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Freedom of
expression is a
citizen's
inalienable right



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Introduction

Eminent American jurist and judge Benjamin N. Cardozo remarked “*Freedom of expression is the matrix, the indispensable condition, of nearly every form of freedom.*”

It has been duly regarded that the freedom of speech is the first condition of liberty. Freedom of speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. In modern times, it is widely accepted that the right to freedom of speech is the essence of a free society and it must be safeguarded at all times.

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

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

To understand the nuances of the freedom being an inalienable right of every citizen in a society, it is necessary to dive into the history and evolution of the topic.

Evolution of the concept

The idea of freedom of speech had originated a long time ago. It was first introduced by the Athenians. They used the term “*Parrhesia*” which means to speak frankly. This term first appeared in late sixth century/ fifth century B.C.

Countries such as England and France have taken a lot of time to adopt this freedom as a right. The English Bill of Rights, 1689 adopted freedom of speech as a constitutional right and it is still in effect. Similarly, at the time of the French revolution in 1789, the French had adopted the Declaration of the Rights of Man and of Citizens.

The most concrete step and evolution towards the concept in modern times occurred in 1948. Article 19 of the Universal Declaration of Human Rights, adopted in 1948, states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”

Today, freedom of speech, or the freedom of expression, is recognised in international and regional human rights law. The right is enshrined in Article 19 of the International Covenant on Civil and Political Rights, (ICCPR), Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights.

Freedom of speech, often used synonymously with ‘freedom of expression’, is understood as a multi-faceted right that includes not only the right to express, or disseminate, information and ideas, but three further distinct aspects:

1. the right to seek information and ideas;
2. the right to receive information and ideas;
3. the right to impart information and ideas

International, regional and national standards also recognise that freedom of speech, as the freedom of expression, includes any medium, whether it be orally, in written, in print, through the Internet or through art forms. This means that the protection of freedom of speech as a right includes not only the content, but also the means of expression.

Meaning of freedom of speech and expression

John Milton famously remarked “*give me the liberty to know, to argue freely, and to utter according to conscience, above all liberties*”.

The above sentence by John Milton clearly displays the essence of freedom of speech. He argued that without human freedom there would be no progress in science, law or in any other field. According to him, human freedom means free discussion of opinion and liberty of thought and expression.

The right to express one’s own philosophies, notions, ideas, thoughts and opinions freely through writing, printing, picture, gestures, spoken words or any other mode is the essence of freedom of speech and expression. It also includes the right to propagate one’s views through print media or through any other communication channel.

For instance, Mr. A comes across a news article about a proposed law in the daily newspaper and feels it is detrimental to society. The ability of Mr. A to freely express his views on any medium, without unjust dire consequences, is considered as freedom of speech and expression.

Free propagation of ideas is the necessary objective, and this may be done through the press or any other platform.

According to Article 19 of the ICCPR, the freedom to seek, receive, and convey information and all kinds of ideas irrespective of boundaries, either orally or in the form of writing, print, art or through any other media of their choice are included in the right to freedom of speech and expression.

Article 19(1)(a) of the Indian constitution

In India, the freedom of speech and expression is granted under Article 19(1)(a) of the Indian Constitution, which is available only to the citizens of India and not to foreign nationals. Freedom of speech under Article 19(1)(a) includes the right to express one’s views through any medium, which can be by way of writing, speaking, gesture or in any other form. It also includes the rights of communication and the right to propagate or publish one’s opinion.

The right that is mentioned above, guaranteed by our constitution, is regarded as one of the most basic elements of a healthy democracy because it allows citizens to participate in the social and political process of a country very actively. Being the world's largest democracy in terms of population, this right assumes unmatched significance in order to ensure correct propagation of democracy.

Freedom of speech and expression – Is it inalienable?

The Cambridge dictionary defines an inalienable right as “a right that cannot be taken away from you.”

An inalienable right, said Richard Foltin of the Freedom Forum Institute, is “a right that can’t be restrained or repealed by human laws.” Sometimes called natural rights, inalienable rights “flow from our nature as free people.”

The most important feature of inalienable rights is that they cannot be given or taken away by a government. Instead, it is a government’s job to protect inalienable rights.

Freedom of speech offers human beings the freedom to express their feelings to another, but this is not the only component which makes freedom of speech an inalienable right. There are more reasons to protect these essential liberties.

There are four important justifications for freedom of speech –

1) *For the discovery of truth by open discussion*

If restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion. That is to say, it assists in the discovery of truth.

2) *Aspect of self- fulfilment and development*

Freedom of speech is an integral aspect of each individual’s right to self-development and self-fulfilment. Restriction on what we are allowed to say and write or to hear and read will hamper our personality and its growth.

3) *For expressing belief and political attitudes*

Freedom of speech provides opportunity to express one’s belief and show political attitudes. It ultimately results in the welfare of the society and state. Thus, freedom of speech provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

4) *For active participation in democracy*

In the words of Abraham Lincoln, “*Democracy is the government of the people, by the people and for the people*”. Democracy is most important feature of today’s

world. Freedom of speech protects the right of all citizens to understand political issues so that they can participate in smooth working of democracy. That is to say, freedom of speech strengthens the capacity of an individual in participating in the decision-making process.

Thus, we find that protection of freedom of speech is essential in a democratic society and is truly an inalienable right which cannot be surrendered by the citizens to the sovereign¹.

¹ According to the social contract theory

Freedom of speech and expression in India

Pulitzer-prize winning author Thomas Friedman remarked² *“The more time you spend in India, the more you realize that this country is one of the world’s greatest wonders- a miracle with a message. And the message is that democracy matters.”*

Freedom of speech enjoys a special position as far India is concerned. The importance of freedom of expression and speech can be easily understood by the fact that preamble of constitution itself ensures to all citizens *inter alia*, liberty of thought, expression, belief, faith and worship.

The constitutional significance of the freedom of speech consists in the Preamble of Constitution and is transformed as a fundamental and human right in Article 19(1)(a) as “freedom of speech and expression” (discussed above). Explaining the scope of freedom of speech and expression, Supreme Court has said that the words "freedom of speech and expression" must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities.

Moreover, it is important to note that liberty of one must not offend the liberty of others. The Hon’ble Supreme Court of India, in *A.K. Gopalan*³ case, observed, *“man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals”*. It therefore includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this country therefore has the right to air his or their views through the printing and or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. In sum, the fundamental principle involved here is the people's right to know.

² Rohit Raj, “Defining Contours of Press Freedom in Backdrop of National Emergency of 1975”, All India Reporter (Journal Section), 2008, pp. 155-160, at 160.

³ 1950 AIR 27, 1950 SCR 88

Freedom of Press

Although Article 19 does not express provision for freedom of press, it is considered that the fundamental right of the freedom of press implicit in the right the freedom of speech and expression.

In the famous case of *Express Newspapers (Bombay) (P) Ltd. v. Union of India*⁴, the Hon'ble Supreme Court observed the importance of press very aptly and held that "*In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate [Government] cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities.*"

The above statement of the Supreme Court illustrates that the freedom of press is essential for the proper functioning of the democratic process. Democracy means Government of the people, by the people and for the people; it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. This explains the constitutional viewpoint of the freedom of press in India.

Right to Information

Right to know, to information is other facet of freedom of speech. The right to know, to receive and to impart information has been recognized within the right to freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.

⁴ 1986 AIR 872, 1985 SCR Supl. (3) 382

The right to know has, however, not yet extended to the extent of invalidating section 5 of the Official Secrets Act, 1923 which prohibits disclosure of certain official documents. Also, the Right to Information Act, 2005, which especially lays down peoples' right to ask information from Government official, prohibits disclosure of certain documents under section 8 of the Act. These exceptions are generally the grounds of reasonable restrictions over freedom of speech and expression under Article 19(1) of Constitution of India.

Based on the above, one can conclude that 'right to information' is nothing but one small limb of right of speech and expression.

Notable judicial precedents in Indian context

1. Sakal Papers v. Union of India⁵

Facts: The petitioner was the owner of a private limited company, 'Sakal', which published daily and weekly newspapers in Marathi. This newspaper used to play a leading part in the dissemination of news and in moulding public opinion. They claimed that their net circulation of copies in Maharashtra and Karnataka on weekdays was 52,000 and on Sunday it was 56,000. However, the Central Government passed the Newspaper (Price and Page) Act, 1956, later, the Daily Newspapers (Price and Page) Order, 1960. Because of that order, the government fixed the maximum number of pages that could be published by the newspapers. So, the petitioner filed a case challenging the constitutionality of that Act.

Judgment: The court held that Section 3(1) of the Act was unconstitutional, and also an order made under the same would be unconstitutional.

2. Union of India v Naveen Jindal and Anr.⁶

Facts: The respondent Naveen Jindal was not allowed to hoist the national flag at the office premise of his factory by government officials on the ground that it was not permissible under the Flag Code of India.

Judgment: In this case, the high court held that the restrictions that the Flag Code imposed on citizens on hoisting the National Flag were not permissible under clause (2) of Article 19 of the Indian Constitution. The court has also stated that displaying a flag is an expression of pride as well as an expression of genuine enthusiasm and it can only be restricted in accordance with what has been prescribed in the Constitution, otherwise, the restriction would discourage the citizens or Indian nationals from identifying with the flag of the country.

⁵ 1962 AIR 305, 1962 SCR (3) 842

⁶ Appeal (civil) 2920 of 1996

3. **Virendra v. The State of Punjab and Anr.**⁷

Facts: Serious communal tension had arisen in the state of Punjab between the Hindus and the Akali Sikhs because of the question of partition of the state on a linguistic and communal basis. There were two petitioners, and both were from different newspapers. Their newspapers' policy was to support the 'Save Hindi agitation'. A notification was passed by the home ministry office under the impugned Act prohibiting the publication and printing of any material relating to the 'Save Hindi agitation'. Both the petitioners filed a complaint alleging that the Punjab Special Powers (Press) Act, 1956 passed by the state legislature was unconstitutional.

Judgment: The court held that *Section 2* of the impugned Act did not merely impose restrictions but imposed a total prohibition against the exercise of the right of freedom of speech and expression, making the same a violation of the right guaranteed by the Constitutional provision.

4. **People's Union for Civil Liberties v. Union of India**⁸

This case challenged the validity of Section 5(2) of the Indian Telegraph Act, 1885, which stated that if there occurred any public emergency, or in the interest of public safety, the Central Government or the State Government or any other officials were authorized to take temporary possession of any telegraph, on behalf of the government.

Two conditions were observed while dealing with this case:

- The occurrence of public emergency
- In the interest of public safety

For the application of the provisions of Section 5(2), these two conditions were the *sine qua non*. If any of these two conditions were not present, the government had no right to exercise its powers under the said Section.

⁷ 1957 AIR 896, 1958 SCR 308

⁸ AIR 1997 SC 568, JT 1997 (1) SC 288

5. Hamdard Dawakhana v. Union of India⁹

This case challenged the validity of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1956, on the ground of restriction that it took away or abridged this freedom. The Supreme Court held that an advertisement is a form of speech only if every advertisement was held to be dealing with commerce and trade and not for propagating any idea.

6. K. A. Abbas v. Union of India¹⁰

It is the first case in which the issue of the prior censorship of films came into consideration by the supreme court of India. The petitioner's film was not given 'U' certificate, so he challenged the validity of censorship under the criteria as it violated his fundamental rights of freedom of speech and expression. The court, however, held that the motion picture stirs emotions more deeply than any other form of art. Hence pre-censorship was valid and was justified under Article 19(2).

As is visible from the landmark rulings above, the freedom of speech and expression encompasses almost every aspect of human life. Thus, the subject is evolving in courts of law and will continue to evolve amidst a dynamic and evolving society.

⁹ 1960 AIR 554, 1960 SCR (2) 671

¹⁰ 1971 AIR 481, 1971 SCR (2) 446

Grounds of restriction

Soren Kierkegaard famously remarked *“People demand freedom of speech as a compensation for the freedom of thought which they seldom use.”*

Freedom of expression, while being an inalienable right, is not regarded as an absolute right. This is to prevent misuse of the seemingly wide freedom by miscreants. For instance, Mr. A does not like Mr. B and hence uses his freedom of expression to malign Mr. B’s image causing a loss to Mr. B. On being questioned, Mr. A cannot take the defence that he was merely exercising his freedom of speech and expression.

There are some restrictions imposed through Clause (2) of Article 19 on freedom of speech and expression on certain grounds.

Article 19(2) states that *“nothing in sub-clause (a) of clause (1) shall affect the operation of the existing law, neither can it prevent the State from making any law, in so far as such type of law imposes reasonable restrictions on the exercise of the right bestowed by the said sub-clause in the interests of the sovereignty and integrity of India, public order, friendly relations with foreign states, the security of the State, decency or morality or in relation to contempt of court, defamation or incitement to an offence”*.

A question arises whether such grounds of restrictions encroach on the freedom of speech and expression envisaged in a democratic society.

The eight grounds of restriction are briefly discussed as follows:

1. Security of the state

Article 19(2) imposes reasonable restrictions on the freedom of speech and expression in the interest of the state. The term ‘security of the state’ should be distinguished from ‘public order’ as security of the state includes an aggravated form of public order. For e.g., waging war against the state, rebellion, insurrection, etc. The term ‘security of the state’ in Article 19(2) does not only mean danger to the security of the entire country but it also implies danger to the security of a part of states or threat to a part of states.

2. Friendly relations with a foreign state

This ground of restriction was added through the Constitutional First Amendment, 1951. The main objective behind adding this provision was to forbid unrestrained vitriolic propaganda against a foreign-friendly state, which could jeopardize the maintenance of good relations between India and that state. If the freedom of speech and expression disturbs or hampers the friendly relations of India with foreign states, the government has the right to impose a reasonable restriction.

3. Public order

This ground of restriction was also added through the Constitutional First Amendment, 1951. A situation had arisen in the case of *Romesh Thapar*¹¹ by the Supreme Court and to meet that situation, this ground had been added in the constitution. The word 'public order' depicts the sense of public safety, public peace, and peace of the community.

In *Om Prakash v. Emperor*¹², it has been said by the judge that anything that disturbs public peace can be said to disturb public order automatically. There is also a test that determines whether an act affects law and order or public order.

4. Decency and Morality

The word to express or say something should be a decent one that it should win the heart of the opposite person and it should not affect the morals of the society. So our Constitution has considered this view and added this ground in our Constitution.

On the ground of decency and morality, sections 292 to 294 of the Indian Penal Code, 1860 provides an example of a restriction on the freedom of speech and expression. These are the terms of variable content having no fixed meaning or we can also say that these words are of wide meaning. It varies from society to society and time to

¹¹ 1950 AIR 124

¹² AIR 1956 All 241, 1956 CriLJ 452

time depending upon the morals prevailing in contemporary society. The words morality and decency are not confined to sexual morality only; it has a broader scope.

5. Contempt of court

In a democratic country, we know that the judiciary plays an important role in governing a country in a peaceful manner so in such types of situation it is important to respect the institution and its order.

Contempt of court can be defined in two categories i.e., civil contempt and criminal contempt. Contempt of court has been defined in section 2(a) of the Contempt of Courts Act, 1971. Initially 'truth' was not a defence under contempt of court but in 2006 an amendment was made to add 'truth' as a defence.

In the *Indirect Tax Practitioner Assn. v. R.K. Jain*¹³ case, the court has held that truth which is based on the facts should be allowed as a valid defence.

Elements or essential needed to establish contempt:

1. Making of a valid court order.
2. The respondent should have knowledge of that order.
3. The respondent should have the ability to render compliance.
4. The respondent should have intentionally or wilfully disobeyed the order.

6. Defamation

Article 19(2) prevents any person from making any statement that defames the reputation of another person. One who gets the freedom of any type should not misuse that freedom to hurt or affect the reputation or status of another person. Generally, a statement that injures the reputation of a man results in defamation. The right to free speech is not qualified. So, it does not mean to hurt any person's reputation which is separately protected under Article 21 of the Indian Constitution.

¹³ CONTEMPT PETITION (CRL.) NO.9 OF 2009

7. Incitement to an offence

This ground was also added by the Constitutional First Amendment Act, 1951. It is obvious that freedom of speech and expression does not include the right to incite people to commit an offence. The word ‘offence’ has been described under section 40 of the Indian Penal Code, 1860.

Any type of offence takes place in two ways:

1. By the commission of an act
2. By the omission of an act

8. Sovereignty and Integrity of India

To maintain the sovereignty and integrity of a state is the main duty of a government. Any speech or expression encroaching the sovereignty or integrity is not allowed and such statements may be considered seditious in nature. This ground has been added by the Constitution (Sixteenth Amendment) Act, 1963.

On a brief overview of the restrictions, a question arises whether the said restrictions hamper the right of freedom of expression healthy for a democracy. The Courts seem to believe that the said rights achieve a balance as the constitutional validity of nearly all the above restrictions have been challenged in different Courts.

From the above analysis, the grounds contained in Article 19(2) show that they are all concerned with national interest or in the interest of the society. Thus, they are indispensable in ensuring that the freedom of expression is exercised in a sustainable manner and the right remains an asset in a healthy democracy.

In this context, one must remember the celebrated words of Cicero¹⁴ “*The people’s good is the highest law*”.

¹⁴ Roman politician, lawyer

Ground reality – Poll survey on public perception of freedom of speech

Why is a survey needed?

- To a great extent, a person is what he thinks. The creation of ideas begins with thinking. If thought is limited, ideas also will be limited, and eventually expression will be inhibited. Thoughts have no power to influence others until they are shared¹⁵.
- A lot is spoken about nuances of freedom of expression arising from political discourse, statutes and courts of law. However, an important aspect of freedom of expression is how well it can be applied by the layman – i.e. whether s/he is allowed to freely exercise the right. If an individual is not able to exercise his freedom of expression for fear of unjust dire consequences, there is a fundamental failure on part of the State machinery. Also, such failure is likely to go undetected and may very well prove to be a silent killer of democratic principles in a society.
- At this point, it is wise to recollect the sage words of Albert Einstein “*Laws alone cannot secure freedom of expression; in order that every man present his views without penalty there must be spirit of tolerance in the entire population.*”

Poll survey

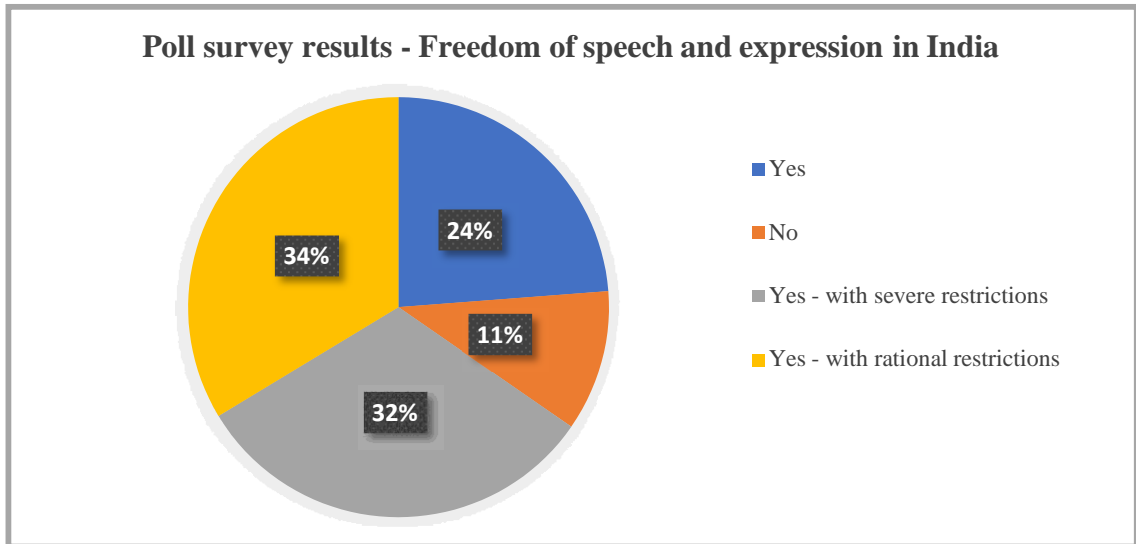
- The author has conducted an independent survey on the perception of Indian citizens as to what their perception of freedom of expression is. The survey was conducted on the LinkedIn platform by way of a poll and the response of 1,472 participants are summarised as under:

*Results*¹⁶

- When asked whether they perceive that India has freedom of speech and expression, 24% respondents answered with a clear Yes, 11% respondents felt that India does not have freedom of speech and expression, 32% respondents perceived India’s freedom of expression is subject to severe restrictions whereas 34% respondents perceived India’s freedom of expression being subject to rational restrictions.

¹⁵ Robert Trager and Donna L. Dickerson, Freedom of Expression in the 21st century 14 (Pine Forge Press, Inc., New Delhi, 1999)

¹⁶ The detailed results are provided in **Appendix**.



Findings from the poll survey

- The overall results reflect that a majority of the respondents are aware that India’s freedom of expression is subject to restrictions and they were nearly equally divided on their perception whether such restrictions were rational (34%) or severe (32%).
- A peculiar finding is that in relation to the respondents (11%) considering that they do not feel India has freedom of speech and expression, a staggering 94% were women. One respondent, a woman in her early 20s remarked *“Freedom of expression doesn’t mean anything if the Government fails to enforce it. As a woman, I can’t simply voice my opinion on a social media platform without perverts and stalkers, hiding behind the anonymity of Internet, sending me obscene and lewd direct messages. In such a scenario, reporting them to the social media platform hardly ever leads to any tangible improvement and the only option I have is to block them. Most of my female friends have faced similar experiences on social media. I would rather not voice my opinion than expose myself to the threat of stalkers latching on to me with minimal protection from the authorities.”*
- To summarise, the findings indicate that 43% of the respondents perceive that India either does not have freedom of expression or that the restrictions placed are severe. Whereas 57% of the respondents perceive that India has freedom of expression or that the restrictions imposed are rational.
- For a democracy to function in a healthy manner, it is not only important that freedom of speech and expression should be present, it is equally important that its citizens should perceive their presence.

Conclusion

The concept of freedom of expression is an age-old topic. Despite a plethora of judicial precedents, laws, debates and expert commentaries, the issue remains an evolving one, especially in light of growing mediums of expression (for instance, the Internet).

However, it is unanimously conceded that freedom of expression is every citizen's inalienable right. It is also generally agreed that the freedom is not absolute and is subject to reasonable restrictions.

What constitutes 'reasonable restrictions', however, is highly subjective and a matter of seemingly unending debate in judicial forums and on public platforms as well. It is also pertinent to note that the debate is not necessarily objective but depends on countless intertwined political, economic and social factors. A good illustration is the ongoing battle between social media platforms Twitter and WhatsApp with the extant Indian government. It will be interesting to see how the matter is eventually played out given that both parties seek to achieve their own version of equilibrium between freedom of speech and "national interest".

Needless to say, the strength of a free society rests on how well its citizens are able to freely express themselves. Based on the results of the survey discussed above, the author believes that freedom of expression, like any law, is ineffective unless and until it is properly enforced and made available to each citizen by the State machinery. Let us not forget the golden words¹⁷ of Leo Tolstoy, "*Writing laws is easy, but governing is difficult.*"

While a debate on the nuances of the freedom of speech and expression is vital to further the concept amidst dynamic times, it is equally imperative for the freedom to be enforced in an equitable manner to ensure a society's smooth progress, especially in a democratic set-up. Only then, in the humble opinion of the author, can it be regarded that the society considers freedom of expression as a citizen's inalienable right.

¹⁷ War and peace (circa 1860s)

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Appendix – Poll survey on public perception of freedom of speech and expression

The poll survey was conducted on LinkedIn web platform.

The respondents were 1,472 in number. The general age group of the respondents was between 22-35 years.

The question asked – “Do you perceive that India has freedom of speech and expression?”

The respondents were given the following four alternatives:

1. Yes
2. No
3. Yes – with severe restrictions
4. Yes – with rational restrictions

A snapshot of the results is provided below:

