10. Further Section 21-A of The Banking Regulation Act, 1949, introduced by amendment in 1984 specifically barred the power of Courts to reopen or make a scrutiny of the rates of interests payable to Banks inspite of the Usurious Loans Act or any other law relating to indebtedness in force in any State. This also does not appear to have been placed before His Lordship Mr. *Sastry*., J.

11. That is why the Supreme Court observed in AIR 1991 SC 1983 in para 21 as follows:-

> "In our system of judicial review which is a part of our constitutional scheme, we hold it to be the duty of Judges of Superior Courts and Tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law……."

12. Under all the above circumstances, I once again submit that the view taken by His Lordship Mr. *Sastry,* J., requires reconsideration. If the Rule of Damdupat is made applicable to cases of loans obtained from Public Sector Banking and Financial Institutions, the effect will be far reaching severely affecting the public exchequer in millions of rupees.

FREEDOM OF SPEEDY AND EXPRESSION :

Some Facts and Problems

(Babul Reddy Lecture, Hyderabad)

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At the outset it is necessary to scocth some persistent heresies about freedom of expression. Freedom of speech is not an exclusive western concept. It embodies a universal value transcending geographical barriers and national frontiers. Freedom of expression has been humanity's yearning, in times ancient and modern. Cato's anguished cri de coeur, "where a man cannot call his tongue his own, he can scare call anything else his own," articulates an universal lament.

Another heresy is to regard freedom of expression as a prorogative or a luxury of the affluent. In our country, thanks to the constitutional guarantee of freedom of expression, and its concomitant, the freedom of the press, numerous indigent and oppressed persons, such as under trial prisoners lanugishing for years in jails, inmates of asylums and care homes, labourers working in unhealthy conditions in stone quarries and brick kilns and countless children forced into hazardous employments, have obtained some ameliorative relief through Courts in public interest litigations. Our experience has demonstrated that freedom of expression is essential for safeguarding other human rights and vindicated the declaration at the first

Session of the UN General Assembly on 14th December 1946 that freedom of expression is the touchstone of all freedoms to which the United Nations is consecrated.

In a democratic society based on the Rule of Law, freedom of expression is not a luxury but a necessity. It constitutes one of the essential foundations of such society, one of the basic conditions for its progress and for the development of every person. In the felicitous language of the great Justice Cardozo freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom.

'Another aspect which needs to be stressed is that freedom of expression is neither a creature nor the consequence of a Bill of Rights or a Charter of Human Rights. It is inherent in a representative democracy. A Bill of Rights recognises its existence and accords constitutional protection to its exercise. It does not give birth to freedom of expression. In certain countries, which did not have a Bill of Rights containing an express guarantee of freedom of expression, it was "created" by the judiciary. A striking example is the decision of the Supreme Court of Canada in 1938, when there was no Charter of Rights in Canada. The preamble of the British North America Act stated that the Canadian Constitution was "similar in principle to that of the United Kingdom". Basing itself on the preamble, the Court spelt out freedom of speech on the reasoning that since the United Kingdom is a parliamentary democracy the right of free discussion of public affairs, which is "the breath of life for parliamentary institutions" was available to Canadian citizens as it was to the citizens of the United Kingdom. The Court ruled that Parliament had, by necessary implication, legislative power to protect the right to free public discussion and, correspondingly, that provincial legislators lacked the power to limit the right.

Similar judicial yearning for freedom of expression is discernible in Australia. There is no judicially enforceable Bill of Rights in Australia and freedom of expression is not a constitutionally guaranteed freedom. Nonetheless the High Court in the Australian Capital Television case deduced freedom of expression as a constitutional right by implication from the provision in the Australian Constitution which provides for a system of responsible and representative government. Chief Justice Mason, speaking for the majority, held that in absence of freedom of expression and communication representative government would fail to achieve its purpose, namely, 'government of the people through their elected representatives', because government would cease to be responsive to the needs and wishes of the people.

What accounts for the yearning of humanity and of the judges, who too are human, for freedom of expression? One main reason is that implicit in the freedom of expression is the people's Right to Know, their right to receive information from diverse and antagonistic sources, the right of the people to be informed through sources, independent of the government, concerning matters of public interest.

Accountability is the *sine qua non* of every democratic society. Consequently, it is essential that people should have information about the functioning of the government and access to information about every public act that is done in a public way by their public functionaries. This is necessary to form informed and intelligent decisions and for holding the institutions of government accountable. Informed public opinion is the most potent of all checks on maladministration.

In the present day and age a citizen is largely dependent on the Press for the quality and the extent of news. He can seldom obtain for himself the information needed for the intelligent discharge of his political responsibilities. In seeking out the news, the

Press therefore acts as the representative or, more appropriately, as the custodian of the public. Freedom of Press is inherent in freedom of expression and there can be no meaningful discussion on the subject of freedom of speech without mention of the role of the Press which ought to serve as a forum for the public, through which it would know what is going on in government and public institutions. Right to know and access to information are essential components of freedom of expression in a democratic and pluralistic society. If the Press is to qualify as a mighty pillar of democracy, it should promote expression of opinion in all its phases, and disseminate news from divergent sources. Thereby, it serves public interest in a pluralistic democracy by throwing up a broad spectrum of views. It also fulfils the individual interest of the citizen by enabling virtually everyone - especially the inarticulate ones who are generally ignored - to find some place for the expression of their opinions.

James Madison, a leading figure in the drafting of the US Constitution, emphasised the importance of an informed citizenry to democratic governance:

> "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives".

These words spoken to centuries ago have not lost their relevance. Today information is power and therefore no one should be surprised at the frantic attempts of officials as also big business and vested interests to suppress it or distort and manipulate information by ways strong and subtle, for reasons spurious and specious.

Another facet of freedom of expression is that it includes the freedom to seek, receive and impart information and disseminate ideas of all kinds. It encompasses not merely the right of the speaker but also the rights of all who wish to listen and receive information and ideas. Freedom of expression, if it is to be meaningful and real, must have a capacious content. It cannot be restricted to expression of thoughts and ideas which are accepted and acceptable but must extent to those that "offend, shock or disturb the State or any Section of the population". It must accord an accommodation as hospitable to the thought which we hate as that which it assures to the orthodoxies of the day.

An important facet of freedom of expression is its wide amplitude. It has close relation with other fundamental rights. For example, (a) freedom of assembly and association; (b) freedom to express oneself in the language of one's choice because language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice; (c) right to participate in genuine and periodic elections for expression of political will of the people; (d) the right to propagate one's religion or beliefs.

It is one of the curious paradoxes of history that humanity's yearning for expression is matched by the urge for its suppression. Censorship has also been an ancient and almost universal phenomenon. It has appeared in one form or another at different times in different societies governed by different systems. Plato was its respectable exponent. Milton, who thundered in his famous Areopagitica, "Give me liberty to know, to utter and to argue freely according to conscience, above all liberties", became Cromwell's official censor. It must be recognised that freedom of expression cannot be absolute and unlimited. There are situations which may warrant withholding of news and information for a temporary duration. For example: movements of military forces during a war, or details of a rescue operation to free hostages held captive

by terrorists; or reports of communal or racial carnage whose publication at a particular point of time is certain to aggravate tension between the concerned races or communities and result in violent conflict. Regional and international human rights instruments recognise the need for curtailment of freedom of speech and expression in certain cases.

Unbridled exercise of freedom of speech at all times and in all circumstances can bring it in conflict with other fundamental rights. Limitation on freedom of expression would spring from observance and acceptance of the basic human rights of other persons. Here we witness the eternal paradox and clash not between the forces of good and evil but between two competing values. For example, freedom of expression is to be reconciled with the protection to honour and reputation of citizens. Libel laws may impose varying restrictions on freedom of speech depending on whether the person defamed is a private individual or a public official. In the case of a public official the generally accepted view is that every incorrect or untrue statement in respect of public officials or public figures is not actionable as libel unless the same was made with malice or with reckless disregard for truth or without making any inquiry as to the correctness or otherwise of the allegations. The rationale of this doctrine'is that public debate about the conduct of public institutions, public functionaries is the corner stone of democracy. Common law rules on libel would deter persons from exercising the right of public discussion on public issues and have a chilling effect on expression. Democracy must have a breathing space and that is the reason for the latitude accorded in the case of public officials and public figures.

Another value with which there is a potential clash is the right of privacy, the invaluable right to be let alone. Interesting questions arise as to what are the limits of the right to know and the criteria for distinguishing unhealthy and intrusive curiosity which subserves no public interest from the legitimate need for information about the conduct of public officials. The recent case of the Press in the U.K. hounding Lady Diana during her lifetime is a striking instance where commercial considerations of increasing circulation was the predominant motive rather than subserving the public's right to know.

Another basic human right is that of fair trial which in certain circumstances may entail certain limitation on the freedom of expression and particularly freedom of the Press.

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

One of the most favourite and frequent excuses for suppressing speech and information is the phantom of national security or public order. Unfortunately the talismanic invocation of the mantra of "national security" by the executive not infrequently generates timorousness in our judicial sentinels leading to an attitude of undue deference to governmental claims. It is not suggested that Courts should lightly dismiss considerations of national security. The point is that judges should not regard the executive's ipse dixit and the oft-repeated bald assertions of danger to national security as papal dogmas of infallibility but should view them with searching scepticism because

history and experience have shown that these concerns tend to be highly exaggerated and are nonexistent in some cases.

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

The High powered Commission of Wartime Relocation and internment of Civilians established in 1980 by an act of Congress unanimously found that military necessity did not warrant the exclusion and detention of ethnic Japanese and there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt. The Commission concluded that "a grave injustice was done to American citizens and resident aliens of Japanese ancestry". In the course of the hearing it was established that government had knowingly withheld information and also provided misleading information to the Court when the critical question of military necessity was being considered. Creditably the US government signified its concurrence with the Commission's observation that "today the decision in *Korematsu* lies overruled in the Court of history".

Judge *Patel*, who decided the case, memorably concludes: "*Korematsu* ... stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect citizens from the petty fears and prejudices that are so easily aroused". This caution should always be uppermost in judicial minds when the Court is confronted with formidable and imperious claims of national security.

Often security of the State gets equated with the security of the current rulers. It happened in India in June 1975 when a spurious emergency was declared by Mrs. *Indira Gandhi*. Under the Indian Constitution one of the grounds for declaration of emergency is threat to the security of India. Somehow those at the helm of affairs read or construed 'security of India' as 'security of Indira'. The consequence was the temporary demise of democracy and suppression of human rights, including freedom of expression in India till the emergency was revoked in March 1977 by the succeeding Janata government.

Hate speech is another instance of proscription of speech on the premise that it causes hurt or injures feeling and sentiments of some people. There can be no doubt that any expression that stigmatises a person as lacking in integrity or ability, unworthy of respect and dignity and unfit for a place in society because of the person's race, religion, creed or colour can hurt badly and the injury caused can be very severe and painful. The person against whom the 'hate speech' is directed certainly needs protection. The problem is whether this protection should take the form of proscription of expression and its criminalisation.

There are several reasons against adopting such a course. In the first place hurt or injury to feelings is a highly subjective matter. Who are the persons whose feelings are to be taken into consideration? Reasonable human beings of ordinary common sense and sensibilities or fanatics

who perceive hurt, humiliation and hostility in every adverse and critical point of view? And in practice how is one to distinguish a fanatic from the ardent believer and the devout? Indeed the more one is convinced of the eternal truth of his or her beliefs, the greater is the hurt that will be felt when these beliefs are questioned and criticised.

A Christian is sure to be hurt if in the course of a theological debate doubts are cast on the divinity of Christ. A Mahomeddan is bound to be outraged if Mahomed is regarded as one in the line of the prophets and who has been succeeded by another prophet *viz.*, *Bahaulla*, the founder of the Bahai religion, Likewise a Bahai would be most hurt if *Bahaulla* who claims to symbolise the second return of Christ is described as a false prophet. Hindus will be most offended if the historical existence of *Ram* or *Krishna* are denied. The feelings of Catholics will be certainly injured if the doctrine of papal infallibility and their belief in the immaculate conception are dismissed as fairy tales. And Protestants would be no less hurt if *Henry VIII's* break with the church is attributed to his passion for *Anne Boleyn* rather than his mission to defend the Faith. And what about atheists and agnostics? Are their feelings not injured if they are portrayed as wicked persons who deserve a special corner in *Dante's* eternal inferno?

Besides, in any movement for religious or social reform, certain practices supposed to be sanctioned by religion such as untouchability, sati (burning of widows on the funeral pyre after their husband's death), stoning to death as a punishment for adultery, would be strongly condemned by reformers. Feelings of the persons who are keen to maintain the existing order and practices are bound to be hurt. But it would not be legitimate to proscribe expression in such cases. Otherwise reforms and improvements become virtually impossible. Moreover, criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unwarranted interference with freedom of expression. Fundamentalist Christians, orthodox Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religious tenets or practices as has happened in India, There is also a real danger of minority regimes misusing hate speech laws against the majority. This happened in India during the British colonial rule and also in South Africa during apartheid where these laws were invoked by the minority white regime to suppress the protest and dissent of the majority population.

Advocacy of objectionable doctrines and theories however strong and vigorous but which lacks the ingredient of imminent incitement to violence or unlawful action cannot legitimately be prohibited and criminalised. Holocaust is a painful historical fact. Those who deny its existence or minimise the sufferings of the victims or attribute it to some imaginary plot do not deserve serious notice. To over-react and prohibit and criminalise such speech or writings is to confer upon the speaker or the writer the halo of a martyr. If we are truly committed to freedom of expression we should not deny a fair field and an honest race to all the infinite variety of cranks and fanatics and the self-appointed saviors of humanity, provided their voice is not one of incitement to violence. If ideas and doctrines are false they should be countered with true and sound ideas. To be afraid of ideas is to be unfit for democracy.

It cannot be overemphasised that expression which does not constitute incitement of imminent violence cannot be suppressed on account threats of violence by persons who find the expression deeply offensive. Freedom of expression cannot be held to ransom by bigots who are so utterly convinced of the infallibility of their beliefs that they resent any unfavourable comments on their Faith and threaten to take to the streets.

A determined effort was made to ban the exhibition of a movie by a group of persons

who regarded its theme and its presentation as hostile to the policy of reservation of jobs in public employment and seats in educational institutions in favour of Scheduled Castes and backward classes. The Madras High Court in an incredible judgment revoked the certificate granted by the Board of Censors permitting exhibition of the film and restrained its exhibition. The Supreme Court however promptly reversed the judgment. In a landmark decision the Court ruled:

> "Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched".

The Court approved the observations of the European Court of Human Rights that:

> "freedom of expression protects not merely ideas that are accepted but those that offend, shock or disturb the State or any sector of the population. Such are the demands of the pluralism, tolerance and broadmindedness without which there is no democratic society".

The Court laid down an extremely important principle :

> "If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threats of demonstration and processions or threats of violence. That would be tantamount to negation of the rule of law and surrender to blackmail and intimidation. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people".

This judgment has far-reaching implications. Its wholesome effect and timeliness cannot be over-emphasised in view of the rising intolerance of late witnessed in India. Tranquility ought not to be maintained in all cases by sacrifice of liberty. In order to prevent a threat to order, the State should not suppress fundamental rights, and particularly freedom of expression, which it is the duty of every democratic state to uphold. Any other course would encourage intolerance and fanaticism. A pluralistic society can hardly survive if a religious or an ethnic group demands not merely equality and the vote, but a violent veto on policies or decisions which do not accept its views and moral judgments.

Another potent source of censorship is the fervent desire of some groups to preserve a "clean" society, the crusade against obscenity and indecency. No one advocates a fundamental right to disseminate obscenity. The trouble is that obscenity, indecency, immorality are equivocal and relative concepts. Standards of morality and decency in the same society vary from time to time and from person to person and there is no uniform test of community standards of acceptance. Sin, as Pascal reminds us, is georgraphical. The history of the books which have been banned at different times - some of which are now regarded as classics - demonstrates the unfeasibility of censorship under these heads, especially when the power is entrusted to officials and bureaucrats who lack the requisite qualifications and outlook. The censor is like the lady who complained to Dr. *Johnson* about the presence of objectionable words in a book and was roundly reprimanded: "Madam, you must have been searching for them".

Judges, despite valiant efforts, have failed to evolve a satisfactory definition of obscenity. The judicial predicament is vividly summed up in the lament of Justice *Stewart* of the US Supreme Court who confessed that he could not define obscenity but recognised it when he saw it. Apparently, obscenity, like beauty, lies in the eyes of the beholder. *Nabokov's Lolita* fell foul of the customs authorities in India and was rescued

after the personal intervention of Prime Minister Nehru who found nothing objectionable in it. The same book surprisingly was branded indecent by a majority of New Zealand judges in 1961. Surprisingly *D.H. Lawrence's* Lady Chatterley's Lover, fell foul of the Indian Supreme Court justices in the case of Ranjit Udeshi. decided on 19th August 1964.

Guarantee of freedom of speech also guarantees the right not to speak. This was vividly brought home when our Supreme Court upheld the claim made by three students of *Jehovah's* witnesses faith that they were forbidden by their religious beliefs to sing the national anthem of any country. The students were expelled by the educational authorities because of their refusal to sing the Indian national anthem, even though they respectfully stood up in silence when the anthem was sung. The Court held that their expulsion was violative of their fundamental right of freedom of expression. The Court concluded with a ringing note: "Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it".

Real protection to freedom of expression would lie in recognising that no group or body of persons has the monopoly of truth and morality about which there may be genuine differences. What is required is a sustained effort to sensitise people to the value of free speech and the importance of dissent. Absence of dissenting views, absence of non-conformity would be symptomatic of serious moral and intellectual malaise in a society. Freedom of expression will rest on solid foundations in a society which is characterised by a temperament of tolerance, by a tolerance of dissent and acceptance of the dissenter as an equal member of the society.

The facet about the tensions inherent in freedom of expression has been admirably brought in the pertinent observations of the Appellate Division of the Supreme Court of South Africa in a case decided in 1965 during the apartheid regime.

"The freedom of speech - which includes the freedom to print - is a facet of civilization which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a Court of Law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost".

In the ultimate analysis the perennial problem is of performing the delicate balancing act; This involves weighing all relevant factors for determining whether expression of a particular kind should or should not be permitted at a particular time and in a particular place. No doubt freedom of expression is a universal value. However its protection cannot be straitjacketed by any universal prototype. Different countries have their distinctive cultures and values, different ethical perceptions, different problems and reactions. Publications which pass muster in America, Europe or Australia may be quite unacceptable in South Africa or Sri Lanka or India or Pakistan. There is no inflexible rule, save one: When in doubt, resolve the issue in favour of expression rather than its suppression.

May I conclude with the memorable words of that indomitable fighter for free speech, *Charles Bradlaugh*: "Better a thousand fold abuse of free speech than denial of free speech. The abuse dies in a day, but the denial slays the life of the people and entombs the hopes of the face".