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23<sup>rd</sup> March, 2017

Dear Shri Ravi Shankar Prasad Ji,

The Supreme Court, in the case of *Pravasi Bhalai Sangathan v. Union of India & Ors.*, AIR 2014 SC 1591, observed that the issue of hate speech deserved deeper consideration by the Law Commission of India. It stated that "...we request the Law Commission to also examine the issues raised herein thoroughly and also to consider, if it deems proper, defining the expression "hate speech" and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of "hate speeches" irrespective of whenever made".

The Supreme Court referred to its consistent clarifications that directions are issued only when there appears to be a total vacuum in law, i.e. "complete absence of active law to provide for the effective enforcement of basic human rights". In case there is inaction on the part of the executive for whatsoever reason, the court has always stepped in to discharge its constitutional obligation to enforce the law. The Court further observed that "in case of vacuum of legal regime, to deal with a particular situation, the court may issue guidelines to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field."

The Commission considered the laws on hate speech in various jurisdictions, judicial pronouncements of the Supreme Court and the High Courts and analysed the existing provisions relevant to the subject matter.

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Consequently, the Commission suggests amendments to the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 by adding new provisions on '**Prohibiting incitement to hatred**' following section 153B IPC and '**Causing fear, alarm, or provocation of violence in certain cases**' following section 505 IPC, and accordingly amending the First Schedule of the CrPC. These suggestions have been put together in the form of the Commission's **Report No.267** titled "**Hate Speech**", which is enclosed herewith for consideration by the Government.

The Commission acknowledges the commendable assistance provided by Ms. Anumeha Mishra, Dr. Saumya Saxena, and Ms. Shikha Dhandharia as consultants working on this project.

Yours sincerely,

*With warmest regards.*

*B.S. Chauhan*

**[Dr. Justice B.S. Chauhan]**

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## **Report No.267**

### **Hate Speech**

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# CHAPTER – I

## Background

1.1 Rights are the cornerstone of individual autonomy. They are guaranteed as limits on the power of State.<sup>1</sup> In democratic societies they have been granted to protect individual from undue State interference. Freedom of expression has been enshrined in article 19 of the Universal Declaration on Human Rights<sup>2</sup>. It is considered to be one of the most significant rights as it allows a person to attain self fulfilment and strengthen the capacity to fully enjoy freedom.<sup>3</sup>

1.2 Globally, history witnessed a complete subversion of rights and loss of freedoms not just under colonial rule but also the brutal regime of Adolph Hitler who had created a ministry to centralise Nazi control of all aspects of German cultural and intellectual life.<sup>4</sup> In the Reich Ministry of Public Enlightenment and Propaganda, Hitler appointed Joseph Goebbels as the Reich Propaganda Minister. An unstated goal was to present to other nations the impression that the Nazi Party had the full and enthusiastic backing of the entire population.<sup>5</sup> It was responsible for controlling the German news media, literature, visual arts, filmmaking, theatre, music and broadcasting. The consequences of such a ministry which aimed at spreading the Nazi ideology,<sup>6</sup> are well documented in history.

1.3 The Constituent Assembly, conscious of the burdens of history

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<sup>1</sup> J.S. Mill, *On Liberty and Utilitarianism* 4 (Bantam Classic, New York, 2008) .

<sup>2</sup> U.N.G.A. Res. 217 A (III), 1948.

<sup>3</sup> Steffen Schmidt and Il Mack C. Shelley, Barbara Bardes *et. al.*, *American Government and Politics Today* (Cengage Learning, USA, 2014).

<sup>4</sup>Peter Longerich, *Goebbels: A Biography* 212-213 (Random House, New York, 2015).

<sup>5</sup> Richard J. Evans , *The Third Reich in Power* 121 (Penguin, New York, 2005).

<sup>6</sup>Roger Manvell and Heinrich Fraenkel, *Doctor Goebbels: His Life and Death* 121 (Skyhorse, New York, 1960).

placed utmost emphasis on 'freedom of speech and expression' as a hard-earned right of the new democracy. The discussion on limitations on this freedom therefore, centred on whether the proviso to the fundamental right to freedom of speech and expression should cover speech that is 'likely to promote class hatred'.<sup>7</sup>The discussion was brought up on multiple occasions, not just limited to debates on fundamental freedoms but also on 'public order' or 'morality'.

1.4 It was initially suggested that the freedom of speech and expression would carry the proviso:

(a) the right of every citizen to freedom of speech and expression:

Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable ...

Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and tribes.

This provision faced substantial opposition in the Assembly where members argued that it denies 'absolute' nature to rights which are fundamental. After deep consideration and multiple revisions Ambedkar pointed out:

it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court. It would be sufficient to quote one such judgment of the Supreme Court in justification

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<sup>7</sup> Those who spoke during the discussion in the Committee on hate speech were K.M. Panikkar, Alladi Krishnaswami Iyer, Syama Prasad Mookherjee, K.M. Munshi, the chairperson J.B. Kriplani, C. Rajagopalachari and H.C. Mookherjee and Thakur Das Bhargava.

of the limitation on the right of free speech contained in Article 13 of the Draft Constitution. In *Gitlow Vs. New York* in which the issue was the constitutionality of a New York "criminal anarchy" law which purported to punish utterances calculated to bring about violent change, the Supreme Court said:

"It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

It is therefore wrong to say that the fundamental rights in America are absolute, while those in the Draft Constitution are not.<sup>8</sup>

1.5 The assumption that a rule denying the state power to restrict speech on the basis of its content will produce the broadest possible debate is problematic as this might produce debate that is informed by the prejudices of the public.<sup>9</sup> This is especially true in regard to speech that acts as a tool to marginalise the vulnerable groups by denying them equal place in the society.

1.6 In a plural democracy, there is always a conflict between different narratives and interpretation of what constitutes public interest. Democracy thrives on disagreements provided they do not cross the boundaries of civil discourse. Critical and dissenting voices are important for a vibrant society. However, care must be taken to prevent public discourse from becoming a tool to promote speech inimical to public order. The mode of exercise, the context and the extent of abuse of freedom are important in determining the contours of permissible

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<sup>8</sup>Constituent Assembly Debates (Nov. 4, 1948) 1459.

<sup>9</sup> Owen M. Fiss, "Why the State?" 100 Harv. L. Rev. 785 (1986-1987).

restrictions.<sup>10</sup> The State therefore assumes an important role in ensuring that freedoms are not exercised in an unconstitutional manner.

1.7 The Constitution acknowledges that liberty cannot be absolute or uncontrolled and makes provisions in clauses (2) to (6) of article 19 authorising the State to restrict the exercise of the freedom guaranteed under that article within the limits specified in those clauses. Thus, clause (2) of article 19, as subsequently amended by the Constitution (First Amendment) Act, 1951 and the Constitution (Sixteenth Amendment) Act, 1963, enabled the legislature to impose reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of (i) the security of the State and sovereignty and integrity of India, (ii) friendly relations with foreign States, (iii) public order, (iv) decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

1.8 Thus it was in this backdrop that the 'limits' to article 19 contained in 19(2) were arrived at, rather than approaching a definition of hate speech itself.

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<sup>10</sup> S. Sivakumar, *Press Law and Journalists* 11 (Universal Law Publishing Co., Gurgaon, 2015)



## CHAPTER-II

### Legal Provisions of Hate Speech in India

2.1 Responsible speech is the essence of the liberty granted under article 21 of the Constitution. One of the greatest challenges before the principle of autonomy and free speech principle is to ensure that this liberty is not exercised to the detriment of any individual or the disadvantaged section of the society. In a country like India, with diverse castes, creed, religions and languages, this issue poses a greater challenge.

2.2 Article 19(2) of the Constitution guarantees freedom of speech and expression to all citizens of India. This article is subjected to certain restrictions, namely, sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

2.3 Hate speech has not been defined in any law in India. However, legal provisions in certain legislations prohibit select forms of speech as an exception to freedom of speech.

#### **Legislations Around Hate speech:**

2.4 Presently, in our country the following legislations have bearing on hate speech, namely:-

(i) *the Indian Penal Code, 1860* (hereinafter IPC)

- Section 124A IPC penalises sedition

- Section 153A 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’.
- Section 153B IPC penalises ‘imputations, assertions prejudicial to national-integration’.
- Section 295A IPC penalises ‘deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs’.
- Section 298 IPC penalises ‘uttering, words, etc., with deliberate intent to wound the religious feelings of any person’.
- 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.

(ii) *the Representation of The People Act, 1951*

- Section 8 disqualifies a person from contesting election if he is convicted for indulging in acts amounting to illegitimate use of freedom of speech and expression.
- Section 123(3A) and section 125 prohibits promotion of enmity on grounds of religion, race, caste, community or language in connection with election as a corrupt electoral practice and prohibits it.

(iii) *the Protection of Civil Rights Act, 1955*

- Section 7 penalises incitement to, and encouragement of untouchability through words, either spoken or written, or by signs or by visible representations or otherwise

(iv) *the Religious Institutions (Prevention of Misuse) Act, 1988*

- Section 3(g) prohibits religious institution or its manager to allow the use of any premises belonging to, or under the control of, the institution for promoting or attempting to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, language or regional groups or castes or communities.

(v) *the Cable Television Network Regulation Act, 1995*

- Sections 5 and 6 of the Act prohibits transmission or re-transmission of a programme through cable network in contravention to the prescribed programme code or advertisement code. These codes have been defined in rule 6 and 7 respectively of the Cable Television Network Rules, 1994.

(vi) *the Cinematograph Act, 1952*

- Sections 4, 5B and 7 empower the Board of Film Certification to prohibit and regulate the screening of a film.

(vii) *the Code of Criminal Procedure, 1973*

- Section 95 empowers the State Government, to forfeit publications that are punishable under sections 124A, 153A, 153B, 292, 293 or 295A IPC.
- Section 107 empowers the Executive Magistrate to prevent a person from committing a breach of the peace or disturb the public

tranquillity or to do any wrongful act that may probably cause breach of the peace or disturb the public tranquillity.

- Section 144 empowers the District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf to issue order in urgent cases of nuisance or apprehended danger. The above offences are cognizable. Thus, have serious repercussions on liberties of citizens and empower a police officer to arrest without orders from a magistrate and without a warrant as in section 155 CrPC.

## CHAPTER – III

### Examination of the Issue by the Commission

3.1 Hate speech has always been a live debate in India. The issue has been raised time and again before the legislature, court as well as the public. In *Pravasi Bhalai Sangathan v. Union of India*<sup>11</sup>, the Supreme Court dealt with a case where the petitioners prayed that the State should take peremptory action against makers of hate speech. The Court did not go beyond the purview of existing laws to penalise hate speech as that would amount to ‘judicial overreach’. The Court observed that the implementation of existing laws would solve the problem of hate speech to a great extent. The matter was referred to the Law Commission to examine if it ‘deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of “hate speeches” irrespective of, whenever made.’

3.2 While recognising the adverse and discriminatory impact of hate speech on individuals, the Court in *Pravasi Bhalai Sangathan*<sup>12</sup> also expressed the difficulty of ‘confining the prohibition to a manageable standard’. The apprehension that laying down a definite standard might lead to curtailment of free speech has prevented the judiciary from defining hate speech in India and elsewhere.

3.3 The Court again went into the question of hate speech in *Jafar Imam Naqvi v. Election Commission of India*.<sup>13</sup> The petitioners filed a writ petition challenging the vitriolic speeches made by the candidates in the

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<sup>11</sup>AIR 2014 SC 1591.

<sup>12</sup>*Ibid.*

<sup>13</sup>AIR 2014 SC 2537.

election and prayed for issue of writ of mandamus to the Election Commission for taking appropriate steps against such speeches. However, the Court dismissed the petition on the ground that the petition under article 32 of the Constitution regarding speeches delivered during election campaign does not qualify as public interest litigation and that the Court cannot legislate on matters where the legislative intent is visible.

### **Analysis of Hate Speech Jurisprudence in India**

3.4 Hate speech can be curtailed under article 19(2) on the grounds of public order, incitement to offence and security of the State. The Supreme Court in *Brij Bhushan v. State of Delhi*<sup>14</sup> opined that public order was allied to the public safety and considered equivalent to security of the State. This interpretation was validated by the First Constitution Amendment, when public order was inserted as a ground of restriction under 19(2).<sup>15</sup>

3.5 However, in *Ram Manohar Lohiya v. State of Bihar*<sup>16</sup>, Supreme Court distinguished law and order, public order and security of State from each other. Observing that:

One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State.

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<sup>14</sup>AIR 1950 SC 129.

<sup>15</sup>The Constitution (First Amendment) Act, 1951 .

<sup>16</sup>AIR 1966 SC 740.

3.6 The standard applied for restricting article 19(1)(a) is the highest when imposed in the interest of security of the State. Also, a reasonable restriction under article 19(2) implies that the relation between restriction and public order has to be proximate and direct as opposed to a remote or fanciful connection.<sup>17</sup>

3.7 In *Ramji Lal Modi v. State of U.P.*<sup>18</sup> the Supreme Court upheld the constitutional validity of this section 295A<sup>19</sup> IPC and ruled that this section does not penalise every act of insult to or attempt to ‘insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.’<sup>20</sup> It was also held by the Court that the expression in the ‘interest of public order’ mentioned in article 19(2) is much wider than ‘maintenance of public order’. Therefore, even if an act does not actually cause breach of public order, its restriction ‘in the interest of public order’ will be deemed reasonable.

3.8 In *Ramesh v. Union of India*<sup>21</sup>, the Supreme Court refused to adjudge speech in isolation and held that a movie that intends to impart message of peace cannot be considered to violate article 19(1)(a) just because it shows fanaticism and violence in order to express the futility of such acts. Thus, it is not the act itself but the potentiality of the act and its

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<sup>17</sup>*O. K. Ghosh v. E. X. Joseph*, AIR 1963 SC 812; and *Supdt. Central Prison v. Dr. Ram Manohar Lohia*, AIR 1960 SC 633.

<sup>18</sup>AIR 1957 SC 620.

<sup>19</sup> It reads: “Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of India], [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [three years], or with fine, or with both.”

<sup>20</sup>*Supra* note 18.

<sup>21</sup>AIR 1988 SC 775.

effect on public tranquility that justifies restriction under article 19(2).<sup>22</sup>In this case, the Court refused to treat the freedom of expression at par with the societal interests enumerated under article 19(2). It was observed that a restriction on speech was justified only if it was imminently dangerous to the community as it was held that:

The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".<sup>23</sup>

3.9 In *Shreya Singhal v. Union of India*<sup>24</sup>, the court declared section 66 A of the Information Technology Act invalid as it did not establish any proximate relationship between the restriction and the act. It was opined that:

...the nexus between the message and action that may be taken based on the message is conspicuously absent – there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility.

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<sup>22</sup> See Ram Manohar Lohiya *supra* note 17; and *Arun Ghosh v. State of West Bengal*, AIR 1970 SC 1228.

<sup>23</sup> Ram Manohar Lohiya *supra* note 17.

<sup>24</sup> AIR 2015 SC 1523.



3.10 The court in this case differentiated between discussion and advocacy from incitement and held that the first two were the essence of article 19(1). Expression could only be restricted when discussion and advocacy amounted to incitement. The incitement was read as incitement to imminent violence in *Arup Bhuyan v. State of Assam*,<sup>25</sup> wherein the Supreme Court declined to impute criminality on a person for being a member of a banned organisation unless that person resorted to violence or incited people to violence or created public disorder by violence or incitement to violence.

3.11 The context of speech plays an important role in determining its legitimacy under article 19(1)(a) of the Constitution. In *State of Maharashtra v. Sangharaj Damodar Rupawate*<sup>26</sup> the Court observed that the effect of the words used in the offending material must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. In *Arumugam Seervai v. State of Tamil Nadu*<sup>27</sup>, the Supreme Court upheld the prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for using the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with the intent to insult. The historical context of the impugned words was examined in this case.

3.12 Interpreting sections 153A and 505(2) of IPC in *Bilal Ahmed Kaloo v. State of AP*,<sup>28</sup> the Court held that the common feature in both sections is that it makes promotion of feeling of enmity, hatred or ill-will between different religious or racial or language or regional groups or castes and communities and doing acts prejudicial to maintenance of harmony an

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<sup>25</sup>(2011) 3 SCC 377.

<sup>26</sup>(2010) 7 SCC 398.

<sup>27</sup>(2011) 6 SCC 405.

<sup>28</sup>AIR 1997 SC 3483.

offence. It is necessary that at least two such groups or communities should be involved to attract this provision. Merely hurting the feelings of one community or group without any reference to another community or group cannot attract either of the two sections.

3.13 In *Babu Rao Patel v. State of Delhi* <sup>29</sup> the Court held that section 153A(1) IPC is not confined to the promotion of feelings of enmity etc. on grounds of religion only, but takes into account promotion of such feelings on other grounds as well, such as race, place of birth, residence, language, caste or community.

3.14 The recent decisions show that the India follows a speech protective regime as in practice in the United States and the Courts are extremely cautious in restricting article 19 of the Constitution. The reason behind such a stance is the apprehension and fear of misuse of restrictive statutes by the State.

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<sup>29</sup>AIR 1980 SC 763.

## CHAPTER – IV

### Impact of Hate Speech on Freedom of Expression

4.1 Right to freedom of speech and expression is one of the most essential liberties recognized by the democratic States.<sup>30</sup> The concept of liberty has been primarily influenced by the principle of individual autonomy. The liberal theory of free speech views speech as an intrinsic aspect of autonomous individual, hence any restriction on exercise of this liberty is always subject to judicial scrutiny. The objective of free speech in a democracy is to promote plurality of opinions. The importance of allowing expression, howsoever, unpopular has been stressed by J.S. Mill in the following words, in his work 'On Liberty':

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 the power, would be justified in silencing mankind.<sup>31</sup>

4.2 The importance of allowing diversity of opinion has guided the principles of free speech. Thus, even a speech that is 'vehement, caustic, and sometimes unpleasantly sharp'<sup>32</sup> is protected from State intervention.

4.3 Hate speech is an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them. There is no general legal definition of hate speech, perhaps for the apprehension that setting a standard for determining unwarranted speech may lead to suppression of this liberty.

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<sup>30</sup> See *Handyside v. United Kingdom*, Application no. 5493/72(1976).

<sup>31</sup>J.S. Mill, *supra* note 1.

<sup>32</sup>*New York Times v. Sullivan*, 376 U.S. 254 (1964).

4.4 The philosopher Jeremy Waldron argues that, while purely offensive speech may not justify restrictions, there is a class of injury, amounting to more than hurt sentiments but to less than harm, in the sense of physical injury, that demands restriction in democratic frameworks. Where speech injures dignity, it will do more harm than simply offend its target. It would undermine the “implicit assurance” that citizens of a democracy, particularly minorities or vulnerable groups are placed on the same footing as the majority.<sup>33</sup> While the right to criticise any group should continue to exist, speech that negates the right of a vulnerable group should be regulated.

4.5 Free speech has always been considered to be the quintessence of every democracy. The doctrine of free speech has evolved as a bulwark against state’s power to regulate speech. The liberal doctrine was a measure against the undemocratic power of the state. The freedom of expression was one of the core freedoms that were incorporated in the Bill of Human Rights.<sup>34</sup> The greater value accorded to the expression, in the scheme of rights, explains the reluctance of the law makers and judiciary in creating exceptions that may curtail the spirit of this freedom. Perhaps, this is the reason behind the reluctance in defining hate speech.

### **An Overview of International Legal Regime on Hate Speech**

4.6 The working of the free speech doctrine very often points to the failure of this freedom in addressing the discriminatory, hostile and offending attitudes of some individuals and some small strata of the society. It was this viewpoint that led to the prohibition of ‘advocacy of

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<sup>33</sup>Jeremy Waldron, *The Harm in Hate Speech* 87-88 (Harvard University Press, Cambridge, 2012).

<sup>34</sup>William A. Schabas, *The Universal Declaration of Human Rights : The Travaux Préparatoires* (Volume I) lxxiii (Cambridge University Press, New York, 2013).

national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence<sup>35</sup> under article 20(2) of the International Covenant on Civil and Political Right, 1966 (hereinafter ICCPR)<sup>36</sup>. Similarly, articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (hereinafter ICERD)<sup>37</sup> prohibits ‘dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin’ and mandates the signatory states to provide effective remedies and protection against such actions.

4.7 The issue of hate speech has assumed greater significance in the era of internet, since the accessibility of internet allows offensive speeches to affect a larger audience in a short span of time. Recognising this issue, the Human Rights Council’s ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’<sup>38</sup> on content regulation on internet, expressed that freedom of expression can be restricted on the following grounds<sup>39</sup>, namely:

- child pornography (to protect the rights of children),
- hate speech (to protect the rights of affected communities)
- defamation (to protect the rights and reputation of others against unwarranted attacks)
- direct and public incitement to commit genocide (to protect the rights of others)

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<sup>35</sup> Roger Kiska, “Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence” 25 *Regent University Law Review* 119 (2012).

<sup>36</sup> 99 U.N.T.S. 171 (1966).

<sup>37</sup> 660 UNTS 195 (1966).

<sup>38</sup> Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 17<sup>th</sup> Session, A/HRC/17/27 (May 16, 2011), available at : [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) (last visited on Jan. 23, 2017).

<sup>39</sup>*Id.* at para 25.

- advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

4.8 The analysis of hate speech in different countries suggests that despite not having a general definition, it has been recognised as an exception to free speech by international institutions and municipal courts.

### **European Union and United Kingdom**

4.9 European Court of Human Rights (hereinafter ECtHR) has contributed immensely in developing jurisprudence on hate speech. Article 10<sup>40</sup> of the ‘European Convention of Human Rights’<sup>41</sup> (hereinafter ECHR) guarantees right to freedom of expression, subject to certain ‘formalities, conditions, restrictions or penalties’ stipulated in clause 2 of this article.<sup>42</sup> Article 17 of the Convention prohibits abuse of rights by ‘any State, group or person.’<sup>43</sup>

4.10 ECtHR while determining cases related to hate speech examines it on the touchstone of the Convention values. If the act in question negates the rights guaranteed under the Convention, it is declared

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<sup>40</sup> Art. 10(1) reads: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

<sup>41</sup>European Convention on Human Rights, 213 UNTS 221(1950).

<sup>42</sup> Art. 10(2) reads : “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

<sup>43</sup> Art. 17 reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

impermissible pursuant to article 17 of the Convention.<sup>44</sup> The Council of Europe's Committee of Ministers to Member States on Hate Speech has defined 'Hate Speech' as:

... the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify 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.<sup>45</sup>

4.11 According to the Council of Europe's Manual on Hate Speech, hate speech involves multiplicity of situations:

Firstly, incitement of racial hatred or in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race; secondly, incitement to hatred on religious grounds, to which may be equated incitement to hatred on the basis of a distinction between believers and non-believers; and lastly, to use the wording of the Recommendation on "hate speech" of the Committee of Ministers of the Council of Europe, incitement to other forms of hatred based on intolerance "expressed by aggressive nationalism and ethnocentrism".<sup>46</sup>

4.12 Pluralism, tolerance, peace and non-discrimination have been termed non-derogatory values by the ECtHR in ascertaining the extent of free speech allowed under the Convention. Speech propagating religious intolerance, negationism, homophobia etc. has been excluded from the ambit of article 10 of ECHR and the importance of responsible speech in a multicultural society has been stressed by the court in several cases.

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<sup>44</sup>*Ibid.*

<sup>45</sup>Recommendation No. R (97) 20, available at:

[https://www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/dh-lgbt\\_docs/CM\\_Rec\(97\)20\\_en.pdf](https://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf), (last visited on Dec. 30, 2016); See also Summary report of the Secretary General.

prepared by the Directorate of Human Rights on the 4th European Ministerial Conference on Mass Media Policy (Prague, Dec. 7-8, 1994), available at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=411463&SecMode=1&DocId=517420&Usage=2> (last visited on Dec. 25, 2016)., Appendix III para 7.

<sup>46</sup> Anne Weber, *Manual on Hate Speech*, available at:

[https://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate\\_Speech\\_EN.pdf](https://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf) (last visited on Dec. 28, 2016).

### **Tests for determining hate speech:**

4.13 Three tests have been adopted by the courts while recognising whether a speech amounts to hate speech or not. Once it has been established that there has been an interference with freedom of expression, the courts resort to a three-fold analysis to determine the legitimacy of such interference:<sup>47</sup>

- (a) Is the interference prescribed by law?

The law that allows limitation of article 10 of ECHR must be prescribed by the statute and must be precise so that the citizens can regulate their conduct in accordance with the law and foresee the consequences of the impermissible conduct.<sup>48</sup>

- (b) Is the interference proportionate to the legitimate aim pursued?

It has been opined by the court in *Handyside v. United Kingdom*<sup>49</sup> that the restrictions imposed by the State under article 10(2) on freedom of expression must be 'proportionate to the legitimate aim pursued.'

- (c) Is the interference necessary in a democratic society?

This test requires a careful examination of the fact to determine whether the freedom was limited in pursuance of a legitimate social

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<sup>47</sup>*Ibid.*

<sup>48</sup>*Delfi AS v. Estonia*, Application no. 64569/09 (2015).

<sup>49</sup>*Supra* note 30 at para 49.



need and in order to protect the principles and values underlying ECHR.<sup>50</sup>

4.14 In *Handyside*,<sup>51</sup> the court remarked that every restriction on article 10 must be carefully scrutinised as every offensive speech is not illegitimate. This neutrality approach that puts all kinds of speech on the same platform is an extension of the liberal view of free speech.

4.15 However, in recent years, ECtHR has moved away from this strictly neutral approach. The interference with freedom of expression is not solely judged on the 'legitimate aim' test but also whether such interference was necessary in a democratic society. One of the criticisms of free speech doctrine is that in an unequal society free speech often conflicts with the commitment to non-discrimination. Affording protection to all kinds of speech, even offensive ones, many times vilifies the cause of equality. European Human Rights jurisprudence has been making an attempt to harmonise these two principles.

4.16 The 'European Commission against Racism and Intolerance' in its Recommendation No. 7 expressly stipulates that exercise of freedom of expression 'may be restricted with a view to combating racism.'<sup>52</sup> Any such restrictions should be in conformity with the ECHR. The European Commission for Democracy Law constituted to review laws of European country remarked that every religious insult cannot be penalized until and unless it has an 'element of incitement to hatred as an essential component'.<sup>53</sup> In recent years a shift from neutrality principle towards

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<sup>50</sup>*Supra* note 43.

<sup>51</sup> *Supra* note 30.

<sup>52</sup> ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination (Dec. 13, 2002), *available at*: [http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation\\_n7/ecri03-8%20recommendation%20nr%207.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-8%20recommendation%20nr%207.pdf) (last visited on Dec. 20, 2016).

<sup>53</sup>*Id.* at para 64.

‘responsible speech’ has been discernible in the ECtHR decisions. Though hate speech has not been defined by ECtHR, it has been undoubtedly established<sup>54</sup> by the Court that such a speech is not protected under article 10.<sup>55</sup>

### **Racial and Religious Hate:**

4.17 In a multicultural society discrimination based on race and religion is one of the parameters on which extremity of speech is measured. The Court in *Jersild v. Denmark*<sup>56</sup> reversed the conviction of a journalist who interviewed a group called ‘Greenjackets’ to expose their racist attitude towards a minority section of the society. The Denmark Supreme Court held that the defamation and offence caused by the racist content of the interview outweighed the right of public to be informed; and therefore, could not be protected under right to freedom of expression. ECtHR reversed this decision and held that:

The picture which the applicant's programme presented to the public was more that of drawing attention to racism, intolerance and simple mindedness, exemplified by the remarks in question, than an attempt to show disrespect for the reputation or rights of others. In such circumstances the Commission finds that the reputation or rights of others, as legitimate aims for restricting the freedom of expression, carry little weight.<sup>57</sup>

4.18 In the case of *Anthony Norwood v. the United Kingdom*,<sup>58</sup> the court held that the applicant’s act of displaying a poster on his window with the words “Islam out of Britain – Protect the British People” and ‘a symbol of a

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<sup>54</sup> See M. Otheimer, “Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law” 17 *Cardozo J. Int'l & Comp. L.* 430 (2009).

<sup>55</sup> *Jersild v. Denmark*, Application No. 15890/89 (1994) para 42.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Application no. 23131/03 (2004).

crescent and star in a prohibition sign<sup>59</sup> portrayed racist bias and intolerance. Such an attack on a religious group was considered contrary to principles of non-discrimination and tolerance by the court.

### **Homophobia:**

4.19 Discrimination based on sexual orientation has also led to decisions that protect sexual minorities. In *Vejdeland v. Sweden*,<sup>60</sup> ECtHR upheld the decision of the Sweden Supreme Court wherein the applicants were found guilty of spreading homophobic statement. It remarked that even though offending remarks are protected under the ambit of hate speech, 'the real problem of homophobic and transphobic bullying and discrimination in educational settings may justify a restriction of freedom of expression'.<sup>61</sup>

4.20 The Supreme Court of Sweden acknowledged the applicants' right to express their ideas while at the same time stressing that along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights. The Supreme Court thereafter found that the statements in the leaflets had been unnecessarily offensive.

### **Negationism:**

4.21 Historical consciousness is essential for recognising instances of denial of basic rights to certain groups, in the past. Negationism is one of the grounds on which ECtHR has in recent years limited article 10. In

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<sup>59</sup> *Ibid*

<sup>60</sup> Application no. 1813/07 (2012).

<sup>61</sup> *Id.* at para 7.

*M'Bala M'Bala v. France*,<sup>62</sup> the court held that anti-Semitism and Holocaust denial could not be protected under article 10. Such a speech is excluded from the protection of the Convention not only when it is sudden and direct but also when it was presented as an artistic production.

### **Threat to Democratic Order:**

4.22 Advocating a totalitarian doctrine was considered incompatible with the values of the Convention. In *Schimanek v. Austria*,<sup>63</sup> conviction of the applicant on account of such speech was declared a legitimate interference under article 10, necessary for the protection of democratic order.

### **Hate Speech and Internet:**

4.23 While internet has made the globe a small and connected place, it has also created a space for unregulated forms of expression. In *Delfi v. Estonia*,<sup>64</sup> the applicants approached the court against the order of the Estonian court, wherein the applicants (owners of the internet news portal) had been made liable for user generated comments posted on their website. This was the first case where the court had to examine the scope of article 10 in the field of technological innovations.

4.24 The court observed that while internet is an important tool for disseminating information and opinions, it also serves as a platform for disseminating unlawful speech. The court emphasized on the need to

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<sup>62</sup> Application no. 25239/13 (2015).

<sup>63</sup> Application No. 32307/96(2000).

<sup>64</sup> *Supra* note 48.

'harmonise these two conflicting realities'<sup>65</sup> as the freedom of expression cannot be exercised at the cost of other rights and values enunciated in the Convention. The court upholding the decision of the Estonian Court held that:

... in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law, the Court considers ... that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.<sup>66</sup>

4.25 The content and context of the expression plays an important role in analysing the permissibility of the speech. The court takes into account various factors before excluding speech from protection under the Convention like, nature of remarks, dissemination and potential impact of remarks, status of targeted person, status of the author of the remarks, nature and severity of penalty imposed (to determine the proportionality of the interference) etc.<sup>67</sup>

## **United States**

4.26 The First amendment of the U.S. Constitution forbids the Congress from making law prohibiting the exercise of free speech. The speech protection doctrine in United States relies on two important assumptions, *firstly*,<sup>68</sup> that there should be equality in the marketplace of

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<sup>65</sup>*Id.* at para 110.

<sup>66</sup>*Id.* at para 159.

<sup>67</sup>See *supra* note 43.

<sup>68</sup>*Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

ideas and *secondly*,<sup>69</sup> the government cannot be given the power to differentiate between good and bad speech. The stringent protection afforded to speech is one of the hallmarks of the United States Constitution.<sup>70</sup>

4.27 *Chaplinsky v. New Hampshire*,<sup>71</sup> was an important case where the United States Supreme Court differentiated between different classes of speech and held that there are certain forms of speech like **fighting words, obscenities, certain profane and slanderous speech**, which are excluded from the protection under First Amendment. Thus, the court held that laws restricting such '**low value speech**' were constitutional and upheld the conviction of Chaplinsky under a State law that penalised offensive and derisive speech.

4.28 Relying on *Chaplinsky*,<sup>72</sup> the Supreme Court in *Beauharnais v. Illinois*<sup>73</sup> upheld the conviction of Beauharnais under the State law prohibiting libel amounting to unrest or breach of peace on grounds of race, colour, creed or religion. The court considered such speech outside the ambit of the First amendment, observing that 'such utterances are not essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'.

4.29 Fighting words were narrowly construed in *Cohen v. California*<sup>74</sup> to mean 'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely

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<sup>69</sup>*Cohen v. California*, 403 U.S. 15 (1971).

<sup>70</sup> See New York Times *supra* note 32; and *Whitney v. California* 274 U.S. 357 (1927).

<sup>71</sup>315 U.S. 568 (1942).

<sup>72</sup> *Ibid.*

<sup>73</sup>343 U.S. 250 (1952).

<sup>74</sup>403 U.S. 15 (1971).

to provoke violent reaction.<sup>75</sup>It was reasoned that the aim of the State cannot be to censor every controversial vocabulary so as to make conversation 'palatable to the squeamish.'<sup>76</sup>

4.30 However, this case was overruled in *New York Times v. Sullivan*,<sup>77</sup> where it was held that until and unless a malicious intent to defame with utter disregard to the truth was proved on part of the author of the speech, the speech could not be considered a violation of the First Amendment. The court opined that:

...rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship"... the rule thus dampens the vigour and limits of the variety of public debate.

(i) *Content Discrimination and Viewpoint Discrimination:*

4.31 There have been two landmark cases that overturned legislations penalising hate speech. In *R.A.V. v. City of St. Paul*,<sup>78</sup> the petitioner was charged for burning a cross on the family lawn of a black family under Minnesota's Bias Motivated Crime Ordinance. The court in this case narrowly construed the fighting word doctrine laid down in *Chaplinsky*<sup>79</sup>. It was held by the court that content based prohibition of speech even for categories of unprotected speech is prohibited under the First Amendment. The ordinance was deemed invalid because it prohibited certain words on selective subject matter, i.e., on the basis of race, colour, creed, religion or gender. Such selectivity was considered as

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<sup>75</sup>*Id.* at 20.

<sup>76</sup>*Id.* at 25.

<sup>77</sup>*Supra* note 32.

<sup>78</sup>505 U.S. 377 (1992).

<sup>79</sup> *Supra* note 71.

content and viewpoint discrimination; and therefore, invalid under the First Amendment.

(ii) *Distinguishing Conduct and Expression:*

4.32 There is a distinction between unlawful conduct and mere free expression. In *Wisconsin v. Mitchell*,<sup>80</sup> a statute penalising hate crime was upheld by the court.<sup>81</sup> The court distinguished this case from *R.A.V.*<sup>82</sup> by differentiating between expression and conduct. It was held:

Nothing in our decision last term in *R. A. V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." ... Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city i.e., those "that contain . . . messages of 'bias-motivated' hatred," ... we held that it violated the rule against content-based discrimination... But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., "speech" or "messages"), the statute in this case is aimed at conduct unprotected by the First Amendment.

(iii) *Test to qualify speech as hate speech:*

4.33 In order to qualify the speech as hate speech, the expression must qualify the clear and present danger test expounded in *Schenck v. United States*<sup>83</sup>. The clear and present danger test was reformulated in *Brandenburg v. Ohio*<sup>84</sup> to imminent threat of lawless action test. The

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<sup>80</sup> 508 U.S. 47 (1993).

<sup>81</sup> Under this statute a wrongful conduct pursuant to a discriminatory viewpoint attracted heavier punishment than a conduct not motivated by such belief.

<sup>82</sup> *Supra* note 78.

<sup>83</sup> 249 U.S. 47 (1919).

<sup>84</sup> 395 U.S. 44 (1969). The Appellant was convicted under an Illinois statute making it a crime to "Advertise or publish, present or exhibit in any public place ...any lithograph, moving picture, play, drama or sketch, which portrays ... depravity, criminality, unchastity, lack of virtue of a class of citizens, of any



Court remarked that ‘freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action’.

## **Canada**

4.34 Canadian Charter of Rights and Freedoms guarantees freedom of thought, belief, opinion and expression subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>85</sup> Pursuant to this, section 319 of the Criminal Code of Canada, RSC 1985 sanctions public incitement of hatred.

4.35 Some important decisions on hate speech in Canada are *R. v. Keegstra*;<sup>86</sup> *R. v. Andrews*;<sup>87</sup> and *Canada Human Rights Commission v. Taylor*.<sup>88</sup> In *Keegstra*, the Canadian Supreme Court held that:

Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the Charter strongly buttress the importance of this objective.<sup>89</sup>

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race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots.”

<sup>85</sup> Section 2.

<sup>86</sup>(1990)3 SCR 697.

<sup>87</sup>(1990)3 SCR 870.

<sup>88</sup>(1990) 3 SCR 892.

<sup>89</sup> *Supra* note 86.

(iv) *Tests to determine limitation on freedom of expression:*

4.36 The court in *Keegstra*<sup>90</sup> referred to test laid down in *R. v. Oakes*,<sup>91</sup> to determine the proportionality of the limitation to the objective sought to be achieved. The three steps to be followed to adjudge the proportionality of the restriction in *Oakes*<sup>92</sup> were:

- Restriction/limitation must have a rational nexus to the object sought to be achieved.
- Even if rationally connected to the objective in this first sense, it should impair "as little as possible" the right or freedom in question.
- There must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

4.37 In *Saskatchewan (Human Rights Commission) v. Whatcott*,<sup>93</sup> the court laid down three tests to determine whether an expression could qualify as hate speech or not. *Firstly*, courts must apply the hate speech prohibitions objectively by applying the test of a reasonable person. *Secondly*, the legislative term "hatred" or "hatred or contempt" must be interpreted to mean the extreme form of the emotions. *Thirdly*, the effect of the expression on the targeted group should be determined by the Court.

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<sup>90</sup> *Ibid.*

<sup>91</sup>[1986] 1 SCR 103.

<sup>92</sup> *Ibid.*

<sup>93</sup>[2013] 1 SCR 467.

4.38 Canadian laws attempt to restrict false and discriminatory statements that expressions that are likely to lead to breach of peace. In *R. v. Zundel*<sup>94</sup> the Court observed that publishing and spreading false news that was known to be false is likely to cause injury to public interest. This should be prevented as it is potentially harmful to the society and multiculturalism in Canada. In *Ross v. New Brunswick School District No.15*<sup>95</sup>, the Court held that anti-semitic writings and statements contribute to an invidiously discriminatory or “poisoned” education environment.

### **South Africa**

4.39 Section 16 of the South African Constitution guarantees freedom of expression. However, this freedom is subject to limitations under section 16(2), namely, ‘(a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm’. The South African Constitution expressly recognizes hate speech as an exception.

4.40 In a recent case, the Equality Court in South Africa in *Nomasomi Gloria Kente v. Andre van Deventer*<sup>96</sup> awarded damages to a domestic worker for being subjected to hate speech. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 prohibits a person from publishing, propagating, advocating or communicating words based on one or more prohibited grounds, against any person that could be construed demonstration of a clear intention to be hurtful, harmful or incite harm, promote or propagate hatred.

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<sup>94</sup>[1992] 2 SCR 731.

<sup>95</sup>[1996] 1 SCR 825.

<sup>96</sup>26 [2015] DEREBUS 45.

## CHAPTER - V

### Identifying Criteria of Hate Speech

5.1 Freedom of speech is an essence to a democratic society, and limitations are subject to scrutiny. The Supreme Court of India in *Shreya Singhal v. Union of India*<sup>97</sup> had differentiated between three forms of speech, discussion, advocacy and incitement. It was held by the Court that a speech can only be limited on grounds of exceptions mentioned in article 19(2) when it reaches the threshold of incitement. All other forms of speech, even if offensive or unpopular have to be protected under article 19(1)(a). Incitement is the key to determining the constitutionality of restriction on free speech.

5.2 The courts in some countries have refrained from identifying criteria of hate speech. However, through an analysis of the decisions of the different State jurisdictions, certain parameters may be summarised:

*(i) The extremity of the speech*

5.3 In order to qualify as hate speech, the speech must be offensive and project the extreme form of emotion.<sup>98</sup> Every offensive statement, however, does not amount to hate speech. The expressions advocacy and discussion of sensitive and unpopular issue have been termed 'low value speech' unqualified for constitutional protection.<sup>99</sup>

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<sup>97</sup> See *supra* note 24.

<sup>98</sup> Saskatchewan *supra* note 93.

<sup>99</sup> Chaplinsky *supra* note 71.

(ii) *Incitement*

5.4 In *Shreya Singhal*,<sup>100</sup> the speech must amount to incitement in order to be restricted. This is an accepted norm to limit speech. The imminent threat to lawless action test laid down by United States Supreme Court also echoes the same reasoning.<sup>101</sup> Moreover, incitement to discrimination lies at the heart of hate speech principles. The principles of hate speech have always come into conflict with two concepts, liberty and equality. The free speech proponents believe that equality is integral to this doctrine as it promotes 'equality in the marketplace of ideas'<sup>102</sup> However, critics of free speech suggest that this concept of neutrality, where all speeches are accorded similar status, often leads to creation of discriminatory environment especially for the minorities and the marginalised, since they are generally not well placed to make their voices heard. They argue that in light of the 'great disparities of wealth and power, free speech's formal equality results in massive substantive discrimination in the marketplace of ideas'<sup>103</sup>.

5.5 Liberty and equality are complementary and not antithetical to each other. The intent of freedom of speech is not to disregard the weaker sections of the society but to give them equal voice. Similarly, the intent of equality is not to suppress this liberty but to balance it with the necessities of a multicultural and plural world, provided such constraint does not unduly infringe on the freedom of expression. Thus, incitement to not only violence but also to discrimination has been recognized as a ground for interfering with freedom of expression.

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<sup>100</sup> *Supra* note 24.

<sup>101</sup> *Supra* note 84.

<sup>102</sup> *Supra* note 68.

<sup>103</sup> J. Weinstein, *Hate Speech, Pornography and Radical Attack on Free Speech Doctrine* 93 (Westview Press, Colorado, 1999).

(iii) *Status of the author of the speech*

5.6 ECtHR has recognized that position of the author of the speech is important in determining the legality of limitation imposed by the State. Thus 'interferences with the freedom of expression of a politician ... calls for the closest scrutiny on the Court's part'<sup>104</sup>. The Supreme Court in *Pravasi Bhalai Sangathan*<sup>105</sup> was approached to sanction hate speech on a similar ground. The petitioners sought court's intervention to declare "hate speeches" delivered by elected representatives, political and religious leaders as unconstitutional. The petition was specifically addressed to the people who held power to influence society on a large scale. The Court recognizing the negative impact of hate speech referred the matter to Law Commission for in depth examination.

(iv) *Status of victims of the speech*

5.7 The status of the targeted audience is also important in determining whether a speech can be limited. ECtHR in *Lingens v. Austria* <sup>106</sup>distinguished between the status of public and private individuals in this regard and remarked that:

...the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.

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<sup>104</sup>*Incal v. Turkey*, Application no. 41/1997/825/1031 (1998).

<sup>105</sup> *Supra* note 11.

<sup>106</sup>(1986) 8 EHRR 407.

(v) *Potentiality of the speech*

5.8 The potential impact of the speech has to be viewed to determine the speaker's state of mind at the time speech was rendered. In *Ramesh v. Union of India*,<sup>107</sup> Supreme Court examined the validity of the restriction on the basis of the potential of the movie to impact the audience.

(vi) *Context of the Speech*

5.9 Every seemingly hateful speech may not be termed as a hate speech. The context in which the speech was made is essential in determining its permissibility. The context of expression has always been looked into while adjudging the restriction.<sup>108</sup>

**Manner of Regulation - Respecting dissent and non-majoritarian speech**

5.10 Any attempt to regulate hate speech need not shrink the space for criticism and dissent, which are covered by the human right of a person to free speech and expression. As a consequence, not all hate speech can legitimately be made the subject of legal prohibition.<sup>109</sup>At the least, the elements of intent and incitement to violence must be included in any formulation of hate speech legislation. Incitement of violence and immediacy of the threat is also considered a relevant factor in determining whether such speech should be prohibited.<sup>110</sup>

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<sup>107</sup> *Supra* note 21.

<sup>108</sup> See e.g. *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

<sup>109</sup> UNGA, Sixty sixth session "Report by Special Rapporteur Frank La Rue on the Promotion and Protection of the Right to Freedom of Opinion and Expression"(Sept. 7, 2012) UN Doc A/67/357, paras 32, 33.

<sup>110</sup>See for e.g. *Chaplinsky supra* note 71 (laying down the fighting words doctrine).

5.11 Broadly, international human rights law requires that measures which limit or restrain the freedom of speech and expression may do so only where the ‘three-part test’<sup>111</sup> is satisfied. This standard requires that the measure by which a human right is being curtailed, must satisfy the following requirements:

- The measure must be prescribed by law. This requirement is satisfied where the right is curtailed by means of a law passed through the appropriate procedures and through provisions worded in explicit and unambiguous language. [**Prescription by law**]
- The measure must directly satisfy a legitimate aim. [**Legitimate aims**]
- The measure must be necessary to achieve its stated aim and must be proportionate to the harm that it attempts to prevent or redress. The standard of proportionality in this context has also been understood to include a requirement for minimum impairment of the right being restricted, i.e., the restriction must not do any more damage to the right than is absolutely necessary to meet its aim. [**Necessity and proportionality**]

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<sup>111</sup> UN HRC, “General Comment 34” One Hundred and Second Session July 11-29, 2011 (July 21, 2011) UN Doc CCPR/C/GC/34, para 22; United Nations Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities”, Forty First Session (1984) “Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights” (Sept. 28, 1984) Annex UN Doc E/CN.4/1984/4 para 17(hereinafter Siracusa Principles); *The Sunday Times v. United Kingdom* (1979) EHRR 245; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (Nov. 13, 1985); *Media Rights Agenda v. Nigeria* (2000) AHRLR 262.



## Chapter – VI

### Review of Penal Law

“...[T]hat the law shall be certain, and that it shall be just and shall move with the times.”

-Lord Reid, *Judge as Law Maker* <sup>112</sup>

6.1 It is difficult to define hate speech as any ambiguity in a definition may allow intrusion into freedom of speech and expression. The erstwhile section 66A of the Information Technology Act, 2002 which was struck down in *Shreya Singhal*<sup>113</sup> is an example wherein the vagueness of the legal provision led to misuse of the law. The precision of law is one of the grounds adopted by ECtHR in adjudging the legality of restriction imposed by the State. Hence, any attempt to define hate speech must meet the aforementioned parameters.

6.2 Incitement to violence cannot be the sole test for determining whether a speech amounts to hate speech or not. Even speech that does not incite violence has the potential of marginalising a certain section of the society or individual. In the age of technology, the anonymity of internet allows a miscreant to easily spread false and offensive ideas. These ideas need not always incite violence but they might perpetuate the discriminatory attitudes prevalent in the society. Thus, incitement to discrimination is also a significant factor that contributes to the identification of hate speech.

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<sup>112</sup> Lord Reid, “The Judge as Lawmaker” 12 *Journal of the Society of Public Teachers of Law* (1972) cited in *Abhiram Singh v. C.D Commachen (Dead) by Lrs. &Ors.* (2017) 2 SCC 629.

<sup>113</sup> *Supra* note 24.

6.3 The term “hate speech” has been used invariably to mean expression which is abusive, insulting, intimidating, harassing or which incites violence, hatred or discrimination against groups identified by characteristics such as one’s race, religion, place of birth, residence, region, language, caste or community, sexual orientation or personal convictions. However, in international human rights law, it is defined by article 20 of the ICCPR. The inherent dignity and equality of every individual is the foundational axiom of international human rights. It is, therefore, perhaps not surprising that international law condemns statements which negate the equality of all human beings. Article 20(2) of the ICCPR requires states to prohibit hate speech. Advocacy of national, racial or religious hatred that constitutes incitement to discrimination or hostility is prohibited by law. Under the common law system, such speech had been treated as ‘*sui generis*’ that is, ‘outside the realm of protected discourse’.

6.4 One of the recent examples of such rumour mongering is the case of the Northeast exodus in the year 2012. Up to 50,000 citizens belonging to the Northeast moved from their residences across India, back to the North-eastern states.<sup>114</sup> This was triggered because of the circulation of false images of violent incidents that took place in Myanmar several years ago. These were projected to be images from the Assam riots of 2012.<sup>115</sup> This resulted in creation of panic across the country as other groups started targeting people from Northeast living in other parts of India. The police authorities responded with a complete internet shutdown.

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<sup>114</sup> Stephanie Nolen, “India’s ethnic clashes intensify within social-media maelstrom” Aug. 23 2012, available at: <http://www.theglobeandmail.com/news/world/indias-ethnic-clashes-intensify-within-social-media-maelstrom/article4496392/> (last visited on Feb. 5, 2017).

<sup>115</sup> Asian Centre For Human Rights, “Assam Riots: Preventable but not Prevented” Sept. 2012, available at : <http://www.achrweb.org/reports/india/AssamRiots2012.pdf> 1 (last visited on Feb. 5, 2017).

6.5 Hate speech has the potential of provoking individuals or society to commit acts of terrorism, genocides, ethnic cleansing etc. Such speech is considered outside the realm of protective discourse. Indisputably, offensive speech has real and devastating effects on people's lives and risks their health and safety. It is harmful and divisive for communities and hampers social progress. If left unchecked hate speech can severely affect right to life of every individual.

### **Examining Restrictions on Freedom of Speech and Expression**

6.6 Analysis of the Constituent Assembly debates and the debate around the First and Sixteenth Amendments, restrictions to speech based on hate speech are located primarily under the terms 'public order' and to a lesser extent 'sovereignty and integrity' under article 19(2). Both sections 153A and 295A have been justified as restrictions under public order.<sup>116</sup> The Supreme Court, in *Ramji Lal Modi*,<sup>117</sup> has held that after the First Amendment in 1951, the language of 19(2) read – "in the interests of public order". This has to be read very widely, so a law like section 295A might not directly deal with public order but can be read to be "in the interests of public order".<sup>118</sup>

6.7 However, if hate speech is also about insulting persons or wounding religious feelings (without involving public order), then one could justify this under the 'decency and morality' clause of article 19(2). The Supreme Court held that section 123(3) was a constitutional restriction on speech, in the interests of decency.<sup>119</sup> Similarly, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 proscribes "*intentionally insult[ing] or intimidat[ing] with intent to*

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<sup>116</sup> See *supra* note 9.

<sup>117</sup> *Supra* note 13.

<sup>118</sup> *Ibid*

<sup>119</sup> *Id.* at paras 27-9.

*humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view.*<sup>120</sup> In *Swaran Singh v. State*<sup>121</sup> the Supreme Court held that calling a member of a Scheduled caste “*chamar*” in public view would attract Section 3(1)(x).

6.8 The form of hate speech that the Supreme Court here is dealing with is insult. It is related to a history of humiliation faced by Scheduled Caste persons, and is not directed against public order. Using the word *chamar* to insult someone could constitute hate speech irrespective of whether it leads to a public order disturbance. The restriction on speech here is more directly linked to ‘decency or morality’ in article 19(2) than ‘public order’.<sup>122</sup> Similarly, the restrictions under section 153B (Imputations, assertions related to national integration) could be justified under the ‘sovereignty and integrity’ restriction in article 19(2).

6.9 Hate speech provisions are found in three different chapters of the IPC, “Of Offences Relating to Religion”, “Of Offences Against the Public Tranquillity” and “Of Criminal Intimidation, Insult and Annoyance”. Section 295A, IPC was enacted to specifically target speech that intended to outrage religious feelings by insulting religion or religious beliefs.<sup>123</sup>

### **Politics and Hate Speech**

6.10 Political speeches often assume a divisive tone in order to exploit social prejudices for electoral gains. However, this discourse must take

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<sup>120</sup>Section 3(1)(x).

<sup>121</sup>(2008) 8 SCC 435.

<sup>122</sup> Restrictions based on public morality have been struck down on the basis that these restrictions were discriminatory. See *Irina Fedotovav. Russian Federation*, UN Doc. No. CCPR/C/106/D/1932/2010.(Held that a Ryazan Regional Law in Russia, prohibiting dissemination of information related to homosexuality to minors, violated the non-discrimination provisions of the ICCPR).

<sup>123</sup> For a recent account of the legislative debates leading to the enactment of section 295A; See Neeti Nair, *Beyond the ‘Communal’ 1920s: The Problem of Intention, Communal Pragmatism, and the Making of Section 295A of the Indian Penal Code*, 50 *Indian Economic Social History Review* 317 (2013) available at; <http://ier.sagepub.com/content/50/3/317>, DOI: 10.1177/0019464613494622 (last visited on Feb. 14, 2017).

place in an environment that does not foster abusive or hateful sentiments. Though, political rivalry might encourage the use of unwarranted language, it is unwise to restrict speech that merely showcases the tendency to evoke unwanted circumstances without intention.<sup>124</sup> In order to promote robust and healthy debate, it is important that a fine balance is struck between freedom and restrictions.

6.11 In *Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte & Ors.*<sup>125</sup>, the Court analysed the meaning of sub-section (3A) of section 123 of The Representation of People's Act, 1951 (hereinafter RPA, 1951) observing that the said provision is similar to section 153A, IPC as "*the promotion of, or attempt to promote, feelings of enmity or hatred*" as against the expression "*Whoever .... promotes or attempts to promote.....disharmony or feelings of enmity, hatred or ill-will ....*" in section 153A, IPC. The expression 'feelings of enmity or hatred' is common in both the provisions but the additional words in Section 153A, IPC are 'disharmony ....or ill-will'. The difference in the plain language of the two provisions indicates that even mere promotion of disharmony or ill-will between different groups of people is an offence under section 153A, I.P.C, while under sub- section (3A) of section 123 of the RPA,1951, only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, are forbidden in the election campaign.

6.12 In *Prof. Ramachandra G. Kapse v. Haribansh Ramakbal Singh*<sup>126</sup>, it was held that the accused could not held responsible for the content of the election manifesto as he did not participate in making it. Also, in

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<sup>124</sup> For difference between 'tendency and intention' see Law Commission of India, "42<sup>nd</sup> Report on Indian Penal Code".

<sup>125</sup> AIR 1996 SC 1113.

<sup>126</sup> AIR 1996 SC 817.

*Manohar Joshi v. Nitin Bhaurao Patil & Anr.*<sup>127</sup>, the Supreme Court observed that a statement by a candidate during election that first Hindu State will be established in Maharashtra cannot be considered a corrupt practice under section 123(3) of the RPA, 1951 as:

[the statement] by itself [was] not an appeal for votes on the ground of his religion but the expression, at best, of such a hope. However, despicable be such a statement, it cannot be said to amount to an appeal for votes on the ground of his religion.

6.13 The recent judgment of the Apex Court, *Abhiram Singh v. C.D Commachen (Dead) by Lrs. &Ors.*<sup>128</sup> analysed the law on corrupt practices under the Act, 1951 taking into account series of case laws and observed that Sub-section 3A was simultaneously introduced so as to provide that the promotion of or an attempt to promote feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language would constitute a corrupt practice where it was indulged in by a candidate, his agent or by any other person with the consent of the candidate or his election agent for furthering the election prospects of the candidate or for prejudicially affecting the election of any candidate. While widening the ambit of the corrupt practice as provided in sub-section (3), a significant change was brought about by the inclusion of the words “for any person on the ground of his”.

6.14 The Constitutional validity of section 123(5) of the Act, 1951 was upheld by the Constitution Bench in which the sweep of the corrupt practice on the ground of religion was rather broad. The Court also made an observation that section 123(3A) has a different ambit. It does not mean vilifying another language or creating enmity between

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<sup>127</sup> 1996 SCC (1) 169.

<sup>128</sup> *Abhiram supra* note 104.

communities. It refers to the promotion of or attempt to promote hatred between different classes of citizens on the proscribed grounds but section 123(3A) does not refer to the religion, race, caste, community or language of a candidate or of a rival candidate (unlike section 123(3) which uses the expression “his”). Section 123(3A) refers to the promotion of or attempts to promote feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language.<sup>129</sup>

### **Judicial Doctrine**

6.15 Courts have consistently upheld the constitutional validity of hate speech provisions, including sections 153A and 295A IPC on the basis of the ‘public order’, an exception carved out in article 19(2).<sup>130</sup>In *State of U.P. v. Lalai Singh Yadav* <sup>131</sup>, the Supreme Court upheld the “the constitutional value of ordered security.”<sup>132</sup> In this judgment, ordered security was identified as a constitutional value that is to be safeguarded and courts should give preference to the State if their intent is to protect safety and peace. Here the principle of ordered security is enunciated as a positive principle, without which creativity and freedom are meaningless.

6.16 The Model Code of Conduct given by the Election Commission of India for the guidance of political parties and candidates should be amended to the extent that effect is given to the sub section (3A) of section 123 of the RPA, 1951. The first part of the Code i.e. General Conduct should expressly provide a provision that prohibits any kind of speech that promotes, or attempts to promote, feelings of enmity or

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<sup>129</sup> See also, *Jamuna Prasad Mukhariya v. Lachhi Ram*, AIR 1954 SC 686.

<sup>130</sup>See *supra* note 14.

<sup>131</sup> AIR 1977 SC 202.

<sup>132</sup> See Siddharth Narrain, “Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech” 51(17) *Economic and Political Weekly* 122 (Apr. 23, 2016).

hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

6.17 In the current scenario the threat of large fines is a deterring factor for publishers, artists, bloggers and those who do not have the financial muscle to contest hate speech litigation.

6.18 Other jurisdictions<sup>133</sup> have developed extensive jurisprudence on hate speech law. Judges have tried to strike a balance between harm caused by hate speech and the threat to freedom of speech and expression. Any legal regulation of hate speech must take into account the principles that have evolved in these jurisdictions. For instance, in the Canadian case *Saskatchewan v. Whatcott*<sup>134</sup>, the Canadian Supreme Court limited the meaning of the term ‘hatred’ to extreme manifestations of “detestation” and “vilification”. In this case, the Court identified two categories of hate speech (i) marginalising individuals based on their membership of a targeted group, thus affecting inclusiveness and dignity (ii) impairing their ability to respond to substantive ideas under debate, thus creating a serious barrier to their full participation in democracy.<sup>135</sup>

### **Distinguishing Seditious from Hate Speech**

6.19 Care must also be taken to differentiate hate speech from seditious. The difference between offences under Chapter VIII (that cover aspects of hate speech) and seditious is that the offence of hate speech affects the

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<sup>133</sup> See section on Chapter IV of this report for a detailed account on international laws.

<sup>134</sup> *Supra* note 93.

<sup>135</sup> *Ibid.*



State indirectly by disturbing public tranquility, while sedition is an offence directly against the State.

6.20 In 1897 when amendments to section 124A IPC were being proposed, a Select Committee reviewing the Bill recommended that sedition must be distinguished from stirring up class hatred. It reasoned that:

It appears, to us that the offence of stirring up class-hatred differs in many important respects from the offence of sedition against the State. It comes more appropriately in the chapter relating to offences against the public tranquility. The offence only affects the Government or the State indirectly, and the essence of the offence is that it predisposes classes of the people to action which may disturb the public tranquility. The fact that this offence is punishable in England as seditious libel is probably due to historical causes, and has nothing to do with logical arrangement.<sup>136</sup>

6.21 To qualify as sedition, the impugned expression must threaten the sovereignty and integrity of India and security of the State. Since it has been made a distinct offence under section 124A, it would not be advisable to place expressions exciting disaffection against the State under the proposed section on hate speech. Also, imputations or assertions prejudicial to national integration are punishable under section 153B IPC.

### **Non-Legal Measures to Address Hate Speech**

6.22 It is also worth considering whether there are ways to combat the harm created by hate speech that are less harmful than banning or blocking the speech. Currently strategies such as prior restraint or punishment for hate speech are being contemplated in Indian law.

6.23 Other strategies have also been explored in other countries and these include:

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<sup>136</sup> W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India* 164 (Thacker, Spink and Co., Calcutta, 1911).

- Popular television dramas which subtly and effectively promote harmony between warring communities,
- the involvement of religious heads to build empathy across religious lines to reduce communal tension, and
- strategic interventions (especially in the context of social media) to monitor the dissemination of hate speech and mob mobilisation.
- Persuading people who are the weakest links, to stop spreading a harmful rumour.

### **An Effort to find Solution**

6.24 The definition of hate speech is still subject to wider intellectual and academic debate. What is at issue is the criminalisation of hate speech and how the existing laws look at it. Since it is entrenched in the constitutional right of freedom of speech and expression, “hate speech” has been manipulated by many in different ways to achieve their ulterior motive under the garb of such right and the law courts in absence of clear provisions in IPC, are not able to prosecute hate speech charges brought before them with success.

6.25 As per the Jakarta Recommendations which was a regional consultation on “*Expression, Opinion and Religious Freedoms in Asia*”, held in Jakarta, Indonesia on 3-5 June, 2015 and which included expert participants such as UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression observed the following:

- There is a need to revise and strengthen the existing anti-discrimination legislation so as to meet universal standards on equality across all groups, communities, men and women;

- Laws should be adopted to punish incitement to hatred that may result in violence, hostility and discrimination. They should be implemented in a non-selective, non-arbitrary and transparent manner, which should not be used to stifle dissent or the legitimate exercise of freedom of expression;
- The religious minorities' parliamentarians should be enabled to raise issues relating to freedoms of expression and religion, and the intersection of these rights, in the parliament and other platforms.
- All instances of violations of freedom of expression in the context of religion and incitement of hatred resulting in violence should be *condemned and prevented*.
- Fight against hate speech cannot be isolated. It should be discussed on a wider platform such as the United Nations. Every responsible government, regional bodies and other international and regional actors should respond to this threat.<sup>137</sup>

6.26 These recommendations can serve as guidelines for developing hate speech jurisprudence.

### **Prohibiting Advocacy of Hatred**<sup>138</sup>

6.27 Freedom of speech and expression has been established as a key freedom required for sustaining democracy. However, with every right comes responsibility; and therein, is the need for a limitation on the right

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<sup>137</sup>Jakarta Recommendations on Freedom of Expression in the Context of Religion (June 17, 2015) available at: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/06/Jakarta-Recommendations-FINAL.pdf> (last visited on Jan. 16, 2017).

<sup>138</sup> The term advocacy of hatred has been used in Article 20 of the ICCPR, Constitution of South Africa, Art. 16(2)(c) and also Human Rights Council, "Report of the Special Rapporteur on Minority Issues", 28<sup>th</sup> session, Agenda item 3, A/HRC/28/64 (Jan. 5, 2015) available at: [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A\\_HRC\\_28\\_64\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_64_ENG.doc). (last visited on Jan. 16, 2017).

to freedom of speech and expression so as to prevent the destructive and regressive effect it could have. The founding fathers of our Constitution were cognisant of the history and the need to highlight the responsibility attached to freedom of speech and expression. Thus, there is a need to convince and educate the public on responsible exercise of freedom of speech and expression.

6.28 The Constitution in its working, however, required amendments to article 19 so as to add several new grounds of restrictions upon the freedom of speech and expression; initially, under the Constitution (First Amendment) Act, 1951 followed by the Constitution (Sixteenth Amendment) Act, 1963. The new grounds of restrictions added were (i) friendly relations with foreign states (ii) defamation or incitement to an offence (iii) the sovereignty and integrity of India (iv) security of State (v) decency and (vi) contempt of court.

6.29 In pursuance of the aforesaid constitutional provisions, certain provisions such as section 153A, section 153B and section 295A, were added in IPC to deal with particular category of offences which fall in general expression of hate speech. In IPC those provisions of hate speech fall under the categories of Offences Relating to Religion, Offences Against Public Tranquillity and Criminal Intimidation, Insult and Annoyance. Section 124A penalises sedition, 153A penalises promoting enmity among groups on various grounds and doing acts prejudicial to maintenance of harmony, section 153B penalises imputation assertions prejudicial to national integration, and section 295A penalises malicious acts intended to outrage religious feelings which supplement section 298 which relates to uttering words with intent to wound the religious feelings. Section 505 deals with statements conducing to public mischief.

6.30 The reading of above provisions make it clear that there is no water tight compartment to deal with the various acts relating to hate

speech which generally overlap. In a particular situation hate speech may become sedition. In the case of *Kedar Nath Singh v. State of Bihar*<sup>139</sup>, the Supreme Court upheld section 124A IPC as constitutionally valid, following the view of the Federal Court in *Niharendu Dutt Majumdar v. Emperor*<sup>140</sup> and did not accept the interpretation given to it by the Privy Council in *Emperor v. Sadasiv Narain Bhalerao*<sup>141</sup>. In *Niharendu*<sup>142</sup> the Federal Court held that “public order or the reasonable anticipation or likelihood of public disorder” was the gist of the offence of sedition and that in order to be punishable under section 124A, - “the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that was their intention or tendency”. The Supreme Court in *Kedar Nath Singh*<sup>143</sup> interpreted section 124A to mean that an utterance would be punishable under this section only when it is intended or has a reasonable tendency to create disorder or disturbance of the public peace by resort to violence.

6.31 Hate speech generally is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like (sections 153A, 295A read with section 298 IPC). Thus, hate speech is any word written or spoken, signs, visible representations within the hearing or sight of a person with the intention to cause fear or alarm, or incitement to violence.

6.32 Hate speech poses complex challenges to freedom of speech and expression. The constitutional approach to these challenges has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary across jurisdictions. A difference of

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<sup>139</sup> AIR 1962 SC 955.

<sup>140</sup> AIR 1942 FC 22.

<sup>141</sup> AIR 1947 PC 84.

<sup>142</sup> *Supra* note 140.

<sup>143</sup> *Supra* note 139.

approach is discernible between the United States and other democracies. In the United States, hate speech is given wide constitutional protection; whereas under international human rights covenants and in other western democracies, such as Canada, Germany, and the United Kingdom, it is regulated and subject to sanctions.

6.33 In view of the above, the Law Commission of India is of considered opinion that new provisions in IPC are required to be incorporated to address the issues elaborately dealt with in the preceding paragraphs. Keeping the necessity of amending the penal law, a draft amendment bill, namely, The Criminal Law (Amendment) Bill, 2017 suggesting insertion of new section 153C (Prohibiting incitement to hatred) and section 505A (Causing fear, alarm, or provocation of violence in certain cases) is annexed as Annexure-A for consideration of the Government.



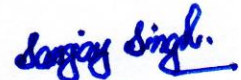
[Justice Dr. B.S. Chauhan]

Chairman



[Prof. (Dr.) S. Sivakumar]

Member



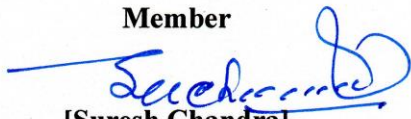
[Dr. Sanjay Singh]

Member-Secretary



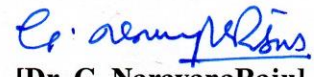
[Justice Ravi R. Tripathi]

Member



[Suresh Chandra]

Ex-officio Member



[Dr. G. NarayanaRaju]

Ex-officio Member

THE CRIMINAL LAW (AMENDMENT) BILL, 2017

A

BILL

further to amend the Indian Penal Code, and the Code of Criminal Procedure, 1973

Be it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:-

CHAPTER I  
PRELIMINARY

1. Short title. This Act may be called the Criminal Law (Amendment) Act, 2017.

CHAPTER II  
AMENDMENTS TO THE INDIAN PENAL CODE

2. ***Insertion of new section after section 153B.***- In the Indian Penal Code, (45 of 1860) (hereinafter referred to as the Penal Code), after section 153B , the following section shall be inserted, namely:-

**Prohibiting incitement to hatred-**

"153 C. 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

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."

**3. Insertion of new section after section 505.**- In the Penal Code, after section 505, the following section shall be inserted, namely:-

**Causing fear, alarm, or provocation of violence in certain cases.**

"505 A. 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".

CHAPTER III

AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE, 1973

**5. Amendment of First Schedule.** In the First Schedule to the Code of Criminal Procedure under the heading " I. – OFFENCES UNDER THE INDIAN PENAL CODE (45 of 1860)",

(i) after the entries relating to section 153B and section 505, the following entries shall respectively be substituted, namely :-

1	2	3	4	5	6
153C	Prohibiting incitement to hatred	Imprisonment for two years, and fine up to Rs 5000	Cognizable	Non-Bailable	Magistrate of the first class



(ii) after the entries relating to section 505, the following entries shall be inserted, namely:-

1	2	3	4	5	6
505A	Causing fear, alarm, or provocation of violence in certain cases	Imprisonment for one year and/ or with fine up to Rs 5000, or both	Non-cognizable	Bailable	Any Magistrate