

HATE SPEECH AND HATE CRIME**Aashna Gupta****Introduction**

Crime can be defined as an act which is forbidden by law and subjects the doer to legal punishment¹. According to the Amnesty International report, there has been a steep rise in hate crimes since 2016 in India. In the first six months of 2019 alone there have been 181 incidents of alleged hate crimes, nearly double than previous three years' half-yearly counts².

There are various reasons why an individual commits any crime, namely, frustration, anger, financial burden, psychological issues or loss of senses etc. Another reason why a person commits crime is due to biases or hatred³. Where all crimes need adequate attention, this is equally true when it comes to hate speeches and hate crimes. "Hate speech is any word written or spoken, signs, visible representations within the hearing or sight of a person with the intention to cause fear or alarm, or incitement to violence"⁴. While hate crime has not been specifically defined under Indian Penal Code ("IPC"), they can be considered as criminal act committed intentionally due to prejudices that a person has against the other individual or social group with regard to race, religion, ethnicity or sex⁵. Hate crimes threaten the democratic foundation of a country. Lynching, mob violence, vigilantism, communal riots, cyber trolling are all categories of hate crime. Print and social media are also one of the major platforms that lead to disharmony. Therefore, the questions that I will be dealing through this paper are, A) Can hate speech be considered a part of free speech? B) Relationship between hate speech and hate crime C) Comparative analysis of legal provisions with US and Western Europe (in particular Great Britain).

A. Conflict Between Free Speech And Hate Speech

We usually tend to strike balance between free speech and apparent hate speech. The view that now prevails is those who support ban on free speech are its real protectors and those

¹ TK Gopal v. State Of Karnataka, (2000) SCC (Cri) 1037 Pg. 176.

² Amnesty International India, *Hate Crime Reports On An Alarming Rise- Reveals Amnesty International India's "Halt The Hate"*, Amnesty International, (Dec. 7, 2020, 1:01 Pm), <https://amnesty.org.in/news-update/hate-crime-reports-on-an-alarming-rise-reveals-amnesty-international-indias-halt-the-hate>.

³ Carolyn Turpin-Petrosino, *Understanding Hate Crimes- Acts, Motives, Offenders, Victims and Justice*, 241, Routledge, (2015).

⁴ Law Commission of India, Report No. 267, Hate Speech, (March 2017).

⁵ *Supra Note 3*.

who do not support ban are hostile to free speech⁶. It is thus pertinent to analyse the perceptions and see whether banning would be detrimental to the growth of nation or not.

The first argument made is that it is the listener's right and autonomy to be able to hear all speeches. But this can be disclaimed by the fact that some hate speeches incite listeners. Moreover, the main affected party of the discrimination or violence that hate speech tends to target is the potential victim whom the state tends to protect and the citizens expect them to do so⁷. One of the examples can be the exodus of Northeast in 2012. Up to 50,000 citizens belonging to the Northeast had to move back to that state due to specific targeting. False images were circulated as images from Assam riots of 2012 though the incident occurred in Myanmar several years ago⁸. Citizens cannot be made guinea pigs of the resultant wrongdoings from hate speech.

The argument that listeners would choose and evaluate by themselves can be disproved by the fact that there are certain things that you listen unintentionally⁹. It cannot be always expected from a common man to make an informed opinion. It is a human tendency to get influenced by thoughts strongly put forth by someone else especially when we aren't well acquainted with the subject matter.

Second argument in support of free speech is that it is only through free communication that an individual can express himself irrespective of its correctness. Autonomy requires that he should be in a position to protect his viewpoints¹⁰. The distinction between right and wrong is a subjective test which varies with each individual. Having said that, it is pertinent to see, whether a particular right which is sought to be protected is in consonance with the moral values of the system that it seeks to protect. The end of every society is to secure justice. Thus, we need to see whether interest of justice is served through those comments. Article 14 of the Constitution ensures that every person has equal rights and people at similar levels are to be treated similarly. If the alleged free speech violates this right of theirs, then it should be restricted.

⁶ Jeffrey W. Howard, *Free Speech and Hate Speech*, 22 Annual Rev. of Polt. Sc., 93, (2019).

⁷ *Id.*

⁸ *Supra Note 4.*

⁹ *Supra Note 3* pg. 94.

¹⁰ *Supra Note 3* pg. 97.

The third argument that needs consideration is that in a democratic structure varying viewpoints of individuals are reconciled through reasons¹¹. However, the value of democracy comes not just from preserving perspectives of each individual but by ensuring that it leads to just outcomes¹². If hate speech starts targeting a particular individual or a particular community on the basis of their racial, religious or ethnic discourse, there certainly arises a need to regulate them. Imposing bans may not constrain hateful thoughts, but their dissemination, from reaching others which can harm them, is prevented.

A.1 Contribution of Media in Hate Speech

The free speech-hate speech debate even extends in the sphere of mass media. There is always a protest when a regulation is made to check internet activities¹³. Question of free speech and privacy is raised every now and then. It is said that internet would cease to evolve ideas if any restriction is placed by law¹⁴. However legislations do not mean to put restrictions on the ever evolving digital era. This innovation cannot come at the cost of an individual's dignity. Many reports, worldwide, have declared 2018 as the "year of online hate"¹⁵. No doubt, online platforms serve as a source of public interactions enabling ordinary people to interact with others nationally and globally. 'Social media does open your life to the public, but to say that victims of cyber harassment are overreacting, is an easy way to escape the liability of the wrong committed'¹⁶. Numerous instances can be found where inflammatory messages are spread through mass media. "Facebook, the social media giant, in its 'Transparency Report' disclosed alarming statistics wherein it ended up taking down 3 million hateful posts from its platform. Youtube, which allows free sharing of video content on its site, removed twenty five thousand videos in a single month alone"¹⁷.

The case of Mohammad Afrazul where his merciless killing was recorded and circulated on whatsapp in the name of love jihad is a gruesome account of how deep hatred is ingrained in the minds of people¹⁸. The virtual circulation of lynching activities gives hate crime a shape

¹¹ *Id.*, Pg. 98.

¹² *Id.*

¹³ Danielle Keats Citron, *Hate Crimes in Cyber Space*, Harvard University Press, 1, (2014)

¹⁴ *Id.*, Pg. 214.

¹⁵ Anandita Yadav, *Countering Hate Speech in India: Looking For Answers Beyond The Law*, 2 ILI Law Review, (2018).

¹⁶ *Supra Note 13*, Pg. 81.

¹⁷ *Supra Note 15*.

¹⁸ Alison Saldanha, 2017, *A Year of Hate Crimes in India: Number of Violent Incidents Related to Cows, Religion is Rising*, Firstpost, Dec. 28, 2017 <https://www.firstpost.com/India/2017-A-Year-Of-Hate-Crimes-In->

of public entertainment. Harsh Mander, social activist explained that these videotaping and online forwarding, reflects the psychology of the offender. Attackers believe they are performing an act of 'masculine heroism', are assured of their impunity thereby communicating a message to the targeted community about their alleged status.¹⁹. Another incident which created a feeling of hatred due to misguided facts spread by the media is the case of tablighi jamaat. 'Corona jihad' or 'Manavbomb' were a few hashtags which were used against them²⁰. This unverified news broadcast largely impacted the psychology of people. Instead of considering it as an individual case, fingers were raised on Muslim community as a whole. Bombay High Court specifically mentioned how the propaganda was made by print and electronic media against the foreigners who had come to attend the Delhi markaz and were made scapegoat by the political parties²¹. Unfortunately, the order of quashing FIR against them was not highlighted by the media as the arrest was.

Such incidents make us rethink our liberty argument and direct us towards a need to have a check on what is posted in the online world.

B. Relationship Between Hate Speech And Hate Crime

The next question that needs to be determined is what is the relationship between hate speech and hate crime?

Hate speech can be considered as one of the components of hate crime. Though such hate speeches may or may not take the form of traditional criminal act. But the impact of hate speech creating a feeling of ill-will against a community creates a base for hate crime.

At the macro level, the concept of hate crime can be understood as a concept of 'us' versus 'them'. Here 'us' is the oppressor or the dominant force, commonly referred as global north and 'them' is the colonized or the oppressed, commonly referred to as global south. It is believed that the global north (developed countries) have always tried to assert their superiority over the global south (developing or least developed countries)²². This notion has

India-Number-Of-Violent-Incidents-Related-to-Cows-Religion-is-Rising-4278751.Html (Last Visited Dec. 6, 2020, 2:45 Pm).

¹⁹ *Id.*

²⁰ Arushi Thapar & Zaid Wahidi, 'Unjust And Unfair': What Three High Courts Said About The Arrests Of Tablighi Jamaat Members, SCROLL.IN (Last Visited Dec. 7, 2020, 4:15 Pm).

²¹ Konan Kodio Ganstone v. State of Maharashtra, Bom. HC, (Cri.)W.P. No. 548/2020.

²² Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (2018).

driven the global south in a strange inferiority complex which can still be seen today. They still, to some extent, cling to the laws or the customs brought in by the global north, unable to get over them. This divide that has been created between the two groups, its effect/similar position can be seen at the micro level even within a nation where a group exerts its dominance over the minority. This bigotry is practiced in order to show its superiority and the consideration that they belong to minority and undeserving categories.

Muzzafarnagar riots in the year 2013 is a good case in hand where provocative speeches by political parties against Muslims took a communal turn and claimed at least 38 lives²³. The apex court in *Tehseen Poonawalla versus Union of India*²⁴ issued guidelines to be followed by state governments addressing the issue of mob lynching on measures needed to tackle hate speech and provocative statements which usually incite such attacks. When even after this, incidents like lynching of Tabrez Ansari occurs, it shows laxity on part of governments. SC had aptly recommended a separate law dealing with such category of lynching offence stating “special law in this field would instil a sense of fear for law amongst the people who involve themselves in such kinds of activities”²⁵.

B.1 Comparative Study

Constitutional framers carefully analyzed the situations of each country and borrowed the best from them. However, it has not been a blind transplantation of laws, but is incorporated according to socio-cultural and economic needs of India. Diffusion of laws of other countries keeping in mind the Indian situation enabled an effective and workable Constitution. In view of this concept, I shall compare the provisions on hate speech and hate crime in India with that of US and Western Europe to examine the need (if any) of having such enactments in India. Since Art. 19 of the Indian Constitution is based upon US Bills of Rights and also finds a mention in numerous Supreme Court judgments, it would be interesting to know the legal provisions in that jurisdiction. In the matter of regulating hate speech, Benoit Frydman has identified two broad approaches that are adhered to by the various countries. One is the “slippery slope” approach which is followed in United States where primacy is given to individual rights. In America, it is only when a ‘case’ or ‘lawless situation’ has arisen that an action may be taken. Second is the “fatal slope” approach that is commonly followed by a

²³ FP Staff, *Muzzarnagar Riots: The Inciteful Speeches That Fanned Rioters’ Fury*, Firstpost, Sept. 12, 2013, <https://www.firstpost.com/Politics/Muzaffarnagar-Riots-The-Inciteful-Speeches-That-Fanned-Rioters-Fury-1103789.html> (Last Visited On 2020-12-06).

²⁴ *Tehseen Poonawalla v. Union of India*, W.P. (Cri). No. 122/2017.

²⁵ *Id.*

majority of jurisdictions like Europe where hate speech that incites violence and lead to mass killings and other hate crimes are banned. Analysing various legislations that India has on hate speech, it seems to have followed European approach²⁶.

The trend for restricting speech in America has undergone various changes. In the early 1940s and 1950s, specific restrictions were put on freedom of speech. In the year 1942 in *Chaplinsky versus New Hampshire*²⁷, 'fighting words' doctrine was developed according to which limits of free speech were defined when such expression were likely to commit breach of peace²⁸. Later, in *Beauharnais versus Illionois*²⁹ constitutionality of group libel statutes was upheld through which statements inflicted at racial or religious groups were punished³⁰. In *Terminiello versus Chicago*³¹, the court stated that provocative speech induces a condition of unrest, creates dissatisfaction and stir public to anger³². Finally in 1969, the decision in *Bradenburg versus Ohio*³³ established the principle that free speech is constitutionally protected. State prosecution can be initiated on incitement to violence which was likely to produce imminent lawless action³⁴. Even though individual rights have been the essence in current judicial course in America, nonetheless, there have been specific laws in place for inflicting punishment on hate crimes. Hate Crimes Sentencing Enhancement Act, 1994 had been passed by US federal government according to which additional penalties could be imposed by judges if the accused acted because of the actual or perceived 'race', 'colour', 'religion', 'national origin', 'ethnicity', 'gender', 'disability', or 'sexual orientation' of any person³⁵. Further, the scope of the Act was widened under Hate Crime Prevention Act, 2009 by including 'gender, sexual orientation, gender identity and disability and mandating the collection of statistics on hate crimes against transgendered people.' It also empowered federal authorities to assist state and local authorities³⁶.

On the contrary, Western Europe is relatively stringent when it comes to hurling hate speeches. European commission on human rights has played a vital role in curbing hate

²⁶ *Supra Note 15*.

²⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 6 (1942).

²⁸ Erik Bleich, *The Rise Of Hate Speech and Hate Crime Laws in Liberal Democracies*, 37 *Journal Of Ethnic And Migration Studies*, 917, (2011).

²⁹ *Beauharnais v. Illionois*, 343 Us 250, 252, 6 (1952).

³⁰ *Supra Note 28*, Pg. 922.

³¹ *Terminiello v. Chicago*, 337 US 1, 4 (1949).

³² *Supra Note 28*, Pg. 923.

³³ *Bradenburg v. Ohio*, 395 US 444 (1969).

³⁴ *Supra Note 28*, Pg. 913.

³⁵ *Id.*, Pg. 924.

³⁶ *Id.*, Pg. 924 & 925.

speech. “The Council of Europe’s Committee of Ministers to Member States on Hate Speech has defined ‘Hate Speech’ as: ... 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”³⁷. If we specifically see in the context of Great Britain, with the passage of Racial and Religious Hatred Act in 2006 it sought to limit the inflammatory speeches. Its laws on hate crime have been deeply influenced by the United States. Through its Crime and Disorder Act, 1998, it firstly stated nine new crimes that distinctly depend upon racial aggravation including crimes of assault, criminal damage, public order offences and harassment, which carry higher maximum penalties than their non-racially aggravated counterparts³⁸. Secondly, if it is proved that an offence was motivated by racially hostility either during or immediately before or after the crime, then it can be considered as racially aggravated³⁹.

India on the other hand has provisions which implicitly cover hate speech such as Sections 153A, 153B, 153C, 295A, 298 and 505 of IPC. However, when it comes to hate crimes, it is still at its nascent stage. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Sections 354A, 354B, 354C, 354D, 376, 509, 498A of IPC etc. are a few legal provisions that punish for offences committed on the basis of caste or gender respectively. Further, after the apex court direction, Anti Lynching Act was passed by a few states. Apart from these specific legislations, all offences whether motivated due to biases or not, are treated at the same pedestal.

Having studied the position of US and Great Britain, in terms of hate speech, it can be said that though there are legislations in place, but lately, courts have also looked into individual rights approach adopted in the US. India is a pluralistic democratic nation where dissenting voices are encouraged to the point they do not cause public disorder. The preamble of the Indian constitution states the cardinal principles of liberty of thought, expression, belief, faith and worship. Article 19(1) of the Indian Constitution guarantees every individual freedom of speech and expression. This freedom can be restricted in case the discussion and advocacy reaches the level of incitement wherein Article 19(2) of the Constitution of India needs to be

³⁷ *Supra Note 4.*

³⁸ *Supra Note 28, Pg. 925.*

³⁹ *Id.*, Pg. 925 & 926.

invoked⁴⁰. The jurisprudence aspect of this restriction is based upon the fact that when an individual is guaranteed rights he also has the duty not to violate other person's rights. There is a mutual respect that needs to be adhered to. There is a very thin line of difference between free speech and its violation which needs to be analysed carefully. Thus unlike the extreme ends followed in the US and Great Britain, India being a multi cultural country seems to have taken a balanced approach.

However, as it stands today, we do not have distinct laws to counter the hate crime situation. Therefore, in such cases, laws from the above countries can be looked at. Every country has its own set of problems. However, general progressive legislations can and should be looked at for the growth and development of a nation. Any violence motivated by such differences shakes the very foundation of the country. It is violative of the fundamental rights ensuring equal justice and protection of human rights under Articles 14 and 21 of the Indian Constitution. Having specific laws increase the gravity of that offence and act as detrimental in the minds of people. 'While the state is often the major violator of human rights, Merry writes, ironically it is also the agent for carrying out human rights reforms'⁴¹.

Conclusion

The prejudices of people cannot be a tool to marginalise vulnerable population⁴². India is a land of diverse culture. Every individual has a right to publicize his opinions. The viewpoints can be an agreement or a dissent. However, the views should not create a divide between majoritarianism and sectarianism. In cases where they tend to create bigotry, curbs have to be placed by the appropriate authorities. As analysed, India has efficient legislations on such speeches. However, its effective implementation is the need of the hour. Police officials should also be sensitised on their powers to arrest which should not be exercised arbitrarily. There is a need for specific laws on hate crimes. Only then can the urgency of the situation be realized.

⁴⁰ Shreya Singhal v. Union of India, (Cri.) W.P. No.167/ 2012.

⁴¹ M.Mohsin Alam Bhat, *Hate Crimes in India*, 11, Jindal Global Law Review, 1-5 (2020).

⁴² *Supra Note 4*.