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Critically Analysing the Concept of Hate Speech under International Convention on the Elimination of all forms of Racial Discrimination and Contrasting it with the Domestic Approaches to Hate Speech

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ABSTRACT

In this paper, initially the author has discussed the concept of hate speech under the International convention on the elimination of all forms of racial discrimination (ICERD). The point is further developed by highlighting the State obligations under the convention and the general recommendations put forth by the committee on the elimination of racial discrimination which in turn monitors the implementation of the convention.

Thereafter, the paper is predominantly focussed on India's stance on hate speech which is substantiated by the case laws. Lastly, the paper critically analyses the contradictory position if any, between the ICERD and the Indian legislation followed by the conclusion.

Keywords: Hate speech, Discrimination, Dalit, ICERD

I. INTRODUCTION

Hate speech is a matter of great international dispute and argumentation. The debate rages on as to what constitutes hate speech and what does not. International law places a high degree of responsibilities on the State to condemn and take effective measures to control the propagation of hate speech. Hate speech as enshrined under **International convention on the elimination of all forms of racial discrimination** (ICERD or CERD) highlights its complexity and inseparability from a broader scale of hatred.

ICERD is one of the core United Nations conventions on human rights. It was adopted by the UN General Assembly in 1965, ICERD becomes the first international treaty which deals with the issue of hate speech and it contains a set of binding standards as regards racial discrimination. It is a simple structure which provides a definition of racial discrimination based on race, colour, descent, national or ethnic origin. Hence, it is not fixated on the notion of race itself, but it contains considerable norms of considerable importance.

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II. STATE OBLIGATIONS UNDER ICERD:

The ICERD under **Article 4**, has placed a responsibility on the States to dispel every and any threat of racial violence. It is, therefore, clear that Article 4 places a “**duty**” on States to condemn ideas that arise from the feeling of racial superiorities, hatred, discrimination etc. Both public and private organisations are punishable by law without distinction. As provided for in CERD, hate speech could be categorised into following four parts:

1. *Transmission of ideas based on racial superiority*
2. *Transmission of ideas based racial hatred*
3. *Incitement to racial discrimination*
4. *Incitement to acts of racially motivated violence.*²

CERD is more of a preventive committee and does not guarantee the right to freedom of expression. Although by its very nature, the CERD committee does not guarantee the right to freedom of expression in an absolute sense but the committee emphasised on the acts which led to racial discrimination and fight for the rights of individuals in the form of compensation and restitution. The committee would take into consideration the following factors before the acts are made punishable by law such as the content and form of speech, the position of the speaker, the objectives of the speech, the reach of the speech and the socio-economic and political climate that was prevalent at the time when the speech was delivered.

In recent years, the notion of racism has evolved and has certainly become more complicated in nature. The CERD committee soon realised as to how the acts of multiple discrimination can affect the very soul of the victims. In response to which, the ambit of CERD has gradually widened and took into considerations all those activities which led to widespread of discrimination.

Article 5 of ICERD provides a non-exhaustive list of rights and the state parties are under obligation to guarantee equality to everyone irrespective of race, nationality, colour, or ethnic origin. Although, in my opinion by its very nature, Article 5 creates an inherent distinction between the rights enjoyed by everyone and the rights of its citizens but principally human rights are to be enjoyed by all persons and the state parties have the obligation to guarantee equality to both citizens and non-citizens at an international level. Hence, there is a room for further developments and interpretation with respect to human rights.

Article 7 of ICERD acts as an awareness clause which requires the states to take effective

²Toby Mendel, ‘Hate Speech Rules Under International Law’ (February 2010)< <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>> accessed on 8th November, 2020.

measures in the fields of teaching, education and culture to combat prejudice which lead to racial discrimination also to promote tolerance friendship and understanding among nations and racial or ethnic groups.³ At the same time inform the state parties about the obligations and duties which had conferred upon them.

III. GENERAL RECOMMENDATIONS:

Recently, the committee issued general recommendation no. 35 which constantly strives to fight against the racist hate speech and aims to understand the causes and consequences of the same. There were other recommendations which was proposed by the committee such as general recommendation no. 30 which focuses on discrimination against non-citizens, general recommendation no. 31 which focuses on the prevention of racial discrimination in the administration and functioning of the criminal justice system and general recommendation no. 34 which focuses on racial discrimination against people of African descent.

IV. CERD'S GENERAL RECOMMENDATION NO. 13 (1993) PARA 3 HIGHLIGHTS THE FOLLOWING:

“In the implementation of article 7 of the Convention, the Committee makes it incumbent on States parties to review and enhance the training of law enforcement officials so as to better the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented.”⁴

(A) INDIA'S STANCE ON HATE SPEECH:

The Freedom of Speech and Expression as enshrined under **Article 19** of the constitution of India cannot be construed as an absolute right and is subject to certain limitations. Therefore, one of the prevalent challenges which sets before the principle of autonomy and the free speech expression is to make certain that the exercise of this principle is not detrimental to any individual or any particular section of the society. India, as we all know is a country known for its thousands of distinct cultures, languages, and communities which in turn poses a greater threat.

As such the term '**hate speech**' is not defined in any law in India. However, under certain legislations there are few provisions which legally prohibit certain forms of speech which in turn acts as an exception to freedom of speech. Broadly speaking, the hate speech debate in

³ Daisuke Shirane, 'ICERD and CERD: A Guide for Civil Society Actors' <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_INF_7827_E.pdf> accessed on 8th November, 2020.

⁴ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 13 (1993) U.N. Doc. A/48/18 at 113 (1994), <http://hrlibrary.umn.edu/gencomm/genrxiii.htm>> accessed on Nov. 8, 2020.

India is majorly driven by two categories: caste-based discrimination and religious sentiments/conflict which stems from the communal violence and the old age Hindu-Muslim conflict which had its seeds sown in 1947⁵.

Following are some the statutory framework on laws governing hate speech in India driven by both subject and context specific:

1. *The Indian Penal Code, 1860*
2. *The Representation of The People Act, 1951*
3. *The Protection of Civil Rights Act, 1955*
4. *The Religious Institutions Act, 1988*
5. *The Cable Television Network Regulation Act, 1995*
6. *The Cinematograph Act, 1952*
7. *The Code of Criminal Procedure, 1973*⁶

(B) COURT'S INTERPRETATION OF HATE SPEECH:

In the case of *Pravasi Bhalai Sangathan v. Union of India*⁷, the Supreme court dealt with the question of hate speech and the petitioners requested the state to take stringent actions against the makers of hate speech. However, the court in this case limits its jurisdiction to the existing laws vis-a-vis hate speech the reason for the same being that the exercise of the power would amount to '**judicial overreach**'. The Court, in *Pravasi Bhalai Sangathan*⁸, elucidates as to how defining a set standard may be difficult because it will lead to curtailment of freedom of expression, which is an essential aspect of our democracy. This has led to an apprehension by the judiciary to define what hate speech.

In the case of *Arumugam Seervai v. State of Tamil Nadu*⁹, it was held by the Supreme Court that the words '**pallan**', '**pallapayal**' or '**paraparayan**' were used with an intent to insult the individual irrespective of the fact that whether it was used in any place within public view or not. Hence, the court in this case went into the historical context of the said words and upheld the prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

⁵ 'COMPARATIVE HATE SPEECH LAW: ANNEXURE' (March 2012) <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/02/1A.-Comparative-Hate-Speech-Annex.pdf>> accessed on 9th November, 2020.

⁶ 'Law Commission of India Report No.267 Hate Speech' (March 2017) <<http://lawcommissionofindia.nic.in/reports/Report267.pdf>> accessed on 9th November, 2020.

⁷ AIR 2014 SC 1591.

⁸ Ibid.

⁹ (2011) 6 SCC 405

However, in the case of *Swaran Singh v. State*¹⁰, the court draws a clear distinction between the words public view and public place. The appellants in this case used the word ‘**Chamar**’ with an intent to humiliate the individual. The word ‘Chamar’ is a highly offensive/derogatory word which is used by the upper-caste individuals as an insult or abuse. Nevertheless, the court interpreted **Section 3(1)(r) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989** which states that “*whoever is not a member of a scheduled caste or scheduled tribe – intentionally insults or intimidates with intent to humiliate a member of a SC or ST in any place within public view shall be punishable with imprisonment for a term not less than six months but which may extend to five years and with fine.*”¹¹

The court observed that the provision uses the word public view and not public place. Therefore, a place which is owned by the government or any municipality would come under the ambit of public place and any place which is easily accessible by any individual from say a road or a lane outside would come under the ambit of public view. Consequently, due to the lack of witnesses the appellant was set free as it was not proved that any member of the public was present when the appellant uttered these words even though prima facie it could be inferred that the intent of the appellants was to humiliate or insult the said individual.

V. CRITICAL ANALYSIS:

In my opinion, the court in the case of *Swaran Singh v. State*¹², had a very narrow interpretation of the word ‘**public view**’ enshrined under **Section 3(1)(r) of SC/ST Act, 1989**¹³. The purpose/objective of the act is defeated in a manner that the Indian legislation has failed to prevent the humiliation and harassment that the members of the SC/ST community faces in many parts of our country. Even if we trace back to the spirit of the constitution it speaks of democracy and equality and the government has duly failed to ensure the fundamental rights to so-called ‘**untouchables**’ despite numerous policies and laws against caste discrimination.

As a result, a distinction can be drawn between the ICERD and the Indian legislation with respect to caste-based segregation and attacks. India’s position is in direct contravention to the ICERD Committee’s interpretation of Article 1 in general recommendation no. 29 which states “*discrimination based on 'descent' means discrimination against members of communities*

¹⁰ (2008) 8 SCC 435

¹¹ ‘THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989’ (11th September 1989) <<https://ncsk.nic.in/sites/default/files/PoA%20Act%20as%20amended-Nov2017.pdf>> accessed on 9th November, 2020.

¹² (2008) 8 SCC 435

¹³ ‘THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989’ (11th September 1989) <<https://ncsk.nic.in/sites/default/files/PoA%20Act%20as%20amended-Nov2017.pdf>> accessed on 9th November, 2020.

according to social stratification such as caste and other systems of inherited status"¹⁴.

Dalits, who are considered to be the marginalised section of our society, are continuously being harassed and are subjected to custodial abuse and torturous acts by police. As mentioned under Article 2 (1) of ICERD¹⁵, the state parties are under an obligation to end caste-based discrimination by all appropriate means. However, the government of India has not abstained from committing the caste-based atrocities against Dalits. India has failed to ensure complete protection and development to the section which in the social ladder holds the lowest position. Also, under Article 2(1) (a) of ICERD, it is the duty of each state party to ensure that the public authorities and public institutions are not indulged in the acts of racial discrimination.¹⁶

However, in India, Dalits are disproportionately targeted by the public authorities, especially police, who are meant to be the protectors of the people including the very persons that they victimise. The **National Human Rights Commission** (NHRC) report states that Dalits are rarely informed of their rights and are subjected to looting, killing and improper exercise of security legislation.¹⁷ This could be substantiated by the fact that in states of Andhra Pradesh and Jharkhand, the Prevention of Terrorism Act, 2002 was exercised inappropriately against Dalits who were targeted solely on the basis of their caste; irrespective of involvement in criminal or terrorist based activities.¹⁸ One such prominent incident occurred in 2003, where numerous Dalits were arrested unreasonably on the account of suspicion of murder and were taken into custody in Tamil Nadu. Later, before the Human Rights Commission the Dalits shared their grievances of being subjected to humiliation, various cruelties and even being beaten to death.¹⁹

VI. CONCLUSION:

On the basis of the critical analysis advanced, I would like to conclude by drawing additional reference to CERD report²⁰ which held that caste-based atrocities such as those faced by Dalits

¹⁴ 'Hidden Apartheid Caste Discrimination against India's "Untouchables"' (12th February 2007) <<https://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables>> accessed on 9th November, 2020.

¹⁵ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p.195, <https://www.refworld.org/docid/3ae6b3940.html> >accessed on 9th November, 2020.

¹⁶UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195,< <https://www.refworld.org/docid/3ae6b3940.html> >accessed on 9th November, 2020.

¹⁷ 'Hidden Apartheid Caste Discrimination against India's "Untouchables"' (12th February 2007) <<https://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables>> accessed on 9th November, 2020.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ 'India: 'Hidden Apartheid' of Discrimination Against Dalits' (13th February 2007), <https://www.hrw.org/news/>

falls squarely within the ambit of the ICERD. India's reply to the same findings did not even make mention of the abuses against Dalits. This reflects the evasive attitude of the government towards the caste-based atrocities and towards a larger conception of Hate Speech which plagues the Indian society. The first step towards grappling with any issue is to recognise the same. So, to alleviate the plight of the Dalits and make them a citizen in the true sense of the word, would mean a recognition of the same and undertaking a positive obligation to eradicate the issue. The development of any country hinges upon respect for and between the citizens. Hate speech creates discord and animosity between the people and the government which impacts the prosperity of the nation.
