



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Freedom of Speech & Expression: Examining its New Boundaries and Changing Stance in India

Shagun Shrivastava^a

^aHidayatullah National Law University, Raipur, India

Received 19 February 2023; *Accepted* 07 March 2023; *Published* 11 March 2023

This article has examined the new boundaries of Freedom of Speech and Expression as laid down by the Supreme Court in the recent judgment of Kaushal Kishor v State of Uttar Pradesh.¹ The article focuses on bringing out the impact of the judgment and the increased extent of application of this right. It also focuses to bring out the scope of this right. At the same time, the article has also covered the restrictions posed on this Fundamental Right by the way of Parliamentary privileges. The article outlines the conflict between the Fundamental right and Parliamentary privileges and provides an answer to the construction of both these rights and privileges as coherent with each other. It aims to examine the validity of such privilege and its impact on the Fundamental Right to Speech and Expression, the text is supported by the case laws. In a conclusion, the article provides a perspective to strike a balance between the restrictions and freedom of the Fundamental Right to Freedom of Speech and Expression.

Keywords: *freedom, restriction, privileges, future disputes, supremacy.*

¹ *Kaushal Kishor v State of Uttar Pradesh* (2023) SCC OnLine 6

INTRODUCTION

Freedom of Speech and Expression is a much more complex fundamental right than it appears to be. A person must be conscious about his words when speaking in public as this fundamental right is not absolute and is restricted by Article 19(2). This fundamental right has recently garnered a lot of attention as a result of numerous cases of defamation, hate speech, etc. against comedians, reporters, media outlets, and politicians. Since 2020 the apex court has passed various judgments demarcating the boundary between Freedom of Speech and Expression and its breach. But in the recent landmark judgment of the Supreme Court in the case of *Kaushal Kishor v State of Uttar Pradesh*,² this fundamental right's scope was broadened, and it was made enforceable not just against the "State," but also against any private individual or organization. The court dealt with some substantial questions and outlined a new perspective to look at the scope and application of Article 19(1)(a). Talking about the new boundaries set by the judiciary in defining the scope of Article 19(1) (a), we must not forget about the existing ambiguity of this article about Parliamentary Privileges. These privileges allow one party to exercise their Right to Freedom of Speech and expression to an extent and at the same time restricts the right of the other party. This article will examine the reasonableness of both, the privilege and the restrictions it imposes. It also tries to analyze the new boundaries of the Fundamental right to Freedom of speech and expression established by the court and examine where this boundary falls short.

FREEDOM OF SPEECH AND EXPRESSION

Article 19(1)(a)³ of the Constitution of India guarantees freedom of speech and expression to the citizens and Article 19(2)⁴ provides for the restriction on this freedom which includes sovereignty and integrity of the nation, defamation, public order, decency or morality, etc. While interpreting the meaning and scope of Article 19(1)(a) one must analyze why the framers have included both the words i.e. 'speech' and 'expression', while many nations only cover one of

² *Ibid*

³ Constitution of India 1950, art 19(1)(a)

⁴ Constitution of India 1950, art 19(2)

them. The conclusion can be drawn that the inclusion of both words in our constitution provides a wider scope to the liberty provided under this right. The Assembly was meticulous and mindful of the colonial exploitation of its people when drafting every Article of the Constitution. They wanted to ensure that the public do not suffer the same injustice at the hands of the government as it had to suffer under the Britishers, and thus they widened the scope of our rights to include every spectrum of it.

When talking about the extended limits of this right, Parliamentary privileges come in. Members of the Parliament enjoy privilege over their Right to Freedom of Speech and Expression in the course of the proceedings of the house under Article 105(1) of the Constitution.⁵ They cannot be arrested, made liable, or questioned in a court of law on what they speak in the house proceedings. Also, the members of the House have the collective privilege to restrict the publication of part of the proceedings, restricting the fundamental right to freedom of speech and expression of others. This restriction is considered a reasonable restriction on the right. It should be noted that this privilege is not absolute on the part of the members of the House.

By the application of Article 12 of the Constitution which defines the state, these Fundamental Rights under Part III of the Constitution are enforceable only against the “State” and its instrumentalities. What is “State”, and its instrumentalities were answered by the judiciary, providing a test to determine this in the case of *Ajay Hasia v Khalid Mujib Seharawardi*⁶. But Article 21 and Article 19 have come out of this boundary, and they are held to be enforceable against the private individual or entity too as stated by the Supreme Court in its recent judgment.

NEW BOUNDARIES OF FREEDOM OF SPEECH AND EXPRESSION

The Constitutional Bench of the Supreme Court provided a new perspective on the freedom of speech and expression guaranteed by Article 19(1)(a)⁷ in the case of *Kaushal Kishor v State of Uttar Pradesh*⁸. The court had to deal with some substantial questions about the application of this

⁵ Constitution of India, 1950, art 105(1)

⁶ *Ajay Hasia v Khalid Mujib Seharawardi* (1981) 1 SCC 722

⁷ Constitution of India 1950, art 19(1)(a)

⁸ *Kaushal Kishor v State of Uttar Pradesh* (2023) SCC OnLine 6

right. The bench was posed with the question that whether the fundamental rights under Article 19 or 21 be enforced against the party except for the state or its instrumentality. The court also deliberated on whether the violation of any citizen's fundamental right by any minister's statement was actionable as a constitutional tort.

The court here while deciding the issue of whether Article 19 and 21 can be enforced against private individuals or entities ruled that "A fundamental right under Article 19 or 21 can be enforced even against persons other than the state or its instrumentalities"⁹ which not only expanded the scope of application of this right but brought a new scope of disputes with it. Although the court also constructed that the right of an individual inconsistent with the rights of other citizens may not be actionable as a constitutional tort unless it is backed by any action or omission on the part of that individual. This judgment was passed by a 4:1 majority with Justice B.V. Nagarathna holding the dissenting opinion.

WHY THIS EXTENSION OF THE BOUNDARY WILL LEAD TO DISPUTES?

Article 19 though guarantees citizens with 6 different types of Freedoms these freedoms are subject to some restrictions which form a broad category. These restrictions were not present in the Constitution from starting but were introduced by the First Amendment Act of 1951.¹⁰ The broader form of restrictions on the Right to Freedom in India is many times criticized at the International Forums, some would say that these restrictions are a need for the values of Indian society and some would picture them as excessive control over the right to Freedom. Amid this, the court has added one more restriction to this Fundamental Right to Freedom.

Extending enforcement of the whole of Article 19¹¹ to private individuals and entities will cause arising of unforeseen disputes in the future. Taking the instance of a situation where the right to profession or right to settle and reside in any part of the country is claimed against any private party. This would be chaos. The court although has limited the enforcement of this extension by

⁹ 'Additional Restrictions Not Found In Article 19(2) Cannot Be Imposed On Right To Free Speech : Supreme Court' (*Live Law*, 3 January 2023) <<https://www.livelaw.in.elibraryhnl.u.remotexs.in/top-stories/supreme-court-free-speech-mp-mla-article-192-restrictions-exhaustive-217925?infinitescroll=1>> accessed 17 February 2023

¹⁰ Constitution (First Amendment) Act 1951, s 3(a) cl (2)

¹¹ Constitution of India 1950, art 19

providing that the contravening fundamental rights of an individual and other citizens will not be actionable per se unless it is reflected in any action or omission, but this does not completely address the broader restriction now imposed on the fundamental right to freedom of citizens.

The court in this particular case decided for this extension to be imposed against a minister, the specific words used by the court were ‘against persons other than the state or its instrumentalities’, when connecting both of these dots it can be constructed that the court wanted to extend the application of this right to the person who is not under the definition of Article 12¹² but is somehow in some way affect the state or are concerned with the functioning of the state.¹³ This opinion was not expressly mentioned in the judgment but was somewhere hidden in the dissenting judge’s opinion. She stated that ‘It is for the party to control the speeches made by their ministers which can be done by forming a code of conduct. Any citizen who feels attacked by such speeches made or hate speech by public functionary etc can approach the court for civil remedies’¹⁴. The dissenting judge held that statement made by a minister can make his political party collectively responsible and violation of any right of the citizen must be upheld against such statement, she specifically used the word ‘public functionary’, this word can be interpreted to conclude extension of the boundary of this right to ‘any person’ associated with the government whose actions affect the government.

PARLIAMENTARY PRIVILEGES: CONFLICT OR COHERENCE?

Parliamentary privileges guarantee an unrestricted Freedom of Speech of Expression to the members of the House, they cannot be sued, made liable, or arrested based on their speech in the Parliament. It is done to ensure them the freedom to work for the nation. There are two types of Parliamentary Privileges, individual and collective. Collective privilege includes the restriction on the publication of proceedings of the parliament which is a restriction of the exercise of the Right to Freedom of Speech and Expression of other persons. Now, the court

¹² Constitution of India 1950, art 12

¹³ Akshat Agrawal, ‘Kaushal Kishor v State of UP: A Tale of Mis-Readings and Bad Externalising’ (*Spicy IP*, 04 January 2023) <[¹⁴ *Kaushal Kishor v State of Uttar Pradesh* \(2023\) SCC OnLine 6](https://spicyip.com/2023/01/kaushal-kishor-v-state-of-up-a-tale-of-mis-readings-and-bad-externalising.html#:~:text=In%20a%20radical%20judgment%2C%20the,its%20instrumentalities%20under%20Article%2012!> accessed on Feb 17, 2023.</p>
</div>
<div data-bbox=)

answered whether this right and privilege are coherent or conflicting in the famous Search Light Case.¹⁵ The apex court in the case of *M.S.M Sharma v Sri Krishna Sinha*¹⁶ observed that the publication of an inaccurate or mashed version of the speech of the proceedings is not accepted to be published and will attract action against them, it is not saved by the right to publication of proceedings. The court also remarked that the House can restrict certain publications of proceedings and this will not be violative of the right conferred under Article 19(1)(a). The court in this case also rejected the contention that Article 194(3)¹⁷ is subject to Article 19(1)(a) and laid down that Parliament has the power to restrict the publication of certain proceedings. Thus, the Supreme court observed that these two Articles of the Constitution are not in conflict with each other instead 194(3) provides for a reasonable restriction on Article 19 (1)(a).

IS THIS PRIVILEGE REASONABLE?

The Parliamentary privileges guaranteed to the member of the House are not absolute. It is always open to judicial scrutiny if it breaches the extent mentioned in Article 122(1).¹⁸ The court will always interfere in the matter if the grievance brought shows gross illegality or violation of constitutional provisions. Judicial review of such is not restricted in any manner by Article 122 or Article 105 as was held by the Supreme Court's Constitutional bench in the case of *Raja Ram Pal v Hon'ble Speaker, Lok Sabha*¹⁹.

When it comes to the recent stand of the court while dealing with the conflict between Article 19(1)(a) and Article 194 the court has observed that 'such powers, privileges, and immunities stood in the same position as Part III of the Constitution and that the fundamental right to free speech and expression under Article 19(1)(a) must yield to Article 194'²⁰. The apex court has laid down a nexus between the Fundamental rights and the privileges given to the Parliamentarians. Thus, it can be concluded that when it comes to a tussle between the rights and the privileges,

¹⁵ *M.S.M. Sharma v Sri Krishna Sinha* (1959) Supp (1) SCR 806

¹⁶ *Ibid*

¹⁷ Constitution of India 1950, art 194(3)

¹⁸ Constitution of India 1950, art 122

¹⁹ *Raja Ram Pal v Hon'ble Speaker, Lok Sabha* (2007) 3 SCC 184

²⁰ *Ajit Mohan & Ors v Legislative Assembly National Capital Territory of Delhi & Ors* (2021) SCC OnLine 494]

the courts have resolved to the harmonious construction of both and safeguarded the interest of both, which makes these privileges reasonable, as there is a check and balance by courts on them.

CONCLUSION

India follows Constitutional Supremacy. Any right or privilege guaranteed to any person or group of people is subject to Constitutional norms. The Fundamental right to freedom of speech and expression is not absolute and has certain reasonable restrictions as mentioned under article 19(2). Parliamentary privileges are also considered a reasonable restriction on this right. When talking about the scope of this fundamental right it is important to understand that the extension of its boundaries of application can have both impacts good and bad. Looking at the good side, it can be observed that it will confer a responsibility and accountability on people specifically those with political motives and attached to a political party to be conscious of what they speak, it will keep a check on increasing cases of hate speech, but on the other side, it will also develop new disputes and a greater restriction on a person's fundamental right to freedom. The court needs to rethink the same, there is already a huge list of restrictions on the said right in the Constitution and IPC, and the inclusion of one more will remove the essence of freedom from it.

The current stance of the Fundamental Right to Freedom of Speech and Expression stands on a pedestal where it has a dual stand, it is under heavy restrictions too, but those restrictions are to an extent necessary and reasonable too. As society progresses, these restrictions should also be changed accordingly. The current Indian society needs some reasonable restrictions to maintain peace in the society but at the same time, it requires freedom to express an individual's viewpoint. The increase in the sensitivity of society is reflected in an increased number of cases against films and comedians. Here, the courts have an important task of shaping society and protecting the Fundamental right of an individual and at the same time saving the value of society.