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ARTICLE

Expressive Conduct and Article 19(1)(a) of the Indian Constitution: A Purposivist Approach

Raghav Kohli*

Gujarat National Law University, India
Corresponding author. raghavkohli1997@gmail.com

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Abstract

Unlike the First Amendment of the United States, the quest to develop a grand theory to explain the scope and purpose of the free speech clause of the Indian Constitution has rarely been attempted. In this void, the significant constitutional question of when expressive conduct should trigger free speech protection has not received adequate academic and judicial scrutiny in India despite its global resonance. This article examines the evolution of the current doctrine by the Indian Supreme Court on the issue of expressive conduct and finds that the Court's ad-hoc approach fails to provide a meaningful resolution framework. Analysing the jurisprudence of the US Supreme Court on its First Amendment, it discusses two potential approaches available to the Indian Supreme Court: one based on the speaker's conduct, and the other, based on state purposes. It argues that focusing on state purposes not only provides a principled answer to this conundrum but is also consistent with Indian free speech jurisprudence. Contrary to contemporary scholarship, it demonstrates that the law on Article 19(1)(a) of the Indian Constitution, as moulded by the Indian Supreme Court over decades, has implicitly treated the examination of state purpose as its predominant inquiry. This article concludes with some ideas on the limitations and prospects of adopting such an approach.

Article 19(1)(a) of the Indian Constitution guarantees the 'right to freedom of speech and expression' to all Indian citizens,[1] subject to 'reasonable restrictions' on specified grounds provided for in Article 19(2) of the Indian Constitution.[2] Just as any coherent theory of freedom of speech presupposes a meaningful distinction between activities that are comprehended within the principle and those that are not,[3] Article 19(1)(a)'s protection only extends to activities that are recognised as 'speech' or 'expression'. However, unlike the First Amendment in the United States,[4] the difficult quest to develop a grand theory to explain the scope and purpose of the free speech clause of the Indian Constitution has rarely been attempted.[5] The almost chaotic jurisprudence of the

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[1]Constitution of India, art 19(1)(a).

[2]Constitution of India, art 19(2).

[3]Frederick Schauer, 'On The Distinction Between Speech And Action' (2015) 65 Emory Law Journal 427.

[4]See eg, Thomas Emerson, 'Toward A General Theory Of The First Amendment' (1962) 72 Yale Law Journal 877; Jed Rubenfeld, 'The First Amendment's Purpose' (2000) 53 Stanford Law Review 767; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) 80–86; Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 Philosophy and Public Affairs 204, 209.

[5]For one such quest, see generally Gautam Bhatia, *Offend, Shock, or Disturb* (Oxford University Press 2016), which concludes that there is no single consistent theory that can explain the different strands of Indian free speech jurisprudence.

Indian Supreme Court, arising partly out of systemic issues such as its polyvocal architecture and inordinate caseload,[6] has led to stark doctrinal inconsistencies making this quest even more challenging. In this chaos, a significant constitutional question has not received adequate academic and judicial scrutiny. Briefly, it is the question of when expressive *conduct* should trigger free speech protection under Article 19(1)(a) of the Indian Constitution.

Consider three scenarios: (a) 'A' is arrested on the night of *Diwali*[7] under a law that prohibits the bursting of crackers; (b) 'B' is prosecuted under a flag-burning law for burning the Indian flag to protest a discriminatory citizenship law; (c) 'C' is arrested for opening fire at a prominent university in New Delhi, India to express their sincere opposition to the liberal culture espoused by the university. All three of them challenge their arrests on the grounds that the state violated their freedom of speech by punishing them for engaging in evidently expressive acts. Should the Indian Courts entertain their claims under Article 19(1)(a)?

Current doctrine in India offers no principled test to address such free speech claims. To clarify, the question is not about whether conduct would be *ultimately* protected after balancing it against countervailing interests under Article 19(2) or otherwise, but whether it would *trigger* free speech scrutiny under Article 19(1)(a) in the first place. While the phrase 'speech and expression' under Article 19(1)(a) has been widely interpreted to include not just words but also expressive conduct,[8] the Indian Supreme Court has adopted an ad-hoc approach without articulating any principle to determine when and what conduct is imbibed with sufficient expressive value to trigger free speech scrutiny.

This issue is compounded in light of the Indian Supreme Court's rhetoric suggesting that the true test for triggering a fundamental right violation is based on the effect of a law on a right, and not the object and purpose of the law.[9] Such a test naturally requires an examination of the expressive value of conduct to first ascertain whether it amounts to speech, before considering the effect of the law on such speech. In line with this approach, most analyses of Indian free speech jurisprudence have focused on the legitimacy of government action by considering the effects of a law from two different lens.[10] First, by the effect of a law on a speaker's ability to communicate a message; and second, by its effect on the audience's ability to receive a message. The inquiry is consequentialist in its approach in both cases, focusing on effects.[11]

This article redirects the emphasis from effects to purposes. It argues that focusing on government purposes behind speech-restricting measures provides a principled solution to address the issue of expressive conduct in India. In other words, the Indian Supreme Court's inquiry must be reformulated to determine whether the state targeted speech in the guise of a speech-neutral restriction, instead of determining whether the conduct itself was sufficiently expressive. Naturally, this claim needs a comprehensive justification; it initially seems to be in direct conflict with much of the Indian Supreme Court's jurisprudence on this issue, as developed over several decades.

[6]Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts' (2013) 61 American Journal of Comparative Law 173.

[7]A prominent Hindu festival, also known as the 'festival of lights', traditionally celebrated by burning firecrackers.

[8]See Section titled 'Limitations of The Indian Supreme Court's Current Doctrine' below.

[9]See Section titled 'Reconciling Purposivism with the "Direct and Inevitable Effect" Test In India' below.

[10]See eg, Soli Sorabjee, 'Article 19(1)(a) and 19(2)', in M Hidayatullah (ed), *Constitutional Law of India* (Bar Council of India Trust 1984) 285; DD Basu, *Constitutional Law of India* (7th edn, Eastern Book Company 1998) 50; Rajeev Dhavan, 'The Press And The Constitutional Guarantee Of Free Speech And Expression' (1986) 28 Journal of the Indian Law Institute 308.

[11]Elena Kagan, 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996) 63 University of Chicago Law Review 426. As will be subsequently discussed, Justice Elena Kagan's seminal analysis of the role of state motive in the US makes it possible to draw many interesting parallels between the free speech jurisprudence of India and the US. I have accordingly found it helpful to borrow some of her formulations to describe the current state of Indian free speech doctrine.

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This article first introduces the need to formulate a principled test to deal with expressive conduct in India. It then examines the current doctrine evolved by the Indian Supreme Court on expressive conduct, and finds that the Court's ad-hoc approach fails to provide any guidance to develop a meaningful resolution framework. In this background, two potential approaches available to Indian Courts are discussed: one based on the speaker's conduct, and the other based on state purposes. It is argued that focusing on state purposes not only provides a principled answer to this conundrum, but is also consistent with the free speech jurisprudence of the Indian Supreme Court. The article thus demonstrates that the law on Article 19(1)(a), as moulded by the Indian Supreme Court over the past decades, has treated the examination of state purpose as its predominant inquiry, though implicitly and perhaps inadvertently. It concludes with some ideas on the limitations of such an approach, and the way forward for the Indian Supreme Court.

The Need for a Principled Test to Recognise Expressive Conduct

The three most commonly articulated imperatives to justify the freedom of speech are (1) individual self-fulfilment; (2) the advancement of knowledge and discovery of truth; and (3) the facilitation of participatory democracy.[12] These rationales are just as important when it comes to the protection of expressive conduct. Even though the word 'expression' is not explicitly mentioned in the text of the First Amendment in the US Constitution (unlike Article 19(1)(a) of the Indian Constitution) the US Supreme Court has consistently acknowledged that speech is not limited to words, but includes actions and conduct.[13] While some have criticised this development,[14] it has been largely been applauded by scholars who have found nothing 'intrinsically sacred' about words.[15] In fact, the protection of expressive conduct serves three important free speech interests. First, it empowers a 'larger, more diverse group' of people to communicate, which leads to the communication of a broader array of messages and exposes a larger group to communication.[16] This is especially necessary from a moral equality standpoint to prevent the alienation of those who do not possess verbal skills, enjoy a lower degree of verbal ability,[17] or do not possess the power, prestige, and financial resources to publicise their verbal messages.[18] Second, it enlarges the gamut of messages that may be communicated, including both messages that are challenging to communicate in words, and those messages in which the conduct is the message.[19] Finally, by protecting 'dramatic displays of action', the protection of conduct helps to attract media attention to unconventional and fringe ideas that may not otherwise become popular.[20] These three interests in turn are designed to protect the interests of all the stakeholders in the process of communication: the speaker's interests in communicating ideas, the audience's interests in receiving ideas, and the public's interests in speech or the message itself.[21]

[12]See eg, Emerson (n 4) 877; JS Mill, *On Liberty And Other Writings* (Stefan Collini ed, Cambridge University Press 1989) 20–21; Kent Greenawalt, 'Free Speech Justifications' (1989) 89 Columbia Law Review 119, 130; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers Of The People* (Oxford University Press 1965) 26–27; C Edwin Baker, 'Scope Of The First Amendment Freedom Of Speech' (1978) 25 UCLA Law Review 964, 966.

[13]See Section titled 'In Search Of A Limiting Principle' below.

[14]See eg, Robert Bork, *Slouching Towards Gomorrah* (Harper Collins 1996) 185; *Street v New York* (1969) 394 US 576, 610 (Black J, dissenting). See also, Eugene Volokh, 'Symbolic Expression and the Original Meaning of the First Amendment' (2009) 97 Georgetown Law Journal 1057.

[15]Laurie Magid, 'First Amendment Protection of Ambiguous Conduct' (1984) 84 Columbia Law Review 470; Louis Henkin, 'The Supreme Court, 1967 Term' (1968) 82 Harvard Law Review 63, 79–80.

[16]Magid (n 15) 471.

[17]ibid 1107.

[18]ibid 471.

[19]ibid.

[20]ibid.

[21]ibid; Eric Barendt, *Freedom of Speech* (Oxford University Press 2007) 23–30.

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The Indian Supreme Court has long recognised that expressive conduct may be deserving of speech protection.[22] However, the absence of a balanced guiding test to determine what conduct should be protected is problematic for at least four convincing reasons. First, if an overly broad test is adopted to determine when conduct can amount to speech, there is a risk of elevating every day-to-day activity which might have some expressive value to the status of a constitutionally protected fundamental right. Preventing this is necessary to avoid the misuse of constitutional rights to thwart governmental reforms and policies. In the US, some have termed this phenomenon 'First Amendment Lochnerism',[23] where the free speech clause is said to have become 'a vehicle for constitutionalizing a policy question of purely legislative dimensions'.[24] It is also necessary to prevent social reform and anti-discrimination laws from becoming toothless, where individuals can continue to discriminate against vulnerable minorities in the name of free speech.[25] While the protection afforded by Article 19(1)(a) is crucial, recognising that 'there is no such thing as a free speech'[26] is important to apprise us of the costs of rights, and how they may often be unfairly distributed.[27]

Second, if an overly narrow test is adopted to determine when conduct may amount to speech, there is a significant risk of courts simply choosing to dismiss speech claims on the grounds that they do not trigger Article 19(1)(a) at all, before testing the restrictions against Article 19(2) or otherwise. It was this concern that prompted the US Supreme Court to reject the requirement that a message should be 'particularised' to invoke the First Amendment protection,[28] holding that 'a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined … would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll'.[29] This concern would also warn against the adoption of a strict content-based test to invoke Article 19(1)(a), for instance, a test that disqualifies all speech advocating for terrorism regardless of whether it qualifies as incitement, since the value of such speech in a democratic society would be better appreciated if tested against the touchstone of Article 19(2) on a case-by-case basis.[30]

Third, the absence of any objective criteria to determine when conduct must be protected will result in courts making arbitrary classifications to justify the value of different types of expressive conduct by invoking, often unsuspectingly, different philosophical theories of free speech.[31] For instance, an examination of the Indian Supreme Court's jurisprudence on commercial speech and newspaper regulation reveals that the Court has inconsistently, and without justification, relied on an instrumental democratic defence of free speech in the past[32] without sufficiently engaging with important philosophical questions such as the place of equality in Indian free speech law.[33] This is not to say that the Court must uniformly ground its decisions in a single theory of free

[22]See Section titled 'Limitations of the Indian Supreme Court's Current Doctrine' below for a comprehensive overview of Indian jurisprudence on this issue.

[23]The term 'Lochnerism' comes from the infamous case of *Lochner v New York* (1905) 198 US 45, which struck down a state law limiting bakers to 60-hour work weeks, symbolising the era in which the US Supreme Court invalidated nearly two hundred social welfare measures, including minimum wage laws and laws designed to enable employees to unionise. See eg, David Strauss, 'Why Was Lochner Wrong?' (2003) 70 University of Chicago Law Review 373, 373.

[24]Rubenfeld (n 4) 771.

[25]ibid 768.

[26]Eric Neisser, 'Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas' (1985) 74 Georgetown Law Journal 257, 258.

[27]Frederick Schauer, 'Harm(s) and the First Amendment' (2012) 2011 The Supreme Court Review 110.

[28]*Spence v Washington* (1974) 418 US 405.

[29]*Hurley v Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 US 557.

[30]*Shreya Singhal vs Union of India* (2013) 12 SCC 73 (Nariman, J, writing the Court's opinion, observed that '(m)ere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.')

[31]See accompanying text to (n 12).

[32]See Bhatia (n 5) 22–24.

[33]See Section titled 'Reconciling Purposivism with the "Direct and Inevitable Effect" Test In India' below.

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speech; the question of whether that is desirable or even possible is a complex one reserved for another time. My limited point in this regard is that the inadvertent use of such theories in the absence of any guiding test, as will be subsequently discussed, is dangerous.

Finally, understanding the scope of Article 19(1)(a) is crucial to understand the constitutional scheme of free speech law in India. In particular, it is necessary to appreciate the exclusive roles played by Article 19(1)(a) and Article 19(2) in the constitutional adjudication of free speech issues. Current doctrine on this issue is in a state of flux; while the court flushes out protected expression at the initial threshold of Article 19(1)(a) in some cases, it proceeds to examine it against the restrictions set out in Article 19(2) in others. For instance, the Indian Supreme Court in *Hamdard Dawakhana* held that Article 19(1)(a) does not protect commercial advertisements without any reference to the grounds under Article 19(2).[34] On the other hand, in *Tata Press*[35] it was found that commercial advertisements are protected speech but 'deceptive, unfair, misleading and untruthful' advertisements would be regulated under Article 19(2).

Clarity on the scope of conduct protected under Article 19(1)(a) also aids in better appreciating the question of whether Article 19(2) provides for an exhaustive list of restrictions that may be imposed on speech.[36] For instance, if the approach that free speech protection is triggered based on the expressiveness of the activity and not by the purpose of the speech restricting law is adopted,[37] then a ban on the expressive conduct of burning crackers for environmental reasons might not pass constitutional muster under Article 19(2) absent a 'public interest' ground. Similarly, if the conduct of a journalist in reporting on a celebrity's private life triggers free speech protection, then a law protecting the privacy of public figures might not provide an effective remedy in the absence of appropriate restrictions under Article 19(2). Such pragmatic concerns necessitate examining the need to import restrictions from other Articles in Part III of the Constitution to supplement Article 19(2).[38] The Indian Supreme Court has a chequered jurisprudence on this question as well; while it has more often than not affirmed the exhaustive nature of Article 19(2),[39] it has read in restrictions from other rights under Part III into Article 19 in a few instances.[40]

Limitations of the Indian Supreme Court's Current Doctrine

Although the Indian Supreme Court has often recognised the expressive value of different kinds of conduct, it has yet to develop a balanced test to determine when it deserves protection under Article 19(1)(a). This is not to say that the decisions of the Court were faulty. Indeed, many of the acts in question would perhaps satisfy a well-defined test formulated for this purpose. But this result can be more appropriately attributed to the fact that the conducts under question were of a *conventional* nature and did not require the Court to substantially engage with the issue of expressive conduct. By *conventional conduct*, I am referring to conduct that is usually performed for communicative reasons.[41] Take for instance, the conduct of flying the Indian flag – few would argue that this conduct is not expressive.[42] Compare this with a case where an individual chooses to *sleep* in a national

[34]*Hamdard Dawakhana vs Union of India* (1960) 2 SCR 671.

[35]*Tata Press vs MTNL* 1995 AIR 2438.

[36]Raghav Kohli, 'The Sound of Constitutional Silences: Interpretive Holism and Free Speech under Article 19 of the Indian Constitution' [2020] Statute Law Review <https://doi.org/10.1093/slr/hmaa012> accessed 10 Jan 2021.

[37]See Section titled 'In Search of a Limiting Principle' below.

[38]Kohli (n 36).

[39]See eg, *Kameshwar Prasad vs State of Bihar*, 1962 AIR 1166; *PUCL vs Union of India* (2003) 4 SCC 399; *Sakal Papers (P) Ltd vs Union of India* 1962 AIR 305.

[40]See eg, *Subramanian Swamy vs Union of India* (2016) 7 SCC 221; *Sahara India Real Estate Corp vs SEBI* (2012) 10 SCC 603. For a comprehensive discussion on whether Article 19(2) provides for an exhaustive list of restrictions on speech, see Kohli (n 36).

[41]Magid (n 15) 467.

[42]*Union of India vs Naveen Jindal* (2004) 2 SCC 510; *Barnes v Glen Theatre* (1991) 501 US 560.

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park in order to protest the plight of the homeless[43] – an instance of *ambiguous conduct*, which is usually performed as a non-expressive everyday activity, but may also be undertaken for communicative reasons.[44] The ad-hoc reasoning adopted by the Indian Supreme Court, which I shall analyse subsequently, does not provide any easy answers to the *ambiguous conduct* conundrum.

Kameshwar Prasad *and the Right to Demonstrate*

In August 1957, the Indian Bihar Government Servants' Conduct Rules 1956 were amended to introduce Rule 4-A which provided that no government servant shall 'participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service'. Soon after the rule was introduced, several petitioners challenged it before the Patna High Court on various grounds including that it interfered with their freedom of speech. Rejecting the contentions of the petitioners, the Patna High Court held that the freedom guaranteed under Article 19(1)(a) did not include a right to strike or to demonstrate so far as Government servants were concerned. Consequently, the constitutional validity of Rule 4-A was upheld. Interestingly, the Bombay High Court around the same time also upheld the validity of a state rule identical to Rule 4-A. Aggrieved by the decisions, the petitioners from both Indian High Courts appealed before the Indian Supreme Court in *Kameshwar Prasad*.[45]

In light of another Indian Supreme Court decision that held that the right to form an association guaranteed by Article 19(1)(c) did not involve the right to strike,[46] the petitioners confined their arguments to the legality of the restriction on the right to demonstrate. The Indian Supreme Court analysed this contention in two parts. First, it examined whether the conduct of holding demonstrations falls under Article 19(1)(a). Second, it then tested the restrictions imposed against Article 19(2).

On the first question, the Court briefly analysed the expressive value of demonstrations by referring to dictionaries, which defined it as an outward exhibition of opinion on political or other questions. It concluded that a demonstration was a 'visible manifestation' of feelings and a 'communication of one's ideas to others to whom it is intended to be conveyed'.[47] It was protected conduct as 'speech need not be vocal' and would include 'signs made by a dumb person'.[48] This reasoning adopted by the Indian Supreme Court is significant. Although the Court did not state an objective test to determine when conduct generally invokes protection, it touched upon an important limb of what such a test could consider: the role of the speaker in communication.[49] The Court held that a demonstration is protected as it is the *intentional* communication of ideas through conduct. But it did not consider the role of an audience or an objective listener in its analysis.[50] As noted earlier, the Court's decision did not turn on this omission, as is usually the case with instances of *conventional* conduct.

On the second question of the validity of Rule 4-A against Article 19(2), the state put forth two interrelated contentions arguing that it was justified under the specified ground of 'public order'. First, the maintenance of discipline among government servants was a *sine qua non* for public order. And second, disorderly agitation and ill-discipline by governments would lead to the demoralisation of the public, and in turn translate into the disappearance of public order. The Indian Supreme Court rejected these arguments. It held that the rule fell afoul of the public order

[43]*Clark v Community for Creative Non-Violence* (1984) 468 US 288.
[44]Magid (n 15) 467.
[45]See *Kameshwar* (n 39).
[46]*All India Bank Employees vs National Industrial Tribunal* (1962) AIR 171.
[47]See *Kameshwar* (n 39).
[48]ibid.
[49]See Barendt (n 21).
[50]ibid.

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restriction as it banned 'every type of demonstration … however innocent and however incapable of causing a breach of public tranquillity'.[51] Notably, in order to determine whether the restrictions were justified, the Court examined the true purpose of the law, which was to impose disproportionate restrictions on protected speech. The significance of adopting such an approach will be discussed subsequently.

Maneka Gandhi *and the Right to go Abroad*

Maneka Gandhi[52] is one of the most celebrated decisions of the Indian Supreme Court. It is widely cited for transforming the court's civil rights jurisprudence by adopting a holistic and integrated reading of fundamental rights under the Indian Constitution, and introducing the substantive due process doctrine under Article 21. In fact, a study in 2018 found that it was the single most widely cited case of the Indian Supreme Court in its jurisprudence though the petitioner herself was not awarded any relief.[53] However, an interesting argument made by the petitioner has rarely, if ever, been examined carefully: she argued that her right to go abroad was protected expression under Article 19(1)(a).

The brief factual matrix was as follows: the passport of the petitioner, a famous politician and journalist, was impounded without furnishing any reasons in public interest by the state in 1977. She filed a writ petition before the Indian Supreme Court contending that the order violated, inter alia, her right under Article 19(1)(a).

Before proceeding further, it is important to bear one caveat in mind. This was not a case where the conduct of going abroad by itself was argued as a primary instance of speech and expression (for instance, a case where citizens travel abroad to protest discriminatory citizenship rules). If it were so, this would have been an ideal case for the Indian Supreme Court to develop a test to deal with ambiguous conduct, as the conduct of going abroad may be undertaken for communicative or non-communicative reasons. Instead, it was argued that the right to go abroad was a peripheral right necessary to exercise one's freedom of speech abroad and to make it meaningful and effective. Further, restrictions on the right to travel abroad would impose impermissible geographical constraints on the freedom of speech.

The majority opinion authored by Justice Bhagwati addressed the second question first. It established with sound reasoning that Article 19(1)(a) is exercisable not only in India but also abroad; it is not limited by geographical constraints. But the analysis of the Indian Supreme Court on the first question was unclear. After examining its jurisprudence on the freedom of circulation of the press, it held that a right could be protected under Article 19(1)(a) 'if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right'.[54] For instance, 'the right to paint or sing or dance or to write poetry or literature' would be protected since 'the common basic characteristic in all these activities is freedom of speech and expression'.[55] It was 'not enough' that a right claimed by the petitioner was necessary to make the exercise of Article 19 (1)(a) meaningful and effective, as it would upset 'the entire scheme of Article 19(1)' if 'practically every activity would become part of some fundamental right or the other'.[56] Applying the 'basic nature and character' test to the right to go abroad, the Indian Supreme Court concluded that

[51]See *Kameshwar* (n 39).

[52]*Maneka Gandhi vs Union of India* (1978) 1 SCC 248.

[53]Devulapalli Sriharsha et al, 'The most influential judgements in Supreme Court's history' (mint, 18 Sep 2018) <https://www.livemint.com/Politics/X4lDGjqQm6bto8isWPQbEN/The-most-influential-judgements-in-Supreme-Courts-history.html> accessed 9 May 2020.

[54]See *Maneka Gandhi* (n 52).

[55]ibid.

[56]ibid.

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Article 19(1)(a) was not implicated since a restriction on the right to go abroad does not in all cases violate freedom of speech, even if it is necessary in some cases to make the right meaningful.

This reasoning alone does not give us any answer to the question of whether the right to go abroad in protest would have been protected by the Indian Supreme Court. The Court gives us no guidance on how to judge whether an activity partakes of the same 'basic nature and character' as speech. The only factor considered was whether the activity restricted would lead to a violation of speech in *all* cases. But this factor is unhelpful in solving the nuanced problem of ambiguous conduct, which is usually performed as a non-communicative act. By definition, it would not involve a violation of speech in *all* cases, as speech would be implicated only in cases where the conduct is performed for communicative reasons. The fact that the Indian Supreme Court went on to consider some instances of going abroad as protected expression makes its analysis even more confusing.

Naveen Jindal *and the Right to Fly the National Flag*

Flags are widely associated with expressive activity due to their intellectual and emotive content.[57] As a symbol of national identity, a flag embodies a nation's historical experience[58] and is often associated with values such as freedom, hope, and national unity,[59] which makes its use apt both as a means to express one's patriotism and as a means of political protest.[60] In *Naveen Jindal*,[61] the petitioner was strangely forbidden to use the flag as a symbol of patriotism by flying it at his office premises. Challenging the action, he argued, inter alia, that a prohibition on such conduct violated his fundamental right to fly the national flag under Article 19(1)(a) as an Indian citizen.

The Indian Supreme Court extensively discussed the symbolic value of the Indian national flag, and accepted the petitioner's argument. It was held that the right to fly the national flag freely with respect and dignity is a fundamental right of a citizen under Article 19(1)(a) as 'an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation'.[62] However, dealing with another instance of conventional conduct, the Indian Supreme Court did not ostensibly find it necessary to lay down a test to evaluate the expressive value of conduct.

Interestingly, while discussing the scope of the word 'expression' in relation to the symbolic value of the flag, the Indian Supreme Court cited the landmark Canadian Supreme Court case of *Irwin Toy*,[63] where the Canadian Supreme Court applied a comprehensive three-tiered test to determine the validity of certain prohibitions imposed on commercial advertising directed at children. Under the test,[64] the Canadian Court first determines whether the activity falls within the protected sphere of conduct. Second, if it does, the Canadian Court would then examine whether the state purpose was to restrict speech or merely regulate harmful conduct independent of its communicative value. Third, even if the state purpose were speech-neutral, the Canadian Court would evaluate whether the restriction had the effect of impeding legitimate expression. The Indian Supreme Court, however, only restated a part of this test without consideration of its context; the observation that 'activity is expressive if it attempts to convey meaning' was quoted in isolation.[65] And again, like in *Kameshwar Prasad*, the Indian Supreme Court did not consider the interests of the audience in deciding the expressive value of conduct.

[57]Sheldon Nahmod, 'The Sacred Flag and the First Amendment' (1991) 66 Indiana Law Journal 512.

[58]ibid.

[59]See eg, Jawaharlal Nehru, observing that the flag is, 'a flag of freedom not for ourselves, but a symbol of freedom to all people who may seek it.' (Constituent Assembly Debates, 22 Jul 1947, 766); *Texas v Johnson* (1989) 491 US 397.

[60]See *Texas* (n 59).

[61]See *Naveen Jindal* (n 42).

[62]ibid.

[63]*Irwin Toy v Quebec (Attorney General)* (1989) 1 SCR 927.

[64]ibid.

[65]See *Naveen Jindal* (n 42).

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After deciding whether the conduct triggered Article 19(1)(a), the Indian Supreme Court examined the question of what restrictions could be placed on this right. It observed that the use of the flag would be protected only when 'confined to nationalism, patriotism and love for motherland', and not when it is used for any 'commercial purpose or otherwise'.[66] Unsurprisingly, it also found that burning a flag in anger was unprotected as it would amount to 'disrespect'.

Two strange ideas in this analysis deserve to be highlighted. First, the Indian Supreme Court drew a distinction between the freedom of speech in relation to the use of flags in the US and India on a false premise. It incorrectly observed (in line with a few preceding Indian Supreme Court judgments)[67] that the First Amendment of the US Constitution confers an 'absolute right' to free speech unlike the 'qualified right' in India, which is subject to Article 19(2). This made it convenient for the Indian Supreme Court to conclude that the 'extreme proposition' of burning a flag could not be adopted in India.[68] In doing so, the Indian Supreme Court oversimplified a very nuanced issue. The reason behind upholding flag burning in the US was not that the First Amendment is absolute, but that the restriction was aimed at expression and could not satisfy the exacting scrutiny required to silence ideas that society finds offensive or disagreeable.[69] Significantly, the US Supreme Court concluded its majority opinion by observing that '[they] do not consecrate the flag by punishing its desecration, for in doing so, [they] dilute the freedom that this cherished emblem represents.'[70] The idea that allowing the burning of a flag might strengthen its legitimacy in society also warns against the immediate instinct to cite Article 51A of the Indian Constitution in the state's defence, as it merely stipulates that the national flag must be respected without expressing any preference between competing visions of what achieves that aim.[71] For instance, the Indian Supreme Court in *Bijoe Emmanuel* found that the expulsion of children from school for not singing the National Anthem though they respectfully stood up in silence was inconsistent with Article 51A and violative of their right to free speech.[72] It is unnecessary for the purpose of this article to comment on the merits of the US approach vis-à-vis the Indian approach to flag burning. This, however, does not take away from the fact that the Indian Supreme Court should have engaged with the values underlying the free speech guarantee before making categorical judgments about what it encompasses.

The second idea worthy of mention flows from the Indian Supreme Court's stipulated restrictions on Article 19(1)(a), which were not justified against the touchstone of Article 19(2), or otherwise. The Indian Supreme Court did not establish why Article 19(2) only permits the use of the national flag when confined to expressing feelings of 'nationalism, patriotism, and love for motherland'.[73] One may, for instance, cite the ground of 'morality' in defence, but such questions merit deeper consideration by courts and do not, and rightly should not, have any easy answers.

NALSA, Navtej Singh *and the Right to Express One's Self-Identified Gender and Sexual Orientation*

Until 2014, the transgender community in India were deprived of the right to recognition of their self-identified gender. This changed with the decision of the Indian Supreme Court in *National*

[66]ibid.

[67]See eg, *Reliance Petrochemicals vs Indian Express* (1989) AIR SC 190; *LIC vs Prof Manubhai Shah* (1993) AIR 171. In *Shreya Singhal* (n 30), Nariman J clarified that such a difference is only illusory.

[68]See *Naveen Jindal* (n 42).

[69]See *Texas* (n 59).

[70]ibid.

[71]Constitution of India, art 51A.

[72]*Bijoe Emmanuel vs State Of Kerala* (1987) AIR 748.

[73]See *Naveen Jindal* (n 42).

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Legal Services Authority[74] (henceforth '*NALSA*'), which arose out of a writ petition filed by members of the transgender community and different bodies demanding such recognition.

In a judgment with far reaching consequences, the Indian Supreme Court upheld the right of transgender persons to legal recognition of their self-identified gender as male, female, or as the 'third gender' under the constitutional guarantees of equality,[75] non-discrimination,[76] equal opportunity,[77] liberty,[78] and importantly, free speech and expression.[79] The Indian Supreme Court found that Article 19(1)(a) includes 'the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc'.[80] Thus, no restriction can be placed on the expression of a transgender person's 'inherent personality' reflected through 'one's personal appearance or choice of dressing, subject to … Article 19(2)'.[81]

It is important to note how the Indian Supreme Court is now directly engaging with the issue of *ambiguous* conduct. There is nothing necessarily expressive about an individual's choice of dressing, mannerisms, or behaviour. Yet, for the transgender community, these forms of conduct may assume special communicative significance in given circumstances as they have been associated with systemic discrimination against the community.[82] This rationale was subsequently reaffirmed in *Navtej Singh Johar*, where the Indian Supreme Court decriminalised homosexuality and observed that the LGBT community 'expressed their sexual orientation in myriad ways' including by 'engagement in intimate sexual acts like those proscribed under Section 377 [of the Penal Code]'.[83] However, in the absence of specific instances of expressive ambiguous conduct under question in either case, the Court found it unnecessary to formulate a test to determine when they would merit protection.

Hamdard, Tata Press, *and the Right to Commercial Speech*

The final set of Indian Supreme Court cases that I have chosen to discuss in this section are not directly concerned with expressive conduct. Broadly dealing with commercial speech and press regulation, these cases however offer some crucial insights on the theoretical underpinnings and adjudicatory methodology informing the current state of free speech doctrine in India.

The first case, *Hamdard Dawakhana*,[84] dealt with the constitutionality of Sections 3 and 8 of the Indian *Drugs and Magical Remedies Act* (DMRA). The stated objective of the DMRA was to prohibit 'misleading' advertisements that claimed certain drugs had magical or other remedies. It was argued, inter alia, that the DMRA violates the petitioners' freedom of speech and expression, as Article 19(1)(a) protected commercial speech. Rejecting the contention, a five-judge bench of the Indian Supreme Court held that when an advertisement is commercial in nature, it 'no longer falls within the concept of freedom of speech for the object is not propagation of ideas – social, political or economic or furtherance of literature or human thought'.[85] In this case, the advertisement was 'a part of business … and had no relationship with what may be called the essential

[74]*NALSA vs Union of India* (2014) 5 SCC 438.
[75]Constitution of India, art 14.
[76]Constitution of India, art 15.
[77]Constitution of India, art 16.
[78]Constitution of India, art 21.
[79]Constitution of India, art 19(1)(a).
[80]See *NALSA* (n 74).
[81]ibid.
[82]See eg, Erin Mulvaney, 'Dress Codes Central in Supreme Court Gender Identity Bias Debate' (BloombergLaw, 2019) <https://news.bloomberglaw.com/daily-labor-report/dress-codes-central-in-supreme-court-gender-identity-bias-debate> accessed 9 May 2020; See Bhatia (n 5) 278.
[83]*Navtej Singh Johar vs Union of India* (2018) AIR SC 4321.
[84]See *Hamdard Dawakhana* (n 34).
[85]ibid.

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concept of the freedom of speech'.[86] The Indian Supreme Court also confusingly held that the advertising of prohibited drugs 'not in the interest of the general public' would not constitute 'speech' under Article 19(1)(a).[87]

It is bewildering to note that the Indian Supreme Court emphatically endorsed one theory of free speech, an instrumental theory aimed at the 'propagation of ideas', as the bedrock of Article 19(1)(a) sans any justification. In the Indian Supreme Court's opinion, any speech which did not further this 'essential concept', whether by words or conduct, was unworthy of protection. Moreover, the use of the word 'relationship' suggests that the Indian Supreme Court viewed different forms of speech as meriting different levels of protection based upon their level of proximity to the declared 'essential concept' of speech.[88] As mentioned earlier, the jurisprudence of the polyvocal Indian Supreme Court has not been consistent in adopting any singular theoretical framework to evaluate free speech claims. While it has exclusively adopted a single theoretical justification in some cases like *Hamdard Dawakhana*, it has considered multiple justifications to understand the free speech clause in others.[89] This makes it dangerous to exclude certain speech based on competing philosophical theories at the initial threshold of Article 19(1)(a), without developing any coherent doctrine to explain the free speech clause.

Even assuming that the Indian Supreme Court were right in making such a sweeping claim, it failed to justify why commercial advertisements would not contribute to the 'propagation of ideas'.[90] Indeed, as would be rightly observed by a three-judge bench of the Indian Supreme Court 35 years later in *Tata Press*,[91] commercial advertising contributes to the indispensable free flow of commercial information in a democratic economy by which the public at large is benefitted.[92] Although the three-judge bench of the Indian Supreme Court in *Tata Press* attempted to distinguish *Hamdard Dawakhana* to hold that Article 19(1)(a) did in fact protect commercial speech, the decision seems to conflict with the wide-ranging observations of the five-judge bench in *Hamdard Dawakhana*.

So far, the analysis of the Indian Supreme Court's jurisprudence on diverse issues implicating Article 19(1)(a) across decades has been unable to provide meaningful guidance on the place of expressive conduct in the free speech doctrine. Although traces of reasoning that may aid in formulating a qualifying test for expressive conduct are located, it remains for the Indian Supreme Court to tie the threads together and comprehensively engage with the nuances of this conundrum.

In Search of a Limiting Principle

In the previous sections, I examined the dangers of not only failing to adopt any test, but also of adopting an overly-broad or overly-narrow test to determine when conduct should merit the protection of Article 19(1)(a). In this section, I discuss two possible approaches that the Indian Supreme Court may adopt to deal with these challenges in a principled manner. The jurisprudence of the US Supreme Court provides a helpful comparative in this regard. Despite the obvious differences in the free speech clauses of both states, US First Amendment jurisprudence has historically exercised a gravitational pull upon both the Constituent Assembly debates and jurisprudence post-

[86]ibid.
[87]ibid.
[88]See Bhatia (n 5) 258–260.
[89]See eg, *Naveen Jindal* (n 42), where the Court citing Emerson noted that free speech is 'necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in society.'
[90]See *Hamdard Dawakhana* (n 34).
[91]See *Tata Press* (n 35).
[92]ibid.

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independence.[93] The wide range of issues arising out of expressive conduct addressed by the US Supreme Court since the 1960s makes it a particularly suitable comparator.[94]

The Conduct-Based Approach

The first approach involves formulating a balanced test to include only certain kinds of conduct that possess sufficient expressive value to pass the Article 19(1)(a) threshold. The objective of the test is straightforward: if the speaker can prove that their act was expressive, the conduct would merit free speech protection. If not, the conduct would be unprotected and the question of testing it against the restrictions in Article 19(2) would not arise. This inquiry naturally places the speaker's conduct at its heart. It does not matter whether the aim of the government in imposing a restriction on speech was to target the message or not. What matters is whether the conduct of the speaker was imbued with sufficient expressive value to qualify as 'speech and expression'. Variants of this approach can be seen across the world,[95] most notably in the US.

The 'Fails Anyway', 'Speech Plus', and 'Pure Speech' Tests

Before 1974, the US Supreme Court avoided formulating any test, presumably out of fears mirroring the discussion in the previous section.[96] Instead, it adopted one of three approaches to deal with expressive conduct: 'speech plus', 'fails anyway', or 'pure speech'.[97]

Under the 'fails anyway' approach, the US Supreme Court circumvented the preliminary examination of whether the act in question was expressive. The US Supreme Court simply *assumed* that the conduct was expressive, and proceeded with the second stage of inquiry. For instance, in *O'Brien*,[98] the petitioner burned his Selective Service registration certificate in violation of a law before a sizable crowd in order to influence others to adopt his anti-war beliefs. The US Supreme Court observed that an 'apparently limitless variety of conduct' could not be labelled speech, but 'even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment', it did not necessarily follow that the petitioner's conduct was constitutionally protected.[99] Without analysing whether the conduct was sufficiently expressive, the US Supreme Court held that the First Amendment claim would have failed anyway.

The 'speech plus' approach rested on a perceived distinction between 'speech' and 'conduct', with conduct being the *plus* element. The US Supreme Court inquired into whether the communicative act being restricted was predominantly 'speech' or 'conduct', and generally allowed interferences with the former where 'conduct' was being regulated.[100] This argument can most famously be found in the writings of Thomas Emerson, who argued that the First Amendment offered

[93]See eg, Dr BR Ambedkar's speech in the Constituent Assembly, where he discusses the similarities between the Indian free speech clause and the US First Amendment in Vol VII, 'Constituent Assembly Debates' (4 Nov 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04> accessed 15 Jan 2021. For Indian cases citing First Amendment jurisprudence, see eg, *Naveen Jindal* (n 42), *Hamdard Dawakhana* (n 34), *Tata Press* (n 35), etc.

[94]Adrienne Stone, 'The comparative constitutional law of freedom of expression', in Tom Ginsburg & Rosalind Dixon (eds), *Comparative Constitution Law* (Edward Elgar 2011) 407.

[95]See eg, UK (*Lee v Ashers Baking Company (Northern Ireland)* [2018] UKSC 49); ECtHR (*Açik v Turkey* App No 31451/03; *Tatár and Fáber v Hungary* App Nos 26005/08 and 26160/08); Canada (*Irwin Toy v Quebec (Attorney General)* (1989) 1 SCR 927).

[96]See eg, *United States v O'Brien* (1968) 391 US 367, 376 ('We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea'); *Brown v Louisiana* (1966) 383 US 131, 165 (Black J, dissenting) ('… if one group can take over libraries for one cause other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their libraries … and … inevitably the next step will be to paralyze the schools').

[97]Magid (n 15) 473.

[98]*O'Brien* (n 96).

[99]ibid 376.

[100]For use of the term 'speech plus', see eg, *NAACP v Button* (1963) 371 US 415, 455 (Harlan J, dissenting).

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protection if the speech element predominated, and not otherwise.[101] However, the distinction between 'speech' and 'conduct' in this context is both theoretically superficial and pragmatically unworkable. They are often intertwined to an extent that makes it impossible to separate the two.[102] As John Ely rightly pointed out in the context *of O'Brien*, 'burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression'.[103] In such cases, any attempts to evaluate which element 'predominates' would 'inevitably degenerate into question-begging judgments about whether the activity should be protected.'[104] Any attempts to revive this incoherent and faulty line of analysis in India must be nipped in the bud.

Under the 'pure speech' approach, the US Supreme Court bypassed the need to differentiate between conduct and speech by likening certain conducts to 'pure speech',[105] which were extended the full panoply of First Amendment protection.[106] Of course, this approach also suffered from defects similar to the last approach, resulting in arbitrary hierarchies of conducts meriting different degrees of protection.

The Spence *Test*

In 1974, the US Supreme Court formulated a seemingly neat test to address the issue of expressive conduct. In *Spence*,[107] the appellant was convicted under Washington's 'improper use' statute for displaying out of his apartment window a US flag upside down with a peace symbol taped on it. He testified at his trial that he displayed his flag to protest actions in Cambodia and serious events at Kent State University, and that his purpose was to associate the American flag with peace instead of war and violence. Recall the discussion in *Naveen Jindal*, where the Indian Supreme Court failed to engage with the very real possibility of the controversial use of an Indian flag in protest. In any case, the Washington Supreme Court sustained the conviction and dismissed the appellant's contentions. On appeal, the US Supreme Court invalidated the conviction on the ground that it unfairly interfered with his protected expression. The US Supreme Court stipulated a two-part test to determine when free speech scrutiny should be triggered: (1) the speaker should have intended to send a particularised message, and (2) their audience were likely to have understood that message in the surrounding context.[108]

Applied to the facts, the US Supreme Court found that a 'flag bearing a peace symbol and displayed upside down by a student' was likely to be understood as a 'pointed expression of anguish … about the then-current domestic and foreign affairs of his government'.[109] At first, this test seems comprehensive. It accounts for the free speech interests of both the speaker and the audience. It also excludes some activities that would not generally be understood as conveying a message. But a closer examination of three diverse illustrations will demonstrate that this test has not been easy to apply in practice.

Take for instance, the expressive activity of painting. Art has conventionally been associated with expression,[110] and yet, without a 'particularised message', would likely fall outside the narrow *Spence* test. In *Hurley*, the US Supreme Court seems to have distanced itself from the particularised

[101]See eg, Emerson (n 4).

[102]Lawrence Tribe, *American Constitutional Law* (Foundation Press 1978) 599–601, 616.

[103]John Hart Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 Harvard Law Review 1495.

[104]ibid.

[105]See eg, *Cox v Louisiana* (1965) 379 US 536, 555 (Justice Goldberg's opinion); *Tinker v Des Moines Indep Community School Dist* (1969) 393 US 503.

[106]Melville Nimmer, 'The Meaning of Symbolic Speech Under the First Amendment' (1973) 21 UCLA Law Review 29, 31.

[107]See *Spence* (n 28).

[108]ibid.

[109]ibid.

[110]See eg, Dr Justice DY Chandrachud, 'Imagining Freedom through Art' (Literature Live's Annual Independence Lecture, 17 Aug 2019) <https://www.thehindu.com/news/cities/mumbai/attack-on-art-is-attack-on-freedom/article29121902.ece>

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requirement, correctly observing that such a test would inexplicably exclude the 'shielded painting of Jackson Pollock' or 'music of Arnold Schöenberg'.[111]

Consider now, a free speech claim arising out of the ambiguous conduct of baking a cake. Would *Spence* provide an easy answer to this question? Will an audience look at a cake and understand any message? If yes, does it implicate the free speech rights of the baker, or the customers who placed the order, or both? Can a baker who considers baking to be an art form be placed on a lower pedestal than a famous painter? These were some of the issues the US Supreme Court was confronted with in *Masterpiece Cakeshop*.[112] This involved a cakeshop owned by Phillips, an expert baker and devout Christian. In 2012, he told a same-sex couple that he would not bake a cake for their wedding because of his religious opposition to homosexuality, but that he could sell them other baked goods like birthday cakes. The couple filed a charge of discrimination before the Colorado Civil Rights Commission. Both the Commission and the US Court of Appeal's subsequently ruled in favour of the couple and dismissed the baker's claim that requiring him to bake a cake for a same-sex wedding would violate his right to expression by compelling him to exercise his artistic talents to express a message with which he disagreed. On appeal before the US Supreme Court, however, the majority decided the case on the narrowest grounds available. It held that the Commission's actions in this case violated the baker's 'free exercise clause' by demonstrating a 'clear and impermissible hostility' towards his religious beliefs. In doing so, the majority did not rule upon the broader implications arising out of the interplay between the right to free speech and free exercise of religion. The issue was nonetheless discussed in the concurring opinion of Justice Clarence Thomas and the dissenting opinion of Justice Ruth Bader Ginsburg.

Justice Thomas concluded that the baker's creation of custom wedding cakes was expressive. Applying the *Spence* test, he held that the use of 'artistic talents to create a well-recognised symbol that celebrates the beginning of a marriage clearly communicates a message'.[113] On the other hand, Justice Ginsburg held that baking a wedding cake was not sufficiently expressive in itself, as the baker 'submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's.'[114] Since both the authorship and the meaning of the message were unclear, the baker was not entitled to free speech protection for his conduct.

While the US Supreme Court uniformly recognised the applicability of the *Spence* test, different judges in the absence of common contextual factors to be considered arrived at starkly different conclusions. *Spence*, although seemingly objective in its approach, does not provide any easy answers. Scholars have suggested different methods to improve this test. For instance, by analysing the conduct involved to assess its relevance to the message,[115] by emphasising on the importance of social meaning,[116] and by not triggering free speech protection in cases of compelled expressive conduct unless the compelled actor is forced to convey a message with which they disagree.[117] However, none of these suggestions help in resolving a large number of cases that unfairly satisfy, or unfairly fail to satisfy, *Spence*.

Consider one such case: an individual bombs a government building to protest human rights abuses committed by the state. Few would say that they did not understand the unequivocal

accessed 20 May 2020; John Hospers, 'The Concept of Artistic Expression' (1954) 55 Proceedings of the Aristotelian Society 313.

[111]See *Hurley* (n 29).

[112]*Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission* (2018) 584 US.

[113]ibid.

[114]ibid.

[115]Magid (n 15) 493.

[116]Caroline M Corbin, 'Speech Or Conduct? The Free Speech Claims Of Wedding Vendors' (2015) 65 Emory Law Journal 241; Robert Post, 'Recuperating First Amendment Doctrine' (1995) 47 Stanford Law Review 1249.

[117]Corbin (n 116) 244.

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message of the speaker, which I would add, is also sufficiently particularised. Would a free speech claim in this regard then pass the *Spence* test? Current doctrine would lean towards a yes. Of course, this does not mean that the conduct involved would eventually be protected. The US Government adopted this line of reasoning in *Clark*,[118] and argued that the *Spence* approach was overinclusive because it accorded First Amendment status to a wide variety of acts that, although expressive, were obviously subject to prohibition. Justice Thurgood Marshall's response in his dissent is revealing. He observed that the government's argument would pose a difficult problem only if the determination of whether an act constitutes 'speech' was the end of First Amendment analysis. Since this was not the case, 'compelling interests' would outweigh any attempts to protect 'antisocial acts'.[119] Even though this approach may correctly deny free speech protection to violent acts ultimately, it permits frivolous free speech claims to be made in the first instance leading to an undesirable *Lochner*-like result.

Rumsfeld *and the 'Inherently Expressive' Test*

In *Rumsfeld*,[120] the US Supreme Court was faced with another intractable instance of ambiguous expressive conduct: the conduct of law schools restricting the access of military recruiters to their students because of disagreement with the US Government's 'don't ask, don't tell' policy on homosexuals in the military. The US Congress responded to this conduct by enacting the Solomon Amendment, which specified that any institution denying military recruiters access equal to that provided to other recruiters would lose certain federal funds. The law schools filed a suit contending that the Amendment violated their First Amendment freedoms.

The US Supreme Court upheld the constitutionality of the Soloman Amendment. Building on the observations in *Hurley*,[121] the Court held that First Amendment protection only applies to conduct that is 'inherently expressive'. The conduct in question was not considered inherently expressive as an observer could not ascertain whether military recruiters were interviewing away from the school because of the school's disapproval or other factors such as lack of vacancy of interview rooms. That the expressive component of the conduct was 'not created by the conduct itself but by the speech that accompanie[d]' it was 'strong evidence' that it was not inherently expressive.[122]

But the US Supreme Court has not consistently required that conduct be inherently expressive.[123] Whether the test works is doubtful too. Without taking surrounding circumstances into account, conduct can scarcely be understood as communicative by itself. Justice Marshall in *Clark*[124] rightly observed that while the conduct of sitting or standing would not usually be construed as expressive, 'for Negroes to stand or sit in a "whites only" library in Louisiana in 1965 was powerfully expressive' and such acts indeed became 'monuments of protest' against segregation.[125] At best, 'inherently expressive' conduct could perhaps benefit from a rebuttable presumption in favour of protection, but the final determination must rest upon the surrounding context and social meaning of the conduct being examined. In any case, the investigation has so far revealed that all the different tests developed by the US Supreme Court that place the speaker's conduct at the heart of their analyses are riddled with contradictions and difficulties. The question remains: how should the Indian Supreme Court analyse cases involving ambiguous expressive conduct?

[118]See *Clark* (n 43).
[119]ibid.
[120]*Rumsfeld v FAIR* (2006) 547 US.
[121]See *Hurley* (n 29) (*Hurley* observing that the 'inherent expressiveness' of marching makes parades expressive).
[122]See *Rumsfeld* (n 120).
[123]Corbin (n 116); *City of Erie v Pap's A M* (2000) 529 US 277, 289 (on the 'inherently expressive' nature of nudity).
[124]See *Clark* (n 43) 306.
[125]ibid.

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The Purposivist Approach

An alternative approach places the state's purpose in enacting a conduct regulating law, instead of the speaker's conduct, at the heart of its analysis. This approach has been invoked by different scholars and courts by interchangeably using words such as motive, purpose, motivation, and intent.[126] In the context of this paper, this will be termed the 'purposivist approach'.

According to the purposivist approach, free speech is only triggered when an individual is prosecuted *for* speaking, but not *as a result of* speaking.[127] When an individual refuses to pay taxes as a mark of dissent, the purposivist school does not begin its inquiry by looking at the expressive value of the speaker's act. Instead, it focusses on whether the purpose of the state in enacting or enforcing the tax law was aimed at expression. So long as the state's purpose was not illegitimate (ie, individuals were not asked to pay taxes to suppress dissent for instance), the free speech clause is not implicated. To borrow an oft-cited example, if one indulges in speeding to protest an irrational speed limit, they cannot claim a free speech defence merely because they are prosecuted *as a result* of their expressive act. In other words, an individual cannot claim immunity for engaging in illegal conduct when the law is not aimed at targeting the expressive component of the conduct.

Once the focus is redirected towards the purpose of the law, the question of what constitutes an impermissible or illegitimate motive rightly assumes great significance. This question in the context of the First Amendment continues to be a contentious one with no easy answers. For instance, Justice Elena Kagan has written about four such inter-related impermissible motives.[128] First, the state may not limit expression 'because it disagrees with or disapproves of the ideas espoused by the speaker', based on opinion.[129] Second, it may not restrict expression 'because the ideas espoused threaten officials' own self-interest'.[130] Third, the state may not 'privilege either ideas it favors or ideas advancing its self-interest'.[131] And finally, it may not limit expression 'because other citizens deem the ideas offered to be wrong or offensive'.[132] Similarly, Jed Rubenfeld has invoked what he calls the 'Anti-Orthodoxy Principle', or the principle that 'individuals have the "right to their opinion," that they cannot be punished for having or for expressing a particular opinion, regardless of the topic, regardless of how foolish or trivial their opinion may be, and regardless even of how unpleasant or dangerous state actors might think it.'[133] Such justifications also help to rationalise free speech issues such as obscenity, commercial speech, 'media' cases,[134] and 'fighting words'[135] from a purposivist account. But how exactly does one ascertain the true purpose of a law? Does it turn on speeches made in Parliament? Would it not lead to insurmountable problems of interpretation if one were to distil the motives behind why each parliamentarian voted the way they did? And in any case, can it even be said that there is a *single* legislative purpose that can explain the 'complex mix of hopes, expectations, beliefs, and attitudes' that drive legislators to vote in a certain way?[136] These are grave concerns, and rightly so. They also happen to be misplaced criticisms of the purposivist approach.

[126]John Hart Ely, 'Legislative And Administrative Motivation In Constitutional Law' (1970) 79 Yale Law Journal 1205; Kagan (n 11); Rubenfeld (n 4) 771.

[127]Rubenfeld (n 4) 776.

[128]Kagan (n 11).

[129]ibid.

[130]ibid.

[131]ibid.

[132]ibid.

[133]Rubenfeld (n 4) 818. He calls this principle the 'Anti-Orthodoxy Principle' in deference to Justice Jackson's famous observation in *WV State Board of Education v Barnette* (1943) 319 US 624, 642: 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be *orthodox* in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'

[134]Post (n 116) 1255.

[135]In *Chaplinsky v New Hampshire* (1942) 315 US 568, 572, the US Supreme Court defined 'fighting words' as words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'

[136]Kagan (n 11) 438.

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Purposivists are not concerned with abstract motives of parliamentarians. Instead, the inquiry demands an evaluation of whether the law truly fits the purported speech-neutral object, or is illegitimately aimed at speech. If a law merely aims to control the physical consequences of particular conduct independent of its communicative value, the state's purpose would generally not be aimed at expression. In this determination, courts have a familiar set of instruments available, including the law's language, effects and consequences, subject-matter, surrounding circumstances, common knowledge, and parliamentary history. Using these tools, courts can assess whether the overinclusive, underinclusive or arbitrary terms of the law, for instance, justify its asserted purpose. If a law criminalises the posting of anti-government statements on social media platforms such as Facebook, it is immaterial whether a parliamentarian who voted in its favour was motivated by a genuine concern to protect public order. What matters is the purpose that a constitutional court must reasonably attribute to the legislation. This approach proves advantageous in addressing many of the issues raised earlier. By disallowing individuals to question conduct regulating laws when they happen to restrict an activity that they wanted to engage in for expressive reasons, it prevents a Lochner-type investigation by courts into legislative policy. It also averts frivolous litigation from mushrooming around supposed free speech claims.

But there is another reason why the purposivist approach seems to provide a principled answer to the expressive conduct conundrum: it can potentially save courts from engaging in the often-arbitrary exercise of 'balancing'.[137] The jurisprudence of the US Supreme Court is replete with the rhetoric of balancing. Courts often purport to determine if a government 'interest' or 'benefit' in imposing a restriction 'outweighs' or 'justifies' a 'burden' or 'cost' upon the exercise of free speech. For instance, the US Supreme Court in *Buckley* found that the governmental interest in preventing corruption by imposing campaign spending caps was weighty but 'insufficient to justify' the restrictions on protected freedoms.[138] Judge Richard Posner, one of the leading pragmatists of our time and foremost proponents of the balancing approach, has famously employed this approach in *Miller*, where the Court was tasked with determining whether non-obscene nude dancing was protected expression under the First Amendment.[139] Answering in the affirmative, Judge Posner argued against 'letting judges play art critic' and held that the First Amendment forbade discrimination between 'upper class and lower class' erotica.[140] Taking the example of bullfighting, he concluded that the activity may be proscribed 'not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value'.[141]

However, Rubenfeld offers a convincing retort to this reasoning. He argues that it is near impossible for judges to have to review society's judgments about the harmful consequences or expressive value of an act – the bare minimum required of judges employing this approach.[142] How would a judge even decide upon the social cost of a tortured bull, and then go on to compare it against the entertainment value of bullfighting?[143] Without a common unit of measure, nothing can be balanced against anything else. Such investigations are prone to the dangers of judges superimposing conclusions and justifying them by tilting the balance to suit their individual biases.

The harms arising from a flawed balancing exercise are not foreign to the Indian Supreme Court. Recall the earlier discussion on commercial speech, where the Indian Supreme Court in the 1960s in *Hamdard Dawakhana* found that a commercial advertisement is unprotected as it does not contribute to the propagation of ideas without any real analysis – empirical or otherwise – of the role of commercial speech in society. Let us fast forward to 2016, where the Indian Supreme Court in

[137]Rubenfeld (n 4) 779.
[138]*Buckley v Valeo* (1976) 424 US 1, 23, 29, 45.
[139]*Miller v Civil City of South Bend* (1990) Nos 88-3006, 904 F2d 1081 (7th Circuit, 24 May 1990).
[140]ibid.
[141]ibid.
[142]Rubenfeld (n 4) 781.
[143]ibid.

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Subramanian Swamy[144] was faced with the constitutionality of criminal defamation in India. After citing a line of authorities adopting the balancing approach,[145] the Indian Supreme Court articulated the issue to be resolved: the right to reputation, which forms an integral part of the right to life under Article 21 of the Indian Constitution, had to be balanced against the freedom of expression under Article 19. The subsequent balancing exercise conducted by the Court, however, leaves much to be desired. It observed that a 'balance' was required as criminal defamation did not have an 'inevitable consequence' on free speech, and one's reputation 'cannot be allowed to be crucified at the altar' of another's free speech.[146]

That was the extent of the Indian Supreme Court's analysis in balancing between the two rights. There was no attempt to explain why striking down *criminal* defamation in particular would 'crucify' one's reputation, when there were several other ways to protect it. There was no analysis of the chilling effect that such a provision may have on speech. Apart from the fact that the Court did not bother look to Article 19(2) as the first limitation on Article 19(1)(a), the indeterminate costs and benefits involved in such balancing often allow anyone to arrive at any conclusion they want.

Although these cases, with their inadequate reasoning, do not do justice to balancing which is achievable through the careful application of the proportionality analysis, they might be exactly why scholars like Rubenfeld oppose it. In *Modern Dental College*, the Indian Supreme Court endorsed a four-part proportionality test in the context of Article 19, observing that a restriction would be valid only if '(i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.'[147] Since proportionality review has become increasingly influential in Indian constitutional law adjudication,[148] the utility of purposivism lies in its ability to determine when the free speech clause must be triggered in the first instance instead of determining when speech must be ultimately protected. It is also worth mentioning that in determining whether a law is aimed at expression and must therefore be struck down, purposivism often also employs aspects of proportionality analysis. For instance, Rubenfeld views 'narrow-tailoring tests as smoking-out devices' in order to ascertain whether the law is 'substantially or illogically overbroad or underbroad with respect to … putative legitimate purposes'.[149] First Amendment purposivism may thus also involve some degree of what could be considered 'balancing' elsewhere. In any case, the approach continues to be relevant in the Indian context in order to filter out frivolous speech claims before entering into the balancing exercise necessitated by Article 19(2).

Although the US Supreme Court, like its Indian counterpart,[150] has voiced concerns about making the constitutionality of a law turn on the legislative purpose, an examination of US free jurisprudence reveals that the US Supreme Court regularly uses proxies to determine impermissible

[144]*Subramanian Swamy* (n 40).

[145]See eg, *Sakal Papers* (n 39); *DTC vs DTC Mazdoor Congress* (1991) Supp (1) SCC 600; *St Stephen's College vs University of Delhi* (1992) 1 SCC 558; *Mr 'X' vs Hospital 'Z'* (1998) 8 SCC 296; *Ram Jethmalani vs Union of India* (2011) 8 SCC 1; *In re: Noise Pollution (V)* (2005) 5 SCC 733.

[146]*Subramanian Swamy* (n 40).

[147]*Modern Dental College & Research Centre vs State of MP* (2016) 7 SCC 353.

[148]For a comparative discussion on the tests of 'reasonableness' and 'proportionality' in Indian constitutional law, see Chintan Chandrachud, 'Proportionality, Judicial Reasoning, and the Indian Supreme Court' (2016) University of Cambridge Faculty of Law Research Paper No 12/2016. See also *Anuradha Bhasin vs Union of India* (2019) SCC 1725; *Modern Dental College & Research Centre vs State of MP* (2016) 7 SCC 353.

[149]Rubenfeld (n 4) 794–795.

[150]See eg, *RC Cooper vs Union Of India* (1970) AIR 564; see *Maneka Gandhi* (n 52).

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government motives.[151] Recall *O'Brien*, where the US Supreme Court denied First Amendment protection to the conduct of burning one's Selective Service registration certificate. A four-part test was laid down by the US Supreme Court which must be satisfied to uphold a law regulating expressive conduct: (1) it must be within the state's constitutional power; (2) it must further a substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of expression; and (4) the incidental restriction on free speech must be no greater than is essential to the governmental interest.[152] In doing so, the US Supreme Court rejected an argument to consider the government's illicit speech-restricting motive in determining the constitutionality of the law stating that it was a 'familiar principle of constitutional law'.[153] But an analysis of the second and third prongs of the test (as employed by the US Supreme Court) makes it clear that the enquiry of the Court was really directed at determining whether the aim of the law was to suppress dissent. It ultimately found that the aim of the legislature was 'limited to the non-communicative aspect of the conduct'.[154] The test, despite the US Supreme Court's objections, was nothing but a proxy to filter out improper government motives.[155] This conclusion has persuasively been found to be true for the entire structure of US free speech jurisprudence, with Justice Kagan noting that the question of government motive is the 'preeminent inquiry' of the First Amendment for 'ferreting out and then invalidating impermissibly motivated governmental actions'.[156] As will be subsequently shown, the story of the Indian Supreme Court's Article 19 jurisprudence is remarkably similar.

Reconciling Purposivism with the 'Direct and Inevitable Effect' Test in India

The Indian Supreme Court has a chequered jurisprudence on determining when a fundamental right is infringed. In one of the earliest cases involving the question of fundamental rights post-independence, the Indian Supreme Court in 1950 was faced with a habeas corpus petition arising out of the detention of AK Gopalan, a prominent Indian communist leader.[157] It was contended that his detention under the *Preventive Detention Act 1950* (PDA) was in contravention of Articles 13, 19, 21, and 22 of the Indian Constitution. In what was to become one of the most infamous opinions in the Indian Supreme Court's history, the majority refused to infuse Article 21 with the American concept of 'due process' and restricted the expression 'procedure established by law' to mean the procedure as established by the Indian Parliament. The word 'law' was to mean state-enacted law, and not equivalent to some abstract notion or common law principles embodying the principles of natural justice.

Interpreting different fundamental rights as water-tight compartments devoid of overlap, the majority found that the question of infringing Article 19(1)(a) would only arise in case of 'a legislation directly attempting to control a citizen's freedom of speech or expression', but not when one's rights are abridged 'as a result of the operation of other legislation, for instance, for punitive or preventive detention'.[158] In other words, it was found that the correct test is to consider 'the directness of the legislation' and not 'the result of the detention' on the detenue's life.[159]

[151]Kagan (n 11); Rubenfeld (n 4).

[152]See *O'Brien* (n 96). It is important to clarify that the third limb of the test does not imply that expressive conduct can only be regulated when the governmental interest is unrelated to the suppression of free expression. The third limb is better understood as the triggering circumstance in which the *O'Brien* case applies.

[153]ibid.

[154]ibid.

[155]Paul Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation' (1975) 27 Stanford Law Review 585, 590.

[156]Kagan (n 11).

[157]*AK Gopalan vs State of Madras* (1950) AIR SC 27.

[158]ibid.

[159]ibid.

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This test was soon followed in 1951 in *Ram Singh,*[160] where the President, Vice-President, and Secretary of the Hindu Mahasabha of Delhi, India were detained again under the PDA to prevent the making of speeches that would 'excite disaffection between Hindus and Muslims and thereby prejudice the maintenance of public order in Delhi'.[161] Citing *AK Gopalan*, the Indian Supreme Court observed that the validity of a preventive detention law was not to be judged upon the touchstone of Article 19 as the Indian Constitution 'treated these civil liberties as distinct fundamental rights'.[162] Interestingly, the petitioners also argued that the district magistrate acted mala fide in issuing the detention orders 'for the collateral purpose of stifling effective political opposition and legitimate criticism of the policies pursued by the [Indian] Congress Party'.[163] The Indian Supreme Court rejected this argument holding that the petitioners made no attempts to discharge their burden beyond making allegations.

It is essential to understand that the *AK Gopalan* test, although uniformly criticised, resembles the purposivist approach in many respects. Instead of exclusively considering the effects of a law, it places its focus on the motives of the government in enacting a speech-restricting law. Thus, the test correctly prohibits a speech claim to be made against a law imposing speed limits if an individual chooses to over-speed to protest a governmental policy. But the test employs erroneous reasoning in arriving at the correct outcome. Instead of considering the government purpose reflected by the true nature and substance of the law, the test merely requires the Court to accept the form and purported object of the law. If a speed limit was deliberately imposed to prevent citizens from engaging in a popular form of protest, the Court is duty-bound to consider the free speech implications of such a law in a challenge. The *AK Gopalan* test, however, satisfied with the facial neutrality and 'directness' of the legislation, would not permit such a claim to be made.

A shift came in 1958, when the vires of the Indian *Working Journalists (Conditions of Service) and Miscellaneous Provisions Act 1955* (WJMPA) and the decision of the statutorily constituted Wage Board in relation to fixing a minimum wage for working journalists was challenged by different newspaper companies in *Express Newspapers* on the grounds that it violated, inter alia, their freedom of speech.[164] The Attorney General, citing *AK Gopalan*, contended that Article 19(1)(a) had no application as the legislation did not directly deal with free speech. The petitioner, citing a 1954 Supreme Court decision in response,[165] argued that the Court must 'look behind the names, forms and appearances to discover the true character and nature of the legislation.'[166]

In a significant development, the Indian Supreme Court attempted to do just that. It first considered the provisions of the WJMPA to assess whether its 'main object' and 'true nature' was to regulate speech or to regulate conditions of service.[167] It correctly observed that 'a general law in regard to the industrial or labour relations' could not be challenged on the grounds of speech, and the mere fact that the WJMPA aimed at workmen in the newspaper industry did not suggest any 'undue preference or a prejudicial treatment' or 'any ulterior motive behind the enactment of such a measure'.[168] But the Indian Supreme Court went a step further to analyse the legislature's purpose: it considered the 'direct or inevitable consequences' of the WJMPA as reflective of the legislative intent.[169] This is where the Indian Supreme Court's purposivist approach is at its clearest. In analysing the WJMPA's effects, the Court did not merely enter into an analysis, empirical or

[160] *Ram Singh vs State of Delhi* (1951) AIR SC 270.
[161] ibid.
[162] ibid.
[163] ibid.
[164] *Express Newspaper (P) Ltd vs Union of India* (1959) SCR 12.
[165] *Dwarkadas Shrinivas vs Sholapur Spinning and Weaving* (1954) SCR 674, 683.
[166] See *Express Newspaper* (n 164).
[167] ibid.
[168] ibid.
[169] ibid.

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otherwise, on its impact on newspaper circulation or on the dissemination of information. This would typically be the role of a Court that uses Judge Posner's balancing approach. Instead, the Indian Supreme Court considered that the harmful consequences highlighted by the petitioners could not be in the 'contemplation of the legislature while enacting a measure of this type for the benefit of the workmen' as they were not the 'direct or inevitable consequences of the measures enacted'.[170] In other words, the harm that the proposed minimum wage aimed at countering did not arise out of the communicative impact of the petitioner's speech. The actual fall in circulation brought about by a general law introducing a minimum wage would, almost certainly, be more than the fall brought about by a law targeted at only one newspaper. But such a targeted law would reek of improper government motives to suppress speech. And for that reason, it would appropriately be ruled unconstitutional. In such cases and others, the primary investigation for the Court has been not to empirically ascertain the effect of the law, but to analyse whether or not the government's purpose in enacting a law was improperly targeted at speech.

The importance of recognising the role of government motive in the free speech jurisprudence becomes clear when the Indian Supreme Court's commercial speech cases are revisited. Recall that the 1960 decision in *Hamdard Dawakhana*[171] concerned the constitutionality of the DMRA, which was enacted to prohibit 'misleading' advertisements that claimed certain drugs had magical qualities. The Indian Supreme Court held that commercial speech was not protected by Article 19(1)(a) because its inquiry was focussed on whether the speaker's action in question was protected as expression under Article 19(1)(a). Upon analysing the decision of the Court closely, one can safely conclude that this erroneous determination was unnecessary to decide the dispute.

In *Hamdard Dawakhana*, the Indian Supreme Court rejected the Article 19(1)(a) challenge on another ground: it was found that the 'scope and object of the [DMRA] its true nature and character is not interference with the right of freedom of speech but…with trade or business'.[172] It was observed that when a law is challenged on the grounds of an infringement of Part III of the Indian Constitution, 'the ascertainment of its true nature and character becomes necessary, ie, its subject matter, the area in which it is intended to operate, its purport and intent[,] … history of the legislation[,] … surrounding circumstances[,] … the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy'.[173] If the law did not give rise to a free speech claim, there was no need to determine whether the act in question constituted speech.

But the analysis does not end here. The Indian Supreme Court correctly held that Article 19 was not violated, but for the wrong reasons. To say that the law was not aimed at 'speech' is simply incorrect. This is not to say that the law was impermissibly aimed at curbing freedom of speech. The harms arising out of misleading and false advertisements are without any doubt *communicative* harms. They arise out of the communicative effects of speech on the audience, who would be harmfully persuaded by such advertisements. Laws regulating fraud, perjury, and defamation, are similarly content-based restrictions on speech that arise out of the harms of expression. The role for the Court in such a case is to determine whether the government can legitimately proscribe such speech or not. In the alternative, the Court was required to justify why such a legislation would regardless not be seen as aimed at speech. And perhaps, with the Indian Supreme Court asking the right questions, the jurisprudence could have started to develop consistent and coherent principles to explain the free speech clause.

[170]ibid.
[171]See *Hamdard Dawakhana* (n 34).
[172]ibid.
[173]ibid.

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The next major shift in the Indian Supreme Court's position came in 1970 with *RC Cooper*,[174] where a bench of 11 judges was constituted to decide on the constitutionality of a statute providing for the nationalisation of certain banking companies in public interest. The Indian Supreme Court expressly overruled *AK Gopalan*, holding that it was 'not the object of the authority making the law … nor the form of action' which was dispositive.[175] Instead, the 'assumption' in *AK Gopalan* that different constitutional articles were independent codes was incorrect, and the true test was of the 'effect of the laws on fundamental rights'.[176]

This test was later applied in *Bennett Coleman* in 1972,[177] where the validity of the Indian Newsprint Order 1962 and Newsprint Policy 1972–73 were challenged. The Newsprint Order 1962 imposed restrictions on the consumption and use of newsprint (a particular type of printing paper used as raw material for newspapers) beyond the limit prescribed by the state, and prohibited the use of any other printing paper by a newspaper. The Newsprint Policy 1972–73 imposed what some may broadly call *post-quota* restrictions, which continued to apply even after the grant of newsprint quota to newspapers: it limited the number of pages to ten; it prohibited an increase in the number of pages by reducing circulation even within the authorised quota; it prohibited the use of quota of one newspaper for another newspaper belonging to a common ownership unit; it prohibited common ownership units from starting a new newspaper from their quota; and it allowed a 20 per cent increase to newspapers under ten pages provided this increase was not utilised for the increasing circulation, while it reduced the percentage increase allowed to bigger newspapers.

Citing *RC Cooper*, the Indian Supreme Court observed that it was neither the object nor form of state action, but the 'direct effect' of the law on fundamental rights which attracted the Court's jurisdiction.[178] But an analysis of the Indian Supreme Court's reasoning reveals that the test the Court truly applied was once again based on examining the true object and purpose of the state action, instead of merely its effects or facial purpose. While the majority did not rule on the 1962 Order, it was found that the Newsprint Policy 1972–73 violated Article 19(1)(a) as 'the object of the newspaper restrictions' was not related to 'the availability of newsprint or foreign exchange' but was to 'control the number of pages or circulation of dailies or newspapers' as the restrictions came into operation after the grant of quota.[179] It was observed the power of the state to import newsprint or control the distribution of scarce newsprint could not be denied, but such distribution must be fair and equitable. The Indian Supreme Court held that post-quota restrictions amounted to 'newspaper control in the guise of equitable distribution of newsprint' as they did not justify their purported object.[180] For instance, it was found that the fixation of 10 pages on account of newsprint scarcity could not justify the 20 per cent increase for smaller newspapers, the inability to reduce circulation to increase pages within the quota would unduly hamper the quality of the dailies and affect the freedom of the press, and restrictions on common ownership units were discriminatory. The reasoning bares the purposivist approach adopted by the Indian Supreme Court. The effect of the law is, of course, an important factor in understanding the law's true purpose. But the decision did not turn on the impact of the law on the level of circulation, which as the Indian Supreme Court admitted, could be legitimately brought about by a 'fair and equitable' law to control the distribution of scarce newsprint.[181] It rather turned on the *purpose* of the state. The Indian Supreme Court held that the true purpose of the legislation was to control the

[174]See *RC Cooper* (n 150).
[175]ibid.
[176]ibid.
[177]*Bennett Coleman vs Union Of India* (1973) AIR 106.
[178]ibid.
[179]ibid.
[180]ibid.
[181]ibid.

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freedom of press and restrict the speech of larger newspapers, which was impermissible under Article 19(1)(a).

What then is the difference between *Express Newspapers* and *Bennett Coleman*? The Indian Supreme Court evidently did not carry out an empirical analysis to compare the effect of a minimum wage law as opposed to newsprint consumption restrictions on the circulation of newspapers. Assuming that the change in circulation brought about by the two legislations was similar, would an effects-based test be able to explain the divergent outcomes? The same questions arise upon examining other cases such as *Sakal Papers*,[182] where the Indian Supreme Court struck down a law regulating the prices of newspaper in relation to their pages and sizes, and *Indian Express Newspapers*,[183] where the Indian Supreme Court struck down an excessive import duty on newsprint. Some have argued that the Indian Supreme Court has, without any determining principle, distinguished between interferences with the freedom of speech and expression, and background conditions within which that freedom must be exercised.[184] However, the issue may be viewed from another lens to derive a determining principle: interferences with the freedom of speech arise out of improper speech-restricting government purposes. Since the Indian Supreme Court has not dealt with this question directly, it is challenging to arrive at a general theory that explains the Court's jurisprudence on what constitutes an improper state purpose under Article 19(1)(a) in light of Article 19(2). This question, however, remains key to understand the free speech provision in the Indian Constitution.

This conclusion is confirmed by an examination of Justice Mathew's dissent in *Bennett Coleman*. Upholding the Newsprint Order 1962 and Newsprint Policy 1972–73, he observed that it was necessary to ascertain whether the provisions were 'calculated to strangle' big dailies or were 'essentially regulatory' in character.[185] He further found that the Newsprint Policy was aimed at making smaller dailies 'attain a position of equality in respect of page level and circulation' which would enable the widest 'dissemination of ideas' and 'ensure the emergence of truth' by promoting 'effective competition of ideas in the market'.[186] In his opinion, post-quota restrictions on common ownership units and reducing circulation were an 'integral part of any system of rationing' to make it workable.[187] Far from basing his decision on any empirical analysis on circulation, Justice Mathew found that the law would enhance freedom of speech in the interest of the public's right to receive information by increasing dissemination of news and equitably meeting the demands of the press. In other words, he held that the purpose behind the law was not to restrict, but to enrich the freedom of speech and this purpose was not prohibited under Article 19(1)(a).[188] A fundamental constitutional question of free speech theory was at play in *Bennett Coleman*. Stated pithily, it was about the place of equality under Article 19(1)(a). However, without framing the right questions and developing a coherent jurisprudence to filter out improper motives, the quest for a general free speech theory in Indian constitutional law will remain incomplete.

The *RC Cooper* test of 'direct effect' was finally modified six years later in *Maneka Gandhi*.[189] Recall that the case involved the state impounding the petitioner's passport 'in public interest', and the Court found that the conduct of going abroad was not protected under Article 19(1)(a). Right before coming to this conclusion, the Indian Supreme Court devoted a section of its judgment to determine the correct approach to ascertain when a fundamental right is triggered. It observed

[182] *Sakal Papers* (n 39).

[183] *Indian Express Newspapers vs Union Of India* (1986) AIR 515.

[184] See Bhatia (n 5) 281–308; See also Dhavan (n 10) 316–317.

[185] See *Bennett Coleman* (n 177) (Mathew J, dissenting opinion).

[186] ibid.

[187] ibid.

[188] In coming to this conclusion however, Mathew J relied on *Hamdard Dawakhana* (n 34), which incorrectly held that commercial advertisements do not fall within Article 19(1)(a).

[189] See *Maneka Gandhi* (n 52).

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that the 'direct effect' test was unworkable as it would 'give the Court an unquantifiable discretion to decide whether in a given case a consequence or effect is direct or not'.[190] Thus, flowing from the test adopted in *Express Newspaper*, the test of 'direct and inevitable effect' was stipulated to 'quantify the extent of directness necessary' to constitute an infringement.[191] This test continues to govern till date.[192] Since the right to go abroad was found to fall outside Article 19(1)(a), the Indian Supreme Court concluded that confiscating the passport did not trigger Article 19(1)(a) as 'its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression'.[193]

The Indian Supreme Court's reasoning is confusing. At one point, it seems to suggest that travelling abroad is not protected as 'it would not be correct to say that whenever there is a restriction on the right to go abroad, *ex necessitae* it involves violation of freedom of speech'.[194] It is no doubt correct that a ban on travelling abroad would not *inevitably* restrict speech, as every instance of going abroad is not an instance of expression. But this reasoning is dangerous as it potentially excludes *all* cases of ambiguous conduct, which involve routine activities undertaken as symbolically expressive. A blanket ban on sleeping in parks, for example, would not *inevitably* restrict speech, but may have free speech implications in cases where the government aim is to quell a protest by a few who engage in that activity for expressive reasons.

It is the next observation of the Indian Supreme Court that is difficult to reconcile with this reasoning: it remarks that the direct and inevitable effect of an order impounding a passport may 'in a given case' be to abridge freedom of speech.[195] This would be the case, for instance, where such an order is made against an 'evangelist who has made it a mission of his life to preach his faith to people all over the world', or against a musician who may 'want to go abroad to sing, a dancer to dance, a rising professor to teach and a scholar to participate in a conference'.[196] This reasoning is equally dangerous as it takes us to the other end of the spectrum as far as protection of ambiguous conduct goes. It would entitle everybody who engages in illegal conduct for expressive reasons to a free speech claim, regardless of whether or not the true state purpose was to restrict speech.

It was, of course, never the intention of the Indian Supreme Court to frame a test that would be overinclusive and underinclusive test at the same time. It was equally not the intention of the Court to completely eliminate the role of state purpose in framing an effects-based test. This is clear from the Indian Supreme Court's observation that when state action has a direct and inevitable effect on speech, 'it must be presumed to have been intended by the authority taking the action'.[197] It remarked that this test can also be rightly called the 'doctrine of intended and real effect'.[198] The inevitable effects of a law are undeniably key to understand the true purpose or 'intended effect' behind a law.[199] So when should an evangelist or musician or professor be allowed to make a free speech claim against an impounding of their passports? It is when the state purpose in making such an order is aimed at curbing their expressive activities or communicative harms arising out of their travel. Against this backdrop, it is important to understand why the Indian Supreme Court found it necessary to remark that 'there is nothing to show that the petitioner was intending to go abroad for the purpose of exercising her freedom of speech … or her right to carry on her profession as a journalist'.[200] The framed inquiry of the Indian Supreme Court, in line with its previous

[190]ibid.
[191]ibid.
[192]See eg, *Jindal Stainless Ltd vs State of Haryana* (2017) 12 SCC 1; *State of Maharashtra vs Indian Hotel & Restaurants Assn* (2013) 8 SCC 519.
[193]See *Maneka Gandhi* (n 52).
[194]ibid.
[195]ibid.
[196]ibid.
[197]ibid.
[198]ibid.
[199]ibid.
[200]ibid.

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jurisprudence, was consistent with the purposivist school. The fact that the Court has developed proxies to examine the state purpose in different factual matrices does not diminish that.

To sum up the discussion on the state of Indian jurisprudence so far: there is no test to address the issue of expressive conduct, and the 'basic nature and character' test does not any provide meaningful guidance. In any case, focussing exclusively on the speaker's conduct is often unhelpful and unnecessary. A descriptive analysis of Article 19(1)(a) jurisprudence suggests that its predominant enquiry has been to ascertain improper government purposes, which also saves Courts from engaging with the fraught classification between conduct and speech. However, the issue of which government purposes are illegitimate remains unclear in the absence of any coherent general theory to explain the free speech clause.

Conclusion

Revisiting the three cases briefly discussed in the introduction, 'A' would not have a free speech claim against a general law prohibiting the bursting of crackers unless it is found to be motivated by an intent to selectively curb the religious expression of the Hindu community. Similarly, 'C' would not have a free speech claim to defend any violent conduct as the laws were not aimed at changing offensive views or attitudes, but were aimed at regulating harmful conduct independent of such views. On the contrary, 'B' would have a valid free speech claim if the law prohibits flag burning for the hurtful message that it may signify.

I do not seek to exaggerate my argument; of course, these conclusions are oversimplified. All such cases involve difficult determinations, and merely adopting a purposivist approach does not always guarantee the right answers. It is by no means an easy task to ascertain whether a facially speech-neutral law is illegitimately aimed at suppressing expression. This is especially true as laws are often couched in underinclusive or overinclusive terms to achieve purported objects, despite the best of parliamentary intents.

The subsequent question of which state motives are unconstitutional is not an easy one either. Unlike the First Amendment, Article 19(2) expressly allows restrictions on speech arising out of its communicative harms by virtue of stipulated grounds such as 'decency' and 'morality'. The concept of 'First Amendment absolutes',[201] which provides an alternative to the balancing approach, resists explanation in terms of these restrictions, especially in light of the increasing influence of proportionality analysis in Indian constitutional adjudication. Deriving a general theory of impermissible motives in light of the fractured jurisprudence of Indian Courts remains challenging.

I also have not claimed that the purposivist approach would explain *all* aspects of Article 19(1)(a) jurisprudence. Indeed, most accounts purporting to develop a single grand theory of free speech are prone to reductionism.[202] This is perhaps why the Canadian Supreme Court has chosen to formulate a tedious three-tiered test to adjudicate on free speech issues: first, it determines whether the activity falls within the protected sphere of conduct; second, if it does, the Court examines whether the state purpose was to restrict speech or merely regulate harmful conduct independent of its communicative value; and third, even if the state purpose was speech-neutral, it evaluates whether the restriction had the effect of impeding legitimate expression.[203] Considering that the Indian Supreme Court has often failed to uphold civil liberties,[204] it is also worth considering the strategic value in adopting a three-tiered test that affords the greatest protection to free speech. These issues, coupled

[201]Rubenfeld (n 4) 778.

[202]For similar criticisms, see Daniel Farber et al, 'Practical Reason and the First Amendment' (1987) 34 UCLA Law Review 1615, 1616; Lawrence B Solum, 'The Value of Dissent' (2000) 85 Cornell Law Review 859, 859.

[203]See *Irwin Toy* (n 63).

[204]Gautam Bhatia, 'ICLP Turns 7 | A Constitutionalism Without the Court' (Indian Constitutional Law and Philosophy, 2020) <https://indconlawphil.wordpress.com/2020/08/01/iclp-turns-7-a-constitutionalism-without-the-court/> accessed 18 Aug 2021; Gautam Bhatia, 'Contempt of Court and Freedom of Speech: An Analysis of the Prashant Bhushan Judgment'

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with the question of what normative underpinnings justify the purposivist approach in the Indian scenario, I leave for another time.

And yet, despite these disclaimers, the conclusion holds substantially true. An inquiry into state purpose, which provides a principled solution to the issue of expressive conduct, has been the unstated but predominant inquiry of the Indian Supreme Court's free speech jurisprudence.

(Indian Constitutional Law and Philosophy, 2020) <https://indconlawphil.wordpress.com/2020/08/14/contempt-of-court-and-freedom-of-speech-an-analysis-of-the-prashant-bhushan-judgment/> accessed 18 Aug 2021.

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