

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO OF 2020

(PIL UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay

...Petitioner

Verses

1. Union of India
Through the Secretary,
Ministry of Home Affairs,
North Block, New Delhi-110001
2. Union of India
Through the Secretary,
Ministry of Law and Justice,
Shashtri Bhawan, New Delhi-110001
3. Election Commission of India
Through the Director Law,
Niravachan Sadan,
Ashoka Road, New Delhi-110001

.....Respondents

**PIL UNDER ARTICLE 32 FOR IMPLEMENTATION OF RECOMMENDATIONS OF THE
LAW COMMISSION OF INDIA REPORT NO 267 ON HATE SPEECH**

To,
THE HON'BLE CHIEF JUSTICE OF INDIA
AND LORDSHIP'S COMPANION JUSTICES
OF THE HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER
THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petitioner is filing this PIL under Article 32 of the Constitution seeking a writ, order or direction or a writ in the nature of mandamus to the respondent-1 to take apposite steps to implement the recommendations of Law Commission Report No-267 on Hate Speech. [Annexure P-1, Pages 8-64]
2. Petitioner has not filed any other writ petition either in this Hon'ble Court or in any other High Court, seeking same and/or similar directions, as prayed.

3. Petitioner's full name is Ashwini Kumar Upadhyay.

Petitioner is an Advocate, practice in this Hon'ble Court and a social-political activist, contributing his best to the development of socially-economically downtrodden people. This Hon'ble Court has issued notice on petitioner PILs relating to election reform, police reform, gender justice & gender equality.

4. The cause of action accrued on 23.03.2017 and subsequent dates, when Law Commission of India submitted its Report No 267 to curtail hate speech. But, Governments did nothing to implement the recommendations till date.
5. The injury caused to the public is large because hate speech severely affects fraternity, dignity of individual, unity and national integration. Hate speech has potential of provoking individuals & society to commit acts of terrorism, genocides, ethnic cleansing etc. Offensive speech has real and devastating effects on people's lives and risks their health and safety. It is harmful and divisive for communities and hampers social progress. Hate speech also offends fundamental rights guaranteed under Article 19 and 21.
6. Petitioner has no personal interests, individual gain, private motive or oblique reasons in filing this PIL. It is not guided for gain of any other individual person, institution or body. There is no motive other than the public interest.
7. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with the issue involved in this petition.
8. There is no requirement to move concerned authority for the relief sought in this writ petition. There is no other remedy available except approaching this Hon'ble Court by way of instant writ petition.

9. Responsible speech is the essence of the liberty granted under article 21 of the Constitution. One of the greatest challenges before the principle of autonomy and free speech principle is to ensure that this liberty is not exercised to the detriment of any individual or the disadvantaged section of the society. In a country ours, with diverse castes, creed, religions and languages, Hate Speech poses a greater challenge. Article 19 guarantees freedom of speech and expression to all citizens but it is subjected to certain restrictions, namely, 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. Hate speech has not been defined in any law in India but legal provisions in certain legislations prohibit select forms of speech as an exception to freedom of speech.
10. Hate speech has always been a live debate in our country. The issue has been raised time and again before the legislature, court as well as the public. In *Pravasi Bhalai Sangathan v. Union of India* [AIR 2014 SC 1591], the Supreme Court dealt with a case where the petitioners prayed that the State should take preemptory action against makers of hate speech. The Court did not go beyond the purview of existing laws to penalize hate speech as that would amount to 'judicial overreach'. However, the Supreme Court observed that the implementation of existing laws would solve the problem of hate speech to a limited extent. Therefore, the matter was referred to the Law Commission of India to examine if it 'deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of 'hate speeches' irrespective of, whenever made.' However, Executive did nothing to implement the report since 2017.

11. While recognizing the adverse and discriminatory impact of hate speech on individuals, the Court in *Pravasi Bhalai Sangathan* [AIR 2014 SC 1591] also expressed the difficulty of ‘confining the prohibition to a manageable standard’. The apprehension that laying down a definite standard might lead to curtailment of free speech has prevented the Court to define hate speech. The Court again went into the question of hate speech in *Jafar Imam Naqvi v. Election Commission of India* [AIR 2014 SC 2537] The petitioners filed a writ petition challenging the vitriolic speeches made by the candidates in the election and prayed for issue of writ of mandamus to the ECI for taking appropriate steps against such speeches.
12. Political speeches often assume a divisive tone in order to exploit social prejudices for electoral gains. However, this discourse must take place in an environment that does not foster abusive or hateful sentiments. Though, political rivalry might encourage use of unwarranted language, it is unwise to restrict speech that merely showcases tendency to evoke unwanted situations without intention. In order to promote robust and healthy debate, it is important that a fine balance is struck between freedom and restrictions. Elections are the manifestations of popular consent in democratic society. History assents that it has significant repercussions on making of a nation’s governance and the nature of its policies. The Constitution makers were concerned that religion race caste community or language may be misused for electoral gain. Similarly a lot of discussion was made regarding inclusion of the word “secularism”. The forty-second amendment of the Constitution, to insert the words Secularism, Unity and Integrity, was in following lines:
“The democratic institutions provided in the Constitution are basically sound

and the path for progress does not lie in denigrating any of these institutions. However, there could be no denial that these institutions have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.....

In Preamble to the Constitution-(a) for words "Sovereign Democratic Republic" the words "Sovereign Socialist Secular Democratic Republic" shall be substituted; and (b) for the words "Unity of the Nation", the words "Unity and Integrity of the Nation" shall be substituted."

GROUNDS

- A.** Because Goswami Committee on Electoral Reform in its Report in 1990 had suggested parallel recommendation: *"Election Commission shall have the power to make recommendations to the appropriate authority (a) to refer any matter for investigation to any agency specified by Commission (b) Prosecute any person who has committed an electoral offence under this Act or (c) appoint any Special Court for trial of any offence or offences under this Act."*
- B.** Because under Section 123 RPA, appeal on the grounds of religion, race, caste, community or language etc. and promotions of feelings of enmity between different classes constitute corrupt practice but same can be questioned only by way of election petition and the Election Commission of India cannot order the investigation even when Model Code of Conduct is in force.

- C. Because there is no provision to challenge the corrupt practice of candidates, who lost the election. Thus, the appeal on the grounds of religion, race, caste, community or language etc. and promotions of feelings of enmity between different classes cannot be questioned even by way of election petition.
- D. Because it has been observed, particularly, since 1990 onwards that not only in Parliament and State Assembly Elections, even in local body elections; hate speech is made to support particular party and candidate, which is against the basic dictum of a 'sovereign socialist secular democratic republic' like ours.
- E. Because hate speech has potential of provoking individuals to commit acts of terrorism, genocides, ethnic cleansing etc. Such speech is considered outside the realm of protective discourse. Offensive speech has real and devastating effects on people's lives and risks their health and safety. It is harmful and divisive for communities and hampers social progress.
- F. Because hate speech severely affect fraternity, dignity of individuals, unity and national integration and also offends the fundamental rights guaranteed under Articles 19 and 21 of the Constitution of India.

PRAYER

Keeping in view the dreadful effects of hate speech on dignity of individual, fraternity, unity & national integration, this Hon'ble Court may be pleased to:

- a) issue a writ, order or direction or a writ in the nature of mandamus to the Respondent-1 Government of India, to take appropriate steps to implement the recommendations of Law Commission Report No-267 (**Annexure P-1**);
- b) pass such other order(s) or direction(s), as this Hon'ble Court may deem fit.

27.02.2020

New Delhi

ADVOCATE FOR PETITIONER

(ASHWANI KUMAR DUBEY)

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO OF 2020

[PIL UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA]

IN THE MATTER OF:

Ashwini Kumar Upadhyay

...Petitioner

Verses

Union of India & another

...Respondents

AFFIDAVIT

I, Ashwini Kumar Upadhyay

at present at New

Delhi, do hereby solemnly affirm and declare as under:

1. I am the sole petitioner above named and well acquainted with facts and circumstances of the case and as such competent to swear this affidavit.
2. I have read and understood contents of accompanying synopsis and list of dates pages (B-E) writ petition paras (1-12) pages (1-6) and total pages (1-67) which are true and correct to my knowledge and belief.
3. Annexure filed with petition are true copies of their respective originals.
4. I have not filed any other petition either in this Hon'ble Court or in any other Court seeking same or similar directions as prayed in this petition.
5. I have no personal interests, individual gain, private motive or oblique reasons in filing this petition. It is not guided for gain of any other individual person, institution or body. The only motive is public interest.
6. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with issue involved in this petition.
7. There is no requirement to move concerned government authority for relief sought in this petition. There is no other remedy available except approaching this Hon'ble Court.
8. I have gone through the Article 32 and the Supreme Court Rules and do hereby affirm that the present petition is in conformity thereof.
9. I have done whatsoever enquiry/investigation, which was in my power to do, to collect the data or material, which was available; and which was relevant for this Hon'ble Court to entertain the present petition.
10. I've not concealed any data/material/information in this petition; which may have enabled this Hon'ble Court to form an opinion, whether to entertain this petition or not and/or whether to grant any relief or not.
11. The averments made in this affidavit are true and correct to my personal knowledge and belief. No part of this Affidavit is false or fabricated, nor has anything material been concealed there from.

(Ashwini Kumar Upadhyay)

DEPONENT

VERIFICATION

I, the Deponent do hereby verify that the contents of above affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false nor has anything material been concealed there from. I hereby solemnly affirm and declare it today i.e. the 27th day of February 2020 at New Delhi.

(Ashwini Kumar Upadhyay)

DEPONENT

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PAPER BOOK

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(ADVOCATE FOR PETITIONER: ASHWANI KUMAR DUBEY)

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PERFORMA FOR FIRST LISTING

Section: PIL

The case pertains to (Please tick / check the correct box):

- Central Act: Constitution of India
- Section: Article 19 and 21 of the Constitution
- Central Rule: N/A
- Rule No: N/A
- State Act: N/A
- Section: N/A
- State Rule: N/A
- Rule No: N/A
- Impugned Interim Order: N/A
- Impugned Final Order / Decree: N/A
- High Court: N/A
- Name of Judges: N/A
- Tribunal / Authority Name : N/A

1. Nature of Matter: Civil

2. (a) Petitioner / Appellant : Ashwini Kumar Upadhyay

(b) Email ID: _____ ,

(c) Phone No: _____ ,

3. (a) Respondent: Union of India and another

(b) Email ID: N/A

(c) Phone No: N/A

4. (a) Main Category: o8 PIL Matters

(b) Sub Category: o812, Others

5. Not to be listed before: N/A

6(a). Similar disposed of mater: No Similar Matter

6(b). Similar pending matter: No similar matter pending

7. Criminal Matters: N/A

(a) Whether accused / convicted has surrendered: N/A

(b) FIR / Complaint No: N/A

(c) Police Station: N/A

(d) Sentence Awarded: N/A

(e) Period of Sentence Undergone including period of detention/custody under gone: N/A

8. Land Acquisition Matters:

(a) Date of Section 4 Notification: N/A

(b) Date of Section 6 Notification: N/A

(c) Date of Section 17 Notification

9. Tax Matters: State the Tax Effect: N/A

10. Special Category: N/A

11. Vehicle No in case of motor accident claim matters): N/A

Date: 27.02.2020

ADVOCATE FOR PETITIONER

(ASHWANI KUMAR DUBEY)

Advocate-on-Record

SYNOPSIS

Responsible speech is the essence of the liberty granted under article 21 of the Constitution. One of the greatest challenges before the principle of autonomy and free speech principle is to ensure that this liberty is not exercised to the detriment of any individual or the disadvantaged section of the society. In a country ours, with diverse castes, creed, religions and languages, Hate Speech poses a greater challenge. Article 19 guarantees freedom of speech and expression to all citizens but it is subjected to certain restrictions, namely, 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. Hate speech has not been defined in any law in India but legal provisions in certain legislations prohibit select forms of speech as an exception to freedom of speech.

Hate speech has always been a live debate in our country. The issue has been raised time and again before the legislature, court as well as the public. In *Pravasi Bhalai Sangathan v. Union of India* [AIR 2014 SC 1591], the Supreme Court dealt with a case where the petitioners prayed that the State should take preemptory action against makers of hate speech. The Court did not go beyond the purview of existing laws to penalize hate speech as that would amount to 'judicial overreach'. However, the Supreme Court observed that the implementation of existing laws would solve the problem of hate speech to a limited extent. Therefore, the matter was referred to the Law Commission to examine if it 'deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of 'hate speeches' irrespective of, whenever made.'

While recognizing the adverse and discriminatory impact of hate speech on individuals, the Court in *Pravasi Bhalai Sangathan* AIR 2014 SC 1591 also expressed the difficulty of ‘confining the prohibition to a manageable standard’. The apprehension that laying down a definite standard might lead to curtailment of free speech has prevented the Court to define hate speech. The Court again went into the question of hate speech in *Jafar Imam Naqvi v. Election Commission of India* [AIR 2014 SC 2537] The petitioners filed a writ petition challenging the vitriolic speeches made by the candidates in the election and prayed for issue of writ of mandamus to the Election Commission for taking appropriate steps against such speeches. However, the Court dismissed the petition on the ground that the petition under Article 32 of the Constitution regarding speeches delivered during election campaign does not qualify as public interest litigation and that the Court cannot legislate on matters where the legislative intent is visible.

Political speeches often assume a divisive tone in order to exploit social prejudices for electoral gains. However, this discourse must take place in an environment that does not foster abusive or hateful sentiments. Though, political rivalry might encourage use of unwarranted language, it is unwise to restrict speech that merely showcases tendency to evoke unwanted situations without intention. In order to promote robust and healthy debate, it is important that a fine balance is struck between freedom and restrictions. Elections are the manifestations of popular consent in democratic society. History assents that it has significant repercussions on making of a nation’s governance and the nature of its policies. The Constitution makers were concerned that religion race caste community or language may be misused

for electoral gain. Similarly a lot of discussion was made regarding inclusion of the word “secularism”. The forty-second amendment of the Constitution, to insert the words Secularism, Unity and Integrity, was in following lines:

“The democratic institutions provided in the Constitution are basically sound and the path for progress does not lie in denigrating any of these institutions. However, there could be no denial that these institutions have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.....

In Preamble to the Constitution-(a) for words “Sovereign Democratic Republic” the words “Sovereign Socialist Secular Democratic Republic” shall be substituted; and (b) for the words “Unity of the Nation”, the words “Unity and Integrity of the Nation” shall be substituted.”

Earlier Goswami Committee on Electoral Reform in its Report in 1990 had suggested parallel recommendation, which reads: *“Election Commission shall have the power to make recommendations to the appropriate authority (a) to refer any matter for investigation to any agency specified by the Commission (b) Prosecute any person who has committed an electoral offence under this Act or (c) appoint any Special Court for the trial of any offence or offences under this Act.”*

Under Section 123, RPA, appeal on the grounds of religion, race, caste, community or language etc. and promotions of feelings of enmity between different classes constitute corrupt practice but same can be questioned only by way of election petition and the ECI cannot order the investigation even when Model Code of Conduct is in force. Ironically, these provisions will have application only during period of election. Moreover, there is no provision to challenge the corrupt practice of candidate, who has lost the election.

It has been observed, particularly, since 1990 onwards that not only in Parliament and State Assembly Elections, even in local body elections; hate speech is made to support particular party and candidate, which is against the basic dictum of a 'sovereign socialist secular democratic republic' like ours. It also offends the fundamental rights guaranteed under Articles 19 & 21.

Hate speech has potential of provoking individuals & society to commit acts of terrorism, genocides, ethnic cleansing etc. Such speech is considered outside the realm of protective discourse. Offensive speech has real and devastating effects on people's lives and risks their health and safety. It is harmful and divisive for communities and hampers social progress. If left unchecked, hate speech can severely affect fraternity, dignity, unity and national integration.

LIST OF DATES

- 29.01.2010: The ECI proposed amendment in RPA to curtail misuse of religion for electoral gain etc. But, Executive did nothing.
- 23.03.2017: Law Commission submitted 267th Report but no action.
- 27.02.2020: Hate Speech severely affect fraternity, dignity, unity and national integration. But, Government did nothing to implement Law Commission Report 267. Hence, this PIL.