
FREEDOM OF SPEECH & EXPRESSION AND THE UNDEFINED THRESHOLD OF OFFENSIVENESS IN INDIAN CONSTITUTIONAL LAW

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ABSTRACT

This research aims to focus on how vague standards such as “decency” and “morality” have an arbitrary restriction on freedom of expression, hence the title, undefined threshold of “offensiveness” under Article 19 (2). The scholarly literature reveals in their study that courts have highlighted the democratic importance of Speech & expression. Courts often oscillate between restrictive colonial era tests like *Hicklin* and more liberal community standards. Recent cases like *Shreya Singhal* and *Amish Devgan* attempt to bring clarity in this matter through proportionality and context-content-intent-harm analysis. The studies collectively agree that the source of the chilling effect is these undefined terms and subjective judicial interpretation. Comparative Analysis of various jurisdictions like the U.S., South Africa, Canada, and the European Court of Human Rights shows that the proportionality and harm-based framework could provide more consistency. Still, India didn’t fully internalize them. No literature explored the complexity of free speech regulation in the Digital domain, as well as the absence of a universally accepted test to balance rights with restrictions. This research uses doctrinal analysis of constitutional provisions, Supreme Court rulings, and comparative jurisdiction, and critical analysis of secondary scholarship. The current findings show the judiciary deciding on majoritarian morality and political expediency rather than protecting expression due to a lack of clear standards. The study concludes by proposing a structured test that would give a clearer standard, along with harm-based assessment and proportionality test, so that freedom of expression is protected, and also dignity, equality, and public order would not be compromised, thereby reducing arbitrariness and safeguarding democracy.

Keywords: Freedom of Speech & Expression, Judicial Inconsistency, Arbitrary restriction, Chilling effect, Hate speech

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I. Introduction

The study critically analyses the indeterminacy of the freedom of Speech and expression and the unspecified limit of offensiveness in the context of the Indian constitutional law, becoming engaged in a subject that has a strong echo in local, national, and global contexts due to the emergence of digital media, the so-called viral hate speech, and shifting morality in society. Such confounded parameters as to what is thought to be offensive or restricted content have caused confusion on the part of artists, religious minorities, and regular citizens, which has given rise to self-censorship and vulnerability to arbitrary police and mob actions that are motivated by sensitivities of the society. Nationally, since in Article 19(2) of the Indian Constitution, there are no clear definitions of the phrase, giving way to reasonable restrictions to free speech on grounds such as decency, morality, and public order, the judicial outcome in cases concerning free speech has been very irregular intervals, basing on subjective determinations, with a high likelihood of being a result of a majority or political pressure, rather than a constitutional decision.² Comparative constitutional paradigms in the world, including the United States, Europe, South Africa, and Canada, demonstrate the efficiency of harm-based and proportionality models, demonstrating that objective judicial testing and background examination may offer more predictable boundaries, without freezing the legitimate expression.³

The background of the study is based on the history of India alternating between the colonial-era tests of obscenity including Hicklin standard of obscenity which identifies a material as obscene as any of the parts might corrupt the vulnerable users, and the more recent attempts to weigh speech within the social and cultural context, as defined by the landmark cases such as the case of *Aveek Sarkar v. State of West Bengal* and *S. Rangarajan v. P. Jagjivan Ram*.⁴ Although these attempts at judicial rectification have occurred, the limits on offensiveness are very subjective, given that courts have swung both ways in protecting expression and imposing restrictions on norms with no objective metrics on this matter, all enhanced by the advent of online platforms and media, which have diffused boundaries in traditional speech and thus expedite the spread of potentially contentious information.⁵ The question that arises is the

² <https://iisppr.org.in/freedom-of-speech-vs-hate-speech-striking-a-constitutional-balance-in-india/>

³ Dhawal Shankar Srivastava & Zubair Ahmed Khan, *Censorship: A Moral Dilemma or an Immoral Siege on Freedom of Speech?*, 5 *Shimla L. Rev.* 144 (2022), <https://doi.org/10.70556/hpnlslr-v5-I1-2022-07>

⁴ <https://www.scconline.com/blog/post/2022/07/21/law-of-obscenity-and-freedom-of-expression-where-to-draw-the-line/>

⁵ *Id.*

problem statement that Indian law lacks a universally agreeable, clear, or empirical definition of the term offensive speech, leaving vast discretion in the hands of the regulators and the courts and creating a chilling effect, arbitrary application, and oppression of a democratic dissent, especially when digital platforms have given millions of people a voice and created new ways to harm one another.⁶

An extensive literature analysis reveals wide gaps in research. The ambiguity of the statutory wording and the threat of majoritarian morality are constantly denounced by leading scholars and committees, but most of them do not go beyond the theoretical analysis to provide strong, practical guidelines and empirically validated standards to the courts and policymakers. An example of such research can be the analysis of Section 66A of the Information Technology Act, which indicates the chilling effect of ambiguous legal text, and research on hate speech laws finds that it is difficult to find a democratic consensus or represent marginalized voices in a multicultural society. Little analysis is also done of the real effects these restrictions have on democratic participation and citizen action, in particular in the digital era, when content trends, viral hate speech, and misinformation frequently lead to responses that are long before the court or legislature. The innovative approaches provided by international jurisprudence are structured proportionality review, harm-based assessment, and contextual balancing tests, but the Indian courts have illusively applied such models without creating official guidelines and a repeatable judicial test on assessing offensiveness.⁷

The synthesis of evidence made by this paper relies on several legal, doctrinal, and case law materials, such as constitutional analysis, judicial interpretation, and mob censorship. Most importantly, works such as Siddharth Narrain, Gautam Bhatia, and comparative reviews of jurisprudence in the US, the ECHR, South Africa, and Canada have shown that offensiveness should be judged onto physical injury and evaluated against the necessity to be democratic and equal, rather than being left to social norms of the day and emotionally in-your-face responses. The aim of the current study is twofold. First, to understand and analyze the current standard that the Indian judiciary uses, and secondly, to come up with a consistent, harm-inflicted, and proportionality-related framework to evaluate the offensiveness of speech within the Indian

⁶ Varun Kumar, *Freedom of Speech Vis-à-vis Hate Speech in India* (June 21, 2025), <https://www.lawaudience.com/freedom-of-speech-vis-a-vis-hate-speech-in-india>.

⁷ Ankita Sharma & Jayendra Singh Rathore, *Balancing Free Speech and Regulation: Examining the Impact of Social and Electronic Media on Freedom of Expression in India*, 6 Int'l J. of Res. Publ'n & Rev. 1648, 1654 (Feb. 2025)

context that incorporates domestic judicial innovations with the help of comparative constitutional learning. The ultimate goal is to eliminate the element of arbitrariness, and make the difficult or complicated legal norms clearer and more understandable, and foster a constitutional culture where individual rights and community interests are respected without succumbing to vagueness, subjectivity, or political expediency.⁸

II. Literature Review

The freedom of speech provided under Article 19(1)(a) and the restrictions available under Article 19(2) are still causing a huge constitutional controversy, particularly by the fact that the line between expression which is considered to be safeguarded and the expression, which is punishable, is still unclear. In the modern literature, one of the most frequent motives is the conflict between democratic discontent and state control, and the courts are frequently left to thread a grey zone between such undefined notions as morality, decency, obscenity, social order, and offensive speech. The studies taken collectively point out that the absence of specific standards is a factor that contributes to inconsistency in enforcement and chilling effect on speech.

One of the key lines of the literature is devoted to undermining constitutional guarantees by ambiguous provisions of reasonable restrictions. The constitutional design of a free speech as the main principle of a democratic engagement is to be seen, but the vocabulary of limitations permits extensive interpretation. There is doubt on the application of hate speech laws, moral policing, sedition and defamation that will restrict, not control, expression. The instability due to these vague norms is that people and factions will censure themselves due to the fear of being prosecuted in a court or being judged by society.⁹

The other notable academic work is an analysis of the connection between morality, decency and offensiveness. By passing such historic cases like *Romesh Thappar v. State of Madras*. Courts have tried to define obscenity and offensive material. *Ranjit Udeshi v. State of Maharashtra*. State of Maharashtra however, the results show a great variation. The concepts of moral offensiveness and obscenity have been found to be relative and much dependant on the context, thereby judicial interpretations have extended free-speech protections to the press, electronic media and even

⁸ Neeti Nair, *Beyond the 'Communal' 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295S of the Indian Penal Code*, 50 *Indn. Eco. & Soc. Hist. Rev.* 317, 320 (2013), <https://doi.org/10.1177/0019464613494622>

⁹ V.R. Uma, *Freedom of Speech in India – An Analysis*, 5 *Int'l Rsch. J. Com. & L.* 46 (Sept. 2018).

the right of the voter to information. Such subjectivity results in disproportional outcomes, more so when the expressions that include sexuality, political critique, or cultural sensitivity are assessed in unequal measures based on the bench, the period, or the general societal attitudes.

Another point of view is that a constitutional condition states that a restriction should be reasonable, non-arbitrary and narrow. The application of this principle, however, is usually inconsistent with the enforcement, especially where the question of the public order is concerned. The looseness in the definition of the concept of public order, decency, and morality leaves a lot of room to be abused. By case like *Kedar Nath Singh v. The judicial review of the*

State of Bihar shows that the State tends to take a very liberal understanding of the meaning of harmful or provocative speech. This broad definition provides a lot of uncertainty to citizens and those who criticize politics particularly those who represent minority opinions.¹⁰

One of the observations that emerge throughout the literature is that the undefined point of offensiveness brings about doctrinal instability. Unlike incitement or defamation, offensiveness does not have any quantifiable measures. What will be taken as offensive by a group of people is a legitimate dissent or even artistic expression by another group. In the absence of preset standards, the judiciary appeals to context to deliver inconsistent outcomes and unreliable standards of law. Such inconsistency undermines his or her constitutional safeguard and exposes the freedom of speech to majoritarianism, political pressure or social pressure.

With the digital age, scholars also observe that the challenges increase. Internet communication enhances speed, reach and emotional turmoil of speech. Information transcends jurisdictional boundaries and legal officials cannot always figure out where the damage is done or where to place the blame. Although the Constitution and previous case law were developed to account offline communication, the emergence of the contemporary digital platforms generate novel forms of offensiveness, including virality-driven harassment, artificially amplified misinformation, and anonymity that targets, which the current body of law is poorly suited to consider. The enforcement would be only hasty and haphazard, not set based on principles and proportions without updated standards.

¹⁰ Shailendra Nath Jha, *Liberty Under Indian Constitution Regarding Speech and Expression: A Bird's Eye View*, 2 INT L J. POL. SCI. & GOVERNANCE 75 (2020)

In spite of the lack of consistency in the doctrinal positions, the literature has come to one common point the democracy needs a strong defense of the speech, but borders should be sharp, short and based on the constitutional values and not on the moral panics or political expediency. This balance is destroyed by the fact that there are no specific boundaries of what is obscene, what is morally right or wrong, and what is offensive. This leads to unequal judgments by courts and people will exercise discretion when expressing themselves in order to escape possible prosecution. The scholarship thus points to a sense of urgency about having a consistent, accurate and empirically derived structure of defining offensiveness, which protects dissent, promotes plurality and is in accord with democratic constitutionalism in physical as well as online public realms.¹¹

The laws controlling internet speech in India are still characterized by constitutional vagueness and statutory excess. Most of the challenge lies in the ambiguous nature of Article 19(2) that allows justifiable limitations on the basis of morality, decency, or public order without providing specific definitions. Such uncertainty has been enhanced by the history of Section 66A of the Information Technology Act, which before it was struck down, made criminal any expression on-line by use of vague language such as grossly offensive or menacing. Even though overruled, its effect lingers in enforcement practice and regulatory demeanor, establishing a situation where both citizen and intermediary can not confidently know where legitimate speech begins and ends. What follows is the creation of a climate where self-censorship is a natural defence mechanism, and random actions by the state are a practical threat. On this legal turmoil, theorists have concentrated on the chilling effect of ambiguous boundaries of offensiveness. According to Singh and Bisht, most users do not dare voice their objection or denunciation over the internet since the lines of what can or cannot be said are not clearly established. They point out that there is a structural issue where individuals fail to predict the outcomes of any content post, defaulting to silence in this case. Their suggested regulatory solution which is a combination of platform accountability, user consciousness, and media literacy will aim at establishing a more balanced system. However, this model fails to answer the most important question of what is considered to be offensive content in constitutional terms. Unless this underlying problem is made clear, any attempt to raise responsibility or literacy can easily turn into a cosmetic measure instead of a meaningful solution. In a heterogeneous society and with various linguistic and cultural backgrounds, the

¹¹ Rupesh Kumar Singh, Freedom of Speech and Expression and Reasonable Restrictions: An Analysis, 2 INDIAN J.L. & LEGAL RSCH. 1 (August-September 2021)

regulatory prescription should address these undecided areas of definition in order to be effectively operative.¹²

The work by Modh takes a separate route and proposes a community-based reporting and voting system to categorize the possibly offensive speech. The suggestion does not seem autocratic and centralised, as it allows users to engage in the process of dictation of the rules of online discourse. Nevertheless, there are more structural problems revealed through the model. Offensiveness is defined in vastly divergent ways in communities based on past, cultural and political events. A voting-based model can thus recreate hegemonic social practices and quash voices of minorities, particularly during the time of increased polarisation of politics. Instead of removing ambiguity, such a strategy can reinforce subjective criteria and majoritarian pressures by accident. Besides, such a system, as one that is heavily dependent on the involvement of the users, has some issues that are the possibility of organised flagging campaigns, low digital literacy rates, and the practicality of rolling out participatory moderation on large multilingual systems. The two proposals are also faced with some practical constraints within the prevailing regulatory environment. The platforms are already stricter in their compliance requirements and deadlines in answering government requests. Adding community-based voting or popular literacy efforts can be an additional cost to operations with no legal clarity to enforce. Without a well defined constitutional test of recognizing harmful speech as opposed to provocative speech as justifiable but free speech no regulatory system can operate in a coherent and predictable way. Combined, these criticisms suggest that the key issue with controlling online expression in India is not whether to focus on state-controllable, platform-controllable, or community-controllable approaches. The greater problem is the absence of an ethical benchmark which indicates the constitutional bar of offensiveness in Article 19(2). Until this loophole is resolved via judicial elucidation or legislative change, any act of regulatory novelty will still be prone to subjectivity, inconsistency and the chilling effect that is still suppressing democratic online engagement.¹³

Two additional submissions show the continued failure of the Indian legal system to overcome the issues of hate speech and protect the freedom of expressive behavior, indicating that a

¹² Aruno Raj Singh & J. S. Bisht, *Regulating Freedom of Speech and Expression on Social Media in India: Constitutional Perspectives, Platform Responsibilities, and Pedagogical Insights Through Case-Based Analysis*, 4 *Int'l Sci. J. Eng'g & Mgmt.* 1 (2025)

¹³ Ketan S Modh, *Controlling Hate Speech on the Internet: The Indian Perspective* (Leiden Univ. Working Paper, 2016)

punitive approach to hate speech is unlikely to reduce destructive speech and instead choke legitimate political participation. The first point of view is that the dependence on general criminal acts has already become counterproductive since these acts silence communication instead of promoting social enlightenment and the more substantive answers are in counter-speech, mediation, community discourse, and restorative justice. The intentions behind these measures are to minimize harm via social participation instead of censorship, yet their usefulness to India is yet to be demonstrated because an empirical evaluation has not been done so far, and this leaves a significant gap in the decision-making process and legal research.¹⁴ The other strand is the evolution of hate-speech law since the colonial period of the laws to govern public order and tranquility through the constitution, proving that the courts have become habituated to prioritizing the tranquility of the people over the freedom of speech, in essence, enabling disruptive groups to suppress speech by threatening disorder. This is because the very concept of offensiveness, insult, or outrage appears to be weakly defined and thus depend on context, across cultural and political backgrounds, and thus is likely to be inconsistently and unevenly applied. The ambiguity has facilitated suppression of dissenting or minority voices in the name of preventing disorder in the street, which has strengthened a trend where controversial thoughts are limited instead of discussed. It is argued that more definite constitutional principles concerning the distinction between speech that only causes discomfort and speech that causes actual harm and more effective truth-based protections are necessary, so that the protection of actual criticism is not discriminated. Combined, these evaluations display a regulatory environment characterized by the lack of conceptual clarity, failed judicial enforcement, and excessive reliance on criminal penalties. They highlight the importance of principled and evidence-based structures capable of striking a balance between the social peace and strong defence of democratic expression.¹⁵

Taken together, three scholarly contributions review the long-standing challenge of balancing the freedom of speech and what is necessary in the Indian democratic system, revealing that the ambiguity of the Constitution and subjectivity still continue to influence the regulation of expression. According to one of the studies, the contradiction of a democracy which boasts of the freedom of expression yet depends on abstract terms like offensiveness to justify censorship is noted. It determines various types of speech, including political, hateful, and misleading, by

¹⁴ Anandita Yadav, *Countering Hate Speech in India: looking for answers beyond the law*, 2, *ILI L.REV*(2018)

¹⁵ Siddharth Narrain, *Hate Speech, 'Hurt Sentiment, and the (Im)Possibility of Free Speech'* *Economic and Political Weekly*, APRIL 23, 2016, Vol. 51, No. 17 (APRIL 23, 2016), pp. 119-126

a doctrinal interpretation of major constitutional jurisprudence and maintains that the lack of legal boundaries frequently permits the subjective application of the law, which yields contradictory results and permits state authorities to deal with dissidentiation at will. It states that the protective mechanisms designed to preserve democratic stability undermine democratic principles when they are not taken under close supervision by the judiciary, which is why the constitutional balancing needs to be clear.¹⁶ The other analysis is revolving around the recurring use of the state when they say that they are exercising public order as a reason to censor, based on the findings of the survey conducted empirically, which show that education levels of people influence the tendencies to accept or tolerate controversial or dissenting opinions. This piece of writing reveals how politicians tend to use the rhetoric of public-order to stifle criticism particularly in the context of a lack of an accurate legal system on what counts as offensive or harmful speech. It also highlights the significance of empowering teachers and encouraging civic literacy in order to curb politically motivated censorship and create a more resilient civil area. The third contribution analyzes the overlap between free speech and law of defamation in India, and how the subjectivity of offensive works against the defamation agreement.¹⁷

variable and unpredictable interpretations are due to their eness and wide judicial discretion. With the spread of digital communication, the existing legal norms find it hard to embrace the emerging discourse and reputational damage, which also makes it more difficult to find an even-handed approach. All of these analyses go to show that India is not just facing problems related to the lack of legislation, but a set of structural doubts inherent in constitutional language and judicial practice. They emphasize the importance of principled differences between speech that is harmful and those that are only uncomfortable, more objective legal standards concerning the offensiveness, and reforms in the institutions that can safeguard the expression of democracy and at the same time avoid social disruptions.¹⁸

III A. Constitutional and Legal Standards for Determining Offensiveness in India

The Indian Constitution guarantees to its citizens the Right to Freedom of Speech and Expression under Article 19(1)(a), but the fact is that the right is not an absolute one. This has

¹⁶ Shalini ALIAS SIMMY, Free Speech in Restricted Democracy in India, International Journal of Law, Management & Humanities [Vol. 7 Iss 2; 1844]

¹⁷ Saadiya, Freedom of Expression and Maintenance of Public Order: Contemporary Issues and State Response, 3 J. Campus L. Ctr. (2015).

¹⁸ Manu Vaishnav, Right to Freedom of Speech and Expression v. Defamation, 3 INDIAN J.

been provided in Article 19(2), which allows the state to put reasonable restrictions in the interests of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency, morality, contempt of court, defamation, and incitement to an offence¹⁹. At first instance, this article appears to keep a balance between individual liberty and collective interest. However, its drawback lies in the fact that the clause doesn't provide a solid definition of what will be called "offensive" speech. Instead, the clauses are relying on vague terms like "decency" and "morality", which don't have accuracy or precise meaning.²⁰ Legal scholars have realized that these terminologies are inherently subjective, as one community that will consider one thing to be indecent or immoral may be regarded as satire, legitimate criticism, or artistic expression by another²¹. This kind of ambiguity leaves persons, regulators, and the court without any clear standard for defining offensiveness, which creates space for arbitrary and selective enforcement, which would silence the artists or the public in general.

If there is an absence of statutory definitions, the responsibility of defining the term offensiveness has been taken by the courts. Early judicial approaches adopted the colonial era Hicklins test, widely known in the case *Ranjit D. Udeshi v State of Maharashtra*, where the court asked if the material tended to "deprave and corrupt" those susceptible to such influence.²² This test, even though it was influential, faced criticism for its overbreadth and failure to consider works in their entirety. Later cases like *Aveek Sarkar v. State of West Bengal* showed changes towards community standard tests, which calculate speech in its social and cultural context rather than focusing on isolated passages.²³ Even after this change, there is still no uniformity in its application. The courts, while deciding, swing back and forth between protecting expression and kneeling before majoritarian morality, leading to inconsistency in the application of Article 19(2).²⁴

These vague constitutional standards have also been further exposed in the digital era. A place where tons of people post content daily. The Supreme Court struck down section 66A of the Information Technology Act in the case of *Shreya Singhal v Union of India*, which criminalised

¹⁹ *India Consti.* art. 19(1)(a), 19(2)

²⁰ Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* (Oxford Univ. Press 2016).

²¹ *Supra* note 5.

²² *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

²³ *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

²⁴ *Supra* note 11.

sending grossly offensive messages through electronic media. The provision was held unconstitutional because the language in the provision was too vague, overbroad, and prone to misuse. Criminalizing undefined offensive content creates a chilling effect.²⁵

The Indian Constitution and legal framework have not provided a clear or generally accepted definition of offensiveness. Article 19(2) has been evolved by the judiciary by introducing tests which often produce inconsistent outcomes. Particularly in the digital era, the absence of any standard and precise definition creates room for arbitrary interpretation and selective enforcement. While attempts have been made through cases to curb vagueness, the oscillation still remains, jumping from defining offensive speech and societal sensitivities, making it undefined and culturally fluid.

B. Judicial Interpretation and Application of Offensiveness in Freedom of Expression Cases in India

Indian Courts have interpreted and applied offensiveness in Article 19 (2) in many series of cases. Hicklin test, which originated 1868 English case *Regina v. Hicklin*. Its core principle is that if any part of a material has the tendency to corrupt or deprive vulnerable individuals (particularly children), then the entire work can be classified as obscene²⁶. Earlier, the Supreme Court adopted the Hicklin test in *Ranjit D. Udeshi v. State of Maharashtra*, looking at whether the matter in dispute tends to “deprave and corrupt” a susceptible mind. This framed offensiveness largely as obscenity and allowed restriction.²⁷ Over time, the court shifted to contextual vision in the *Aveek Sarkar v. State of West Bengal*, it embraced contemporary community standards and held that material be evaluated as a whole in its social setting, not by conservative norms, which narrowed the term offensiveness that justified censorship.²⁸ As far as public order is concerned, the court held that speech can be restricted if there is a direct and close connection with the words and actual disorder. In *S.Rangarajan v. P. Jagjivan Ram*, the courts held that a film can’t be banned just because some people threaten to react violently. If speech doesn’t satisfy the contents of Article 19(2), then it can’t be suppressed. The State has a Duty to protect law and order and protect the rights of individuals, not give hecklers veto

²⁵ *Supra* Note 8.

²⁶ F. W. Smith, Jr., *Obscenity: From Hicklin to Hicklin*, 2 U. Richmond L. Notes 289, 317 (1967), <https://scholarship.richmond.edu/lawreview/vol2/iss5/2> (last visited Oct. 21, 2025).

²⁷ *Supra* note 4.

²⁸ *Supra* note 5; S. N. Jha, *Liberty under the Indian Constitution Regarding Speech and Expression: A Bird's Eye View*, 2 Int'l J. Pol. Sci. & Gov. 75, 81 (2020), DOI: 10.33545/26646021.2020.v2.i2b.58

power.²⁹ The Munawar Faruqui controversy is the best example of heckler's veto. Even though there was no evidence that offensive jokes were actually performed, the stand-up comedian was arrested and was continuously denied bail, largely due to the complaints filed by politically connected individuals claiming that their religious sentiments were hurt. This shows a pattern in the Indian judiciary where the state restricts speech not because it directly threatens public order, but because of the hostile public's threat. This causes a chilling effect as well.³⁰

Coming to the digital era, the case of *Shreya Singhal v. Union of India* struck down section 66A of the IT Act because the court held that the definitions "grossly offensive" and "annoyance" are constitutionally vague, and that would cause a chilling effect. The judgment clarifies that only incitement that has a close link to the 19(2) can be penalised.³¹ The courts have made it clear that defamation and hate speech can be held valid limitation on free speech. The was allowed because a person's reputation and dignity are protected under 19(2). But if we look at *Amish Devgan v. Union of India*, the court looked at sections 153A and 295A of the Indian Penal Code that dealt with hate speech. It was held that not all offensive remarks can be counted as hate speech. The court applied the content, context, intent, and harm test. The court held that they were not deciding whether Devgan was guilty of hate speech. It only held that allegations could not be dismissed outright, but it will go under the regular process of investigation.³²

Courts have further developed more nuanced interpretative approaches in subsequent years. The Supreme Court in *Indibly Creative v. Government of West Bengal* established an elevated protection standard for satirical expression, especially when targeting marginalized communities. It said that unofficial bans on political satire violated Article 19(1)(a). This is the case where the Court recognized that offensive content requires differentiated analysis depending on the target and social power dynamics involved.³³ The Court noted that satirical expression targeting society's marginalized groups deserves constitutional protection as it serves the democratic discourse function. In recent years, the Supreme Court has still balanced between freedom of expression and claims of offensiveness. The court quashed the FIRs filed against Imam Pratapgarhi for sharing a politically evocative poem and also clarified that speech

²⁹ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574; Narrain, S. (2016); *Supra* note.11 pg119–127.

³⁰ Vichhotiya Vinamra, *Freedom of Speech and Expression with Respect to Munawar Faruqui Case*, 4 Indian J.L. Legal Rsch. 1 (2022).

³¹ *Singhal v. Union of India*, (2015) 5 SCC 1

³² *Amish Devgan v. Union of India*, (2020) 11 SCC 1.

³³ *Indibly Creative Pvt. Ltd. v. State of West Bengal*, (2020) 12 SCC 436.

which merely disrupts, provokes, or offends will not lose constitutional protection unless it crosses the specified boundaries in Article 19(2).³⁴

C. The Role of Comparative Constitutionalism in Shaping India's Legal Definition of Offensiveness in Free Speech.

The Indian constitutional provisions on freedom of expression are founded on Article 19(1)(a), which guarantees each person the right to free speech, and clause 2 of Article 19 permits reasonable restrictions on the grounds of decency, morality, public order, and incitement to an offence. Still, the difficulties lie in the vagueness of these terms, like “decency” and “morality,” which do not provide clear and reasonable standards for measuring offensiveness.³⁵ This Lack of precision has allowed courts to oscillate between broad censorship and narrow protection. This results in uncertainty and chilling effects on speech³⁶. Thus, in this context, comparative constitutionalism provides a constructive direction for India to draw on the experiences of other countries that have grappled with the same tensions between freedom and restriction.

The United States represents one end of the constitutional spectrum, in which the First Amendment has been interpreted to give speech a high degree of protection. The U.S Supreme Court has limited restrictions to categories like “fighting words”³⁷ and inciting “imminent lawless action”³⁸. This jurisdiction stresses on direct causation between speech and harm instead of relying on abstract notions of morality. For example, in *Brandenburg v. Ohio*, the Court held that mere advocacy of violence is very well protected to the extent that it doesn't direct inciting imminent unlawful conduct³⁹. If the Indian Courts engaged more with this harm-oriented standard, they could reduce the arbitrary use of Offensiveness as a ground for censorship.

The European model “European Court of Human Rights(ECHR)” adopts a “Margin of appreciation” doctrine, which allows the State to define in its own discretion, offensiveness while still requiring restriction to be “necessary in a democratic society”⁴⁰. The ECHR has stressed proportionality, ensuring that State-imposed restrictions are justified and narrowly

³⁴ Imran Pratapgadhi v. State of Gujarat, 2025 SCC OnLine SC 678

³⁵ M.P. Jain, *Indian Constitutional Law*, 8th edn., LexisNexis, Gurgaon, 2018.

³⁶ *Supra* note 16.

³⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

³⁸ *Whitney v. California*, 274 U.S. 357 (1927).

³⁹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁴⁰ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

tailored⁴¹. In cases that involve blasphemy or offensive satire, like *Otto Preminger Institute v. Austria*, the Court upheld restrictions but stressed contextual analysis. This framework shows how offensiveness can be understood as a culturally dependent but always tested against necessity and proportionality.

South Africa offers another informative model. Its Post Apartheid Constitution explicitly protects dignity and equality along with free expression. The court is required to balance these values instead of subordinating one to the other⁴². In *Islamic Unity Convention v. Independent Broadcasting Authority*, the Constitutional Court struck down the overbroad provisions that were regulating offensive speech, stating that limits must be precise and proportionate⁴³. This jurisprudence is significant for India as it often equates offensiveness with majoritarian morality rather than being linked to Constitutional values like dignity and equality.

Canada offers a comparative lesson through its adoption of the “Oakes test,” in which all speech restrictions would go under a rigorous proportionality review⁴⁴. Canadian courts are aware of the fact that offensive expression is regulable when it results in a clear harm to the protected interests such as equality or public order and not just discomfort. It is aimed at avoiding actual damage, like discriminating against or endangering social cohesion as opposed to prohibiting expression merely because it offends or discomposes individuals. Regulation should be well harmonized to uphold the freedom of expression and safeguard vulnerable groups as well as ensure that people are safe. The justifications of restrictions should only be applicable in occasions where they are needed by the society on an urgent basis and are commensurate to the harm that they are incurred. This is because by doing this, they would secure the freedom of expression as an essential right but it does not consider it to be used as a means of protecting harmful or damaging speech.⁴⁵ This doctrinal clarity can be useful to Indian courts to adopt a structured, multi-step proportionality analysis when evaluating restrictions under Article 19(2)

Beyond case law, comparative scholarship highlights that the concept of offensiveness should not be left to the societal norms that keep fluctuating. Scholars like Frederick Schauer argue

⁴¹ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* 134–39 (2006).

⁴² *Otto Preminger Institute v. Austria*, 19 Eur. Ct. H.R. 34 (1994).

⁴³ *Islamic Unity Convention v. Independent Broadcasting Authority*, 2002 (4) SA 294 (CC) (S. Afr.).

⁴⁴ *R v Oakes*, 1 SCR 103 (SCC).

⁴⁵ Richard Moon. (2021). *The Constitutional Protection of Freedom of Expression*.

https://www.researchgate.net/publication/353417564_The_Constitutional_Protection_of_Freedom_of_Expression. (last visited on Oct. 21, 2025)

that offensiveness must be tied to concrete harms to avoid allowing the state to have arbitrary power⁴⁶. Ronald Dworkin stresses that the free expression of offensive speech plays an essential role in preserving a culture of equal and free citizenship since it takes into account individuals as independent moral entities who can make their own judgments. In his argument, he claims that the government should not be able to restrict speech that tends to offend or disgust people because it deprives the citizens of the moral obligation to exercise their freedom of speech and expression to the views that are different and even offensive. This defense of offensive speech, according to Dworkin, is the foundation of democratic institutions as it guarantees that citizens are allowed to freely exchange ideas and this is the key to political equality. His point is that only prohibitions against real harm of others may possibly serve as justification of any restrictions to speech, but simple offense does not fit this threshold. Hence, protection of offensive speech is a key to a fair society that appreciates equality, free will, and free discussion⁴⁷. For India, comparative constitutionalism provides three major contributions. First, it highlights the need for a contextual harm test over the present abstract morality. Second, it explains the importance of structured proportionality review in assessing restrictions. Third, it demonstrates that offensiveness must be evaluated not from the standpoint of the most sensitive individuals, but by assessing it in the light of democratic necessity and equality. These insights align with India's Gradual shift towards proportionality in cases such as *Puttaswamy v. Union of India*, where the court adopted proportionality as a constitutional standard.⁴⁸

D. Developing a Consistent Judicial Test for Offensiveness: proportioning Free Speech, Public Order, and Dignity in Indian Constitutional Law

The Supreme Court keeps oscillating between the restrictive Hicklin test and the liberal community standard approach, coupled with vague constitutional terms like “decency” and “morality” in Article 19 (2), and because of that, a chilling effect has arisen on legitimate Speech & expression. Recent developments show progress and persistent challenges in this matter.

The Amish Devgan case's introduction of content-context-intent-harm analysis⁴⁹, the Shreya

⁴⁶ Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* 65-67 (Cambridge Univ. Press 1982). *Enquiry*.

⁴⁷ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 200-03 (1996).

⁴⁸ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁴⁹ Devgan v. Union of India, Global Freedom of Expression(Columbia Univ.) <https://globalfreedomofexpression.columbia.edu/cases/devgan-v-union-of-india>. (last visited Sept. 10, 2025).

Singhal rejection of "grossly offensive" as constitutionally ambiguous, and the growing emphasis on proportionality testing all demonstrate that judges are aware of these definitional flaws.⁵⁰ But inconsistent enforcement by various benches keeps undermining legal certainty.

The Indian Court should develop a Six-stage integrated test that would combine already existing jurisprudential developments with comparative constitutional insights and also address the constitutional structure. At first, courts must establish objective definitional parameters for offensiveness that would move beyond subjective moral judgment. The term Offensiveness should also include expression that, when evaluated in their entirety and context, significantly undermines constitutional values of dignity, equality, and fraternity, or pose substantive harm to protected interests, beyond mere discomfort or disagreement with the content expressed. This definition Adopts a few essential elements, like objective harm criteria rather than subjective offense. Sticking on to Constitutional values rather than fluctuating according to societal pressure. Lastly, it has contextual evaluation rather than isolated content assessment. This would give the threshold its definitional clarity. By the framework expressed in *Amish Devgan*, the court should develop a four-dimensional analytical matrix that includes content analysis, context analysis, intent analysis, and impact analysis.⁵¹

For the purpose of structured proportionality review, the Courts should apply the four-pronged proportionality test that was established in *Modern Dental College* and subsequent cases that refined it. The four tests are

Legitimate Aim: This is the need by the Court to identify whether the limitation of free speech is directed to safeguard the colliding core rights or seek an end that is clearly acknowledged in Article 19(2) of the Constitution i.e. the security of the State, decency, morality or order. The State has to demonstrate that the reason why the restriction is imposed is not arbitrary or extraneous but it is constitutional.

Rational Connection: The Court at this stage has a look at whether the restriction is logically and reasonably related to the purpose to be accomplished. The adopted measure should in fact serve to advance the specified goal, i.e. the restriction should not be premised on assumptions or speculative harms; there should exist a provable connection between the restriction and the

⁵⁰ <https://indconlawphil.wordpress.com/2025/03/03/an-abuse-of-jurisdiction-the-supreme-courts-new-order-in-ranvir-allahbadias-case>. (last visited Oct. 21, 2025)

⁵¹ *Supra* note 14.

issue the restriction tries to respond to.

Necessity: It is a standard that compels the Court to determine whether the State had the option to choose less restrictive and equally effective alternative to accomplish the same goal. When it can be achieved through other policies, regulations or other safeguards at a lower cost on free speech, the restriction does not pass this test. The measure should be, therefore, the least restrictive possible.

Proportionality Stricto Sensu: In the last step, the Court weighs the extent of the harboring damages in the freedom of expression to the significance of attaining the legitimate objective. The limitation should not place undue or unreasonable limitations in comparison to the advantage it is meant to obtain. In case the damage to free speech is more crucial than the significance of the end, this limitation cannot be maintained as a constitutional one.

Harm-Based Assessment over Morality-Based restriction based on comparing the constitutional insights of South Africa and Canada, Indian courts should give importance to concrete harm over abstract moral judgment. The test should consist of a focus

1. Does the expression consistently jeopardize the targeted groups' participation and equal citizenship? Does the expression systematically undermine the equal citizenship and participation of targeted groups?⁵²
2. Is there a direct and obvious link between the expression and the likelihood of public disorder, rather than just the potential for others to react?⁵³
3. Does the phrase compromise citizens' equitable participation in public life or the democratic process?⁵⁴

When an expression crosses constitutional boundaries, courts should go for a graduated remedial measure rather than blanket prohibitions. The Supreme Court should issue comprehensive guidelines as done in *Vishaka* guidelines. These guidelines should provide the lower courts with a structured framework to apply this test. A hybrid model could enhance both

⁵² Marelize Marais, *Hate Speech in the Equality Act Following the Constitutional Court Judgment in Qwelane v SAHRC*, DOI: <https://doi.org/10.17159/1727-3781/2023/v26i0a15438>

⁵³ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22

⁵⁴ *Hansman v. Neufeld*, 2023 SCC 14

the clarity model could enhance both clarity and flexibility.

IV. Conclusion

The constitutional Indian experience of the freedom of speech and the indefinable term of offensiveness depicts a terrain full of vagueness and arbitrariness. The fundamental foundation of democracy proclaimed by Article 19(1)(a) as speech is weakened by the loose words of Article 19(2), in which such terms as decency and morality have been transformed into fungible instruments of partial regulation and majoritarian fears. Rather than punishing this imprecision, judicial interpretation has gone astray in an uncertain manner, thus swinging between the old colonial-era formulations, such as the Hicklin test, and more pragmatic formulations without ever establishing a settled doctrine. Significant decisions, such as the pruning of the overly broad cyber-speech restraints by *Shreya Singhal*, the challenge of the issue of hate speech by *Amish Devgan*, and the preservation of the freedom of art by *Indibly Creative*, provide indications of improvement but in the aggregate depict a picture of disunity instead of solidity. A better contrast can be drawn through comparative constitutional experience: American, Canadian, South African, and European courts have rejected vague conceptions of moral injury and instead have based restrictions on specific evaluations of the harm, organized proportionality tests, and contextual balancing. Such strategies show that reasonable restrictions on speech have to be linked to threats to constitutional values that are provable, like dignity, equality, and public order, and it's not to changing sentiment or political convenience. The study thus suggests a systematic six-phase model based on definitional accuracy, content-context-intent-impact grid, and a coherent proportionality assessment, which would reduce the degree of arbitrariness, create a absolute distinction among discomfort, real damages, and make sure that the restrictions are strictly limited. Judicial guidelines that are institutionalized, based on the *Vishaka* precedent, might strengthen uniformity through the lower courts and protect the constitutional balance between liberty and democratic order. Hence, to protect free expression in India, it is necessary not alone to have doctrinal clarity but also judicial determination, only by binding offensiveness to objective harm and proportionality can the law avoid its hysterical spur and control the development of a principled equilibrium that respects individual liberties and safeguards the constitutional commitments spirited in the collective interest an imperative even more acute in the digital era, where speech spread like wildfire and sensitivities trigger at the press of a button.