

Offensive Speech and Constitutional Safeguards: An Indian Legal Analysis

Ms. Kanak Singh¹, Mr. Yatin Sharma²

^{1,2}Advocate, BA.LL.B (Hons.), LL.

ABSTRACT

Freedom of speech and expression under Article 19(1)(a) of the Constitution of India is a fundamental right essential for the functioning of a democratic society. However, this freedom is not absolute and is subject to reasonable restrictions under Article 19(2), particularly in cases involving hate speech and offensive expression. In recent years, the rise of political polarization, social media platforms, and mass communication has intensified debates around the limits of permissible speech and the need to curb expressions that threaten public order, morality, and social harmony.

This paper examines the legal and constitutional framework governing hate speech and offensive speech in India. It analyses statutory provisions such as Sections 196, 299, and 353 of the Bharatiya Nyaya Sanhita 2023, along with relevant constitutional principles. The study also explores landmark judicial pronouncements of the Supreme Court of India, including *Pravasi Bhalai Sangathan v. Union of India* (AIR 2014) and *Amish Devgan v. Union of India* (AIR 2020), to understand how courts have attempted to balance free expression with societal interests.

The paper argues that while regulation of hate speech is necessary to protect equality, dignity, and public order, vague definitions and inconsistent enforcement risk chilling legitimate speech and dissent. It concludes that a clear, narrowly tailored, and constitutionally consistent approach is required to address hate speech without undermining the democratic value of free expression. Strengthening judicial guidance and promoting responsible speech are essential to maintaining constitutional balance in a diverse society like India.

Keywords: Hate Speech, Freedom of Expression, Article 19(1)(a), Constitutional Limitations, India.

INTRODUCTION

The term "hate speech" does not have a universally accepted definition in jurisprudence, though it is generally understood as communication that attacks individuals or groups based on their identity characteristics—such as religion, race, ethnicity, caste, language, or place of birth. The Oxford English Dictionary defines hate speech as "public speech that expresses hate or violence towards a person or group based on attributes such as race, ethnicity, gender, religion, sexual orientation, or disability." [1] In the Indian context, the concept gained significant prominence in the late twentieth century as the nation grappled with communal violence and social fragmentation.

Freedom of speech and expression, protected under Article 19(1)(a) of the Indian Constitution, represents one of the foundational pillars of Indian democracy. This right was enshrined in the Constitution to protect democratic values, promote transparency in governance, and enable individuals to participate meaningfully in the political and social life of the nation. As Dr. B.R. Ambedkar, the principal architect of

the Indian Constitution, emphasized during the Constituent Assembly debates, freedom of speech is necessary for the proper functioning of a democratic system.[2]

However, the Constitution itself recognizes that this freedom cannot be absolute. Article 19(2) imposes reasonable restrictions on freedom of speech and expression in the interests of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, and in relation to contempt of court, defamation or incitement of an offence.[3] The existence of these restrictions reflects the constitutional framers' understanding that individual liberty must be balanced with collective societal interests.

In contemporary India, the challenge of regulating hate speech has become increasingly urgent. The proliferation of social media platforms, the intensity of political discourse, and the persistence of communal tensions have created an environment where hateful expressions can spread rapidly and cause significant social harm. Recent years have witnessed escalating incidents of hate speech targeting religious minorities, marginalized communities, and vulnerable groups. According to data compiled by the Association for Democratic Reforms, as of 2024, over 107 Indian lawmakers face hate speech cases, underscoring the prevalence of this phenomenon even at the highest levels of political discourse.[4]

This paper undertakes a comprehensive analytical examination of the legal and constitutional framework governing hate speech and offensive speech in India. It traces the evolution of constitutional protections and limitations on speech, examines statutory provisions introduced through the Bharatiya Nyaya Sanhita 2023, and analyzes landmark judicial precedents that have shaped the understanding of permissible speech boundaries. The paper specifically addresses the tension between protecting freedom of expression and preventing hate speech, exploring how Indian courts have navigated this constitutional challenge.

SECTION 1: DEFINITIONAL FRAMEWORK AND CONCEPTUAL FOUNDATIONS

1.1 Understanding Hate Speech: Legal and Philosophical Dimensions

Hate speech is not merely offensive speech; it represents a category of expression that carries the potential to incite violence, discrimination, or hostility against specific groups. The distinction between offensive speech and hate speech is critical to constitutional analysis. Offensive speech, while disagreeable or uncomfortable, may enjoy protection as legitimate political discourse or social commentary. Hate speech, by contrast, typically exhibits the following characteristics: (1) it targets individuals or groups based on immutable or quasiimmutable characteristics; (2) it is intended to, or has the effect of, dehumanizing or delegitimizing such groups; and (3) it creates conditions for discrimination or violence.[5]

In the Indian constitutional context, the concept of "public order," as understood through Article 19(2), has become the primary vehicle for restricting hate speech. Public order denotes a condition of peace and tranquility that permits the normal functioning of society. Significantly, the threshold for restricting speech under the public order ground is narrower than restrictions based on national security. The courts have held that mere offense or emotional distress is insufficient to restrict speech; rather, the expression must pose a clear and proximate threat to public order.

1.2 Etymological and Linguistic Considerations

The origin of "hate speech" as a legal concept can be traced to twentieth-century constitutional jurisprudence, particularly in democracies grappling with the aftermath of totalitarianism and genocide. In India, the concept emerged as a response to communal violence, particularly during the Partition and in subsequent periods of communal conflict. Unlike countries such as Germany and Canada, which have

explicit constitutional or statutory provisions addressing hate speech, India's approach has been evolutionary, developed through judicial interpretation of Article 19 and subsequent statutory enactments. The term "hate" itself carries significant weight. Hate, in the legal sense, implies a deliberate intention to cause harm, incite violence, or promote discrimination. This is distinct from mere criticism, however harsh or acerbic. The Indian Supreme Court has consistently held that satire, parody, and even caustic criticism, while potentially offensive, do not necessarily constitute hate speech if they serve the purpose of social commentary or political expression.[6]

SECTION 2: HISTORICAL EVOLUTION OF SPEECH REGULATION IN INDIA

2.1 Pre-Constitutional Jurisprudence

During the colonial period, the British Indian legal system inherited English common law principles governing sedition and libel. These principles were adapted to serve the purposes of colonial governance, resulting in laws such as Section 124-A of the Indian Penal Code (sedition clause), which was used extensively to suppress nationalist dissent and freedom struggle activities. The colonial approach to speech regulation prioritized state security and control over individual liberty.

However, even during the colonial period, Indian courts occasionally recognized principles of free expression. For instance, in the case of *Nuth Mull v. Zuka-Oolah Beg* (1855), the courts acknowledged the right to privacy and freedom from arbitrary state interference, demonstrating that proto-democratic principles existed even under colonial rule.[7]

2.2 Constitutional Recognition and the Constituent Assembly Debates

The Constituent Assembly of India engaged in extensive debates regarding the scope of freedom of speech and expression. Members of the Fundamental Rights Sub-Committee, including K.M. Munshi, proposed comprehensive protections for freedom of expression, including the right to criticize government policies and the right to access information.[8] Dr. B.R. Ambedkar emphasized the importance of this right for democratic governance and individual dignity.

However, even during these drafting stages, concerns were raised about the need to restrict speech that might threaten public order or communal harmony. The Constituent Assembly recognized that absolute freedom of speech was neither feasible nor desirable in a diverse society. Consequently, Article 19(2) was included in the Constitution, providing for reasonable restrictions on speech.[9]

Notably, the original draft Constitution included provisions for protecting private correspondence and preventing arbitrary searches and seizures. Some members advocated for explicit constitutional protection against hate speech and communal incitement. However, these specific provisions were not included in the final constitutional text, leaving the regulation of hate speech to be developed through statutory law and judicial interpretation.

SECTION 3: CONSTITUTIONAL FRAMEWORK GOVERNING SPEECH REGULATION

3.1 Article 19(1)(a): The Fundamental Right

Article 19(1)(a) of the Indian Constitution provides that all citizens shall have the right to freedom of speech and expression. This right is recognized as a fundamental right, signifying its constitutional importance and the constitutional scrutiny applicable to any laws restricting it.

The fundamental right to freedom of speech and expression encompasses several dimensions:

1. **Political Speech:** The right to criticize government policies, engage in political discourse, and participate in democratic processes.[10]

2. **Press Freedom:** The right of the press to publish news, express opinions, and serve as a watchdog on governmental functioning.[11]
3. **Artistic Expression:** The right to create and express artistic content, including literature, cinema, and visual arts.[12]
4. **Academic and Scientific Expression:** The right to conduct and publish research, engage in scholarly debate, and advance knowledge.[13]
5. **Social Commentary:** The right to engage in social criticism, satire, and commentary on prevailing social conditions.[14]

The Supreme Court has repeatedly held that Article 19(1)(a) is not limited to political speech but extends to the entire spectrum of human expression, reflecting the democratic principle that individuals should have autonomy in expressing their thoughts, opinions, and ideas.

3.2 Article 19(2): Reasonable Restrictions Framework

Article 19(2) provides that the freedom guaranteed by Article 19(1)(a) can be restricted by law in the interests of:

- Sovereignty and integrity of India
- Security of the State
- Friendly relations with foreign States
- Public Order
- Decency or Morality
- Contempt of court
- Defamation
- Incitement of an offence

The concept of "reasonable restrictions" was explained in *A.K. Gopalan v. State of Madras* (1950), wherein the Supreme Court held that restriction must be "reasonable" in the sense that it must satisfy the test of necessity and proportionality.[15] Later cases have developed the doctrine further, establishing that restrictions must be:

1. **Prescribed by Law:** The restriction must be imposed through a validly enacted law, not arbitrary executive action.
2. **Narrowly Tailored:** The restriction must be proportionate to the legitimate objective it seeks to achieve.
3. **Targeted at Specific Harms:** The restriction must focus on preventing clearly identifiable harms (such as public disorder or violence), not on mere offense or disagreement.
4. **Non-Discriminatory:** The restriction must apply evenhandedly without targeting specific viewpoints or speakers based on their identity or ideology.

3.3 The "Public Order" Ground: Primary Framework for Hate Speech Regulation

Among the grounds enumerated in Article 19(2), the "public order" exception has been the primary basis for restricting hate speech in India. Public order is a more specific concept than national security and refers to the state of tranquility necessary for the normal functioning of society. A crucial principle established through case law is that mere emotional distress, offense, or social disagreement is insufficient to restrict speech; rather, the expression must pose a clear and proximate danger to public order.

In *Arup Bhuyan v. State of Assam* (2011), the Supreme Court held that expression could only be restricted when it amounts to "incitement to imminent lawlessness." [16] This high threshold reflects the constitutional commitment to protecting speech even when it is disagreeable or provocative.

SECTION 4: STATUTORY FRAMEWORK: BHARATIYA NYAYA SANHITA 2023

The Bharatiya Nyaya Sanhita (BNS) 2023 replaced the Indian Penal Code and contains several provisions specifically addressing hate speech and offensive expression. The most directly applicable provisions are:

4.1 Section 196: Promoting Disharmony Based on Religion, Race, Caste, etc.

Section 196 of the BNS provides:

"Whoever—

- 1. by words, either spoken or written or by signs or by visible representations or through electronic communication or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities; or*
- 2. commits or conspires to commit any act which is prejudicial to the maintenance of harmony or the integrity of such groups or communities, and which disturbs or is likely to disturb the public peace; or*
- 3. organises, plans, prepares for, promotes, or attempts to organise, plan, or prepare for any act which is intended by him, or which he knows to be likely, to cause fear or alarm to any group or community on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever—*

shall be punished with imprisonment which may extend to five years, or with fine which may extend to one lakh rupees, or with both."[17]

Key Features of Section 196:

- Broad Definitional Scope:** The section covers a wide range of discriminatory grounds, including religion, race, caste, language, place of birth, and "any other ground whatsoever."
- Multiple Forms of Expression Covered:** The section encompasses spoken words, written communications, signs, visual representations, and electronic communications, reflecting the legislator's awareness of modern communication technologies.
- Intent and Effect Standard:** The section covers both intentional promotion of disharmony ("promotes or attempts to promote") and actual disturbance of public harmony.
- Graduated Conduct:** The section addresses three levels of conduct—promoting disharmony, committing prejudicial acts, and organizing preparatory activities—reflecting the legislator's concern with incitement and instigation.

Constitutional Concerns with Section 196:

Despite its comprehensive nature, Section 196 raises significant constitutional concerns:

- Vagueness:** Terms such as "disharmony," "ill-will," and "any other ground whatsoever" are susceptible to broad interpretation and may capture legitimate speech that does not pose a clear threat to public order.
- Subjective Application:** The provision depends heavily on the subjective determination of what constitutes "disharmony" or "hatred," creating potential for selective enforcement based on political considerations.
- Proportionality Questions:** The punishment (up to five years imprisonment) may be disproportionate to expressions that cause offense but pose no real threat to public order.

4.2 Section 299: Hate Crimes

Section 299 of the BNS provides enhanced punishment for crimes motivated by hatred based on protected

characteristics. This provision recognizes that crimes committed with a hate motivation warrant greater punishment than comparable crimes without such motivation.

4.3 Section 353: Criminal Force to Deter Public Servant

While not directly addressing hate speech, Section 353 has been applied in contexts involving offensive speech directed at public officials and police officers.

SECTION 5: JUDICIAL INTERPRETATION AND LANDMARK CASES

5.1 Pravasi Bhalai Sangathan v. Union of India (2014) 11 SCC 677

In this landmark case, the Supreme Court was petitioned to issue directions stopping the practice of hate speech and to establish guidelines for determining when speech constitutes hate speech. The petitioner argued that existing laws were insufficient to combat hate speech and that comprehensive legislative or judicial intervention was necessary.

The Supreme Court's response in this case reflected judicial caution regarding the regulation of speech. While acknowledging the seriousness of hate speech, the Court did not issue sweeping declarations or establish detailed guidelines for what constitutes hate speech. Instead, the Court held that existing legal provisions were adequate to address hate speech and that the primary responsibility lay with law enforcement agencies to enforce these provisions effectively.

Key Judicial Observations:

1. The Court recognized the pernicious nature of hate speech in a diverse democracy like India.
2. The Court acknowledged that hate speech can incite violence and undermine social harmony.
3. The Court emphasized that regulation of hate speech must be balanced against the need to protect legitimate expression.
4. The Court declined to establish new legal standards, deferring to existing statutory provisions and the good faith enforcement efforts of executive authorities.

Constitutional Significance:

The Pravasi Bhalai Sangathan decision reflected the Supreme Court's recognition of the difficulty inherent in regulating hate speech without chilling legitimate expression. The decision signaled that while courts are prepared to protect against genuinely dangerous speech, they will not expand the scope of hate speech restrictions beyond what existing law provides.

5.2 Amish Devgan v. Union of India 2020 SCC OnLine SC 994

This case involved Amish Devgan, a television journalist and debate moderator, who during a televised debate intentionally insulted a Pir (a revered Muslim saint), using derogatory language. The expression was directed at a historically and religiously significant figure revered across religious communities. Criminal proceedings were initiated under Section 153A of the Indian Penal Code (then applicable; now addressed under Section 196 of the BNS).

Devgan filed a writ petition before the Supreme Court seeking dismissal of the criminal proceedings. The petition argued that his statement constituted protected political and social commentary that should not be criminalized.

The Supreme Court's Analysis:

The Supreme Court conducted a thorough examination of hate speech jurisprudence, considering both Indian jurisprudence and comparative law. The Court held:

1. **Hate Speech Definition:** "Hate speech has no valid or redeeming motive other than hostility for a specific group." [18] This definition distinguished genuine hate speech from commentary that, while

harsh or offensive, serves a legitimate communicative purpose.

2. **Intent Analysis:** The Court examined whether Devgan's statement was made with the intention to promote communal hatred or was rather an expression of social criticism or political opinion.
3. **Contextual Analysis:** The Court considered the context in which the statement was made, including the medium (televised debate), the audience, and the surrounding discussion.
4. **Precedent on Article 19(1)(a):** The Court reiterated that Article 19(1)(a) protects robust, energetic, and even acerbic criticism, provided such criticism is not designed solely to promote hatred against a group.

Court's Decision:

The Supreme Court refused to grant relief to Devgan, holding that the criminal proceedings could continue. However, the Court's reasoning clarified important principles:

1. Speech targeting specific individuals, however harsh, may constitute hate speech if it is designed to promote communal hatred.
2. The historical and religious significance of the person targeted is a relevant consideration in determining whether the expression crosses the threshold from criticism to hate speech.
3. Even criticism in the context of democratic debate is not absolutely protected if it is designed to incite communal violence.

Critical Analysis:

While the Court's decision upheld the criminalization of Devgan's statement, the judgment provided important guidance on distinguishing hate speech from protected expression. The emphasis on "intent" and the focus on whether the expression was designed solely to promote "hostility" rather than serve a communicative purpose reflects a principled approach to hate speech regulation that respects constitutional protections on speech.

5.3 S. Khushboo v. Kannan Padmanabn (2010) 5 SCC 600

In this case, the Supreme Court examined the balance between freedom of speech and the suppression of speech that violates societal moral standards. The case involved an actress who made statements about pre-marital relationships and sexuality. The Court held that while her statements were controversial and contrary to traditional social values, they were protected as expressions of personal opinion on social issues.

Relevant Principles:

This case established that controversial or morally disagreeable speech is not automatically criminalized. The Court distinguished between moral offense and harm to public order, holding that the former does not justify restriction on speech under Article 19(2).

5.4 Shreya Singhal v. Union of India 2015 SCC OnLine SC 248 and (2015) 5 SCC 1

This landmark case struck down Section 66-A of the Information Technology Act, which had been widely used to criminalize offensive speech on social media. The Supreme Court held that the provision was unconstitutionally vague and had been applied to criminalize legitimate criticism, satire, and social commentary.

Key Holdings:

1. **Vagueness Doctrine:** Section 66-A was struck down on grounds that it was vague and overbroad, capturing protected speech.
2. **Chilling Effect:** The provision had a substantial chilling effect on free speech, causing individuals to self-censor legitimate expression.

3. **Proportionality:** Even if the provision addressed a legitimate objective (preventing genuinely dangerous speech), it was not narrowly tailored and was disproportionate. **Significance for Hate Speech Regulation:**

The Shreya Singhal decision established that while hate speech regulation is constitutionally permissible, the law must be clearly drafted to capture only genuinely dangerous speech, not all offensive or disagreeable expression. This principle applies directly to the interpretation of new provisions like Section 196 of the BNS.

SECTION 6: THE TENSION BETWEEN FREE EXPRESSION AND HATE SPEECH REGULATION

6.1 The Chilling Effect Problem

One of the most significant challenges in regulating hate speech is the risk of a "chilling effect"—the tendency of individuals to self-censor and refrain from legitimate expression out of fear of legal consequences. When hate speech laws are vague or overly broad, they may deter individuals from engaging in protected forms of expression, including political criticism, social commentary, and artistic expression.

In *Shreya Singhal v. Union of India*, the Supreme Court explicitly considered the chilling effect problem. The Court noted that individuals faced with vague criminal liability for speech might refrain from engaging in legitimate expression to avoid legal jeopardy. This undermines the democratic value of freedom of expression, which depends on individuals feeling secure in expressing their views.

6.2 The Problem of Definitional Clarity

Hate speech laws depend on clear definitions of what constitutes prohibited expression. Terms such as "disharmony," "hatred," and "ill-will" are inherently subjective and contextdependent. What constitutes "disharmony" between religious groups in one context may be considered legitimate political discourse in another context.

The Indian Supreme Court has recognized this problem in various cases. The Court has held that subjective standards that depend on the feelings of specific groups are insufficient to justify restriction on speech. Rather, restrictions must be based on objective criteria—such as the likelihood of imminent violence or disruption of public order.

6.3 The Countermajoritarian Paradox

In a diverse democracy like India, where multiple religious, cultural, and linguistic communities coexist, hate speech regulation faces a particular challenge: the potential for use by majoritarian communities to suppress the voice of minorities. There is a documented risk that hate speech laws can be selectively enforced against members of minority communities while being applied leniently against members of majority communities.

This concern reflects a fundamental tension in democracy: the need to protect minorities through law while ensuring that law enforcement does not become a tool of majoritarian oppression. The Indian Supreme Court has recognized this risk and has demanded rigorous scrutiny of governmental action purporting to enforce hate speech laws.

6.4 The Empirical Question: Does Hate Speech Regulation Prevent Violence?

An important empirical question underlying hate speech regulation concerns its actual effectiveness in preventing violence and maintaining public order. Critics argue that criminal prohibition of hate speech does not address the underlying social tensions and communal divisions that facilitate violence. Rather,

addressing hate speech may require broader social, educational, and political reforms.

Proponents of hate speech regulation, however, argue that criminal law has both a deterrent effect and a communicative function—it signals societal disapproval of hate speech and may reduce its prevalence, thereby reducing opportunities for it to incite violence.

SECTION 7: COMPARATIVE PERSPECTIVES AND INTERNATIONAL STANDARDS

7.1 The European Approach

The European Union and its member states, informed by the experience of Nazi totalitarianism, have adopted relatively stringent hate speech restrictions. Many European countries, including Germany and France, maintain criminal prohibitions on Holocaust denial and incitement to violence based on protected characteristics.

The European Court of Human Rights has held that hate speech regulation is compatible with Article 10 of the European Convention on Human Rights (freedom of expression), provided the regulation is necessary for protecting the rights of others and maintaining public order.

Key European Principles:

1. Hate speech must be defined with reasonable specificity.
2. The regulation must be justified by a legitimate aim (such as protecting the rights of minority groups).
3. The regulation must be proportionate to the legitimate aim.
4. The regulation should not be used to suppress political opposition or legitimate criticism.

7.2 The American Approach

The United States, informed by its constitutional history and commitment to free speech absolutism, has adopted a more permissive approach to hate speech regulation. The First Amendment to the U.S. Constitution provides broad protection to speech, and hate speech is generally protected unless it falls within narrow categories such as "incitement to imminent lawless action" or "true threats."

The American approach reflects a judgment that in a diverse democracy, the dangers of speech suppression exceed the dangers of permitting hateful speech. Critics of this approach argue it fails to adequately protect minority groups from the harms of hate speech, while proponents argue that suppression of speech poses greater risks to democracy.

Key American Principles:

1. Speech is protected even if it is offensive or expresses hatred.
2. Restrictions on speech must be content-neutral and apply to all speech equally.
3. Restrictions on speech must be narrowly tailored to prevent imminent harm.
4. Authorities should not suppress speech merely because they disagree with its message.

7.3 Relevance to Indian Constitutional Context

India's approach to hate speech regulation must reflect its own constitutional values and democratic traditions rather than simply adopting either the European or American model. However, comparative experience provides valuable insights:

1. The need for clear, specific definitions to avoid vagueness and overbreadth.
2. The importance of protecting speech even when it is offensive or promotes controversial ideas.
3. The risk that hate speech regulation can become a tool of majoritarian oppression in diverse societies.
4. The necessity of balancing minority protection with majority expression rights.

SECTION 8: CURRENT CHALLENGES AND AREAS OF INCONSISTENCY

8.1 Lack of Consistent Judicial Guidance

One of the significant problems in current Indian jurisprudence on hate speech is the absence of consistent guidance on what constitutes prohibited hate speech. While individual cases have established principles, there is no comprehensive framework comparable to the doctrines developed in other areas of constitutional law.

The Supreme Court has called for clarity on hate speech standards but has not yet established definitive guidelines. The result is that lower courts and law enforcement agencies operate with considerable discretion, leading to inconsistent application of hate speech laws.

8.2 The Role of Online Platforms and Social Media

Contemporary hate speech increasingly occurs on social media platforms and online forums. These platforms present particular challenges:

1. **Scale:** Hateful content can reach massive audiences instantly.
2. **Anonymity:** Online anonymity may embolden individuals to express more extreme views.
3. **Algorithmic Amplification:** Platform algorithms may amplify divisive content that generates engagement.
4. **Jurisdictional Issues:** Online content may cross national borders, raising questions about which jurisdiction's laws apply.

Current Indian laws, including Section 196 of the BNS, address online hate speech, but their application to the unique features of social media remains an ongoing area of legal development.

8.3 The Problem of Political Speech

A particular area of tension concerns hate speech expressed in political contexts. Political campaigns in India have increasingly involved divisive rhetoric targeting specific religious or ethnic groups. The question of whether such political speech constitutes impermissible hate speech or protected political expression remains contested.

The Supreme Court has held that even harsh political criticism is protected, but it has not clearly delineated where protected political speech ends and impermissible hate speech begins. This ambiguity creates uncertainty for political actors and risks either oversuppression of legitimate political speech or under-enforcement of hate speech laws.

8.4 Enforcement and Procedural Issues

Even when hate speech laws are constitutionally sound, enforcement issues arise:

1. **Selective Prosecution:** There is documented evidence that hate speech laws are applied more frequently against speakers from minority communities or political opposition groups.
2. **Police Discretion:** Police have considerable discretion in determining whether to file cases under hate speech provisions, and this discretion may be exercised in politically partisan ways.
3. **Investigative Standards:** There are inadequate standards for how police should investigate hate speech cases, including assessing the context of the speech and the intent of the speaker.
4. **Burden on Courts:** The volume of hate speech cases threatens to overwhelm the judicial system, diverting resources from other important matters.

SECTION 9: CONSTRUCTING A CONSTITUTIONALLY COHERENT FRAMEWORK

9.1 Principles for Coherent Hate Speech Regulation

Based on constitutional principles, comparative law, and Indian jurisprudence, the following principles sh-

ould guide hate speech regulation:

1. **Clarity and Specificity:** Hate speech laws must be clearly defined to provide fair notice of prohibited conduct. Terms such as "disharmony," "ill-will," and "hatred" should be defined with reference to objective criteria relating to likelihood of violence or disruption of public order, not subjective emotional responses.
2. **Narrowly Tailored Restrictions:** Restrictions on speech must be narrowly tailored to prevent clearly identifiable harms (such as imminent violence or serious public disorder), not broad categories of disagreeable or offensive speech.
3. **High Threshold for Restriction:** Consistent with international human rights standards and American constitutional law, the threshold for restricting speech should be high. Speech should not be restricted merely because it offends or causes emotional distress; rather, there must be a substantial likelihood of imminent harm to public order.
4. **Protection for Political and Social Commentary:** Even harsh criticism of religions, political ideologies, or social practices should be protected. The question should be whether the speech is designed to incite violence or discrimination, not whether it criticizes or offends.
5. **Context-Sensitive Application:** In determining whether speech constitutes impermissible hate speech, courts must consider the full context, including:
 - The medium of communication
 - The intended audience
 - The broader political and social context
 - The intent of the speaker
 - Whether the speaker is engaged in political or social commentary
 - Whether the speech contains elements of satire or parody

6. Safeguards Against Selective Enforcement

Given the risk that hate speech laws may be used selectively against minority groups or political opposition, strong procedural safeguards are necessary:

- Judicial review of police decisions to file hate speech cases
- Requirement that prosecutors justify hate speech charges with reference to specific legal standards
- Regular monitoring of enforcement patterns to identify selective prosecution
- Appeals rights allowing review of convictions for hate speech

7. Remedies Beyond Criminalization

While criminal law has a role to play, a comprehensive approach to hate speech should also include:

- Civil remedies such as injunctions and damages
- Administrative remedies such as removal of content from platforms
- Educational initiatives to promote tolerance and counter hate speech
- Community dialogue and reconciliation efforts

9.2 Proposed Judicial Doctrine: The "Incitement to Imminent Lawlessness" Test

Drawing on American constitutional jurisprudence, the Supreme Court should consider adopting a clear test for determining when speech constitutes impermissible hate speech. The test might be formulated as follows:

Speech constitutes impermissible hate speech subject to restriction under Article 19(2) (public order ground) only where:

1. **the speech is directed to inciting or producing imminent lawless action; and**
2. **it is likely to incite or produce such action; and**
3. **the speaker intends to incite lawless action.**

This test, adapted from *Brandenburg v. Ohio* (1969) in American jurisprudence, provides a clear, objective standard that distinguishes between protected expression (even if offensive) and genuinely dangerous speech. The requirement of imminence ensures that speculative or remote harms do not justify speech restriction. The requirement of intent ensures that the speaker's purpose is relevant to determining whether restriction is justified.

Advantages of This Test:

1. **Clarity:** The test provides clear guidance to courts, law enforcement, and citizens about what constitutes prohibited speech.
2. **Protection of Legitimate Expression:** The test protects even harsh, offensive, and highly critical speech from restriction.
3. **Prevention of Chilling Effects:** By providing clear guidance, the test reduces the chilling effect of hate speech laws.
4. **Consistency:** The test provides a principled basis for consistent enforcement across different cases and different speakers.
5. **Constitutional Fidelity:** The test respects the high value placed on freedom of expression in the Indian Constitution.

9.3 Role of Other Institutions Beyond Courts

Comprehensive regulation of hate speech requires not only legal reform but also action by other institutions:

Role of Executive Agencies:

- Development of clear guidelines for police investigation and prosecution of hate speech cases
- Training of law enforcement officers on constitutional principles governing free speech
- Monitoring of enforcement patterns to ensure non-discriminatory application
- Coordination with social media platforms to address online hate speech

Role of Educational Institutions:

- Inclusion of media literacy and critical thinking in school curricula to help students evaluate hateful claims
 - Education about the history of communal violence and its relation to hate speech
 - Promotion of intercommunal dialogue and understanding
- ##### **Role of Media and Civil Society:**
- Promotion of responsible journalism that reports on communal issues without inflammatory language
 - Community engagement and dialogue initiatives to reduce tensions
 - Independent monitoring of hate speech enforcement to identify patterns of selective prosecution

Role of Religious and Community Leaders:

- Use of religious and cultural authority to promote tolerance and discourage hate speech
- Community responses to hate speech that affirm shared values and common humanity
- Leadership in post-violence reconciliation efforts

SECTION 10: SPECIAL CHALLENGES AND EMERGING ISSUES

10.1 Hate Speech During Elections

Elections in India involve intense political competition and speech. Candidates and political parties often engage in divisive rhetoric targeting specific religious or ethnic communities. The question of whether such speech constitutes impermissible hate speech or protected political expression is frequently litigated. The Election Commission of India has attempted to regulate hate speech during elections through the Model Code of Conduct, but the relationship between electoral regulations and constitutional protections on speech remains unclear. The Supreme Court has recognized the need to protect robust political discourse during elections while preventing genuinely dangerous speech designed to incite violence.

10.2 Hate Speech Against Women and LGBTQ+ Communities

While Section 196 addresses hate speech based on religion, race, and caste, it does not explicitly address hate speech targeting women or LGBTQ+ communities. The growth of misogynistic and homophobic hate speech, particularly on social media, raises questions about whether existing legal frameworks adequately protect vulnerable groups.

10.3 Fact-Based Critique vs. Hate Speech

A challenging issue concerns statements that, while factually accurate, are presented in ways designed to promote hatred against a group. For example, accurate statistics about crime rates of specific groups, if presented selectively and with the intent to incite discrimination, might constitute hate speech. However, the legitimate reporting of factual information should not be criminalized.

10.4 Cultural Expression and Religious Sensitivity

The relationship between freedom of artistic and cultural expression and protection against religiously offensive speech remains contested. Cases involving literature, cinema, and other art forms frequently raise questions about the proper balance between artistic freedom and respect for religious beliefs.

CONCLUSION

The regulation of hate speech in India presents a fundamental constitutional challenge: the need to protect vulnerable groups from the harms of hate speech while preserving the core democratic value of freedom of expression. The paper has examined the constitutional framework governing speech, the statutory provisions addressing hate speech, and the judicial interpretation of these provisions.

Several conclusions emerge from this analysis:

First, Hate Speech Regulation is Constitutionally Permissible but Requires Clear Limits

Article 19(2) of the Constitution permits reasonable restrictions on speech in the interest of public order. Hate speech—expression designed to incite violence or discrimination against groups based on protected characteristics—is a legitimate target of regulation. However, consistent with constitutional principles and comparative jurisprudence, such regulation must be clearly defined and narrowly tailored. Vague provisions that capture offensive or disagreeable speech pose risks to legitimate expression and democratic discourse.

Second, Judicial Guidance is Essential

The Supreme Court should provide clearer guidance on what constitutes impermissible hate speech. While individual cases have established principles, there is no comprehensive doctrine comparable to what exists in other constitutional areas. The adoption of a clear test—such as the "incitement to imminent lawlessness" standard—would enhance consistency and reduce the chilling effect of hate speech laws.

Third, Enforcement Must Be Non-Discriminatory and Transparent

Even well-designed hate speech laws may become instruments of oppression if enforcement is selective or discriminatory. Strong procedural safeguards, independent monitoring, and judicial review of enforcement decisions are essential to prevent misuse of hate speech laws against minority groups or political opponents.

Fourth, Comprehensive Approaches are Required

While criminal law has a role to play, addressing hate speech requires a comprehensive approach involving education, community engagement, responsible media practice, and leadership from religious and community leaders. Legal measures alone cannot create the social conditions necessary for coexistence in a diverse society.

Fifth, Democratic Values Must Remain Central

In regulating hate speech, Indian democracy must remain faithful to its foundational commitment to freedom of expression and individual dignity. This means protecting even harsh, offensive, and highly critical speech from restriction, while drawing a clear line at speech designed to incite violence or discrimination. The challenge is to find this balance without either failing to protect vulnerable groups from genuine harms or suppressing legitimate democratic discourse.

The path forward requires sustained engagement with difficult constitutional questions, willingness to learn from comparative constitutional experiences, commitment to transparent and non-discriminatory enforcement, and recognition that the ultimate goal is not merely the suppression of hate speech but the creation of social conditions in which diverse communities can coexist peacefully and with mutual respect. In a diverse democracy like India, with its history of communal violence and its commitment to constitutional democracy, getting the balance right between protecting freedom of expression and preventing hate speech is essential. This balance must be achieved through clear law, principled judicial interpretation, fair enforcement, and comprehensive social strategies. Only through this multifaceted approach can India maintain constitutional democracy while protecting the rights and dignity of all its citizens.

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