything that may be interesting to the public need not necessarily be in public interest. Investigative journalism involving surreptitious gathering of evidence could, if at all, be justified only if it serves to unearth evidence of a serious crime or to protect public health and welfare and that too when such evidence cannot be obtained by normal means. The media has to respond to the pulls of conflicting interests of society particularly in the areas of clash between a person's right to be left alone and the right of the public to be informed. They will have to be governed by some ethics.

Challenges of Technology:

The tremendous growth of science and technology brings in its wake new problems. It promotes the freedom of expression. Communication is facilitated and the exercise of the right is made easier. But it also facilitates the abuse of the right and freedom. Newer forms of misuse and abuse of this precious freedom emerge posing threat to privacy, dignity, reputation and even national interests and security. These problems will have to be addressed efficaciously. This again highlights the needs for balance and restraint which will have to be from within and also to be imposed by law as the need and circumstances demand. This is another challenge of modern times.

Commercial Advertisements: Commercial advertisements at one stage were considered outside the protection of freedom of speech and expression. But later in **Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.19**, the Supreme Court held that a commercial advertisement or commercial speech was also a part of the freedom of speech and expression, which would be restricted only within the limitation of Article 19(2). The court however made it clear that the government could regulate the commercial advertisements, which are deceptive, unfair, misleading and untruthful. Examined from another angle the Court said that the public at large has a right to receive the "Commercial Speech". Art. 19(1)(a) of the constitution not only guaranteed freedom of speech and expression, it also protects the right of an individual to listen, read, and receive the said speech.

Pre-Censorship on Print Media: In **Romesh Thapar v. State of Madras**, the validity of the Madras Maintenance of Public Order Act, 1949 while in **Brij**

[19] (1995) 5 SCC 139

Bhushan v. The State of Delhi, a pre-censorship order against the paper "Organizer" was challenged. In both the cases, not only the validity of Governmental action but the constitutional validity of the enabling statute themselves was questioned. The Supreme Court found that the statutes covered ultra vires fields and declared them invalid under Article 13 of the Constitution. The learned judges agreed that the expressions 'public order" and "public safety" covered much wider fields than the Constitution permitted through the use of expression "undermines the security of or tends to overthrow the State". They also agreed that on many occasions and in many circumstances a danger to public order or to public safety would also be a danger to the security or foundations of State the Court pointed out that many acts prejudicial to public order or to public safety would not be grave enough to endanger the security or the foundation of state and hence Constitution would not permit the extreme measure.

No Monopoly on Electronic Media: The concept of speech and expression has evolved with the progress of technology and encompasses all available means of expression and communication. Further adding new dimension to freedom of speech and expression the Supreme Court in **Secretary, Ministry of I & B v. Cricket Association of Bengal 20**held that the government has no monopoly on electronic media and a citizen has, under Article 19(1) (a), a right to telecast and broadcast to the viewers/listeners through electronic media. In **Odyssey Communications (P) Ltd. v. Lokvidayan Sanghatana21**, the Supreme Court held that the right of a citizen to exhibit films on the State channel was a part of the fundamental right guaranteed under Article 19(1)(a).

Right to Report Court Proceedings: Justice, it is often said, must not only be done; but must be seen to be done. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, courts must generally hear causes in open and must permit the public admission to the court-room. The right to report judicial proceedings, stems from the necessity for transparency. Openness is a safeguard against judicial error and misconduct. In

[20] (1995) 2 SCC 161
[21] (1988) 3 SCC 410

famous **Naresh Mirazkar's22** case, the Supreme Court quoted the following words of English Philosopher Bentham:

> **"In the darkness of secrecy sinister interest, and evil in every shape, have full swing only in proportion as publicity has place any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying, under trial."**

The Court however; cautioned that it may restrict the publicity of proceedings in the interests of justice. The court has the inherent power under Section 151 of Code of Civil Procedure, 1908 to order a trial to be held in camera, but this power must be exercised with great caution and only where the court is satisfied beyond doubt that the ends of justice would be defeated if the case were to be tried in open court.

Freedom to Criticize Government: Kedar Nath Singh v. State of Bihar23 arose out of a constitutional challenge to Section 124-A of Indian Penal Code, 1860 which penalizes attempts to excite disaffection towards the Government by words or in writing and publications which may disturb public tranquility. The Supreme Court dismissed the challenge but classified that criticism of public measures or comments on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression.

Right to Know: The freedom to know, receive and impart information has also been declared as a part and parcel of freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information. In **Prabha Dutt v. Union of India24**, the Supreme Court directed the Superintendent of the Tihar Jail to allow the representatives of a few newspapers to interview two death sentence convicts however, cautioned that it is not and absolute right, nor indeed does it confer any right on the press to have an unrestricted access

[22] (1966) 3 SCR 744; AIR 1967 SC 1
[23] AIR 1962 SC 955
[24] (1982) 1 SCC 1

to means of information. The right to information was consistently recognized by the Court in number of cases as an essential aspect of freedom of speech and expression until finally it was incorporated in the Right to Information Act, 2005.

Freedom of Silence: In a landmark judgement dealing with the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the National Anthem in the morning assembly though they do stand respectfully when the National Anthem is sung, the Apex Court in **Bijoe Emmanuel v. State of Kerala25** declared it against the fundamental right to freedom of expression and freedom of conscience and freely to profess, practice and propagate religion. Setting aside the judgment of the High Court, this court directed the respondent authorities to re-admit the children into the school, to permit them to pursue their studies without hindrance and to facilitate the pursuit of their studies by giving them the necessary facilities. Justice Chinappa Reddy ended his judgment with following lines: **"our tradition teaches tolerance; our philosophy preaches tolerance; our constitution practices tolerance; let us not dilute it.**

The latest in this line is the recent **Shreya Singhal v. Union of India26**, which once again is a delightful affirmation of the value of free speech and expression quashing section 66A of the Information Technology Act, 2000 as unconstitutional. The verdict is momentous and landmark in the history of Supreme Court for several reasons. It not only represents the court taking an extreme step by declaring a censorship law as illegitimate but it illuminated with remarkable felicity, the scope of freedom of speech and expression available to a citizen and the limited role for the state to put restrictions on this fundamental freedom. The bench while trying to balance the freedom and its fine constrictions has struck a spiteful setback against the duplicitous attitude taken by the State, which consistently represents the right to freedom of speech and expression as a fragile guarantee at best. In the opinion of the court Section 66A is vague, incapable of precise definition and hence were also against the basic tenets of criminal law. The expressions "grossly, offensive, or menacing" used in the section are too vague and hence there is no manageable standard by which a person can be said to have committed an offence. My brother Justice Nariman used the famous American Supreme Court doctrine of chilling effect that has grown from

[25] (1986) 3 SCC 615
[26] (2015) 5 SCC 1

an emotive argument into a major substantive component of first amendment adjudication of the United States. The chilling effect concept had been recognized most frequently and articulated most clearly in decisions chiefly concerned with the procedural aspects of free speech adjudication. The possibility that the existence of an unconstitutional state statute might inhibit the exercise of first amendment freedoms was the primary justification for those decisions establishing a more receptive approach to affirmative federal court litigation contesting the validity of such legislation. Accepting the contention of the petitioner court approved that Section 66A produced a chilling effect and forced people to abridge their speech and expression of any form of dissent, howsoever innocent. The court narrated few examples: A certain section of a particular community may be grossly offended or annoyed by communications over the internet by liberal views-

"such as the emancipation of women or the abolition of the caste system or whether certain members of a non-proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of the particular communities and would fall within the net cast by Section 66A."

Hence, Section 66A was simply indefensible; it contained no immediate nexus with any of the constitutionally permitted grounds on which state may impose reasonable restrictions on the freedom of speech and expression. The court also explained the conditions under which restrictions may be imposed. For instance, if free speech is to be restricted on the specific ground of public order, the law placing such a constraint has to satisfy the test of clear and present danger, used by American Court for almost a century to determine the speech, the government may restrain.

Seeing the trend of opinions delivered by the Supreme Court since the **Romesh Thaper** and **Brij Bhusan** cases it would not be an embellishment to say that the free speech clause has always been an engaging fundamental right for the Supreme Court right since inception. Let me conclude by reciting Faiz Ahmed Faiz once again:

Bol, ke lab azaad hai tere:
Bol, zaban ab tak teri hai,
Tera ustwan jism hai tera –
Bol, ke jan ab tak teri hai.

Dekh ke ahan gar ki dukaan mein
Tund hai shu'le, surkh hai aahan,
Khulne-lage quflon ke dahane,
Phaila hare k zanjeer ka daaman.
Bol, ye thora waqt bahut hai,
Jism o zuban ki maut se pahle;
Bol, ke sach zinda hai ab tak –
Bol, jo kuchh kahna hai kah-de!

AS WE ARE

A row of dead lamps in the niches of our hearts,
Shrinking from the light, of all things weary.
Like the fading image of beauty once loved.
Clasping to us the cloak of our obscurity.

The limits of good and evil, the means and the end,
The same idle curiosity and futile questions.
By the fleeting hours of dull today saddened,
Regretting yesterday, by tomorrow terrified.

Avid thoughts and desires that nothing satisfies,
Scorched tears that cannot come into the eyes.
A great pain, which of a song, cannot become the surge,
Nor from the dark crevices of the heart emerge.

And a vague confused, search for a remedy,
A desire of revolt, prison, a desert where to flee.

I would once again thank the organizers for bestowing me the great honor of sharing my thoughts with you on a subject of not only contemporary but lasting importance for any civilized society especially one like ours with such diversity as is found nowhere else in the world.

Jai Hind!