CHAPTER IV

POST-CONSTITUTIONAL CONTROVERSIES

1. CONSTITUTIONAL PROVISION AND ITS AMENDMENT

Constitution has made freedom of speech and expression a fundamental right of a citizen. It provides:

> "Art. 19(1): All citizens shall have the right—(a) to freedom of speech and expression;
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> .....
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> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law insofar as it relates to, or prevent the state from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

Laws in force before the Constitution are declared to be void to the extent of their inconsistency with the provisions contained in the part dealing with fundamental rights.[1] The State is prohibited from making any law which takes away or abridges any rights contained in that part.[2]

To what extent the pre-Constitution laws discussed in the previous chapters are valid after the coming into force of the Constitution ? In ascertaining the constitutionality of a law, whether pre-constitutional or post-constitutional, the foremost task is to determine the meaning of the law. If a statute admits of two constructions, one making it constitutional and the other making it unconstitutional, that construction which makes it constitutional should be preferred,[3] for the supposition is that the legislature which enacted the law is minding its own business.[4] The necessary corollary of this position is that a statute is to be so construed as to make it constitutional.[5]

The Supreme Court incidentally discussed in *Brij Bhushan* v.

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1. Article 13.
2. *Ibid.*
3. *R.M.D. Chamarbaugwala* v. *Union of India*, [1957] S.C.R. 930.
4. *MacLeod* v. *Attorney-General for New South Wales*, [1891] A.C. 455.
5. *Kishan Chand* v. *Commr. of Police*, A.I.R. 1961 S.C. 705.

State of Delhi[6] and *Romesh Thappar* v. *State of Madras*'[7] the question whether the law of sedition was in accordance with the fundamental right of freedom of speech and expression. The Court noticed with emphasis that the provision in the draft Constitution making sedition as a permissible sphere of restriction on the freedom[8] was omitted from the Constitution in its final form, when it was enacted. Reasons for the omission were the subject of sharp divergence of opinion.

In *Romesh Thappar* v. *State of Madras*[9] the validity of sec. 9 (1-A) of the Madras Maintenance of Public Order Act, 1949, which empowered the Madras Government to impose restrictions on the circulation of a publication in the intrests of public safety and the maintenance of public order, was in question. In *Brij Bhushan* v. *State of Delhi*,[10] the validity of section 7(1)(c) of the East Punjab Public Safety Act, 1949, which empowered the Punjab Government to impose pre-censorship of a publication "for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order", was in question. The Supreme Court had no difficulty in holding that an imposition of restraint on circulation or an imposition of a pre-censorship was a restriction on the freedom of expression. But the further question which the Supreme Court had to decide was, whether restrictions enacted in the interests of public order and not solely imposed to prevent the underminingt he security of, or tending to overthrow, the State were valid.

The Supreme Court pointed out that there is a difference between the nature of restrictions which may be imposed in the interests of public order and those imposed to prevent the undermining the security of State. In so pointing out, the majority [11] invoked the subject of sedition as a restriction on freedom of speech and said that the offence of sedition as interpreted by the Judicial Committee was not even in the interests of public order and that therefore it should have been omitted from the Constitution in its final form. In his dissent Fazl Ali, J. thought that sedition

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6. A.I.R. 1950 S.C. 129.
7. A.I.R. 1950 S.C. 124.
8. Article 13 (1) of the Draft Constitution.
9. A.I.R. 1950 S.C. 124.
10. A.I.R. 1950 S.C. 129.
11. The Majority judgment was delivered by Patanjali Sastri, J. With the judgment Kania C.J., Mahajan, Mukherjea and S.R. Das JJ. concurred.

in any serious sense would be disturbing to the public order. To preserve the security of State, public order should be maintained. A law penalising seditious utterances, was in fact a law enacted in the interests of security of State. Therefore he said that sedition as a permissible restriction on the freedom of speech should have been omitted in the final form of the Constitution because it is already provided under the security of State.

For the maintenance of the security of State, a stricter standard of prevention is necessary than for the maintenance of the public order. The East Punjab and the Madras laws discussed above imposed restrictions both in the interests of security of state and public order. The Constitution did not permit restrictions on the freedom to be imposed in the interests of public order. Declaring the provisions in the laws totally void, the majority of the Supreme Court formulated [12] a proposition in the following terms:

"We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order."

The Supreme Court further held that a law imposing restrictions within and outside the constitutionally permissible limits is void in its entirety and that it is not severable. It said:[13]

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not permissible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable."

The Constitution First Amendment replaced Art. 19(2) by substitution of the following provision.

> "Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly

12. *Ramesh Thappar* v. *State of Madras*, A.I.R. 1950 S.C. 124, 129.
13. *Ibid.*

relation with foreign States, public order, decency, or morality, or in relation to contempt of court, defamation or incitement to an offence."

The operation of the amendment was expressed to date back to the time of commencement of the Constitution. The two significant changes made by the First Amendment were, that the restrictions enacted by the State should be reasonable, which means that they are made justiciable and that the State may impose them also in the interests of public order.

(a) *Doubts as to the validity of Sections 124-A and 153-A before the Constitution First Amendment*

In *Tarasingh* v. *State*,[14] the East Punjab High Court literally applying the test of total invalidity of statutes laid down by the Supreme Court held that sections 124-A and 153-A were invalid in their entirety after the Constitution. This case was decided before the Constitution First Amendment. Weston C.J., said:[15] "there can be no dispute that section 124-A is a restriction on the freedom of speech." This conclusion does not seem to be universal. There is an undeniable distinction between freedom and license. If the speech in question cannot be said to be an exercise of freedom, it can never be said that the right to freedom is abridged. When an interest is made a right and protected by law, it is a definite interest. A vague indefinite interest cannot be the subject of an enforceable right. Therefore the clause making freedom of speech and expression as a right has two inherent limitations in freedom and in right. Thus speeches for making of which a person is liable under sections 124-A or 153-A of the Penal Code cannot always be said to be an exercise of the right. It may incidentally be noted that sections 124-A and 153-A are not always restrictions on the right to freedom of speech.

The analogy sought to be drawn from *Brij Bhushan* and *Romesh Thappar* cases to show that the sections are restrictions on the right to freedom of speech is not quite exact. In those cases, the Supreme Court held that pre-censorship and restraint on circulation were restrictions on the freedom. This is a universal proposition. In the case of penal statutes the courts have final authority to determine whether the speech in question is an abuse of freedom or an exercise of right and thus have the power to enforce a penal provision in a constitutional manner. While in the case of statutes imposing a

14. A.I.R. 1951 Punjab 27.

15. *Ibid.*, 29.

prior restraint, the final authority lies with an administrative official, and the court's power of review is restricted only to determine the constitutionality of the law under attack.

Having come to the conclusion that sections 124-A and 153-A of Penal Code were restrictions on freedom of speech, the East Punjab High Court applied the test laid down by the Supreme Court in *Brij Bhushan* and *Romesh Thappar* cases, of total invalidity of a statute applicable to constitutionally permissible and forbidden situations, and held that the sections became void after the Constitution. It can easily be seen that the questions involved are not the same in a penal and a preventive statute and thus the instant case is clearly distinguishable from the Supreme Court cases in which the test was laid down.

In *The State of Bihar* v. *Shailabala Devi*,[16] the Supreme Court explained the test of total invalidity laid down in *Romesh Thappar* and *Brij Bhushan* cases as follows:

> "Whatever ends the impugned act (The Madras Maintenance of Public Order Act, 1949) may have been intended to sub-serve and whatever aims its framers may have had in view, its application and scope could not, in the absence of delimiting words within the statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to endanger the security of the State, nor was there any guarantee that those authorised to exercise the powers under the Act would in using them discriminate between those who act prejudicially to the security of the State and those who do not."

It was not possible for the East Punjab High Court to consider the elucidation made by the Supreme Court itself because the case in which the above observation was made was decided after *Tara-singh's* case.[17]

Assuming that sections 124-A and 153-A of the Penal Code be came void as the Punjab High Court thought, It is difficult to see. how the sections could be considered to have been erased from the statute book. As freedom of speech is made a funda-

16. [1952] S.C.R. 654, 658 and 659.

17. The Punjab High Court decided *Tarasingh's* case on 28-11-50, *Shaila Bala Devi* v. *State of Bihar*, was decided by the Patna High Court on 13-10-1950. Appeal against the decision was decided by the Supreme Court on May 26, 1952. Constitution First Amendment Act received the assent of the President on June 11, 1951.

mental right of a citizen, the sections cease to apply to citizens, but nevertheless continue to apply to persons who are not citizens. In support of this view the following observation of Das C.J., in *Deep Chand* v. *The State of U.P.* may be quoted. He said:[18]

> "A post-Constitution law may infringe either a fundamental right conferred on citizens only or a fundamental right conferred on any person, citizen or non-citizen. In the first case the law will not stand in the way of the exercise by the citizens, but it will be quite effective as regards non-citizens."

In regard to pre-Constitution laws like sections 124-A and 153-A, the position is unquestionable as the Constitution itself laid down that such laws are only void to the extent of repugnancy.[19]

If all the arguments advanced against the validity of sections 124-A and 153-A in *Tara Singh's* case were correct, the sections cease to be enforceable against citizens. On suspension of the fundamental right of freedom of speech in emergencies by an order issued by the President,[20] whether the sections revive or not is a more difficult question to answer.

(b) After the First Amendment to the Constitution

In *Debi Soren* v. *The State*[21] the Patna High Court held that sections 124-A and 153-A could be construed so as to be in accordance with the Constitution after the first amendment. The speeches for making of which the prosecution was filed were made before the Constitution.[22] By the time the Constitution came into force, the action could not be said to be inchoate. Therefore according to the principle laid down by the Supreme Court in *Keshavan* v. *State of Bombay*,[23] the law applicable was that obtaining before the commencement of the Constitution.

The speeches in question seem to have been made at an *Adibasi* conference. One of them alleged that the Bihar Govern-

18. A.I.R. 1959 S.C. 648, 652.

19. Article 13(1).

20. Articles 352 and 358 of the Constitution.

21. A.I.R. 1954 Patna 254.

22. The speeches were made on 24th, 25th and 26th March, 1949. Sub-Divisional Magistrate of Dumka decided the case on May 31,1951. Against the conviction awarded by the Magsitrate, appeals were filed to the High Court on Sept. 24, 1953.

32. A.I.R. 1951 S.C. 128.

ment need not be respected and might be spitted on the face. It was stated that the Government did what the British Government did not do, namely, to resort to merciless firing on the females. The following passage is more significant:

> "Dikus are thieves and dacoits. Biharis entered first like needle but became ploughshares. Go back, Biharis, to your country and construct a hut by the side of the Ganges and sit like a crow and sell oil and salt."

Das, J. construed the text of the speeches merely as putting forward a claim to Jharkhand and for that purpose as making an appeal for co-operation of all classes of people and no more. He did not think that the speeches brought the Government established by law into contempt or hatred or that they promoted feelings of class hatred. Thus it can be seen that whatever may be the construction placed on sections 124-A and 153-A of the Penal Code, no offence was committed.

As to the law applicable to the case, the learned Judge said that there was no difficulty in narrowly construing the sections so as to make them constitutional. Even if section 124-A was construed in the sense in which it was construed by the Privy Council, he said, after the addition of the words "public order" in Art. 19(2), the section could be constitutionally applied. Whatever is said in regard to section 124-A equally applied to section 153-A.

This decision was sometimes supposed to be an authority for the position that section 124-A as interpreted in *Tilak's* case has become valid after the First Amendment to the Constitution. Das, J. who delivered the judgment in the case was on the Bench of the Supreme Court which decided *Kedarnath Singh* v. *State of Bihar*.[23a] In that case, the Supreme Court assumed that section 124-A as interpreted in *Tilak's* case was unconstitutional. If the supposition that Das, J., in the Patna case held that the section as understood in pre-Constitution times was constitutional is correct, Das, J. must have changed his view. But it seems in the light of the supervening events that Das, J. never laid down such a proposition. What he said was that if section 124-A was construed in the interests of public order, the section would become constitutional.

In *Indramani Singh* v. *Manipur State*,[24] the Judicial Commissioner, acquitting the accused on the facts held that section 124-A

23a. A.I.R. 1962 S.C. 955.

24. A.I.R. 1955 Manipur 9.

was not wholly void but was valid to the extent to which it makes representation against the government provoking of hatred and contempt an offence. Similarly he expressed that section 153-A was not wholly void after the First Amendment. His view seems to be that the sections to the extent to which they may be said to be an offence against public order may be saved.

A Full Bench of the Allahabad High Court in *Ram Nandan* v. *State*[25] held that section 124-A was neither a legislation in respect of public order, nor was it a reasonable restriction on the free speech and therefore that it was void. Amongst other things alleged against the accused, the following words were said to be used by him in his address to an audience of 200 persons:

> "Labourers of U.P have now organised themselves. Now they will not beg for pity but will take up cudgels and surround the ministry and warn it that if it did not concede to their demands it would be overthrown. If it was thought desirable that cultivators and labourers should rule the country every young person must learn the use of swords, guns, pistols, batons and spirit bottles, because without a fight the present Government would not surrender. Governments have not been overthrown without the use of batons. Cultivators and labourers should form association and raise an army. If they wanted a Government like the Chinese Government, they should raise an army of volunteers and train them in the use of guns and pistols."

From the three judgments delivered in the case it can be seen that the learned judges were satisfied that the words spoken were not within the allowable limits of freedom. Desai, J. realised that a mere expression not to use force for the attainment of the end could not conclusively be taken as an appeal to bring about an orderly change, when the tenor of the whole speech was an exhortation for the use of force. In their learned discussions, the three judges felt unable to support the constitutionality of section 124-A under which the prosecution proceeded. Attempt to excite disaffection against the Government established by law is an offence under the section. When any excitation of bad feelings is disaffection and an unsuccessful attempt to excite such feelings is within the purview of the section, an unsuccessful attempt to excite bad feelings against the Government, which may not in all likelihood have any effect on public order is an offence. Therefore trivial words uttered by a person not involving any danger to the public orders, for their bad

25. [1958] All. L.J. 793.

tendency, make the person criminally liable, because public order is not an ingredient of the offence. Gurtu, J. invoked the observation cited above made by the Supreme Court in *Romesh Thappar's* case saying that a law laying down restrictions on fundamental rights in language wide enough to cover restrictions within and outside the permissible spheres is void in its entirety, and declared that section 124-A was void. He did not make an attempt to analyse the scope of the principle sought to be laid down, nor did he refer to Supreme Court's own elucidation in, *State of Bihar* v. *Shailabala Devi*,[26]. Beg, J. for both reasons held that the section has become void. In the Court's view, the invalid part of the section is not severable from the valid one, and therefore it is void in its entirety. Even in that event, how the section has become void in the sense that it was wiped out from the statute book, it is difficult to see. If the reasons given by the Allahabad High Court were correct, it ceases to be enforceable against the citizens.

2. RECOMMENDATION OF THE PRESS COMMISSION

The recommendations of the Press Commission were that:
(1) section 124-A should be repealed,[27]

(2) section 153-A, as recommended by the Press Laws Enquiry Committee, should be explained further by the addition of a second explanation saying that "it does not amount to an offence under this section to advocate a change in the social or economic order, provided that any such advocacy is not intended or likely to lead to disorder or to the Commission of offence,"[28] and

(3) section 295-A "should be brought indisputably within the provisions of the Constitution by limiting its operation to those cases where there is intention to cause violence or knowledge of likelihood of violence ensuing."[29]

3. LIBERAL TRENDS

After the Constitution it may fairly be seen that there was a trend to liberally construe the words spoken or written. The Supreme Court in *State of Bihar* v. *Shailabala Devi*[30] and the Patna

26. [1952] S.C.R. 654.

27. Report of the Press Commission, Part I 403 (1954).

28. *Ibid*, 404.

29. *Ibid.*

30. [1952] S.C.R. 654. This was a case under the Press Emergency Powers Act, 1931, demanding the petitioner to deposit a security of Rs. 2,000/- for publishing the pamphlet in question.

High Court in *Debi Soren* v. *The State*[31] gave such liberal construction. In the former case, the expressions inciting people to rebel written in high flown Bengali couched in abstract propositions of a demagogic character, the Supreme Court said were merely laughable and incapable of producing any effect on the readers. In the latter case, the Patna High Court merely said that expressions used against the Government were used for the purpose of advancing the speaker's case. This was exactly the position indicated by Gwyer, C.J. in *Niharendu's* case. A person who feels aggrieved, factually or otherwise, cannot be expected to be logical in the use of expressions. The better way of treating such utterances is to ignore than subjecting the utterer to the trammels of prosecution.

31. A.I.R. 1954 Patna 254.