

3rd S. C. Agrawal Memorial Lecture at Kanodia College on 7-3-2025**“Technology, Freedom of Speech: A Constitutional Conundrum”****Hon. Justice R. S. Chauhan**

It is, indeed, a rare privilege and an honour to be invited to deliver the 3rd Justice S. C. Agrawal Memorial Lecture by the Rajasthan Education Trust and the Kanoria School of Law for Women. At the outset, I must confess that I am bit nervous in addressing this August House full of my elders who are more knowledgeable and wiser than I am. Like a Priest I am asked to light a lamp before the Gods, who themselves are the storehouse of light and enlightenment. When I was appointed as a judge, a friend quipped, “do try to be half-decent judge”. Today, I will try to be half-decent speaker.

We preserve the memories of those who inspire us, who guide us, who are our role model. Hon’ble Mr. Justice S. C. Agrawal is certain one of those who continue to shine in our mental horizon. He was a judge with a stern façade, but a soft heart. We stood in awe of his knowledge, his legal acumen, and of his towering personality both literally and figuratively. His courage, fierce independence, his unwavering objectivity set him apart as a judge. In his tenure of twenty years as a Judge, Justice Agrawal authored many enlightening judgments which testify to his boldness and juristic vision. But more than a Judge, Justice Agrawal known for his human qualities: he was not only an avid reader, but also a lover of music. An ardent follower of Swami Vivekanand, he followed Vivekanand’s advice, “Arise, awake, and stop not till the goal is reached.” He was a god-fearing person. In fact, he donated all his property to the Rama Kishan Mission. Today, we re-ignite his memory, with the fond hope that his personality and character, his courage and impartiality will continue to guide us as we explore uncharted territories.

We live in a new World order. The tectonic shift in our lifestyle, in our thinking, in our political, social and economic arenas is no longer subtle. It is quick, fast and, at times, brutal. With the onset of Industrial Revolution in the 19th century, our lives have never been the same. Technology is the catalyst or the culprit which has triggered of this metamorphosis. Like the boon given by the gods, in our Puranic stories, Technology is both a blessing and a curse. It is both transformative and disruptive; it facilitates, yet frightens all of us. The technological changes are not just challenging the old paradigms, but most importantly are opening up a Pandora's box of Constitutional issues that the judiciary, all over the world, would have to address.

A youtuber cracks an obscene joke in a comedy show, FIRs are registered against him; a sitting MP posts a poem on social media and an FIR is also registered against him. Recently, the Delhi High Court has prescribed guidelines for students bringing smart phones to the school. These are issues arising from latest technologies. Such incidents raise fundamental constitutional questions about our freedoms, about our inalienable rights.

In the olden days, the means of written communication was through books or letters, pamphlets or newspapers. But the explosion of social media, based on innovative information technology, has enabled instant communication. Social media has liberated the imagination and amplified speech. Communication, both verbal and written, has been democratized. Everyone is free to express his or her opinion on the most mundane to most intellectual topics, from the most sacred to the most profane. This free flow of speech has turned "the market of ideas" into a carnival of offensive, abusive hate speeches.

Today, we will deal with two aspects of the cyber world: i) social media, in general, and ii) hate speech in particular. We will also deal with the constitutional

issues which have arisen due to information technology. We will also notice as to how the American Supreme Court and the Indian one differ in their approaches to hate speech. Lastly, we will consider the possible solutions for regulating social media and for controlling hate speech.

The Age of social media began in 1997, with Six Degrees permitting people to create profiles, connect with friends and build networks. In 2002, Friendstar expanded social networking capabilities by enabling users to share content and connect through mutual friends. Early 2000s saw rapid increase in social media sites. Today, of course, we have YouTube, with 3.9 billion monthly users, Facebook with 2.1 billion users, Instagram with 1.6 billion users, WhatsApp with 1.1 billion users. We also have a few controversial sites, like Tik Tok, with 954 million users.

Social media is like a beautiful red rose—full of color and fragrance, but also full of thorns. While it has benefited many spheres of our lives, it has its own disadvantages. It has provided women with a public space for voicing their concerns, interests and rights. Yet, it has increased cyber stalking and cyber bullying. It has perpetuated a myth about ideal feminine beauty leading to self-esteem issues.

Similarly, while students may have gained access to information, educational resources, networking opportunities, and platforms for self-expression and activism, they are also distracted by social media, leading to poor academic performance, mental health issues, and social pressures.

Likewise, sexual minorities have found a space for their visibility, activism, and community networking. Yet, their identity is targeted, their privacy invaded, their existence stigmatized.

The judiciary has been both strengthened and weakened by social media. It has introduced transparency by providing real-time updates on court proceedings,

judgments and legal developments. But ironically, it has also led to the distortion of legal procedures and proceedings, trolling of Judges, including a former CJI, and casting doubts about the functioning of the Judiciary. It has not just encouraged trial by media, but more so diluted the Rule of Law. People presume an offender to be guilty, even before the trial has begun. Yet when the offender is acquitted, questions are raised about the impartiality of the judges. The faith of the people in the judicial process is jolted.

Social media has also influenced the media houses and the art of journalism. While it permits instant news dissemination, audience engagement, and diverse perspectives to be voiced, it has also led to fake news, yellow journalism, sensationalism, and hate speeches. It has diluted, if not distorted, the objectivity and impartiality of the media houses and the journalists. Both in India and in the United States, the media seems to be dancing to the dictates of the government and the business oligarchy.

Regulating Hate Speech:

If social media has a dark side, hate speech is a black hole. By tearing the social fabric, hate speech will eventually suck the vitality out of the society. Yet, to date, the term “hate speech” is defined neither in International, nor in Indian Law. The most universal definition of hate speech is given in the **UN Strategy and Plan of Action on Hate Speech**. According to it, hate speech means “*any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to religion, ethnicity, nationality, race, color, descent, gender or other identity factor.*” The American Bar Association defines hate speech as “*speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability, or other traits.*”

The dissemination of hate speech through social media platforms has raised alarm all over the world. According to the India Hate Lab Report, 2024, between 2023 and 2024 incidents of hate speech in India increased by 74.4%. Far from being isolated or spontaneous outbursts of communal hatred, these speeches formed part of coordinated strategy of certain political parties. During 2024, the national election and the state elections of Jharkhand and Maharashtra greatly contributed to the rise of hate speech in India.

The social media played a crucial role in broadcasting hate speech. Out of the 1,165 hate speeches delivered in 2024, Facebook alone hosted 495 hate speech videos, while You Tube hosted 211. About 266 anti-minority hate speeches were live-streamed across multiple platforms. Not surprisingly, about 1,147 hate speeches targeted the Muslim community. Out of these, 259 speeches explicitly called for violence against Muslims; 111 speeches called for economic boycott of Muslim business; 274 for destruction of mosques and Muslim homes; 123 for the Hindus to arm themselves against the Muslims. Even the other minorities, like the Christians, have not been spared. For, 2024 also saw 115 hate speeches against the Christians. Thus, social media is playing a crucial role in spreading hatred in India.

Hate speech is not unique to India. It is a global phenomenon. In the United States, with racial relationship being rather delicate, hate speech has existed for decades. Both the American and the Indian judiciary deal with the same constitutional issues about how to contain hate speech under their respective Constitutions. Interestingly, the American and the Indian Judiciary take different stand on the issue.

The First Amendment of the American Constitution prohibits the Congress from “*making any law abridging the freedom of speech, or of the press.*” At first blush this constitutional command may seem limitless, but freedom of speech does

not mean licence to create chaos. As Justice Holmes said, freedom of speech does not mean the liberty to shout “fire” in a crowded theatre. In the case of **Beauharnais v Illinois** [343 U. S. 250], Justice Frank Murphy outlined instances where speech may be curtailed, including “*lewd and obscene, the profane, the libelous and the insulting or ‘fighting’ words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace.*” In the case of **Terminello v Chicago** [337 U. S. 1], Justice William O. Douglas, for the majority, opined that freedom of speech “*protected against censorship or punishment, unless shown likely to reduce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.*” According to the Court, a speech may anger the audience, may be offensive, but nonetheless it is protected by the First Amendment. Thus, the American Supreme Court protects hate speech unless it leads to “clear and present danger”, or to “incitement to violence”.

1970s saw the emergence of the National Socialist Party in the United States of America. The party was not only anti- Black, but was also antisemitic. In 1977, the party decided to march through a suburb of Chicago, called Skokie. The suburb had a large population of Blacks, and the Jewish people who had escaped the horrors of the holocaust. The Party decided to burn crosses, which was a sign of being anti-Black, and to carry the Swastika, which was a sign of Nazi party against the Jewish people. Fearing disturbance to public order, the Municipal Authority denied the permission for the march to the National Socialist Party. The Municipal order was challenged before the County Court. The Court upheld the order. Even the Supreme Court of Illinois upheld the order. But in the case of **National Socialist Party v Skokie** [432 U. S. 43] the American Supreme Court reversed Municipal Order *inter alia* on the ground that the government could not violate the freedom of speech enshrined in the First Amendment of the Constitution of USA. The case does

demonstrate that even offensive demonstrations are protected under the First Amendment.

On the other hand, under the Indian Constitution, freedom of speech is not an absolute right; it can be cribbed, cabined and confined under Art. 19 (2) of the Constitution of India. The said Article permits the government to place reasonable restrictions on the grounds of interest of sovereignty and integrity of India, 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. Thus, the Constitution itself circumscribes the freedom of speech.

In the case of **Pravasi Bhalai Sangathan v Union of India [(2014) 11 SCC 477]** the Hon'ble Supreme Court dealt with the consequences of hate speech. The Apex Court held that, *“Hate speech” is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination to ostracism, segregation, deportation, violence, and in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.*”

In sharp contrast to the American Supreme Court's ruling in the case of **National Socialist Party v Skokie**, the Indian Supreme Court, in the case of **State of Karnataka and Ano. v Dr. Praveen Bhai Thogadia [(2004) 4 SCC 684]**, upheld the decision of the State government to debar Mr. Thogadia from addressing public rallies in the State. The Apex Court opined that *“the valuable and cherished right of freedom of expression and*

speech may at times have to be subjected to reasonable subordination to social interests, needs and necessities to preserve the very core of democratic life—preservation of public order and rule of law.” The Hon’ble Supreme Court further held that *“It is imperative that if any individual or group of persons, by their action of caustic and inflammatory speech are bent upon sowing seeds of mutual hatred, and their proposed activities are likely to create disharmony and disturb the equilibrium, sacrificing public peace and tranquillity, strong act, and more so preventive actions are essentially and vitally needed to be taken. Any speech or action which would result in ostracization of communal harmony would destroy all those high values which the Constitution aims at. Therefore, whenever the authorities concerned in charge of law and order find that a person’s speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining a foothold, undermining and affecting communal harmony, prohibitory orders need necessarily to be passed, to effectively avert such untoward happenings.”* Thus, on the ground of disturbance of public order, the Supreme Court upheld the reasonable restriction prescribed by Art. 19 (2) of the Constitution of India on freedom of speech.

A plethora of laws deal with hate speech in India, ranging from the old IPC to Representation of People Act, from UAPA to Protection of Civil Rights Act, from Religious Institutions (Prevention of Misuse) Act, to Cinematographers Act. In the old IPC, sections 153 A, 153 B, 295 A, and 505 criminalized speeches. While retaining these provisions, the new Bhartiya Nyaya Sanhitha, 2023 has merely included electronic communication in its fold. Thus, hate speech through social media is equally an offence now.

Information Technology Act, 2000 is the principal law dealing with the cyber world. Section 69 A of the Act empowers the government to direct the removal of or the blocking of access to any information. If the direction is not obeyed by the intermediary, it is likely to be punished for up to seven years and fined.

Interestingly, Section 79 of the Act bestowed immunity on the intermediaries, if they were to satisfy certain conditions. We not only have the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, but also have the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. These Rules were further amended in 2023. These Rules impose certain duties on the intermediaries, such as Rule 3 of the Rules makes it mandatory for the intermediary to observe due diligence while discharging its duties under the Rules. One of the duties is to ensure that the user does not encourage enmity between different groups on the grounds of religion or caste with the intent to incite violence, or threatens public order. The intermediary is equally bound to disable such information within thirty-six hours of receiving a notice either from the government or from the court of law. According to Rule 7 of the Rules of 2021, if the intermediary fails to adhere to these Rules, the immunity, provided under Section 79 of the Information Technology Act, would be denied to the intermediary.

Besides the laws, in 2008, the Central Government had also issued guidelines for promoting communal harmony in the State and the Union Territories, called the **Guidelines on Communal Harmony**. The Law Commission of India, in its 267th Report, had also recommended certain amendments in the IPC for declaring hate speech as an offence in a more nuanced manner. However, these recommendations have not been accepted by the Central Government.

In the case of **Ashwani Kumar Upadhaya v Union of India [2021 SCC OnLine SC 629]** and **Shaheen Abdulla v Union of India** the Hon'ble Supreme Court also directed that the police should sui moto register FIR against those who are indulging in hate speech.

Indeed, we are armed with strong laws against hate speech. Yet, we have not been able to tackle and reduce this phenomenon. The fact that in 2024, 1,165 hate

speeches were made, and many of them disseminated over the social media, clearly proves that law is being observed more in breach than in conformity. In fact, of the 495 videos of hate speech on Facebook, only three have been removed so far. It is not that the laws are weak, it is that upholders of laws are meek.

In the last decade, even the Hon'ble Supreme Court is weary of touching the issue of "hate speech. In the **Jafar Imam Naqvi v Election Commission of India [(2014) 15 SCC 420]** a direction was sought from the Apex Court to the Election Commission for disqualifying a political party engaging in speeches stoking religious tensions. However, the Apex Court dismissed the said petition. Similarly, in **Pravasi Bhalai Sangathan v Union of India**, the Apex Court was requested to issue directions for regulating hate speech in India. The Hon'ble Supreme Court declined to do so. Twice we have missed the bus.

Moreover, in **Amish Devgan v Union of India [(2021) 1 SCC 1]**, the Hon'ble Supreme Court took a step backward, when it suggested that speech reflecting hate which tends to vilify, humiliate and incite hatred or violence against the target group based upon identity of the group can be punished. This seems to suggest that incitement to violence is a prerequisite before a speech can be criminalized. However, the Law Commission in its 267th Report had opined that, *"Incitement to violence cannot be the sole test for determining whether a speech amounts to hate speech or not. Even speech that does not incite violence has the potential of marginalizing a certain section of the society or individual. In the age of technology, the anonymity of internet allows a miscreant to easily spread false and offensive ideas. These ideas need not always incite violence but they might perpetuate the discriminatory attitudes prevalent in the society. Thus, incitement to discrimination is also a significant factor that contributes to the identification of hate speech."*

The Way forward:

The regulation of social media and hate speech raises many constitutional issues: What is the extent of freedom of speech? What is obscenity? Can a joke be obscene or merely distasteful? Should speech be banned merely because it is vulgar or offensive? Are vulgarity and obscenity the same? What tests should be applied to see if an information, or comment, or scene is obscene? We have discarded the Hicklin's test in 2004, shall we apply the Miller's test? According to it, three factors would have to be considered: 1) if the questionable comment, or scene is obscene according to the current "community standards"; 2) Does the comment or scene depict patently sexual conduct; 3) Does it lack literary, artistic, scientific, or political value? Who should regulate, the government, or an independent entity? What should be the scope and ambit of regulation? What is the standard definition of hate speech? Is it necessary that the speech must either create "clear danger", or lead to "imminent violence"? Would vulgar, hostile speech which leads to discrimination or targeting of a section of society qualify as hate speech? Should more stringent punishment be prescribed? Should a political party or a candidate be debarred from contesting an election if it or the person indulges in hate speech?

Many other suggestions have been made:

Firstly, to educate the people about the use of social media. Thus, a digital literacy program should be initiated both by the intermediaries and the government. Recently, the Delhi High Court has recommended that students should be taught how to interact with social media in meaningful ways.

Secondly, the intermediaries should warn the users against misuse of social media for spreading fake news, mis-placed rumours, and hate speeches.

Thirdly, more responsibilities and liabilities should be placed on the intermediaries with regard to the content on their platform. The intermediaries should be responsible for preventing or deleting harmful contents from their respective platforms.

Fourthly, for this purpose, more Algorithmic transparency should be insisted upon. The intermediaries should be required to disclose and explain their algorithms' functioning to mitigate biases and improve content visibility.

Fifthly, we need to develop more advanced AI tools for content moderation so as to swiftly detect and remove harmful contents while protecting freedom of expression.

Sixthly, rewarding positive content creation in order to incentivize users who create informative, educational or community-building content. India's National Creators Award, 2024 is a significant step in this direction.

Seventhly, either enact laws banning children's access to social media, or introduce parental guidance for access by children to the social media sites.

Eighthly, to have a more nuanced definition of "hate speech" and to amend the Bharatiya Nyaya Sanhita, 2023 to deal with the more nuanced definition of "hate speech". Perhaps we need to have a more stringent punishment for those who indulge in hate speech.

However, till we start implementing these possible solutions, we are faced with a half-baked remedy.

We are certainly dealing with a complex set of issues, which would not only require out of the box solutions, but also require strict implementation of the laws. The introduction of Artificial Intelligence would also aggravate these issues. But it is for us to take the call. After all, the buck must stop somewhere. The foundation of the Indian Civilization is based on assimilation, inclusion and pluralism. Hate speech teaches us extermination, exclusion and singularism. It shakes the very foundation of our existence. It needs to be countered and contained objectively, and forcefully.

I am certainly grateful to the Rajasthan Education Trust and to the Kanoria School of Law for Women for giving me this rare opportunity to share my feeble thoughts on burning issues with all of you. I am beholden to all of you for giving me such a patient hearing. Thank you very much.
