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ISSUE OF HATE SPEECH IN INDIA: A SCHISM AFFRONT IN RELATION TO FREEDOM OF SPEECH AND EXPRESSION AND ITS REASONABLE RESTRICTIONS

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ABSTRACT

In the multicultural country like India, the issue of hate speech is of serious concern. India, having a vast diversity of cultures and backgrounds like different religions, languages, castes, creed, race, etc., we have witnessed a spike in cases of Hate Speech. The term '*hate speech*' does not find mention anywhere in any law in India. It is linked with the person disaffection towards the particular individual or class of persons and the aim of such speech is to instigate violence or to show hatredness or disrespectful attitude towards a particular nationality, ethnic group, religion, social class and so on. The question whether there is any borderline between 'free speech' and 'hate speech' has become one of the fundamental problem in our society especially in the country like India that has been built on the concept of "Unity in Diversity" where conflicts of opinions is bound to happen all the time. Thus, law gives a great importance to the diversity of opinions but at the same time it does not allow intrusion into the freedom of speech and expression. However, the state must intervene in the cases where an unwarranted speech is likely to cause hatredness, hostility or violence between the groups. The present article deals with the issue of Hate Speech and analyzes the current status of freedom of speech in India. The article further highlights the distinction between free speech in relation to hate speech embodied under Article 19 of the Indian Constitution.

KEYWORDS: FREE SPEECH, HATE SPEECH, INCITMENT, INTOLERANCE, RELIGION AND UNITY

I. INTRODUCTION

Hate speech covers many forms of expressions that promotes hatred and leads to conflicts, riots and disagreement in the society. It hurts person religion, beliefs and background and leads to moral damage. The word “Hate Speech” does not refer to offensive or foul-mouthed speech that is directed to the people or at the government but it is the speech that can cause actual material harm through the social, political and economic marginalization of a community. It seeks to delegitimize group members by exposing them to hatred, reducing their social standing and acceptance within the society. Most people misinterpret the idea of hate speech as they believe that hate speech should be allowed because it comes under the purview of the freedom of speech and expression. But it doesn't fall under the classification of freedom of expression and it is a particular problem to it. Hate speech has been criticized for encroaching on the freedom of speech and expression. As we know that Article 19(1) (a) provides for freedom of speech and expression under the Constitution of India 1950. This freedom gives the liberty to express one's view through any medium i.e. by words in writing, speaking etc. It is recognized as one of the most important feature that a free democratic country must provide as responsible speech is the essence of the liberty guaranteed under Article 21 of the Indian Constitution. In the country like India, where there is diverse religions, castes, languages, the issue of hate speech poses a greater challenge and it becomes difficult to ensure that this liberty is not exercised in such a way that it becomes detriment of any individual or the disadvantaged section of the society. If on one hand, free speech allows the individual to speak freely about the matter that concerns them and to put forward their opinions and then on the other hand unwarranted speech which can cause distress, incite violence and creates the feeling of hatred among the individuals or groups may lead to suppression of this liberty.

In the 267th report of Law Commission of India, it was stated that, “*Liberty and equality are contemporary and not antithetical to each other. The intention of having the freedom of speech is not to disregard the weaker section of society but to give them an equal voice. The intent of equality is not restraining this liberty but to balance it with the necessities of a multicultural and plural world, provided such constraint does not unduly infringe on the freedom of expression.*”

In *Pravasi Bhalai Sangathan v. Union of India*¹, the petitioner approached the Supreme Court

¹ Pravasi Bhalai Sangathan v. Union of India AIR 2014 SC 1591

of India by way of writ petition under Article 32 of the Indian Constitution so as to curb the hate speech made by the politicians and religious leaders based upon religion, caste, creed, colour etc. The petitioner further stated in his petition that by way of this Hate Speech there is violation of Articles 14, 15, 19 and 21 of the Indian Constitution. The court held that *“it did not go beyond the purview of existing laws to penalize hate speech as it would amount to judicial overreach. The issue of hate speech needs a deeper consideration and referred the matter to the Law Commission to examine if it deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of Hate speeches irrespective of, whenever made.”* The Chairman of Law Commission of India along with the **Dr. Justice B.S Chauhan**, Former Judge of Supreme Court of India in its **Report No. 267 on HATE SPEECH** published on 23rd March 2017 considered the laws on hate speech in various jurisdiction and judicial pronouncements and consequently the Commission suggested the amendment to the Indian Penal Code 1860 by adding two new provisions i.e. “Prohibiting incitement to hatred and causing, fear, alarm or provocation of violence in certain cases under Section 153 B and Section 505” respectively and amended the First Schedule of Criminal Procedure Code. There are various statutory provisions especially the penal provisions that indirectly deal with such issue and provide the remedy to curb such Hate Speeches but only the problem lies with effective execution of the laws and as a result of this today’s world is witnessing a battle through words which has led to dreadful hate crimes such as communal riots, violent clashes between religious communities and large number of horrifying killings. Therefore, the issue of Hate Speech constitutes a great challenge.

II. MEANING OF HATE SPEECH

The term hate speech does not find mention anywhere because our Indian laws do not use the phrase hate speech. But different forms of what may be called hate speech are covered in different ways by the Indian legislations. This term is disputed one. It means that there is lack of clarity in the definition. But efforts have been made to define and clarify the concept of hate speech.

- ❖ The Law Commission of India in its 267th report defines hate speech as an *“incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like.”* This report assert that due consideration

must be given to the context of speech and the potential impact of that speech on the parties in order to determine whether a particular speech is hate speech or not.²

- ❖ According to the report by UNESCO published in 2015 defined hate speech as a speech at *“the intersection of multiple tensions. It is the expression of conflicts between different groups within and across societies.”*³
- ❖ The Observer Research Foundation defined hate speech as *“expressions that advocated incitement to harm, violence, discrimination and hostility based on the targets being identified with a certain social or demographic group protected under the Indian constitution.”*
- ❖ According to Michel Rosenfeld, hate speech can be defined as *“speech premeditated to endorse hatred on the basis of ethnicity, race, national origin or religion. He further puts forth that this poses complex and vexing problems for constitutional right to freedom of expression.”*⁴

Thus, in a broad sense hate speech is a “speech that is derogatory towards someone else.”⁵ It denotes the expressions that is insulting, abusive or that incites violence, hatred against a particular community. Most common grounds of hate speech across countries are religion, class and race. The words either spoken or written or any kind of visual representation qualifies as ‘speech’. If such speech offends any individual or spreads hatred among a particular class of community on the grounds of religion, ethnicity, or cultural basis, then such speech is categorized as ‘hate speech’.

III. IDENTIFYING CRITERIA OF HATE SPEECH

Since there is no legal and universal definition of hate speech, it has remained an area of debate and interpretation so it becomes challenging to detect the hate speech. This means that some content can be considered hate speech to some and not to others based on their respective definitions. There have been multiple instances in the past where the courts have explored the definition and have looked into the scope of hate speech. As we all know Freedom of speech and

² Law Commission of India Report 267, “Hate Speech” 23rd March 2017

³ Countering Online Hate Speech, UNESCO, 2015

⁴ Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis (2002-2003) 24 Cardozo Law Review 1523

⁵ Gautam Bhatia, “Offend, Shock Or Disturb : Free Speech Under The Indian Constitution” 139 (Oxford University Press, Delhi, 1st Edition 2016)

expression is quintessential for democratic setup and same as been provided under Article 19(1) (a) and the limitation for the same as been provided under Article 19(2). The Supreme Court of India in **Shreya Singhal vs Union of India**⁶ held that *“a speech can only be limited or restricted on the specific grounds of exceptions mentioned in Article 19(2) of Indian Constitution when it reaches the threshold of incitement as it is the key to determine the constitutionality of restriction on free speech.”* The Law Commission of India in its 267th Report on the issue of hate speech had identified the criteria that can be used to determine hate speech by analyzing the decisions of different State jurisdictions. These parameters are:

A. THE EXTREMITY OF THE SPEECH: In order to identify a particular speech as hate speech it must be offensive and outlines the intense form of emotion. In **Saskatchewan (Human Rights Commission) v. Whatcott**⁷, the court held that *“the word hatred carry the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups and in applying hate prohibitions, courts must assess whether the impugned expression is likely to expose a protected group to hatred and potentially lead to the activity that the legislature seeks to eliminate. Not only have the offensive statements amounted to hate speech but there other expressions also.”* In **Chaplinsky v. New Hampshire**⁸, the Supreme Court of United States held that *“certain form of speech that carry obscenities, fighting words, certain profane and slanderous speeches are excluded from the protection under First Amendment and the laws restricting such low value speech were constitutional.”*

B. INCITEMENT: In **Shreya Singhal VS Union of India**⁹, the court held that *“three fundamental concepts to understand the freedom of expression: discussion, advocacy and incitement. According to the court, the first two i.e. discussion and advocacy are the essence of article 19(1) and the law may curtail such expression when such discussion and advocacy amounts to incitement.”* The Supreme Court of United States in **Brandenburg v. Ohio**¹⁰ held that, *“in order to impose criminal liability it must incites others to illegal actions. These conditions are imminent harm, a likelihood that the*

⁶ Shreya Singhal v. Union of India AIR 2015 SC 1523

⁷ Saskatchewan (Human Rights Commission) v. Whatcott [2013] 1 SCR 467

⁸ Chaplinsky v. New Hampshire 315 U.S. 568 (1942)

⁹ Shreya Singhal VS Union of India

¹⁰ Brandenburg v. Ohio 395 U.S. 44 (1969)

incited illegal action will occur and intent by the speaker to cause imminent illegal actions. Further, the court held that the government cannot punish inflammatory speech unless that speech is directed to inciting or producing imminent lawless action and is likely to incite, or produce such action.” The Supreme Court of India applied this decision in the case **Arup Bhuyan v State of Assam**¹¹. In this case, the court asserted that, *“there is no concept of guilt by association in Indian Law i.e. a person cannot be punished merely on the basis of company he keeps. By reading down the Section 3(5) of the TADA*¹², *the court observed that mere advocacy of violence as a means of accomplishing political or social reform, or publishing or circulating any book or paper containing such advocacy is not per se illegal. It will become illegal only if it incites to imminent lawless action and held that the members of a banned organization cannot be treated as criminals unless they actually resort to violence, incite people to violence or destroys the public peace.”* In **Balwant Singh v State of Punjab**¹³, the Supreme Court overturned the convictions for sedition under section 124A¹⁴ of Indian Penal Code for promoting enmity between different groups on the grounds of race, religion, etc. and acquitted the persons who had shouted anti-India slogan after the Indira Gandhi assassination. Thus, the court stated that, *“the speech can be criminalized and punished only in the situations where it is being used to incite mobs or crowds to violent action.”* Further it observed that, *“advocating revolution or advocating even violent overthrow of the state does not amount to sedition, unless there is incitement to violence and more importantly, the incitement is to imminent violence.”*

¹¹ Arup Bhuyan vs State of Assam (2011) 3 SCC 377

¹² **Section 3(5) TADA**- “Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life, or with fine which may extend to rupees ten lakh, or with both.”

¹³ Balwant Singh vs State of Punjab (1987) 2 SC 27

¹⁴ **124A. Sedition.**—“Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India] shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. The expression “disaffection” includes disloyalty and all feelings of enmity. Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.”

C. STATUS OF THE AUTHOR OF SPEECH: The position of the author of the speech plays a vital role in determining the legality of the speech. **Incal v Turkey**¹⁵, in this case the applicant Incal along with the members of the executive committee belonging to People Labour Party decided to distribute leaflets criticizing the measures taken by the local authorities with a particular view to restrict the areas in which the street traders could operate. For this activity, they were held accused of inciting hatred and hostility through the use of racist words and charged under the domestic terrorism laws. The European Court of Human Rights held unanimously that, *“there had been a violation of Article 10¹⁶ of the **European Convention on Human Rights** and also observed that freedom of expression is particularly important for political parties because they represent their electorate, draw attention to their preoccupation and defend their interests. Accordingly, interference with the freedom of expression of a politician who is a member of an opposition party like the applicant, called for the closet scrutiny on the court’s part.”*

The Supreme Court in the case of **Pravasi Bhalai Sangathan v Union of India**¹⁷ also proceeds to sanction hate speech on similar ground. In this case, the petitioners prayed that the state should take peremptory action against the makers of hate speech. Here, the court observed that, *“the implementation of existing laws would solve the problem of hate speech as the court cannot go beyond the purview of existing laws to penalize hate speech as it would amount to judicial overreach. For this the court referred the matter to the Law Commission to examine if it deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of hate speeches irrespective of, whenever made.*

D. POTENTIALITY OF THE SPEECH: The speaker state of mind can be judged by the impact of the speech on the society. In **Ramesh v Union of India**¹⁸, the petitioner states that the exhibition of the serial “Tamas” which depicts the period prior to partition and how the killing and communal violence took place between the Hindu-Muslim

¹⁵ Incal v Turkey [1998] ECHR 48

¹⁶ **Article 10(1) reads:** “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

¹⁷ Pravasi Bhalai Sangathan v Union of India (2014) 11 SCC 477

¹⁸ Ramesh v Union of India 1970 2 SCC 780

communities is against the public order and is likely to incite the people to indulge in the commission of offences and it is therefore violative of *Section 5-B (1) of the Cinematograph Act, 1952*¹⁹ and destructive of the principle embodied under *Article 25*²⁰ of the constitution. The Supreme Court in this case held that “*the speech cannot be adjudged in isolation as the movie intends to impart the message of peace and coexistence and it cannot be considered violative of Article 19(1) (a) of Indian Constitution just because it shows the extremism and violence in order to express the importance of the acts.*” **Superintendent Central Prison v. Dr. Ram Manohar Lohia**²¹, in this case the court observed that “*the freedom of press is a fundamental right enshrined under Article 19(1) (a) of the constitution. The state is empowered to restrict free speech on the grounds in relation to public order, decency and security of the state and the restriction on the speech would be justified only if it poses imminent danger to the community. The court also makes it clear that citizen right to expression and state power to restrict such freedom cannot be put on equal footing. Therefore, the restrictions imposed under article 19(2) in the interest of public order have to be a reasonable restriction and such restriction should have a proximate nexus with public order. The anticipated danger should not be remote, far-fetched or hypothetical. The expression of thought should be dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a spark in a powder keg.*”

E. CONTEXT OF THE SPEECH: The context in which statement is made plays a vital role in determining whether the speech is to be considered as a hate speech or not. In **Bobby Art International v. Om Pal Singh Hoon**²², the respondent filed a petition for quashing the ‘A’ certificate granted to the film “*Bandit Queen*” on the grounds that the

¹⁹ **Section 5B Principles for guidance in certifying films.**—“(1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the sovereignty and integrity of India the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.”

²⁰ **Article 25 Freedom of conscience and free profession, practice and propagation of religion** “(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”

²¹ Supdt. Central Prison v. Dr. Ram Manohar Lohia AIR 1960 SC 633

²² Bobby Art International v. Om Pal Singh Hoon AIR 1996 SC 1846

portrayal of film was of indecent nature as it contained the scenes of rape and nudity. In assessing whether the scenes of sexual violence and nudity were in fact indecent, the court emphasized “*the importance of the context of the film and placing the scenes in the context of the plot as the film showed the brutality to which the girl was subjected. Thus the context of the expression plays an important role in analyzing the permissibility of the speech.*” These are the parameters that the court takes into account before excluding the speech from protection and in determining whether a particular speech is hate speech or not.

IV. CONSTITUTIONAL FRAMEWORK OF FREEDOM OF SPEECH AND EXPRESSION

Part III of Constitution of India, titled as “*Fundamental Rights*” contains a long list of fundamental rights that secures to the people of India, certain basic, natural and inalienable rights. These rights have been declared essential rights in order that “*human liberty may be preserved, human personality develops and an effective social and democratic life gets promoted.*” The inclusion of Chapter III in the Constitution is in accordance with the modern democratic thought. In the case of **Maneka Gandhi v Union of India**²³, Justice Bhagwati observed the importance of Fundamental Rights and stated that “*These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantees on the basic structure of human right and impose negative obligations on the state not to encroach on individual liberty in its various dimensions.*” The Right to freedom that is enshrined from Articles (19-22) comes under the one of the fundamental rights and is considered the personal liberties which provide the backbone of the fundamental rights. Article 19 of the Constitution of India guarantees to every citizen of India the six basic fundamental freedoms:

- A. *Freedom of speech and expression.*
- B. *Freedom of Assembly*
- C. *Freedom to form Associations or Unions or Co-operative Societies.*
- D. *Freedom of movement*

²³ Maneka Gandhi v Union of India AIR 1978 SC 597

E. *Freedom to reside and settle in any part of territory of India.*

F. *Freedom to practice any profession, occupation, trade or business.*

These fundamental freedoms have been viewed as the basic necessity and cardinal virtue in a democratic nation. Right to freedom of speech and expression is one of the fundamental freedoms that is enshrined under Article 19(1) (a). Article 19(1) (a) guarantees to all its citizens the right to freedom of speech and expression. The importance of this Article has been shown by the framers of the Indian Constitution by stating “*to secure to all its citizens LIBERTY of thought, expression, belief, faith and worship.*” This freedom is considered essential in a democratic setup of the state where people are the sovereign rulers. *Sir Iver Jennings* said “*without freedom of speech, the appeal to reason which is the basis cannot be made.*” **Justice Bhagwati** observed that “*Democracy is based essentially on free debate and open discussions for that is the only corrective of Government actions in a democratic setup. If democracy means government of the people by the people it’s obviously that every citizen must be entitled to participate in democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion is absolutely essential.*”

In **Romesh Thapar v State of Madras**²⁴, court observed that, “*Freedom of speech and press lay at the foundation of all democratic organizations, for without free political discussions no public education so essential for the proper functioning of the government.*” This freedom implies that every citizen right to speak and to express one’s opinions and convictions by words of mouth, writing, printing or any other mode. In **LIC of India v ManuBhai D. Shah**²⁵ the Supreme Court observed that, “*Every citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom to air one’s views is the lifeline of any democratic institution and any attempt to stifle, to suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.*” The freedom of speech and expression serves four-fold purpose:

- *It helps an individual to attain self-fulfillment.*
- *It allows for the free flow of ideas, beliefs and thoughts that strengthens the capacity of an individual in participating in decision making.*

²⁴ Romesh Thapar v State of Madras AIR 1950 SC 124

²⁵ LIC of India v ManuBhai D. Shah AIR 1993 SC 171

- *It ensures that the voices are not suppressed so that it can lead to discovery of truth at large.*
- *It provides a mechanism by which it would be possible to maintain a reasonable balance between stability and social change.*²⁶

Freedom of speech and expression is regarded as mother of all other liberties. The liberty of thought and to know is the sources of expression. The Supreme Court in **Secretary Ministry of I.B v Cricket Association Bengal**²⁷ held that *“the liberty to express oneself freely is important for number of reasons. Firstly, Self expression is significant instrument of freedom of conscience and self achievement. Secondly it enables the people to participate in debates relating to social and moral values as the very essence of democracy lies in free debate and free discussion. Thirdly, the freedom of expression allows political discourse which is necessary in any country which aspires to democracy.”* This freedom allows one to promote and express plurality of opinions. Thus, the free speech has been considered the heart of democracy and that’s why this is the most valuable right guaranteed to the citizens by the Indian Constitution.

V. RESTRICTIONS ON FREEDOM OF SPEECH AND EXPRESSION AND HATE SPEECH IN INDIA

Though the Constitution has enumerated the basic freedoms and individual liberties under Article 19(1) but has also prescribed in various clauses the reasonable restrictions i.e. under clause (2) to (6) of Article 19 that may be placed upon them by law so that they may not conflict with the public welfare or general morality. It has been realized that absolute and unrestricted individual rights do not, and cannot exist in any modern state as unrestricted liberty becomes a license and jeopardizes the liberty of others.²⁸ Hence, the liberty has got to be limited in order to be effectively possessed. Justice Patanjali Shastri in **A.K. Gopalan v State of Madras**²⁹ observed that *“Man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by the other individuals.”*

²⁶ Dr. J. N Pandey, “Constitutional Law of India” published by Central Law Agency, 52nd Edition 2015,P 187

²⁷ Secretary Ministry of I.B v Cricket Association Bengal AIR 1995 SC 1236

²⁸ Supra Note 7 at P 55.

²⁹ A.K. Gopalan v State of Madras AIR 1950 SC 27

Therefore, the freedom of speech and expression under the Article 19(1) (a) has not been expressed in absolute terms and is subject to ‘reasonable restrictions’ under Article 19(2).³⁰ It means that it should be to controlled, regulated and curtailed to some extent by the laws made by the Parliament or State legislatures. If individuals are allowed to have absolute freedom of speech and action the result would be chaos, ruin and anarchy. On the other hand, if the state has absolute power to determine the extent of personal liberty the result would be tyranny. That’s why our Indian Constitution has maintained a balance between the conflicting interests of individuals and of the society by enumerating what are the fundamental rights and by setting the limits within which they can be curtailed.³¹ In connection to this, Justice Mukerjee in **A.K.Gopalan v. State of Madras** observed that “*There cannot be any such thing as absolute and uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to safety, health, peace of the community. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interest of society, on the other hand , social control which exists for the public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to render his life as he pleases, to say what he will, to go where he will and to do any other thing which he can lawfully do without any hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do by declaring the rights of the people is to strike a balance between individual liberty and social control.*”

An important characteristic of Article 19(2) is the concept of “reasonable restrictions”. The most important fact to be decided by the court is to see whether the restriction imposed is reasonable or not. The word ‘reasonable’ has no set definition; therefore it implies intelligent care and deliberation which reason dictates. There is no exact standard or general pattern of reasonableness that can be laid down for all cases. Each case is to be judged on its own merit.

³⁰ **Article 19(2):** “Nothing in sub clause (a) of (1) shall affect the operation of any existing law or prevent the state from making any law, in so far as, such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, Security of the State, friendly relations with the foreign states, Public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

³¹ Supra note 7 P 55.

The standard varies with the nature of the right infringed, the underlying purpose of the restrictions imposed and the extent and the urgency of the evil sought to be remedied. The following three tests must be satisfied in order to impose restrictions. These are:

1. A restriction can be imposed only by or under the authority of law duly enacted by the legislatures. Thus, no restriction can be imposed by the executive action alone without the authority of law.
2. The restriction must be imposed in the interests of or for the particular purpose mentioned in the clauses on that particular freedom i.e. there must be a reasonable nexus between the restriction imposed and objects enshrined. It means that the restriction must have the reasonable relation with the object which the legislation seeks to achieve and must never exceed it.³²
3. The restriction must be reasonable. The court must determine the reasonableness of restriction by objective point of view and not by subjective one. The Supreme Court in **Javed v State of Haryana**³³ observed that *“the test of reasonableness is not wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice- economic, social and political cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty.”*

Clause (2) of Article 19 specifies the purposes or grounds in the interest of which reasonable restrictions can be imposed on the freedom of speech and expression. These grounds are:

1. *Security of the State*
2. *Friendly relation with the foreign state*
3. *Public Order*
4. *Decency or morality*
5. *Contempt of court*
6. *Defamation*
7. *Incitement of an offence*

³² Narender Kumar, “Constitutional Law of India” Published by Allahabad Law Agency 9th Edition 2015 P 238.

³³ Javed v State of Haryana AIR 2003 SC 3057

8. *Sovereignty and integrity of India*

In the paradigm of fundamental right of freedom of speech and expression, hate speech casts a necessary limitation. It is considered a limitation on free speech which exposes a person to hate or violence. Therefore, Hate speech can be curtailed under Article 19(2) on the grounds of public order, security of the state, decency or morality and incitement to offence. The judiciary had examined the constitutionality of hate speech restrictions on the grounds as stated above. The ground of ‘public order’ was added by the Constitution First Amendment Act, 1951. The Supreme Court in **Brij Bhushan Vs State of Delhi**³⁴, established that the freedom of speech and expression may be curtailed on the grounds of public order. The court held that *“public order was a part of public safety and security of the state which was inserted as a legitimate ground for dismissal of the rights guaranteed under Article 19 by the First Constitutional Amendment Act.”* The word ‘public order’ is something more than the maintenance of law and order. The court has elaborated this concept in the case **Ram Manohar Lohiya v. State of Bihar**³⁵ by differentiating between the three concepts i.e. law and order, public order and security of the state by the three functional concentric circles and observed that *“largest circle represents the law and order, the next circle public order and the smallest circle represents the security of the state. Every infraction of law must necessarily affect law and order but not the public order and an act may affect public order but not the security of the state.”*

In **Ramji Lal Modi v. State of U.P.**³⁶, the court upheld *“the constitutionality validity of Section 295A³⁷ of Indian Penal Code and ruled out that this section does not penalize every act of insult to or attempt to insult the religion or religious belief of a class of persons but also penalizes those acts and attempt which are perpetrated with deliberate intention to hurt religious feelings of any class of persons and words in the interest of public order include not only such utterances are directly intended to lead to disorder but also those that have the tendency to lead to*

³⁴ Brij Bhushan Vs State of Delhi AIR 1950 SC 129

³⁵ Ram Manohar Lohiya vs State of Bihar AIR 1966 SC 740

³⁶ Ramji Lal Modi vs State of U.P AIR 1957 SC 622

³⁷ **Section 295A Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.**—“Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

disorder.” In Superintendent Central Prison v. Dr. Ram Manohar Lohia,³⁸ the court observed that “the freedom of press is a fundamental right enshrined under Article 19(1) (a) of the constitution. The state is empowered to restrict free speech on the grounds in relation to public order, decency and security of the state and the restriction on the speech would be justified only if it poses imminent danger to the community. The court also makes it clear that citizen right to expression and state power to restrict such freedom cannot be put on equal footing. The restrictions imposed under article 19(2) in the interest of public order have to be a reasonable restriction and such restriction should have a proximate nexus with public order. The anticipated danger should not be remote, far-fetched or hypothetical. The expression of thought should be dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a spark in a powder keg.” In Shreya Singhal v. Union of India,³⁹ the court declared section 66 A of Information Technology Act as unconstitutional on the grounds of violating the freedom of speech guaranteed under Article 19(1)(a) of Indian Constitution. The court further held that “this section was not saved by virtue of being a reasonable restriction under Article 19(2) as the prohibition against dissemination of information by means of computer resource or a communication device intended to cause annoyance, inconvenience or insult did not fall within any reasonable exceptions to the freedom of speech and expression.”

The judiciary adopted the broad concept of what may be categorized as hate speech in the case of **Gopal Vinayak Godse v Union of India**⁴⁰ In this case, copies of book named, “**Gandhi Hatya Ani Me**” authored by Nathuram Godse was confiscated by the Judicial Magistrate under *Section 99⁴¹ of Code of Criminal Procedure* on the grounds that the book contained the matter which promoted the feeling of enmity and hatred between the Hindu and Muslim Communities as the book was concerned with the controversies relating to partition. The author of the book contended that *Section 99 Code of Criminal Procedure* was an infringement of freedom of speech and profession and the question before the court was whether the author of the book as

³⁸ Supdt. Central Prison v. Dr. Ram Manohar Lohia AIR 1960 SC 633

³⁹ Shreya Singhal v. Union of India AIR 2015 SC 1523

⁴⁰ Gopal Vinayak Godse v Union of India AIR 1971 Bombay 56

⁴¹“**Section 99: Direction, etc., of search warrants** The provisions of sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search- warrants issued under section 93, section 94, section 95 or section 97.”

constituted an offence under *Section 153A⁴² of Indian Penal Code 1860*. It was held that, *“it is not necessary to prove in Section 153A of Indian Penal Code that the enmity or hatred was in fact caused or there was any intention to cause such hatred, even if the language of the text is considered to be of such nature that it could promote the feelings of hatred then section 153A could be applied. Not only this, the court remove a truthful account of history as defense to the offence and stated that promotion of hatred between different classes of citizens, as for example, Hindus and Muslims or deliberate, malicious acts intended to outrage the religious feelings of any class by insulting its religion or religious beliefs are not purely local problems. Recent history shows that these tendencies constitute a serious danger to the very way of life to which we are pledged under the Constitution.”* The necessity of putting a restriction to speech that may qualify as hate speech has been explained by the court in the case of **State of Karnataka and another v Dr. Praveen Bhai Thogdia⁴³** where the court held that *“strong action needs to be taken against the comments that create disharmony or sacrifice public peace and tranquility because any speech of this sort might create communal disharmony which would destroy all the high values which the Constitution aims at. As welfare of the people is of paramount importance, the court recognized that there is need to curb free speech that induces communal hatred.”* The Andhra Pradesh High court⁴⁴ observed that *“the object of delivering such hatred speeches which are highly inflammatory is to spread and foment communal hatred. These speeches are capable*

⁴² **“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.—(1) Whoever (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, (c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both. Offence committed in place of worship, etc.—(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.”**

⁴³ State of Karnataka and another v Dr. Praveen Bhai Thogdia

⁴⁴ Mohd. Abdul Ghani Hamid v. State, 1957 Cri LJ 703

*of creating ill feeling between various classes and communities and are calculated to undermine the security of the state.” In **Virendra v The State of Punjab**⁴⁵ the Court said that circumstantial evidences must be taken into consideration to determine the interest of the act. The Court observed that, “*in determining whether the act or speech falls under the ambit of reasonable restriction or not, only the state action can be challenged and not the statute from where the state is deriving the power to do so. This case has further established the validity of Article 19(2) and it has been applied in various instances dealing with the issue of hate speeches.*” In **S. Rangarajan v P. Jagjivan Ram**⁴⁶, the court highlighted that “*the speech could only be curtailed if it is intrinsically dangerous to public interest. Proximity test was laid down to mean that the expression should be inseparably locked up with the action contemplated like the equivalent of a spark in a powder keg. The analogy of spark in a powder keg brings in temporal dimension of immediacy that the speech should be immediately dangerous to public interest.*”*

By way of this case studies mentioned above it can be inferred that the Indian Constitution by law seeks to prevent the delivery of hate speech under the purview of Freedom of speech and expression in the form of reasonable restrictions.

VI. CONCLUSION

The relationship between hate speech and free speech is quit complex. Free speech is considered one of the fundamental liberties under Article 19(1) (a) of Indian Constitution and is recognized as one of the most important feature that a free democratic country must provide. But nowadays, the impact of hate speech is so immense that it has become a tool to wound, humiliate terrorize and degrade the dignity of an individual, thus posing a great challenge to promote a balance between the individual dignity and freedom of speech and expression. The only problem the society faces is that most of cases related to hate speech are not taken into consideration meaning thereby the person delivering the hate speech are not criminalized because it becomes difficult to interpret whether the speech comes under the ambit of hate speech and what kind of speech will constitute an offence under the proposed sections. So there is a need of proper legal definition of hate speech that will exactly define what elements does hate speech covers so that persons can be

⁴⁵Virendra v State of Punjab 1957 AIR 896

⁴⁶ S. Rangarajan vs. P. Jagjivan Ram 1989 SCC (2) 574

charged for the offence. There are various set of provisions under different laws whether it is Indian Penal Code, Criminal Procedure Code and others statues to deal with the hate speech but we witness the non- observance on the part of State as no action is being taken against such kinds of peoples especially the politicians. We see the enforcement of hate speech laws against the commoners because the people who are tried and convicted are either the authors, publishers but not the politicians. Thus from this, it is witnessed that proposed sections dealing with the issue hate speech seems to be dead letter for the politicians. Recently in the case of **Kaushal Kishore V State of Uttar Pradesh Government of UP Home Secretary**,⁴⁷ the petitioner highlighted that, *“the laws against hate crimes are selectively applied and there have been various instances of hate speech that are being carried out in the guise of freedom of speech and expression where he informed the Supreme Court that since 2014 there has been 500% rise in reported hate speech cases against public functionaries and politicians. He further suggested that, “legislature have to frame a code of conduct for the cabinet ministers or should adopt the Ombudsman Model that will act as independent official that will receive complaints against public officials who are abusing the freedom of speech and expression .”* Therefore, the constant increase in hate speech cases has weakened the pillars of the Indian Constitution and the expression enshrined in the Indian Constitution i.e. ‘We the People of India’ is being questioned as the issue and incidents of hate speech connotes the absence of ‘We’ feeling among people.

So in order to curb to menace of hate speech that is prevailing in the country the State has to punish the offenders of hate speech and there should not be discrimination in the execution of penal laws as our Indian Constitution clearly provides in Article 14 i.e. the equality before law. Thus, from this study it has observed that issue is not the non- existence of laws against the hate speech but there is improper enforcement and non observance of laws by the citizens and public authorities is adversely affecting the society. Not only this, strict Intermediary guidelines is the need of the hour that should be framed by every social media platforms such as Facebook, Instagram, twitter to tackle the online hate content. Lastly, being a citizen of India, it is duty of everyone to criticize and discourage the people that they cannot make the use of hate speech for their political and selfish ends and being a responsible citizens it is the duty of ours to report the

⁴⁷ Writ Petition (Criminal) No. 113/2016 decided on 15.11.2022

hate speech crimes and compel the public authorities to take appropriate actions as per the existing law.

