Limits to Free speech: A Comparative Study of Philosophical and Legal Perspectives on Hate Speech

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Abstract

In 2014, the Supreme Court of India asked the Law Commission of India to examine what would constitute 'hate speech' in the context of numerous Public Interest Litigations being filed against political leaders for their speeches inciting hatred and violence against marginalized communities. In this context, it has become necessary to engage in a discussion on the philosophical and legal debates regarding 'hate speech,' and look into the complexity of striking a balance between the liberal ideals of prioritizing the search for truth by individuals and the communitarian ideals of ensuring social harmony in a deeply plural and culturally heterogeneous society like India. This paper attempts to question whether hate speech in India should be identified with 'fighting words' as in US leaving wider scope for free speech than is currently existing; or should hate speech be conceived in terms of "dangerous speech" as conceived by Susan Benesch which leads to hate crimes against communities; should a specific law be enacted by the Parliament to explicitly and concretely define and prohibit hate speech and if so, what should be the philosophy guiding such a law in the context of India whose colonial past and partition legacy has left bitter marks on Indian psyche.

Keywords — *Freedom of speech, Hate speech, Constitutional rights, Group rights, Individual rights*

INTRODUCTION

The first section of this paper briefly discusses the emergence of 'free speech' doctrine along with limits to freedom of speech in liberal philosophy of the West, particularly the United Kingdom (UK) and the United States of America (USA). The second section discusses the context in which the provisions of the Indian Penal Code that are identified as hate speech were added in the late nineteenth century under the British Raj. The third section deals with the socio-historical context in which the Article 19(1) (a) was inserted in the Indian Constitution along with the first constitutional amendment that added reasonable restrictions to the freedom of speech and expression under Article 19(2). It discusses the equivocal interpretations of judiciary, since independence, on the question of what constitutes hate speech. The final section provides a comparative discussion of hate speech provisions in USA and Canada. It argues that in a multicultural country like India, the social, historical and political context matters in stating the philosophy on which free speech is justified and in deciding concretely what constitutes hate speech. This paper argues that in India, it does not serve the public interest to take an absolutist stand towards free speech as in USA and that a balance has to be found between extreme freedom and extreme restrictions on free speech. Taking from the arguments of different legal and philosophical scholars, it argues that the speech that causes psychological or moral injury to the listeners should be legally prohibited in order to allow for constitutional equality of both the powerful and the marginalized and the preservation and continuance of cultural diversity that India is renowned for.

I

Before the emergence of modern democracies in the West, there were restrictions and regulations on speech of the subjects. Until the late seventeenth century, publications of any kind in England required license from the government. Following the renaissance period and the emergence of the age of reason or Enlightenment in the long eighteenth century (1685-1815), individual autonomy from the State's legal authority and public opinion became the focus of Western philosophers. Consequently, John Stuart Mill's defense of freedom of speech in *On Liberty* (1859) became the most famous and still the most discussed liberal defense of free speech [1].

According to J.S. Mill, an individual must be free to express oneself through speech, writing or gestures and must not be restricted by laws of the state or by public opinion unless the individual's actions inflict harm on others (harm principle). He wrote in a period when democracy (the rule of many) began to be accepted as a better form of government than the rule of the monarch. He was apprehensive of what he termed as the 'tyranny of the majority' in a democracy in which the views and ways of life of different minorities could be opposed and suppressed (Mill 1859, 8). He was of the opinion that even if a

single individual holds an opinion that is contrary to the opinion of others, he should not be prevented from expressing his view. Mill observed that every individual should have the right to think, speak and act for oneself and make mistakes and learn from them instead of being advised by others on how to lead his life.

Mill and Holmes' defense of free speech

J. S. Mill believed that freedom of speech is essential for the society to be exposed to a variety of ideas so that in collision with errors and half-truths, there is a maximum chance for the emergence of complete truth. Mill was a consequentialist in that he believed that the consequence of a free exchange of ideas will benefit each individual's self development process and the society as a whole will flourish. He believed that when an individual's views are challenged in an environment of free speech, he actively thinks about his views and either changes them or holds on to them with a new vigor instead of being a passive recipient of dead dogmas of his society or ancestors. Thus for Mill, free speech was important in the search of the ultimate truth and in the development of human beings as active and rational beings [2]. In USA, a former colony of UK, similar views on freedom of speech of individual citizens prevailed when the First Amendment to the constitution of USA was enacted in 1791. The First Amendment prevented the Congress (lower House of the Federal legislature) from making laws that abridged the freedom of speech of the people [3]. Like J.S.Mill, Justice Oliver Wendell Holmes Jr., of the Supreme Court of USA defended the freedom of speech as, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[4] Holmes observed that unless there is a "clear and present danger" (Warburton 2009, 10), constitutional protection of free speech is not applicable. Consequently, the USA's protection of freedom of speech is identified as an 'absolutist' approach to free speech wherein free speech is restricted only on grounds of imminent violence or "narrowly-defined obscenity" rather than the 'content' of the speech itself [5]. *This section has set the context in which free speech came to be accepted as a value that is necessary for discovering truth and human development.* Additionally, free speech came to be perceived as an *important feature of democratic* national governments that are accountable to people as it *empowered the citizens to criticize the government for its failures and acts of omission and commission without the fear of suppression.* It has briefly laid down the liberal philosophy from which the free speech doctrine emerged espousing minimal interference from the state and the society as long as there is no imminent threat of social disruption.

II

The British government enacted penal codes in its colonies to maintain law and order so as to enable an unhindered process of colonial exploitation. In British India, the Indian Penal Code (IPC), the main criminal code, was drafted in 1860 based on the recommendations of the first law commission of India set up in 1834 and chaired by Thomas Babington Macaulay. After few revisions based on the socio-political context (the sepoy mutiny of 1857), the IPC came into force on 1 January, 1862. Sections 153A, 153 B, 295, 295 A, 298 and 505 were added in the IPC [6] under which public expression of hatred towards a community or individual with the intention to incite violence against them was and is still punishable in India in addition to provisions under Criminal Procedure Code (CrPC) of 1973. Sections 153A, 153 B of IPC are classified under offences against the public tranquility; sections 295, 295 A, 298 under offences relating to religion; section 505 under offences relating to criminal intimidation, insult and annoyance.

It is to be noted that Macaulay laid great emphasis on maintaining stability in British India under the East India Company (until 1858) [7] and conceived Indian colonial subjects as particularly and uniquely vulnerable to passionate crimes on the basis of perceived insult to their religion. In consonance with the paternalistic attitude of the oriental thinkers, Macaulay considered that the British administration should take up the role of a neutral and rational arbiter as the subjects had not reached the level of intellectual and emotional maturity as that of the Western civilization. He observed that it was not important whether a speech on the religion of others was true or false but whether it had the intention to cause hurt [8].

The search for truth or human development was not as important as the *need to maintain security and stability in the colony* as Macaulay commented, "No offence in the whole [Indian Penal] Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection"(Macaulay 2002, 102). Thus the IPC emerged from a context in which the authors of the code considered "Indian civilization as despotic, hierarchical, stultifying and mired in superstition" [9] and Indians as "incapable of agency beyond an ancient and immutable cultural framework dictating their responses" (CCMG, 13). Ahmed observes that such a notion of Indians justified the continued presence of the British in India with the burden of civilizing their subjects and the making of laws to regulate religious passions conversely constituted them (Ahmed 2009, 177). Liang notes that, "once you have a law that allows for the making of legal claims on the basis of charged emotional states, you begin to see the emergence of cases that steadily cultivate a legal vocabulary of hurt

sentiments"[10]. The IPC created a legal category of hatred leading to self-fulfilling prophecy. This section has shown that the *emergence of hate speech provisions in Indian criminal code, later criminal procedure code and other laws had their roots in the perception of the colonial masters on the role of religion in destabilizing the security and order of the colony under their rule.* Being aware of this historical background is necessary to discuss what constitutes hate speech in India and also whether it has to be narrowly or broadly defined in relation to the constitutionally guaranteed freedom of speech and expression.

III

Dr. B.R. Ambedkar stated in the Constituent Assembly that fundamental rights in the draft Indian Constitution were inspired from the American Constitution with its Bill of Rights (first ten amendments to the American Constitution) [11]. Like the freedoms defined in the Bill of Rights are not absolute as understood from the judgments of the Supreme Court of USA, the fundamental rights as embodied in Indian Constitution were drafted with exemptions. Ambedkar justified the exemptions citing from the Supreme Court judgment in *Gitlow Vs. New York* as: "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom" (ibid). Nevertheless, when the Indian Constitution came into force on 26 January, 1950, the fundamental rights of freedom guaranteed under Article 19 [12] were not subject to 'reasonable restrictions' under Article 19 (2) which were later added under the Constitution (First Amendment) Act, 1951, with retrospective effect. Reasonable restrictions to right to freedom were identified as restrictions in 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 in relation to contempt of court, defamation or incitement to an offence" [13].

Jawaharlal Nehru, the first Prime Minister of India, defended the enactment of the First Amendment in 1951 recalling the horrors of partition on the basis of religion and also defended the continuance of section 153A of the IPC. Narrain observes that for Nehru, freedom of speech can only be guaranteed by the maintenance of public order and safety and that Nehru trusted the "state as having the common sense to differentiate between dangerous speech and speech that is in the domain of political criticism, satire, creativity, art, humour and social reform"[14]. In Indian legal history, the appellate courts have given judgments that sometimes have upheld what has been contested as hate speech as part of free speech in search of truth and at other times have agreed with the state when it restricted free speech to maintain public safety and peace.

In the early decades since Indian independence, the Supreme Court often justified restrictions on free speech for the sake of maintenance of public order stating that "…Liberty has, therefore, to be limited in order to be effectively possessed' [15]. It was observed that free speech restrictions were necessary for the citizens to peacefully engage in "their normal avocations of life" [16]. Such judgments have to be noted in the context of the immediate history of partition of India on communal grounds due to which speech or text promoting hatred between religious communities was restricted for the sake of maintaining communal harmony. The same historical context had motivated the inclusion of preservation of minority rights (Articles 29 and 30) in the Indian Constitution. In addition to the reasonable restrictions provided under Article 19(2), the Supreme Court upheld the section 295 A of the IPC as a reasonable restriction in the interests of maintaining public order in *Ramji Lal Modi v State of Uttar Pradesh* (1957). In its judgment, the Court noted that section 295 A penalized only those acts or insults that were "perpetuated with the *deliberate and malicious intention* of outraging the religious feelings of the class" (emphasis added) [17].

Yet the focus on 'intentions' of the speaker or writer has not been consistent and the 'immediate consequence to public order' has been the vantage point from which free speech has been prohibited as hate speech. In *Gopal Vinayak Godse v Union of India and ors* (1971) case, the Union government had charged under section 153 A that the book 'Gandhi-hatya Ani Mee' had the potential to create public disorder. The Bombay High Court held that, "adherence to the strict path of history is not by itself a complete defence to a charge under section 153A" [18]. While declaring that truth in itself cannot be a defence for speech promoting hatred among communities, the Court however rejected the prohibition of the book stating that the 'intention of the writer' was not malafide. It also commented that 'intentions' of the writer was irrelevant if the writing was of the nature specified in section 153 A. The Court reasoned that as the writing did not deal with the then contemporary communal problem it had limited potential to provoke immediate public disorder and so the book need not be prohibited. Even in 2007, the Supreme Court held that the right to free speech "may at times have to be subjected to reasonable subordination to social interests, needs and necessities *to preserve the very core of democratic life – preservation of public order and*

rule of law"(emphasis added) [19]. Unlike US, the 'content' of the speech is looked into by the Indian courts to penalise speech, depending on the ideology or opinions expressed if it has the potential to affect the public order [20]. Even though the Indian judiciary has not taken an absolutist approach to free speech as in US, in some of its judgments, it has upheld the freedom of speech of citizens protecting the rights of authors, publishers, film makers to critique and reform religion in a rational and restrained manner addressed to reasonable audience (Narrain 2016, 121-122).

On the other hand there have been judicial pronouncements by some judges that have condoned hate speeches in the guise of freedom of speech with the rationale that free exchange of ideas is necessary to arrive at the truth. In *N. Veerabrahmam vs State Of Andhra Pradesh* (1959) case, where the majority judges of Andhra High Court upheld that a book by Veerabrahmam on Bible had hurt the religious sentiment of Christian citizens and therefore had to be prohibited from circulation. Justice Bhimasankaran gave a dissenting pronouncement, "…our law and Constitution do allow citizens even to offer insults to religion, if such insults are not made with the deliberate and malicious intention of outraging the religious feelings of that class, on the twin principles that curbs on freedom of expression are a greater evil than any consequences that may follow by exercise of such freedom and that one must not be afraid of error so long as truth is free to combat it" [21]. The Supreme Court on 3 March, 2014 had dismissed a Public Interest Litigation (PIL) seeking its intervention in directing the Election Commission of India to curb hate speech stating that *"We cannot curtail fundamental rights of people. It is a precious right guaranteed by Constitution… we are a mature democracy and it is for the public to decide. We are 128 million people and there would be 128 million views. One is free not [to] accept the view of others"* (emphasis added) [22]. The discussion in this section points out that the inconsistent judgments and pronouncements on limits to free speech flow from the broad language used in the IPC and the CrPC that allow different interpretations depending on the ideological inclinations of the judges interpreting it.

IV

US, the world's oldest democracy, follows absolutist approach to freedom of speech by which speech is restricted narrowly in cases of clear and present danger of violence and not on the basis of the content of the speech even if it advocates violence [23]. Certain words are classified as 'fighting words' which when uttered provoke the listener to commit an act of violence [24] and only these are unprotected by the First Amendment [25]. Weinstein observes that such an approach is unique for "the strong protection it affords to some of the most noxious forms of speech imaginable"[26]. Donald Trump, as the Republican US Presidential nominee, had made statements in 2016 against Muslims and women that would have been penalised as hate speech in Western European democracies but in US it is constitutionally protected under the First Amendment.

This absolutist approach has been criticized by scholars like Mahoney who state that the perception of a marketplace where all kinds of ideas can be freely exchanged is based on the assumption of a society with high degree of dialogue and inter-communication [27]. She says that for a 'marketplace of ideas' to function effectively, there is a need for equal participation of all voices so that ideas may be scrutinized on their merit rather than on the number of people supporting it (quality not quantity). She argues that in a world where the media is owned by multinational and wealthy conglomerates, the ideas that see the light of the day are often those of the socially, economically and politically powerful people. In such a situation, "untruths can certainly prevail if powerful agencies with strong motives gain a hold in the market" (Mahoney 1996, 800).

Mahoney argues that hate speech is not legitimate speech and that it is "a form of harassment and discrimination that should be deterred and punished just like any other behaviour that harms people" (ibid, 793). She asserts that *hate speech must not be seen from the lens of autonomy of an individual to exercise her right of free speech but must be regarded as a social and group based activity.* She argues that hate speech should be viewed as an injury in itself as it causes the victims to withdraw from full participation in the society in fear, "They are humiliated and degraded, and their self-worth is undermined. They are silenced as their credibility is eroded. The more they are silenced, the deeper their inequality grows"(ibid, 793). The *ability of hate speech to incite violence must be considered distinctly from its ability to cause psychological injury or 'moral injury'* as Mahmood would consider it [28]. Butler argues in a similar vein that movies promoting negative portrayals of Muslims not just depict violence but also "they do violence, and, most peculiarly, they do both in the name of freedom"[29]. I argue that In India too, it is necessary to consider hate speech as an injury in itself as it harms psychologically the people against whom it is addressed. In the case of Muzaffarnagar riots in 2013, community leaders and politicians of both Hindu Jat and Muslim communities had delivered hate speeches in Mahapanchayats that led to large scale violence (physical and sexual) and displacement of at least 50,000 people, majority of whom were Muslims [30]. Even though many politicians were booked for hate speech none of them were convicted in the court of law. Even after three years, the riot victims did not want to go back to their own villages from which

they had fled because of the fear that has been instilled in them due to the physical and psychological violence of hate speeches [31]. The Delhi Minority Commission, in its fact finding report on the North-East Delhi riots of February 2020, pointed out that incendiary speeches by certain political party leaders led to massive violence and huge loss of lives and property, which could have been prevented had those who made hate speeches were immediately arrested [32].

In Canada, the Supreme Court has prohibited hate speech as not only offensive but as a serious injury on emotional and psychological health of the people [33]. In the case of a Canadian high school teacher James Keegstra who repeatedly made anti-semitic statements in class, he was convicted for intentional public expression of ideas intended to promote hatred against an identifiable community even though there was no evidence of his incitement to anti-semitic violence [34]. The Court rejected the American absolutist approach in which 'clear and present danger' to violence was required to convict a person, stating that such a test was incapable of addressing the harms that hate speech causes undermining "mutual respect among diverse racial, religious and cultural groups in Canada than to promote any genuine expression of needs or values"(Rosenfeld 2002, 1543). The court asserted that hate propaganda had only 'marginal' truth value that is significantly outweighed by the Canadian constitutional value of 'equality' that is harmed by hate speech. The majority judgment noted, "'[T]he international commitment to eradicate hate propaganda and, most importantly, the special role given [to] *equality and multiculturalism* in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression" (emphasis added) (Keegstra 1990, SCR 687).

In India too, there is a need of formulating a law prohibiting hate speech in concrete terms instead of relying on a number of provisions of colonial IPC and sections of CrPC. This is important in the contemporary socio-political scenario in which we observe politicians making hate speeches before state and central legislative assembly elections to polarize voters and win elections. While the existing hate speech provisions have been abused to curtail the creative freedom of expression of artists and writers in a lengthy judicial process which becomes a punishment in itself according to Dhavan [35], they have not deterred politicians from inciting communal violence in various places across India and across different points of time since independence. When we formulate a law prohibiting hate speech we must arrive at a philosophy guiding the law. *In a multicultural country like India, the social, historical and political context matters in stating the philosophy on which free speech is justified and in deciding concretely what constitutes hate speech.* Our laws cannot be based on liberal and secular view of the West as Butler suggests that the moral framework of hate speech discourse of the West draws upon "Christian discourse and social history" and the historical circumstances under which free speech doctrine emerged (Butler 2009, 103).

CONCLUSION

Given the Indian history of centuries of co-existence of diverse communities, *we need to base our arguments for free speech on values of 'equality of groups' and 'cultural diversity' than on values of arriving at a singular truth at the expense of harming communities.* Group rights, an essential part of fundamental rights under Articles 29-30 of Indian Constitution, should have predominance over the right to free speech under Article 19, in the context of hate speech. We can take guidance from the Supreme Court of Canada's justifications for free speech, "seeking and attaining truth is an inherently good activity… participation in social and political decision-making is to be fostered and encouraged… diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated *in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed*" (emphasis added) (Keegstra 1990, SCR 687, 728). We could take into consideration the Canadian conception of individual autonomy that "is less individualistic than its American counterpart, as it seemingly places equal emphasis on the autonomy of listeners and speakers" (Rosenfeld, 1543). A philosophy in which certain abhorrent forms of free speech (in the guise of individual autonomy to express one's views), is prohibited will allow for the self-expression of those whose voices are in the danger of getting drowned due to socio-economic and historic inequalities.

In concrete terms, such a law can identify what is hate speech depending on five variables put forth by Susan Benesch, "(1) a powerful speaker with a high degree of influence over the audience, (2) the audience has grievances and fear that the speaker can cultivate (3) a speech act that is clearly understood as a call to violence (4) a social or historical context that is propitious for violence, for any of a variety of reasons, including longstanding competition between groups for resources, lack of efforts to solve grievances, or previous episodes of violence (5) a means of dissemination that is influential in itself, for example because it is the sole or primary source of news for the relevant audience"[36]. Even though many of our judicial pronouncements have taken into account two or more of these variables into account in prohibiting hate speech, I conclude that explicit and concrete definitions, prioritising the

constitutional values of equality of groups and not just individuals and cultural diversity, which do not leave wide room for interpretations will benefit our society in the longer run.

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[37] This suggestion is based on the assumption that state and its courts are part of the society and cannot be considered as neutral arbiters standing above the society at all times.