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HATE SPEECH REGULATION UNDER IPC: A STUDY ON REQUISITE REFORMS- Shunmalar¹**ABSTRACT**

In contemporary times, hate speech has become more than an offensive speech. It incites the use of violence which in turn disturbs the social order and peace in the society. The Indian Penal Code, 1860 (IPC) forms the basis for the administration of substantive criminal law. Though IPC or even any Indian law has not used the phrase 'Hate Speech' IPC comprises six sections such as sections 153A, 153B, 295, 295A, 298 and 505 criminalising the different forms and aspects of hate speech which are spread out in three various chapters; Chapters VIII, XV and XXII.² This research paper identifies whether the hate speech laws curtail the freedom of speech and expression. It also explores the provisions of the IPC dealing with the hate speech and finds out the extent to which the aspects of hate speech are criminalised in the aforementioned sections and recommends a prospective solution for it.

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² The Indian Penal Code, 1860 (Act 45 of 1860).

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INTRODUCTION

The term hate speech is widely used in the negative discourse expressed by the speaker to spread hatred and prejudice towards a specific section of the society. Hate speech poses threat to the social order, peace and disturbs the democratic values of the nation. The provisions and laws criminalising the aspects of hate speech are often seen to be in contradiction with the freedom of speech awarded by the Indian Constitution. It is felt that these laws infringe the rights provided to the people to speak out and express their opinion. However, on considering India's diversity several restrictions are allowed to be imposed upon the freedom of speech and expression conferred under Article 19, Constitution of India³. The restrictions are placed in order to promote the public peace, safety and tranquillity. In the recent days, there is a growing criticism of these sections being misused due to the vagueness present in their definitions. In order to remove the lacuna in these sections, there is a need for the law to be amended accordingly. This has been recommended in the case, *PravasiBhalaiSangathan v. Union of India & Ors*⁴. The Court in this case has requested the Law Commission of India for addressing the issue of hate speech with a deeper consideration by giving a proper definition to it by means of which the commission has examined the hate speech law and gave its suggestion in the 267th report of the commission⁵.

HATE SPEECH AND ITS INGREDIENTS

There is no legal term internationally definition the phrase 'Hate speech'. In addition, it is even disputed and controversial to characterize the term 'hateful'. As per United Nations, for the purpose of a document, hate speech has been understood as any attack made or any insulting/discriminating language used against a person or set of persons based on their race, color, religion, nationality, gender, descent, ethnicity or any other identity factor through any form of communication in speech, writing or behavior.⁶ However this definition is limited to this specific document. By analyzing various judgments, certain criteria are to be examined before considering any language as hate speech.

The first of all is that the effect of causing hatred, contempt or disaffection should be accompanied with an "intention" to cause public disorder. Basically, a speech must be offensive

³ The Constitution of India, art. 19.

⁴ AIR 2014 SC 1591.

⁵ Law commission of India, "267th Report on Hate Speech" (March, 2017).

⁶ UN Secretary-General, *United Nations Strategy and Plan of Action on Hate Speech* (May 2019).

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enough projecting the extreme form of emotion for it to be regarded as hate speech,⁷ as every offensive statement cannot be qualified as hate speech. In the case, *KedarNath Singh v. State of Bihar*⁸, due to the variations found in the interpretation of clause (2) of article 19, the Indian Parliament, by means of section 3 of the Act, substituted the original clause (2) with the new clause (2) and amended article 19(2)⁹ into the present form it stands. This amendment had a retrospective effect and signified that the statement of the law, has been accepted, as available in the dissenting judgment of Fazl Ali, J., “in so far as he had pointed out that the concept of ‘security of the state’ was very much allied to the concept of ‘public order’ and that restrictions on freedom of speech and expression could validly be imposed in the interest of public order”.

Therefore, the Court has the duty of differentiating the extent to which the fundamental right is conferred upon a citizen under Art. 19(1)(a) of the Constitution and the legislature’s power to place reasonable restrictions on that right in the interest of various grounds as mentioned in the Act. When any word has the malicious tendency/ intention of creating public disorder or to create disturbance in the law and order, in written or spoken, etc. only then the law shall intervene for preventing such activities in order to maintain the public order. So the term ‘Hate Speech’ has to be essentially construed by including term “intention” as one of its essence for maintaining equilibrium between the fundamental rights of individual and the interest of public order. Especially in the case of *KedarNath*, the court uses the words “intention” and “tendency” interchangeably. However, as a matter of textual re-drafting the two words have different connotations, where the word “tendency” denotes causation but not necessarily a state of mind. Instead, if the word “intention” is read in conjunction with the words “of causing” then it not only denotes the state of mind of the accused but also it firmly retains the judicial interpretation that the “actual” occurrence of creating public disorder is irrelevant as long as the intention to cause such disorder is proved. Hence it is necessary to look into the context in which the speech has been made which leads to the accused speech for hatefulness to be determined as a free speech. On adjudging the restriction, the context of the expression made has always been taken into consideration.¹⁰

⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, (2013) 1 SCR 467.

⁸ AIR 1962 SC 955.

⁹ The Constitution (First Amendment) Act, 1951.

¹⁰ *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

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Flowing from this, the other criterion required is that the speech must lead to “incitement” for it to be regarded as hate speech¹¹. Moreover “incitement” is considered to be a determinant factor for upholding the constitutionality of restriction imposed on the free speech.¹² The original effect of the speech which is employed by the accused in order to cause hatred, contempt or disaffection is to be retained. The validity of the restriction imposed based on a movie’s impact on its audience has been examined by the Supreme Court in the case, Ramesh v. Union of India¹³. The word “incite” is sometimes used interchangeably with the word “excite” and has also been found in the judgements laid down by the Supreme Court. However, the two words have two distinct meanings.¹⁴ Supreme Court has used the word “incite” in the context of action whereas the word “excite” amounts just to feelings without the potential of action. The Court, through interpretation, has suggested a more intimate relation between the words employed and the creation of feelings of hatred, contempt or disaffection. This is often done by the Court by using the word “incite” which indicates a tangible proximity between hatred, contempt or disaffection and the words used by the accused. Besides this, the need for a degree of proximity as a necessary element of speech offences that disturb public order has been identified by the Supreme Court. In Rangarajan¹⁵, it was held that **“in other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg”.**” In the year 2011, a two-judge Bench of the Supreme Court through the case Arup Bhuyan¹⁶, directly incorporated the Brandenburg test into the free speech law of India, holding - “In [Brandenburg v. Ohio¹⁷] the U.S. Supreme Court...held that mere ‘advocacy or teaching the duty, necessity, or propriety’ of violence...is not per se illegal. **It will become illegal only if it incites imminent lawless action.** We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental rights are similar to the Bill of Rights in the U.S. Constitution.” Hence, incitement to violence or even to any form of discrimination interfering with the liberty provided under the Constitution by way of article 19(1) must be considered as a main ingredient of the hate speech.

¹¹ShreyaSinghal v. Union of India, AIR 2015 SC 1523.

¹² Supra, note 4.

¹³ AIR 1988 SC 775.

¹⁴ Incite: to encourage someone to do or feel something unpleasant or violent; excite: to make someone have strong feelings of happiness and enthusiasm.

¹⁵ S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.

¹⁶ Arup Bhuyan v. State of Assam, (AIR 2011 SC 957).

¹⁷395 US 444 (1969).

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A conclusive definition for the term 'Hate Speech' being applicable to our whole nation is still not available. Hence there is a need for the term 'Hate Speech' to be defined in a manner not affecting any innocent speech but criminalising the speech employed with an intention to incite hatred, disaffection or contempt against any single person or a set of persons based on any grounds. It is very important to have these two words "intention" and "incite" in the definition as they are the main constituents of the crime 'Hate Speech'. If the alleged hate speech lacks either then such a speech is supported under the freedom of speech and expression guaranteed by article 19 of the Indian Constitution.

HATE SPEECH LAW AND INDIAN CONSTITUTION

All the citizens of India are guaranteed the right to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution. In the cases, *BrijBhushan v. State of Delhi*¹⁸ and *Sakal Papers (P) Ltd v. Union of India*¹⁹, an individual is granted the right to propagate his/ her ideas under article 19(1) and also each citizen has been conferred the right to publish, promulgate and circulate their ideas. The three important phrases of the article 19(2), 'reasonable restrictions', 'public order' and 'in the interests of' determine the constitutionality of a hate speech law. Generally, Constitution does not place any arbitrary restriction on speech. However, the speech is restricted or limited when it falls under any one of the eight grounds provided in Article 19(2) of the Constitution. Such a limitation will be protected by Article 19(2) only if it is found to be 'reasonable'. Most of the laws criminalising hate speech are justified by the exception of 'public order' available under the article 19(2).²⁰ Other grounds such as 'decency', 'morality' and 'incitement to an offence' have also saved the hate speech laws. The Supreme Court held that only in exceptional cases, the restrictions or limitations imposed over a fundamental right guaranteed by the Constitution shall be considered reasonable. The reasonableness should not be arbitrary and the restrictions should be reasonable by both, substantive and procedural law. A balance between the freedom guaranteed to an individual and the restriction allowed to be imposed on it by way of Article 19(2) must be maintained.²¹ When a fundamental right has been infringed, its nature, the reason for the imposition of such restrictions, any inconsistency found in the imposition and the conditions existing at the time of imposition are to be taken into consideration for finding out the validity

¹⁸ (1950) 1 SCR 605.

¹⁹ (1962) 3 SCR 842.

²⁰ Siddharth Narrain, "Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech" 17 *Economic and Political Weekly* 122 (2016).

²¹ *Supra*, note 5

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of the restrictions imposed. The restrictions imposed under Article 19(2) shall only be made ‘in the interests of’ the grounds specified under the article. Through this phase, a proximate relationship has been established between the actual limitation imposed and the exception available under Article 19(2).²² Also the court has held that as long as the requirements under Article 19 are met, a prior restriction on speech is permitted.²³

In the year 1951, the exception of ‘public order’ has been added under the article 19(2) by means of the first amendment to the Constitution of India²⁴. This exception has saved some hate speech laws from being regarded as unconstitutional. Since the enactment of the Constitution, the standard for determining as to what poses a threat to the public order has evolved a lot. These standards are important that they are used to determine the constitutionality of the hate speech laws. From various judgments, it can be inferred that the exception of ‘public order’ protects the laws which regulate the activities having the tendency of causing public disorder even when there is no actual breach of public order. Section 295A of the IPC has been declared to be constitutional as the aggravated forms of insult made on any religion has a tendency to disrupt the public order²⁵. This decision held in the case of RamjiLalModi is still valid being reiterated in the recent case of 2016 which challenged the constitutionality of section 295A.²⁶ In the case Virendra v. State of Punjab, a framework for the standards of ‘public order’ has been created by the Court. Though the government has the responsibility to preserve law and order, and shall initiate anticipatory action against any activity having a tendency to disrupt the public peace, it cannot make assumptions when exercising its statutory powers.²⁷ This principle has been later refined in the case Superintendent, Central Prison, Fatehgarh v. Dr. Ram ManoharLohia²⁸. When a limitation is imposed for protecting the public order, then it must have a proximate connection with the public order. In another case Ram ManoharLohia v. State of Bihar²⁹, though the court didn’t deal with Article 19 of the Constitution, differentiated the terms “law and order”, “public order” and “security of state” stating that ‘security of state’ falls under ‘public order’ and then public order falls under ‘law and order’. This has been demonstrated as three concentric circles. The court said that anything which affects the law and

²²RamjiLalModi v. State of UP, AIR 1957 SC 620.

²³BabulParate v. State of Maharashtra, 1961 SCR (3) 423.

²⁴ The Constitution (First Amendment) Act, 1951.

²⁵ Supra, note 17.

²⁶AshishKhetam v. Union of India, Writ petition (a) (criminal) no(s). 135/2016 (Supreme Court).

²⁷ AIR 1957 SC 836.

²⁸ (1960) 2 SCR 82.

²⁹ AIR 1966 SC 740.

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order need not have an effect on the public order so as those affecting public order may not affect the state's security. Thus, a restriction imposed 'in the interests of public order' should have a reasonable relation to the object aimed to be attained.

Basically, the grounds mentioned as exceptions to the right to freedom of speech and expression guaranteed under Article 19(2) are exhaustive in nature. An arbitrary action is allowed to be imposed on a speech until the requirements of Article 19(2) are satisfied. In such a case, the restrictions imposed on the speech should be found reasonable. As long as the hate speech law has a connection with the maintenance of the public order, it will be held constitutional. Hence a hate speech law cannot curtail the right to freedom of speech and expression guaranteed under Article 19(2) unless the restrictions imposed are reasonable and the law is in the interest of any of the grounds specified in the article.

ASPECTS OF HATE SPEECH IN IPC

The Indian Penal Code, though, does not have an explicit provision criminalising the hate speech, has six various sections spread in 3 different chapters criminalising certain aspects of hate speech. The first one is section 153A of IPC. This section criminalises the promotion of enmity between different groups of people based on the grounds such as religion, race, place of birth, residence, language, etc., and also criminalises the acts that are prejudicial for the maintenance of harmony.³⁰ In order to establish that an offence has been committed under Section 153A, the intention of the offender matters, though the text does not explicitly require it. In the case of *Bilal Ahmed v. State of Andhra Pradesh*³¹, the requirement of mensrea as an important ingredient of the offence has been reaffirmed from the case of *Balwant Singh v. State of Punjab*³². Prior to the amendment in 1961, the ground for criminalising was only 'classes' whereas it has been substituted by including various grounds such as, 'religious, racial or language groups or castes or communities' for the purpose of extending the applicability of the provision to more diverse groups. Although various grounds such as race, religion, language, ethnicity, place of birth and caste or community are available, the grounds of 'gender', 'sex', 'tribe', 'disability' and 'sexual orientation' have no place in the text of section 153A. The constitutionality of this section is upheld as the restriction imposed is found to be reasonable falling under the exception of 'public order'.

³⁰ The Indian Penal Code, 1860 (Act 45 of 1860), s.153A.

³¹ (1997) 7 SCC 431.

³² (1995) 3 SCC 214.

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The next provision is Section 153B. This section criminalises the assertions or imputations made prejudicial to the harmony of the community and the national integrity.³³ When any act is carried on for the purpose of generating fear or apprehension of fear and insecurity to the members of a particular targeted group based on some aspect such as language, religion, region, race, caste or community. This section generally punishes three different offences by way of criminalising any imputation or assertion on a specific ‘class of persons’ (1) made for the reason of them being a member of such class, do not have true faithfulness and also do not bear true allegiance to the Constitution or fail to uphold India’s integrity and sovereignty; or (2) that the rights of such class as Indian citizens are deprived; or (3) that the obligation of a member of such class is likely to instigate disharmony/ hatred/ feelings of enmity/ ill-will among the persons of such class and also with others. This section also, does not consider ‘sex’, ‘gender’, ‘tribe’, ‘disability’ and ‘sexual orientation’ as one of the grounds. This section has narrowed down the grounds based on which the imputations or assertions or placed on a class of persons by failing to have the phrase of ‘any other grounds whatsoever’ as available in Section 153A.

The act of insulting a place of worship/ sacred by destructing it with either intention or knowledge, is equivalent to insulting the religious sentiments of a specific group of people. This is criminalised under Section 295 of IPC. The judiciary has given broad interpretation to the word ‘defilement’ under Section 295. In the case of *Bharat Bhushan Sharma v. Kundan Kumar*³⁴ and in the case of *ZacPoonen v. Hidden Treasures Literature Incorporated*³⁵, a publication or speech is evaluated in order to check whether such speech or publication amounts to an act of defilement of anything considered as sacred by any class of persons. Flowing from this, section 295A criminalises the act of insulting religion/ religious beliefs to outrage the religious feelings of any class of persons, deliberately and maliciously. For the acts of unlawful speech a high threshold of intention is required by this section. A critique placed with good faith for the social reforms should be protected and cannot be held under this section. “Section 295A privileges certain kinds of offence, or insult, or outrage, which are grounded in religion, over others, which are not. Correspondingly, it accords to religious believers a right to suppress offending material that is not accorded to non-religious people.” How can a constitution committed to equality and non-discrimination justify placing a higher value upon the feelings of a person who is a believer of a religion than upon the feelings of all others.

³³ The Indian Penal Code, 1860 (Act 45 of 1860), s.153B.

³⁴ 2013 SCC Online (Punjab and Haryana) 4421.

³⁵ 2001 (4) KCCR 2361.

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Section 298 punishes any oral speech intentionally uttered to hurt the religious feelings of any person. This section is applicable to any speech employed against a person in order to oppose a class or group of people. Section 295A is a graver version of this section requiring ‘deliberate and malicious’ intention whereas this section has a lower standard of requiring ‘deliberate’ intention and even mere intention or knowledge of hurting one’s religious feeling will not hold the accused liable under this section. Finally Section 505 criminalises various kinds of speech and publication. This section covers the promotion of class hatred and also the incitement of violence towards the state or against any other community. Having a wider scope and applicability, the careless spread of rumors with an intention to create mischief is prevented under Section 505.

On analyzing all the six sections of IPC containing the aspects of hate speech, a separate provision must be inserted in IPC as prescribed by the 267th Law Commission Report of India for prohibiting incitement to hatred³⁶. The provision must be inclusive of the grounds such as sex, gender, sexual orientation, disability or tribe based on which the discrimination is made. Following which, the phrase ‘any other grounds whatsoever’ must be present in the provision.

Though there are around six provisions available with the aspects of hate speech, they all are incomplete in criminalising every aspect of hate speech. Section 153A and 153B of IPC fails to criminalize the enmity promoted between/ imputations placed on, specific group of people based on gender, sex, disability, tribe and sexual orientation. Even an attempt to cause disharmony is regarded unlawful under sections 153A and 153B. For Sections 153A and 505(2) to apply, the arousal of incitement of hatred against a targeted group is required. Hence these sections cannot be attracted unless a speech or representation creates a conflict between different classes. Hence as suggested above, there is a need for a separate provision criminalising ‘Hate speech’.

CONCLUSION

The permissible restrictions imposed on the right to freedom of speech and expression has received a lot of criticism. For a sustaining democracy, the freedom of speech and expression remains as a key freedom. However any freedom granted cannot be absolute and comes along with certain responsibilities. Each of the sections criminalising hate speech have been challenged for their constitutionality which are saved by the clause (2) of article 19 of the

³⁶ Supra, note 4.

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Constitution by allowing restrictions to be imposed only when they are found reasonable for the protection of law and order and various other grounds. The standard for reasonableness has been laid down through various judgments. By way of this exception available under the Constitution, a limitation on the freedom of speech and expression has been posed against the hate speech enacting laws with the aspects of hate speech present. In a simple way, hate speech can be defined as anything that incites hatred against a targeted group of people based on certain grounds such as race, religion, caste or community, ethnicity, language, sex, gender, sexual orientation or any other identical grounds, in written or spoken, signs or by any mode of visual representation which is made with an intention to create fear or apprehension of fear or to incite violence among people.

Insertion of Section 153C through an amendment as prescribed by the law commission report³⁷ falls under the Constitution's Concurrent list. So far only four states along with three union territories have approved to the proposal of the centre and on the other hand the hate speech is increasing significantly.³⁸ Also the existing provisions on hate speech are not exhaustive. So, an additional provision is required to be inserted in the IPC for having a clear cut definition of hate speech. This protects an innocent from being attacked and ensures that the offender of hate speech is punished which in turn results in maintaining public order in the society.

³⁷ *Supra*, note 37.

³⁸ Sajib Ahmad Bhat and TaniyaBazaz, "Criminalisation and Regulation of Hate Speech in India" 1 *Kashmir University Law Society Journal* 47 (2018).

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