

**BOOK REVIEW: HATE WHY WE SHOULD RESIST IT WITH FREE
SPEECH NOT CENSORSHIP**

*Saurabh Sinha**

Free speech is the bedrock of democratic foundation. A civilized society and an informed citizenry find an innate desire to express themselves on various issues of national and international importance as well as the judgments of the courts and the functioning of the judiciary; demand accountability from the government, question about the functioning or working of democratic institutions and raise a demand for an answer for anything over which they have doubt, or about which they feel apprehensive.

Freely expressing oneself even otherwise outside the ambit of the law is the most cherished right of an individual except in certain special circumstances under which the law places genuine restrictions on the same.

It is for this very reason that free speech is a constitutionally protected right in democracies around the world. Under the Indian Constitution, freedom of speech and expression has been enshrined as a right under Article 19 (1) (a) with reasonable restrictions under clause (2) of the same article.

The tussle between exercising the right of free speech and legitimate criticism has been a challenging one and citizens have often borne the brunt and faced the heat of the state power for criticism of the power wielders, however legitimate it might seem or appear.

This legitimate exercise have seen them in a legal quagmire, where prosecution under various laws, sometimes draconian makes life very difficult for them and coming out of the legal tangle becomes very daunting.

Nadine Strossen is a Professor of Constitutional law at New York Law School and the first woman national President of the American Civil Liberties Union, where she served from 1991 to 2008.

Her book “Hate; Why We Should Resist It With Free Speech, Not Censorship” is an earnest effort in advocating free speech even in those cases which are not constitutionally protected or which might otherwise appear distasteful.

* Saurabh Sinha, Advocate, Delhi High Court and Author, New Delhi.

The first amendment to the US Constitution, a part of which is similar to Article 19 (1) (a) of the Constitution of India states that the Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people to peacefully assemble, and to petition the Government for a redress of grievances.

The author has begun by describing various terms used in the book which are relevant to explaining the subject which she has covered. She describes Disfavoured, Disturbing or Feared Messages to summarize the three major potential negative impacts attributed to constitutionally protected “hate speech”, which proponents of “hate speech” laws cite as justifying such laws, but which cannot justify the laws consistent with the fundamental emergency and viewpoint neutrality principles.

She then describes “Hate Speech” as demonizing a wide array of disfavoured views. Nadine Strossen has advocated promoting unpopular views even those that may appear distasteful to some or may even be categorized as hateful and not covered under the constitutional protection except those which are placed under some kind of exception.

Freedom of speech, as mentioned earlier is a constitutional right in all democracies and though the book has its base in the US law of free speech, the principles enunciated therein are applicable to India as well.

Criticism, as described cannot be the sole basis of suppressing it. Dissent and criticism strengthen democracy and stifling it on the basis of subjective interpretations does not bode well except in cases where free speech proves a threat in the real sense.

The author starts by saying “If we allowed government to suppress speech that might exert a negative influence on our minds or actions, then no speech would be safe. As Supreme Court Justice Oliver Wendell Holmes declared in a landmark 1919 dissent; in which he strongly repudiated the majority’s bad tendency doctrine, “Every idea is an incitement”. He did not mean by this statement that government might therefore suppress every idea, but rather the opposite: that government may suppress speech only when it directly causes specific, imminent and serious harm”.

The first chapter deals with hate speech controversy and the varying interpretations it can be put to as described earlier. Referring to campus hate speech the author opines “It is technically

impossible to write an anti-speech code that cannot be twisted against speech nobody wants to bar. It has been tried and tried and tried”.

Unpopular views invite unpopular and distasteful reactions. The analysis and interpretation of “unpopular”, however, is a subject of debate. For some, everything which is contrary to the opinion and views they hold is unpopular and therefore should be subjected to censorship or prosecution under the law of the land. Dissent or criticism itself is bad according to holders of this doctrine.

This is a patently erroneous view. The author quotes Frank LaRue, Former UN Special Rapporteur on Freedom of Expression “Freedom of Expression is not only a fundamental right but also an ‘enabler’ of other rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress, as well as civil and political rights. Use of criminal law to sanction legitimate expression constitutes one of the gravest form of restriction, as it leads to other human rights violations.”

She further says “Freedom of speech has been a long and widely cherished right for multiple reasons, venerated under International Human Rights Law and in most national legal systems.

Additionally, freedom of speech is the prerequisite for exercising all other rights and freedoms, enabling us to advocate and organize in support of such rights, and to petition the government for redress of rights violations. Free speech also facilitates the speech for truth and promotes tolerance.

Reasons for stifling, gagging or acting upon legitimate exercise of free speech may be many and varied, which though may not be expressly stated, nevertheless is understood and implied.

Dissent involves expression of opinion which many times may counter critically, the fallacies and lacunas of government policies and therefore bring before the public domain their shortcomings.

Speaking against the government however subjectively or objectively should not be a ground for censorship as criticism helps improve governance. A government imposing their will on the people through policy decisions under the garb of public will is the most abominable thing in a democracy.

Suppressing free voices critical of government is no ground for suppression of speech leave aside prosecution under various laws. The same holds true of other institutions as well.

The nation recently witnessed the Supreme Court of India admonishing a prominent member of the Bar for criticism of the institution, which in SC's opinion adversely affected the administration of justice. The move drew sharp criticism from respected members of the society as well as many legal luminaries.

Freedom of speech is sometimes also stifled to suppress the truth which it might bring forward to expose a malfunctioning government or other institutions of the State. This is what the author has explained in Chapter three drawing a distinction between protected and punishable speech.

She says "The Supreme Court⁵⁰⁹ has held that governments may constitutionally punish what it has labelled "true threats". True threats are limited to statements through which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or a group of individuals" and, in consequence, the targeted individuals reasonably fear the violence.

In the next part the author describes how ambiguity in hate speech laws enhances its potential for misuse. She says "Another closely related problem that hate speech laws pose is what lawyers' term "substantial overbreadth": hate speech laws tend to be written in such capacious language that they extend to speech that even the laws' proponents do not seek to punish.

Although these laws could be relatively confined in scope, thus reducing the overbreadth problem, the undue vagueness problem appear to be inescapable. She quotes a 2016 Human Rights Watch report describing that the hate speech laws in India are used to stifle political dissent, harass journalists, restrict activities by non-governmental organizations, arbitrarily block internet sites or take down content, and target religious minorities and marginalized communities such as Dalits.

The author even describes the role of social media in fuelling hate speech and quotes Kate Klonick, a Ph. D at Yale Law School who opines that Facebook is evolving into a place where celebrities, world leaders and other important people have disproportionate to persuade Facebook to permit certain material to be posted even if it violates Facebook rules.

Another problem with respect to hate speech laws according to the author is the selective manner in which it is made applicable, or in other words under enforcement of a specific kind and specific manner to attain the desired outcomes.

⁵⁰⁹ Supreme Court of the United States

She says “The under enforcement problem is especially acute in countries that lack longstanding democratic structures or traditions, where powerful figures routinely engage in speech that violates their countries’ “hate speech” laws but are not held legally accountable for doing so. The author quotes the example of Poland, Hungary, Zimbabwe and India where hate speech laws are enforced and under enforced with a specific aim.

Finally, in the concluding chapter the author talks about the measures to tackle hate speech; and the most effective measure according to the author is counter speech.

She contends “Paradoxically, in some circumstances the most effective form of counter speech is silence. By deliberately choosing to ignore provocative, hateful speakers, silence can powerfully convey implicit messages of disdain, while at the same time denying hateful speakers the attention they seek and often get from sparking controversy.

Nadine Strossen ends well by saying “Even if constitutionally protected “hate speech” did noticeably contribute to the feared harms, and even if “hate speech” laws would meaningfully help to reduce them, we still should reject such laws because non-censorial measures can effectively counter the feared harms, and because “hate speech” laws would deeply damage freedom of speech, democracy, equality, and societal harmony.”

The book is a good read for understanding the finer nuances of freedom of speech including hate speech.