

Constitutional Silence, Judicial Voice: Hate Speech Regulation and the Limits of Free Speech In India



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Abstract

Hate speeches are on rise and so is the division in the society but what is more surprising is the fact that the courts and parliament have not made any endeavour so far to directly deal with the issue of hate speech. Nevertheless, it has come to be recognised by way of construction as a limitation on the free speech going against the dictates of the settled law. This paper argues that such a course is not permissible and any restriction imposed on free speech should be specifically mentioned under the Article 19(2) of the Constitution. To argue on this contention, a mixed approach is adopted. The paper points out at the nuance of construction as to how hate speech criminalisation is justified which suffers from an inherent infirmity. The infirmity is explained in the paper with the help of case laws. The paper, further, argues that if hate speech is to be recognised then an amendment is inevitable and it cannot be done by way of construction. The said research gap has not been covered critically and more so with the help of case laws.

Key Words: *Free Speech, Hate Speech, Limitation, Construction, Constitution.*

I. Introduction

The term “Hate Speech” has become a buzz word in India lately and its use has become more and more with the passage of time, although the word is not of recent origin. Largely, it affects the human rights and dignity of the community itself, which has been targeted, and thereby the individuals belonging to those communities, besides persons belonging to the minority or group as those directly targeted. Hate speech is not only dangerous but

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it is divisive as well in any society as it threatens the very fabric of the democracy by affecting inclusion and effective participation of those who have been the targets. Since, any act of hate or division would erode the trust of the people and they would voluntarily be forced out of the public debate and silenced.¹ The term hate speech itself is of wide import and it includes various meanings within its fold – the Law Commission of India has attempted to define it in these terms – “Hate speech is an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them.”²

It is an undoubted fact in the contemporary times that not only hate speech dominates public discourse but it holds equally true in the field of litigation nevertheless it is important to keep in mind that Article 19(2)³ of the Constitution of India doesn't mention any such word. In the field of litigation, there have been many cases dealing with hate speech in recent times like - *Amish Devgan*⁴, *Ashwini Upadhyaya*, *Kaushal Kishor*⁵. In recent times, politicians are accused of making hate speech against one community or group for fulfilling their political motives. They are also accused of polarising the society as an effect of such speeches. However, so far no noticeable action has been taken but cases like the abovementioned have reached the highest courts in India which shows the gravity of these hate speeches.

Thus, a clear gap exists at the moment with regards to the constitutional text and regulatory practices. Since, it is an admitted position that hate speech does not form part of Article 19(2) of the Constitution. However, it is argued that the hate speech can be read into the existing restrictions like law and order etc. which is nothing more than interpretation of the said text and in light of *Kaushal Kishor* judgement which says that the restrictions mentioned

¹What is hate speech and why is it a problem? available at: <https://www.coe.int/en/web/combatting-hate-speech/what-is-hate-speech-and-why-is-it-a-problem-> (last visited on Feb 01, 2026).

²The Law Commission of India, “267th Report on Hate Speech” 15 (March, 2017).

³The Constitution of India, Art. 19(2): “Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”

⁴*Amish Devgan v. Union of India*, (2021) 1 SCC 1.

⁵*Kaushal Kishor v. State of U.P.*, (2023) 4 SCC 1.



under sub clause(2) of Article 19 of the Constitution is exhaustive in nature.⁶This would also be in coherence with the judgements like *Romesh Thapar*⁷ and *Brij Bhushan*⁸ which struck down the provision of the assailed statutes on the ground that said restriction doesn't form part of the restrictions mentioned under Article 19(2). Thus, what naturally flows from these judgements is that no restriction can be placed in the name of hate speech without it being actually incorporated under the constitutional text by way of an amendment.

The objective of this research paper is to underline the fact that the freedom of speech and expression as mentioned under Article 19(1)(a) of the Constitution of India should not be trampled with, without any strict textual reference in this regard. Further, the fact that India had to fight a long battle to get what lawfully belonged to her in the first place. The experiences of those people who have fought hard to gain Independence were broadly of the view that in an Independent India everyone would have the right to express their mind without any fear or favour. The constitutional forefathers were mindful of the very fabric of the nation at that stage where India just got its Independence and the restrictions mentioned under Article 19(2), as it existed originally, was the reflection of that mindset. That in a sense underlined the basic argument that free speech is the rule and limitation, if any, needs to be categorically mentioned in the constitutional text.

II. Free Speech under Article 19(1)(a): Core, Value and Limits

The article clearly stipulates that “(1) All citizens shall have the right – (a) to freedom of speech and expression;” meaning thereby that people of India have the right to freely express themselves but it is important to note that the said freedom is not absolute. A similar provision with respect to this has been mentioned under the Preamble of the Constitution whereby “Liberty” in the form of thought, expression, belief, faith and worship are ensured to the people of this country i.e., India. Both these mandates that free expression is ensured to every citizenry without any prejudice in a democratic government like India.

Freedom of speech is the bulwark of democratic government. This freedom is not only essential for the proper functioning of the democratic process, but it should be understood as the first condition of liberty. In a hierarchy of liberty, this holds the top place as it also affords aid and protection

⁶Ibid.

⁷*Romesh Thapar v. State of Madras*, 1950 SCC 436.

⁸*Brij Bhushan v. State of Delhi*, 1950 SCC 449.



to other liberties. The significance of this can be understood by the simple fact that this liberty is often touted as the mother of all other liberties.⁹ In a democracy like ours, this right acts as the opening gate where wide-ranging issues are freely discussed to form public opinion on any given issue be it social, political and economic matters. With the passage of time, the interpretation which has come to be ascribed to this freedom cannot be called narrow in any sense but it has been described broadly as a “basic human right”, “natural right” and the like. It incorporates, within its fold, propagation and interchange of ideas freely, besides free flow of information to aid formation of one’s opinion and viewpoint and on that basis can engage in debates on matters of public concern.¹⁰

Political speeches, in this regard, forms a different class and it incorporates within its fold such “speeches relating to government policies” that forms the basis for “preservation and promotion of democracy.”¹¹ These speeches are different from the one where “dissent and criticism of the elected government’s policy, when puissant, deceptive or even false would be ethically wrong” but such speech would not be penalised.¹² Thus, political speech is considered at a higher pedestal in a democratic structure like India, where the people associated with them should weigh their speech before they speak as they have a larger audience and things they speak amplifies and reaches a larger audience.

The restrictions attached to “free speech and expression” must be construed narrowly as the makers of the Indian Constitution had to live through such times where they could not object to the rule of foreign rulers in the country and it is important that the voices must be protected as J.S. Mill has said:

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.¹³

The free speech principle is guided by the plurality of opinion to mean that even a speech which is ‘vehement, caustic, and sometimes unpleasantly sharp’ is protected from State intervention.¹⁴ However, what is being done

⁹I, Report of the Second Press Comm, 34-35.

¹⁰Union of India v. Naveen Jindal, (2004) 2 SCC 510.

¹¹*Supra* note 4.

¹²*Ibid.*

¹³J.S. Mill, On Liberty and Utilitarianism 4 (Bantem Classics, New York, 2008).

¹⁴*Supra* note 2.



in the case of hate speech is that, firstly it has been associated with human dignity to mean that hate speech lowers human dignity and even at this stage it could not come under the above said limitation. The Supreme Court drew a different parallel that dignity of individual and unity and integrity of the nation are linked. The linkage is on the basis of the fact that the former is a right of an individual whereas the latter is an obligation upon the individual to ensure unity and integrity of the nation. Further, it was observed that if there would be intent to disrupt public order or to demean dignity of targeted groups then in that case it would be justified to act as per the law.¹⁵In all these, the Supreme Court has failed to take note of the fact that individuals and groups are different and at the moment the hate speech doesn't target an individual but a group. Furthermore, such a reading goes against the very grain of the constitution as this is what was decided in the cases like *Romesh Thapar* where the case involved a challenge to Section 9(1-A) of the Madras Maintenance of Public Order Act, which authorized the government to ban publications that threatened public safety or order. The Court struck down this provision as unconstitutional, holding that Article 19(2) as originally enacted permitted restrictions on free speech only where it undermined the security of the State, not for maintaining public order.¹⁶This approach should have been followed by the Apex court of this country while dealing with the issue of free speech as the endeavour should be in the favour of protecting speeches as has been promised under the Constitution under Article 19(1)(a). Any restriction, based on which the endeavour is being made to prohibit speech should be clearly traceable to Article 19(2). As it was clearly held in *Kaushal Kishor* that –

The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other Fundamental Rights or under the guise of two fundamental rights taking a competing claim against each other, additional restriction not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual.¹⁷

What is surprising from the aforesaid ratio is the fact that it has been clearly stated that to invoke other fundamental rights no restriction which does not actually form part of the said provision can be read into it. Now, for recognising hate speech what they did was they first linked it with human dignity and only thereafter it was linked with unity and integrity and then

¹⁵*Supra* note 5.

¹⁶*Supra* note 7.

¹⁷*Supra* note 5.



that was further linked was public order. So, what is happening here is that human dignity comes under the ambit of Article 21 and on that basis, the finding of the court in recognising it as hate speech would not be sustainable anymore and that is what the court have failed to notice, thus far.

III. Hate Speech in Indian Law: A Concept without a Constitutional Home

This is an acceptable position in the field of law that the term “hate speech” has neither been defined in the Indian laws nor does the law which are recognised as hate speech laws specifically mentions the term as hate speech. The Constitution does not define hate speech nor does it mention it even at one place in the whole text. The conspicuous absence seems deliberate as the makers of the Constitution were visionary and they must have thought of this in light of their lived experience to mean that presence of such a term might water down their intention in giving the citizen with free speech.

The Law Commission of India in its report on “Hate Speech” has recognised that the following laws have bearing on the hate speech, they are as follows¹⁸:

Act/Statute	Relevant Provisions
1. The Indian Penal Code, 1860 (Act No. 45 of 1860). ¹⁹	Ss. 124A, 153A, 153B, 295A, 298 and 505(1) & (2).
2. The Representation of People Act, 1951 (Act No. 43 of 1951).	Ss. 8, 123(3A) and 125.
3. The Protection of Civil Rights Act, 1955 (Act No. 22 of 1955).	Section 7.
4. The Religious Institution (Prevention of Misuse) Act, 1988 (Act No. 41 of 1988).	Section 3(g).
5. The Cable Television Network Regulation Act, 1955 (Act No. 7 of 1955).	Ss. 5 and 6.
6. The Cinematograph Act, 1952 (Act No. 37 of 1952).	Ss. 4, 5B and 7.
7. The Code of Criminal Procedure, 1973 (Act No. 2 of 1974). ¹	Ss. 95, 107 and 144.

One important thing in this regard is that all these legislations have been said to have some bearing on hate speech but on what basis could these restrictions be justified is missing completely.

¹⁸*Supra* note 2 at pp. 5-8.

¹⁹ Please refer the Bharatiya Nagrik Suraksha Sanhita, 2023 (Act No. 46 of 2023) Ss. 98, 126 and 163.



The Judiciary has been approached to deal with the issue from time to time but the court has been reluctant in view of judicial restraint. The Supreme court had observed that “the mode of exercise of free speech, the context and the extent of abuse of freedoms” are the factors based on which “contours of permissible restrictions” are determined. The court agreed to the view of the Commission in this regard “that laying down a definite standard might lead to curtailment of free speech.” This has been the prime reason that the courts have refrained themselves from defining hate speech in India. Nonetheless, the Supreme Court in the significant case of *Pravasi Bhalai Sangathan* defined the expression as follows:

Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group’s ability to respond to the substance ideas under debate, thereby placing a serious barrier to their full participation in democracy.²⁰

The court relied on the judgement of the Canadian Supreme Court in the case of *Saskatchewan* where it was held that for the control of publication of ‘hate speeches’, human rights obligations forms the basis. Further, it was said that repugnancy of ideas although expressed is not sufficient to justify restriction on any expression and further it would be irrelevant that whether or not such expression was intended to promote hatred or discrimination.²¹

Further, the Supreme Court referred to a few definitions, like, of hate speech given by *Richard Delgado* as language intended to demean a group which would be labeled as a “racial insult” by a reasonable person.²² *Mari J. Mastunda* refers to “hate speech as a message of racial inferiority, prosecutorial, hateful and degraded.”²³ The Supreme court of India has relied

²⁰*Pravasi Bhalai Sangathan v. Union of India*, (2014) 11 SCC 477.

²¹*Saskatchewan Human Rights Commission v. William Whatcott*, 2013 SCC OnLine Can SC 6.

²²*Supra* note 5.

²³*Ibid*.



over these expressions but has refrained or abstained from actually defining and conclusively deciding on the issue of hate speech.

In light of the aforesaid, it can be said that hate speech in India operates as a functional category and not as a constitutional one. To understand this a little further within the Indian constitutional framework, hate speech does not exist as an independent and textually recognised category of restricted speech. The Constitution does not expressly identify “hate speech” as a basis for limiting freedom of expression under Article 19(2) unlike mentioned grounds such as *public order, decency or morality, or incitement to an offence*. Consequently, hate speech in India does not derive its regulatory force from constitutional text but from the function it is perceived to perform in society. In this sense, hate speech operates as a *functional category* to mean that it is not restricted because it is labelled as “hate speech”, but because of its anticipated consequences such as to disturb public order, threaten social harmony, incite violence, or undermine equality and dignity.

IV. Public Interest, Public Order, and Law & Order: The Constitutional Bridge

It is true that there is absence of an explicit constitutional prohibition on hate speech in India. Thus, its regulation is justified, primarily, by the aid of interpretation. The reliance in this regard is placed on *public order* which finds mention under Article 19(2). Hate speech is categorised as discriminatory and against human dignity which is linked with unity and integrity of the nation and any action that tends to promote any hatred would disturb “public order”.²⁴ In this way, the regulation in the name of hate speech is justified and any action taken by the authorities to proscribe such speech is justified. Therefore, the constitutional legitimacy of such restrictions rests not on the expressive content itself but on its perceived consequences within the public sphere, as has been explained earlier.²⁵

Before taking this argument any further it is important to note that in the landmark case of *Shreya Singhal*, three kinds of expression have been talked about – discussion, advocacy and incitement.²⁶ It was observed by the

²⁴*Supra* note 5.

²⁵Raghav Kohli, “Expressive Conduct and Article 19(1)(a) of the Indian Constitution: A Purposivist Approach” 16(2) *Asian Journal of Comparative Law* 259-284 (December 2021), <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/abs/expressive-conduct-and-article-191a-of-the-indian-constitution-a-purposivist-approach/EA81276A4115683570D5DAAF981D4852> (last visited on Feb 3, 2026).

²⁶*Shreya Singhal v. Union of India*, 2015 INSC 257.



court that the earlier two forms are protected but not the last one. This only strengthens the argument that any action against hate speech would be based on consequence of such incitement.²⁷ Thus, consequence-based justification operates in a familiar way: speech that exhibits a tendency to incite hostility, violence, or social disharmony is treated as posing a threat to public order, thereby attracting constitutional sanction. In this framework hate speech is not restricted *because it is hateful*, but because it is assumed that it may cause such circumstances to exist which may endanger public tranquility or undermine collective interests. The emphasis remains on the likelihood of disorder to justify intervention by the state, without formally expanding the grounds enumerated in Article 19(2).²⁸

However, the reality reveals a significant slippage between constitutional theory and enforcement. In many instances, expressions that merely offend sensibilities or challenge dominant narratives are treated as public order concerns, notwithstanding the absence of a proximate or imminent threat.²⁹ Preventive restrictions are often imposed in the name of maintaining peace and the reliance is based on speculative assessments of harm rather than demonstrable tendencies toward violence or disruption. As a result, the public order justification risks functioning as a proxy for content-based censorship, enabling restrictions that the constitutional text itself does not clearly authorise. However, the various tests to check whether a speech amounts to hate speech or not are also required to be tested based on the content of such speech.³⁰

This slippage exposes the fragility of the constitutional bridge that connects hate speech regulation to public interest and public order. While the interpretative framework permits regulation without overt constitutional distortion, its elasticity also allows for expansive and discretionary control over speech. The challenge, therefore, lies not in the theoretical possibility of regulating hate speech under Article 19(2), but in ensuring that such regulation remains tethered to clear, narrowly tailored, and demonstrable threats to public order, consistent with the constitutional commitment to free expression.

V. Judicial Construction of Hate Speech: Expression Without Amendment

It has been discussed earlier that both in the landmark case of *Amish Devgan* as well as *Kaushal Kishor* that the Hate Speech is construed to relate to

²⁷*Ibid.*

²⁸*Supra* note 5.

²⁹*Supra* note 26.

³⁰*Supra* note 4.



a situation which may endanger public order. Thereby, justifying any coercive step to restrict such speeches but while doing so, the court has not paid heed to the wisdom of the Constitution makers. *Hukam Singh* during one of the meetings of the Constituent Assembly Debates (CAD) exhorted that the draft Constitution undermined free speech by granting the legislature excessive power to restrict expression under broad justifications related to “state authority.”³¹ Similarly, *Sardar Bhupinder Singh Man* pointed out to the draft structure of the free speech provision as to how Article 13 of the draft Constitution offers rights with one hand and takes them away with the other through numerous restrictions.³² It is important to remember that the nature and form of Article 19(2) before the first³³ and sixteenth³⁴ amendment was different and it only mentioned six grounds to restrict such speech. A comparative table is given hereafter to show how it has changed before amendment and after the said amendments.

S.No.	Prior to Amendment	Post Amendment
1.	Libel	Interest of sovereignty and integrity of India
2.	Slander	The security of the State
3.	Defamation	Friendly relations with foreign States
4.	Contempt of Court	Public order
5.	Any matter which offends against decency or morality	Decency or morality
6.	Any matter which undermines the security of the State or tends to overthrow the State	Contempt of court
7.		Defamation
8.		Incitement to an offence

The above said table shows that by way of first and sixteenth amendment, the said provision has been amended to include and incorporate changes which were earlier not part of the same. It was specifically made part of where they didn't exist and not by way of construction as has been done in the case of hate speech. Also, if the table is analysed with little care, it reveals that *libel*, *slander* and *defamation* would form part of the same group, meaning thereby, the nature of restrictions were limited and not overbroad

³¹VII, Constituent Assembly Debates, Dec 1, 1948, <https://www.constitutionofindia.net/debates/01-dec-1948/> (last visited on Feb 3, 2026).

³²*Ibid.*

³³The Constitution (First Amendment) Act, 1951, s.3.

³⁴The Constitution (Sixteenth Amendment) Act, 1963, s.2.



like it exists today. As expressions like public order is very broad and can be construed to justify any action of the state like it has been shown in the *Kaushal Kishor* judgement. It is shown that *public order* is the common ground across all the provisions which deal with restriction of free speech.³⁵

The Supreme Court of India through judgments like *Amish Devgan*, *Kaushal Kishor* have recognised hate speech as a restriction on free speech by way of construction. But it is important to note, as discussed earlier in the paper, that neither “hate speech” is a ground specifically mentioned under Article 19(2) nor does the term found mention itself.

The problem which exist in this regard is simple yet very problematic as any speech curbed on the anvil of Article 19(2) must meet the standards which has already been laid by the court itself through judgements like *Romesh Thapar* and *Brij Bhushan* which was decided by a bench of 6 judges. The said law still holds good in the eyes of law as they have not been overruled and therefore following the rigour of Article 141³⁶ which gives these judgements values of binding precedents. Therefore, any attack on free speech in the name of restriction not mentioned in Article 19(2) gives a chilling effect. Moreover there are examples where two girls were detained for posting something over the internet out of them one was detained for liking the post.³⁷ This shows the chilling effect it could have over other individuals and society at large. In a society like ours where tolerance is not only preached but it is also practiced, such examples give a very negative effect to the tolerant image of India. Further, it also shows view point discrimination is treated as an offence where it should not have as hate speech is imposed upon them. This further aggravates such cases and its effect on society.

VI. Conclusion

It is an undoubted position which must be cleared that hate speech must be regulated nevertheless any restriction which has any kind of bearing on free speech must adhere to the principles of constitutional law. Further, it is important to understand that –

³⁵*Supra* note 5.

³⁶The law declared by the Supreme Court shall be binding on all courts within the territory of India.

³⁷International Humanist and Ethical Union, Freedom of Thought 2012: A Global Report on Discrimination against Humanists, Atheists and the Nonreligious, <https://humanists.international/wp-content/uploads/IHEU%20Freedom%20of%20Thought%202012.pdf> (last visited on Feb 3, 2026).



‘Free speech’ includes the right to comment, favour or criticise government policies; and ‘hate speech’ creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of (the) message which is to cause humiliation and alienation of the targeted group.

Without going into the criticality of the term hate speech and the content of such speech and the position of speaker³⁸ – it is important that a restriction in the form of hate speech should comply with Article 19(2) of the Constitution.³⁹ At the same time, it is important that any speech should not be curtailed unless it has such overtones which can really cause an issue of law and order. Since, the most significant consideration in a democracy could be nothing other than the right to express oneself. In this democratic setup, the law and policies must go through the scrutiny of democratic processes which includes criticism and questioning.⁴⁰The *Amish Devgan’s* judgement also reflects upon the view of *George Bernard Shaw*, where he stressed upon the significance of free speech right to mean that the theory of freedom of speech does not rest upon the assumption that everybody was right. On the contrary, it is based upon the assumption that everybody was wrong on some point where somebody else was correct. Therefore, anyone going unheard has public danger.⁴¹

Thus, stressing over the need of free speech on the one hand and regulation of free speech on the other hand is crucial and must be taken seriously by the government as well as the Constitutional courts so that any conflict can be resolved. While dealing with this issue, they must be mindful that such a restriction doesn’t exist as of now and an amendment should be done without deploying the canons of interpretation to their aid. That such a course would be a permissible one in light of the binding precedent in form of *Bri Bhusan* and *Romesh Thapar* which did not entertain any act which was not in the ambit mentioned under Article 19(2).

The Hate speech could be proved to be a menace in the contemporary time as it promotes discrimination which is an accepted position based on

³⁸*Supra* note 4.

³⁹*Supra* note 5.

⁴⁰Vikram Raghavan, “Taking Free Speech Seriously” 51(2) *Economic and Political Weekly* 24-27 (August, 2016), <https://www.jstor.org/stable/44004700> (last visited on Feb 3, 2026).

⁴¹*Supra* note 4.



several judgements like *Pravasi Bhalai Sangathan, Amish Devgan, Kaushal Kishor* etc. In contemporary times, it is equally important to protect dissent and the same should not be trampled with using hate speech as an aid. History shows that hate speech has also been intentionally used to mobilise groups and societies against each other in order to provoke violent escalation, hate crime, war and genocide.⁴² Thus, there is clear need of recognising hate speech constitutionally under Article 19(2) and a clear direction or guidelines should be issued by the competent authority to deal with this issue.

⁴²*Supra* note 1.