



COMMERCIAL AND PROHIBITED SPEECHES NOT PART OF FUNDAMENTAL RIGHTS: A CONSTITUTIONAL AND JURISPRUDENTIAL ANALYSIS

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Abstract

Freedom of speech and expression, guaranteed under Article 19(1)(a) of the Indian Constitution, forms a cornerstone of democratic governance and individual liberty. However, this right is not absolute. The Supreme Court of India, through a recent judgment, reaffirmed that commercial and prohibited forms of speech do not fall within the ambit of Fundamental Rights. This article delves deeply into the constitutional framework governing free speech, judicial interpretations shaping its evolution, and the implications of excluding commercial and harmful expressions from constitutional protection. Examining relevant case law, statutes, and policy developments, the article argues that this exclusion aligns with constitutional morality, public interest, and the doctrine of reasonable restrictions. The analysis also highlights the growing concerns around social media, influencer accountability, and digital regulation, emphasizing the urgent need for comprehensive legal frameworks to balance free expression with societal responsibility.

Keywords: Freedom of speech, commercial speech, prohibited speech, Supreme Court of India, reasonable restrictions, free expression, social media, influencer accountability, constitutional law.

I. Introduction

The right to freedom of speech and expression constitutes one of the most essential guarantees within the constitutional framework of India. It facilitates democratic participation, intellectual exchange, and the pursuit of truth thus serving as an instrument for discovering social justice and truth in governance¹. Nevertheless, as Douglas observed, “freedom of speech is not freedom to destroy”². The Supreme Court’s recent observation that commercial and prohibited speeches are *not protected* under the scope of fundamental rights reiterates the constitutional position that freedom must coexist with responsibility.

This judicial stance gains relevance in a digital landscape where speech often intertwines with commerce, and unregulated platforms can

magnify harm exponentially. The central question, therefore, is how constitutional doctrine accommodates commercial and harmful communication within a matrix that values both autonomy and public welfare.

II. Constitutional Scheme: Scope and Limitation of Expression

A. Article 19(1)(a): The Guarantee

Article 19(1)(a) of the Constitution confers upon citizens the “freedom of speech and expression.” This right includes political activism, journalistic publication, artistic expression, symbolic acts such as protests, and online dissent³. The fundamental philosophy underpinning this right aligns with the marketplace of ideas doctrine articulated by Justice Holmes⁴, suggesting that truth will prevail in open competition of ideas.



However, the Indian Constitution adopts a structured methodology, allowing only those forms of speech which enrich democratic discourse or safeguard individual autonomy from arbitrary restraint⁵.

B. Article 19(2): Reasonable Restrictions

The restriction clause under Article 19(2) establishes the normative counterbalance to the right under 19(1)(a). It allows the State to legislate restrictions in the interests of sovereignty, security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation, and incitement to offences⁶.

Judicially, this has been interpreted through the doctrine of *proportionality*, as grounded in *Modern Dental College v. State of Madhya Pradesh* (2016) 7 SCC 353, mandating that any restriction must be legitimate, necessary, and proportionate to its aim⁷. The 2025 ruling fits comfortably within this tradition by limiting the right in areas where expression morphs into commerce or social harm.

III. The Supreme Court's 2025 Pronouncement

In clarifying that commercial and prohibited speech are not constitutionally protected, the Court offered an expansive articulation anchored in three domains: (a) definitional boundaries, (b) societal harm, and (c) regulatory necessity.

A. Commercial Speech and Profit Motive

The Court observed that *commercial speech*, exemplified by advertising and brand promotion, is primarily profit-oriented and lacks intrinsic democratic value. The Court reaffirmed the principle that speech directed toward consumer deception or profit maximization cannot be elevated to the same pedestal as political dissent⁸.

This doctrinal reasoning echoes *Tata Press Ltd. v. MTNL* (1995), where the Court extended conditional protection to truthful commercial expression beneficial to consumers⁹. However, the current ruling narrows that scope,

emphasizing that misleading or manipulative messages, especially via social media influencers, fall outside the Constitution's protective fold.

B. Prohibited Speech: Hate, Incitement, and Obscenity

"Prohibited speech," as interpreted by the Court, refers to communication that promotes intolerance, enmity, or violence on grounds such as religion, caste, or disability. The reasoning builds upon *Pravasi Bhalai Sangathan v. Union of India* (2014) 11 SCC 477 and *S. Rangarajan v. P. Jagjivan Ram* (1989) 2 SCC 574, adopting a *clear and present danger* threshold for restriction¹⁰.

The judgment reaffirmed that hate speech, by its nature, corrodes public order and collective dignity. It cannot, therefore, seek refuge under Article 19(1)(a). Furthermore, in line with *Aveek Sarkar v. State of West Bengal* (2014) 4 SCC 257, the Court extended the "community standards test" to digital platforms, recognizing evolving notions of decency and morality¹¹.

IV. Statutory Architecture Regulating Expression

The regulation of speech and expression in India extends beyond constitutional guarantees. It operates through a network of statutory laws that collectively safeguard citizens' rights while curbing misuse of speech. These laws form the operational backbone of Article 19(2) by offering concrete mechanisms to address obscenity, defamation, misinformation, and hate speech through administrative and criminal processes.

1. Consumer Protection Act, 2019

The *Consumer Protection Act, 2019* empowers the Central Consumer Protection Authority (CCPA) to curb false, misleading, and deceptive advertisements. Under Sections 10 and 21, the CCPA may direct the discontinuation or modification of such advertisements and impose penalties on manufacturers and endorsers found guilty of misrepresentation (Consumer Protection Act, 2019).



This is particularly relevant in the age of influencer marketing, where celebrities and social media personalities promote products without adequate verification. The law enforces accountability by ensuring that promotional speech upholds honesty and public interest. For example, if a celebrity endorses a health drink claiming it cures diabetes without medical evidence, both the company and the endorser may face penalties. This aligns with the morality and public order exceptions under Article 19(2).

2. Information Technology Act, 2000 (Section 67)

Section 67 of the *Information Technology Act, 2000* prohibits the publication, transmission, or sharing of obscene or lascivious content in electronic form (Information Technology Act, 2000). The provision extends the notion of obscenity to online spaces, recognizing the moral and psychological impact of digital content.

It penalizes individuals who circulate or host sexually explicit or corrupting material on platforms such as websites, social media, or messaging apps. For instance, uploading pornographic or indecent videos on a website can invite prosecution under this section. This law embodies the constitutional concern for decency and morality in the digital age.

3. Indecent Representation of Women (Prohibition) Act, 1986

The *Indecent Representation of Women (Prohibition) Act, 1986* seeks to prevent the objectification and sexualized portrayal of women in media and advertising. It prohibits any depiction that presents women in an indecent, derogatory, or sexually suggestive manner (Indecent Representation of Women Act, 1986).

The Act supports gender-sensitive media practices by criminalizing the visual or textual portrayal of women that can corrupt or harm public morality.

Example: An advertisement showing women as mere decorative objects to sell consumer goods can be challenged under this law. It

strengthens the constitutional commitment to dignity, morality, and equality.

4. Indian Penal Code, 1860 / Bharatiya Nyaya Sanhita, 2023

The *Indian Penal Code (IPC), 1860*, and its modern successor, the *Bharatiya Nyaya Sanhita (BNS), 2023*, codify a wide range of speech-related offences. These include:

- Defamation (§499 IPC / §354 BNS) – Protects an individual's reputation from false statements (Indian Penal Code, 1860; Bharatiya Nyaya Sanhita, 2023).
Example: Publishing unverified allegations against a public figure can constitute defamation.
- Obscenity (§§292–294 IPC / §§281–283 BNS) – Prohibits the sale, circulation, or public exhibition of obscene material.
Example: Distributing obscene magazines or posters in public.
- Promotion of Enmity (§153A IPC / §194 BNS) – Punishes speech that fosters hatred among groups based on religion, caste, or language.
Example: Delivering a hate speech that incites communal violence.

These criminal provisions operationalize Article 19(2) by protecting public order, decency, morality, and national integrity through enforceable sanctions.

Together, these laws establish a comprehensive regulatory ecosystem that supports the constitutional vision of free but responsible speech. They prevent abuse of expression that can harm individuals or destabilize society. By doing so, they maintain a balance between liberty and accountability, ensuring that the right to freedom of expression remains both meaningful and socially constructive.

V. Digital Speech and Influencer Liability

The judiciary's recognition of *digital accountability* situates this judgment within the realities of the 21st-century speech ecosystem. The Court's explicit observation



concerning *influencer responsibility* marks a doctrinal transition from passive liberty to *active responsibility*. In this context, influencers are no longer mere private actors but participants in the quasi-public discourse with measurable social consequences¹⁶.

The Central Consumer Protection Authority's *Guidelines for Influencers (2023)* and the Supreme Court's subsequent directive to frame *comprehensive online content regulation* together form an emergent corpus of *digital constitutionalism*—a jurisprudence balancing innovation, commercial engagement, and the public good¹⁷.

VI. Jurisprudential Resonances and Comparative Insights

The Indian position aligns with global trends distinguishing protected from unprotected forms of expression. In the United States, while the First Amendment provides robust protection to commercial speech, it acknowledges regulatory space for restrictions on false or deceptive advertising (*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 1980)¹⁸. The European Court of Human Rights has similarly upheld restrictions under Article 10(2) of the *European Convention on Human Rights* when commercial expression undermines societal morality or order¹⁹.

India's approach, therefore, while constitutionally unique, resonates with comparative legal standards that prioritize substance over form in determining the constitutional value of speech.

VII. Doctrinal Implications

The Court's ruling amplifies three key doctrinal dimensions:

1. Reaffirmation of the Proportionality Principle

The first doctrinal advance is the reaffirmation of the proportionality principle as the central test for adjudicating restrictions on free speech. The Court reiterated that limitations imposed by the State must pursue a legitimate constitutional objective, be necessary to

achieve that objective, and remain proportionate in their scope and effect (*Modern Dental College v. State of Madhya Pradesh*, 2016; *K.S. Puttaswamy v. Union of India*, 2017).

This proportionality test ensures that any interference with free expression is not arbitrary or excessive but is guided by reason and constitutional purpose. In applying it to digital and commercial expression, the Court underscored that the State must demonstrate a rational connection between the restriction and the harm addressed, avoiding unnecessary encroachments on individual autonomy.

2. Functional Segmentation of Speech

The second doctrinal contribution involves the functional segmentation of speech, recognizing that not all forms of expression hold equal constitutional value. The Court distinguished between core democratic expression—such as political critique, journalistic investigation, and artistic creativity—and commercial or socially harmful expression, which may legitimately attract greater regulation.

This conceptual approach mirrors developments in comparative constitutional law, including the commercial speech doctrine established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976) and the contextual proportionality analysis of the European Court of Human Rights.

3. Institutional Responsibility and Digital Governance

The third doctrinal innovation lies in the Court's articulation of institutional responsibility in digital governance. In a landscape dominated by artificial intelligence, social media, and algorithmic communication, the Court emphasized the positive duty of the State to ensure that freedom of expression does not devolve into misinformation, hate speech, or moral injury.

Rather than perceiving regulation as censorship, the judgment reframed it as a constitutional obligation to maintain the authenticity, safety, and inclusiveness of the



digital public sphere. This approach mirrors the emerging global doctrine of digital constitutionalism, which calls for transparent, accountable, and rights-oriented governance of digital platforms (Celeste, 2019).

For instance, laws regulating deepfake videos or AI-generated misinformation are not viewed as suppressing speech but as protecting the integrity of democratic discourse and preventing social disorder.

The Court thus marked a jurisprudential evolution toward constitutional modernity, where traditional freedoms are interpreted dynamically to respond to new technological contexts.

Collectively, these doctrinal shifts redefine India's constitutional understanding of speech and expression. By reinforcing proportionality, differentiating functional categories of speech, and acknowledging the State's institutional duty in digital governance, the judgment situates Indian jurisprudence within a global constitutional conversation. It elevates freedom of expression from a static liberty to a living constitutional principle, capable of balancing autonomy, accountability, and technological progress in equal measure.

VIII. Conclusion

The Supreme Court's contemporary reaffirmation that commercial and prohibited speech shall not be shielded under Article 19(1)(a) underscores a mature and responsible vision of constitutional liberty. It reflects a deeper jurisprudential understanding that democracy thrives not through absolute license but through moral and normative discipline. As India advances into the digital epoch, this decision equips the constitutional framework to address emerging complexities of commercial inducement, online abuse, and societal fragmentation.

Ultimately, the Court has reasserted that freedom of speech, although sacred, is a *qualified right* bound by the imperatives of decency, accountability, and public order—a

proposition entirely harmonious with the Constitution's transformative character.

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