

# The Battle between Hate Speech and Freedom of Speech

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**Abstract:** *The rules and regulations of hate speech have been found to be challenging now-a days. The anti-hate speech law is a challenge because of its collision with article 19 (freedom of speech and expression). In practice, the law standing between the regulation and restriction forming a thin line in between. Despite new and strict laws, the number of cases of hate speech is increasing day by day. To restrain this, more rigorous laws were proposed by the Law Commission of India in 2017. This has led to a situation where bulk of laws and a state of over criminalisation of speech related offences are present at the same time. In order to eradicate the hate speech it is important to change the framework of the current system and start addressing the hate speech according to legal framework. Legality and framework and where we lack are discussed herein.*

**Keywords:** hate speech, freedom of speech

## 1. Introduction

In times of huge political, social and economical views, the world is witnessing a battle against each other through words. It won't to say that the times is not far when a new kind of war will start by these speech through social media and social gathering. Dehumanizing and defaming are new weapons of the society which they use to humiliate one person over mass level. People now-a-days has misapprehended the term freedom of expression with hate speech. Availability of social media has given people enough opportunity and liberty to present their point of views on an idea or on a person.

Hate is an emotion which we all face at some point in our lives. Hate speech has gained its popularity in very recent times when the mass media has become most famous source of spreading news. Now-a-days the best way to harm someone's reputation to make people suffer is HATE SPEECH. Hate speech at a mass level can ruin people's life, their agendas like few speeches given by the leader at the time of CAA which led to riots. In this article we will be discussing about the different dimensions of hate speech and its legality in India.

### Hate Speech

Hate is an emotion which we encounter in our day to day life; it is omnipresent in our society. Hate speech can be seen in the statement of many legislators, scholars and jurists and so on.

According to reports, 2018 was declared 'THE ERA OF ONLINE HATE', a lot of people chose online platform to spread hate through their posts at mass level [1].

*Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate" [2]*

Directed Action + Hate Speech = Hateful Conduct

A speech becomes hateful conduct when it targets a particular person and is responsible for the after effects.

### Freedom of Expression

Article 19(1) (a) of the Constitution of India states that, "all citizens shall have the right to freedom of speech and expression" [3]. The idea behind this article is to give voice to the Indian citizen the license to express thoughts with some reasonable restrictions.

### **The principle behind freedom of speech and expressions is as under-**

- Only the Indian citizen has the liberty to enjoy this right, the right isn't given any foreign citizen.
- This right gives liberty to express one's view through any medium e.g.: -by words in writing speaking, in pictures etc.
- Since the freedom of speech and expression is not an absolute right, the government is given powers to frames law for and against it.

### **Restriction imposed on freedom of speech and expression is:**

Article 19 (2) deals with the restriction that are imposed on the freedom of speech and expression.

- 1) Security of the state: Liberty to express one's view is prohibited in cases where a question is raised on the security of the state [4].
- 2) Friendly relation between foreign countries: in case one's speech or expression or words violates the relation between India and other foreign countries, it will treated as a crime and it is prohibited under article 19 (2).
- 3) Public order: since public order are different from security of the state. It is important to safeguard the public order and maintain its authenticity in cases where the order is put under question [5].
- 4) Contempt of court: any words which contempt [6] the decorum of the court prohibited under freedom of speech and expression [7].
- 5) Incitement of an offense: Any statements in any sense which incite the population to commit an offense are prohibited.
- 6) Sovereignty and integrity of India: any person is prohibited to make statements though which the sovereignty and integrity of India at put at stake [8].
- 7) Defamation: any statement [9] given by an individual at any level through any medium, which defame other

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individual or society in any way is prohibited unless it is made for public good.

### **Legality**

Hate speech is prohibited in India under several provisions [10]:

#### **The Indian Penal Code, 1860**

Section 124A penalises seditious

Section 153A 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 penalises 'imputations, assertions prejudicial to national-integration.

Section 295A penalises 'deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

Section 298 penalises 'uttering, words, etc., with deliberate intent to wound the religious feelings of any person'.

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

#### **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.

#### **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

#### **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.

#### **The Cable Television Network Regulation Act, 1995**

Sections 5 and 6 prohibit transmission or retransmission 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.

#### **The Cinematograph Act, 1952**

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

#### **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.

#### **Punishment for hate speech**

Hate is an emotion which can be hidden behind the curtains of a statement which people might take logical and natural. Besides being hidden there are few key points that help in the discovery of the hate in a statement or speech.

According to a report [11], anyone who is found to be involved in hate speech for one's origin, region or place of birth will be imprisoned for 2 years or 5000 fine or both.

#### **Influence of internet and social media**

Internet is a boon and a bane to the society. Now-a-days it is very difficult to imagine our lives without internet but despite being so useful and important in our lives it is somehow invading our privacy and also provokes hate speech

With the internet the number of hate speech and hate crime rate is immensely increasing. It is said that the things said online are the product of an offline chaos and since geography and time doesn't affect internet; the hate speech affects a large mass beyond boundaries.

According to Delhi police [12], social media is spreading hate speech at a vast level for which no clear laws have been made so far to provide justice. To maintain the level of hate and fear among the people of the nation a plea [13] was filed demanding for strict laws against hate speech.

Social media platforms have made specific guidelines under which hate speech is governed if we talk about YouTube it is clearly mentioned that any video which violates someone's image in respect of age, gender, nationality, disability, ethnicity, race, religion and based on the content of someone else, will be removed from the YouTube on the grounds of promoting hatred. Recently a vlogger's video was removed by YouTube by the higher authority for promoting hatred towards other artist. This doesn't happen for the first time, any video which violates someone reputation by spreading hatred in the society is removed by YouTube.

Facebook which is very popular among youth also have guidelines to prevent hate speech, it is mentioned in their guidelines if any content which spread hatred and the intention behind it is unclear, the content will be removed [14].

Social media relies on special kind of team which includes artificial intelligence, user reporting and content moderators. All of them works to enforce their guidelines related to the appropriate content.

#### **How does India regulates hate speech online?**

Social media has made new rules regarding the hatred which has been spreading through it. Now the government can order the authorities to take such post down within 24 hour with all the details of the users so that actions could be taken against him. Though social media platforms such as Facebook, YouTube and Twitter etc. have taken enough measures to stop the hatred by forming certain guidelines yet it is difficult to stop hate speech when it comes to leaders who intentionally or unintentionally spreading hatred through their speeches which results into riots and damage to the humankind [15].

#### **People's perspective on hate speech**

When a leader tends to speak at a mass level, the population follows. We all are aware of the Delhi riots 2020 [16], when some leaders came forward and said things to spread hatred among the youth and the population which directly gave birth to the anger, which resulted in destruction and loss of lives. This was the perfect example of hate speech causing harm to the society as well as the people and the environment around them this proved that hate speech w not only affects the people involved in it but the people who are innocent are also affected by it.

Recently Ayaz Khan [17] was arrested for allegedly spreading hate speech through a Facebook live session for which he was arrested and sent to the Khar police station in Mumbai. This was not the first time when he was involved in spreading hatred at communal level.

#### **Examination of hate speech**

Hate speech has always been a favourite topic of discussion India. The question has been raised time to time in before the legislature and certain amendments have been made from time to time.

In Pravasi Bhalai Sangathan v. Union of India [18] the petitioner prayed the state to take actions against those who make hate speech, though the court didn't go beyond the existing laws as it would amount to the judicial overreach and suggested the matter to law commission of India to examine the situation and recommendation to the election commission against those who made hate speech, irrespective when it was made. Though it was found difficult to confine the prohibition on hate speech at a manageable level.

Again in Jafar Imam Naqvi v. Election Commission of India [19], the question on hate speech aroused, in this case a writ petition was filed questioning the speeches made by the candidates during election thought the court dismissed the petition saying the speeches doesn't qualify as PIL.

#### **How widespread is the hate speech problem?**

If we talk about the hatred emotion, it is been in every continent most of the world is connected through internet and social media [20].

In **Germany**, a relation was found between the anti refugee and Germany party through facebook posts. It was found that the upticks of attacks such as arson were found in the hate post.

In **United States** executioners of recent attacks was found to be circulated through online and used social media to spread hatred against the white supremacy

In **India** rumours on whatsapp groups initiated a lot od lynched mobs and riots specially communal riots.

Different countries have different stories of crime based on hate speech.

#### **Will hate speech be criminalize in India?**

The government is proposing a 'code of conduct' for media agency such as YouTube, Twitter and Facebook to stop hate speech. Law commission was asked to prepare a bill which would govern speech across social media and other messaging application.. In September 2015, the Supreme Court struck down section 66 A of IT act saying that its ability invades the right of freedom of speech and expression and upsets the balance between the restrictions and the itself. It was said that any information which is spread over the internet must not incite anybody at all, written words must be completely and purely in the realm of discussion of a particular point of view and not against it. With section 66A of IT act gone all the hate speech which were listed under this section are now filed under other sections of IT act and sedition.

According to 153C of IPC, any speech will be criminalised only if it follows two conditions that is it advocates hatred and causes incitement of an offence. The Supreme Court distinguished advocacy and incitement and said that the latter will be punished according to the law i.e. incitement of lawless actions only, will be criminalised [21].

#### **Impact of hate speech on article19**

Right of freedom of speech and expression is one of the essential liberties which are given to the people in the country [22]. The basic concept of Liberty was to have variety of opinions regarding any new issue. The right of freedom of speech and expression is mainly guided the diversity in the opinion which are given by the people thus, a speech which is unpleasant [23] or cause harm is also protected by the state its .hate speech is not property defined anywhere though an application is there which describes the standard of hate speech .

Free speech has always been considered as an essential part of every democracy. The doctrine of free speech is rather against State Power to regulate speech. An overview of international legal regime on hate speech said that the working of freedom of speech is often treated as freedom to discriminate and offend people of some society. The issue of hate speech is assumed to have a great significance in the era of internet where it is reachable to a large audience in a very short span of time for which human right council in the report [24], restricted the freedom of expression on the following grounds in certain cases:

- 1) Child pornography.
- 2) Hate speech which affects the community.
- 3) Defamation to protect the reputation of other.

- 4) Incitement to commit offence.
- 5) Incitement to discrimination or violence on National racial or religious grounds.

### Essentials to determine hate speech

Once it was found that there has been an interference with the freedom of speech for which the court adopted threefold analysis to determine whether the interference is legitimate or not and whether it amounts to hate speech or not. Three fold analysis is as follows:

- a) Whether the interference is prescribed by the law or not [25]?
- b) Whether the interference has a legitimate in or not? The court in *Handyside versus United Kingdom* [26], said that that the restrictions which are imposed by the state on freedom of expression must be proportional to the legitimate aim persuaded.
- c) Whether the interference is required for the society or not?

### Identifying criteria of hate speech

Freedom of speech is an important part of the democratic society. In *Shreya Singhal versus Union of India* [27], differentiation between the forms of hate speech as speech, discussion and advocacy and incitement was concluded. the court held that any speech can only be limited on the grounds mention in article 19(2). All the speeches whether offensive or not will be covered under article 19(1). the criteria was set to identify hate speech:

- 1) The extremity of the speech: Any speech to qualify as hate speech, must be offensive in the extreme form. Though every offensive statement cannot be considered as hate speech, the expressions and discussion of any sensitive and unpopular issue is unprotected by the constitution.
- 2) Incitement: In *Shreya Singhal* [28] case, it was said that the speech must be proved incited to be restricted. United State Supreme Court also says that the imminent threat to lawless action must be restricted. Hate speech often crosses the path of two concept liberty and equality [29], though both of them are complementary and aims to provide liberty to the weaker section of the society to step forward and present their ideas and point of view regarding any new policy or any new agenda.
- 3) The status of the author of the speech: The position of the author of the speech plays a vital role in determining the legality of the speech that is why the interference with the freedom of expression of a politician is called as the closed scrutiny by the court [30].
- 4) Status of the victim of the speech: Determine whether the speech is a hate speech or not it is very important to see the point of view of the victims to determine the extent of damage.
- 5) Potentiality of the speech: The speaker's state of mind can be judged by the impact of the speech on the society, the damage caused to the society [31]. It when the actual motive of the speaker is known.
- 6) Context of the speech: Context of the speech is very important when it comes to decide whether the speech is a hateful speech or not [32]; every hateful speech cannot be considered as hate speech hence the context in which the statement is made is essential to determine

permissibility of it thus the context of the statement plays a very vital role in determining whether the speech is to be considered as a hate speech or not.

## 2. Conclusion

The hate speech is a topic for debate because of its intellectual nature. Since hate speech is considered as a part of article 19 freedom of speech and expression it becomes very difficult to differentiate it from healthy speech. The hate speech can be manipulated in different ways, so it becomes difficult to criminalize it under the provisions in IPC due to which to prosecute the hate speech charges becomes difficult when it comes to the court. After studying every aspect of hate speech and freedom of speech and expression it can be said that there is a need to revise and strengthen the pre-existing laws and revising the punishments for it. Hate speech has become a universal problem nowadays because of the internet availability to every single person at an immense level; it is reachable to every part of the society.

To make sure that it does not affect the society and does not damage or defame any person's reputation and beliefs, there is a huge need of having a transparent system. Speech which spreads violence and discrimination based on several aspects could be penalised. To fight against hate speech we require a wider platform where everything can be discussed in a transparent manner and result could be drawn out of it, as it is a fight which cannot be fought alone.

“Raise voices not hate”

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