



**ANALYSING FREE SPEECH IN A
DEMOCRACY: A COMPARATIVE
ANALYSIS OF THE FIRST
AMENDMENT TO THE U.S.
CONSTITUTION AND ARTICLE
19(1)(A) OF THE INDIAN
CONSTITUTION**

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

-John Milton

ABSTRACT

Freedom of speech, Supreme Court Justice Benjamin Cardozo declared years ago, “is the matrix, the indispensable condition of nearly every other form of freedom.” James Madison while introducing the First Amendment was certain that this was the source “for all the triumphs which have been gained by reason and humanity, over error and oppression.” On the other hand, the right to freedom of speech and expression in India is guaranteed under Article 19(1)(a) of India’s Constitution. 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. Freedom of speech is an essential element in

a democracy, it therefore becomes important that citizens of a democracy be allowed to express themselves. In a democracy diversity in thought and opinion play an important role. It is imperative for a democratic government to tolerate dissent and opposition.

This paper aims at analysing the free speech in a democracy and then goes on to analyse the right under the First Amendment of the US Constitution and under Article 19(1) (a) of the Indian Constitution. It also touches upon the federalist papers, and the Constituent assembly debates to understand the debates that gave us the right of freedom of speech in the two biggest democracies. It further aims to bring about a comparative analysis of the same by taking into consideration the ambit of free speech when it comes to freedom of press and restrictions to the right.

I. INTRODUCTION

Freedom of speech is the bulwark of democratic government. This freedom is crucial for the proper functioning of a democracy. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succour and protection to all other liberties. It has been variously defined as “the basic human right” and a “natural right”. It has been truly said that it is the mother of all other liberties.¹ Freedom of speech is important in assessing contemporary governments. Governments are called “democracies” when freedom of speech and press is guaranteed to the citizens.² States that do not allow dissent and

¹ Report of the second Press Comm., Vol. I, 34-35; See M P Jain, *Indian Constitutional Law* (7th edn, Lexis Nexis 2016) 1019

² Frederick Schauer, ‘Free Speech and the Argument from democracy’ (1983) 25 *American Society for Political and Legal Philosophy* 241



criticism are often considered as undemocratic.³ When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme as it was held by the Apex Court of India.⁴ On a communal level, free speech facilitates majority rule, on the other hand on an individual level, speech is a means of participation.⁵ Freedom of speech is the right to defiantly, robustly and irreverently speak one's mind just because it is one's mind.⁶ Free Speech is often called as the indispensable tool of self-governance in a democratic society.⁷ Because it is free speech what makes a democracy a true democracy. Democracy is based essentially on free debate and open discussion.⁸ How a Government treats dissent tells us a lot about how truly free the citizens are, dissent being an important facet of free speech. As the Apex Court of India has held there is no freedom of speech if there is no freedom after speech.⁹ This gives us an understanding that freedom of speech is not merely about protecting the freedom to speak, but also the freedom after one has spoken.

Freedom of Speech and expression means the right to express one's own beliefs and opinions freely by words of mouth, writing, printing, pictures or any other mode. In modern time it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all

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

This paper in the next chapters will attempt at discussing the ambit and scope of freedom of speech in America as guaranteed by the First Amendment in contrast to Freedom of Speech guaranteed by Article 19 of the Indian Constitution. The freedom of speech in India is not absolute as there are restrictions laid down in the Constitution itself. The First Amendment may seem absolute as it has no explicit restrictions but however these restrictions evolved by judicial decisions, the same will be discussed in the chapters that follow.

II- THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Among other cherished values, the First Amendment protects freedom of speech. The First Amendment to the United States Constitution says that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

³ Frederick Schauer, 'Free Speech and the Argument from democracy' (1983) 25 American Society for Political and Legal Philosophy 241

⁴ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1

⁵ www.lincoln.edu. Available at < <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> > accessed 13 March 2020

⁶ www.lincoln.edu. Available at < <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> > accessed 13 March 2020

⁷ www.lincoln.edu. Available at <<http://www.lincoln.edu/criminaljustice/hr/Speech.htm>> accessed 13 March 2020

⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

⁹ *Maqbool Fida Husain v. Raj Kumar Pandey*, CrI. Revision Petition Nos. 282/07; 114/2007 and 280/2007



freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”¹⁰

The Freedom of speech is solidly entrenched in the Constitution of the United States. The First Amendment’s protection of speech and expression is central to the concept of American political system. This provides for a direct link between free speech and a spirited democracy. Madison¹¹ believed that the freedoms guaranteed by the First Amendment were the source “for all the triumphs which have been gained by reason and humanity, over error and oppression.”¹² Justice Louis Brandeis wrote in 1927 that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”¹³ As held by the Courts, the First Amendment preserves “an uninhibited market place of ideas which will ultimately prevail...it is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences.”¹⁴

2.1. Adoption of the First Amendment

The debate in the House is unenlightening with regard to the meaning the members ascribed to the speech and press clause, and there is no record of debate in the Senate.¹⁵

Madison’s version of this clause provided: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”¹⁶ The special committee made a few changes to Madison’s draft, to make it read “The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.”¹⁷

The Senate further rewrote it to read: “That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”¹⁸ Subsequently, the religion clauses and these clauses were combined by

¹⁰ U.S. Constitution, Amendment I

¹¹ James Madison was a Virginia representative who went on to become the fourth president of the United States. He created the Bill of Rights which was introduced to Congress in 1789 and adopted on December 15, 1791, includes the first ten amendments to the U.S. Constitution.

¹² Allen C. Guelzo, ‘Free Speech and Its Present Crisis’ (City Journal 2018) <<https://www.city-journal.org/free-speech-crisis>>_accessed 16 March 2020

¹³ *Whitney v. California*, 274 U.S. 357 (1927)

¹⁴ *Kleindiest v. Mandel*, 408 US 753, 763 (1972)

¹⁵ Available at <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020; The House debate insofar as it concerned this Amendment was

concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their representatives

¹⁶ 1 Annals of Congress 434 (1789) <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020; Madison had also proposed language limiting the power of the states in a number of respects, including the freedom of press. Although passed by the house, the amendment was defeated by the Senate.

¹⁷ Available at

<<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020

¹⁸ B. Schwartz, *The Bill of Rights: A Documentary History*, 1971;<<https://www.law.cornell.edu/constitution->



the Senate. In the course of the debate, Madison warned against the dangers that would arise from discussing and proposing abstract propositions, of which the judgement may not be convinced.¹⁹

It appears as though Madison advanced the libertarian views from the following, “If we advert to the nature of republican government,” Madison told the House, “we shall find that the censorial power is in the people over the government, and not in the government over the people.”²⁰ But however it is important to mention that, Madison during the revolutionary period had promoted prosecution of loyalist speakers and the burning of their pamphlets.²¹

It is evident that Jefferson held to the Blackstonian view, writing to Madison, Jefferson said: “A declaration that the Federal Government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed.”²² Jefferson further suggested that the free-speech clause should read as follows: “The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or

affecting the peace of the confederacy with foreign nations.”²³

The Blackstonian view with respect to the freedom of press can be understood to mean that liberty of press is essential to a free state and to lay down restrictions on this would mean to destroy the freedom of press. But if one publishes what is improper, mischievous, or illegal, he would face consequences.²⁴ This lays down the foundation of restrictions to free speech when it is of the nature that may cause harm to another individual or the State.

The Blackstonian view was a general consensus that prevailed at that time and perhaps what influenced the minds of the ones that drafted, voted for and ratified the First Amendment. It is thus evident that the first Amendment was influenced by the Blackstonian view, especially in the suggestions of Jefferson which included restrictions. Although Jefferson’s suggestions included restrictions the Amendment as we see today does not have any restrictions in the text but however, the Courts have read in various restrictions on this right to free speech which makes the right a non-absolute right.

conan/amendment-1/freedom-of-expression-speech-and-press> accessed 16 March 2020

¹⁹ Available at <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020

²⁰ 4 Annals of Congress 934 (1794); <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020

²¹ Papers of James Madison 147, 161-62, 190-92; Available at <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020

²² 13 Papers of Thomas Jefferson 442; available at <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020

²³ 15 Papers of Thomas Jefferson; available at <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020

²⁴ Blackstone’s Commentaries on the laws of England 151-52; available at <<https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press>> accessed 16 March 2020



The United States was founded on the cantankerous revolutionary principles of John Locke, who taught that the sovereignty always rests with people, who never surrender their natural right to protest, or even revolt, when the state exceeds the limits of legitimate authority. Speech is thus a means of “people-power”, through which the people may ferret out corruption and discourage tyrannical excesses.²⁵ The free speech as we see today is one of the most celebrated rights of the American Citizens. This free speech has been extended to freedom of expressing symbolic speech which includes burning the flag in a protest.²⁶

Freedom of speech is also an essential contributor to the American belief in a government confined by a system of checks and balances, operating as a restraint on tyranny, corruption and ineptitude.²⁷ Freedom of speech in the American context is not merely linked to grandiose ends as the service of the democracy or the search for the truth. Freedom of speech has more value on a more personal and individual level. Freedom of speech is a part of the human personality itself, a value intimately intertwined with human autonomy and dignity. In the words of Justice Thurgood Marshall in the case of, *Procurier v. Martinez*²⁸, “...The First Amendment serves not only the needs of the

polity but also those of the human spirit, a spirit that demands self-expression.”²⁹

While the Language of the First Amendment appears absolute, freedom of speech is not an absolute right. According to the Current State of Law, freedom of speech does not protect the following: Speech that contains “fighting words” (insulting or abusive language that is likely to cause “an immediate violent response.”); Obscenities; Language or communication directed to inciting, producing or urging the commission of a crime; Defamation, words or communication that are false and untrue and intended to injure the character and reputation of another person; Abusive, obscene or harassing telephonic calls; Loud speech and loud noise meant by volume to disturb others or to create a clear and present danger of violence. The restrictions shall further be discussed in chapter four of this paper.

III- ARTICLE 19 (1) (a) OF THE INDIAN CONSTITUTION

Article 19(1) (a)³⁰ guarantees to all citizens of India the right to “freedom of speech and expression. Article 19(1) (a) corresponds to the First Amendment of the US Constitution. The Courts in USA have to spell out the restrictions on this right from case to case as the language of the First Amendment does not have any restrictions.³¹ Unlike the

²⁵ www.lincoln.edu. Available at < <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> > accessed 16 March 2020

²⁶ *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990)

²⁷ www.lincoln.edu. Available at < <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> > accessed 16 March 2020

²⁸ *Procurier v. Martinez*, 416 US 396 (1974)

²⁹ www.lincoln.edu. Available at < <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> > accessed 16 March 2020

³⁰ Constitution of India, 1950, art. 19 –“Protection of certain rights regarding freedom of speech etc(1) All citizens shall have the right (a) to freedom of speech and expression; available at < <https://indiankanoon.org/doc/237570/> > accessed 17 March 2020

³¹ M P Jain, *Indian Constitutional Law* (7th edn, Lexis Nexis 2016) 1020; Also see *Secretary, Ministry of*



Constitution of the US the Indian Constitution clearly lays down the restrictions to free speech in the Constitution. It is pertinent to mention that out of the several rights enumerated in clause (1) of Article 19, the right in sub-clause (a) is not merely a right of speech and expression but a right to freedom of speech and expression.³² The concept of such freedom is to be able to speak and express freely, the thoughts and opinion of one person. The significance of this freedom can be understood from the Preamble to the Constitution where it ensures to every citizens liberty of thought, expression, belief, faith and worship.

Information and Broadcasting v. Cricket Association, Bengal, AIR 1995 SC 1236: (1995) 2 SCC 161 for a discussion on the First Amendment

³² *Dharam Dutt v. Union of India*, (2004) 1 SCC 712

³³ Article 13 of the Constituent Assembly debate Corresponds to the present-day Article 19. Art. 13. (1) Subject to the other provisions of this article, all citizens shall have the right-

(a) To freedom of speech and expression;
(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency. or morality or undermines the authority or foundation of the State.

Available at https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2019 accessed 17 March 2020

³⁴ Shri Damodar Swarup Seth argued that: “Article 13, as at present worded, appears to have been clumsily drafted. It makes one significant omission and that is about the freedom of the press. I think, Sir, it will be argued that the freedom is implicit in clause (a) that is, in the freedom of speech and expression. But, Sir, I submit that the present is the age of the Press and the Press is getting more and more powerful today. It seems desirable and proper, therefore, that the freedom of the Press should be mentioned separately and explicitly.” Available at Constituent Assembly of India Debates Volume VII, 2 December 1948,

3.1. The Constitutional Assembly Debate

The Constituent Assembly Debate on Article 13³³ was held on 1 December 1948. During the debate Shri Damodar Swarup Seth argued that one significant omission is that of the word “press” he further mentioned that although it may be argued that the freedom of press is implied but he was of the opinion that the freedom of press should be mentioned separately.³⁴ Prof. K. T. Shah was of the opinion that said that the words “of thought and worship; of press and publication be added.”³⁵

Shri K. M. Munshi argued to amend clause (2) of Article 13³⁶. In Shri K. M. Munshi’s

available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02 accessed 17 March 2020

³⁵ Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02 accessed 17 March 2020

³⁶ The clause (2) as introduced (2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency. or morality or undermines the authority or foundation of the State. Amendment introduced by K.M. Munshi “13 (2) Nothing in subclause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law relating to libel, slander, defamation, or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. He proposed that the words “in so far as it relates to” should be added; in the place of “shall affect the operation of an existing law”, because, that connects this clause with “to libel, etc.”

Available at https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2019 accessed 17 March 2020



opinion this would make the meaning clear. He was also in favour to omit the word sedition from clause (2) of Article 13.³⁷ Sardar Bhopinder Singh argued that the rights should not be restricted and all peaceful opposition should get full opportunity.³⁸

Shri Seth Govind Das was of a view that although he prefers that these rights should be granted to people without restrictions, the Conditions in our country. He was also of the opinion that it is a matter of great pleasure that an amendment was introduced to remove the word sedition.³⁹

Shri Sardar Hukum Singh perceptively noted that the phrase “in the interest of”, placed just ahead of the substantive restrictions, would

serve to reduce the Supreme Court’s area of review to very narrow sliver.⁴⁰ Pandit Thakur Dass Bhargava suggested a way out: add “reasonable” before “restrictions.”⁴¹

Although the Constituent Assembly was unanimous on the incorporation of the rights to freedom in the Constitution. The Assembly saw skirmishes that primarily revolved around the clauses that allowed existing and future laws to restrict the rights to freedom on certain grounds. While some members were convinced that rights could not be absolute, others were concerned that restrictions effectively nullified the rights.⁴²

From the debates it is clear that the arguments raised were in respect to include freedom of

³⁷ Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020

³⁸ Sardar Bhopinder Singh “I want that these rights should not be restricted so much, and all opposition that is peaceful and not seditious should get full opportunity, because the opposition is a vital part of every democratic Government. To my mind, suppression of lawful and peaceful opposition means heading towards fascism” available at Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020

³⁹ Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020

⁴⁰ Sardar Singh Argued that: “The question of whether a legislation was “in the interest” of the security of the State, for instance, would restrict the Court to merely being able to interrogate its bona fides. “The proviso in article 13(3)”, he argued, “has been so worded as to

remove from the Supreme Court its competence to consider and determine whether in fact there were circumstances justifying such legislation.”

Available at Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020

⁴¹This, he suggested, would ensure that “the courts shall have to go into the question and it will not be the legislature and the executive who could play with the fundamental rights of the people. It is the courts which will have the final say. Therefore, my submission is that we must put in these words "reasonable" or "proper" or "necessary" or whatever good word the House likes.”

Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 17 March 2020

⁴² Constituent Assembly of India Debates (Proceedings) – Volume VII, 2 December 1948, available at <https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2019> accessed 17 March 2020



press expressly in the Article and with respect to the reasonable restrictions i.e., whether these restrictions would take make the freedom insignificant. Members were concerned that the restrictions in 13(2) would limit the freedom guaranteed in 13(1)(a). However, the Article along with the Restrictions was adopted with certain amendments.

November 4, 1948 was a critical date in India's Constitution-making process. It was on this day that the President of the Constituent Assembly, Dr. B.R. was called upon to formally introduce the draft Constitution of India in the Constituent Assembly.⁴³ Dr. Ambedkar made a long and comprehensive speech that would become famous and widely cited in the post-independent India while introducing the Draft. During the speech at one point, and only at this point Dr. Ambedkar felt it necessary of invoking a judgment in his support. The topic was the restriction of Fundamental Rights. The Judgment was the

opinion of the United State Supreme Court in *Gitlow v. New York*⁴⁴. This was one Judgment that Ambedkar felt would justify the Drafting Committees' restrictions on Fundamental Rights.⁴⁵ With regard to Freedom of Press, Dr. B.R Ambedkar said that:

“the press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager is merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of press.”⁴⁶

After renumbering and rearranging the sections of the bill, freedom of speech and expression was included in article 19. Thereafter, certain amendments were made to the article. The first amendment in 1951 removed the words slander and libel that was included previously. The sixteenth amendment act in 1963 added sovereignty and integrity of India' to clause (2) of article 19. At present, freedom of speech and

⁴³ Constituent Assembly Debates Vol. VII (4 November 1948) available at <https://www.constitutionofindia.net/blogs/b_r_ambekar_introduces_the_draft_constitution_in_the_constituent_assembly>accessed 17 March 2020

⁴⁴ 286 US 652 (1925) ; Ambedkar Stated the following : 'It is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance... in support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court. It would be sufficient to quote one such judgment of the Supreme Court in justification of the limitation on the right of free speech contained in Article 13 of the Draft Constitution. In *Gitlow Vs. New York* in which the issue was the constitutionality of a New York "criminal anarchy" law which purported to punish

utterances calculated to bring about violent change, the Supreme Court said: "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”

⁴⁵ Gautam Bhatia, 'The Conservative Constitution: Freedom of Speech and the Constituent Assembly Debates' available at <<http://ssrn.com/abstract=2679215>> accessed 17 March 2020

⁴⁶ Dr. Ambedkar's Speech in the Constituent Assembly Debate accessed <https://www.constitutionofindia.net/blogs/b_r_ambekar_introduces_the_draft_constitution_in_the_constituent_assembly>accessed 17 March 2020



expression is not absolute as per the constitution itself. Article 19(2), imposes certain reasonable restrictions in exercising this right in the interests of security and integrity of the nation.

It becomes clear that Article 19(1)(a) preserves the essence of free speech i.e., the ability to think and speak freely. The freedom of speech under Article 19(1)(a) includes the right to express one's view and opinions at any issue through any medium, for example, by words, writing, printing, picture, film, movie, etc. This is however subject to reasonable restrictions under Article 19(2). Article 19(2) provides that the Government can frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency or morality and contempt of Court, defamation and incitement to an offence.

IV- INDIA v. AMERICA: AN ANALYSIS

The two greatest democracies of the world America and India rightly recognise the right of freedom of speech and expression. While Article 19(1)(a) corresponds to the American First amendment both the countries have almost similar provisions in their constitutions. However, the provisions of the US Constitution have two notable features i.e., Freedom of Press that is expressly mentioned and there are no restrictions in the First Amendment. Although there are no restrictions in the language of the text, as discussed above, the Courts of the United

States have read in restrictions to this freedom from case to case.

As far as India is concerned, although there is no mention of "freedom of press" in Article 19(1) (a) but this has been done by the Judiciary which has widely interpreted Article 19(1)(a) to include freedom of press in considered an essential in a democracy. The Supreme Court of India speaking about the freedom of press in the case of *Indian Express Newspapers v. Union of India*⁴⁷ has observed that:

"The expression freedom of the press" has not been used in Article 19 but it is comprehended within Article 19(1)(a). Article 19(1)(a) encompasses within itself the freedom of press. The expression means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Freedom of the press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate."

The Judiciary has held that the Freedom of Press is regarded as a "species of which freedom of expression is a genus".⁴⁸ Therefore, the press cannot be subjected to any special restrictions which cannot be on

⁴⁷ (1985) 2 S.C.R. 287

⁴⁸ *Sakal Papers v. Union of India*, AIR 1962 SC 305: (1962) 3 SCR 842



any private citizen and at the same time the press cannot claim any privilege (unless conferred specifically by law), as such, as distinct from other citizens. The freedom of press is a cherished right in every democracy. It brings out ideas, opinions and ideologies to the people, rightly described as the fourth estate of a democracy.

On the other hand, in America, a very liberal approach has been adopted with regard to freedom of press. The Constitution framers provided the press with extensive, expansive and wide-ranging freedom. This freedom was considered necessary to the establishment of a strong, independent press sometimes called “the fourth branch” or “the fourth pillar of the democracy”. The American Jurisprudence on freedom of press has reaffirmed that “freedom of expression upon public questions is secured by the First Amendment, so that “debate on public issues should be uninhibited, robust and wide-open.”

The Supreme Court of America has played an effective role in shaping the First Amendment in such a manner by spelling out restrictions from time to time, since the text of the First Amendment does not spell out restrictions. The Freedom of speech in the US is extended to freedom not to speak specifically, the right not to salute the Flag⁴⁹; it includes the right of students to wear black armbands to school to protest a war⁵⁰; to contribute money (under certain

circumstances) to political campaigns⁵¹; to advertise commercial products and professional services (with some restrictions)⁵²; to engage in symbolic speech (e.g., burning the flag in protest)⁵³. While the Court has held that these would fall under the ambit of Freedom of speech, the Courts have held that Freedom of speech does not include the right to incite actions that would harm others (e.g., shouting of ‘fire’ in a crowded theatre)⁵⁴; to make or distribute obscene materials⁵⁵; to burn draft cards as an anti-war protest⁵⁶; of students to make an obscene speech at a school-sponsored event⁵⁷; of students to advocate illegal drug use at a school-sponsored event⁵⁸. Further the American Court also recognises defamatory speech of publication i.e. slander and libel as a restriction to free speech.⁵⁹ Thus it can be seen that, despite the guarantee of free speech in the United States, the judiciary has not treated the speech as absolute and has put restrictions on this freedom.

On the other hand, in the Indian Context the reasonable restrictions are laid down in the text of Article 19(1) (a) as on one hand it is necessary to maintain and preserve freedom of speech and on the other hand no freedom can be absolute. Article 19(2) provides that the Government can frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency or morality and

⁴⁹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)

⁵⁰ *Tinker v. Des Moines*, 393 U.S. 503 (1969)

⁵¹ *Buckley v. Valeo*, 424 U.S. 1 (1976)

⁵² *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)

⁵³ *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990)

⁵⁴ *Schenck v. United States*, 249 U.S. 47 (1919)

⁵⁵ *Roth v. United States*, 354 U.S. 476 (1957)

⁵⁶ *United States v. O'Brien*, 391 U.S. 367 (1968)

⁵⁷ *Bethel School District #43 v. Fraser*, 478 U.S. 675 (1986)

⁵⁸ *Morse v. Frederick*, 551 U.S. 393 (2007)

⁵⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)



contempt of Court, defamation and incitement to an offence. The Courts have also the right to Freedom of speech encompasses in its ambit the right to silence⁶⁰; the right to receive information⁶¹; the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner (telephone tapping has been held violative of Article 19(1)(a))⁶². When it comes to advertisements, the supreme Court considered the question as to how far advertisements are protected under Article 19(1)(a) in *Hamdard Dawakhana v. Union of India*⁶³. The Court held that an advertisement promoting drugs and commodities, the sale of which is not in public interest could not be regarded as propagating any idea and, as such, could not claim the protection under Article 19(1)(a). But, however the Supreme Court has modified its view in the case of *Bennet Coleman and Co. v. Union of India*.⁶⁴ The Court held that "for a democratic press the advertising "subsidy" is crucial. With the curtailment in advertisements, the price of the newspaper will be forced up and this will adversely affect its circulation which is a direct interference with the right of freedom of speech and expression under Article 19(1)(a)." It can be seen how the Judiciary has played an active role from time to time in interpreting the right to Freedom of speech and ensuring that the Citizens are not deprived of this very fundamental right.

In India the freedom enshrined under Article 19(1)(a) does not merely promote the basic rights of the Citizen but also certain democratic values. The Supreme Court has time and again held that it is possible that a right does not find express mention in Article 19 and yet it may be covered by the clauses therein as mentioned in the abovementioned paragraph.

CONCLUSION

What is undeniable is that freedom of speech is essential ingredient of a democracy. Free speech plays a critical role in promoting and maintaining democracy. There can be no doubt that the First Amendment is the most cherished right of every American. Chapters II and III of this paper have laid down the intent of the framers of the Constitution and what is the pertinent is the unanimous opinion of the framers about this right being an absolute necessary in a democracy although certain changes were proposed to the draft text. The First Amendment has however been drafted in a broad manner the text does not contain any reasonable restrictions nonetheless the U.S. Courts while interpreting the First Amendment have read in restrictions on a case to case basis as discussed. It may be said that the freedom of speech in America is broader than freedom of speech in India. For example the Law in the U.S. not only recognises the right to fly National Flag but has gone to the extent where it recognises the flag burning as an

⁶⁰ *Noise Pollution (V) in re*, (2005) 5 SCC 733 "The right comprehends the freedom to be free from what one desires to be free from."

⁶¹ *PUCI v. Union of India*, (2003) 4 SCC 399, The Supreme Court held that the right of the Citizens to obtain information on matters relating to public acts flows from the Fundamental right enshrined in Article 19 (1)(a)

⁶² *Peoples Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, The Supreme Court has held telephone tapping to be violative of Article 19 (1)(a) unless it falls within the grounds of restrictions falling under Article 19(2)

⁶³ AIR 1960 SC 554

⁶⁴ AIR 1973 SC 106; See also *Sakal Papers v. Union of India*, AIR 1962SC 305



expression of free speech but the Indian Constitution does not approve the latter part as envisaged in the U.S. Constitution.⁶⁵ Unlike the U.S. the Indian Constitution lays down reasonable restrictions and laws such as sedition etc which inhibits the citizens from speaking as they wish. The rich Jurisprudence shows that the restrictions imposed by the American Courts are similar to the reasonable restrictions in the Indian context. The only real difference when compared can be said that the degree of free Speech in US is broader than the free speech in India.

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