

## THE LITMUS TEST FOR FREE SPEECH

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

In the *Brandenburg v. Ohio* case (1969), the 'clear and present danger' test was expanded, and the 'imminent lawless action' test was laid down by the U.S. Supreme Court (in picture), which the court has followed since. File | Photo Credit: [AFP](#)

Freedom of speech and individual liberty are enshrined in Articles 19(1)(a) and 21 of the Constitution. However, these rights, like all others, are not absolute but subject to reasonable restrictions. What would be a reasonable restriction is an extremely important matter to consider, as on that would depend the validity of several detention orders and prosecutions in India.

In America, the earlier decisions of the U.S. Supreme Court had laid down the 'bad tendency' test to determine whether the restriction was reasonable or not. This test was that free speech or acts could be prohibited if they were likely to adversely affect the welfare of the public. However, Justice Oliver Wendell Holmes, a celebrated judge of the U.S. Supreme Court, felt that the 'bad tendency' test was vague. In *Schenck v. United States* (1919), he laid down the 'clear and present danger' test to determine the reasonability of the restriction. This test means that a restriction would be reasonable only if the speech or action constitutes a clear and present (and not remote) danger to state security or public order.

The 'clear and present danger' test was not consistently followed by the U.S. Supreme Court, though. In *Dennis v. United States* (1951), for instance, a 'balancing' test was adopted.

In *Brandenburg v. Ohio* (1969), the 'clear and present danger' test was expanded, and the 'imminent lawless action' test was laid down by the U.S. Supreme Court, which the court has followed since. This test states, "The constitutional guarantees of free speech and free press do not permit the state to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action".

The word 'imminent' used in the judgment is very important. Imminent means 'likely to happen very soon,' 'at hand,' or 'fast approaching.'

Two decisions of the Indian Supreme Court — *Sri Indra Das v. State of Assam* (2011) and *Arup Bhuyan v. State of Assam* (2011) — followed the decision in *Brandenburg v. Ohio*, and so *Brandenburg* has become the law of the land in India too.

By applying the *Brandenburg* test, it becomes evident that the prosecution against the Bhima Koregaon accused; Professor G.N. Saibaba; activist Shehla Rashid; and Pawan Jaiswal, the journalist who published a report that children in a primary school in Mirzapur, Uttar Pradesh, were getting only roti and salt in their mid-day meals; among others deserve to be quashed as these acts or speeches did not create any danger of an imminent lawless act. The recent detention of many persons in Kashmir (except those accused of militant activities) would also be illegal from that standpoint.

Recently, the Bombay High Court rejected the plea of Gautam Navlakha, an accused in the Bhima Koregaon case, for quashing the criminal proceedings against him, observing that there was some material to indicate that the accused was in contact with Naxalites. But being in contact with a militant organisation cannot by itself be a crime, as it does not result in any imminent lawless act. One could be a writer who contacts Naxalites for doing research about

them, or a social activist, or even a sympathiser. That would be legal, being within the ambit of the Brandenburg test.

It is submitted with respect that the Bombay High Court's decision is incorrect, and should be set aside by the Supreme Court, which should reaffirm the Brandenburg test. That would pave the way for quashing several detentions and prosecutions (many of them based on manufactured evidence) which are a slur on democracy and liberty.

In these critical days in India, when onslaught on liberty and freedom of speech is commonplace, it is the higher judiciary which must do its duty as guardians of the citizens' constitutional rights. The court must not succumb as it did during the Emergency.

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