

FREEDOM OF SPEECH AND EXPRESSION VERSUS THE GLORIFICATION OF ACTS OF TERRORISM: DEFINING LIMITS IN THE INDIAN CONTEXT

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Abstract: Freedom of speech and expression is one of the essential rights for humans; however, some people in the guise of right to freedom of speech and expression glorify the acts of terrorism. In India, there are several laws making certain speeches punishable, but these laws fail to take into consideration speeches that glorify terrorists or acts of terrorism. The objective of this article is to examine the scope of provisions or laws that may be introduced to prohibit speech glorifying acts of terrorism in India while maintaining a balance with the right to freedom of speech and expression granted under the Constitution of India, 1950. This article attempts to assess United Nation Security Council Resolution 1624 and laws enacted in the wake of terrorist attacks in European countries such as the United Kingdom and France, and how they deal with speech that glorifies terrorism. This article also discusses case laws on glorification of terrorism of the European Court of Human Rights.

Keywords: Freedom of Speech and Expression, Glorification of terrorism, United Nation Security Council Resolution 1624, Apology of terrorism, Unlawful Activities (Prevention) Act 1967 and Incitement to terrorism.

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1. INTRODUCTION

Article 19(1)(a) of the Constitution of India, 1950 provides every citizen a fundamental right to freedom of speech and expression but some citizens often misuse their right to freedom of speech granted under the Constitution. In the garb of exercising freedom of speech, they make statements that glorify terrorism and in the absence of specific laws proscribing it, they get away unpunished. The major reason for it is despite enacting various anti-terror legislations such as Unlawful Activities (Prevention) Act, 1967 and others, India still does not have specific laws or provisions in existing laws that prohibit or criminalize speech that glorifies terrorists or acts of terrorism.

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At this juncture it is important to throw light on what constitutes terrorism in India. Section 15 of Unlawful Activities (Prevention) Act, 1967 defines a ‘terrorist act’ as any act done with the intention to endanger or likely to endanger the ‘unity, integrity, security or sovereignty of India’ or with the motive to cause terror or likely to cause terror among people in India or in any foreign country.

In *Hitendra Vishnu Thakur v. State of Maharashtra*¹, the court held that ‘terrorism’ is one of the indicators of rise in lawlessness and violence. Both violence and crime are a menace to an established order and are opposed to a civilized society.² But it is the intended and organized use of coercive intimidation that differentiates ‘terrorism’ from other forms of violence.³ The court further held that every ‘terrorist’ may be considered a criminal but not every criminal can be tagged as a ‘terrorist’.⁴ While, in *People’s Union for Civil Liberties v. Union of India*,⁵ the court held that what separates ‘terrorism’ from other political offences is principally the ‘psychological’ factor that is always supported with violence and unrest. It instils fear in the public not only by making them subject to violence but also gives them a feeling of insecurity.⁶

In the wake of terrorist attacks, few European countries have in the recent past either enacted or amended existing laws and have targeted speech glorifying acts of terrorism. These new laws can offer help to the Indian legislature in understanding the relevance of having such narrowly defined laws or provisions that criminalize speeches that glorify terrorism in a democracy like India. The advantage of having specific laws or provisions targeting such speech would be that it shall remove ambiguity from existing laws that might be misused to restrict the right to freedom of speech.

The prime reason for comparing Indian laws with those of the United Kingdom (UK) and France in this article is that these countries are democracies and safeguard the right to freedom of speech and expression. The judiciary remains independent and can uphold the citizens’ right to free speech. In India, whenever any state or central government tried to curb the right to free speech of citizens, the courts have always come to the rescue of citizens. There are several other democracies around the world, which protect the right to freedom of speech, however, the author attempts to limit his analysis to the UK and France only.

This article also discusses United Nation Security Council (UNSC) Resolution 1624, International Covenant on Cultural and Political Rights (ICCPR), European Convention of Human Rights (ECHR), United Nation Declaration on Human Rights (UDHR) and a few other international treaties. This article shall attempt to strike a balance between the rights of citizens to freedom of speech and expression on one hand and the need for curbing speech that glorifies acts of terrorism on the other hand.

¹ (1994) 4 SCC 602.

² *Id.* at para. 7.

³ *Ibid.*

⁴ *Ibid.*

⁵ (2004) 9 SCC 580.

⁶ *Id.* at para. 6.

1.1. Background

On 13 December 2001, five terrorists entered the Indian Parliament complex when more than 100 Members of Parliament were inside the Parliament building and started firing haphazardly resulting in the death of five police officers, a Parliament security guard, a gardener, and injuring 22 others.⁷ In the words of the then Prime Minister, the attack was not just an attack on the building of the Parliament but a ‘warning to the entire nation.’⁸ Afzal Guru was found guilty for these terror attacks, and while upholding the death sentence of Afzal Guru, the Supreme Court of India observed, ‘Short of participating in the actual attack, he did everything to set in motion the diabolic mission.’⁹

In February 2016, some students arranged an event commemorating the death anniversary of the terrorists Afzal Guru and Maqbool Bhat¹⁰ inside the campus of a Central Government University, namely the Jawahar Lal Nehru University (JNU).¹¹ During this event, many provocative and insensitive slogans were raised against the national integrity of India and in favour of the convicted terrorist Afzal Guru. The slogans were also quoted by Delhi High Court in its order dated 02 March 2016.¹²

Central Forensic Science Laboratory of India confirmed the authenticity of the video footage of the JNU incident.¹³ Delhi Police filed a charge sheet in this case on 14 January 2019, and the accused were charged with offences under section 124A (offence of sedition), 323 (punishment for voluntarily causing hurt), 465 (punishment for forgery), 471 (using as genuine a forged document or electronic record), 143 (punishment for being a member of an unlawful assembly), 149 (being a member of an unlawful assembly), 147 (punishment for rioting) and 120B (criminal conspiracy) of the Indian Penal Code (IPC).¹⁴

⁷ Firstpost 2013, ‘All you need to know about the 2001 Parliament attack’, *Firstpost*, 9 February, viewed 10 November 2020 <<http://www.firstpost.com/india/all-you-need-to-know-about-the-2001-parliament-attack-619622.html>>.

⁸ BBC, “2001 Suicide Attack on Indian Parliament”, *BBC*, viewed 08 November 2020 at <http://news.bbc.co.uk/onthisday/hi/dates/stories/december/13/newsid_3695000/3695057.stm>.

⁹ *State (NCT of Delhi) v Navjot Sandhu*, (2005) 11 SCC 600, para. 237.

¹⁰ Maqbool Bhatt was a separatist charged for the murder of an Indian army officer. His supporters in the UK, who were seeking his release, kidnapped and murdered Indian diplomat Ravindra Mhatre. See, Sreedharan, C 2001 ‘The Rediff Special’, Rediff.com, 13 February, viewed 04 January 2021 <<https://www.rediff.com/news/2001/feb/13spec.htm>>.

¹¹ The Hindu 2016, ‘JNU row: What is the outrage all about?’, *The Hindu*, 16 February, viewed 04 January 2021 <<http://www.thehindu.com/specials/in-depth/JNU-row-What-is-the-outrage-all-about/article14479799.ece>>.

¹² *Kanhaiya Kumar v. State of NCT of Delhi* (2016) SCC OnLine Del 1362, para. 29

¹³ The Hindu 2016, ‘JNU event footage authentic, says report’, *The Hindu*, 11 June (Updated 18 October 2016), viewed 18 August 2021 <<https://www.thehindu.com/news/cities/Delhi/JNU-event-footage-authentic-says-report/article14414770.ece>>.

¹⁴ Livelaw.in 2019, ‘JNU Sedition Case : Delhi Police Files Chargesheet Against Kanhaiya Kumar, Umar Khalid and others’, Livelaw.com, 14 January, viewed 11 October 2020 <<https://www.livelaw.in/news-updates/jnu-sedition-case-delhi-police-files-chargesheet-against-kanhaiya-kumar-umar-khalid-and-others-142103>>.

On 28 February 2020, Government of National Capital Territory of Delhi gave sanction to Delhi Police to prosecute those involved in the raising of slogans in JNU and the government in its order stated that the 10 accused involved '*prima facie committed an offence punishable under sections 124A and 120B*'.¹⁵ In February 2021, a Delhi Court took the cognisance of the final report filed by the Delhi police and summoned the accused persons to face trial for the offences under section 124A/ 323/ 465/ 471/ 149 and 120B of the Indian Penal Code 1860.¹⁶

The prime reason why the JNU incident took place in the first place was due to the absence of laws and provisions in India that specifically prohibit speech glorifying terrorists and acts of terrorism. Though India has laws that define terrorist¹⁷ and make support given to a terrorist organisation a criminal offence,¹⁸ but those laws do not categorically prohibit any kind of speech glorifying acts of terrorism. If India already had in place the laws that criminalized statements glorifying acts of terrorism or terrorists, then incident at JNU could have been averted. Thus, this article aims to suggest that India needs to enact unambiguously defined laws that restrict speeches glorifying terrorism.

2. SIGNIFICANCE OF THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

Article 19(1) and 19(2) of ICCPR provides everyone a right to have opinions without interference and a right to freedom of expression. This right, however, comes with duties and responsibilities and is subject to some restrictions that can be imposed on the ground of respecting repute of others or in the interest of national security, public order...etc, under article 19(3)(a) & (b).¹⁹ India acceded to the ICCPR on 10 April 1979.²⁰

2.1. Freedom of speech and expression in India

The right to freedom of speech and expression is available to all citizens under article 19(1)(a) of the Constitution of India, 1950. Though the Constitution provides a fundamental right to freedom of speech and expression, at the same time article 19(2) of the Constitution provides that restrictions on the right to freedom of speech and expression can be imposed by the State in the interest of the 'sovereignty and integrity of India,

¹⁵ Hindustan Times 2020, 'Sedition case: Govt gives sanction to prosecute Kanhaiya Kumar', *Hindustan Times*, 29 February, viewed 21 December 2020 <<https://www.hindustantimes.com/cities/delhi-govt-gives-sanction-to-prosecute-kanhaiya-in-jnu-sedition-case/story-c3L1z9vPKR9CRxteD4i9DM.html>>.

¹⁶ The Economic Times 2021, 'JNU sedition case: Delhi court takes cognisance of chargesheet against Kanhaiya Kumar, others', *The Economic Times*, 16 February, viewed 18 September 2021 <<https://economictimes.indiatimes.com/news/politics-and-nation/jnu-sedition-case-delhi-court-takes-cognisance-of-chargesheet-against-kanhaiya-kumar-others/articleshow/80968280.cms?from=mdr>>.

¹⁷ Terrorist Affected Areas (Special Courts) Act, 1984, s. 2(1)(h).

¹⁸ UAPA, s. 39.

¹⁹ art. 19(3)(a) & (b).

²⁰ *A Handbook on International Human Rights Conventions* 2012 (page 22), National Human Rights Commission, viewed 19 October 2020 <https://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf>.

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.’²¹

Important observations have been made by the courts in India regarding the importance of free speech from time to time. The Supreme Court in *Subramaniam Swamy v. Union of India* was of the view that it remains a cherished treasure in vibrant democracy,²² and in *Shreya Singhal v. Union of India* the court reiterated the significance of this right and held that the freedom of thought and expression is of prime worth in a democracy and under the Indian constitutional system it holds supreme importance.²³

While freedom of speech and expression remains fundamental for strengthening a democracy, it also carries with it some duties. In *Subramaniam Swamy* case it was also observed that freedom of expression is the most valuable right but at the same time the Constitution of India envisages reasonable restriction upon such right.²⁴ In *Sahara India Real Estate Corpn. Ltd. v. SEBI*, the court held that freedom of expression under the Constitution of India is not an ‘absolute value.’²⁵ The Law Commission in its 267th report observed that the right of freedom of speech and expression requires restrictions to avert any negative or destructive effects that may be caused by exercise of this right.²⁶ In *Laxmi Khandasari v. State of UP*, the Court held that the fundamental rights laid down in the Constitution of India are neither absolute nor unlimited but are subject to reasonable restrictions that the State can place in public interest under article 19(2) to 19(6).²⁷ In *Ramlila Maidan Incident, in re*, it was held that limitation imposed on freedom of speech and expression should be inside the structure of the established law, as endorsed by article 19(2) of the Constitution of India.²⁸

In *Shreya Singhal v. Union of India*,²⁹ the Supreme Court of India laid down three concepts for understanding freedom of speech and expression. The concepts are ‘discussion’, ‘advocacy’ and ‘incitement’. The court observed that even though unpopular, ‘discussion’ and ‘advocacy’ remain at the heart of article 19(1)(a) of the Constitution of India. Article 19(2) would come in when such ‘discussion’ or ‘advocacy’ gets as far as the point of incitement.³⁰ The court further explained the difference between ‘advocacy’ and ‘incitement’ by citing Mark Antony’s speech in Shakespeare’s ‘Julius Caesar’:

*‘Antony—Good friends, sweet friends, let me not stir you up
To such a sudden flood of mutiny.*

²¹ The Constitution of India.

²² (2016) 7 SCC 221, para. 98.

²³ (2015) 5 SCC 1, para. 8.

²⁴ *Subramaniam Swamy v. Union of India*, (2016) 7 SCC 221, para. 195.

²⁵ (2012) 10 SCC 603, para. 25.

²⁶ *Law Commission of India report 2017, Hate Speech* para 6.27 (Report No. 267).

²⁷ (1981) 2 SCC 600, para. 16.

²⁸ (2012) 5 SCC 1, para. 35.

²⁹ (2015) 5 SCC 1.

³⁰ *Shreya Singhal v. Union of India*, para. 13.

*They that have done this deed are honourable:
 What private griefs they have, alas, I know not,
 That made them do it: they are wise and honourable,
 And will, no doubt, with reasons answer you.
 I come not, friends, to steal away your hearts:
 I am no orator; as Brutus is;
 But, as you know me all, a plain blunt man,
 That love my friend; and that they know full well
 That gave me public leave to speak of him:
 For I have neither wit, nor words, nor worth,
 Action, nor utterance, nor the power of speech,
 To stir men's blood: I only speak right on;
 I tell you that which you yourselves do know;
 Show you sweet Caesar's wounds, poor poor dumb mouths,
 And bid them speak for me: but were I Brutus,
 And Brutus Antony, there were an Antony
 Would ruffle up your spirits and put a tongue
 In every wound of Caesar that should move
 The stones of Rome to rise and mutiny.
 All—We'll mutiny.³¹*

The court held that it was at this juncture when a speech or expression may lead to public disorder or may affect sovereignty and integrity of India...etc, a law curbing such speech and expression may be made.³² Thus, the Court attempted to set out the grounds on which the state may interfere with the right to freedom of speech and expression.

Among other grounds for restrictions on freedom of speech under article 19(2) of the Constitution of India, the court focused on the ground of 'incitement to an offence.' The court made a distinction between 'advocacy' and 'incitement.' A speech glorifying terrorism may not directly incite any offence or any kind of violence but may promote it under the guise of 'advocacy', which the court did not prohibit in *Shreya Singhal* case.³³ By expanding the right to freedom of speech and making it subject to the only condition of incitement to an offence, as suggested in *Shreya Singhal* case, may limit the scope of restrictions that may be imposed by the state on speech glorifying terrorism.

Kofi Annan in his keynote address to the closing plenary of the 'International Summit on Democracy, Terrorism and Security' had said that terrorism can never be 'accepted or justified.' He further stated that terrorism directly attacks the human rights and the rule of law.³⁴ Though the speech by students in JNU did not directly incite any

³¹ *Shreya Singhal v. Union of India*, para. 13.

³² *Shreya Singhal v. Union of India*, para. 13.

³³ *Shreya Singhal v. Union of India*, para. 13.

³⁴ Kofi Annan's key note address to the closing plenary of the International Summit on Democracy, Terrorism and Security (Madrid, 10 March 2005), viewed 18 October 2020 <<https://www.un.org/sg/en/content/sg/speeches/2005-03-10/kofi-annan%E2%80%99s-keynote-address-closing-plenary-international-summit>>.

offence but was clearly embedding a culture of promoting/ supporting terrorism. It rather glorified the terrorists, ignoring the acts committed by them. Even the High Court of Delhi observed that the slogans raised were capable of having ‘demoralising effect’ on the martyrs’ families.³⁵

2.2. Should incitement to offence or violence be the only criterion for restricting speech glorifying terrorism?

Dr Ben Saul³⁶ correctly points out:

Propaganda has long been the hand-maiden to violence: inciting, justifying and naturalizing it; ploughing the ground for violence by softening our psychological defences to it and desensitizing us to its brutalizing effects. (Saul, 2005, p. 868)

Dr Bibi van Ginkel³⁷ in her research paper argues that the term ‘incitement’ does not have any specific definition, however, both literature and the policy documents present various examples. It may comprise of diversity of elements such as inciting the members of public to perpetrate terrorist attacks, dehumanising the victims of acts of terrorists... etc. Statements made in the public, demonstrations, political remarks, social media, radio, TV broadcast or distributing pamphlets are some of the commonly used methods deployed to spread such messages (Ginkel, 2011, p. 3).

Preaching or publication of radical language helps in propagation of the extremist ideology and in mobilization of new members.³⁸ Today, violent extremist ideology drives a new threat of terrorism and combating that extremist ideology is an essential element of counter terrorism strategy (Marchand, 2010, p. 142). The United Kingdom’s counter terrorism strategy focuses on challenging the ideology that promotes violent extremism and focuses on obstructing those who encourage the violent extremist ideology.³⁹ Targeting those who spread violent extremist ideology is one of the ways of curbing this extremist ideology (Marchand, 2010, p. 142).

European countries have regularly recognised the legality of anti-incitement laws, particularly by making them conditional upon the judicial mechanism of balancing the interest of government in curbing incitement to terrorism on one hand and the right to free speech on the other (Barak-Erez & Scharia, 2011, p. 26). In addition, the main United

³⁵ *Kanhaiya Kumar v. State of NCT of Delhi* (2016) SCC OnLine Del 1362, para. 42.

³⁶ Professor of International Law and an Australian Research Council Future Fellow at the University of Sydney.

³⁷ Research Fellow at International Centre for Counter-Terrorism and a coordinator of the Security Cluster of the Clingendael Research Department of the Netherlands Institute for International Relations ‘Clingendael’

³⁸ Taher, A 2008, ‘Third of Muslim Students Back Killings’, *The Sunday Times*, 27 July, viewed 30 November 2020, <<https://www.thetimes.co.uk/article/a-third-of-muslim-students-back-killings-9fzqfzgmzkz5>>.

³⁹ *The United Kingdom’s Strategy for Countering International Terrorism* 2009, Pursue Prevent Protect Prepare, p. 80, viewed 14 October 2020, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228644/7547.pdf>.

Nation bodies are in favour of prevention and prohibition of incitement to terrorism, irrespective of lack of legally binding obligations proscribing incitement to terrorism in the international law. They are also of the view that one of the most important part of counter terrorism strategy is barring of such kind of incitement (Barak-Erez & Scharia, 2011, p. 23).

The need for new laws or introduction of new provisions in the existing laws, to prohibit speech glorifying terrorism also derives from the fact that present day terrorist activities by extremist and quasi-religious groups is accompanied by the resurrection of venomous propaganda and provocative rhetoric, which is facilitated by inexpensive digital technology and videos of terrorists that are distributed over the internet (Saul, 2005, p. 868). UK government's 2004 classified report, which was later leaked to the media, found well-educated graduates being targeted by extremist recruiters.⁴⁰

University campus is a place for young minds to exercise their right to freedom of speech and expression and engage in various discussions including the ones critical of government and its policies. No government should indulge in curbing free speech on university campuses. However, in the fight against terrorism, speeches that do propaganda for terrorist, even though indirectly, need to be restricted. Speeches glorifying any act of terrorism at university campuses or other places must be prohibited because this culture of promoting or supporting such speech may result in creation of an environment, which is conducive to extremist views. This may not only be limited to an atmosphere that nurtures speeches glorifying terrorism but may go further in justifying all terror acts and may later develop into extremist ideology, which may even encourage others in joining terror groups and in committing the acts of terrorism. Hence, in the light of such a situation it may be suggested that incitement to criminal offence or violence should not be the sole criterion for restricting speech glorifying terrorism as mentioned by Supreme Court of India in *Shreya Singhal* case, and attention must be paid to speeches that even do propaganda for acts of terrorism.

3. NEED FOR MAKING GLORIFICATION OF TERRORISM A PUNISHABLE OFFENCE IN INDIA

Many laws still in force in India are either too old or fail to take into consideration the contemporary problems. Unlawful Activities (Prevention) Act 1967 (UAPA), the foremost anti-terror legislation in India, defines 'Unlawful activity' as an act that supports cession or secession of a part of the territory of India, or disclaims, questions the sovereignty of India and integrity of India, or promotes disaffection against India.⁴¹ Section 39 of the UAPA makes giving support to a terrorist organisation an offence. A person perpetrates the offence of providing 'support' to a terrorist outfit if he invites support for the terrorist

⁴⁰ Winnett, R & Leppard, D 2005, 'Leaked No 10 Dossier Reveals Al-Qaeda's British Recruits', *The Sunday Times*, 10 July, viewed 18 November 2020, <<https://www.thetimes.co.uk/article/leaked-no-10-dossier-reveals-al-qaedas-british-recruits-9lpg68xw93r>>.

⁴¹ s.2 (o).

organisation with the motive of promoting the activities of that organisation⁴² or if he organises a gathering to promote the activities of terrorist outfit.⁴³

The accused in the JNU incident have also been charged under section 124A IPC. Section 124A of the IPC sets out the offence of sedition and forbids the use of signs, representations or words that may promote hatred or causes or seeks to cause disaffection towards government established by law and the maximum punishment for the offence of sedition is life imprisonment.

In *Hardik Bharatbhai Patel v. State of Gujarat*, the High Court of Gujarat was of the viewpoint that if the speaker in his speech or statement urges others to adopt violence, then it can be considered that it is meant to rouse disaffection towards the Government established by law and it would constitute the offence of section 124A of IPC.⁴⁴ However, the scope for application of section 124A of IPC is restricted by the judgement of Supreme Court in *Kedar Nath Singh v State of Bihar*, wherein the court held that the use of law of sedition must be limited only where there is instigation to commit violence or intention to create ‘public disorder’ or disrupt ‘public peace.’⁴⁵

The existing situation in India demands enactment of new laws or provisions that specifically criminalize glorification of terrorism as the existing laws are inadequate in dealing with such speeches. In this background, it is recommended that the Indian legislature may consider evaluating the UNSC Resolution 1624 and legislations existing in some European countries that specifically prohibit glorification of terrorism, while ensuring freedom of speech at the same time. Also, a reference can be made to the landmark judgements of European Court of Human Rights.

3.1. Scope of right to freedom of expression under European Convention of Human Rights (ECHR)

This section discusses case laws where some individuals approached European Court of Human Rights claiming violation of article 10 of the ECHR. Though India is not a State party to the ECHR, however, the test applied by European Court of Human Rights in different cases may help Indian courts in understanding the demarcating line between the protected speech and those speeches that may not fall under the category of protected speech.

Article 10(1) of the ECHR gives everyone, within the jurisdiction, right to freedom of speech and expression. Article 10 of ECHR is more of a collective right than merely an individual freedom because it preserves the right of an individual to express himself in all possible forms but at the same time, it comes with civil and political duties towards

⁴² s. 39(1)(a).

⁴³ s. 39(1)(b).

⁴⁴ 2016. (1) RCR (Criminal) 542, para. 14.

⁴⁵ AIR 1962 SC 955, para. 27.

the community (Thorgeirsdottir, 2004, p. 607). Article 10(1) includes all expressions, whatever the content may be, while article 10(2) determines the basis upon which an intrusion with the rights may be upheld (Thorgeirsdottir, 2004, p. 606).

Glorification is a debatable term and goes beyond ‘incitement to violence,’ which is a ground for imposing restriction on freedom of speech under article 10 of ECHR. It is not clear how far glorification goes from actual incitement to violence (Davis, 2013, p. 503). Article 10 of ECHR does not provide protection to the expressions that aim to incite, propagate, or justify hatred based on intolerance.⁴⁶ Article 10(1) of ECHR is subject to article 10(2), which allows imposition of restrictions and penalties for safeguarding national security, territorial integrity, public safety, avoiding disorder...etc.

In *Handyside v The United Kingdom*,⁴⁷ the European Court of Human Rights observed that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed on the right to freedom of expression must be in proportion to the legitimate aim pursued.⁴⁸ At the outset, European Court of Human Rights assesses whether under article 10(1) of ECHR there is an interference with the freedom of expression, and if there is an interference, then the court assesses whether such interference can be justified under article 10(2) by following three standards. The standards are, firstly, whether the interference is ‘prescribed by law,’ secondly, does it pursue a ‘legitimate aim’, and thirdly, whether it is ‘necessary in a democratic society’ (Harris et al., 2014, p. 614). On analysing the decisions of European Court of Human Rights, it can be understood that the first requirement, ‘prescribed by law’ necessitates identification of the basis in the national law by the state authorities under which a limitation on the right under article 10 can be imposed. The second prerequisite of legitimate aim has hardly given rise to any significant deliberation in the case law. Regarding the third standard, the court has considered ‘necessary in a democratic society’ to mean ‘pressing social need’, which is a proportional balance between the medium chosen to satisfy a lawful end and the extent of harm foisted upon expression rights (Harris et al., 2014, p. 614). These standards, though not obligatory, may be helpful for Indian courts to evolve some new standards when the scope of right to freedom of speech and expression under article 19(1)(a) of the Constitution of India is involved.

*Leroy v France*⁴⁹ is a landmark case related to the glorification of terrorism. On 13 September 2001, a weekly newspaper *Ekaitza* in France published a cartoon drawn by Denis Leroy that represented 11 September 2001 attack on twin towers in US, with a caption ‘We have all dreamt of it... Hamas did it.’ Post publication, under the charges of complicity in condoning terrorism, proceedings were brought against Mr Leroy and newspaper’s publishing director. Both were convicted by the court for complicity in condoning terrorism. The Pau Court of appeal in September 2002 upheld the judgement of the first instance court. The main part of the appeal on points of law lodged by the

⁴⁶ *Gündüz v Turkey* App no 35071/97 (ECHR, 4 December 2003)

⁴⁷ App no 5493/72 (ECHR, 7 December 1976).

⁴⁸ *Handyside v The United Kingdom* App no 5493/72 (ECHR, 7 December 1976) [49].

⁴⁹ App no 36109/03 (ECHR, 2 October 2008).

applicant was dismissed by the Court of Cassation (highest court in the French Judicial System).

In November 2003, an application was lodged by him before the European Court of Human Rights relying on article 10 of ECHR which grants freedom of expression. Before European Court of Human Rights, Mr Leroy claimed that his cartoon was meant to convey only his anti – American political perspective in a satirical form and was exercise of freedom of expression granted under article 10 of ECHR. European Court of Human Rights unanimously disagreed with the contentions raised by Mr Leroy and stated that the cartoon was not limited to criticism of American imperialism but glorified the destruction of US by violent means. Also, the caption of the cartoon reflected that he supported those who attacked twin towers and committed violence against thousands of civilians. The European Court of Human Rights further held that the language used by the applicant belittled the dignity of the victims and the drawing had evoked public reaction and it was capable of rousing violence and affect the public order in region where the newspaper was circulated. The court finally held that the fine imposed on the applicant was not disproportionate and the measure imposed was not disproportionate to the legitimate aim pursued. Hence, there was no violation of article 10 of ECHR.

It is significant that in the *Leroy* case the court did not consider it important that no violence had actually taken place. It was the likelihood of violence that was significant and not the actuality of violence (Belavusau, 2010, p. 373, cited in Buyse, 2014, p. 500). The court considered three important factors; firstly, that the cartoon glorified destruction of America by violent means and supported those who killed civilians, secondly, the court took into consideration that such cartoons were capable of arousing public sentiments and thirdly, crucial element was not the actual violence taking place but even the possibility of violence was sufficient to make it punishable.

It can be suggested that the European Court of Human Rights took into consideration the probable consequence of a speech on public irrespective of the fact that such speech did not directly incite violence. In the JNU incident, slogans raised can be compared to the headline used by Mr Leroy. It would not be wrong to suggest that the reasoning applied by European Court of Human Rights in *Leroy* case may be applied in the present case by the Indian Courts as the slogans raised at JNU were indeed capable of provoking public sentiments, which could give rise to violence and disrupt the public order as could be seen from the fact that some students at the University protested against such provocative slogans being raised in the campus. The slogans reflected that they were made in favour of those who committed violence against Indians and belittled dignity of victims of terrorist attacks. Also, the slogans raised glorified destruction of India by violent means. It is pertinent to mention here that like European Union, Indian judiciary is also independent and capable of punishing the wrong and protecting the innocent.

The standards followed by the European Court of Human Rights, though not binding, can help and provide guidance to the Indian courts in deciding matters where laws interfering with freedom of speech and expression are challenged. Case laws such as *Leroy* would provide a path to the courts in India to develop similar approach in interpreting

such laws that Parliament may enact in future restricting freedom of speech in the interest of national security or public order under article 19(2) of the Constitution of India 1950.

3.2. Analysing the UNSC Resolution 1624 and legislations in the UK and France

The basic proposition of international human rights is the intrinsic dignity and equality of all individuals.⁵⁰ The objective of this section is to assist the Indian legislature in understanding the scope of the right to freedom of speech and at the same time consider imposing reasonable restrictions, if any, on the right to freedom of speech in India in the light of UNSC Resolution 1624 and domestic laws of the UK and France.

3.2.1. UNSC Resolution 1624

UNSC Resolution 1624 was adopted on 14 September 2005 in the wake of 7 July 2005 London bombings. After adoption of the UNSC Resolution 1624, Tony Blair, Prime Minister of the UK, stated that in order to combat the problem of terrorism, the world must unite in resisting its poisonous propaganda and not merely in condemning the acts of terrorism.⁵¹ He also said that action must be taken against those who give twisted reasoning and wretched excuses for acts of terrorism.⁵² Prime Minister Blair's statement indicated that the fight against terrorism now included combating the ideology that supported or even promoted it.

The UNSC Resolution 1624 is the first universal instrument that directly deals with the issue of incitement to terrorism (Ronen, 2010, p. 646). The preamble of the resolution 1624 asks states to repudiate attempts aimed at 'justification or glorification (*apologie*) of terrorist act' that may lead to further incitement of such acts.⁵³ Further, it calls upon member states to forbid 'incitement' to the commission of acts of terrorism.⁵⁴ UNSC Resolution 1624 proposed to make 'incitement to terrorism' an inchoate offence by calling upon the states to make it a criminal offence, notwithstanding the terrorist act took place or not (Ginkel, 2011, p.3). However, it does not clarify what constitutes the offence of incitement to 'terrorist acts' (Ronen, 2010, p. 660).

The preamble of the UNSC resolution 1624 also evokes the right to freedom of expression mentioned in article 19 of the UDHR and in article 19 of ICCPR and clarifies that any limitation on the right to freedom of expression may be imposed by law in accordance with the grounds stated in paragraph 3 of article 19 of the ICCPR.⁵⁵ Fighting

⁵⁰ *Law Commission of India report 2017, Hate Speech* para 6.3 (Report No. 267).

⁵¹ Press Release 2005, *Security Council Meeting of World Leaders calls for Legal Prohibition of terrorist incitement, enhanced steps to prevent armed conflict*, SC/8496, 14 September, viewed 18 November 2020 <<https://www.un.org/press/en/2005/sc8496.doc.htm>>.

⁵² Press Release 2005, *Security Council Meeting of World Leaders calls for Legal Prohibition of terrorist incitement, enhanced steps to prevent armed conflict*, SC/8496, 14 September, viewed 18 November 2020 <<https://www.un.org/press/en/2005/sc8496.doc.htm>>.

⁵³ UN Security Council, S/RES/1624 (14 September 2005), p. no. 1.

⁵⁴ UN Security Council, S/RES/1624 (14 September 2005), p. no. 3.

⁵⁵ UN Security Council, S/RES/1624 (14 September 2005), p. no. 1, 2.

the incitement that acts as a medium in the formation of a situation nurturing terrorism is the primary objective of Resolution 1624 (Ronen, 2010, p. 674).

Dr Yaël Ronen⁵⁶ argues that the modern terrorism, which relies on appealing to hearts and minds, influences Resolution 1624. The willingness to act (commit terrorist attacks) emerges from the pressure mounted by the inciters of acts of terrorism, who plant and nurture the ideological basis in the public. This aim is accomplished not by any direct demand for action at earlier stages but by continuous vilification and denigration of the target. Thus, the prohibition sought under Resolution 1624 must include acts that go beyond direct call for action to successfully avert such activities (Ronen, 2010, p. 663).

The UNSC Resolution 1624 does not define ‘incitement’ and it remains unclear whether ‘incitement’ will include indirect incitement, private incitement or *apologie* of terrorism (Saul, 2005, p. 870). As per the report of Committee of Experts on Terrorism, *Apologie* can be understood as the ‘public expression of praise, support or justification of terrorists and/ or terrorist acts.’⁵⁷ However, UN Secretary General in his guidelines for UNSC Resolution 1624 (2005) stated that only incitement to terrorism, which ‘directly’ promotes ‘commission of a crime’ must be made a punishable offence and a speech that glorifies acts of terrorism, should not be criminalized because the states must comply with the international protections for freedom of expression.⁵⁸

Dr Yaël Ronen rightly suggests that both Resolution 1624 and its interpretation by the Secretary General are discouraging because the resolution asks states to prohibit incitement of acts of terrorism, but it does not extend to include ‘justification or glorification (*apologie*)’ of terrorist acts, which may encourage more terrorist acts. Though the UNSC Resolution 1624 explicitly does not prohibit states from making indirect advocacy of terrorism a punishable offence, but the guidelines laid down by the Secretary General do so (Ronen, 2010, p. 663).

Guidelines by Secretary General also ask states to distinguish incitement from glorification and assert that incitement can be proscribed but not glorification because it may not reach a point to trigger or encourage the commission of terrorist activities.⁵⁹ Guidelines suggest that in cases where commission of act of terrorism is promoted by an *apologie*, even then it cannot be restricted because it is not ‘direct.’ The way the guidelines of Secretary General describe the offence, it may even fail to address the purpose for which the offence was created under the UNSC Resolution (Ronen, 2010, p. 664).

⁵⁶ Assistant Professor at Sha’arei Mishpat College, Israel and a former diplomat in the Israeli Foreign Service.

⁵⁷ Committee of Experts on Terrorism 2004, “*Apologie du terrorisme*” and “*Incitement to Terrorism*” *Analytical Report*, 3rd meeting, (Strasbourg, 24 June), CODEXTER 5.

⁵⁸ UN Secretary General 2008, *The protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/63/337, 28 August, para. 60-62.

⁵⁹ UN Secretary General 2008, *The protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/63/337, 28 August, para. 61.

Dr Ronen further argues that these guidelines also fail to take into consideration the role-played by incitement in promoting an environment that nurtures act of terrorism (Ronen, 2010, p. 668). The necessity of preventing an environment favourable to terrorism must supersede the concern for freedom of speech, while indirect advocacy of acts of terrorism must be considered a criminal offence (Ronen, 2010, p. 665). Resolution 1624 does not demand states to adopt criminal prohibition on incitement, however, the context in which the resolution was adopted indicates the intention to include a criminal prohibition because the resolution makes a call to the states to act ‘by all means’ and to take ‘measures as may be necessary and appropriate’ (Ronen, 2010, p. 668).

Chapter VII resolutions of the UNSC are legally binding on all member states of the UN (Weiner, 2006, p. 425). However, Resolution 1624 (2005) adopted by the Security Council is neither a Chapter VII resolution nor its language is mandatory in nature (Bianchi, 2006, pp. 1047-48). For the implementation of its anti-terror resolutions, the UNSC is completely dependent on the UN member states because the steps taken by the UNSC demand effective execution of the domestic enforcement machinery of the states. Therefore, the success of action taken at the international level is dependent on the inclination and ability of the states to embrace international standards in their national legal systems and making them subject to the adjudication and enforcement procedures of those international standards (Bianchi, 2006, p. 1045). It is the environment conducive to terrorism, which must be nipped in the bud to prevent any serious repercussions in the future. Free speech holds importance but not at the cost of creating an environment that supports terrorism.

3.2.2. Legislations in the United Kingdom

In Europe, there has been a rise in the trend of criminalizing those statements, which do not go so far in inciting or promoting violence or acts of terrorism but present them favourably.⁶⁰ PM Tony Blair in a speech post 7 July, 2005 London bombings stated that terrorism is an ‘evil ideology’ and a battle of ‘ideas, hearts and minds.’⁶¹ He further mentioned that to win the fight against terrorism there is a need to combat not only the methods employed by terrorists, but also their ‘views’ as the fight is against ‘barbaric ideas’ of terrorists and not just limited to their barbaric acts.⁶² Thus, the battle against terrorism is not only limited to the physical acts of terrorism but goes beyond and focuses on fighting the extremist ideology, which nurtures and supports terrorism.

In the aftermath of London bombings, the UK government came up with a strong anti-terrorism legislation, namely the Terrorism Act 2006. Section 1 of this act

⁶⁰ Houry, N 2018, ‘France’s Creeping Terrorism Laws Restricting Free Speech’, *Just Security*, 30 May, viewed 24 November 2020 <<https://www.justsecurity.org/57118/frances-creeping-terrorism-laws-restricting-free-speech/>>.

⁶¹ Words of Prime Minister Tony Blair in a speech after 7 July 2005 London bombings 2005, ‘Full Text: Blair Speech on Terror’, *BBC*, 16 July, viewed 14 December 2020, <http://news.bbc.co.uk/2/hi/uk_news/4689363.stm>.

⁶² Words of Prime Minister Tony Blair in a speech after 7 July 2005 London bombings 2005, ‘Full Text: Blair Speech on Terror’, *BBC*, 16 July, viewed 14 December 2020, <http://news.bbc.co.uk/2/hi/uk_news/4689363.stm>.

criminalizes encouragement and glorification of terrorism. It applies to the statements that are understood by some or all members of the society to whom it is published as a direct or indirect encouragement to the commission, preparation or instigation of the acts of terrorism or convention offences.⁶³ It includes the statements that glorify the ‘commission or preparation’ of acts of terrorism or convention offences.⁶⁴ Section 1(5) of the act makes it irrelevant whether such a statement actually encouraged or induced commission of any offence or not. As per section 20(2) of the act, ‘glorification’ includes all kinds of praise or celebration (of acts of terrorism).⁶⁵

Regarding interpretation of the term ‘glorification’ in section 1(1),⁶⁶ Home Secretary Charles Clarke suggested that it should comprise of statements such as ‘Terrorists go straight to paradise when they die.’⁶⁷ This suggests speeches that support terrorist acts, though indirectly, would be covered under the scope of this offence.

3.2.3. Legislations in France

The French Constitution acknowledges the right to freedom of speech but at the same time also permits legislation restricting it.⁶⁸ Post *Charlie Hebdo* incident, France has enhanced its anti-terrorism laws including those putting restrictions on speech. France had the offence of ‘apology of terrorism’ in the French Press Law 1881; however, the application of this law was limited and applied subject to various precautions until finally it was added in the French Penal Code in November 2014.⁶⁹

Article 421-2-5 of the French Penal Code makes direct provocation of acts of terrorism or public apology of acts of terrorism a punishable offence carrying five years’ imprisonment and a fine of €75,000. French law clarifies that presenting or commenting in favour of a terrorist act already carried out amounts to the offence of ‘apology of terrorism.’⁷⁰ However, apology is not the same as negation. When a person totally or partially rejects the terrorist acts without accepting them directly, it constitutes denial of terrorist acts. For punishment under the French law, the apology should have been made in the public.⁷¹ As per the data of French Ministry of Justice, three persons were convicted

⁶³ Terrorism Act, 2006, s. 1(1).

⁶⁴ Terrorism Act, 2006, s. 1(2).

⁶⁵ Terrorism Act, 2006, s. 20.

⁶⁶ Terrorism Act, 2006.

⁶⁷ Caldwell, C 2006, ‘After Londonistan’, *The New York Times Magazine*, 25 June, viewed 18 December 2020 <<https://www.nytimes.com/2006/06/25/magazine/25london.html>>.

⁶⁸ Weber, A 2015, ‘FALQs: Freedom of Speech in France’, *Library of Congress*, 27 March, viewed 18 December 2020, <<https://blogs.loc.gov/law/2015/03/falqs-freedom-of-speech-in-france/>>.

⁶⁹ Houry, N 2018, ‘France’s Creeping Terrorism Laws Restricting Free Speech’, *Just Security*, 30 May, viewed 24 November 2020 <<https://www.justsecurity.org/57118/frances-creeping-terrorism-laws-restricting-free-speech/>>.

⁷⁰ Definition, *service-public.fr*, viewed 14 October 2020, <<https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en>>.

⁷¹ Definition, *service-public.fr*, viewed 14 October 2020, <<https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en>>.

under the offence of apology for terrorism in the year 2014. The number of convictions rose to 230 in year 2015 and 306 in 2016.⁷²

The French law further defines ‘Direct incitement to terrorism’ as an encouragement to perpetrate terrorist acts that have already been predetermined. It is an inducement to carry out acts in the future and not an approval of the acts already perpetrated.⁷³ However, making such remarks before a large gathering is not an essential criterion for this offence.⁷⁴

The French law also allows associations assisting the victims of terrorism to prosecute the person making such apology or provocation, and also entitles such associations to claim damages by becoming a civil party.⁷⁵ This is a progressive step as it takes into consideration the impact of such speech on the victims of terrorist attacks and gives them a right to claim damages from terror apologists. The relevance of incorporating provisions from the UK and French legislations in India shall be discussed in the next section.

4. EVALUATING PROVISIONS OF THE UK AND FRENCH LEGISLATIONS IN THE INDIAN CONTEXT

Criminalizing incitement to acts of terrorists serves the purpose of making early intervention at the domestic and international level for combating terrorism driven by extreme ideology (Ronen, 2010, p. 673). Prof. Eric Barendt⁷⁶ argues that it is risky to prohibit speeches encouraging terrorism because it will empower the government to restrict those speeches, which it ‘dislikes’ (Barendt, 2009, p.453). This view needs reconsideration because it should be made clear that the laws curtailing speech glorifying acts of terrorism must be narrowly defined leaving no scope for ambiguity. This will help in avoiding unnecessary restrictions on speeches by the government and shall allow it to restrict only those speeches that glorify terrorism.

A speech that questions or challenges the government on various issues should not be prohibited because it contributes towards a constructive democracy. A speech glorifying or encouraging any form of terrorism must be held distinct from a political speech, or a speech criticising any government, its policies, or leaders. Such speech forms an essential element of a democracy, and it should never be stifled by any government. However, a speech glorifying terrorism does not question any government, political party or a leader

⁷² Houry, N 2018, ‘France’s Creeping Terrorism Laws Restricting Free Speech’, *Just Security*, 30 May, viewed 24 November 2020 < <https://www.justsecurity.org/57118/frances-creeping-terrorism-laws-restricting-free-speech/>>.

⁷³ Definition, *service-public.fr*, viewed 14 October 2020, <<https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en>>.

⁷⁴ Definition, *service-public.fr*, viewed 14 October 2020, <<https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en>>.

⁷⁵ Initiation of legal proceedings, *service-public.fr*, viewed 14 October 2020, < <https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en> >.

⁷⁶ Emeritus Professor of Media Law, Faculty of Law, UCL.

but represents a view contrary to the democratic values of any nation and deserves to be prohibited.

Freedom of speech and expression is the most treasured possession of all human beings, but it also carries with it responsibilities. Everyone has a responsibility of not inflicting harm unto others and not providing support to the acts of terrorism. Under article 19(2) of the Constitution of India, the Indian Parliament has the power to make laws imposing 'reasonable restrictions' on right to freedom of speech granted under article 19(1)(a) but unfortunately no law or provision has been made so far, which specifically prohibits speech glorifying terrorism.

There are some provisions in the Indian Penal Code, which makes certain speeches a criminal offence. Section 153B of the IPC makes imputations and assertions, whether spoken or written, a punishable offence; section 153A criminalizes fostering enmity between different groups based on race, religion, residence...etc, and section 295A makes those deliberate and malicious acts a punishable offence that are made with the purpose of outraging religious feelings of any class. Despite such provisions in the penal code restricting and criminalizing certain forms of speech, none of them *per se* prohibits a speech glorifying terrorism.

4.1. Provisions recommended for India

India has a lot of scope to learn from the laws enacted in the UK and France that specifically target speech glorifying terrorism. These laws do not restrict free speech but impose limitations on the speech that glorifies terrorism or amounts to terror *apologie*. Such restrictions help in curbing trend or phenomenon which supports acts of terrorism.

In view of the above discussion, it can be recommended that if section 39 of Unlawful Activities (Prevention) Act, 1967 (UAPA) is amended by incorporating relevant provisions from laws in the UK and France, it will enable the government in restricting the speech glorifying acts of terrorism in India. To restrict such speeches, penalties may be imposed in the form of a heavy fine or imprisonment, depending on the gravity or content of the speech.

Section 39 of UAPA sets out the offence of giving support to a terrorist organisation and considers inviting support for a terrorist organisation as a criminal offence. An overall reading of the laws of the UK and France offer an opportunity to India to expand the scope of section 39. Section 39 UAPA may be expanded to include the offence of 'glorification of terrorism' by inserting a new section 39A by taking the cue from definition provided under the law currently existing in the UK and this would help in filling the vacuum that exists in the laws dealing with terrorism in India. This would help in preventing anyone from making a speech glorifying terrorism on the Indian soil.

Section 1 of the UK Terrorism Act 2006 strictly prohibits encouragement and glorification of terrorism and clarifies that glorification includes 'all kinds of praise or celebration' of acts of terrorism. By providing 'glorification' clause and defining what can

be included in it, there shall be more precision and it would assist in preventing the misuse of such provisions by law enforcement agencies. The provision in the UK can help in defining a new offence of ‘glorification of terrorism’ in India under section 39A of UAPA and adding further clarity in the definition would make it more effective.

Another new section 39B on lines of French law may be introduced, which would make ‘apology of terrorism’ a criminal offence. France proscribes ‘presenting or commenting favourably on either terrorist acts in general or specific terrorist acts already committed’.⁷⁷ In addition, the French law clarifies that in order to be punished under this law, the apology must have been made before the public.⁷⁸ It does not make the speech subject to ‘incitement to violence’ or ‘direct call to terrorism’. India can learn from this law by adding an offence of ‘apology of terrorism’, which is presently not specifically considered as an offence in India under any law. It may reasonably serve the purpose of curbing speeches promoting terror apology.

The French law has also made a distinction between ‘apology of terrorism’ and ‘provocation to terrorism.’ It criminalizes both and leaves no scope for confusion between the two. Therefore, it is suggested that India should introduce a new section 39B to UAPA, which after the offence of ‘glorification of terrorism’ would make ‘apology of terrorism’ a separate offence. This would help in curbing speech, which may not directly amount to ‘glorification of terrorism,’ but presents terrorist attacks favourably.

France also allows associations assisting victims of terrorist attacks to prosecute the perpetrators criminally or seek damages as a civil matter.⁷⁹ Thus, we can see that French law gives importance to impact such speech can cause on the victims of terrorism, which may result in their disparagement or humiliation. India can inculcate provisions of the French law, which takes into consideration the humiliation faced by victims of terrorist offenses and empowers them to claim damages. It can be incorporated through a new section 39C in UAPA. This would address the sufferings caused to the victims of terrorist attacks and the families of the victims, who feel humiliated and distressed when someone makes a speech supporting terrorists.

The narrowly designed definitions restricting glorification of terrorism and terror apology introduced in anti-terror laws in countries such as France and the UK in the wake of terrorist attacks certainly require deliberation by the Indian legislature so that these provisions can also be incorporated in the Indian laws.

⁷⁷ Definition: Apology of terrorism, *service-public.fr*, viewed 14 October 2020, < <https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en> >.

⁷⁸ Definition: Apology of terrorism, *service-public.fr*, viewed 14 October 2020, < <https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en> >.

⁷⁹ Initiation of legal proceedings, *service-public.fr*, viewed 14 October 2020, < <https://www.service-public.fr/particuliers/vosdroits/F32512?lang=en> >.

4.2. Will prohibiting speech glorifying terrorism interfere with the right to freedom of speech and expression in India?

In *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*,⁸⁰ while accepting the argument that there should be no constricted interpretation of freedom of speech and expression, the court held that this did not connote that there can never be any restriction.⁸¹ In addition to it, in *Laxmi Khandsari v. State of UP*, the Supreme Court held that the restriction imposed must be in public interest and should maintain a balance between deprivation of a right and evil sought to be averted by that restriction.⁸² National laws allowing limitations on the right to freedom of expression should be interpreted narrowly and the action taken by the government must be open to scrutiny (Davis, 2013, p. 349).

In *Subramaniam Swamy v. Union of India*,⁸³ writ petition under article 32 of the Constitution of India, 1950 was filed challenging the constitutional validity of criminal defamation law in India. While upholding constitutional validity of the defamation laws on the grounds of reasonable restriction, the court observed that a restriction placed on a constitutional right must be proportional in order to be constitutional. The Court further observed that the law placing limitations on the constitutional rights can be considered proportional if it aims to attain a proper purpose, is reasonably linked to the purpose and if those steps are essential to achieve the purpose. In addition, the restrictions imposed should not be of arbitrary or excessive nature that surpasses what is required in the public interest.⁸⁴

It is recommended that the criterion laid down in the *Subramaniam Swamy* case⁸⁵ by Supreme Court should be followed by the Courts in interpreting laws prohibiting speech glorifying acts of terrorism by the courts in India and not those laid down in *Shreya Singhal* case, which demand ‘incitement’ and not ‘advocacy’ as an essential ingredient for prohibiting speech.⁸⁶ As it fails to take into consideration the possibility of harm that can be caused by advocacy itself.

Laws prohibiting ‘glorification of terrorism’ and ‘apology of terrorism’ recommended above as new section 39A, 39B and 39C of UAPA would meet the criterions laid down in *Subramaniam Swamy* case. The recommended laws, imposing restrictions on the right to freedom of speech and expression by prohibiting certain kind of speeches shall be regarded proportional because such laws are for ‘proper purpose,’ the purpose of which is to prevent speeches glorifying terrorism, ‘measures taken’ by these laws are also ‘connected’ to the purpose because they target only specific kind of speeches and are not ambiguous. Lastly, these steps can be argued to be ‘necessary’ to prevent the creation of an

⁸⁰ (2015) 6 SCC 1.

⁸¹ *Id.*, para. 107.

⁸² (1981) 2 SCC 600, para. 16.

⁸³ (2016) 7 SCC 221.

⁸⁴ *Id.* at para. 194.

⁸⁵ (2016) 7 SCC 221.

⁸⁶ (2015) 5 SCC 1, para 13.

environment conducive to terrorism in India and to avert speech that would cause distress to the victims of terrorist attacks and their families.

Also, these restrictions may not be considered excessive as they do not restrict political speeches that are essential in a democracy but only restrict speech that glorifies terrorism, makes an apology of terrorism, and humiliates victims of terrorist attacks. By specifically criminalising such speeches, the government shall be prevented from making any unnecessary arrests of citizens for making speeches critical of the government, its leaders, or policies. The courts of law shall strike down orders of such arrests because that was not the purpose for which such laws were enacted. It will ensure that the right to freedom of speech and expression in India is not only preserved but also prospers.

5. CONCLUSION

Interest of the individuals engaged in the acts of expression must be seen not only from the speaker's viewpoint but also after considering various factors such as the place, audience, scenario, expected reaction, purpose and the gathering where such freedom of speech was exercised by the citizen.⁸⁷ Freedom of speech and expression is an essential part of democracy and deserves protection, but no right can be considered absolute. An analysis of the laws of the UK and France shows us how clearly and distinctly laws can be defined to prohibit speech glorifying terrorism, without hampering right to freedom of speech. The UK has made a separate offence of glorification of terrorism, while France has made a distinction between 'provocation to terrorism' and 'apology of terrorism'.

There seems to be no likely reason as to why India should not prohibit speech glorifying terrorism. The JNU incident pointed out for the need of having specific laws that curb speeches, which glorify acts of terrorism. European countries that provide wider rights of freedom of speech and expression restrict speeches glorifying terrorism by having adequate laws in place. These laws do not curb political speeches or speeches that criticise government or political leaders but proscribe only those speeches which fall under the category of glorification of terrorism or apology of terrorism. The same can be implemented in India. The legislature can enact such laws and if some members of the civil society or human rights group feel that the laws enacted infringe the right to freedom of speech and expression, they would still have the opportunity to challenge such laws in the court of law.

In the *Leroy* case, the European Court of Human Rights considered the effect of speech glorifying terrorism on public and held that it was capable of arousing public sentiments and thus, punishment imposed was held proportional in pursuance of the legitimate aim. Decision of European Court of Human Rights in cases such as *Leroy*, would further assist courts in India in evaluating the scope of right to freedom of speech and expression granted under article 19(1)(a) of the Constitution of India, 1950.

⁸⁷ *D.C. Saxena (Dr) v. Hon'ble The Chief Justice of India*, (1996) 5 SCC 216, para. 31.

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