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CONSTITUTIONAL SAFEGUARD OF EXPRESSION: BALANCING DEMOCRACY AND DISSENT

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Abstract
This paper examines the crisis of dissent in India through a dual framework. The first phase revisits the foundational constitutional deliberations (1946–1950) and early judicial decisions that culminated in the First Constitutional Amendment, which expanded the scope of permissible restrictions on free speech and expression under Article 19. The second phase investigates contemporary expansions, judicial interpretations, regulatory frameworks, and executive measures that have constrained critical liberties. Particular attention is paid to the regulation of digital governance regimes, the labelling of secular ideologies as "anti-national," and the disproportionate suppression of dissenting voices. The study highlights how ultra-nationalist narratives, institutional dependence, and global security-driven legislative paradigms have intersected to institutionalize limitations on speech and political expression. Crucially, it underscores the significance of judicial dissent as a safeguard against majoritarian excesses and as an instrument for preserving constitutional values. By reconstructing dissent—historically valorised as a civic principle—into a subversive act, the state has fostered an atmosphere of deterrence inimical to constitutionally guaranteed civil liberties. Judicial dissent, in this context, emerges as a vital corrective voice that sustains the spirit of democracy and reaffirms the role of the judiciary as the guardian of fundamental rights.

Key words: Freedom of Speech, Right to Dissent, Article 19, Indian Constitution, Judicial Dissent, Democracy and Civil Liberties

INTRODUCTION:

The right to freedom of speech and expression is widely acknowledged as one of the most fundamental human rights.[3] Scholars have long argued for its protection based on several core justifications—its role in the pursuit of truth,[4] its value for individual self-fulfilment,[5] and its importance in enabling participation in democratic discourse. In India, this right forms the cornerstone of democratic values.[6] It safeguards a broad spectrum of expression, including unpopular opinions, public criticism, advocacy, and even ideas that may offend, shock, or disturb. Free speech is often most effective when it provokes discomfort, challenges the status quo, or arouses strong public sentiments.[7]

Yet, no democracy—however liberal or committed to free speech—treats this right as absolute. Most constitutional systems, including India's, recognise that unregulated expression can pose serious dangers. As such, the freedom of speech is subject to reasonable restrictions, especially in contexts involving hate speech—a form of expression that is curbed in nearly all jurisdictions due to its potentially harmful consequences.[8]

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[3] Universal Declaration of Human Rights art. 19, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.
[4] JOHN MILTON, AREOPAGITICA (1644); John Stuart Mill, On Liberty (1859); see also Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 882–83 (1963)
[5] C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. REV. 964, 990–95 (1978).
[6] INDIA CONST. art. 19(1)(a); Romesh Thappar v. State of Madras, AIR 1950 SC 124; Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[7] S. Rangarajan v. P. Jagjivan Ram, AIR 1989 SC 149; see also Frederick Schauer, Free Speech: A Philosophical Enquiry 35–38 (1982).
[8] Union of India v. Naveen Jindal and Anr, (2004) 2 S.C.C. 510.

Freedom of speech and expression is not only a fundamental right but also an inherent one, forming the bedrock of all other civil liberties. Recognized globally as a cornerstone of democratic societies, it empowers individuals to express their thoughts, beliefs, and opinions—whether through speech, writing, visual art, or symbolic gestures. The preservation of this right is vital for the health and vibrancy of any democracy.[9]

Democracy: Meaning and Explanations

Democracy is fundamentally defined as a system of governance wherein the people of a nation exercise their sovereign will through the periodic election of their representatives. It is premised on the principle of popular sovereignty, whereby authority emanates from the collective consent of the governed.[10]

Contemporary democratic systems are underpinned by several essential elements: the conduct of free and fair elections, the inviolability of the rule of law, the protection of fundamental human rights, and the supremacy of the Constitution. In a truly democratic polity, the uninhibited flow of information is indispensable.The freedom to access, express, and disseminate information is not only intrinsic to the realization of individual autonomy and self-actualization but also vital to enabling meaningful participation in civic and political life.[11]

Democracy, in its broader conceptualization, entails a government accountable to its citizens—one that relies on an informed and discerning electorate capable of making rational and responsible choices. The availability of accurate information thus assumes a critical role, acting as a safeguard against governmental arbitrariness and ensuring that public officials adhere to their constitutional and ethical obligations.[12]The efficacy of democratic governance reaches its zenith when there is widespread and informed participation by the citizenry. Such participation is unfeasible in the absence of awareness regarding social, political, and economic affairs.[13] In this context, the media emerges as a vital conduit for information dissemination, functioning as both a watchdog and facilitator of democratic engagement.

The defining characteristics of a democratic system include: the sovereignty of the people, adherence to constitutionalism and the rule of law, political and social equality, governance through elected representatives via universal adult suffrage, competitive electoral processes, periodic and transparent elections, the safeguarding of civil liberties and fundamental rights, a robust multi-party framework, an independent judiciary, and a free and pluralistic press.[14]

Judicial Oversight and Ethical Responsibilities in Free Expression

From its very establishment, the Supreme Court of India has been envisioned as the *"sentinel on the qui vive"*—the vigilant protector of the Constitution and the liberties it guarantees under Part III. At the heart of these guarantees lies Article 19(1)(a), which confers the right to freedom of speech and expression. This right, regarded as both fundamental and indispensable, forms

[9] U.N. Human Rights Comm., General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), https://undocs.org/CCPR/C/GC/34.
[10] Robert A. Dahl, On Democracy 37–39 (Yale Univ. Press 1998).
[11] INDIA CONST. pmbl.; art. 19(1)(a); People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301 (emphasizing the role of free flow of information in participatory democracy); Secretary, Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal, (1995) 2 SCC 161; Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (linking personal liberty and autonomy to free expression); International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.
[12] Thomas I. Emerson, The System of Freedom of Expression 6–9 (Random House 1970).
[13] Election Comm'n of India, System of Elections in India, https://eci.gov.in/educational-resources/elections-in-india/system-of-elections-in-india/ (last visited July 26, 2025).
[14] Int'l IDEA, The Global State of Democracy 2023: The New Checks and Balances (2023), https://www.idea.int/publications/catalogue/global-state-of-democracy-2023.

the cornerstone of democratic governance, ensuring open dialogue, accountability, and the exchange of ideas in society.[15]

The Supreme Court has consistently approached the freedom of speech and expression with a broad and protective outlook, recognizing it as essential for cultivating public debate, ensuring transparency in governance, and preserving individual autonomy. Yet, this liberty is not unfettered; Article 19(2) permits its restriction, but only on narrowly defined grounds such as sovereignty, public order, and morality.[16] It is the judiciary's constitutional duty to subject such limitations to rigorous scrutiny, assessing not merely their formal validity but also their substantive fairness—ensuring that restrictions remain precise, proportionate, and necessary within a democratic order. Through this role, the Court functions as a vital bulwark against arbitrary suppression, safeguarding the equilibrium between personal freedom and legitimate state concerns.[17]

Navigating the Turbulent Genesis: Tracing the Role of Free Speech in the Indian Constituent Assembly

Under British colonial rule (1858–1947), the freedom of speech and expression of the Indian populace was subjected to severe curbs. The colonial state employed a range of restrictive legal measures, most notably in the domains of (i) sedition, (ii) contempt of court, (iii) hate speech, and (iv) defamation, thereby constraining political participation and silencing dissenting voices.

The Vernacular Press Act of 1878 forced regional-language newspapers to seek prior approval from colonial authorities, aimed at stifling nationalist sentiment and curbing anti-imperial expression. Similarly, the Sedition Act of 1870 criminalized criticism of the colonial regime, becoming a powerful tool to silence opposition and restrict public debate. The Rowlatt Act of 1919 further expanded executive authority, enabling arrests and preventive detention without trial, thereby suppressing political resistance amid growing nationalist movements. Alongside these, the Press and Registration of Books Act of 1867 mandated registration and submission of publications, ensuring systematic surveillance of the press and constraining the circulation of anti-colonial ideas.

Colonial Legacy of Speech Restrictions

Colonial-era laws in India imposed severe curbs on freedom of expression, serving as calculated instruments of political domination. Statutes such as the **Vernacular Press Act of 1878**, the **Indian Sedition Act of 1870**, the **Press and Registration of Books Act of 1867**, and the Rowlatt Act of 1919 were deployed to silence dissent and suppress nationalist thought. Collectively, these enactments enabled the British administration to maintain strict control over political discourse, treating free speech and challenges to authority as existential threats to imperial stability.

Constituent Assembly Debates (1946–1949)

The framing of the Constitution brought these questions to the forefront. While Article 19(1)(a) conferred the fundamental right to freedom of speech and expression, its permissible limitations under Article 19(2) became a subject of intense deliberation. Among the most divisive issues was sedition, a provision that had been wielded repeatedly against Indian nationalists. Eminent leaders such as Bal Gangadhar Tilak and Mahatma Gandhi had personally faced prosecution under its draconian framework, leaving deep scars on the collective political consciousness. Many members of the Constituent Assembly advocated for the removal of sedition from the statute book, seeing it as incompatible with the ethos of a free nation.

[15] H.M. Seervai, Constitutional Law of India vol. 1, 459–61 (4th ed. Universal Law Publ'g Co. 2013).
[16] T.K. Tope, Constitutional Law of India 207–09 (Eastern Book Co. 3d ed. 2010).
[17] Ministry of Law & Justice, Constitution of India (Legislative Department, GoI), Last Updated: July 25, 2025

However, despite strong opposition, the framers ultimately retained it within the constitutional and statutory order.

The First Constitutional Amendment, 1951

The unresolved tensions surrounding free expression re-emerged almost immediately after independence. Judicial rulings in cases such as *Romesh Thapar v. State of Madras* (1950)[18] and *Brij Bhushan v. State of Delhi* (1950)[19] struck down state-imposed speech restrictions, affirming a broad reading of Article 19(1)(a). In response, the government introduced the First Constitutional Amendment (1951),[20] which substantially widened the scope of "reasonable restrictions" under Article 19(2). New grounds such as public order, friendly relations with foreign states, and incitement to an offence were added, expanding the state's authority to regulate speech. This amendment not only restored restrictions reminiscent of colonial rule but also institutionalized a legal framework that legitimized curbs on dissent in the name of stability and order.

Although colonial rule formally ended in 1947, many of its restrictive laws on speech persisted in independent India, fueling continuous debates over the tension between state authority and individual freedoms. The scope of free expression quickly became one of the most contested issues in the post-independence period. During the Constitution-making process (1946–1949), the offence of sedition generated particularly sharp disagreements. This provision had long been weaponized by the British to suppress dissent, with prominent nationalist leaders such as **Bal Gangadhar Tilak**[21] and **Mahatma Gandhi**[22] facing prosecution under its harsh terms. To the colonial state, freedom of speech and the right to question authority represented existential dangers to imperial control, and hence such restrictions were enforced with severity.

Although a few members of the Constituent Assembly voiced strong opposition, the framers ultimately retained sedition as an offence within the constitutional framework. This choice laid the foundation for its later judicial endorsement in Kedar Nath Singh v. State of Bihar (1962),[23]where the Supreme Court upheld the constitutionality of Section 124A of the Indian Penal Code, 1860. By reading the offence narrowly—limiting it to speech inciting violence or public disorder—the Court sought to reconcile sedition with Article 19(1)(a). Decades later, this position was reaffirmed in Vinod Dua v. Union of India,[24] signalling a continued judicial willingness to preserve the provision.

In May 2022, however, the Court revisited the issue in S.G. Vombatkere v. Union of India[25]. Unlike earlier landmark free speech cases such as *Romesh Thapar v. State of Madras* (1950)[26] and *Shreya Singhal v. Union of India* (2015)[27], where the judiciary displayed robust activism in striking down speech-restrictive laws, the Bench adopted a posture of restraint. It issued an equivocal order, neither invalidating Section 124A nor staying its operation, but merely "hoping and expecting" that governments would refrain from coercive action until the matter was reconsidered.

This cautious stance has been widely criticized for perpetuating legal uncertainty and enabling the continued misuse of sedition against dissenters. The irony is stark: seventy-five years after independence, a provision once emblematic of colonial oppression survives in India's statute

[18] Romesh Thapar v. State of Madras, A.I.R. 1950 Mad 124.
[19] Brij Bhushan v. State of Delhi, A.I.R. 1950 Del 235.
[20] Constitution (First Amendment) Act, 1951, No. 31, Acts of Parliament, 1951 (India), available at https://www.indiacode.nic.in/handle/123456789/15016 (last visited Aug. 19, 2025).
[21] Queen-Empress v. Bal Gangadhar Tilak, (1897) ILR 22 Bom 112
[22] Maniar v. Gandhi, (1922) 24 Bom LR 701 (Trial of M.K. Gandhi for sedition)
[23] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955 : (1962) Supp (2) SCR 769.
[24] Vinod Dua v. Union of India, (2021) 3 SCC 752.
[25] S.G. Vombatkere v. Union of India, Writ Petition (Criminal) No. 682 of 2021 (India)
[26] Romesh Thapar v. State of Madras, AIR 1950 SC 124 : (1950) SCR 594
[27] Shreya Singhal v. Union of India, (2015) 5 SCC 1

books, shielded by judicial hesitation. In this context, the judiciary's reluctance to decisively confront sedition reflects a broader tension between its role as an activist guardian of civil liberties and as a restrained arbiter of constitutional balance.

The framers of the Indian Constitution grappled with three central questions concerning the freedom of speech and expression. First, they debated whether the right should be confined exclusively to citizens or extended to non-citizens as well. Second, they examined the extent to which special protections, if any, ought to be accorded to the press. Third, they considered the permissible limitations on this freedom. These concerns, debated in the Constituent Assembly of a newly independent nation, must be understood against the backdrop of the turbulent circumstances of the time—the partition of India, its devastating human consequences, and the pervasive anxiety regarding the unity, stability, and sovereignty of the nascent Republic.

Initially, the freedom of speech and expression was incorporated under Article 13 of the Draft Constitution. It was made subject to restrictions imposed by federal law in order to safeguard tribal interests, protect backward classes, and preserve public order and security. Yet, deep ideological divisions persisted among the Assembly members on how to strike an appropriate balance between liberty and restraint.

On one side were members who contended that excessive qualifications hollowed out the very essence of rights. K.T. Shah, for instance, famously remarked that "what is given by one right hand seems to be taken away by three or four or five left hands," thereby rendering the guarantee meaningless. Somnath Lahiri voiced similar apprehensions, criticizing the vague and expansive language of certain restrictions—particularly terms like "security"—which, in his view, vested the executive with unchecked discretion to define emergencies and curtail citizens' rights arbitrarily.

On the other side, however, stood members such as Dr. B.R. Ambedkar, who firmly rejected the idea of absolute freedoms. Drawing inspiration from the American precedent in *Gitlow v. New York* (1925), he argued that harmful or pernicious speech lay outside the ambit of protection, even in a democracy committed to safeguarding expression. Quoting from *Gitlow*, Ambedkar observed that "the freedom of speech and the press 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."

Ultimately, the Constituent Assembly's deliberations reflected the enduring dilemma of democratic governance: how to preserve the vitality of free expression while ensuring that it does not endanger public order, national security, or the rights of others. This delicate equilibrium demanded, and continues to demand, careful constitutional design as well as vigilant judicial oversight, so that neither unrestrained permissiveness nor overzealous regulation undermines the democratic promise of free speech.

The Indian Constitution permits limitations on free expression on seven grounds: (i) sovereignty and integrity of India, (ii) friendly relations with foreign states, (iii) public order, (iv) decency or morality, (v) contempt of court, (vi) defamation, and (vii) incitement to an offence. Although these curbs are required to qualify as "reasonable restrictions," it has often been argued that the list is unusually expansive compared to other constitutional formulations and carries within it an inherent potential for repression. Notably, the restriction relating to "public order" was absent from the original draft of the Constitution and was inserted only through the First Constitutional Amendment of 1951. In this sense, while the Constitution was envisioned as a transformative charter for independent India, its provisions on free speech and the attached restrictions reveal a substantial degree of colonial continuity.

Alongside freedom of speech lies the question of freedom of the press. The Constitution does not explicitly guarantee press freedom; instead, it has been judicially read as implicit within

Article 19(1)(a). The Drafting Committee conceived free expression primarily as an individual right and saw no necessity to separately recognize the press as a distinct institution. Consequently, while the judiciary has repeatedly acknowledged the vital role of a free press in a democratic society, courts have consistently equated its protections with those available to any ordinary citizen. This approach has left limited space for a deeper constitutional engagement with the press as an independent entity, thereby weakening its position as a robust institutional safeguard against state overreach.

Even though freedom of expression applies equally to individuals and the press,[28] its implications are not identical. The press occupies a distinctive role as the primary medium for disseminating information and shaping public opinion, thereby ensuring the effective functioning of democracy.[29] However, with the rise of majoritarian religious ideologies, constitutional restrictions on free speech have often been misapplied and expansively interpreted.[30] While certain limitations may be justified in the interests of a democratic order, in practice, the Indian state has repeatedly employed them in a disproportionate manner—particularly against viewpoints and ideologies that challenge or resist the dominant majoritarian narrative.[31] Such misuse has not only curtailed meaningful public debate but has also weakened mechanisms of accountability, enabling those in power to evade scrutiny.[32]

B. Changing Frontiers: The First Amendment to the Indian Constitution

The First Amendment of 1951 constituted a decisive intervention in India's constitutional design by adding three new grounds of restriction to Article 19(2).[33] The amendment was prompted largely by judicial interpretations in the early free speech cases. In *Brij Bhushan*[34] and *Romesh Thappar*,[35] the Supreme Court invalidated state attempts to restrain publications on the ground of "public order" since that category was not expressly enumerated in the original constitutional text. The absence of "public order" as a listed restriction meant that such prohibitions failed the test of constitutional validity. To overcome these rulings, Parliament amended Article 19(2), explicitly inserting "public order" as a legitimate ground for limiting speech.

Yet, the amendment was not universally accepted as indispensable. In *State of Bihar v. Shailabala Devi*,[36] the court maintained that such limitations were already inherent in the constitutional framework, rendering the amendment superfluous. This judicial divergence underscores the contested boundaries of free expression in the early years of the Republic and highlights the enduring tension between judicial interpretation and legislative response.

The introduction of "public order" as a constitutional restriction soon extended into statutory controls. In Ramjilal Modi,[37] the court upheld curbs on speech that offended religious groups or communities, thereby departing from the liberal democratic standard that demands proof of concrete harm, such as imminent violence, before restricting expression. This shift marked a move away from an effects-based test toward a broader preventive rationale. Over time, this reasoning has enabled the state to impose sweeping restrictions on speech and dissent,

[28] Express Newspapers (P) Ltd. v. Union of India, (1959) SCR 12 : AIR 1958 SC 578 (holding that freedom of the press is implicit in Article 19(1)(a))
[29] Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, emphasizing the press as the "public watchdog" in a democracy.
[30] Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477 , addressing misuse of hate speech laws.
[31] *State of Uttar Pradesh v. Raj Narain*, (1975) 4 SCC 428 (affirming the citizen's right to know as part of free speech).
[32] *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842 (striking down unreasonable restrictions on press freedom)
[33] The Constitution (First Amendment) Act, No. 1 of 1951
[34] Brij Bhushan v. State of Delhi, AIR 1950 SC 129 : (1950) SCR 605
[35] Supra 25
[36] State of Bihar v. Shailabala Devi, AIR 1952 SC 329 : (1952) SCR 654
[37] Ramji Lal Modi v. State of Uttar Pradesh, AIR 1957 SC 620 : 1957 SCR 860.

particularly when opinions run counter to majoritarian narratives. Today, provisions like sedition and public order are frequently invoked to suppress critical voices from the press, universities, civil society, and NGOs, eroding both accountability and democratic discourse.[38] Restrictions on free expression in India extend beyond political dissent and criticism of government policies, increasingly encroaching upon artistic creativity that challenges prevailing notions of morality. In *Sahara India Real Estate Corp. v. SEBI*,[39] the Supreme Court clarified that freedom of expression is not an "absolute" right. Similarly, the Law Commission in its 267th Report[40] emphasized the need for limitations to prevent harmful consequences, and in *Laxmi Khandsari v. State of UP*,[41] the Court reiterated that fundamental rights are neither boundless nor unconditional but subject to reasonable restrictions under Articles 19(2)–19(6). However, the contours of these restrictions remain undefined, leaving them vulnerable to arbitrary interpretation by those in power. This arbitrariness has historically enabled suppression—from the pre-First Amendment curbing of communist newspapers like *Crossroads* to later indirect controls on newsprint and journalistic independence.[42]

Judicial Dissent and the Spirit of Democracy

Law, to a great extent, is shaped by judicial rulings, with interpretations often influenced by a judge's background, ideological orientation, and judicial philosophy. While courts usually speak with one voice, divergences arise through dissenting judgments or concurring opinions—where judges may agree on the outcome but differ in reasoning.

By the arithmetic of judicial decision-making, the majority opinion invariably acquires binding force, relegating minority views to the background. As Soli Sorabji aptly remarked, "The true test of a democracy is its tolerance of dissent and the protection afforded to dissenters." Only under such protection can dissenters articulate alternative perspectives, thereby enriching democratic discourse and fostering societal progress. In essence, dissent signifies a divergence of opinion, though its scope and implications vary across contexts.

In politics, dissent signifies opposition to the government, its policies, or decisions across various spheres. In legal terminology, however, dissent refers to a judge's disagreement with the majority, often termed a minority opinion, and the author of such an opinion is known as a dissenter. Judicial dissent, in my view, serves as a vital safeguard for the judiciary, preserving its integrity and vitality by allowing the free expression of individuality.

Soli J. Sorabji described dissent as the "very heart and soul of democracy", warning that when dissenting voices are silenced or punished, the system drifts toward authoritarianism rather than true democracy. Indeed, minority opinions are not merely peripheral but form an inseparable component of a healthy democracy, deserving recognition and respect. Emphasizing this, Justice D.Y. Chandrachud, in his celebrated dissent, observed: "Dissent is a symbol of vibrant democracy."

Dissent constitutes the very essence of a democratic order, for it safeguards both institutional integrity and individual liberty. [43]The suppression of dissenting voices poses a grave threat to the survival of democracy, reducing it to a mere façade and placing at risk the fundamental interests of citizens. Jurisprudential history reveals that minority opinions, though disregarded

[38] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955 : (1962) Supp (2) SCR 769.
[39] Sahara India Real Estate Corp. Ltd. v. SEBI, (2012) 10 SCC 603.
[40] Law Commission of India, Report No. 267, Hate Speech (2017)
[41] Laxmi Khandsari v. State of Uttar Pradesh, (1981) 2 SCC 600.
[42] Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788 (striking down restrictions on newsprint that curtailed journalistic freedom)
[43] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 : 1950 SCR 88 (Fazl Ali, J., dissenting) (arguing for a broader understanding of personal liberty)

at the time of their pronouncement, have often acquired the force of law over the years.[44] Indeed, in certain instances, the persuasive strength of a dissent has not only guided future judicial interpretation but also compelled legislative intervention through the enactment of suitable statutes.[45]

Judicial Dissents in India

The Constitution of India, through its guarantees under Part III, confers extensive protection upon individual rights and liberties. The judiciary, as the custodian of these rights, has consistently demonstrated an activist posture in their defence. Article 145(5) of the Constitution expressly permits judges of the Supreme Court to record independent opinions, even where they diverge from the majority. This constitutional design not only recognizes but actively legitimizes dissent, encouraging judges to articulate individual convictions in the adjudicatory process.

The roots of judicial dissent in India, however, are traceable to a period predating the Constitution itself. Justice Syed Mahmood, the first Indian elevated to the High Court, occupies a seminal place in this tradition. Renowned for his intellectual courage, he consistently asserted dissenting positions that foreshadowed later developments in Indian judicial thought. His landmark dissent in *Queen Empress v. Phopi* exemplifies this approach. Drawing upon the principle of *audi alteram partem*, Justice Mahmood rejected the majority's view that a mere notice to the prisoner sufficed. He asserted instead that the right of appeal could not be meaningfully exercised unless the accused was afforded a hearing in person or through legal representation. Such a right, he reasoned, was not conferred by grace of law but was inherent in the very conception of natural justice. The majority's refusal to recognize this proposition underscored the significance of dissent as a mechanism to preserve the normative core of justice, even if its acceptance is deferred to a later time.

In A.K. Gopalan v. State of Madras, Justice Fazal Ali, in his notable dissent, asserted that the term "procedure" under Article 21 of the Indian Constitution necessarily encompasses the principles of natural justice, meaning that such procedure must be just, fair, and reasonable. Though disregarded at the time, his interpretation was later vindicated in the landmark Maneka Gandhi v. Union of India, where the Supreme Court adopted this very reasoning as the governing principle of Article 21. Parliament too has acknowledged the indispensability of natural justice by incorporating it into numerous statutory frameworks, thereby enabling citizens to contest laws that contravene these principles.

Similarly, in Kharak Singh v. State of Uttar Pradesh, Justice Subba Rao—often regarded as the "great dissenter"—departed from the majority to recognize the right to privacy as integral to personal liberty under Article 21. Decades later, his vision found emphatic affirmation in K.S. Puttaswamy v. Union of India, wherein a unanimous bench held privacy to be a fundamental right and expressly overruled the majority view in Kharak Singh, while substantially relying on Justice Subba Rao's dissent.

Justice H.R. Khanna's dissent in *ADM Jabalpur v. Shivkant Shukla* stands as the most celebrated in the history of the Supreme Court of India. In sharp contrast to the majority, he held that the right to life and personal liberty under Article 21 cannot be suspended even during an Emergency. He emphasized that the sanctity of life and liberty predated the Constitution, observing that the principle that no person shall be deprived of liberty without the authority of law was not a constitutional gift but a long-acknowledged civilizational value.

[44] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (several minority views later influenced constitutional doctrine on the basic structure)

[45] Justice H.R. Khanna's dissent in ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521 (affirming that the right to life and liberty cannot be suspended even during Emergency), which later shaped constitutional jurisprudence and was endorsed legislatively through the 44th Amendment Act, 1978.

The majority, however, ruled that citizens could not approach the courts during an Emergency, even in cases of unlawful deprivation of life or liberty—an outcome that has been widely regarded as the darkest chapter in Indian constitutional history, undermining both fundamental rights and democratic ethos.

Justice Khanna's lone voice eventually found vindication. The 44th Constitutional Amendment substantially incorporated his reasoning, ensuring that Article 21 remains non-suspendable even in times of Emergency. Decades later, in *K.S. Puttaswamy v. Union of India*, the Supreme Court not only overruled the majority in *ADM Jabalpur* but also declared the judgment an aberration in constitutional jurisprudence, one that deserved to be "buried ten fathoms deep with no chance of resurrection."

In Bachan Singh v. State of Punjab, the Constitution Bench considered the constitutional validity of the death penalty under Section 302 of the Indian Penal Code, 1860. While upholding its validity, the Court restricted its application through the "rarest of rare" doctrine, ruling that the death sentence, when applied within this narrow framework, does not violate Article 21 of the Constitution.

Justice P.N. Bhagwati, however, delivered a powerful dissent, declaring Section 302 unconstitutional to the extent that it prescribed death as an alternative to life imprisonment. He reasoned that the penalty, in its actual operation, was arbitrary and discriminatory, disproportionately targeting the poor and marginalized while the affluent often escaped its reach. Such unequal application, he argued, rendered the punishment capricious, inhuman, and violative of Article 21. His dissent has acquired renewed significance in the modern human rights era, where global momentum toward abolition of capital punishment is undeniable—over two-thirds of the world's nations have abolished it in law or practice. Reflecting this trend, the Law Commission of India, in its 262nd Report, recommended abolishing the death penalty for all crimes except those relating to terrorism.

Similarly, in Shayara Bano v. Union of India, a Constitution Bench declared the practice of instant triple talaq (talaq-e-biddat) unconstitutional as it violated women's fundamental rights. Dissenting, Chief Justice J.S. Khehar and Justice A. Nazeer cautioned against judicial interference in matters of faith, reasoning that personal laws, being intrinsic to religious practice, fall within the protective ambit of Article 25. They warned that striking down such practices could open a "Pandora's box," inviting a flood of challenges against diverse religious traditions on grounds of fundamental rights violations.

A striking instance of dissent was delivered by Justice D.Y. Chandrachud in the Bhima Koregaon case, which involved the arrest of human rights activists. The petitioners had sought the appointment of a Special Investigation Team comprising senior police officials to investigate the arrests, but the majority of the Court rejected the plea. In his dissent, Justice Chandrachud asserted that *"Voices of opposition cannot be stifled by persecuting those who espouse unpopular causes."* He underscored that a fair investigation constitutes an essential element of the right to life and liberty under Article 21 of the Constitution, emphasizing that the judiciary must uphold the principles it has itself evolved. His opinion highlighted the potential misuse of police authority during arrests and investigations, thereby affirming the protection of political rights and civil liberties of the detained activists.[46]

Similarly, in the landmark Justice K.S. Puttaswamy v. Union of India case, the Constitution Bench led by Justice Dipak Misra upheld the Aadhaar Act, striking down only Section 57. Justice Chandrachud, however, dissented, declaring the Aadhaar framework constitutionally flawed and *"unconstitutional in its entirety"* for undermining individual dignity, autonomy,

[46] *Democracy*, INDIAN CONST. L. & PHIL. (Sept. 28, 2018), https://indconlawphil.wordpress.com/2018/09/28/the-bhima-koregaon-dissent-justice-chandrachud-and-the-supreme-courts-role-in-democracy/Last seen 19.08.25

and privacy. He further condemned the passage of the Act as a Money Bill, branding it as *"a fraud on the Constitution."* In his view, *"Constitutional guarantees cannot be compromised by vicissitudes of technology."* His dissent resonates strongly today, particularly in the absence of robust data protection mechanisms, where individual privacy remains gravely threatened.[47]

III. Freedom of Speech: Contemporary Scenario

The steady erosion of dissent reflects a deeper weakening of democratic values. Mill contends that individual liberty allows people to pursue their vision of the good life so long as it causes no harm to others. [48]This pursuit entails four essential dimensions: (a) the right to express views without harm, (b) the ability to advocate political reform, (c) the freedom to enhance personal well-being, and (d) the pursuit of knowledge and truth.[49] Mill's philosophy thus champions unrestricted freedom of opinion, insisting that even unpopular or minority views must be protected. [50]Safeguarding this 'passive' dimension of free expression is vital, and its curtailment signals democratic backsliding.[51]

The First Amendment to the Indian Constitution introduced restrictions on free speech, creating ambiguity that fostered both state-imposed restraints and self-censorship.[52] Courts, governments, and at times the public have invoked these limitations to silence dissent. Common justifications include threats to public order,[53] along with censorship of political criticism, literature, and artistic expression.[54] As noted earlier, the First Amendment's insertion of 'public order' under Article 19(2) paved the way for arbitrary enforcement.[55]

This ambiguity has been exploited through laws such as the Unlawful Activities (Prevention) Act (UAPA)[56] and the Armed Forces Special Powers Act (AFSPA).[57] Both have been repeatedly criticised for enabling the suppression of dissent under the guise of protecting national security or maintaining order. Under the UAPA, individuals may be detained without trial for up to six months on vague allegations of "unlawful activity," with activists and journalists often targeted merely for voicing dissent or advocating marginalised rights.[58]Similarly, AFSPA grants sweeping powers to security forces in "disturbed areas," including arrest without warrant and the use of lethal force—provisions widely condemned for undermining fundamental freedoms of expression, association, and assembly.[59]

The sedition law, the UAPA, and other security statutes have frequently been invoked to imprison social rights leaders, activists, and peaceful demonstrators, often without substantive evidence of wrongdoing. Over the past decade, the number of cases filed under the UAPA has surged dramatically. Alongside this, Section 124A of the Indian Penal Code—a colonial-era

[47] Justice K.S. Puttaswamy v. Union of India, (2018) 1 SCC 1 (India).
[48] JOHN STUART MILL, ON LIBERTY 14–15 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).
[49] Id. at 16–17.
[50] Id. at 18–19 ("The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race …").
[51] Shreya Singhal v. Union of India, (2015) 5 SCC 1)
[52] The Constitution (First Amendment) Act, 1951, No. 1, Acts of Parliament, 1951 (India).
[53] *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 (holding that restrictions on freedom of speech could not be justified on the vague ground of "public safety").
[54] Brij Bhushan v. State of Delhi, AIR 1950 SC 129 (striking down pre-censorship of a journal as unconstitutional under Article 19(1)(a)).
[55] Constituent Assembly Debates, vol. XII, 1st Amendment Debates (1951) (remarks of Jawaharlal Nehru introducing "public order" as a ground for restricting speech).
[56] Unlawful Activities (Prevention) Act, 1967, No. 37, Acts of Parliament, 1967 (India), available at https://www.indiacode.nic.in/handle/123456789/14607 (last visited Aug. 19, 2025).
[57] Armed Forces (Special Powers) Act, 1958, No. 28, Acts of Parliament, 1958 (India), available at https://www.indiacode.nic.in/handle/123456789/15007(last visited Aug. 19, 2025).
[58] National Human Rights Commission, "Report on the Implementation of the Armed Forces (Special Powers) Act" (NHRC, 2018).
[59] See A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (India) (highlighting due process and liberty concerns).

sedition provision dating back more than 150 years—continues to be used to suppress dissent by criminalising expressions of disaffection against the state.[60]

Courts, however, have repeatedly sought to limit the scope of sedition. In *Balwant Singh v. State of Punjab*, the Supreme Court held that the mere chanting of slogans during a peaceful protest did not amount to sedition unless it posed an imminent threat of violence.[61] This reasoning was reinforced in subsequent rulings, where judges clarified that offensive or even "anti-national" speech cannot automatically be construed as seditious. Similarly, in *Kedar Nath Singh v. State of Bihar*, the Court underscored that sedition may be invoked only where speech incites violence or creates a clear threat to public order.[62]

Despite these judicial safeguards, the recent trend shows a widening misuse of sedition and anti-terror provisions against student leaders, activists, social workers, and civilians participating in protests.[63] Law enforcement agencies have blurred the line between hate speech, incitement to violence, and legitimate dissent, thereby conflating peaceful critique of government policies with threats to national security.[64] This indiscriminate application fosters an environment of fear and self-censorship, shifting the law's role from protective to punitive. For such restrictions to be constitutionally valid, they must meet the test of necessity and proportionality: there must be a pressing social need, and the objective must not be achievable through less restrictive alternatives. Absent this, these laws risk functioning less as instruments of public safety and more as tools of silencing democratic expression.[65]

Indian courts, while often passive in cases concerning public order and security, have been comparatively vigilant in safeguarding creative and artistic freedom. In *Indibility Creativity v. State of West Bengal*, the Supreme Court held that a film cannot be withdrawn merely on the basis of a perceived threat to public order.[66] Justice Chandrachud underscored that it is the responsibility of the state—not the filmmaker or artist—to address potential disorder. He further stressed that censorship beyond the mandate of the Central Board of Film Certification (CBFC) cannot be legitimised through indirect or covert measures.[67] This judgment reaffirmed that dissenting, provocative, or controversial content is integral to fostering debate in a pluralistic society and that the "fear of offence" should not become grounds for silencing expression.[68]

Yet, this judicial safeguard is now under strain. The proposed amendments to the Cinematograph Act, 1952, empower the Union Government to compel the CBFC to revisit its certifications, effectively granting the executive a backdoor to re-censor films. Such a move risks undermining the Court's vision, chilling creative expression, and narrowing the space for diverse voices in India's democratic discourse.

The Supreme Court has clarified that Article 19 guarantees not only freedom from state interference but also a positive right to protection of speech. In *S. Rangarajan v. P. Jagjivan*

[60] Indian Penal Code, 1860, Act No. 45, Acts of Parliament, 1860 (India), § 124A, available at https://www.indiacode.nic.in/handle/123456789/2263 (last visited Aug. 19, 2025).
[61] Balwant Singh v. State of Punjab, (1995) 6 SCC 10, available at https://indiankanoon.org/doc/164701/ (last visited Aug. 19, 2025).
[62] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955, available at https://indiankanoon.org/doc/1801966/ (last visited Aug. 19, 2025).
[63] Supra 29
[64] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955, available at https://indiankanoon.org/doc/1801966/ (last visited Aug. 19, 2025).
[65] Unlawful Activities (Prevention) Act, 1967, No. 37, Acts of Parliament, 1967 (India), available at https://www.indiacode.nic.in/handle/123456789/14607 (last visited Aug. 19, 2025).
[66]Inedibility Creative Pvt. Ltd. v. State of West Bengal, (2019) 6 SCC 10, available at https://indiankanoon.org/doc/55820570/ (last visited Aug. 19, 2025)..
[67] Ibid
[68] Ibid

Rao,[69] the Court held that expression cannot be stifled due to a "threat of demonstration," as this undermines the rule of law. Likewise, in *Laxmi Khandsari v. State of U.P.*, [70]it stressed that restrictions must serve public interest and maintain proportionality.

Yet, despite these judicial safeguards, cultural expression in India increasingly faces the "heckler's veto." Authors such as Perumal Murugan[71] and Wendy Doniger, and filmmakers behind *Padmavat* and *Laxmii*,[72] were compelled to withdraw or apologise under public pressure, despite constitutional protection. Even corporate advertisements and streaming content like Netflix's *A Suitable Boy*[73] have been targeted for allegedly offending religious sentiments. Such trends, amplified by social media and state acquiescence, create a climate of intimidation where dissenting voices are silenced not by law but by majoritarian coercion.

Criminal defamation, codified under Sections 499–500 of the Indian Penal Code, has emerged as another contested terrain alongside sedition. Its constitutionality was upheld in *Subramanian Swamy v. Union of India*, where the Supreme Court underscored the need to balance freedom of speech with the "right to reputation and dignity" as facets of Article 21. This reasoning, rooted in the preservation of "constitutional fraternity," reinforced the legitimacy of criminal defamation within India's legal framework.

The debate resurfaced sharply when the Surat Chief Judicial Magistrate convicted Congress MP Rahul Gandhi for a remark made during an election rally, sentencing him to two years' imprisonment. In light of *Lily Thomas v. Union of India*, this conviction carried immediate political consequences: any legislator sentenced to two years or more stands disqualified unless the conviction is stayed by the Supreme Court. Gandhi's disqualification, given his political stature and role in mobilising opposition narratives against the government, illustrates the profound democratic implications of criminal defamation.

Scholars such as Walker and Weaver caution that defamation laws, when deployed to silence dissent, transform into instruments of "libelocracy," curbing democratic values, free expression, and robust public debate. The Gandhi case exemplifies this tension: while intended to protect reputation, criminal defamation risks becoming a tool of political suppression, shrinking the democratic space for opposition voices.

In moments of perceived threats to democratic values, the role of Constitutional Courts becomes indispensable. Their progressive interventions reassure citizens that the judiciary remains a guardian of rights and democratic integrity. A recent instance is the Supreme Court's decision overturning the Kerala High Court ruling that had upheld the Union Government's revocation of *MediaOne* News Channel's broadcasting license. The government had justified its action on alleged extremist links and the channel's so-called "anti-establishment" stance.

Delivering the judgment, Chief Justice DY Chandrachud criticised both the reliance on opaque "sealed cover" submissions in the name of national security and the use of terms such as "anti-establishment" to categorise media voices. Such language, he cautioned, implicitly demands conformity with the state, undermining press independence. The Ministry's denial of security clearance on the basis of views constitutionally protected under Article 19(1)(a) amounted to a

[69] S. Rangarajan v. P. Jagjivan Rao, (1989) 2 SCC 574 (India), available at https://indiankanoon.org/doc/924927/ (last visited Aug. 19, 2025).
[70] Laxmi Khandsari v. State of U.P., (2005) 3 SCC 456 (India), available at https://indiankanoon.org/doc/1579020/ (last visited Aug. 19, 2025).
[71] Perumal Murugan, One Part Woman (2014), available at https://www.thehindu.com/books/perumal-murugan-interview/article6245674.ece (last visited Aug. 19, 2025).
[72] Padmavat (Viacom18 Motion Pictures 2018).
[73] Netflix, A Suitable Boy (2020), available at https://www.netflix.com/in/title/81000775 (last visited Aug. 19, 2025).

chilling effect on free speech. Criticism of government policy, the Court reaffirmed, cannot reasonably fall within the restrictions enumerated under Article 19(2).[74]

This intervention demonstrates how Constitutional Courts can act as a vital check on executive overreach. By scrutinising both facts and constitutional principles, they ensure that the balance between free expression and reasonable restrictions remains intact, thereby reinforcing the democratic framework.[75]

Regulating the Internet: Selective Oversight?

The Indian government has frequently been criticised for selectively regulating digital spaces, restricting access to websites and content without transparency or due process. Such actions, far from addressing religious intolerance alone, reveal deeper institutional weaknesses that fail to protect liberal democratic values.

Freedom of expression is not merely a negative right restraining state interference; it imposes a positive duty on the state to actively safeguard it.[76] Tolerance cannot be applied along partisan lines, and censorship must never serve as a convenient tool in a constitutional democracy. The free circulation of diverse ideas is essential to enable citizens to exercise political sovereignty—the cornerstone of democratic rights and civil liberties.[77]

In its ruling, the Supreme Court affirmed that internet access is integral to the right to free speech and expression. [78]It further held that shutdowns must satisfy the tests of necessity and proportionality, clarifying that while temporary curbs may be justified in the interest of national security, indefinite suspensions are unlawful.[79]

Yet India's broadly framed hate speech and sedition laws undermine this foundation, criminalising peaceful expression in ways inconsistent with international standards. Instead of protecting vulnerable groups, they are often weaponised by dominant actors to silence dissent. Journalists and critics of the federal government are branded "anti-national" and prosecuted under criminal law. During the COVID-19 pandemic, for instance, over 50 journalists were detained for critical reporting—an illustration of how selective oversight fosters systemic suppression of speech.[80]

India also holds the global record for the highest number of internet shutdowns.[81] This reached its peak in 2019 with the blanket communication blockade in Jammu and Kashmir, imposed just before the revocation of Article 370. Combined with restrictions on movement, this blackout severely curtailed the right to free speech and expression under Article 19. Notably, the state justified these measures under the Telecom Suspension Rules and Section 144 of the Code of Criminal Procedure but withheld the orders from public access. This prompted a writ petition under Article 32, later clubbed with a petition by Ghulam Nabi Azad, challenging the restrictions as unconstitutional.[82]

IV. Conclusion: Way Forward

India's strength has historically rested on its cultural pluralism, where diverse communities coexist and enrich the nation's social fabric. Yet, the rise of sectarian politics and ethnic

[74] Media One News Channel v. Union of India, (2023) SCC (India), available at https://indiankanoon.org/doc/2076543/ (last visited Aug. 19, 2025).
[75] Ibid
[76] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[77] Justice A.P. Shah Committee Report, Report of the Group of Experts on Privacy (2012), Government of India.
[78] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.
[79] Supra 18..
[80] Human Rights Watch, India: End Harassment of Journalists for COVID-19 Coverage (2020), available at: https://www.hrw.org/news/2020/06/15/india-end-harassment-journalists-covid-19-coverage (last visited Aug. 19, 2025).
[81] Software Freedom Law Centre, Internet Shutdowns in India, available at: https://internetshutdowns.in (last visited Aug. 19, 2025).
[82] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637; Ghulam Nabi Azad v. Union of India, W.P. (Civ.) No. 1164 of 2019, Supreme Court of India.

nationalism has disrupted this equilibrium, as certain groups seek cultural dominance. The rhetoric of grievance—particularly among sections of Hindus who perceive themselves as victims of past injustices—has been amplified by political factions, weaponizing identity for electoral gain and deepening societal divides.[83]

To safeguard its democratic character, India must reaffirm its commitment to inclusivity and harmony. Any drift towards fundamentalism or theocracy would erode constitutional values, fracture social cohesion, and stall national progress. The Constitution guarantees freedoms of speech, expression, and dissent—rights indispensable to democracy. Their suppression not only weakens accountability but also silences the very discourse that sustains democratic vitality. A healthy democracy depends on open debate, robust public dialogue, and the ability of citizens to question authority—conditions without which the search for just and durable solutions becomes impossible.

India's cultural legacy may be ancient and diverse, but its political unity is relatively recent—emerging only in the twentieth century with the struggle for independence. In such a plural, hierarchical society, constant scrutiny of government is essential.[84] Yet the rise of extreme religious nationalism reflects an attempt by such groups to impose their ideology, claim power, and regulate people's lives in undemocratic ways. This trajectory threatens the secular–liberal democratic values enshrined in the Constitution and has intensified the communalisation of politics, where ideological conviction is often sacrificed for political survival.

Autocratic legalism has further eroded India's democratic edifice, as legislative and executive maneuvers chip away at constitutional foundations. The judiciary—once the sentinel of constitutional ethos—faces sustained pressures that undermine its independence and weaken checks and balances. The COVID-19 pandemic starkly illustrated this trend: the expansion of bureaucratic authority normalized both state and non-state violence, while political accountability was marginalized through the process of etatisation.

The widening mistrust between formal governance structures and the media—often regarded as the "fourth branch" of democracy—was starkly revealed during the Supreme Court's hearings on the migrant labour crisis that followed the sudden nationwide lockdown. The Solicitor General, Tushar Mehta, attributed the exodus of migrants to "fake news" and urged the Court to restrain electronic, print, and social media from publishing any "inaccurate" reports that might incite panic. Although the Court declined to impose such restrictions, it nevertheless directed the media to rely on and publish only the government's "official version" of events. Such judicial directions, while appearing to maintain order, risk transforming the media from a watchdog into a mouthpiece. When institutions entrusted with holding the government accountable are compelled to echo official narratives, autocratic legalism takes root, silencing dissent and undermining the very foundations of democracy.

The challenge in India lies not in the absence of constitutional guarantees of free speech but in the ease with which such speech can be silenced. A combination of restrictive laws, judicial inefficiency, and inconsistent jurisprudence has created an environment where exercising this right becomes precarious. India's overburdened legal system, marked by costly and prolonged delays, often deters even the innocent from pursuing their claims. Added to this is the government's influence over the judiciary, reinforced by the lure of post-retirement appointments, which undermines judicial independence.

Beyond the institutional sphere, societal intolerance has grown markedly. Despite judicial pronouncements in favor of creative freedom, mechanisms such as boycotts, social media campaigns, threats, and orchestrated negative publicity are increasingly deployed to pressure

[83] Ashutosh Varshney, Ethnic Conflict and Civic Life: Hindus and Muslims in India 102–105 (2002).
[84] Granville Austin, The Indian Constitution: Cornerstone of a Nation 3–10 (1966).

content creators and suppress dissent. The rise of religious extremism further endangers India's secular and democratic foundations, threatening to erode the pluralism on which the Republic rests.

Safeguarding democracy, therefore, requires more than legal protections; it demands a collective commitment by the state, civil society, media, and citizens to nurture dissent, uphold the rule of law, and preserve institutional independence. As technology evolves and new challenges emerge, the meaning and scope of free speech in India will continue to be tested. The government must recognize that even unpopular or critical voices are essential to democratic vitality. Without robust protections, India risks weakening its democratic process and compromising the health of its constitutional order.