

CASIHR Journal on Human Rights Practice

- ENLARGING SCOPE OF PRISONER'S RIGHT TO VISITATION: A CRITIQUE OF RIGHT TO PROCREATION
- COMBATING HATE SPEECH: A STUDY OF THE EXISTING PROVISIONS
- INTERNATIONAL LAW FOR THE ACTUALIZATION OF THE FREEDOM OF THE PRESS WITH SPECIAL EMPHASIS ON INDIA'S POSITION IN MEETING THE INTERNATIONAL
- CHANGING CONTOURS OF HOMOSEXUALITY IN INDIA
- PROTECTION OF HUMAN RIGHTS: THE IMPORTANCE OF HUMAN RIGHTS EDUCATION
- HUMAN CLONING – LEGAL AND POLICY CONCERNS
- RE-DEFINING SEDITION IN INDEPENDENT
- THE REPUBLIC OF HATE SPEECH AND RELIGIOUS SENTIMENTS
- HATE SPEECH – CHALLENGE TO FREE SPEECH
- AN ANALYSIS OF FREE SPEECH AND HATE SPEECH AND THE DIFFERENCE, IF ANY, BETWEEN THE TWO
- "CENSORSHIP" – A NEW WAY TO CLAMP DOWN ON ARTISTIC EXPRESSION
- A HUMAN RIGHTS ANALYSIS OF REPRODUCTIVE RIGHTS
- BOOK REVIEW- RAVISH KUMAR THE FREE VOICE ON DEMOCRACY, CULTURE AND THE NATION
- HATE SPEECH AND FREEDOM OF SPEECH: A LEGAL SCRUTINY
- THE GOOD, THE BAD AND THE MORALLY PATERNALISTIC: THE JUDICIARY ON FREEDOM OF SPEECH AND EXPRESSION IN INDIA
- MANDATORILY STANDING DURING NATIONAL ANTHEM – JEOPARDISING FREEDOM OF SPEECH AND EXPRESSION
- RESOLVING THE CENSORSHIP PARADOX
- 'ONE MAN'S VULGARITY IS ANOTHER MAN'S LYRIC': IS IT TIME FOR A NEW TEST OF OBSCENITY?



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RESOLVING THE CENSORSHIP PARADOX

*ARYA WARRIER

**ASHNA D

1. INTRODUCTION

In response to our glorious victory and independence from British rule, the architects of our Constitution, guaranteed us in Chapter III, a fundamental right to freedom of speech and expression under Article 19(1)(a)¹. Being the largest and perhaps most diverse democracy in the world, this liberty is of utmost importance. Yet, we find this freedom being constantly threatened by the idea of censorship. To begin with, let us understand what the word censorship means. Censorship is derived from the Latin word *censura* which means “*to assess or estimate*.”² In the next few paragraphs, we shall study the brief history of censorship during the British era, and how the Central Board of Film Certification (CBFC) came into being.

Literature, films and events are imperative in a society which is constantly shaped by emerging ideas and thoughts. Across the spectrum of society, they are tools that engage people in discussion, provide the oppressed with a platform to voice their grievances, create awareness and entertain the masses. Cinema or motion pictures has been defined as the art of colourful moving images.³ Expressions through mediums like art and literary works, can be considered as few of the many ways of expressing freely, our thoughts. Books enable people to express themselves; films with their broad outreach help break the barriers of illiteracy, and events set the tone for critical discussions. During the British era in England, there were various kinds of controls on then fast becoming popular “cinemas”. It became necessary to have licenses for every public screening and the world’s first legislation in cinematograph was passed in 1909, in Britain. The aim, though quite ambiguous, was to ensure safety

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¹INDIA CONST. art. 19, cl. 1.

²JOHN MCCORMICK „&”. MAIRI MACINNES, VERSIONS OF CENSORSHIP 11 (John McCormick et al.Mairi MacInnes) (2011).

³Gabe Moura, *What’s cinema*, ELEMENTS OF CINEMA, (Jul. 14, 2016, 04:00PM) , <http://www.elementsofcinema.com/cinema/definition-and-brief-history>

standards by controlling all the licenses issued. Thereafter, The British board of film censors was formed in the year 1912⁴.

Back home, in India, the first full length film, *Raja Harishchandra*, was released in the year 1913. Half a decade later, the Imperial Council proposed the introduction of a bill, which in their words “ensured the protection of the public from indecent or otherwise objectionable acts.” Thus was born the Cinematograph act of 1918 which gave magistrates the power to issue licenses based on whether the films were suitable for public watching. This was later replaced by the 1952 act that we know of today, which lays down provisions for the certification, regulation and exhibitions made by means of cinematographs⁵. Back then, too, it was not mentioned what the inspectors had to look for while issuing these licenses. Meanwhile, censor boards began to be established in the year 1920, in all the major presidencies. They adopted sets of rules to judge the appropriateness of the all the films that were being released in the Indian subcontinent. Pleasantly enough, the administration of the Bombay Board of Film Censors laid down that “no generally and rigidly applicable rules of censorship shall be laid down”. Soon, there was also an Indian Cinematograph Committee that was set up.

However, going through various accounts, the ultimate taboo, as it seems, was not obscenity but nationalism and of course the various depictions of Gandhi. Listed in the Journal of The Motion Picture Society of India (1937) are the titles of banned newsreels—*Mahatma Gandhi's Historic March*, *Gandhi Sees the King*, *Bombay*, *Mahatma Gandhi After his Release*, and several others—short non-fiction reports that the British clamped down on. Gandhi was in fact the hidden subject of the first film to be banned in India.⁶ Decades later, in 1983, the Central Board of Film Certification was formed. All the regional boards were abolished, and U and A were adopted as certification categories. The Indian Press Emergency Act was scrapped in the year 1931. It abolished pre- censorship of newspapers in India. However, there was no corresponding act to abolish the same in films. The act of 1918 was repealed but was later replaced with an act that was more or less similar in scope.⁷ *Kissa Kursi ka*, which is seen by most people as India's first political spoof, was said to be loosely based on Sanjay Gandhi's power in the government. It was refused a censor certificate. When

⁴Uday Bhatia, 100 years of film censorship in India, LIVEMINT (Jul. 14, 2018, 08:59 AM) , <https://www.livemint.com/Leisure/j8SzkGgRoXofpxn57F8nZP/100-years-of-film-censorship-in-India.html>

⁵*Id.* at 4.

⁶*Id.* at 4.

⁷Arpan Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis*, 2 SSRN 557, 595 (2010).

emergency was declared in the country, the master print and negatives of the movie were confiscated and burnt by congress workers. This was a case of censorship much outside the purview of law itself.⁸

The fundamental question that arises is why the legislation is so problematic and why it is not implemented and enforced in the correct manner. To understand this, one must look into the legislation governing censorship. The heart of the legislation is section 5(B), which gives the board, vague, not to mention vast powers, to play with certifications. The section states that “anything which is against the interests of the security of the state, public order, decency or morality or involves defamation or contempt of the court or is likely to incite the commission of the offence” can be denied a certificate. Furthermore, it is to be noted that the government has the power to issue rules- which the board must follow. The problem with the rules is that not all may be followed, and those which are followed and implemented are done, according to the convenience of the people heading the committee. This was the condition of the film censorship immediately after independence. Barring a few committees and a few other minor changes in rules- the system, 72 years on, is almost the same. There persists an attitude that was most evident during the British era, that the viewers are incapable of deciding for themselves what they want or should view. Art is subjective. Therefore, wanting to watch a film or not should be left to each person’s sensibilities. Often, it is clear that the CBFC denies certificates or ban films, not as per the rules established or its obscene and vulgar content, but because of pressure from various political parties.

2. CENSORSHIP OF FILMS, BOOKS AND EVENTS – A CRITICAL ANALYSIS

It is a well-recognized fact that films in India have always been one of the best means to spread ideas, shape opinion or simply entertain and fascinate the audience it caters to. While speaking of films, the focus is on the impact it has on the audience. What is often not investigated into is the creativity of the filmmaker and his right to expression of ideas.⁹

However, these grounds under section 5(B) are ambiguous and can be widely interpreted and misused. Some of these provisions regarding examination of films provide the CBFC with the power to either refuse to sanction the film for public exhibition or direct the applicant to carry

⁸Devang Pathak , Understanding India’s Dangerous History Of Film Censorship & Its Implications, HOMEGROWN (Mar. 13, 2017), <https://homegrown.co.in/article/25265/understanding-indias-dangerous-history-of-film-censorship-and-its-implications>.

⁹The Cinematograph Act, 1952, No. 37, Acts of Parliament, 1952 (India).

out changes or modifications which the Board deems necessary.¹⁰ It is disturbing to note that in recent times, most people refer to this board as the Censor Board. Time and again, Indian artists and filmmakers find their work being excessively censored and their rights being unduly curbed. This has become clear in recent times where the CBFC, whose major role is only to provide appropriate film specific certification, has begun misusing its powers to direct cuts and censor parts that does not align with its views. Apart from this, guidelines have been laid down by the Central Government in 1991, about certification. The words used in these guidelines are again, very vague and extremely subjective, thus allowing members of the Board to further misuse their powers.

In 1970, the Supreme Court recognized the universal treatment of motion pictures different from that of other forms of art and expression.¹¹ He further insisted that it has a deep impact on adolescent children more than that on mature women and men. The need of censorship thus arises from the prolonged effect that a motion picture has on an individual that doesn't occur in a painting, book or play¹²

Deepa Mehta's *Water* (2005) was a movie that ventured into the plight of widows in Varanasi, it tackled the issues of ostracism and misogyny. Just the filming of the movie aroused the ire of the people to the extent that the sets of the movie were burned. Similarly, the movie *Aandhi* (1975), which allegedly depicted the life of Indira Gandhi, was banned during the Emergency. The ban was lifted only after the Emergency was over. BBC's documentary, *India's daughter*, released in the year 2015, which contains interviews with the alleged rapists of the 2012 Delhi gang-rape victim, is banned in India because it records certain views of the rapists which show the country in a poor light. *Parzania* (2005) won several awards but faced an unofficial ban in Gujarat. The story dealt with Azhar, a small Muslim boy, who was lost during the Gujarat riots. In the year 2004, documentary *Final Solution*, directed by Rakesh Sharma was banned only because the censor board felt that the documentary might trigger off unrest and communal violence.¹³

¹⁰*Id.* at 9.

¹¹K.A Abbas v The Union of India & Anr., (1970) 1971 AIR 481 (India).

¹² Avadhi Jain, *India: Is Censorship A Necessary Evil?*, *MONDAQ*, (Mar. 7, 2018), <http://www.mondaq.com/india/x/680434/broadcasting+film+television+radio/Is+Censorship+a+Necessary>

¹³R.S. Chauhan, *Clamping down on creativity*, *THE HINDU* (Mar. 30, 2017, 00:02 AM), <https://www.thehindu.com/opinion/op-ed/clamping-down-on-creativity/article17739798.ece>

These are just a few examples of famous movies that have been banned in India, post-independence. If reasons for the ban are studied closely, one would find shocking similarities. Most of the films are not banned because they actually offended certain governments in power, or the religious sentiments of certain “communities or because they did in fact, hurt the sentiments of the people, but because they *might*, in the future, cause a furore or an agitation. This alone, is a gross violation of the clause of “reasonable restrictions” mentioned in Article 19. In a democracy such as India, there are bound to be diverse opinions. This does not give the government, or the censor board, or any other group to ban another individual’s work of art or creative expression.

The most recent incident of movie, and perhaps one of the most infamous, is that of *Padmavat*. Originally called Padmavati, the movie was based on a Rajput queen and a Muslim queen in the 14th century. The group had disrupted shooting and one member had slapped Bhansali (the director) on the set earlier this year. Others vandalised cinemas and threatened to chop off Padukone's nose. A film is often, a form of creative expression or escapism, and in this case, a historical fiction. To resort to such extreme measures is something that cannot be tolerated. It is ironic because in today’s digital world, films can be watched in one way or another. It is intriguing as to why the very Board that liberally permits certain movies to be screened only at certain fixed hours at night, prejudicially censors, and bans, in broad daylight, films that involve portrayal of the LGBTQ community, feminism and women’s empowerment – narratives that really need to be discussed. ‘*I disapprove of what you say, but I will defend to the death your right to say it*’, said Voltaire. If only Indian society thought along similar lines.

Literature in the form of books is intricately woven into the fabric of our country. At the same time, the practice of banning books for a variety of reasons is also something we have witnessed from time immemorial. One of the earliest books to be banned in India, post-independence, was VS Naipaul’s *An Area of Darkness*. The book is said to have portrayed India in an unflinching manner- the varied difference between the rich and the poor, the contentious caste system and its apparent nostalgia for the British Raj. The subject and the style of writing was not received too well with the government, and was banned. It was claimed that *Satanic Verses* (1998) by Salman Rushdie, was based on the life of Prophet Muhammed and was banned in India. Rushdie, in his memoir, wrote that the ban was not

examined by any authorised body, nor was there any semblance of judicial process¹⁴. He described it to be a ‘painful blow’ and defended the art of literature against an act of political opportunism.¹⁵ Be it for satirising the Ramayana¹⁶ or depicting the religion of Islam in bad light¹⁷, banning books has often been used under the guise of maintaining public order, protecting the interests of the minorities. In such situations, the denial of freedom of speech and right to express one’s creativity is rarely questioned. Another book that was banned for similar reasons, added to the fact that it hurt religious sentiments of the Muslim “community” was *Lajja* by Taslima Nasreen which was banned as it was based on the demolition of the Babri Masjid in India. When questioned about the reason for the ban, the Home Ministry stated that it was due to the demands of the various religious forums, and was causing public unrest. What was failed to be understood, or perhaps ignored, was the fact that that it was not the general public, but these minority religious groups who were creating a furore. Why must the freedom of expression of one person be curtailed, because it does not agree with the religious beliefs of a group? Religion is as subjective and personal as the art of an individual. Once again, the decision reflected that readers could not decide for themselves what they should or should not read.

The reasonable restriction clause under Article 19 is subjective and this provision must be applied only after much thought and caution. Luckily, in the cases of censorship of print, there has often been a Court of Appeal; a second chance which has enabled writers to successfully exercise their right to freedom of expression. Take, for example, Khushwant Singh’s novel, the *Company of Women*, which survived a challenge in the Madras High Court when a man filed a PIL stating that he was offended by the raunchy encounters. The court disposed of the petition, saying that it trusted the good sense of the readers¹⁸. Arundhati Roy’s *God of Small Things* survived two challenges in Kerala, one on the grounds of obscenity and the other for making derogatory references to the communist government that existed during that period¹⁹. These were only small wins, but important ones nevertheless.

¹⁴ Alison Flood, *Banning Salman Rushdie's Satanic Verses was 'wrong' says Indian minister*, THE GUARDIAN, (Dec. 1, 2015, 06:00 GMT) , <https://www.theguardian.com/books/2015/dec/01/banning-salman-rushdies-satanic-verses-was-wrong-says-indian-minister>

¹⁵ *Id.* at 14.

¹⁶ AUBREY MENEN „&“ VALMIKI, THE RAMAYANA (New York, Scribner, 1954) (1954).

¹⁷ RAM SWARUP, UNDERSTANDING ISLAM THROUGH HADIS (Arvind Ghosh, 1982) (1982).

¹⁸ Devangshu Datta, *A history of censorship in India*, BUSINESS STANDARD (June 14, 2013, 05:14 PM) , https://www.business-standard.com/article/opinion/devangshu-datta-a-history-of-censorship-in-india-106072201076_1.html

¹⁹ *Id.* at 18.

But then, there was the book *Basava Vachana Deepthi*²⁰, was banned in 1998, when the State of Karnataka invoked Section 95 of the Code of Criminal Procedure. This law allows the state to forfeit and suspend publications that it deems to be in violation of certain provisions of the Indian Penal Code. The reason that the book invoked a ban was supposedly because the author substituted the original words in some religious text, which hurt the feelings of the Veerashaiva community of Karnataka. In this case, the government found that the book's contents appeared to infringe Section 295A of the IPC, which criminalises speech that hurts religious sentiments.²¹ It is clear that Section 95 of the CrPC and Section 295A of the IPC are remnants of India's time during the British rule and ought not to really have a place in a liberal democracy, that we claim to be.²² For an offence to be committed under this provision, not only must the speech in question "insult" the religious beliefs of a certain class of citizens, but there must also be a malicious intention of doing the same²³. Whether these conditions were met was not explained by the Court.

In *Poojaya Sri Jagadguru Maate Mahadevi v. Government of Karnataka*, the Hon'ble Supreme Court, dismissed the author's appeal deliberately not giving a reasoned order, thus ignoring the repercussions of such orders on free speech. In fact, the bench even told the author that although her intent was not malicious, it did not see the need to interfere with the view taken by the High Court.²⁴ When such literature published without malicious intent, and bound to be subjectively interpreted, is banned, the government's reasoning of a 'possible disturbance of public peace' clearly does not fall within the 'reasonable restriction' clause.²⁵ This clearly tells us that a review of the laws in place is imperative to ensure that primitive laws are not being used to redress contemporary grievances. Nonetheless, the law is only a part of the problem. The greater issue concerns its interpretation. In a just and tolerant society, one would imagine the courts would accord to rules of this kind the narrowest possible construal, allowing the greatest possible latitude to free expression.²⁶

²⁰POOJAYA SRI JAGADGURU MAATE MAHADEVI, BASAVA VACHANA DEEPTHI (Poojaya Sri Jagadguru Maate Mahadevi) (1998).

²¹ Suhrith Parthasarathy, *The right to read, and be read*, THE HINDU (Oct., 16, 2017, 00:02 AM) , <https://www.thehindu.com/opinion/lead/the-right-to-read-and-be-read/article19866346.ece>

²² *Id.* at 21.

²³ The Wire Staff, *Kannada Author Loses Plea Against Ban on Her Book, SC Dismisses It Without Reasoned Order*, THE WIRE (Sept., 20, 2017) , <https://thewire.in/books/mate-mahadevi-kannada-author-loses-case-against-book-ban>

²⁴ *Id.* at 20.

²⁵ *Id.* at 20.

²⁶Suhrith Parthasarathy, *The Right to Read and be Read*, THE HINDU, (Oct. 16, 2017, 00:02 AM) , <https://www.thehindu.com/opinion/lead/the-right-to-read-and-be-read/article19866346.ece>.

Today, when courts are presented with such petitions where a literary work is challenged for portraying any part of the community in bad light, judges are confused. They are posed with the arduous task of attempting to balance three factors: social interests, liberty of thought and expression, and public safety.²⁷ But in a nation like India, very often, even a mere dissenting opinion can cause a stir among the masses. Thus, authors find themselves spending more time self-censoring or fighting it out in Court.

It is not just books and films in India that have been banned or faced the ire of a particular community. Time and again, attempts have been made in India to ban or attempt to ban events that involve controversial literature, films or eminent personalities. Be it Mr. Salman Rushdie's scheduled video conference at the Jaipur Literature festival that created a communal stir, to a simple 'Thank you India' event at New Delhi to commemorate the Dalai Lama's 60th anniversary of setting foot on Indian soil for exile²⁸, events that create even the slightest of controversy and difference of opinion, are banned. On August 5th this year, the United Kingdom blatantly rejected India's request to ban an event planned by a US based group called Sikhs for justice that called for a referendum on the independence of Punjab.²⁹ Elsewhere, Hon'ble Justice and head of the Press Council of India, Markandey Katju reminded politicians to be more tolerant as India did not follow the dictatorship regime. This was in response to Mr. Aseem Trivedi, a cartoonist who was put in judicial custody on sedition charges under Article 124-A. His drawings merely expressed his concern over corruption among the political elite and his drawings depicted the Parliament building as a lavatory buzzing with flies.³⁰

Now, In July 2011, the UN Human Rights Committee introduced a General Comment under Article 19 of the ICCPR. It spoke about what the freedoms of opinion and expression mean in practice. Although India is not a party to this Covenant, it is important to investigate the fundamental essence behind these comments. It spoke of two tests – necessity and proportionality as grounds for restricting one's freedom to express and opine. "When a State

²⁷Soli J. Sorabjee, *The Law of Press Censorship in India*, 20 ILI 315, 315-320 (1978).

²⁸The Tibetan Review Staff, *New Delhi compelled Tibetans to Shift 'Thank you' event to D'shala*, TIBETAN REVIEW, (Mar. 11, 2018, 6:35 AM), <http://www.tibetanreview.net/new-delhi-ban-compelled-tibetans-to-shift-thank-you-india-event-to-dshala>.

²⁹Prasun Sonawalkar, *UK Rejects India's Request to Ban Sikh Separatist event in London*, HINDUSTAN TIMES (Aug. 05, 2018, 23:44PM) , <https://www.hindustantimes.com/world-news/theresa-may-govt-rejects-india-s-request-to-ban-sikh-separatist-event-in-london/story-qQvW2SY2C92M0maHSTBLFK.html>.

³⁰Jason Burke, *Indian cartoonist Aseem Trivedi Jailed after Arrest on Sedition charges*, THE GUARDIAN, (Sep. 10, 2012, 13:16 PM), <https://www.theguardian.com/world/2012/sep/10/indian-cartoonist-jailed-sedition>.

party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, by establishing a direct and immediate connection between the expression and the threat". What this calls for is a need to practically maintain a balance between community and individual interest to respect the rights and reputations of others and at the same time protect the nation's security, order, health and morals.³¹ These represent the opening moves in what is typically a prolonged and often tortuous battle over free speech, with an uncertain outcome.³²

So, the real question is, when a controversial personality or topic is being discussed or presented at a public event, do religious groups, individuals or governments have a right to ban that event? In our mind, the answer is both yes and no. The authors personally believe that rather than focussing on the actual event or circumstances, we must look into the motives of the people asking for such censorship. That will help us understand better, this paradox, whose solution hangs in maintaining a delicate balance.

It has been argued that Article 19³³ embodied the ideology of the Indian freedom movement, where violent forms of resistance were discouraged by leaders like Gandhi.³⁴ Some scholars have opined that the only way is to abolish censorship in all its forms as it is today an anachronism. Others call it a necessary evil. So what is the solution? Are Indian laws really all that against the idea of constructive criticism?

Courts have upheld the freedom of expression of the filmmakers stating that it is for the audience to decide what is good for them. Judges have stated that it is necessary to view, analyse and inquire into the subjects discussed in these films to truly understand them.³⁵ The right to convey his perception, freedom of speech is constitutionally protected and cannot be held ransom on the mere fall of a hat.³⁶ This freedom cannot be suppressed because of threat

³¹OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN COOPERATION WITH THE INTERNATIONAL BAR ASSOCIATION, SOME OTHER KEY RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE, RELIGION, OPINION, EXPRESSION, ASSOCIATION AND ASSEMBLY, 108 (2003).

³² Gautam Bhatia, *The Architecture of Censorship*, THE HINDU, (Aug. 17, 2017, 00:02 AM) , <https://www.thehindu.com/opinion/lead/the-architecture-of-censorship/article19504501.ece>.

³³Article 19 is not an absolute right and is subject to certain 'reasonable restrictions' which can be imposed in the interest 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.

³⁴ *Id.* at 7.

³⁵ Sony Pictures Releasing of India Ltd. v. State of Tamil Nadu and Ramesh Pimple v. CBFC, (2004) A.I.R 2004 Bom. 397 (India)

³⁶Directorate General of Doordarshan and Oths. V. Anand Patwardhan and Ano, (2006) 8 S.C.C 433 (India).

of demonstration and processions or threats of violence.³⁷ It is true that they who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.³⁸

3. RESOLVING THE PARADOX: CREATING A BALANCE MOVING FORWARD

There needs to be more structure within the board and its functions wherein legislators come up with a set of comprehensive, encompassing legislations. Broad restrictions only lead to greater hate speech and stir more emotions. What we find taking place is not the government acting in public interest, but rather self-employed moral police on the job.³⁹ Apart from open censorship enforced by the government, the provisions of the Cinematograph Act as well clearly show us that the government holds immense power to decide exactly what is suitable for viewership by the Indian audience.⁴⁰ We require a defined structure as to how the movie is to be categorised, going beyond the whims and fancies of the board or of the respective governments in power. For example, the US government devised a three-prong test to determine if a particular material can be called “obscene” and applies these guidelines to determine whether broadcast content can be classified as profane, indecent, or obscene⁴¹

The board should be reconstituted to simply rate the movies and its process of certification must always be responsive to social change. The Board, whose functions must be legal not moral, must only be allowed to clearly provide warnings about the nature of the film’s content and after such a statutory warning, film viewing must be consensual, voluntary and completely up to the viewers discretion.⁴² It is also recommended that the adult category be divided into further sub categories⁴³ such as AC (adult with caution) which will inform adults about the type of films they are going to watch. We must remember that when such movies are banned, illegal versions of it, such as internet torrents and pirated versions get circulated

³⁷S. Rangarajan v. P. Jagjivan Ram and Ors, (1989) 2 S.C.C. 574 (India)

³⁸ Eugene Volokh, *Liberty, safety, and Benjamin Franklin*, WASHINGTON POST (Nov. 11, 2014) , https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/11/liberty-safety-and-benjamin-franklin/?noredirect=on&utm_term=.

³⁹Ritu Menon, *Censorship in India, The truth*, LAW WIRE (2017) , <http://lawinfofire.com/articleinfo/censorship-india-truth>

⁴⁰ *Id.* at 8.

⁴¹ Anonymous, *Censorship and Freedom of Speech - Understanding media and culture: An Introduction to mass communication*, LIBRARIES: UNIVERSITY OF MINNESOTA, <http://open.lib.umn.edu/mediaandculture/chapter/15-4-censorship-and-freedom-of-speech/>

⁴² Shyam Benegal, BROAD GUIDELINES/ PROCEDURE FOR CERTIFICATION OF FILMS BY THE CENTRAL BOARD OF FILM CERTIFICATION (CBFC) BROAD GUIDELINES/ PROCEDURE FOR CERTIFICATION OF FILMS BY THE CENTRAL BOARD OF FILM CERTIFICATION (CBFC) 1–91 (2016) , https://mib.gov.in/sites/default/files/Shyam_Benegal_committee_Report.pdf (last visited Aug 21, 2018).

⁴³ *Id.* at 39

and the artist ends up paying a heavy price for his freedom of speech. Further, whether such bans are politically or morally motivated is also an issue that needs to be addressed.

The power of banning books, ideally, should be taken out of the control of the government. An individual who wishes for a book to be banned must be allowed legal redress, but Courts must be extremely cautious while allowing parties to invoke the law, and must place a heavy burden on their shoulders. Lastly, the only way to change the narrative is to engage the masses in creating a new narrative, by changing their outlook. Free speech can only be countered with more free speech and not vice-versa. It is high time we adopted a spirit of acceptance.

No doubt that with differing and ambiguous legislation that is applied variably and in uncertainty, the paradox of censorship becomes unavoidable. We must keep in mind that the law cannot take into account the views and aspirations of every individual and is based on the view of the majority; the minority inevitably finding themselves unprotected. It is for this reason that the authors reiterate that we can find solace to this paradox in the law or in our judiciary only to some extent. The rest must come from the people themselves. Unless there is a clear, direct intention of causing harm to the public at large, governments are treading a dangerous path by buying into arguments which may be motivated by factors other than public interest. The underlying reason behind this is to ensure that no person is prevented from engaging the masses in discussion or from expressing his or her views no matter how different from majority opinion. Our opinions in this article itself, may be challenged, but we welcome such a challenge. A challenge with more words, more expression, more peaceful engagement; not a riot, not a ban, and certainly not censorship.

**‘ONE MAN’S VULGARITY IS ANOTHER MAN’S LYRIC’: IS IT TIME FOR A NEW TEST OF
OBSCENITY?**

*AVANI DUBEY

••DIKSHA DUBEY

1. INTRODUCTION

Obscene speech does need to be restricted. It has been excluded from the umbrella of constitutional protection under Article 19(1)(a), as it does not qualify as merely free speech and expression. It has more dimensions to it than solely freedom. As it was observed by the Supreme Court of the U.S.A so long ago in a case resorted to even in the present judgment, it adds minimal value to the society, and the social interest in morality is more significant than any marginal worth contributed by obscene speech.⁴⁴ The definition given in this case had wisely been made adequately narrow so as to extend constitutional protection to sexually explicit art or literature with redeeming social value.⁴⁵ This had been altered later on, and now the sole requirement for constitutional protection of a work has been established as its literary, artistic or scientific value. Howsoever objective the definition would have looked after *Regina v. Hicklin*⁴⁶, and even after the Miller test propounded in the case of *Miller v. California*⁴⁷, courts in India as well as every other parts of the world have had difficulty in actually identifying the meaning of the word ‘obscene’, and hence setting the boundaries of the boundless but a limited field of free speech.

The Kerala High Court, in the present case, has thrown open the gates of the age-old debate revolving around the concepts of obscenity, decency and morality. The case arose out of the seemingly indecent magazine cover of a magazine called *Grihalakshmi*, which was asserted by the petitioner, Felix M.A. to have ‘shocked the morals’ of the society due to its obscenity. The cover of the magazine, which portrayed a model-poet-actress Gilu Joseph breastfeeding an infant, her bosom slightly exposed, had been alleged by the petitioner to have violated Sections 3(c) and 5(j), III of Protection of Children from Sexual Offences Act and Rules, as well as Section 45 of the Juvenile Justice Act. He had also alleged violation of Sections 3 and

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⁴⁴ *Roth v. United States* 354 U.S. 476 (1957).

⁴⁵ *Id.* at 484, 487.

⁴⁶ *Regina v. Hicklin* 3 L.R.-Q.B. 360 (1868).

⁴⁷ *Miller v. California* 413 U.S. 15, 36 (1973).

4 of Indecent Representation of Women (Prohibition) Act, 1986, and Article 39(e) and (f) of the Constitution of India. The cover bore the caption, “Don’t stare, we need to breastfeed.” The Court, surpassing the Miller tests, resorted to the principle laid down in *Roth v. United States*⁴⁸, which is as follows:

A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind [sic] and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted... obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

The Court therefore can to the following findings:

- (a.) The image of a breastfeeding woman does not qualify as obscene, as according to the prevailing community standards, obscenity can no longer be held to be attributable to it, and hence does not violate the abovementioned provisions of enactments mentioned therein.
- (b.) The picture’s particular posture and its background setting as depicted in the magazine did not qualify as prurient or obscene.

Hence, the writ petition was duly dismissed. With beliefs and perceptions of society changing at the speed of light, it has indeed been difficult to build a law around these concepts: a law which can prove to be acceptable both in terms of preserving the fundamental right to speech and the fundamental moral standards and values of the society. Breastfeeding in public having been in vogue recently, with the Australian senator Larisa Waters having moved a motion while breastfeeding; and model Mara Martin walking the ramp while doing it⁴⁹, it is evident that community standards indeed have ascended to a new pedestal. For breastfeeding to be regarded as obscene and opposed to community standards, ergo, the case has come as a death knell. However, the underlying concern remains untouched, as the Court here has

⁴⁸ *Roth v. United States* 354 U.S. 476 (1957).

⁴⁹ Model breastfeeds baby as she walks the ramp, starts debate on social media, *The Indian Express* (India, July 18, 2018) , <https://indianexpress.com/article/trending/trending-globally/model-mara-martin-breastfeeds-baby-ramp-5263544/>, accessed on 4th August 2018.

refrained from going into that question, restraining itself to the matter at hand. There is yet to be propounded a reasonable definition of ‘obscenity’, which does not smother valuable expression of speech but sets a permissible picket fence for maintaining reasonable limits. Therefore, certain questions do demand immediate attention:

1. Whether the Court was justified in circumventing the Miller test and adopting the Community Standards Test?
2. Whether the Miller test is an adequate standard for judging obscenity according to prevailing societal circumstances?

2. ANALYSIS

As mentioned above, the High Court held that the obscenity of any work is to be judged by considering the contemporary mores and national standards. Further, in case of a conflict, constitutional morality shall prevail over popular morality, and thus an individual cannot be stopped from publishing any book, article or photograph merely because a certain group of people considers the act as immoral.

The *Community Standards test* states that the obscenity in any work is to be judged from the point of view of an average person, and by applying contemporary community standards, hence protecting the fundamental right of speech and expression of an individual.⁵⁰

The judgment is significant as it clears the air on the principle that is to be followed while judging obscenity and has, further, defined the boundaries that an individual has to keep in mind while exercising this fundamental right. The Supreme Court had previously in 1964, in *Ranjit D. Udeshi v. State of Maharashtra*⁵¹, followed the principle laid down in the English case *Regina v. Hicklin*⁵². The Hicklin principle, as it has come to be known, had established that any work, if it depraves and corrupts those whose minds are open to such immoral influences, and into whose hands a publication may fall, it will be categorized as obscene. It simply means it should not corrupt or deprave the minds of the young of either sex, or even to persons of more advanced years, with thoughts of tainted and libidinous character. The same

⁵⁰ Constitution of India, Article 19.

⁵¹ *Ranjit D. Udeshi v. State of Maharashtra* [1965] SCR (1) 65.

⁵² *Regina v. Hicklin* [1868] LR 3 QB 360.

was reiterated in *Chandrakant Kalyandas Kakodar v. State of Maharashtra and Ors.*⁵³ Later in various judgments, the Court drifted from the strict interpretation of the Hicklin principle but did not completely discard it. For instance, in *Bobby Art International, Etc v. Om Pal Singh Hoon & Ors*⁵⁴ Supreme Court allowed the movie Bandit Queen to be screened in the country, as the Court held that nakedness does not always allow this baser instinct.⁵⁵ In *Samaresh Bose v. Amal Mitra*⁵⁶, and *Khushboo v. Kanniammal*⁵⁷ it was held that Judges should step in the shoes of the readers of each age group in whose hands the book or article is likely to fall and shall then try to appreciate the kind of impact or influence the book will have on their minds and, furthermore, try to understand the author's work in entirety.

Finally, in *Aveek Sarkar v. State of West Bengal*⁵⁸, the Court adopted the Community Standard test. The latter came to be adopted due to the obvious fallacies in the Hicklin principle, as the Hicklin principle emphasized on judging the context for obscenity based on isolated passages of the work, and then checking the apparent influence of the same on the readers, whereas Community Standard test emphasized that the work has to be taken as a whole. Thus, in the present case, it was held that the obscenity of the picture will depend upon the particular posture and background in which the woman is depicted. Therefore, the cover photo of the magazine (a mother feeding a baby) was not considered as obscene or prurient.

Though the judgment is significant, it is still fraught with certain issues that need to be addressed. Firstly, the Court circumvented the *Miller test* /three prong patent-offensiveness test, which is more comprehensive and less subjective than the Community Standard test, as it judges the work from two more perspectives, i.e., "whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."⁵⁹ This test is a more objective way of approaching the definition of obscenity, as it contemplates scenarios beyond sexual obscenity. The Community Standards Test is vague, and allows the case to depend on the subjectivity of the

⁵³ *Chandrakant Kalyandas Kakodar v. State Of Maharashtra and Ors* [1970] SCR (2) 80.

⁵⁴ *Bobby Art International, Etc v. Om Pal Singh Hoon & Ors* [1996] 4 SCC 1.

⁵⁵ *Id.*

⁵⁶ *Samaresh Bose v. Amal Mitra* [1986] AIR 967.

⁵⁷ *Khushboo v. Kanniammal* [2010] 5 SCC 600.

⁵⁸ *Aveek Sarkar v. State of West Bengal*, [2014] 4 SCC 257.

⁵⁹ *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

judge's perception. Moreover, the answer to what constitutes "community", too, is unclear.⁶⁰ The latter test may have proven to be suitable for the present case; however, it sets a bad precedent for later cases, as it rests on uncertain ground.

However, the Miller test, propounded as early as 1973, itself suffers from many anomalies if analysed from an *Indian* perspective. What is the standard for determining *serious* scientific, artistic, political value of the work at hand? If this was applied as it is to *Indian* circumstances, a model appearing on the cover of a fashion magazine posing naked and minimally covering her modesty, as many Western models have in the past⁶¹, would be deemed lacking of serious artistic, scientific, and political value.

It is palpable that the case at hand did not require the test to be adopted, as it conveniently fits into the boundaries of the Community Standards test, but it was still of importance that a feasible standard be formulated by the court keeping in mind the peculiar societal circumstances in India. The Community Standards test being too vague, and the Miller test being too objectively tailored to fit Western circumstances, it would have been of much consequence had the Court resolved to formulate a test which adopts a more objective, yet an *Indian* approach.

3. THE NEED TO AMEND RELATED PROVISIONS UNDER IPC

The 109th law commission report suggested that s.293A should be inserted, in which the punishment given in s.292, 293 was to be extended to the person who publicly displays any indecent material. Further, the state of Tamil Nadu and Orissa have amended s.292 and have inserted s.292A which provide for punishing the person dealing with indecent matter intended for blackmail. It is suggested that the same should be applicable for the whole of India.

4. CONCLUSION

The case has re-ignited the debate on the question of obscenity, decency and morality in the contemporary scenario. The verdict of the case has been, indelibly, a positive and an affirmative mark on the freedom of speech in India, but has left many questions unanswered

⁶⁰ Alexander Conley, *Obscene Terrorism: Can the First Amendment's Obscenity Framework Be Applied to Terrorist Speech*, 51 NEW ENG. L. REV. 345, 354 (2017).

⁶¹ Rachel Hosie, *British Vogue Shocks with Images of Gigi and Bella Hadid Naked Together in New Issue*, INDEPENDENT, Jan. 31, 2018, <https://www.independent.co.uk/life-style/fashion/british-vogue-gig-hadid-bella-naked-sisters-images-photos-new-issue-edward-enninful-a8186946.html>

such as what should be the suitable test to measure obscenity, what standards should be adopted to define the line between obscene and indecency, such that they prove acceptable to the Indian society: not hampering its moral beliefs and traditions, but still letting the flag of free speech and expression fly high. It may be so that the standards to determine obscenity are impossible to quantify in a strait-jacket formula, but to preserve freedom of speech, a contemporaneous test needs to be developed, which takes into account peculiar Indian circumstances and social, economic, political and cultural development rates, keeping the freedom which has long been etched in the Constitution pristine and untouched.

CHANGING CONTOURS OF HOMOSEXUALITY IN INDIA

* DR. MONIKA AHUJA

Homosexuality is a very personal conduct and does not effect the society. So, state should not interfere in personal conduct until and unless it does not effect the society.

– Prof. H.L.A. Hart

1. INTRODUCTION

Since times immemorial, sex has been the central issue in governing human relations. Human sexual behavior all across the world has been influenced by different attitudes and opinions over the time. It is generally seen that societies which hold conservative attitude towards sexuality also tend to suffer from a lack of general freedom of expression, which in turn is often associated with a lack of economic, democratic and religious freedom. However, the actual ideological makeup of sexual conservatism differs from culture to culture. Thus, homosexuality may be stigmatized in one culture by sexual conservatives while tolerated or even advocated by others.

Homosexual is a term derived from the Greek word homos, which means 'the same'. Homosexuality means sexual orientation and sexual gratification with the same sex.⁶² In English speaking word 'Gay' denotes male homosexuality and 'Lesbianism' denotes female homosexuality.

There are basically three types of sexual orientation. These are as follows:

- (i) Heterosexuality- Sexual attraction to the opposite sex/ gender only.
- (ii) Homosexuality- Sexual attraction to the same and includes lesbianism and gay.
- (iii) Bisexuality- Sexual attraction to both sexes.

Two Types of Homosexuality

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⁶² 2 Douglas Malti Fedwa, Encyclopedia of Sex and Gender, 724 (MacMillan Social Science Library, 2007).

Lesbian

Gay

Interestingly, sexuality holds a central place in Indian culture, with early hindu texts and art heavily charged with sex. Homosexuality has existed from the time when man began to record history. The best examples of this are the carvings of Khajuraho temples, the 'love science' or 'the love teachings of Kamasutra by Vatsyayana'.⁶³ In the Greek city, States of Sparta and Thebes, homosexuality was closely limited to the military and in Athens, homosexuality and sport were intimately related. The same was in practice in Britain also. But in the 13th century the term sodomites became a common term to broadly refer to same-sex acts, prominently between men.⁶⁴ But by the influence of Judeo-Christian values and belief it was made criminal. It is mentioned clearly in the Halsbury Laws of England as follows:

Sodomy: The offence of sodomy can only be committed per annum. It may be committed by a man upon a woman even upon his own life.

The offence consists in penetration per annum and it can be committed by a man with a man, or with a woman, or with an animal. It is a misdemeanor for any male whether in public or private to take part in or attempts to procure the commission by any male of any act of gross indecency with another man. In criminal law it is known as buggery⁶⁵ many other nations followed the track. Since India was under the control of the English, it also couldn't escape unaffected, British anti-sodomy laws were in effect in India and the influence of Judeo-Christian considerations took hold in India. The law relating to homosexuality in India was made an offence under the Indian Penal Code (IPC), 1860 framed by Lord Macaulay as under:

2. THE OFFENCE

Section 377- Unnatural Offences- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life,

⁶³ 2 Douglas Malti Fedwa, Encyclopedia of Sex and Gender, 725 (MacMillan Social Science Library, 2007).

⁶⁴ 2 Douglas Malti Fedwa, Encyclopedia of Sex and Gender, 722 (MacMillan Social Science Library, 2007).

⁶⁵ 3 Courtney Kenny, Outlines of Criminal Law, 37-38 (9th Edn., Cambridge University Press, 1962).

or with imprisonment of either description for a term which may extend to ten years; and shall also be liable to pay fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The unnatural offences discussed under this section are:

- (i) Sodomy and
- (ii) Bestiality.

SODOMY

The word 'sodomy' generally denotes anal intercourse by a man with a man or with a woman or with an animal.⁶⁶ Sodomy may be either homosexual or heterosexual.⁶⁷ In case the parties are of same sex, it will be termed, as homosexual and if the parties are of opposite sex it will be called as heterosexual. Consent unlike rape is not a defence to the charge. The person affecting the intercourse is known as the 'agent' and the other party as the 'patient'.

BESTIALITY

Bestiality means the sexual intercourse either by a man or by a woman carried out in any way with a beast.⁶⁸ The section is wide enough to include a woman for committing unnatural offence. However, the section is not attracted if the act is done either by a man or a woman with an inanimate object.

Further this section states with any man, woman or animal, it means this section punishes homosexuality and bestiality as a whole because according to this section these are unnatural forms of intercourse which is not procreative. At the same time this section punishes intercourse apart from per vaginum, among heterosexuals, even with one's own wife.

Now the most controversial term used in this section is voluntarily. This particular term gives a sweeping scope over all type of non-procreative intercourse whether voluntarily or

⁶⁶ II William Oldnall Russell, Russell on Crime, Second Indian Reprint 2012, 735 (nineteenth edn., Universal Law Publishing, 2012)

⁶⁷ Smith and Hogans, Criminal Law, 479 (fourteenth edn., 2015).

⁶⁸ II William Oldnall Russell, Russell on Crime, Indian Reprint, 735 (nineteenth edn., Universal Law Publishing, 2001).

forcefully because consent for this section is immaterial. It means if an act has been done or performed any type of non-procreative intercourse with anybody. One is liable under this section regardless of mental state.

This section punishes all types of penetrative and non-penetrative sexual acts regardless of the mental state of the parties. Hence this act clearly takes homosexuality under its horizon. But these laws of sodomy or unnatural sex have constantly undergone change with the passage of time.

The English Law was reformed in Britain by the Sexual Offences Act, 1967, which decriminalized homosexuality and acts of sodomy between consenting adults (above age of 21) pursuant to the report of Wolfenden Committee. The Committee advising the Parliament had recommended in 1957 repeal of laws punishing homosexual conduct. Before this even in England, homosexuality was crime, but they reformed their law according to need and want of their society. Lord Macaulay drafted Indian Penal Code, 1860 and introduced it in 1861. But we are still bearing the odds of S. 377 and Indian Penal Code, a code which was drafted approx 157 years ago. Ironically, while the British drafted Section 377 of the Indian Penal Code, while replacing a tolerant Indian attitude towards sexuality with a highly oppressive one by giving a codified shape in the form of law.⁶⁹

To get a answer whether homosexuality or same-sex relationship existed in India, and in what form, we have to turn to three sources: images on temple walls, sacred stories and ancient scriptures.

Construction of Hindu temples in stone began around the sixth century of the Common Era. Construction reached climax between the twelfth and the fourteenth century when the grand pagodas of eastern and southern India such as Puri and Tanjore came into being. On the walls and gateways of these magnificent structures, we find a variety of images of gods, goddesses, demons, nymphs, sages, warriors, lovers, priests, monsters, dragons, plants and animals. Amongst scenes from epics and legends, one invariably finds erotic images including those that modern law deems unnatural and society considers obscene. Similar images also embellish prayer halls and cave temples of monastic orders such as Buddhism

⁶⁹ Amit Kumar Sinha, *Homosexuality in India: Better Late than Never*, Indian Law Journal (2007).

and Jainism built around the same time.⁷⁰

The range of erotic sculptures is wide: from dignified couples exchanging romantic glances, to wild orgies involving warriors, sages and courtesans. Occasionally one finds images depicting bestiality couples with friezes of animals to intercourse. All rules are broken: elephant are shown copulating with tigers, monkeys molest women while men mate with asses. And once in a while, hidden in niches as in Khajuraho, one does find images of either women erotically embracing other women or men displaying their genitals to each other, the former being more common (suggesting a tilt in favour of the male voyeur).

These images cannot be simply dismissed as perverted fantasies of an artist or his patron considering the profound ritual importance given to these shrines. There have been many explanations offered for these images - ranging from the apologetic to the ridiculous. Some scholars hold a rather puritanical view that devotees are being exhorted to leave these sexual thoughts aside before entering the sanctum sanctorum. Others believe that hidden in these images is a sacred Tantric geometry. The aspirant can either be deluded by the sexuality of the images or enlightened by deciphering the geometrical patterns therein. One school of thought considers these images to representations of either occult rites or fertility ceremonies. Another suggests that these were products of degenerate minds obsessed with sex in a corrupt phase of Indian history. According to ancient treatises on architecture, a religious structure is incomplete unless its walls depicts something erotic, for sensual pleasures (kama) are as much an expression of life as are righteous conduct (dharma), economic endeavours (artha) and spiritual pursuits (moksha).

Interpretations and explanations aside, these images generates the 'idea' of same-sex and what the colonial rulers termed 'unnatural' intercourse did exist in India. One can only speculate if the images represent the common or the exception.⁷¹

3. THE STORIES

In Indian epics and chronicles, there are occasional references to same-sex intercourse. For example, in the Valmiki Ramayana, Hanuman is said to have seen Rakshasa women kissing

⁷⁰ Dr. Dev Dutt Patnaik, *Did Homosexuality Exist in Ancient India?* Debonair, Annual Issue (2000).

⁷¹ *Ibid.*

and embracing those women who have been kissed and embraced by Ravana. In the Padma Purana is the story of a king who dies before he can give his two queens the magic potion that will make them pregnant. Desperate to bear his child, the widows drink the potion, make love to each other (one behaving as a man, the other as a woman) and conceive a child. Unfortunately, as two women are involved in the rite of conception, the child is born without bones or brain (according to ancient belief, the mother gives the fetus flesh and blood, while the father gives the bone and brain). In these stories, the same-sex intercourse, born of frustration or desperation, is often a poor substitute of heterosexual sex.

More common are stories of women turning into men and men turning into women. In the Mahabharata, Drupada raises his daughter Shikhandini as a man and even gets 'him' a wife. When the wife discovers the truth on the wedding night, all hell breaks loose; her father threatens to destroy Drupada's kingdom. The timely intervention of Yaksha saves the day. He lets Shikhandini use his manhood for a night and perform his husbandly duties.

According to a folk narrative from Koovagam in Tamil Nadu, the Pandavas were told to sacrifice Arjuna's son Aravan if they wished to win the war at Kurukshetra. Aravan refused to die a virgin. As no woman was willing to marry a man doomed to die in a day, Krishna's help was sought. Krishna turned into a woman, married Aravan, spent a night with him and when he was finally beheaded, mourned for him like a widow. These stories allow women to have sex with women and men to have sex with men on heterosexual terms. One may interpret these tales as repressed homosexual fantasies of a culture.⁷²

Perhaps the most popular stories-revolving around gender metamorphoses are those related to Mohini, the female incarnation of Lord Vishnu.⁷³ They are found in many Puranas. Vishnu becomes a woman to trick demons and tempt sages. When the gods and demons churn the elixir of immortality out of the ocean of milk, Mohini distracts the demons with her beauty and ensures that only the gods sip the divine drink. Mohini was so beautiful that when Shiva looks upon her he sheds semen out of which are born mighty heroes such as Hanuman (according to Shiva Purana) and Ayyappa (according to the Malayalee folk lore). One

⁷² *Ibid.*

⁷³ According to Mastya Purana, Lord Vishnu took a form of Enchantress Mohini to trick the demons. However, when Lord Shiva saw Vishnu as Mohini, he was instantly in love. the union between the Gods manifested a child – Lord Ayyappa. Hari is one of the names of Vishnu and Hara is one of the names of Shiva. In Hindu worshipping, when Vishnu and Shiva are worshipped together they are called Hari-Hara. The prayers dedicated to Hari-Hara describe Hari (Vishnu) and Hara (Shiva) as a male couple.

wonders why Vishnu himself transforms into a woman when he could have appointed a nymph or goddess to do the needful. However, devotees brush aside even the suggestion of a homosexual subtext; for them this sexual transformation is merely a necessary subterfuge to ensure cosmic stability. He who is enchanted by Mohini's form remains trapped in the material world; he who realizes Mohini's essence (Vishnu) attains liberation.

Hijras are organized communities comprises of males who express themselves socially as women. They are a mix of transsexuals (men who believe themselves to be women), transvestites (men who dress in women's clothes), homosexual (men who are sexually and romantically attracted to men), hermaphrodites (men whose genitals are poorly defined due to genetic defect or hormonal imbalance) and eunuchs (castrated men). In one of the many folk stories associated with Bahucharaji (patron goddess of hijras worshipped in Gujarat), the goddess was once a princess who castrated her husband because he preferred going to forest and 'behaving as a woman' instead of coming to her bridal bed. In another story, the man who attempted to molest Bahucharaji was cursed with impotency. He was forgiven only after he gave up his masculinity, dressed as a woman and worshipped the goddess.

4. THE SCRIPTURES

The Kali Yuga marks the final phase in the cosmic lifespan. Hindu scriptures state that in this age all forms of sexual irregularities will occur. Men will deposit semen in apertures not meant for them (Mouth? Anus?). According to Narada Purana: "The great sinner who discharges semen in non-vagins, in those who are destitute of vulva, and uterus of animals shall fall into the hell 'reto-bhojana' (where one has to subsist on semen). He then falls into 'vasakupa' (a deep and narrow well of fat).

In another indicator of the liberal Hindu heritage, Kama Sutra, a classic written by Sage Vatsyayana, devotes a whole chapter to homosexual sex saying "it is to be engaged in and enjoyed for its own sake as one of the arts." Besides providing a detailed description of oral sex between men, Kama Sutra categorizes men who desire other men as "third nature" and refers to long-term unions between men.⁷⁴

⁷⁴ Manoj Mitha, Ancient India did not think Homosexuality was Against Nature, Times of India, June 27, 2009.

The Manusmriti scorns female homosexuals. It states, "If a girl does it (has sex) to another girl, she should be fined two hundred (pennies), be made to pay double (the girl's) bride-price, and receive ten whip (lashes). But if a (mature) woman does it to a girl, her head should be shaved immediately or two of her fingers should be cut off, and she should be made to ride on a donkey. And: "If a man has shed his semen in non-human females, in -a man, in a menstruating woman, in something other than a vagina, or in water, he should carry out the 'Painful Heating' vow." The 'Painful Heating' vow is traditionally said to consist of cow's urine, cow dung, milk, yogurt, melted butter, water infused with sacrificial grass, and a fast of one night. Compared to the treatment of female homosexuals, the treatment of male homosexuals is relatively mild.⁷⁵

An overview of temple imagery, sacred narratives and religious scriptures does suggest that homosexual activities- in some form- did exist in ancient India. Though not part of the mainstream, its existence was acknowledged but not encouraged.

Section 377, IPC is intended to punish carnal intercourse committed against the order of nature by a man with another man, or in the same unnatural manner with a woman, or by a man or a woman in any manner with a beast. The section includes acts of sodomy, buggery and bestiality for which punishment may extend up to imprisonment for life or 10 years and fine.

In *Brother John Anthony v. State of Tamil Nadu*,⁷⁶ the petitioner, warden of a boarding house, was found to have committed on the inmates of the boarding school following unnatural offences, viz,

- (i) Inserted the penis into the mouth of the victim and in doing the act of carnal intercourse leading to ejaculation of semen into the mouth; and
- (ii) Holding the penis in the hand of the victim making the manipulated movements of the penis and withdrawal up to the point of ejaculation of semen.

While holding the petitioner liable under s 377, IPC for committing unnatural offences, the Madras High Court held that: "Manipulation and movement of the penis of the accused whilst

⁷⁵ The Rigveda Says, "Vikruti Evam Prakriti" (diversity is what nature is all about).

⁷⁶ 1992 CrLJ 1352.

being held by the victim in such a way as to create orifice like thing for making manipulated movement of insertion and withdrawal till ejaculation of semen will fall within the sweep on unnatural carnal offence."

In *Naz Foundation v. Government of NCT of Delhi and Others*,⁷⁷ in view of recognition of right to personal freedom as a fundamental human right, Naz Foundation, working on HIV/AIDS filed a PIL in Delhi High Court seeking that homosexuality between consenting adults should not be penalised.

The PIL said that s 377 IPC which makes carnal intercourse against the order of nature punishable with imprisonment for life or 10 years' was violative of Articles 14,⁷⁸ 15,⁷⁹ 19(1)⁸⁰ and 21⁸¹ of the Constitution of India to the extent that it penalises sexual acts between consenting adults. There is no compelling state interest that exists to justify the curtailment of such an important element in the fundamental right to life and liberty, the petition said.

Allowing the petition, a bench comprising of Chief Justice AP Shah and Justice S Murlidhar delivered a path-breaking judgment on 2nd July 2009 "decriminalising consensual sex of adults of the same sex in private" under s 377 IPC. The court declared s 377 IPC *ultra vires* so far as it "criminalised consensual sexual acts of adults above 18 years of age in private," since it is violative of fundamental rights to personal liberty, equality before law and discriminates people on the ground of sex under Articles 21, 14 and 15 respectively of the Constitution.

The court clarified that hence forth s 377 IPC which was enacted in 1860 to deal with an

⁷⁷ 2010 CrLJ 94 Del (DB).

⁷⁸ Article 14– Equality before law– The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁷⁹ Article 15– Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth.

⁸⁰ Article 19– Protection of certain rights regarding freedom of speech, etc.– (1) All citizens shall have the right–

(a) To freedom of speech and expression;

(b) To assemble peaceably and without arms;

(c) To form associations or unions [or cooperative societies];

(d) To move freely throughout the territory of India;

(e) To reside and settle in any part of the territory of India; and

(f) [***]

(g) To practice any profession or to carry on any occupation, trade or business.

⁸¹ Article 21– Protection of Life and Personal Liberty– No person shall be deprived of his life or personal liberty except according to procedure established by law.

unspecified range of "unnatural offences" would be restricted to "non-consensual penile," "non-vaginal sex" (rape by a homosexual) and "penile non-vaginal sex involving minors". Upholding the petition, the court ruled, *"Indian constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs (lesbians, gays, bisexuals and transgender) are. It cannot be forgotten that any kind of discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual."*

Elaborating its contention the court held, *"There is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality and that the Law Commissions' suggestion to repeal s 377 IPC while redefining rape to include sexual offences of non-consensual sex between adults of the same sex and paedophilia in its 172nd Report⁸² (2000) was most appropriate."*

With the landmark judgment delivered by Delhi High Court, India took a giant, step towards globalisation by suggesting to amend a 157-year-old colonial era law under s 377 of the Indian Penal Code and decriminalise private consensual sex between adults of the same sex. The judgment is the biggest victory for gay rights and a major milestone in the country's social evolution.

The verdict triggered protests from religious leaders across the spectrum who invoked the "will of God" to claim that the ruling would lead to the "ruination" of society and family values. On the other hand, social workers and psychologists welcomed the order, describing it as "scientific and humane."

Political parties were, however, divided. The CPM welcomed the judgment, while Samajwadi Party said it was totally opposed to it. Both Congress and BJP are indecisive and have not formed any opinion on this important issue.

In *Suresh Kumar Koushal and another v. Naz Foundation*,⁸³ the Supreme Court on a Special Leave Petition through a two Judges Bench consisting of Justice G.S. Singhvi and Justice Sudhanshu Jyoti Mukhopadhyaya reversed the ruling of Delhi High Court in *Naz Foundation*

⁸² 172nd Report of Law Commission of India as on Review of Rape Laws, March, 2000.

⁸³ *Suresh Kumar Koushal and another v. Naz Foundation*, AIR 2014 SC 563.

case and held—Section 377 does not suffer from the vice of unconstitutionality. Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the different category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is to merely define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family, the person is found guilty. The High Court was not right in declaring Section 377 I.P.C. *ultra vires* Articles 14 and 15 of the Constitution.¹ While reading down Section 377 I.P.C. the Division Bench of the High Court overlooked that a miniscule fraction of the country's population which constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than two hundred persons have been prosecuted (as per the reported orders) for committing offence under Section 377 of I.P.C. and this cannot be made sound basis for declaring that section *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution.

Section 377 I.P.C. was attacked on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. These are the daily problems which the community faces but this aspect was ignored by the Hon'ble Supreme Court.

5. GLOBAL TREND TO RECOGNISE DIGNITY RIGHTS OF SAME SEX RELATIONS :

In *Lawrence v. Tex.*,⁸⁴ Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons, of the same sex to engage in certain intimate sexual conduct, vide s 21.06(a) (2003)⁸⁵ of the Texas Penal Code. In affirmation, the State Court of Appeals held, that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The petitioner accordingly moved the US Supreme Court against the State

⁸⁴ John Geddes Lawrence and Tyron Garner v. Texas 539 U.S. 653 (2003).

⁸⁵ Tex Penal Code Ann. 21.06(a) (2003) provides:

"A person commits an offence if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person' or
"(B) the penetration of the genitals or the anus of another person with an object."

courts' verdict as unconstitutional.

The question before the court is the validity of a Tex statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

Overruling *Bowers v. Hardwick*⁸⁶ (1986), the US Supreme Court by a majority of 5 to 4⁸⁷ held that Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home, as impinging on their exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

Justice Kennedy speaking for the court observed,

"The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual [page 578]."

The European Commission of Human Rights (ECHR) in 1981 for the first time in *Dudgeon v. The United Kingdom*,⁸⁸ held that criminalisation of homosexual practices is a violation of the privacy protection in Article 8 of the ECHR. The court held that,

⁸⁶ 478 U.S. 186 (1986).

⁸⁷ Kennedy J., delivered the opinion of the court, in which Stevens Souter, Ginsburg and Breyer, JJ. Joined. O'Connor, J. filed an opinion concurring in the judgement. SCALIA J. filed a dissenting opinion, in which Ehnquist, CJ. And Thomas, J. Thomas, J. filed a dissenting opinion.

⁸⁸ *Dudgeon v. The United Kingdom*, 45 Eur. Ct.H.R. (Ser A) (1981).

"Criminalising homosexual acts constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 para 1 (Article 8-1)... The very existence of such legislation continuously and directly affects his private life."

Similarly in *Norris v. Republic of Ireland*,⁸⁹ The European Court of Human Rights ruled that Ireland's blanket prohibition on gay sex breached the ECHR. The court quoted with approval the finding of an Irish Judge that,

"One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow ... [para 21]."

In view of the decision of United Nations Human Rights Committee in *Toonen v. Australia*,⁹⁰ consensual sexual relations between adult males have been de-criminalised in New Zealand in 1992. In Canada, consensual adult sodomy was decriminalised by statute in 1989 in respect of such acts committed in private between 18 years or more.

In *James Obergefell v. Richard Hodges*,⁹¹ is a landmark United States Supreme Court judgement in which the Court has held in a 5:4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁹²

Decided on June 26, 2015, *Obergefell* overturned *Baker* and requires all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions.⁹³ This legalized same-sex marriage throughout the United States, and its possessions and territories. The Court examined the nature of fundamental

⁸⁹ *Norris v. Republic of Ireland*, 142 Eur. Ct.H.R. (Ser A) (1988). The European Court of Human Rights again held in *Modinos v. Cyprus*, 259 Eur. Ct.H.R. (Ser A) (1993) that such a law violated the right to privacy.

⁹⁰ *Toonen v. Australia*, No. 488/1992 CCPR/C/50/D/488/1992, March 31, 1994.

⁹¹ *James Obergefell v. Richard Hodges*, No. 14-556, slip op. (http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf) at 23 (U.S. June 26, 2015).

⁹² Denniston, Lyle (June 26, 2015). "Opinion Analysis: Marriage Now Open to Same-Sex Couples". SCOTUSblog. Retrieved July 2, 2015.

⁹³ *Obergefell*, slip op. (http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf). at 28 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all states.").

rights guaranteed to all by the Constitution, the harm done to individuals by delaying the implementation of such rights.

In recent years, a number of open democratic societies have turned their backs to criminalisation of sodomy laws in private between consenting adults despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitutions. Homosexuality has been de-criminalised in several countries of Asia and Africa also. For instance, the High Court of Hong Kong in *Leung T.C. William Roy v. Secy. for Justice*,⁹⁴ and the High Court of Fiji in *Dhirendra Nandan & Another v. State*,⁹⁵ struck down sodomy law in their respective countries in 2005. Nepalese Supreme Court has also struck down the laws criminalizing homosexuality in 2008.

Similarly, the Constitutional Court of South Africa in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*,⁹⁶ struck down the sodomy laws on the ground of violation of rights to privacy, dignity and equality. Ackermann, J, speaking for the court said,

"The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the" daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and

⁹⁴ *Leung T.C. William Roy v. Secy. for Justice*, Dated 24th August, 2005 and 20th September, 2006.

⁹⁵ in *Dhirendra Nandan & Another v. State*, Criminal Appeal Case No. HAA 85 & 86 of 2005, decided on 26th August, 2005.

⁹⁶ In *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, decided by the Constitutional court of South Africa on 9th October, 1998.

devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of the Constitution."

6. CONCLUSION AND SUGGESTIONS

The ancient Hindu scriptures describe the homosexual condition to be a biological one, although the scripture gives guidance to parents on how to avoid procreating a homosexual child but it does not condemn the child as unnatural.

Homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality. Homosexuals are as normal as others. Yet, just because they love 'their own kind', they are ostracized and looked down upon by society, harassed and humiliated by law enforcement agencies. Relationships are decided by comfort levels and not societal sanctions. Like heterosexuality, homosexuality is an orientation which is not unnatural. The world is slowly and slowly accepting this orientation.

The argument that same sex relationship should not be made legal "because they do not produce kids" is ridiculous. Should heterosexual couples over 50 not be allowed to marry as they cannot produce kids either? If two people love each other and want to unite their destinies, then it is a beautiful thing which should be celebrated. Whether it is called "marriage" or "life pact" does not matter.

Different sexual expressions or orientations automatically come within the ambit of expanded right to life and personal liberty as this right also includes provision for future developments. Right to equality as well as right against any discrimination based on sex would also be violated in absence approval of homosexuality. Marriage is more than a legal status. It affects many things in society such as tax filing status, joint ownership of property, insurance benefits and agency law. It affects critical medical decisions. For example, if one member of a gay couple that has been together for 20 years gets critically ill, visitation may not even be allowed since the other isn't considered a "spouse or immediate family member". Also, critical medical decisions must often be made when one person is incapacitated; e.g., should a certain surgery be done or not? It is completely unfair to deny these privileges to people

because their relationship doesn't fit the state's definition of one. An overwhelming amount of research has been done showing that homosexuality has a biological causation not a genetic one, but a biological one.

Today, homosexuality is recognized across the globe, with the Netherlands being the first country to permit marriage for gay and lesbian couples. While the UK has passed legislation recognizing gay relationships, events expressed the essence of being homosexual such as Mardi Gras in Sydney, Midsummer in Melbourne, Gay and Lesbian Pride in Johannesburg, Women's Celebration Week in Greece, and the Gay and Lesbian Film Festival in Lisbon. Yet, India remains untouched though literature drawn from Hindu ancient walls of temples, sacred stories and scriptures testify to the presence of same-sex relationship. Ancient texts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads and Puranas refer to homosexuality.

If laws are supposed to represent socially-acceptable do's and don'ts, then a new mindset is the need of the hour. Otherwise, normal human beings will continue to suffer inhuman exploitation just because nature has nourished them with the need to be different. In this regard the Delhi High Court judgement regarding homosexuality in Naz Foundation Case is highly commendable. When the court said that, "Any kind of discrimination is anti-thesis of right to equality", it thus decriminalizes homosexuality. There is a need to be patient and understand clearly that being a homosexual is not a fashion but its biological and there may be other factors to as different scientists have found in their research.

PROTECTION OF HUMAN RIGHTS: THE IMPORTANCE OF HUMAN RIGHTS EDUCATION

***DR. PUJA JAISWAL**

1. INTRODUCTION

Human rights are a set of principles concerned mainly with equality and fairness. These rights recognise one's freedom to make choices about their lives and to develop potential as human beings. Human rights are about living a life free from fear, harassment or discrimination. They can broadly be defined as a number of basic rights that people from around the world have agreed are essential for humans. These include the right to life, freedom of speech, the right to health and freedom of religion, education and an adequate standard of living, the right to a fair trial, freedom from torture and other cruel and inhuman treatment, etc. These human rights are the same for all people everywhere – men and women, young and old, rich and poor, regardless of one's background, where one live, what one thinks or what one believes in. This is what makes human rights 'universal'.

Human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations on Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.⁹⁷ But, human rights violations are prevalent in all societies whether developed, developing or under developed. Most of the people do not come forward because of unawareness of their rights and, therefore, there is need for human rights education for making people aware what their rights are. Human rights education has a crucial role in preventing human rights violations.

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⁹⁷United Nations, *As per the Office of the High Commissioner for Human Rights (OHCHR)*, (Apr. 30, 2017, 9:00PM). <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>.

Every individual has the right to education, and that education shall be directed to the full development of the human personality and the sense of its dignity, that enables all persons to participate effectively in a free society and promote understanding, tolerance and respect amongst people and all racial, ethnic or religious groups, and further promoting such activities for the maintenance of peace, security amongst nations and promotion & development of human rights.

Human rights education plays a significant role in realization of human rights. Human rights education aims at developing an understanding of our common responsibility to make human rights a reality in every community and in society at large. In this sense, it contributes to the long-term prevention of human rights abuses and violent conflicts, the promotion of equality and sustainable development and the enhancement of participation in decision-making processes within a democratic system.⁹⁸

Human rights education is to facilitate learning that develops the knowledge, skills, and values of human rights. Human Rights Education can be explained as "training, dissemination, and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the molding of attitudes which are directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, respect, gender equality, and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free society;
- (e) The building and maintenance of peace;

⁹⁸ COMMISSION ON HUMAN RIGHTS RESOLUTION 2004/71 (21 April 2004), Preambular, para. 4.

- (e) The furtherance of the activities of the United Nations for the Maintenance of Peace."

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2. THE OBJECTIVE OF HUMAN RIGHTS EDUCATION AND ITS PROMOTION

Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should also have access to human rights education and training. Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights. The effective enjoyment of all human rights, in particular the right to education and access to information, enables access to human rights education and training.¹⁰⁰

The Objectives of the Human Rights Education are as under:¹⁰¹

- (a) To promote the development of a culture of human rights;
- (b) To promote a common understanding, based on international instruments, of basic principles and methodologies for human rights education;
- (c) To ensure a focus on human rights education at the national, regional and international levels;
- (d) To provide a common collective framework for action by all relevant actors;
- (e) To enhance partnership and cooperation at all levels;
- (f) To survey, evaluate and support existing human rights education programmes, to highlight successful practices, and to provide an incentive to continue and/or expand them and to develop new ones.

Further, human rights education encompasses¹⁰²:

⁹⁹ PLAN OF ACTION OF THE UNITED NATIONS DECADE FOR HUMAN RIGHTS EDUCATION (1995-2004), para. 2.

¹⁰⁰ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, 2011, art.1, (The said Declaration was adopted by the General Assembly, vide Resolution 66/137, A/RES/66/137, 19 December 2011).

¹⁰¹ WORLD PROGRAMME FOR HUMAN RIGHTS EDUCATION, SECOND PHASE, PLAN OF ACTION, 2012, UNITED NATIONS.

- (a) Knowledge and skills — learning about human rights and mechanisms, as well as acquiring skills to apply them in a practical way in daily life;
- (b) Values, attitudes and behaviour — developing values and reinforcing attitudes and behaviour which uphold human rights;
- (c) Action — taking action to defend and promote human rights.

Article 2¹⁰³ of the United Nations Declaration on Human Rights Education and Training, 2011, discusses objectivity and the concept of promotion of human rights education and training, i.e.

“Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing, inter alia, to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.”¹⁰⁴

Thus, education in human rights is itself a fundamental human right. Human rights education teaches both about human rights and for human rights. Its goal is to help people understand human rights, value human rights, and take responsibility for respecting, defending, and promoting human rights. An important outcome of human rights education is empowerment, a process through which people and communities increase their control of their own lives and the decisions that affect them. The ultimate goal of human rights education is people working together to bring about human rights, justice, and dignity for all.

3. FRAMEWORK FOR THE PROMOTION OF HUMAN RIGHTS UNDER INTERNATIONAL INSTRUMENTS

¹⁰² World Programme for Human Rights Education (2010) (A/HRC/15/28, 27 July 2010), *Plan Of Action For The Second Phase* (2010-2014), , (Apr. 30, 2017, 11:30PM), [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionforthesecondphase\(2010-2014\)oftheWorldProgrammeforHumanRightsEducation\(2010\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionforthesecondphase(2010-2014)oftheWorldProgrammeforHumanRightsEducation(2010).aspx).

¹⁰³ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, 2011, (Adopted by the General Assembly, Resolution 66/137, A/RES/66/137, 19 December 2011).

¹⁰⁴ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, 2011, art.2.

The promotion and protection of human rights is a matter of priority for the international community, and that the various International Covenants focuses on need for Human rights education as an effective strategy to prevent human rights violations.

The United Nations General Assembly has proclaimed the importance of Human Rights education as central to the achievement of the rights enshrined in the Universal Declaration of Human Rights (UDHR)

*“Now, Therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, **shall strive by teaching and education to promote respect for these rights and freedoms** and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”*¹⁰⁵

Article 26.2 of the UDHR,¹⁰⁶ called for by the declaration that human rights education helps in achieving social order:

“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”

The *Vienna Declaration*, the decade from 1995 to 2004 was declared the UN Decade of Human Rights Education. The World Conference on Human Rights in the Vienna Declaration and Programme of Action stated that human rights education, training and public information were essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace.¹⁰⁷

Building on the achievements of the *United Nations Decade for Human Rights Education (1995-2004)*, the World Programme seeks to promote a common understanding of the basic

¹⁰⁵ UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, Preamble.

¹⁰⁶ UNIVERSAL DECLARATION OF HUMAN RIGHTS.

¹⁰⁷ VIENNA DECLARATION THE DECADE FROM 1995 TO 2004, sec. I, para. 33.

principles and methodologies of human rights education, to provide a concrete framework for action and to strengthen partnerships and cooperation from the international level down to the grass roots.¹⁰⁸ UNESCO¹⁰⁹ has the responsibility to promote human rights education, and was a key organiser of the UN's Decade for Human Rights Education. UNESCO attempts to promote human rights education through:

- Development of national and local capacities for human rights education, through its co-operation in development projects and programmes at national and sub-regional levels.
- Elaboration of learning materials and publications and their translation and adaptation in national and local languages.
- Advocacy and Networking Activities.

United Nations Declaration on Human Rights Education and Training (2011),¹¹⁰ lays down that,

“Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training. Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights. The effective enjoyment of all human rights, in particular the right to education and access to information, enables access to human rights education and training.”¹¹¹

According to Article 2 of the *United Nations Declaration on Human Rights Education and Training*, 2011, human rights education and training encompasses¹¹²:

¹⁰⁸ *Ibid.*

¹⁰⁹ The United Nations Educational, Scientific and Cultural Organization, is a specialized agency of the United Nations (UN) based in Paris, to contribute to peace and security by promoting international collaboration through educational, scientific, and cultural reforms in order to increase universal respect for justice, the rule of law, and human rights along with fundamental freedom proclaimed in the United Nations Charter.

¹¹⁰ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, 2011, Adopted by the General Assembly, Resolution 66/137, A/RES/66/137, 19 December 2011.

¹¹¹ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, 2011, a rt. 1.

¹¹² UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, 2011, *supra* note 14.

- (a) Education about human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection;
- (b) Education through human rights, which includes learning and teaching in a way that respects the rights of both educators and learners;
- (c) Education for human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.

Thus, the said International Covenants emphasizes on human rights education in order to prevent human rights violations that result in ruinous human, social, cultural, environmental and economic costs. Human rights education contributes to protecting the dignity of all human beings and to building societies where human rights are valued and respected.

4. THE ROLE AND RESPONSIBILITY OF KEY STAKEHOLDERS (MEDIA AND EDUCATIONAL INSTITUTIONS) IN THE PROMOTION OF HUMAN RIGHTS

Human rights education and training is a lifelong process that concerns all ages. Promotion of human rights makes an essential contribution to the prevention of abuses and conflict and helps to create a society in which all persons are valued and respected just because of their humanity. Human rights education and information contribute to a concept of development consistent with the dignity of women and men of all ages that takes into account the diverse segments of society such as children, indigenous people, minorities and disabled persons, other marginalized groups.

In India, the law makers have always comprehended their responsibility and have played an important role in creating awareness, dissemination of information regarding human rights. Apart from State, there are other stakeholders like media, educational institutions, NGOs', etc. that are partnering with the state in promotion of Human Rights education. The scope of this paper has been limited to throw light on the role of media and educational institutions w.r.t. Law universities and schools in India in promoting human rights education in India.

4.1 Media

In view of the fact that there is a revolutionary change and growth in every sphere of life and mainly in the communication and media world, media today, plays a decisive role in the development of society. In the 21st century, the word ‘promotion’ by itself is associated with the media. Media, *the fourth pillar of our democracy*, has become irreplaceable choice to spread information. Media is a communicator of the public. Thus, the role of media in protection of human rights cannot be ignored or minimized. The impact of media on society today is beyond doubt and debate. Today, its role extends not only to giving facts as news, it also analyses and comments on the facts and thus shapes the views of the people. The media has been setting for the nation its social, political economic and even cultural agenda. With the advent of satellite channels its impact is even sharper and deeper. With twenty-four hours news-channels, people cannot remain neutral to and unaffected by what the channels are serving day and night. It is, therefore, of paramount importance that the media plays an important and ethical role at all levels and in all parts of the country and the world.¹¹³

Media can play a major role in protecting and promoting human rights across the globe. The Clause 3(e)¹¹⁴ of the *Guidelines for National Plans of Action for Human Rights Education, 1997*, clearly lays down in its objectives for strengthening the role of mass media. In the 21st century, there are a wide ranges of access to different types of media and with the ever growing interest of the people to keep abreast of the topics of the day, the role of media has become all the more important. It can make people aware of the need to promote certain values in the cause of human rights which are of eternal value to the mankind. Peace, non-violence, disarmament, maintenance and promotion of ecological balances and unpolluted environment and ensuring human rights to all irrespective of caste, colour and creed should be the minimum common agenda for the media. The media can perform this role in different ways. It can make people aware of

¹¹³ G.N Ray, *The Role of Media in Protection of Human Rights*, (May 8, 2017, 9:15PM), available at www.presscouncil.nic.in.

¹¹⁴ GUIDELINES FOR NATIONAL PLANS OF ACTION FOR HUMAN RIGHTS EDUCATION (1997-A/52/469/Add.1 and A/52/469/Add.1/Corr.1, 20 October 1997 and 27 March 1998), (May, 8, 2017, 10:30PM). at [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/GuidelinesforNationalPlansofActionforHumanRightsEducation\(1997\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/GuidelinesforNationalPlansofActionforHumanRightsEducation(1997).aspx).

Clause 3, The Plan of Action has five objectives:

- (a) The assessment of needs and formulation of strategies;
- (b) Building and strengthening human rights education programmes at the international, regional, national and local levels;
- (c) Developing educational materials;
- (d) Strengthening the role of mass media;
- (e) Global dissemination of the Universal Declaration of Human Rights.

their rights, expose its violations and focus attention on people and areas in need of the protection of human rights and pursue their case till they achieve them. Media can also give publicity to the individuals and organisations, which are engaged in securing human rights. This will encourage as well as motivate others to do the similar work. Media can inform and educate the people of their rights and suggest ways and means by which they can solve their problems and thus empowering them to protect their rights. Since media plays the role of communication between the state and the public, it can also play an effective role of making the authorities aware of their duties.¹¹⁵ The activities of the media in circulating human rights and related information on the radio, newspapers, television and other mass media; drama, sports, artistic and cultural events has proved to be effective way of reaching the population often cut off from human rights discourse. These activities of the media facilitate efforts of the state to promote values, beliefs and attitudes that encourage individuals to uphold their rights and those of others.

But, many a times, media is in the role of the perpetrator, in many cases the media adds on heating up conflicts, using propaganda etc.. Also, the use of language in terms of reproducing stereo types or the media violating the rights to privacy are important issues to consider. Furthermore, the media has a lot of power to turn an issue into a public debate or to ignore it. Guaranteed freedom of expression is the base for media to take a responsible role of protector, promoter and educator in human rights, and also to expose human rights violations while protecting the reporters. A diverse environment with independent media and no monopolization is crucial in avoiding media getting into the role of the perpetrator and limiting the effects of agenda setting.

4.2 Educational Institutions w.r.t. Law Universities and Schools

Human rights education and training concerns all parts of society, at all levels, including pre-school, primary, secondary and higher education, taking into account academic freedom where applicable, and all forms of education, training and learning, whether in a public or private, formal, informal or non-formal setting. It includes, inter alia, vocational training, particularly the training of trainers, teachers and State officials, continuing education, popular education, and public information and awareness activities. The Vienna Conference recommended that States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and the

¹¹⁵ *Ibid.*

strengthening of respect for human rights and fundamental freedoms. It called on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.¹¹⁶

In India, although educational institutions at all levels are providing and promoting human rights education but lacks a through and holistic approach. Introducing or improving human rights education particularly in the higher education system requires adopting a holistic approach to teaching and learning, by integrating programme objectives and content, resources, methodologies, assessment and evaluation; by looking beyond the classroom. Teaching personnel have a major responsibility to transmit human rights values, skills, attitudes, motivation and practices, both in the performance of their professional responsibilities and in their function as role models. To this end, the recognition of and respect for their professional status, as well as the provision of adequate human rights training, are essential.

The role of Law universities and schools in the country in promoting human rights education is very significant. These institutions can play a very important role by conducting Legal Aid Camps/Clinics, awareness programmes, social mobilization programmes etc. These legal aid camps and clinics are an important medium to disseminate human rights education. The volunteers i.e. the students of the Law Universities and schools by creating awareness about the human rights promote respect for these rights and freedoms. The main focus of Legal Aid Camps is to spread and publicize the knowledge of fundamental rights and to promote peace and prosperity to all the individuals without distinction of race, creed, sex, religion and language. Legal Aid Camps and Clinics connect individuals with real life issues empowering them to make meaningful change.

A responsible Law University/school strengthens a culture of human rights in the state. Legal Aid Clinics basically serve the purpose of providing legal advice not for the aim of earning profit but in general public interest. Students pursuing law have zeal and enthusiasm to provide legal aid services. Law students in these Legal Aid Camps and Clinics educate people about their basic human rights and provide them with information

¹¹⁶ VIENNA DECLARATION THE DECADE FROM 1995 TO 2004, (May, 8, 2017, 11:10PM). http://www.humanrights.ch/upload/pdf/090818_Media_HRE_Presentation_AH.pdf.

and the range of ideas and opinions which enables them to resolve their dispute amicably. Thus, students of Law are exposed to social action work, imparting of human rights education, thus, making an effort in eradicating human rights violations and playing a crucial role in promotion of human rights education in the society.

5. CONCLUSION AND SUGGESTIONS

We can conclude with, that human rights education is a lifelong process that builds knowledge and skills, as well as attitudes and behaviours, to promote and uphold human rights. The main focus of human rights education is to disseminate fundamental rights and to promote peace and prosperity to all the individuals without distinction of race, creed, sex, religion and language. Human rights education connects individuals with real life issues empowering them to make meaningful change, and therefore, human rights education is very essential for all the human beings.

In India, the law makers have always comprehended their responsibility and have played an important role in creating awareness, dissemination of information but a lot more still needs to be done. Human rights education is very essential for all human beings and it would not be wrong to say that media and educational institution especially the law schools have showed their commitment towards human rights education. Media and educational institutions play a crucial role in promotion of human rights education in the society. A responsible media strengthens a culture of human rights in the state and provides its readers, listeners, viewers with information and the range of ideas and opinions which enables them to participate actively in a political democracy and educate them about their basic human rights. Promoting human rights education has a crucial role in preventing human rights violations and is a vital mean to ensure its protection. The policy makers needs to develop strategies for infusing human rights as a cross-cutting issue into all higher-education disciplines—not only law, social sciences but also disciplines in the technical and scientific fields. Further, Universities and Advanced Studies Departments must consider offering introductory courses on human rights for students of all disciplines and also consider introducing advanced courses addressing human rights issues specifically relevant for each course of study. The training of trainers, pre-service and in-service training of teaching personnel also needs to be comprehensively devised. Thus, human rights education can be implemented in a more better and an organized way if all key stakeholders start implementing the promotion of human

rights education diligently, working to empower young people to volunteer in their communities for imparting human rights education.

HUMAN CLONING – LEGAL AND POLICY CONCERNS

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1. INTRODUCTION

The landmark event of the birth of first cloned mammal, the sheep Dolly, in the ROSLIN INSTITUTE OF EDINBURGH in 1996, has made it very clear that human cloning was no longer a question of “if” but rather a question of “when”.¹¹⁷ The issue of human cloning and the legal repercussions thereof further came into the limelight following the creation of a ‘human- ape’ chimera¹¹⁸ by Dr. Stuart Newman of the New York Medical College¹¹⁹; an event which, not only broke new path but also managed to open a Pandora’s Box in terms of an entirely new debate between the old enemies: science and morality, leaving it to legal process to reconcile them. In order to truly grasp the varied moralistic and scientific arguments that are raised in any academic debate on cloning, it is imperative to have a preliminary understanding of what

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¹¹⁷ Chougule, G et al, Human Cloning: Not If, but When, *Science*, New Series, Vol. 292, No. 5517. (Apr. 27, 2001).

¹¹⁸ A chimera (derived from Greek mythology) means an individual, organ, or part consisting of tissues of diverse genetic constitution.

¹¹⁹ Dr. Stuart A. Newman, a professor of cell biology and anatomy at New York Medical College, wanted to do something controversial to evoke public and scientific debate on the morality of genetic engineering. So Dr. Newman and a colleague filed a patent for a process to make “chimeras,” creatures that are part human, part animal. In the above instance he created a human-ape chimera. The interesting thing is that he *does not want* patent to be granted to genetically modified chimeras and transgenics and undertook the experiment only as an attempt to develop the position of law in this field. Available at <http://www.hindu.com/seta/2005/05/19/stories/2005051900041600.htm>.

‘cloning’ actually means. It is felt whether we are playing god by projecting a new era in science and technology which has poised to marshal with the lives and the integrity of everything around us. Cloning is just an example with reference to the various techniques and skills that the developments in science and technology have thrown open.

The method of cloning involves the introduction through artificial means of nuclear material from a somatic cell (incapable of differentiation) into an egg or oocyte. This ‘asexually cultivated’ embryo then starts dividing to form copies of the original somatic cell, and a clone is born. Cloning may be for: (a) REPRODUCTIVE PURPOSES, or (b) THERAPEUTIC PURPOSES, i.e., stem cell research with embryonic cells.¹²⁰ As can be readily imagined, the issue of cloning humans has stoked a vociferous debate on religious, moral, ethical and even scientific grounds.¹²¹ While those who stand in favor of cloning, seek to focus on the scientific advancements and medical revolution which cloning techniques would introduce in the treatment and eradication of till-date incurable genetic diseases, others are not quite so sanguine as they deem a clone to be against the scheme of nature and an offence against human dignity and life. The singular objection which pervades all opposition is that cloning would result not only in vesting power in the hands of those who are not entitled to it, but that even at research or therapy stage, it would amount to killing of human beings in cases where stem cell was extracted from artificially generated embryo.¹²² In the course of this research paper, an attempt will be made to look at the scope of human cloning, both therapeutic and reproductive and its potential benefits and harms to the society of today and the legal and regulatory regime governing the same. For this purpose, the ensuing paper shall be divided into three distinct sections.

Firstly, an overview of the concept of Human Cloning in its conventional form and a brief explanation of the procedure involved. *Secondly*, the paper would deal with a perusal of the ethical, religious and scientific conceptual objections that have been raised against cloning of human beings and the arguments against the same. Also, in this section the paper will seek to address the all-important issue of human rights in cloning and the consequences of the same.

¹²⁰ Lenzerini, F., *Biotechnology: Human Dignity & Human Genome*, *Biotechnology & International Law*, ed. F. Francioni, J. Scorazzi, Hart Publishing, 2006, pp – 309.

¹²¹ Evans, John H., *Religion and Human Cloning: An Exploratory Analysis of the First Available Opinion Data*, *Journal for the Scientific Study of Religion*, Vol. 41, No. 4. (Dec., 2002)

¹²² Shalev C., *Human Cloning and Human Rights: A Commentary*, *Health and Human Rights*, Vol. 6, No. 1. (2002). This paper will subsequently address the issue of attributing ‘humaness’ to an embryo, recognizing the rights of an embryo and the stage at which an embryo can be deemed to be a human being. For further discussion, see Arsanjani, M., *Negotiating the UN Declaration on Human Cloning*, *The American Journal of International Law*, Vol. 100, No. 1. (Jan., 2006).

Thirdly, a study of the international policy and legal considerations that have flown from human cloning and an analysis of the international instruments at global and regional levels to draw conclusions as to the international framework and mindset governing cloning of human beings and the best possible legal regime that may be adopted to regulate cloning. It is important to keep in mind that the international community itself has not been able to arrive at a ‘consensus of ideas’,¹²³ in relation to human cloning, thus leaving room for continuing bouts of hot tempered debate. In such a scenario, it is becomes the prerogative of the nation states to formulate domestic policies that can serve as the guiding tool to realize the immense potential of cloning as a medical and scientific phenomenon.

2. UNDERSTANDING CLONING: THE ARTIFICIAL CREATION OF LIVING BEINGS

The term ‘CLONE’ is derived from the Greek word ‘*klon*’ meaning ‘twig’ and maybe defined as a copy of an object that exists. Originally, it was used to refer to the process of ‘vegetative propagation’ wherein a part of a plant was cut, grew roots and developed into a new plant. However over time the term has acquired significance in the field of biotechnology and with the development of various scientific techniques and processes, cloning is no longer restricted to vegetative plant propagation but is a procedure applicable to, cell lines, genetic material and higher organisms as well. In present times, scientifically speaking, cloning means creating a “precise genetic copy of a molecule, cell, plant animal or human being”.¹²⁴

2.1 THE SCIENCE OF CLONING

To form a complete and comprehensive understanding of what ‘cloning’ means and involves, it is necessary to first identify the different types of cloning by classifying it in a proper manner. Cloning can, primarily be distinguished on the basis of two grounds:

- *Procedure or the technique that is used for cloning.* The two methodologies most commonly practiced are:

¹²³ James F. C., Human Cloning and Human Dignity, *The Hastings Center Report*, Vol. 33, No. 3. (May - Jun., 2003)

¹²⁴ Sreenivasulu, N.S., and Raju, C.B., *Biotechnology & Patent Law: ‘Patenting Human Beings’*, 1st Ed., Manupatra, 2008.

- BLASTOMERE SEPARATION TECHNIQUE; and
- SOMATIC CELL NUCLEAR TRANSFER (SCNT) TECHNIQUE
- *Application or the purpose for which such cloning is being done.* On the basis of application or purpose of cloning, it may be further classified into:
 - REPRODUCTIVE CLONING, i.e., cloning with the intention of creation of human babies; and
 - THERAPEUTIC CLONING OR NON-REPRODUCTIVE CLONING, i.e., cloning with the intention of harvesting stem cells from the embryo.

2.2 Blastomere Separation Technique

The Blastomere Separation Technique or Embryo Splitting Technique is the more simpler procedure adopted for cloning as it does not involve nuclear transfer of somatic cell. This technique deals with the splitting of an early embryo, allowing each split Blastomere cell to grow into a separate individual organism.¹²⁵ Therefore, this process of cloning is adopted to replicate only a *fertilized egg and is not applicable for cloning adult cells*.¹²⁶

2.3 Somatic Cell Nuclear Transfer

Cloning by Somatic Cell Nuclear Transfer (SCNT) is a more complex and sophisticated process, which involves the *removal of a haploid nucleus from an unfertilized egg cell and replacing it with a diploid nucleus from the donor somatic cell*. The somatic nucleus in the ‘reconstructed’ egg cell is reprogrammed by the components of the egg cell along with artificial stimuli and begins to divide and develops into an embryo (embryogenesis).¹²⁷ The technique of SCNT has a long history dating back to the 1960s and was the procedure adopted for cloning of the sheep, Dolly from an adult somatic cell.¹²⁸ By the use of this process an adult cell can be duplicated as well and consequently, it is the procedure more commonly preferred to create clones since there is no requirement of a fertilized egg and

¹²⁵ Ibid

¹²⁶ As a matter of fact, this process is very close in resemblance to a natural biological situation where a zygote is split to create twins. The Blastomere Separation Technique has also passed scientific scrutiny in production of mammals when in 1995 Rosalin Institute in Edinburgh created the two cloned sheep MORAG AND MEGAN, from a single differentiated embryo. However, this process is considered a distant second substitute to the SCNT process. See <http://library.thinkquest.org/C0122429/history/1995.htm>

¹²⁷ Shalev C., Human Cloning and Human Rights: A Commentary, *Health and Human Rights*, Vol. 6, No. 1. (2002).

¹²⁸ In fact, Gurdon wrote about this process in 1962; Burley, J., An Abstract Approach to the Regulation of Human Genetics: Law, Morality and Social Policy, *The Regulatory Challenge of Biotechnology: Human Genetics, Food and Patents*, ed. H. Somsen, Edward Elgar Pub. Ltd., 2007, Pp 83-84.

clone can be created from a somatic cell itself. Now, as has been stated before, these procedures may be used to create a clone for either one of two purposes, i.e., reproductive purposes or therapeutic purposes.

2.4 Reproductive cloning

It deals with the creation of a cloned human embryo (from a somatic cell) that will subsequently be transferred into a woman's womb to produce cloned human babies. The idea therefore, is to create a cloned embryo that will grow into a human being, albeit as a clone of the donor somatic cell.

2.5 Therapeutic cloning

The other kind of cloning variously referred to as 'therapeutic', 'scientific', 'research' or 'non-reproductive' cloning involves the *creation of cloned human embryos merely for the purpose of acquiring the stem cells*. The importance of STEM CELLS lies in the fact that they are 'unspecialized' and are capable of developing into many different cell types in the body and thus, serve an important role as a 'repair system' for the body. Also, the body tissue or organ created by the embryonic stem cells is genetically similar to the person from whom the clone is being made and this allows organ transplant, or cell-tissue restructuring to take place without the risk of the patient rejecting the new cells implanted in his or her body.¹²⁹ In therapeutic cloning, these stem cells are removed from the cloned embryo so that such stem cells can be utilized in various medical therapies for the treatment of afflictions such as Parkinson's Disease, tissue damaged after stroke, spinal cord injuries, etc. However, it is important to note that the removal of the stem cell leads to the death of the embryo as obviously it cannot develop any further.

Human Cloning, both for reproductive and therapeutic use has raised a torrid debate on various scientific, ethical and moral issues which seek to question the validity of the practice of cloning human beings. Different people have differing views relating to the million-dollar question: "Should Cloning be allowed?" and it is difficult to find any perfect answer. In the following chapter, the authors will seek to present the major issues that are considered in the debate over cloning and the arguments, which are raised for or against the validity of cloning.

¹²⁹ Supra note 5

3. HUMAN CLONING: THE ISSUES IN CONTENTION

Ethics, it is often said, does not deal in specifics, but tries to formulate the rules and framework of thoughts that can then be adapted to specific questions. In this section, the authors will discuss the issues raised in a debate over sanctioning cloning in relation to the classification *considering reproductive and therapeutic cloning separately and distinct from each other*. The principal reason for adopting this splintered approach to analyzing the issues in cloning is the fact that it is essential to appreciate the distinction between reproductive and therapeutic cloning and the consequences they ensue.

3.1 Reproductive Cloning:

The arguments in favor of reproductive cloning often assume a ‘UTILITARIAN PERSPECTIVE’; that is to say, it tries to highlight the benefits that may be accrued resultant from the creation of human clones.

3.1.1 What it has to offer

- ❑ REPRODUCTIVE LIBERTY: The most important point raised by the ‘pro-reproductive cloning’ forum is the fact that every individual has the right of “reproductive liberty”, i.e., right of a person to pro-create life. A comparison maybe drawn with the right of a couple to create a biological offspring as an exercise of their right to “reproductive liberty”.¹³⁰ Therefore, it is contended that cloning would allow every individual to exercise this right and create life.¹³¹
- ❑ OTHER ARGUMENTS: Apart from the argument of right to reproductive liberty or autonomy, the proponents of reproductive cloning also point to various other advantages of reproductive cloning, such as, (a) scientific development and revolutionizing the health and medicine sector. A clone could be used to as a genetically identical donor, (b) parents of a child who died prematurely or even through a tragic accident would, through reproductive cloning, be able to compensate

¹³⁰ Indeed, the immediate impetus to develop reproductive cloning is to enable infertile couples to have a child. The supporters of reproductive cloning assert that normally the process of IVF is marked by trial and error and involves numerous egg retrieval circles which is not only an inconvenient process for women, but given today’s technology, also prohibitively expensive. Thus a more viable procedure in these circumstances shall be the process of cloning to avoid such unnecessary hassles. *See* Anon, Efforts to Ban Human Cloning, *The American Journal of International Law*, Vol. 99, No. 1. (Jan., 2005)

¹³¹ S.D., *Medical Law & Ethics*, Sweet & Maxwell, London, 2006, pp- 326.

for their loss through having a ‘second version’ of their child,¹³² (c) continuing development of cloning techniques would ensure that the clones produced have greater immunity and would improve society in the long run, and finally, (d) reproductive cloning would create life, give birth to a human being and bringing someone into existence, who would otherwise not have been conceived can not be criticised as unethical or immoral.

3.1.2 Dissuasive Forces

- ❑ ETHICAL AND MORAL GROUNDS: The foremost argument against reproductive cloning is made on the grounds of ethics and morality wherein doubts are raised regarding the ethical dilemma posed by creating human clones. The argument also acquires religious overtones when it is argued that producing cloned human embryos amounts to “playing God”, usurping God’s role in the universe and violating the basic principles of life and God’s “plan for the world”.¹³³ Various other points are raised, such as the fact that reproductive cloning is an unnatural phenomenon, which is against the laws of nature and defeats the purpose of man’s life on earth and contravenes the manner in which the human race ought to be propagated.¹³⁴
- ❑ INEFFICIENT PROCESS: The technique of Somatic Cell Nuclear Transfer applied for cloning is uneconomical and also not foolproof. Moreover, there exists a degree of unpredictability regarding the success of human cloning and the fate of the clone produced.¹³⁵
- ❑ EFFECT ON THE CLONE: Some people argue that cloning is detrimental not only for society in general but also from the perspective of the clone. This is because a clone would have emotions and feelings just like any other human being and would thus; find it difficult to adjust in the world, as it exists today, perpetually in the shadow of

¹³² The underlying legal position behind this, especially in the United States, is the right to privacy which has been enlarged to include right of a couple to reproduce by the courts. *See Anon, Human Cloning and Substantive Due Process, Harvard Law Review*, Vol. 111, No. 8. (Jun., 1998).

¹³³ *Supra* note 5, pp-308

¹³⁴ Malby, S., Human Dignity and Human Reproductive Cloning, *Health and Human Rights*, Vol. 6, No. 1. (2002)

¹³⁵ In fact, the sheep Dolly was born only after as many as 276 failed attempts to transfer a somatic cell nucleus into an egg. Pattison, S.D., *Medical Law & Ethics*, Sweet & Maxwell, London, 2006, pp- 314.

his or her 'elder twin'. This may even result in serious psychological harm being caused to the clone.¹³⁶

- VIOLATION OF NATURAL GENETIC DIVERSITY: A clone is quite simply the genetic copy of an existing person. It is therefore, contended that permitting cloning would lead to diminution of the natural genetic diversity and the gene pool will be diminished.¹³⁷ There would be a decline in the heterogeneous gene mixture, which is facilitated by normal reproduction and would ultimately lead to the formation of a 'monoculture' of sorts.

In view of these arguments, the fact that emerges, at least for the time being, is that REPRODUCTIVE CLONING IS NOT VIABLE IN PRESENT SOCIETY. While the technology is still underdeveloped and the risks are too great, it would not significantly further human and societal development and costs would be too high. The authors will consider the legal stand on reproductive cloning in the next chapter of this paper.

3.2 THERAPEUTIC CLONING: WHYS AND WHY NOTS

While there exists a general consensus among most of the scholars and scientists relating to the prohibition of Reproductive Cloning, there exists much greater controversy on the question of moral and legal stand on 'Non-reproductive or Therapeutic Cloning'. It is interesting to note that the procedure or technique itself is referred to by different terminology by these two groups. While the supporters call it 'THERAPEUTIC CLONING' in a bid to focus on the positive impact it has in medical technology; the critics often term it as 'RESEARCH EMBRYO CLONING' or simply 'RESEARCH CLONING' as if to highlight the moral issue of violating human rights and dignity.

¹³⁶ Brock, Human Cloning and Our Sense of Self Dan W. Brock *Science*, New Series, Vol. 296, No. 5566. (Apr. 12, 2002), pp. 314-316. It is argued that if many human clones were created from a single genetic source, so that a person would be likely to encounter another individual virtually identical in appearance to him/her around every street corner, his/her psychological sense of uniqueness and individuality might be undermined even if in other respects beyond appearance the various clones differed in many ways. Also see Harold, T. S., Ethical and Policy Issues of Human Cloning, *Science*, New Series, Vol. 277, No. 5323. (Jul. 11, 1997)

¹³⁷ It is further argued cloning will fundamentally alter what it means to be human and that the human race stands to lose something vital to its humanity—the uniqueness of every human being.

(contd.) Lenoir, N., Europe Confronts the Embryonic Stem Cell Research Challenge, *Science*, New Series, Vol. 287, No. 5457. (Feb. 25, 2000)

- TECHNICAL DIFFICULTIES: Before going into the ethical issues it is important to consider the charges leveled against Therapeutic Cloning on grounds of it being a suitable and efficient mode of medical treatment. Firstly, it is difficult to get enough cells, since it needs the cells from three fetuses to treat one patient and so it is important to be able to grow them in vitro. Further, there is always the possibility of transformation to form tumor cells in this process, which may even lead to the death of the patient. And lastly, doubts are raised as to whether there exists sufficient scientific evidence to conclusively prove the importance and necessity of pursuing cloning as a means of treating diseases.¹³⁸

- ETHICAL DILEMMA – ‘HUMANNESS’ OF EMBRYO: As has been stated before, the technique of therapeutic cloning involves the harvesting of stem cells from the embryo which consequently leads to the death of the embryo.¹³⁹ The all-important question that is raised therefore is *whether it is feasible to equate an embryo to a living person attributing every aspect of human life, dignity and rights to the embryo*. It is argued that the protection of ‘human dignity’ is inherent in the human conditions which qualify any human being, irrespective of his/her status/capacities, ability to perceive, sensations etc. If the embryo is to be attributed ‘human dignity’, then he/she would have the same rights as a human being when it comes into existence, and thus cannot be morally or legally sacrificed even if it were to result in benefit for any person.¹⁴⁰ Thus, considering the fact that the embryo is deemed to be a ‘*person at conception*’ and the purpose of therapeutic cloning is to essentially “kill” the embryo, critics contend that therapeutic cloning is an affront to human life and dignity. The ‘person at conception’ theory is however, not infallible and alternate conceptions have been suggested over time. In his book, Medical Law & Ethics, Prof. S.D. Pattison suggests different ‘MORAL STATUS POSSIBILITIES’ for an embryo. On one hand, one may have the “FULL STATUS POSITION”, when an embryo is granted all moral rights

¹³⁸ There is evidence for the effectiveness of therapeutic cloning as shown by work involving the introduction of stem cells into the brain of patients suffering from Parkinson's disease, when the cells which have been added differentiate to form nerve cells which can in turn then lead to recovery of the lost function. Available at <http://www.prochoiceforum.org.uk/ri5.asp>.

¹³⁹ Burley, J., *An Abstract Approach to the Regulation of Human Genetics: Law, Morality and Social Policy, The Regulatory Challenge of Biotechnology: Human Genetics, Food and Patents*, ed. H. Somsen, Edward Elgar Pub. Ltd., 2007, Pp. 86.

¹⁴⁰ Supra note 5, pp – 310. In 2005, Judge Jeffrey Lawrence of Cook County (Illinois, US) ruled that a ‘pre-embryo is a human being’ and is therefore, ‘a legal person from the time of conception’. This case dealt with claim of damages by a couple when their embryos that were stored in a clinic for assisted human reproduction were damaged.

from the point of its creation (i.e., the ‘person at conception’ theory); and on the other, there is the “NO STATUS POSITION”, where an embryo has no value until its birth. According to Prof. Pattison, the most accepted position is the “PROPORTIONAL STATUS POSITION”; wherein it states that the moral status of the embryo increases with its growth and it can only be equated with a human being after *a certain stage of development has been attained*. Thus, any research conducted on the embryo before it reaches such a stage would not violate any human rights.

- POTENTIAL BENEFITS: While the ethical and moral aspects of the rights of the embryo as a pre-cursor of human life are no doubt, important, it is nevertheless true that these arguments may sometimes be stretched too far into the realms of naivety. After all, as many authors and scientists assert, is it logical or even ethically justified to allow a person to die because his treatment may result in harming the moral rights of an embryo? Justine Burley, in vocal support of therapeutic cloning seeks to compare the balance of the ‘life of a cell conglomeration’ and the life of a living individual.¹⁴¹ He speaks of a hypothetical situation where one has to choose between saving the life of an embryo and saving the life of a living person and the conception of ‘humanness’ involved therein. According to him, ‘respect for human life’ embodies something more than “mere consideration of the notion that all human lives in virtue of being human are equal *qua* human”.¹⁴² In the same line of argument, it is interesting to note the paradox that surfaces with respect to the moral protection granted to an embryo formed *in vitro* as compared to a naturally formed embryo, which may be aborted. This paradox highlights the difficulties in resolving the ethical issues in situations such as these.¹⁴³
- ALTERNATIVE STEM CELLS: Another important question that is often raised is why there exists the need to create embryos to harvest stem cells when such cells are available in an adult human being, in the bone marrow. That argument is easily countered on scientific grounds alone. *Embryonic stem cells* are substantially more flexible than adult stem cells, as they have the potential to develop into virtually any

¹⁴¹ Supra note 27, pp –84

¹⁴² *ibid.* In support of this argument, Burley cites the example of two islands one with adult humans and the other with human embryos. Given the choice to save the occupants of either one of the islands, would one normally choose embryos over humans with past lives and memories? The question that Burley poses is difficult to answer but is sufficient drive home his point.

¹⁴³ Supra note 5, pp- 316.

and all kinds of tissues. Depending on their capacity to differentiate stem cells are categorized as ‘*totipotent*’, ‘*pluripotent*’ and ‘*multipotent*’.¹⁴⁴ While embryonic stem cells are either totipotent or pluripotent, adult stem cells have much lesser differentiating ability and are only multipotent. Thus, it is necessary to harvest embryonic stem cells.

Having considered these arguments, the authors feels that the “Proportional Status” theory is extremely reasonable and proceeds on the basis of a valid presumption of greater acquiring of human traits as the embryo increases in age. In light of this, it is fair to say that though the arguments posed against reproductive cloning hold water at this stage, the same can hardly be said of the arguments centering therapeutic cloning.

4. HUMAN RIGHT ISSUES IN CLONING

Apart from the issues highlighted above, there exists another question of fundamental importance in relation to cloning, i.e., the viability of cloning in a human rights discipline. In relation to human rights, the possibility of human cloning represents a violation of the two fundamental principles on which all human rights are based: the principle of equality among human beings and the principle of non-discrimination. According to Prof. Juan de Dios Vial Correa, of the Pontifical Catholic University of Chile, cloning of human beings results in upsetting the basic principle of parity and equality in all human beings. Also, the aspect of selective-eugenics or the ability to program character traits influenced by specific genomic sequences is, according to the professor, abhorrent to human dignity and life. He thus, rejects cloning since he argues that the practice of cloning “denies the dignity of the person subjected to the cloning and the dignity of human procreation.” The prospect of creating successful human clones has thrown open a whole gamut of possibilities as people now ask themselves whether the process will ultimately lead to a ‘commercialization’ of humans, as the power to give life may be ‘marketed’ and people are turned into ‘disposable and recyclable products’. The questions posed put forward a strong argument for the preservation of human dignity and life created through natural procreation, and though steeped in theology, these arguments cannot be wholly discarded on the basis of scientific justifications. In the subsequent section, the authors will undertake a brief analysis of the manner in which these concerns have been dealt with by international legislations and regulations.

¹⁴⁴ Pattison, S.D., *Medical Law & Ethics*, Sweet & Maxwell, London, 2006, pp- 306

5. HUMAN CLONING: LEGAL AND POLICY CONSIDERATIONS

In the course of this paper, the authors have attempted to present an overview of what the term ‘cloning’ means, the different techniques and types of cloning along with their implications and consequences as well as the scientific, ethical and moral issues related to cloning and the perspective of different opposing factions that either defend or seek to prohibit cloning. The authors will now bring to light certain important legislations and regulations on the subject of human cloning, keeping in mind however, the severe limitation that there are in fact no uniformity of ideas cutting across boards. The authors will look at the interactions in the UNITED NATIONS as well as the EUROPEAN UNION emanating out of human cloning. The authors will further look at the domestic regime in the UNITED STATES OF AMERICA and the UNITED KINGDOM in the field of human cloning and the relevance of such municipal laws on determining the legal position in INDIA.

6. HUMAN CLONING AND THE UNITED NATIONS

The UNIVERSAL DECLARATION ON THE HUMAN GENOME AND HUMAN RIGHTS (UDHGHR) is the principal text of the United Nations system in the area of human biotechnology and human rights. Together with the GUIDELINES for its implementation adopted in 1999, the UDHGHR sets out a framework for dealing with new human rights issues posed by advances in technology relating to the human genome. In doing so, it complements the ethical approach, which has in the past been applied to medical and biotechnological dilemmas.¹⁴⁵ Article 11 of the UDHGHR prohibits reproductive cloning by terming it as the major example of “*practices contrary to human dignity that cannot be permitted.*” The UDHGHR sets out a framework for dealing with new human rights issues posed by advances in technology relating to the human genome and in some ways gives vent to the ethical approach. It might be noted here however, that this document remains silent about therapeutic cloning and in fact recognises the promise that it may hold.¹⁴⁶ The EXPERT GROUP ON HUMAN RIGHTS AND BIOTECHNOLOGY, convened by the UN High Commissioner on Human Rights, submitted a report in 2002, emphasizing that ‘*cloning – for reproductive purposes is an area*

¹⁴⁵ Available at <http://www.unhchr.ch/biotech/conclusions.htm>

¹⁴⁶ UNHCHR's Expert Group on Human Rights and Biotechnology, Expert Group on Human Rights and Biotechnology Convened by the UN High Commissioner for Human Rights: Conclusions on Human Reproductive Cloning, *Health and Human Rights* Vol. 6, No. 1. (2002).

of biotechnology with the greatest potential for controversy’ but ‘more importantly also recognizing *‘the importance of therapeutic cloning as providing possibilities for preventing and fighting diseases.’* A similar approach has been adopted by the AD HOC COMMITTEE ON AN INTERNATIONAL CONVENTION AGAINST REPRODUCTIVE CLONING OF HUMAN BEINGS. The Committee, appointed by the UN General Assembly in 2001, exhibits unanimity of view regarding the banning of reproductive cloning, but there exists much controversy and debate relating to therapeutic cloning.

Further, the WORLD HEALTH ORGANIZATION (WHO) DRAFT GUIDELINES ON BIOETHICS rejects reproductive cloning as ‘morally unacceptable’ and ‘contrary to human dignity’ but also state that *‘non-reproductive cloning research, with the clinical objective of repairing damaged tissue, has important potential benefits and should be encouraged.’*¹⁴⁷ In spite of such divergent views, the UN General Assembly passed a Resolution in 2005, the UNITED NATIONS DECLARATION ON HUMAN CLONING, which seeks to prohibit *all forms of cloning*.¹⁴⁸ Although, this resolution is not binding on the member-states, it nevertheless, proves the continuing conflict of views and opinions in relation to ethics and legality of human cloning, which makes the adoption of a uniform single universal regime a distant dream.

7. HUMAN CLONING AND THE EUROPEAN UNION

The stand of the European Union as a whole, not taking into account the odd divergent nation (being the UK), on the issue of human cloning is actually uniform and restrictive. Reproductive Cloning is explicitly prohibited by Article 3 of the CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. While there seems to exist general consensus in prohibiting ‘Reproductive Cloning’, the stance with relation to ‘Therapeutic Cloning’ is considerably more debatable. The EUROPEAN PARLIAMENT in its RESOLUTION ON HUMAN CLONING of 7th September 2000 specifically stressed on the fact that it did not perceive “*any difference between cloning for therapeutic purposes and cloning for the purposes of reproduction*” and went on to say that therapeutic cloning poses “*poses a profound ethical dilemma, irrevocably crosses a boundary in research norms and is contrary to public policy*

¹⁴⁷ supra note 5, pp- 315,316.

¹⁴⁸ Supra note 27, pp - 80. The Declaration called on the member-states to ‘adopt all measures necessary to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life.

as adopted by the European Union.”¹⁴⁹ This somewhat stricter view of the European Parliament is not shared by the EUROPEAN GROUP ON ETHICS IN SCIENCE AND NEW TECHNOLOGIES, which seeks to create a clear distinction between “*cloning aimed at the birth of identical individuals and non-reproductive cloning limited to the in vitro phase.*”¹⁵⁰ While the Group univocally condemns reproductive cloning it concedes the fact that: “the philosophical and scientific debate on cloning is open and it should be stressed that prohibition of a scientific technique may prevent important discussions about human genetics.”¹⁵¹

8. LEGAL FORMULATIONS IN THE UNITED KINGDOM

The United Kingdom has one of the most liberal domestic regimes for cloning. Although, it prohibits reproductive cloning, it has specific legislations, which allow therapeutic cloning to be carried out for the purposes of medical research and treatment. The HUMAN FERTILISATION AND EMBRYOLOGY ACT OF 1990, is a landmark piece of legislation in the field of cloning. This Act, based on the ‘Warnock Report’, confers a PROPORTIONAL MORAL STATUS to the embryo, and provides for a system of licensing by the Human Fertilisation and Embryology Authority for any research on cloned embryos. *Thus, the Act allows the creation of embryos specifically for the purposes of scientific research.* Moreover, the Act also laid down certain conditions that need to be adhered to while carrying out such activity. For example, the embryo research is permitted *only up to 14 days after fertilization of the embryo or the appearance of the ‘primitive streak’*, which marks the development of the embryo into a moral status comparable to a living individual. Also, the research embryo cannot be implanted into the womb and the research should be for ‘necessary’ and ‘desirable’ purpose.¹⁵² However, there remained certain loopholes in the Act, which were exposed by a legal challenge initiated by Pro-Life Alliance in 2001, in the case *R (Bruno Quintavalle) v. Secy. of State for Health*¹⁵³.

¹⁴⁹ Supra note 36. The ideology of the European Parliament is further strengthened by the fact that it calls for ‘adoption of human artificial insemination techniques that do not result in excess number of embryos’, since it is opposed to conducting scientific research even on superfluous embryos.

¹⁵⁰ This view of the Group was apparent in its report, titled ‘Citizen’s Rights and New Technologies: A European Challenge’, on the “Ethical Aspects of Research Involving the Use of Human Embryo” a programme of the EU.

¹⁵¹ Supra note 36

¹⁵² supra note 32, pp- 320. The Schedule to the Human Fertilisation and Embryology Act lays down the purposes for which research cloning may be carried out. Also has provision for approval by the Ethics Committee.

¹⁵³ [2003] UKHL 13. Also see *R (Josephine Quintavalle) v. HFEA* [2005] UKHL 28

The term ‘embryo’ was defined by the Act as a ‘fertilised egg’. In this case, the issue that was raised was whether the Act would apply to ‘cloned embryo’ since a cloned embryo is formed without fertilisation. The House of Lords adopted a liberal and purposive interpretation of the definition to include a ‘cloned embryo’ in the ambit of the Act.¹⁵⁴ More importantly, this case led to pro-active steps being taken by the UK Legislature to plug the loopholes in the 1990 Act by introducing the HUMAN REPRODUCTIVE CLONING ACT OF 2001 and the HFE (RESEARCH PURPOSE) REGULATIONS, 2001 that widened application and objectives of the Act to include “permitting embryo research for the purpose of increasing knowledge about serious diseases and enabling such knowledge to be applied in developing treatment for serious diseases.”¹⁵⁵ In accordance to its system of licensing, the Human Fertilisation and Embryology Authority granted its first license for research on cloned embryos to the Newcastle Centre for Life in August 2004 and also to the famed Roslin Institute of Edinburgh, in February 2005.¹⁵⁶

9. LAW AND POLICY IN THE UNITED STATES

Keeping in mind the decisive role, played by the US Judiciary in formulating the progressive principles of patenting biotechnological inventions and granting patent protection to Genetically-Modified Organisms¹⁵⁷, it is somewhat surprising to note the ‘conservative’ approach adopted by the US in terms of human cloning. Unlike the UK, where cloning for research purposes is allowed by law, *in the United States cloning both for ‘reproductive’ and ‘non-reproductive purposes’ is prohibited*. An exception is made only with regards to allowing Stem Cell Research on ‘existing stem lines.’ This standpoint of the US can largely be attributed to the attitude and views of the US President, George W. Bush, who is a vocal critic of human cloning. In August 2001, President Bush issued the “ETHICAL GUIDELINES FOR STEM CELL RESEARCH” from the White House, placing a prohibition on cloning for any purposes whatsoever and allowing use of federal fund only in instances of research on the existing stem cell lines. He also played a major role in convincing the Senate to pass the

¹⁵⁴ Wall, W., *Genetics & DNA Technology: Legal Aspects*, 2nd Ed., Cavendish Publishing, London, 2004, pp-96-97

¹⁵⁵ *supra* note 42

¹⁵⁶ In pursuance of its license, the Newcastle Centre for Life announced the creation of UK’s first cloned human embryo in May 2005. Available at <http://www.concordat.org.uk/signatories/fullsignatories/hfea.cfm>.

¹⁵⁷ The US judiciary played major role in formulating the basic principles relating to the patenting of biotechnological inventions; more so in later half of 20th century by adopting a liberal interpretation of existing law relating to patenting of inventions (S.101 of US Patent Code). Evidence of this pro-active turn of the US Supreme Court may be found in cases such as *Diamond v. Ananda Chakraborty* (1980) USSC 447, *Ex parte Hibberd* (1986) 227 USPQ 443, *Harvard Oncomouse Case*, etc.

HUMAN CLONING PROHIBITION ACT, 2003 based on reports of NATIONAL BIOETHICS ADVISORY COMMITTEE and the PRESIDENTS COMMITTEE ON BIOETHICS.¹⁵⁸ The Act makes human cloning a punishable offence under law and seeks to prohibit human cloning in all forms and means. Indeed, President Bush also used his powers of Presidential Veto to strike down a 2006 Bill aimed at reducing the limitations on stem cell research saying that an embryonic stem-cell research Bill "crossed a moral boundary" and should not be allowed.

10. LEGAL POSITION IN INDIA

India, like most other nations, *has been opposed to Reproductive Cloning* asserting that it is unethical, morally unacceptable and contrary to respect for human beings, but has supported research on stem cells saying that the new technology could be used to fight certain diseases. Stem Cell Research in India is regulated by the guidelines issued by the INDIAN COUNCIL OF MEDICAL RESEARCH (ICMR) and the DNA SAFETY GUIDELINES brought out by the Government of India. In 2007 however, the ICMR in association with the Department of Biotechnology submitted the DRAFT GUIDELINES FOR STEM CELL RESEARCH/REGULATION, which will be enforced after the government gives its consent. While the Guidelines allow research on embryonic stem cells, it stresses on the fact that the main source of embryonic stem cells will be from the ART/IVF clinics dealing with Infertility treatment where "Spare or Supernumerary" embryos will be available for these purposes. *However no embryo can be created for the sole purpose of obtaining stem cells.* Thus, the Guidelines prohibit Therapeutic Cloning. Two committees are being planned to oversee and regulate the research: A National Apex Committee for Stem Cell Research and Therapy (NAC-SCRT) and an Institutional Committee for Stem Cell Research and Therapy (IC-SCRT). They will analyze the scientific, technical, ethical, legal and social issues in embryonic stem cell research. The primary reason why cloning is prohibited in spite of allowing stem cell research, may be attributed to the philosophy that cloning for the 'purpose of killing' is unethical and should not be permitted. Therefore, research is allowed only on the 'superfluous embryos' and cloning embryos for research purposes is not allowed.

¹⁵⁸ supra note 9, pp – 201. The Act defines 'cloning' as "human asexual reproduction, accomplished by introducing nuclear material from one or more human somatic cell into a fertilized oocyte whose nuclear material has been removed or inactivated so as to produce a living organism that is genetically virtually identical to an existing or previously existing human organism."

11. CONCLUSION

Justine Burley, a vocal advocate for permitting cloning and related research that could benefit Medical Science and mankind invokes a unique argument to dissuade governmental regulation on cloning. He relies on Ronald Dworkin's statement that "early life has an essentially religious character" to draw an analogy with the reticence of states to legislate on religious and moral issues. According to him, the ideal role of the government should be to create 'conditions of freedom so that people holding divergent views are able to exercise their individual choice in a free society'.¹⁵⁹ In such a situation, there would be no law on cloning as such but rather an environment of independence, where people can choose what they deem fit and proper. No doubt, his views are somewhat radical since it is inevitable that there would be legislations and regulations of a technology as revolutionary and possessing the capacity to completely change human life, as cloning. The need for regulations exists inasmuch as it would lead to better utilization and increased efficiency of the research undertaken.

Society, as it stands today is probably not yet ready for 'Reproductive Cloning' and this is proved by the almost universal consensus on prohibiting of the same. But when it comes to Therapeutic Cloning, it is often the case that we allow prejudices to cramp the growth of development. Having accepted the potential benefits and advantages of allowing research in embryonic stem cells, it is inconceivable that we should prohibit continued research in that field on ethical grounds open to debate. The UK Act on cloning, Human Fertilisation and Embryology Act of 1990, is in this regard a momentous piece of legislation since it embraces the requirement of encouraging a new research technology and also lays down conditions and regulations to ensure that the moral and ethical standards are not compromised in any manner. This Act therefore, serves as the ideal model on which other laws ought to be modeled subject of course specific regional requirements. In conclusion, therefore, the authors would like to state that before adopting any stand, either prohibiting or allowing cloning, one should consider Bentham's Utilitarian philosophy: "Greatest good for the greatest number" and the impact such a move would have on society as a whole. It is submitted that any technique which would result in the greater benefit of the society at large

¹⁵⁹ Burley, J., An Abstract Approach to the Regulation of Human Genetics: Law, Morality and Social Policy, *The Regulatory Challenge of Biotechnology: Human Genetics, Food and Patents*, ed. H. Somsen, Edward Elgar Pub. Ltd., 2007, pp- 86.

should be promoted and encouraged in the interest of the society. However while doing so; the question with respect to the social acceptance needs to be very well addressed.

**INTERNATIONAL LAW FOR THE ACTUALIZATION OF THE FREEDOM OF THE PRESS WITH
SPECIAL EMPHASIS ON INDIA'S POSITION IN MEETING THE INTERNATIONAL**

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“Freedom of the press is the mortar that binds together the bricks of freedom and it is also the open window embedded in those bricks, through which we can all see the world.”¹⁶⁰

—Dr. Shashi Tharoor (Former Under-Secretary-General for Communications and Public
Information at the United Nations)

1. INTRODUCTION:

Theoretically speaking and keeping the ideals of a democratic state in mind, there is little room for muzzling the press as the media helps strengthen the edifice of a democratic state by holding the powerful accountable for their misdeeds. The little room that subsists is exercisable solely in accordance with the law of the land and for limited purposes. However, the true position is far from the aforementioned theoretical suppositions.

All the nation-states of the world have their own set of governance policies and the extent to which freedom of the press is guaranteed acts as a barometer to determine the amount of

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¹⁶⁰ Dr. Shashi Tharoor, *Mediapersons under siege*, *The Hindu*, 05 November 2003. Available at: <https://www.thehindu.com/thehindu/mag/2003/05/11/stories/2003051100070300.htm>

liberty enjoyed by the citizens as freedom of the press is merely an extension of the freedom of speech and expression.

On the one hand, countries such as China and North Korea continue to stifle the press by censoring what is emitted; most recently the authorities in China arrested a retired professor and human rights activist during an on-air interview for his criticism of leader Xi Jinping's policies. As he was being taken away, he was overheard saying "I am entitled to freedom of speech."¹⁶¹ On the other hand, countries such as the United States of America have explicitly provided for the freedom of the press in the Constitution¹⁶². In between these two extremes, we find countries such as India that adopt the middle path.

We can never expect absolute freedom of the media as several practical constraints exist differing from nation to nation. However, a straitjacket approach is equally damaging to the advancement of nation-states. Therefore, balance between freedom of the press on the one hand and larger public interest on the other is a must. What Blackstone wrote in the 18th century holds ground even today "The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiment he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal he must take the consequence of his own temerity."¹⁶³

2. EFFORTS OF THE INTERNATIONAL COMMUNITY TO SECURE FREEDOM OF THE PRESS:

For the sake of convenience, the efforts of the international community have been summarized under the following sub-heads:

- 1) Customary international law;
- 2) Ratification of treaties;

¹⁶¹ Amanda Erickson, *Here they come again: Chinese police arrest dissident professor during on-air interview*, The Washington Post, 03 August, 2018.

Available at: https://www.washingtonpost.com/news/worldviews/wp/2018/08/03/here-they-come-again-chinese-police-arrest-dissident-professor-during-on-air-interview/?noredirect=on&utm_term=.9805a2c3e1ff

¹⁶² 1st amendment to the U.S. Constitution reads "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."

Available at: https://www.law.cornell.edu/constitution/first_amendment.

¹⁶³ Vol. IV Blackstone, *Commentaries on the law of England*, p.151-152 (Ed. John Wendell, Harper, New York, 1854).

- 3) Interpretation of Article 19 of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”) by the United Nations Human Rights Committee;

2.1. Customary international law:

Customary international law has been defined as “international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties.”¹⁶⁴ Therefore, nation-states may not have any legal obligations in the strict sense, yet ‘established state practice’ will bind them with equal force where customary international law stands established.

For instance, the Universal Declaration of Human Rights (hereinafter referred to as “UDHR”) is not a treaty and therefore does not bind nation-states in the strict sense. However, it is often argued that since it has been continuously invoked by nation-states in more than sixty years of its existence, it has assumed binding force as part of customary international law.¹⁶⁵

The declaration is regarded as the first document in the world that proclaimed the universality of human rights for all individuals irrespective of nationality. The sanctity ascribed to the declaration is fathomable from the fact that it has been hailed as “.....the mine from which other conventions as well as national Constitutions protecting these rights have been and are being quarried”.¹⁶⁶

Article 19 of the UDHR seeks to protect everyone’s right to freedom of opinion and expression. In clear terms it lays down that people around the world shall have the right to exchange information and ideas through the media without border constraints. This declaration being the guiding factor, the United Nations has endeavored to ensure that the right to freedom of speech and expression encapsulating the freedom of the press receives global recognition.

Although no specific limitation is attached to the freedom guaranteed under article 19, yet a general limitation on all the rights and freedoms embodied under the declaration including the right to freedom of opinion and expression has been incorporated under article 29(2) of

¹⁶⁴ Legal Information Institute, Cornell Law School.

Available at: https://www.law.cornell.edu/wex/customary_international_law.

¹⁶⁵ Australian Human Rights Commission

Available at: <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights>.

¹⁶⁶ J.E.S. Fawcett, *The Law of Nations*, p.158 (The Penguin Press, London, 1968).

the declaration. Limitations on the rights and freedoms espoused by the declaration can be imposed when the following conditions have been met:

- a) The limitation should be in accordance with the law;
- b) It should be in furtherance to securing due recognition and respect for the rights and freedoms of fellow human beings; and
- c) Limitations must be imposed for meeting the just requirements of morality, public order and the general welfare in a democracy.

2.2. Ratification of treaties:

Although International law does not have the same binding force as municipal law but once countries ratify a treaty, ratifying countries become obligated to undertake enforcement of the same in their respective nation-states; thereby making these treaties as effective as municipal law for the ratifying countries. In the words of Starke, “In nearly all cases, the object of a treaty is to impose binding obligations on the states who are parties to it.”¹⁶⁷ The conventions of the United Nations are examples of such treaties. The key measures taken by the international community to secure the freedom of the press have been discussed below:

2.2.1. International Covenant on Civil and Political Rights¹⁶⁸: With a whopping 171 countries¹⁶⁹ having ratified the ICCPR, it is clear that a vast majority of nation-states have become duty-bound to protect the freedom of the press. Article 19 of the covenant protects not only the right to freedom of opinion but also the right to freedom of expression through any media of choice, unencumbered by frontiers.

Freedom of expression [Article 19(2)] comes with a rider in the form of article 19(3). Article 19(3) clarifies that the right to expression is not absolute or unqualified and certain ‘special duties and responsibilities’ are attached to the liberty therewith. Therefore, limitations on the right to freedom of expression can be imposed by nation-states when the following conditions have been duly met:

- a) The limitation should be in accordance with the law;
- b) The limitation should be necessary for either of the following:
 - Respecting the rights or reputations of other persons; or

¹⁶⁷ J.G. Starke, *An introduction to International Law*, p.438 (Butterworth & co, Kent, 1989).

¹⁶⁸ Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹⁶⁹ Available at: <http://indicators.ohchr.org/>.

- Protection of national security; or
- Public order; or
- Public health; or
- Morals.

2.2.2. European convention on human rights¹⁷⁰:

The convention came into force in 1953 and the 47 member countries of the Council of Europe are also parties to the said convention and therefore bound by it. The convention has given effect to many of the rights and fundamental freedoms enumerated under the universal declaration of human rights.

Article 10(1) of the European convention seeks to protect the freedom of expression and is very similar to article 19 of the UDHR in its letter and spirit. However, the permissible grounds for imposing restrictions under article 10(2) of the European convention are far greater than the general limitations [article 29(2) of the UDHR] imposable against all rights and freedoms operational within the scope of the UDHR or the limitations specific to the freedom of expression enumerated under article 19(3) of the ICCPR for that matter.

Limitations on the freedom of expression under article 10(2) of the convention can be imposed when the following conditions have been met:

- a) Limitations must such as may be prescribed by law & necessary in a democratic society;
- b) The limitation should be necessary for either of the following:
 - In the interests of national security, territorial integrity or public safety; or
 - For the prevention of disorder or crime; or
 - For the protection of health or morals; or
 - For the protection of the reputation or rights of others; or
 - For preventing the disclosure of information received in confidence; or
- For maintaining the authority and impartiality of the judiciary.

¹⁷⁰Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

Section II of the convention enumerates provisions governing the ‘European court of human rights’. Article 19 of the convention specifically states that the court stands established for observance of engagements undertaken by member states under the convention.

As a supranational court, the European court has played a crucial role in upholding the freedom of the press whenever the governing nations have faltered. For instance, in the *Barfod* case¹⁷¹ where the applicant had been convicted for allegedly defaming two lay judges by questioning their ability to impartially decide a case brought against their very own employers in an article he had written, the European court upheld the applicant’s freedom of expression. In paragraph 29 of the judgment, the court has stressed upon the importance of “not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern.” Similarly, in *Goodwin v. the United Kingdom*, the court overruled a decision of the House of Lords which required the applicant to reveal his source of information. The court ruled that “protection of journalistic sources is one of the basic conditions for press freedom..... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”¹⁷²

2.3.Interpretation of Article 19 of the ICCPR by the United Nations Human Rights Committee¹⁷³:

The United Nations is comprised of several treaty bodies and each such body publishes interpretations on the provisions of their treaties from time to time. These interpretations help clarify doubts that may arise from a bare reading of the provisions of the treaty. Therefore, it is important to read article 19 of the ICCPR in conjunction with general comment no. 34 as it deals extensively

¹⁷¹ *Barfod v. Denmark*, European Court of Human Rights, Judgment date: 22/02/1989. Available at: <http://hudoc.echr.coe.int/eng?i=001-57430>.

¹⁷² European Court of Human Rights, Judgment date:27/03/1996, Paragraph 39. Available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57974%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57974%22]}).

¹⁷³ United Nations Human Rights Committee, *General comment no. 34-Article 19*, adopted on 21st July, 2011. Available at: <http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx>.

with matters related to the freedom of opinion and expression and thereby provides the much needed clarity on the confines of the freedom of the press.

- Paragraph 8 presses upon the state-parties to give effect to article 19 of the ICCPR under their respective domestic laws.
- Paragraph 12 classifies books, newspapers, pamphlets, posters & banners, audio-visual, electronic and internet based modes of expression as the different means of expression.
- Paragraph 13 reiterates the importance of the freedom of the press not merely to enjoy freedom of opinion & expression but also to enjoy other rights guaranteed by the covenant. Further, a free press is must to enable censor-free commenting on public issues which is a pre-requisite to inform public opinion.
- Paragraph 14 asks member-states to take appropriate steps to encourage an independent and diverse media as the public has a corresponding right to receive media output and therefore, should have a wide range of information and ideas at its disposal.
- Paragraph 21 lays down that whenever restrictions are imposed on the freedom of expression on the basis of article 19(3) of the covenant, the right to expression itself should not be jeopardized i.e. there must not be role reversal between the norm and its exceptions or the right and its restrictions.
- Paragraph 22 seeks to limit the grounds for restricting the freedom of expression strictly to those enumerated under article 19(3) of the covenant and none other. Moreover, this paragraph requires the member-states to observe the strict tests of necessity and proportionality before imposing restrictions on this valuable right.
- Paragraph 23 obliges states to ensure that freedom of expression is never silenced nor is article 19(3) of the ICCPR invoked against advocacy in furtherance to the promotion of democratic tenets and human rights. Paragraph 23 further asks the member-states to investigate attacks against journalists in a timely fashion, to punish the perpetrators and to ensure appropriate redressal for the victims or their representatives, as the case may be.

- Paragraph 24 clarifies that laws created to impose restrictions on the freedom of expression in accordance with the spirit of article 19(3) of the covenant may include laws regarding ‘parliamentary privilege’ or ‘contempt of court’.
- Paragraph 25 imposes a duty on member-states to formulate laws imposing restrictions on the freedom of expression with ‘sufficient precision’ so as to enable the subjects of the state to regulate their conduct accordingly. Moreover, there must not be boundless discretion in the hands of those who have been vested with the powers to execute the laws but rather laws must provide them with ample guidance on the matter.
- One of the legitimate grounds for imposing restrictions on the freedom of expression enumerated under article 19(3) is for the purpose of ensuring respect for the ‘rights’ or reputations of others. Paragraph 28 clarifies that the term ‘rights’ used therein includes not only the human rights recognized by the ICCPR but also human rights recognized under international law generally.
- Paragraph 30 assumes great significance in this day and age as it addresses an area of concern that is most likely to be misused for muzzling the voice of the press. It implores the member-states to ensure that laws related to treason, national security, official secrets, sedition etc. are created in a manner consistent with the requirements of article 19(3) of the covenant. Invoking such laws merely with the intention of concealing information in larger public interest goes against the letter and spirit of article 19(3).
- Paragraph 35 requires the state party invoking article 19(3) to establish a direct and immediate connection between the expression and the threat in order to impose a legitimate restriction on the freedom of expression.
- Paragraph 42 clarifies that criticism of the government must never be met with penalization of the concerned media outlet, publisher or journalist as criticism of the government can never warrant invoking the restrictions laid under article 19(3) of the covenant.
- Internet based dissemination of information has become very prominent in the 21st century. Paragraph 43 seeks to afford protection to freedom of expression taking place on the online platforms. The article does not permit restrictions on the online platforms that are not in conformity with article 19(3). Further, the banning of information is to be content-specific as generic bans on websites go against the spirit of article 19(3). Lastly, paragraph 43 does not

permit prohibition of dissemination of information on the internet merely because the content is critical of the government.

- Paragraph 45 seeks to give effect to two essential rights of journalists. Firstly, it seeks to protect the right of journalists to travel freely, intra as well as inter country. Secondly, it asks state-parties to recognize and respect the journalistic privilege enabling the protection of sources so as to ensure that journalists are not forced to reveal their sources. Protecting journalistic sources assumes prime importance in times when nation-states have taken to mass-surveillance under the garb of national security.
- Paragraph 47 provides much needed guidance as regards the permissible scope of operation for defamatory laws. It asks member-states to make defamatory laws in compliance with article 19(3) of the ICCPR and not such as would amount to stifling the freedom of expression. Truth, absence of malice and public interest should be admissible as defenses against defamation laws. Consideration should be made towards decriminalization of defamation by state-parties and states must endeavor to avoid excessive penalties. Lastly, imprisonment should never be considered an appropriate penalty for criminal defamation.

3. FREEDOM OF THE PRESS IN INDIA:

Article 19(1)(a) of the Constitution of India guarantees to every citizen (including the members of the press) the right to freedom of speech and expression in accordance with the mandate of Article 19 of the UDHR.

Although article 19(1) (a) of the Constitution does not explicitly include the freedom of the press as done in the United States of America, a perusal of the constituent assembly debates dispels all doubts as regards the intention of the framers of the Constitution vis-à-vis freedom of the press. Dr. B.R. Ambedkar while justifying the non-specification of the freedom of the press under the article corresponding to the freedom of speech & expression stated “The press is merely another way of stating an individual or a citizen. The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity.....no special mention is necessary of the freedom of the press at all.”¹⁷⁴

¹⁷⁴Vol. VII Constituent Assembly Debates, p.780.

The judiciary has also clarified its position on the freedom of the press in several decisions. In a case¹⁷⁵, the apex court ruled that pre-censorship of a journal amounts to restriction on the liberty of the press which stands protected under Article 19(1) (a). Similarly, in *Romesh Thappar v. The state of Madras*¹⁷⁶, the court concluded that the freedom of speech & expression includes the freedom of propagation of ideas which is impossible without guaranteeing the freedom of circulation. In *Express Newspapers (private) Ltd and another v. The Union of India and others*¹⁷⁷, Justice Bhagwati made a similar observation as regards the freedom of the press. Again, in *Bennett Coleman & Co & others v. Union of India & Others*¹⁷⁸ the Supreme Court held that it is the requirement of 19(2) that any restriction imposed on the freedom of speech & expression not only be founded on some 'law' but also that such 'law' reasonably satisfy the grounds laid down under article 19(2). The court said that although the freedom of the press has not been expressly declared under 19(1) (a) "yet it is well recognized that the press provides the principal vehicle of expression of their views to citizens." Besides the cases enumerated above, there exist a plethora of judgments reiterating the freedom of the press.

The freedom of the press, like the freedom of speech & expression of an individual, is not an absolute and unqualified right. Article 19(2) of the Indian Constitution imposes reasonable restrictions on the freedom by protecting laws impinging upon the freedom of speech & expression on the following grounds:

- a) Sovereignty and integrity of India;
- b) Security of the State;
- c) Friendly relations with foreign States;
- d) Public order, decency or morality;
- e) Contempt of court, defamation or incitement to an offence.

The original draft of the Indian Constitution also contained 'sedition' as a restriction on the freedom of speech & expression. It was only upon the motion of Shri. K.M. Munshi that the obnoxious idea was dropped¹⁷⁹; He argued ".....now that we have a democratic government a line must be drawn between criticism of government which should be welcome and incitement which would undermine the security or order on which civilized life is based

¹⁷⁵ *Brij Bhushan and another v. The state of Delhi*, 1950 SCR 605.

¹⁷⁶ *Romesh Thappar v. The state of Madras*, 1950 SCR 594.

¹⁷⁷ *Express Newspapers (private) Ltd and another v. The Union of India and others*, 1959 S.C.R. 12.

¹⁷⁸ *Bennett Coleman & Co & others v. Union of India & Others*, 1973 AIR 106

¹⁷⁹ Justice E.S. Venkataramiah, *Freedom of Press*, p.26, (B.R. Publishing Corporation, New Delhi, 1987).

or which is calculated to overthrow the state.”¹⁸⁰ Had ‘sedition’ been included as a limitation on the freedom of speech & expression, freedom of the press in India would have suffered a terrible setback.

The Supreme Court¹⁸¹ has also stated that the deletion of ‘sedition’ from the grounds restricting the freedom of speech & expression goes to show that criticism of the government cannot become a ground for restricting the freedom of the press unless it is of such nature that would tend to undermine the security of the state or overthrow it.

However, the current position is far from satisfactory. Recently, the government drew flak when the Unique Identification Authority of India (UIDAI) filed an FIR against a journalist for her exposé on how easy it was to gain illegal access into the AADHAR database, India’s flagship identification program. Calling it a direct attack on the freedom of the press, the editor’s guild of India stated that it “condemns UIDAI’s action to have the tribune reporter booked by the police as it is clearly meant to browbeat a journalist whose investigation on the matter was of great public interest.”¹⁸²

To make matters worse, India is also lagging behind in shielding journalistic sources. Section 15(2) of the ‘Press Council Act, 1978’¹⁸³ is the sole Indian legislative provision touching upon the right to maintain confidentiality of journalistic sources. Unfortunately, the privilege is limited to matters arising from the act itself and therefore the privilege does not extend beyond inquiries held by the press council under the act. Thus, there is neither any law seeking to protect the confidentiality of journalistic sources in the real sense nor has the apex court clarified whether or not such protection falls within the purview of freedom of speech & expression. The ambit of the permissible limits of source protection may be up for debate but there can be no two opinions about the need to statutorily recognize this journalistic privilege which is quintessential for the enjoyment of the freedom of the press.

¹⁸⁰ Vol. VII Constituent Assembly Debates, p. 731.

¹⁸¹ *Romesh Thappar v. The State of Madras*, 1950 SCR 594.

¹⁸² Aadhaar FIR against Tribune reporter is an attack on the press: Editors Guild, The Indian Express, 08 January, 2018. Available at: <https://indianexpress.com/article/india/aadhaar-data-breach-story-uidai-fir-against-tribune-reporter-attack-on-press-editors-guild-5015381/>.

¹⁸³ Full text of the act: Available at: <http://presscouncil.nic.in/OldWebsite/act.htm>.

Of the 180 countries analysed for press freedom in 2018, India ranked a dismal 138th on the world press freedom index'.¹⁸⁴ We clearly have a long way to go before we can pride ourselves as a truly democratic and tolerant nation.

4. CONCLUDING REMARKS:

As is evident from the foregoing discussion, freedom of the press has received adequate recognition under international as well as Indian law. However, the adoption of mass-surveillance, data retention, anti-terrorism and a host of other national security laws in today's digital age is having a detrimental impact on press freedom globally, especially as regards maintaining confidentiality of journalists' sources.¹⁸⁵

It is noteworthy that the European convention on human rights has adopted an important distinction while laying down the permissible restrictions on the freedom of expression under article 10(2) of the said convention insofar as it requires the restriction to be not only 'prescribed by law' but also 'necessary in a democratic society'. The aforementioned twin tests help ensure that the principle of proportionality is taken into consideration by the European court of human rights before upholding any restriction on the freedom of expression. It would go a long way in protecting the freedom of the press if nation-states adopted a similar approach before censoring the press.

As members of the international community, it is the responsibility of nation-states to sanctify the mandate of international law i.e. to treat freedom of the press as the norm and restrictions on the right to expression, as the exception.

¹⁸⁴ The detailed methodology is available on the official website of 'reporters without borders', compilers of the '2018 World Press Freedom Index'. Available at: <https://rsf.org/en/detailed-methodology>.

¹⁸⁵ Julie Posetti, Protecting journalistic sources in the digital age, UNESCO, 2017. Available at: <http://unesdoc.unesco.org/images/0024/002480/248054E.pdf>.

RE-DEFINING SEDITION IN INDEPENDENT

*MANYAA CHANDOK

**JASMEET SINGH CHADHA

1. INTRODUCTION

“Now so far as I am concerned that particular Section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better.”

Pandit Jawaharlal Nehru on Section 124A, IPC

Constitutional Assemblé Debate, 1951¹⁸⁶

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¹⁸⁶ R.K. Misra, *Freedom of speech and the law in India*, 8 J.I.L.I. 116 (1966).

67 years since Pt. Jawaharlal Nehru's recital, it is not uncommon to find §124A of the Indian Penal Code, 1860 (*hereinafter 'IPC'*), being quoted in your newsfeed at least once a month. It is also not surprising to find that freedom of speech is hiding in the shadows, many a times behind bars, against the darkness pulling us back into the colonial era. But it is, most definitely, astonishing that Fundamental Freedoms are bending down to give cognizance to the imperial, out-dated and unjust law of Sedition.

The law of sedition is nothing but a criminalisation of dissent, running in contravention to the freedom of speech, which is a guaranteed fundamental right.¹⁸⁷ The right to protest through civil disobedience has been recognized as a right of the citizen in a democratic polity.¹⁸⁸ Even a slight reflection on the International Treaties and Conventions concerning human rights, particularly Article 19 of United Nations Declaration of Human Rights, 1948, Article 19 of International Covenant on Civil and Political Rights 1966, Article 10 of European Charter on Human Rights 1953, Article 9 of African Charter of Human And People's Rights 1979, Article 13 of American Convention On Human Rights 1978, all embrace and emphasise the importance, and necessity of freedom of free speech and expression.

The poorly drafted §124A has been at the centre of constitutional challenges repeatedly because its literal interpretation hinders its understanding, not only for the general citizenry but also for the courts resulting in divergent interpretations. Consequently, a menace has been created in the society stifling and silencing the voices of protest, or dissent of the Government. In fact, it is highly subjective in nature, giving ample discretion, to the police officials and to the courts, to determine on a case-to-case basis, if any threat is caused to the security or stability of the Government. This acts as a tool in the hands of a repressive government to regulate and undermine the free speech guaranteed under the Constitution.

Furthermore, the punishment for Sedition is evidently harsh in comparison to other offences in the IPC. It is a cognizable, non-bailable, and non-compoundable offence, which can attract prison term ranging from 3 years and may extend to life imprisonment.

Through this paper, we endeavour to bring to light the atrocities committed and policing done under the garb of §124A, which already qualifies to be struck down as unconstitutional in its

¹⁸⁷ *Nationwide News v. Wills*, (1992) 177 C.L.R. 1(Australia).

¹⁸⁸ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 249.

present form. Part A deals with the history of Sedition under §124A of the IPC tracing its first draft in 1837 and incorporation in the IPC in 1870 to its Post-Independence interpretation. Part B establishes the case against the use of §124A in light of the Constitutional principles of validity and its misuse. Lastly, Part C enlists the recommendations and concluding remarks that the authors present as solutions to overcome the challenges to freedom of speech and expression.

2. HISTORY OF SEDITION IN INDIA

2.1 Colonial Rule

The offence of sedition was introduced for the first time during the colonial rule in 1837 by The Indian Law Commission headed by Thomas Macaulay as Clause 113 of the Draft Indian Penal Code which made it an offence to “excite feelings of disaffection against the government”. However, Macaulay’s definition of sedition was not as broad as the pre-1832 English law of seditious libels¹⁸⁹. Though the said section was present in the Draft Penal Code, it was omitted by the enactment of IPC 1860. The official explanation for this omission was a clerical mistake, however, it was quite evident that Clause 113 of the Draft Penal Code was omitted from the IPC in 1860 for being with the then British law of sedition.

The offence of sedition didn’t find its place in the IPC until 1870, when an amendment was introduced and Clause 113 of Macaulay’s draft was inserted into the Penal Code as §124A. Sir James Stephen, the Law Secretary to the Government of India, made references to various men in different parts of the country who raised their voices to make war against the Government of India. Similarly, in 1898, the Lieutenant Governor of Calcutta said that it was “the Wahabi conspiracy and the open preaching of jihad or religious war against the government” in 1870 that had prompted the introduction of sedition into the IPC. The Section as enacted in 1870 ran as:

*124A. Exciting Disaffection: Whoever by words, either spoken
or intended to be read, or by signs, or by visible representation,*

¹⁸⁹ The English law of seditious libel was too broad and expansive wherein a person could be convicted for sedition for saying anything that brought the government into “hatred or contempt” or even for merely raising “discontent or disaffection” against the government. The absence of violence or apprehension of violence was immaterial under the said law. Unlike the expansive definition of seditious libel in England which included exciting hatred, contempt or ill will against the government, the Draft Indian Penal Code provided for a restrictive meaning to sedition by opting for the term “disaffection” to describe Sedition.

otherwise, excites, or attempts to excite, feelings of disaffection to the government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation- Such a disapprobation of the measures of the government as is compatible with a disposition to render obedience to the lawful authority of the government, and to support the lawful authority of the Government, against unlawful attempts to subvert or resist the authority of the Government, is not disaffection. Therefore, the making of comments on the methods of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.

The said section was used as a tool to suppress the voices of protest and criticism of the British Government. Mahatma Gandhi, while being tried for sedition in lieu of his articles in *Young India*, remarked “§124A under which I am happily charged, is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen.”¹⁹⁰

The law of sedition, as introduced in 1870, remained in force, unaltered, for a period of 28 years, until an amendment was made to the said section in 1898, primarily, to remove the vagueness vis-à-vis interpretation of the term ‘Disaffection’ used in the section, and also, to bring it in conformity with the strong law of Treason prevailing in England. Within the period of 28 years, a number of cases sought to interpret the term ‘Disaffection’, starting with *Queen Empress v. JogindraChunder Bose (Bangobasi case)*¹⁹¹ wherein Sir Comer Petheram CJ, explained:

“Disaffection means a feeling contrary to affection; in other words, dislike or hatred...If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of

¹⁹⁰Atul Dev, *A History of the Infamous Section 124A*, THE CAVARAN, (Feb. 25, 2006, 8.15PM) <http://www.caravanmagazine.in/vantage/section-124a-sedition-jnu-protests>.

¹⁹¹*Queen Empress v. Jogindra Chunder Bose*, ILR (1892) 19 Cal. 35.

creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them.”

Similar observations were made in the case of *Queen Empress v. Bal Gangadhar Tilak*¹⁹² wherein Strachey J, held:

The offence as defined in the first clause is exciting or attempting to excite feelings of disaffection to the Government.... It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the government. ‘Disloyalty’ is perhaps the best general term, comprehending every possible form of bad feeling to the government... You will observe that the section places on absolutely the same footing, the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find either of the prisoners has tried to excite such feeling in others, you must convict him even if there is nothing to show that he succeeded... Whether any disturbance or outbreak was caused by these articles is absolutely immaterial.”

However, a contrary view was taken in the case of *Queen Empress v. Ramchandra Narayan*¹⁹³ wherein the Full bench of the Bombay High Court observed that the word ‘Disaffection’ could not be construed as meaning absence of or contrary to affection or love. Ranade J, interpreted the word ‘disaffection’ not as meaning mere absence or negation of love or goodwill but a positive feeling of aversion, which is akin to ill-will, definite insubordination of authority or seeking to alienate the people and weaken the bond of allegiance, a feeling which tends to bring the government into hatred and discontent, by imputing base and corrupt motives to it. The above conflicting views were reviewed by a Full bench of the Allahabad High Court in the case of *Queen Empress v. Amba Prasad*¹⁹⁴ wherein Edge CJ, while adopting the observations made in the *Bangobasi case* and *Bal Gangadhar Tilak case* pointed out that a man may be guilty of the offence defined in §124A of the

¹⁹² *Queen Empress v. Bal Gangadhar Tilak*, I.L.R. (1898) 22 Bom. 112.

¹⁹³ *Queen Empress v. Ramchandra Narayan*, I.L.R. (1898) 22 Bom. 152.

¹⁹⁴ *Queen Empress v. Amba Prasad*, I.L.R. (1898) 20 All. 55.

attempting to excite feelings of disaffection against the government established by law, although in a particular article or speech he may insist upon the desirability or expediency of obeying and supporting the government.

Keeping these interpretations in view, the section was therefore amended by the Indian Penal Code (Amendment) 1898. The single explanation to the section was replaced by three separate explanations as they stand now. The section inserted in 1898 differed from the old one as: (a) the ‘feeling’ in the former was limited to one of ‘disaffection’, whilst under the new section it may be one of ‘hatred’, ‘contempt’ or ‘disaffection’, (b) the object of the ‘feeling’ under the former section was ‘government established by the law in British India’ to which under the new section has been added ‘Her Majesty’, and (c) the offence was termed ‘sedition’ instead of ‘exciting disaffection’.¹⁹⁵

2.2 Constitutional Assembly Debate

The ambiguity in interpreting ‘sedition’ was felt by the members of Constituent Assembly during the time of drafting the Constitution. The Fundamental Right to Free speech and Expression was placed under Article 13 of the Draft Constitution. Though the members of the Constituent Assembly advocated for extensive freedom of speech and freedom of press, it was felt that the said right could not be absolute. Initially Clause (2) of Article 13 which laid down restrictions on the fundamental right to Freedom of Speech read:

“Nothing in sub-clause (a) of Clause (1) of this article shall affect the operation of any existing law or prevent the state from making any law relating to libel, slander, defamation, offences against decency or morality or sedition or other matters which undermine the security of the state.”

However, an amendment was moved by the then Member of Assembly Shri K.M. Munshi which ran as follows:

That for Cl.(2) of Art. 13, the following be substituted: -

“(2) Nothing in sub-cl.(a) of cl.(1) of this Act shall affect the operation of any existing law or prevent the State from making any law relating to libel, slander, defamation, or any matter

¹⁹⁵2 R.A.NELSON, INDIAN PENAL CODE906 (11th ED., 2015).

which offends against decency or morality or which undermines the security of or tends to overthrow the State.”

While explaining the object of said amendment, Mr. Munshi pointed out at the considerable doubts existing in the minds of the members of the House as well as the Courts of law. He observed:

“Sedition embraces all those practices whether by word or deed or writing which are calculated to disturb the tranquillity of the state and lead ignorant person to subvert the Government. But in practice it has had a curious fortune. A hundred and fifty years ago in England, holding a meeting or conducting a procession was considered sedition. Even holding an opinion against, which will bring ill-will towards government, was considered sedition once. Our notorious §124-A of the IPC was sometimes construed so widely that I remember in a case of criticism of the District Magistrate was urged to be covered by §124-A. But the public opinion has changed considerably since and now that we have a democratic government a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State.”¹⁹⁶

The said amendment was supported by other members of the Assembly namely Shri Hukum Singh, TT Krishnamachari and Seth Govind Das. There was a clear consensus amongst the members of Assembly to remove ‘sedition’ as a ground for restriction of freedom of speech and expression. Consequently, sedition was dropped from clause (2) of Article 13 of Draft Constitution.

2.3 Post-Independence Era

Though ‘sedition’ was omitted from Article 19(2) as a restriction on fundamental right to freedom of speech and expression, it remained in force as a penal offence under S.124A IPC. The constitutional validity of the said section was however challenged in the case of *Tara Singh v. State*¹⁹⁷ on the ground that the said section is

¹⁹⁶2 SAMARADITYA PAL, INDIA’S CONSTITUTION- ORIGIN AND EVOLUTION 16-17 (1stED., 2015).

¹⁹⁷ *Tara Singh v. State*, (1951) S.C.R. 729.

violative of Article 19(1)(a) of the Constitution and is not saved by the reservations made in clause (2) of Article 19. The East-Punjab High Court while relying on the principle held that, if the language restricting a fundamental right is wide enough to cover instances falling both within and outside the limits of constitutionally permissible legislative action affecting such a right, then such a restriction shall fail in its entirety.

In 1951, the then Prime Minister Pandit Jawaharlal Nehru, moved the First amendment to the Constitution expanding the scope of Article 19(2) adding grounds of 'public order' and 'relation with friendly states' in the list of permissible restrictions on freedom of speech and expression.¹⁹⁸

Following the first Constitution Amendment in 1951, the validity of §124A IPC came into consideration before the Hon'ble Supreme Court in the case of *Kedar Nath v. Union of India*¹⁹⁹ wherein the Court following the interpretation given by the Federal Court in *Niharendu Dutt Majumdar v. King Emperor*²⁰⁰ held that incitement of violence was an essential ingredient of the offence of sedition. Further, the Court held that the offence of sedition could be constitutionally valid only if it could be read into any of the six grounds mentioned in Article 19(2) of the Constitution. The court while making use of the principle of constitutional presumption²⁰¹ held that sedition was a reasonable restriction both on the grounds of 'public order' and 'security of the state' and thereby, overruling the judgment of *Tara Singh*, declared §124A as constitutionally valid.

3. THE CASE AGAINST SEDITION

The case against Sedition is built in two sections. The first section addresses the lacunae inherent in the language of §124A bringing it under the vice of unconstitutionality. The second section deals with the misuse of discretionary powers in the hands of the executive authorities, calling for re-examination of the said section.

¹⁹⁸The Constitution (First Amendment) Act, 1951, No. Acts of Parliament.

¹⁹⁹*KedarNath v. State of Bihar*, (1962) 2 S.C.R. Supl. 769.

²⁰⁰*NiharenduDuttMajumdar v. King Emperor*, A.I.R. 1942 F.C. 22.

²⁰¹*CL Chowdhary v. Union of India*, (1950) S.C.R. 869.; *D.T.C. v. D.T.C. M. C.*, (1991) 1 S.C.C. Supp. 600;

3.1 Flaws in section 124A, IPC

The validity of a statute can be challenged on grounds of contravention of fundamental rights²⁰², absence of legislative competence or unreasonableness of the law.²⁰³ In *Papnasam Labour Union v. Madura Coats Ltd*²⁰⁴ the Hon'ble Supreme Court laid down a number of guidelines to adjudge the reasonableness of a restriction namely that:-

- (i) the restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved²⁰⁵
- (ii) The need of the society and complex issues faced by the people which the Legislature intends to solve through effective legislation
- (iii) In doing so judicial approach must necessarily be dynamic, pragmatic and elastic.

§124A as it stands today, suffers from vices inherent in its language and the same has been brought into question and criticised at various instances. An analysis of the of the most important challenges to the Constitutionality of §124A are discussed herein below:

3.2 Section 124A Is Vague in Its Construction

The Hon'ble Supreme Court in *Kedar Nath Singh v. State of Bihar*²⁰⁶ laid down 'incitement or tendency to incite violence' to be the test of establishing the offence of sedition. However this phrase has been interpreted differently in various judgments given by the Apex Court²⁰⁷, making it highly subjective and open-ended. In the first thread, the Court applied an older and weaker American standard, which required merely the 'tendency' or 'likelihood' of violence as a consequence of speech. It was opined that the use of the words 'in the interest of' before 'public order' in Article

²⁰² *Kheybari Tea Co. Ltd. v. State of Assam*, (1964) 5 S.C.R. 975.

²⁰³ *Namit Sharma v. Union of India*, (2013) 1 S.C.C. 745.

²⁰⁴ *Papnasam Labour Union v. Madura Coats Ltd.*, (1995) 1 S.C.C. 501.

²⁰⁵ *Chintaman Rao v. State of Madhya Pradesh*, 1950 S.C.R. 759.

²⁰⁶ *Supra* note 15.

²⁰⁷ *Sunil Abraham, Shreya Singhal and 66-A: A Cup Half Full and Half Empty*, 50 E.P.W. 12, 13-14 (2015).

19(2) implied a ‘wide ambit’ of protection and would even include acts with the mere tendency to cause violence.²⁰⁸

In the second thread, the Court has applied a higher threshold, namely the ‘proportionality’ or ‘proximity’ test in which the restriction in question must have a proximate relation with the object sought to be achieved, must be proportionate and must not be ‘remote, arbitrary or fanciful.’²⁰⁹ Particularly, in *S. Rangarajan v. P. Jagjivan Ram*²¹⁰, the Court held that the anticipated danger should have a proximate and direct nexus with the expression, and likened it to the infamous “spark in a powder keg”.²¹¹ Lastly, in the third thread,²¹² the Supreme Court has applied the modern American test of a ‘clear and present danger’²¹³ which requires that restrictions cannot be placed on speech or expression unless it is directed to inciting, and is likely to incite “imminent lawless action”.

In *A.K. Roy & Ors. v. Union of India & Ors.*²¹⁴ and *State of Madhya Pradesh & Anr. v. Baldeo Prasad*²¹⁵, different provisions were struck down as unconstitutional as they were vague. Just like the word ‘sacrilegious’ was said to be subjective as its standards varied among the 300 sects of New York²¹⁶, similarly the terms ‘incitement to hatred’ and ‘disaffection’ are subjective too. Moreover, the words ‘hatred’, ‘disaffection’ and ‘contempt’ that constitute as essential ingredients of the provision, are words devoid of any parameters and convey different meanings to different people. The absence of any precise objective standard or norm, leaves the provision at the discretion and autonomy of the authorities enforcing the law.

Thus, even after the Hon’ble Supreme Court’s interpretation of §124A in *Kedar Nath*²¹⁷, the provision remains vague, wide worded and ambiguous.

²⁰⁸ *Ramji Lal Modi v. State of U.P.*, (1950) S.C.R. 860.; *Virendra v. State of Punjab*, (1958) S.C.R. 308.; *Kedar Nath*, *supra* note 15.

²⁰⁹ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 S.C.C. 574.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Indra Das v. State of Assam*, (2011) 4 S.C.R. 289.; *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 77.

²¹³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²¹⁴ *A.K. Roy & Ors. v. Union of India & Ors.*, (1982) 1 S.C.C. 271.

²¹⁵ *State of Madhya Pradesh v. Baldeo Prasad*, (1961) 1 S.C.R. 970; *H.R. Bhanthia v. Union of India*, (1969) 2 S.C.C. 166; *Kartar Singh v. State of Punjab* (1994) 3 S.C.C. 569.

²¹⁶ *Burstyn v. Wilson*, 343 U.S. 495 (1952).

²¹⁷ *Supra* note 15.

3.3 Restriction Imposed is Arbitrary and Unreasonable

In the case of *Charan Lal Sahu v. UOI*²¹⁸, the SC observed, that “*In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into.*” There is no doubt that a great divide exists between the Supreme Court, the lower courts, and the police officials in applying §124A. According to the *NCRB Report 2015*²¹⁹ out of 147 such cases, 30 cases were registered under sedition during 2015. A total of 73 male persons were arrested for the offences of sedition during 2015 while no convictions were made. These statistics make it evident that §124A has been made an unscrupulous tool to violate the basic human rights of the citizens.²²⁰

Additionally, the guidelines laid down in *Papnasam*²²¹ explicitly provide that the restriction imposed under Article 19(2), is unconstitutional if it is arbitrary or of an excessive nature. §124A of IPC is so loosely framed that it takes within its garb speech which is permitted, and has a chilling effect²²² on the same, taking it outside the ambit of protection under Article 19(2).

3.4 Sedition is Against The ‘Effect Doctrine’

If the proximate effect and operation of the Act is such as to bring it within the mischief of Article 19 (1) (a) it is liable to be struck down.²²³ The effect doctrine has been explained by the Apex Court in *Bennett Coleman & Co. & Ors v. Union Of India & Ors*²²⁴:

“The true test is whether the effect of the impugned action is to take away or abridge fundamental rights if it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be,

²¹⁸ *Charan Lal Sahu v. Union of India*, (1990) 1 S.C.C. 613.

²¹⁹ NCRB, *Crimes in India 2015*, NATIONAL INFORMATION CENTRE – GOVERNMENT OF INDIA (2015).

²²⁰ *Common Cause v. Union of India*, (2016) 8 S.C.A.L.E. 601.

²²¹ *Papnasam*, *supra* note 20.

²²² *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 S.C.C. 632; *S. Khushboo v. Kannaimal*, (2010) 5 S.C.C. 600;

²²³ *Dwarkadas Shrinivas v. Sholapur & Weaving Co.*, (1954) S.C.R. 119. ; *RC Cooper v. Union of India*, (1970) 1 S.C.C. 248.; *Sakal Papers v. Union Of India*, (1962) 3 S.C.R. 842.

²²⁴ *Bennett Coleman & Co. & Ors v. Union Of India & Ors*, (1973) 2 S.C.R. 757.

related to the directness of effect and not to the directness of the subject matter of the impeached law or action.”

On a plain reading of §124A, it becomes clear that the subject matter of the section is prohibiting any opinion that aims at bringing hatred or excite disaffection towards the government established by the law in India. On the other hand, the effect of this section is restricting the citizen's fundamental right of freedom of speech and expression as laid down under Article 19(1)(a) of the Constitution. Hence, the overall effect of §124A sufficiently establishes a case for its unconstitutionality.

4. MISUSE OF SEDITION LAW IN RECENT TIMES

§124A IPC has been in force for almost 150 years and with the passage of time, it has been invoked in a number of cases. While the whole object of introducing the section in 1870 was curb dissent against the British Crown, the section was not given a liberal interpretation until the Supreme Court in *Kedar Nath case* distinguished between mere criticism of the Government and incitement to violence or the tendency or the intention to create public disorder which have the tendency or the effect of subverting the Government established by law. Even-though the said interpretation stands today, but in reality, the enforcement agencies have failed to consider the same and continue to use it as a political tool to rope in innocent people and subjecting them to mental and physical harassment. In fact, a 2016 Public Interest Litigation was filed by NGO Common Cause²²⁵ before the Hon'ble Supreme Court praying for its urgent intervention to address the misuse and misapplication of §124A by successive governments causing routine persecution of students, journalists and intellectuals engaged in social activism. The mindless slapping of sedition charges in Independent India have become rampant like an epidemic. In addition to the failure of law enforcement officers appreciating the actual essence of the offence under §124A, the following aspects play an integral role in contributing to its misapplication:

5. THERE HAS BEEN A CHANGE IN THE OBJECT AND APPLICATION OF THE SECTION

If the object of the law has changed over the years from what it was when brought into existence then the Law becomes void and unconstitutional²²⁶. There exists a stark distinction

²²⁵ *Common Cause v. Union of India*, (2016) 8 S.C.A.L.E. 601.

²²⁶ *Supra* note 20.

pre-Independence and post -Independence use and interpretation of the said §124A of the IPC. §124A was added by the Indian Penal Code (Amendment) Act 1870. One of the reasons for this move was Wahabi activities in the period between 1863 and 1870²²⁷, in addition to the basic aim of silencing the voices and curbing actions of men across the country to overthrow the imperial power. The absence of any Constitution or Fundamental Rights in place may have justified its existence prior to 1950. However, once the Constitution was adopted, the law of Sedition became redundant in light of Independence from the Colonial rule and establishment of a democratic Indian Republic.

In *Master Tara Singh v. The State*²²⁸ Chief Justice Eric Weston wrote:

A law of sedition though necessary during a period of foreign rule has become inappropriate by the very nature of the change, which has come about...Thus, merely expressing feeling of hatred, contempt or exciting or attempt to excite disaffection towards the Government makes one punishable under sedition. Prior to the Framing of the Constitution such an interpretation of the Section was very much valid and acceptable. However, with the coming of the Part III of the Constitution, Article 19(1)(a) vested in the individuals a fundamental right to freedom of speech and expression. This empowered the individuals to criticize the Government and its policies."

The object of this section has now changed from criminalising incitement of hatred against the British to criminalising mere political dissent and overriding the fundamental freedoms guaranteed in the Constitution.

It is also pertinent to note that as a result of this implied change in the object of §124A, its application has also resulted in frivolous prosecutions and increase in society's intolerant attitude. We must realise that we are evolving as a country, in our thinking and in our traditions. The police officials and courts must take into consideration the growing awareness and maturity of its citizenry while determining which speech would be sufficient to incite them to attempt to overthrow the government through the use of violence.²²⁹ Words and acts that would endanger society differ from time to time depending on how stable that society is. Meetings and processions that would have been considered seditious 150 years ago would not

²²⁷Siddharth Narain, 'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India, 46 E.P.W. 33 (2011).

²²⁸*Master Tara Singh v. The State*, (1951) Cri. L.J. 449.

²²⁹1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 718 (4TH ED., 2010).

qualify as sedition today.²³⁰ The times have changed and society is stronger than before.²³¹ This consideration becomes crucial in determining the threshold of incitement required to justify a restriction on speech. Thus, the audience must be kept in mind in making such a determination. In *S. Rangarajan v. P. Jagjivan Ram*²³², the Court held that “the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.”²³³ In *State of Bihar v. Shailabala Devi*²³⁴, it was stated that critical writing of a national character leaves the readers cold and nobody takes them seriously as they have become too familiar with it.

However, the plight of the use of this section to accuse and arrest persons for merely exercising their fundamental freedom of speech and expression is against the object and intent with which it was added in 1870 especially after the adoption of the Constitution of India in 1950.

6. BLURRING THE DISTINCTION BETWEEN CRITICISM AND SEDITION

Public discussion with people participation is a basic feature and a rational process of democracy distinguishing it from all other forms of government. Democracy can neither work nor prosper unless people share their views²³⁵. In the recent years, §124A is being used as an autonomous tool by the ruling party to prevent and punish citizens merely for exercising their fundamental freedom of speech and expression against the Government in power. This runs contrary to the well settled ratio of the Supreme Court that a citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.²³⁶“...

²³⁰*Id.*

²³¹*Bowman v. Secular Society Ltd*, (1917) A.C. 406 (H.L.).

²³²*Supra* note 25.

²³³*Id.*

²³⁴*State of Bihar v. Shailabala Devi*, (1952) S.C.R. 654.

²³⁵*Supra* note 25.

²³⁶*Supra* note 8, DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA 2547(Y.V Chandrachud et al, 8th ed., 2008).

*Seldom a day has passed in the State when such or similar slogans have not been shouted in one or other part of the State.*²³⁷

7. MAJOR INSTANCES OF RECKLESS MISUSE OF SEDITION

First is the case of *Sanskar Marathe v. State of Maharashtra*²³⁸ wherein allegations were that Assem Trivedi, a political cartoonist and social activist, through his cartoons, not only defamed Parliament, the Constitution of India and the Ashok Emblem but also tried to spread hatred and disrespect against the Government and published the said cartoons on 'India Against Corruption' website, amounting to serious act of sedition. The Bombay High Court, while declaring the charge of §124A IPC leveled against the accused to be invalid, held that §124A, IPC could not be invoked to penalize criticism of persons engaged in carrying administration and that Freedom of speech and expression available to accused could not be encroached particularly when he did not have any intention to create public disorder.

Secondly, in *Javed Habib v. State (NCT of Delhi)*²³⁹ the question before the Delhi High Court was whether articles published in a Weekly expressing anguish over the injustice done to the Muslims by Former Prime Ministers such as Indira Gandhi and Atal Bihari Vajpayee amounted to sedition. Emphasising on the duty of the courts to consider the article as a whole and gave it a full, free and generous consideration and deal with it in a fair and liberal spirit, rather than looking at isolated expressions, the Court held that for an offence under §124A IPC the real intention and the spirit of the article has to be ascertained. The Court has to find out whether the general tendency of the article is such that it is intended to excite the feelings of a section of the society or it was a severe criticism of the acts of the government. Holding an opinion against the Prime Minister or his actions or criticism of the actions of government cannot be considered as sedition under §124A of IPC.

Thirdly, in *Binayak Sen v. State of Chhattisgarh*²⁴⁰, the appellant was found to be in possession of letters allegedly containing Naxal literatures and charged of sedition. The Chhattisgarh High Court, while citing the widespread violence by banned Naxalite group against the members of armed forces, convicted the appellant. This judgement was thereafter,

²³⁷ *Alavi v. State of Kerala*, 1982 K.L.T. 205.

²³⁸ *Sanskar Marathe v. State of Maharashtra*, (2015) Cri.L.J. 3561.

²³⁹ *Javed Habib v. State (NCT of Delhi)*, (1988) 35 D.L.T. 170.

²⁴⁰ *Binayak Sen v. State of Chhattisgarh* (2011) S.C.C. OnLineChh 30.

criticized widely as the Court failed to explain how mere possession of letters containing Naxal literature would amount to sedition, particularly when there was no incitement to violence. The Court completely ignored the ‘Proximity test’²⁴¹ or the ‘test of clear and present danger’²⁴² while deciding convicting the appellant. Similarly, in *Asit Kumar Sen Gupta v. State of Chhattisgarh*²⁴³ the appellant was convicted by the Chhattisgarh High Court for being in possession of Maoist literature.

Apart from the above instances, the enforcement agencies have misused the law of sedition by invoking it on various occasions like Cheering for Pakistan team during a cricket match²⁴⁴, levying allegations of Corruption on the Police Commissioner²⁴⁵, leading an agitation demand ST status for Gujjars²⁴⁶, dancing to a song that spoke about “mujahids” who “threatened” India’s unity²⁴⁷, making remarks against the Indian Army²⁴⁸, making peaceful speech against torture committed by police²⁴⁹, stopping CM’s convoy²⁵⁰, protesting against Kudankulam Nuclear Power Plant (KNPP)²⁵¹, making remarks on rising intolerance in the country²⁵² and the recent case of hugging the Army chief of Pakistan²⁵³.

²⁴¹ *Supra note* 25.

²⁴² *Shreya Singhal v. Union of India* (2013) 12 S.C.C. 73.

²⁴³ *Asit Kumar Sen Gupta v. State of Chhattisgarh*, (2012) 3 B.L.J. 81.

²⁴⁴ Sanjeev Miglani, *Kashmir Students In Meerut In Trouble After Cheering Pakistani Cricketers*, REUTERS, (Mar. 26, 2014, 9.43 PM), available at: <https://in.reuters.com/article/india-pakistan-cricket-kashmir-idINDEEA250DN20140306>.

²⁴⁵ *Bharat Desai v. State of Gujarat*, Criminal Misc. App. 7536 of 2008.

²⁴⁶ T.J. Rajalakshmi, *Stir and Standoff*, FRONTLINE, (Jun. 21, 2008, 4.37 PM) available at: <https://www.frontline.in/static/html/fl2513/stories/20080704251302600.htm>.

²⁴⁷ Santosh Singh, *Five Minors Face Sedition Charge For Dancing To ‘Anti-India Song’*, THE INDIAN EXPRESS (Jun. 20 2018, 6.57 AM) available at: <https://indianexpress.com/article/india/five-minors-face-sedition-charge-for-dancing-to-anti-india-song-5224928/>.

²⁴⁸ Karan Sehgal, *Ghulam Nabi Azad, Saifuddin Soz Accused Of Sedition Following ‘Remarks Against Indian Army’; Petitioner Cites 22 June Interview*, FIRSTPOST, (Jun. 29, 2018, 2.10.PM), available at: <https://www.firstpost.com/india/ghulam-nabi-azad-saifuddin-soz-accused-of-sedition-following-remarks-against-indian-army-petitioner-cites-22-june-interview-4628731.html>.

²⁴⁹ *Id.*

²⁵⁰ Akash Singhal, *Woman Who Married Yogi Adityanath’s Picture Charged With Sedition For Stopping UP CM’s Convoy*, FIRSTPOST, (Dec. 11, 2017, 7.40 AM), available at: <https://www.firstpost.com/india/woman-who-married-yogi-adityanath-picture-charged-with-sedition-for-stopping-up-cms-convoy-4252319.html>.

²⁵¹ Arun Janardhanan, *8,856 ‘Enemies Of State’: An Entire Village In Tamil Nadu Lives Under Shadow Of Sedition*, THE INDIAN EXPRESS, (Sept. 12, 2016, 7.02 AM) available at: <https://indianexpress.com/article/india/india-news-india/kudankulam-nuclear-plant-protest-sedition-supreme-court-of-india-section-124a-3024655/>.

²⁵² Omar Rashid, *Sedition Case Filed Against Aamir Khan*, THE HINDU, (Nov. 25, 2015, 6.52 PM) available at: <https://www.thehindu.com/news/national/sedition-case-filed-against-aamir-khan/article7916139.ece>.

²⁵³ Girish Ahuja, *Sedition Case Filed Against Navjot Sidhu For Hugging Pakistan Army Chief*, HINDUSTAN TIMES (Aug. 20, 2018, 3.50 PM) available at: <https://www.hindustantimes.com/india-news/sedition-case-filed-against-navjot-sidhu-for-hugging-pakistan-army-chief/story-Gg8YAov1RTyMVsmkOuNEDI.html>.

As per the available data from 2014 to 2016, 179 people were arrested on the charge of sedition but only two were convicted in three years²⁵⁴.

From the abovementioned instances, it is safe to conclude that there is a definite misuse of sedition law in India primarily for the reason that the enforcement agencies have failed to appreciate the findings made by the Hon'ble Supreme Court in the case of *Common Cause v. Union of India*²⁵⁵ wherein it is held that the authorities while dealing with the offences Under Section 124A of the IPC shall be guided by the principles laid down by the Constitution Bench in *Kedar Nath case*.

8. RECOMMENDATIONS

The Right to Freedom of Speech and expression is the basic human right envisaged on citizens of a civilised nation. While emphasizing on the significance of free speech in a democracy Justice Bhagwati in *Maneka Gandhi v. Union of India* held *if democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his rights of making a choice, free & general discussion of public matters is absolutely essential*. The crux of the crime of sedition is violence or apprehension of violence of such degree leading to public disorder. The essential ingredients to fall within the ambit of Chapter VI of IPC are incitement, promoting enmity, provocation with intent to spark a riot and hampering national security. However, a thorough examination of Chapter VI of the IPC demonstrates that the offence of sedition can be addressed by various other provisions. Keeping in mind the same, it is recommended that s.124A IPC should be repealed. Moreover, keeping in mind the large-scale misuse of the said section, it is imperative that section be scrapped off from the IPC. While dealing with the misuse of provision directing automatic arrest under the Scheduled Caste and Tribes (Prevention of Atrocities) Act 1989, Hon'ble Supreme Court held that such an arrest is null and void for it is essential that all the substantive as well as procedural laws must conform to Articles 14 and 21 and any

²⁵⁴Kamaljit Kaur Sandhu, *MHA Data Shows Only 2 Convicted Under Sedition Law In 3 Years*, INDIA TODAY, (Jul. 18, 2018, 5. 38 PM) available at: <https://www.indiatoday.in/india/story/exclusive-mha-data-shows-only-2-convicted-under-sedition-law-in-3-years-1289231-2018-07-18>.

²⁵⁵*Supra* note 53.

abrogation of the said rights has to be nullified by this Court by appropriate orders or directions.

The most controversial aspect of S.124A IPC has been its interpretation. A literal interpretation of the said section hampers the sacrosanct right to Freedom of speech and expression for it would make even political dissent an offence. Recently, while dealing with the arrest of five activists in Bhima-Koregaon blast, Justice D.Y. Chandrachud remarked “Dissent is the safety valve of democracy. If you don’t allow these safety valves, it will burst.” It is for this reason that Post-independence, Courts have been reluctant to give the section a literal interpretation. Considering the varied meaning given by different courts, it is imperative that the language of said section be examined and re-drafted. It is for this reason that the author intends to recommend that a new section be substituted in place of the existing section which reads as follow:

“Whoever by words, either spoken or written, by signs, or by visible representation, or otherwise, excites, or attempts to excite, disaffection towards the Constitution or the Government established by law, intending or knowing it to be likely thereby to endanger the integrity or security of India, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall be liable to fine.”

Explanation 1: The term ‘disaffection’ shall include acts of enmity or rebellion or subversion.

Explanation 2-Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3-Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Presently, section 124A IPC is a cognizable offence and thus where any information relating to the commission of sedition is brought to the notice of police, section 154 of Code of Criminal Procedure comes into to play and the police officer is bound to record the same and does not have the discretion to hold a prima facie enquiry to ascertain the veracity of the

information. As a result of this, in cases of frivolous complaints, the accused is subjected to mental torture and dragged into unnecessary police investigation and subsequent litigation. In order to overcome this problem, it is recommended that S.124A be made a non-cognizable offence. Doing so would necessitate the holding of preliminary enquiry by the Magistrate before commencement of investigation under section 156 of the CrPC.

Owing to rise in a large number of frivolous complaints being made under s.124A to rope in persons expressing dissent towards the government, it is recommended that a clause be added in section 124A dealing with malicious prosecution providing for simple imprisonment upto 2 years or fine of Rs. 50,000/- or both against persons filing baseless complaints for crime of sedition.

The law of sedition was introduced in India during the Colonial rule by the British power in consonance with the law of seditious libel that existed in India. However, it is quite ironical that whereas the crime of sedition has been repealed in England, it still remains in force in India. The primary reason for abolishing the offence of sedition was its archaic nature and its failure to respect the values of present day constitutional democracies. In the year 2014, even the International Court of Justice and the United Nations condemned the Malaysian government's increased use of the 1948 Sedition Act, to criminalize freedom of expression and silence voices perceived as challenging governmental policy. They remarked that the Act tends to restrict the exercise of freedom of expression that are grossly over-broad and inconsistent with basic rule of law and human rights principles²⁵⁶. Time has come that our Parliament also takes steps to re-define the offence of sedition in the independent India to further strengthen the basic human right of Free speech and expression.

²⁵⁶Emerlynne Gil, *Malaysia: ICJ Condemns The Use Of Sedition To Suppress Freedom Of Expression, Calls For The Abolition Of The Sedition Act*, INTERNATIONAL COURT OF JUSTICE, (Sept. 04, 2014, 6.03 AM) available at: <https://www.icj.org/malaysia-icj-condemns-the-use-of-sedition-to-suppress-freedom-of-expression-calls-for-the-abolition-of-the-sedition-act/>.

THE REPUBLIC OF HATE SPEECH AND RELIGIOUS SENTIMENTS.

*SAIFUDDIN PATEL.

**SHIBANA FARHEEN

1. INTRODUCTION:

Free speech is the foundation of a democratic system. Dissemination of information without restraints, free exchange of ideas, airing of different views and view point, dissemination of knowledge and forming one's own views and expressing them are the basic ideas of a free

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society. This freedom makes it possible for people to formulate their own opinions on a proper basis and to exercise their own social, economic and political rights in a free society in an informed manner. Rights are the cornerstone of individual autonomy. They are guaranteed as limits on the power of State.²⁵⁷ In democratic societies they have been granted to protect individual from undue State interference. Restraint on this right has been jealously watched by courts. It is regarded as one of the pillar of individual liberty.

On the other hand, secularism has been a pillar of our Nation since independence. Many religions are practiced in India and a number of Gods are worshiped. It is considered here that religion is to be practised and not to be discussed. Religion has played an important role in development of India and its masses. The framer of our Constitution Dr. B.R. Ambedkar once expressed his views on this topic, “I would say that the rise of Buddhism in India was as significant as the French Revolution. Prior to the advent of Buddhism, it was impossible to even think that shudra would get throne. History of India reveals that after the emergence of Buddhism, shudra’s are seen getting thrones. Verily, Buddhism paved way for establishment of democracy and socialistic pattern of society in India”²⁵⁸.

2. FREEDOM OF SPEECH AND EXPRESSION:

Article 19 of the Universal Declaration on Human Rights speaks about Freedom of Expression²⁵⁹. As it allows a person to strengthen his own capacity and to attain self-fulfilment to fully enjoy freedom, it is considered to be one of the most significant rights²⁶⁰. The Constitution of India came into being on 26th November, 1949. It contains various rights both for Non-Citizens and Citizens of India. One such freedom is Freedom of Speech and Expression guaranteed under Article 19, clause (1), sub-clause (a), it lays down that all citizens have a right to freedom of speech and expression. However this right is not absolute. It comes with certain restrictions which are laid down in Article 19 clause (2), as amended by Constitution (First Amendment) Act, 1951 and Constitution (Sixteenth Amendment) Act, 1963, and enables the legislation to impose restrictions upon the freedom of speech and expression on the following grounds:

²⁵⁷ J.S. Mill, *On Liberty and Utilitarianism* 4 (Bantam Classic, New York, 2008).

²⁵⁸ B.R. Ambedkar English Address to the Conference of the World Fellowship of Buddhism, Colombo, Sri Lanka, June 6th 1950. English Report: BAWs Vol.17(3) p.406-9.

²⁵⁹ U.N.G.A. Res. 217 A (III), 1948.

²⁶⁰ Steffen Schmidt and II Mack C. Shelley, Barbara Bardeset. al., *American Government and Politics Today* (Cengage Learning, USA, 2014).

- i. Sovereignty and integrity of India;
- ii. Security of State;
- iii. Friendly relations with Foreign States;
- iv. Public Order;
- v. Decency and Morality;
- vi. Contempt of Court;
- vii. Defamation;
- viii. Incitement of an offence.

The problem of hurt sentiments arises when a law made under the following heads of reasonable restrictions is violated. Problem also arises due to vague and ambiguous nature of words used under the said Article such as 'Morality', 'Decency', 'Public Order', etc. Can we have a standard of Morality for India?

It is clear that the standard of morality which is acceptable to a state legislature is not necessarily binding on the courts. The Bombay high Court has pointed out that, so long as drinking is not prohibited in all states,, it would be unreasonable to hold that mere commendation of a drink would constitute an encroachment upon 'morality' in the particular state which has a law of prohibition²⁶¹. "The morality referred to in Article 19(2) is a morality which is accepted by all the world". However owing to ethnic cultural and even physiological differences,, it is not possible to formulate a universal standard of morality. The notions of morality vary from country to country from age to age. "The World has not yet been able to settle any common code of morality"²⁶². The reason is obvious, all social ideas, ethical ideas are largely shaped or influenced by the exigencies of a particular society.

3. CONCEPT OF HATE SPEECH:

Hate speech means an expression which is likely to offend or cause distress to individuals or a particular group. No legal definition of the term is available as it is likely that if a standard is laid down, it may suppress the liberty guaranteed to citizens under the constitution.

While purely offensive speech may not justify restrictions, argues Philosopher Jeremy Waldron, there is a class of injury amounting to more than hurt sentiments but to less than

²⁶¹*Nasserwanji v. State of Bombay*, AIR 1951, Bom 210.

²⁶²*C.F. Handyside v. U.K.* (1975) 1 EHRR 737.

harm, in the sense of physical injuries that demands restriction in democratic framework. Speech does injure dignity when it is intended to hurt sentiments of the people it brings into its garb and when it does that, it will do more harm than offending its target. This can violate “implicit assurance” that in a democratic country the underprivileged or the minorities are treated at par with the majorities²⁶³. This being a necessary move to uplift the unfortunate has also proven to be a trump card in every election campaign in our country till date. Speech negates the right of a vulnerable group should be regulated, while the right to criticise any group should continue to exist as only this will ensure that the letter of freedom enshrined in Constitution can be brought to light in its true spirit.

The internet has given hate speech greater significance as internet allows offensive speeches to affect a larger audience. A single tweet or comment on a social networking site can cause much more harm than any other primitive source of speech and expression. Recognising this issue, the Human Rights Council’s ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’²⁶⁴ on content regulation on internet, expressed that freedom of expression can be restricted on the following grounds, namely:

- child pornography (to protect the rights of children),
- hate speech (to protect the rights of affected communities)
- defamation (to protect the rights and reputation of others against unwarranted attacks)
- direct and public incitement to commit genocide (to protect the rights of others)
- advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

4. ESSENTIALS OF HATE SPEECH:

*Shreya Singhal v. Union of India*²⁶⁵, a case in which the Supreme Court of India struck down Section 66A of the Information Technology Act, 2000, on being vague, arbitrary and not falling within the reasonable restrictions under Article 19 clause (2). It also differentiated between form of speech, incitement, discussion & advocacy, though courts in some countries

²⁶³Jeremy Waldron, *The Harm in Hate Speech* 87-88 (Harvard University Press, Cambridge, 2012)

²⁶⁴ Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 17th Session, A/HRC/17/27 (May 16, 2011), available at : http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

²⁶⁵ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

refrained from identifying criteria of hate speech. However, analyses of the decisions of various courts of different State jurisdictions have laid down certain parameters which may be summarised as follows:

4.1 The extremity of the speech

To qualify as speech to hurt sentiments of people, it must be offensive and have capacity to project extreme form of emotion²⁶⁶. Expressions like advocacy and discussion of unpopular or sensitive issue may be termed as 'low value speech' which does not qualify for constitutional protection²⁶⁷.

4.2 Incitement

In *Shreya Singhal*²⁶⁸, the speech must amount to incitement in order to be restricted. This is an accepted norm to limit speech. United States Supreme Court has given the same reasoning earlier²⁶⁹. Incitement to discrimination is at heart of hate speech principles. The concept of liberty and equality has always been at conflict with hate speech principles²⁷⁰. However, those who criticise free speech argue that if all speeches are accorded the same status then this will create discrimination for the underprivileged or the minorities as against the majority. The minority is not considered to be in a good position to make their voices heard. It has been argued by them that the discrimination of wealth and power results in inequality and substantial discrimination in the marketplace of ideas²⁷¹.

Freedom of speech is to give voice to weaker sections of society and not to disregard them. The weaker sections can now raise their voice against any speech which is to suppress them or cause religious hurt to them. Intent of equality is to balance and not to suppress his liberty with necessities of a multicultural & plural world. Thus, incitement to not only discrimination but also to violence has been recognised as ground for interfering with freedom of speech.

4.3 Status of the author of the speech

²⁶⁶ *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 SCR 467

²⁶⁷ *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).

²⁶⁸ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

²⁶⁹ *Brandenburg v. Ohio* 395 U.S. 44 (1969). The Appellant was convicted under an Illinois statute making it a crime to "Advertise or publish, present or exhibit in any public place ...any lithograph, moving picture, play, drama or sketch, which portrays ... depravity, criminality, unchastity, lack of virtue of a class of citizens, of any race, colour, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots."

²⁷⁰ *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972)

²⁷¹ J. Weinstein, *Hate Speech, Pornography and Radical Attack on Free Speech Doctrine* 93 (Westview Press, Colorado, 1999).

The position of author is important in order to determine the legality of limitation imposed by the State. Sometimes a speech by a normal person or as layman not associated with the subject matter he is speaking on may not cause grave consequences as may be caused by a person who has a particular status and knowledge about the issue at hand. Closest scrutiny on court's part is required in interference with the freedom of expression of a politician²⁷² as he is a person of status and has to represent the voice of masses being represented by him. The Supreme Court in *Pravasi Bhalai Sangathan*²⁷³ was approached to sanction hate speech on a similar ground to hold unconstitutional the speeches made by public representatives and politicians.

4.4 Status of victims of the speech

ECtHR in *Lingens v. Austria*²⁷⁴ distinguished between the status of public and private individuals in this regard and remarked that: ...the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. As a result he must display a greater degree of tolerance. The former is more vulnerable and has to possess a degree of tolerance against scrutiny of public.

4.5 Potentiality of the speech

Potential impact of speech can be determined by determining the speaker's state of mind at the time when speech was rendered. In *Ramesh v. Union of India*²⁷⁵, Supreme Court examined the validity of the restriction on the basis of the potential of the movie to impact the audience.

In April 1993, Nancy Adajania, a 22 year old student of Bombay University, published an article in The Illustrated Weekly of India named, "Myth and Supermyth", on April 10th and argued that 'new nations, in their attempts to establish an identity, create icons out of the past heroes', she also took the example of Shivaji Maharaj, Lakshmibai the queen of Jhansi and Gangadhar Rao the king, to prove her thesis. The publication of the said article led to various

²⁷² *Incal v. Turkey*, Application no. 41/1997/825/1031 (1998).

²⁷³ *Pravasi Bhalai Sangathan*, AIR 2014 SC 1591.

²⁷⁴ *Lingens v. Austria*, (1986) 8 EHRR 407.

²⁷⁵ *Ramesh v. Union of India*, AIR 1988 SC 775.

chains of protest throughout the state of Maharashtra. For writing the said article she was charged with defaming Shivaji Maharaj and various other icons and hurting the sentiments of Maharashtrians, and was immediately arrested. The editor of the weekly had to finally tender an apology.

4.6 Context of the Speech

Every seemingly hateful may not be termed as a hate speech. A speech made at a particular time when there is existing religious or communal tension may qualify as hate speech at that time and may escape it at other times. The context of expression has always been looked into while adjudging the restriction²⁷⁶.

5. TESTS FOR DETERMINING HATE SPEECH:

Now, we shall look at tests which have been laid down under various jurisdictions for determining the ingredients which need to be present for hatred component to be asserted. Courts have adopted three tests while recognising whether speech qualifies for hate speech or not. Once there is a presumption that there has been interference with freedom of speech and expression, only then the court will take into consideration the three-fold analysis to determine the gravity of such interference:

(a) Is the interference prescribed by law?

Any law which limits or acts as limitation of Article 10 of ECHR must have such limitation laid down in the statute so precisely, that citizens can in accordance with such law, regulate their conduct and abstain from impermissible conduct and its consequences.²⁷⁷

(b) Is the interference proportionate to the legitimate aim pursued?

It has been opined by the court in *Handyside v. United Kingdom*,²⁷⁸ that the restrictions imposed by the State under article 10(2) on freedom of expression must be 'proportionate to the legitimate aim pursued.'

(c) Is the interference necessary in a democratic society?

²⁷⁶ *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

²⁷⁷ *Delfi AS v. Estonia*, Application no. 64569/09 (2015)

²⁷⁸ *Handyside v. United Kingdom*, Application no. 5493/72(1976).

A careful examination of the fact is required under this test, to determine the limit, if any, on freedom in pursuance of order to protect the principles and legitimate social need and values underlying ECHR.²⁷⁹

6. BLASPHEMY LAW AND THE FREEDOM OF SPEECH:

Blasphemy means an act of insult or contempt or lack of reverence to a deity or things which are held to be sacred or inviolable. There are various blasphemy laws in India the Chief one being Section 295A of the Indian penal Code, 1860 which is used to prevent insult to Christianity, Islam and Hinduism. Article 19(2) of the Constitution only allowed for reasonable restriction upon the freedom of speech in the interest of public order, section 295A of the Indian Penal Code, 1860. However cast its net much wider, by criminalising all speech that was intended to outrage religious feelings. It could be called 'over-breadth'- it covered speech that the state could legitimately regulate under constitution (i.e. speech causing public disorder) and speech that it couldn't (i.e. mere religious insult with no public disorder).

As scholar Neeti Nair records, "It was with a view to control such religiously triggered violence, while assuring religious committee that their 'sentiments' were going to be protected, that Section 295A was drafted"²⁸⁰. Even at that time, the drafting committee voiced its doubts about wide wording of the section, and predicted that it might come to be used to target not just the 'scurrilous scribbler', but also religious dissent and critique. There are various examples and history has proven those fears justified.

Internationally there has been an infringement of rights and violation of freedoms under many colonial rules and also under brutal regime of Hitler who had created his own ministry in the Nazi governance to centralise the control of German culture and intellectual life that the citizens over there lived²⁸¹. In the, Hitler appointed Joseph Goebbels as the Reich Propaganda Minister. Hitler then appointed Joseph Goebbels as the Minister of Reich Propaganda in the Reich Ministry of Public Enlightenment and Propaganda. The ultimate goal was to create an impression in the minds of other nations that the Nazi party has the

²⁷⁹ Art. 17 reads: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

²⁸⁰ For a recent account of the legislative debates leading to the enactment of section 295A; See Neeti Nair, Beyond the 'Communal' 1920s: The Problem of Intention, Communal Pragmatism, and the Making of Section 295A of the Indian Penal Code, 50 Indian Economic Social History Review 317 (2013) available at; <http://ier.sagepub.com/content/50/3/317>, DOI: 10.1177/0019464613494622

²⁸¹ Peter Longerich, Goebbels: A Biography 212-213 (Random House, New York, 2015)

backing of the population in all its work and motions²⁸² and that the news media of Germany was controlled by the Nazi party also that it handled the visual arts, literature, theatre, music and broadcasting. The history has enough evidences of the ministry which aimed only to spread the Nazi ideology²⁸³ in the minds of the people and its consequences.

7. EXAMINING RESTRICTIONS ON FREEDOM OF SPEECH AND EXPRESSION:

When the Constituent Assembly Debates are analysed along with the debates on amendment to Article 19 clause (2), one finds that restrictions on speech are *prima facie* not under 'sovereignty and integrity' but under 'public order'. Both sections 153A and 295A have been justified as restrictions under public order²⁸⁴. The Supreme Court, in *Ramji Lal Modi*²⁸⁵, has held that after the First Amendment in 1951, the language of 19(2) read – "in the interests of public order". A wider interpretation is required so that Section 295A of Indian Penal Code, 1860 can be read to be 'in the interest of public order' and not directly with 'public order'.

However, if speech is also about wounding religious feelings or insulting persons (without involving public order) then one can justify this under the 'decency and morality clause in Article 19 clause (2). The Supreme Court held that section 123(3) was a constitutional restriction on speech, in the interests of decency. Similarly, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 proscribes "intentionally insulting or intimidating with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view."²⁸⁶ In *Swaran Singh v. State*²⁸⁷ the Supreme Court held that calling a member of a Scheduled caste "chamar" in public view would attract Section 3(1)(x).

The form of hate speech that the Supreme Court here is dealing with is insult. The form of speech that the Supreme Court dealt with is associated with insult and is related to a history of humiliation that the persons belonging to Scheduled Caste have faced, and not directed against 'public order'. Irrespective of whether it leads to a public order disturbance, the use of word 'chamar' to insult someone can constitute hate speech. The restriction here is linked to

²⁸² Richard J. Evans, *The Third Reich in Power* 121 (Penguin, New York, 2005).

²⁸³ Roger Manvell and Heinrich Fraenkel, *Doctor Goebbels: His Life and Death* 121 (Skyhorse, New York, 1960).

²⁸⁴ Harv. L. Rev. 785 (1986-1987)

²⁸⁵ *Ramji Lal Modi v State*, AIR 2014 SC 2537.

²⁸⁶ Section 3(1)(x).

²⁸⁷ *Swaran Singh v. State*, (2008) 8 SCC 435.

‘decency or morality’ rather than ‘public order’ under Article 19 clause (2).²⁸⁸. Similarly, the restrictions under section 153B (Imputations, assertions related to national integration) could be justified under the ‘sovereignty and integrity’ restriction in article 19(2). Provisions relating to speech that can hurt public or religious sentiments are found in the following chapters of the Indian Penal Code, namely: “Of Offences Relating to Religion”, “Of Offences Against the Public Tranquillity” and “Of Criminal Intimidation, Insult and Annoyance”. Section 295A, IPC was enacted to specifically target speech that intended to outrage religious feelings by insulting religion or religious beliefs.

8. AT WHAT STATE OF CAUSAL CONNECTION BETWEEN SPEECH AND VIOLENCE CAN THE STATE ACT?

Ram Manohar Lohia was prosecuted for calling upon people to protest the government policies by refusing to pay their taxes. The state argued that even something as innocuous as a call not to pay taxes could be a ‘spark’ that would one day set the country ablaze in the flames of revolution. The court however rejected the argument, it held that the state must establish a ‘proximate’ or ‘eminent’ connection between speech and violence and not merely rely upon hypothetical, or remote possibilities. Here, it was clearly established that for a speech to come under the heading of violence or hurting of sentiments must have proximate and eminent likelihood of causing unrest, no hypothetical assumptions or remote possibilities can be taken into consideration in forming the conclusion as to breach of freedom.

A recent example of rumour mongering is the case of Northeast exodus, where in 2012 upto 50,000 citizens of Northeast moved from their respective residences across India, back to North-eastern States²⁸⁹. This created a panic in the country as other groups’ targeted people from North-eastern living in other parts of India²⁹⁰. At such a point the state needs to interfere and stop any speech or alleged acts which can hurt public sentiments or create an apprehension of fear which can cause unrest among the masses.

9. MANNER OF REGULATION OF SPEECH WHICH CAN AFFECT RELIGIOUS SENTIMENTS:

²⁸⁸ Restrictions based on public morality have been struck down on the basis that these restrictions were discriminatory. See Irina Fedotovav. Russian Federation, UN Doc. No. CCPR/C/106/D/1932/2010.

²⁸⁹ Stephanie Nolen, “India’s ethnic clashes intensify within social-media maelstrom” Aug. 23 2012, available at: <http://www.theglobeandmail.com/news/world/indias-ethnic-clashes-intensify-within-socialmedia-maelstrom/article4496392/>

²⁹⁰ Asian Centre For Human Rights, “Assam Riots: Preventable but not Prevented” Sept. 2012, available at : <http://www.achrweb.org/reports/india/AssamRiots2012.pdf>

Any attempt that is made to regulate speeches which can affect religious sentiments should not eradicate criticism or dissent. It has also been recognised as freedom of speech and expression in Human Rights²⁹¹. As its consequence not all speech can be made subject to legal prohibition. At the least what can be done is to include incitement or mala fide or mens rea in any legislation for hate speech. Whether a speech should be prohibited should depend on incitement of violence and threat which of immediate nature.

Broadly, international human rights law requires that measures which limit or restrain the freedom of speech and expression may do so only where the ‘three-part test’²⁹² is satisfied. The standard laid down requires that measures by which human right is curtailed must satisfy following requirements:

- The measure must be prescribed by law. It is satisfied when law is passed by appropriate procedures and provisions worded in unambiguous & explicit language.
- The measure must directly satisfy legitimate aim.
- The measure must be necessary to achieve its stated aim & should be proportionate to harm it attempts’ to redress or prevent.

It is harmful for communities & social progress is hampered. If left unchecked, it can affect principles of right to life of every individual, which in turn would corrode the basic principles and the very fabric of our constitution.

10. NON-LEGAL MEASURES TO ADDRESS HATE SPEECH:

It is worth finding whether there are ways to combat the harm caused by hate speech rather than blocking or banning speech. Prior restraint or punishment are the strategies that are currently being advocated for hate speech in Indian Law. However, there are different strategies contemplated in other countries and these include:

²⁹¹ UNGA, Sixty sixth session “Report by Special Rapporteur Frank La Rue on the Promotion and Protection of the Right to Freedom of Opinion and Expression”(Sept. 7, 2012) UN Doc A/67/357, paras 32, 33.

²⁹² UN HRC, “General Comment 34” One Hundred and Second Session July 11-29, 2011 (July 21, 2011) UN Doc CCPR/C/GC/34, para 22; United Nations Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities”, Forty First Session (1984) “Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights” (Sept. 28, 1984) Annex UN Doc E/CN.4/1984/4 para 17(hereinafter Siracusa Principles); *The Sunday Times v. United Kingdom* (1979) EHRR 245; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (Nov. 13, 1985); *Media Rights Agenda v. Nigeria* (2000) AHRLR 262.

- Television programmes which can effectively and subtly promote harmony between communities,
- reduction of communal tensions through involvement of religious heads to build empathy across religious lines,
- strategic interventions (especially in the context of social media) to monitor the dissemination of hate speech and mob mobilisation, and
- persuading people who are the weakest links, to stop spreading a harmful rumour.

11. AN EFFORT TO FIND SOLUTION:

Without having free speech in a country, the search for truth is not possible, neither can there be a discovery of truth nor such discovery will be useful. An abuse of freedom of speech which is a thousand folds is better than the complete denial of free speech. An abuse that is rendered may die in a day but the aftermath and denial of it stays on for life of the people affected. It not only tramples upon the rights of the people but also their hopes. Rather than as attempt to draw a conclusion, it is believed that one should never be drawn. The grey area existing between the freedom of speech & expression subject religious sentiments of others must be left undecided. Malleable standards need to be applied to this subject which is as sensitive as religion in this republic and the application of a strait-jacket formula might prove to be counterproductive in the future.

The perennial conflict at hand between freedom of speech and offending the sentiments of people has a special significance in the socio-religious milieu of India. Can it not then be justifiably argued that in a country where something as trivial as the release of a fictional movie can stir up violence and nation-wide protests, there is a greater need of restrictions to be placed on the freedom of speech? Then another question arises as to what exactly these restrictions would be and the extent to which they would be applicable. However, though laws are to be applied equally to all, it is rarely seen that restrictions on speech are placed on the representatives of the government in power. A prime example of this is ‘the Saamna’, the mouthpiece of the Shiv Sena, known for its rants against the people of Uttar Pradesh, Bihar and the Muslim Community.

The definition of hate speech is still subject to wider intellectual and academic debate. How existing law looks at it is what is at issue. Since it has been laid down in freedom of speech

and expression which an important constitutional right, hate speech concept has been manipulated to achieve the ulterior motives in many different ways. Ulterior motives are being achieved through hate speech under the right of speech & expression and in law courts are not able to prosecute hate speeches or its charges brought before them, with success, because of absence of clear provisions of Indian Penal Code. As provided in the Jakarta Recommendations which is on regional consultation of “Expression, Opinion and Religious Freedoms in Asia”, and which also included expert participants such as UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression observed the following:

- There is a need to revise and strengthen the existing anti-discrimination legislation so as to meet universal standards on equality across all groups, communities, men and women;
- To punish incitement of violence and hatred which may result in discrimination & hostility, laws should be enacted and implemented in a transparent, non-selective and non-arbitrary manner.
- The religious minorities’, parliamentarians should be enabled to raise issues relating to freedoms of expression and religion, and the intersection of these rights, in the parliament and other platforms.
- Incitement of hatred resulting in violence should be condemned and prevented, also all instances of violations of freedom of speech should be condemned.
- Fight against hate speech cannot be isolated. It should be discussed on a wider platform such as the United Nations. All governments which are responsible or regional bodies and regional and international actors should respond to this threat²⁹³.

²⁹³ Jakarta Recommendations on Freedom of Expression in the Context of Religion (June 17, 2015) available at: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/06/JakartaRecommendations-FINAL.pdf>

HATE SPEECH – CHALLENGE TO FREE SPEECH

*PRIYANSHI JADIYA

**PUNYA MEHROTRA

1. NEED FOR FREEDOM OF SPEECH AND EXPRESSION

George Washington, the first US president said: *“If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.”*

Freedom of speech and expression helps in attaining a rational mindset resulting in holistic development of an individual.

2. ASPECT OF FREEDOM OF SPEECH IN INTERNATIONAL LAW

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In international law, freedom to form opinions and express ideas is considered a pre requisite for the formation of democratic society. This right has been enshrined in article 19 of the Universal Declaration on Human Rights²⁹⁴ which was adopted in 1948 by the UN and India had actively participated in drafting of it. After World War II, when there was obscurantism of rights and loss of freedom, it was necessary to enact such a document. Human rights require people to be sensitive and respectful towards other human beings. India has incorporated this right in the form of Fundamental Rights and Directive Principle of State Policy in its Constitution.

The International Covenant on Civil and Political Rights (ICCPR) which became a part of International law in 1976 and to which India acceded on 10 April 1979 mandates all its state parties to accept and approve variety of human rights. It stresses that all human beings shall have right to hold opinion,²⁹⁵ freedom of expression including “freedom to seek, receive and impart information and ideas of all kinds”²⁹⁶ and freedom of thought²⁹⁷ as well.

3. FREEDOM OF SPEECH IN CONTEXT OF INDIAN CONSTITUTION

Fundamental rights are borrowed from USA and are enshrined in part III of the Indian Constitution. But still there exist a distinction between Indian and USA’s law of Freedom of Speech and Expression. The citizens of U.S.A are vested with absolute right of religion and free expression, but in Indian constitution they are subjected to reasonable restriction under Article 19(2). Hence, this article only provides a qualitative right.²⁹⁸ Further, in India, right to freedom of speech and expression is not vested on its citizens at the cost of national interest. In U.S.A. even burning of flag is considered as lambasting the government or expressing resentment against the country. Simultaneously in India, right to fly a flag is regulated by the Emblem and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1961.²⁹⁹ The makers of Indian Constitution felt the need to add reasonable restriction seeing the past of our country but in no way wished to snuff out democracy of the country. June 25th, 1975 is considered the darkest hour of India as

²⁹⁴ Universal Declaration on Human Rights, art. 19.

²⁹⁵ International Covenant on Civil and Political Rights art. 19, cl. 1.

²⁹⁶ International Covenant on Civil and Political Rights art. 19, cl. 2.

²⁹⁷ International Covenant on Civil and Political Rights art. 18, cl. 1.

²⁹⁸ 1 Durga Das Basu, *Shorter Constitution Of India* 278(14d ed. Lexis Nexis 2013).

²⁹⁹ *Union of India v. Naveen Jindal*, (2004) 2 S.C.C. 476.

emergency was declared by the then Prime Minister Smt. Indira Gandhi and “*Bharatlost its freedom to authoritarianism.*”³⁰⁰ However, when the regime changed and Emergency came to an end various amendments were made to safeguard human rights and dignity in future. By way of 43rd and 44th constitutional amendment mischief of 38th and 42nd constitutional amendments was resolved.³⁰¹

Hence, our constitutional makers have taken every step to ensure that the citizens of the country are able to cherish our hard earned freedom.

4. EXTENT OF FREEDOM OF SPEECH AND EXPRESSION

Freedom of speech is a foundation of democratic government. This freedom is essential for the proper functioning of the democratic process and it is considered as the first condition of liberty.³⁰² It is highly beneficial to provide people their right to free speech as; it not only breeds more rational, more creative society but also minimizes dissatisfaction and help in bringing social reform.³⁰³ Supreme Court discusses the importance in *Romesh Thappar v. State of Madras*³⁰⁴. The case observed that freedom of speech is the basic foundation of all democratic organization and it is extremely crucial to have political discussion for the proper functioning of the government.

A person is given liberty to think and express his view and opinion freely by word of mouth, writing, printing pictures or any other mode. However, this does not give him the right to say anything, anywhere and anytime without any restrictions. Right to incite public and bring hatred towards them is certainly not the meaning that can be inferred from freedom of speech and expression. In *State of Madras v. V.G. Row*³⁰⁵ it was observed that test of reasonableness is to be applied individually in the statute impugned, as no straight jacket formula can be laid down. Reasonable restriction as explained in a case³⁰⁶ is a limitation to be imposed on a person. It should not be excessive or arbitrary and further check should be

³⁰⁰ Surya Prakash, “*The Emergency — Indian Democracy’s Darkest Hour*”, HINDU POST (June 25,2017), available at: <https://www.hindupost.in/history/emergency-indian-democracys-darkest-hour/>.

³⁰¹ Dr. Lokendra Malik, *The Emergency of 1975: An Academic Inquest*, LIVE LAW.IN (June 24, 2015) available at: <https://www.livelaw.in/the-emergency-of-1975-an-academic-inquest/>.

³⁰² MP Jain, *Indian Constitutional Law* 1019(6d ed. LexisNexis Butterworths Wadhwa 2010).

³⁰³ *To what extent should freedom of speech be a guaranteed right?*, A LEVEL ASSISTANT (Nov. 8, 2010), available at: <https://alevelassistant.wordpress.com/?s=>.

³⁰⁴ *Romesh Thappar v. State of Madras*, A.I.R. 1950 S.C. 124.

³⁰⁵ *State of Madras v. V.G. Row*, A.I.R. 1952 S.C. 196.

³⁰⁶ *Chintamanrao v. State of M.P.*, A.I.R. 1951 S.C. 118.

made to ensure that it is in line with the interest of the public and in no case it is exceeding beyond it. The meaning deduced from the word 'reasonable' is that intelligent care and deliberation required in a situation should be taken into account. A restriction should be direct in nature and not in excess of the object³⁰⁷ which is desired to be achieved. The determination of what constitutes reasonable restriction is not final or conclusive³⁰⁸ but is subjected to the supervision of the courts. Government can exercise its excessive power in putting restriction on free speech depending on what is right or wrong.

It was observed in *Gopal Vinayak Godse case*³⁰⁹, that a passage, sentence or word if severed from the main content, cannot be said to incite violence even if it supplies inflammatory matter to a person. Text as a whole should be read taking in account reaction of the common reader. In this case, the book 'Gandhi's Assassination and I' was forfeited by Delhi Government on the ground that it incites communal hatred. Publication of this book is punishable under Section 153-A of the I.P.C.³¹⁰ Later when the author challenged this order in court, a Special Bench of Bombay High Court was set up to look into the matter. It was pointed out that book when considered as whole and from the point of view of a reasonable man does not incite people or inflames communal passions. The court also said that the book is drawn from the history, depicting the true facts about Gandhi's assassination and hence can't be said to be hurting feelings of anyone. This case represented that Government does not have an absolute power in making reasonable restriction and judiciary has the right to review any restriction imposed by the Government.

5. MISUSE OF FREEDOM OF SPEECH AND EXPRESSIONS

Today, this fundamental right is being used in bizarre ways. Citizens are not disenfranchised of their rights but using these rights to incite violence is something which is definitely not permitted. One cannot cave in to some nebulous argument and advocate his right of speech and expression under art. 19(1)(a) if the same violates the integrity of the constitution.

In *Kanhaiya Kumar v. State of NCT Delhi*³¹¹ case petitioner was the President of Jawaharlal Nehru University Students Union, and according to the State was against the judicial killing of Afzal Guru and Maqbool Bhatt. He raised certain anti national slogans like *Indian*

³⁰⁷ *Arunachala Nadar v. State of Madras*, A.I.R. 1959 S.C. 300.

³⁰⁸ *Bhau Ram v. Baij Nath Singh*, A.I.R. 1962 S.C. 1476.

³⁰⁹ *Gopal Vinayak Godse v. Union of India*, A.I.R. 1971 Bom 56.

³¹⁰ Indian Penal Code, 1860 § 153A.

³¹¹ *Kanhaiya Kumar v. State of NCT Delhi*, W.P.(CRL) 558/2016 & Crl.M.A. Nos.3237/2016 & 3262/2016.

Army Murdabad, Bharat Tere Tukde Honge, Inshaallaha Inshaallah etc. which defiled the sovereignty of the constitution. On the other hand, petitioner advocated his speech under freedom of speech and expression guaranteed under art.19(a). Court observed that petitioner may have his own ideology but the same is subjected to the framework of Constitution. Further, such acts have demoralizing effect on the family of soldiers who have sacrificed their life for the nation.

Though, the petitioner is currently released on bail and the case is still pending, it's high time to realize that such acts need to be stopped for the purposes of safeguarding the integrity of nation.

5.1 Misuse by way of Freedom of Press

Freedom of press is not expressly mentioned in our Constitution as that mentioned in U.S.A. In Indian Constitution it comes under freedom of speech and expression and is subjected to the restrictions mentioned in article 19(2).³¹² Under these restrictions if someone by way of writing in newspapers, magazines or books tends to attack the integrity of the nation he shall not go unpunished. Arundhati Roy, a reputed writer, misrepresented Supreme Court proceedings in Narmada Bachao Andolan³¹³ case. This in turn resulted in people holding a dharna in front of Supreme Court and shouting slogans which attacked the integrity of the court. She was held guilty for the contempt of court and was subjected to symbolic imprisonment and fine of Rs 2000.³¹⁴ It should be kept in mind that India is a vast country and majority of population being uneducated can easily be misled.

Press has a huge role in shaping minds of the people. It can twist and turn the facts and depict totally different picture of a situation. The duty of the press is to convey news to the citizens of the country. Hence, it should be done diligently by ensuring that the news presented is covering both sides of the story. Further, it should refrain from showing news according to its ideology as his happening in today's era. People of this country are sensible enough to form their own opinion based on the true facts delivered to them.

5.2 Misuse of Freedom of Speech and Expression on Internet

³¹²Indian Const. art. 19 (2).

³¹³*Narmada BachaoAndolan v. Union of India and others*, 1999 8 S.C.C. 308.

³¹⁴*Arundhati Roy, In re*,(2002) 3 S.C.C. 343.

The problem with internet is that “its low start-up costs and global reach, enables almost anyone in the world, in theory, to speak and be heard around the world, as well as hear others speech.”³¹⁵ Ease of access leads to internet being a paradise for figures like political candidates, cultural critics and corporate gadflies. They can express their opinion far more easily than was ever been possible before.³¹⁶ However, this platform of expression has become a major source of exploitation of the liberty conferred upon the citizens. Fake news and posting of unreliable information has become a general trend on internet. It is high time that Government of India should come up with a solid legislation to restrain the exploitation of freedom of speech and expression. Traditionally any information that gets printed, go through editors and if the content of some article is found to incite people or is derogatory does not get published. On the contrary, same is not the case when someone posts similar content online. Therefore, at present there is an urgency to frame some uniform guidelines which can be followed around the globe because dissemination of content on internet is not a domestic matter.

To combat the situation of violence and distress, many a time’s governments of various countries have resort to blocking internet services. Disabling internet facilities in J&K is a daily affair. But the real question which remains unanswered in the midst of this chaos is, whether restraining the freedom of speech and expression of the whole state a feasible solution, because under the vigilance of Armed Forces Special Power Act, this sort of solution can have major repercussions as well. Therefore, it’s time for the government to acknowledge this ever growing evil of internet liberty and come up with some well codified legislation to fight it.

The faster, easier, and cheaper it becomes to communicate and connect with people, the more effortlessly the right to freedom of speech and expression will be misused.³¹⁷ Social networking sites are boon as well as a bane. The point that it does not need any editing helps people to know the actual news but at the same time there’s no measure to check the authenticity of it. This leads to the posting of fake and biased news resulting in all sorts of violence. Recently, approximately 20 people in India were subjected to death because of the fake news propaganda.

³¹⁵PatrickBarkham, *Freespeechontheinternet*, THE GUARDIAN (Feb5,1999), available at: <https://www.theguardian.com/technology/1999/feb/05/freespeech.internet>.

³¹⁶William Fisher, *Freedom of Expression on the Internet*, THE BERKMAN CENTRE FOR INTERNET AND SOCIETY (June 14, 2001), available at: <https://cyber.harvard.edu/ilaw/Speech/>.

³¹⁷*The Abuse of Freedom of Speech*, UK ESSAYS (Sept. 4, 2018), available at: <https://www.ukessays.com/essays/general-studies/abuse-freedom-speech-8253.php?vref=1>.

Two innocent men in Assam namely, Nilotpal Das and Abhijeet Nath were lynched on the rumors of them being child traffickers. Lynching and violence have been aggravated due to the easy availability of smart phones and internet access even in the most backward areas of the country³¹⁸ where majority is incompetent to check the veracity of the information. Therefore, even for this very reason stringent laws against fake information become a need of the hour.

6. HATE SPEECH AN EXCEPTION TO FREEDOM OF SPEECH

As quoted by Newton Lee, “There is a fine line between free speech and hate speech. Free speech encourages debate whereas hate speech incites violence.” Hate speech poses complex challenges to freedom of speech. These complex challenges may come under the ambit of Article 19(2). This Article allows the state to make laws that regulates freedom of speech under the scope of reasonable restrictions, for the purposes of ensuring safety and public order. It was held in a case³¹⁹ that “no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. Hate speech promotes prejudice with time can undermine the roots of society, resulting in creating societal groups instead of unity amongst the people. Eventually this can lead to deep divides in the social cohesion.

It cannot be ignored that India is country with vast disparities in language, culture and religion. Therefore, unwarranted and malicious criticism or interference in the faith of others cannot be accepted.” In the 17th session³²⁰ of the Human Right, hate speech was declared to be an exception to Freedom of Speech. India being a member of it has to follow. In *Shreya Singhal*, court³²¹ differentiates speech as three forms – “Discussion, Advocacy and Incitement”. Court held that free speech can only be curbed when the exceptions in Article

³¹⁸Panjuri Kachari, *Death by 'fake news': social media-fuelled lynchings shock India*(July 14,2018), available at: <http://www.france24.com/en/20180714-death-fake-news-social-media-fuelled-lynchings-shock-india>.
<https://www.news24.com/World/News/death-by-fake-news-social-media-fuelled-lynchings-shock-india-20180714>

³¹⁹*Sri. Baragur Ramachandrappa v. State of Karnataka*, 2007(5) S.C.C. 11.

³²⁰ Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, OHCHR (May 16, 2011), available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

³²¹*Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1.

19(2) reach the threshold of incitement. Not everything that will be offensive will come under the ambit of hate speech. A speech to be punished as hate speech should incite people.

It has being observed that, in incidents which depict true facts of history, court has allowed to manifest, what otherwise would have constituted hate speech. India has a tragic past in relation to partition and communal riots. It was believed by the Supreme Court³²² that showing the past would not result in communal violence; instead a reasonable man would learn from those mistakes and will refrain from repeating the same. In another case,³²³ a book regarding murder of Gandhi Ji and the controversies of India – Pakistan partition was confiscated. Bombay High court allowed the same to be published, since it depicted true facts from history. It can be inferred from these decisions that depiction of reality will not come under the ambit of Hate Speech.

British brought the concept of hate speech in the Penal code. This was done so as to secure religious harmony among all groups of people and to avoid communal tensions. In Indian Penal Code, Sections 153A(1)(a) and 153B were included to ensure “that any person who promotes hatred, enmity, disharmony or ill-will between different linguistic, religious, regional groups or racial, communities or castes, by verbal or written expression is punishable for disrupting public order.”³²⁴ In 1927 after a Lahore High Court case³²⁵ need was felt to add Section 295(A). The court in this case³²⁶ held *Rangila Rasool*, a book which contained scandalous references to Prophet Mohammed’s life as offensive to Muslims. However, Court did not put it under the ambit of hate speech as it did not constitute any feeling of enmity or hatred between different religions. This attributed in demand of Muslims to change existing legal provisions. Thereafter, § 295(A) was enacted by the Criminal Law Amendment Act (25 of 1927).³²⁷ Various other legislations like section 298 and 505(1) & (2) of Indian Penal Code, section 5B of Cinematograph Act, section 7 of Protection of Civil Rights Act, 1955, etc. were added to ascertain the ambit of hate speech.

³²² *Ramesh.S/O Chotalal Dalal v. Union Of India & Ors.*, 1988 A.I.R. 775.

³²³ *Gopal Vinayak Godse v. Union of India and ors.*, A.I.R. 1971 Bom. 56.

³²⁴ Indian Penal Code, 1860 §153(A) 1(a) & (B).

³²⁵ *Rajpaul v. Emperor*, A.I.R. 1927 Lah. 590.

³²⁶ *Rajpaul v. Emperor*, A.I.R. 1927 Lah. 590.

³²⁷ Ratanlal & Dhirajlal, *The Indian Penal Code* 1105-06 (1st Ed. Lexis Nexis 2015).

We have been trying to make a law against hate speech since 1860 so as to reduce communal rights but have been unsuccessful in the attempt. From 1969, Gujarat riot to as recent as 2016 Kaliachak riots, communal riots have been a part of Indian History for extensive stretch of time. To curb this situation in 2017 Law Commission after suggestion by the Supreme Court³²⁸ came up with its 267th Report. In this report the Commission suggested inserting section 153C – “Prohibiting incitement to hatred” and section 505A – “Causing fear, alarm, or provocation of violence in certain cases”.³²⁹

7. RELATION BETWEEN RELIGION AND HATE SPEECH

India is a diverse country which houses people of different religions. In a population of 1.2 billion we have groups of Hindus, Muslims, Sikhs, Buddhists, Christians, Jains, Jews and Zoroastrians. Due to this diversity there has always been a discomfort in the society with regard to respecting traditions and cultural norms of all the religions. This often results in hatred and communal riots among people of the same society. Hate speech is “incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like.”³³⁰

India being a secular country guarantees us freedom to practice and propagate any religion.³³¹ Further, under Article 19³³², we have been given freedom to state and voice our opinions but the same is subjected to respecting the religious beliefs of others. It has been noticed that these two fundamental rights have often been in conflict with each other. For instance, making jokes and religious remarks on Sikh community in the form of Santa Banta Jokes is defamatory to their religion. According to them, they have a right to be protected under Article 25. However, the court was of the view that making rules for humour would curb free speech. Further, it stated that it is difficult to lay down guidelines for each and every religion. In another case³³³ late artist M.F. Hussain had portrayed nudes of Hindu religious figures and iconography leading to a long battle of legal allegations and actions. The court had however, dismissed all the charges against him stating, “mere knowledge of the likelihood that the

³²⁸*Pravasi Bhalai Sangathan v. Union of India*, 2014 (11) S.C.C. 477.

³²⁹*Hate Speech*, LAW COMMISSION (Mar. 23, 2017), <http://lawcommissionofindia.nic.in/reports/Report267.pdf>.

³³⁰*Hate Speech*, LAW COMMISSION (Mar. 23, 2017), <http://lawcommissionofindia.nic.in/reports/Report267.pdf>.

³³¹Indian Const. art. 25.

³³²Indian Const. art. 19 (1).

³³³*Maqbool Fida Husain v. Raj Kumar Pandey*, 2008 Cri.L.J. 4107.

religious feelings of another person maybe wounded would not be sufficient to be called as hate speech.”It can be observed that Supreme Court in the above two cases, gave primacy to Article 19 thus, superseding Article 25.

However, Supreme Court³³⁴ in other cases gave diverse opinion regarding the two fundamental rights. With respect to Article 25 court interpreted hate speech in *Ramji Lal Modi v. State of Uttar Pradesh*³³⁵. In this, a petition was filed to ban Quran. It was believed that the book fosters feeling of hostility among various religions and incites violence. However, Judiciary was of the view that such petition would contravene the preamble and will result in violation of Article 25.

In another judgement³³⁶ Supreme Court with respect to two articles had to distinguish between fundamental right to speak freely violative of Section 153-A from political theory and historical truths. The first article titled, “A Tale of Two Communalisms” referred to the rumoured Muslim practice of rape, loot, violence and murder. Similarly, the second article entitled, “Lingering Disgrace of History”, appeared to be a protest against naming the Roads in Delhi after Mughul emperors. The court observed that both articles promote sentiments of animosity and hostility and the same cannot be encouraged on the grounds of political thesis or historical truth. Thus, from the abovementioned cases it can be drawn that there is no straight jacket formula to decide which fundamental right will proceed in such scenario. Hence it will always come under the ambit of judicial scrutiny depending on the facts and circumstances of the case.

8. POLITICAL AGENDAS AND HATE SPEECH

The fact that India is a diverse country with different religions, caste, tribal groups etc, is taken as a favourable situation by number of politicians. They use different communities as their vote bank. Hopes are being sold by mocking caste and religion. But unlike in USA, in India giving hate speech during election campaign is punishable under section 125 of the Representation of the People Act³³⁷. Further section 123(3) of the Act prohibits any party to

³³⁴*Babu Rao Patel v. State of Delhi*, 1980 A.I.R. 763; *Ramji Lal Modi v. State of Uttar Pradesh*, 1988 Cri.L.J. 739 Cal.

³³⁵*Ramji Lal Modi v. State of Uttar Pradesh*, 1988 Cri.L.J. 739 Cal.

³³⁶*Babu Rao Patel v. State of Delhi*, 1980 A.I.R. 763.

³³⁷Representation of the People Act, 1951 § 125.

ask for votes on the basis of religion, language, race, caste and so on.³³⁸ But these provisions are not taken seriously.

Statistically, in 2006, there were 32,407 recorded occurrences of caste-based violence across over India excepting Jammu and Kashmir.³³⁹ In 2015, there were 751 reported incidents of communal riots in India, in which 97 people were dead and 2,264 people were severely injured.³⁴⁰ It has been seen that various political leaders use hate speech to full fill their political agenda. Das Rao Deshmukh had used a poster in order to appeal for votes. That poster was with the intention to teach a lesson to Muslims. The Supreme Court³⁴¹ ruled that this kind of appeal is potentially offensive as it “rouses passion in the minds of the voters on communal basis. Such appeal to teach a lesson was also likely to bring disharmony between the two communities, namely, the Hindus and the Muslims and offended the secular structure of the country.”

During the 2014 elections, Amit Shah, an eminent BJP member, said he would teach a lesson to people involved in Muzaffarnagar riots. He was banned by the Election Commission from making political speeches. The ban was removed after he apologized. During the same election Giriraj Singh, said, “Those opposed to Modi would have to shift base to Pakistan after the election results.” Three police complaints have been registered against him, but so far no arrest has been made by police. Even having legislation being made on it, we are still unable to stop our politicians from making such comments. Back in 1995, Supreme Court³⁴² termed it a 'way of life', when an appeal for votes was made by BJP leader Murli Manohar Joshi on the ground of 'Hindutva'. The issue lies with our judicial system as well. The system has failed to go against huge political figures engaged with breaking the country into communities. Kamini Jaiswal, a Supreme Court lawyer, said "Our Election Commission is

³³⁸ Representation of the People Act, 1951 § 123 (3).

³³⁹ Government of India, Ministry of Home Affairs, Rajya Sabha, Unstarred Question No. 4123, May 5, 2008.

³⁴⁰ *Communal Violence And Tension In The Country*, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA (Feb. 24, 2016), available at: <https://mha.gov.in/MHA1/Par2017/pdfs/par2017-pdfs/rs-20122017/521.pdf>.

³⁴¹ *Dr. Das Rao Deshmukh v. Kamal Kishore Nanasaheb Kadam*, 1996 A.I.R. 391.

³⁴² *Manohar Joshi v. Nitin Bhaurao Patil*, 1996 A.I.R. 796.

very pro-active. They are trying very hard to make polls a successful exercise. But our legal and judiciary is slow."³⁴³

Supreme Court rejected a PIL on March 3, 2014 seeking court's approval to restrict politicians from making "provocative and hate speeches" saying that it cannot "curtail people's fundamental right to free speech".³⁴⁴ Further CJI R.M Lodha said "We cannot curtail fundamental rights of people. It is a precious right guaranteed by Constitution. We are a mature democracy; 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".³⁴⁵ The constitution of India talks about secularism and equality but here we are, after 72 years of independence still differentiating on castes, religion and gender. Our politicians need to understand that we all belong to one united country.

9. INCREASE IN HATE SPEECH THROUGH SOCIAL MEDIA

Throughout ages, discrimination towards a group on basis of caste, religion has existed and is still present in this modern world. Social media is being used as fuel in mushrooming hate speech. Hate crimes have flourished into both our offline and online lives as an instrument use for subjugating religious, cultural and sexual minorities. With a click of button we can reach people around the world and creating a far reaching impact. It is a shame that many do not realise that what impact few words on Facebook or Twitter can have. They might not have an intention of inciting violence but it can sow a seed in the mind of someone who already disregard that specific group. It can be a dangerous weapon to create communal violence.

³⁴³Baba Umar, *Getting away with hate speeches in India*, ALJAZEERA(Apr.24, 2014), available at: <https://www.aljazeera.com/indepth/features/2014/04/getting-away-with-hate-speeches-india-201442474555948198.html>.

³⁴⁴ Live Law, *Supreme Court dismisses PIL seeking to restrain politicians from indulging in 'provocative and hate speeches'*, LIVE LAW (Mar.4, 2014), available at: <https://www.livelaw.in/supreme-court-dismisses-pil-seeking-restrain-politicians-indulging-provocative-hate-speeches/>.

³⁴⁵Live Law, *Supreme Court dismisses PIL seeking to restrain politicians from indulging in 'provocative and hate speeches'*, LIVE LAW (Mar.4, 2014), available at: <https://www.livelaw.in/supreme-court-dismisses-pil-seeking-restrain-politicians-indulging-provocative-hate-speeches/>.

In 2015, India was ranked fourth, after Syria, Nigeria and Iraq with an index value of 8.7 out of 10 in The Social Hostilities Index.³⁴⁶ It was a report given by Pew Research Centre on global restrictions on religion which took in account 13 indicators to measure hostilities around the issue of religion. Recently the director and actors of Padmavat movie were recipient of extreme hate and threatening messages on social media as people thought the movie is against the Rajpoot's believes. Without actually seeing the movie, they believed that the movie will result in communal riots. Lot of theaters were burnt or threatened to be burnt if they show the movie. The same has happened before with many movies like Oh My God, PK, etc. Even after being passed by the censor board, these movies received a lot of restrictions from the society and the situation got aggravated due to trouble free communications through social media. India does not have any law specific to banning hate speech on social media. The only provision that dealt with transmission of offensive messages through Internet was section 66A of IT Act, which was repealed by the Supreme Court³⁴⁷. But in a recent case Delhi High Court³⁴⁸ held, "posting insults of members of the Scheduled Castes/Scheduled Tribes (SC/ST) community on facebook is punishable under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989."

There is a grey area between what would constitute to be offensive speech and what would be protected under Freedom of speech. Due to this internet companies avoid going into the rem of hate speech as they are apprehensive they will disregard the established secured right. Some of these internet companies have tried to curb hate speech. According to facebook community standards³⁴⁹, post that contains any attack on people based on their religion, caste, gender etc, would constitute as hate speech and is not allowed. But facebook will not restrict any attempt on humor or satire in these cases. Similarly according to twitter advertisement policy³⁵⁰ prohibit promotion of hate speech and inappropriate content. Even after having such policies, these companies find are unable to restrain hate speech at the speed it is growing. Social Media plays an important role and is a major reason of hate speech mushrooming in India. It has been used time and again to promote communal and religious hate speech with

³⁴⁶Appendix B: Social Hostilities Index, PEW RESEARCH CENTER (Mar., 2015), available at: <http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/04/07154135/Appendix-B.pdf>.

³⁴⁷*Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1.

³⁴⁸*Ms. Gayatri v. State & Anr.*, 2017 S.C.C. OnLine Del. 8942.

³⁴⁹Community Standards, FACEBOOK (Apr. 24, 2018), available at: <https://www.facebook.com/communitystandards/>.

³⁵⁰Twitter Advertisement Policy, TWITTER (Aug. 30, 2017), available at: <https://business.twitter.com/en/help/ads-policies/introduction-to-twitter-ads/twitter-ads-policies.html>.

the agenda of inciting people. As recommended in 267th law commission report, India needs a law to curb the situation before it gets out of our hands.

10. CONSEQUENCES OF HATE SPEECH

“Every action has a consequence. Be it you sleeping in those extra five minutes, and then missing the train, or you calling someone a fag and then going home feeling hurt.”³⁵¹ If you do something noble for the society you’ll see your society improving and country growing while if you instill hatred among your countrymen you’ll see violence increasing and country going backwards because the energy of the youth is used for destruction of the country.

Words have a far reaching effect in the minds of a person. These words can bring about either peace or a revolution in the country. It is because of these provocative words, India has long been facing series of communal riots ranging from caste-based riots like Chundur massacre in Andhra Pradesh to religious Jammu Kashmir riot in 1989 when Islamists forced majority of Hindu Pundits to evacuate their houses. This was because of the provocative, communal and threatening slogans that interspersed with martial songs, inciting the Muslims to come out on the streets and break the chains of ‘slavery’³⁵² Terrorism and violence against religious and ethnic groups will continue and may even escalate if government do not come up with harder punishments for those found guilty for the instigation of such violence.

It is because of the hate speech, practiced by various groups that minority is targeted in almost every part of the world. Be it Jews in Hitler regime, or Hindus and Sikhs in Afghanistan and Pakistan or even in West Bengal or Muslims in some parts of India. Hundreds of riots can be prevented if this right of speech and expression is used wisely.

11. CONCLUSION

Freedom of Speech and Expression no way means freedom to express thoughts which are in consonance with the policies of the government. Positive criticism is an essential ingredient of a robust democratic structure. However, criticism should not be with the intention to

³⁵¹Lorna Costelloe, *Effects of Hate Speech*, NO HATE SPEECH MOVEMENT IRELAND (April 20, 2015), available at: <http://www.nohatespeech.ie/effects-hate-speech-lorna-costelloe>.

³⁵²Col(Dr) Tej Kumar Tikoo (Retd.), *Kashmiri Pandits offered three choices by Radical Islamists*, INDIAN DEFENCEREVIEW(Jan.19,2015), available at: <http://www.indiandefencereview.com/news/kashmiri-pandits-offered-three-choices-by-radical-islamists/>.

disrupt public order or to incite violence. Therefore, it becomes important to draw a line between free speech and hate speech. Insinuating public against the government or against group of people based on caste, religion etc. is something restricted under freedom of speech and expression.

Further, relying only on laws to combat hate speech is not the solution. Laws against hate speech are mostly unworkable and subjective in nature. Those in power can harass their enemies by way these laws. So apart from having legislation to combat hate speech it is an individual's duty as well to make people aware about the same.

Media plays a crucial role in apprising people about important issues. However, the same is now being used to escalate hate speech all around the globe. We have free mass media in India but that 'free media' does not give freedom to present distorted facts.

In this contemporary time, it has become the need of the hour to implement policies controlling hateful comments on electronic media. Strategies like blocking of offensive materials or voluntary blocking can be implemented. Funding for groups that spread awareness and educate people regarding hate speech should also be encouraged. Various sites should be developed to monitor hateful material on internet. Method of reporting hateful content to the site or service, like that available on facebook can also be adopted. Lessons about hate speech should also be included in curriculum of school going students. It should be kept in mind that combating hate speech is a public task. Therefore, instead of watching everything as a mute spectator, one should act in whatever manner he can and fight for a cause.

**AN ANALYSIS OF FREE SPEECH AND HATE SPEECH AND THE DIFFERENCE, IF ANY,
BETWEEN THE TWO**

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1. METANARRATIVE AND HATE SPEECH

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The question: how does one reconcile the two things that a democracy need fundamentally have by default. Freedom of speech guaranteed by the constitution) and non-discrimination (which is also guaranteed by the constitution). This is the balancing act one sees in the precedent that shall be discussed, the Supreme court had to decide which of the qualities of a democracy must win. Whether the majority opinion against communism should be protected, or the freedom of speech of an individual to voice socialist ideas, alternatively the majority opinion that certain speech is in favor of, and the minority that such speech hurts, it is this choice that defined the hate speech/ restriction of free expression debate.

In order to better understand this argument, one may refer to the French and German legislations that prevent Holocaust denial and use of any expression/ speech that eviscerates the ethos of the Holocaust.³⁵³ This is a clear contrast to the American perception on similar matter, where the court has constantly upheld the right of certain persons to express ideas deeply rooted in the racist and supremacist past of the Holocaust,³⁵⁴ this shows us that although there is an international convention for the prevention of hate speech (in the specific context of denigrating group of people), the speech that each society finds offensive, and banned as being offensive depends strictly on the particular society that it is.

In other words, the metanarrative prevalent social opinion is what determines to a great extent, what is acceptable and what isn't, and the harm that is cause by speech that is allowed, is always at risk of being artificially diminished in favor of the prevailing narrative in the society.

2. INTRODUCTION TO HISTORY OF HATE SPEECH

In order to understand hate speech in the context of free speech, the researcher feels that a case study would be apt. This case study shall encompass the evolution of hate speech jurisprudence in America, and It's origins. This case study will be a point of reference for defining the conditions conducive to the presence an development of a hate speech

³⁵³ Kevin Boyle, *Hate Speech: The United States Vs. Rest of the World*, 53 ME L.R. 487, 497-499(2001).

³⁵⁴ Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 WILL. L. R. 33, 743, 746-749(1992).

jurisprudence. Although the case study will specifically refer to the United States and the history relevant to the jurisprudence in that context.³⁵⁵

2.1 ORIGINS OF LIMITING SPEECH- THE GENTOO CODE

The case study needs to examine the antecedent to the attitude that certain conduct is unacceptable, and needs to be legally/ constitutionally regulated, this began with the British colonial government codifying Indian 'laws'. This refers to the creation of the Gentoo code, where the assembly of priests was tasked with the preparation of a universal law book for the colonizers to refer to.³⁵⁶ It is important to note, that a lot of behaviors that has been proscribed here has later been found to be common practice among the non-priestly classes in India,³⁵⁷ and that the code had never been a full and accurate law book of Indian practices.³⁵⁸ This is an instance of imposing the constitution of Britain, as it was at that time, and the beliefs that were legally protected at that time, on a society that had neither at said time. This bred the legitimacy in other colonies, and later societies to shun and punish conduct that was not protected in England, and later by the constitution, in that given instance. Giving rise to a strict culture of absolutism towards the constitution

It is because of this code that there has been great persecution of classes of Indian society, and as a result there have been many changes in the way Indian society conducted itself. This code was the beginning, in a sense, in India, of the repression of freedom of speech and expression, and the rationale that was proposed was the barbarity of the practices that were carried out in the country.

One needs to keep in mind that hate speech was not fully developed as a concept at this point, but the notion of things to come had been set, the paradigm around which future hate speech laws has been laid down in this notion of barbarism of oriental practices, this idea of limiting the expression of certain ideas for the mere presence of content that does not stand to the reason and scanner of the society that seeks to limit it, has already taken root. One can cogently argue that all hate speech regulation has been an extension of this right expressed in

³⁵⁵Alexander Traum, *Contextualizing the Hate Speech Debate: The United States and South Africa*, 47 INTERNATIONAL L.J. SOUTH AFRICA 1 64, 68, 69 (2014).

³⁵⁶RAJIV MALHOTRA, *THE BATTLE FOR SANSKRIT*, (Harper Collins India) 2016.

³⁵⁷Sushil Srivatsava, *Constructing the Hindu Identity: Moral and Intellectual Adventurism in 18th Century India*, 33 ECONOMIC AND POLITICAL WEEKLY 20, (1181-1189), 1183(1998).

³⁵⁸*Ibid.*

colonial India that a speech that does not fit in with the standards of the society can validly be limited. This has been a recurring and constant theme in legislature preventing expression of opinion for over a third of the 20th century.

Once the notion that certain speech has been deemed limitable has been set in place, we *need* to explore the early trend in speech regulatory legislature, and the rationale that fuelled them. The researcher will refer to the concept of 'Boutique multiculturalism'.³⁵⁹ This is the idea that has surfaced during the late 19th and early centuries among the theorizing bourgeoisie, and has a great impact on how, even today certain manner of speech is hateful. This concept developed in the vein, that the early allowance of speech and expression has been permitted, only to the extent that the same adhered to the acceptability of the society in general, and specifically the occidental society,³⁶⁰ that was marred and prejudiced in its own devices. What it has done, is first of all, create legislation in many colonies that prevent certain practices that did not align with the occidental notions of acceptable behavior,³⁶¹ but it also made it easier later, for the same countries to limit the speech of its own citizens.

To phrase it more accurately, the earliest notions of speech that were limited by governments, was more in the nature of harmful speech [to the society] rather than speech imbued with hate, that concept was still in the making, and wouldn't be a prevalent concept until much later until World War II.

We have established two essential components of the early principles on which states limited the speech/ expression rights of their citizens. Now the researcher seeks to introduce the concept of viewpoint absolutism,³⁶² a concept that can be defined, in fairly simple terms as the intention to protect speech of all manner, irrespective of the content of the same, and to prevent the restriction of the same, if not the active protection of it. This theory argues that there is no conceivable way in which the freedom of speech clauses that modern democracies

³⁵⁹Stanley Fish, *Boutique Multiculturalism, or Why Liberals are Incapable of Thinking about Hate Speech*, 23 UNIVERSITY OF CHICAGO PRESS JOURNALS 2, 378.

³⁶⁰Stanley Fish, *Boutique Multiculturalism, or Why Liberals are Incapable of Thinking about Hate Speech*, 23 UNIVERSITY OF CHICAGO PRESS JOURNALS 2, 381.

³⁶¹ Richard W. Larivierre, *Justices and Panditas: Contradictions in Contemporary readings of Hindu Legal Past*, 48 JOURNAL OF ASIAN STUDIES 4, 759-760, 757(1989).

³⁶²Eric Heinze, *Viewpoint Absolutism*, 69 MODERN L.R. 4, 549, 543-582(2006).

impose in their constitutions, can refuse the dissemination of un-popular ideas, or ideas that this democracy considers harmful.³⁶³

Before the history of hate speech is explored, one needs to understand that not all speech adheres to the same standard, and that there are speeches that are not considered hate/harmful, irrespective of the content thereof. This comes from the classification of speech as High/ Low/ Non-value speeches.³⁶⁴ It is important and interesting to note that these speech categories have no definitions of themselves, and in fact depend on the content to determine protection of constitutional freedom. If the speech has harmful content, then it is liable to be downgraded to a lower standard of speech and held liable,³⁶⁵ the classification becomes more of a debate on what the court in charge of the decision making deems that example of speech to be rather than anything else. This brings aptly to the changing nature of the court's treatment of speech and it's sanctity under the first amendment.

3. HATE SPEECH IN THE U.S

What becomes obvious through even a cursory reading of the precedent, is that the standard has depended on public perception of issues through the decades, and the court has done little to improve upon the beliefs held by the society that might affect nationally binding

³⁶³*Ibid.*

³⁶⁴Eric Bleich, *The rise of Hate Speech and Hate Crime Laws in Democracies*, 37 JOURNAL OF ETHNIC AND MIGRANT STUDIES 6, 917-934, 921(2011).

³⁶⁵*Supra* 1, 65.

judgment. It begins in the '20's when during the first world war the court had a slew of decisions that focused on the draft protests,³⁶⁶ what can be seen here, is the principle of harm speech, being applied aptly to a fact situation, the court claimed that as long as any given speech/ expression does not hurt any government/ public policy, there can be no legal consequences,³⁶⁷ and since the draft was government policy, it was considered harm speech. The 'Fighting Words' principle was developed in this era for the first time,³⁶⁸ and was soon diluted to such an extent that the principle had no inherent meaning and hate speech became more a politically oppressive term, than a liberating one and this happened in more than one way.

3.1 The U.S. Supreme Court- Precedent

It needs to be seen how the U.S Supreme Court treated the statements made by people, that have had objections piled against them. There have been many phases of the same. The researcher begins with the pre- WWI era, the cases during this era were a product of the Federal espionage act, they were decided in the aftermath of the war, most prominent among them *Shenck V. U.S.*³⁶⁹, the question in this and others, has been whether the statements made in the anti-draft protests had a present danger that the Federal government needed to protect against.³⁷⁰ The standard that the court came up with, was a little different from the 'fighting words' standard that became prominent later on, but essentially the same the requirement that , their intent/ posture to cause damage to the federal government, was enough to restrict such speech.³⁷¹ The standard evolved further, during the McCarthyism era,³⁷² when there was a prominent scare of the spread of communism in America, here the court, prominently in *Whitney V. California*,³⁷³ held, even in the absence of war, that the statements themselves, advocating a governmental takedown, were sufficient on their own to be dangerous and thereby to be restricted.³⁷⁴ This tendency to limit and persecute even statements that are mildly threatening to the government, has subsided ever since, where the

³⁶⁶William B. Fisch, *Hate Speech in The Constitutional Law of the United States*, 50 AMERICAN JOURNAL OF COMPARATIVE LAW, 463-492, 471(2002).

³⁶⁷*Schenck v. United States* 249 U.S. 52, 53.

³⁶⁸ Michael J. Manheimer, *The Fighting Words Doctrine*, 93 COLUMBIA L.R. 6, 1527-1571, 1530, 1532(1993).

³⁶⁹*Schenck v. United States* 249 U.S. 47.

³⁷⁰*Supra* 12.

³⁷¹*Schenck v. United States* 249 U.S. 51.

³⁷²*Supra* 12 472.

³⁷³*Whitney v. California* 274 U.S. 372.

³⁷⁴*Supra* 12 473.

court has deemed it necessary that each such statement that has been made, needs to be evaluated on its own merits. But for all this, the court insisted that communism was such an evil that it need not be poised specifically for the court's opinion on it.

This attitude of the court must be read with the context at the time in the United States, the debate on hate speech was only recently gaining the spotlight it deserved, after there was protest against campus hate speech codes were introduced.³⁷⁵ Although the court did not conflate the speech made in favor of communism with speech made against certain races, the court's opinion on racist speech is merely an extension of the declared unconstitutionality of these speech codes. The initial argument had been along the first amendment lines,³⁷⁶ but the court has gone on to extend the same courtesy to city and state legislation,³⁷⁷ creating challenges for both.³⁷⁸

The court's conflation has led to the extension of first amendment rights to speech that, doesn't meet its own standards from previous judgments. A popular example is the case of *Brandenburg v. Ohio*,³⁷⁹ this was a case in which active violence had been advocated by the accused, more so against the government,³⁸⁰ and the supreme court decided that his conviction be reversed, and the reason for doing so is even more bizarre, although at the heart of it, sound. The charge brought against the clan members had been on the basis of the Crime Syndicate statute of the state. This statute proscribed the 'advocacy' of violence, and crimes against the state, the supreme court differentiated the current actions as being the preparation/ incitement for action, rather than advocacy, and hence, the clan member was acquitted.³⁸¹ This begs the question, why was he not convicted for potentially endangering the government/ bringing about a state of lawlessness to the local government/ the Congress. This is a theme that is visible in a majority of the racial bias and hate crime cases throughout the 60's, beginning with this one. Even in the popular case of *R.A.V. v. St. Paul*³⁸², very similar actions were carried out by clan members, in this instance, they burnt a cross in the

³⁷⁵ Frederick M. Lawrence, *Resolving the hate Crime/ Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L.R. 673, 683(1993).

³⁷⁶ *Doe v. Michigan* 721 F. Supp. 852 .

³⁷⁷ *Supra* 21, 684.

³⁷⁸ Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech*, 82 CALIFORNIA L.R. 4, 875(1994).

³⁷⁹ *Brandenburg v. Ohio* 395 U.S. 446, 449.

³⁸⁰ *Brandenburg v. Ohio* 395 U.S. 445.

³⁸¹ *Ibid* 448.

³⁸² *R.A.V. v. St. Paul* 505 U.S. 377.

yard of a black resident of the community, and the case was brought before the Supreme Court, here the decision was given that the actions were mere statements, and that there were no ‘fighting words’,³⁸³ this refers to the test of immediacy the court advocated in the dissent judgment for *Holms-Brandeis*. Here is a constant trend, the court has followed, exemplified by the judgment in the *Skokie* case,³⁸⁴ here the court gave the supremacist groups permission to carry out marches in a city populated by jews, many if them holocaust survivors, on the sole argument that the same would not lead to immediate harm to the community.

The precedent thus far shows us a trend. What this case study began as, was an exercise into trying to understand whether there was any correlation with the speech that is banned and the society that band the said speech, and it can be said that a certain degree of certainty, that the United States, a country that has a majority population of Caucasians, and was a traditionally a capitalist economy, with the welfare aspects of it, having been introduced only at the end of the second world war.³⁸⁵ Would naturally censor any content that is socialist, of communist in nature and would in turn not take such a hard stand on speech that in essence would favor the Caucasian populace.

The remaining project shall focus on the proposal for a handy definition and debate around what might constitute hate speech.

4. CRITERION FOR DETERMINING HATE SPEECH

In *Pravasi Bhalai Sangathan v. Union of India*³⁸⁶, the court recognised difficulty in providing a specific standard for determining hate speech. While there is no definition of hate speech,

³⁸³Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech* (1996), FACULTY SCHOLARSHIP PAPER 1323, 284.

³⁸⁴*National Socialist Party of America v. Skokie* 432 U.S. 43 (1977).

³⁸⁵*Supra* 1, 68.

³⁸⁶*Pravasi Bhalai Sangathan v. Union of India*, AIR 2014 SC 1591.

there is a universal understanding on what its core components are – a malicious expression of hatred against a person or an idea which causes harm.³⁸⁷

Numerous legislations address the issue of hate speech –

- a) the IPC penalises sedition³⁸⁸, promotion of enmity³⁸⁹, uttering of words with intent to harm religious beliefs³⁹⁰ and publication of any statement which causes enmity or ill-will among classes³⁹¹;
- b) The Representation of People Act 1951 prohibits promotion of enmity on grounds of religion, caste, community as a corrupt electoral practice³⁹²;
- c) The Cable Television Network Regulation Act 1995 prohibits transmission of any programme through a cable network which doesn't adhere to the prescribed code.³⁹³

Although there are more legislations dealing with hate speech, the chosen laws display essential characteristics of what we consider to be hate speech – malicious intention, a person/idea being affected and harm being caused. Therefore, it is necessary to examine these three criteria for deciding if a particular speech can be called hate speech or not. Further, we must examine any possible mitigating factors which influence the affixation of liability for hate speech. In doing so, the authors shall first discuss the validity of the criteria and the impact of the mitigating factors in absence of any metanarrative or guiding ideology and then compare it to the validity of the same tests in presence of a metanarrative:

4.1 Test of Content

Malicious intention to incite hatred is primarily determined by the content of the speech. Such content is usually required to be an explicit incitement of hatred, since subtle messages can often go unnoticed. Restricting speech on a potential hidden message which may cause incitement is too vague a ground to be justified.

³⁸⁷ 'Hate Speech' Explained - A Toolkit, Free Word Centre, (2015) available at: <https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>.

³⁸⁸ §124A, PEN. CODE (1860).

³⁸⁹ §153A PEN. CODE (1860).

³⁹⁰ §298 PEN. CODE (1860).

³⁹¹ §505(1) PEN. CODE (1860).

³⁹² §123(3A), The Representation of People's Act, 1951, No. 43, Acts of Parliament, 1951.

³⁹³ §5, The Cable Television Networks (Regulation) Act, 1995, No. 7, Acts of Parliament, 1995.

The major problem with the test of content is that our usage of words is not uniform across race, caste, community and language³⁹⁴, causing meanings to be twisted and interpreted differently, which can cause an innocent speech to be labelled as hateful or vice-versa. Even if we can establish a common ground for words, we have to deal with the way in which these words are expressed because the way in which an idea is expressed can also provide insight into language.

It is important to note that the content of the speech by itself doesn't reflect malicious intention. Use of words such as 'untouchable' or 'retard' do not make a speech hateful by themselves, but depend on the context in which they are used. For example, the word 'retard' is used in two possible ways - to delay progress and as an insult to a person with a mental disability.³⁹⁵ The word 'untouchable' can also mean two things – something so great which cannot be rivalled or as an insult to a person belonging to the lowest caste as per the traditional Hindu caste system.³⁹⁶ Therefore, mere inclusion of certain words does not reflect intention, it is the contextual usage which has to be looked at.

Even if we take the contextual usage, the tone of the speaker can be justifiably said to overrule any hidden message which might be hateful. This means that any speech which takes the form of an 'offensive' joke, a parody or a satire cannot be labelled as hate speech.³⁹⁷ Similarly, body language and emotions of the speaker can reveal if the speech is made in jest or in seriousness.³⁹⁸

What is left with us is a very narrow area of content which can be said to reflect malicious intention. Only that speech which is unambiguous in generating hatred and made by a speaker who makes the speech in full conviction can be said to be 'hate speech'.

4.2 Test of Person/Idea

³⁹⁴ Sarah Seewoester, *Linguistic Ambiguity in Language-Based Jokes* (November 1, 2009) (unpublished M.A. thesis, College of Communication) (on file with the Institutional Repository at DePaul University).

³⁹⁵ <https://www.merriam-webster.com/dictionary/retard> (last visited Aug. 22, 2018).

³⁹⁶ <https://www.merriam-webster.com/dictionary/untouchable> (last visited Aug. 22, 2018).

³⁹⁷ Paul Chadwick, *If you take a joke apart, what do you have left?*, THE GUARDIAN, Mar. 25, 2018, available at: <https://www.theguardian.com/commentisfree/2018/mar/25/joke-readers-editor-investigating-satire-parody-news>.

³⁹⁸ Nick Morgan, *7 Surprising Truths about Body Language*, FORBES (Oct. 25, 2012, 03:35 PM), available at: <https://www.forbes.com/sites/nickmorgan/2012/10/25/7-surprising-truths-about-body-language/#70fc4bfa509f>.

The target of hate speech is either a person or an idea. Usually, minorities are vulnerable to hate speech due to existing community tensions. With respect to ideas, any deviation from the existing ideological ground is considered to be hate speech.

The major problem with the test of person/idea is that we arbitrarily create a class of persons and ideas which are immune from any criticism, while some are deprived of this immunity.

Consider the distinction we make between soldiers of the Indian army and the Naxalites. Both sets of persons are Indian citizens and members of both sets have taken lives for a cause which they believe is right. However, any criticism of the army is treated with disdain.³⁹⁹ Contrasting this to the treatment of any show of sympathy with the Naxalites as ‘supporting terrorism’.⁴⁰⁰

Similar to the difference between two sets of persons, consider the distinction between the ideas of religion and atheism. Both concepts are a personal choice of the person, and are at their core philosophies of life which enable the person to lead a good life. However, blasphemy laws in India are broad in their scope, with any insult to religious feelings being treated as hate speech.⁴⁰¹ In contrast, atheists are often the target of violence perpetrated by religious fundamentalists – the author Perumal Murugan committed ‘literary suicide’ after protests from the Gounder community⁴⁰², murder of H. Farook⁴⁰³ and protests against a private atheist meeting.⁴⁰⁴ Despite ideologically motivated attacks, none of these actions have been treated as infringing on a person’s (non)religious beliefs.

³⁹⁹ Kanti Bajpai, *Dangerous nonsense: Once we put the Indian army above criticism we become Pakistan*, TOI (Jun. 17, 2017, 02:01 AM IST), available at: <https://blogs.timesofindia.indiatimes.com/toi-edit-page/dangerous-nonsense-once-we-put-the-indian-military-above-criticism-we-become-pakistan/>.

⁴⁰⁰ Pratik Kanjilal, *Maoists, Naxalites or Terrorists?*, THE INDIAN EXPRESS, Jun. 1, 2013, available at: <https://indianexpress.com/article/opinion/columns/maoists-naxalites-or-terrorists/>.

⁴⁰¹ Gautam Bhatia, *The Constitutional Case against India’s Blasphemy Law*, THE WIRE, Jan. 18, 2016, available at: <https://thewire.in/law/the-constitutional-case-against-indias-blasphemy-law>.

⁴⁰² Amrith Lal, *Tamil author Perumal Murugan announces his ‘death’ on Facebook over lack of freedom of speech*, THE INDIAN EXPRESS, Jan. 15, 2015, available at: <https://indianexpress.com/article/india/india-others/forced-to-withdraw-novel-tamil-author-announces-his-death/>.

⁴⁰³ Arun Janardhanan, *Tamil Nadu youth killed for being an atheist, father says he too will become one*, THE INDIAN EXPRESS, Mar. 27, 2017, available at: <https://indianexpress.com/article/india/tamil-nadu-youth-h-farook-killed-for-being-an-atheist-father-says-he-too-will-become-one-4586999/>.

⁴⁰⁴ Mohammad Ali, *Hindutva activists attack, force cancellation of private meeting of atheists in Mathura*, THE HINDU, Oct. 14, 2016, available at: <https://www.thehindu.com/news/national/other-states/Hindutva-activists-attack-force-cancellation-of-private-meeting-of-atheists-in-Mathura/article16071222.ece>.

Therefore, the test of person/idea seems to unjustly and arbitrarily create protected sets of persons and ideas. Speech is evaluated as hate speech only if it seems to criticise the protected set. As it was held in *S.Khushboo v. Kanniamal & Anr.*⁴⁰⁵, there is a need to tolerate unpopular ideas. Justice Holmes' dissent in *Abrams v. United States* explained the 'market place of ideas' concept, according to which "*the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.*"⁴⁰⁶

4.3 Test of Harm

Most conventional definitions of hate speech do not consider harm to be an essential component, mainly because emotional distress is not explicitly labelled as a harm in the same degree as physical manifestation of hatred in the form of violence.

The major problem with the test of harm is that its scope is either too broad or too narrow, and in both cases, it unfairly restricts innocent speech or allows hate speech. Considering only physical consequences to be harm makes the scope narrow whereas including emotional distress broadens the scope excessively.

If we consider only physical manifestations of hatred to be considered a harm, it defeats the objective of classifying certain speech as hate speech as emotional distress is caused to the victim who has no recourse available. In extreme cases, it can mean that enmity between communities can worsen with the law waiting for any person to act before it can intervene.

On the other hand, including emotional distress can trivialise the concept of hate speech. Due to the subjective nature of emotional distress, virtually any speech which hurts the sentiments of the target can be treated as hate speech. As a result, it decreases communication and discussion of different viewpoints. A common example

⁴⁰⁵ *S.Khushboo v. Kanniamal & Anr.*, (2010) 5 SCC 600.

⁴⁰⁶ *Abrams v. United States*, 250 US 616 (1919).

is that of safe spaces in universities, a place where discriminatory words or actions are not tolerated.⁴⁰⁷

Therefore, the test of harm runs the risk of either condemning the innocent or of letting the guilty go scot-free. It eliminates any scale and instead presents us with two absolutes – either allow all speech or restrict everything.

5. AFFIXING LIABILITY FOR HATE SPEECH: MITIGATING FACTORS

In order to affix liability for hate speech, it is necessary to draw a causal link between the harm caused to the person/idea as a result of the malicious expression by the speaker. However, there are numerous mitigating factors which display the difficulty in penalising hate speech⁴⁰⁸.

5.1 Speaker

Restricting and penalising a person's speech requires a qualifier of actual harm which can be caused by such speech. In this regard, it becomes important to consider the person who is making the speech. Two factors have to be assessed to determine the speaker's liability – influence wielded by the speaker and possibility of coercion or absence of malicious intention.

A speaker who is influential and considered to be an authority by people will be more likely to materialize a tangible harm out of any expression of hate speech. Similarly, popular people like celebrities or politicians should be held accountable to a higher degree of care since their speech has greater possibility of inciting hate. This implies that people who are not influential should be given more freedom of speech.

It is important to also consider any possibility of coercion or absence of malicious intention on part of the speaker. For example, if a hateful remark is made under

⁴⁰⁷ Sally Weale, *Safe spaces used to inhibit free speech on campuses, inquiry finds*, THE GUARDIAN, Mar. 27, 2018, available at: <https://www.theguardian.com/education/2018/mar/27/safe-spaces-used-to-inhibit-free-speech-on-campus-inquiry-finds>.

⁴⁰⁸ Susan Benesch, *Dangerous Speech: A Proposal to Prevent Group Violence*, WORLD POLICY INSTITUTE, (Jan. 12, 2012), available at: <https://worldpolicy.org/wp-content/uploads/2016/01/Dangerous-Speech-Guidelines-Benesch-January-2012.pdf>.

provocation, when a person is intoxicated or when a person is coerced into saying something hateful, it should not make him liable for such speech.

Therefore, the position of the speaker does impact their liability for hate speech. It would be an unfair curtailment of speech to restrict any non-influential person's speech since it is unlikely that the objective of penalising hate speech would be furthered. Also, holding a person liable for hate speech made under coercion or without required malicious intention is unjust.

5.2 Audience

All speech is carried out in the form of a communication between the speaker and the audience. In this regard, it is important to discuss the role of the audience in order to establish a causal link between the hate speech and the harm caused. Two factors have to be assessed – level of understanding of the audience and personal biases of the audience.

Hate speech requires incitement of hatred as a result of the speech. Therefore, two possible cases arise – when the listener doesn't understand or doesn't care about what is being said by the speaker and when the listener misinterprets the speech and hatred is incited as a result of this misinterpretation. In the first case, speech cannot be termed as hate speech because it doesn't have any impact. For example, if a religious fanatic passionately asks a child to kill all non-believers, it can't be hate speech because it doesn't have any impact. On the other hand, if the audience itself bears strong emotions about a particular issue, it might misinterpret the speech and generate hatred against a particular person, even though the speaker might have made the speech innocently. In both cases, the speaker cannot be said to be liable as either his speech doesn't have any impact, or it just becomes an excuse to act on a hatred which was already existing.

Existing biases can lead to the impact of a particular speech being overexaggerated or undermined. If a person makes a comment, and that comment goes against the personal belief of the listener, the listener can claim it to be hateful. On the other hand, if a hateful comment is made which is aligned with the personal beliefs of the listener, any incitement of hatred is likely to be overstated, since such speech will be

readily accepted. In both cases, the speaker's liability has to be reduced as their contribution to hatred is largely dependent on the listener.

Therefore, the listener plays a huge role in deciding the liability of the speaker. The personal beliefs of the listener and their understanding can have material consequences on hatred, and thus can decide if we consider a speech to be hateful or not.

5.3 Socio-political circumstances of the speech

The liability imposed for hate speech can also be mitigated depending on the socio-political circumstances under which the speech is made. Broadly speaking, the two factors affecting liability are location of making the speech and reactionary nature of the speech.⁴⁰⁹

The location where the speech is made is relevant as absence of the target of hate speech from the region where such hatred exists renders the objective of the speech useless. For example, if I incite hatred against an ethnic community which doesn't reside in my nation, liability cannot be imposed since the objective of hate speech is not met. On the other hand, if I espouse hatred against a community which resides in my nation, it means that there exists a way for hatred to be physically expressed against the target of such speech.

A speech can said to be reactionary if it inspired by a particular incident which occurred in the region, usually if the incident had tragic consequences. It is human nature to feel hatred against a community and stereotype it in response to a tragic incident. In such cases, the speech can be said to be an extension of 'grave provocation'. For example – the stereotyping of Muslims after the 9/11 terror attack and growing hatred is a natural response by a group of people who feel threatened.⁴¹⁰ Even if consequences arise out of the speech, it is difficult to deny the possibility that the speech may be a verbal manifestation of the existing hatred and can simply act as a trigger for the violent reaction.

⁴⁰⁹ Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1528 (2003).

⁴¹⁰ Md. Abu Shahid Abdullah, *Muslims in Pre- and Post- 9/11 Contexts*, 3(3) IJCLTS 52, 53 (2015).

Therefore, it is necessary to account for socio-political circumstances of the speech, as they display how imposition of liability is unjustified.

5.4 Platform and magnitude of speech

In order to affix liability, it is necessary to establish that there has been incitement of hatred in the minds of the listener. This is usually determined by interaction between the listener of hate speech and the target. Broadly speaking, two factors must be looked at – platform of communication and magnitude of the speech itself.

Verbal face-to-face communication is not the only way in which hateful ideas can be communicated. In the modern era, hate is also expressed over the internet on social media platforms such as Facebook, Twitter, YouTube etc. However, such platforms provide anonymity and access to many like-minded persons.⁴¹¹ As a result, herd mentality and perceived lack of personal culpability can result in multiple expressions of hatred, which are often not reflective of genuine beliefs of the parties involved.⁴¹² It becomes difficult to determine whether such interactions reflect genuine hatred or not.

The magnitude of speech considers the size of the audience exposed to hate speech and quantity of repetition of hateful ideas in communication. However, mere expression of hateful ideas cannot be said to reflect hatred as in the transitioning from listeners to speakers, the hateful opinion is itself transformed and expressed by the (now) speakers in their own way. Even if it is just a replica of the original opinion, the purpose for expressing such opinion can vary from person to person and passing off liability on the original speaker denies role of the listener-turned-speaker in promoting hatred.

Therefore, liability for increase in quantity of hateful expressions cannot be imposed on the original speaker alone.

⁴¹¹*Social Media, Bullying and the Growing Lynch Mob Mentality*, DANNY BROWN (Jan. 1, 2014), available at: <https://dannybrown.me/2014/01/07/social-media-bullying-and-the-growing-lynch-mob-mentality/>.

⁴¹² Ramsey M. Raafat et al, *Herding in Humans*, 13(10) TRENDS IN COGNITIVE SCIENCES 420, 422 (2009).

6. METANARRATIVES AND HATE SPEECH

On the basis of aforementioned tests and factors, no speech can be categorised as ‘hate speech’, because of uncertainty on the question of reasonability or by logical extension all speech to be hate speech. Further, there are several mitigating factors which make it unjust to hold the speaker liable.

The addition of a metanarrative solves this problem, as it allows us to make distinction between speech by providing us with fundamental principles which cannot be challenged and laying down an objective for the state to achieve. Essentially, metanarratives enable us to justify the creation of arbitrary distinctions between speech and imposition of penalty for certain speech on the speaker as a means to reach a pre-determined goal.

For example, consider the metanarrative of inclusivity. Inclusivity means that we should seek to accommodate all diverse communities into our everyday activities. This means that historically oppressed communities should be given special treatment in order to integrate them in a otherwise exclusive sphere⁴¹³ This means that women, ethnic minorities, economically-backward classes etc. have to be elevated to an equal stature as other members of the State. In order to achieve this goal, the State introduces special benefits for them such as reservation and financial support. Rights such as survival of the minority, promotion of identity, non-discrimination and equality must be given in order to meet this objective.⁴¹⁴

Classifying responses to such special treatment into three possible categories – a) hatred arising out of internal biases; b) satire or non-malicious speech; and c) valid criticism of the minority, we find that inclusivity allows us to curb down on all three types of responses as all three types of speech impede achieving integration of minorities by making the population aware of the differences among the larger community and minorities.

Consider the controversy over demolition of confederate statues in the USA. One part of the population believes that the statues should be demolished as they represent historic violence against the black population. Others argue that the statues should be acknowledged as a part

⁴¹³ Christine M. Riordan, *Diversity is Useless Without Inclusivity*, HARVARD BUSINESS REVIEW (Jun. 5, 2014), available at: <https://hbr.org/2014/06/diversity-is-useless-without-inclusivity>.

⁴¹⁴ *Minority Rights: International Standards and Guidance for Implementation*, UN OHCHR, HR/PUB/10/3, (2010), available at: https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf.

of American history and heritage.⁴¹⁵ A more nuanced example is of the travel ban imposed by President Donald Trump on Muslim-majority countries. There were a lot of protests on grounds of equality and justice, countered by claims of split between ‘American values’ and ‘Islamic beliefs’.⁴¹⁶ Both these issues at their core deal with the ideological split between the left-wing Democrats and the right-wing Republicans. This is further manifested in the debate over Islamic terrorism, with Democrats emphasising on differentiating between radical extremists and peaceful believers to not criticise Islam as a whole, while Republicans ask for ‘blunt talk’.⁴¹⁷ This ideological split is a conflict between inclusivity and white supremacy. While the former aims at incorporating every community into the State, the latter places the white population at the centre and allows any benefit to be extended only if doesn’t harm the interests of this white population.⁴¹⁸

Similarly, seemingly trivial speech can be curbed for being harmful to integration. In *Arumugam Seervai v. State of Tamil Nadu*⁴¹⁹, the Supreme Court affirmed prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 for usage of words like ‘pallan’ and ‘parayan’ which have been used as insults in the past. This issue is reflected in criticism of white comedians who have used the word ‘nigger’ in a joke while black comedians are given a free pass to use the same word.⁴²⁰

Therefore, we can conclude that it is the existence of a metanarrative that enables us to attach the prefix of ‘hate’ before speech. Either we must necessarily allow all speech to be free, or we must utilise an appropriate metanarrative to justify curbing certain speech as hate speech.

⁴¹⁵ Lindsey E. Jones, *Don’t call all American white supremacists “Nazis.” Their ideology of hate is homegrown.*, VOX, Aug. 18, 2017, available at: <https://www.vox.com/first-person/2017/8/18/16166708/unite-the-right-2018-alt-right-charlottesville-dc>.

⁴¹⁶ Tom McCarthy, *Trump hails ‘tremendous victory’ after supreme court upholds travel ban*, THE GUARDIAN, Jun. 26, 2018, available at: <https://www.theguardian.com/us-news/2018/jun/26/trump-supreme-court-upholds-travel-ban>.

⁴¹⁷ *Republicans Prefer Blunt Talk About Islamic Extremism, Democrats Favour Caution*, PEW RESEARCH CENTER, (Feb. 3, 2016), available at: <http://www.pewforum.org/2016/02/03/republicans-prefer-blunt-talk-about-islamic-extremism-democrats-favor-caution/>.

⁴¹⁸ David Gillborn, *Rethinking white supremacy*, 6(3) ETHNICITIES 318, 320 (2006).

⁴¹⁹ *Arumugam Seervai v. State of Tamil Nadu*, (2011) 3 SCC 377.

⁴²⁰ Kristine Phillips, *‘That’s our word, and you can’t have it back’: Ice Cube confronts Bill Maher for using the n-word*, THE WASHINGTON POST, Jun. 10, 2017, available at: https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/06/10/thats-our-word-and-you-cant-have-it-back-ice-cube-confronts-bill-maher-for-using-the-n-word/?utm_term=.6ef5451d7514.

“CENSORSHIP” – A NEW WAY TO CLAMP DOWN ON ARTISTIC EXPRESSION

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I. INTRODUCTION

In any democratic setup, greater the access is, greater will be the responsiveness restrictions, the feeling of powerlessness and alienation. Information is the basis for knowledge, which provokes thought, and without thinking process, there is no expression. Art. 19(1)(a) of the Indian Constitution is one of the unique features of Indian democracy. The right to dissent and criticise also forms an integral part of freedom of speech. Moreover, the judiciary has also considered peaceful protest as an essential part of freedom of expression, and it plays a significant role in maintaining the democracy of the country. It is a well-accepted fact that there is no boundary for art and also there should not be any such restrictions on it. Further, the entertainment industry over the world in imparting various societal issues or frictional stories which are related to the day to day life of an individual creating widespread awareness of many important issues. Through movies, various essential factors are being promoted including the contemporary society's indignation against child labour, child prostitution etc. Artistic freedom is vital to both the cultural and political aspects of our society which are even protected under Art. 15 of International Covenant on Economic, Social and Cultural Rights and Art. 19 of the International Covenant on Civil and Political Rights. But despite these pros, there are some aspects in the society which try to intervene into the artistic minds and try to stop portrayal of various issues which are relevant in the current scenario because of their political gain.

Censorship, is the anti-thesis to the freedom of speech, expression and information⁴²¹. It is in fact the suppression of speech or any information that may be considered harmful, objectionable, sensitive, politically incorrect or inconvenient as determined by governments, media outlets or other figures of authority in a state. Further, it is extremely difficult to

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⁴²¹ Sarkar S, 'Right to Free Speech in a Censored Democracy' (2009) 7 UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL 62 available at: <http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf>.

attribute one definition to censorship as they are not reducible to a circumscribed and predefined set of institutions and institutional activities, but is produced within an array of constantly shifting discourses, practices and apparatuses. It cannot, therefore, be regarded as either fixed or monolithic. Many writers argue that censorship cannot be looked at from a single lens and hence needs to have an inclusive definition that responds to the diverse experiences of censorship, and which reflects the socio-historical specificity of instances of control, conditioning or silencing. Primarily (but not necessarily) censorship may either be legal or extra-legal. Legal censorship is imposed through means strictly authorized by law. It comprises both pre-censorship (pre-dissemination restraints) and subsequent censorship (post-dissemination sanctions), while extra-legal censorship refers to the suppression of information through means not strictly authorized by law⁴²². Moreover, some of the driving rationales behind the concept of censorship around the world are the interests of national security, religious peace keeping, to control obscenity and hate speech. National security, obscenity and hate speech are definitional grey areas, as they are extremely all-encompassing and hence ambiguous, which makes it problematic to comprehend these terms in the context of censorship because, anything and everything that is even mildly offensive or threatening can and has been subject to censorship which makes it essential to address the concept of censorship in the context of freedom of speech and expression in order to see if it is possible to determine the limits of censorship.

In the recent years, it can be observed that the CBFC is becoming like a body of moral policing. The main contention of bringing such body is to give a new look to the Indian Cinematographic Act, 1952 with an aim to bring in such legislation which would be pertinent for the next fifty years or in other words, something, which would be free from the burden of the past. However, that couldn't happen as it was unceremoniously removed in July 2002. It has been observed that even after five decades since it's the first enactment the current legislation are not able to curb many contemporary issues. By taking into account of the recent judicial activism and moral policing of a different sect of people the question here arises that are we proceeding towards the Victorian period. The Indian film censorship administration mirrors an exceedingly risky engagement between the colonial past and the postcolonial present that goes much beyond this 'victorian' legacy. One needs to inspect how far is the present a takeoff from the past and to what degree is the past recorded in the

⁴²²A Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis*, 2 DREXEL LAW REVIEW 557 (2010).

present. In the context of film censorship in India, neither the past nor the present is an independent substance. Over the period, the censorship of movies in India has come under intense scrutiny, for one reason or another. But from time to time, it has been encircled within the domain of post-colonialism, which explains the simplified, and often partial, perception, which clarifies an intersection between continuity and change.

The censorship of movies was started in India is a distinguished achievement, which came in front of the Supreme Court in the year 1963 in the case of *K. A. Abbas vs. Union of India*⁴²³. But the nature to control the artistic views are much prevalent today also, making a façade of progress. From the analysis, it can be seen that operational confinement on a medium with the assistance of regulatory instruments. Certification itself incorporates an attack on the aggregate mind of the picturesque views which violates Art. 19(1)(a) of the Constitution. Even after enactment of Cinematograph Act, 1952, the exercise of power around film censorship has procured a more extensive range and many more enunciations than was the case before independence. Further, every time articulation overwhelms us; their wide differences disguise the real import of film censorship in this country. Every aspect of the society goes on highlighting its 'ethical' parameters, whereas the media tries to convict and questions the reasonableness of movies. This Trial by media can be seen in many instances, recently during the release of the movies like *Oh My God* (2012), *Vishwaroopam* (2013), *Haider* (2014), *PK* (2014), *Messenger of God* (2015), *Dharam Sankat Mein* (2015), *Udta Punjab* (2016). However, despite the one-sided portrayal of the facts on moral ramifications of film censorship in this nation, political proclamations keep on impacting film control things have been turning around and the judiciary has also been seen appreciating the artistic views of the filmmakers.

2. LEGISLATIVE FRAMEWORK AND HISTORICAL EVENTS IN INDIA

The Preamble of Constitution of India incorporates 'Liberty of thought and expression'⁴²⁴ which is also resembled in Article 19(1)(a) of the Constitution. The freedom of speech and expression provides enough room for a citizen to profess his ideologies within the framework of the Constitution. One enjoys a right to express his views through different modes⁴²⁵ in a vast democratic setup. The right to freedom of speech and expression is not absolute but is

⁴²³*K. A. Abbas vs. Union of India*, (1970) 2 SCC 780.

⁴²⁴*PUCL v. Union of India*, AIR 2004 SC 1442.

⁴²⁵*Union of India v. Motion Pictures Assn.*, (1996) SC 2334.

being regulated by reasonable restrictions imposed under Article 19(2)⁴²⁶ of the Constitution of India. But the permissible restriction on this right must be imposed by a duly enacted legislation and must not be unreasonable or arbitrary in nature. If any restrictions are in excess, then they may defeat the very purpose of enacting the said freedom under Article 19(1)(a). Restriction implies that part of the fundamental right is restricted leaving the other part intact.⁴²⁷ While many other judges have interpreted in a different way such as the partial prohibition of the freedom and partial control. Therefore, by way of imposition of reasonable restrictions, the law does not affect the right to freedom of speech and expression but the manner in which it is exercised is restricted. However, time and again the judiciary has emphasized on protecting the right of those especially who express dissenting views.⁴²⁸

It has been observed that even after Independence our country is struck with vengeance. The artistic views through movies are governed by the Cinematograph Act, 1952 which is supplemented by the Cinematograph (Certification) Rules, 1983. Under the said Act Section 3 establishes a regulatory body called as Central Board of Film Certification which is primarily assigned the task of certifying films for public exhibition and is accountable for certification of movies in the country without which a movie cannot be released into the public domain. The creative content is an integral aspect of Article 19(1) of the Constitution of India but it is not absolute.⁴²⁹ The regulatory measures are reflected from the language employed under Section 5B of the Act, which states as follows: -

Principles of guidance in certifying films.—(1) *A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against 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 involves defamation or contempt of court or is likely to incite the commission of any offence.”*

Beside the Cinematograph Act, 1952 there are even statutory acts which are applicable within the territory of the State. The expression of an idea by anyone through the medium of movies is a public medium has its own status under the Constitution and the statute. However, the

⁴²⁶Shobha De v. Maharashtra Legislature, (2015) 7 SCC 319.

⁴²⁷A.K. Gopalan v. State of Madras, 1950 SCR 88, AIR 1950 SC 27.

⁴²⁸MarkandeyKatju v. Lok Sabha, (2017) 2 SCC 384.

⁴²⁹Ramlila Maidan Incident, In re, (2012) 5 SCC 1.

powers granted to the CBFC under the Act has been widely misused as on a number of occasions it has gone beyond its statutory powers to over-regulate cinema which clearly stands in violation of the fundamental spirit of freedom of thought and expression.⁴³⁰ It is vital to note that the power of the Board under the Act extends only to regulation of the film through certification. Ideally, the CFBC's prime and only duty should be to ensure that proper certificate for exhibition must be given to films subject to reasonable scrutiny.⁴³¹ However, in many cases, the stand taken by the Central Board of Film Certification has been highly questionable and one attacking the very base of expression of thoughts and ideas which can be seen in the case of *Rangarajan v. P. Jagjivan Ram*⁴³², where it was held that freedom of expression cannot be suppressed merely on account of threat of demonstration and processions or threats of violence. Such an act would tantamount to the negation of the rule of law and a surrender to black mail and intimidation. It is the duty of the state to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression. In the case of *Ajay Gautam v. Union of India*⁴³³, a case that concerned the movie 'PK' and its portrayal of god men as being demeaning to Hindus, thereby being violative of Articles 19(2) and 25 of the Constitution of India, the court held that free speech cannot be suppressed on the ground either that its audience will form harmful beliefs or may commit harmful acts as a result of such beliefs, unless the commission of harmful acts is a real close and imminent consequence of the speech in question. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

Since the last decade when it can be seen that the government is trying to control everything two films *Aandhi* and *KissaKursiKaa* were seen to have delineated the biography of the then-Prime Minister Indira Gandhi, for which one was denied a censor certificate and the other was withdrawn from the cinema halls. '*Aandhi*' was re-released a few weeks later when Indira Gandhi herself cleared it after consulting some critics. On another hand, '*KissaKursiKaa*' ended up being the most disputable film ever constructed in the history of Indian cinema.⁴³⁴ Moreover, it has been found that since the movies were criticising the

⁴³⁰*Crossword Entertainment Pvt. Ltd. v. CBFC*, 2017 SCC OnLine Del 12211.

⁴³¹*Gajanan P. Lasure & Anr. v. CBFC*, (2011) 5 AIR Bom R 535.

⁴³²*Rangarajan v. P. Jagjivan Ram*, 1989 SCR (2) 204.

⁴³³*Ajay Gautam v. Union of India*, Delhi High Court, W.P.(C) No.112/2015.

⁴³⁴*State (Delhi Administration) v. Sanjay Gandhi*, AIR 1978 SC 961.

functioning of the Government under Indira Gandhi both the movies had to face such problem before its release. During those time the industry was put under intense pressure to aid the Government's propaganda campaigns. Artists who refused to comply or cooperate were blacklisted, and films were denied exhibition certificates by the Censor Board. One of the most common basis for imposing censorship on films, in India is the paternalistic idea that the Indian audience is immature⁴³⁵. This presumption was refuted by the Delhi High Court wherein it held that a film is a work of fantasy and watching a feature film is the conscious choice of the spectator and person offended by the content or the theme of the film is free to avoid watching the film.

3. ROLE OF JUDICIARY AND LATEST CONTROVERSIES OF BANNING MOVIES

Despite a legislation being in place, we have time and again seen how the press abuses its freedom. It is to be noted that protection and promotion of right to speech and expression has been promoted internationally too, such as Art.19 of UDHR whereas ICCPR specifically says, “*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal*” in the determination of any criminal charge or in a suit at law.

It has been duly noted by the Judiciary as well that filmmakers must filter its content before it releases the said movies in the public domain.⁴³⁶ The burden on the Censor Board is immense when filmmakers don't make the effort to filter what is suitable and what is not in their film. Therefore, a film can be restricted to be made if it is a trial by media. However, in *Superintendent, Central Prison v. Ram Manohar Lohia*,⁴³⁷ the Hon'ble Supreme Court has laid down that there must be a proximate and reasonable connection which must be established between the sub judice matter and the material that is published in the media. In the absence of any connection, the proposed film should not be restricted from being made and released.⁴³⁸ The State must protect the film from being restricted and must ensure that the film is released into the public domain in a smooth fashion.⁴³⁹ Movies are sometimes

⁴³⁵ Sidharth Bhatia, *Censorship in India is Based on the Paternalistic Idea that Citizens are not Mature*, THE WIRE (April 28, 2016), available at: <http://thewire.in/2016/01/02/censorship-in-india-is-based-on-the-paternalistic-idea-that-citizens-are-not-mature-18461/>.

⁴³⁶ *Bata India Ltd v. A. M. Turaz&Ors*, IA No. 18245/2012 in CS (OS) No. 3010/2012.

⁴³⁷ *Superintendent, Central Prison v. Ram Manohar Lohia* AIR 1960 SC 633.

⁴³⁸ *Phantom Films Pvt. Ltd. v. The Central Board of Certification*, (2016) 4 AIR Bom R 593.

⁴³⁹ *Union of India v. K.M. Shankarappa*, (2001) 1 SCC 582.

restricted to be released in public domain as they do not comply with the reasonable restrictions imposed by Article 19(2) of the Constitution of India which poses a question: -

Whether we really enjoy our freedom of speech and expression in true letter and spirit?

In many instances even though the movie or documentary is not obscene or violent or does not harm the security of the country it is been banned. Further, it can be seen in the cases of Leslee Udwin's documentary on the Nirbhaya Rape Case. Moreover, the same was brought into question in the case of *Kritika Padode v. Union of India*⁴⁴⁰ whereby the petitioners contended it that was a violation of the right to freedom of speech and expression. In the aforementioned case, the Delhi High Court reaffirmed the ban on the film as it considered not only the highly derogatory comments made by one of the convicts whose interview was shown in the movie but also as it considered that the said convict had mentioned about the incident. The particulars as said by him violated the right to privacy of the victim. A biased portrayal of information which would be put forward by any film may damage the reputation of such victims who had are already aggrieved. This power of the media is in clear breach with the right to privacy.⁴⁴¹ The Judiciary in *Court on its Own Motion v. State* had instead called upon the media to ensure that there is no misuse of the freedom of the press.

A person undoubtedly has the right to freedom of speech and expression, within the restrictions imposed under Art. 19⁴⁴². However one does not have the right to divulge opinions of information about others without their consent. In the case of *R. Rajagopal v. State of Tamil Nadu*⁴⁴³ the petitioners challenged the publication of the life story of a convict named Auto Shankar. The issue, in this case, was that his consent was not taken beforehand and it was contended by them such release would breach his right to privacy. However, the court stated that since the particulars of the film were already in public domain, it could not be considered as a breach of the right to privacy. Moreover, the Supreme Court has also emphasized in another case that there cannot be a complete erasure of history even if the right to privacy is to be sought.⁴⁴⁴

⁴⁴⁰ *Kritika Padode v. Union of India*, 2016 SCC OnLine Del 4360.

⁴⁴¹ *Hindustan Times v. High Court of Allahabad*, (2011) 13 SCC 155.

⁴⁴² *LIC, India v. Manubhai D. Shah*, AIR 1993 SC 171.

⁴⁴³ *Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632.

⁴⁴⁴ *Supra* note 438.

Despite such moral policing the concerned authorities have to consider that movies which have content that might prove to be dangerous to the society at large must be restricted.⁴⁴⁵ The most recent case wherein the judiciary stepped in and whipped the Central Board of Film Certification on its overreach is that of the controversy surrounding the film *Uda Punjab*. In *Phantom Films Pvt. Ltd. v. The Central Board of Certification*⁴⁴⁶, the Board refused to certify the film *Uda Punjab* which is based on the drug menace prevailing in the state of Punjab. The film was pictured in the state of Punjab. Aggressive attitude of the characters of the movie came along with a plethora of abusive slangs in the movie. A huge controversy centric to the same resulted in the judiciary ordering the filmmakers to remove or mute certain parts. Moreover, a controversial comment against a particular community was also made to be deleted from the film before it was released. The Court in the aforementioned case observed that the CBFC is not necessarily empowered to censor films. The word *censor* is not found in the Cinematograph Act, 1952 and it has only power to modify the content of the movie but this power must be exercised in consonance with Constitutional Guarantee and Supreme Court orders.

Further, earlier in the above-mentioned controversy there was another case *Ajay Gautam v. Union of India*⁴⁴⁷ where a case was filed against the film 'PK' which was contended to hurt the religious sentiments of certain sections of the society due to there was a widespread protest against the movie and also there was an internal disturbance in some part of the country. However, in contrast, in *Nachiketa Walhekar v. Central Board of Film Certification & Anr.*,⁴⁴⁸ the Hon'ble Supreme Court had laid down that '*a thought-provoking film should never mean that it has to be didactic or in any way puritanical*' allowing the movie to be freely shown across the country. In this context, the most pertinent contemporary case is that of *Viacom 18 Media Pvt. Ltd. v. Union of India & Ors.*⁴⁴⁹ where the petition was filed to movie ban the movie 'Padmavat' in the certain States of India by their respective government. Also, few of the States such as Rajasthan and Gujarat even banned the movie through with their statutory power. The Apex Court lifted a stay order imposed on the said

⁴⁴⁵ *Hamdard Dawakhana v. Union of India*, (1960) 2 SCR 671.

⁴⁴⁶ *Phantom Films Pvt. Ltd. v. The Central Board of Certification* (2016) 4 AIR Bom R 593.

⁴⁴⁷ *Ajay Gautam v. Union of India* AIR 2015 Del 92.

⁴⁴⁸ *Nachiketa Walhekar v. Central Board of Film Certification & Anr* 2017 (13) SCALE 572.

⁴⁴⁹ *Viacom 18 Media Pvt. Ltd. v. Union of India & Ors* (2018) 1 SCC 761.

film barring it from being shown in the theatres in six states in India.⁴⁵⁰ The Court upheld Art. 19 (1) (e) and discouraged the banning of a movie stating that it would also amount to restricting a form of art that moviemaking is. Further, relied upon the judgment of *Prakash Jha Production v. Union of India*, where the only suspension of the movie is allowed if there is only threat to the peace and security. Also, the Court held that once the movie is been passed by the CBFC it is the States responsibility to exhibit the movie in public domain.⁴⁵¹

4. RECOMMENDATION

After analysing the whole scenario and discussing the major issues which the country is facing in light of the certification of movies it is felt that there is a dire need for reform in the Central Board of Film Certification. The inclusion of the artistic people on board of the CBFC is an indispensable change which needs to be put into effect as soon as possible There is a major loophole in implementation part which can be seen after various failure from time to time even after suggesting measures being laid down by various Committees. CBFC while carrying out the certification must comply with the following guidance: -

- i. Movies should be responsible and sensitive to the values and standards of society. While filmmakers have the freedom to make movies in whatever context they want, they must realise that the content of it cannot hurt the sentiments of its society. They must always keep in mind that the freedom to make movies is subject to the restrictions prescribed under Art. 19 (2).
- ii. Artistic expression and creative freedom should not unduly be curbed and certification should be responsive to social change. Even if movies contain anything that is not acceptable to some section of people, the freedom of speech and expression allows views which may be dissenting in nature. This should rather be seen in an educational perspective and to explore a different point of view. Once a movie has received a green signal from the CBFC, nothing must obstruct it from the exhibition.
- iii. Examination of the movie should be done according to the period depicted in the film, context, containing theme and people to which the film relates. There must be no pre-conceived notion that the movie will not be suitable for the public. It must first be

⁴⁵⁰Debjani Chatterjee, *Producers of Padmaavatmove Supreme Court after 6 States Ban Film*, NDTV ONLINE (January 17, 2018, 06:13 PM), available at: <https://www.ndtv.com/india-news/producers-of-padmaavat-move-supreme-court-after-states-ban-film-1801082>

⁴⁵¹*Union of India v. K.M. Shankarappa*, (2001) 1 SCC 582

critically examined. At the same time, the movie, if depicting something particular, must not deviate from the truth. The media is always reminded to adhere to accuracy and truth.

- iv. The Cinematograph Act provides that a certificate granted by the Board shall be valid throughout India for a period of ten years⁴⁵² but it doesn't provide for any system or scheme of what happens on the expiry of the certificate nor for the renewal of such a certificate. Such a lacuna, allows a filmmaker or artist to make more profits out of already existing films, by bringing out uncensored/uncut version of their film, years later, thereby unearthing their suppressed artistic freedom of expression.
- v. It is no doubt that the target market of the film industry is the youth. Hence, movies must comply with the contemporary standards of the country while it caters to the entertainment of the sensitive young minds. While the film makes must ensure that nothing must be hurtful towards the sovereignty and integrity of the nation as well as the sentiments of the people, they must take due care that the contents of the film do not provoke the aggressive nature of the youth.
- vi. CBFC should be restricted only to certification of films in order to analyse and certifying the film to the audience groups on the basis of age and maturity. CBFC must, therefore, stick to its statutory responsibilities as per the Cinematograph Act, 1952, the Cinematograph (Certification) Rules, 1983 and strictly adhere to the guidelines issued by the Central Government. The CBFC must not encroach upon other responsibilities, assigned to others, in order to prevent arbitrary acts of the CBFC in terms of certification of the movie. It must strictly not order for change of the contents of the movie, however, CBFC may advise the same.
- vii. Role of the Chairman of the Board should be amended to be of advisory nature only in order to make sure there is no biasness in the process of examining the movie for certification. This would also ensure that there is no arbitrary action taken on his behalf that would result in losses to the filmmakers. This will also ensure that the Chairman is disabled from taking out personal vengeance with a member of the filmmaking team.

5. CONCLUSION

⁴⁵² The Cinematograph Act, 1952, § 5A (3).

It is well evident and accepted all over the world that art is an important instrument of expression be it through movies or any other mode, they must remain free from any unreasonable censorship. By imposing the restriction on any such mode of expression is not the violation of the Constitutional right under Art. 19(1)(a) but also the basic human right of expressing one's view in the community of civilized societies. Further, in this era of globalisation, the people are matured enough to decide the obscenity or any violation of their religious sentiments so it is a dire need for the government and also the fringe groups to realise that they to stop intervening in someone's right to decide what is right or wrong for them. Also, there must be certain fast-track proceeding against the fringe groups who take the law in their own hand to safeguard the interest of a particular community. It is a need to portraying the harsh realities of the society by the artistic way to aware the current situation. Through the recent events, the authors have realised that mere imposition a bad on the process of expression for the peace and security of the society is not the permanent solution. Since cinema as a public expression can influence the society at large, therefore, after the approval of the movie the caution must be taken by the concerned authorities and the states for the exhibition of the film.

The being an important element in today's society should also come up and play a positive part in moulding the public opinion. Though it is evident from recent past that the media has been playing a very important role in the promotion and protection of human rights in India, including print as well as audio-visual, therefore, they must follow the principles of fairness, accuracy and truth while they perform their jobs. This will result in the media playing a positive role in the society. The right to freedom of speech and expression also allowed the freedom of speech and expression even if it was a dissenting view. Further, movies are free to be released⁴⁵³, so the CBFC must take a balanced approach while reviewing a movie and must take into account that the harmony between freedom of expression but at the same time sense ongoing scenario in the society. The Board must be given autonomous powers to function independently without any interference. Moreover, the implementations of provisions of the Act of 1952 that allows an opportunity to take public opinion should be utilized by the CBFC compulsorily so as to avoid conflicts and let the audience decide the content of the movie and exercise their own discretion while watching the movie.

⁴⁵³*Odyssey Communication Pvt. Ltd. v. LokvidayanSanghatan and Ors.*, (1988) 3 SCC 410.

A HUMAN RIGHTS ANALYSIS OF REPRODUCTIVE RIGHTS

*E. SHRI LALITHA REDDY

International Human rights law does not provide for any specific or direct way of deliberating on reproductive rights for women. However by reading several International treaties and laws in concurrence, one can infer the presence of such rights, which can culminate into a reality only in an indirect way. “Hence the recognition of reproductive health as a human right under international human rights law has been sporadic, piecemeal, and indirect.”⁴⁵⁴ One must know what comprises of Reproductive rights, in order to understand the impact that Human Rights law has on it.

“Reproductive health rights are human rights that uphold reproductive health and well-being, including rights that protect the ability to decide whether and when to reproduce, guarantee reasonable access to adequate reproductive health services, minimize social conditions that may undermine reproductive health and related decisions, and strengthen health and social systems to support good reproductive health.”⁴⁵⁵

The different sources on an international platform, that one can infer to be the repositories of reproductive rights, are ICCPR⁴⁵⁶, ICESCR⁴⁵⁷, UDHR⁴⁵⁸ and CEDAW⁴⁵⁹.

Universal Declaration of Human Rights, which is considered as having the force of customary international law by virtue of Article 25,⁴⁶⁰ declares under its sub-section (1) that

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⁴⁵⁴ Lance Gable, No. 10-20, Reproductive Health As a Human Right (Wayne State Univ. Law School Research Paper 2009-2010).

⁴⁵⁵ Ibid

⁴⁵⁶ International Covenant on Civil and Political Rights, entry into force 23 March 1976, in accordance with Article 49.

Available at: <http://ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

⁴⁵⁷ International Covenant on Economic, Social and Cultural Rights, entry into force 3 January 1976, in accordance with article 27.

Available at: <http://ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

⁴⁵⁸ The Universal Declaration of Human Rights 1948, Available at: <http://www.un.org/en/universal-declaration-human-rights/>

⁴⁵⁹ The Convention on the Elimination of all forms of Discrimination Against Women, Available at: <http://ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

⁴⁶⁰ “Article 25(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

everyone has a right to have a standard of living that is required to facilitate a healthy and well-being condition for himself and his family. However under this sub-section there is a reference only to a man and not a woman. Hence one cannot read, by the way this article is articulated, that a man means to include a woman because it states “himself and his family”. This indicates that a woman is included in the man’s family and has no existence of her own otherwise there is no other reason to understand why they need to explicitly mention “his family”. So, if a woman is unmarried and is not a part of a family maybe because she is an orphan she does not have the rights under this article, this is not the case for a man because he is explicitly mentioned. In its sub-section (2) the article however address the need for special care for motherhood with regard to women’s health care but this does not include the other facilities that she might need, other than when she is actually gives birth to a child and falls under the category of motherhood, like menopause, abortion, depression caused due to abortion or miscarriage, menstruation etc.

“The Universal Declaration of Human Rights, 1948 (‘UDHR’) does not however directly mention the right to health. The State is not being asked to directly provide essential medical care; instead it talks of placing an individual in a position wherein he would be in a position to achieve the same. Hence it was not till the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) that there was any clear recognition of the right of an individual to health.”⁴⁶¹

The International Covenant on Economic, Social and Cultural Rights (ICESCR), in its Article 10⁴⁶² and 12⁴⁶³ obligates a State party to take positive actions or steps to ensure that everyone

⁴⁶¹Karthy Nair & Pallavi Sharma, 4 DELIVERING the RIGHT to HEALTH to the RURAL SECTOR 394 (NUJS LAW REVIEW 2011).

⁴⁶²“Article 10(1) the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. (2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”

⁴⁶³“Article 12 (1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2)The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions, which would

enjoys the highest attainable standard of physical and mental health. Health was given the at most importance and in specific the health of a woman by virtue of the two articles abovementioned. Unlike UDHR, they to some extent expand the term motherhood and include the period before and after childbirth. Though this does not solve the problem entirely because it still does not address issues like access to safe abortion, menstruation, transmission of sexual diseases to which women are more vulnerable. The committee has however later expanded more on how these articles need to be read in its General Comments 14 and 22. General Comment 14⁴⁶⁴ of the ICESCR has concentrated on how in general for men and women health care needs to be available, accessible, acceptable and of good quality. It also stated that, “The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”⁴⁶⁵ However the General Comment 22⁴⁶⁶ was more gender specific and related to how all these aspects should be in particular available to women and it was the first time that they mentioned the word abortion. This was a landmark move because it means that now women can have safe abortion by their choice without any social or cultural practice obstacles as they are now empowered by law.

International Covenant on Civil and Political Rights (ICCPR) to some extent gives effect women's reproductive rights by virtue of its Articles 6⁴⁶⁷, 17⁴⁶⁸ and 26⁴⁶⁹, which provide for right to privacy, life and non discrimination.

assure to all medical service and medical attention in the event of sickness.”

⁴⁶⁴Committee On Economic, Social And Cultural Rights, Twenty-second session Geneva, 25 April-12 May 2000, Agenda item 3 substantive issues arising in the implementation of the international covenant on economic, social and cultural rights, General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights).

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⁴⁶⁶Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)

⁴⁶⁷“Article 6 (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

⁴⁶⁸“Article 17 (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”

⁴⁶⁹“Article 26 - All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) by virtue of Article 12⁴⁷⁰, obligates the State parties to take all such measures that are required to safeguard women from being subject to discrimination and restore equality between men and women by any means in the health sector. The state party is expected to deliver this safeguard by opening up access to health care and by providing with special health care that women require before, during and after pregnancy. The committee elaborated on the understanding of this Article in its General Recommendation 24⁴⁷¹. The recommendation elaborated the article in a manner as to reconcile the possible setback that might creep in as a result of asking for equal treatment of men and women. This article does not specify as to how they should be treated equally because men don't need certain services to be provided so does that mean that women don't? The result of looking at the Article through the lens of formal equality might lead to a lot of disparities as women do need special care for the special function that they perform in the society. So, access to healthy abortion won't be available because men don't need it? The outcome is not equal and hence it is indirect discrimination that purports out of such reading and is express exclusion. Hence the General comment elaborates on this article for it to mean substantial equality and not formal equality. The biological, socio-economic and psychological factors that differ for men and women need to be taken into account by the State party for providing these rights, because women are more vulnerable in all these aspects. The general comment also emphasizes that State parties should report these issues and developments on these issues regularly as that will help the committee understand how the situation for women can be made better. By way of this general comment, the committee reads the article to mean that the State party has a duty to respect, protect and fulfill its obligations with regard to women's health rights.

The author in the article "Reproductive Health As a Human Right"⁴⁷² argues that the conjunction of the two evolving models, namely reproductive rights model and right to health model, result in Reproductive rights. The Reproductive rights model has derived its existence from the ICCPR and the right to health model from ICESCR. The nature of both the

⁴⁷⁰“Article 12(1). States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

⁴⁷¹General Recommendations Adopted By The Committee On The Elimination Of Discrimination Against Women in its twentieth session (1999), □General recommendation No. 24: Article 12 of the Convention (women and health)

⁴⁷² Supra 1.

obligations is different but as a result of blending them they give birth to the Reproductive Rights. In the author's view ICCPR provides for a negative obligations of Right to privacy, Right to life and Right to non discrimination; whereas the ICESCR provides for positive obligation to ensure that everyone can attain the highest standard of mental and physical health. The combination of these positive and negative rights can be understood to be the Reproductive right that women have or should be give. Hence even though there is no specific mention of Reproductive rights for women, one can infer them by reading these international obligations, which state parties have, in unison.

In order to appreciate the interplay of these international obligations one must look at how one of the State parties grapples with them. This will give a complete understanding as to how human rights actually plays out in reality with specific regard to Reproductive Rights. For the same purpose this paper intends to analyze the situation in India and how has it in any manner fulfilled its obligations.

India is a signatory to all the above-mentioned treaties and has also ratified them. However it has placed a reservation⁴⁷³ against some articles of ICCPR and ICESCR, which states that those article are binding on India as long as they are not inconsistent with the Domestic law. India has been active in submitting reports to UPR and in its first UPR it has only reported how they have introduced several laws, schemes and policies to facilitate the growth of the women in the country in all fields. But the problematic aspect of this report is that they have not reported how these schemes, policies and affirmative actions taken by them have played out in reality and how many women actually benefitted from this. They have just elaborately reported about how well they have superficially complied with their international obligation but have nowhere mentioned the reality. This is in no way going to help or aid anyone to fix the problems that women face in the country. However in their 2nd UPR they have at least spelt out the problems instead of just laying out the different laws, schemes and pollicises that they have introduced, but still it lacks the element of analysis with regard to the outcome of these measures.

⁴⁷³"With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 12, 19 (3), 21 and 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India."

The Constitution of India has incorporated these obligations by way of Fundamental Rights and Directive Principles of State Policy, which are of both positive and negative obligations in nature. Article 21, which guarantees right to life, reads into it even the reproductive rights of a woman. For instance, the case of *Suchita Srivastava vs Chandigarh Admn*(2009) 9 SCC 1: (2009) 3 SCC (Civ) 570⁴⁷⁴ establishes the same explicitly. This case states position of law regarding reproductive rights and also the restrictions that it imposes. The court in this case is re-affirming the international obligations that India has signed up for and in explicit terms stating the rights of a woman.

Now we know that India has incorporated its international obligations into its domestic law. But the question remains whether it is a reality or not? Are all these rights only available for women on paper or does the state actually take positive actions as it is obligated to under its international obligations and make reproductive rights a reality?

The case of *Laxmi Mandal Vs. Deen Dayal Harinagar Hospital* ⁴⁷⁵ provides evidence of how the state performs its obligations. In this case they lay out all the schemes and policies that the government provides with regard to reproductive rights and in the lights of its international obligations for the same analysis the case at hand. The fact that even after having so many schemes and policies the government in this case failed to deliver the same, which is evidence of the fact that all these privileges and rights are only offered to women on paper and the reality is far what they claim to provide. Though in this case the courts provided with relief for the surviving child but what it is point when they could not save the life of a woman, which they easily could have, my providing her with the basic facilities that they otherwise claim to do so.⁴⁷⁶

⁴⁷⁴“There is no doubt that a woman's right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilization procedures. Reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a ‘compelling state interest’ in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices”

⁴⁷⁵*Laxmi Mandal Vs. Deen Dayal Harinagar Hospital*, 172 (2010) DLT 9 ..

⁴⁷⁶ The court held that, “The case points to the complete failure of the implementation of the schemes. With the women not receiving attention and care in the critical weeks preceding the expected dates of delivery, they were

The Human rights analysis of reproductive rights requires one to first understand the existing rights and then further build upon them in the direction that will provide for reproductive rights. By such analysis one can infer that international human rights law does provide for Reproductive rights for all women. However the issue still remains that of implementation, *Dejure* all women have reproductive rights but *de facto* in order to achieve them they have to cross a lot of hurdles that are put their way in the form of disparities that they possess socio-economically, culturally, religiously etc.

deprived of accessing minimum health care at either homes or at the public health institutions. As far as Shanti Devi is concerned, the narration of facts concerning her fifth and sixth pregnancy show that she was unable to effectively access the public health system. It was either too little or too late. The quality of services rendered in the private hospital to which Shanti Devi was referred during the fifth pregnancy is a matter for concern. It points to the failure of the referral system where a poor person who is sent to a private hospital cannot be assured of quality and timely health services.”

COMBATING HATE SPEECH: A STUDY OF THE EXISTING PROVISIONS

* DR. SHRUTI GOYAL

1. INTRODUCTION

The Law Commission of India has recently recommended that new sections shall be added in the Indian Penal Code to criminalize hate speeches.⁴⁷⁷ Hate speeches have the potential of provoking individuals as well as groups in the society to commit acts of violence, terrorism, death etc. In India there has been a tendency to resort to communally charged speeches especially during elections to garner votes. These speeches disturb the equilibrium of the society and creates crack in the multifaceted fabric of the society. The effect of hate speech is further aggravated in the era of information technology where due to internet, false and offensive ideas are spread at a lightning speed. The author in this article has delved into the meaning of the term ‘hate speech’, the relation of hate speech vis-à-vis the right of freedom to speech and expression, the existing laws in India to deal with the problem of hate speeches, the role played by the government in trying to curb hate speeches and the legislations in other countries to deal with the problem.

2. DEFINITION OF HATE SPEECH

There is no definition of hate speech in Indian Legislation. According to Black’s Law Dictionary, the expression ‘hate speech’ is defined as “speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence”. According to Webster’s, hate speech is “speech that is intended to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability)”. Human Rights Watch has defined hate speech as “any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women.”

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⁴⁷⁷ 267th Report of Law Commission of India, Hate Speech, 2017.

According to Council of Europe's Committee of Ministers 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.⁴⁷⁸

Thus, the term "hate speech" is used invariably to mean expression which is abusive, insulting, intimidating, harassing or which incites violence, hatred or discrimination against groups identified by characteristics such as one's race, religion, place of birth, residence, region, language, caste or community, sexual orientation or personal convictions.⁴⁷⁹

3. HATE SPEECH VIS-A-VIS FREEDOM OF SPEECH AND EXPRESSION

Right to freedom of speech and expression is one of the most cherished right of a civilized, democratic society. The objective of free speech in a democracy is to promote plurality of opinion.⁴⁸⁰ This right assures a person that he has a right to speak freely and express his mind even if his speech is in disagreement, dissenting or critical to others including government. It is a significant right that allows a person to attain self fulfillment. This right is guaranteed to a human being under Universal Declaration of Human Rights.⁴⁸¹ The right to freedom of speech and expression limits the power of state. In India, this right is guaranteed under Article 19(1)(a) of the Constitution.

It is pertinent to note that in an unequal society free speech is in conflict with the doctrine of non-discrimination. Equality of speech to all including offensive speech many times vilifies the cause of equality. Therefore, an important question is whether the right to freedom of speech and expression is absolute or shall any restrictions be imposed on this right? This question was intensely debated by the Constituent Assembly. Some members of the committee debated that there should be restrictions on this right. They suggested that the right to freedom of speech and expression should carry a proviso which shall authorize the state to make laws for (i) taking action or prescribing punishment for publication or utterance of

⁴⁷⁸ Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b>.

⁴⁷⁹ *Supra* Note 1, p.38.

⁴⁸⁰ *Supra* Note 1, p. 15.

⁴⁸¹ Article 18 and 19 of the Universal Declaration of Human Rights.

sedition, obscene, blasphemous, slanderous, libellous or defamatory matter ... and (ii) reasonable restrictions as may be necessary may be imposed in the public interest including the protection of minority groups and tribes.⁴⁸² The inclusion of such provisos faced substantial opposition as it was argued that this denies the 'absolute' nature of rights. Dr. B.R Ambedkar relied on American Jurisprudence and said that fundamental rights are not absolute in America also.⁴⁸³ He cited an American judgment in which the United States Supreme Court had imposed limitations on the right to freedom of speech and expression.⁴⁸⁴ In this backdrop, 'limits' were added to the right of freedom of speech and expressions.

The limitations to right of freedom of speech and expression are contained in Article 19(2) of the Constitution. Under this, the state is authorized to make law to impose reasonable restrictions on the exercise of this right in the interests of (i) sovereignty and integrity of India, (ii) security of the State (iii) friendly relations with foreign States, (iv) public order, (v) decency or morality or in relation to contempt of court, defamation or incitement to an offence.

The above discussion clarifies that the state can impose restrictions on free speech within the limitations prescribed under Article 19(2) of the Constitution. Hate speech can be curtailed on the grounds of public order, incitement to offence and security of the State.

4. FACTORS TO BE CONSIDERED WHILE IMPOSING LIMITATION ON FREE SPEECH

There are certain factors which are to be taken into account while putting restriction on the freedom of speech and expression. These factors are:

4.1 The extremity of the speech

Limitation can be imposed on free speech if it is offensive and project extreme form of 'emotion'. This parameter of 'emotion' is based on the law laid down by the Supreme Court

⁴⁸² The members of the Committee who spoke on hate speech were Alladi Krishnaswami Iyer, C. Rajagopalachari, H.C. Mookherjee, J.B. Kriplani, K.M. Munshi, K.M. Panikkar, Syama Prasad Mookherjee, and Thakur Das Bhargav.

⁴⁸³ Constituent Assembly Debates (Nov. 4, 1948) 1459.

⁴⁸⁴ *Gitlow vs. New York* 268 US 652 (1925).

of Canada in the case of *Saskatchewan (Human Rights Commission) vs. Whatcott*.⁴⁸⁵ The Court in this case said that the term “hatred” must be interpreted as being restricted to those extreme manifestations of the emotion described by the words ‘detestation’ and ‘vilification’.

4.2 Incitement

The speech must amount to incitement. That is, it must be differentiated from discussion and advocacy. The Supreme Court of India in the case of *Shreya Singhal vs. Union of India*⁴⁸⁶ has classified ‘speech’ into three parts. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Thus, only that speech which causes incitement can be curtailed under Article 19(2).

This parameter of incitement is based on the test laid down by the Courts in United States in the case of *Brandenburg vs. Ohio*.⁴⁸⁷ The court in this case laid the test of imminent threat of lawless action. That is, a speech may be termed as ‘hate speech’ if it results in incitement of lawless action.

4.3 Status of the author of the speech

The status of the author of the speech is an important factor in determining the legality of putting limitations on speech. There may be a need to impose restrictions on the freedom of speech of people who have power to influence society on a large scale. For example, in the case of *Pravasi Bhalai Sangathan vs Union of India*⁴⁸⁸ the Supreme Court was approached to declare ‘hate speeches’ delivered by elected representatives, political and religious leaders as unconstitutional. The European Court on Human Rights also recognizes that position of the

⁴⁸⁵ *Saskatchewan (Human Rights Commission) vs. Whatcott* , 2013 SCC 11(Canada Supreme Court).

⁴⁸⁶ *Shreya Singhal vs. Union of India* , (2015) 5 SCC 1.

⁴⁸⁷ *Brandenburg vs. Ohio* , 395 US 44 (1969).

⁴⁸⁸ *Pravasi Bhalai Sangathan vs Union of India* , (2014) 11 SCC 477.

author of the speech is important in determining the legality of limitation imposed by the State.⁴⁸⁹

4.4 Status of victims of the speech

The status of victim of speech also plays an important role in determining whether the speech should be limited or not. The European Court on Human Rights distinguished between the status of a public and private individual. A person in public life is more open to criticism than an individual in private life.⁴⁹⁰ For example, a politician lays himself open to criticism for every word and every deed. Thus, he should have more tolerance towards criticism.

4.5 Potentiality of the speech

The potentiality of the speech or the impact of the speech has to be determined keeping in mind the speaker's state of mind at the time at which speech was delivered.

4.6 Context of speech

Every speech is to be seen in the context in which it was made.

5. TESTS FOR DETERMINING 'HATE SPEECH'

Every speech that is offensive cannot be termed as 'hate speech'. In fact, there is no set criterion for determining 'hate speech'. The European Courts of Human Rights has developed a "three part test" which must be satisfied before the limitations are imposed on right to freedom of speech. These parameters are:

5.1 Prescription by law

Limitation can be imposed on free speech if it is prescribed by law. The provisions prescribing punishment must be explicitly worded and should be in unambiguous language.

⁴⁸⁹ *Incal v. Turkey*, Application no. 41/1997/825/1031 (1998) available at <https://www.legal-tools.org/doc/c074b1/pdf/>.

⁴⁹⁰ *Lingens vs. Austria* (1986) 8 EHRR 407.

This is important so that the citizens can regulate their conduct according to prescribed law and can foresee the consequences for impermissible conduct.

5.2 Legitimate aim

The limitation imposed must directly satisfy a legitimate aim. Every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed on the freedom of speech must satisfy the legitimate aim pursued.⁴⁹¹ In a democratic society a person should be open to criticism and receiving of ideas which he does not approve. A democratic society demands tolerance and broad mindedness. The European Courts have moved further and said that the aim should not only be legitimate but also necessary in the democratic order.⁴⁹²

5.3 Necessity and proportionality

The limitation imposed on free speech must be necessary to achieve its stated aim and must be proportionate to the harm that it attempts to prevent or redress. That is, the limitation imposed on the right of speech must not do any more damage than is absolutely necessary to meet its aim.

6. LAWS DEALING WITH HATE SPEECH IN INDIA

There is no legislation as such which uses the terminology ‘hate speech’. However, there are a number of legislations which revolve around this concept and prohibit several forms of speech. These statutes focus on different situations. The statutes are:

6.1 The Representation of People Act, 1951

The Representation of People Act, 1951 provides for disqualifications for membership to the houses of Parliament and State Legislatures.⁴⁹³ Section 8 of the Act disqualifies a person from contesting election if he is convicted for certain offences. A person is disqualified if he is convicted for the offence of promoting enmity between different groups on ground of

⁴⁹¹ *Handyside vs. The United Kingdom* Application No. 5493/72.

⁴⁹² Available at: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

⁴⁹³ Preamble of the Representation of People Act, 1951.

religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony;⁴⁹⁴ or offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies.⁴⁹⁵

6.2 Indian Penal Code, 1860

Penal consequences for hate speech are found in different sections of the Indian Penal Code. Section 124A punishes the offence of sedition. Sedition requires two essentials: (a) bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite dissatisfaction towards the Government of India. (b) Such act or attempt may be done (i) by words, either spoken or written or (ii) by signs or (iii) by visible representation. There is difference between the offence of sedition and hate speech. Sedition affects the state directly whereas hate speech affects the state indirectly by disturbing public tranquility.

Section 153 A punishes the act of promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. Section 153 B prescribes punishment for imputations, assertions prejudicial to national integration. Section 295A penalizes deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs. Section 298 prescribes punishment for uttering words etc. with deliberate intent to wound the religious feelings of any person. Section 505(1) and (2) penalizes publication or circulation of any statement, rumour or report causing public mischief and enmity, hatred or ill-will between classes.

6.3 Code of Criminal Procedure, 1973

The Code contains law relating to criminal procedure. Under Section 95 of the Code the State Government is empowered to declare certain publications forfeited and to issue search-warrants for the same. Where it appears to the State Government that the matter the publication is punishable under section 124A or section 153A or section 153B or section 292

⁴⁹⁴ Section 153 A of the Indian Penal Code, 1860.

⁴⁹⁵ Section 505(2) and (3) of the Indian Penal Code, 1860.

or section 293 or section 295A of the Indian Penal Code, the State Government may by notification declare such publications forfeited and issue search-warrants for the same.

Under section 107 of the Code the Executive Magistrate is empowered to take security if he receives information that any person is likely to commit breach of peace or disturb public tranquility. Under section 144 in urgent cases where immediate prevention is required the District Magistrate may pass orders abstaining any person from a certain act or to take certain order with respect to certain property in his possession or under his management, if the Magistrate considers that such direction is likely to prevent disturbance of the public tranquility.

Under section 151 of the Code the police officer is empowered to arrest any person if the police officer knows that the person is going to commit a cognizable offence to prevent the commission of cognizable offence.

6.4 Unlawful Activities (Prevention) Act, 1967

Under the Act, the Central Government has the power to declare an association as unlawful association.⁴⁹⁶ An unlawful association means an association which has as its object or which encourages or undertakes any unlawful activity or which has its object any activity which is punishable under section 153A or 153 B of the Indian Penal Code.⁴⁹⁷ Once an association is declared as unlawful if any person continues to be a member or takes part in meetings of such associations; or uses the funds of such association; or uses any place in respect of which a prohibitory order is made then, the person is liable to be punished under section 10, 11 and 12 of the Act respectively.

6.5 Information Technology Act, 2000

Section 66 A of the Act prescribes punishment for sending offensive messages through communication service, etc. It is pertinent to note that this provision has been held unconstitutional by the Supreme Court in the case of *Shreya Singhal vs. Union of India*.⁴⁹⁸

⁴⁹⁶ Section 3 of the Unlawful Activities (Prevention) Act, 1967.

⁴⁹⁷ Section 2(f) and (g) Unlawful Activities (Prevention) Act, 1967.

⁴⁹⁸ *Shreya Singhal vs. Union of India* (2015) 5 SCC 1.

Further, under section 69 of the Act the central government, the state government or any of its officer specially authorised have been empowered to issue directions for interception or monitoring or decryption of any information through any computer resource. Under section 69A they also have the power to issue directions for blocking for public access of any information through any computer resource.

An intermediary is required to observe due diligence while discharging his duties under the Act.⁴⁹⁹ The Information Technology (Intermediaries Guidelines) Rules, 2011 lays down rules which shall be followed by intermediaries. Rule 3 gives guidelines regarding due diligence to be observed by intermediaries. It says that the intermediary shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that is grossly harmful, harassing, blasphemous defamatory, hateful, or racially, ethnically objectionable, disparaging or otherwise unlawful in any manner,⁵⁰⁰ or threatens the public order or causes incitement to the commission of any cognisable offence⁵⁰¹.

6.6 Protection of Civil Rights Act, 1955

The Protection of Civil Rights Act was passed by the Parliament in 1955 in order to penalize the preaching and practice of untouchability.⁵⁰² The Act penalizes incitement to and encouragement of untouchability through words, either spoken or written, or by signs or by visible representations or otherwise.⁵⁰³ The punishment for the said offence is imprisonment for a term of not less than one month and not more than six months and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees.⁵⁰⁴

It is important to note that the scope of this Act is limited as it shall cover cases of hate speech only when it is related to untouchability.

⁴⁹⁹ Section 79(2)(c) of the Information Technology Act, 2000.

⁵⁰⁰ Rule 3(2)(b) of the Information Technology (Intermediaries Guidelines) Rules, 2011.

⁵⁰¹ Rule 3(2)(i) of the Information Technology (Intermediaries Guidelines) Rules, 2011.

⁵⁰² Preamble of the Protection of the Civil Rights Act, 1955.

⁵⁰³ Section 7(1)(c) of the Protection of the Civil Rights Act, 1955.

⁵⁰⁴ Section 7(1) of the Protection of the Civil Rights Act, 1955.

6.7 Religious Institutions (Prevention of Misuse) Act, 1988

The Religious Institutions (Prevention of Misuse) Act was passed by the Parliament to prevent misuse of religious institutions for political and other purposes.⁵⁰⁵ Section 3 provides that no religious institution or its manager shall allow the use of any premises belonging to or under its control for doing any act which promotes or attempts to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, language or regional groups or castes or communities.⁵⁰⁶ Further, section 6 provides that no religious institution or its manager shall allow any ceremony, festival, congregation, procession or assembly organised or held under its auspices to be used for any political activity.

6.8 Cable Television Networks (Regulation) Act, 1995

The Act regulates the operation of cable television networks in the country.⁵⁰⁷ Under section 5 and 6 of the Act no person shall transmit or re-transmit through a cable service any programme or advertisement unless such programme or advertisement is in conformity with the prescribed programme code or advertisement code. Rule 6 and 7 of the Cable Television Network Rules, 1994 tells us what is programme code and advertisement code. According to Rule 6 no programme shall be carried in the cable service which contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes. Rule 7 provides that no advertisement shall be allowed which tends to incite people to crime, cause disorder or violence.

6.9 Cinematographers Act, 1952

The Act makes provision for the certification of cinematograph films for exhibition.⁵⁰⁸ Under the Act a person who desires to exhibit film requires certificate from the Board of Film Certification constituted under the Act.⁵⁰⁹ Section 5B lays down principles of guidance in certifying films. It provides that a film shall not be certified for public exhibition if it is likely to incite the commission of any offence.

⁵⁰⁵ Preamble of the Religious Institutions (Prevention of Misuse) Act, 1988.

⁵⁰⁶ Section 3(g) of the Religious Institutions (Prevention of Misuse) Act, 1988.

⁵⁰⁷ Preamble of the Cable Television Networks (Regulation) Act, 1995.

⁵⁰⁸ Preamble of the Cinematographers Act, 1952.

⁵⁰⁹ Section 4 of the Cinematographers Act, 1952.

Thus, Indian law empowers the state fully to deal with hate speeches and bring the offenders to book.

7. JUDICIAL ATTITUDE TOWARDS HATE SPEECH

The Supreme Court has so far abstained from issuing any guidelines/ directions on the issue of hate speech. In the case of *Pravasi Bhalai Sangathan vs. Union of India (UOI) and Ors*⁵¹⁰ the Supreme Court was approached under its writ jurisdiction to issue directions/ guidelines to regulate the menace of hate speech. The petitioner in this case prayed that State should take preemptory action against the makers of hate speech. The Court in this case abstained from issuing directions on the ground that the Court cannot legislate law and has powers only to enforce existing laws. It can issue guidelines/ directions on the issue where there is absence of law till legislation is framed on that point.⁵¹¹ However, as far as hate speeches are concerned there is law existing on the point and the authors of hate speech can be booked under the existing penal law. The Court in this case said that the root of the problem is not the absence of laws but rather a lack of their effective execution. The Supreme Court refused to issue any directions/guidelines in case of hate speech and said that effective implementation of the existing laws would solve the problem and urged the enforcement agencies at all levels to perform their duties. However, the Supreme Court realized that the issue of hate speech deserved deeper consideration and referred the matter to Law Commission of India for making recommendations.

Later on in the case of *Jafar Imam Naqvi vs. Election Commission of India*⁵¹² the Supreme Court was again approached for issuing writ of mandamus to the Election Commission of India to take stern action against the politicians involved in delivering hate speeches during election campaign. The Court however dismissed the petition on the ground that speeches delivered

⁵¹⁰ *Pravasi Bhalai Sangathan vs. Union of India (UOI) and Ors*, (2014) 11 SCC 477.

⁵¹¹ For example, the Supreme Court in the case of *Vishaka vs. State of Rajasthan* (1997) 6 SCC 241 laid down guidelines for the protection of women from sexual harassment at workplace .in the absence of any law. Also see *Daryo and Others vs. State of U.P. and Others*, AIR 1961 SC 1457; *Union of India and Another. vs. Raghbir Singh (Dead) by L.Rs. etc.*, AIR 1989 SC 1933; *Kanusanyal vs. District Magistrate, Darjeeling and Others*, AIR 1973 SC 2684; and *M.C. Mehta and Another. vs. Union of India and Others*, AIR 1987 SC 1086.

⁵¹² *Jafar Imam Naqvi vs. Election Commission of India* , (2014) 15 SCC 420.

during election campaign does not qualify as public interest litigation and that the Court cannot legislate on matters where the legislative intent is visible.

8. RECOMMENDATIONS OF THE LAW COMMISSION OF INDIA

The Law Commission of India delved into the matter of hate speeches. The issues that were referred to it by the Supreme Court were (i) defining the term hate speech (if deemed proper) and (ii) recommendations to Parliament to strengthen the Election Commission to curb the menace of “hate speeches” irrespective of whenever made.

There are some concerns regarding hate speech. Firstly, it is very difficult to define ‘hate speech’. The Legislature has to be very careful in defining the term as a fine balance has to be strike between freedom of speech and expression on one hand and putting restrictions on the other. A loosely worded definition will result in infringing the fundamental right of freedom of speech and expression and misuse of law. Secondly, incitement of violence cannot be the sole test for deciding whether a particular speech is ‘hate speech’ or not. Many a times, the effect of hate speech may be marginalizing a group of people. This group may feel fear, insulted, intimidated or threatened. The effect of hate speech is that the group feels discriminated and “less equal”. The Commission after examining the matter suggested that two new sections, that is, section 153 C and 505 A be added in the Indian Penal Code.

“153C Prohibiting incitement to hatred- Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe - (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or (b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs 5000, or with both.”

“505A Causing fear, alarm, or provocation of violence in certain cases: Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe- uses words, or displays any writing, sign, or other visible representation which is gravely threatening, or derogatory; (i) within the hearing or sight of a person, causing fear or

alarm, or; (ii) with the intent to provoke the use of unlawful violence, against that person or another, shall be punished with imprisonment for a term which may extend to one year and/or fine up to Rs 5000, or both.”

9. POWER OF GOVERNMENT TO INITIATE ACTION AGAINST HATE SPEECH

Police and public order are State subjects as mentioned under Schedule VII of the Constitution.⁵¹³ Therefore, primarily it is the responsibility of the state government to initiate action against the perpetrators of hate speech. In India, many a times the hate speech propagates communal disharmony. The Central government has issued detailed guidelines to promote communal harmony to the States and Union Territories in 2008.⁵¹⁴ These guidelines inter-alia provides that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances.⁵¹⁵ However, the primary responsibility to initiate action, register a case and prosecute it rests with the state government.

10. POWER OF NATIONAL HUMAN RIGHTS COMMISSION

The National Human Rights Commission (NHRC) was established under the *Human Rights Act, 1993*.⁵¹⁶ The NHRC has the powers to inquire suo motto into any complaint of human right violation or its abetment.⁵¹⁷ In case of hate speech, the Commission would be well within its power if it decides to initiate suo-motto proceedings against the alleged authors of hate speech.⁵¹⁸

11. CONCLUSION AND RECOMMENDATIONS

Many individuals have the tendency to degrade others in the society and brand them as less equal. Hate speech is a form of propaganda that is being used by hate groups in order to further a particular goal or trend, or result in an outcome favorable to the hate group. Hate speeches are used to intimidate, humiliate and insult others. Hate speeches are totally

⁵¹³ Entry 1 and 2.

⁵¹⁴ Available at http://mha.nic.in/sites/upload_files/mha/files/Communal%20harmonyEnglish_29042017.PDF.

⁵¹⁵ *Pravasi Bhalai Sangathan vs. Union of India (UOI) and Ors* (2014) 11 SCC 477.

⁵¹⁶ Section 3 of the Human Rights Act, 1993.

⁵¹⁷ Section 12(a) of the Human Rights Act, 1993.

⁵¹⁸ *Pravasi Bhalai Sangathan vs. Union of India (UOI) and Ors*, (2014) 11 SCC 477.

unwarranted and endanger the safety and security of public at large. It also undermines the structure of a democratic country. There is no dearth of laws dealing with the menace of hate speeches. The inclusion of two new sections would make the substantive law more wholesome. However, the real need is to implement the existing laws with proper vigor and to devise ways to combat the harm caused by hate speeches

BOOK REVIEW- RAVISH KUMAR THE FREE VOICE ON DEMOCRACY, CULTURE AND THE NATION

*SIMRAN KAUR

“The Socialization of Fear is complete.

To be Afraid is to be civilized in this New Democracy”

The book opens with an alarming message for the citizens of this country. Quoting a particular incident which triggered a lot of debate, the suspicious death of Judge Loya who had been presiding over the CBI court in the Sohrabuddin Sheikh fake encounter case in Gujarat in which BJP President Amit Shah was the prime accused, the author reminds us that if the family of protector of justice fears to speak their mind and their courage is hampered due to fear what would be the condition of a common citizen. The onus of reassuring the faith of free speech and expressing yourself is to be assured by the Chief Justice of India or the Chief Minister and if they fail to do so, in whom will the citizens impose their faith? Due to the fear in the minds of people to speak out the blanket of fear has become so powerful that it continues to terrorize everyone. At almost 9 pm the author who can be safely regarded as the most fearless journalist was overwhelmed by fear. He felt as if a news anchor was falling into a deep dark well and if anything could save him it was the voice. The voice which he gave to his words was used by him as steps to climb the ladder leading away from the depths of fear. After reporting this incident on NDTV Prime Time Show, Ravish Kumar confessed he had let go off his fear which was suffocating him for long to speak freely. But that was not it, he realized fear does not end after one has spoken it, it begins after you have expressed yourself. Following the path of free speech definitely liberates you but does not make you free from the true fear.

Fear of speaking your mind freely can be illusionary but the fear is real. To speak freely is persevering; everything from one's job, credibility and life itself is at stake. The bottom line of the book bases itself on the phrase “Where your fear ends is where those who sit at the top of the power hierarchy go to work”. As power knows who should be removed from the path of its onward march and when. courage in the era of free speech now is reduced to a struggle to emerge from one circle of fear to another. The author's day starts with all sorts of threats and abuses hurled against him. The act of free speech comes with a lot of price which not

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everyone is ready to pay. Being once confronted by a colleague who expressed remorse at the choice of profession he and the author had, Ravish Kumar contemplating joining the mob which kills someone on a train, which would not allow a movie to be released, which corners a person and murders him in his own house. The fulcrum of free speech now is that Post 2014 criticism of the government is equated with criticism of the nation leading to free thinking individuals branded as “antinational”. The author takes the readers on a trail in which they discover the sources of fear which creep the minds of the thoughtful citizens who wish to speak their minds out.

The I.T Cell which works as per the mandate of the government produces various varieties of fear. The I.T Cell spared no one exemplifying a sort of mentality which now dominates a large section of society. The IT Cell has rapidly transformed media into godi media the lapdog media. It has killed the democratic instinct the inherent defiance in the citizens which comes by virtue of India being the world’s largest democracy. The collaboration of the IT Cell and Whatsapp University has been in fructuous to the discourse of free speech in India. This combination produces the most obnoxious and distorted versions of history with an attempt to rewrite it. Within its ambit it has vilified journalists like Rajdeep Sardesai, Rana Ayyub, Barkha Dutt and the author himself who happens to be the most finely social intellectual investigating the problems associating free speech in India.

The biggest deterrence to free speech is the creation of “mob” which intimidates women on behalf of power broadcasting new rumors and lies every day. Every question about the accountability of the government results in letting the mob loose. Another aspect the author noted was that today’s youth is polluted with explosive poison of communalism which keeps them away from the truth. Abuse is now a part of Indian Culture and enduring abuses is an exercise in sensing the true heft of power. The mob has established a government of fear. It can strike fear in the name of religion. Mob has no fear of law. Safe escape of fear was found in the mob; hence people joined the mob to silence others.

Online Trolling is not a new phenomenon, many have fallen a victim to it. The language of the IT Cell has become language of the ministers of government. The fear of being tapped is so pervasive that it makes routine meetings suspicious. If Politics transforms society to such an extent that it calls the dissenter a traitor, harboring a barbed wire between itself and the citizen that is the worst form of assault and violence on Free Speech.

In between 2014 and November 2017 more than forty people were either arrested or defamation cases were slapped against them for criticizing PM Modi and UP Chief Minister Yogi Adityanath. As a result of fear, social sanction for speaking out is lessening. A glimpse of this can be witnessed when a powerful fear is created over maniacal debates on T.V Channels. News Anchors swarm like fearsome attackers over those asking questions, it leads to their loose of confidence in standing apart from the mob adversely affecting the minority community. The author moves on to juxtaposition democracy and free speech in India.

Fake news is not merely an electoral game but a phenomenon for which statements are crafted with great deal of intelligence, the manufacture of fake news is a highly skilled game based on a deep knowledge of the common man. So a continuity of false impressions exists and no one doubts the veracity of fake news. And if the fake news travels from the Prime Minister himself it reaches quickly to the masses and the whole politics becomes fake. Fake news takes the focus far away from the real problems. Citizens allowing themselves to be manipulated entangled in fake news do great harm to themselves leading to intellectual and moral impoverishment. The society which falls within the ambit of influence of media platforms speaking the same language is left with limited options to seek facts as false realities on the basis of spurious issues is being created.

There is a close nexus between government's PR machinery and the corporate media. It results in people who make a genuine democracy an inert, lifeless unit. In a scenario in which all pathways of information are controlled, through them only one kind of information is disseminated which is false and cannot be questioned is the most wretched obstacle in free speech as truth cannot be used to challenge authority. In March 2017, Reporters without Borders released a report which rated countries across the world on the basis of freedom of press; India ranked 136 among 180 countries. Fake news is used a means to impose a kind of censorship.

The mainstream media endorses fake news. Paid media is any news or analysis appearing in any media for a price in cash or kind as consideration plays a big role in spreading misleading information. The author takes note of the lasting impact of all of this on democracy and free speech. He has quoted real examples of Indian Media being hijacked by power and the International scenario as well. The Associated Press an organization which is 171 years old and from which so many radio networks source from has fallen victim to fake news. In reality fake news have always been weapons of fascists and majoritarian fundamentalists in

democracies. The creation of false narratives begins in the corridors of power. Politically motivated fake news not only removes citizenry from its reality but also creates a wide schism between the citizenry and those who ask questions on behalf of it. The threat to free speech has assumed a scary level, one such incident was as described by the author that two journalists Alok Singh and Kaunian Sheriff were covering the sedition case in which Kanhaiya Kumar was involved, the former president of Jawaharlal Nehru University Students' Union. They were accused of being anti national and attacked by lawyers inside the Patiala House Court complex in Delhi. The general public perhaps would never know what transpired there. Fear is now a daily reality. The National Project of Instilling Fear has now according to the author- journalist reached within the individuals and the news room as very few have the courage to do honest reporting. The mainstream media is believes in the firing line of hate mongers.

The aftermath of the cold bloodied murder of Gauri Lankesh met with public justification of her murder by the extremists with a lot of vitriolic. The collective message was this was not the India everyone knew. The national curriculums which revolve around rewriting history and make the entire nation sit in a history class. The troll, the bhakht, the news anchor above all is the historians. The whole mandate is that some great man, or the other has been ignored wiped out of history and everyone is focused on giving that person his due place in history. The ultimate aim is of myth making fuelled by the idea of retribution, the faithful and true Hindus will avenge the deeds, real and imagined of the people who are no longer in midst of us. As a result young hearts are being transformed into human bombs exploding with deadly instincts of Communalism. The youth then becomes a part of the mob who kills Junaid Khan, Aqhlaq on mere suspicion that too baseless. This sends down the message that children too are not safe from the devastation caused by this fear. The television channels produce a narrative of inhumanity. The mob is so huge in dense populations that there is not even sufficient evidence to prosecute the murders. The current discourse on Indian Politics aligned itself with creating a bridge between the legacies of Nehru and Patel. However in the entire history there can be no bigger example of two statesmen forging a path of accord in the midst of their own political differences.

The author in the book takes account of almost all the dimensions relating to Free Speech in India, the factors working behind it the factors surrounding it and the circumstances created by the exercise of free speech. The book gives an interesting account of the feudal Law of Defamation. Equating this law to reduce the status of citizens in democracy, the author said

that big corporate use the law to keep themselves out of the reach of Media. An alarming example of threat to free speech was the proposed Criminal Laws Rajasthan Amendment Bill, 2017 which aimed at stopping anyone from reporting on corruption charges against public servants, magistrates and judges. Had the fearless journalists not come out launching protests against the draconian law, journalists would have been no better than bonded labour. The power of journalists is being eroded worldwide. Due to the weakening of Free Speech attributing to the fear factor, the citizen is being dominated by the political system instead of the citizen dominating the political system. People put their unqualified trust in the leader and submit to his aspirations but lose the questioning streak in him. Bogus Nationalism is the framework for the mainstream media and the conversations between people as well. As the process of being democratic requires great courage, the discourse of free speech becomes even more squeezed. The author trails through the demographic dividends of India commenting on the socio economic realities of the country and how the media does not give adequate representation to it. What are the true aspirations of people and how the state has failed to cater to those?

This book serves as the classic commentary on the paradigm of free speech in India and its associated problems. The intensity of the threat to free speech enshrined under Article 19 of the Indian Constitution can be assessed by the examples of crime committed against people who exercise free speech. The book adopts a realistic, simple and candid approach to address issues which are contemporary in nature and the ones with which everyone can associate. Free Speech is the essence of democracy and with recent incidents like failed attempt of assassination of Umar Khalid, the incessant raids carried out against human rights activists prove the author's view on the status of free speech in India which faces a tremendous jolt and threat from all sides.

ENLARGING SCOPE OF PRISONER'S RIGHT TO VISITATION: A CRITIQUE OF RIGHT TO PROCREATION

*DR. UPNEET LALLI

1. INTRODUCTION

Imprisonment has emerged as the default method of punishing offenders by the criminal justice system. There are around 10.35 million prisoners around the world.⁵¹⁹ The pains of imprisonment are well known. Imprisonment not only implies loss of liberty, but also loss of relationships. A prison sentence can be extremely challenging for not only the prisoners but also their families, often placing significant strain on personal relationships.

The International Covenant on Civil and Political Rights 1966, provides that- "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Imprisonment implies loss of liberty and restricts the rights and freedoms of prisoners. Autonomy, freedom of movement, association, and privacy are all very limited in a prison setting. It is indeed tough balancing competing public and private interests while dealing with prisoner's rights. While it is indisputable that imprisonment removes or limits some rights of prisoners, but it is also indisputable that imprisonment does not automatically result in the forfeiture of all rights at the prison gate. Hence, the right to maintain contact with family remains intact.

Realizing the importance of family for prisoners, the UN Standard Minimum Rules for the Treatment of Prisoners (1955), Rule 37 states that "Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits". Rule 79 states that "Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both". The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principle 19 states that "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate

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⁵¹⁹ Walmsley, R. (2017). World Prison Population List (11th Edition). London: Institute for Criminal Policy Research. Available at: <http://www.prisonstudies.org>.

opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations”.

Staying in contact with a support system, such as family members, has been shown to decrease the likelihood of recidivism. This support network is essential in successfully reintegrating prisoners into society.⁵²⁰

The Standard Minimum Rules revised as Nelson Mandela Rules (2015), the global standards and framework relating to treatment of prisoners, also cover conjugal rights now. Rule 58 (1) “Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and (b) By receiving visits. 58 (2) Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.” This rule has been added taking into account the developments that have taken place.

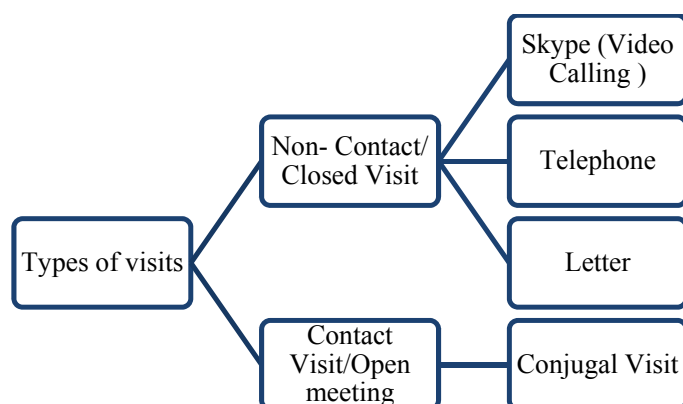
The visits in prison are normally contact or non contact type, and have their own challenges within the structured prison environment. There has been development on both fronts. In the non contact type, the advent of technology has facilitated contact through telephone, video call, video-conferencing and Skype. Recently in the United States, non contact visits through Skype have become more common. It is in the human contact that issues of security concern emerge. “Prison phone justice” has emerged as a pressing civil and human rights issue in U.S. Prisons. It broadly refers to the high costs of phone calls that are made to and from prisoners and their families. Phone companies charge exorbitant rates due to a bidding process that occurs between several competing companies and prisons. Amongst the contact type visits, the arrangements for conjugal visits put an added responsibility on prison administration. Interesting legal questions have emerged on the nature of rights or privileges as regards conjugal visits.

⁵²⁰ Duwe, G. and Clark, V. (2013), ‘Blessed be the Social Tie that Binds: The Effects of Prison Visitation on Offender Recidivism’, *Criminal Justice Policy Review*, 24: 271–96.

2. DIFFERENT TYPE OF VISITS WHICH ARE ALLOWED:

In UK there are three types of contact visits that are special visits. These include: Family visits, Lifer's days and Family learning visits. These visits are given after a prisoner submits an application and security clearances are obtained. These visits give prisoners the possibility to spend some quality time with their family members in a stress-free environment. Families have the opportunity to participate in different activities and also share a meal together. In fact in some prisons, visitors have other facilities such as toilets, baby changing, refreshments, access to tea bar and play area for children etc.⁵²¹ In Scotland, to keep family links alive, the "Storybook Dads" scheme allows imprisoned parents to record bedtime stories for their children.

In Closed visit a prisoner and a visitor are separated by glass and have no physical contact. It is usually done in the case when the prison suspects that a visitor has tried to smuggle in unauthorized items.



Prison administration decides when and where a visit can take place and also who all can be allowed to meet the prisoner. In general prison administration has autonomy to draft visitation policy that maintains institutional security and discipline. Prison guards are always present, and sometimes a lot of time is wasted in security screening. In prisons which have a huge population, the visits may have to be booked beforehand. For women prisoners, contact with their children emerges as the most important issue. One contentious issue is the nature of contact that is permitted with partners, and the prisoners' right to start a family.

⁵²¹ Available at; <https://www.offendersfamilieshelpline.org/index.php/visits/>. Retrieved July 26, 2018.

3. PRISON VISITS IN INDIA

Prison visits are ideologically framed more as a privilege rather than right. Prison Manuals also provide the framework of rules on prisoners' contact with the family. The number of mulaqaats and duration may vary slightly from state to state as prison is a state subject. Contact with family, and maintaining family ties is essential to humanize a person, but can take place in a most inhumane way. The Mulaqqat normally takes place behind bars. The mulaqat rooms are almost like a fish market where prisoner and family members can't hear each other. But since the last few years, certain improvements have taken place- individual cabins have been made and the wire mash has been replaced by glass. Now there is less screaming and shouting as the prisoner can talk with family members over the phone. But as far as allowing free contact with family that is restricted in most states. Recently Maharashtra has provided an incentive-known as "Gala bhet"-mulaqaat, and "embrace your child" i.e. a contact visit, with no barriers. According to the Model Prison Manual 2016 in India visits by family members are allowed once in a week for convicted prisoners and twice in a week for undertrial prisoners. In case of disciplinary offences by prisoners this facility is curtailed. When prisoners are held far away from their families, then visiting can become financially or practically difficult. There is no specific provision for conjugal visits in India.

4. CONJUGAL VISITATION PRACTICES IN VARIOUS COUNTRIES

"Conjugal rights are the sexual rights or privileges implied by, involved in and regarded as exercisable in law, by each partner in a marriage. They refer to the mutual rights and privileges between two individuals arising from the state of being married. These rights include mutual rights of companionship, support, sexual relations, affection and the like. The act of a husband or wife staying separately from the other without any lawful cause is referred to as subtraction of conjugal rights."⁵²²

There are some countries which view the practice of conjugal visit as inconsistent with the ethic of punishment against those who view the visits as improving inmate behavior, reducing recidivism and maintaining family bonds. Originally, prison conjugal visits were used as an incentive to motivate working prisoners to be more productive. Out of the 195 countries, only a few countries agree to conjugal visits for prisoners. In countries like Canada, Brazil,

⁵²² Temitayo, B. H. (2018). *Conjugal Rights for Prisoners: To Be Or Not To Be?* Retrieved July 23, 2018, from Unilag Law Review: <https://unilaglawreview.org/2018/01/21/conjugal-rights-for-prisoners-to-be-or-not-to-be/>.

Denmark, Russia, Germany, Spain, Saudi Arabia, Belgium and USA conjugal visits / or extended family visits are permitted. In European prisons, short home leaves for selected classes of prisoners have been established in England, Wales, North Ireland, Scotland, Denmark, Switzerland, Germany, Greece, and Sweden (Cavan & Zemans, 1958).⁵²³ Latin American States such as Argentina, Chile, Puerto Rico, and Mexico permit supervised visits of the spouse with the prisoner within the prison. Chile has permitted for both prison visits as well as for home leaves.⁵²⁴ In Norwegian prisons, prisoners have the privilege to spend 2-3 days with their families. Prisons have the visitation facility that included small buildings resembling motel units.⁵²⁵ Brazil & Israel also allow same sex conjugal visits. In Canada, inmates are allowed every 2 months to spend up to 72 hours in a flat with their family members including spouse, children, partners, parents or in-laws, and they not only live together but also cook and play together.⁵²⁶

In the U.S. in early 1990s, 17 states had conjugal visit programs in the United States but now only four state prisons allow conjugal visits. Federal prisons do not have such facility. The state prisons that allow conjugal visits are California, Connecticut, New York, and Washington. Visitation in most of the U.S. states that permit conjugal visits, is highly regulated. Rules require that “the prisoner seeking such visits have a clean prison record of good behavior and no violence, prohibit visitation for prisoners incarcerated for child abuse or domestic violence, and restrict visits to prisoners in low- or medium-security prisons; conjugal visits are not granted to prisoners in high security facilities or on death row”.⁵²⁷ Ironically, American prisons are now ending face-to-face contact between the prisoners and family members. All the visits are now done by video calling and no more in-person visits. Each video visit made from home costs \$12.99 for 20 minutes while in-person visits were free. With the introduction of this new video calling system, questions have been raised about very nature of prisoner’s conjugal rights.⁵²⁸

⁵²³ Cavan, R. S., & Zemans, E. S. (1958). Marital Relationships of Prisoners in Twenty-Eight Countries. *Journal of Criminal Law and Criminology*, 49 (2), 133-139.

⁵²⁴ Available at: <https://www.thestatesman.com/features/conjugal-visits-1502620871.html>. Retrieved on July 23, 2018

⁵²⁵ Available at: <http://thewireless.co.nz/articles/should-prisoners-be-allowed-to-have-sex> Retrieved on July 23, 2018

⁵²⁶ Available at: <https://www.economist.com/international/2013/11/02/no-laughing-matter> Retrieved on July 23, 2018.

⁵²⁷ Available at: <https://www.criminaldefenselawyer.com/resources/criminal-defense/state-felony-laws/states-that-allow-conjugal-visits>. Retrieved July 26, 2018.

⁵²⁸ Available at: <https://www.theguardian.com/us-news/2017/dec/09/skype-for-jailed-video-calls-prisons-replace-in-person-visits> Retrieved on July 23, 2018.

In the al-Hair prison of Saudi Arabia, there are suites with facilities where family can visits.⁵²⁹ In the prisons of Spain a monthly conjugal visit, or a monthly family visit and a quarterly extended family visit is allowed to the prisoners. The conjugal visit takes place in a private room without any supervision by jail authorities.⁵³⁰ Even in Pakistan, the Sindh home department grants conjugal rights to convicted inmates following a Supreme Court order as a part of the government's jail reforms (Temitayo, 2018)⁵³¹.” Can the conjugal visits be interpreted with the human rights framework? The right to marry and to found a family exists in Article 16 of the Universal Declaration of Human Rights, 1948.

5. LEGAL CASES REGARDING CONJUGAL RIGHTS INCLUDING PROCREATION RIGHTS IN USA

In US there are four states which allow conjugal visit. The death row prisoners are not entitled to conjugal visits. The lawsuits for conjugal visits in the United States which have been filed in Federal and State Courts have been argued on basically four grounds: (i) the constitutional prohibition on cruel and unusual punishment, (ii) prisoner and spousal rights to marital privacy, (iii) the right to procreate, (iv) and the First Amendment right to religious freedom. The Courts in these cases have rejected these arguments and held visitation rights as privilege and not as a Constitutional right. Reasonably restrictions are placed in the US and in one case of *re Cummings* (1982)⁵³² the California Supreme Court upheld the prison policy of limited conjugal rights of prisoners excluding the long-term girlfriends. The death row prisoners have no right to conjugal visits (*Anderson v. Vasquez* (1992)⁵³³.

In 1942 the United States Supreme court in *Skinner vs. Oklahoma*⁵³⁴, held the right to procreate as “one of the basic civil rights of man” and ruled out the law, requiring the sterilization of habitual criminals as an unconstitutional violation of that right. As per the rule under the Oklahoma Habitual Criminal Sterilization Act of 1935, habitual offenders were

⁵²⁹ Available at: <http://listverse.com/2017/12/17/10-stimulating-facts-about-conjugal-visits/> Retrieved July 24, 2018.

⁵³⁰ Available at: <https://www.dfa.ie/media/embassypain/Prison-Information-Pack-Spain.pdf> Retrieved June 27, 2018.

⁵³¹ Temitayo, B. H. (2018). *Conjugal Rights for Prisoners: To Be Or Not To Be?* Retrieved July 23, 2018, from Unilag Law Review: <https://unilaglawreview.org/2018/01/21/conjugal-rights-for-prisoners-to-be-or-not-to-be/>.

⁵³² *re Cummings* (1982) 30 Cal. 3d 870, 640 P.2d 1101.

⁵³³ *Anderson v. Vasquez*, 827 F. Supp. 617 (N.D. Cal. 1992).

⁵³⁴ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

subjected to forced sterilization. In this case, a man had been convicted once of the crime of stealing chickens and twice for armed robbery and was subject to forcible sterilization as the rule. The Court explained that, because “marriage and procreation are fundamental to the very existence and survival of the race,” hence forced sterilization of criminal offenders violates the Equal Protection Clause of the Fourteenth Amendment. The court held the main argument that a state can treat different group differently but it cannot keep out a certain group from treatment without any rational basis.

The court in *State v. Oakley*⁵³⁵ upheld a stipulation on Oakley who was on probation, to be required to avoid having children, until he could show the means to support them. This condition was held to be reasonably related to his rehabilitation. Oakley was convicted of refusing to pay child support.

In *Turner vs. Safley*⁵³⁶, the petitioner in the U.S. Supreme Court challenged two regulations propagated by the Missouri Division of Corrections. One of them included the Fundamental right to marry. As per the prison regulations, an inmate was permitted to marry only with the permission of Prison Superintendent, that could be given only when there were "compelling reasons" to do so. These compelling reasons were limited only to pregnancy or birth of a child. The Court in its decision struck down the regulation that prohibited inmates from marrying without the permission of the Prison Superintendent, finding that it was not "reasonably related to legitimate penological objectives" and "impermissibly burdened the right to marry".

In *Goodwin vs. Turner*⁵³⁷ a prisoner's request to procreate by sending a sample of his semen to his wife for childbearing purpose was denied by the Bureau of Prison. The Bureau of Prisons denied petitioner's request because there was no policy governing artificial insemination. The court while it held that the right to procreate is fundamental, nonetheless held that denying Goodwin's simple request was reasonably related to the prison's legitimate penological objectives. In 1990, the Eighth Circuit held, in *Goodwin v. Turner*, that “the right to procreate does not survive incarceration”.

⁵³⁵ *State v. Oakley*, 2001 WI 103, 629 N.W.2d 200, 245 Wis. 2d 447 .

⁵³⁶ *Turner v. Safley*, 482 U.S. 78 (1987).

⁵³⁷ *Goodwin vs. Turner*, 89-1101, 908 F.2d 1395 (8th Cir.1990).

In another case *Gerber vs. Hickman*⁵³⁸, William Gerber was a 41- years -old inmate at Mule Creek State Prison in California, sentenced to life in prison (100 years to life plus another 11 years) alleged that prison violated his constitutional rights by refusing him to provide his wife with a sperm specimen, so that she may be Artificial inseminated. The Ninth Circuit, in *Gerber v. Hickman*, ruled that an inmate serving a life term sentence could artificially inseminate his wife while in prison.⁵³⁹ The Supreme Court dismissed his appeal of artificial insemination and maintained that a prisoner does not have a constitutional right to procreate while incarcerated. The Court of Appeals, with a majority of 6-5 held that (i) “many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement”; (ii) “prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits”. Thus, it concluded that a prisoner does not have a constitutional right to procreate while incarcerated.

6. LEGAL CASES REGARDING PROCREATION RIGHTS IN UK

According to Sutherland (2003), ‘unlike the position in the United States, the right of prisoners to procreative freedom in the United Kingdom is not removed at the prison gates’. There is no provision for conjugal visits for prisoners and their partners in the UK as compared to many other countries.

“If a prisoner and his or her partner wish to conceive a child together, unless the prisoner is permitted Release on Temporary License (ROTL), then the prisoner has no alternative but to seek access to facilities for artificial insemination. In contrast with the situation in the USA, where there is a blanket ban, the decision as to whether to grant a prisoner access to such facilities is made by the Family Ties Unit, part of the Prisoner Administration Group of the Prison Service. Where prisoners and their families wish to challenge a decision such as this, judicial review and proceedings under the Human Rights Act 1998 provide valuable mechanisms, as does recourse to the European Court of Human Rights. It is, arguably, the discretionary nature of this decision, which makes this issue potentially more thought provoking in legal terms than if there were an outright prohibition on access to these facilities⁵⁴⁰.

⁵³⁸ *William Gerber vs. Rodney Hickmen*, 00-16494, 291 F.3d 617 (9th Cir. 2002).

⁵³⁹ Kirkley, R. M. (2003). Prisoners and Procreation: What Happened Between Goodwin and Gerber?. *Pepperdine Law Review*, 30 (1), 93-124.

⁵⁴⁰ Codd, H. (2006). Policing Procreation: Prisoners, Artificial Insemination and the Law. *Genomics, Society and Policy*, 2 (1), 110–117.

The Queen on the Application of *Mellor v. Secretary of State for the Home Department*⁵⁴¹, the Court upheld a judgment dismissing an application from a prisoner who was seeking access to artificial insemination. Mr. Mellor was 29-years-old serving a life sentence for murder when he met and subsequently married a prison official in 1997. His life sentence was due to expire in 2006 by which time he would be 35 years old and his wife would be of 31 years old. He applied for permission to inseminate his wife artificially. He claimed that he was refused to access the AI facilities by the Secretary of State for the Home Department. This violated his right to respect for private and family life under article 8 of the European Convention of Human Rights (ECHR), and his right to marry and found a family under Article 12.

The court rejected Mellor's claim and held that one of the purpose of imprisonment was to punish the criminal by depriving him of certain rights and pleasures which he could only enjoy at liberty, including the enjoyment of family life, the exercise of conjugal rights and the right to found a family and have children by AI would 'raise difficult ethical questions and give rise to legitimate public concern'.

In *Dickson vs. The United Kingdom*⁵⁴² the applicant Kirk Dickson applied for facilities to artificially inseminate his wife, which was refused. He (first applicant) was a murder convict and sentenced to life imprisonment. He had no children. He met the second applicant while she was also imprisoned. She had since been released. The applicants got married in 2001. As they wished to have a child, the first applicant applied for facilities for artificial insemination to which the second applicant also joined. They relied on the length of their relationship; first applicant's earliest expected date of release and the age of second applicant to urge that it was unlikely for them to have a child together without the use of artificial insemination facilities. The Secretary of State refused their application. Their challenge to that decision was turned down by the High Court as well.

Dickson(s) alleged violation of Articles 8 & 12 of the European Convention on Human Rights which, inter alia, provides that (i) everyone has a right to his private and family life and (ii) that men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of that right. The Grand Chamber of

⁵⁴¹ *Mellor v. Secretary of State for the Home Department* (2001) 2 FLR 1158.

⁵⁴² *Dickson vs. The United Kingdom* (Application No.44362/04) – decided on 4th December, 2007,

ECHR held that Article 8 was applicable to the Applicants' complaint as the refusal of artificial insemination facilities concerned with private and family lives which notions incorporate the right to respect for their decision to become genetic parents. The Court then awarded monetary compensation to the applicants on the strength of Article 41 of the Convention which enables it to afford just satisfaction to the injured party.

It may be seen that from U.S. to Europe, the rights to conjugal visits, procreation or even artificial insemination facilities have been recognized only partially, being integrally embedded in Articles 8 & 12 of 'European Convention on Human Rights' or as the rights that are fundamental to the liberty and human dignity emanating from the Eighth Amendment. They are further subject to the justifiable and proportionate restrictions.

Because of the unique needs of the penitentiary system, the problems and questions that arise from reproductive technology will vary from the way in which similar questions are raised for free citizens. The questions raised by *Goodwin, Gerber, and Dickson case*: such as what is the impact on prisoners who seek similar treatment; what are the safety concerns involved in the procedure; and what is the government's responsibility-financial or otherwise-to those who cannot afford to partake in these procreation techniques, remain unresolved by the courts. Other considerations that arise are what type of stability is there in the family unit when both the father or mother is in prison?

7. PROCREATION RIGHTS OF PRISONERS IN INDIA

The rights of prisoners are broadly interpreted under the Constitutional guarantees. The issue of prisoners' right to contact and communication with the outside world is largely streamlined by the Prison Act, 1894, the Prisoner's Act, 1900 and Rules there under. The State Governments are vested with rule making powers under these Acts, and state manuals lay down the procedure .

The Courts have evolved Prison right jurisprudence to cover various rights of prisoners, like right to speedy trial, right to contact with family, protection against ill-treatment and custodial torture etc. Article 21 of the Indian Constitution which guarantees right to dignified life to all ,has been broadly interpreted while deciding the rights of the prison inmates. After

the Sunil Batra-I (1978)⁵⁴³ and Sunil Batra-II (1980)⁵⁴⁴ judgment the issue of prisoners being considered as a human and to be treated with dignity is well settled. Justice Krishna Iyer held, “Imprisonment does not mean farewell to fundamental rights as laid down under Part-III of the Constitution”. In its landmark judgments, the Hon’ble Supreme Court has given the Right to visit, Right to publish, Right to interview (Francis Coralie vs. Union Territory of Delhi) to the persons who are incarcerated. Press and the media persons were brought in the ambit of friends in Prabha Dutt vs Union of India⁵⁴⁵ case. The right of prisoners on death row to meet their family was recognised in the case of Shatrughan Chauhan and Another vs. Union of India and others⁵⁴⁶ the Supreme Court held that it would be mandatory for prison authorities to facilitate and allow a final meeting between the prisoner and his family and friends prior to his execution.

Under the colonial rule, the Britishers had arranged for two kinds of meetings for some categories of prisoners: *kacchi mulaqat* (temporary meeting) and *pakki mulaqat*. In the latter, a convict was allowed to spend time with his wife in isolation, ensuring they were in a better frame of mind.

The issue of right to procreation for prisoners arose in the case of *Jasvir Singh & Anr. vs. State of Punjab & Ors.*⁵⁴⁷ The petitioners were husband and wife who were lodged in the Central Jail at Patiala in separate cells for kidnapping and brutally murdering a 16-year-old minor for ransom. Their death sentence was confirmed by the High Court, but the wife’s sentence was commuted into life imprisonment by the Supreme Court. The petitioners sought the enforcement of their perceived right to have conjugal life and procreate within the jail premises. They wanted judicial intervention to direct the Jail authorities to allow them to stay together, resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. The Husband (first petitioner) stated that he was the only son of his parents and 8 months into their marriage.

The petitioners claimed that their demand is not for personal sexual gratification. The petitioners were also open to ‘artificial insemination’. The petitioners’ main plank was on Article 21 of the Constitution. The ‘right to life’, they insist, has two essential ingredients,

⁵⁴³ *Sunil Batra vs. Delhi Administration and Ors.* AIR 1978 SC 1675.

⁵⁴⁴ *Sunil Batra vs. Delhi Administration* AIR 1980 1579, 1980 SCR (2) 557.

⁵⁴⁵ *Prabha Dutt vs Union of India & Ors.* 1982 AIR, 6 1982 SCR (1) 1184.

⁵⁴⁶ *Shatrughan Chauhan and Another Vs. Union of India and others* (2014) 3 SCC.

⁵⁴⁷ *Jasvir Singh & Anr. vs. State of Punjab & Ors.* CWP No.5429 of 2010 (O&M) Date of Decision: 29.05.2014.

namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital. The following issues emerged for determination before the Court:-

- i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?
- ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
- iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?
- iv. If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

The state authorities argued that there was no such provision in the Prisons Act, 1894 and Punjab Jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convict.

The High Court ruled that the "right to procreate" of a convict falls within the Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution of India. However, right to procreate while incarcerated is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the 'right to procreate' is not an absolute right and is subject to the penological interests of the State.

In his judgment, Justice Kant directed the State of Punjab to constitute a Jail Reforms Committee to formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and to identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities." The Committee would also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same. The Committee is yet to be formed, and the question still remains to be settled.

The Andhra Pradesh High Court in *Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) vs. State of Andhra Pradesh*⁵⁴⁸ dealt with similar issues as therein a direction was sought to allow conjugal visits to spouses of prisoners in jails across the State of Andhra Pradesh. The Court rejected the claim observing that, if conjugal visits are to be allowed keeping in view good behavior of the prisoners, “chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit...” and that “the issue raised in the writ petition being a policy decision is within the domain of the State...”. The Court further viewed that Chapter-IV of Andhra Pradesh Prison Rules, 1979 provide for the release of prisoners on furlough/leave and parole/emergency leave.

In recent case of *Sumeet Bajwa vs State of Punjab & Ors*⁵⁴⁹ the right to marriage was stressed by the petitioner. The petitioner, only child of her parents, was engaged to a prisoner. Due to the demise of girl’s father, their marriage was postponed and later on the marriage could not take place as the man was arrested in murder case, and in custody since the last 2- ½ years. He gave an application requesting release on bail from the prison to perform his marriage with the petitioner on the fixed date of his marriage. However, his application for bail was declined by the court. The Court observed that ,even if the factum of marriage is proved, still it was not inclined to grant bail, keeping in view the serious nature of the crime and gravity of allegations, and also the petitioners’ conduct in jail. The Court held that “an under- trial prisoner, being presumed to be innocent, has a right to marry with someone who is not an under-trial like him/her and/or a person can marry an under-trial prisoner, if he/she desires”. The court also held that “the marriage can only be performed outside the jail as the jails cannot be converted into marriage palaces”

In January of 2010, while hearing PIL on treatment facilities for HIV positive prison inmates, the Bombay High Court had directed the Maharashtra government to examine the possibility of allowing jail inmates to have sex with their wives in privacy. Especially those who have been lodged for two to three years in jails should allow to meet their wives sometime every month in privacy. Justice Majumdar held that: “There may be physical needs. See whether a separate place can be given to a prisoner and his wife for a day or two. The government is

⁵⁴⁸ *Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) vs. State of Andhra Pradesh*. PIL No. 251 of 2012 decided on 16th July, 2012.

⁵⁴⁹ *Sumeet Bajwa vs State of Punjab & Ors* CWP No.2239 of 2015. Decided on 12 January, 2016.

spending crores of rupees to curb the AIDS menace in jails. Instead why don't you take preventive steps.”⁵⁵⁰

In the latest case of *Mrs. Meharaj vs The State Represented By Its on*, 2018⁵⁵¹ The Madras High Court has allowed a 40-year-old detenu serving life imprisonment in the central prison in Tirunelveli district to go on a two-week leave for the “purpose of procreation”. His 32-year-old wife had filed the habeas corpus petition. The court observed that “Conjugal visit leads to strong family bonds and keep the family functional rather than the family becoming dysfunctional due to prolonged isolation and lack of sexual contact. Conjugal visits of the spouse of the prisoners is also the right of the prisoner. This right is recognized at least in few countries of the world. When the prisons are overcrowded providing place for conjugal visits may be a problem, but the Government has to find out a solution.” The Court granted the convict prisoner to go on temporary leave.

8. ARGUMENTS FOR AND AGAINST THE RIGHT TO CONJUGAL VISITS

Questions regarding procreative autonomy have no clear cut answers, especially in a prison setting. Penology, public policy, privacy, family issues, human rights, security issues and law all intertwine in this matter. According to Claire & Dixon (2015)⁵⁵² prison visits have positive effects on prisoners’ well-being and offending behavior. In 2012, research published by the Southern Criminal Justice Association noted, “Conjugal visitation helps to improve the functioning of a marriage by maintaining an inmate’s role as husband or wife, improve the inmate’s behaviour while incarcerated, counter the effects of incarceration, and improve post-release success by enhancing the inmate’s ability to maintain ties with his or her family”.⁵⁵³

While some others have the view that conjugal visitation of prison inmates may put the system of discipline & security at risk and it would make the jails as rest house for prisoners. On the other hand, the denial of the right may cause unnecessary physical and mental punishment to the prisoners and their innocent family members. It is also difficult to arrange

⁵⁵⁰ The Times of India. (2010, January 14). Why can't Prisoners have Sex in jails, Court asks Maharashtra Govt. *The Times of India*. Retrieved from: <http://timesofindia.indiatimes.com/india/Why-cant-prisoners-have-sex-in-jails-court-asks-Maharashtra-govt/articleshow/5445590.cms>.

⁵⁵¹ *Mrs. Meharaj vs The State* HCP No.1837 of 2017.

⁵⁵² Claire, K. D., & Dixon, L. (2015). The Effects of Prison Visits from Family Members on Prisoners’ Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research Since 1991. *Sage Journals*.

⁵⁵³ D’Alessio, S. J. & Flexon, J. & Stolzenberg, L. (2012). The Effect of Conjugal Visitation on Sexual Violence in Prison. *American Journal of Criminal Justice*. 38 (1).

for private visitation, as most of the prisons are overcrowded and a constant surveillance by prison staff is required. In 2010 at German prison, a 50-year-old convict killed his girlfriend during a conjugal visit. He had been incarcerated in prison for 19 years for the rape and murder of a nine-year-old girl.⁵⁵⁴

In the current political environment and the era of harsher penalties, such issues will not get approval and may send the wrong signals. However, the negative impact of imprisonment on prisoners' families is not something that society responds to.

9. PRACTICAL AND POLICY CONSIDERATIONS, POSSIBLE SOLUTIONS IN INDIA

With a growing prison population the question surrounding this population's ability to procreate is of fundamental concern not only to the penological institutions and their objectives, but also to the society and public policy foundations. The fundamental right granted to free citizens to procreate naturally or via reproductive technologies should not accompany a prisoner into the prison gates. Ethical questions do arise when we expect the state to allow an opportunity to a prisoner to create a new child after murdering someone's or even their own child. Specifically, affording this right to prisoners would cause too great of a strain on resources and further the rights of the unborn child also need to be considered.. Finally, holding and discharging parental responsibilities is much more challenging than procreation itself, and shifting sands of responsibility may not be in the best interest of the child. Penological goals of deterrence, security considerations and victim's rights do influence policy considerations as well.

In India we need to focus on the priority areas of prison reforms. Prisoners and not just prison staff have also expressed reservations regarding conjugal visits in a prison complex. There is a need to humanise the contact that prisoners have with their families. The best preventative measure against the despondency many prisoners feel, is contact with family. We need to streamline the present mulaqat system and make it more humane for the family. Visits by women and children to a prison are not only difficult but also embarrassing and uncomfortable. Better mulaqat facilities, decent waiting areas, physical contact of incarcerated mother /father with their children and booking of mulaqat to stop the rush are not too difficult to implement. As far the right to family life is concerned, the system of

⁵⁵⁴ Stanglin, S. (2010). *Inmate kills girlfriend during unsupervised conjugal visit* Retrieved July 23, 2018, from USA Today: <http://content.usatoday.com/communities/ondeadline/post/2010/04/inmate-kills-girlfriend-during-unsupervised-conjugal-visit/1#>.

parole is available to the convict prisoners, which allows them to visit their home and meet their family obligations. It can be made more liberal and a better system of supervision can ensure that it does not get misused. There is no cost on the state, and it meets various needs of the prisoner and his family. Open prison System is another practices that should be encouraged for life convicts. The Sanganer open camp permits prisoners to stay with their families and undertake family responsibility is a sustainable model of reintegration. Strengthening the contact of prison inmates with family and community is a step toward prisoner's reintegration. Ultimately prisoner's have to reenter society and efforts need to be made to facilitate and humanise the contact with family.

HATE SPEECH AND FREEDOM OF SPEECH: A LEGAL SCRUTINY

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**ESHITA JAIN

1. INTRODUCTION

In regard to the law of hate speech responsible for inciting communal passions, the central reality in India is not the abuse of law, but persistent refusal to enforce it.”

Hate speech is an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech. Hate speech has become so common and frequent in political campaigns that we hardly listen anything of substance which can be passed on to our generations as inspiration and words of wisdoms by our leaders. Freedom of speech is one of the prerequisite of any popular democracy. This freedom is guaranteed with the condition to respect the rights of others when anyone expresses anything publically.

There are innumerable instances where different political groups spread hatred through their speeches and remarks which can develop communal passions. There seems the problem with two concepts first is freedom of speech one of the fundamental right provided under article 19(1)(a) and hate speech which is offence under section 153A of Indian Penal Code. Though right to freedom of speech is not absolute, it is subject to reasonable restrictions which are enumerated under article 19(2). But what we are experiencing with nonstop intended hate speech by different political groups under the guise of right to freedom of speech and expression. There are many members in religiously oriented political parties who are famous for hate speeches. Strict action is needed against them to curb hate speech and for smooth growth of political democracy.

2. ANALYTICS OF HATE SPEECH AND FREEDOM OF SPEECH

“The plain fact is that not all free speech is good speech, which means that freedom of speech is not always a sound or just policy”.

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Michel Rosenfield defines 'hate speech' as 'speech designed to promote hatred on the basis of race, religion, ethnicity or national origin. According to him, the issue of hate speech poses vexing and complex problem for contemporary constitutional rights to freedom of expression⁵⁵⁵. Hate speech can be understood as incitement to hatred against a group of persons in terms of race, religion, ethnicity, national origin, gender, sexual orientation.

Freedom of speech is prerequisite fundamental value for any popular democracy. People are supposed be rational and respectful towards the rights of the others. The ability to do this can be called political tolerance which is defined as willingness to put up with those things one rejects or opposes. Yearning for freedom of expression for humanity is ancient and check on freedom is almost universal phenomenon. Freedom of speech and restriction pulled in each other in different directions. But meaningful exercise of the former needs dissemination of ideas and information from different sources.

The power of words is much more than anything which cannot be undermined. Words have tremendous potential to produce unimaginable effects. The power of words can move the nations, stir revolutions, can give hope to depressed or vice versa can abet to commit suicide an already depressed person. There are numerous instances of communal riots which took place as a result of spread of rumors and hate speeches delivered by politically motivated persons, in 1968, riots were triggered off by an altercation between a Hindu boy and a Muslim boy over impounding a cow. The riots lasted for 10 days.

There are innumerable instances where different political groups spread hatred through their speeches and remarks which have potential to develop communal passions. There seems the problem with two concepts-first is freedom of speech one of the fundamental right provided under article 19(1)(a) and hate speech which is offence under section 153A and section 295-A of Indian Penal Code. Though right to freedom of speech is not absolute, it is subject to reasonable restrictions which are enumerated under article 19(2). But what we are experiencing political leaders who are repeatedly engaged in hate speech crime are least bothered about the impact of their speeches.

Hate speech has become the tool in the hands of the politicians to get overnight popularity among their favored groups i.e. the caste, community or any region they belong. Such kind of speeches are well programmed with intent get votes and support from a particular community

⁵⁵⁵Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis (2002-2003) 24 *Carozo Law Review* 1523.

that can be based on religion, caste, gender or domicile etc. We have enormous set of laws to deal with to curb hate speech but we hardly witness any action against such kind of people. As India is socially, culturally, religiously and ethnically is a diverse society, therefore it becomes necessary to curb hate speech to protect minority groups from aftermath consequences of hate speech. There is need for proper enforcement of hate speech laws to curb hate speech to tackle with the menace of hate speech. We have long list of laws to deal with crime of hate speech as IPC make it offence to spread communal hate under section 153-A and Unlawful activity (prevention) 1967 was amended to enable the banning of any organization which violates section 153-A⁵⁵⁶.

Words may incite the mob violence (case of Dadri lynching) where an announcement was made from temple located in Bisahada village that about having beef in Akhlak's house and a crowd attacked his house and killed him brutally and the whole nation quaked with shock over that event. Still in that area condition has not been restored as normal. There are numerous incidents recently took place where riots lasted for many days as a consequence of hate speeches e.g. Godhra riots, Bengal riots, Muzaffar Nagar Riots etc. The most important about these riots that they were all politically motivated. Many people lost their life, houses were burnt, women were raped and molested. How horrible consequences may occur is beyond imagination but it's true that we have long history which is full communal riots and hate speech had contributed to great extent to the same.

3. HATE SPEECH AND LAW

It's true that law can play limited part in creating civil society which is humane and gentle. But law is essential to have check and balance and to regulate objectionable humane behavior. To deter a person who spread group hatred must be prosecuted and punished as per hate speech law provides. It is really difficult to interpret anti hate speech legislation because our constitution guarantees free speech as one of the fundamental right on one hand and does not support hate speech on the other. Consequence of right to freedom of speech and expression is that political leaders delivering non stop hate speeches and there is no action is being taken by the enforcement agencies., as they take the plea of free speech is fundamental right.

⁵⁵⁶ Indian Penal Code Section, 153-A.

Hate speech is treated differently in different jurisdictions. The first Approach is American which is extremely liberal and highly tolerant of offensive, obscene or hateful speech. The second approach is followed by other jurisdictions where it is deemed rational to inhibit all sorts of speech and expressions which might be even remotely hateful in order to protect its citizens from verbal assaults that could lead to violence or cause emotional distress.

Hate speech legislation is British legacy. First incident is found in the year 1927, a book ‘Rangeela Rasul’ was published. The book contained some material related to marital and sex life of Prophet Mohammad. A complaint was filed and publisher was arrested. Since there was no law against to insult religion, He was acquitted. Publisher was murdered by Ilm-ud-din. Muslims demanded law against to insult religious feelings. British government enacted section 295-A. According section 295-A reads as “Deliberate and malicious acts intended to outrage feelings of any class by insulting its religion or religious beliefs— whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise] insults or insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”⁵⁵⁷

According to Section 153-A of Indian penal Code the promotion of enmity between groups on the basis of religion, caste, race, and place of birth, language etc, or any act which is prejudicial to maintenance of harmony.-(1) Whoever (a) By words, either spoken or written or by signs or by visible representations or otherwise, promotes or attempts to promotes, on the ground of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feeling of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, or (b) Commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturb the public tranquility.”⁵⁵⁸

The aforesaid provision seems to be almost exhaustive to deal efficiently with hate speech crime. But there is lot of trouble to interpret that section as where and when a person can be booked under the section.

⁵⁵⁷ Indian Penal Code 1860 Section, 295-A.

⁵⁵⁸ Indian Penal Code.

Section 153-B further buttressed the scope of section 153-A which prohibits imputations and assertions prejudicial to national integration. 153-B makes criminal offence the use of words either spoken or written, sign or by visible representations or otherwise.⁵⁵⁹

Section 298 prohibits uttering words with deliberate intent which can wound religious beliefs. Section 505(1) prohibits statements conducive to public mischief. Section 505(2) prohibits statements creating or promoting enmity, hatred or ill will between classes⁵⁶⁰.

Section 95 of Criminal Code of Procedure to declare certain publication forfeited if the publication seems to contravene the provisions of section 124-a, 292, 293, 295A of Indian Penal Code⁵⁶¹.

Penal provisions have been supplemented by Information Technology Act 2000, which regulate electronic dissemination of hate speech. Section 66-A prohibits publication of material which is grossly offensive despite being known to be false for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will.⁵⁶² The Information Technology (Intermediaries Guidelines) Rule 2011 are available in addition to the Act, empower the government to prohibit hate speech⁵⁶³.

4. ONLINE HATE SPEECH

The internet keeps to be perceived as a place of unregulated anarchy. However this influence is turning into much less and less accurate, as governments are seeking to monitor and rein in our online activities. Initiatives to fight online hate speech threaten to neuter the internet's most innovative attribute – the fact that anyone, anywhere, who has a computer and a connection, can express themselves freely on it. Inside the UK, regulator the Internet Watch Foundation (IWF) advises that if you “see racist content on the internet”, then “the IWF and police will work in partnership with the website hosting service issuer to eliminate the content material as soon as possible”.⁵⁶⁴

⁵⁵⁹ *supra* note 8.

⁵⁶⁰ *Id.*

⁵⁶¹ Criminal Procedure Code Section 124-A, 292, 293, 295A.

⁵⁶² Information Technology Act, 2000.

⁵⁶³ The Information Technology (Intermediaries Guidelines) Rules, 2011.

⁵⁶⁴ “Racial issues”, on the Internet Watch Foundation website, available at; <http://www.iwf.org.uk/howto/page.20.27.htm>.

The presumption here is actually in favour of censorship – the IWF provides that “if you are unsure as to whether the content is legal or not, be on the safe side and report it”.⁵⁶⁵ not only are the authorities increasingly looking for and censoring internet content material that they disapprove of, but the ones sensitive souls to the crimes committed by way of the Nazi regime during the second world war and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by different international courts set up since 1945 by relevant international legal instruments.”⁵⁶⁶

this is an instance in which the proponents of hate speech regulation, while ostensibly guarding against the spectre of totalitarianism, are behaving in a disconcertingly authoritarian way themselves. aside from the fact that Holocaust revisionism can and should be contested with actual arguments, in preference to being censored, the scale and causes of later atrocities such as those in Rwanda or former Yugoslavia are nonetheless subjects for legitimate debate – as is whether the term “genocide” ought to be applied to them. the European government claim to oppose historical revisionism, and yet they stand to enjoy new powers that will entitle them to impose upon us their definitive account of recent history, which we must then accept as true on pain of prosecution.

Remarkably, the regulations on free speech contained in the additional Protocol could have been even more excessive. apparently, “the committee drafting the convention mentioned the possibility of including other content material-related offences”, but “was no longer in a position to reach consensus on the criminalization of such conduct”.²⁴ nevertheless, the additional Protocol as it stands is a extensive impediment to free speech, and an impediment to the procedure of contesting bigoted opinions in free and open debate. As one of the additional Protocol’s more acerbic critics feedback: “Criminalising certain varieties of speech is scientifically confirmed to eliminate the underlying sentiment.

5. THE UNITED STATES SUPREME COURT AND THE FREEDOM OF EXPRESSION

The exceptionally extensive freedom of expression concept that reigns inside the united states nowadays is largely the work of the supreme court. it's far thanks to the court that the right to

⁵⁶⁵“The hotline and the law”, Internet Watch Foundation website, available at: <http://www.iwf.org.uk/public/page.31.htm>.

⁵⁶⁶Explanatory report, Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Council of Europe, 28 January 2003, available at: <http://conventions.coe.int/Treaty/en/Reports/Html/189.htm>.

speech one's mind has been progressively imposed as one of the fundamental values of American society.³ The right encompasses the right to dissent and the right to disagree.¹⁴ these encompassed rights are also linked to the right to safety because they support an guarantee that one will not be bothered for one's statements, even if the recipient isn't always in settlement or believes himself to be hurt or insulted.⁵ by virtue of the fact that it's been made completely by judges, the right to freedom of expression in the u.s. is a pure product of the common law approach.⁶ it is hence a difficult, complex, and technical right-one which has even been compared to the internal revenue Code in its technicality.⁷ however it is also a fascinating right and, in a larger experience, an excellent field of observation in which to uncover the high-quality work by which, decision by decision, the court has deconstructed and reconstructed the law so as to respond to the needs of society. certainly, the court has performed a veritable *tour de force* considering the difference between the preliminary right to the freedom of expression and what it is today. Stone after stone, case after case, the court demolished the old common law institutions that bound freedom of expression in order to reconstruct the law on new and more liberal foundations.

5.1 Principle of the U.S. Law

From its preceding status of residual freedom in common law, freedom of expression has become a fundamental freedom. In different phrases, freedom of expression is henceforth the rule, and its limit the exception contrary to the earlier regulation, which gave public authorities a responsibility to assume the "bad tendency" of oral and written statements, the fundamental character of the freedom of expression obligates them to pay no attention. under the paradigm of a fundamental freedom, the common regulation was overturned and relegated to being the exception. Accordingly, now public authorities are justified in concerning themselves only tangentially with the events or acts related to the exercise of the liberty of expression.

Now that the fundamental character of the right to freedom of expression has been established, it is vital to assess its scope. Despite the two words "no law," which Justice Hugo Black preferred to emphasize with a purpose to give prominence to what he considered the absolute nature of the first amendment,¹ the primary change does not forbid all law of expression. It prohibits best regulation abridging freedom of speech or of the press. Throughout its construction of the freedom of expression doctrine, the court has involved

itself with the question of what kinds of regulation do not abridge the freedom of expression. Currently, the court seems to have provided responses. First, a regulation may abridge the freedom of expression if it is a neutral law-the obligation of absolute neutrality is the founding principle of the new law. Second, a regulation may not contain any ex-ante restrictions.

5.2 Absolute Neutrality of Regulation

The first to have understood that the "fundamental" nature of the freedom of expression required the general public authorities-the legislator, as well as the judge and the jury to disregard the content of expression in order to concentrate only on its results, was Oliver Wendell Holmes. His well-known "clear and present danger" test for evaluating the validity of crimes of sedition can be summarized as follows: to judge the fact of the crime, it is vital to focus on the effects produced by the statements, and not their content. ¹four thus, it is not the content of statements that is essential, but the consequences they produce, and these consequences range according to the circumstances. Holmes emphasised, "it is a question of proximity and degree many things that is probably said in time of peace are this kind of hindrance to its effort that their utterance will not be endured so long as men fight." Time was important before the court aligned itself with this prophetic vision. For a long term, the court accepted that the government could each modify expression on the basis of mere potential and largely hypothetical danger as well as freely dissect the contents of a statement in an effort to predict the consequences that it might produce. It only gave up this approach upon the erosion of the categories of expression that prevailed in the common law. regularly, another approach, characterized by the growing significance that the court accorded to the categories of regulation, imposed itself.

5.3 The Prohibition of Ex Ante Restrictions

Beyond regulations founded on the content of expression, the First Amendment has also long prohibited regulations that contain ex ante restrictions, those that intervene even before the opinion or idea has been expressed. An example would be a regulation that provides for a system of prior restraint or that has a dissuasive effect (chilling effect).

6. HATE SPEECH AND INDIAN CONSTITUTION

Article 19(1)(a) provides right to freedom of speech and expression read with Article 19(2)⁵⁶⁷. The right is not absolute as provided in American Constitution. American approach is extremely liberal in regard to offensive expression unlike of ours. Aforesaid right is subject to reasonable restriction enumerated under Article 19(2) which empowers state to impose reasonable restrictions over freedom of speech and expression on the ground of:

- (a) Security of state
- (b) Friendly relations with foreign states,
- (c) Public order,
- (d) Decency and morality or
- (f) In relation to contempt of court,
- (g) Defamation
- (h) Incitement to an offence,
- (i) In the interest of sovereignty and integrity of India

Therefore, Indian Constitution does not permit hate speech as Incitement to an offence is one of the reasonable restrictions under article 19(2). The term reasonable is quite vague in nature as what can be reasonable for someone the may not be reasonable for other. It is subject to interpretation and has been interpreted by differently. Justice Shashtri in *A.K Gopalan (1950)*⁵⁶⁸ case held and justified the reasonable restrictions;

“Man as rational being, desires to do many things, but in civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has therefore to be limited in order to be effectively possessed.”

⁵⁶⁷INDIAN CONST. art 19, cl2..

⁵⁶⁸*A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

7. HATE SPEECH AND JUDICIAL ATTITUDE

Every objectionable speech cannot be hate speech. To charge a person under hate speech provisions, it is necessary to study the contents of speech very carefully whether the words spoken were mere objectionable or could be brought under definition of hate speech law. To solve this ambiguity or confusion there is judiciary who is empowered to decide and interpret the same.

Indian constitution provides wide discretionary powers to higher and supreme judiciary of our nation respectively. It really becomes difficult to ascertain the cases regarding hate speech because there is very thin line difference between right to free speech and hate speech. Moreover, the law of hate speech is quite complex to interpret and decide whether the case really attract the penal provision or not. It cannot be the choice of the complainant to decide the case if he feel somebody's speech as hate speech. It must fall under the essential ingredient of the sections provided in Indian Penal code to attract penal provision as we have right to freedom of speech and expression under Article 19(1)(a). Balancing rights and responsibility is a big challenge no doubt, as sometimes while exercising our rights we forget our limits where to hold and where to express. If there is any substantial question of law then Supreme Court of India is empowered to interpret the complex provisions of any law and to decide its validity or constitutionality. Judicial approach has remained most of the time in favor of right to freedom of speech and expression.

Apex court had remained in its approach different at different times. Supreme Court in *A.K. Gopalan* justified the restrictions on free speech which are provided under Article 19(2) on utilitarian grounds: some restrictions are essential on freedom so that others may enjoy their freedom also.⁵⁶⁹

The most invoked section of Indian Penal Code is 153-A in the cases related to hate speech. In *Babu Rao Patel v. State of Delhi* Supreme Court had to distinguish speech violative of Section 153-A from a thesis based on historical truth. The article "A tale of two Communalisms" "is undisguised attempt to promote feeling of enmity, ill will, between Hindu and Muslim communities."⁵⁷⁰

⁵⁶⁹*A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

⁵⁷⁰*Babu Rao Patel v. State of Delhi*, (1980) 2 SCC 402 : AIR 1980 SC 763.

In *Virendra v. State of Punjab*, the petitioners challenged the validity of the Punjab special Power (Press) 1956 passed by state legislature when there were serious communal tensions between Hindus and Akali Sikhs over the question of partition of state on linguistic and communal basis. Justice Sudhir Ranjan Das observed “If a news paper is prevented from publishing its own view or views of its correspondents, it is certainly a serious encroachment on valuable and cherished right of freedom of speech and expression⁵⁷¹. In *Ram Manohar Lohia* (1960) public order is necessary for citizens to peacefully pursue their normal course of life⁵⁷².

Mensrea is the most important and essential ingredient of section 295-A and the expression is made without intent, the provision would not be attracted. Supreme Court in case of *Ramjilal Modi* held that “the calculated tendency of this aggravated form of insult should clearly be to disrupt public order”.

In April 2013 a PIL was filed by *PravasiBhalaiSangthan* a voluntary organization seeking guidelines to curb hate speeches by the politicians on the ground that those speeches were violative of statute as well of constitution. Petitioner specified the names of few politicians who are the repeat offenders of hate speech crime viz *Raj Thackery*, *AkbaruddinOwaisi* and *Praveen Togadia*. As a result of that PIL the Apex Court asked the central government as well as the state governments to take penal actions to curb hate speech. The bench was headed by CJI Altams Kabir.

Recently, a PIL was filed by advocate M.L. Sharma in the Supreme Court for seeking an intervention by the court to direct the election Commission to curb hate speech. The apex court dismissed the plea and CJI R.M. Lodha said

“We cannot curtail fundamental rights of people. It is a precious right guaranteed by Constitution. We are a mature democracy; 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”. The Court also said it is a matter of perception, and a statement objectionable to a person might be normal to other person.⁵⁷³

⁵⁷¹*Virendra v. State of Punjab*, AIR 1957 SC 896.

⁵⁷²*Superintendent, Central prison v. Ram Manohar Lohia*, AIR 1960 SC 633.

⁵⁷³Eric Posner, *More on Section of Hate Speech*, RESTRAINING HATE SPEECH (Aug. 29, 2018, 10:04 AM) available at: <http://www.deccanchronical.com/140304/nation-current-affairs/articles/supreme-court-not-restraining-hate-speeches/>.

This view of apex court seems to be encouraging for politicians who are repeat offenders of hate speech crime. We cannot follow the American approach which highly liberal and tolerant towards free and offensive speeches. We are plural diverse society where the maintenance of public order and safety of minority groups is constitutional mandate. Free speech has a purpose, and has been devised for discussion and exchange of ideas. Free speech does not mean from ideology, does not mean saying anything or everything is justified or comes under ambit of freedom of speech and expression.

8. HATE SPEECH AND ROLE OF PRESS

Press has acquired great importance over the years and has achieved the status of fourth pillar of democracy and seems to be the strongest and most powerful among all, which has potential to change the mindset of the people through the power of interpretation. Press can play a very constructive and positive role to pacify the hate speech impact as well by refraining to the political hate speech coverage. What we are experiencing that the press instead of avoiding the coverage of hate speeches they make sensational news headlines which can be a potential threat to public tranquility, public order and public safety. We are experiencing that the press is working as catalyst to develop communal disharmony by making the hate speech as breaking news and by providing hate content the front page of the news paper. Provocative and sensational headlines can be avoided. Everyday there is some negative news is occupying the big space on very front page which can be positively given to some good and constructive news instead of making sensational headlines. If we explore the content of news carefully and match it with reality then we come across the fact that news is found less as fact more a projection work. Media should act to be the investigating authority as well judicial authority to decide the cases of hate speech. We cannot ignore the significance of press as watch dog because it is the only press which has been assigned the job of exposing the real face of all organs of the government.

9. CONCLUSION

The relationship between free speech and hate speech is quite complex. Free speech plays vital role in the growth any democracy, as free speech facilitates exchange of ideas, which can help political decision making. Free speech is necessary for enjoyment of personal liberty, but now a days hate speech has become a tool to get publicity and posing a complex threat to the right to free speech.

History of acquittal and conviction under hate speech law reveals that the people who were arrested, tried, convicted and acquitted were commoners, means middle class, educated cartoonists, authors, publishers not the politicians. This is an irony to see the enforcement of hate speech laws against a commoner and against a politician. Indian Constitution guarantees equality before law under Article 14, therefore there should not be any discrimination in execution of penal laws. We hardly witness conviction of any political leader under hate speech law. If it could have been made possible by prosecution then we would have definitely observed less hate speeches. Such kind of non observance or improper enforcement of laws promotes more hate speeches and somewhere it adversely affects receptive young minds. Nonstop intended hate speeches are potential threat to the smooth growth of political democracy. As educated class is well aware of their vested interest in hate speeches, but that is not enough to avoid the effect of hate speech. We as responsible citizens of our nation are under duty which has been cast by Indian Constitution to report the crime of hate speech and compel the enforcement authorities to take appropriate action as per exiting law.

We should not abandon hope of reform. We should not cease to work for getting rid our public life of hate speech. Whenever the communal atmosphere is created by hate speeches, the law empowers state to deal with it effectively and bring the offenders of hate speech to book and punish them. In reality it is not the inadequacy of the laws regarding hate speech but there is lack of political will and the administrative resolve which explains why the law of hate speech is a dead letter for the politicians.⁵⁷⁴ Apart from penal law and other set of laws it is the duty of every right-minded citizen of India to discourage and condemn the people taking help of hate speech for their selfish and political ends.

⁵⁷⁴A.G. Noorani, Hate of Speech and free speech, Economic political weekly, November 14, 1992.

THE GOOD, THE BAD AND THE MORALLY PATERNALISTIC: THE JUDICIARY ON FREEDOM
OF SPEECH AND EXPRESSION IN INDIA

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1. INTRODUCTION

Unhampered flow of words, liberty to express one's ideas and opinions without any kind of interference are the precursors of any democratic nation and the same has been guaranteed to the Indian citizens via Article 19 (1) (a) of the Indian Constitution⁵⁷⁵ (hereinafter Constitution) which includes right to express one's view and opinions at any issue through any medium. Freedom of speech and expression is the foremost step for attaining liberty and it gives protection to all other liberties guaranteed to a person. Freedom of speech and expression guarantees right to conduct free discussions and to form public opinions on any social, political or economic matter.

It is but a common sense that a person can have either a positive or a negative opinion about any issue. As a result, there is presence of assenting as well as dissenting views in a society. Freedom of speech and expression give us the right to express difference of opinion on an issue for a Democracy without any dissent is meaningless. Infact, the progress of any nation depends upon the history of informed dissent.⁵⁷⁶ A citizen has right to dissent so long as such dissent does not lead to a breakdown of any constitutional mechanism. In order to prevent this, these rights have not been made absolute and are subject to reasonable restrictions mentioned under Article 19(2) of the Constitution. Thus, *reasonable restrictions* on the exercise of freedom of speech and expression can be put by the State in the interests of the security of the State, friendly relations with State, public order, morality, decency, sovereignty and integrity of India, or in relation to contempt of court, defamation or incitement to an offence.⁵⁷⁷

Internationally, the freedom of speech and expression is considered as a core human right which is guaranteed under various international Conventions, treaties and agreements. This

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⁵⁷⁵ INDIAN CONST. art 19, cl.1(a).

⁵⁷⁶ Sanjay Hegde, *No freedom without dissent*, THE HINDU, (Oct 26, 2018, 9:04 AM), available at: <https://www.thehindu.com/opinion/lead/No-freedom-without-dissent/article14135235.ece>

⁵⁷⁷ INDIAN CONST. art 19, cl.2.

includes, most notably, Article 19 of Universal Declaration of Human Rights (UDHR) which was adopted by the General Assembly of United Nations in 1948.⁵⁷⁸ It provides right to freedom of opinion and expression and it includes freedom to hold opinions without any interference and to seek, receive and impart information and any ideas through any media.⁵⁷⁹ Although the guarantee of freedom of expression under UDHR is not legally binding on states, yet it is widely regarded as having acquired legal force as customary international law.⁵⁸⁰

Similar rights have been guaranteed under the International Covenant on Civil and Political Rights (ICCPR)⁵⁸¹ subject to two key categories of restrictions: (i) Respect of rights or reputations of others; (ii) Protection of national security or of public order, or of public health or morals.⁵⁸² These restrictions must be provided by law and are necessary. There are certain other regional human rights treaties which also protect freedom of speech or expression: Article 9 of African Charter on Human and Peoples' Right⁵⁸³, Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁸⁴, Article 13 of American Conventions on Human Rights⁵⁸⁵, ASEAN Human Rights Declaration⁵⁸⁶, etc., to name a few.

The importance of free speech and expression has been increasing with the growth of mass media, book publications, radio broadcasting and cinema. New kinds of challenges have been put forth (for example, preservation of Indian culture and values) which pose a question on defining the limits of the freedom of speech and expression. Obscenity is one of the greatest challenges that faces the basic human right of freedom of speech and expression in India today. What is the thin line that demarcates the freedom of speech and expression from the

⁵⁷⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁵⁷⁹ United Nations, *Universal Declaration of Human Rights*, UNITED NATIONS, (Oct. 26, 2018, 9:40 AM), available at: <http://www.un.org/en/universal-declaration-human-rights/>.

⁵⁸⁰ Article 19 Global Campaign for Free Expression, *Memorandum on Croatian Criminal Libel Provisions*, XIX ARTICLE 19 GLOBAL CAMPAIGN FOR FREE EXPRESSION (Oct. 26, 2018, 9:50 AM), <http://www.refworld.org/pd/fid/4756cfa20.pdf>.

⁵⁸¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

⁵⁸² Ibid.

⁵⁸³ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), Jun. 27, 1981, 1520 U.N.T.S. 217.

⁵⁸⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5.

⁵⁸⁵ Organisation of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁵⁸⁶ Nicholas Doyle, *The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-building and Standard-setting*, 63 INT'L & COMP. L.Q., 67-101 (2014).

reasonable restrictions, particularly obscenity? When these questions are asked with regards to obscene materials, we face innumerable challenges due to the subjectivity attached to the term ‘obscene’. There has been no consensus on what exactly constitutes an obscene material or act. Left with puritanical and colonial Penal Code with decades old American test to determine what constitutes an obscene material, the study of the same has become very relevant in contemporary India. What was believed to be obscene years ago can’t necessarily be categorised obscene today. Therefore, there is a growing need to understand what constitutes obscenity in the Indian context and the laws governing obscenity.

2. LEGAL PROVISIONS ON OBSCENITY IN INDIA

There are numerous legal provisions that function as a restriction on free speech, particularly with respect to obscenity. However, Article 19(2) of the Constitution and Section 292 of Indian Penal Code (hereinafter IPC)⁵⁸⁷ are the primary ones. All other provisions derive the meaning of obscenity from these two only. Article 19 (1) (a) of the Constitution guarantees to all its citizens the right to ‘freedom of speech and expression’. This right is subject to reasonable restrictions being imposed under Article 19(2).⁵⁸⁸ Article 19(2) mentions decency as one of the reasonable restrictions on the exercise of the freedom of speech and expression. The word “indecent” practically conveys the same meaning as that of “obscenity”.⁵⁸⁹ This kind of interchangeability and relativity of these concepts has given birth to much conundrum.

Section 292 of IPC defines an obscene act and prescribes punishment for the commission of the same. It criminalizes the publication and dissemination of any book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object which is *lascivious or appeals to the prurient interest* or if its effect, taken as a whole *tends to deprave and corrupt persons* who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.⁵⁹⁰ Thus, there must be two things proved under Section 292, namely, (i) the content is obscene; and (ii) the accused has sold, distributed, imported, printed or advertised the obscene matter.⁵⁹¹ However, under Section 292, certain publications

⁵⁸⁷ Indian Penal Code 1860 § 292.

⁵⁸⁸ INDIAN CONST. art 19, cl.2.

⁵⁸⁹ Minattur J., *Obscenity: In Freedom of the Press in India*, SPRINGER, DORDRECHT (Oct. 25, 2018, 4:04 PM).

⁵⁹⁰ Indian Penal Code 1860 § 292, cl. 1.

⁵⁹¹ P S A PILLAI, CRIMINAL LAW 557 (13 ed. Lexis Nexis 2017).

or pictures which *per se* appear to be obscene but are justified because (a) it is in the interest of literature, science, art, learning or other objects of general concern, or (b) is kept or used *bonafide* for the religious purposes, are exempted.⁵⁹²

Similarly, Section 67 of Information Technology Act, 2000⁵⁹³, criminalizes publishing or transmitting of any obscene material in electronic form. Section 67 A penalizes the publication or transmission of any material that contains sexually explicit act in electronic form.⁵⁹⁴ The same exceptions have been carved out from both the Sections that are mentioned under Section 292 of IPC.⁵⁹⁵ Furthermore, the Indecent Representation of Women (Prohibition) Act, 1986⁵⁹⁶ is also one of the statutes that talks about obscenity. It criminalizes and prohibits indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner.⁵⁹⁷ The definition of indecent representation of women is given in the Act itself as, “depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals”.⁵⁹⁸ Same exceptions of Section 292 can be used in application of this Act as well.⁵⁹⁹

Likewise, there are some other provisions⁶⁰⁰ also which discuss about an obscene act. It is pertinent to note that all the above-mentioned provisions merely criminalise the dissemination and publication of a material that is obscene. However, no provision or statute has given an exhaustive definition of what shall constitute ‘obscene’. In the absence of a proper definition of obscenity, a lot of responsibility lies on the Courts of the country, and unfortunately this onus has lead to a dangerous grandstanding of the Apex Court of the country.

⁵⁹² Indian Penal Code 1860 § 292, cl. 1.

⁵⁹³ Information Technology Act, 2000§ 67.

⁵⁹⁴ Information Technology Act, 2000§ 67 A.

⁵⁹⁵ Information Technology Act, 2000§ 67 B.

⁵⁹⁶ Indecent Representation of Women (Prohibition) Act, 1986.

⁵⁹⁷ Indecent Representation of Women (Prohibition) Act, 1986 § 3 - §4.

⁵⁹⁸ Indecent Representation of Women (Prohibition) Act, 1986§ 2, cl. 6.

⁵⁹⁹ Indecent Representation of Women (Prohibition) Act, 1986 § 4.

⁶⁰⁰ § 20 of the Post Office Act of 1898; The Customs Act, 1962; The Cinematograph Act, 1952; § 95 of Code of Criminal Procedure.

3. TRENDS IN JUDICIAL DICTA

*“If liberty means anything at all, it means the right to tell people what they do not want to hear.”*⁶⁰¹

-George Orwell

Indians, by their very nature, are often categorised as a community of persons who can get offended by almost anything and everything.⁶⁰² What George Orwell could decipher back in 1945, still remains a mystery to our country as creative freedom is largely at the mercy of the Government. Judiciary of the country should have been the protector of this Freedom but unfortunately, the trend in judicial dicta paint a gloomy picture instead.

The first landmark judgement in the arena of suppression of Freedom of Speech and Expression with regards to obscenity was the case of *Ranjeet D. Udeshi v. State of Maharashtra*⁶⁰³ when the Apex Court of the country was given the task of adjudging what constitutes ‘obscenity’ in the Indian context. In the instant case, an unexpurgated version of the banned book Lady Chatterley’s Lover was being sold at a book stall and the seller was prosecuted for the same under Section 292 of IPC.⁶⁰⁴ The seller had primarily taken the defense of Section 292 being violative of Right to Freedom of speech and expression. This case not only lead the Court to uphold the constitutional validity of said Section but also introduce the infamous *Hicklin Test*⁶⁰⁵ of Cockburn C.J. to the nation. Having gone into the common-law history of the offence, Hidayatullah J. settled for the test that defines obscene as something that would:

“... deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . it is quite certain that it would suggest to

⁶⁰¹George Orwell, *The freedom of the Press*, N.Y. TIMES, Oct 26, 2018, 9:30 AM), <https://www.nytimes.com/1972/10/08/archives/the-freedom-of-the-press-orwell.html>.

⁶⁰²Kalpana Sharma, *Republic of the Offended*, THE HINDU (Oct 25, 2018, 5: 20 AM), available at: https://www.thehindu.com/opinion/columns/Kalpana_Sharma/republic-of-the-offended/article4365249.ece

⁶⁰³*Ranjeet D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

⁶⁰⁴Indian Penal Code 1860 § 292, cl. 1.

⁶⁰⁵*Regina v Hicklin*, [1868] LR 3 QB 360.

the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.”⁶⁰⁶

The Court, acting on its own whims, read the word “public” appearing in 19(2) to qualify not just order but also decency and morality without any rationale and thus invented the exceptions of “public decency” and “public morality” to be able to suit the idea of community mores, that Hicklin also proposes. There is no proof to suggest how Court arrived at this conclusion and there’s an equal possibility that the Framers of the Constitution would have meant an individual morality and not a public one in 19(2). Furthermore, this test, enunciated in *Regina v. Hicklin*⁶⁰⁷ in 1868, is problematic at dual levels. Firstly, it defines obscenity from the point of view of those, whose hands the material is likely to fall and secondly, the alleged obscene content is to be viewed in isolation and not in the entire context in which the author/artist has used it. Despite this kind of subjectivity manifested in the judgement and it being subject to severe criticism⁶⁰⁸ by jurists, the test continued to be the cornerstone in our country for several upcoming years.

It is noteworthy that applying the Hicklin Test, the Hon’ble Court did uphold artistic freedom in some of the cases⁶⁰⁹ that came up. However, a new trend started growing years later. In *Bobby Art International*⁶¹⁰, a ban was sought on the movie Bandit Queen on the grounds that it depicted brutal sexual assaults and rape of a woman who later went on to become a dreaded dacoit. The Supreme Court struck down the ban on the movie upholding that it would be wrong to conflate sex as essentially obscene without keeping in purview the idea that the scene was trying to portray. Similarly, in *D.I.G Doordarshan v. Anand Patwardhan*⁶¹¹ where the TV Channel had refused to air a documentary parts of which showcased what it categorised as ‘communal violence’, the Court refused banning, upholding that a single scene cannot be viewed in isolation keeping aside the message that the Documentary aims to put forth. This is in stark contrast to the perspective of viewing alleged content in isolation, as

⁶⁰⁶*Ranjeet D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

⁶⁰⁷*Regina v Hicklin*, [1868] LR 3 QB 360.

⁶⁰⁸Abhinav Chandrachud, *Double Talk on Free Speech*, THE HINDU (Oct 25, 2018, 10:45 AM), available at: <https://www.thehindu.com/opinion/op-ed/Double-talk-on-free-speech/article16080557.ece>.

⁶⁰⁹*Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, A.I.R. 1970 S.C. 1390, *K.A. Abbas v. Union of India and Anr.*, AIR 1971 SC 481.

⁶¹⁰*Bombay International v. Om Pal Singh*, AIR 1996 SC 1846.

⁶¹¹*D.I.G. Doordarshan v. Anand Patwardhan*, AIR 2006 SC 3346.

done in *Udeshi*⁶¹² and thus highlights a fundamental shift in the ideology of the Court. The final nail in the coffin went down with the much-celebrated judgement of *Aveek Sarkar v. State of West Bengal*.⁶¹³

This judgement is particularly significant because it was in this that the Court did away with the Hicklin test and clearly disapproved of its own decision in *Ranjit D. Udeshi*.⁶¹⁴ The Court, after citing several examples from different countries adopted a newer, much liberal approach which it called the ‘*Community Standards Test*’, making use of the case of *Roth v. United States*.⁶¹⁵ The cover page of a German Sports Magazine having worldwide circulation had featured Tennis Player Boris Becker posing nude, covering the breasts of his dark skinned fiancée Barbara to show the player’s protest against the practice of Apartheid. This photograph was reproduced in multiple Indian magazines and newspapers. A lawyer from Kolkata approached the Court on the ground that his experience sufficed to conclude that the picture had the capability to corrupt the minds of those whose hands it was likely to fall.⁶¹⁶ The Court caught this opportunity to finally terminate the archaic Hicklin Test and upheld that the picture of a naked woman isn’t necessarily obscene and will have to be adjudged in the background of the dominant theme of its portrayal. It was upheld that only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the *point of view of an average person*, by applying *contemporary community standards*.⁶¹⁷

While the Community Standards Test is seen as a huge leap and ground-breaking approach keeping in mind the previous morally paternalistic perspective of the Courts, a careful dissection of the judgement brings forth few inherent problems. Foremost, the Court completely ignored the fact that the Americans had themselves done one away with the Roth Test years ago, replacing it with *Miller Test*⁶¹⁸ which doesn’t even find a mention in the judgement. More importantly though, the Community Standards Test is only an incomplete, vaguely bowdlerised version of the original Roth Test which had a three-pronged approach

⁶¹²*Ranjeet D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

⁶¹³*Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

⁶¹⁴*Ibid.*

⁶¹⁵*Roth v. United States*, 354 U.S. 476 (1957).

⁶¹⁶*Aveek Sarkar v. State of West Bengal*, (2014) 4 S.C.C. 257.

⁶¹⁷*Ibid.*

⁶¹⁸*Miller v. California*, 413 US 15 (1973).

out of which community standards test is only the first prong.⁶¹⁹ The Roth test was, in effect, a proxy rule for identifying valueless, and only valueless, sexually-oriented material.⁶²⁰ This step forward, was hence, only a step partially taken.

Henceforth, while India continued to receive applause for its forward-looking judgements in cases like *Shreya Singhal v. Union of India*⁶²¹, there seems to be a more treacherous monster lurking around the freedom of speech and expression recently – escalating judicial activism by the Courts of this country.

*Devidas Tujlapurkar v. State of Maharashtra*⁶²² deserves a special mention in so far as retd. Chief Justice Dipak Mishra essentially gave birth to a whole new exception of ‘historically respected personalities’ to the constitutionally recognised Freedom of Speech and Expression in this rather vociferous judgment. The case involved the issue of banning of a poem on Mahatma Gandhi titled ‘Gandhi Mala Bhetala’ which was originally meant for private circulation. When brought before the Court on grounds of obscenity, Justice Mishra observed that as the issue was about a historically respectable personality, a concept of ‘degree of obscenity’ had to be applied.⁶²³ This newly introduced concept is not rooted in any of the constitutional provisions and does not find mention in any of the foreign judgements either, and unfortunately, isn’t even discussed at length within the case. The Court has essentially imposed its own idea of a person as historically respectable on the society and further bowdlerised an already incompletely adopted version of the Roth Test to arrive at this conclusion.

While the trends in judicial dicta already discussed are disturbing enough, the Hon’ble Supreme Court of this country forgot all its barriers when it recently sat down to adjudge whether or not a book titled ‘Meesha’ authored by S. Harish could be banned⁶²⁴. The petitioners were seeking this ban on the grounds that it was obscene in so far as it contained a line alleged to be disrespectful to the religious sentiments of many by giving a lascivious touch to the women going to temple well dressed. The Court applied the community standards test, read the line in the background of the entire book, found it rather harmless and

⁶¹⁹Gautam Bhatia, “Historically respectable personalities”: The Supreme Court invents a new exception to free speech, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Oct. 25, 2018, 01:44 PM), available at: <https://indconlawphil.wordpress.com/?s=historically+respectable+personalities&search=Go>.

⁶²⁰Chris Hunt, *Community Standards in Obscenity Adjudication*, 66(2) CAL. L. REV. 1277, 1281 (1978).

⁶²¹*Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

⁶²²*Devidas Ramchandra Tujlapurkar v. State of Maharashtra*, AIR 2015 SC 2612.

⁶²³*Supra* note 44.

⁶²⁴*N. Radhakrishnan @ Radhakrishnan Varenickal v. Union of India And Ors.*, WP (CIVIL) No. 904 of 2018, (Dec. 05, 2018).

upheld the Right to Freedom of Speech and Expression of the author.⁶²⁵ The Court gathered hearty appraisal for its pro-free speech approach keeping aside the barriers of religion⁶²⁶ except the Court did something it was not entitled to, in the first place.⁶²⁷ It is very important to note that this was the first time in the history of free speech laws in republic India that the Court was asked to ban a book per se. A minute loophole in the understanding is that the Courts are not empowered to ban, as per the existing laws of the country, they can only review a ban which the Executive is entitled to place. The language of 19(2) clearly states that it is only by 'procedure established by law' that a ban could be sought and with the perusal of Article 13, a judgement of the Supreme Court is not 'law' within the Constitution per se. This disregard for jurisdiction and separation of powers is not only outrageous and noxious but also opens floodgates to thousands of frivolous litigations mushrooming across the country asking to ban books that anybody or everybody finds obscene⁶²⁸. Essentially, the Court has given to itself the power that Constitution hadn't handed over to it.

4. ANALYSIS OF THE VISIBLE TREND

Beginning from Ranjit D. Udeshi to the latest Meesha judgement, there appears a rather disheartening trend in the way jurisprudence on this subject has developed. The Courts have shown disregard to principles of statutory interpretation and separation of powers among others to impose their own morality on the Country. While Judicial Activism has played important role in the enforcement of justice at various points in the country⁶²⁹, this kind of upsurge in judicial ascendancy is not to be appreciated. Separation of Powers remains a part of the Basic Structure of the Constitution⁶³⁰ and is therefore something that cannot be overstepped, ignored or over-reached, not even by the Apex Court of the Country.

⁶²⁵Ibid.

⁶²⁶ Ashish Tripathi, *Culture of banning books impacted free flow of ideas: SC*, DECCAN HERALD (Oct. 25, 2018, 03:12 PM), available at: <https://www.deccanherald.com/national/sc-refuses-ban-novel-meesha-685120.html>.

⁶²⁷ Gautam Bhatia, *The Meesha Judgment: Book Bans and the Supreme Court's Dangerous Grandstanding*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Oct. 25, 2018, 04:47 PM), available at: <https://indconlawphil.wordpress.com/2018/09/05/the-meesha-judgment-book-bans-and-the-supreme-courts-dangerous-grandstanding/>.

⁶²⁸ Gautam Bhatia, *The Meesha Judgment: Book Bans and the Supreme Court's Dangerous Grandstanding*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Oct. 26, 2018, 01:38 PM), available at: <https://indconlawphil.wordpress.com/2018/09/05/the-meesha-judgment-book-bans-and-the-supreme-courts-dangerous-grandstanding/>.

⁶²⁹ Pratiyusha Kar, *Judicial Activism in India*, 3(3) JOURNAL CONTEMPORARY ISSUES OF LAW 4-10 (2017).

⁶³⁰ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

In *Udeshi* when Hidayatullah J. spoke for the Hicklin Test, the reasoning resorted to is squarely unsatisfactory. The principle of *expressio unius est exclusio alterius*⁶³¹ when read along with the exceptions given in 19(6), particularly public interest, would clearly reveal that the Framers had never intended public morality and public decency to be exceptions to the freedom of speech and expression under 19(2). When the Court finally did realise its mistake more than fifty years later, they did not do much to correct it. The Community Standards Test was introduced with an incomplete understanding of the Roth Test which was its essential basis. The other two prongs of this three-pronged test were as important as the first one to be able to give full effect to the freedom of speech and expression while doing away with completely valueless creations. The Miller Test, which has already replaced the Roth Test in America is a much liberalised version of the Roth Test and has been developed by the US Supreme Court keeping in mind the needs of the present day while India still manages with the age old, semi-bowdlerised Roth Test. Moving backwards from the developments already done, the Court recently resorted to inventing an altogether new exception of ‘historically respected personalities’ by thrusting its own idea of Mahatma Gandhi being a historically respectable person on the entire India.

It is important to note that dissent is the soul of democracy and the very essence of freedom of speech lies in allowing others to say what is not very pleasing to oneself. It is the job of free speech to strike at the very heart of already crystallised notions of the society and to make space for newer, ground-breaking ideas. Judgements like *Devidas Tujlapurkar*⁶³² are a blot in the sense that the Court cannot compel others to respect who it finds respectable. The society cannot be constrained to become a reflection of the beliefs and thoughts of the judges presiding various cases. Similarly, while allowing petitions like *N. Radhakrishnan*⁶³³, the Court cannot forget that it is the Constitution that is supreme in the country and Rule of law pervades all. At a time when the nation already faces bottlenecks in the judicial system because of close to 27 million pending litigations⁶³⁴, judgements like *Meesha* only add fuel to fire and reek of errors that the Apex Court of the Country cannot be allowed to make. If Courts of this country took in their hands the job of enforcing and inventing restrictions on

⁶³¹Clifton Williams, “*Expressio Unius Est Exclusio Alterius*”, 15 Marq. L. Rev. 191 (1931).

⁶³²*Devidas Ramchandra Tujlapurkar v. State of Maharashtra*, AIR 2015 SC 2612.

⁶³³*N. Radhakrishnan @ Radhakrishnan Varenickal v. Union of India And Ors.*, WP (CIVIL) No. 904 of 2018, (Dec. 05, 2018).

⁶³⁴*Summary Report of India As On Date: -- 28/10/2018*, NATIONAL JUDICIAL DATA GRID (Oct. 28, 2018, 11:53 PM), available at: http://njdg.ecourts.gov.in/njdg_public/main.php.

free speech that the Constitution does not speak of, a new era of distress and terror would arise.

5. SUGGESTIONS AND CONCLUSION

The *Doctrine of Living Constitutionalism* advocates that the Constitution is an organic document which must be interpreted dynamically with the changing needs of the society.⁶³⁵ This Doctrine also found mention by the Constitution Bench that upheld the Right to Privacy in the Puttaswamy⁶³⁶ judgement recently. It is high time that the judiciary, keeping in mind the shortcomings of this doctrine, revisited its earlier Freedom of Speech and Expression judgments to be able to truly uphold this Fundamental and Basic Human Right in the nation by introducing the Miller Test to India. The widely accepted Miller Test of categorizing obscene contents has been stated as:

“a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

*(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”*⁶³⁷

Part (a) is simply the Roth test slightly restated. Part (b) contains three hurdles to an ultimate finding of obscenity. First, the "patently offensive" requirement. Second, the material must portray "'hard-core' sexual conduct." Third, the prosecution must occur under a statute that specifies which hardcore conduct may not be depicted or described and that provides sufficient detail, either by statutory wording or prior judicial construction, to give fair warning to primary actors. Finally, part (c) talks about a "serious value" standard.⁶³⁸

The Miller Test is preferable to the Community Standards Test because of the problem of vagueness manifested in the current approach. This problem can be cut down by sharpening

⁶³⁵ James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1178 (2011).

⁶³⁶ *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

⁶³⁷ *Miller v. California*, 413 US 15 (1973).

⁶³⁸ *Supra* note 45 at 1284.

focus on the other two parts of the Miller which is a much more liberal and objective approach. It does away with the idea of banning anything and everything sexual and also does not completely leave it to the whims of the Judiciary by introducing the concept of *serious value*. Henceforth, Miller Test is the current need of the Indian society.

Articles 14, 19 and 21 of the Constitution of India have been beautifully christened as the Holy Trinity. These form the basis of the Democracy in India and are quintessential for its sustenance – they stand as a wall of hope between the democratic Indian state and its conversion to a majoritarian anarchy. They are the wheels on which the chariot of individuality rests and forms the nucleus of the modern society. The modern world is one where individuality finds more importance than any other trait in the society. A recent judgement of the Constitution Bench in the case of *Navtej Singh Johar and Ors. v. Union of India and Ors.*⁶³⁹ is being hailed as a “vision statement” because of its forward-thinking rationale which began with the ret. CJ Dipak Mishra quoting a German philosopher as - “I am what I am so take me as I am”. This is the very essence of the Fundamental Right to Freedom of Speech and Expression.

The Freedom of speech is not just the right to speak what one wishes to, it is in fact Democracy at work. It makes space for ideas that not everyone is comfortable talking about and celebrates individuality. As European Court of Human Rights has stated, this right is also the right to offend, shock and disturb⁶⁴⁰. No authority in the country can take away what the Constitution has promised to the citizens of India as denial of the same would put basic human rights of the citizens in peril. It is imperative for all of us to make errors, but what is more important is that these errors are learnt from. If the Courts of this country have mistaken in past by over-intervention, there is always window for a larger Bench to correct those and establish a higher watermark, and the authors are hopeful for the same.

⁶³⁹*Navtej Singh Johar and Ors. v. Union of India and Ors.*, W.P. (Cr.) 76 of 2016. (Sept. 06, 2018).

⁶⁴⁰*Handyside v. United Kingdom*, (1976) ECHR 5.

**MANDATORILY STANDING DURING NATIONAL ANTHEM – JEOPARDISING FREEDOM OF
SPEECH AND EXPRESSION**

*PRIYA AGARWAL

1. INTRODUCTION

Freedom is the core basis to live a dignified life. In the contemporary world, no law can govern the freedom guaranteed to people or citizens. Therefore, every person has the right to liberty.⁶⁴¹ Merely guaranteeing the Liberty does not necessarily means enjoyment of liberty. This is the paradox of liberty. Individuals continue discussing liberty as their rights, however, they might not be able to relish the same. An imperative facet of enjoyment of liberty is Freedom of Speech and Expression which is guaranteed to Citizens of India by the Indian Constitution.

Supreme Court⁶⁴² has recently in January 2018, modified its interim order over the National Anthem guidelines making it directory to play National Anthem in cinema hall but compulsory to pay respect to National Anthem by standing if played in the cinema hall and asked Central government to ‘take a call’. In the contemporary times, where Supreme Court has gone too far in interpreting the Right to Freedom of Speech and Expression, it seems an oddity of freedom that an individual cannot express the respect by its own way. It will certainly affect the liberty of an individual, particularly Freedom of Speech and Expression.

The paper aims at analyzing the Freedom of Speech and Expression in contemporary times as to whether in the disguise of reasonable restriction, the enjoyment of right is being suppressed. The same is examined keeping in view the compulsorily standing on the playing of the National Anthem. The first part of the paper deals with the background of the case where the Supreme Court makes it compulsory to pay respect to National Anthem. The second part of the paper deals with the analyzing as to how the Freedom of Speech and Expression is being curtailed in contemporary times by Supreme Court interpretation in this case, violating the autonomy and individuality of an individual. The third part of the paper makes a comparative study of the Freedom of Speech and Expression with respect to National Anthem in the USA.

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⁶⁴¹INDIA CONST. art. 21.

⁶⁴²*Shyam Narayan Chouksey v. Union of India*, (2018) 2 S.C.C. 574.

2. NATIONAL ANTHEM CASE

Shyam Narayan Chouksey stood in the cinema hall where the National Anthem in the scene of a movie *Kabhi Khushi Kabhi Gum* was played while others were still sitting. People even complaint him for obstructing their views. He, therefore, filed a petition in Madhya Pradesh Court against the movie for depicting the National Anthem in the poor state. High Court in the case *Shyam Narayan Chouksey v. Union of India*,⁶⁴³ directed the producer to pay compensation to the petitioner and ordered to withdraw the movie from theater unless that scene is deleted from the movie.

Karan Johar, the director of the movie, approached Supreme Court where Supreme Court overrules the High Court Decision satisfying that in view of the instructions issued by the Government of India that the National Anthem which is exhibited in the course of exhibition of newsreel or documentary or in a film, the audience is not expected to stand as the same interrupts the exhibition of the film and would create disorder and confusion, rather than add to the dignity of the National Anthem.⁶⁴⁴ Shyam Narayan filed a review petition which the court disposed keeping open the question of law and decided to deal with it in an appropriate case. It was consequently entertained in 2016.

2.1 Interim Order

SC on 30 Nov 2016, passed an interim order providing the following rules,⁶⁴⁵

- There shall be no commercial exploitation to give financial advantage or any kind of benefit.
- There shall not be dramatization of the National Anthem and it should not be included as a part of any variety show. It is because when the National Anthem is sung or played it is imperative on the part of every one present to show due respect and honour.

⁶⁴³ *Shyam Narayan Chouksey v. Union of India*, A.I.R. 2003 M.P. 233.

⁶⁴⁴ *Karan Johar v. Union of India*, (2004) 5 S.C.C. 127.

⁶⁴⁵ *Shyam Narayan Chouksey v. Union of India*, 2016 S.C.C OnLine S.C. 1411.

- National Anthem or a part of it shall not be printed on any object and also never be displayed in such a manner at such places which may be disgraceful to its status and tantamount to disrespect. It is because when the National Anthem is sung, the concept of protocol associated with it has its inherent roots in National identity, National integrity and Constitutional Patriotism.
- All the cinema halls in India shall play the National Anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the National Anthem.
- Prior to the National Anthem is played or sung in the cinema hall on the screen, the entry and exit doors shall remain closed so that no one can create any kind of disturbance which will amount to disrespect to the National Anthem. After the National Anthem is played or sung, the doors can be opened.
- When the National Anthem shall be played in the Cinema Halls, it shall be with the National Flag on the screen.
- The abridge version of the National Anthem made by anyone for whatever reason shall not be played or displayed.

Further, Supreme Court making amendment in the order, said that when the National Anthem is played during film or documentary nobody is compelled to stand and extend the exemption of certain disabled person. On 23rd October 2017, the apex court gave the discretion to Central Government to 'take a call' on the issue independently of the interim order.

2.2 Judgment

Supreme Court held that the Committee appointed by the Union government shall submit its recommendations to the competent authority and modify the order passed on 30th November 2016 to the extent that playing of the National Anthem prior to the screening of feature films in cinema halls is not mandatory, but optional or directory.⁶⁴⁶ It further held that citizens or

⁶⁴⁶*Shyam Narayan Chouksey v. Union of India*, (2018) 2 S.C.C. 574.

persons are bound to show respect as required under executive orders relating to the National Anthem of India and the prevailing law, whenever it is played or sung on specified occasions.⁶⁴⁷

In the backdrop of this decision, the final call of the government is still awaited. The next part analyzes how this compulsion of showing respect curtailed the fundamental freedom of speech and expression.

3. ANALYSIS

India is a democratic country. Dissent is necessitous for the growth of genuine advancement and a matured democracy.⁶⁴⁸ Without freedom of dissent, it is useless to call democracy a democracy. Liberty of thought and expression to all citizens is guaranteed by Preamble of Indian Constitution. A dissent may be either implied or expressed in the conduct or speech or thought of an individual which is essentially part of the personal Liberty. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and impart information and ideas through any media regardless of frontiers.⁶⁴⁹ It was only by freedom of speech, freedom to think and freedom to dissent that human progress was possible.⁶⁵⁰ Thus, Liberty and Autonomy is at the centre of human rights. It is only in the case of fulfillment of certain reasonable restriction under article 19(2) that Right to Freedom of Speech and Expression can be curtailed. Compelling by the Judiciary to stand for paying respect for National Anthem amount to curbing of the freedom to dissent as the respect for National Anthem cannot be inculcated by sanction.

The direction of mandatorily paying respect to National Anthem by standing implies the suppression of the expression of an individual. Stuart Mill in his book *On Liberty* expressed, “The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”⁶⁵¹ It further robs the autonomy of an individual which is inherent in liberty and plays a significant role in freely exercising the Right to Freedom of Speech and Expression. The phrase “personal liberty” includes within it the aspects of

⁶⁴⁷*ibid.*

⁶⁴⁸*Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221.

⁶⁴⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁶⁵⁰*Govt. of A.P. v. P. Laxmi Devi*, (2008) 4 S.C.C. 720.

⁶⁵¹ JOHN STUART MILL & A.D. LINDSAY (ED.), *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 79 (1964).

autonomy, self-determination and personhood.⁶⁵² Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.⁶⁵³ Therefore, expressing patriotism or not is an individual's choice. Guaranteeing the same, it should not be dictated by any other body or being. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.⁶⁵⁴

The existing law for preventing the insult to National Anthem is Prevention of Insults to National Honor Act, which neither make sitting during National Anthem as a crime nor penalize any person to stand for the anthem but whoever intentionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing.⁶⁵⁵ The constitutional duty under article 51A (a) provides the duty of citizens to respect the National Anthem. Neither of the law qualifies that while sitting National Anthem is disrespected and standing during National Anthem signifies respect. Furthermore, why is there any explicit need to show respect to National Anthem even if one does not show clear disrespect?

Whether an individual wants to stand to pay respect to National Anthem or not, is his individual autonomy. The autonomous choice and freedom of speech and expression provide freedom to pay respect towards National Anthem by any means rather than just standing. It is the absurdity of liberty that on the one hand, an individual has guaranteed right to freedom of expression to pay respect towards National Anthem and on the other hand, an individual has no choice to express the respect rather than just standing.

The order prohibits the use of National Anthem in regards to commercial activities and restricts it from deriving any financial advantage. But what purely 'commercial use' means. One distinguishable use is in the films, televisions, advertisement etc. but this is not the exploitation of National Anthem in the strict sense and implying that no film and drama can have National Anthem as a part of the show lead to unreasonable restriction on the Freedom of Speech and Expression. The producer cannot express his Freedom of Speech and Expression exhibiting patriotism through the film or drama. Thus, Supreme Court who

⁶⁵² *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1.

⁶⁵³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶⁵⁴ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁶⁵⁵ The Prevention of Insults to National Honour Act, 1971, No. 69, Acts of Parliament, 1971, § 3.

wanted to inculcate the feeling of patriotism limit the producers from articulating their feelings through their script. Does it through its ruling trying to impose restrictions on the soulful renditions and in turn on singers. In restricting its print on any object, does the object include textbook as well? If yes, then it had to make an exit from there. Wouldn't that lead to curbing the feeling of nationalism and also the liberty? This is the paradox of liberty.

Only state can impose reasonable restriction under article 19(2) and it is only state action that can be challenged under article 32 for the violation of the Fundamental Rights. Since judiciary is not state and its judicial order neither qualifies the definition of law under article 13(3) nor subject to writ jurisdiction, it has no jurisdiction to pass such order and therefore cannot impose reasonable restriction under article 19(2) and therefore, possess no jurisdiction. The curtailment of the right to freedom of speech and expression by this direction of the Supreme Court is entirely a product of judicial fiat - it is neither a reasonable restriction of the kind allowed under Article 19(2) nor backed by any law enacted by Parliament⁶⁵⁶ as the modified interim order is still applicable and Central Government recommendations are still awaited.

It can thus be seen that Indian Judiciary being the protector of our Fundamental Rights curbs the right to personal Liberty by this judgment, thereby creating the paradox of liberty and narrowing down the right to Freedom of Speech and Expression. However, the position in the USA seems different which is detailed in the next part.

4. COMPARATIVE ANALYSIS

4.1 Case of US National Anthem

The case of US National Anthem was in its initial phase was similar to what we face in India. There were numerous instances when people refused to stand for the National Anthem. They were therefore either suspended or were protested against. But this power was restricted by the first amendment to the US constitution providing for the freedom of speech and expression. US Supreme Court on several occasions had held that it is no disrespect for the anthem on not standing or singing. In *West Virginia State Board of Education v.*

⁶⁵⁶Ritwika Sharma, *SC's National Anthem Order: The Seven Commandments of 'Constitutional Patriotism'*, Dec. 01, 2016, FIRSTPOST (Dec 01, 2016, 15:52), available at: <http://www.firstpost.com/india/supreme-courts-national-anthem-order-the-seven-commandments-of-constitutional-patriotism-3134412.html/amp>.

Barnette,⁶⁵⁷ SC of USA overruled *Minersville School Dist. v. Gobitis*,⁶⁵⁸ stating that public schools could not force the students to salute and pledge allegiance to the flag. But Supreme Court still avoided symbolic speech in various cases although from time to time federal court does recognize the same. In 1965, when a basketball player Abdul Rafiq precluded himself from participating in National Anthem, he was removed from the team but when legal action was initiated, a federal judge, Joseph P Kinneary, ordered for the reinstatement of the student saying that forcing anyone participating in symbolic patriotic ceremonies against their will is violative of the first amendment. However, it was only in *Johnson*, decided in 1989 that the Court first squarely faced the question of the constitutionality of a state's flag desecration statute as applied to flag burning in political protest.⁶⁵⁹ There was an anti-war comedy show that shows the refusal of people to stand during the anthem.

US legal code provides the conduct that one should follow when a National Anthem is played. The word used is “should” and not ‘must’ or ‘shall’ and therefore, does not render it compulsorily. There is no provision that penalizes the action of sitting during the National Anthem. Thus, it is not an offence while sitting when the National Anthem is being played. If someone kneels down or sits during the National Anthem, it is the part of their freedom of speech and expression.

In 2016, a national football league player, Colin Kaepernick kneeled down during the National Anthem describing it as his expression to protest against the country that oppresses the black people. There arises controversy for not respecting the country but it is their way of expression which is protected under the first amendment and judiciary being a state action cannot violate the people’s fundamental rights. The USA has a very liberal interpretation of the constitution.

4.2 Comparison

Indian position related to National Anthem is very different from that of USA’s current position. Unlike India, USA is liberal and considered it as a symbol of expression. However, it does not happen in one go. It took almost 200 years by USA judiciary to reach today’s

⁶⁵⁷ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁶⁵⁸ *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

⁶⁵⁹ Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66, I.L.J. 511,548 (1991).

position of liberty and speech and expression. However, it is just 70 years since independence. Furthermore, India is a diverse country with diverse culture and religion. Therefore, it becomes necessary to unify nation and Supreme Court finds it a way. It thus, implies that, the playing field is not yet leveled for both the country.

Supreme Court in the case of *Bijoe Emmanuel v. State of Kerala*⁶⁶⁰ referred the USA cases in order to decide the case. While directing the admission of the three Jehovah's witnesses students, Supreme Court refused to declare non-singing of National Anthem as disrespect based on the case of *Minersville School District v. Gobitis*⁶⁶¹ and *West Virginia State Board of Education v. Barnette*⁶⁶².

The arena in which India stands today has already been experienced by the USA. Judiciary too directs them to respect their flag and anthem as is the case today in India. A time may come when Indian Judiciary will also be ready to accept the same position as in the USA but for that Indian Democracy has to be strong. The same leveling field has to be created in order to expect the same position.

5. CONCLUSION

In the contemporary time, there exists a wide interpretation of Personal Liberty and Freedom of Speech and Expression. These are considered to be basic human rights in order to live a dignified life. In National Anthem Case Supreme Court has diluted this practice. On the other hand, it is necessary to unify the nation and paying respect to Nation Anthem is one way. However, paying respect just by standing is in contravention of the fundamental right to speech and expression. It can thus be concluded that there exists a paradox of liberty. Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance.⁶⁶³ Thus, keeping the same in mind, the paradox has to be solved.

⁶⁶⁰*Bijoe Emmanuel v. State of Kerala*, (1986) 3 S.C.C. 615.

⁶⁶¹*Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

⁶⁶²*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁶⁶³*Bijoe Emmanuel v. State of Kerala*, (1986) 3 S.C.C. 615.