

LEGALFOXES LAW TIMES

THE GOOD, THE BAD, THE UGLY: THE LEGAL CONUNDRUM OF ONLINE HATE

SPEECH IN INDIA

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ABSTRACT

The legal conundrum of hate speech in India under the Information Technology Act, 2000 is a concept much debated upon. After Section 66A of the Information Technology Act, 2000 was struck down in the case of *Shreya Singhal v Union of India*¹ in the year 2015, the Supreme Court has directed the Law Commission of India to suggest recommendations and establish the need of laws in India to the legislature, for both inclusion in the Indian Penal Code of 1860 and Information Technology Act, 2000. The author in this research paper will be looking at the positive aftermaths and negative repercussions, need be for an amendment brought in the Indian Penal Code, 1860 and Information Technology Act, 2000 and actual need of inclusion of online forms of hate speech especially in a country like India with a comparison of laws from other nations, primarily the United Kingdom, United States of America and Australia.

The scope of online forms of hate speech, include most active and commonly used social media platforms such as Facebook, Instagram and WhatsApp, with other few. The primary concern of the author would be to see how to regulate individual reactions made in derogatory manner to others, and that does it restrict the Freedom of Speech and Expression enshrined under Article 19(1)(a) of the Indian Constitution. The paper will be conclusive on the essence of suggesting ways or changes in legislation through a critical analysis of the Law Commission Report No. 267.

¹ WP (CrI) No. 167 of 2012

Keywords: Freedom of Speech and Expression, Indian Penal Code, 1860, Information Technology Act, 2000, Law Commission Report No. 267

1. INTRODUCTION:

Human beings have become accustomed to their surroundings for they are ensured protection in lieu of the Fundamental Rights bestowed upon them by the State. The constant expansion of these rights into the realms of other guiding policies and duties to be fulfilled by the State, has undoubtedly made them take everything already arranged and served in a platter for. However, the non-inclusion of certain spheres and domains, falsify these perceived notions. One such province that falls as a restriction to the Freedom of Speech and Expression in India, is that of the common parlance concept of “Hate Speech”.

Although the concept has not been defined in any legislation or the Constitution itself and neither has the use of the word been made, but for the purpose of this research paper, the author will adopt certain aspects from the definition given by The Council of Europe’s Committee of Ministers to Member States on Hate Speech as follows:

“ ... the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”² This has been broken down into three facets namely for racial hatred, religious hatred and expression of aggressive nationalism. In the Indian context, there are many legislations that have been talked about in the Law Commission Report No. 267 on Hate Speech in March 2017 which include Indian Penal Code, 1860, Representation of People’s Act, 1951, Code of Criminal Procedure, 1973 and many more.

This definition will be restricted to categorize and analyze online forms of hate speech. For the very first time in India, after Section 66A of the Information Technology Act, 2000 was struck down, a need for the regulation of the two forms of hate speech – verbal and online, was realized by the Supreme Court which gave directions for the investigation of the need of the law and

² Summary report of the Secretary General. prepared by the Directorate of Human Rights on the 4th European Ministerial Conference on Mass Media Policy (Prague, Dec. 7-8, 1994), Appendix III para 7. Retrieved from: <https://rm.coe.int/16806461fb>

hence the present Law Commission Report No. 267 came to being. A proposal was then put forth for the amendment of the Indian Penal Code, 1860 and Code of Criminal Procedure, 1973 which explicitly laid down what must constitute the same. But, to this proposal, I do not agree completely as there is a scope of interpretation in the negative sense as well. Apart from this, in the absence of required law, the misuse of provisions with a wider ambit to include hate speech such as in Section 124A and 153A of the Indian Penal Code, 1860, have been made, for criminalizing sedition and promotion of enmity between two different groups. Hence in the current research paper, the author will critically analyze the Law Commission Report No. 267 with respect to online forms of hate speech.

2. FREEDOM OF SPEECH AND EXPRESSION:

Article 19(2) of the Constitution of India provides for forms of reasonable restrictions on the freedom and fundamental rights bestowed under Article 19(1) of speech and expression. Jurisprudentially, any freedom comes with the inherent capacity of liberty as it is not a right and thence, does it not possess any duty. However, in this case, the expression freedom, has a connotation of “Right to Freedom of Speech and Expression” and hence is not an absolute right. This means every individual has a sense of duty towards the other individual in the society, which in case of India is restricted to one citizen towards the other. History edifices various instances where, such freedom has been misused to such a grave extent to wash the minds of people and direct them to a destructive path, without their conscious knowledge as in case of orate excellent speakers like Benito Mussolini and Adolf Hitler in German media. As it can be seen, if a person is not allowed to recount even the true facts of history, then it is a direct attack on the sacrosanct right of speech and expression.³ Hence, the drafters of this Constitution, while interpreting the American Constitution to not provide it as an absolute right, deemed it necessary in the best interest of the democracy to incorporate this right with exceptions like subject to public morality and order and denied its absolute nature. Hence, now speech comes with responsibility and accountability.

³Raghav Pandey, N.B. (2019, April 04). *Hate speech vs free speech*. Retrieved from The Pioneer: <https://www.dailypioneer.com/2019/columnists/hate-speech-vs-free-speech.html>

3. JUDICIAL TREND AND THE PROBLEM OF REGULARIZING HATE SPEECH:

Any law restricting any kind of speech is seen as an exception to the freedom of speech and expression and to that effect, hate speech is no concession. For example, post the scrapping off of Article 370, a lot of communal unrest has been experienced in the now Union Territory of Jammu and Kashmir, has attracted agitations amongst the youth who have expressed their opinions, mostly of dissent on the way the step has been taken, on online media portals, which may be seen as forms of hate speech. These thoughts spread like wild fire due to the global communication connectivity and hence, the question now arises of where a line must be drawn to differentiate between dissenting opinion and forms of hate speech.

Hence, this poses a challenge narrowing down to the question whether it must be restrained and if so, then to what extent. The assumption that a rule denying the state power to restrict speech on the basis of its content will produce the broadest possible debate is problematic as this might produce debate that is informed by the prejudices of the public⁴ and in case of speech, being used as an instrument to relegate the defenseless. To determine what constitutes as a mere use of words or expression and what affects the tranquility, clear distinction and guidelines must be set apart. A wider ambit of these guiding principles with respect to milieu, subject to narrow interpretation is what is required at the moment to resolve conflicts between the fundamental right of the individual and societal balance. The mode of exercise, the content and the extent of abuse of freedom are important in determining the contours of permissible restrictions.⁵

The Law Commission Report (LCR) No. 267 enumerates plentiful legislations that in a scattered way, aim at restricting forms of hate speech and include the Indian Penal Code, 1860, Representation of People's Act, 1951, Protection of Civil Rights Act, 1955 and the list goes on. One such legislation under which the scope of regulating online forms of hate speech fell, was under Section 66 A of the Information Technology Act, 2000, which has now been termed as draconian and has been repealed. However, the author disagrees from it being in violation of the fundamental right although, it is admitted that its wide and vague terms, open to interpretation,

⁴ Owen M. Fiss, "Why the State?" 100 Harv. L. Rev. 785 (1986-1987). Retrieved from: https://digitalcommons.law.yale.edu/fss_papers/1208/

⁵ S. Sivakumar, *Press Law and Journalists* 11 (Universal law Publishing Co. Gurgaon, 2015). Retrieved from: https://law-all.com/index.php?route=product/product&product_id=4949

were being misused by police officials and other branches of the executive to the deterrence of the people, who they are supposed to protect which included unjustified arrests, fines and imprisonments on mere expression of opinion. Speech in its essence is due to its volatile nature of being subjective, may be perceived by humans according to different notions and this is where the problem arises. A simple example of this can be, we often might use racial slangs like nigga with our friends, which is perceived by them in a friendly way as they know the intention is not to cause injury to person. Whereas if the same word is used to address an African native, it might sound very offensive to them. Hence, it is context and address based.

The position was reclaimed in India through the case of *Shreya Singhal v Union of India*⁶, where Section 66 A and Section 79 with Rules of the Information Technology Act, 2000 were struck down in a 52 page judgement on being violative of Article 19(1), the mere mention as objectionable and offensive used by the two girls on Facebook, for expressing their dissent on the shutting down of public services, primarily shops on the death of an eminent political figure, Shiv Sena chief, Bal Thackeray and their arrest was ordered, approved by senior police officials. However, the Supreme Court applied the “chilling effect” to the justification and said it would apply to not advocacy but only incitement. Black’s Law Dictionary defines “chilling effect” as communication that describes a situation where a speech or conduct is suppressed by fear of penalization at the interests of an individual or a group and affects one’s free speech. Another parallel case was going on in the apex court at the same time and the decision in the former, was used to influence the judgement in *Mouthshut.com v Union of India*⁷ and *Common Cause v Union of India*⁸. Only the Doctrine of Severability was applied which essentially states that if a part of statute is rendered repugnant, reading into the Preamble, and the part is so severable that the rest of the statute has the power to sustain itself without that part, it will hold true if in consonance with the Preamble. However, the Court ignored the “Doctrine of Harmonious Construction” in this case which provides for reading a statute as a whole rather than interpreting it in isolation with other statutes to remove and determine its repugnancy, which can be viewed as one of the criticisms of this judgement.

4. HATE SPEECH AND RIGHT TO FREEDOM OF SPEECH AND EXPRESSION:

⁶ WP (Cr) 167/2012

⁷ Writ Petition (Civil) of 2013

⁸ [W.P. (C) No. 21 of 2013]

Nevertheless, when it comes to online forms of hate speech know no geographical boundaries and limitations. This hence creates a lot of room for mischiefs of criminal nature, leading to extremist forms of repercussions or reactions. The utter reason for this, is the sole nature of the way internet connectivity was designed to make the world a global village. This is an open invitation for people to throwup their opinions because they tend to realize that it is the communication to electronic devices but whereas in reality, it involves views from millions reading or sparring through it. This is the reason people do not often realize how any piece of information that scrapes through or flashes in front of their eyes, impacts sub-consciously on their behavioral patterns, assuming all people are irrational in some way or the other. Hence, in any situation, where people maybe rational or irrational, the consequences of their acts cannot be determined definitely. If such had been the situation, the need of this research paper would not have arisen at the first instance. Considering all humans behave unreasonably on the domain where unrestricted freedom to elaborate on their emotions is provided to them, which is taken for granted by them, where a dissimilarity is required to be noted is of in the realms of personal abuse from the forms of hate speech inciting violence through remarks derogatory to a society, community or a discrete, diverse groups.

The late 2000s, the present era has seen rampant instances of racist, derogatory expressions of people mainly, which reaches every individual linked to them on social media if done on public fora media like Twitter and Facebook and personally via WhatsApp, emails, etc. mainly due to two reasons. First, the technology that we are talking about of online mass communication was not available to the people back then, when the primary mode of information dissemination was via forms of paper, including leaflets, pamphlets, newspapers and more and the print on the publication was fairly regulated by higher authorities. Second, because the present forms of data broadcasting are as stated before, more fast, rapid and one click apart, ready to be used at the tip of one's finger. Freedom of Speech and Expression does not necessitate to include the injury to other in case of a reasonable man of common prudence. To this effect, the author is presuming exceptional cases to be that of Egg Shell Skull, who may be offended on small and trivial matters. Thus, there has been an increase in racist and hate attacks on the Internet where the

anonymity, accessibility and immediate publication of digital technology make it easier for individuals to target their victims.⁹

The author has identified three primary reasons for such an activity. First, the cost of information circulation is very low, which is almost negligible as compared to the audience, it is received by. Second, there is no approval required by anyone before any thought is put out in the public domain, which requires no professional consent. And lastly, the onlookers that it reaches to is very large, incalculable if on a public social media, inviting abundant of eyes to look upon. The global reach of social media also compounds the problem of seeking adequate redress for victims.¹⁰ Although there are many enumerated legislations to curb the menace, but the National Crime Records Bureau (NCRB) fails to report such cases because, such a heinous crime is not recognized as offence in the Indian Penal Code, 1860 especially on social media, which was reported by an official of the bureau. The problem has increased manifold, as people have derived from their right to privacy after the *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India And Ors.*¹¹, which is a landmark judgement using the 'Golden Triangle' of Article 14, 19 and 21 on the subject matter, to their posts on social websites as a platform. The reasoning as deciphered is that State has no purpose to interfere in the personal sphere of an individual because its sole determination is to ensure peace, tranquility and social order in the society, ensuring all execution falls in place. However, the State must be made duty bound to ensure the delicate balance between the individual autonomy and legitimate privacy rights.

There are various reasons why there is a need for strong regulation required of online forms of hate speech, the most important being that the legislature must make sure of the social order in this public domain too as the language so construed of comments or opinions can be manipulated as a factor to incite violence, disturbing the state machinery for it calls a public law and order situation. Second, as it involves the addressor and the addressee who may not necessarily know each other, the need for respect and dignity to be maintained towards the other person, becomes essential as also mentioned in the Preamble of the Indian Constitution. This interaction may be of

⁹ L Shaw 'Hate speech in cyberspace: Bitterness without boundaries' (2011) 25 Notre Dame Law, Ethics & Pub Pol'y 279 at 280. Retrieved from: <https://scholarship.law.nd.edu/ndjlepp/vol25/iss1/9/>

¹⁰ McGonagle op cit (nl) 433-434. Retrieved from: <http://uir.unisa.ac.za/bitstream/handle/10500/21722/Hate%20speech%20on%20the%20Internet.pdf?sequence=1&isAllowed=y>

¹¹ Contempt Petition (Civil) No. 34 of 2018 in Writ Petition (Civil) No. 1014 of 2017

personal or impersonal nature, owing to fake accounts and addressal portals and information hence given out may or may not be actually true in its essence. The speech is addressed to us 'in common with strangers' and the fact that the recipients have a 'partial non-identity with the object of address' is part of what makes speech public.¹²The main agenda of these laws must focus on the elements in society who write up lewd comments just to draw mere attention for the number of reposts and likes determine their importance in social space which satisfies their inner self of being recognized. However, the difficulty lies in the arena of differentiation of satire and humor from ordinary speech which the Courts must interpret for every case due to its subjective nature, depending on the context and intention of the individual. Hence, the Law Commission Report No. 267 has proposed an amendment to be introduced via The Criminal Law (Amendment) Bill, 2017 to prohibit incitement of hatred through forms of hate speech although it is only restricted to verbal forms only.

5. ANALYSIS OF THE “THREE PART TEST” OF LAW COMMISSION REPORT NO. 267

The ‘European Convention of Human Rights’¹³ under Article 17 states that “The court takes into account various factors before excluding speech from protection under the Convention like, nature of remarks, dissemination and potential impact of remarks, status of targeted person, status of the author of the remarks, nature and severity of penalty imposed (to determine the proportionality of the interference) etc.”¹⁴The Report lays down a “Three Part Test” for determining whether a figure of speech constitutes as hate speech or not as a standard as everything in one sense or the other may be interpreted to find itself in the realms of the same.

The first is of the “Prescription by law” which reads “This requirement is satisfied where the right is curtailed by means of a law passed through the appropriate procedures and through provisions worded in explicit and unambiguous language.”¹⁵ This implies that the Courts will have an option to opionate on the right of an individual of free speech and expression. This will be done in lieu of “appropriate procedures” in due course of time. But it being subject to

¹² J. Baxter (ed), *Speaking Out: The Female Voice in Public Contexts* (Basingstoke: Palgrave Macmillan 2006). Retrieved from: <https://www.palgrave.com/gp/book/9781403994073>

¹³ ‘European Convention of Human Rights’, 213 UNTS 221 (1950). Retrieved from: https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁴ Ibid. 12

¹⁵ Law Commission Report No. 267. Retrieved from: <http://lawcommissionofindia.nic.in/reports/Report267.pdf>

interpretation, brings in a lot of scope for ambiguity as a counter argument. However, the solution can be traced back to the doctrine of separation of powers enshrined by the Fathers of the Indian Constitution between the legislative, judiciary and executive. When either the legislature deviates from its path of reasonableness to provide for such procedures, the judiciary will cross verify independent on the cases that come to the forefront and analyze the practical repercussions of the same in India. When the judiciary deviates from its path, in certain cases, it can subject its decisions to judicial review in this context and the legislature can direct it to do so.

The second test laid down is of “Legitimate aims”. The suggestion of this test has been left open ended and vague and the Law Commission Report only mentions “The measure must directly satisfy a legitimate aim”¹⁶ the author does not deem it to be an appropriate test to determine hate speech especially on online platforms as the State or the judiciary cannot sufficiently determine the aims or intentions of an individual with which the act was done. There may be many conditions that would have led to such an act including grave and sudden provocation, intoxication, insanity, minority, etc., which would have to be exempted from such an act. This would in turn mean, the defense is also ready to be taken, which defeats the purpose of this law if it comes into existence. Only in very obvious cases *prima facie* can the motive and intention of an individual be considered but then the burden of proof on the prosecution, makes it very difficult to prove the same and ends up victimizing the victim even more. The court demands concrete evidence to convict a person of an offence, but if the “legitimate aim” test is applied, it would be impractical to establish the same. This would alienate him from the idea of justice, equity and good conscience, which is to be ensured by the State and does no good to his cause. Hence, according to the author, the “legitimate aim” test would not hold any value on practical grounds.

The third segment of the “Three Part Test” is the “Necessity and Proportionality” rule which essentially states “The measure must be necessary to achieve its stated aim and must be proportionate to the harm that it attempts to prevent or redress. The standard of proportionality in this context has also been understood to include a requirement for minimum impairment of the right being restricted, i.e., the restriction must not do any more damage to the right than is

¹⁶*Id. at* 14

absolutely necessary to meet its aim.”¹⁷ This is rather a more of a hysterical suggestion that the Law Commission has provided for very simple reason. It states that the necessity of the statement made by a person must be evaluated in the first part. This means that the Courts while deciding a case, must go into the complete background, the psychology and the mental elements of the person before deciding a case which in a country like India is highly impractical. This would not only waste the time of the court to end up giving non conclusive objectives but also, exhaust the resources of the State machinery, which may be redirected towards rehabilitation of other criminals or offenders. To look into the psychology of necessitating any statement is not the job of the Courts to look into and the mental element of every individual is very different from another. Hence, this in the opinion of the author, will only play an instrumental part in wasting the time, energy and resources of the state and nothing else.

The second part of this test aims at proportionality element of the statement made. This again is a very improbable assumption to make and there is no established test to regulate the proportionality of a statement made to another. If in this scenario, the “Egg Shell Skull” test is applied, it is impossible to convict the offenders making derogatory remarks to the such sensitive people. A casual conversion by this test can be made to aggravate into an offensive one and the Courts will be forced to convict the not so serious offenders as well. The question lies in the statement that in cases where the statements made online are a continuation of a previous transaction. The first part of the statement may seem to be well-lit and made in good faith but then the second part of the same statement or in the same course of transaction of the statement being made, may seem to be offensive to the person and vice versa. It is in these cases that the convictions under this test will become implausible and unconvincing. If such a test is considered to determine the offences, the need of the legislation would not be approved and defeats the whole purpose of bringing in a new statute or amendment to consider the issue raised at hand. When the right in this context is restricted, the duty on the other person is also restricted which in a democracy, must not be done to the citizens to restrict their rights. Standard of minimum impairment cannot be ascertained in any way as due regard to the rampant exercise of right to freedom of speech and expression guaranteed under Article 19 (a) of the Constitution. Hence, according to the author, this test also in its strict interpretation cannot be applied to the

¹⁷Supra

current situation in India or anywhere in the world due to the diverse nature of the internet global networking. Incitement to violence cannot be the sole test for determining whether a speech amounts to hate speech or not.¹⁸ A very recent example can be taken of the LGBTQIA+ community where some members of the community took offence when they were addressed as he/she and him/her and they claimed that they would not want to be recognized as either one of them and using of these words to address them, would amount to act of hate speech against them and hence they filed a case in court. The matter is still sub judicia and the courts have entered the dominions of looking into the jurisprudence behind the same. if such a situation arises in a relatively fresh democracy lie India to determine hate speech or not, a mockery of the Indian Judicial System will flourish as the legislature has not yet settled the law in question.

6. SUGGESTIONS AND CONCLUSION:

In a nutshell, the author would conclude that the Internet provides an avenue for individuals to resort to racist and xenophobic propaganda due to its flexibility and anonymity, with the result that it is often complex and difficult to monitor extremist sites online.¹⁹ A mere suggestion by the Law Commission given on the direction of the Supreme Court of India will not help to resolve the problem by only listing out the suggestions and amendment which may be applicable without a well-planned initiative for execution of the same.

The author will suggest a proper amendment of the repealed Section 66A of the Information Technology Act, 2000, in a narrower and clear way to the aid of the judiciary. Proper authoritative and indicative list must be put out of what kinds and phrases would constitute verbal hate speech and online hate speech to make the distinction easier for people, for who essentially these laws are meant. The vague nature of the repealed section must be altered in scope to tailor the existing needs in the country. The government agency of Ministry of Information and Broadcasting must be given the authority to block, restrict and report online hate speech which may in their opinion amount to grave violations of individual's right and temporarily or permanently aim at affecting public order or tranquility. However, this power must be bestowed upon the Nodal Officers in each district and it must be made mandatory for

¹⁸*Ibid* 16

¹⁹ Wolf op cit (n6) 13; Thomas and Loader op cit (n3) 249. Retrieved from:
<http://uir.unisa.ac.za/bitstream/handle/10500/21722/Hate%20speech%20on%20the%20Internet.pdf?sequence=1&isAllowed=y>

them to give the reasons on a weekly basis for such actions to the Senior officer, who shall in turn check and if his prudence so suggests according to law, interfere in matters he thinks has been unfair and derogatory to the individuals, focus on resolving and compensating them from the salary of such nodal officer who has acted with such *mala fide* intention. The senior officer must then compile reports of such instances along with the action taken on monthly basis and submit the same to the respective State Governments who shall deem it necessary in matters of unjust treatment to the citizens in proportion to the crime, either allow an appeal to the High Court or take up the matter with the Ministry of Information and Broadcasting at the Central Government level. However, before any of such actions are implemented, it must be very specifically mentioned in the Information Technology Act, 2000, of what and why will the symbols of speech be prohibited or taken action against and the circumstances under which such are liable to be blocked from free flow over the internet. This is a justification that must be given before the restrictions imposed upon free speech and expression. Only then will the right to freedom of speech and expression be true in its quintessence by bequeathing a duty on the other person and the State.

In cases where a liability is to be ascertained, as suggested in The Criminal Law Amendment Bill, 2017 is proposed, the first perpetrator and addressor must be held liable for the same as that is the source from where such a cause of action arises, inciting the course of transactions that follow. Therefore, such tests to determine the possibility of determining online forms of hate speech will not suffice in a country like India. It is high time that the legislature must realize on the need for a law restricting forms of hate speech in India.