

HATE SPEECH – SOCIETY SHOULD NOT STAND SPEECHLESS

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ABSTRACT

Free speech is an essential feature of democracy. A nation that allows its citizen the Right to Freedom of Speech and Expressions' can only be regarded a progressive nation in true sense. Speech, verbal and non-verbal, plays an important role in dissemination of ideas, beliefs, concepts and doctrines and often initiates a person into action on the expressed views. Existence of multiple opinions in a plural society is indicative of growth and peaceful co-existence and a society which encourages difference of opinion is capable of building a strong nation, defined in the following verse of the poet Rabindranath Tagore:

*“Where the clear stream of reason has not lost its way
into the dreary desert sand of dead habit
where the mind is led forward by thee
into ever-widening thought and action
into that heaven of freedom, my Father, let my country awake.”*

However, provocative speeches, bereft of any logical reasoning, as the poet had contemplated, coupled with ill-conceived thoughts and actions, defying the decorum of a civilized society, bordering on insanity, have off late played havoc not only with the social fabric of a nation but with its unity and integrity as well. Hence, while it is important that a nation allows its citizen the Right to Freedom of Speech and Expressions, it is equally important that such a right do not infringe on other citizen's right to have one's own opinion, ideas, faith and belief, including religious belief. To that extent, a society shouldn't stand speechless, as a mute spectator, to the verbal assault of a few mindless lunatics and must draw a *lakshman-rekha*, a sort of mechanism to keep control on such fringe elements that may try to create differences within a society and destroy the peace and tranquility in the process. This article seeks to study the phenomenon in the backdrop of recent developments where hate speech- online and offline, by an individual or an organization have trampled on fellow citizen's rights. It analyses what constitutes hate speech and the mechanism developed by various nations, including India, in controlling hate

speech without jeopardizing the Right of Freedom of Speech and Expressions ingrained in the Constitution. The options available before the law-makers the world over to restrict hate speech, and in the process keep the window of free expressions wide open has also been analyzed in context of legal framework developed by various nation, which demarcates hate speech *vis-à-vis* freedom of speech and expressions. Needless to mention that when an individual or an organization take recourse to hate speech, it is done with the avowed aim of self-aggrandizement and they do not have the interest of the society or the nation at heart; as often such mischief mongers make their followers to believe. Lastly, trolling on social media, a recent development, aimed at silencing a voice of dissent, a genuine criticism of policy and programmes of the Government or organization, has also been studied in context of its effect to gag free dissemination of views and opinions.

1. INTRODUCTION

The right to swing my fist ends where the other man's nose begins.

- Oliver Wendell Holmes.

The freedom of speech and expression is considered as the utmost condition of liberty. It occupies a preferred and important position in the hierarchy of liberty. Hence, it can be truly said about the freedom of speech and expression that it is the mother of all other liberties.¹ Free speech is quintessential for democracy because it facilitates the exchange of diverse opinions. Dialogue facilitates the testing of competing claims and obtaining of diverse input into political decision making. Free speech is also essential to the enjoyment of personal autonomy. Freedom of speech and expression can be defined as the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. In modern times it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all time.²

Right to Freedom of Speech and Expressions must be exercised with due diligence so that it does not hurt other fellow citizen. Each person should be aware of his duty towards his fellow citizen, particularly in a pluralistic society with multiplicity of ideas and opinion. However,

¹DheerendraPatanjali, *Freedom of speech and expression: India v. America – A study*, India Law Journal (Sept. 14, 2016, 6:30 a.m.), http://indialawjournal.com/volume3/issue_4/article_by_dheerajendra.html

²Id.

such restraint has been found missing in recent times and often citizens indulge in, what is termed as hate speech, merely for self-interest, without bothering about the interest of the society or the nation. Hate speech can be defined as such communication which is aimed at disparaging people on account of their social and ethnic group such as caste, creed, gender, age, race, ethnicity, nationality, religion, sexual orientation, gender identity, physical disability, language, ideology, social class, occupation, appearance, mental capacity and any other distinction that may be weighted down by other. Michel Rosenfeld has defined 'hate speech' as a form of 'speech designed to promote hatred on the basis of race, religion, ethnicity or national origin'.³ Laws in some of the countries define hate speech as any form of speech, gesture or conduct, writing, or display which is forbidden because it would incite violence or prejudicial action against a protected individual or group, or because it would disparage or intimidate a protected individual or group.⁴ In some countries, a victim of hate speech may seek redress under civil law as well as criminal law, or both. Hate speech corrodes the mandate of free speech which is based on sound principles of self-fulfillment, discovery of truth, capacity of decision taking and maintaining a balance in society so that everyone can form their own belief and communicate them freely to others. Thus, it can be said that an act of hate speech is a universal crime. Hate speech is often the precursor to the scapegoating, dehumanizing and demonizing of out-groups, especially minorities, and the escalation of violent attacks. Hate speech has tremendous power as it generates complex human emotions which can stir motives for revenge.

In India's context, the Constitution provides the Right of Freedom of Speech and Expression (Articles 19, 20, 21 and 22) with a view to guarantee individual rights. The Right to Freedom under Article 19 guarantees the Freedom of speech and expression, as one of its six freedoms.⁵ However, this is not an absolute right and subject to certain restrictions to control its misuse.

Internationally, for race related speech, the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) calls for a ban on expressing ideas of superiority or inferiority of people categorized by "race".⁶

³ Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, (2002-2003) 24 *Cardozo Law Review* 1523, 1523.

⁴ Yogyakarta Principles in Action, An Activist's Guide to The Yogyakarta Principles, p125.

⁵ Indian Constitution – Part 3, Article 19.

⁶ Convention on the Elimination of All Forms of Racial Discrimination- Article 4.

Article 20 of the International Covenant on Civil and Political Rights (ICCPR) lay down that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".⁷ Article 19 ensures that hatred based on people's gender, sexual orientation or other features may be limited in the interest of respect of the rights or reputations of others. However, in all the three cases such restrictions have to be specified in law and cannot be left to discretion or arbitrary decision of an authority. It must stand the test of "necessary" requirement in order to avoid any collateral restriction of legitimate expression, which would not be justifiable. It is also essential that such restriction on hate speech is done for a legitimate purpose and does not become an exercise of "power". In view of the subjective nature in ascertaining the "necessary" requirement that qualifies a speech as hate speech, legislation to curb it have often become a subject of heated debate and criticism by the liberals. Many a times a speech is categorized under hate speech to silence critics of social policies that have been poorly implemented in a rush to appear politically correct while others try to point a link between violent rhetoric and real world brutality.⁸ History has many examples when hate speeches were used to trigger ethnic violence resulting in genocide, as it happened with the Jews in Nazi Germany and the Tutsi community in Rwanda. Regulation on hate speech is a post-Second World War phenomenon.⁹

2. HATE SPEECH IN INDIA

In Indian context, contemporary meaning of the term 'hate speech' is inextricable from its origins (as a form of legal action) in colonial attempts 'to assume the role of the rational and neutral arbiter of supposedly endemic and inevitable religious conflicts'¹⁰ Given this historical context, hate speech has primarily been understood in India as referring to speech intended to promote hatred or violence between India's religious communities. This apart, India's hate speech offences are largely a part of the British legacy.¹¹ These provisions were viewed, by the

⁷International Covenant on Civil and Political Rights- Article 20.

⁸ Hate Speech, Wikipedia (Sept. 16, 2016, 9:40 a.m.), https://en.wikipedia.org/wiki/Hate_speech#cite_note-7

⁹Learning with the times — In India, there is no law that defines hate speech, The Times of India (Sept. 17, 2016, 11:10 a.m.), <http://timesofindia.indiatimes.com/india/Learning-with-the-times-In-India-there-is-no-law-that-defines-hate-speech/articleshow/49225313.cms>

¹⁰Asad Ali Ahmed, *Specters of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial Predicament in Raminder Kaur and William Mazzarella (eds)*, *Censorship in South Asia: Cultural Regulation from Sedition to Seduction*, Indiana University Press, 2009, 173.

¹¹ Rajeev Dhavan, *Harassing Hussain: Uses and Abuses of the law of Hate Speech*, Safdar Hashmi Memorial Trust, 2007, 27.

Englishmen, as a necessary expedient to maintain security and stability in their colonial territories: From the British view point, purpose of hate speech provisions was to avoid communal tension, irrespective of who was right or wrong.¹²

Acknowledging India's cultural diversity, the drafters of the Indian Constitution decided that the document must ensure a culture of tolerance by putting some restraints on freedom of speech. Sub-clause (a) of clause 1 of Article 19 of the Constitution states that all citizens have the right to freedom of speech and expression. It also states that the state can put “reasonable restrictions” on the exercise of this right in the interest of sovereignty and integrity of the country, security of state, friendly relations with foreign states, public order, decency and morality and in relation to contempt of court.¹³ Article 28 prohibits any religious instruction in any educational institution wholly maintained out of State funds. Article 51A (h) imposes on every citizen the duty to develop the scientific temper, humanism and the spirit of inquiry and reform.

In March 2014, Supreme Court asked the law commission to suggest how hate speech should be defined and dealt with since the term is not defined anywhere in existing law.¹⁴

2.1 LEGAL PROVISIONS TO CONTROL HATE SPEECH IN INDIA

India prohibits any form of hate speech by several sections of the Indian Penal Code, the Code of Criminal Procedure, and by other laws which put limitations on the freedom of speech and expression.

THE CODE OF CRIMINAL PROCEDURE, 1973.

Section 95 of the Code of Criminal Procedure, 1973 gives government the right to declare certain publications “forfeited” and to issue search warrants for the same. Where-

(a) Any newspaper, or book,

(b) Any document, wherever printed, appears to the State Government to contain any matter the publication of which is punishable under Section 124A or Section 153A or Section 153B or Section 292 or Section 293 or Section 295A of the Indian Penal Code (45 of 1860), the State

¹² Id at 31.

¹³ Supra note 9.

¹⁴ Id.

Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorize any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.¹⁵

THE INDIAN PENAL CODE, 1860

Various sections of IPC deal with hate speech. According to Sections 153A and 153B, any act that promotes enmity between groups on grounds of religion and race and is prejudicial to national integration is punishable. Section 295A of IPC states that speech, writings or signs made with deliberate intention to insult a religion or religious beliefs is punishable and could lead to up to three years of jail.¹⁶

OTHER LEGAL PROVISIONS

There is also Protection of Civil Rights Act, 1955, which was enacted with an aim to abolish untouchability, and it therefore has provisions related to penalize hate speech against Dalits.¹⁷

Section 125 of the Representation of the People Act, 1951 restrains political parties and candidates from creating enmity or hatred between different classes of citizens of India. Section 123(3) of this Act also states that no party or candidate shall appeal for votes on the ground of religion, race, caste, community, language and so on. The Information Technology (Intermediaries Guidelines) Rules 2011, functioning in addition to the Act, further expands the capacity of the Government of India to prohibit 'hate speech'.¹⁸

2.2 CASES CONCERNED WITH HATE SPEECH IN INDIA

Over the past years there have been many instances where cases have been filed in Court in regard of hate speech. Even the Indian judiciary has often come up with some landmark judgments on certain occasions to fight the danger posed by hate speech.

¹⁵The Code of Criminal Procedure, 1973 – Section 95.

¹⁶Supra note 9.

¹⁷Id.

¹⁸Id.

In 1927, an appeal to ban a book Rangila Rasul that concerned the marriage and sex life of Prophet Mohammad was turned down in absence of any law against insult to religion. The Indian Muslim community demanded a law against insult to religious feelings. Hence, Colonial British Government enacted Section 295A of IPC.

In 1932, some Muslim clerics denounced a young woman physician named Rashid Jahan, and threatened her with disfigurement and death. She and three others had published a collection of Urdu short stories called “Angarey” in which they had robustly criticized obscurantist customs in their own community and the sexual hypocrisies of some feudal landowners and men of religion. Under Section 295A of IPC the authorities banned the book and confiscated all copies.¹⁹

In 1933, police arrested Dr. D'Avoine under section 295A of IPC for his article “Religion and Morality”, which was considered offensive to Roman Catholics, in the September 1933 issue of the magazine Reason. The trial judge found that the article’s purpose was consistent with the purpose of the magazine, namely, “to combat all religious and social beliefs and customs that cannot stand the test of reason and to endeavor to create a scientific and tolerant mentality among the masses of the country”. The trial judge Sir H. P. Dastur found that the article had no malicious intent and did not constitute a violation of section 295A.²⁰

On May 27, 1953, Periyar E. V. Ramasamy, who is considered as father of Dravidian Movement, broke the image of God Ganesh in a public meeting at Town Hall. Despite a police complaint and investigation confirming the occurrence, local trial magistrate dismissed the complaint holding that the breaking of a mud image of Ganesh was not an offense, which was also upheld by the Sessions Court and High Court. High Court judge also refused to certify that this was a fit case for appeal to Supreme Court under Article 134(1) (c) of the Constitution. On August 25, 1958, a petitioner, S. Veerabadrhan Chettiar, filed a special leave petition in Supreme Court stating that before breaking the idol, accused gave a speech, and expressly stated that he intended to insult the feelings of the Hindu community by breaking the idol of God. Therefore, Supreme Court disagreed with lower court judgment and criticized lower court for being

¹⁹Priyamvada Gopal, *A Forgotten History*, Outlook India (Sept. 17, 2016, 12:18 p.m.), <http://www.global-sisterhood-network.org/content/view/1988/59/>

²⁰*Hate speech laws in India*, Wikipedia (Sept. 17, 2016, 12:30 a.m.), https://en.wikipedia.org/wiki/Hate_speech_laws_in_India#cite_note-Muawiya-11

cynical but concluded that 5 year has passed and case is stale. Therefore, the very appeal was dismissed.²¹

On Sept 26, 1988, London based Penguin group published Satanic Verses. Sensing trouble, Penguin's Indian arm decided not to publish the local edition. Within 9 days of London publication, India banned Satanic Verses (First country to do so).²²No petition in regard of challenging the government order was filed.

In 1990s, many cases were filed against Maqbool Fida Husain for hurting religious sentiments for painting Bharat Mata as a woman in nudw. Taslima Nasreen's book, "Dwikhandita" faced criticism on the grounds that it outraged the religious feelings of the Muslim community. The West Bengal government ordered forfeiting of all copies of "Dwikhandita". However, in 2005, Supreme Court set aside the decision of West Bengal government to forfeit all the copies of book "Dwikhandita".²³

In the year 2006, some states (Nagaland, Punjab, Goa, Tamil Nadu, and Andhra Pradesh) banned the release or exhibition of the Hollywood movie "The Da Vinci Code" (and also the book). Later on two states lifted the ban under high court order.²⁴

In December 2008, the then Chief Minister of Gujarat Mr. Narendra Modi made a speech at an election rally in Mangrol, justifying the 'fake' encounter of Sohrabuddin, even when the matter was pending in Supreme Court for hearing. The speech also violated the Model Code of Conduct as it incited a community against another. The speech, therefore, created grave misgivings not only in the Election Commission, but among those who had been assisting the Supreme Court in its monitoring of the Gujarat police's investigation into the killing. The Gujarat Government Counsel Mr. K. T. S. Tulsi, quit his brief in protest against Modi not taking him into confidence before branding Sohrabuddin a terrorist. Though the case proceeded from here with a different counsel, Mr. Tulsi did made an attempt to set the records straight in

²¹S. VeerabadranChettiarvs E. V. RamaswamiNaicker& Others, 1958 AIR 1032 , 1959 SCR 1211.

²²Manoj Mitta, Reading 'Satanic Verses' legal, The Times of India (Sept. 17, 2016, 1:05 p.m.), <http://timesofindia.indiatimes.com/india/Reading-Satanic-Verses-legal/articleshow/11622048.cms?referral=PM>

²³ Supra note 20.

²⁴Da Vinci code faces further ban, BBC News (Sept. 17, 2016, 1:30 p.m.), http://news.bbc.co.uk/2/hi/south_asia/5043934.stm

matter related to hate speech by leaving a lucrative position, which became a precedence of citizen's response to hate speech.²⁵

In November 2012, Maharashtra Police arrested Shaheen Dhada for questioning the total shutdown of the city for Bal Thackeray's funeral in a Facebook post. Even her friend Renu Srinivasan was arrested for liking her post.²⁶ Although no religious issues were involved, the two were charged under Section 295 (A) for hurting religious sentiments as well as Section 66 (a) of the Information Technology Act 2000.²⁷ However the charges under Section 295 (A) were later dropped and the girls were charged with Section 505 (2) of the Indian Penal Code, which pertains to statements which create or promote enmity, hatred or ill-will between classes.

In December 2015, Azam Khan, Senior Minister of Uttar Pradesh government, stated that RSS workers are homo-sexual. In response, Kamlesh Tiwari gave an objectionable statement against Prophet Mohammed. Kamlesh Tiwari was arrested and bail was denied. In West Bengal, a Muslim rally against Kamlesh Tiwari led to Kaliachak riots.²⁸

On 26 January 2016, Manjunath Mudugal, an ITI student, was arrested for allegedly posting derogatory comments about Muslim ruler Tipu Sultan on Facebook.²⁹

In July 2016, Shantaram Naik, Congress Rajya Sabha MP, demanded that controversial Islamic preacher Zakir Naik should be booked under various provisions of Indian Penal Code (IPC) for hate speech and spreading communal ill-will. There were many more protests all over the country to arrest Zakir Naik on the charges of hate speech.³⁰

3. HATE SPEECH LAWS IN OTHER COUNTRIES

²⁵G.P. Sampath Kumar, *Hate Speech and the Law*, Frontline (Sept. 21, 2016, 3:53 p.m.), <http://www.frontline.in/static/html/fl2425/stories/20080104242513200.htm>

²⁶*Mumbai shuts down due to fear, not respect*, The Hindu (Sept. 17, 2016, 1:35 p.m.), <http://www.thehindu.com/news/national/two-girls-held-for-fb-post-over-thackeray-funeral/article4111814.ece>

²⁷Ram Parmar, *In Palghar, cops book 21-year-old for fb post*, Mumbai Mirror (Sept. 17, 2016, 1:40 p.m.), <http://www.mumbaimirror.com/mumbai/others/In-Palghar-cops-book-21-year-old-for-FB-post/articleshow/17856942.cms?>

²⁸*NSA against Tiwari : ABHM to challenge HC's order*, The Pioneer (Sept. 17, 2016, 1:45 p.m.), http://www.dailypioneer.com/print.php?printFOR=storydetail&story_url_key=nsa-against-tiwari-abhm-to-challenge-hcs-order§ion_url_key=state-editions

²⁹*Karnataka man arrested for derogatory remark on Tipu Sultan*, India Today (Sept. 17, 2016, 1:50 p.m.), <http://indiatoday.intoday.in/story/karnataka-man-arrested-for-derogatory-remark-on-tipu-sultan/1/579888.html>

³⁰*Zakir Naik should be booked for hate speech and spreading communal ill-will*, The Hindu (Sept. 17, 2016, 1:54 p.m.), <http://www.thehindu.com/news/national/other-states/zakir-naik-should-be-booked-for-hate-speech-and-spreading-communal-illwill/article8835454.ece>

Apart from India many more countries have passed a number of legislation in order to curb hate speech and related crime.

3.1. UNITED STATES OF AMERICA

The 1789 Constitution of the United States of America dealt with only three heads of power—legislative, executive, and judicial—and sketched the basic outlines of federalism in the last four articles. The protection of civil rights were not written in the original Constitution but was added two years later with the Bill of Rights, implemented as several amendments to the Constitution. The First Amendment ratified on December 15, 1791, stated that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

Although this section was considered only to apply to the federal congress (i.e. the legislative branch), the 14th Amendment, ratified on July 9, 1868, clarified that this prohibition applies to laws of the states as well. Some state constitutions also have a "free speech" provision, most notably, California.³¹ However, some limits on expression were contemplated by the framers and have been read into the Constitution by the Supreme Court.

There have been numerous instances where the Supreme Court of the United States of America has upheld the right to freedom of speech and expressions by interpreting the First Amendment in broadest possible terms so much so that it prohibits Governments from regulating the content of speech, subject to a few exceptions such as defamation and incitement of riot. Even where a speech encourages illegal violence, instance of incitement qualify as criminal only if the threat of violence is imminent. This strict standard prevents prosecution of many cases of incitement, including prosecution of those advocating violent opposition to the Government, and those exhorting violence against racial, ethnic or gender minorities. In 1969, the Supreme Court in a unanimous decision set aside Bradenburgh’s criminal conviction concluding that Ku Klux Klan may have advocated violence, but that it had not incited it. Significantly, in drawing the line between incitement and advocacy, the Court applied to hate speech a standard it had

³¹Pruneyard Shopping Center v. Robins, 447 U.S. 74.

recently established to deal with Communist speech involving advocacy of forcible overthrow of Government.³²

In the 1980s and 1990s, more than 350 public universities adopted "speech codes" regulating discriminatory speech by faculty and students. However, these codes have not fared well in the courts, where they are frequently overturned as violations of the First Amendment. Debate over restriction of "hate speech" in public universities has resurfaced with the adoption of anti-harassment codes covering discriminatory speech.³³

In 1992, Congress directed the National Telecommunications and Information Administration (NTIA) to examine the role of telecommunications in advocating or encouraging violent acts and the commission of hate crimes against designated persons and groups. The NTIA study investigated speech that fostered a climate of hatred and prejudice in which hate crimes may occur. The study failed to link telecommunication to hate crimes, but did find that "individuals have used telecommunications to disseminate messages of hate and bigotry to a wide audience." It recommended that the best way to fight hate speech was through additional speech promoting tolerance, as opposed to government regulation.³⁴

3.2 UNITED KINGDOM

Though the United Kingdom does not have a written Constitution, nevertheless, it has enacted a number of statutes which criminalize hate speech against several categories of persons. The statutes forbid communication which is hateful, threatening, abusive, or insulting and which targets a person on account of disability, ethnic or national origin, nationality (including citizenship), race, religion, sexual orientation, or skin color. The penalties for hate speech include fines, imprisonment, or both.^{35 36 37 38 39}

3.3 CANADA

³²Prof. M. K. Bhandari & Dr. M. N. Bhatt, *Hate speech and freedom of expression: Balancing Social Good and individual liberty*, 2012.

³³Kermitt L. Hall, *Free speech on public college campuses overview*, First Amendment Center (Sept. 17, 2016, 2:34 p.m.), <http://www.firstamendmentcenter.org/free-speech-on-public-college-campuses>

³⁴Victoria Munro, *Hate Crime in the Media: A History* (May 2014), ABC-CLIO. p. 230.

³⁵ Criminal Justice Act, 2003.

³⁶Criminal Justice and Public Order Act, 1994.

³⁷ Amendment to Crime and Disorder Act, 1998

³⁸ Racial and Religious Hatred Act 2006 (England and Wales)

³⁹Criminal Justice and Immigration Act 2008.

Canada is one of the few nation which has adopted the International covenants and standards related to hate speech in its domestic laws. The Canadian Charter of Rights and Freedoms, a document at par with the Bill of Rights, guarantees this freedom and the Supreme Court has recognized the three values associated with the Charter's guarantee of expression (i) seeking truth; (ii) participating in social and political decision making and (iii) achieving self-fulfillment and human flourishing in a pluralistic society.⁴⁰The latter is very close to the "Concept of Self-determination" that Robert C. Post regards as being at the heart of free speech.⁴¹

Stressing the Canadian Constitution's commitment to multicultural diversity, group-identity, human dignity and equality, the Supreme Court adopted a nuanced approach designed to harmonize these values with those embedded in freedom of expression. Thus, the Canadian protection of freedom of expression, like the American, relies on the justification from democracy, on that from the pursuit of truth and on that from autonomy. In Canada dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.⁴²

3.4 COUNCIL OF EUROPE

The Council of Europe has worked intensively on this issue. While Article 10 of the European Convention on Human Rights does not prohibit criminal laws against revisionism such as denial or minimization of genocides or crimes against humanity, as interpreted by the European Court of Human Rights (ECHR), the Committee of Ministers of the Council of Europe went further and recommended to member governments to combat hate speech under its Recommendation R (97) 20. The ECHR does not offer an accepted definition for "hate speech" but instead offers only parameters by which prosecutors can decide if the "hate speech" is entitled to the protection of freedom of speech.⁴³

⁴⁰ Canada Charter of Rights and Freedoms, Constitution Act 1982, Pt.I.

⁴¹ Robert C. Frost, Racist Speech, Democracy and First Amendment (1991) 32 WM & MARY L REV 267.

⁴² Bhandari & Bhatt, *supra* note 32.

⁴³ Alina Dain Sharon, A Web of Hate: European, U.S. Laws Clash on Defining and Policing Online Anti-Semitism, The Algemeiner (Sept. 17, 2016, 3:00 p.m.), <http://www.algemeiner.com/2013/02/28/a-web-of-hate-european-u-s-laws-clash-on-defining-and-policing-online-anti-semitism/#>

The Council of Europe has also created the European Commission against Racism and Intolerance, which has produced country reports and several general policy recommendations, for instance against anti-Semitism and intolerance against Muslims.

On May 31, 2016, Facebook, Google, Microsoft, and Twitter, jointly agreed to a European Union code of conduct obligating them to review the majority of valid notifications for removal of illegal hate speech posted on their services within 24 hours.⁴⁴

4. CRITIQUES OF HATE SPEECH

Philosophers like Judith Butler and Kathleen E. Mahoney have challenged the traditional view of restrictions upon hate speech as ‘contradictions’ or ‘restraints’ upon freedom of expression. While Mahoney argues that hate speech is not a ‘legitimate speech’ (comprising instead ‘a form of harassment and discrimination that should be deterred and punished just like any other behavior that harms people’),⁴⁵ Butler argues that the secular/liberal juridical framework regarding hate speech fails to adequately explain the impact and nature of hate speech in alternate cultural contexts.⁴⁶

The UNESCO has always stood for free flow of information as well as freedom of expression and maintains that this should be observed as a matter of norm and in absolute terms without any legislative control. However, even the most ardent supporter of free speech believe that in the present context, where a speech or an act spreads like wild fire, there is a need to develop a mechanism to monitor and control hate speech in larger societal good. Hence we need to draw a line that separates freedom of speech and expression from hate speech.

5. CONCLUSION

It may be concluded that freedom of speech and expression is a double edged sword which may benefit the society if used in right context. On the other hand its sharp edge can create wide rift within a society that may even lead to disintegration of a nation, if it crosses the line

⁴⁴ Alex Hern, Facebook, YouTube, Twitter and Microsoft sign EU hate speech code, The Guardian (Sept. 17, 2016, 3:10 p.m.), <https://www.theguardian.com/technology/2016/may/31/facebook-youtube-twitter-microsoft-eu-hate-speech-code>

⁴⁵Kathleen E. Mahoney, Hate Speech: Affirmation or Contradiction of Freedom of Expression (1996) University of Illinois Law Review 789, 793.

⁴⁶ Judith Butler, The Sensibility of Critique: Response to Asad and Mahmood in T. Asad, W. Brown, J. Butler and S. Mahmood, Is Critique Secular ?Blasphemy, Injury and Free Speech, Townsend Center for the Humanities, 2009,118.

of decency and becomes a hate speech aimed at a particular segment of the society- a race, believers of a particular religion or an ethnic group. It entirely depends on the intelligence and social and educational upbringing of the person. An enlightened society may use it effectively but the same may not be true for every society and nation. Likewise the extent of freedom of speech and expression granted to people the world over varies from nation to nation. This depends on the level of enlightenment of a society and a nation. Thus, while America allows the right to freedom of speech and expressions in the widest terms the same may not be true for Latin American or African nations. The outbursts of a Donald Trump may not create any disturbance in USA but such rhetoric may lead to violence in fragile and volatile democracies in nations of Africa. Nations like India fall somewhere in between.

In recent times, efforts have also been made in India to minimize the scope of ‘hate speech’ and allow people greater freedom of speech and expression. Debate has been initiated in India to review the provisions such as Sections 153A, 153B, 295A and 505 of IPC that restricts freedom of speech and expressions in the name of hate speech and have a more liberal approach as in United States of America. Supreme Court of India has been petitioned for the purpose. Senior Advocate K. T. S. Tulsi who represented Dr. Subramanian Swamy against the decision of the Delhi Government to prosecute Swamy under these Sections of IPC feels that “the same may require permission from the Centre since one of the IPC Sections has national ramification.”⁴⁷

The Supreme Court has taken contradictory stand while hearing cases on two different cases. In April 2013 the bench of then Chief Justice Altamas Kabir issued a notice to the central government on a petition seeking to frame guidelines to curb elected representatives from delivering hate speeches in pursuance of their political goals. The notice was also issued to the Election Commission of India, and the Maharashtra and Andhra Pradesh governments. The public interest litigation (PIL) was filed by the voluntary organization Pravasi Bhalai Sangathan.⁴⁸

⁴⁷ Neha Lalchandani & Abhinav Garg , Hate speech: Delhi govt nod to prosecute Swamy, The Times of India (Sept. 21, 2016, 4:20 p.m.), <http://timesofindia.indiatimes.com/city/delhi/Hate-speech-Delhi-govt-nod-to-prosecute-Swamy/articleshow/50689907.cms>

⁴⁸ Supreme Court issues notice to centre on curbing hate speeches, India Today (Sept. 17, 2016, 2:01 p.m.), <http://indiatoday.intoday.in/story/supreme-court-issues-notice-to-centre-on-curbing-hate-speeches/1/261290.html>

However, the Supreme Court in March 2014 dismissed a PIL filed by Advocate M. L. Sharma seeking intervention by the court in directing the Election Commission to curb hate speeches. Dismissing the plea, the Apex court said that it could not curb the fundamental right of the people to express themselves.⁴⁹ Thus the debate on efficacy and effectivity of these Sections of IPC may be a long drawn process before a decision can be taken with regard to keeping or setting aside these Sections of IPC.

Right to freedom of speech and expression which is symbolic of individual autonomy needs to be weighted down in the backdrop of larger societal good and national interest that such speech or expression may lead to. It is therefore imperative to understand when does offensive speech shade into hate speech? Often, such speech and expressions are meant for personal gains and have nothing to do with social good. In such cases the State should intervene for the sake of peace and harmony in society. In the present time when a speech gets rapidly disseminated due to internet, the need for caution increases so that pluralism is respected and dignity of every single citizen is protected. People, especially on social media will have to brace themselves to handle communication that is increasingly disturbing and offensive with restraint and maturity.

At the same time the State needs to counter hate speech through reason instead of regulation. Right to Freedom of Speech and Expressions does not extend the right to advocacy of hatred based on race, ethnicity, gender or religion, or that may lead to “incitement with the purpose to cause harm”. As the Indian democracy becomes more robust, there have been an increase in speeches which may lead to controversy, contestation and conflict, but nevertheless such speech must never cross the borderline of public decorum which becomes the humble duty of every citizen. If we forget this duty, it becomes the duty of the State to intervene. In order to maintain the integrity of its constitutional system along with harmony in society, it is the ordained duty of the Government and the society to protect both- equality and the freedom of expression as much as to not remain speechless against hate speech.

⁴⁹Sajid Sheikh, Supreme Court Erred Again: Mistaken on Hate Speech as Free Speech, Lawlex (Sept. 17, 2016, 2:09 p.m.), <http://lawlex.org/lex-bulletin/supreme-court-erred-again-mistaken-on-hate-speech-as-free-speech/9420>