
COMBATING THE MENACE OF HATE SPEECH

Saumya Tripathi, Banaras Hindu University (BHU)

ABSTRACT

The scope of freedom of speech and expression is a very good parameter to adjudge the maturity of a democracy. But this freedom is subject to certain reasonable restrictions, however what constitutes reasonable restriction is a subject matter of intense debate. In today's world of growing inequality it is upon the State to transcend the limits of formal equality among diverse opinion towards a more inclusive approach that vehemently discourages selective and systemic targeting of minorities by way of Hate Speech that evokes hatred and feeling of contempt against them. Hate Speech is an abstract concept and therefore it is difficult to attribute a universally accepted definition to it. It is an utterance that invokes hatred against an individual or group solely because of its shared identity. It draws a wedge of hostility between communities and groups, instills terror, spurs riots, leaves a corrosive effect on the conduct of collective life and therefore it is worthy of being restrained by way of law. In this regard, this paper deliberates upon the pernicious effect such a speech has on the targeted group of people, the democratic institutions and the social fabric. It also discusses the jurisprudence evolved around the world, especially in India to tackle the menace of hate speech. With the help of judicial decisions and proposals put forward by various committees, an effort has also been made to emphasise the need to overhaul the penal laws to bring in specific provisions to curb the threat of hate speech.

Keywords: Hate speech, Freedom of speech, Reasonable restrictions, Democracy

“It may be true that morality cannot be legislated, but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless.”¹

I. INTRODUCTION

The scope of the right to freedom of speech and expression is an important touchstone through which an estimation of the maturity of a democracy can be obtained. Free speech forms not just the foundation of a democratic institution but is also a basic human right that facilitates individuals to form and freely voice their opinions². However, freedom of expression is not absolute and may be subject to reasonable restrictions, as Boyle notes, *“a society that respects freedom of expression is not one where there are no restrictions on that freedom. There are always restrictions.... [A] healthy society is to be measured ... by noting whether there is open public debate and argument about the necessity of restriction in particular cases”³*. Therefore, the question that begs a sincere consideration is how to strike a balance between the competing interests, or rather how to reasonably restrict speech that incites violence and invokes hatred or beyond what threshold will a speech be discerned as one invoking hatred.

For an expression of opinion to be adjudged as a responsible exercise of freedom of speech and expression, the utterance should not just be devoid of deliberated abuse, defamation, denigration or incitement to violence but it should be an expression that does not tend to discriminate against or incite hatred towards a person or group of persons on the basis of their caste, religion, race, creed, sexual orientation, gender, nationality or immigration status⁴. In today’s world of growing inequality, it’s upon the state to move away from a free speech doctrine based on formal equality among diverse opinions to one that discourages the targeting of the minority or the vulnerable section of the society⁵. This inclusive understanding calls for laws to penalise hate speech to safeguard the collective interest of the minority.

II. WHAT IS HATE SPEECH?

¹ James Melvin Washington (ed.), *A Testament of Hope: The Essential Writings of Sir Martin Luther King JR.* 99 (1986).

² See *Handyside v. United Kingdom* (1976) 49 ECHR

³ Kevin Boyle, *Freedom of Expression and Restriction on Freedom of Expression* (2002) (unpublished manuscript, on file with the Tulsa Journal of Comparative & International Law).

⁴ Editorial, “Incorporating limits: on IPC and Hate Speech”, *The Hindu*, May 28, 2021, available at: <https://www.thehindu.com/opinion/editorial/incorporating-limits-the-hindu-editorial-on-ipc-and-hate-speech/article34661703.ece> (Last visited: March 20, 2022).

⁵ *Ibid*

Hate speech is too abstract an idea, therefore it is extremely challenging to define. Thus, it has no universally acknowledged definition attributed to it. It includes a speech that is abusive, denigrating, harassing and targeted against a group's or an individual's national, racial, sexual, religious or ethnic identity⁶. Human Rights Watch defines hate speech as “*any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and women*”⁷.

According to Prof. Waldron, hate speech refers to “*utterances that incite violence, hatred, or discrimination against people based on their collective identity, be it race, ethnicity, religion, gender or sexuality*”⁸.

Black's Law Dictionary identifies hate speech as the “*speech that carries no meaning other than an expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence*”⁹.

III. NEED FOR REGULATING HATE SPEECH

It is imperative to take into consideration the philosophical and moral aspects of prohibiting hate speech¹⁰. The core principle behind hate speech prohibition has been laid down in *Chaplinsky v. New Hampshire*¹¹, where the U.S. Supreme Court held that the US Constitution does not safeguard “*insulting or 'fighting' words — those which, by virtue of mere utterance, mete out injury or tend to incite an immediate breach of the peace.*”¹²

The insidious words uttered in a hate speech more often than not have far-reaching repercussions as observed by Lord Bhikhu Parekh, a British political theorist who said that: “*(Hate speech) views members of the target group as an enemy, refuses to accept them as legitimate and equal members of society, lowers their social standing, and... subverts the very basis of a shared life. It creates barriers of mistrust and hostility between individuals and*

⁶ Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 749 (Oxford U. Press, 2nd ed., 2000).

⁷ Samuel Walker, *Hate Speech: The History of American Controversy* 8 (University of Nebraska Press, 1995).

⁸ See Jeremy Waldron, *The Harm in Hate Speech* 71 (Harvard University Press, 2012)

⁹ Black's Law Dictionary, 9th edn., 2009

¹⁰ Kaleeshwaram Raj and Thulasi K. Raj, “Tackling Hate Speech”, *The Hindu*, Sept. 21, 2021, available at <https://www.thehindu.com/opinion/op-ed/tackling-hate-speech/article36573494.ece> (last visited on March 20, 2022)

¹¹ 1942 U.S. 571-72

¹² *Ibid.*

*groups, plants fears, obstructs normal relations..., and....exercises a corrosive influence on the conduct of collective life.*¹³”

Supreme Court of India in *Pravasi Bhalai Sangathan v. Union of India*¹⁴ emphasised on the malicious effect of hate speech that hate speech by instilling terror in the minds of the target audience and the targeted group, inhibits their ability to constructively respond to utilitarian ideas under debate, thereby hampering their participation in the functioning of democratic institutions around them.

Not only is hate speech pernicious when it incites people to commit an offence, but often the mere exposure to such a hateful speech, as observed by neuroscientists leads to inflammation in the human amygdala¹⁵, which in turn impairs the ability of man to respond to a threatening situation in a calm and composed manner¹⁶. This nexus between violence and hate crime has been highlighted by criminologist, Jack Levin when he states that, “*hate speech at the top influences hate crimes at the bottom*¹⁷”.

Thus, hate speech is not an end in itself instead it unleashes a situation of moral crisis where people get targeted for being who they are. It also leads to a series of hate crimes taking place as a consequence of the hate that is invoked through hate speeches, thus creating an endless vicious cycle of hate crimes, malice and violence.

IV. FREE SPEECH V. HATE SPEECH

The liberal theory of free speech holds speech as an intrinsic aspect of individual autonomy. The importance of allowing people to express their opinion no matter how unpalatable it is has been laid down by J.S. Mill in his book ‘On Liberty’ as:

“If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had

¹³ Supra note 10.

¹⁴ (2014) 11 SCC 477

¹⁵ C. Daniel Salzman (ed.), Britannica Encyclopedia, *available at*: www.britannica.com (last visited Oct. 27, 2021).

¹⁶ N. Isenberg, D. Silbersweig, et.al. “Linguistic threat activates the human amygdala” 96(18) *Proceedings of The National Academy of Sciences* 10458 (1999).

¹⁷ Zoe Mathews, “Hate speech at the top influences hate crimes at the bottom”, *Gloucester Daily Times*, Nov. 28, 2018, *available at*- <https://www.glocestertimes.com/news/local-news/hate-speech-at-the-top-influences-hate-crimes-at-the-bottom/article-5802769d-b069-54bd-9bd3-828cfa7c3564.html> (last visited on Oct. 18, 2021)

*the power, would be justified in silencing mankind*¹⁸.

The doctrine of free speech has been developed as a safeguard against the state's tendency to quell dissent by restraining speech. However, hate speech is the class of speech that if allowed to be exercised unabated can trample upon the very essence of democracy and turn it into an odious ochlocracy, lacking safeguards for the minorities. Thus, the philosopher Jeremy Waldron argues that, while it is not acceptable to restrict a speech that is merely offensive but a speech that injures dignity deserves to be quelled because it inflicts greater detriment than simply offending the target. It poses a challenge to the assurance that is implicit in the very essence of democracy that the minority and the majority groups have equal rights and are equally protected without any bias towards any particular group¹⁹.

Thus, disapproval of hate speech does not imply denial of the immense importance of free speech, instead, it amounts to taking cognisance of the potential dangers that can arise out of the unrestricted exercise of expression of opinion²⁰. Though freedom of expression is indispensable to defeating discrimination, bigotry and intolerance, it cannot be always preferred to other equally important rights, like that of equality²¹.

V. REGULATION OF HATE SPEECH: A WORLDVIEW

Countries have resorted to myriad measures to respond to hate speech in accordance with their past experiences. For instance, as a result of the Second World War and its horrid reminiscences, the European approach to free speech is considerably different from the United States' approach. Having witnessed the catastrophic effect of the insidious speeches made by Hitler and Mussolini, the European states have become very cautious of the harm that can potentially be caused due to unleashed form of speech.

1. A. International Conventions

International law encourages states to introduce legislation that penalizes hate speech, particularly when it incites criminal behaviour. The International Convention on the

¹⁸ J.S. Mill, *On Liberty and Utilitarianism* 4 (Bantam Classic, 2008).

¹⁹ Supra note 8 at 87-88.

²⁰ See Paul Beaumont, "Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination", 43(2) *International and Comparative Law Quarterly* 476 (1994).

²¹ Ibid.

Elimination of All Forms of Racial Discrimination (CERD)²² is one of the most inclusive convention pertaining to the prohibition of hate speech and eradication of racial discrimination at the international level. As of now, 173 states are party to the Convention, which proves that the international community is *ad idem* on the notion of the elimination of racism in general and hate speech in particular. Apart from that, the International Covenant on Civil and Political Rights, promulgated by the United Nations in 1966, also requires that “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*”.²³

2. B. Regulation of Hate Speech in the USA

In the United States hate speech is considered as the cost at which absolute protection is made available to the freedom of speech and expression through the first amendment to the United States Constitution.

Americans consider freedom of speech as an integral aspect of being a human being; as the means to protect all other rights as freedom of speech ensures that people may speak out when any right is infringed or likely to be infringed. They believe that the only answer to misused freedom is more speech. Thus, irrespective of how despicable hate speech is, it is nevertheless protected by law in public discourse except when it involves incitement of criminal behaviour. Incitement of violence in itself does not invite proscription²⁴. Instead only when incitement takes place in a context in which breakout of violence is imminent that American jurisprudence allows for the state to intervene to punish those involved in hate speech.²⁵

3. C. Regulation of Hate Speech in Europe

European laws are relatively stringent when it comes to tackling hate speeches. The European Commission on Human Rights plays a vital role in curbing hate speech. The Council of Europe’s Committee of Ministers to the Member States on Hate Speech has widely defined ‘Hate Speech’ as “*covering all forms of expression which spread, incite, promote or justify*

²² See generally UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106(XX), GOAR, UN Doc A/Res/2106/20 (Dec 21, 1965)

²³ See Article 20(1), UN General Assembly, *International Covenant on Civil and Political Rights*, GA Res 2200A(XII) GOAR, UN Doc GE/17/22215(E) (Dec 16, 1966)

²⁴ Surith Parathasathy, “Defining the Contours of Hate Speech”, *The Hindu*, Sept. 20, 2021, available at: <https://www.thehindu.com/opinion/lead/define-the-contours-of-hate-in-speech/article32655176.ece> (Last visited on Oct 28, 2021).

²⁵ Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech: Rethinking Regulations and Responses* 116 (Cambridge University Press, 2012).

*racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*²⁶”.

VII. REGULATION OF HATE SPEECH IN INDIA

Freedom of speech and expression is the spirit of liberty granted under Article 21 of the Constitution of India. One of the greatest impediments to the implementation of the spirit of free speech is to ensure that the liberty to speak is not exercised to the detriment of the disadvantaged and vulnerable section of society.

So far, hate speech is not defined in any law in India. However, legal provisions in certain legislations prohibit certain forms of speech as a reasonable restriction on freedom of speech under Article 19(2) of the Constitution. For example- the Indian Penal Code under Sections 153A²⁷, 153B²⁸, 295A²⁹, 298³⁰, 505(1)³¹ makes it a punishable offence to ‘promote disharmony, enmity, hatred or ill-will’ or ‘offend’ or ‘insult’ anyone on the basis of religion, ethnicity, culture, language, region, caste, race etc. by means of word, spoken or written, or signs or any kind of visual. Besides this, there are a plethora of laws dealing with utterances targeting a particular community, like Representation of Peoples Act, Information Technology Act³², Unlawful Activities (Prevention) Act, 1967 and others³³.

However, given some recent events³⁴, it can be inferred that India’s laws dealing with hate speech are suffering from a Delphic imprecision. They are a mere imitation of what hate speech

²⁶ Law Commission of India, “267th Report on Hate Speech” (2017).

²⁷ Section 153A of IPC penalises ‘promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony’

²⁸ Section 153B of IPC penalises ‘imputations, assertions prejudicial to national-integration’

²⁹ Section 295A of IPC penalises ‘deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs’

³⁰ Section 298 IPC penalises ‘uttering, words, etc., with deliberate intent to wound the religious feelings of any person’

³¹ Section 505(1) and (2) IPC penalises publication or circulation of any statement, rumour or report causing public mischief and enmity, hatred or ill-will between classes

³² Information Technology Act, 2000 (Act 21 of 2000), Sec. 69

³³ Some of them are: Protection of Civil Rights Act, 1955, Sec.7 ; Religious Institutions (Prevention of Misuse) Act, 1980, Sec.3, 6 ; The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; The Cable Television Networks (Regulation) Act, 1995, Sec.5, 6,11,12,16,17,19,20 ; The National Security Act, 1980; The Cinematographers Act, 1952, Sec. 4, 5B, 7 ; related provisions in Code of Criminal Procedure, 1973, Sec. 95,107,144,151,160

³⁴ See Nissim Mannathukarren, “Narcotic jihad and the delusion of catholic church”, *The Wire*, Sept. 22, 2021, available at: <https://thewire.in/religion/narcotic-jihad-and-the-delusions-of-the-catholic-church>. See also N.C. Asthana, “Talk UPSC Jihad a baseless attempt to delegitimise Muslim participation in governance”, *The Wire*, Aug. 29, 2020, available at: <https://thewire.in/communalism/sudarshan-news-upsc-jihad-muslims-governance>

laws are across the world, without taking into consideration the special requirements of a country as diverse as India³⁵. The laws are ambiguously worded and are often invoked to quell dissent. As a result, they transgress the permitted grounds for restraining free speech enumerated in Article 19(2) of the Constitution³⁶.

Furthermore, in India incitement to violence amounts to the main test for determining a speech liable to be restricted. However, incitement to violence should not be the lone test for determining whether a speech amounts to hate speech because even a speech that might not qualify the criterion of inciting violence might have the potential to marginalise an individual or a certain section of the society. In the age of technology, the anonymity provided by the internet permits the offender to easily spread false and offensive ideas. These ideas need not always incite violence but they might disseminate and perpetuate the discriminatory attitudes prevalent in society. Thus, incitement to discrimination should also be a significant factor contributing to the identification of hate speech.

VIII. HATE SPEECH JURISPRUDENCE IN INDIA

The judiciary in India has been reasonably proactive in dealing with hate speeches targeted against minorities. At the same time, the judiciary has taken a tough stance against the instances of stifling dissent under the garb of restraining hate speech.

The Supreme Court in *Shreya Singhal v. Union of India*³⁷ differentiated between three forms of speech viz. discussion, advocacy and incitement. It was held by the Court that a speech be limited on no other ground except those mentioned in Article 19(2) that too only upon reaching the threshold of incitement. All other forms of speech, even though offensive are to be protected under Article 19(1)(a).

In *Ramji Lal Modi v. State of U.P.*³⁸, the Supreme Court upheld the constitutional validity of Sec. 295A IPC and ruled that it penalises only those act or attempt to insult the religion or the religious beliefs of a class of citizens which are perpetrated with the deliberate and malicious intention of offending the religious feelings of that class of people. It was also held by the Court that the expression in the ‘interest of public order’ mentioned in Article 19(2) is much wider

³⁵ Supra note 26

³⁶ Ibid

³⁷ AIR 2015 SC 1523

³⁸ AIR 1957 SC 620

than ‘maintenance of public order’, so an act though not causing a breach of public order may be restricted ‘in the interest of public order’³⁹.

In *Ramesh v. Union of India*⁴⁰, the Supreme Court refused to judge a speech without considering the message it intended to put across. Thus, it was held that it is not just the act in isolation but its potentiality and effect on public tranquillity that justifies restriction under Article 19(2)⁴¹.

In *Babu Rao Patel v. State of Delhi*⁴², the Court held that Sec. 153A(1) IPC does not only penalise the promotion of feelings of enmity etc. on grounds of religion, but also takes into account promotion of similar feelings on other grounds such as race, place of birth, residence, language, caste or community.

In the recent case of *Amish Devgan v. Union of India*⁴³, the Court observed that “*In a polity committed to pluralism, hate speech cannot conceivably contribute in any legitimate way to democracy and, in fact, repudiates the right to equality.*”⁴⁴ The court also highlighted the ill-effects hate speech has on society by observing that, “*loss of dignity and self-worth of the targeted group members contributes to disharmony amongst groups, erodes tolerance and open-mindedness which are a must for a multi-cultural society committed to the idea of equality*”⁴⁵.

Thus for a speech to be criminalised as hate speech, it must go beyond the limit of advocacy when gauged on the parameters of constitutional morality and not on the basis of societal morality. This is to ensure that a speech that is merely disparaging or offensive by nature continues to be protected by law, on the contrary, a speech that treats communities with scorn and creates in them a sense of terror, a sense of exclusion from civic life, is prohibited.

IX. PROPOSED AMENDMENTS TO THE PENAL LAWS TO REGULATE HATE SPEECH

³⁹ Supra note 20

⁴⁰ AIR 1988 SC 775

⁴¹ AIR 1970 SC 1228

⁴² AIR 1980 SC 763

⁴³ 2020 SCC OnLine SC 994

⁴⁴ Ibid

⁴⁵ Ibid

In the wake of increasing instances of malefactors resorting to hate speeches, several committees have been established to propose a definition of hate speech and to overhaul the criminal law system with a view to incorporate specific provisions dealing with hate speech in the laws of the land.

The Bezbaruah Committee constituted by the Centre in February 2014 in the event of a series of racial attacks on persons belonging to the north-eastern part of India, had suggested the inclusion of Section 153C (to penalise promotion or attempt to promote acts prejudicial to human dignity) and Section 509A (to penalise words or gestures made with the intent to bring disgrace to a member of a particular race), to the IPC.

In March 2017, the 21st Law Commission, headed by former SC judge, Justice B.S. Chauhan, suggested the Criminal Law (Amendment) Bill, 2017 which proposed the insertion of two new provisions in the IPC- Section 153C⁴⁶ and Section 505A⁴⁷. The Commission had also attempted to define hate speech as *“incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like”*⁴⁸.

In 2018, the Home Ministry asked the Law Commission to formulate a separate law to deal with online “hate speech” in accordance with a report submitted by a committee headed by former Lok Sabha Secretary General T.K. Viswanathan which had suggested to bring about sterner laws to deal with the menace of hate speech.

Moreover, this year, a panel has been constituted by the Union Home Ministry to suggest reforms to the antiquated Indian Penal Code (IPC) and to examine recommendations made by

⁴⁶ Sec. 153C in the Criminal Law (Amendment) Bill, 2017 read that- " Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe - (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or
(b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence 52 shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs 5000, or with both."

⁴⁷ Sec. 505A in the Criminal Law (Amendment) Bill, 2017 read that- " Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe- uses words, or displays any writing, sign, or other visible representation which is gravely threatening, or derogatory;

(i) within the hearing or sight of a person, causing fear or alarm, or;
(ii) with the intent to provoke the use of unlawful violence,
against that person or another, shall be punished with imprisonment for a term which may extend to one year and/or fine up to Rs 5000, or both"

⁴⁸ Supra note 28

the Law Commission and the Expert Committee led by T.K. Viswanathan, on incorporating Sec. 153C and 505A.

However, despite several proposals made by several committees time and again, none has been implemented.

X. CONCLUSION

Hate-mongers do not endorse liberty; instead, they advocate the subjugation of vulnerable groups, homosexuals, racial minorities and immigrants over whom they claim alleged superiority. The fundamental narrative that is set up in a hate speech is often ancillary to a greater propaganda to systematically target the oppressed who lack access to communication channels to voice their grievances or to seek redressal. Subsequently, in event of being deprived of the means to seek protection against such verbal violence through institutional mechanisms these targeted powerless segments of society often resort to violence, therefore perpetuating the vicious cycle of hate crimes and violence once initiated.

Undeniably, the legal restriction imposed on hate speech does not mitigate its root causes; nonetheless, it serves the purpose of regulating individual behaviour by fastening sanctions to untoward acts. Law, in this sense, imposes boundaries on our liberties by envisaging a rule of model conduct that is deemed obligatory and binding upon all citizens. In this vein, the law is needed not to eliminate the underlying causes of hate speech, but to prevent its damaging consequences.

Having said that hate speech is not just a grave issue in itself but it is also symptomatic of even more critical issues of ethnocentrism-which is deep-rooted antagonism for people of other communities, sense of insecurity, unfounded feeling of superiority of a particular group, deep-seated fault lines in the fabric of the society, distrust among diverse social and communal groups and growing intolerance among the people. These underlying issues should be dealt with in a progressive manner by way of educating the masses and making the public institutions inclusive in nature. Moreover, a comprehensive analysis of the causes of inequality and historical grievances should be made to remedy the wrong. However, these are long term measures to tackle the core issues leading to venting out of malice in the form of hate speech, but to mitigate the immediate effects of such speeches, law must be brought to the fore to regulate human conduct.