CHAPTER-I

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(a) Indian Constitution and the Nature of Fundamental Rights

India woke to freedom after a long struggle and to redeem its pledges gave itself a Constitution guaranteeing fundamental rights to its citizens. The Constitution of India is a product of knowledge and experience exercised with the art of the possible. The leaders who took the catalyst role in the Constituent Assembly were all part of the freedom struggle and were aware of the aspirations of the people. They have also realized that life, liberty, private property, and freedom are the essential necessities of any democracy and accordingly have provided for these in our Constitution. These were incorporated in the justiciable Fundamental Rights of the Constitution, while the socialistic objectives of development were enumerated in the non-justiciable directive part.

The philosophical foundation of Fundamental Rights, according to some is the natural law, and that the history of rights of man is bound with the history of natural law. This makes the fundamental rights similar with the inalienable natural rights. They are supposed to be moral rights which every human being everywhere at all times ought to have, simply because of the fact that in
contradiction with other beings, he is rational and moral. Natural law theory however has lost some of its appeal to modern jurists. Having said that it can also be stated that the framers of the Indian Constitution did not solely accepted the incorporating of fundamental rights in the Constitution because it has a rational basis in natural rights, but they wanted to grant a solid foundation to the civil and political rights of the citizens of a newly emerging country from foreign yolk after a long and sacrificing struggle.

The fundamental rights described in Part III of the Constitution are concretized interests of the individual citizens and other persons recognized by the state. These arise out of the original freedoms which are at once the necessary attributes and modes of self expressions of the human beings and primary conditions of their community life within an established legal order\(^1\). They are established as constitutional legal principles and made enforceable against the state which cannot dispute their validity or infringe them by means of a majority of votes in the legislature. These rights are similar to what the Americans described as 'natural and inalienable' in their declaration of independence while establishing the Union and describing the power and procedure of the constitutional government of the Union and the States. The people reserved their basic rights

and made them fundamental, thus denying the state the power to abridge them.

The concomitants of these fundamental rights are so many freedoms, privileges, and interests which are declared inviolable by law and are made enforceable by the authority of the state through judicial proceedings. There are so many curbs on the state action, its regulations, and controls upon the individual behaviour and his interest, rights and freedom of action. They are given sanction of the higher law and are made sancrosanct. The modern trend of guaranteeing fundamental rights to the people may be traced to the Constitution of US drafted in 1787. The US Constitution was the first modern Constitution to give concrete shape to the concept of human rights by putting them in the Constitution and making them justiciable and enforceable through the instrumentality of the Courts. The original US Constitution did not contain any fundamental rights. There was trenchant criticism of the Constitution on this score; consequently the Bill of Rights came to be incorporated in the Constitution in 1791 in the form of ten amendments, which embody the Lockelian ideas about the protection of life, liberty, and property. The nature of fundamental rights in the USA has been described that, "the very purpose of a Bill of Rights was to withdraw certain subjects

from the vicissitude of political controversy, to place them beyond the reach of majorities and officials to establish them as legal principles to be applied by the Courts. Once right to life, liberty and property and free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on no outcome of elections."^{3}

The inclusion of a set of fundamental rights in the India's Constitution had its genesis in the forces that operated in the national struggle during British Rule. With resort by the British executive to such arbitrary acts as internments and deportations without trial and curbs on the liberty of the Press in the early decades of the century, it became an article of faith with the leaders of the freedom movement. Some essential rights like personal freedom, protection of one's life and limb and of one's good name, derived from the common law and the principles of British jurisprudence were well accepted and given at least in theory statutory recognition in India by various British enactments relating to the Government and the Constitution of India."^{4}

Few good reasons made the enunciation of Fundamental Rights in the Constitution rather inevitable in our country. For one

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4 The Framing of India's Constitution, B. Shiva Rao, (1968), IIPA, New Delhi, p.170.
thing, the main political party, the Congress, had for long been demanding these Rights against the British rule. During the British rule in India, human rights were violated by the rulers on a very wide scale. Therefore, the framers of the Constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights. The Indian society was fragmented into many religious, cultural, and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some Rights which may be enforced against the government which may become arbitrary at times. Though democracy was being introduced in India, yet democratic traditions were lacking, and there was a danger that the majority groups may manipulate the rights of the people and such a danger could be minimized by having a Bill of Rights in the Constitution. The Fundamental Rights are a necessary consequence of the declaration in the Preamble to the Constitution that all people of India have solemnly resolved to constitute India into a Sovereign democratic republic and to secure to all its citizens, justice, social, economic and political; liberty of

\[6\] Ibid.
thought, expression, belief, faith and worship; equality of status and 
of opportunity.

In India, there were additional reasons for including fundamental rights in the Constitution. The Indian National Congress at its Madras Session, resolved that the Constitution of India must be based on declaration of fundamental rights. The Sapru Committee proposed the inclusion of Fundamental Rights in the Constitution of India, with a view to prescribing a standard of conduct for the legislature, the government, and the Courts. The Committee further suggested a division of the rights as justiciable and non-justiciable and recorded, that “we are alive to the danger of too much interference with the executive government on the part of the judiciary. Provisions guaranteeing fundamental rights are essential for securing stability in national life and for preventing one party dictatorship in the political life of a country. They also help considerably in solving the problems of minorities. Some of the fundamental rights form the bedrock of democracy. No democracy can function fruitfully in the absence of the basic freedom of speech and expression. If the doctrine of “consent of the governed to be real, people must have the twin freedoms of speech and expression”.
The need to have the fundamental rights was so very accepted by all members in the Constituent Assembly that the point was not even considered whether or not to incorporate such rights in the Constitution. In fact the fight all along was against the restrictions being imposed on them and the effort all along was to have the fundamental right on as broad and pervasive a basis as possible.

Although ordinary remedies exist for the protection of rights, the prerogative writs have put teeth in the fundamental rights provisions. The writs have become popular for they are commonly believed to be the corner stone of freedom and liberty. However, the rights although are enforceable by the Courts, the Assembly members well realized that they could not be absolute. The question was to what extent and to what way the right should be limited. The rights, it was decided could best be limited by attaching provisos to the particular right and by providing for the rights to be suspended in certain circumstances.

In Karachi resolution, for example, it was decided that the right to free speech was as not to contravene law or morality. Additionally the rights had further qualified the Assembly members

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felt in two directions about the need to limit individual liberty by allowing state intervention for certain social purposes, there was little argument. The need to circumscribe the basic freedom of speech, expression, assembly and association and movements however, there was no easy argument. At issue was the always the delicate and explosive question of freedom versus state security and to a lesser extent of liberty versus licence in individual behaviour. The two strongest advocates in the sub-committee of the limitations of the rights were A.K. Ayyar and K.M. Munshi and with one or two exception, there fellow members supported them. At its meeting on 25th March 1948 the sub-committee drafted the rights to freedom of the Constitution and voted to qualify each with proviso that the exercise rights be subject to public order and morality.

In the Assembly a week later, the provisos received a mixed reception. Their supporters explained that they were to prevent the misuse of the rights by subversive groups and were nothing more than the embodiment of precedent as it had been established by case law. The more common view was that the provisos so circumscribed the rights that they no longer had any meaning. As one member put it,

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8 The Indian Constitution, Corner Stone of a Nation, Granville Austin, Oxford University Press, 1966, p.69.
the rights had been framed 'from the point of view of a police constable'.

This goes to show the anxiety of the founding fathers as to preserve the freedom of the citizens as they all were champions in a free democracy. India as a nation was emerging at the time when liberty and freedom were the virtues of the post World War. And despite the internal turmoil and pain of partition they wanted India to become a country with a promise – of liberty, equality and freedom. It was the realization that fundamental rights would not only be guarantees. These would also be checks on subsequent governments for a transparent, vigilant and functioning democracy. It was believed that eternal vigilance was the price of liberty; hence freedom of speech and expression were necessary to preserve, protect and redress liberty and their abuse.

Throughout India's freedom struggle, there was a persistent demand for a written bill of rights for the people of India which included the guarantee of free speech. Understandably, the founding fathers of the Indian Constitution attached great importance to freedom of speech and expression and the freedom of press. Their experience of waves of repressive measures during British rule

\* CAD III, 2, 384; Somnath Lahiri.
convinced them of the immense value of this right in the sovereign democratic republic which India was to become under its Constitution. They believe that freedom of expression and freedom of press are indispensable to the operation of a democratic system. They knew that the avenues of expression are closed the government by consent of the governed will soon be foreclosed. In their hearts and minds was imprinted the message of the father of the nation, Mahatma Gandhi that evolution of democracy is not possible if one is not prepared to hear the other side. They are endorsed to the thinking of Jawaharlal Nehru who said “I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed and regulated press”\textsuperscript{10}. No wonder that members of the Constituent Assembly hailed the guarantee of free speech as the ‘most important’, ‘the charter of liberties’, ‘the crux of fundamental rights’\textsuperscript{11}.

The Founding Fathers while drafting our Constitution, insisted that the freedom of expression is not only a right guaranteed to the citizens of India, it also acts as a restraint on the Government, that it shall carry on the business of governance in a manner provided by law and the Constitution. Our Constitution is drafted at a time

\textsuperscript{10} Nehru’s speech on 20 June 1916 in protest against the Press Act 1910 as quoted in Law and Justice, An Anthology, Soli J Sorabji Ed. Universal, Delhi 2003, p.296.
when the world was infused with the ideas of liberalism and democracy. The post-world war was developing concepts of welfare states and also ripening the democratic institutions. In such an environment, when the stalwarts of our freedom movement wanted to deliver the nation into an era of social revolution, which was to silently usher in an era of progress and prosperity. The founding fathers wanted India to be a liberal democracy and it was realized by them that without fundamental rights, the ideal of democracy could not be achieved. The founding fathers also realized that without the freedom of speech and expression the nation can not be a true democracy.

The draft prepared by Mr. K.M. Munshi that every citizen should have within the limits of and in accordance with the law of the Union several personal rights safeguarded to him, including the rights of freedom of expression of opinion, of free association and combination, of assembling peacefully and without arms, of secrecy of correspondence and of free movement and trade. The freedom of the press was also to be guaranteed subject only to such restrictions imposed by the law of the Union as might be necessary in interest of public order or morality. Ambedkar’s draft besides providing that ‘no law shall be made abridging the freedom of speech of press of

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12 The Framing of India’s Constitution: A Study, B. Shiva Rao, IIPA, (1968), Delhi, p.211.
association and of assembly except for considerations of public order and morality' and also laid down the citizen's right to reside and subject to permission of the state to settle in any part of India\textsuperscript{13}.

The Constituent Assembly considered the fundamental right of freedoms with power of State to promulgate laws overshadowing it at the time of necessity and some members expressed their concern about the restrictions on the freedoms. While considering the Constitution and the Fundamental Rights, the Chairman of the Drafting Committee Dr. B.R. Ambedkar was of the view that Fundamental Rights are not absolute\textsuperscript{14} and subject to the interest of the general public and the security of the State. Mahaboob Ali Baig Sahib Bahadur advocated in the Constituent Assembly during discussion of Article 13\textsuperscript{15} that the judiciary ought to consider the imposition of any limitations on such right and not the executive or the legislature, He opined

"... according to the well recognized cannons, it is not the executive or the legislature but it is the independent judiciary of the State that has to judge, whether a

\textsuperscript{13} Ibid.
\textsuperscript{14} CAD, VII, p. 728.
\textsuperscript{15} Article 19 of the present Constitution was discussed as Article 13 of the Draft Constitution.
certain citizen has overstepped the limits so as to endanger the safety of the state.\textsuperscript{16}

While making a comparison of similar provision in other democracies, he further opined:

"This distinction was recognized by the framers of the American Constitution in that famous Fourteenth Amendment, which clearly laid down that no Constitution can make any law to prejudice the freedom of speech, the freedom of association and the freedom of press...if an American citizen transgressed the limits and endanger the State, the judiciary would judge him and not the legislature or the executive. In the case of Britain, there is no written Constitution but there are two prominent and effective safeguards. They are governed by the law of the land, the law of the land is the law which gave them freedom of thought, freedom of expression, and they can not be proceeded against without due process of law.\textsuperscript{17}

He was critical about the restrictions imposed on the right and took the view,

\textsuperscript{16} CAD, VII, p.728. 
\textsuperscript{17} Ibid.
"... It is only the German Constitution that we find restrictions such as those in Clauses (2) to (6). It is only in the German constitution that the fundamental rights were subject to the provisions of the law that may be made by the legislature. That means the citizens could enjoy only those rights, which the legislature would give them, would permit them to enjoy from time to time, that cuts at the very root of fundamental rights and the fundamental rights cease to be fundamental"\(^{18}\).

Sardar Hukum Singh spoke while a motion for the deletion of the restrictions on the fundamental right of freedom was taken up, he was of the view that the restriction is a coercive state power and in fact takes away the freedom granted in the provision. He remarked

"... in Article 13(1), sub-clauses (a), (b) and (c), they give constitutional protection to the individual against the coercive power of the State, if they stood by themselves. But sub-clauses (2) to (6) of Article 13 would appear to take away the very soul out of these protective clauses. These laid down that nothing in sub-clauses (a), (b), (c) of Article

\(^{18}\)Ibid.
13 shall effect the operation of any of the existing laws, i.e., the various laws that abrogate the rights envisaged in sub-clause 1, which were enacted for the suppression of human liberties, for instance the Criminal Law Amendment Act, the Press Act, and other security Acts. If they are to continue in the same way as before, then where is the change ushered in and so loudly talked of? The main purpose of declaring the rights as fundamental is to safeguard the freedom of the citizen against any interference by the ordinary legislature or the executive of the day. The rights detailed in Article 13(1) are such that they can not be alienated by any individual even, voluntarily. The government of the day is particularly precluded from infringing them, except under very special circumstances. But here, the freedom of assembly, freedom of the press and other freedoms have been made so precarious and entirely left at the mercy of the legislature that the whole beauty and the charm has been taken away. It is not only existing laws that have been subjected to this clause, but the state has further armed with extraordinary powers to make any law relating to libel, slander, etc."19.

He also compared the provision with the similar provisions in other countries and stated,

"But in other countries like America, it is for the Supreme Court to judge the matter, keeping in view all the circumstances and the environments and to say whether individual liberty has been sufficiently safeguarded or whether the legislature has transgressed in to the freedom of the citizens. The balance is kept in the hands of the judiciary, which in the case of all civilized countries has always weighed honestly, and consequently protected the citizen from unfair encroachment, by the legislatures"\textsuperscript{20}.

Mr. Anantathasayanam Ayyangar opined while supporting the restriction upon the freedom of expression remarked:

"We have improved upon the restrictions that have been imposed in Clause 2. The word sedition has been removed. If we find that the government for the time being has a knock of entrenching itself, however, that its administration might be, it must be the fundamental right of every citizen in the country to overthrow that Government without violence by persuading the people by

\textsuperscript{20} Ibid., p.733.
exposing its faults in the administration, its methods of working and so on. The word sedition has become obnoxious in the previous regime. We had therefore, approved of the amendment that the word sedition ought to be removed except in cases where the entire state itself is sought to be overthrown or undermined by force or otherwise leading to public disorder; but any attack on the Government itself ought not to be made an offence under the law we have gained that freedom and we have ensured that no government could possibly entrench itself, unless the speeches lead to an overthrow of the state altogether"$^{21}$. Some of members wanted the restrictions for a definite period only$^{22}$. Pundit Nehru, however, was the opinion,

"... I am not aware of any State, democratic, semi-democratic or other in the world today, which will not pull up a person or a group, which does something which is dangerous to its security or safety, from an outside power or internally. Therefore, to say that Parliament should have the right to frame laws in regard to relationship with foreign

$^{22}$ Sri Syamanandan Sahaya moved an Amendment in the Constituent Assembly in this regard, see CAD, Vol. VII, p.743.
powers is an inherent right of parliament to do so. It just does not matter if it is not incorporated there. Because I do maintain with all respect that Parliament has the right and nothing in the fundamental rights takes it away or can take it away, because it is the basic right of the State to do that in relation to foreign powers"23.

While discussing about restrictions relating to freedom of speech one Hon’ble Member Pt. Thakur Dass Bhargava of the Constituent Assembly took the view,

"if you put the word ‘reasonable’ there the Court will have to see whether a particular act is in the interest of the public and secondly whether the restrictions imposed by the legislatures are reasonable, proper and necessary in the circumstances of the case. The Court shall have to go into the question and it will not the legislature and the executive who could play with the fundamental rights of the people. It is the words ‘reasonable’, ‘proper’ or ‘necessary’ or whatever good word the house likes. I understand that Dr. Ambekdar is agreeable to

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the word 'reasonable'. I have therefore, put the word 'reasonable' to be reasonable' 24.

The Indian Constitution at the time of its drafting was influenced by various constitutions of the world and the 'choicest morsels' of these constitutes the staples of the Indian Constitution, some adaptations were however made to suit the peculiar scenario of the country. Further the ideas of the great revolutions such as the French Revolution, the American War of Independence and Bolshevik outbreak inspired the Founding Fathers to form a democratic free Indian state and its Constitution. However, it was a time of turmoil because of the partition of the country and hence a balanced approach was considered keeping the freedom of the citizens on the one hand and the security of the State on the other.

The Fundamental Rights described in Part III of the Constitution are recognizably concretized interests of the individual citizens, other persons, and certain recognizable cultural, linguistic and denominational groups of citizens. They arise out of the "original freedoms which are at once the necessary attributes and modes of self-expression of the human beings and primary conditions of their

community life within an established legal order." They are established as constitutional legal principles, and made enforceable against the state which cannot dispute their validity or infringe them by means of a majority of votes in the Legislature. These rights are similar to what the Americans described as "natural and inalienable" in their Declaration of Independence. While establishing the Union and prescribing the power and procedure of the Constitutional governments of the Union and the States the people reserved their basic rights and made them fundamental, thus denying the state a power to abridge them. The concomitants of these Fundamental Rights are so many freedoms, privileges and interests which are declared inviolable by law and are made enforceable by the authority of the state through judicial proceedings. They are so many curbs on state action, its regulations and controls upon the individual behaviour and his interests, rights and freedom of action. They are given sanction of the higher law, and are made sacrosanct and immune from the inroads, except from the permissible socio-economic and political regulatory actions. They are made inviolable by all state action whether executive, legislative and judicial. The twin conditions of ensuring the dignity of the individual and the unity of the nation

insisted that the residue of the power held back by the people themselves should be regarded out of reach of both the legislature and the executive government, except under exceptional circumstances caused by an emergency or an overriding public interest. The State and its activities cannot infringe the Fundamental Rights and deprive the individual of his inalienable interests. It cannot abridge them by legislative action, executive decrees or otherwise. The rights are perfect and complete legal rights; and their infringement constitutes a legal wrong. The provisions of Part III of the Constitution afford protection against the menacing interference with the life, liberty, freedom and interests of the individual. Looking from the side of the State, these rights can be described as so many obligations and duties of the Legislature and the Government towards the citizens and other persons living within the territories of the Union. These are incorporated in the Constitution with a view to promote a deliberately declared public policy. They are described by the framers, and recognized by the Supreme Court as 'transcendental', "inalienable" and "primordial". They constitute the ark of the Constitution.

Based on a perusal of the reports of the Debates as the Constituent Assembly, a judicial appraisal of the aspirations, hopes, demands and obligations underlying the Fundamental Rights was
attempted at the highest level in the judgments in *Golak Nath vs. State of Punjab*, \(^{26}\) *Keshavananda Bharati vs. State of Kerala*\(^ {27}\) and *Minerva Mills Ltd. vs. Union of India*\(^ {28}\).

The British structure of Parliamentary democracy with some features of American Presidential system were adopted, and the State was given some directives to devise necessary legislation for the socio-economic development of the people of India in the line of the Irish Constitution. The fundamental rights are an improvisation on the American Bill of Rights and the idea of Natural Law and Rule of Law. The Americans promulgated the Bill of Rights well after the Constitution of confederation was inaugurated and especially the freedom of speech was included later after an amendment of the Constitution.

In Constitutions where fundamental rights are positivised, there are also limitations or regulations of these rights. In considering this aspect of fundamental rights, the concepts of the core of the rights, the circumstances and an outdoor edge are important. The United States of America incorporated the Bill of Rights in the Constitution by various amendments. In America along with freedom of religion, the First Amendment provides for freedom of speech and

\(^{26}\) AIR 1967 SC 1643.  
\(^{27}\) AIR 1973 SC 1461.  
\(^{28}\) AIR 1980 SC 1789.
press. The First Amendment concludes by providing that the people have the right to assemble peacefully and petition the government for redress of grievances. Therefore, the jurisprudence of freedom of speech is a later development in America whereas in India the Constitution itself guarantees such freedom to the citizens. Jackson J. of the Supreme Court of America explained the purpose of fundamental rights as follows:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities and officials, to establish them as legal principles to be appointed by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to votes, depend on the outcome of no election"\textsuperscript{29}.

The Founding Fathers of our Constitution has cherished the liberal ideals and the freedom of the individual, but they have not compromised the cohesion of the State in any manner by providing 'reasonable restrictions' and special powers to the State to override the rights of the individual at the time of need. In sum, the Fundamental Rights are declared for the good of the individual and so

he possesses them as something inherent in his status of a human being. They are conferred on him; and are made inalienable even by him. The social interest is best served by letting him enjoy these rights. He is not free to give them up. Any promise by him to waive any of the Fundamental Rights must be against the public policy of the Constitution, and therefore, unlawful. He cannot be heard to say that he is prepared to surrender them. The fundamental rights are conferred upon all citizens in fulfillment of the objectives of the Preamble, and for realization of the aims of the new social and economic order that must be established by implementation of the Directive Principles of State Policy set out in Part IV of the Constitution.

(b) Nature of the Constitution of U.S.A.

The concept of a written Constitution is one of the unique contributions that the United States has made to the art of government. The American Constitution, which has been in effect since 1789, is the oldest written national Constitution now in use. Its long life seems even more remarkable when we consider the changes that have taken place in the United States since the Constitutional Convention of 1787.
The Constitution of the United States was ratified in 1787, which makes it the oldest written Constitution still in force. It is certainly the most legally active. It is not, of course, exactly the way it was in 1787. The Constitution has been amended twenty-six times, some of the amendments (the Fourteenth, for example) have been extraordinarily important. But when we consider how the world has changed since 1787, twenty-six amendments do not seem like a lot. Twelve of these had been added to the Constitution by 1804; there have been only fourteen since.

When we talk about the influence or effect of the Constitution, we must remember that the Constitution is only a piece of paper by itself. There is no magic in words and phrases. It is not the American Constitution that is powerful, but the constitutional system. It is a system made up, first, of public attitudes toward the Constitution, and secondly, of behaviour patterns and institutions that have grown up around the Constitution. The Constitution itself, important as it is, well crafted as it is, could not and cannot account for the constitutional system.¹⁰

Whatever the situation in other countries, in this country constitutional government is a strong force to be reckoned with it is

part of the fabric of American life. The American Constitution is living law because it is enforced. Some of the enforcement comes through the Courts, by means of "judicial review". The Courts are not the only guardians of the constitutional system, but they are a powerful and important one. Indeed, when people talk about the Constitution as living law, they usually mean doctrines and understandings that Courts have invented, developed, and spread. The Constitution, in short, is what the judges say it is, as Chief Justice Charles Evans Hughes once bluntly put it. What they say is said in the context of actual cases. Actual cases arise out of real disputes between real litigants. They are always a product of their times. They reflect the social issues of the day, and thus these issues are the immediate source of constitutional law31.

Constitutional behaviour is more than judicial behaviour. Constitutional law begins outside the Court-room: it begins with claims of constitutional right. Also traditions of behaviour and understanding exist that are independent of judges and Courts. First Amendment guarantees freedom of speech; so do all the state constitutions. Yet the Supreme Court did not decide an important free speech case until Schenck vs. United States32. Schenck was convicted

31 Ibid.
32 249 US 45 (1919).
of violating the 1917 Espionage Act during the First World War. Schenck was opposed to the war and mailed a document out to draftees attacking the war and the draft. By then, the First Amendment was over a century old. Yet the federal Courts had said almost nothing about the meaning and limits of freedom of speech. During "the federal government took many actions which would be considered gross violations of our rights today. On the other hand, there was never general censorship of the press during peacetime. Wide-open political debate was always possible, on a scale that few countries achieve even today. Freedom of speech, then, was part of our basic tradition. The essential point is this: constitutionalism is more behaviour than theory, at any given time".33

The First Amendment provides for freedom of speech and press. The First Amendment concludes by providing that the people have the right to assemble peaceably and petition the government for redress of grievances.

In the discussion that follows, two major points should be kept in mind:

1. The First Amendment restrictions applied only to Congress for many years. Only after the Supreme Court's expansion of the

Fourteenth Amendment could the denial of First Amendment rights by the states be challenged in the federal Courts.

2. Despite the fact that the First Amendment states categorically that Congress shall make no law abridging freedom of speech, the Court has never held that an individual is always entitled to say anything he pleases, any way he pleases, in any place he pleases, under any circumstances he pleases. Whether one adopts the most “absolute” interpretation of the First Amendment, as Justices Black and Douglas frequently did, or reads almost all meaning out of the amendment, as Justices Frankfurter and Judge Learned Hand sometimes did\textsuperscript{34}, the issue is always just how much freedom of speech the Court is will.

The literature and Court decisions on freedom of speech, press, and assembly are exceedingly vast and complex\textsuperscript{35}.

The first congressional limitation on freedom of speech was made in the Sedition Act of 1798, only seven years after the adoption of the First Amendment. But the Sedition Act never came directly before the Supreme Court. In fact, no important case involving freedom of speech or press was decided by the Supreme Court prior to World War I. After that war, an important group of

cases came before the Court as the result of convictions obtained under the Espionage Act of 1917 and the amendments to that law enacted in 1918 and known as the Sedition Act. These statues were enacted because of the fears engendered by the war with Germany and by the Russian Revolution of 1917.

In the United States of America, there is no specific provision in the Constitution enabling the Government to restrict the "freedom of speech and expression" or any fundamental rights. Hence, the Supreme Court of the U.S.A. invented the doctrine of "Police power" for bringing about the essential reconciliation. The Supreme Court of America observed, "The liberty of the individual to do as he pleases even in innocent matters, is not absolute. It must frequently yield to the common good". Police power" is the right of the legislature to pass such legislation as is necessary in furtherance of security, morality and general welfare of the community, except in cases where it is expressly prohibited from exercising it, by the Constitution. The doctrine of "Police power" is based on the theory that the State is armed with an inherent authority to protect public health, safety and morals. It is the power of the people exercised through the State Governments to restrain an individual in the interest of the public. The absence of any power in the legislature to restrict
the fundamental rights was the efficient cause of the birth of this
doctrine.

The Fourteenth Amendment to the American Constitution
says — “No person shall be .. deprived of his life, liberty or property
without due process of law”. By a process of liberal interpretation,
the word 'liberty' has been interpreted to include practically all the
fundamental rights, e.g.

(i) Freedom of speech
(ii) Freedom of Press
(iii) Freedom of religion
(iv) Freedom of assembly
(v) Freedom of movement and residence
(vi) Freedom of profession.

In the result, a State can not make any law imposing
restrictions upon any of these fundamental rights, without conforming
to the requirements of 'due process'. "Due process" is a dynamic
concept and the Supreme Court has refused to give it any static
definition. Broadly speaking, it negatives anything which is
'arbitrary' or 'shocking to the universal sense of justice' having
regard to the circumstances of each case. Under this power, the
American Judiciary claims to nullify any legislation, which may be
otherwise valid, on the ground that there is something which seems to be arbitrary or opposed to the 'fundamental principles of liberty and justice to the bench of Judges which tries the particular case in relation to which the statute comes to Court. Any States action legislative, administrative or judicial which violates 'due process' either directly or indirectly, is void.

(c) Hypothesis

The provisions of two Constitutions as to freedom of speech and expression are essentially different, the difference being accentuated by provisions in our Constitution for preventive detention which have no counterpart in the U.S. Constitution.

There is a greater element of certainty about the Indian Constitution on account of the mention of the specific heads in Clause (2) to (6) of Article 19, which delimit the scope and extent of restrictions on the Fundamental rights. Thus, the danger of vagueness and variety of views that may be held by individual judges in the field of restrictions on individual freedom is much minimized in the Indian Constitution. The Constitution of the U.S.A. suffers in this respect from vagueness. This is a very important point of distinction between the Constitution of the United States and that of India. This gave Indian Constitution a far more certainty then the American
Constitution. There is another point of distinction to be noted in this behalf. The American Constitution is based on the doctrine of 'separation of powers'. But there is no rigid 'separation of powers' in the Indian Constitution. These differences naturally lead to the conclusion that the decisions of the American Supreme Court should not be blindly followed in interpreting the Indian Constitution. Moreover social conditions and habits of the people are different.

(d) Objectives of the Study

The present research intends to dwell around a few objectives with reference to freedom of speech and expression only.


2. To compare the important decisions of the Supreme Court of U.S.A. and India with reference to the social background.

3. To study the influence of the judgements of Supreme Court of U.S.A. in the decision making process of Supreme Court of India.
(e) Methodology

This is a doctrinal research and analytical one. Research work has been conducted by taking the available materials published in different books, periodicals, law journals and official documents. As it is exclusively a legal study, more emphasis has been given to the judicial decisions and the interpretations of the Constitutional provisions. While doing the research work a number of views from various published works mostly from the writers of the Constitutional law have found place in the research. American Central Library at Calcutta which is a specialized library for American literature was of great help to collect the data.

During the course of research the researcher has visited several libraries of different part of the country. Prominent among them are Library of the Indian Law Institute, New Delhi; Indian Institute of Public Administration, New Delhi and National Library, Calcutta. Some materials have been collected from various websites on Internet.

This thesis consists of six chapters including the Introduction and Conclusion.

The first chapter being the introduction is dealt with the nature of the Constitution of India and United States of America. The
constitutional provision relating to freedom of speech and expression has been discussed. This chapter also deals with hypothetical statement of objective of the study and the methodology followed to complete the research work.

The second chapter deals with the freedom of speech and expression in detail in the Indian Constitution. The discussions of constituent Assembly debates have been reflected in this chapter. The views of the Constitution makers relating to freedom of speech and expression are discussed.

The third chapter deals with the reasonable restriction on freedom of speech and expression in India. Different grounds of reasonable restriction are discussed with reference to judicial decisions.

Chapter four deals with the emergency provisions of the Indian Constitution and the suspension of fundamental rights. The developments during the period of emergency in different period have been discussed with reference to the comments of the scholars and the judiciaries.

The fifth chapter deals with the different aspects of the freedom of speech and expression of the American Constitution with reference to First Amendment. The power of the State to regulate the
freedom of speech and expression is discussed with reference to 'Police Power' and the decision of the Supreme Court. The comparison has been made with reference to the provision of Indian Constitution. The influence of the decisions of the American Supreme Court over the decision of the Supreme Court of India is critically analysed.

The sixth chapter being the conclusion deals with findings of the research work. A systematic analysis has been given on the point of comparative aspect of different provisions of U.S. and Indian Constitution relating to freedom of speech and expression.