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A TALE OF RELUCTANCE AND RESPONSE: AN ANALYSIS OF THE JUDICIAL APPROACH TO HATE SPEECH IN INDIA

Ms. Shaima Vahab*

Introduction

There is a surge in hate speech cases in India along with a slight increase in those that reach the courts. The judiciary has always relied on ‘public order’ and ‘morality’ to curtail speech that incites hatred. This has conjured up several problems that warrant a re-look. The decision of the Supreme Court in *Pravasi Bhalai Sangathan v. Union of India*¹ is cardinal here. It indicates a seminal shift in the judicial approach. The earlier decisions of the Apex Court give prominence to the subjective concepts of hurt and wounded feelings of those subjected to hate speech. The in-depth analysis of the court in *Pravasi Bhalai Sangathan* borrows significantly from the Canadian judicial interventions and discourse on hate speech, particularly the decisions in *Canada v. Taylor*². The Court justifies the proscription of hate speech as it strikes at the fundamental rights of equality, dignity, and the right to life. It excludes, discriminates, and marginalizes the subjected group. The ‘other’ing that hate speech does takes away the assurance that they are worthy of equal treatment in society and effectively silences them. The Court observed judicial deference, holding that the legislative provisions are effective in curbing the menace while simultaneously directing the Law Commission to come up with

* UGC SRF research scholar at the School of Indian Legal Thought, Mahatma Gandhi University, Kerala

¹ AIR 2014 SC 1591

² [1990] 3 SCR 892

suggestions to strengthen them, hinting at an inconclusive and ambiguous judicial mind. In the cases that followed, the judiciary attempted to distinguish between hate speech and free speech. And yet, even after what seemed like an acknowledgment of the many harms of hate speech, no solid action has been taken by the Judiciary, much like the other two limbs; the executive and the legislature. The article tries to analyze the engagement of the judiciary with hate speech overtime on two key points; the reluctance to recognize hate speech in itself as an issue, time and its repose at a time when solid action remains the prime need.

The Inception of Hate Speech Regulation

The Constitution of India guarantees the right to freedom of speech and expression, qualified by scenarios when the same may be curtailed reasonably. The deliberations of the Constituent Assembly before drafting the free speech provision are cardinal to understanding the historical evolution of hate speech regulation in India. Hate Speech, owing to the communally charged environment at the time, was much debated; the possibility of free speech being invoked to spread hatred against religious groups was a big concern. The makers of the Constitution intended to exclude hate speech from free speech and to carve out a specific exception to prevent communal hatred³. The latter did not materialize, but the courts have since relied on the ‘public order’ exception to deal with hate speech cases. The provisions of the Indian Penal Code relating to hate speech, Sections 153A and 295A, have their origins in the colonial era when publications from both the Hindu and Muslim sections of the population ensued in violent conflicts and bloodshed, and the British administration

³ ABHINAV CHANDRACHUD, *REPUBLIC OF RHETORIC- FREE SPEECH AND THE INDIAN CONSTITUTION* 62 (Penguin Books 2017).

reacted by carving offenses out of hate speech⁴. Section 153A criminalized ‘promoting feelings of enmity or hatred between different classes of Her Majesty’s subjects.’⁵

Tracing the trajectory of Judicial Engagement on Hate Speech

The pre-independence decisions

After an initial spell of inertia that lasted almost three decades, the hate speech provision made it to court for the first time in *P.K.Chakravarty v. The King Emperor*⁶. The Calcutta High Court held that the foolish inducement of momentarily unreasonable feelings against a certain class is no ground to curtail free speech, and that the act of a newspaper calling on Muslims to act against other religious groups did not fall within the ambit of section 153-A. This decision may be regarded as the first of several which has left hate speech unpunished, clearly indicating a lack of clarity in constituting the offense.

In 1927, the decision of the Lahore High Court in *Raj Paul v. Emperor* created a huge uproar in the country⁷. The accused had come out with an Urdu pamphlet titled the ‘Ranghila Rasul’ with contents that insulted the Prophet Mohammed, which Gandhiji believed was ‘sure to inflame passions’ and ‘was an abuse.’⁸ Justice Dalip Singh is reported to have remarked that the pamphlet was ‘malicious’ and capable of ‘wounding the religious feelings of the Muslim community.’⁹ But, his decision did not acknowledge the said conclusion. He held that criminalizing the accused's act would be wrong as the section seeks to prevent attacks on a religion as it existed then and not to halt those aimed at dead leaders of the said

⁴ Id. Pg.225.

⁵ Id. Pg.226.

⁶ AIR 1926 Cal 1133

⁷ AIR 1927 Lah 590.

⁸ CHANDRACHUD, *Supra* note. 4.

⁹ Id. pg no. 228.

religion¹⁰. Hate speech, once again, was protected. The Ranghila Rasul judgment was followed by a decision of the Lahore High Court in the same year but by a two-judge bench composed of two British judges.

The *Devi Sharan Sharma v. Emperor* case saw the conviction, the first after the enactment of the section, of an author who had published a hateful article against Prophet Mohammed in an Urdu daily¹¹. The cumulative effects of all these decisions in the Indian sub-continent led to the enactment of the second provision on hate speech, section 295-A, in 1927. It made it an offense to ‘outrage the religious feelings or insult the religion or religious beliefs of any class of persons with a deliberate and malicious intention.’¹²

Post-Independence decisions

The plethora of decisions of the Constitutional Courts of the country on free speech has established that only incitement of offense is punishable; while advocacy is permissible speech. In *Balwant Singh v. State of Punjab*, the Supreme Court highlighted the importance of the intent of the maker and the effect of words spoken to create a law and order problem in deciding whether it is hate speech or not¹³. This means that speech containing hateful nature or that causes hatred between groups are protected under free speech if they do not create any violent responses. The courts have since then embarked on determining the legitimacy of speech based on its after-effects of it. Most hate speech cases are tested against the anvil of the ‘public order’ restriction; the likeliness of expression to disrupt public order determines whether it is protected or not. This has remained the norm since the first amendment added ‘public

¹⁰ Id. pg no. 229.

¹¹ AIR 1927 Lah 594.

¹² Indian Penal Code, 1860, S 295-A, No. 40, Acts of Parliament, 1860 (India).

¹³ (1995) 3 SCC 214.

order' to the constitution. The content of the speech is immaterial and what matters is the 'potentiality', its 'effect on public tranquility', held the Supreme Court¹⁴. In the much-celebrated decision of *Shreya Singhal v. Union of India*, the Court elaborated on the differences between advocacy, discussion and incitement¹⁵. As stated before, the first two are obvious shades of free speech, while the last one falls out of its protective ambit.

A reluctant judiciary

The reluctance of the courts to view hate speech as more than a public order problem is a major hindrance to the effective curtailment of it. Hate speech is 'any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.'¹⁶ Hate speech is any utterance that stems from the hatred for the 'other'; on whatever grounds and has several harms irrespective of its ability to disrupt public order. The courts are only concerned with whether an expression topples public order or not. The ostracizing, marginalizing, degrading effect of hate speech is completely left out while deciding cases. It does harm by itself, like how an injury does, which is distinct from those that ensue from it, like incitement of violence and disruption of public order. The mere utterance and conveyance of the same injures the subject. Eric Heinze validates the same, he holds that being subjected to hate speech is like receiving a slap on the face, the harm being instantaneous¹⁷. 'Hate speech as harassment and discrimination that

¹⁴ *Supdt. Central Prison v. Dr. Ram Manohar Lohia*, AIR 1960 SC 633.

¹⁵ AIR 2015 SC 1523.

¹⁶ U.N. Secretary-General, *The United Nations Strategy and Plan of Action on Hate Speech*, (June 18, 2019).

¹⁷ ERIC HAINZE, *HATE SPEECH AND DEMOCRATIC CITIZENSHIP*, (Oxford University Press, 2016)

warrants punishment like any offence that harms people' is often left not acknowledged by courts¹⁸.

Hate speeches are not without any physical harm either. It has been established cogently that the short-term harms of hate driven utterances include rapid breathing, headaches, raised blood pressure, dizziness, rapid pulse rate, drug taking, risk-taking behavior, and even suicide¹⁹. There are scientific studies which attribute the high blood pressure of African Americans to repressed anger owing to the hatred they are subjected to. The psychological harm of hate speech includes fear, nightmares and withdrawal of the victimized minority from the society²⁰. These effects of hate speech do not play any role in determining if the same is to be curtailed or criminalized.

The public order reasonable restriction stands on the premise that speech that results in violence is the only category that warrants proscription. Hate speeches do not always disrupt the public order. At times the victims are rendered voiceless. Hate speech is directed against minorities who are already on the fringes of the society. Continuous vituperation and vilification pushes them further away from the society and takes away the assurance of equality. It strikes at the fundamental liberties of dignity and the right to life of the targeted.

The very concept of what amounts to hate speech has undergone grave changes over time. The requirement of speech igniting a public order problem raises the bar too high. It makes it impossible to bring within its purview most hurtful expressions that do not cause an imminent danger to

¹⁸ Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, U. Ill. L. Rev. 789, 793 (1996).

¹⁹ 1 RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND*, (Routledge 2004).

²⁰ *Id.*

hate speech. With the advance in technology, the channels available to spread hatred are not limited to physical public gatherings. Social media platforms are now rife with hate speech. An average social media user encounters hate speech that ranges from cartoons and memes portraying violence against religious minorities, fake auctioning of women on the basis of religion, spreading false news and openly calling for execution of groups on an everyday basis. These are sure to invoke feelings of enmity and a sense of 'us v. others,' but it's not always that the same results in a public order disruption. The courts do not rely on the 'clera and imminent' danger test as stipulated in *Abrams v. US*²¹. The speech need not result in public disorder at that instant but there must be a traceable, causal link between the said expression and public disorder²². Courts also try to categorize speech that causes violence and those that do not. The latter, irrespective of its content, is protected under the umbrella of free speech. It is worth mentioning that the requirement of violence or public order disruption is not a pre-requisite for it to fall under hate speech. The only notable exception to the said rule is the United States which guarantees free speech in an almost absolute sense by its first amendment to the constitution. Justice Madan B. Lokur, a former judge of the Supreme Court, while giving a speech on hate speech had stated that violence does not form a part of hate speech but the courts in the country insists it be made so²³. While the judiciary remains adamant as to the requirement of public order disruption, hate speech continues to evade criminal sanction.

A phase of Judicial Repose

²¹ 250 US 616 (1919).

²² CHANDRACHUD, *Supra* note. 4.

²³ Aratrika Bhaumik, *Are We Now Reaching The Extreme Of Genocide?': Justice Madan Lokur Decries Executive Inaction Against Hate Speech Incidents; Calls For Special Law*, Livelaw (Feb.22, 2022), <https://www.livelaw.in/top-stories/hate-speech-genocide-justice-madan-lokur-special-law-executive-inaction-192435>.

Hate speech in the country is at an all-time high. It is used as a tool to terrorize, degrade and dehumanize the subjects and as a mobilization tool during elections. The minorities, already in a disadvantaged and dire position, are forced to face the brunt of rampant hate speech. Social media platforms offer a vast, expeditious space for hate speech to fester. An alarming, astronomical escalation of hate speech incidents in the country places a burden on the legal structures to re-evaluate the frame work to combat the same. Both the legislature and the judiciary remain mute spectators to the issue when an intervention from both is utmost essential. The judiciary has been conscious of the peculiar nuances of hate speech; especially post its decision in the case of *Pravasi Bhalai Sangathan v. Union of India*²⁴. The petitioners in the case had invoked the PIL jurisdiction of the apex court to seek appropriate actions against hate speech made during elections by elected representatives, and religious and political leaders. The Court, though displayed a classic stand of deference citing the existence of adequate legislative provisions, engaged in an elaborate discussion on hate speech. This was a first, and the court relied on decisions from foreign jurisdictions, especially Canada, to explain the nature of hate speech. The effect of hate speech in delegitimizing the minorities, reducing their social standing and acceptance, silencing and thereby hindering their full participation in the society were highlighted. The Court recognized how hate speech can lay the foundation for organized attacks against minorities which in the most extreme cases may end in genocide. Hate speech as an issue that is beyond its capability to disrupt the public order was considered. The long term, unrestricted free flow of hate speech causes problems to the societal structure and social fabric. It erodes social cohesion, magnifies differences and divisions, and

²⁴ AIR 2014 SC 1591

ignites deep sense of detest for the other. It strikes at many fundamental rights, including that of equality, free speech and expression and right to life.

In spite of having rendered an elaborate discussion on hate speech and the repercussions that ensues, the Apex Court restrained itself from issuing the directions prayed for. But, the Court issued directions to the Law Commission of India to look into the matter and define 'hate speech.' This direction, while it had sternly maintained the capability of existing legislations, mirrored a doubtful mind. The Law Commission came out with suggestions to incorporate changes to the criminal law in its 267th report on 'Hate Speech' that came out in March, 2017²⁵. It sought to prohibit the 'incitement to hatred and causing fear, alarm, and provocation of violence in certain cases.' These changes have not been made a part of the penal law until now.

The judgment in *Amish Devgn v. Union of India* is important here²⁶. The Supreme Court provided an in-depth picture of hate speech regulations internationally and in the United States, United Kingdom, Canada, South Africa, Australia, Germany and France. The court identified one of the main purposes behind the guarantee of free speech was the 'protection of marginalized voices²⁷.' The court further continued the analysis by studying seminal academic works on the same. The court tried to distinguish between free speech and hate speech, and maintained that the criminalization of the latter served the purpose of securing everyone's dignity and social and political equality among all²⁸. Expression that tends to incite violence or hatred against target groups was held to be hate

²⁵ LAW COMMISSION OF INDIA, REPORT NO. 267: HATE SPEECH 67 (2017).

²⁶ 2020 SCC OnLine SC 994

²⁷ Id. para. 14.

²⁸ Id. para 54.

speech, in a stark departure from the earlier requirement of speech to disrupt public order²⁹. The court did not give any direction as to how hate speech could be better dealt with. The elucidation with respect to, and acknowledgement of the ill effects of hate speech did not bring about any change in law. This phase is a self-induced repose of the judiciary and is not for the lack of a need to act. It gives out comprehensive lectures on the intricacies and injuries that may ensue from hate speech, but states its hands are tied when meaningful actions are sought.

Conclusion

There has not been a time that has required stringent action hate speech than now. Hate speech has become the norm of the day, and the makers walk scot free while the minorities live in constant fear and discrimination. Any action of the judiciary regarding the issue is paramount as the legislature is inactive and indifferent to the needs of the time. The court in *Pravasi Bhalai Sangathan* maintained that it cannot issue directions when there are existing legislative provisions criminalizing hate speech. The effectiveness of these said provisions are questionable. It has not created a deterrent effect in the minds of the people and hate speech is on the rise by each passing day. There is, as apparent from the state of affairs, a legal vacuum and judicial activism is the need of the hour. A set of directions that can guide how to go about tackling the menace to last until the penal law is strengthened is necessary. This is important in the background of many legal luminaries and scholars advocating for a special law to deal with the issue³⁰.

²⁹ Id. para 55.

³⁰ Bhaumik, *Supra*. Note 24.

The penal provisions are not invoked most of the times, especially when the makers of hate speech are prominent political and religious leaders. In the case they are, courts show notorious delay in deciding matters. A decision in *Feroz Iqbal Khan v. Union of India*, despite the court itself calling it urgent, is yet to come even after two years of it being pending before the apex court³¹. The Law Commission report on hate speech was tabled before the parliament but no avail. In *Ashwini Kumar Upadhyay v. Union of India and Ors.* the petitioners sought an intervention of the apex court in seeking a reconsideration of the said report³². The Judiciary is vested with the duty to step up in case of a lax approach from the other two limbs, the executive and the legislature. While the same is apparent in the hate speech issue, the Judiciary holds that its hands are tied. This has led to the biggest deprivation of fundamental rights of the minorities on an everyday basis. The judiciary has failed to act in accordance with its role as the protector of human rights of the citizens. The judicial inaction is a wrong if not corrected can cost the lives of millions, if hate speech escalates to genocide as it did in Nazi Germany, Rwanda and Myanmar.

³¹ Id.

³² Writ Petition(s)(Civil) No(s).699/2016