

Free Speech: Identity, expression, and self-realisation

2nd Soli Sorabjee Memorial Lecture by

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1. A very good morning to Lord Burnett of Maldon, the learned Chief Justice of England and Wales, the President of the Commonwealth Lawyers Association, Mr. Peter Maynard, the former President of the Association, Brian Speers, and other dignitaries on and off the stage. It is indeed a great pleasure to be delivering the Soli Sorabjee Memorial Lecture. I am happy to see distinguished dignitaries from across the globe in attendance. Sadly, the immense work load of the office I hold did not permit me to extend my stay in Goa to deliver the address in person. Having closely interacted with Soli both on a personal and professional front, I am happy to be a part of this occasion virtually. To me personally, Soli was a mentor, guide, friend and compass.

2. Soli Sorabjee, over the course of his illustrious career, brought a sense of dignity and ingenuity to the profession. His legal acumen and his wit should not surprise us. His legal acumen came only second to his versatility. The field of drama, mimicry, and jazz suffered a great loss when Soli decided to pursue the law. When asked if he would prefer being Chief Justice or Benny Goodman, he said “I would any day play like Benny Goodman, which I’m doing in fantasy land now”. Soli defied the expression jack of all trades and master of none; he was a master of all trades, be it the field of law, jazz, poetry or simply mimicry. His ability to make a spoof on the high, mighty and the powerful ensured that the enormous

weight of the roles he donned and the offices which he held did not affect his sensibilities. Soli truly spoke truth to power.

3. Two of the most prominent cases Soli Sorabjee appeared in as an advocate were **S. Rangarajan v. P Jagjivan Ram**¹ and **Shreya Singhal v. Union of India**². In **Rangarajan**, the Madras High Court revoked the U-certificate that was granted to a film criticising the reservation or affirmative policy of the Government. In **Shreya Singhal**, the provisions of the Information Technology Act 2000, punishing a person for sending any information that is grossly offensive, or knowing that it is false were under challenged. In both these cases, Soli advocated for the expansion of the right to freedom of speech and expression. He argued that free speech and expression extended to controversial opinions, and such opinions must be evaluated through debate and discussion in the public forum and not in courts. Only such an interpretation, he argued, would be in tune with the liberal spirit of the Constitution. Along the same vein, he argued that free speech cannot be restricted based on the subjective notions of those who feel offended by speech. Soli understood the importance of free speech in terms of the value that it holds in a democratic society.

4. Today, I will speak about these values of freedom of speech and expression that Soli embodied. I will not focus on freedom of speech within the rights framework or how courts have more often than not been placed in a difficult position

¹ (1989) SCC (2) 57

² 2013 12 SCC 73

of balancing the competing claims of free speech and hate speech. Instead, I will focus on the inherent value of free speech in a democratic, multicultural polity.

5. According to Professor Thomas Emerson, society seeks to ascribe certain values in protecting the right to free speech. These values are assurance of individual self-realization, attainment of truth, individual participation in social and political decision-making, and maintaining a balance between stability and change in society.³ Freedom of speech is intrinsically linked to freedom of thought and opinion. The ability to think and express freely is an important aspect of our identity and personhood, necessary to achieve the values Professor Emerson spoke about. Justice Thurgood Marshall opined that the “human spirit demands self-expression [and] such expression is an integral part of the development of ideas and a sense of identity.”⁴ Speech - whether it be verbal or non-verbal, alphabets or emojis – is an attempt to forge an identity.

6. Identity is an individual’s perception of who they are. An individual’s identity is both personal and social. In the personal sense, an identity implies an individual’s set of attributes, beliefs, desires, or principles that form the basis of their dignity or self-respect.⁵ In the social sense, an identity implies a relationship with a wider social group – for example, a national identity, a cultural identity, or a gender identity.⁶ The Indian Constitution seeks to protect both personal and social identity.

³ Thomas Emerson, ‘Toward a General Theory of First Amendment’ (1963) 72(5) Yale Law Journal 877-956.

⁴ *Procunier v. Martinez*, 416 U.S. 396 (1974)

⁵ James Fearon, ‘What is Identity (As we now use the word)?’ available at: <http://www.web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>

⁶ David Buckingham, ‘Introducing Identity’ *Youth, Identity, and Digital Media* (MIT Press, 2008) 1-24.

7. The Constitution under Article 19 enumerates a bundle of rights such as free speech and expression, freedom of movement of residence and the practice of any profession or trade, among others. These enumerated rights enable a meaningful existence by guaranteeing an individual's identity and dignity. Similarly, the Constitution seeks to protect an individual's social identity by prohibiting discrimination on grounds of religion, race, caste, or sex. The entrenchment of the right to the freedom of religion as well as cultural and educational rights in the Constitution protected and nurtured the social or group identity of individuals.

8. For centuries, markers of identity such as caste, religion, language, and gender were used to structurally and institutionally marginalized vast sections of our population from the mainstream of society. However, with the advent of a constitutional democracy after Independence from colonial rule, these very markers of social identity have become a site for the marginalized to organize themselves and fight for the rights of their communities. Expression is an assertion of identity.

9. Freedom of speech recognizes the autonomy of individuals to participate in public dialogues and cultural conversations. In one of my dissenting opinions, I observed that the integrity of our nation is based on a framework of mutual recognition of social identities and characteristics. I observed:

“[Our Constitution] recognizes the position of religion, caste, language and gender in the social life of the nation. Individual histories both of citizens and collective groups in our society are associated through the ages with histories of discrimination and injustice on the basis of

these defining characteristics. In numerous provisions, the Constitution has sought to preserve a delicate balance between individual liberty and the need to remedy these histories of injustice founded upon immutable characteristics such as of religion, race, caste and language. The integrity of the nation is based on a sense of common citizenship.”⁷

10. For more than a century, the LGBT community in India was oppressed and marginalized by the operation of Section 377 of the Indian Penal Code, which criminalized consensual sexual conduct of same sex adults. In **NALSA v. Union of India**, the Supreme Court noted that gender identity and sexual orientation are integral to one’s personality and is a basic aspect of self-determination, dignity, and freedom.⁸ This was reiterated by the Constitution Bench of the Supreme Court in **Navtej Singh Johar v. Union of India**, which read down Section 377 of the Indian Penal Code ⁹ to exclude sexual relationships between adults of the same gender. However, even before these decisions of the Supreme Court, the LGBT community in India had been valiantly marching on the streets, with pride and rainbow flags, to assert their identity and to make a strong and collective point to bystanders that they have a right to equal participation, and the right to live with dignity in society. To openly and bravely assert your gender identity, when the closet is an option, is to serve as a symbol for others.

⁷ Abhiram Singh v. C D Commachen, (2017) 2 SCC 629

⁸ NALSA v. Union of India, (2014) 5 SCC 438

⁹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

11. Freedom of speech contains within itself the seeds of social and political liberty. Speech in itself is powerful, but it acquires social and political power only when it is articulated in public. For example, in the 1970s, a new literary movement spearheaded by Dalit writers burst forth in India. These Dalit writers verbalized their collective experience in prose and poetry replete with anger and resistance against the caste hierarchy.¹⁰ These writers publicly articulated the practices, burdens, and struggles of Dalits and thereby introduced society to their hitherto unknown and unimagined reality.

12. One of the primary motives of Dalit literature was to assert the Dalit identity and to develop a sense of fraternity within the Dalit community. In penning down their life stories, Dalit writers sought a sense of belonging to their own people and culture. The Dalit writers, inspired by narratives of their historical struggle, wrote songs of unity and upliftment. I would like to quote a few lines by a poet Mangal Rathod, where he evokes Babasaheb Dr Bhimrao Ambedkar, the architect of the Indian Constitution :

O Babasaheb!

The first sip of water you drank

Quenched our thirst of ages.

We learned the taste of life!

We can never forget you

¹⁰ Umer Ali, 'Self-actualization of Dalit woman and narration as a strategy for transition: An analysis of Bama's works' IJHS 6(S2) (2022)

for your memory lingers

in each step we ascend.¹¹

13. This poem refers to the historic satyagraha by Dr. Babasaheb Ambedkar at Mahad in the year 1927. Such Dalit writings are an important site of dissemination of Dalit struggles and their cultural identity. In today's day and age of social media, the form of Dalit expression has undergone significant change. For example, today we have Dalit rappers who are taking on issues of Dalit identity through their songs and reels – one beat at a time.¹² The point that I want to emphasize here is that it is free speech that has enabled the Dalits to articulate their identity in public. And such public articulations have helped them to participate in social and political decision-making.

14. Another important value in protecting freedom of speech is the assurance of individual self-fulfilment or self-realization. According to Rabindranath Tagore, our existence is meaningless if we can never expect to realize the highest perfection of our potentialities as human beings.¹³ We often understand our character and potential only through self-realization. Self-realization is the development of our mind through the expression and exchange of ideas and opinions.

15. E M Forster queried “How do I know what I think until I see what I say ?” We often articulate our thoughts in order to grasp and preserve their meaning. Often,

¹¹ Taken from: Eleanor Zelliot, 'Dalit literature, language, and identity' in 'Language in South Asia' (eds Braj Kachru, Yamuna Kachru, and SN Sridhar) Cambridge University Press (2008)

¹² Manasi Shah, 'Apun Ka Time Ayegaa' (The Telegraph, 7 February 2021) available at: <https://www.telegraphindia.com/culture/dalit-rappers-apun-ka-time-aayegaa/cid/1805899>

¹³ Rabindranath Tagore, 'Sadhana: The Realization of Life'; available at: <https://terebess.hu/english/tagore16.html>

this is just the first step in a series of interactions with society. Expression helps us become part of a process whereby we converse, debate, and are often intellectually challenged by others. However, it is this very process which imbibes in us a greater awareness of the world.

16. In 2012, after the gruesome gangrape and murder of Nirbhaya in Delhi, thousands of protestors took to streets in the national capital demanding better safety for women and more stringent punishments for offenders.¹⁴ This protest was a manifest expression of rage and anger against widespread instances of sexual violence against women in India. The protests compelled the general public, as well as legislators, to introspect on the efficacy of legislation dealing with crimes against women. The result was that in 2013, the penal law was amended to make it more stringent. Since the 2013 amendments, commentators have argued that a stringent law is not really the answer to eradicate crime against women. Such diverse opinions lead to a healthy discourse to identify the model that would best work for society. The Nirbhaya protests forced men to evaluate how they treat women who are part of their lives and even beyond. In the United Kingdom and Europe, we are witnessing young men and women protesting against the unrestrained use of fossil fuels, which is a significant contributor to climate change. These protests have forced the world to take cognizance of climate change and take immediate mitigating steps. This self-realization, which comes through a free expression of opinions and ideas, is what will ultimately spur us in the direction of justice.

¹⁴ Divya Arya, 'Nirbhaya 10 years on: The lives the Delhi gang rape changed' (BBC, 6 December 2022) available at: <https://www.bbc.com/news/world-63817388>

17. Our Constitution grants every citizen the right to speech and expression. We should use this freedom to stand up for the voiceless and marginalized and use our privilege for the betterment of others. In doing so, we become more self-aware about our own role in the society and recognize the social realities of the world we inhabit. Exercise of free speech is the first step towards understanding others and coming to terms with our human essence. The power of words and actions, is an ally in the fight against collective vice and apathy towards the marginalized communities.

18. Baba Amte, a well-known social reformer from Maharashtra, devoted his life to serving leprosy patients and fighting the stigma associated with the disease.¹⁵ Amte started Anandwan - a care center for treatment and rehabilitation of leprosy patients in Chandrapur in Maharashtra. To fight the stigma around leprosy, Amte injected himself with the bacilli from a patient to show that the disease itself was not contagious. It was through such efforts that Baba Amte broke the social stigma associated with leprosy and helped leprosy patients live a life of dignity. Baba Amte's life is a great example of how exercise of speech can be used to effectively enhance human freedom and offer a direct contribution to the quality of life of the neglected and the marginalized.

19. In 1963, Martin Luther King Jr. delivered a monumental speech on the steps of the Lincoln Memorial. He said :

“We cannot be satisfied as long as the Negro's
basic mobility is from a smaller ghetto to a larger

¹⁵ 'On his birth anniversary, remembering social reformer Baba Amte' (The Indian Express, 26 December 2019) available at: <https://indianexpress.com/article/cities/mumbai/on-his-birth-anniversary-remembering-social-reformer-baba-amte-6185408/>

one. We can never be satisfied as long as our children are stripped of their selfhood and robbed of their dignity by signs stating: for whites only.

We cannot be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote.

No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters, and righteousness like a mighty stream.”¹⁶

Martin Luther King Jr.’s momentous speech caused a ripple effect within the black community in the United States and across the globe, and spearheaded the civil rights movement in the second half of the 19th century. Speech rouses the emotions and opens up our minds. It stimulates our worries and sorrows. Speech is the medium through which we express happiness and joy. It is this power of speech that has aided in the aspiration for social change.

20. Closer home, in the Indian State of Andhra Pradesh women have lead a mass uprising against the production and sale of arrack, a country liquor.¹⁷ This movement was a product of the mass literacy programmes that were organized in the State. Women got together in groups and freely expressed their agonies as spouses, mothers and children subjected to domestic violence. This led to women expressing that cheap illegal manufacturing of alcohol was the source of their domestic woes.

21. These two illustrations indicate that free speech and expression of the marginalized communities is a formidable weapon to effect socio-political change.

¹⁶ Martin Luther King, Jr, I have a Dream, full transcript available at <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety>

¹⁷ Dhvani S, The Anti-Arrack Movement: The Historical Women’s Protest for Total alcohol prohibition (*Feminism in India*), available at <https://feminisminindia.com/2019/06/14/anti-arrack-movement-women-andhra-pradesh/>.

22. In the second half of my lecture, I will focus on the intricate link between free speech and expression, and equality. While doing so, I will attempt to tackle an important question: What value does speech and expression hold for the marginalized groups? Does free speech serve a heightened purpose for marginalized and disadvantaged communities?

23. Free speech and equality share an integral link.¹⁸ They are mutually reinforcing and are not, as some would like to argue, in conflict. The interrelationship of these two concepts that are entrenched as fundamental rights in numerous Constitutions has undergone a four stage evolution. In the first stage, restrictions on free speech of communities create and entrench marginalized groups. Communities are treated unfairly by limiting their access to free speech and expression. It is this unequal access to choices of expression that creates a stratified society. In the first stage, restriction on free speech and expression is the cause for marginalization. The restriction could be multi-fold. It could be a restriction on the expression of identity; or the expression of food and clothing choices, or it could be a limitation on the opportunities that the community would have liked to explore. All these restrictions on expression cumulatively create a marginalized community.

24. Most Southern States in the United States protected the freedom of expression, including freedom of the press. However, Southern legislators and

¹⁸ See Nadine Strossen, Freedom of Speech and Equality: Do we have to choose, 25 J.L. & Pol'y 185 (2016)

Congressmen enforced the 'slaver's veto' by adopting draconian laws against the exercise of free speech by the black community. To put this in perspective, in 1776, Virginia approved the declaration of rights. But a Virginia law in 1836 criminalized publications intent on "persuading persons of colour... to rebel, or denying the right of masters to property in their slaves, and inculcating the duty of resistance to such right."¹⁹ When David Walker, a free black man published an anti-slavery pamphlet, titled 'Appeal to the colored citizens of the world', the legislature responded by imposing death penalty for the 'circulation of pamphlets of evil tendencies'.²⁰

25. In India, until the Supreme Court decriminalized homosexuality a few years back, homosexuals were penalized for expressing their identity. Similarly, women are disadvantaged because their choices of expression are stifled and curbed in a patriarchal society. The restriction of expression could be attached to basic civil rights such as voting; or it could extend to the freedom to partake in recreational activities or even the freedom to play a sport of choice. Women in most parts of the world did not have the right to vote until the 1900s. In 1921, the English Football Association banned women stating that the 'game of football is quite unsuitable for females and should not be encouraged'. This ban was followed by many other countries across the globe such as Belgium, Brazil, and Denmark. In 1955, the German Football Association also imposed a ban on women's football claiming that the 'roughness of the sport would damage women's fertility and health' and that "in the fight for the ball, female grace disappears, body and soul are inevitably damaged, and the public parading of the body is offensive and indecent." These

¹⁹ Jacob Mchangama, *Free Speech: A history from Socrates to social media*, (Basic Book, New York) 209.

²⁰ *ibid.*

rules and laws restricting the expression of choices of a community marginalise them because access to free expression is vital for the development of the human self, both in terms of individual identity and group identity.

26. In the second stage, mostly through the Constitution, undoes all the restrictions on choices by communities. The law recognises the discrimination and unequal treatment faced by marginalised communities and issues a call for equality, and grants all citizens the same access to free speech and expression. On January 26, 1950, when the Indian Constitution was adopted, we gave ourselves a new order based on the rule of law and shred away the colonial baggage and the heavy-handedness of the State. The Constitution expressly abolished untouchability, and conferred women with equal rights. Any rule that restricts the access to expression of the marginalised communities is then struck down by the courts based on constitutional principle of equality and freedom of free expression.

27. In the third stage, we are concerned with the operation of general restrictions on free speech and expression. Constitution framers across the globe disagreed with the old nursery rhyme, “sticks and stones may break my bones, but words will never hurt me’. The Indian Constitution expressly limited free speech and expression on substantive grounds of ‘sovereignty and integrity of the nation, the security of the State, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation or incitement to an offence.’ Further, the penal statute in India criminalises hate speech, defamation, sedition, and obscenity. These substantive grounds of limitation are vague and not defined

precisely which allows for greater discretion in restricting free speech. The Delhi High Court while vindicating MF Hussain, an Indian artist, of the charges of obscenity asserted that ‘beauty lies in the eyes of the beholder and so does obscenity’. If anything, this depicts the vagueness that is inherent in the phrase of ‘obscenity’ which is a statutory limitation on free expression.²¹

28. Though the limitations are applicable to all citizens, *in effect*, they do not equally apply to all persons across group identities. These restrictions disproportionately impact members of marginalised communities. In the recent past, I have witnessed situations in which Dalit literature is sought to be censored and banned. Calls for ban were issued against Dalit-activist Perumal Murugan’s book, *One Part Women*. Officials coerced an unconditional apology out of the author in the form of a peace settlement order. Perumal Murugan instituted proceedings before the Madras High Court contending that the settlement was not binding on him. The Madras High Court allowed the petition observing that ‘if you do not like the book, simply close it.’ He won the battle in the courtroom but lost the battle outside the courtroom. Perumal Murugan issued a statement on Facebook committing literary suicide. He claimed that “Perumal Murugan- the writer is dead”. He became, he said, “a walking corpse”. The case of Perumal Murugan depicts the disproportionate impact of restrictions on freedom of speech and expression on the identity of members of the marginalised communities. His strong words depict the intensity of emotional devastation that he would have undergone.

²¹ MF Hussain v. Raj Kumar Pandey, Crl. Revision Petition Nos. 282/07; 114/07; 114/2007 & 280/2007.

29. In Florida's Polk County, Nobel laureate for Literature Toni Morrison's novels *The Bluest Eye* and *Beloved* were taken off the shelves in public school libraries. While the books were sought to be taken off the shelves for the depiction of sex and racism, scholars have noticed that other books with similar depictions authored by whites have been not been challenged.²²

30. In 2005, the Legislative Assembly in the State of Maharashtra banned the performance of dance, '*of any kind or type, in any eating house, permit room or beer bar*'. However, the provision excluded the performance of dances in hotels that bore three stars or above. The counsel for the State submitted before the Court that the classification between the exempted establishments and prohibited establishments is based on the 'degree of harm'. It was urged [I quote] '*the type of crowd that visits banned establishments is also different from the crowd that visits the exempted establishments*'. Scholars have argued how the ban was unjustified and reflected a restrictive social morality, which found problems with the bar dancing activities of women from vulnerable communities like Bedia and Nat.²³ Furthermore, the State by exempting hotels that are three-star and above from the purview of the ban reinforced the morality of the dominant community that the members belonging to the lower strata are sexually perverted. The State class-coded the provision penalising obscenity.²⁴

²² Why Toni Morrison's Books are so often the target of book bans, <https://time.com/6143127/toni-morrison-book-bans/>

²³ Mandal, S. (2021). Book review: Sameena Dalwai. 2019. *Bans & Bar Girls: Performing Caste in Mumbai's Dance Bars*. *Contributions to Indian Sociology*, 55(1), 142–145. <https://journals.sagepub.com/doi/full/10.1177/0069966720979335>

²⁴ Madhavi Menon, *The Law of Desire*, (Tigerbacks 2021) 70-71.

31. That leads to the fourth stage, where we are concerned with the degree of protection required for speech and the expression of marginalised communities. The identity of marginalised communities is under threat due to the increasing tendency to homogenise culture such as food habits and clothing. In addition to the threat to identity, there are stigmas attached to their identity. Marginalised communities carry the baggage of the threat to identity and bear the scars of discrimination. Because of the manifold forms of discrimination, speech on biased ideas about protected identities such as race, gender and caste causes a higher degree of emotional and psychic harms. The Indian legal framework recognises the higher degree of harm when the expression targets protected identity. The Schedule Caste and Schedule Tribe (Prevention of Atrocities Act) 1989 penalises anyone who 'intentionally insults or intimidates with an intent to humiliate a member of the scheduled caste or scheduled tribe in any place within public view'. A corollary to this argument is whether speech by members of protected groups requires a higher degree of protection because of the historical and continuing forms of harms suffered by them. Would they not need stronger forms of expression to communicate their sufferings? I leave this question open and request all of you to ponder upon it.

32. The aim behind elucidating the four stages of evolution of the interlink between freedom of speech and equality is to explain how the concepts of speech and equality are joined by the hip. While formal restrictions on the freedom of expression of marginalised communities may have subsided, it is a reminder that for an equal society, care must be taken to nurture all forms of expression of marginalised communities.

33. Before concluding my speech, I would like to briefly speak about an important value that is essential in public discourse: civility and sensitivity. Having served as a Judge for the past twenty two years, I have noticed an increasing degradation of the values of tolerance and respect. Is this the new normal in our post-truth societies ? We choose our friends carefully. We like to interact with like-minded people. This feeling of affinity towards like-minded people has led to a situation where the views of diverse sections of the population are insulated from us. We only interact with people who speak the same tongue with the same undertones. There is nothing wrong with liking to be surrounded by like-minded people to discuss politics and life; and share happiness and sorrow. However, a society that is culturally diverse depicts a plurality of worldview. In a culturally diverse society, it is important to *firstly* be open to contrarian social and political views, and *secondly* to be civil and sensitive during such conversations. We need to inculcate the value of interacting with persons from diverse backgrounds. Associating with and understanding their stories and struggles is a step towards an inclusive existence.

34. In today's lecture, I have argued that free speech has a certain value and purpose in a democratic society. Free speech is the expression of our innermost being. It is an integral part of development and assertion of identities. Such expression of ideas and opinions leads to revelation and self-realization. In today's world, speech takes many forms, but what is important is that we use our agency and autonomy to speak up for what is right and just. Through our expressions, and with every word and emoji, we have the ability to differentiate between that which is just and unjust, between the good and the evil. Our speech has embedded in it

the ability to give voice to the voiceless, mainstream the discourse on marginalisation, and bring gender to the canvas of equal rights. Expression sustains the eternal quest for the greater good of humanity.

35. Bob Dylan could encapsulate the essence of a long address in a few lines of verse titled - 'Chimes of Freedom':

“Tolling for the aching ones whose wounds cannot be nursed
For the countless confused, accused, misused, strung-out ones an' worse
An' for every hung-up person in the whole wide universe
An' we gazed upon the chimes of freedom flashing”²⁵

36. Thank you!

²⁵ <https://www.bobdylan.com/songs/chimes-freedom/>