FREEDOM BUT NOT REALLY: THE "*UNPROTECTED*" ZONES OF ARTICLE 19 (1)(A)

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The structure of the Indian free speech clause is radically different from that of the First Amendment in the United States ["U.S."]. While some speech is "unprotected" under the First Amendment (in the sense of being completely invisible to it), all speech is visible to and protected under Article 19(1) (a) of the Indian Constitution. In India, therefore, restrictions on speech may only be placed by invoking Article 19(2). This difference matters: Article 19(2) is a rigorous provision which provides meaningful protections for speech.

This understanding of the free speech clause is in phase with most of the Indian Supreme Court's jurisprudence on the freedom of speech, which reflects a constitutional tradition of protecting this valuable right. This tradition is composed of judgments which have expansively interpreted Article 19(1) (a), hailing this right as one having paramount importance, with powerful rhetoric as to why it must be zealously protected.

There are, however, some incoherent patches in the Court's jurisprudence. Through some problematic judgments, the Court has effectively declared Article 19(1)(a) as inapplicable to certain areas of speech and expression. These include the speech of electoral candidates, commercial speech, compelled speech and loud speech. In two of these contexts, the Court placed heavy reliance on U.S. case laws. I argue that these judgments are wrong and inconsistent with our speech-protective constitutional tradition. I further argue that in any case, these aberrations are unnecessary, as Article 19(2) is sufficient to deal with all our speech problems.

Thus, even if the Court feels that Article 19(2) does not accommodate what are otherwise desirable restrictions on speech, it has no choice but to invalidate such restrictions. Our constitutional scheme does not leave the power of exception-making in the hands of judges.

INTRODUCTION

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Sixty years ago, the Indian Supreme Court declared certain kinds of trade as outside the purview of Article 19(1)(g) of the Indian Constitution [hereinafter a reference to "Article" shall mean reference to the Article of Constitution of India].[1] The reason given was that the subjects of trades such as gambling, liquor etc., are *res extra commercium* and the State enjoys complete control over their trade.[2] Senior Advocate, Arvind Datar has explained why this idea is a total misfit in our constitutional scheme.[3] He rightly points out that, Article 19(1) is a catchall provision: if the State wants to place restrictions on any of these rights, it must seek justification under the relevant restriction clause (Article 19(6) in case of the right to trade) and establish the reasonableness of the restriction.[4] And yet, as he observes, the Court has imported the doctrine of *res extra commercium* from the U.S. without regard to the context in which it originated. The U.S. runs this doctrine because its constitution recognizes the State as having "*police powers*", i.e. a general authority to regulate behaviour subject only to express constitutional limitations.[5] Our Constitution, Datar explains, explicitly rejects the notion of police powers by expressly defining the extent of the State's power.[6]

This paper is not about trade. It is about speech. My aim is to highlight that Article19(1)(a) has its own version of *res extra commercium* (perhaps, it can be referred to as *res extra speechum*?). Just like in the trade context, the Supreme Court has, in some cases, skirted the requirements of Article19(2) by carving out certain kinds of speech from the scope of Article19(1)(a) and it has done this after repeatedly proclaiming that it may not be done. It has often (inappropriately) relied on U.S. case law to achieve this result. But something differentiates this from the Court's approach in the trade context. There, the Court at least has an express rationale (*res extra commercium*) which it must invoke to explain why certain trade is unprotected. Here there is no such rationale; the Court often doesn't explain why it holds certain speech as unprotected.

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[1]State of Bombay v. R.M.D. Chamarbaugwala, 1957 SCR 874 ¶43.
[2]*Id.*; Har Shankar v. Excise & Taxation Commr., (1975) 1 SCC 737 ¶50.
[3]Arvind P. Datar, *Privilege, Police Power and Res Extra Commercium – Glaring Conceptual Errors*, 21(1) NLSIR. 133 (2009).
[4]*Id.*
[5]*Id.*
[6]*Id.*

Focusing on the importance of the restriction clause called Article 19(2), I argue as follows:

Part I. Most of the Indian Supreme Court's jurisprudence reflects a constitutional tradition of protecting the freedom of speech. This tradition is composed of judgments which have expansively interpreted Article 19(1)(a), hailing this right as one having paramount importance, with powerful rhetoric as to *why* it must be zealously protected. Part I is intended to set out necessary context for the remaining paper.

Part II. The structure of the Indian free speech clause is radically different from that of the First Amendment in the U.S. While some speech is "*unprotected*" under the First Amendment (in the sense of being completely invisible to it), all speech is visible to and protected under Article 19(1)(a). In India, therefore, restrictions on speech may only be placed by invoking Article 19(2). This difference is material: Article 19(2) is a rigorous provision which provides meaningful protections for speech. Its compulsory invocation, therefore, is in line with the constitutional tradition highlighted in Part I.

Part III. There are incoherent patches in the Supreme Court's jurisprudence. Through some problematic judgments, the Court has effectively declared Article 19(1)(a) as inapplicable to certain areas of speech and expression. These include the speech of electoral candidates, commercial speech, compelled speech and loud speech. In two of these contexts, the Court placed heavy reliance on U.S. case law. It is argued that these judgments are wrong and inconsistent with the constitutional tradition identified in Part I.

Part IV. Notwithstanding my argument in Part III, it is argued that these aberrations are unnecessary. Article 19(2) is sufficient to deal with all our speech problems. Further, if the Court feels that in some cases Article 19(2) is not adequate, we are talking of the need for a constitutional amendment, not of constitutional interpretation.

Part V. Conclusion.

I. A SPEECH-PROTECTIVE CONSTITUTIONAL TRADITION

The Indian Supreme Court's jurisprudence on the freedom of speech reflects a tradition of protecting this right as extremely valuable. Two aspects of this tradition can readily be analyzed by asking the following questions. First, how important is this right and why? Second, what is its scope?

a. How important and why?

It is extremely important, by virtue of being a natural right.[7] Just like the other Article 19 rights, it is not *conferred* upon the citizen by the State but is merely *recognized* by it.[8] Additionally, our constitutional scheme treats the freedom of speech as "*a cardinal value… of paramount significance*",[9] for it is "*the bulwark of a democratic government*".[10] The most important among the Article 19(1) rights,[11] it is characterized as the "*mother of all liberties*" for it gives "*succour and protection*" to other liberties.[12] The text of the Preamble supports this conclusion. The only Article 19(1) right it expressly mentions is the liberty of thought and expression.[13]

The upshot is that free speech is extremely important. But why? The Court gives three broad justifications. First, the right is valuable because it enhances one's freedom, enabling one to develop her personality in her own way.[14] Thus, it furthers self-fulfillment.[15] Second, it enables the pursuit of truth.[16] As no person is wise enough to conclusively determine

[7]K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 ¶261 (Chandrachud, J.), 395-396 (Bobde, J.); National Legal Services Authority v. Union of India, (2014) 5 SCC 438 ¶69; Ramlila Maidan Incident, In re, (2012) 5 SCC 1 ¶11 (Hereinafter 'Ramlila').
[8]National Legal Services Authority v. Union of India, (2014) 5 SCC 438 ¶69.
[9]Shreya Singhal v. Union of India, (2015) 5 SCC 1 ¶17.
[10]Subramanian Swamy v. Union of India, (2016) 7 SCC 221 ¶112; Ramlila ¶11.
[11]*Id*; N.K. Bajpai v. Union of India, (2012) 4 SCC 653, ¶12.
[12]*Supra* note 11.
[13]INDIA CONST, Preamble.
[14]State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶37.
[15]The Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ¶43.
[16]*Id.*

the truth, it is best to allow all ideas and opinions to be expressed openly.[17] "*Thought control*", therefore, "*is alien to our constitutional scheme.*"[18] All ideas can thus find their way to a "*marketplace*" where they can compete against each other.[19] Truth is bound to emerge from this competition, for the "*best test of truth*" is its power to survive this competition.[20]

Third, the freedom of speech and expression ensures a vibrant and responsible democracy.[21] People make better decisions when they are better informed; they are better informed when fewer fetters are placed on the dissemination of information.[22] A stronger version of this argument (quoted in *Shreya Singhal*)[23] was famously made by Brandeis, J. of the U.S. Supreme Court in 1927.[24] According to him, "*the greatest menace to freedom is an inert people*", and hence, "*public discussion is a political duty*".[25] Linked to this are two ideas: (1) that public criticism of institutions is crucial to the good functioning of a democracy;[26] and (2) that a "*culture of open dialogue*" is needed to "*sustain the collective life of the citizenry*".[27]

b. Scope

In line with its immense importance, the freedom of speech and expression is understood as having "*capacious content*".[28] The Indian Supreme Court has now expanded its scope by "*consistently adopting a very liberal interpretation*".[29] Illustratively and broadly speaking, Article 19(1)(a) covers one's right to educate, inform and even entertain others,[30] the

[17]Gajanan Visheshwar Birjur v. Union of India, (1994) 5 SCC 550 ¶10.
[18]*Id.*
[19]Abrams v. United States, 250 U.S. 616 (Holmes, J., Dissenting).
[20]*Id.*
[21]Shreya Singhal v. Union of India (2015) 5 SCC 1 ¶10.
[22]*Id.* ¶9; S. Khushboo v. Kanniammal, (2010) 5 SCC 600 ¶45 (Hereinafter 'Khushboo').
[23]*Supra* note 22 ¶12.
[24]Whitney v. California, 274 U.S. 357 (Brandeis, J., Concurring).
[25]*Id.*
[26]*Supra* note 22 ¶9.
[27]S. Khushboo ¶45.
[28]Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603 ¶25.
[29]State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶38.
[30]Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ¶75.

freedom to commercially advertise,[31] and the freedom to discuss and advocate one's opinions notwithstanding their unpopularity.[32] The right extends to circulation of one's views/information through any available media of one's choice.[33] Also protected is the linked right to receive information,[34] which includes the right to be educated, informed and entertained.[35] Crucially, this right protects not just public acts but also private one-on-one telephonic conversations,[36] the right to choose one's partner,[37] the right to sexual preferences,[38] and a parent's right to decide the medium of primary school instruction for her child,[39] none of which have an essentially public character.

It is important to note that Article 19(1)(a) recognizes two distinct interests.[40] The fact that "*expression*" is separately protected must mean that it holds at least some distinct content that is not "*speech*". Thus, among the "*manifold meanings*"[41] of the freedom of expression lies the freedom of "*manifesting by action*".[42] Behaviour & mannerism expressing one's gender identity,[43] choice of dressing,[44] manifestation of one's emotions and feelings,[45] protests,[46] casting a vote,[47] and flying the national flag[48] are examples of protected conduct.

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[31]Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139 ¶17.
[32]*Supra* note 22 ¶13.
[33]*Supra* note 16.
[34]*Id.*
[35]*Id.* ¶75.
[36]PUCL v. Union of India, (1997) 1 SCC 301 ¶19.
[37]Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368 ¶18.
[38]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1¶¶132, 245 (Misra, C.J.), ¶415 (Chandrachud, J.) (Hereinafter 'Navtej').
[39]*Supra* note 30 ¶40.
[40]*Supra* note 22 ¶17.
[41]People's Union for Civil Liberties (PUCL) v. Union of India, (2003) 4 SCC 399 ¶95.
[42]*Id.*
[43]National Legal Services Authority v. Union of India, (2014) 5 SCC 438 ¶72.
[44]*Id.* ¶69.
[45]*Supra* note 42.
[46]Ramlila ¶7.
[47]Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 ¶38.
[48]Union of India v. Naveen Jindal, (2004) 2 SCC 510 ¶90.

II. MATERIALLY DIFFERENT SPEECH CLAUSES

The argument as to the difference between the Indian and US position is that unlike in the U.S., where the absolutely-phrased[49] First Amendment compels judges to treat certain speech as "*unprotected*", no speech is unprotected under our Constitution. It follows that Article 19(1)(a) covers *all* speech, the only avenue for the State to justifiably interfere with that freedom being Article 19(2).

a. Not Absolute: Rewriting the First Amendment

The First Amendment is drafted in absolute terms. The relevant portion reads: "*Congress shall make no law… abridging the freedom of speech…*".[50] When faced with legislation desirably abridging the freedom of speech, the U.S. Supreme Court (SCOTUS) had to answer the question as to whether the First Amendment literally means what it says. The answer (understandably) came as a firm no, and what followed was an ad-hoc rule-making journey. Consider some of the famous decisions of early First Amendment law.[51]

1. Inciting violence

In *Gompers*,[52] the defendants were restrained by a court from boycotting the complainant by publishing statements accusing him of unfair trade.[53] The SCOTUS held that under prohibition in this case were "*verbal acts*", i.e. words having "*force*".[54] Since those are not properly characterized as speech, no First Amendment challenge lay.[55]

During the First World War, a man distributed leaflets to those who were conscripted encouraging them to abandon or obstruct the conscription.

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[49]U.S. CONST. amend. I.

[50]*Id.*

[51]It is to be noted that heads 1-3 are indicative and not exhaustive of the classes of unprotected speech. The crucial point is that no First Amendment challenge may lie in respect of an unprotected class of speech, no matter how disproportionately the State treats it.

[52]Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

[53]*Id.*

[54]*Id.*

[55]*Id.*

He was convicted for espionage.[56] The SCOTUS affirmed the conviction, holding that free speech protection would depend heavily on the context and circumstances of the case.[57] Holmes, J. famously wrote: "*The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.*"[58] In another contemporary espionage case, the SCOTUS upheld convictions of leaflet-distributors who called for a general strike of all workers to frustrate the U.S. Government's war attempts.[59] Holmes, J. (dissenting this time) wrote, again famously, that speech may only be curtailed when there is an "*emergency that makes it immediately dangerous to leave the correction of evil counsels to time*".[60] A modified version of this idea eventually became the law on incitement in 1969.[61]

2. Fighting words and Obscenity

In *Chaplinsky*,[62] the appellant called the City Marshal "*a God damned racketeer*" and "*a damned Fascist*", violating a prohibition on throwing insults at another person with intent to "*deride, offend or annoy him*".[63] Affirming, the SCOTUS held that the First Amendment did not protect "*fighting words*", i.e. words that "*cause an average addressee to fight*", because such words are "*no essential part of any exposition of ideas*" and thus have negligible social value.[64]

Likewise, in *Roth*,[65] the SCOTUS held that the First Amendment "*gave no absolute protection for every utterance*" merely on account of its "*unconditional phrasing*".[66] Though speech having "*the slightest redeeming social importance*" would be protected, obscene speech, having zero social value, was not.[67]

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[56]Schenck v. United States, 249 U.S. 47 (1919).
[57]*Id.*
[58]*Id.*
[59]Abrams v. United States, 250 U.S. 616 (1919).
[60]*Id.* (Holmes, J., Dissenting)
[61]Brandenburg v. Ohio, 395 U.S. 444 (1969).
[62]Chaplinsky v New Hampshire, 315 U.S. 568 (1942).
[63]*Id.*
[64]*Id.*
[65]Roth v. United States, 354 U.S. 476 (1957).
[66]*Id.*
[67]*Id.*

3. Schools, Workplaces and Prisons

These three are largely treated as unprotected zones. Schools are free to regulate speech that affects their "*basic educational mission*".[68] Employees may be subjected to any speech restrictions unless they are speaking as citizens on matters of public importance.[69] A prisoner loses First Amendment rights which are "*inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.*"[70]

4. All That's Left: Protected Speech

Protected speech is not immune from State's regulation. Rather, it gets varied levels of protection depending on *how* the State regulates it. A law or state measure that abridges it based on its content –for example, laws proscribing cross-burning,[71] flag-burning,[72] pornography,[73] etc. – target speech or expressive conduct based on its subject-matter. The SCOTUS uses strict scrutiny to test such laws, which means that the State must show (i) a compelling interest in prohibiting the speech and (ii) narrow tailoring of the restriction (i.e. unavailability of less speech-restrictive alternatives).[74] On the other hand, laws merely regulating the time, place, manner etc. of speech which are "*justified without reference to the content*"[75] of the speech – like a ban on protests near residences,[76] a zoning prohibition on adult movie theatres,[77] etc. are subjected to a lesser scrutiny.[78] Here, the State interest must be substantial (as opposed to compelling), the restriction must be narrowly tailored, and it must leave open alternate means of communication.[79]

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[68]Bethel School District v. Fraser, 478 U.S. 675 (1986).
[69]Gil Garcetti v. Richard Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consolidated School, 439 U.S. 410 (1979); Pickering v. Board of Education, 391 U.S. 563 (1968).
[70]Jones v. North Carolina, 439 U.S. 119 (1977).
[71]RAV v St. Paul, 505 U.S. 377 (1992).
[72]Texas v. Johnson, 491 U.S. 397 (1989).
[73]American Booksellers Ass'n v. Hudnut, 771 F.2d. 323 (7th Cir. 1985).
[74]*Supra* note 71.
[75]Virginia Pharmacy v Virginia Citizens, 425 U.S. 748 (1976).
[76]Frisby v Schultz, 487 U.S. 474 (1988).
[77]Renton v Playtime Theatres, 475 U.S. 41 (1986).
[78]*Id.*; *Supra* note 75.
[79]*Supra* note 77; *Supra* note 76.

b. The Indian Setting

At least three differences between Article 19(1)(a) and the First Amendment are manifest. First, Article 19(2) opens with the words: "*Nothing in sub clause (a) of clause (1)…*".[80] This shows that the grounds in Article 19(2) are intended to justify restrictions on speech otherwise protected by Article 19(1)(a). Therefore, even obscene, inciteful and defamatory speech,[81] which is "*unprotected*" in the U.S. context,[82] is *prima facie* protected under Article 19(1)(a).[83]

Second, crucially, "*protected*" speech (i.e. not obscene, defamatory, inciteful etc.) may *also* be curtailed under the First Amendment upon the showing of a substantial or compelling state interest.[84] This is not so under Article 19(2): the nine stated grounds exhaust the permissible grounds for restriction.[85] A quick look at Article 19 reveals that the different rights are subject to restrictions on different grounds.[86] This reflects careful deliberation by the drafters. E.g., while Article 19(1)(d), Article 19(1)(e) and Article 19(1)(g) rights may be restricted in public interest, Article 19(1)(a) rights may not.[87]

Third, Articles 19(1)(a) and 19(2) do not incorporate the distinctions between content-neutral and content-based restrictions.[88] Neither does it exclude speech made in special contexts, such as in prisons, schools and workplaces.[89] It is apparent that such concerns would be considered at the time of determining the reasonableness of the restriction under Article19(2). Unlike the First Amendment in the U.S., the very presence of a restriction clause like Article19(2) negates the possibility of excluding any speech at the Article 19(1)(a) stage.

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[80]INDIA CONST art .19(2).
[81]*Id.*
[82]*See* Section II(a)(i)-(ii) *supra.*
[83]*Supra* note 22 ¶17.
[84]*Supra* note 71.
[85]INDIA CONST art.19(2); *Supra* note 83.
[86]INDIA CONST art.19(1).
[87]Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842 ¶34 (Hereinafter 'Sakal').
[88]*See* Section II(a)(iv) *supra.*
[89]*See* Section II(a)(iii) *supra.*

Hence, though the two constitutions are similar in the sense that the freedom of speech is absolute in neither, their approaches to speech-restrictions are radically different. However, a closer look at other jurisdictions will demonstrate similarity with India's position.

c. Foreign and International Jurisdictions

The point here is to only demonstrate a contrast between different constitutional structures. Consider Canada, the International Covenant on Civil and Political Rights ["ICCPR"] and the European Convention on Human Rights ["ECHR"] on the one hand, and South Africa on the other. The Canadian/ECHR/ICCPR model is increasingly like that of India. The South African model is mid-way between the U.S. model and the Indian/Canadian/ECHR/ICCPR model.

The Canadian Charter of Rights and Freedoms guarantees[90] to everyone the freedom of expression.[91] This freedom, just like all other rights under the Charter, is subject "*only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".[92] Unlike the First Amendment in the U.S., and like the Indian Article19, the free speech clause protects all speech, notwithstanding its content and nature.[93] All restrictions must therefore be justified under the restriction clause.[94]

Likewise, the ECHR explicitly provides that rights may only be restricted for the purposes "*for which they have been prescribed*",[95] and an exhaustive list of legitimate aims is set out in the freedom of expression provision.[96] Similarly, under the ICCPR, a restriction is valid only if it pursues one of the enumerated legitimate aims,[97] and State Parties are simultaneously obligated to prohibit advocacy of hatred on select grounds.[98] Under both the ECHR and the ICCPR, speech restrictions are always subjected to the

[90]CONSTITUTION ACT §1 (1982) (Can.).
[91]*Id.* §2(b).
[92]*Id.* §1.
[93]R v Keegstra, [1990] 3 S.C.R. 697.
[94]*Id.*
[95]European Convention on Human Rights art.18, Nov. 4, 1950.
[96]European Convention on Human Rights, Art.10, Nov. 4, 1950.
[97]International Covenant on Civil and Political Rights art.19, Dec. 19, 1966.
[98]International Covenant on Civil and Political Rights art.20, Dec. 19, 1966.

"*three-part test*" of legality, legitimacy and necessity,[99] except if the person whose speech is restricted is trying to use his convention rights in order to destroy the rights of others, in which case the application is treated to be inadmissible.[100]

In contrast, the South African Constitution recognizes the freedom of expression but clarifies that it shall not extend to war propaganda, incitement to violence and hate speech.[101] There is a separate limitation provision (like the general provision in Canada) which provides that any right may be restricted "*only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedoms*" and lists relevant factors to be considered while judging the restriction.[102] Thus, except the three classes of speech excluded from protection,[103] speech may not be restricted without justifying it under this general provision.[104]

d. The Distinction Matters

Whether speech is restricted (A) by terming it "*unprotected*" and hence invisible to Article 19(1)(a), or (B) by terming it "*protected*" but nonetheless allowing restrictions under Article 19(2) – what difference does it make?

Choosing (B) yields three desirable consequences which are not shared by (A). First, the State cannot restrict speech for a reason outside Article 19(2), no matter how compelling the reasons are. The Supreme Court has said this repeatedly, constitution bench after constitution bench.[105]

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[99]Refah v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECtHR (2001); Faurisson v. France, Communication No. 550/1993, United Nations Human Rights Committee (1996).

[100]European Convention on Human Rights art.17, Nov. 4, 1950; International Covenant on Civil and Political Rights art.5, Dec. 19, 1966; Glimmerveen v. Netherlands App. Nos. 8348/78, 8406/78, ECtHR (1979).

[101]CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA §16 (1996).

[102]*Id.* §36(1).

[103]Afri-Forum v Malema, 2011 (6) SA 240 (EqC) (South African Equality Court).

[104]De Reuck v Director of Public Prosecutions 2004 (1) SA 406; Islamic Unity Convention v. Independent Broadcasting Authority 2002 (4) SA 294 (South African Constitutional Court).

[105]Romesh Thappar v. State of Madras, 1950 SCR 594 ¶10, Brij Bhushan v. State of Delhi, 1950 SCR 605 ¶5, Kameshwar Prasad v. State of Bihar, 1962 Supp (3) SCR 369

Second, the restriction must be "*reasonable*".[106] This means that it should be proportionate to the stated aim.[107] Further, the evil sought to be curbed must be substantial and sufficiently urgent.[108] Sometimes, the Court sets an even higher standard where the State must show that it adopted the least speech-restrictive alternative.[109] Third, the petitioner needs to show that Article 19(1)(a) stands *interfered* with.[110] The remaining burden[111] – of showing reasonableness and proximate nexus[112] with an Article 19(2) ground – is borne by the State.[113]

In contrast, under (A), "*unprotected*" speech could be restricted whimsically and disproportionately by the State. Therefore, (A) is a misfit with our speech-protective constitutional tradition (see Part I). And yet, we find traces of (A) in the Supreme Court Cases (SCC) volumes.

III. ABERRATIONS IN THE CONSTITUTIONAL TRADITION: THE SUPREME COURT'S EXPERIMENTS WITH THE "*UNPROTECTED*" ZONES OF ARTICLE19 (1) (a)

Four such zones are highlighted below: speech by electoral candidates, commercial speech, compelled speech and loud speech. The first is a question of eligibility. The last three pertain to the content of speech protected under Article 19(1)(a).

a. Electoral Candidates

"*All citizens*" enjoy the rights listed under Article 19(1).[114] However, its effectiveness remains questionable.

¶8; Sakal ¶34, State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶41.

[106] *Supra* note 80.

[107] State of Madras v. V.G. Row, 1952 SCR 597 ¶15.

[108] *Id.* ¶15.

[109] N.K. Bajpai v. Union of India, (2012) 4 SCC 653 ¶14; Ramlila ¶28.

[110] *Id.* ¶12.

[111] There is some tension between this and the notion of presumption of constitutionality. But that is not within the scope of this paper.

[112] Ramlila ¶28.

[113] *Supra* note 110.

[114] *Supra* note 86.

1. Jumuna Prasad Mukhariya

In *Jumuna*,[115] under challenge (*inter alia*) was a now-repealed legal provision that prohibited a candidate from making to voters a "*systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion*".[116] Rejecting the Article 19(1)(a) challenge, the constitution bench held that since the right to contest elections as a candidate is not a fundamental right, but only "*a special right created by the statute*", it "*can only be exercised on the conditions laid down by the statute*".[117] Accordingly, Part III has "*no bearing on such a right*".[118]

The Court's reasoning is flawed for four reasons. First, this reasoning has absurd consequences. Suppose the Parliament prohibited candidates from using the country's economic development as the basis to appeal for votes. Or, suppose it prohibited them from discussing about the growing crime rate. In a more draconian world, suppose the Parliament totally prohibited election campaigning by candidates or their agents. It seems absurd to suggest that Article 19(1)(a) – the right most closely linked to the idea of a vibrant democracy[119] – would not come to the rescue in such cases. If the people directly involved in the political process are prohibited from talking about significant political issues,[120] what is left of the political process?

Some might believe that such laws could still be challenged as manifestly arbitrary under Article 14.[121] Unfortunately, that door is not necessarily open. Whether courts may strike down arbitrary legislation is still grey. At least one constitution bench has said no.[122] In any case, *Jumuna* excludes

[115]Jumuna Prasad Mukhariya v. Lachhi Ram, (1955) 1 SCR 608. (Hereinafter 'Jumuna').
[116]*See* Ebrahim Suleiman Sait v. M.C. Mohammed, (1980) 1 SCC 398, at para 5.
[117]*Supra* note 115 ¶5.
[118]*Id.*
[119]Khushboo ¶45.
[120]Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629 ¶120 (Chandrachud, J., Dissenting).
[121]Shayara Bano v. Union of India (2017) 9 SCC 1 ¶5 (Kurian, J.), ¶101 (Nariman, J.), Navtej ¶238 (Misra, C.J.), ¶82 (Nariman, J.), ¶380 (Chandrachud, J.), ¶523 (Malhotra, J.).
[122]K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1 ¶205.

the applicability of the *whole* of Part III (including Article14) to electoral candidates.[123]

Second, it is simply counter-intuitive that a candidate possesses no fundamental rights. Suppose a law prescribes that while male candidates may deliver public speeches as part of their election campaigns, female candidates may not. The female candidates can raise no discrimination claim because, says *Jumuna*, Article 14 has "*no bearing*" on the purely statutory right to be a candidate.[124] Suppose again that a law prohibits Dalit candidates from entering Brahmin-dominated constituencies throughout their period of candidature. As per *Jumuna*, Article 17 would not hit this law, as the purely statutory right of candidature "*can only be exercised on the conditions laid down by the statute*".[125]

Third, the *Jumuna* decision suggests that when a citizen signs up to be an electoral candidate, she *waives* or is *estopped from* claiming her Part III rights. The law on this point has shifted post *Jumuna*. At least one constitution bench has declared that no citizen can ever barter away Part III rights through doctrines such as waiver and estoppel.[126]

Fourth, the Supreme Court has held that the State cannot condition the receipt of a benefit or subsidy on the relinquishment of a fundamental right.[127] A similar constraint should operate when the State places conditions on the exercise of statutory rights (just like with subsidies and benefits, statutory rights are created at the State's discretion). *Jumuna* is inconsistent with this view.

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[123] *Supra* note 115 ¶5.

[124] *Id.*

[125] *Id.*

[126] Olga Tellis v. Bombay Municipal Corpn. (1985) 3 SCC 545 ¶28; P. Rathinam v. Union of India, (1994) 3 SCC 394 ¶34; Nar Singh Pal v. Union of India, (2000) 3 SCC 588, ¶13; *See also* Behram Khurshid Pesikaka v. State of Bombay, (1955) 1 SCR 613 ¶12.

[127] Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717 ¶14 (Ray, C.J. and Palekar, J.), ¶171 (Mathew and Chandrachud, JJ.), ¶199 (Beg, J.). I admit that except Mathew and Chandrachud, JJ., the other justices state this proposition only in respect of minority rights under Art.30. But it is hard to see why it wouldn't apply also to cases where the relinquishment of other fundamental rights is sought by the State.

2. Ramesh Yeshwant Prabhoo

Under challenge in *Prabhoo*[128] was another provision of the same Act which prohibited a candidate from soliciting votes on the ground of "*his*" religion, caste etc.[129] Surprisingly, despite *Jumuna*, the Court bit the bullet and acknowledged the possible interference with Article 19(1)(a).[130] Assuming the interference (without giving a finding thereon),[131] it tested the legislation against Article 19(2) and upheld it as a reasonable restriction in the interests of "*decency*", i.e. the "*current standards of behaviour or propriety*".[132] It reasoned that the propriety standards of a "*secular polity*" did not allow a candidate to seek votes on the ground of his religion.[133]

3. Abhiram Singh

In *Abhiram*,[134] a bench of seven judges re-interpreted the meaning of the word "*his*". The majority, led by Lokur, J., expansively read the word to include not just the candidate's religion but also (*inter alia*) the voter's.[135] It was argued before the Court that such a broad interpretation would violate Article 19(1)(a).[136] In response, Lokur, J. simply extracted the discussion on this point from *Jumuna* and said: "*We need say nothing more on the subject.*"[137] This is strange. The Court could at least have explained *why* it agrees with a 60-year old decision despite the vast body of progressive case law that followed it.[138]

4. Comments

Something deeply contradictory belies the Supreme Court's approach. On the one hand, it waxes eloquent about how "*the essential concept of the freedom*

[128]Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130.
[129]Representation of the People Act §123(3) (1951).
[130]*Supra* note 128 ¶27.
[131]*Id.* ¶30.
[132]*Id.* ¶29.
[133]*Id.*
[134]Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629.
[135]*Id.* ¶48.
[136]*Id.* ¶34.3.
[137]*Supra* note 135.
[138]*See* Part I *supra.*

of speech" lies in political discussion and an informed citizenry.[139] On the other hand, it feels that it "*need say nothing*" about the denial of constitutional speech protections to electoral candidates who are perhaps the primary players in political discourse. I see no way to reconcile these two positions.

b. Commercial Speech

Facing an Article 19(1)(a) challenge in *Hamdard*[140] was a law prohibiting the advertisement of certain drugs and remedies claiming that such drugs/remedies possess magical qualities.[141] The Court acknowledged that commercial advertisements are "*no doubt a form of speech*".[142] Yet, it held that the law did not even *interfere* with Article 19(1)(a). Why? Because the object of an advertisement is trade and commerce, not propagation of ideas.[143] Hence, says the Court, advertisements have "*no relationship*" with "*the essential concept of the freedom of speech*".[144]

But, under our constitutional scheme, all speech-restrictions are to be tested under Article 19(2).[145] How, then, did the Court go so wrong? It erred because it invoked U.S. case law[146] and diligently followed it despite the significant constitutional differences highlighted above. Thirty-five years later, in *Tata*,[147] the Court tried to correct its error and held that commercial speech, even if "*deceptive, unfair, misleading and untruthful*", is covered by Article 19(1)(a) and any restriction thereon must pass muster under Article 19(2).[148] But *Tata* was delivered by a bench of three judges (as opposed to *Hamdard*'s five). So, *Hamdard* is still good law.

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[139]Hamdard Dawakhana v. Union of India, (1960) 2 SCR 671 ¶17 (Hereinafter '*Hamdard*').
[140]*Id.*
[141]*Id.* ¶3.
[142]*Id.* ¶17.
[143]*Id.*
[144]*Id.*
[145]Romesh Thappar v. State of Madras, 1950 SCR 594 ¶10, Brij Bhushan v. State of Delhi, 1950 SCR 605 ¶5, Kameshwar Prasad v. State of Bihar, 1962 Supp (3) SCR 369 ¶8; Sakal ¶34, State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶41.
[146]Valentine v Chrestensen, 316 U.S. 52 (1942); *Supra* note 139.
[147]Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139.
[148]*Id.* ¶17.

c. The Law of Motion: Free Speech versus Public Interest?

In *Motion*,[149] the impugned law mandated every movie theatre to screen a short educational or scientific film (documentary, news clip etc.) along with the film being screened.[150] Under the Article 19(1)(a) challenge, the exhibitors argued that (i) this law compelled them to 'speak', and (ii) no ground under Article 19(2) could possibly justify a restriction of this nature.[151] The Court upheld the law, ruling (once again) that Article 19(1)(a) was not even implicated,[152] relying (once again) on U.S. case law.[153] This is because the law promoted "*informed decision-making*" which forms "*the essence*" of the freedom of speech. Article 19(1)(a) would be infringed if the law compelled the exhibitors to project a partisan viewpoint.[154] But, the Court said, that is not this case.

There are a number of problems with this reasoning. First, informed decision-making is not the only "*essence*" of the freedom of speech. Equally an essence of the right is individual self-fulfillment,[155] which stands violated the moment there is compulsion. Second, on an abstract level, the answer to "*Is X being forced to speak?*" cannot depend on the answer to "*What is X being forced to say?*". Indeed, the latter question may logically be asked only if and after the former is answered affirmatively. The Court reverses this order for no clear reason. Third, equally, the question "*Is X's freedom interfered with?*" cannot logically be answered based on *why* X's freedom is interfered with. The *why* question is a justification question. It is an Article 19(2) question. Fourth – and this is perhaps the most important one – the Court's reasoning flies in the face of the clear command issued by the constitution bench in *Sakal Papers*:[156] "*It is not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law*

[149]Union of India v. Motion Picture Assn., (1999) 6 SCC 150.
[150]*Id.* ¶10.
[151]*Id.* ¶12.
[152]*Id.* ¶19.
[153]*Id.* ¶¶16-17; Turner Broadcasting System, Inc. v. Federal Communications Commission 512 U.S. 622 (1997).
[154]*Supra* note 149 ¶15.
[155]State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485 ¶37.
[156]Sakal.

competent under clause (2) of Article 19."[157] It must be noted that "*public interest*" is listed as a ground under Article 19(6) but not under Article 19(2). And yet, the law under challenge in *Motion* was undoubtedly a public welfare law and was characterized and upheld by the Court as such.[158]

The Court then discussed the mandatory printing of ingredients on food products and health warnings on cigarette packs.[159] It observed that these provisions exist to ensure that the consumer is well-informed about the product. Since such laws compel the dissemination of relevant information, the Court says, they *further* the freedom of speech rather than *curtail* it.[160] Similar is the law in question.[161] Hence, the Court concludes, while these provisions "*compel speech*", they don't violate Article19(1)(a) for they are "*designed to further free speech and expression and not to curtail it.*"[162]

But they could do both. They could curtail one person's freedom of speech in order to better secure another's. In fact, that is precisely what is going on here. Yet, instead of acknowledging the conflict between the speech rights of different groups, the Court holds that the individual's right to speak doesn't *exist* (as opposed to saying it is *outweighed*) where the public's right to receive information does. It seems like the Court sees "*freedom of speech and expression*" as one huge block that is held collectively by the Indian population – when some people learn, this block of freedom grows, and Article 19(1)(a) is enhanced. Individual freedom has no place in this view. It seems that if public information is enhanced as a result, the Court will not even factor individual freedom in its consideration. This view of Article 19(1)(a) seems wrong.

What if the law in *Sakal Papers* required every newspaper to dedicate two pages to articles on modern Indian history? What if the State passed a law mandating every song to start with a minute-long discussion on a scientific phenomenon of the singer's choice? The right to receive information is not a right to compel others to speak against their will.

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[157] *Id.* ¶34.
[158] *Supra* note 149 ¶17.
[159] *Id.* ¶15.
[160] *Id.* ¶17.
[161] *Id.*
[162] *Id.*

Holding otherwise turns Article 19(1)(a) on its head, as the right to freedom of speech and expression is possessed by "*all citizens*",[163] not by some citizens at the cost of others.

Further, suppose that a law criminally prohibits people from rejecting Darwin's Theory of Evolution as false. Suppose that it also prohibits the rejection of the Big Bang Theory. Would the Court say these prohibitions are not restrictions on the freedom of speech because they prevent misinformation? Or suppose that a law punished film directors for any pro-smoking or pro-alcohol statements made in their films. Would that not be a speech case? Perhaps the Court could draw distinctions between these hypothetical cases and *Motion*. But nothing in the Court's opinion suggests this. The Court makes blanket statements concerning the importance of reaching the illiterate masses who otherwise have no access to important information and the permissibility of placing restrictions on the freedom of speech for this purpose.[164] But it doesn't state the outer limits of this principle.

d. 'Loud' Speech and Article 21

Remember that freedom of speech includes the freedom to speak through any medium of the speaker's choice.[165] What if I want to choose to speak through loudspeakers and amplifiers in a residential locality in the middle of the night?

In *Noise Pollution*,[166] the question was whether the right to speak through loudspeakers (such as at political rallies and religious functions), which was "*undoubtedly*" part of the freedom of speech and expression,[167] could be invoked to violate others' rights against "*aural aggression*" under Article 21.[168] The Court says no: since the right under Article 19(1)(a) is "*not absolute*", it "*cannot be pressed into service*" when it conflicts with Article 21.[169]

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[163] INDIA CONST. art.19(1) (1950).
[164] Union of India v. Motion Picture Assn., (1999) 6 SCC 150 ¶17.
[165] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 ¶8; Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 ¶43.
[166] Noise Pollution (V), In re, (2005) 5 SCC 733.
[167] *Id.* ¶11.
[168] *Id.*
[169] *Id.*

Once again, the Court avoids the nuance it should have tackled and sweeps Article 19(1)(a) under the carpet. Its reasoning is flawed, like it was in *Motion*: because there is a good reason to *curtail* the right, there *exists* no right. Instead, the correct question to ask would have been: which ground under Article 19(2) has room for protecting the Article 21 right against aural aggression, or more generally, the right to privacy?

This is not the only occasion when the Court had to resolve a conflict between Article 19(1)(a) and Article 21. In *Sahara*,[170] the Court considered whether courts could pass orders prohibiting the media from publishing sensitive information on *sub judice* cases.[171] The case involved the media's press rights under Article19(1)(a) and, in conflict, the right to fair trial under Article 21 along with the Court's interest in administration of justice.[172] Acknowledging an interference with Article 19(1)(a) and observing that this case involved a clash between "*rights of equal weight*",[173] the Court held that the interests in fair trial and administration of justice were protected by the head of "*contempt of court*" in Article 19(2).[174] But, because such orders must be reasonable, they should be temporary and passed, after considering other alternatives, only in cases where there exists a "*real and substantial risk of prejudice*" to the said interests.[175] Thus, the Court invoked the doctrine of "*balancing*" to ensure that the two rights in conflict are "*given equal space in the constitutional scheme*".[176] It is submitted that this is the only proper approach in the case of a conflict between rights.

Also consider *Subramanian Swamy*[177] where the Court upheld the constitutionality of criminal defamation. The case was once again characterized as presenting a conflict between Article 19(1)(a) and the right to reputation under Article 21.[178] Yet, the Court located the justification for restricting the Article 19(1)(a) right in Article 19(2)

[170]Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603.
[171]*Id.* ¶15.
[172]*Id.* ¶25.
[173]*Id.* ¶42.
[174]*Id.* ¶46.
[175]*Id.* ¶42.
[176]*Id.*
[177]Subramanian Swamy v. Union of India, (2016) 7 SCC 221.
[178]*Id.* ¶144.

("*defamation*"),[179] citing *Shreya Singhal*[180] for the proposition that all restrictions on the right under Article 19(1)(a) must be located somewhere in Article 19(2).[181] These cases show that resolution of conflicts between Articles 19(1)(a) and 21 is possible through Article19(2). The Court's approach in *Noise Pollution* was therefore erroneous.

IV. THE ABERRATIONS ARE UNNECESSARY

Apart from being constitutionally problematic, the Supreme Court's reflex action in declaring some speech outside the purview of Article 19(1)(a) is wholly unnecessary. Article 19(2) provides an adequate framework to deal with the problems the Court is concerned about. Mostly responsible for this adequacy are the grounds of "*decency*" and "*morality*". But if Article 19(2) seems inadequate some cases, the judicial response should be to invalidate the restriction. Anything else would amount to a judicial amendment of the constitution.

a. Morality

After the recent Indian decision invalidating Section 377 of the Indian Penal Code, 1860 [hereinafter IPC], "*morality*" is to be construed as constitutional morality and not social/public morality.[182] Therefore, Article 19(1)(a) may be restricted to prevent outcomes that the *Constitution* considers wrong. I submit that morality is an adequate framework to resolve conflicts between rights. Depending on the rights in question, the Constitution may demand that they be balanced or, alternatively, that the hierarchy between them be enforced.[183]

Consider some IPC provisions that regulate speech. A man commits an offence by (a) making unwelcome sexual advances,[184] (b) making sexually

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[179] *Id.* ¶150.
[180] Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[181] *Supra* note 177 ¶145.
[182] Navtej Singh Johar v. Union of India, 2018 SCC OnLine SC 1350. This decision is possibly in tension with the decisions on obscenity, such as Ranjit Udeshi v. State of Maharashtra, AIR 1965 SC 881. However, that potential conflict is not within the scope of this paper.
[183] E.g. Art.25 is expressly made "*subject to other provisions*" of Part III.
[184] Indian Penal Code §354A(1) (1860).

coloured remarks,[185] or (c) saying any word or making any gesture intending to insult the modesty of a woman.[186] It is also an offence to (d) say something intending to wound another's religious feelings,[187] (e) insult someone intending to provoke a breach of peace,[188] or (f) making someone act by inducing them to believe that they could otherwise be the object of divine displeasure.[189] At least (a) to (c) are desirable restrictions. They could be justified based on constitutional morality, which contains *inter alia* values of equality and fraternity.[190] This is also true of hate speech provisions. Insofar as they are grounded in the constitutional value of dignity,[191] i.e. equal social standing for all citizens,[192] they further constitutional morality.[193]

This view of "*morality*" also brings our Constitution in line with internationally accepted standards for restricting speech. Foreign jurisdictions and international human rights instruments often provide for and practice restrictions on speech for the legitimate aims of protecting others' (a) rights and (b) reputations.[194] the ECHR,[195] the American Convention on Human Rights i.e ACHR,[196] and the ICCPR.[197] The European Court of Human Rights has held hate speech legislation to be justified for the protection of rights and reputation of others.[198] The ICCPR Human Rights Committee has done the same.[199] The Canadian Supreme Court's hate speech jurisprudence is along similar lines: while

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185 *Id.*
186 *Id.* §509.
187 *Id.* §298.
188 *Id.* §504.
189 *Id.* §508.
190 Navtej Singh Johar v. Union of India, 2018 SCC OnLine SC 1350 ¶115 (Misra, C.J.), ¶497 (Chandrachud, J.)
191 Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477, ¶15.
192 *Id.* ¶8.
193 GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 155-169 (2016).
194 Universal Declaration of Human Rights art.29, Dec. 10, 1948.
195 European Convention on Human Rights art.10, Nov. 4, 1950.
196 American Convention on Human Rights art.13, Nov. 22, 1969.
197 International Covenant on Civil and Political Rights art.19, Dec. 19, 1966.
198 Vejdeland v. Sweden, App. No. 1813/07, ECtHR (2012); *See also* Jersild v. Denmark, App. No. 15890/89 (European Commission of Human Rights) (1993).
199 Faurisson v. France, Communication No. 550/1993, United Nations Human Rights Committee (1996).

hate speech is *prima facie* protected under the free speech clause, proscribing it is a reasonable limitation which serves the legitimate aim of preserving values of equality, multiculturalism and dignity.[200]

In addition to that, constitutional morality is not only about fundamental rights. Directive Principles, Fundamental Duties, Preamble etc. would all be relevant in determining what is constitutionally right and wrong. The aim of this paper is not to suggest final answers to the puzzles presented by the cases discussed. The aim is merely to propose that Article 19(2) is adequate to deal with all of them. Constitutional morality provides a solid framework to tackle issues of fraudulent commercial speech, misleading information about drug use and magical remedies, mandatory health warnings on cigarette packs,[201] electoral speech, and noise pollution, because it grounds justification for the restrictions within the constitution in a systematic way, i.e. by taking the Article 19(2) route.

b. Decency

Unlike morality, decency remains a social, not constitutional standard. Further, it is not a standard of right versus wrong. Rather, it is one of *proper* versus *improper*.[202] Recall *Prabhoo*: decency implies social standards of behaviour and propriety.[203] This ground may save some desirable restrictions on speech that may not be justifiable under morality or any other ground in Article 19(2).

Consider time-place-manner restrictions. A public library may prohibit talking inside the library premises. The prohibition would extend to protesting, singing or disseminating information in any other form inside the library. Similar prohibitions may be placed in and around a public hospital. A public university may prohibit students from talking during exams (or even regular class hours). A student may be punished for violating discipline if she keeps asking questions about star formation in a

[200]R v Keegstra, [1990] 3 S.C.R. 697.
[201]The ECtHR has upheld bans on tobacco advertising as serving the "*fundamental considerations of public health*". *See* Société de Conception De Presse et D'édition et Ponson v. France, App. No. 26935/05, ECtHR (2009).
[202]Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130 ¶29.
[203]*Id.*

literature class. Even the teacher may be fired for talking international politics during a chemistry class and wasting everyone's time. Similarly, a soldier in the military may be punished for preaching religion to his fellow soldiers during drills and exercise. He could be punished even for expressing his anger by staring back at his superior.

All these restrictions seem to be justifiable. Most of them are about discipline. More broadly, all of them are about preservation of order in some sense. As per *Prabhoo*'s definition, they would all further the State's interest in maintaining decency.[204] They can therefore be upheld upon a showing of reasonableness and proportionality by the State.

CONCLUSION

When a court is called upon to decide whether a speech-restriction is constitutionally permissible, adjudication must proceed as follows:

Step 1. Decide if the state has (a) stopped the citizen from speaking or expressing, (b) punished her for doing so, or (c) compelled her to do so.

Step 2. If the answer to any of the three is yes, hold that the State has interfered with the freedom of speech and expression. Automatically go to Article 19(2).

Step 3. Decide if there is a ground under Article 19(2) that justifies the prohibition. If there isn't, case over – the State's measure is unconstitutional.

Step 4. If there is a ground under Article 19(2), decide if the measure was reasonable.

It is concluded that substantive adjudication about the permissibility of restrictions must happen at Article19(2), not at Article19(1)(a). Otherwise, courts unconstitutionally assume the power to decide when censorship is subject to Article19(2) and when it isn't. Such an approach is not only unnecessary but also inconsistent with our speech-protective constitutional tradition.

[204] *Id.*