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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

FREE SPEECH V HATE SPEECH

AUTHORED BY - AMAN SINGH

The Essential Tension: Free Speech vs. Hate Speech in the Indian Context

The journey of Homo sapiens is intrinsically linked to our unique capacity for expression. This ability to articulate thoughts, share knowledge, and propagate ideas is what defines us and has propelled our civilizational progress—driving us from rudimentary social structures to the exploration of the cosmos. As United Nations Secretary-General António Guterres articulated, the regulation of harmful speech is not an attempt to diminish freedom, but to prevent its catastrophic escalation: “Addressing hate speech does not mean limiting or prohibiting freedom of speech. It means keeping hate speech from escalating into something more dangerous, particularly incitement to discrimination, hostility and violence, which is prohibited under international law.”

At its core, the philosophical ideal of free speech asserts that the human mind and tongue must remain free from external, governmental control. It is an inherent human quality, indispensable to any society that claims to be democratic. Conversely, the existence of speech that is inherently intolerant, abusive, and hostile—what we term hate speech—paradoxically emerges from this very freedom. Hate speech is the shadow of free expression, negatively impacting the mental, emotional, and psychological well-being of targeted groups, ultimately posing a direct threat to the harmony and public order that the state is obligated to secure.

The Philosophical Foundations and the Millian Imperative

The value of unfettered expression is not a modern invention; it is a legacy built upon ancient democratic ideals and Enlightenment thought. The very existence of a democratic structure presupposes a citizenry free to dissent, critique, and exchange viewpoints without fear of reprisal. This is the definition of a free man (and woman, and all others), whose mind is not subjected to the dictates of the governing body.

One of the most profound arguments for unrestricted speech was articulated by John Stuart Mill in *On Liberty*. Mill asserted that the peculiar evil of suppressing an opinion is that it constitutes "robbing the human race." His rationale was twofold:

If the opinion is right: Society is deprived of the opportunity to "exchange error for truth."

If the opinion is wrong: Society loses the "clearer perception and livelier impression of truth, produced by its collision with error."

The inherent meaning of Mill's argument is that expression must not be constrained simply because it contains elements of falsehood, hatred, or absurdity. The right must be allowed to exist so that the individual retains the fundamental liberty to express themselves, allowing truth to ultimately prevail in the "marketplace of ideas." To allow the state to judge what is suitable to be spoken is to turn the citizenry into a "herd of sheep whose mind is subjugated to those who rule it." The political vigour and health of a civilization are dependent on its ability to tolerate diverse and even abrasive viewpoints. Any society that attempts to silence the expression of a person, just because it speaks lies or hate, or has no truth in speaking, is attempting an action on an inherent quality of human beings, which will inevitably lead to an unimaginable response from those carved mute.

The Constitutional Origin and its Indian Exception

While the global constitutional framework for free speech, epitomized by the U.S. First Amendment, often tends toward an absolute interpretation, the Indian legal landscape, forged in the violent crucible of Partition and faced with the daunting task of managing an unprecedentedly diverse and often communally charged populace, adopted a fundamentally different approach. The Indian Constitution provides the citizen with the right to free speech but simultaneously empowers the state to curb it—a duality that defines the entire discourse.

Article 19: The Grant and The Clawback

The tension is explicitly drafted into the fundamental rights chapter of the Constitution:

Article 19(1)(a) – The Grant: This clause guarantees to all citizens the fundamental right to "freedom of speech and expression." This right, essential for the progression of any society, covers not just verbal communication but all modes of expression, including art, print, and digital media.

Article 19(2) – The Restriction: This is the critical fine print that sets India apart. It empowers the State to impose "reasonable restrictions" on the exercise of the right guaranteed by 19(1)(a) in the interests of:

- Sovereignty and integrity of India,
- Security of the State,
- Friendly relations with foreign States,

Public order,
Decency or morality,
Contempt of court,
Defamation,
Incitement to an offence.

The founders of the Republic, haunted by communal violence and aiming to preserve the delicate social fabric, simply could not afford the American luxury of waiting for speech to turn into "imminent lawless action." The primary priority was placed on protecting collective harmony and the often volatile religious sentiments of the various groups that constitute India. This proactive approach, enshrined in Article 19(2), allows the government to intervene much earlier, making the law a preventative measure against hostility and communal disharmony rather than a purely reactive one.

The Definition and Regulation of Hate Speech in India

In India, hate speech is not defined by a single, omnibus law, but is instead addressed through a mosaic of provisions within the Indian Penal Code (IPC), 1860, designed to target specific harms related to communal discord and religious insult. These laws are the state's primary arsenal for enforcing the "reasonable restrictions" permitted by Article 19(2).

The Heavy Hitters of the IPC:

Section 153A – Promoting Enmity: This is arguably the most potent provision. It criminalizes the act of promoting or attempting to promote "on grounds of religion, race, place of birth, residence, language, caste, or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language, or regional groups or castes or communities." It is intended to prevent the systematic creation of communal hostility and is used widely against political or social commentary that may appear divisive.

Section 295A – Deliberate and Malicious Acts to Outrage Religious Feelings: This section addresses the particularly sensitive issue of religious insult. It penalizes those who, with "deliberate and malicious intention," outrage the religious feelings of any class of citizens by insulting or attempting to insult its religion or religious beliefs. This provision reflects the high value the Indian legal system places on protecting religious sentiments, stemming from the historical reality of religiously diverse public order. The threshold here is that the act must be both deliberate and malicious, placing it higher than mere hurt sentiments.

Section 505 – Statements Conducive to Public Mischief: This section targets statements,

rumours, or reports made with the intent to cause fear or alarm to the public, or to incite one class of people to commit an offense against another. This often acts as a catch-all for circulating misinformation that can lead to physical or social violence.

Judicial Interpretation and the 'Proximate Link'

The Supreme Court of India has consistently attempted to balance the guarantee of free speech with the necessity to curb hate speech, focusing on the principle of "public order" as the decisive factor. Landmark judgments, particularly those following the landmark *Romesh Thappar v. State of Madras* case, established the crucial distinction between speech that merely criticises and speech that incites.

The Nexus Requirement: The speech must have a direct or proximate nexus with a disruption of public order. Mere criticism or dissent, however strong or uncomfortable, cannot be penalized unless it is likely to incite violence or imminent lawless action. This is the judicial brake against the overzealous application of the restrictions.

The Requirement of Malice/Intention: Especially under Section 295A, the prosecution must prove a deliberate and malicious intention to wound religious feelings, as distinct from genuine literary, artistic, or journalistic critique. Without this *mens rea*, the action should not constitute an offense.

The Test of Decency and Morality: The courts often rely on the standard of the "average, right-minded man" to judge whether an expression transgresses public decency or morality, a standard that is inherently subjective and often changes with societal norms.

The Paradox: Protection vs. Persecution

While the intentions behind the Indian framework are noble—to safeguard the vulnerable and prevent the state from collapsing into communal chaos—the execution is fraught with difficulty and contradiction.

The paradox is this: the broadness of the legal language, intended to be flexible enough to secure peace, is frequently exploited to silence legitimate dissent. Terms like "public order" and "religious feelings" are inherently vague and elastic. The danger is that the hate speech itself is the prerogative of the free speech, but the constraints introduced to curb it become tools of state scrutiny that decide what to speak and what not.

The Misuse of Law

Powerful groups, often with political backing, have readily weaponised Sections 153A and

295A. This enables them to lodge criminal complaints to shut down genuine:

Artistic Expression: Films, paintings, and plays that depict controversial historical or religious figures, often leading to the phenomenon of prior restraint or mass withdrawals.

Political Critique: Strong, non-violent criticism of ruling parties, policies, or even historical narratives, often labeled as seditious or promoting enmity.

Satire and Humor: Often interpreted as insulting, malicious, or defamatory by hypersensitive groups.

The process of facing such a criminal complaint—including police investigation, arrests, the crushing cost of legal defense, and prolonged legal battles—is punishment in itself, regardless of the ultimate verdict.

The Chilling Effect

The unavoidable fallout of this constant threat of legal action is the "chilling effect." Instead of relying on the slow, expensive, and often intimidating process of the courts to defend their fundamental right, writers, journalists, artists, and scholars choose self-censorship. They preemptively silence their opinions, prune their creative works, or avoid controversial subjects altogether to dodge the sheer hassle and financial burden of litigation.

This phenomenon directly violates the Millian ideal: society is robbed of the chance to hear new truths, challenge old errors, and engage in the robust exchange of ideas necessary for democratic health. The system, designed to protect the collective, ends up inhibiting the individual liberty necessary for intellectual and political growth.

Conclusion

India's approach to the free speech versus hate speech dilemma is a profound reflection of its historical journey. It is a deliberate choice to prioritise the collective need for stability and security over the more absolutist individual liberty championed by Western democracies. This choice is rooted in the tragic memory of a divided nation and the daily necessity of managing a highly sensitive, multicultural polity.

The legal provisions are not the issue; they serve a necessary function in preventing incitement. The issue lies in their execution. The efficacy of the Indian model hinges entirely on the restraint and fairness of the state and its police machinery. The continuous, essential debate in the Indian context is not whether hate speech is harmful—it clearly is, and it causes threats over the practice of free speech—but whether the immense power granted by Article 19(2) and the IPC provisions can be trusted not to be deployed against genuine, non-violent political and

social dissent.

Ultimately, the goal of a mature democracy must be to cultivate a culture of tolerance that encourages the collision of ideas (Mill's vision) while simultaneously establishing clear, enforceable judicial standards that restrict speech only when it presents a demonstrable, proximate risk of incitement to violence, hostility, or the violent overthrow of public order. Only through rigorous judicial scrutiny and an institutional commitment to avoiding the misuse of law can India reconcile its imperative for peace with its constitutional guarantee of liberty.

