

“Restrictions on the Freedom of Speech and Expression and its effect on Democracy”

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Introduction

"No law shall be passed restraining the free expression of opinion, or retraining the right to speak, write or print freely or any subject whatever."

-OREGON CONSTITUTION, Article 1, Section 8

Discourse is a gift for Heaven to Mankind. A human being conveys his opinions, emotions, and feelings to others through speech and gesture. Therefore freedom of speech and expression is a fundamental right gained by a human being upon birth. And it's a human right. The freedom of speech and expression is considered the first condition of democracy. In the hierarchy of democracy, it holds a favored and important position, it is honestly said regarding freedom of expression that it's the mother of all other freedoms. Freedom of speech and expression means the right to freely express one's own beliefs and opinions through word of mouth, publishing, printing., photography or any other process. This includes the expression of one's ideas through any communicable medium or visible representation. Such as, gestures, signs and the like. In modern times it is widely accepted that the right to freedom of speech is the essence of free society and it must be Safeguarded at all times. The first principle of a free society is an uncurbed flow of words in an open forum.

Through India's struggle for freedom there was a persistent demand for a written bill of rights for the Indian people which included guarantee of freedom of speech and expression. The founding fathers of the Indian Constitution, naturally, attached great importance to freedom of speech and expression. Their experience of waves of oppressive steps under British rule persuaded them of the tremendous importance of this right in India's Independent sovereign democratic republic. We claimed freedom of speech is necessary for democratic system to operate. They knew that when avenues of expression are closed, government by consent of the governed will soon be foreclosed.¹

In their hearts and minds was imprinted the message of Mahatma Gandhi, that evolution of democracy is not possible if one is not prepared to hear the other side. They endorsed the thinking of Jawahar Lal Nehru who said, "*I would rather have a completely free speech and expression with all dangers Involved in the wrong use of that freedom than a suppressed of regulated speech and expression*"²

¹ Soli. J. Sorabjee, " Freedom of Expression in India", law and Justice, 47 (1996), p. 3.

² Nehru's speech on 20 June 1916 in the protest against the press act, 1910

Freedom of speech and expression is the bulwark of democratic government. That freedom is important for the democratic process to work properly. The freedom of speech and expression is considered the first condition of democracy. It occupies a preferred position in the hierarchy of freedoms which assists and protects all other freedoms.³

Freedom of speech and expression has been recognised as being Central and indivisible to a democratic polity. It's claimed to be the foundation of democracy's functioning. It is the building block of a democratic society. This is important for rule of law and citizens' rights. In *ROMESH THAPAR V. STATE OF MADRAS*⁴, Patanjali Sastri, C. J. Observed:

Freedom of speech and of the press lay at the foundation of all democratic organizations., for without free political discussion no public education., so essential for the proper functioning of the process of popular government is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected with Madison, who was the leading spirit in the preparation of the first Amendment of the Federal Constitution, what it is better to leave a few of its noxious branches to their luxurious growth than by pruning them away, to injure the vigour of those yielding the proper fruits".

In *MAHESH BHATT V. UNION OF INDIA & ANR.*,⁵ The Supreme Court held that the freedom of speech and expression is one of the pillars of the constitution of India and indeed sustains in democratic structure. Part III of the Indian constitution guarantees a wide range of enforceable constitutional rights which are largely in line with the civil and political rights enshrined in 1966 Universal Convention on Political rights (ICCPR). Under article 19(1) (a) of the constitutional freedom of speech and expression is guaranteed as a constitutional right. Freedom of speech is not absolute, as are other constitutional rights enshrined in the Indian Constitution. It can be restricted provided three distinct and independent prerequisites are satisfied

- The restriction shall have the power to enforce it by statute. Executive orders or administrative acts which lack the sanction of law cannot curb freedom of speech
- The law shall fall firmly under one or more headings of the restriction provided for in article 19(2). Restriction on freedom of speech cannot be enforced on such omnibus grounds as " In the general public's interest", which is permissible in the case of constitutional freedoms such as commerce and business free

³ M. P. Jain, Indian Constitutional Law, lexis Nexis Butterworths Wadgawa, 6th edn, 2012,p 1078.

⁴ AIR 1950 SC 124.

⁵ 2008(147) DLT561

- The restriction must be reasonable. It must not be excessive or Disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.⁶

STATEMENT OF PROBLEM

The aim and objective of the freedom of speech and expression defines in article 19(1) (a) that there must be restrictions which are provided in clause(2) of article 19. But the question arises that the reasonable restrictions of freedom of speech and expression is reasonable or unreasonable or what are the impacts on democracy? In the era of globalisation and enhancement of technology, where most of the people use social media and express their own views and what are its impact on restrictions of freedom of speech and expression. Go the researcher will comprehensively deal with the issue, make observations and suggestions.

SIGNIFICANCE OF STUDY

From analysis of this study of the freedom of speech and expression, tend to define freedom of speech as the human right enjoyed by every human being by virtue of his/her existence. Freedom of speech and expression can also extend to other aspects including, bodily, integrity, personal and autonomy, informational self determination, protection from state Surveillance, dignity, confidentiality, compelled speech and freedom to dissent or move and think.

CONCEPT OF FREEDOM OF SPEECH AND EXPRESSION

Struggles over freedom of speech have a long track record. In ancient Greece Athens citizens actually enjoyed a considerable amount of freedom of speech in the 400s B. C. However, freedom of expression was a central issue in the dispute b/w religion and politics during European history including the sixteenth - century Reformation that gave rise to a modern religious movement of Protestantism restrictions on speech imposed by king James I contributed to the parliament's declaration of independence in 1621. Throughout the 17th and 18th centuries of the enlightenment, expression was seen as a universal right. England and France's prominent philosophers underlined the value of citizens, with each individual having the right to speech freely and participate in the government. Freedom of speech thus became a major factor in the French Revolution which led to the declaration of rights of Man in 1789.

The colonists were well aware of the practice in English of suppressing speech. The founder deemed free speech absolute necessity in establishing a democracy. Equality of opinion would

⁶ Chintamani Rao v. State of Madhya Pradesh, AIR 1951 SC 118.

have no value unless opinions were articulated and communicated openly. In addition, during the drafting of the Constitution, a culture of vigorous and rowdy speech prevailed. If the government was to be ruled by the people, the framers argued, therefore the government would be only as Efficient as informing the citizens. Influenced by the French declaration of 1789, the framers lifted freedom of expression yet another standard that required constitutional law, more convincing then a sentence. In the end, Colonists struck a balance between absolute freedom and the English form or restricted freedom.

The concepts of freedom of speech can be found in early texts on human rights. England's Bill of Rights 1689 constitutionally defined the fundamental right to freedom of speech in Parliament that is still in force. The Declaration of The Rights of Man and the Person, introduced during the French Revolution in 1789, expressly recognised freedom of speech as an inalienable right. Freedom of speech is a feature of the First Amendment to the United States Constitution.⁷

The French Declaration provides for freedom of speech and expression in article 11, which stated that:

*The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, right and print with freedom, but shall be responsible for such abuses for this freedom as shall be defined by law.*⁸

Thus, the concept of freedom of speech originated long back. England's Bill of right 1689 adopted freedom of speech as a constitutional right and still in effect. The French Revolution in 1789 adopted the declaration of rights of man and the citizens. This further affirmed the freedom of Speech as an undeniable right.

"Democracy is based essentially on free debate and open discussion, for that is the only corrective of the government. Action in a democratic setup. If democracy means govt. Of the people by the people and for the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely Essential ".

FREEDOM OF SPEECH AS A FUNDAMENTAL RIGHT IN INDIA

The freedom of speech and of expression is considered the first condition of democracy. This holds a privileged and important place in the liberty hierarchy, it is honestly said of freedom of speech that it is the mother of all other freedoms. It is generally accepted in modern times that

⁷ Editors, history com. " Freedom of Speech.

⁸ ⁸ Arthur W. Diamond Law Library at Columbia Law School (26march 2008). "Declaration of the Rights of Man and the Citizens".

the right to freedom of expression is the core of democracy, and must be safeguarded all the time. An unbridled flow of words in an open environment is the first concept of a free society. Freedom without hindrance to express opinions and ideas, and particularly without fear of retribution, plays a significant role in the growth of the particular society and ultimately for the state. It is one of the most essential constitutional freedoms granted against the repression or control of the State.

In India, Freedom of speech and expression is also constitutional right under the Constitution which is very necessary. It is crucial for the growth of one's own identity and for the progress of the democracy of Parliament. It is said that the right to free speech in a democracy is not only an individual's right, but rather a community's right to hear and be educated.

The freedom of speech and expression is not only guaranteed by the Constitution or statutes of various states but also by various international conventions like Universal Declaration of Human Rights, European Convention on Human Rights and fundamental freedoms, International Covenant on Civil and Political Rights etc. These declarations expressly talk about freedom of speech and expression.

The Constitution of India guarantees various fundamental rights to its citizens. One such important right is the right to freedom under Article 19. This includes right to freedom of speech and expression, right to assemble peacefully and without arms, freedom to form associations and unions, right to move freely throughout the territory of India, right to reside and settle in any part of the territory of India and right to practice and profession or to carry on any occupation, trade or business. Article 19(1)(a) of the Constitution of India. Article 19(1)(a) guarantees that all the citizens have the right to freedom of speech and expression . This right is available only to the citizens of India and not available to any person who is not a citizen of India i.e. foreign nationals.⁹

In the Preamble to India's Constitution, the Indian people proclaimed their absolute resolve to ensure freedom of thought and speech for all their citizens. The Constitution affirms the right to freedom of speech, which includes the right to share one's opinions, the right to obtain facts and ideas, the right to receive information and the right to reveal information. The Indian state is under an obligation to create conditions in which all the citizens can effectively and efficiently enjoy aforesaid rights.

Importance of Freedom of Speech and Expression

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties”. –John Milton.

⁹ J. N. Pandey, The Constitutional Law of India, Central Law Agency, 47th edn., 2010, p. 183.

John argued that without human freedom there can be no progress in science, law or politics, which according to him required free discussion of opinion. Mill's *On Liberty*, published in 1859 became a classic defense of the right to freedom of expression. John argued that reality forces put falsity, and there should be no fear of the free speech of ideas, real or false. The reality is not set or constant but evolves over time.

John also argued that free debate is important in order to prevent a "deep slumber" The debate would propel the March of Facts forward, and the foundation of true views could be reaffirmed.

The Right to freedom of speech and expression as per as Indian Constitution means the right to express one's own convictions and opinions freely. The word "freely" means including by words of mouth, writing, printing, banners, signs, and even by way of silence.

The supreme court of India has held that hosting the National Flag by citizens is a form of freedom of speech and expression in *Union of India v. Naveen Jindal and Anr*¹⁰.

The right of freedom of expression is crucial in a democracy, information ideas help to inform political debate and are essential to public accountability and transparency in government, for a democratic system to function, people have to be able to form their own ideas. One must be able to receive and impart many different ideas and information, reflecting many different perspectives, before being able to see the truth. That is why freedom of expression is so fundamental. It is essential to the functioning of our pluralist society. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfillment.

FREEDOM OF SPEECH – DEMOCRACY

The right to freedom of speech and expression in India is not absolute. Article 19 of India's constitution guarantees the right "to freedom of speech and expression." However, the constitution also allows the government to limit freedom of expression "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

There are also several sections of the penal code that criminalize certain speech. Section 153A, for example, criminalizes "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony by words, either spoken or written, or by signs or by visible representations or otherwise." Section 292 criminalizes obscenity. Section 295A criminalizes "deliberate and

¹⁰ 2004) 2 SCC 510

malicious acts intended to outrage religious feelings of any class" of citizens. Section 298 criminalizes "uttering any word or making any sound" with "the deliberate intention of wounding the religious feelings of any person."

The Indian government has used these laws to ban books, such as Salman Rushdie's novel *The Satanic Verses*, and movies, such as *India's Daughter*, a 2015 documentary film made by Leslee Udwin for the BBC on the 2012 gang rape of a Delhi college student. In 2014, RSS member and self-appointed cultural vigilante Dina Nath Batra forced Penguin India to withdraw University of Chicago scholar Wendy Doniger's book *The Hindus: An Alternative History*, and to agree to pulp all copies in its possession, by bringing a series of civil and criminal actions against the book on the basis that it violated Section 295a.

Then there is sedition. In an effort to quash rebellion, the British made sedition a crime in India in 1860. And so it remains. Section 124 of the Indian Penal Code states: "Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with imprisonment for life." India's Supreme Court has limited sedition to speech that is "incitement to imminent lawless action." Few have been convicted of sedition, but it suffices to bring the charge against someone to unleash a legal process that can take years before the individual is, as is usually the case, acquitted.

Censorship also comes in the form of physical intimidation. In January 2015, celebrated Tamil author Perumal Murugan posted on his Facebook page: "Perumal Murugan, the writer, is dead." Murugan declared literary suicide after being hounded by local chapters of right-wing Hindu groups affiliated with the BJP and the RSS that found passages in his novel *One Part Woman* offensive. After copies of his book were burnt by an angry mob and he'd received threatening phone calls, Murugan met with local authorities and agreed to apologize and withdraw copies of his book from sale.

In July 2016, the Madras High Court delivered a decision in defense of the author and of free speech in general. Chief Justice Sanjay Kaul wrote in the court's decision: "One of the most cherished rights under our Constitution is to speak one's mind and write what one thinks." He told the book's detractors: "If you do not like the book, throw it away." It was a stinging rebuke to self-appointed censors of the Hindu right.¹¹

The Constitution (First Amendment) Act, amended the Constitution to bring in the "reasonable restrictions" as we know them today and also had the dual purpose of providing validity to laws

¹¹ Central & South Asia Education, Society & Culture APRIL 23, 2018: Mira Kamdar

that may have been void under the previous Article 19(1)(a) and 19(2) and instead held them up to the new standard, in effect, saving many such laws from being struck down by the courts.

When Rajendra Prasad granted his assent to that amendment, he in effect re-introduced a situation in India where freedom of speech was restored to an almost pre-constitutional like status, where considerations of necessity would often override the freedom of the individual to express themselves.

The phrases added “public order” and “Interests of Security of the State” were words of almost near colonial import and may have reflected the nature of the times. The unification of the states was still something that was happening and there were various movements in India calling for secession from the Union. Laws had to be enacted to take steps to prevent that from occurring.

As opposed to the original phrases that were there which did not have the term public order and only allowed a restriction in case someone “undermined security of or attempted to overthrow the State”. Post the amendment, the government's powers in relation to speech in the interests of public order and security became much broader in scope and in fact the Supreme Court in the Kedar Nath versus State of Bihar 1962 AIR 955 SC saved sedition, as an offence, from being struck down as violating the right to free speech on the grounds that public order and national security were reasonable restriction under Article 19(2).¹²

However, In the 2017 World Press Freedom Index, India sank three places to position 136 ("least free"). The 2017 India Freedom Report, published in May by media watchdog The Hoot, spoke of "an overall sense of shrinking liberty not experienced in recent years". It counted 54 reported attacks on journalists, at least three cases of television news channels being banned, 45 internet shutdowns and 45 sedition cases against individuals and groups between January 2016 and April 2017.

India encodes freedom of expression as a constitutional right under Article 19, though it is a heavily qualified prerogative. Laws classified in the constitution as "reasonable restrictions" to freedom of expression are numerous, broad in scope, and, according to a 2016 Human Rights Watch report, "prone to misuse".

In the first half of 2017, 20 incidents of religiously inspired "cow-protection" lynchings were reported. The murders, targeting mostly Muslims, were met largely with silence by BJP leaders. After a Muslim man named Pehlu Khan was killed by Hindu vigilantes, Rajasthan's home minister Gulab Chand Kataria, a senior BJP figure, responded that the attackers had done "a good job by protecting cows from smuggling". He then went on to say: "But they have violated

¹² Firstpost , ambiguity of free speech laws in India , Ajay kumar

the law by beating people brutally." In June 2017, the murders, and the hushed response from leaders, prompted #NotInMyName, a series of protests against normalisation in cities around the country¹³.

Thus, Freedom of speech has to be curtailed by speech laws which are actually in against the public policy or against the spirit of freedom of speech and expression which is guaranteed as a fundamental right.

The importance of free speech as a basic and valuable characteristic of society cannot be underestimated. Freedom of speech serves a number of functions. One of its most important functions is that decision-making at all levels is preceded by discussion and consideration of a representative range of views.

Almost all Constitutions of democratic nations including India have given prime place to the right to free speech. About two decades ago while addressing the Newspaper Society, famous Indian jurist Nani Palkhivala observed:

*"Freedom is to the Press what oxygen is to the human being; it is the essential condition of its survival. To talk of a democracy without a free press is a contradiction in terms. A free press is not an optional extra in a democracy."*¹⁴

Freedom of press has always been a cherished right on all democratic countries. The newspaper not only surveys news but also ideas, opinion and ideologies, besides much else. They are supposed to guard public interest by bringing to fore the misdeeds, failings and lapses of the government and other bodies exercising governing power. Rightly, therefore, it has been described as the Fourth Estate.

CONCLUSION

Discourse is a gift from Heaven to mankind. A human being conveys his opinions, emotions and feelings to others through speech and gesture. Therefore, freedom of speech and expression is a fundamental right gained by a human being upon birth. And it is a human right. The freedom of speech and of expression is considered the first condition of democracy. In the hierarchy of democracy, it holds a favored and important position, it is honestly said regarding freedom of expression that it is the mother of all other freedoms. Freedom of speech and expression means the right to freely express one's own beliefs and opinions through words of mouth, publishing, printing, photography or any other process. It thus includes the expression of ones ideas through any communicable medium or visible representation, such as, gesture, sighs and the like. In

¹³ Al Jazeera , Is free speech under threat in Modi's India? 3 Aug 2017 , Maya Prabhu

¹⁴ Nani. A. Phalkhivala, We The Nation- The Lost Decade, 1994 edn., p. 291. From the speech he delivered at The Golden Jubilee Valedictory Function of the Indian Newspaper Society, Delhi, September 29, 1989.

modern times it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all times. The first principle of a free society is an uncurbed flow of words in an open forum.

The Constitution of India guarantees various fundamental rights to its citizens. One such important right is the right to freedom under Article 19. This includes right to freedom of speech and expression, right to assemble peacefully and without arms, freedom to form associations and unions, right to move freely throughout the territory of India, right to reside and settle in any part of the territory of India and right to practice and profession or to carry on any occupation, trade or business. Article 19(1)(a) of the Constitution of India. Article 19(1)(a) guarantees that all the citizens have the right to freedom of speech and expression . This right is available only to the citizens of India and not available to any person who is not a citizen of India i.e. foreign nationals.

Over the decades there have been many more amendments to the Constitution, not all of which have great historical significance. However, one thing is certain every period of conflict in the history of India can almost be mapped alongside a history of moves to amend the Constitution, the constitutional history during the Emergency being a classic case. The first amendment, however, retains a significant space in this history, not merely because it was the first amendment but because in many ways it also signalled the kinds of battles that would take place between the projects of nation building and the sphere of the media. It marked the rather premature end of the vision of a „seamless web“, with the promotion of national security and sovereignty being prioritized over the promotion of democratic institutions.

However , The right to freedom of speech and expression in India is not absolute. Article 19 of India's constitution guarantees the right "to freedom of speech and expression." However, the constitution also allows the government to limit freedom of expression "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

There are also several sections of the penal code that criminalize certain speech. Section 153A, for example, criminalizes "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony by words, either spoken or written, or by signs or by visible representations or otherwise." Section 292 criminalizes obscenity. Section 295A criminalizes "deliberate and malicious acts intended to outrage religious feelings of any class" of citizens. Section 298 criminalizes "uttering any word or making any sound" with "the deliberate intention of wounding the religious feelings of any person."

Thus, Freedom of speech has to be curtailed by speech laws which are actually in against the public policy or against the spirit of freedom of speech and expression which is guaranteed as a fundamental right.

The importance of free speech as a basic and valuable characteristic of society cannot be underestimated. Freedom of speech serves a number of functions. One of its most important functions is that decision-making at all levels is preceded by discussion and consideration of a representative range of views.

It can be easily concluded that the right to freedom of speech and expression is one of the most important fundamental rights. It includes circulating one's views by words or in writing or through audio-visual instrumentality, advertisements or through any other communication channel. It also comprises the right to information, freedom of press etc. Thus, this fundamental right has a vast scope. From the above case law analysis, it is evident that the Court has always placed a broad interpretation on the value and contents of Article 19(1)(a), making it subjective only to the restrictions permissible under Article 19(2). Efforts by intolerant authorities to curb or choke this freedom have always been firmly repelled, more so when public authorities have betrayed tyrannical tendencies.

The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred and important position in the hierarchy of liberty, it is truly said about the freedom of speech that it is the mother of all the other liberties. In modern times it is widely accepted that the right to freedom of speech is the essence in society and it must be safeguarded all the time.

The first principle of a free society is an untrammled flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays a significant role in the development of the particular society and ultimately for the state. It is one of the most important fundamental liberties guaranteed against state suppression or regulation.

Civil society provides one of the most basic guarantees to citizens i.e., freedom of expression in the context of speech. After concluding we can say that the right to freedom of speech and expression is an important fundamental right, whose scope has been widened to include freedom of the press, right to information which also includes commercial information, right to not speak and right to criticize.

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