



# **FREEDOM OF SPEECH AND EXPRESSION VERSUS HATE SPEECH IN INDIA: A CRITICAL ANALYSIS**

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## **ABSTRACT**

Freedom of speech is essential, no matter what the situation demands or the law making supreme authority decided for the reason of continue ruling on the people. Why the speech of people often controlled by the government is a controversial issue which needs to be discussed. The foremost important factor to not controlling speech of public lies in the fact that present generation would not shut their opinions and not share their thoughts or views on any matter because the modern world is different from contemporary world, when we talk about sharing and discussing matters and having an opinion on it. When the modern world is working on making more and more progress scientifically and technologically and we are provided with immense opportunity to socialize with the world through different platforms of media, we cannot even try our best to nuclear ourselves. Freedom of expression upholds the right of all to express their views and opinion freely, in this way different ideas can be expressed and people have right to either agree with definite opinion or to be disagreed.

There is an implied obligation to uphold peoples' rights in any cultural community where they are declared and executed, regardless of whether they are guaranteed by the Constitution or not. Despite the fact that the rights apply to everyone equally, yet it will do no purpose if the other person disregards his right. Therefore, one must respect others' rights and act within the bounds of their own in order for the system to function properly. Therefore, no right can be absolute since a community cannot tolerate an absolute or unrestrained right.

Thus, freedom of expression also does not grant an unrestricted license that protects everyone from liability or an unrestricted right to express or disseminate whatever one likes.

**KEYWORDS:** Freedom of Speech, Hate Speech, Liberty, Right to Life, Restrictions

## INTRODUCTION

Without thought there can be no expression. One cannot be able to express one's thoughts unless one has freedom of thought. Expression comes from thought and belief. Faith takes a higher place than thought and expression. People's faith rests on freedom of thought and expression. Freedom of speech and expression is a bastion of democratic government. This freedom is essential for the proper functioning of the democratic process. Freedom of speech and expression is considered the first condition of freedom. It occupies a preferred position in the hierarchy of freedoms and gives value, meaning, and protection to all other freedoms. It has truly been said that freedom of speech is the mother of all other freedoms and prepares the way for all other freedoms.

The right to freedom of speech and expression is available to all citizens under article 19(1)(a) of the Constitution of India, 1950. Though the Constitution provides a fundamental right to freedom of speech and expression, at the same time article 19(2) of the Constitution provides that restrictions on the right to freedom of speech and expression can be imposed by the State in the interest 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 offense.'<sup>1</sup>

At its heart, the Constitution contained a chapter on fundamental rights. One of these rights was the right of every citizen in India to freedom of speech and expression. It would be quite an initiative to think that this important fundamental right belonged to the transformative part, not the status quo part, of the constitution. After all, this was perhaps the first time in India history that political rights inspired by individualistic western values, rights like the right to life, personal liberty and equality, were formally recognized in a legally enforceable constitutional document.

In one of India's most historic cases, **Maneka Gandhi v. Union of India**<sup>2</sup>, the Supreme Court of India held that Article 21 should not be read in isolation; all violations and procedural requirements under Article 21 are also tested for Article 14 and Article 19. The Supreme Court in the above case adopted the broadest possible interpretation of the right to life and personal liberty guaranteed by Article 21 of the Constitution. Also considering the relationship between Article 19 and Article 21, the Court held that Article 21 is controlled by Article 19, i.e. it must meet the requirement of Article 19. Thus, a law "depriving a person of 'personal liberty' must not only stand the test of Article 21, but must even in the examination of Article 19 and Article 14 of the Constitution.

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1. INDIA CONST. art. 19(1)(a) §19(2)

2. Maneka Gandhi v. Union of India AIR 1978 SC 597

Courts in India have made important observations regarding the importance of freedom of expression from time to time. The Supreme Court in **Subramaniam Swamy v. Union of India**<sup>3</sup> and **Shreya Singhal Vs. The Union of India** held that freedom of speech and expression will remain a valuable treasure in a vibrant democracy, it was also decided that freedom of thought and expression is in a democracy and occupies the highest place in the Indian constitutional system.

Freedom of speech also protects our basic rights from being violated by our oppressive government or a government entity that wants to control what we think and say. We wouldn't be able to have open and honest debates about important issues if we didn't have freedom of speech.

Life in Article 21 of the Constitution is not just the physical act of breathing. It does not mean the mere existence of animals, but has a much wider meaning, including the right to live with human dignity, which means above all the freedom to express opinions and put opinions forward.

Every society has different standards for protecting human life and individual dignity. The right to life expresses the meaning of human existence. It is widely called the highest fundamental rights. The Constitution of India provides fundamental rights which are designed to protect and preserve the basic human rights of individuals in Article 21 of the Constitution of India which is a guaranteed fundamental right to the citizens of India. The main intention of the framer of the constitution is to support the individual.

### **THE NEED TO PROTECT FREEDOM OF SPEECH**

Freedom of speech offers a person the opportunity to express their feelings to others, but it is not the only reason; in order to protect freedom of speech. There could be more reasons to protect these basic freedoms. If undue restrictions on speech through government regulations are tolerated, society prevents the discovery and publication of accurate facts and valuable opinions. This means that free speech and expression as a right help in discovering the truth. The other reason for providing freedom of expression to people is that it is an integral part of every individual's right to self-development and self-realization which is a bulwark for civilized society. Limiting what we are allowed to say and write or hear and read will hinder our personality and its growth. It helps the individual to achieve self-realization.

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#### 3. Subramaniam Swamy v. Union of India AIR 2016 SC 2728

When we talk about social change it is only possible when individuals are free enough to express their beliefs and oppose the situations and circumstances. Freedom of speech provides an opportunity to people express one's beliefs and show the mirror to the law-making authorities. Ultimately, the result is the well-being of society and the state. Thus, freedom of speech provides a mechanism by which to strike a reasonable balance between stability and social change.

Democracy is the most important feature of today's world. Freedom of speech is supposed to protect the right of all citizens to understand political issues in order to participate in the smooth functioning of democracy. This means that freedom of speech strengthens the individual's ability to participate in decision-making.

In *Romesh Thapar v. State of Madras*<sup>4</sup>, Patanjali Shastri C.J observed that "freedom of speech and of the press is the basis of all democratic organization, for without political discussion there is no public education which is so necessary to the proper functioning of the process of popular government." possible. Freedom of such amplitude may involve the risk of abuse. But the framers of the Constitution may have thought of Madison, who was the guiding spirit in the drafting of the First Amendment to the Constitution.

**REASONABLE RESTRICTIONS: LEGAL FRAMEWORK**

Responsible speech is fundamental to democracy and the right granted by Article 19 of the Constitution. One of the greatest challenges before the judiciary and the principle of freedom of expression is to ensure that this freedom is not exercised to the detriment of any individual or disadvantaged section of society. In a country like India with different castes, creeds, religions and languages, this issue poses a greater challenge.

Article 19(2) of the Constitution guarantees freedom of speech and expression to all citizens of India. This article is subject to certain limitations, namely the sovereignty and integrity of India, national security, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, libel or incitement to offence. Hate speech has not been defined in any law in India.

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4. Romesh Thapar v. State of Madras AIR 1950 SCR 594

Further, there is a fundamental duty imposed upon individual to abandon activities depreciatory to dignity of an individual. With such safeguards guaranteed by the Constitution itself in favour of dignified life, it is important to analyze their effectiveness with another basic right of individual, i.e. freedom of speech through any medium. Precisely, there is a need to address an important difficulty as to whether freedom of expression includes the liberty to portray an individual in a manner that denigrates his or her dignity.

**OTHER STATUTORY PROVISIONS**

- IPC,1860<sup>5</sup> declares it an offense to provoke enmity among various sections of society either by words or by the depiction or otherwise as provided by Section153A; or spreading any rumor or source rebellion or stoppage of obligation by a constituent of military, to create panic to segment of society thereby inducing people to commit crime against the government or public tranquility or to provoke any section of society to commit any crime against other section of society(Section-505) to speak words or to make noticeable representations with an aim to injure the spiritual sentiments or faith of people or of any section of society(Section-295A and Section-298).
- Police Act,1922<sup>6</sup> Section-3 of the Act declares it crime to commit any action “which causes or is likely to cause disaffection towards the Government established by law in India amongst the members of a police force or induces or attempts to induce any member of a police force to withhold his services or to commit a breach of discipline”.
- Drugs and Magic Remedies Act, 1954<sup>7</sup>, proscribe, for the benefit of public health, obnoxious advertisements regarding magical treatment and self-medication of sexual ailments.
- Section-11 of Customs Act,1962<sup>8</sup> (which replaces the Sea Customs Act, 1878 and the Land Customs Act,1924), enables State to forbid import and export of commodities if in the opinion same is required.

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5. Indian Penal Code 1860, NO. 153A, NO. 505, NO.295A,Act of Parliament, 1860(India)

6. Police Act 1922, NO. 3, Act of Parliament, 1922(India)

7. Drugs and Magic Remedies Act, 1954, Act of Parliament 1954(India)

8. Customs Act, 1962, NO. 11, Act of Parliament 1962(India)

## IMPACT OF HATE SPEECH ON FREEDOM OF EXPRESSION

The right to freedom of speech and expression is one of the most inherent rights of any democratic society. The liberal theory of freedom of expression views speech as an intrinsic aspect of every freedom, and therefore liberal theory focuses on judicial review if the law is putting any kind of restriction on the exercise of that freedom. The goal of freedom of speech in a democracy is to promote a way for opinions.

The importance of allowing expression, however unpopular, was emphasized by J.S. Mill in the following words, in his work 'On Liberty,' "If all mankind without one were of one opinion, and only one man was of the opposite opinion, mankind would no more be justified in silencing that one man than he, if he had the power, would be justified in silencing mankind". It is very important and necessary to allow diversity of opinions in a democracy as it acts as a guiding principle for free speech and expression in a society. Therefore even when speech is unpleasant, caustic, or sharp, there must be least intervention of the state.

Hate speech is an expression that is likely to cause distress or offend other individuals. This expression comes from the belief and thinking of one individual towards another. In most of the cases person unintentionally hurt someone's feelings by only relying upon his belief. There is no general legal definition of hate speech under any law in India, except that the only standard set for determining the meaning of hate speech is to regulate speech by those who specifically speak against the norms of a civilized society.

Freedom of expression has traditionally been regarded as the foundation of any democracy. The notion of free speech arose as a bulwark against the ability of the state to control speech. The liberal concept served as a check on the state's undemocratic power. One of the essential liberties included in the Charter of Human Rights was the right to free speech. Legislators and judges are reluctant to make exceptions that would restrict the spirit of this freedom because of the higher significance placed on expression in the context of rights. Maybe this is why it's difficult to classify hate

### **Shreya Singhal vs Union of India<sup>9</sup>**

This case is monumental in India's jurisprudence as its judgement took down Section 66A of the IT Act, sought to be in violation of Article 19 (1) of the Constitution of India that guarantees the right to freedom of speech and expression to all citizens. Shreya Singhal filed a petition in 2012 seeking an amendment in the section 66A, triggered by the arrest of two young girls in Mumbai, for a post on Facebook that was critical of the shutdown of the city after the death of Shiv Sena leader, Bal Thackeray; one of them posted the comment, the other merely 'liked' it.

9. Shreya Singhal vs Union of India AIR 215 SC 1523

The supreme court held that a person could not be tried for sedition unless their speech, however "unpopular," offensive or inappropriate, had an established connection with any provocation to violence or disruption in public order. The Supreme Court distinguished between "advocacy" and "incitement", stating that only the latter is punishable by law.

In this case, three judges are hearing a petition challenging the legality of curfew and internet shutdown orders imposed in Jammu and Kashmir following the abrogation of the state's special status in August 2019.

The court observed that such indefinite internet suspension is not permissible and repeated orders under section 144 crpc will amount to abuse of power. The court also added that the government should publish the restriction orders and should follow the principles of proportionality to adopt less restrictive measures

### **BALANCING OF FREEDOM OF SPEECH AND EXPRESSION AND REPUTATION**

According to the Supreme Court, sixty years of jurisprudence has made reputation a part of Article 21 of the Constitution, especially considering the necessity and disregard for independence. During that period, the Supreme Court gave broader interpretations of constitutional rights in various decisions, and reputation was one of the consequences, but in the words of Rajiv Dhawan, a constitutional expert, "since the law is strongly based on the intent of the constitution, Article 21, as envisaged by the constitutionalists, does not include either honor (in which the view of life and liberty is limited) nor due process (as defined by law) in sanctioning procedures. However, Subramanian Swamy's ruling is shown at the same time as this enhancement of art. Verse 21, which speaks of individual freedom and human dignity, has reached the cross of art. While this statement is correct, it completely ignores not only the "post-emergency" judgments and debates, but also the arguments of the Constituent Assembly, which tries to read the limits of reason in a narrow sense."<sup>11</sup>

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10. Anuradha Bhasin vs Union of India AIR 2019 SCC 1031

11. MOLIN AHMAD, "BLEMISHES WORDS AND STICK, A CRITIQUE OF CRIMINAL DEFAMATION IN INDIA, IJLCR,,Jan 2017

As reputation is an integral part of Article 21, we do not think that it should be allowed to be tarnished merely because another individual may have his liberty. It is not a restriction that has inevitable consequences that disrupts the flow of thoughts and ideas. In fact, it is a control with respect to another person's right to go to court and claim that they have been wronged and abused. He can resort to a procedure recognized and accepted by law to recover and repair his reputation. Therefore, a balance must be found between these two rights. The reputation of one cannot be crucified on the altar of others, the right to freedom of expression.<sup>12</sup>

The right to a "good name" was protected by Article 21 of the Constitution, which guarantees "life and personal liberty". Now, Article 21 only protects the life and liberty of the individual from interference by the state. Regardless of this minor textual obstacle, the Supreme Court declared that the right to freedom of expression under Article 19, paragraph 1 letter should have been executed but simply arrested because reputation could not be "crucified" on the altar of free speech, criminal defamation was constitutional.<sup>13</sup>

**PROTECTION AGAINST HATE SPEECH**

A justification for free speech that is closely related to the points just made but that focus on the speaker more than his listeners is the idea that the government should treat people with dignity and equality. As a matter of the basic human respect we may owe it to each other to listen to what each of us has to say, or at least not to foreclose the opportunity to speak and to listen. Under this view, suppression represents a kind of contempt for citizens that is objectionable independent of its consequences and when suppression favours some points of view over others it may be regarded as failing to treat citizens equally.<sup>14</sup>

**Arnab Goswami Vs Union of India<sup>15</sup>**

The sudden arrest and alleged assault of republic TV editor in chief Arnab Goswami by the Raigad police in Maharashtra has brought to the forefront concerns about India long cherished freedom of speech and whether it is losing its place of pride in the constitution.

A supreme court bench headed by chief justice S.A. Bobde while hearing them matter in which Maharashtra government opposed a Bombay high court order that stayed a probe into first two information reports filed against republic TV had earlier observed that “some people were targeted with greater intensity and needed more protection”.

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12. I NDIA CONST. art. 21

13. Gautam Bhatia, “A Blow Against Free Speech”, *The Hindu*, May 16, 2018

14. Mahendra P Singh, *Comparative Constitutional Law*, 405 (Eastern Book Company, 2nd Edition)

15. Arnab Goswami Vs Union of India AIR 2018 10 SCC 753

The first information report pertained to Goswami’s observation during his television programme on the Palghar lynching incident and migrant labourers gathering in large numbers in Bandra area. His lawyer has alleged that the TV anchor was denied access to his legal team and police used force at the time of request.

**Tablighi Jamaat Case<sup>16</sup>**

A bench headed by chief justice S.A Bobde which was hearing pleas of JamiatUlama I hind and other professing that a group of people from media was spreading communal hatred over TabhlighiJamaat congregation during the onset of Covid 19 pandemic, pulled up the centre for its evasive and brazen affidavit on the issue. The CJI said in a reaction to the centre affidavit that freedom of speech is one of the most abusive right in recent time. It had also sought the views of the press council of India on action taken against TV channels which carried alleged fake news blaming the tablighi markaz for the spread of covid 19 in the country. The petitioner had accused the media of communalizing the spread of the pandemic in the country against all rules and regulations dealing with TV broadcasting content and said this was a violation of the cable TV

As a general rule "Liberty is the acceptance of the principle, there are opinions, but anger can be more dangerous than dissent. there must be a cultural organization in all human endeavors. Certain self-imposed limitations must find a place in all rules and regulations.

Freedom of expression can never be an unlimited right in India. Holmes J. said, "The strictest protection of freedom of expression does not preclude a man who unjustly sets fire to a theater and causes fear. The Constitution of India has empowered the judiciary to protect the fundamental right of the individual from abuse by the state.

A.K. Gopalan v. State of Madras<sup>17</sup> The Court tried to interpret the "amendment" of the Constitution as the fundamental rights were not completely destroyed, but preserved respectively.

As stated by Mukherjee J., in A.K. Gopalan v. State of Madras "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community".

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16. Tablighi Jamaat Case AIR 2020

17. A.K. Gopalan v. State of Madras AIR 1950 SC 27

The Supreme Court, Narendran Kumar v. Union of India<sup>18</sup> interprets the restriction as "full protection" where restriction

is applicable. The use of the right is restricted. An unreasonable restriction will not affect this right, but will still limit the exercise of this right when the restriction is necessary.

This restriction be partial or complete. Therefore, the principle of all restrictions is the idea of adequacy.

In Sahara India Real Estate Corpn. Ltd. v. SEBI<sup>19</sup> apex court held that the limitations applied on fundamental rights under Article 19 (1) must be those prescribed under Article 19

(2). If a restriction does not fall under any of the heads of Article 19(2), the same cannot be justified on the ground that the purpose supposed to be accomplished is laudable. Thus, a detailed analysis of the restrictions laid down under Article 19(2) is required.

## CONCLUSION

The freedom of speech and expression which is mentioned in Article 19 of the Constitution of India needs to be protected because through this right a person is able to express his feelings or thoughts to the whole world. However, this cannot be the only reason to ensure this right mentioned in Article 19 of the Constitution. There are many other reasons to protect this right, such as uncovering the truth or investigating a situation. Freedom of speech and expression helps in revealing the actual facts or truth related to ongoing public policy or laws or actions that have been taken. It is this right that leads to arguments for or against a particular policy, law or idea. This helps in revealing the full truth or motive of the parliament behind the implementation of that particular law. This article is necessary to protect the democratic aspect of our country.

Thus, preserving the right to free speech and expression contributes to maintaining our nation's fundamental democratic principles and ideals. Additionally, Article 19 guarantees diversity in the nation. In a society similar to this one, where each person has a voice and is free to form the associations or unions they like,



plurality will rule and no one's ideology will be denigrated for any reason, pluralism will win. In a nation with as much diversity as India, this aspect of Article 19 is crucial. This makes sure that no voice is silenced only due to societal differences or ideological conflicts.

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18. Narendra Kumar v. Union of India AIR 1989 SCR 43 1990
  19. Sahara India Real Estate Corpn. Ltd. v. SEBI AIR 2012 SC 8643

The evidence shows that no right is infallible. The interests of an individual and the whole public can diverge. The Constitution's creators recognised that granting one individual unrestricted dominance could be problematic for the general populace. Freedoms have therefore been legitimately limited. Additionally, the authors of our constitution thought that restricting this freedom was acceptable in cases of extreme necessity. In certain ways, the choice of the Constitution's drafters to impose reasonable restrictions on the right to free expression is justifiable.

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