INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

A CONSTITUTIONAL DILEMMA: FREEDOM OF SPEECH VERSUS HATE SPEECH

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Abstract

Freedom of speech stands as one of the most celebrated constitutional guarantees in democratic societies, yet it invariably collides with the equally pressing concern of preventing speech that demeans, dehumanises, or incites violence against individuals on account of their identity. This paper examines the constitutional dilemma that emerges when the right to free expression under Article 19(1)(a) of the Constitution of India confronts the regulatory imperative of curbing hate speech. Drawing upon landmark judicial decisions, comparative constitutional frameworks, and scholarly discourse, this paper argues that the boundary between protected expression and proscribed hate speech cannot be resolved through a single categorical formula. Instead, it calls for a context-sensitive, proportionality-driven jurisprudence that preserves the democratic vitality of free speech while protecting the dignity of marginalised communities. The paper proceeds through an analytical framework that examines the constitutional foundations of free speech, the theoretical and legal definitions of hate speech, judicial approaches in India and abroad, the adequacy of existing legislative measures, and the path forward for a cohesive regulatory framework.

Keywords: *Freedom of speech, hate speech, Article 19, constitutional dilemma, India, proportionality, dignity.*

ISSN: 2582-6433

I. Introduction

The idea that individuals ought to be free to express their thoughts, opinions, and beliefs without governmental interference is deeply embedded in the constitutional architecture of modern democracies. In India, this fundamental guarantee is enshrined in Article 19(1)(a) of the Constitution of India, which confers upon every citizen the right to freedom of speech and expression.[1] At the international plane, Article 19 of the Universal Declaration of Human Rights[2] and Article 19 of the International Covenant on Civil and Political Rights[3] affirm the same commitment. Yet the exercise of this right does not exist in a vacuum; it operates within a social context in which words can be wielded as instruments of oppression.

The Supreme Court of India, as far back as 1950, recognised that free speech is "the foundation of all democratic organisations" and the lifeblood of political discourse. In *Romesh Thappar v State of Madras*, the Court struck down a pre-censorship order as unconstitutional, affirming the paramount importance of a free press.[4] Similarly, in *Brij Bhushan v State of Delhi*, prior restraint upon publication was condemned as fundamentally inconsistent with democratic governance.[5] These early decisions signalled that free speech would be treated as a near-inviolable value in Indian constitutionalism.

However, the ascendancy of free speech has been persistently challenged by the rise of hate speech — expression that targets individuals or groups on grounds of race, religion, ethnicity, gender, caste, or sexual orientation, with the purpose or effect of inciting hostility, discrimination, or violence. The constitutional dilemma is stark: an expansive interpretation of free speech risks providing constitutional cover to expression that degrades human dignity and fuels communal violence, while an overbroad regulation of hate speech risks chilling legitimate dissent, minority voices, and artistic expression. This paper seeks to map and interrogate this constitutional tension, arguing that its resolution requires a sophisticated doctrinal architecture grounded in proportionality, context, and constitutional values beyond the text of Article 19 alone.

[1] Constitution of India 1950, art 19(1)(a).
[2] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 19.
[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 19.
[4] *Romesh Thappar v State of Madras* AIR 1950 SC 124 (Supreme Court of India).
[5] *Brij Bhushan v State of Delhi* AIR 1950 SC 129 (Supreme Court of India).

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II. Constitutional Foundations of Free Speech in India

Article 19(1)(a) of the Constitution of India guarantees to every citizen the right to freedom of speech and expression. The Supreme Court has interpreted this right expansively to encompass not only verbal expression but also the freedom of the press, the right to receive information, the right to broadcast, and artistic and creative expression. In *S Rangarajan v P Jagjivan Ram*, the Court held that freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom, underscoring its foundational character.[6]

This right, however, is not absolute. Article 19(2) of the Constitution permits the State to impose reasonable restrictions on free speech in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, or in relation to contempt of court, defamation, or incitement to an offence.[7] The critical word in Article 19(2) is "reasonable." The restriction must be proportionate to the mischief sought to be prevented, must not be excessive, and must bear a rational nexus to the legitimate aim pursued. This standard of reasonableness has been the primary battleground for adjudicating the constitutionality of laws that regulate speech.

In *Kedar Nath Singh v State of Bihar*, the Supreme Court interpreted the sedition provision of the Indian Penal Code narrowly so as to restrict it to speech that has a direct tendency to incite violence, rather than mere criticism of the Government.[8] This approach — of reading penal provisions narrowly to protect the core of free speech — illustrates the Court's instinct to shield political dissent from over-zealous prosecution. The landmark decision in *Shreya Singhal v Union of India* further entrenched this methodology by striking down Section 66A of the Information Technology Act 2000 as being overbroad and unconstitutionally vague, thereby failing to satisfy the test of reasonable restriction under Article 19(2).[9]

III. Defining Hate Speech: Theoretical and Legal Perspectives

Defining hate speech with precision has proved to be one of the most contested exercises in constitutional law. The difficulty stems from two interrelated problems: the amorphous nature of "hate" as a subjective state, and the contested boundary between harmful expression and mere offensiveness. A statement may be deeply offensive to a community without crossing the

[6] *S Rangarajan v P Jagjivan Ram* (1989) 2 SCC 574 (Supreme Court of India).
[7] Constitution of India 1950, art 19(2).
[8] *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955 (Supreme Court of India).
[9] *Shreya Singhal v Union of India* (2015) 5 SCC 1 (Supreme Court of India).

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threshold of incitement to discrimination or violence; conversely, seemingly innocuous rhetoric may embed structural dehumanisation that fuels long-term discriminatory attitudes.

Indian criminal law addresses hate speech through a constellation of provisions in the Indian Penal Code 1860, including Sections 153A (promoting enmity between different groups), 295A (deliberate acts intended to outrage religious feelings), 298 (uttering words with deliberate intent to wound religious feelings), and 505 (statements conducing to public mischief).[10] These provisions share a common focus on the communal or religious dimension of harmful speech, reflecting India's particular post-Partition preoccupation with communal harmony. Crucially, however, India has no standalone statute specifically addressing hate speech in a comprehensive and rights-compatible manner.

Scholarly perspectives on hate speech diverge considerably. Jeremy Waldron argues that hate speech inflicts harm not merely by provoking immediate violence but by undermining the social standing of its targets — eroding their assurance that they will be treated as full and equal members of society.[11] On this account, hate speech regulation is not merely about preventing physical harm; it is about protecting the conditions of social dignity necessary for equal participation in democratic life. Critical race theorists such as Matsuda and Delgado advance a related argument, contending that words that wound inflict psychological injury, silence minority voices, and reinforce structures of subordination.[12]

Against these arguments, classical liberal theorists invoke the Millian "marketplace of ideas" and insist that the remedy for harmful speech is counter-speech, not suppression. On this view, the State's power to suppress speech based on its content is inherently dangerous because it can too easily be used to silence minority political or religious dissent. The resolution of this theoretical standoff is not merely academic; it directly shapes the doctrinal frameworks that courts adopt when adjudicating hate speech cases.

IV. Judicial Approaches: India and Comparative Perspectives

The Indian Supreme Court has not yet directly addressed the constitutional validity of hate speech regulation in a comprehensive manner, but its decisions on related provisions illuminate

[10] Indian Penal Code 1860 (Act 45 of 1860), ss 153A, 295A, 298, 505.
[11] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 4.
[12] Mari J Matsuda and others, *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press 1993) 36.

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the doctrinal terrain. In *Pravasi Bhalai Sangathan v Union of India*, the Court was asked to direct the State to formulate a comprehensive law against hate speech, particularly in the context of political leaders making communally inflammatory statements. While the Court acknowledged the problem, it refrained from issuing any mandatory direction, observing that legislative inaction was not per se unconstitutional.[13] This reluctance reveals the Court's sensitivity to the separation of powers in the domain of speech regulation.

In *Arup Bhuyan v State of Assam*, the Court adopted an approach closer to the American "clear and present danger" standard, holding that mere membership of a banned organisation is insufficient to constitute an offence in the absence of a specific overt act tending towards violence.[14] The standard of proximity between speech and harm was similarly elaborated in *Superintendent, Central Prison v Ram Manohar Lohia*, where the Court insisted on a proximate, not merely a remote, causal connection between the speech and the public order concern invoked to restrict it.[15]

Comparative jurisprudence reveals sharply divergent approaches. The United States Supreme Court, in the seminal decision of *Brandenburg v Ohio*, held that the First Amendment protects all speech, including incendiary advocacy, unless it is directed to and is likely to produce imminent lawless action.[16] The "imminent lawless action" test sets an extraordinarily high bar for speech regulation, reflecting the American commitment to a near-absolute free speech principle. An earlier decision, *Beauharnais v Illinois*, had upheld a group libel statute, but it has fallen into doctrinal disrepair and is rarely cited as authoritative today.[17]

Canadian law takes a markedly different approach. In *R v Keegstra*, the Supreme Court of Canada upheld the Criminal Code prohibition on wilful promotion of hatred against an identifiable group, finding that it constituted a reasonable limit on freedom of expression that could be demonstrably justified in a free and democratic society under Section 1 of the Canadian Charter of Rights and Freedoms.[18] The Canadian approach, grounded in proportionality analysis and attentive to the values of equality and multiculturalism, offers a model that balances expressive freedom with the protection of vulnerable groups more

[13] *Pravasi Bhalai Sangathan v Union of India* (2014) 11 SCC 477 (Supreme Court of India).
[14] *Arup Bhuyan v State of Assam* (2011) 3 SCC 377 (Supreme Court of India).
[15] *Superintendent, Central Prison v Ram Manohar Lohia* AIR 1960 SC 633 (Supreme Court of India).
[16] *Brandenburg v Ohio* 395 US 444 (1969) (Supreme Court of the United States).
[17] *Beauharnais v Illinois* 343 US 250 (1952) (Supreme Court of the United States).
[18] *R v Keegstra* [1990] 3 SCR 697 (Supreme Court of Canada).

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explicitly than either the Indian or American frameworks.

The European Court of Human Rights has likewise endorsed the regulation of hate speech under Article 10(2) of the European Convention on Human Rights, holding that freedom of expression carries "duties and responsibilities" and may be subject to restrictions necessary in a democratic society for the protection of the reputation or rights of others.[19] The doctrine of the "margin of appreciation" allows member states considerable latitude in determining the appropriate balance, reflecting the recognition that the social and historical context of speech regulation varies across polities.

V. Adequacy of the Existing Legislative Framework in India

India's existing legislative arsenal for regulating hate speech is, at best, a patchwork. The provisions of the Indian Penal Code 1860 outlined above were enacted in the colonial era and were designed primarily to prevent communal riots rather than to protect the dignity of minority communities in a rights-consistent manner. Section 153A, for instance, requires proof of "promotion of enmity" between different groups, a standard that has been inconsistently applied by courts and frequently weaponised by authorities against minority voices and political dissenters rather than majority communal agitators.

The Representation of the People Act 1951 contains provisions disqualifying candidates who indulge in corrupt practices including the use of religion for electoral purposes, and provides for the punishment of persons who promote enmity on grounds of religion, race, caste, community, or language.[20] While valuable, these provisions operate only in the electoral context and do not provide a general framework for hate speech regulation.

The Information Technology Act 2000 and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 attempt to regulate online hate speech, but the framework is primarily directed at intermediary liability rather than the substantive definition and prosecution of hate speech.[21] The deletion of Section 66A following *Shreya Singhal* left a regulatory vacuum in the digital space that has yet to be adequately filled.

[19] European Court of Human Rights, *Handyside v United Kingdom* (1979-80) 1 EHRR 737 [49].
[20] Representation of the People Act 1951 (Act 43 of 1951), s 8(2).
[21] Information Technology Act 2000 (Act 21 of 2000), s 66A (struck down in *Shreya Singhal* [n 9]). See also Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021.

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The 267th Report of the Law Commission of India on Hate Speech, submitted in March 2017, recommended the insertion of new provisions into the Indian Penal Code specifically targeting hate speech, including speech that incites hatred on grounds of race, caste, sex, gender identity, sexual orientation, religion, and place of birth.[22] The Report proposed a tailored definition of hate speech that would require proof of both the advocacy of hatred and the likelihood of incitement to violence or discrimination. Despite the Commission's recommendations, no comprehensive legislation has been enacted to date, leaving the regulatory framework fragmented and inadequate.

VI. The Digital Dimension: Hate Speech in the Age of Social Media

The proliferation of social media platforms has dramatically amplified the reach and velocity of hate speech, presenting novel challenges for constitutional law. Speech that would previously have been confined to a small audience can now be disseminated instantaneously to millions, with algorithms incentivising inflammatory content by maximising user engagement. The anonymity afforded by digital platforms further emboldens hateful expression, reducing the social accountability that once served as an informal check on the grosser forms of public speech.

The United Nations Special Rapporteur on Freedom of Opinion and Expression has highlighted the tension between the right to freedom of expression online and the growing problem of hate speech on digital platforms, calling for a nuanced approach that holds platforms accountable for facilitating the amplification of hateful content while avoiding the chilling effects of over-censorship.[23] In the Indian context, the absence of a standalone hate speech statute means that platform regulation under the Intermediary Guidelines remains the primary, albeit imperfect, tool for addressing online hate speech.

The constitutional challenges raised by digital hate speech regulation are, in many respects, more acute than those in the offline context. The vagueness and breadth of any regulatory provision that applies to digital communication risks capturing vast swathes of protected speech, including political satire, artistic expression, and minority community discourse, within its proscriptive net. The proportionality analysis therefore demands even greater judicial

[22] Law Commission of India, *267th Report on Hate Speech* (March 2017).
[23] Hate Speech and the Internet: Report of the Special Rapporteur on Freedom of Opinion and Expression (UN Doc A/HRC/38/35, 2018).

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vigilance in the digital domain.

VII. Towards a Coherent Constitutional Framework

The foregoing analysis reveals that neither an absolutist free speech approach nor an overbroad hate speech regulation is constitutionally or democratically defensible in the Indian context. What is required is a principled framework that integrates the constitutional values of free speech, equality, and dignity. Several doctrinal tools are available to construct such a framework.

First, the proportionality principle — now firmly embedded in Indian constitutional law following *Justice K S Puttaswamy v Union of India* — requires that any restriction on free speech must be (i) provided for by law, (ii) in pursuit of a legitimate aim, (iii) rationally connected to that aim, (iv) necessary in the sense that no less restrictive measure could achieve the same aim, and (v) proportionate in the strict sense that the benefits of the restriction outweigh its costs to free expression.[24] Applied to hate speech regulation, the proportionality framework demands that legislators and courts demonstrate, with empirical rigour, the causal link between the targeted expression and the harms of discrimination, violence, or dignity injury that the regulation seeks to prevent.

Second, a harm-centred definition of hate speech, aligned with the Law Commission's recommendations, should replace the existing patchwork of colonial-era provisions. Such a definition should require that the speech in question (i) targets an individual or group on the basis of a protected characteristic such as religion, race, caste, sex, or sexual orientation; (ii) advocates hatred, contempt, or discrimination against that individual or group; and (iii) is likely to cause substantial harm, whether in the form of incitement to violence, systematic dehumanisation, or the silencing of minority voices.[25]

Third, any hate speech law must be accompanied by robust procedural safeguards against abuse. The history of IPC provisions such as Section 295A demonstrates that speech laws in India are frequently misused to suppress legitimate religious criticism, artistic expression, and political dissent. Mandatory prior sanction from a senior judicial or quasi-judicial authority

[24] Constitution of India 1950, art 14, art 21.
[25] Incitement to Hatred Act 2024 (India) (proposed legislative framework under deliberation by the Law Commission of India).

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before any prosecution is initiated, strict time limits for investigation and trial, and enhanced protections for journalists, academics, and civil society actors are essential to prevent the weaponisation of hate speech law.

Fourth, in the digital domain, a tiered liability framework for online platforms, proportionate to their size, reach, and the severity of the content concerned, should replace the blunt instrument of intermediary liability under the 2021 Rules. Platforms should be required to develop and transparently report on their community standards, to maintain accessible appeals mechanisms, and to cooperate with judicial orders for the removal of content that meets a clearly defined threshold of hate speech.

VIII. Conclusion

The constitutional dilemma between freedom of speech and hate speech is not susceptible to easy resolution, nor should it be. It reflects a genuine and deep tension between two foundational values of democratic constitutionalism: the freedom of every individual to speak, criticise, and dissent, and the equal dignity and standing of every member of the political community. The task of constitutional law is not to dissolve this tension by privileging one value over the other, but to manage it through a principled, contextually sensitive, and institutionally accountable framework.

India's constitutional framework, interpreted through the lens of proportionality and animated by the twin commitments to liberty and equality under Articles 14, 19, and 21, is capable of sustaining such a framework. What is urgently required is the political will to enact comprehensive hate speech legislation aligned with the Law Commission's recommendations, the judicial readiness to apply proportionality rigorously rather than deferentially in speech cases, and the institutional capacity to ensure that any regulatory framework is administered fairly, transparently, and without discriminatory application.

Freedom of speech must remain robust enough to protect the dissident, the satirist, and the minority voice. But it must also be sufficiently grounded in the constitutional value of equal dignity to refuse protection to expression whose primary function is to dehumanise and degrade. Navigating this balance is the enduring challenge of constitutional democracy, and it demands the best of our legal institutions.