# THE UNCERTAIN REGULATION OF HATE SPEECH BY THE SUPREME COURT

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## ABSTRACT

*This paper attempts to analyze the fluctuating stance of the Indian Supreme Court regarding the regulation of Hate Speech. It focuses on the interpretation of the phrase 'in the interest of …public order' included in Article 19 (2) of the Constitution of India, which has been used by the judiciary to legitimize overbroad restrictions on speech by the State. It argues in favour of adopting a clear legislative policy to aid the judiciary in determining the contours of free speech, over and above the Constitutional framework provided, with a view to establish uniformity in judicial reasoning, in the absence of which the scattered nature or regulations hinder the creation of binding precedents.*

## INTRODUCTION

> *"…that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."*[1]
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> - John Stuart Mill, *On Liberty*

The regulation of free speech in a democracy has often given rise to intense debate. This freedom, considered to be the cornerstone of modern democratic state practice, has come to be guaranteed by all major international human rights documents[2] and national constitutions (or bills of rights) as a fundamental individual liberty, rooted in the idea that freedom of thought and uninhibited exchange of ideas leads to progress and development in society, accountability in governance and facilitates the creation of a just society.

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[1] JOHN STUART MILL, ON LIBERTY 18 (LONDON, LONGMAN ROBERTS AND GREEN et al. eds., 4th ed. 1869).

[2] G.A. Res, 217A, Universal Declaration on Human Rights (Dec. 10, 1948); G.A. Res, 2200A(XXI) International Covenant on Civil and Political Rights (Dec. 16, 1966).http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Standards.aspx

The discontent with free speech however emanates from the restrictions placed upon it by the law, involving the characterization of certain kinds of speech as harmful and thus imposing a ban or other sanctions on such speech. While civil libertarians advocate for greater freedom to express ideas, arguing that States have attempted to push forward covert socio-political agendas by censuring free speech, the State contends that it has the primary responsibility of ensuring safety and security for all its citizens.[3] In other words, it cannot allow the exercise of an individual freedom by one citizen to harm the essential security of another citizen[4]. The justification behind such regulations lies in the potential of this category of speech in inciting its audience to act violently or in a discriminatory manner towards an identifiable group or community, and the State justifies criminalizing such speech (popularly referred to as 'hate speech'), in the interest of public order, preservation of national unity or to stop the spread of communal violence.

There exists no universal definition of Hate Speech, though its constituent factors have been identified by several international legal texts. The ICCPR defines it as "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".[5] Thus, incitement by spoken words or expressions of hatred based on racial, religious, ethnic, or other groups with a view to cause, or threaten to cause harm would qualify as hate speech. Further, incitement to discriminate through use of expressions against a group identity could also be characterized as hate speech.[6]From the above characterizations, two broad constituent elements may be identified- the incitement to hatred and the targeting of a group identity. The protection of these groups, often vulnerable minorities, isn't merely restricted to protection from physical violence, but also to ensure the sanctity of their life free from fear of persecution and protection of their essential liberties.

[3] Amnesty International, "*Freedom of Expression*", http://www.amnestyusa.org/our-work/issues/censorship-and-free-speech

[4] Mill, supra note 2.

[5] The International Covenant on Civil and Political Rights, art. 20(2), Mar. 23, 1976.

[6] International Convention on the Elimination of All Forms of Racial Discrimination, Art. 4, 6: prohibit 'dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination…'

Scholarly opinion is equally divided on the issue of regulating hate speech. (Justice) Elena Kagan, in her famous 1993 essay on the subject[7], argues in favor of framing regulations that would balance the competing interests of free speech and protect the vulnerable from crimes consequent to hate speech being made. She supports the crafting of legislation which could achieve to some extent the regulation of graphic-content in speech, thereby allaying the fears of the vulnerable and the affected, without striking at the heart of the sacrosanct speech rights. Mari Matsuda[8] argues that the debate between regulation and freedom fails to reflect correct characterization of the conflict. Allowing uninhibited racial hate speech could have the effect of silencing the racial minorities who are the targets of such speech, just as allowing unrestricted pornography could potentially silence women. Feminist legal scholars[9] have also addressed the question of silencing women though pornography, though the focus has been more on the oppression of marginalized female population. This view is however, contested by others like Kathleen Sullivan[10] who are of the opinion that such an attack on the liberties of a group could in fact serve as an incentive for them to make their voices heard.

Several strategies have been evolved in order to tackle the menace of hate speech. In liberal democracies like the US, where the right to free expression is paid highest reverence to by the Courts and the Constitution[11], censorship of speech based on its content has been generally disallowed, and any law attempting the same is subjected to 'strict scrutiny' by the Courts in exercise of their review powers.[12] The regulations most often found permissible would be content-neutral ones, which attempt to regulate the manner of expression rather than the ideas expressed therein.[13] In contrast, a plethora of laws operating in India routinely censure speech based on content, some

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[7] Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 902 (1993).

[8] M J Matsuda, *Public response to racist speech: Considering the victim's story*, 87 MICH. L. REV. 2320-2381, (1989).

[9] Susan H. Williams, *Feminist Jurisprudence and Free Speech Theory*, 84 IND. L.J. 999 (2009).

[10] Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971.

[11] Lawrence H. Tribe, *Toward A Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 246 (1978).

[12] City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994)

[13] *Id.* A number of cases thereafter have highlighted this distinction in regulating speech. In *Hill v Colorado,* [530 U.S. 703, 735 (2000)], Justice Souter notes: "content-based discriminations are subject to strict scrutiny because of the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others."

of which were framed during the colonial rule. Thus, despite deriving the fundamental right to free speech from the US Bill of Rights, India has chosen to continue with overbroad speech restrictions and not to incorporate the American model for the regulation of the same liberties.[14]

In the Indian context, eminent jurists like Soli Sorabjee[15] and AG Noorani[16] point out that certain sections of the criminal legislations, (such as the provision on Sedition in the Indian Penal Code-S.124-A) [17] should be removed as they are not in consonance with our current democratic framework. Moreover, several of these provisions are relics of a colonial past, once used by the British to prosecute Indian freedom fighters, and should therefore be removed from the statute books of independent India. Relying on cases ranging from the persecution of MF Hussain to Tasleema Nasrin[18], they contend that the development of Indian jurisprudence on Hate Speech has been far from satisfactory, since the Apex court has time and again fluctuated in its stance on the issue. Despite the existence of a number of laws, scattered through statutes ranging from the Indian Penal Code, 1860 ("**IPC**") to the Cinematograph Act, 1952, the lack of a clear legislative policy and overbroad regulatory regime has led to a scenario of uncertain protection against the harm of hate speech.

This paper will try to analyze the fluctuating stance of the Supreme Court regarding the regulation of Hate Speech in India. It focuses on the interpretation of the phrase 'in the interest of …public order' included in Article 19 (2) of the Constitution of India ("**the Constitution**"), used by the judiciary to legitimize overbroad restrictions on speech by the State. It argues in favor of adopting a clear legislative policy to aid the judiciary in determining the contours of free speech, over and above the Constitutional framework provided, with a view to establish uniformity in judicial reasoning, in the absence of which the scattered nature or regulations hinders the creation of binding precedents for the future.

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[14] MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW, 204-06. Eastern Book Company (2006)

[15] Soli Sorabjee, *Hate Speech Dilemma*, FORTNIGHT, No. 318 Jun, 1993, at 27.

[16] AG Noorani, *Hate Speech and Free Speech,* 27 ECONOMIC AND POLITICAL WEEKLY, No. 46 2456 (1992)

[17] The Law Commission in its 267th Report addressed the differences between Hate Speech and Sedition. Infra note 35, at pp. 44-45.

[18] Rajeev Dhawan, *Harassing Husain: Uses and Abuses of the Law of Hate Speech*, 35 SOCIAL SCIENTIST, No. ½ (2007)

## THE FLUCTUATING JURISPRUDENCE OF THE SUPREME COURT ON HATE SPEECH

The issue of regulating offensive or hurtful speech arose before the Supreme Court in *Ramji Lal Modi v State of UP*[19], a case concerning a constitutional challenge to S. 295A of the IPC, which criminalizes the act of insulting religious belief with the deliberate intent to 'outrage religious feelings of a class of citizens'. The Court, upholding the constitutionality of the provision, said the right to free speech was not absolute and that Article 19(2) of the Constitution envisages reasonable restrictions upon the exercise of free speech. It took the view that the phrase 'in the interest of…public order' connotes wider import than 'maintenance of public order' which enables the State to impose restrictions on publications to this end, even without the requirement to establish a causal linkage between the impugned speech and resulting violation of public order or safety. This decision was followed in the case of *Virendra v State of Punjab*[20] arising in the same year, where the Court applied the same rationale in the interpretation of the phrase 'in the interest of', thereby establishing the unquestionable regulatory capacity of the State, pursuant to a strict interpretation of Article 19(2) of the Constitution.

In both these cases, the Constitution Benches were led by Chief Justice SR Das, who in his determination was influenced by the 'bad tendency' test- an innovation of the American Courts. In *Patterson v. Colorado*[21], this test was applied to restrict speech which was deemed to have been made for the express purpose of causing unrest or incitement. Any speech which could be considered to cause a public order violation could be restricted upon the application of this test, as was done in both these cases by the Indian Supreme Court.

The argument before the Court in *Ramji Lal Modi*, relying on previous cases like *Romesh Thapar*[22] and *Brij Bhushan*[23], questioned the reasonability of a law which restricted speech without determining

[19] AIR 1957 SC 620

[20] AIR 1957 SC 896

[21] 205 U.S. 454

[22] 1950 AIR 124

[23] AIR 1950 SC 129

whether the speech could reasonably be estimated to have had any causal linkages with a potential violation of public order. However, the Court opined that such a connection need not be established so long as the law has the effect of preserving public order, basing their reasoning on the aforementioned distinction between 'in the interest of' and 'maintenance of'. It further noted that the import of Section 295A of IPC was restricted to curbing speech which was made with 'malicious intent' and not merely offensive speech.

> *'[Section] 295A does not penalize any and every… insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalizes only those acts [or] insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetuated with the deliberate and malicious intention of outraging the religious feelings of the class.'*[24]

Although commentators[25] note that the Court erred in its application of the 'bad tendency' test and excessive reliance on the 'in the interest of' phrase, it is useful to remember that the importation of the test from American jurisprudence was not unexpected. Since the Fundamental Rights chapter in the Indian Constitution was largely adopted from the Bill of Rights, it was but natural for the judges to follow the position prevalent in the US, which was at the time in favor of applying this test. Further, the preservation of public order and communal harmony, especially in the nascent years of the republic seems to be a justifiable objective undertaken by the government of the day, which was supported in its efforts by a judiciary marked by its pliant nature.

The deviance from this position, however, came shortly after. In *Superintendent, Central Prison v. Ram Manohar Lohia*[26], Justice Subba Rao established the 'proximate nexus' test for regulating free speech in the interest of public order. His opinion marked a clear shift from the previously stated position that any law which would have minor linkage with public order would be deemed constitutional. He emphasized:

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[24] *Id.*

[25] Gautam Bhatia, "*Free Speech and Public Order*", CIS Blog (2016) http://cis-india.org/internet-governance/blog/free-speech-and-public-order-1

[26] 1960 AIR 633

> *"… The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order."*[27]

Interestingly, Chief Justice Sinha, who was part of the bench in *Ram Manohar Lohia*, speaking for the majority in the subsequent case of *Kedar Nath Singh v State of Bihar*[28] reverted to the earlier doctrine of 'bad tendency'. This case challenged the constitutionality of Section 124A of the IPC, which criminalizes sedition. In delivering the judgment, Chief Justice Sinha quoted with approval the judgment rendered in *Ramji Lal Modi*, without referring to the *Lohia* decision even once in his final decision. This development was quite curious, especially since the majority verdict by J Subba Rao in *Ramji Lal Modi* seemed to indicate a shift in the trend by the Court in regulating speech rights, to which the erstwhile-CJ Sinha was party.

In a much later case of *Bilal Ahmed Kaloo v State of Andhra Pradesh*[29], the Court examined the components of hate speech. It concluded that for the application of Sections 153A[30] and 505(2)[31] of the IPC, the arousal of hatred or incitement against a group is a prerequisite. In other words, till the impugned speech or representation fails to create a conflict between two different classes, these sections are not attracted. It relied on the decision in *Kedar Nath Singh* in interpreting Section 124A of the IPC, of which crime it found the accused not guilty.

In *Shreya Singhal v. Union of India*[32], which involved a constitutional challenge to Section 66A[33] of the Information Technology Act, 2000 ("**IT Act**") the contours of free speech were discussed in great

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[27] *Id.*

[28] 1962 AIR 955

[29] AIR 1997 SC 3483

[30] Indian Penal Code, 1860, §153A: Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

[31] The Indian Penal Code, 1860, §505(2): Statements creating or promoting enmity, hatred or ill- will between classes.

[32] AIR 2015 SC 1523

detail by Justice Nariman. He separated with care the different categories of speech, and attempted to understand when 'offensive speech' could be criminalized.

> *"There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc."*[34]

Relying on the US doctrines of 'clear and present danger'[35] and 'imminent lawless action'[36], he established the position that speech may only be criminalized in case it leads to an act of illegality which has causal linkages with the words spoken, which must be proximate enough to establish such a nexus.

The decision by Nariman J. in *Shreya Singhal* marks a watershed moment in Indian jurisprudence on free speech. Apart from striking down the section 66A of the IT Act due to vagueness, this case makes a number of other significant observations. It discusses the futility of adhering to the previous standard of 'bad tendency' and marks a shift towards the modern, rational standard of 'imminent lawless action' based on American case law. Most significantly, it denounces the practice of the legislature wielding large regulatory powers in delegitimizing speech.

Despite such clarity of intent however, recent developments are far from encouraging. Dr. Subramaniam Swamy, Rajya Sabha Member for the BJP, filed a PIL before the Supreme Court recently challenging the constitutionality of several sections of the IPC which he believed were in

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[33] Information Technology Act, 2000, § 66A: Punishment for sending offensive messages through communication service, etc.

[34] *Id.*

[35] Schenck v United States, 249 US 47 (1919)

[36] Brandenburg v Ohio, 395 US 444 (1969)

violation of free speech rights. This challenge came in the backdrop of a case filed against him based on his speech at Kaziranga University, Assam, containing inflammatory comments characterized by the prosecution as Hate Speech. A final decision is yet to be delivered by the Apex Court in this regard. In another recent case of *Pravasi Bhalai Sangathan v Union of India*[37], the Court directed the Law Commission to examine the possibility to regulating hate speech especially in relation to electoral offences. Pursuant to this, the Law Commission submitted its 267th Report[38] on Hate Speech in March this year. One of the salient features of the report, which carries out an in-depth analysis of hate speech regulation in different jurisdictions across the world, was an attempt to identify the factors to be considered for hate speech regulation. Importance was laid on the extremity of the impugned speech, the incitement it caused, the status of the victim and the perpetrator- both individually and in relation to one another, context and potential impact of the speech.[39] Further, it reiterated the position taken by the European Court of Human Rights and UN Special Rapporteur's Report[40], which suggested that apart from speech perpetuating violent behavior, incitement to discriminate based on group hatred, would also be considered a significant factor in identifying hate speech.[41] The Commission also displayed concern regarding the proliferation of hate speech on the internet, which offers a twin advantage to the author- anonymity and instantaneous mass circulation to a global audience.[42] While acknowledging that the advent of the internet has had a significant positive impact on the access to and spread of information and opinion, the Commission was justifiably wary of the mischief caused by malicious speech online. In light of these and other observations, the Report made recommendations towards strengthening the restrictions, suggesting the addition of two new crimes within the IPC.[43] An expert committee constituted under the Chairmanship of TK Vishwanathan submitted its report to the Home Ministry recently, with similar

[37] AIR 2014 SC 1591

[38] LAW COMMISSION OF INDIA, REP. NO. 267 *Hate Speech*, 2017

[39] *Supra* note 35, at pp. 32-35.

[40] UN Special Rapporteur's report on Hate Speech and Incitement to Hatred, 2012.

[41] *Id.*, at 37.

[42] Id., at 24-5.

[43] 'Prohibition of Incitement to Hatred'; and 'Causing fear, alarm or provocation to violence in certain cases'.

recommendations. The Committee identified the need to strengthen the penal laws, in particular to amend the IPC, the IT Act and the CrPC in order to tackle the proliferation of hate speech in cyberspace.[44]

However, several commentators[45] have noted that the absence of penal provisions is not what ails the regulation of vitriolic speech in India. In fact, there remain a large number[46] of laws in force which impact speech that causes incitement, especially on the grounds of religion or race. Despite this, however, the proliferation of hate speech has continued unabated, which indicates that in the absence of more holistic regulation and the executive will to enforce the same, India will continue its stuttering stance in this regard.

## IDENTIFYING THE IMPEDIMENTS

As aforementioned, the central problem in regulating or outlawing certain kinds of speech is the effect such regulations have (or likely to have) on other, permissible forms of speech. The idea that hate speech has inherent risks for the security of groups in society is beyond debate, and yet the manner of imposing restrictions continues to attract criticism. The effect of such speech in silencing vulnerable sections of the society has often been used as a justification for outlawing it, as has the issue of preeminence of the right to life and liberty of the targeted communities over free speech rights of individuals. On the other hand, censorship of speech can have a chilling effect on divergence and dialogue essential to democracy.

The pre-censorship regime instituted at the behest of the Supreme Court since the 50s and 60s has had a similar impact upon the exercise of certain classes of speech in India. Without attempting to

[44] The Committee recommended amendments to Sections 153C and 505A, IPC, Sections 25B and 25C, CrPC and Section 78 of the IT Act. The definition of the offences outlined in 153C and 505A were broadened to 'any means of communication' purportedly to include cyberspace; whereas the CrPC amendments create the posts of State-level and District -level Cybercrime Coordinators. The amendment to the IT Act specifies that the investigating officer should be of the rank of a Sub-Inspector, indicating that younger officers specially trained should deal with investigation of offences under the Act. Seema Chisti, *Prescription post Section 66A: 'Change law to punish hate speech online',* The Indian Express, 6 Oct, 2017 available at http://indianexpress.com/article/india/hate-speech-online-punishment-supreme-court-section-66a-information-technology-act-narendra-modi-4876648/

[45] See generally, Chinmayi Arun and Nakul Nayak, *Preliminary Findings on Online Hate Speech and the Law in India* (2016), Berkman Klein Center Research Publication No. 2016-19; Gautam Bhatia, *Free Speech and Public Order*, CIS Blog (2016).

[46] See Indian Penal Code, 1860; Representation of The People Act, 1951; The Cable Television Network (Regulation) Act, 1995; The Religious Institutions (Prevention of Misuse) Act, 1988; The Cinematograph Act, 1952; Code of Criminal Procedure, 1973: contain provisions which seek to regulate hate speech.

draw appropriate linkages between speech and action, these early decisions justified curbing free speech based on the overbroad construction of public order concerns. The shift from this standpoint came much later, through more recent pronouncements of the Court, but has had little effect on the criminalization of speech which is deemed insulting to religious beliefs. While the colonial justification for legitimizing such a regulatory regime was based on the paternalistic and insulting assumption of religious intolerance among Indian subjects and for the purpose of maintaining British dominance over the colonies, to carry on with the vestiges of an inglorious past speaks poorly of the protection of civil liberties in a modern democracy.

An important impediment in this regard is largely procedural. The stand taken by the latter benches of the Supreme Court, especially in *Shreya Singhal*, seems to be unable to negate the ill-effects of the 'bad tendency' test. Whereas both *Ramji Lal Modi* and *Kedar Nath Singh* were decisions by a constitutional bench of the Court, the bench in *Shreya Singhal* comprised of two judges. This implies that the adoption of the 'imminent lawless action' doctrine by the latter would theoretically fail to dismiss the applicability of these cases, and that the operating law takes from the judgments in *Ramji Lal Modi* and *Kedar Nath Singh*, which proposes a dated doctrine long disregarded in the country of its origin. While the doctrine of 'imminent lawless action' provides an evaluation of the cause, effects and dangers of the impugned speech based on justifiable criteria laid down by US Supreme Court decisions[47], the application of the 'bad tendency' test merely exemplifies all that is amiss with the speech regulation regime, providing overbroad powers in the hands of the judiciary in curbing free speech often based on non-objective parameters. Commentators also point out that a modern reevaluation of archaic provisions (such as Section 124A and 295A) the constitutionality of which were once upheld, require a two-judge bench being satisfied of a *prima facie* case, thereby referring it to a Constitutional Bench for their assessment. If convinced, this bench would then need to be reconstituted to a larger seven judge bench for the judgment in *Ramji Lal Modi* to be overturned.[48]

## CONCLUSION

The inconsistent positioning of the Supreme Court on regulation of Hate Speech is largely owing to the existence of a legislative vacuum, which allows the subjective assessment of individuals on the

[47] *Supra* note 36. The test has been consistently followed in the US thereafter.

[48] Gautam Bhatia takes note of this procedural impediment. See *Free Speech and Public Order*, CIS Blog (2016).

bench to determine the contours of a right as crucial as free speech. In the US, where judges of the Supreme Court have life-tenure, there remains the possibility of creating uniform precedent on issues, owing to the same set of judges serving on the bench for a longer period. In contrast, Indian judges have a lesser possibility of addressing similar issues during their relatively short stay on the bench. Thus, extremely divergent benches address matters of constitutional importance, which allows for deviation from precedent, antithetical to the development of common law jurisprudence. This leads to the anomalous positioning of the Court we witness over the past few decades on issues ranging from privacy to free speech. The remedy seems abundantly clear- the creation of a legislative policy to address these specific concerns, which may guide both the judiciary in their decision making and the citizenry in their actions. Hate Speech regulation has been so scattered through the texts of such a large variety of statutes, it seems but impossible to reconcile the differences in judicial interpretation without bringing these within the umbrella of a single policy, which defines and delimits the exercise of 'speech that wounds'. While the adoption of a single definition may not serve equally to restrict hateful speech in all its varying context, especially considering the diverse demographics in India, the adoption of a uniform policy- one that contextually defines the different standards to be applied in cases of political, commercial or other kinds of speech- is the need of the hour.