Constitutional Studies
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Lecture 17
Free Speech and Religious Freedom

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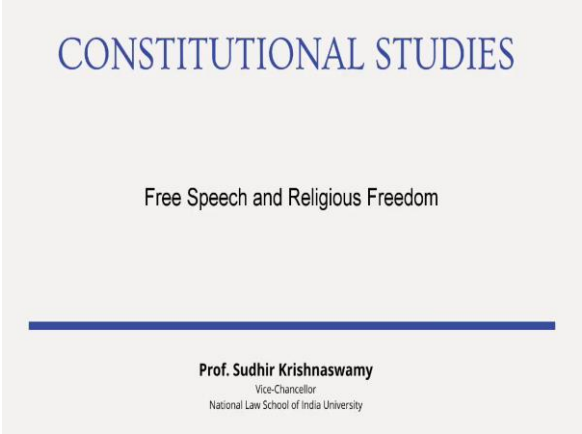

Hey there, welcome back to Week 8 of Constitutional Studies., A~~a~~s we make a determined push through the last three weeks lecture and materials, please stay updated on the website as we give you some additional materials and prepare well for the upcoming exam. This lecture is the third and the last in the series that we have done on free speech and on fundamental rights., T~~t~~his month is on free speech and religious freedom.

We made it clear at the very start that we will be unable to cover all the fundamental rights in the constitution. But we have covered the primary ones –~~:~~ life ~~-~~and liberty, equality and now free speech and religious freedom. There are other rights in the constitution and we invite all of you to go back and look at them in detail in the ways that we have done elsewhere in this course. But for the purposes of this course, we are going to close the series on fundamental rights with this lecture.

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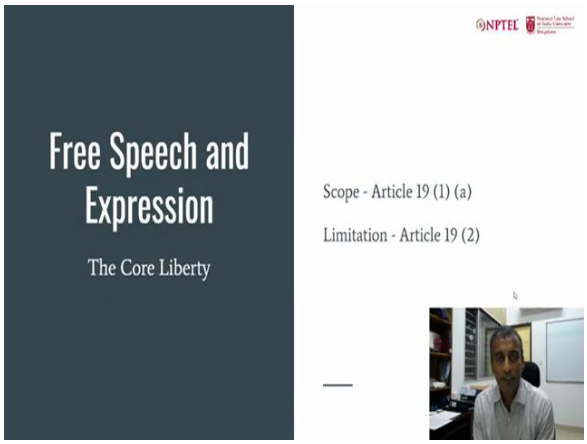

So free speech and expression is a core liberty in constitution. There are other liberties, the right to assemble peacefully, the right to form associations, the right to practice the profession, conduct the business and so on. But many of them rest on a fundamental assurance that we have free speech and expression. The Indian constitution sets out the free speech clause in Article 19 (1) (a) that tells us the scope of the right. It is not an unlimited right, and the limitations or exceptions are set out in Article 19 clause 2.

When this was being drafted, many in the Constituent Assembly argued that since the list of exceptions was rather long that effectively the right was emaciate. And the view that others in the Constituent Assembly took was that even if we were to give an absolute right to free speech, inevitably, we would leave it to the course to determine the exceptions. The constitution framers took the view that they were better off framing the exceptions and hence, we get this two part structure to the right to free speech, a scope and limitation. Let us dive right in to see what these provisions set out.

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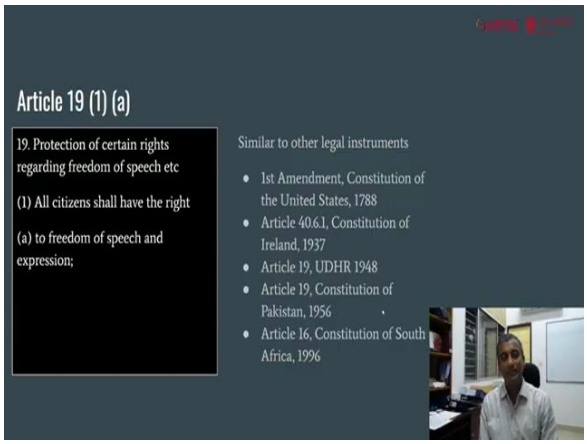

Article 19 (1) (a) of the Constitution sets out the right to freedom of speech and expression.~~,~~ ~~as well as is an~~The same Aarticle ~~the~~ has other sub clauses ~~of~~ which contain other freedoms. How does it read? Article 19 says, "the protection of certain rights regarding freedoms of speech, et cetera." Notice in clause 1 that all citizens have the right, the right to what? Freedom of speech and expression. Why should we have a right to freedom of speech and expression? One would understand that the expanded phrasing of the clause is meant to include other forms of non-verbal expression, might be the clothes that you wear, ~~the way that you might,~~ artwork that you might draw up and so on and so forth.

The song you might think, all forms of non-verbal expression be captured in that word expression. When the Indian Constituent Assembly sat down to draft the free speech clause, other constitutions had already done this. And so we had much to learn from and we made some strategic choices in 1950.

In 1788, the First Amendment of the Constitution of the United States set out a rather elaborate free speech clause without exception. Oftentimes, we hear in the U.S. that there is an unrestricted or an unlimited right to free speech. This is a bit of an overstatement as it simply means that the U.S. Supreme Court and other courts have while interpreting the constitution inserted some limitations into what otherwise looks like an absolute free speech.

In Ireland and in other countries, there is an even wider scope of the right to include not just free speech and expression, but also opinion, thought and conscience. And one might want to think what is that wider scope mean? Is it captured by that phrase, speech and expression or

should the Indian constitution makers have gone on to include opinion for ~~unconscious~~conscience?

The Universal Declaration of Human Rights is interesting and important document made in 1948. Significantly is Article 19 in the Universal Declaration as well as in the Constitution of Pakistan that deals with free speech. The UDHR does two important things; first it clarifies for us that the right to free speech includes the right to both speak, that is to impart information, but also to receive information.

Now, the Indian Constitution does not make that clear in its text, but the Supreme Court has stepped in and done so in interpretation. Further, the UDHR makes it very clear that this right extends to all mediums, all mediums in which we may speak and express ourselves, Indian Constitution with their text says little or nothing about the medium in which this communication occurs. And as you will see, the Indian courts have had to clarify that the free speech and expression clause can apply to all mediums of expression.

The South African constitution is the most recent version of a free speech clause and it sets out wide goals about artistic, encouraging artistic creativity and academic and scientific research and also sets out a list of exceptions, which are quite different from the Indian Constitution. But I am not going to get into a detailed exploration of the points of difference, but for those of you who want to explore this ~~spacemen~~ specimen in greater depth, Article 16 of the Constitution of South Africa is the place that you want to turn to.

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I said while discussing the question of medium, which the Indian Constitution is silent about, that the ~~court has had~~courts had to clarify, what does it mean to protect free speech and expression if one does not protect the medium in which the speech and expression takes place. The earliest challenges to these questions arose in the context of the press.

Notably, the Indian constitution did not expressly protect the printing press as a medium of expression and hence, even from the early 1950s and tailing into the 1970s the ~~Indian government has in~~ various Indian governments have regulated the press in various ways. One way of regulating the free speech and expression right would be to out rightly ban or censor something, you might require the pre-registration of a newspaper before it begins circulation. This kind of regulatory requirement, the courts have been willing to sanction. But what if you control the way labour are employed and the way journalists are paid in a newspaper printing press.

The courts have been protective enough of the printing press to insist that even where there are regulations, labour law regulations that adversely affect the print industry, this may be a threat to free speech and should be regulated by the courts. In the 1970s in the heyday of the emergency, there was a further regulation of the volumes that a printing press could circulate. *Benetton Coleman*, which all of you know is the company that owns *The Times of India* newspaper group complained about import restrictions as well as the removal of subsidies to newsprint. Once again, the court was willing to step in and say that protecting free speech and expression without protecting the medium of expression, it would be meaningless and hence the court has extended the scope of protection of free speech to include the medium of expression.

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Now, does this only apply to the printed press and newspapers? Does this range of protection apply to all medium? Let us say broadcasting media, let us say cable TV, the Internet, film and so on. And by and large, the court's answer to this question has been yes, the court is willing to step in and protect a wide range of media equally under the free speech thoughts. However, it is important to recognize that not all mediums of expression are protected in the same way, in some mediums of expression, prior restrictions may be possible and permitted, in other mediums of expressions this may not be possible technologically or otherwise, and may not be legally permissible, and so one must pay attention to the medium of expression when we think about the application of the free speech clause.

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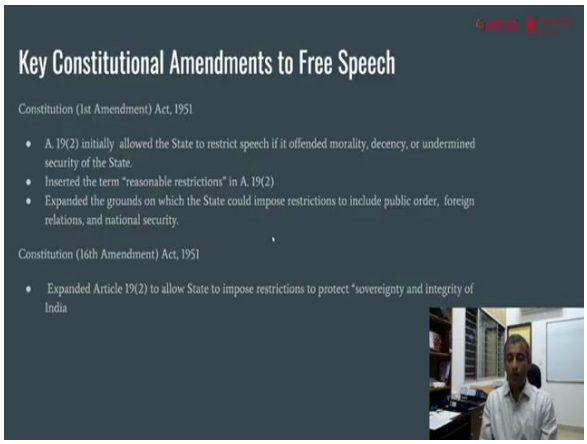

The constitution, as initially enacted in 1950 was quite quickly amended by the Constitution First Amendment Act of 1951. The Constitution First Amendment Act includes a wide range of amendments, but some part of it dealt with free speech. 19 clause 2, which already provided for a range of limitations on the grounds of morality, decency or security of the state was further expanded, and it was expanded in two ways.

First, the clause reasonable restrictions was introduced. Now, the phrase reasonable restrictions have been interpreted in several decisions subsequently, but much turns on what can and cannot be characterized as a reasonable restriction. Second, the number of grounds in 19, clause 2 was increased to now include *public order, foreign relations* and the rather broad ground *national security*.

The introduction of these additional grounds, especially *public order, national security* ~~have added,~~ have given the state much power to regulate free speech and~~of~~ expression. And it is an issue that we return to later in this lecture to get some further nuance and understanding of.

The Constitution 16th Amendment Act, and that is a mistake, it is not 1951, but later in the 1960s, expanded 19 clause 2 to protect the *sovereignty and integrity of India*. Now, not only do we have public order and national security, we have the sovereignty and integrity of India as a ground on which free speech and expression may be restricted in a reasonable manner. It is clear now that what some constitutional framers were fearful of has indeed occurred in the Indian context, while we have a limited 19 (1) (a) free speech and expression clause, we have

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a rather long list of exceptions and limitations in 19 clause 2. And this question has meant that this area of law is highly litigated and is one that is quite contentious in character.

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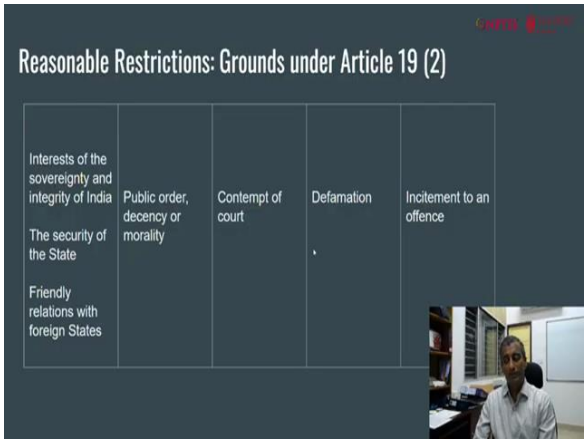

So at this point, what do these reasonable restrictions look like? These are the reasonable restrictions in the constitution in 19 clause 2. The interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, and incitement to an offense.

All of these grounds are included in 19 clause 2 and as we will learn, several statutes have been enacted that seek to be defended under each of these grounds and that is the question to which we will now turn.

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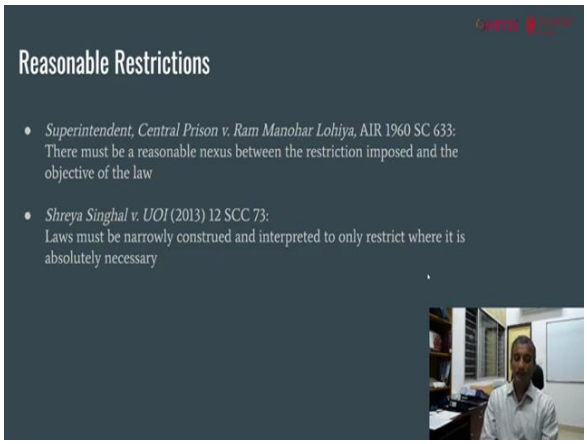

Reasonable restrictions, ~~is~~ seems like an innocuous (harmless) ~~enough~~ phrase and you might think, what does it mean? It means any restriction that can be defended, offering good reasons in court, the court in *Ram Manohar Lohiya* case, where there was a question about access to printed materials in the prison, took the view that there must be a good reason that connects the restriction access to printed material and the objective of the law, which was simply to reform prisoners, or to punish them for veterans sake.

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And the court took the view that, ~~you could not have,~~ a prison manual could not have too many restrictions that were, that related to reading and writing in the prison, that were unrelated to the logical purpose that the law was setup to achieve. So a law that had restrictions unrelated to the objective of the law would be struck down by the Supreme Court as not being a reasonable restriction. And that was an early case that sets the tone in this field.

In a recent case, in *Shreya Singhal* in 2013, when the court was considering the nature of restrictions that may be imposed under the Information Technology Act, the court took the view that the restrictions must be clearly defined, not overbroad and expansive, so that a police station somewhere in India may interpret the clauses in a lose manner and punish citizens across the country. This kind of clause, the court took to be an "unreasonable restriction."

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So any law must be narrowly defined and interpreted to only impose the necessary restrictions on speech. So here is the first element of an analysis of what free speech rights we

have. We dealt with the scope of the free speech protection and we know it is a rather wide scope. So, restrictions must first and foremost be reasonable.

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Let us explore a few of these exceptions and try and better understand how this field has evolved. Section 295A of the Indian Penal Code rather old section already restricts the kind of speech. Let me ~~and will let me~~ just read a little bit about from section 295:~~.~~ "d~~D~~eliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs." This kind of clause section 295A requires some forethought and some mental intention to indeed, outreach religious feelings.

Section 153A of the Indian Penal Court that deals more read with 295 also criminalizes the promotion of en~~e~~mity between different groups, not only on religious grounds, but also on grounds of race, place of birth, residents, language, which affect harmony in society. These two clauses are rather broad.~~;~~ Section 295A and S~~s~~ection 153A of the Indian Penal Code ~~urt and~~ have come to in a sense comprise the core of what we might consider a hate speech law.

Please remember that in the context of the ubiquitous Internet communication, the questions of hate speech have come back with a vengeance in recent times. But it was in an early case in 1957 in *Ramji Lal Modi*, where the court took a restriction on a magazine that it happened to be a magazine about *gau rakshaks* to be a reasonable restriction, especially a restriction that said statements in a magazine like that, that inflamed religious sentiments could be restricted to ensure the maintenance of public order.

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So in 1957 the court was willing to concede that this kind of clause is a reasonable restriction on free speech. The court was particularly sensitive to the multi-religious and multi-ethnic character of India, and was concerned that in the absence of these restrictions, much harm could come. But would section 295A survive scrutiny under the new *Shreya Singhal* standard. In the last slide, we looked at how the court had insisted that any criminal restriction in the statute, in that case the Information Technology Act, the IT Act must be narrowly construed and narrowly defined. Would section 295A survive that kind of scrutiny is a question we are asking and exploring at greater detail.

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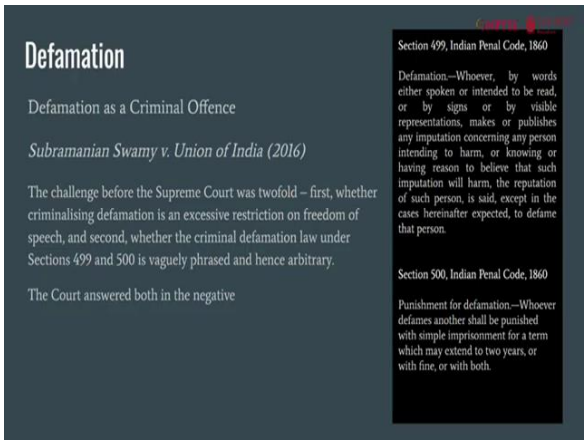

A second area where restrictions of speech become quite controversial and quite broad is in the area of definition. Section 499 and section 500 of the Indian Penal Code deal with defamation. It reads, "whoever by words either spoken or intended to be read or by signs or by visible representations, makes or publishes any imputations concerning any person intending to harm or knowing, or having reason to believe that such imputation would harm, the reputation of the person is set, except in cases hereinafter excepted to defame that person."

Criminal defamation allows for a person to protect their reputation from offensive words from intending to harm the person or their reputation. And this kind of restriction has been tested, the constitutionality has been tested in several cases, most recently in the 2016 case, where Subramanian Swamy, a well known political actor and commentator sought to have Section 499 declared unconstitutional.

The challenge before the Supreme Court had two limbs. First, whether criminalizing definition is an excessive restriction of freedom of speech. And whether criminal defamation law under 499 and 500 was too vaguely phrased and hence arbitrary. The court concluded that criminal defamation law was not an excessive restriction, and that 499 was not too vaguely drafted and upheld the law.

So criminal defamation stays on the statute and I think it is important at this stage for me to clarify that defamation can be of two types. There is civil defamation, for which we can claim damages in the civil court like commercial money, money as compensation for damage to my reputation. The challenge in this case is only to criminal defamation that might result in imprisonment for a term which can extend to two years. The court, however, decided that there were good reasons to sustain the defamation law and that stays on our books.

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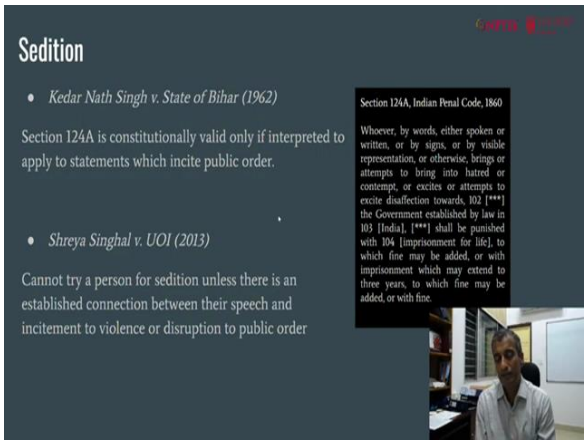

The third area which I will focus on and the last for this section is the area of sedition. You remember that in the first amendment in 1951, we introduced the exception relating to the sovereignty and integrity of India. Prior to that, we had a very important section, Ssection 124A of the Indian ~~Panel Court~~Penal Code, which has a very broad phrasing, reads like this, "whoever by words, either spoken or written or by signs, or by visible representation," very similar to what we read under 499 or other words, "brings or attempts to bring into hatred, or contempt, or excites or attempts to excite disaffection towa~~o~~rds, the G~~g~~overnment established by law in India shall be punished with imprisonment for life to which fine maybe added."

Much turns in this definition as to what means by the phrase, "bringing into hatred or contempt or to excite disaffection towaeards." This broad sedition law has been on the Indian statute books from the colonial period and continues up to this time. This sedition law has been tested in *Kedar Nath ~~was the~~versus state of Bihar*. Kedar Nath had criticized the Government of India for being capitalistic, for generating social inequality and praised the former communist party as a solution to remedy these concerns.

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This was considered to be a statement that incited distaste, disaffection to the Indian Republic and Kedar Nath challenged section 124A as being unconstitutional. Unfortunately in that case, he failed. What might otherwise be considered to be a criticism of the government of the day was considered to be sufficient and a valid restriction on free speech and we carry that legacy to this day. However, in Shreya Singhal~~in~~ in 2013, the court insisted that a sedition trial was only possible when speech could be connected to an incitement to violence or a disruption to public order.

We are fully aware that currently, there are several trials underway not only under the sedition law, but under other criminal statutes for a group that might be otherwise described as "urban naxals" and it is described by the government as being urban naxals. And the question remains, what is the extent is it the mere expression of particular views that counts for a criminal offense, must there be an incitement to violence and a disruption to public order?

So these questions are still with us, they are very real questions and questions that remain to be relevant as we think about the appropriate balance between the right to free speech and the limitations on that speech. So with these three exceptions hate speech, defamation and sedition, we close the discussion on the freedom of speech and expression.

We have learned so far that the constitution protects both speech and expression across mediums of expression, the printed press, the Internet, and so on, but not absolutely as it is subject to some reasonable restrictions on the grounds set out in Article 19 clause 2. What we learn from the examples that we have studied so far is that the protection of these grounds is slightly erratic in some contexts, context of hate speech, the court might draw some tighter lines, but on questions of sedition or on questions of criminal defamation, the court has taken a more relaxed view. So these are questions that are with us and questions that we should pay careful attention to, as we move forward.

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The next section, however, moves on to the questions of religious freedom. And religious freedom is a very complicated area in the Indian Constitution or in constitutions across the world. And the best we can do in a short session like this is to spend some time to understand the broad outlines of religious freedom.

For those of you who joined me for the talk on the preamble, you will remember that the word secular was introduced into the Indian constitution by amendment in the 1970s. But the Indian Constitution is quite significantly notable both for old constitution or for that matter, for new constitutions, in that there is no invocation of God or religious belief anywhere in the preamble or for that matter in any part of the Constitution.

So the constitution is avowedly secular, but what kind of religious freedom should a secular constitution have?- We understand that the word secular must mean that the Indian Constitution does not embrace a state, religion, we are not a theocratic country, but how much freedom should such a secular constitution grant its citizens?

So, to understand this complicated area, we must understand that the Indian constitution grants individuals freedoms in Article 25 and assures individuals religious equality in Article 15 (1) and Article 29, clause 2. However, when it comes to groups, the Indian constitution only gives groups freedoms in articles 26, 29 and 30. But no equality, there is no religious group equality that is assured by the Constitution.

What we will find, as we go further is often there is a tension between individual equality guaranteed in the constitution and group freedoms guaranteed in the Constitution and this is

an issue on which we will spend some time. But before we go there, we must begin with Article 25.

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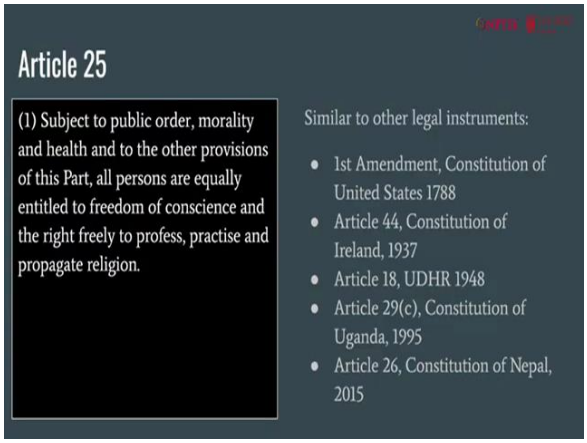

Article 25 makes it clear this is the core individual freedom of clause makes, it clear that subject to~~of~~ "public order, morality and health" and to other provisions of this part that is Part 3 of the Constitution. All persons are equally entitled to what? To freedom of conscience. Remember, we noted that free speech and expression did not include conscience in Article 19 (1) (a), here is in Article 25 and the right to freely profess, practice and propagate religion.

Please notice this 3 –pronged protection. What we understand from this clause is that the freedom of conscience is internal to persons. It is a freedom of belief, we can believe anything we want, either religious or atheistic. There is no special privilege to religious belief. Anyone can believe what they want and the state has no business regulating the nature of these beliefs.

However, the constitution goes further, it gives us the freedom to profess, to practice and propagate religion. When we turn to other constitutions around the world and other international instruments, we get around a view of the nature of these protections, so let us spend some time here.

In the United States, similar to the guarantee of free speech, there is also a guarantee on the freedom to practice religion, and there are no limitations. So you might think that the freedom to practice religion in the United States is an absolute one, but let me remind you that the

caution is that the court has put in place some restrictions on the practice of religion to service and public order, much like the Indian Constitution does in Article 25.

The Constitution of Ireland, as well as the Constitution of South Africa expressly invoke religious faith and belief as a part of the Constitution, while allowing the freedom to profess and practice. The Universal Declaration of Human Rights allows a wide berth of rights. It allows the right to teach, practice, worship and observe religion in all its forms. The key word that one might pay attention to is the right to propagate. What does it mean to propagate religion? It extensively means to profess means to talk about the religion, to practice means an individual or group practice.

Let us imagine a religious or a liturgical practice around a religion. But to propagate a religion means to spread the religion. How could you spread a religion? You could spread a religion by just talking about it, but you could also spread a religion by converting others to your religion by professing its virtues. The Nepal Constitution, a very new constitution by contrast, in Article 26, very specifically does not allow a propagation right. It allows all groups the rights to preserve their religion, but not to propagate their religion. And you might notice that the debates in India about the scope of the propagation right and debates about proselytisation and conversion have remained significant ones. And you can understand that Indian constitution made a specific choice to protect the propagation of religion in 1950.

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The Indian Court has interpreted the scope of the rights to freedom of religion to be essentially restricted to what the court has defined as "essential religious practices," not all

religious practices are protected, but key religious practices that are crucial to the geological core of a religion are protected. Now, the debate about how one draws the line between essential and non-essential religious practices has extended as the image suggests, right from the earliest *Shirur Mutt* case in 1954, all the way into *Shayara Bano versus Union of India* in 2017.

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For a course like this, I will not work through how the essential religious practices test has evolved during this period, but it is both a colourful and instructive introduction to the nature of religious practice in India, and the complexity of state regulation of these religious practices. And so I recommend to you to acquaint yourselves with these cases and you will learn about Indian culture and religion in insightful and interesting ways.

The essential religious practice phrase is a way for the court to limit the scope of the right under Article 25 and prevent the range of practices that might have adverse public consequences from being protected under Article 25.

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Let us now turn to group freedoms. I mentioned that the Indian Constitution provides for individual religious equality in Article 15 (1). It is an article we have spent some time on where the constitution says that the state shall not discriminate on the basis of religion. And article 29 (2) doubles up on the article 15 (1) protection and says that the state shall not discriminate in the field of education, admission to educational institutions on the basis of religion.

So those 2 equality clauses get clubbed with the individual freedoms clause, but how about group freedoms? Article 26 protects religious denomination in a particular way by giving them freedom over their affairs, by which we mean religious affairs, institutions and properties. So religious denominations have a protected freedom under 26. Article 29 allows for cultural minorities to have their own distinct language script or culture to preserve their culture.

You remember, we noticed that the Nepal Constitution allowed for the right to preserve religious right to preserve one's religion, in Article 29 this right is assured to cultural minorities. Article 30 allows religious and linguistic minorities to establish and administer their own educational institutions. This special power to religious and linguistic minorities has generated considerable controversy and debates in India. And oftentimes we do not quite recognize that linguistic minorities are the motive force behind private education in India and this clause Article 30 has inadvertently maybe become a gateway for professional private education in India.

Apart from this, the constitution asks for social reform of religion and permits the state to make that intervention, while ensuring secularism in the preamble. This mix of group freedoms, as well as state power to engage in social reform and ensure secularism means a tightrope walk for any government in India, which may try to ensure a secular country, while allowing for these both individual and group freedoms to be exercised.

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It is not surprising then that we have a complex set of cases that have arisen where group freedom and individual equality concerns have come to the fore. As many of you might have read in *Shayara Bano versus the Union of India* in 2018, the Supreme Court took the view that the instantaneous triple talaq, which was a cultural or religious practice among a section of the Muslim community was held to be unconstitutional among other reasons for violating individually equality concerns in this case, especially of women.

In the Shayara Bano case, the court took the view that while religious group freedom need to be preserved, it need not be preserved in all its forms and manifestations. When a particular practice which may have been in existence for a significant period of time is not essential for the protection of a religion, it must give way to individual equality concerns.

But in a similar case, in dealing with a very different religious practice in *Indian Young Lawyers' Association* in the state of Kerala in the same year in 2018, the court took the view that in Sabrimala Temple's custom of preventing menstruating women from entering the temple during specific, their years of menstruation was declared unconstitutional once again, as a violation of an individual equality guarantee to men and women, a gender discrimination.

So like *Shayara Bano*, the Sabrimala case raises questions where religious groups freedom claims rub up against questions of individual equality. Once again in Sabrimala, the court took the view that the religious freedom claimed for the temple was not one that was essential or core to the religious practice concern.

Not surprisingly, ~~these cases have been~~in these cases, reviews have been filed. And very important decision needs to be made by the court in *Kantaru Rajeevaru verses Indian Young Lawyers' Association*, a large nine-judge bench will resolve some of these critical questions on the relationship between the fundamental right to freedom of religion, and its relationship with other fundamental rights.

I am sure that many of you are familiar with these debates, as they have occurred in the media. And I am sure some of you have gone off and read these judgments online, they are freely available. But as you can tell, this debate is not an ideal one, it is one that will have significant impact on the evolution of a secular republic in India and we should all participate in these debates with interest and contribute to a better understanding of the proper zone or division between religious group freedoms and individual freedoms and equalities.

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So that is as much as I am going to say about questions of religious freedom. Today, we have focused on the freedom of speech and expression and religious freedom in this session. In previous sessions, we are focused on life, liberty and equality, as well as a general introduction to fundamental rights.

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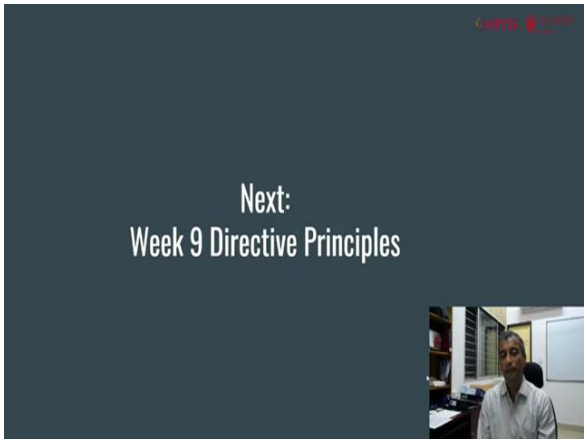

With that we conclude the broad discussion of fundamental rights and turn in the next session to Directive Principles, a much ignored part of the Indian constitution that we will spend the next lecture on. Thank you for joining us. Please look out for some additional videos and reading materials that we will place on our learning platform and look forward to having you back for Week 9's lecture in a day or two. Thank you.