

Defining the Scope of Hate Speech: A Comparative Jurisprudential Approach

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Abstract

The concept of hate speech has been in debate for many years, and it has received immense attention in the recent past. With the advent of the internet, the content is reaching more swiftly to the audience than ever before, having greater implications. Laws have been enacted both in the international and national spheres to regulate the menacing effect of hate speech. Nevertheless, such anti-hate speech laws have been continuously challenged as they violate the right to free speech and expression. Supra-national courts like the European Court of Human Rights as well as the courts in other democracies have considered various aspects and tried building up jurisprudence in this regard. India is no exception to such phenomena and has witnessed a surge in such incidents in recent times. Wherein in many cases, the State has turned blind eye to the serious ramification that such speeches were capable of, in other instances, it has incarcerated people indiscriminately, accusing them of making speeches amounting to sedition. Prohibition against hate speech has found references in various laws and the judiciary has long played a pivotal role through balancing acts. Besides defining 'hate speech', this research paper has attempted sketching the limits of hate speech by reconciling Indian jurisprudence with the ones developed by the courts abroad.

Keywords- Seditious, Free Speech, Racial Discrimination, 'Clear and Present Danger Test', European Court on Human Rights.

I. Introduction

The foundation of an individual's self-sufficiency is their right to self-determination, which is guaranteed by democracies as limitations on the State to

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shield people from its intervention. Both citizens and non-citizens are guaranteed a number of rights. The ability to express oneself freely is seen as being of utmost importance for an individual since it enables self-actualization and strengthens one's capacity to enjoy independence and freedom. The right to free expression has evolved into the legal principle that is most frequently disputed due to the rise of the internet and social media.

Hate speech can be expressed both online and offline, and as technology has advanced, the frequency of online hate speech has considerably increased.³ The term 'hate speech' is not defined in the statute books and it does not have a universal definition. However, it has attained its prominence from the context and framework it operates in which is formed as a result of different identities and assessments of people like them belonging to a particular caste, religion, ethnicity, culture, etc.⁴ The meaning of hate speech is dependent upon the morals of the society. If a society is defined on the basis of caste or culture, it is easier to reach a unanimous consensus on the definition of hate speech.⁵

In the modern times, the meaning of hate speech has gone beyond offensive speeches that are either insulting, derogatory, discriminatory, provocative or for that matter even those which encourage or incite violence or may lead to a violent retaliation.⁶ Hate speech disrupts the peace and tranquility of society as a whole and transforms into a horrific crime that directly harms the victims of hate crimes on a psychological and physical level. It continues to have an intangible impact on its victims, which has an impact on their right to free speech and expression and ultimately prevents them from participating in democracy and public dialogue.⁷

Hate speech goes on to pose extreme danger for a democratic society, for human rights protection and rule of law, which if not addressed can result in violence and conflict on a much larger scale, which can lead to an extreme form of

³ Anandita Yadav, *Countering hate speech in India: looking for answers beyond the law*, 2 ILI LAW REV 1, 2 (2018) <https://ili.ac.in/pdf/csi.pdf>. (last visited Apr. 5, 2024).

⁴ *Id.*

⁵ Ketan Modh, *Controlling Hate Speech on the Internet: The Indian Perspective*, 1, 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783447 (last visited Apr. 5, 2024).

⁶ Yadav, *supra* note 1, at 2.

⁷ *Id.*, at 4.

intolerance and can contribute to hate crime.⁸ It is necessary to weigh and balance the speech made in India where a speech may be alleged to impact national integrity can get you imprisoned; whereas in the United States (US), the President can also go to the extent of calling Mexicans as rapists openly without any restriction.⁹ This shows that there are two forms of challenges on free speech in the world. First, in developing countries like India, wherein the legal protection of free speech is limited. Second, in developed countries like the US, free speech is equated with absolute speech.

In this research paper the authors have discussed the hate speech jurisprudence nationally and internationally. In the first part, the authors give an introduction about the topic, meaning and contours of hate speech. In the second part, the authors have highlighted the international perspective on hate speech which discusses the various United Nations (UN) legal instruments as well as laws prevalent in the US, Canada, South Africa, and the United Kingdom (UK). The third part deals with some recent incidents along with Indian jurisprudence developed by the judiciary through various judgments. The last part is the concluding part.

II. International Perspective on Hate Speech

The topic of hate speech has been dealt with internationally in an extensive manner. Many countries have laws against hate speech and their meaning and limits differ in different countries. The judiciary has also interpreted and assigned a new meaning to the scope of hate speech under the international legal instruments including the UN conventions. Since there is no definition of hate

⁸ Eur. Comm'n on Racism and Intolerance (ECRI), *General Policy Recommendation No. 15 on Combating Hate Speech* (Dec. 8, 2015), available at <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01> (last visited Apr. 5, 2024).

⁹ See *Drug dealers, criminals, rapists: What Trump thinks of Mexicans*, BBC, Aug. 13, 2016, <https://www.bbc.com/news/av/world-us-canada-37230916> (last visited Apr. 5, 2024).

speech that is universally accepted so the States and legal institutions have adopted a different concept of hate speech as well as its limitation.¹⁰

A. Hate Speech in International Law

It is important for the UN to intervene to curb hate speech because it is a danger to democracies. The primary goal of the UN is to prevent armed conflicts, atrocities and violations of human rights.¹¹ The UN in 2019 came up with a Strategic Plan of Action¹² which mainly focused on combating hate speech along with maintaining the spirit of free speech and expression.¹³ Some of the conventions and international legal instruments like the Universal Declaration on Human Rights (hereinafter ‘UDHR’)¹⁴, the Genocide Convention,¹⁵ International Convention on Elimination of all forms of Racial Discrimination (hereinafter ‘CERD’),¹⁶ International Covenant on Civil and Political Rights¹⁷ (hereinafter ‘ICCPR’) have provisions against hate speech.

Article 19(3)¹⁸ of the ICCPR mentions restrictions on free speech should fulfill three criteria:

- a) The restriction should be given by the law;
- b) The restriction should be on legitimate grounds;

¹⁰ See Natalie Alkiviadou, *The Legal Regulation of Hate Speech: The United Nations Framework as the Common Denominator for Europe and Asia*, 10 Euro-Asian J. L & Governance 23 (2020).

¹¹ See Seep Gupta, *Prevention of hate speech in the light of international human rights*, IPLEADERS, <https://blog.ipleaders.in/prevention-hate-speech-light-international-human-rights/> (last visited Apr. 5, 2024).

¹² See Rodrigo Saad, Former Universal Rights Group – NYC, *The UN Strategy and Plan of Action on Hate Speech: tackling discrimination, hostility and violence* (Aug. 8, 2019).

¹³ See Gupta, *supra* note 10.

¹⁴ Universal Declaration on Human Rights, art. 8, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948). (Hereinafter ‘UDHR’).

¹⁵ U.N. Convention on the Prevention and Punishment of the Crime of Genocide, art. 3, G.A. Res. 260A (III), U. N. GAOR, 5th Sess., 78 U.N.T.S. 277 (Dec. 9, 1948). (Hereinafter ‘Genocide Convention’).

¹⁶ U.N. Convention on the Elimination of All Forms of Racial Discrimination, art., 4, G.A. Res. 2106(XX) U.N. GAOR, 20th Sess., 660 U.N.T.S. 195 (Dec. 21, 1965). (Hereinafter ‘CERD’).

¹⁷ International Covenant on Civil and Political Rights (ICCPR), art. 20(b), 999 U.N.T.S. 171 (Mar. 23, 1976). (Hereinafter ‘ICCPR’).

¹⁸ *Id.* Art. 19.

c) The aim of the restriction should be to attain a lawful purpose.

The Human Rights Committee (hereinafter 'HRC') heard many cases on hate speech under Article 19(3) ICCPR. In *Faurisson v. France*,¹⁹ the remark made by a French professor casting a doubt on the existence of gas chambers during Holocaust was deemed as hate speech. Professor Faurisson opposed the Gayssot Act, 1990²⁰ since it was an offence under the Act to oppose the crimes against humanity. He also claimed that the legislation restricted his free speech and expression. The HRC emphasised on the importance of upholding respect for the Jewish community to live a life of dignity free from anti-Semitism.²¹ Although denial of holocaust is not specifically mentioned in Article 20(2)²² of the ICCPR, the HRC stated that may nonetheless constitute a form of incitement to hatred. The HRC in its decision upheld the Gayssot Act as it was for the purpose of serving the struggle against racism and anti-Semitism. It was argued by HRC that this struggle is a legitimate aim and is needed to restrict the right to free speech and expression.²³

Article 1 of CERD uses the term 'race discrimination'²⁴ which is highly inclusive as it encompasses not just distinction or restriction but also giving preference based on several factors that can prevent someone from recognizing, exercising or taking advantage of their and freedoms in different spheres of life. The prohibition on racist thoughts, promotion, and speech is mentioned in Article 4 of the CERD, along with a prohibition on racial violent acts and instigation to such acts. It tries to combat racial hatred as shown by the words and deeds committed by organized groups as well as racist statements made by public figures.²⁵

The willingness of CERD to impose restriction on free speech and expression, thereby controlling the spread of hatred was reflected in *Jewish Community of*

¹⁹ HRC, *Faurisson v. France*, Communication No. 550/93, views adopted on Nov. 8, 1996.

²⁰ Gayssot Act, 1990 (Act no. 615/1990).

²¹ See Legal Resources Centre, South Africa, Comparative Hate Speech Law: Annexure 14 (Mar. 2012).

²² ICCPR, Art. 20(2).

²³ See HRC, *Faurisson*, para. 9.4.

²⁴ CERD, Art. 1.

²⁵ See Alkiviadou, *supra* note 8, at 24.

Oslo et al. v Norway.²⁶ This judgement examined what the due regard²⁷ clause meant in relation to a march honoring German Nazi leader Rudolf Hess. Article 4 of CERD requires that to meet the ends of prohibition mentioned in art. 4 of CERD due regard be given to the principles of non-discrimination²⁸ mentioned in UDHR and should also give due regard to the rights mentioned in art. 5 of CERD.

The Genocide Convention²⁹ criminalizes all forms of genocide, including the actual act of committing it as well as any conspiracy, incitement, attempt, or complicity. This clause applies because hate speech has the capacity to incite people or societies to commit genocide. The U.N. Strategy and Plan of Action on Hate Speech,³⁰ recognizes that since past many years hate speech has contributed to crimes like genocide.

The International Criminal Tribunal for the Former Yugoslavia³¹ (hereinafter ‘ICTY’) and the International Criminal Tribunal for Rwanda³² (hereinafter ‘ICTR’) –which were formed by the UN Security Council Resolution to punish heinous crimes which were committed in Rwanda and the former Yugoslavia during wars also analyzed the crime of hate speech in the context of genocide and incitement of it. In the case of *Nahimana et al.*,³³ the ICTR Trial Chamber I analyzed the jurisprudence dealing with international human rights bodies which dealt with hate speech and discrimination thereby depicting the proximity and interconnection between genocide and hate speech.³⁴

²⁶ *The Jewish community of Oslo et al. v. Norway* (Aug. 15, 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003).

²⁷ CERD, Art. 4.

²⁸ UDHR, Art. 2.

²⁹ See Genocide Convention, Art. 3.

³⁰ See Saad, *supra* note 10.

³¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808/1993 (May. 25, 1993).

³² Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 (1994) (Nov. 8, 1994).

³³ See Case No. ICTR 99-52-T, Decision on Judgment and Sentence, (Int’l Crim. Trib. for Rwanda, Dec. 3, 2003).

³⁴ See Legal Resources Centre, *supra* note 19 at 8.

The Council of Europe 1997 defines hate speech as expressions that can incite violence or promote racism and other hatred based intolerance.³⁵ The Council of Europe's Manual on Hate Speech,³⁶ has laid down a three-fold test to be adopted by the courts to recognize hate speech and once it is known that interference with regard to freedom of expression has taken place, the courts use such a test to decide the lawfulness of the intrusion. The three-fold test is as follows:

a) Whether interference is by the law?

The law which allows a restriction under art. 10³⁷ of European Convention on Human Rights (hereinafter 'ECHR') should be specified in the legislation and be defined in order to let the citizens to control their actions in harmony with the law and foresee the outcomes of any unacceptable conduct.³⁸

b) Whether the obstruction is in proportion to the lawful aim that is followed?

In the case of *Handyside v. United Kingdom*,³⁹ it has been concluded that the limitations enforced by the State under art. 10(2) of ECHR on free expression should be in proportion to the legitimate aim that is pursued.⁴⁰

c) Whether interference is needed in a democratic set-up?

It needs a complete analysis of the issue to understand if the freedom was constrained in accordance with reasonable societal necessity and to defend the values and principles that are fundamental to ECHR.⁴¹ It is remarked in *Handyside case*,⁴² that all the restrictions on art. 10 of the ECHR⁴³ needs to be

³⁵ Council of Europe, Committee of Ministers, Recommendation no. R(97)20 on Hate Speech (Adopted by the Committee of Ministers on Oct. 30, 1997 at the 607th meeting of the Ministers' Deputies) https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-97-20-of-the-committee-of-ministers-to-member-states-on-hate-speech (last visited Apr. 5, 2024).

³⁶ See generally Anne Weber, *Manual on Hate Speech*, EUR. CONSUL. http://icm.sk/subory/Manual_on_hate_speech.pdf (last visited Apr. 5, 2024).

³⁷ Eur. Conv. on H.R. 1950, Art. 10.

³⁸ *Delfi AS v. Estonia*, Application no. 64569/09 (2015).

³⁹ *Handyside v. United Kingdom*, Application no. 5493/72 Eur. Ct. H.R. (1976).

⁴⁰ ECHR, Art. 10(2).

⁴¹ ECHR, Art. 17.

⁴² See *Handyside supra* note 37.

⁴³ See *id.*

prudently examined and not all offensive speech is illegitimate.⁴⁴ The lawful aim is not only the sole test to determine the interference but also it needs to be seen whether the intrusion is needed in the democratic society.⁴⁵

The European Court on Human Rights (hereinafter 'ECtHR') also has failed to provide a definition of 'hate speech'. It has associated the idea of hate speech with expressions that incite, or justify intolerance based on hatred.⁴⁶ In the case of *Vejedland v. Sweden*,⁴⁷ the ECtHR mobilized around the chance to rectify the gaps left by the Council of Ministers in regard to homophobic speech and also alleged that such speech should be outlawed just like a racist speech. It was also observed that it is not necessary for a speech to overtly call for acts of hatred because injury might simply come through insulting, deriding, or demeaning certain groups of people.⁴⁸

The European Commission against Racism and Intolerance in Recommendation No. 7⁴⁹ mentions that freedom of expression may be regulated so as to combat racism⁵⁰ and the regulation needs to be in correspondence to ECHR. The European Commission for Democracy Law⁵¹ was instituted in order to analyze the laws of Europe and observed, if hatred is incited due to insult to religion, then only it can be penalized. An International Seminar on Human Rights Violations faced by Muslims was conducted in Istanbul on 16 & 17 February 2022⁵² where the experts raised their concerns with regard to the disintegrating situations of Muslims in Asia, especially in the countries like India and Myanmar wherein

⁴⁴ See *id.*, para. 49.

⁴⁵ *Id.*, para. 45.

⁴⁶ Alkiviadou, *supra* note 8, at 24.

⁴⁷ *Vejedland and Others v. Sweden*, App. no 1813/07 (Eur. Ct. H.R Feb, 9 2012).

⁴⁸ See *id.*

⁴⁹ See EUR. CONSULT. ECRI General Policy Recommendation N 7 on national legislation to combat racism and racial discrimination, (Dec. 7, 2017). <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.7> (last visited Apr. 5, 2024).

⁵⁰ See *id.*

⁵¹ See EUR. CONSULT, *Democracy through Law* (Venice Commission) (May 10, 1990) https://www.venice.coe.int/WebForms/pages/?p=01_Presentation (last visited Apr. 5, 2024).

⁵² See *Anti-Muslim sentiment spreading in Asia at alarming pace-seminar*, TRT WORLD, Feb. 18, 2022, available at <https://www.trtworld.com/magazine/anti-muslim-sentiment-spreading-in-asia-at-alarming-pace-seminar-54890> (last visited Apr. 5, 2024).

violence against Muslims has been on the rise and to some extent even normalized in these nations.⁵³

The courts in certain countries refused to recognize the criteria of identifying a speech as hate speech but there are certain parameters which are classified as follows:

- a) The extremity of speech- The speech to come under the purview of hate speech and to qualify as a hate speech must be offensive and should show an extreme form of emotion.⁵⁴
- b) Incitement- The speech must lead to an incitement of an offence to employ the limitation and it is a norm to limit free speech. Even the United States Supreme Court laid down the test of imminent threat.⁵⁵ The hate speech has always conflicted with liberty and equality.
- c) Status of the person who made the speech- The ECtHR observed that the status and position of the speaker is critical to determining the legitimacy of the State-imposed restriction. Hence freedom of expression of a politician also calls for a close check on the Court's power.⁵⁶
- d) Status of speech's intended audience- In determining whether a speech can be restricted, it is also important to consider the status of the intended audience. The ECtHR in the case of *Lingens v. Austria*⁵⁷ differentiated between the private and public individuals' status and stated that the limit of criticism which is acceptable is much larger in the case of a politician than in the case of a private individual.⁵⁸
- e) Potentiality of the speech- The possible impact that a speech would have needs to be examined in order to understand the state of mind of a speaker while making the speech. The Supreme Court upheld the legality of the restriction in *Ramesh v. Union of India*⁵⁹ on the grounds that the film might have the ability to influence the audience.

⁵³ *Id.*

⁵⁴ See *Saskatchewan (Human Rights Commission) v. Whatcott*, (2013) 1 S.C.R. 467.

⁵⁵ *Brandenburg v. Ohio*, 395 U.S. 44 (1969).

⁵⁶ *Incal v. Turkey*, Application no. 41/1997/825/1031 (1998).

⁵⁷ (1986) 8 E.H.R.R. 407.

⁵⁸ *Id.*

⁵⁹ 1988 S.C.R. (2)1011.

- f) Context of the Speech- All the hateful speeches are not labelled as hate speech as the context in which the statement is made is also important.⁶⁰

Several proposals were made in the Jakarta Recommendations, which were the outcome of a regional consultation on ‘Expression, Opinion and Religious Freedoms in Asia’:⁶¹

- a) The anti-discrimination legislation is required to be strengthened in order to meet the standards on equality across the groups.
- b) A law that punishes incitement to hatred which results in violence, discrimination and hostility should be adopted.
- c) The parliamentarians from religious minorities ought to have the authority to bring up problems involving religious liberty and freedom of speech in the legislature and on other stages.
- d) All acts of incitement to hatred that result in violence and violations of the right to freedom of expression related to religion shall be condemned and prohibited.

India is a party to the UN conventions like the CERD, the Genocide Convention which have provisions against hate speech, so it is an obligation of India to be in consistency with them. Article 51⁶² and Article 253⁶³ read with Entry 14⁶⁴ of the Union List in the Seventh Schedule of the Constitution of India (hereinafter ‘Constitution’) obligates that any international convention inconsistent with Part III⁶⁵ of the Constitution must be interpreted to broaden the meaning and content and to encourage the goal of the constitutional guarantee. The role of international treaties in implementing domestic laws cannot be overlooked.

⁶⁰ See generally *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

⁶¹ See Jakarta Recommendations on Freedom of Expression in the Context of Religion (Jun. 17, 2015) <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/06/JakartaRecommendations-FINAL.pdf> (last visited Apr. 5, 2024).

⁶² INDIA CONST. art. 51- Promotion of international peace and security.

⁶³ *Id.* Art. 253- Legislation for giving effect to international agreements.

⁶⁴ *Id.* sch. VII, list 1, entry 14- Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

⁶⁵ *Id.* part III- Fundamental Rights.

By virtue of the Constitution, the Government of India is allowed to enter into treaties and to implement them. The Supreme Court in *Vishaka v. State of Rajasthan*⁶⁶ has said that if need be Indian courts can take the aid of international conventions for the purpose of constructing a domestic law. The issue that crops up for the courts in India is regarding the implementation of international law treaties is whether the treaties are binding on the country directly or if it needs an enabling legislation. The Supreme Court held that regard must be given to international conventions and norms for coming up with a domestic law. The Court further ruled that international agreements that conflict with fundamental rights must be studied in order to clarify their meaning and content. International law is not just used to interpret or define domestic law, according to the Court.⁶⁷

In 2014, the transgender community was acknowledged as a third gender in *National Legal Services Authority v. Union of India*.⁶⁸ In this instance, the Court held that in the event that parliamentary legislation contradicts international law, Indian courts are obligated to apply Indian law rather than international law. The municipal courts in India would adhere to international law principles, nonetheless, in the absence of conflicting laws.” For fulfilling the responsibility, the Indian courts translated international law into domestic law.

It is beyond doubt that hate speech is an actual evil in democracy. The collective efforts of the UN and other international bodies in the context of the legal instruments formulated by them are needed to combat the menace of hate speech in society.

B. Hate Speech Jurisprudence Developed in Foreign Countries

In the 20th century, hate speech in Germany can be traced from the era of Holocaust wherein speeches were made that had the potential to cause harm to Jews as a group.⁶⁹ As per a news report in 2021 which warned against the rise in anti-Semitism comments on the internet during the pandemic indicated that

⁶⁶ AIR 1997 SC 3011.

⁶⁷ *Id.*

⁶⁸ (2014) 5 SCC 438.

⁶⁹ See generally Claudia E. Haupt, *Regulating Hate Speech-Damned if you do and damned if you don't: lessons learned from comparing the German and U.S. approaches* 23 BOS. UNIV. INT'L L. J. (2005) <https://www.bu.edu/law/journals-archive/international/volume23n2/documents/299-336.pdf> (last visited Apr. 5, 2024).

certain survivors had stated that hate speech during the Holocaust was responsible for the mass murders that followed.⁷⁰

In Germany, there is a lack of laws dealing with hate speech and even for the German Penal Code⁷¹ (hereinafter ‘GPC’) online medium is still a new area. As per Section 86⁷² and 86a⁷³ of the GPC, it is forbidden to use the symbols of organizations that are unconstitutional and if found to be using them, then they are sentenced to a fine or sentenced up to 3 years. As per Section 111⁷⁴ of GPC, it is deemed illegal to call upon someone to undertake a criminal act and posting on the internet in the public domain and if committed, one can be sentenced to 5 years of imprisonment. As per Section 130⁷⁵ of GPC, incitement of hatred is punishable with fine or a custodial sentence of 3 months to 5 years. In a case,⁷⁶ the Wolfenstein video game was banned in 1998 as it had images of swastikas and Nazis but in 2018,⁷⁷ it was reversed and brought under the purview of exception to Section 86a with respect to artistic, journalistic and educational works.

Therefore, the German legal regime sees hate speech as forfeiting free-speech protection.⁷⁸ The German regime gives more protection to dignity of the victims of hate speech and unlike the US regime, hate speech is not unprotected and attracts criminal punishment as well.⁷⁹ The Germans along with other non-European democracies are more concerned to curb the ideology of hate speech

⁷⁰ *It started with words: Holocaust survivors recount how hate speech led to mass murder*, EURO NEWS, Apr. 18, 2021 <https://www.euronews.com/2021/04/08/it-started-with-words-holocaust-survivors-recount-how-hate-speech-led-to-mass-murder> (last visited Apr. 5, 2024).

⁷¹ German Cri. Code, (Strafgesetzbuch – StGB), 1998.

⁷² *Id.* sec. 86- Dissemination of propaganda material of unconstitutional and terrorist organisations.

⁷³ *Id.* sec. 86 a- Use of symbols of unconstitutional and terrorist organisations.

⁷⁴ *Id.* sec.111- Public incitement to commit offences.

⁷⁵ *Supra* note 69, sec.130- Incitement of masses.

⁷⁶ The infamous *Wolfenstein 3D* court decision (case no. 1 Ss 407-97).

⁷⁷ *Wolfenstein II: The New Colossus* (DW-08/09/2018).

⁷⁸ See Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law* (Part I), GERMAN L. J 23, 27 https://germanlawjournal.com/wp-content/uploads/GLJ_Vol_04_No_01_Brugger.pdf (last visited Apr. 5, 2024).

⁷⁹ *Id.*, at 32.

whereas, the American doctrine is interested in allowing its propagation.⁸⁰ In Germany, it is against the law to incite hatred, and making a hate comment may result in a police raid. Whereas in the US, the vilest comments and speeches are protected under the US Constitution. It also happens that people living in the same country have varying levels of tolerance for speech or comments that are made. For example, some people may consider comments made against religious leaders to be hate speech and blasphemy, while others may find gender-based insults to be amusing and deserving of a laugh.⁸¹

In the US, the protection guaranteed to free speech is far greater than the protection accorded in other countries.⁸² The First Amendment of the US Constitution⁸³ precludes the Congress to come up with laws that are against the virtues of free speech and expression. This protection in the US is based on two major assumptions. The first being the need of equality of ideas⁸⁴ and secondly an assumption that the government does not have the power of differentiating between right and wrong.⁸⁵ The government must defend debates on matters of public significance, even if those arguments result in offensive and hostile speech that might cause others to feel grief, fear, or rage, according to the courts' interpretation of the First Amendment's protection.⁸⁶ Although hate crimes have been increasing in the US since almost a decade,⁸⁷ hate speech in the US is so widely protected that it almost qualifies for an absolute speech without any restriction.⁸⁸ In the US, absolute protection is the norm; however, this is not the case in any other country, developed or not.

In the case of *New York Times v. Sullivan*,⁸⁹ the US Supreme Court said unless malicious intention to insult with complete ignorance to truth is ascertained, the

⁸⁰ *Id.*, at 38.

⁸¹ *Id.*

⁸² See generally Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 *Vil. L. Rev* 743, 744 (1992).

⁸³ See U.S. CONST. amend I.

⁸⁴ See *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

⁸⁵ See *Cohen v. California*, 403 U.S. 15 (1971).

⁸⁶ See *Scynder v. Phillips*, 562 U.S. 443 (2011).

⁸⁷ See generally *US hate crime highest in more than a decade – FBI*, BBC, Nov. 18, 2020, <https://www.bbc.com/news/world-us-canada-54968498> (last visited Apr. 5, 2024).

⁸⁸ See Floyd Abrams, *supra* note 80, at 748.

⁸⁹ 376 U.S. 254 (1964).

speech cannot be considered a violation of the First Amendment. The US law follows the ‘clear and present danger’ test for determining hate speech. The test was accepted by the US Supreme Court in *Schenck v. the United States*⁹⁰ to evaluate when restrictions on speech and expression are appropriate. It is a standard which is needed to determine whether the speech is within the ambit of First Amendment right. The test says that the expressions be it spoken or written cannot be subjected to restraint unless clear and present danger of causing a serious wrong is present.⁹¹ There are two requirements for this test to apply:

- a) The speech made should impose a threat that an evil would take place.
- b) It also requires that the threat is a real one and is an imminent threat.

The Canadian Charter of Rights and Freedom⁹² guarantees freedom of belief, thought, opinion and expression that can be subjected to reasonable limitations approved by the law which are accepted in a democratic society.⁹³ Hate speech laws are assessed in the light of section 2(b)⁹⁴ under the Canadian Charter. The Canadian Criminal Code, 1985⁹⁵ forbids inciting violence and the communicating statements in public which can excite hatred against a group which can result in disorder.⁹⁶ It also contributes to the willfully promoting hatred against any particular group.⁹⁷ The Canadian Human Rights Act, 1985⁹⁸ deals with hate speech in the online medium by eliminating expressions which can incite hatred contempt against a person on the basis of their association based on a prohibited ground of discrimination.⁹⁹

⁹⁰ 249 U.S. 47 (1919).

⁹¹ See generally *Clear and Present Danger*, LEGAL INFO. INST., available at https://www.law.cornell.edu/wex/clear_and_present_danger#:~:text=The%20clear%20and%20present%20danger,bringing%20about%20a%20substantial%20evil (last visited Apr. 5, 2024).

⁹² See generally Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.)

⁹³ See *id.*, sec. 1.

⁹⁴ See *id.*, sec 2(b).

⁹⁵ See Canadian Criminal Code, R.S.C. 1985, c. C-46 (Can.).

⁹⁶ *Id.*, sec. 319(1).

⁹⁷ *Id.*, sec. 319(2).

⁹⁸ See Canadian Human Rights Act, R.S. 1985, c. H-6.

⁹⁹ See *id.*, sec. 13(1).

In *R. v. Keegstra*,¹⁰⁰ the Canadian Supreme Court ruled that the Parliament had realized the extent of damage that could emerge as a result of the publicity and has taken steps so as to protect the targeted citizens, avoid racial, religious, and ethnic strife, and avoid state-sanctioned violence. The promotion of hatred towards vulnerable groups was repressed by the Parliament. The Canadian jurisprudence follows the guidelines put forward in *R v. Oakes*,¹⁰¹ for ascertaining the proportionality of the restriction on free speech with respect to the objective that needs to be achieved. In *Taylor v. Canada*,¹⁰² the Canadian Supreme Court upheld the Human Rights Act ban on hate speech among private citizens.

In South African jurisprudence restrictions on free speech are mentioned in the Constitution of South Africa.¹⁰³ The Constitution of South Africa guarantees free expression¹⁰⁴ and is limited on the grounds that propaganda for war is created, imminent violence is incited, or results in hatred which are based upon factors like race, gender or religion, and it results in incitement to causing harm.¹⁰⁵

In 2021, the South African Constitutional Court established a precedent on the prohibition of hate speech in the case of *Qwelane v. South African Human Rights Commission and Another*.¹⁰⁶ In this case the Court clarified the tension which existed between the hate speech prohibition and right to freedom of expression.¹⁰⁷ The Court declared section 10(1)¹⁰⁸ of the Equality Act¹⁰⁹ as unconstitutional as it uses the word “hurtful” in the prohibition of hate speech. A “hurtful” speech does not constitute hate speech, as there is no such limitation under section

¹⁰⁰ [1990] 3 S.C.R. 697 (Can.).

¹⁰¹ [1986] 1 S.C.R. 103 (Can.).

¹⁰² [1990] 3 S.C.R. 892 (Can.).

¹⁰³ S. AFR. CONST., 1996.

¹⁰⁴ See S. AFR. CONST., sec. 16.

¹⁰⁵ See *id.* sec. 16(2).

¹⁰⁶ CCT13/20[2021] Z.A.C.C. 22.

¹⁰⁷ Tanya Calitz, *South Africa's Constitutional Court Sets Precedent for the Prohibition of Hate Speech*, OXFORD HUM. RTS. HUB, Aug. 8, 2021, <https://ohrh.law.ox.ac.uk/south-africas-constitutional-court-sets-precedent-for-the-prohibition-of-hate-speech/> (last visited Apr. 5, 2024).

¹⁰⁸ See Equality Act, sec. 10(1)

¹⁰⁹ Promotion of Equality and Prevention of Unfair Discrimination, 2000 (Act 4 of 2000) (The Equality Act).

16(2)¹¹⁰ of the Constitution of South Africa. The Court also remarked that hate speech is an antithesis of the values enshrined by the right to free speech and it is destructive of democracy.¹¹¹ This judgment led to the passing of the Prevention and Combating of Hate Crimes and Hate Speech Bill¹¹² on March 15, 2023. The Bill represents an important measure towards safeguarding South Africans against hate crimes and hate speech.

In the UK, there are many laws against hate speech. According to section 4A of the Public Order Act, 1986¹¹³ it is unlawful to employ words or actions that can harass another person or cause them distress. If the offender meant to incite racial hatred or actually did so, they face punishment.¹¹⁴ This offence is covered under the Racial and Religious Hatred Act 2006.¹¹⁵ The Criminal Justice and Immigration Act of 2008¹¹⁶ covers inciting hatred based on sexual orientation as an offence. The hate crimes have been on the rise in the UK and in the year 2022, there was a 26% rise in the instances of hate crimes.¹¹⁷

The UN instrumental framework no doubt seeks to tackle and prohibit hate speech and it is an important contributor against the menace of hate speech. Foreign countries too have laws in place to prohibit hate speech. The standards of protection given to free speech vary in each country with the highest protection accorded to free speech in the US.

III. Hate Speech and Indian Jurisprudence

Indian courts have repeatedly debated the subject of hate speech. The foundation of an individual's freedom is their right to free speech and expression. These

¹¹⁰ See S. AFR. CONST., sec. 16 (2).

¹¹¹ *Qwelane v. South African Human Rights Commission and Another*, CCT13/20[2021] Z.A.C.C. 22, para 78.

¹¹² Prevention and Combating of Hate Crimes and Hate Speech Bill (B9B-2018).

¹¹³ Public Order Act 1986 (c. 64).

¹¹⁴ See generally *id.* pt. III-Racial Hatred.

¹¹⁵ See Racial and Religious Hatred Act, 2006 (c.1).

¹¹⁶ See Criminal Justice and Immigration Act, 2008 (c. 4).

¹¹⁷ See generally Official Statistics, *Hate crime, England and Wales, 2021 to 2022*, GOV.UK, Oct. 6, 2022, <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2021-to-2022/hate-crime-england-and-wales-2021-to-2022> (last visited Apr. 5, 2024).

rights should not be restricted, as doing so will reduce their autonomy. Even if the speech is offensive, it shouldn't be entirely interfered with aside from the fact that it can be regulated by Article 19(2) of the Constitution. It is important to have a variety of opinions because if there isn't, everyone would have the same opinion, and it wouldn't be justifiable.

The Constituent Assembly,¹¹⁸ while debating on the restriction on 19(1)(a)¹¹⁹ along with the terms mentioned in the article now had then also included class-hatred, blasphemy and sedition as well, but later they were dropped.¹²⁰ These restrictions were dropped because the framers of the Constitution argued that these deny absolute freedom. The hate speech can be curtailed based on the restrictions, namely in the interest of sovereignty and integrity of the country, security, public order, decency, morality, incitement to an offence as given in Article 19(2)¹²¹ of the Constitution.

The Supreme Court of India has stated that if a political leader ever uses hate speech that is communal in nature, it threatens to harm the nation's democratic framework because of the diversity of religions, castes, languages, and ethnicities in India and the frequent use of religion to incite violence there. The Court observed in 1975¹²² that the 'political history' has made it an essentiality that the difference that can produce 'powerful emotions', thereby denying people of their thoughts, would not be punished or exploited, in case the 'imperative conditions' to preserve the 'democratic freedoms are disturbed'.¹²³

It is needed to regulate hate speech but the opponents of this regulation claim that the regulation may result in an interference to freedom of expression which

¹¹⁸ See INDIA CONST. ASSEMB. DEB., Nov. 4, 1948, <http://164.100.47.194/Loksabha/Debates/cadebatefiles/C04111948.html> (last visited Apr. 5, 2024).

¹¹⁹ See INDIA CONST. art.19(1)(a)- Protection of certain rights regarding freedom of speech, etc.

¹²⁰ See Madhavi Goradia Divan, *Safeguarding free speech from threats is important Opinion*, HINDUSTAN TIMES, Jan. 27, 2020, <https://www.hindustantimes.com/india-news/republic-at-70-safeguarding-free-speech-from-threats-is-important/story-rhjYwMspMJNcJVtdaOlcfn.html> (last visited Apr. 5, 2024).

¹²¹ See INDIA CONST. art.19(2).

¹²² *Ziauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*, A.I.R. 1975 S.C. 1788.

¹²³ *Id.*, para. 9.

would go on to have a negative impact on few aspects. The main rationale behind regulating hate speech can be ascertained by balancing the speaker's interests in exercising their right of free expression against the collective harm to pluralism as well as dignitary harm to individuals.¹²⁴ Even though hate speech laws restrict the fundamental right to free speech and expression in India, its constitutionality rests on the grounds that they are a reasonable restriction intended to uphold public order under Article 19(2).

Free speech and expression imply that the speech being produced should not be arbitrary and instead should be in the spirit of the freedoms provided by Article 21¹²⁵ of the Constitution. The Constitution permits restrictions, and the terms used in the restrictions are quite broad and unclear in their meaning, giving the State the authority to enact legislation governing free expression.¹²⁶

A. Hate Speech in Indian Legal Regime

In India, there are many legislations along with the Constitution for prohibiting hate speech and many such provisions also make hate speech to be a criminal offence. The Indian Penal Code, 1850¹²⁷ (hereinafter 'IPC') has many provisions dealing with hate speech. Section 153A IPC¹²⁸ deals with promoting enmity based on different grounds. Section 153B¹²⁹ IPC deal with imputations that may be pre-judicial for national integration while Section 295A¹³⁰ IPC deals with outraging religious feelings and Section 505¹³¹ IPC criminalizes hate speech.

The IPC has now been proposed to be replaced by the Bhartiya Nyaya Sanhita, 2023¹³² (hereinafter 'BNS'). The BNS too does not define hate speech as such,

¹²⁴ See Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353 (2009).

¹²⁵ INDIA CONST. art. 21. Protection of life and personal liberty.

¹²⁶ See Modh, *supra* note 3 at 7.

¹²⁷ INDIA PEN. CODE, No. 45 of 1860.

¹²⁸ See INDIA PEN. CODE, sec. 153A - Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

¹²⁹ See *id.*, sec. 153-B- Imputations, assertions prejudicial to national-integration.

¹³⁰ See *id.*, sec. 295A- Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

¹³¹ See *id.*, sec. 505- Statements conducing to public mischief.

¹³² Bhartiya Nyaya Sanhita, 2023, Act No. 45 of 2023.

but Section 196 has been drawn on the same lines as Section 153A IPC. The punishment prescribed is three years only but the new provision has introduced imprisonment of five years as well for committing the offence in a place of worship. Further, section 197 BNS has been introduced which is on the same lines as section 153B with the only difference that one more ground relating to sovereignty and integrity has been introduced. The punishment remains the same. Section 295A IPC has been replaced with section 299 BNS and now the punishment has increased to three years. Section 505 IPC is now Section 353 BNS.

The Supreme Court¹³³ highlighted the difference between Section 153A IPC and 505 IPC and held that both the sections have a common ingredient that is promoting the feeling of enmity, ill or dislike between the different classes of people, therefore *mens rea* is a necessary postulate for the sections.

Earlier, speeches were delivered physically at rallies, during election road shows, or through a well-known medium like radio or television, which can be easily tracked down, monitored, and restricted as well. However, now, speeches are also delivered online, which makes it easier for hate speech to spread faster, even in the most rural areas.¹³⁴ The amplified usage of social media platforms and instant messaging services and other communication websites no doubt have in the recent past contributed to the spread of fake news.¹³⁵ Apart from the Model Code of Conduct¹³⁶ there is no framework for controlling the hate speech made during elections.

The New York Times gave a glaring example of a flagged site or post being visible online and it was reported in it that a legislator from Hyderabad called Muslims as “cow killers” in various posts on the Facebook page.¹³⁷ According to

¹³³ *Bilal Ahmed Kaloo v. State of Andhra Pradesh*, A.I.R. 1997 S.C. 3483.

¹³⁴ See Anandita Bhargava, *Tightening the Grip on the Hate Speech Law in India Vis-à-vis-Elections*, RGNUL STUD’T RES. REV., Jun. 27, 2019, <https://rsrr.in/2019/06/27/hate-speech-law-in-india-vis-a-vis-elections/> (last visited Apr. 5, 2024).

¹³⁵ *Id.*

¹³⁶ See generally Election Comm’n of India, Model Code of Conduct for the Guidance of Political Parties and Candidates, <https://eci.gov.in/mcc/> (last visited Apr. 5, 2024).

¹³⁷ See Indu Goel & Sheera Frankel, *In India Election, False Posts and Hate Speech Flummox Facebook*, N.Y. TIMES, Apr. 1, 2019,

a study by the Huffington Post, WhatsApp is used to spread hate speech against Muslims since there are no restrictions on the dissemination of divisive ideas.¹³⁸

The elections in India are regulated by the Representation of People Act, 1951¹³⁹ (hereinafter 'RPA'). In order to ensure the election of proper men of good ethics, RPA has issued rules of conduct and has prohibited some acts. Part VII¹⁴⁰ of the RPA categorizes acts done during the elections in two groups, i.e., corrupt practices¹⁴¹ and electoral offences¹⁴² and the main distinguishing factor between them is that a wrong under the head of corrupt practices can be brought before the courts by the end of elections while in other offence the provisions of the Criminal Procedure Code, 1973 comes into picture. It is important to note that hate speech by a politician that is communal in nature goes on to harm the democratic framework of the country. Hence, RPA comes into picture to curb it.¹⁴³

Section 8 RPA¹⁴⁴ goes on to specify that a person punished for an offence under Section 153A IPC,¹⁴⁵ or convicted for an offence under Section 505 IPC,¹⁴⁶ or convicted under Section 125 RPA,¹⁴⁷ shall be disqualified under RPA. Section 123(3) RPA,¹⁴⁸ states an appeal by a candidate or any person authorized by him to cast a vote or refrain from casting a vote to any person based on the grounds of religion, caste, community, etc., or using religious symbols for furthering the election prospects of that candidate or affects the election of a candidate would

<https://www.nytimes.com/2019/04/01/technology/india-elections-facebook.html> (last visited Apr. 5, 2024).

¹³⁸ See Betwa Sharma, *Election 2019: Inside The Frightening WhatsApp Messages Of A BJP Voter*, HUFFINGTON POST, Apr. 13, 2019 available at https://www.huffpost.com/archive/in/entry/election-2019-a-bjp-voters-whatsapp-is-the-stuff-of-nightmares_in_5cb06b64e4b098b9a2d22bf0 (last visited Apr. 5, 2024).

¹³⁹ Representation of Peoples Act, No. 13 of 1951.

¹⁴⁰ See RPA. pt. VII- Corrupt Practices and Electoral Offences.

¹⁴¹ See *id.*, sec. 2(c)- 'corrupt practice' means any of the practices specified in section 123.

¹⁴² See *id.*, pt. VII-Chapter III- Electoral Offences.

¹⁴³ See Bhargava, *supra* note 132.

¹⁴⁴ See RPA, sec. 8- Disqualification on conviction for certain offences.

¹⁴⁵ See INDIA PEN. CODE, sec. 153 A.

¹⁴⁶ See INDIA PEN. CODE, sec. 505 IPC- Statements conducing to public mischief.

¹⁴⁷ See RPA, sec. 125- Promoting enmity between classes in connection with election.

¹⁴⁸ See *id.*, sec. 123(3).

be considered as corrupt practices. Section 123(3A) RPA¹⁴⁹ prohibits promotion of feelings of hatred among the citizens on different grounds be deemed as corrupt practices. Section 125 RPA¹⁵⁰ punishes a person who has a connection with election with an imprisonment of 3 years or fine or both, if he goes on to promotes hatred between the citizens based on religion, race, community, caste.

In *Pravasi Bhalai Sangathan v. Union of India*,¹⁵¹ a writ petition was filed in the Supreme Court to curb the threat caused by political leaders' hate speech. It was decided that the aggrieved party should make use of the numerous laws, particularly in the IPC, to deal with hate speech. The Bench further stated that the issue is not a lack of legislation addressing hate speech, but rather a lack of effective enforcement. The Law Commission of India was also asked to look into the problem to see if hate speech needs to be defined and to also give suggestions to the Parliament so as that the Election Commission be strengthened to combat the menace of hate speech.¹⁵²

The Court went into the question of hate speech during the 2014 Lok Sabha elections in *Jafar Imam Naqvi v. Election Commission of India*.¹⁵³ The petitioners sought the Election Commission to issue a writ of mandamus in order for appropriate action to be taken in response to the candidates hate speeches during the election. The petition, however, was rejected on the grounds that it did not satisfy the criteria for a case of public interest under Article 32 of the Constitution and that the Court cannot take action on matters where the legislative intent is obvious.

In *Shaheen Abdullah v. Union of India*,¹⁵⁴ decided in March 2023 remarked that the moment politics is separated from religion, hate speech would be curbed. It opined that mixing the two is dangerous for democracy. The Court in this case remarked that the State is impotent and powerless and wondered about its inability in developing mechanisms to curb this evil of hate speech.

¹⁴⁹ *See id.*, sec. 123(3A).

¹⁵⁰ *See id.*, sec. 125- Promoting enmity between classes in connection with election.

¹⁵¹ A.I.R. 2014 S.C. 1591.

¹⁵² *Id.*

¹⁵³ A.I.R. 2014 S.C. 2537.

¹⁵⁴ W. P. (Civil) No. 940/2022.

The Religious Institutions (Prevention of Misuse) Act, 1988,¹⁵⁵ in Section 3(g) prohibits religious institution and their managers from permitting the use of any premises to incite tension, hostility, hatred or malice among different religious, racial, linguistic or regional groups, castes or communities. This provision makes it possible to limit hate speech in religious settings.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter 'SC/ST Act'),¹⁵⁶ in Section 3(1)(x)¹⁵⁷ Section 3(1)(x) states that anyone who insults or intimidates a SC or ST person in a public place will be imprisoned for 6 months to 5 years. However, this provision does not punish the promotion of enmity or ill-will or hatred against the members of the SC/ST. Instead, Section 3(1)(u)¹⁵⁸ punishes any attempt to devalue a person based on their caste, which would result in a hostile environment for the community.

In *Yuvraj Singh v. State of Haryana*,¹⁵⁹ the Punjab and Haryana High Court held that no offence *prima facie* is made out against the petitioner that is punishable under Section 153-A IPC. *Mens rea* is a prerequisite for invoking the provisions of Section 153-A IPC even though the language used in Section 3(1)(u) of the SC and ST Act is largely *pari materia* with Section 153-A(1)(a). However, this would not necessarily be the case for any offense punishable under the Act, specifically Section 3(1)(u). The Act's goal is to prevent SC and ST members from suffering any humiliation or indignities.

The use of the word 'bhangi' even in a friendly context is prohibited by Section 3(1)(u) of the SC/ST Act, even if the user's intent was not malicious and the result was to cause indignities or humiliation to any member of a scheduled caste by using any name of a caste as a derogatory word. Therefore, even if the user's intent was not malicious, the use of the word would still be prohibited.

¹⁵⁵ See Religious Institutions (Prevention of Misuse) Act, No. 41 of 1988, sec. 3(g)-Prohibition of use of religious institutions for certain purposes.

¹⁵⁶ Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989.

¹⁵⁷ See *id.*, sec. 3(1)(x).

¹⁵⁸ See *id.*, sec. 3(1)(u).

¹⁵⁹ *Yuvraj Singh v. State of Haryana*, MANU/PH/0241/2022.

Regarding the case of *Amish Devgan v. Union of India*,¹⁶⁰ Amish Devgan, a journalist, hosted a debate on TV on Places of Worship Act, 1991. During the discussion he labelled a revered Muslim Sufi Saint Pir Hazrat Moinuddin Chishti as a terrorist who coerced Hindus to convert to Islam. The two-judge panel debated how hate speech differs from free speech and if it should be made illegal. Free speech, addresses political, social, and economic issues and policies, whereas hate speech concentrates on the substance instead of the subject matter of the message with the primary goal of alienation and humiliation of the targeted groups.¹⁶¹ According to the Court, the goal of making hate speech illegal is to defend peoples' dignity and ensure their equality on all fronts, including political and social ones.¹⁶² The judgment delineates three constituent elements of hate speech: one based on content, one based on intent, and one based on harm.¹⁶³ The content-based component permits unfettered use of expressions and statements that are insensitive to a group of people and to society. One can establish the speech's potential to incite hatred on the grounds of race, colour, creed, religion, or gender by using reasonable standards. The speech must basically advocate anger, resentment, or violence towards a group of individuals in order to satisfy the intent-based component, without also having to convey a valid message.¹⁶⁴ The harm-based component highlights the fear that hate speech may hurt its targets, whether through physical harm, psychological harm, stress, or exclusion from the political process.¹⁶⁵ The Court conducted all the three tests of elements of hate speech and held that offence has been made out.

During the elections in Uttar Pradesh, the Election Commission warned the parties to not indulge in hate speeches,¹⁶⁶ still a lot of such speeches were made.

¹⁶⁰ *Amish Devgn v. Union of India*, 2021 S.C.C. Online Del. 3353.

¹⁶¹ *See id.*, para 47.

¹⁶² *See* Manu Sebastian, *Hate Speech Repudiates Right To Equality In A Polity Committed To Pluralism: Supreme Court*, LIVE LAW, DEC. 7, 2020, available at <https://www.livelaw.in/top-stories/hate-speech-supreme-court-equality-right-amish-devgan-166922> (last visited Apr. 5, 2024).

¹⁶³ *Amish Devgn*, para. 48.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See EC: Parties must ensure there is no hate speech*, THE TIMES OF INDIA, Jan. 9, 2022,

One such speech was delivered in 2021 at the Haridwar Dharma Sansad. The Hindu Raksha Sena's president, Swami Prabodhanand Giri, said that India is their State. The Hindus have been killed and hanged; it is now time to 'kill'. The 'police,' 'army,' 'politicians', and 'every Hindu' must 'pick up weapons' and launch a 'cleanliness drive' (safai abhiyan) against Muslims. Protests broke out across the nation when the famed seers delivered hateful statements against Muslims.¹⁶⁷

In *Ashwini Kumar Upadhyay v. Union of India*,¹⁶⁸ the Supreme Court extended the October 2022, interim order, which was only applicable to the Governments of NCT Delhi, Uttarakhand and Uttar Pradesh to all the other States and Union Territories mandating them to file *suo motu* FIR against hate speeches regardless of religion.

One of the former judges, Justice Madan B Lokur, voiced a very strong dislike of the widespread hate speech being employed in the country. He criticized the government for not stopping it but taking an active part in it. He referred to a Delhi conclave, wherein a minister had remarked '*Goli maaro*', which was in itself an incitement to kill, though he claimed that he did not point them out. Justice even pointed out that not just the executive is silent but also garlanding people making such comments for lynching the Muslims.¹⁶⁹ He also drew a comparison between Canadian and Indian regime, and stated that in Canada, hate speech is viewed from the reasonable man's point of view, considering the recent incidents it is very confusing as to who is a reasonable man in India.¹⁷⁰

In response to a petition on the Delhi riots, the Delhi High Court stated that while hate speech is not illegal when delivered with humor, it is illegal when delivered

http://timesofindia.indiatimes.com/articleshow/88784293.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited Apr. 5, 2024).

¹⁶⁷ *Haridwar Dharma Sansad hate speech case Jitendra Narayan Tyagi arrested*, THE HINDU, Jan. 13, 2022, <https://www.thehindu.com/news/national/dharma-sansad-hate-speech-case-jitendra-narayan-tyagi-arrested/article38267522.ece> (last visited Apr. 5, 2024).

¹⁶⁸ (2021) 8 SCC 511.

¹⁶⁹ See Shahruckh Alam, *Hate Speech: What It Is And Why It Matters*, THE WIRE, Jan. 22, 2022, <https://thewire.in/law/hate-speech-what-it-is-and-why-it-matters> (last visited Apr. 5, 2024).

¹⁷⁰ See *id.*

in an offensive manner.¹⁷¹ In Karnataka, the females came in the forefront and protested the ban on wearing of hijabs in educational institutions. The activists also claimed that banning hijabs is tantamount to hate crimes against Muslims.¹⁷² Union Minister Giriraj Singh spoke at a programme in Mohammadabad in UP's Ghazipur district where he termed the Muslim populated districts in Seemanchal district of Bihar as 'Bangladesh'.¹⁷³

The Parliamentary Panel in January 2022, called for amendments in the hate speech regime and it reiterated that the recommendations made in 2017 by the Law Commission¹⁷⁴ should be implemented.¹⁷⁵ The Law Commission report had suggested that Section 153C and 505A be inserted in the IPC. According to Section 153C, those who use spoken or written words, signs, or visual representations to promote hatred against people because of their race, religion, caste, community, gender identity, sexual orientation, place of birth, place of residence, language, disability, or tribe with the intent to cause fear or alarm would face an imprisonment up to two years, and fine up to Rs. 5,000, or both.¹⁷⁶

Anyone who intentionally uses words or displays objects that are gravely threatening or derogatory in public on similar grounds, within someone's hearing or sight, causing fear or alarm, or who intends to incite the use of unlawful force

¹⁷¹ See Aneesha Mathur, *No criminality if something said with a smile, says HC on Delhi riots hate speech case*, INDIA TODAY, Mar. 26, 2022, <https://www.indiatoday.in/india/delhi/story/delhi-hc-no-criminality-if-smiling-delhi-riot-case-1929825-2022-03-26> (last visited Apr. 5, 2024).

¹⁷² See Jagriti Chandra, *Activists say hijab ban is tantamount to hate crime*, THE HINDU, Feb. 10, 2022, <https://www.thehindu.com/news/national/activists-say-hijab-ban-is-tantamount-to-hate-crime/article65043051.ece> (last visited Apr. 5, 2024).

¹⁷³ See Maktoob Staff, *Hate speech: Union minister terms Muslim populated region in Bihar Bangladesh*, MAKTOOB, Nov. 30, 2022, <https://maktoobmedia.com/2022/11/30/hate-speech-union-minister-terms-muslim-populated-region-in-bihar-bangladesh/> (last visited Apr. 5, 2024).

¹⁷⁴ LAW COMM'N OF INDIA, GOV'T OF INDIA, TWO HUNDRED SIXTY SEVENTH REPORT ON HATE SPEECH (2017), (hereinafter 'LAW COMM'N REPORT')

¹⁷⁵ See Bharti Jain, *Parliamentary panel echoes 2017 hate speech proposals*, THE TIMES OF INDIA, Jan. 22, 2022, http://timesofindia.indiatimes.com/articleshow/89050869.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited Apr. 5, 2024).

¹⁷⁶ See LAW COMM'N REPORT at 51.

against anyone, would be punished under Section 505A with up to a year in prison, a fine of up to Rs 5000, or both.¹⁷⁷

The Law Commission's recommended sentence is less severe than the IPC's current provisions, such as Sections 153A, 153B, and 505, although those sections do not specifically address hate speech. The recommendation goes on to discuss several justifications for hate speech. It is crucial that the State implements the suggestions and adopt a legislation against hate speech in addition to them.

In a recent judgment, the Supreme Court in *Kaushal Kishore v. State of Uttar Pradesh*¹⁷⁸ held that the Parliament in its wisdom must enact codes, legislations, rules to prevent citizens from making derogatory or hurtful comments about citizens, thereby taking into consideration the limitations of Article 19(2) and keeping in mind the freedom under Article 19(1) (a) of the Constitution. The Court further ruled that the respective political parties should govern and monitor the behavior of their officials and members.¹⁷⁹ Additionally, it gave victims of hate speech or other kinds of expression the ability to seek justice in a court of law under both criminal and civil statutes by filing a legal complaint.¹⁸⁰ When permitted by the applicable statutes, civil remedies in the form of injunctions, declaratory relief, and monetary damages may be awarded.¹⁸¹

The pandemonium of hate speech has left us with no option other than deeply pondering over the clash between hate speech and free speech.¹⁸² In spite of the fact that there are numerous harsh provisions against hate speech in India's criminal law, the main problem is that the courts are unable to define hate speech precisely because there is no agreed-upon definition, and any attempt to do so would unintentionally curtail the freedom of speech and expression.¹⁸³

¹⁷⁷ See LAW COMM'N REPORT at 52.

¹⁷⁸ MANU/SC/0004/2023, decided on Jan. 3, 2023.

¹⁷⁹ See *id.*, para. 223 (a).

¹⁸⁰ See *id.*, para. 223(b).

¹⁸¹ See *id.*, para. 223(c).

¹⁸² See Neha Gupta and Kavya Gupta, *Do Indian Courts Face A Dilemma in Interpreting Hate Speech?*, ECON. & POL. WKLY, (2020) <https://www.epw.in/engage/article/do-indian-courts-face-dilemma-interpreting-hate> (last visited Apr. 5, 2024).

¹⁸³ See *id.*

IV. Conclusion and Suggestions

There is no definition of “hate speech” in either Indian or international law. However, it has had an effect, causing instability and public commotion. With the development of technology and the internet, online hate speech has become a major problem because it can be challenging to determine the speaker's motivation. The incitement to discriminate is also a contributing aspect in determining whether a communication qualifies as hate speech, in addition to the incitement to commit acts of violence. The expressions that are made need to be balanced in some way. The complicated issues brought on by hate speech must be addressed immediately. It must be determined precisely what constitutes hate speech in order to address it effectively. Hate speech is an extreme form of stereotyping an individual or a group of individuals by dehumanizing them. It is suggested that the recommendations laid down by the Law Commission in its 267th Report need to be put in force as there is still no definition of hate speech in the BNS.

The judiciary has deliberated comprehensively on the topic of hate speech recently. The Supreme Court in *Amish Devgn's* case emphasised on three elements of hate speech and held that hate speech should be criminalized. The judiciary recently in the case of *Kaushal Kishore* remarked that the Parliament should enact laws and codes to restrict the citizens from making hate speeches. Therefore, from the findings of these cases it is clear that the judiciary seeks to criminalize hate speech. It has even sought explanations from the Central Government regarding the delay in acting upon the recommendations of the Law Commission in *Ashwini Kumar Upadhyay* case.

The Jakarta Recommendation should be kept in mind while framing the jurisprudence on hate speech in India as that would serve as a guideline for the law makers in India. While framing the hate speech jurisprudence in India, the three- fold test laid down in the *Handyside* case may be adhered to as not all speeches that may be offensive would be classified as hate speech. The idea of ‘imminent threat’ as outlined in *Schenck v. the United States* may be applied as for a speech to be classified as hate speech, it must be one that is of an extremely strong emotion and encourages hatred. Along with ‘imminent threat’, the state of

mind of the speaker, impact of the speech and the context of the speech are important factors to be considered.

The authors propose that the State should reassure citizens on the requirement of amity based on communal lines. The State should reorient itself to the rule of law and adhere strictly to constitutional norms in order to preserve the nation's secular fabric at all costs. There should also be strategic interventions on social media to monitor and mobilize the dissemination. The prime reason that necessitates a separate knowledge of hate speech is that the existing provisions on hate speech are from the colonial era and the provisions are built within the ambit of the acts which are 'detrimental to harmony.'

Legal remedies alone, such as limitations on free speech, are insufficient to combat hate speech. People must be educated to extend their viewpoints and adapt their ways of thinking in order to fully solve the issue. Some strategies include intercultural discussion, educating on tolerance and diversity. A complete legal framework, including anti-discrimination and equality laws, together with increasing discussion of many cultures, multiculturalism, and diversity should be the response to hate speech. It is important to offer minority groups a voice as well, perhaps through more favorable media coverage. In reality, engaging people in society and permanently altering their perspectives may be best accomplished through freedom of expression.