Hate speech under article 19(1) (a): Conceptualising the case for constitutional protection of hate speech

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In this paper I aim to argue the case for protecting hate speech in all its form and expression as protected speech. I start by showing how article 19(1) (a) was never meant to protect hate speech in any form and how such a conception was based on a faulty colonial understanding of freedom of speech which also influenced the constitution framers' idea of the right. I argue that Indian hate speech laws are based on flawed assumptions, are vague and suffer from conceptual confusion by discussing various freedom of speech theories. I argue for a *viewpoint neutral standard* of restriction of speech and discuss the US constitution's first amendment for developing Indian free speech jurisdiction and modifying article 19(2).

The context:

The actual effect of the constitution on India is the subject matter of an intense continuous scholarly debate – with many arguing that it continued the same colonial logic and method of governance in form and substance[2], while others arguing the constitution's effect as *transformative*.[3] When it comes to freedom of speech, and particularly hate speech – it is safe to argue that the constitution framers continued entirely in form and partly in substance, the colonial logic for restriction of the right and the state's legitimacy to do so.

The sections of the Indian Penal Code[4] and Code of Criminal procedure[5] that deal with regulating insult, hurt sentiments and incitement to hatred and discrimination – which broadly may be categorised as 'hate speech', have their genesis in the colonial setting. All of these sections caste a wide criminal net by criminalising not just the act, but also attempts to that act, *irrespective* of any real harm caused, while defining the acts in as broad and vague terms as possible.[6] Terms such as 'outraging the religious feelings' in section 295A are exemplary of

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[2] Sandipto Dasgupta, "*A Language which is foreign to us": Continuities and anxieties in the making of the Indian constitution*, 34 Comparative Studies of South Asia, Africa and the Middle East 228-242 (2014).
[3] Gautam Bhatia, The Transformative constitution (1st ed. 2019).
[4] Sections 153A, 153B, 295A, 298, and 505 of the IPC.
[5] Section 95 CrPC.
[6] I reproduce section 153A (1) (a) as an example: "*Whoever by words, either spoken or written, or by signs or by visible representations 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*

the slippery slope[7] and over-breadth at the heart of such speech restrictive laws. The draconian nature of these laws was evident in the unlawful detention of comedian Munnawar Farroqui under sections inter alia 153A, 259A of the IPC.[8]

The sheer criminal power that such legislations give to the state is not surprising when one remembers that these legislations are a product of a colonial power outnumbered by the natives, whose imperative was of *subjugation* and *control*.[9] The reason why it is important to see these laws as purely colonial laws is to bring forth the idea that these laws were made to *control* the subjects in absence of any fundamental right to free speech. As scholars argue, the fact that almost all of the colonial laws found their way into a free India is as indictment of the constitution framers as merely continuing the old colonial apparatus of control and subjugation, rather than securing for its citizenry new *transformative* rights - rights which would signify the transformation from being a subject to a citizen.

Constitution framers & their anxieties:

Freedom of speech and expression found articulation in article 19(1) (a) of the new constitution. My argument here is to show that the framers were astutely aware of the need to carve out robust democratic rights for the citizens due to their lived experiences of misuse of power by the colonial state, but ended up continuing the same restrictive apparatus driven by a false insecurity of the breakdown of the nation by the exercise of these very rights.

Constituent assembly members such as Somnath Lahiri were very vocal about the restriction clauses to the freedom of speech.[10] There were two distinctive types of arguments that were used in defence of the state's wisdom and authority to restrict the fundamental rights.[11] The

enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities."

[7] Ajit Warrier, *Section 295 IPC and the slippery slope of outrage*, Mondaq, (Jun., 20, 2021), https://www.mondaq.com/india/broadcasting-film-tv-radio/1013784/section-295a-ipc-and-the-slippery-slope-of-outrage39.

[8] Jai Babaria, *Misuse of section 295A: A potent weapon in criminalising comedy and cinema*, Criminal Law Studies, NLUJ, (Jun., 21, 2021), https://criminallawstudiesnluj.wordpress.com/2021/02/22/misuse-of-section-295-a-ipc-a-potent-weapon-in-criminalising-comedy-and-cinema/.

[9] Bhairav Acharya, *Free Speech in India still plagued by pre modern laws,* Media Asia Insights, available at http://dx.doi.org/10.1080/01296612.2016.1150582.

[10] He said, 'If we lay down fundamental rights and then insert provisions in every clause for taking away those rights, we will become a laughing stock for the world'. Available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-29.

[11] Bhatia, Gautam, *The Conservative Constitution: Freedom of Speech and the Constituent Assembly Debates* (October 24, 2015). Available at SSRN: https://ssrn.com/abstract=2679215 or http://dx.doi.org/10.2139/ssrn.2679215.

first strain of argument was put forth by K. Hanumathaiya[12] which said that since these restrictions were being decided by the real representatives of the people, they are legitimate. The second and more important strain of argument was put forth by Brajeshwar Prasad[13] who argued that the reason why these restrictions are and should be considered bona fide is because the state *now* is in the right hands. Implicit in this statement is the idea that it is *not* the coercive apparatus of the state which makes it evil or worth suspicion, what matter is *who* runs it. Implying that now that the colonial state is replaced with the Indian state, it will de facto only result in good outcomes for the citizens, regardless of the coercive laws.

It is important to note how none of these rebuttals counter Lahiri's argument in substance, which is built on the premise of democratic rights and questioned the legitimacy of the state to restrict that right on particular grounds. The context to both of these arguments for restriction run against a constitutional theme that has been with us ever since our independence. And that is the Indian state's obsession with '*public order*'. The most common reasoning given for restricting freedom of speech is that certain types of speech (*hate speech*) are a threat to maintaining 'public order'. The anxiety of framers was articulated by N. G. Ranga when he said "*people who believe in liberalism at one end and communism at the other will not be enabled to take advantage of these rights to pave the way for totalitarianism*." However Bhatia argues[14] that there is one major distinction between the reasons for why the colonial state privileged public order versus why the modern Indian state did. One of the justifications for the many colonial era hate speech laws was that the 'Indian Subject is uncivilised and highly excitable on matters of religion and community, not capable of rationalising for himself'.[15] Thus the need to restrict certain types of speech i.e. hate speech was found in the fact that such speech is likely to stir up public emotions and sentiments and thus likely to create a law and order problem. Thus in order to prevent that, such speech should be banned. The constitution framers on the other hand, based their reasoning for restriction in the fact that there are certain 'special conditions' in India owing to its diversity due to which an absolute or a robust right to free speech cannot be created. My argument is that even though superficially they appear to be two distinct arguments, the 'specific conditions' argument has its roots in the 'unique Indian

[12] Constituent Assembly debates, 2 December 1948, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02.
[13] Id.
[14] Supra Note 11.
[15] Siddharth Narrain, *Hate speech, hurt sentiments and the (Im) Possibility of free speech*, 17 EPW 119-126 (2016).

subject' colonial argument itself. Because if we dig deep, the reason why constitution framers were anxious to grant a robust speech right was because they were afraid that individuals will exercise that right to make speech that will prove to be inflammable and cause public order issues. And implicitly they found the reasoning in the assumption that Indian citizens are not autonomous individuals capable of self-rationalising and are primitive uneducated individuals who will, without applying their mind, be excited by such speech and brought to action. Thus the colonial legacy was continued fully in form (through laws) and partly in substance (through a different justification). The framers did not intend to protect inflammatory speech in any way.

Genesis of 'public order' jurisprudence of free speech:

An interesting thing to note is that in the original article 19(2), 'public order' did not appear as a ground for restriction of speech. In its original form Article 19(2) used the words 'undermines the security of the State or tends to overthrow the State' and not public order. In *Romesh Thapar*[16] and *Brij Bhushan*[17] both of which are pre first amendment cases, the court created a distinction between 'undermines the security of, or tends to overthrow, the State' as meaning an act '*nothing less than endangering the foundations of the State or threatening its overthrow'* and rejected the government's argument for restricting the right on merely public order arguments which they found to be of a lesser threshold than what article 19(2) demanded.

It was in context of this that public order was introduced as a ground for restriction through the first amendment and has had an everlasting impact on free speech jurisprudence in India. The court in *Ramji Lal Modi v State of Uttar Pradesh*[18] stated that combination of the words 'in the interest of' and 'public order' is not limited to 'for the maintenance of public order' and that it has much wider meaning than 'maintenance of public order'. It said, '*If ... certain activities have a tendency to cause public disorder, a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order*'. The court in *Ram Manohar Lohiya*[19] stated that 'public order' was synonymous with public peace, safety, and tranquillity thereby widening the scope of the restriction. Thus I argue that the

[16] Romesh Thapar v UOI, 1950 AIR 124.
[17] Brij Bhushan & Anr. vs The State Of Delhi, 1950 Supp SCR 245
[18] 1957 AIR 620.
[19] The Superintendent, Central Jail, Fatehgarh vs Ram Manohar Lohia, 1960 AIR 633.

introduction of 'public order' ground and the wide interpretation of its scope by the court has given the state almost blanket powers to curb speech, or attempt at speech, that has any potential of being inflammatory or causing any outrage or shock to certain individuals or communities. This marked a significant shift in free speech jurisprudence for speech that can be categorised as hate speech. Pre first amendment restriction of such speech would have to be of such nature that either incites, or undermines security of the state' – both very high threshold. By introducing the public order ground, the state could now legally curb attempts to, or any such speech that in its understanding may have, or is likely to, or may tend to disturb public order.

Freedom of speech and hate speech:

In its simplest form, doctrines of freedom of speech rely on consequentialist notions which state that on a whole, a society benefits by freedom of speech and expression. The claim is that long term benefits of the right will outweigh short term apparent harms.[20] There is much debate on the difference between speech and expression as it has a major impact on how we understand the right, but Scanlon argues that what we should be focusing on is the communicative aspect of the said speech or act i.e. the underlying message.

There are many justifications for free speech, I will present four[21]:

1. *Democracy justification*: This states that in a deliberative democracy, freedom of speech functions as a core tool to question the government through debates and discussions and generates accountability.
2. *Truth justification*: This states that freedom of expression is the means to find the truth and the only way any idea can survive as a truth if it is allowed to be pitted against falsities in the marketplace of ideas.[22] Therefore the best way to arrive at the truth is to not regulate viewpoints regardless of their moral contents.
3. *Autonomy justification*: Individuals are autonomous and capable of self-actualising by rationalising various viewpoints to arrive at their own worldview. The state should not indulge in viewpoint regulation as a way to respect individual autonomy.

[20] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Philosophy & Public Affairs 204-226 (1972).
[21] J.K.Miles, *A Perfectionist defence of freedom of speech*, 38 Social Theory & Practice 213-230 (2012).
[22] J. Oliver Wendall Holmes Jr.'s dissent in Abrams v. US, 250 US 616 (1919).

4. *Self-development justification*: Censorship allows for state backed viewpoint manipulation and robs individuals of coming to their own views and ideas, thus obstructing their self-development.

All of these arguments require that no part of public speech be restricted by the government in any form. And the reason for that is that for individuals to be truly autonomous, who can search for truth, contribute in a democracy and engage in self-development - they will have to have access to the full spectrum of public debate and discussion for independent decision making, which is a pre requisite to being autonomous.[23] And independent decision making cannot happen as long as the state engages in selective censorship of speech based on viewpoints. In other words, the state has to engage in '*viewpoint neutrality'* i.e. the idea that no speech should be regulated or censored because of the *viewpoint* it espouses. It is important to differentiate it from regulation of speech based on content – such as trade secrets, national security, Intellectual property etc. Viewpoint neutrality demands that the government do not restrict any speech it considers inflammatory or morally hazardous only because *it* thinks so.[24]

It is important to realise that conceding to the logic of restricting hate speech means conceding to the larger logic of restriction of speech and ideologies. And that is bad because it allows the state and the government to become the masters of the marketplace of ideas. The reason why that is bad is because the government and the state itself is a hegemonic political entity which uses this right to restrict speech for its personal gain – to suppress the speech that is unfavourable and promote propaganda that favours it. Thus it is in our interest to mistrust the government and the state for deciding for the citizens which speech is acceptable and which not, in the free market of ideas.[25] Another major argument favouring restriction of hate speech argues that it is important so that certain ideas do not monopolise and restrict access to other ideas in the public sphere. There are three issues with this. First, it assumes that there is a finite bounded actual space known as public sphere which certain entities can control the access to. Neither is the public sphere bounded so as to be capable of being hijacked by any one ideology, nor there exist any mechanism by which one ideology may unfairly restrict the other from presenting itself in the public sphere except the coercive state apparatus itself. Second, this

[23] Berg, Chris, *An Institutional Theory of Free Speech* (February 2, 2017). Available at SSRN: https://ssrn.com/abstract=2910563 or http://dx.doi.org/10.2139/ssrn.2910563.
[24] William B. Fisch, *Hate Speech in the constitutional law of US*, 50 Am. J. Comp. L. 463 (2002).
[25] Ilene R. Penn, *Right or Privilege: Indecent, Inciteful and hateful speech*, 1 COMMLAW CONSPECTUS 126-139 (1993).

argument also stems from a morally objective standpoint i.e. certain ideologies are good and others are bad. But there is no single basis to actually make an objective claim, for morals are relative. Given that there actually is no agreed upon, single framework to adjudicate permissible speech – the best thing to do is to let the ideas counter each other in the marketplace of ideas. It is not the perfect mechanism, but it is the best available mechanism. Third, the first principle of commitment to freedom of speech is that no matter how morally repugnant one believes any argument to be, if autonomous individuals accept it and it gains monopoly in the marketplace of ideas, it must be the closest approximation of arriving at the truth. In no shape or form, should be the government be able to, nor should it have a right to, impose upon others, its version of the truth.[26]

Viewpoint neutrality demands and implies constitutional protection of hate speech.[27] If hate speech is defined as disparaging a person or group of people based on their social or ethnic group such as race, gender, age, ethnicity, nationality, religion, sexual orientation etc.,[28] it is nothing but political speech that espouses a distinct viewpoint about the individual or the class of individuals it addresses. There is nothing inherently different in hate speech and any other speech that people may find offensive[29] that legitimises state backed restriction of offensive speech based on certain protected attributes such as religion, caste, region etc.

All the arguments for restricting hate speech function on the faulty logic and framing of 'harm'.[30] In *Pravasi Bhalai Sangathan* v. *Union of India*[31] the court borrowed Canadian court's articulation of hate speech harm in *Sasketchewan* v. *Whatcott*[32] i.e. hate speech does not only affect people's feelings, but by 'marginalising individuals based on membership of a group, hate speech delegitimises group members leading to discrimination'. My argument here is that there is a conceptual misunderstanding vis-à-vis the meaning of inclusiveness and the role of public debate. Such an articulation confuses constitutional inclusion through equal rights with public inclusion through private interaction and communication. Which is to say that such an

[26] Gautam Bhatia, Offend shock or disturb (1st ed. 2016).
[27] Kenneth Lasson, *To Stimulate, Provoke, or Incite? Hate Speech and the First Amendment*, 3 St. Thomas L. F. 49 (1991).
[28] Anandita Yadav, *Countering Hate speech in India: Looking for answers beyond the law*, 2 ILI L. R. Winter issue (2018).
[29] I may take more offence for being called a loser due to my liking of an artist than being called a loser for being Indian for example. The standard is entirely subjective.
[30] Ritika Patni & Kasturika Kaumudi, *Regulation of Hate Speech,* 2 NUJS L. REV.749-777 (2009).
[31] (2014) 11 SCC 477.
[32] 2013 SCC 11.

argument places an unjustified positive burden on all members of the society to 'include' all other group members by not engaging in criticism through hate speech. The reason why it is unjustified and actually, pointless to argue, is because exclusion in and of itself is not an absolute harm, it only becomes harmful if it results in any *material* harm. Material harm is understood in the context of active discrimination i.e. discrimination which leads to unequal access to opportunities and goods. Thus if hate speech leads to discrimination on protected attributes under articles 14, 15 & 16 – it is punished by the constitution. If hate speech turns into hate crime, then it is punished by criminal law. Therefore, hate speech in and of itself is not harmful per se. Moreover in a situation in which there is no sufficient causal relationship between existence of hate speech and hate crime, arguing for restricting hate speech based on the harm hypothesis is without basis.

Public order, incitement and the first amendment

It is important to note that the Indian hate speech jurisprudence is based wholly on the 'public order' restriction. Not only such a reasoning falsely assumes that there is a causal relationship between hate speech and adverse outcomes, but also assumes that all persons are likely to lose their rationality and become primitive Vikings ready to fight for the honour of their tribe. This is a non sequitur at best and state paternalism at worst.

Conceptually, there is only a right to free speech. There does not exists a right to not be offended. An individual has a rights claim against the state (who has a duty towards the citizen) to not engage in discrimination (active act based on protected attributes). A citizen does not have a rights claim against another citizen to not engage in speech that offends him precisely because there is no duty on the other citizen to not offend him. We need to use the concept of rights clash resolution because one's right should only be curtailed if it comes up against another or another's rights, and not due to vague state objective of keeping 'public order'. That diminishes the value of the right itself.

The US constitution's first amendment prohibits the Congress from making any law abridging speech. Even though there are some categories of speech that only receive low 1A protection,[33] "The First Amendment means that government has no power to restrict expression because of

[33] NYT v Sullivan 376 U.S. 254.

its message, its ideas, its subject matter, or its content."[34] Simply put the 1A protects all political debate and discussion[35], and because at its core hate speech is an idea – it receives full constitutional protection because the congress has to abide by the viewpoint neutrality principle. The standard of which speech is not permissible is very simple. Only speech that incites is prohibited. And that too not speech that is likely to, or tends to incite but it requires an '*intention* to incite and a *likelihood* that the advocacy *will* incite unlawful action".[36]

Thus, in order to truly be committed to free speech, article 19 must protect all forms and expressions of hate speech by eliminating 'public order' as a reasonable restriction and only use the 'incitement to offence' standard for restricting hate speech.

[34] Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).
[35] G. R. Stone, *Hate Speech and the US Constitution*, 3 East European Constitutional Review 78 (1994).
[36] Brandenburg v. Ohio, 385 US 444 (1969).