Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech

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This paper examines the evolution of hate speech law through chronological developments. Beginning during the Constitutional Assembly debates, it examines how hate speech law has been interpreted by courts and legislative developments in the six decades post independence. Through this exercise, the author argues that the courts have interpreted the law through a pragmatic lens, often eschewing doctrine for practical reasons. If the judiciary's approach to hate speech law has been through the lens of pragmatism, what does this mean for legal reform, and for framing civil society responses to the existing legal framework around hate speech? Is it possible to ensure a more speech expansive framework while working within the limits of existing constitutional jurisprudence? Do we have to move beyond existing jurisprudence to encourage and protect fearless speech?

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The raging debates in the aftermath of the *Charlie Hebdo* attack have turned the spotlight on the question of how the law deals with criticisms, caricatures, and insult to religion, religious figures and icons held sacred or divine by followers of religion. Even as protests erupted worldwide around these attacks, the Indian law enforcement machinery post the *Charlie Hebdo* attacks was trying to prevent the circulation of images of the cartoons online by blocking over 650 posts and pages.[1] This reaction encapsulated the tenor of debate around this aspect of free speech in India.

It is this overwhelming concern for law and order, the constitutional value of "ordered security" that has governed the legal regulation of speech, and determined the contours of free speech rights in the country. The problem with this approach is that the threat of a disruption of public order trumps the promise of free speech, and in turn translates into the censorship of creative endeavour, artistic work, criticism of religion, challenge to social orthodoxy, and satire. This, in turn, has encouraged a "heckler's veto," where every time the government gives in to threats of disruption of public order, it legitimises vigilante censorship. This becomes an extra-constitutional method to curb speech. Instead of the burden being on the government to ensure an atmosphere where everyone can speak, it puts the burden on the speaker to ensure that their audience and potential are not offended enough to disrupt the peace.

The emphasis on the constitutional value of "ordered security" is related to the view that the nature of speech that circulates in public should fit the Habermasian ideal of rational debate, where irrational passions, ideas and emotions have no place. One of the founding principles of the provisions in the Indian Penal Code (IPC) that deal with religion was Macaulay's belief that everyone should have the right to discuss religion, but not so as to cause pain, disgust, or outrage, thereby infringing on the rights of others (Pinney 1974: 43–44).

There are two aspects to the regulation of speech that are seen to go beyond the Habermasian framework of rational debate. The first is the idea that there is an excess of passion, ideas, emotions, which if allowed in the unregulated and irrational form is dangerous. The second is that there is a form of speech that is capable of causing hurt, pain, outrage and disgust, which *in itself* is harmful. The IPC uses the language of "outrage," "disgust," and "pain" to regulate such speech. In an essay, Pratap Bhanu Mehta (2015) criticised the assumption that Indian citizens could not treat speech for what it was—

speech—and referred to the "Hobbesian dread that religion releases passions in which the agency of citizens is impaired." According to Mehta, this assumption leads to a justification of paternalism and allows for attacks on artists, where the state only steps in to restore order and not to protect free speech.

Indian law has never had a formal legal category called hate speech.[2] The debate around what we term hate speech today has its history in the policy of colonial rulers, and the belief that Indians were susceptible to religious excitement.[3] This concern can be seen through the language in a cluster of penal provisions (Sections 153A, 153B, 295A, 298, and 505 of the IPC[4] and related provisions of the Code of Criminal Procedure (CrPC)),[5] and clauses in other legislation, guidelines and self regulatory mechanisms that deal with regulating insult, hurt sentiment and incitement to hatred and discrimination.[6] While the punishment for these provisions differs, they do not differ greatly in terms of the kind of content they seek to regulate.

In the colonial period, one of the debates that raged publicly was whether the law as it stood then was capable of dealing with speech that targeted religious figures and not religions per se, the understanding being that while the latter was clearly not allowed, the status of the former was ambiguous. The ambiguity was evident in a series of three cases in the 1920s, when in similar circumstances, the High Courts of Lahore and Allahabad came to different conclusions. The Lahore High Court in the Raj Paul (*Rangeela Rasool*) case[7] held that the author of the tract, a satire on the Prophet Mohammad, could not be held guilty of violating Section 153A IPC as the law did not cover the targeting of religious figures. But in very similar circumstances, the Lahore High Court in *Devi Sharan Sharma*[8] and the Allahabad High Court in *Kali Charan Sharma*,[9] held the publishers of material satirising the Prophet guilty of violating Section 153A IPC. The colonial government responded by enacting Section 295A of the IPC, which outlawed "deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs." This was different from the existing Section 153A that outlawed "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc." This section originally contained an explanation that allowed for speech that was without malicious intention[10] (Donogh 1911: 165). The explanation to the law was dropped in 1961.[11]

Free Speech vs Hurting Religious Sentiment

Thus, the focus of the law shifted from promoting enmity between religions to outraging the religious feelings of a class of citizens—in recognition of the fact that the two were linked, and that there was much public outrage around tracts like *Rangeela Rasool* that caricatured the Prophet. The language of Section 295A IPC has been carefully chosen; it is about "outraging religious feeling" by insulting religion or religious beliefs. Even at the time that this law was passed, there was a spirited debate about the implications of a law that protected against insulting religious belief, with lawmakers expressing the concern that the amendments will allow for greater restrictions on speech.[12]

Sections 295A and 153A are often used together, showing that the police presume a link between "outraging religious feeling" and "promoting enmity between religions." The question, of course, is what happens to creative and artistic expression, religious reform, academic research, and other forms of speech that are seen to be outraging religious feeling but may have no intent to promote enmity between groups. Indian appellate courts have sought to strike a balance between these two interests by taking into account both "internal" factors such as the tenor and tone, and language used as well as "external factors" such as whether there is already an atmosphere that has been vitiated or tensions between communities that already exist.

Courts inferred intention from the form of content, and the manner of discourse and nature and text of captions is significant. Thus there is room for criticism of religion if it is in restrained language appearing to be rational argument. Similarly, there is freedom to express diverse viewpoints and freedom of creativity and art as long as the mode of delivery and the language used does not indicate a deliberate and malicious intention to hurt sentiments or outrage feelings. Academic material is also protected unless the language used is crude or coarse (Narrain 2014: 46). Generally the standard of the reader or viewer is taken to be of the reasonable, strong-minded and courageous person, and not the weak and vacillating mind that scents danger in every point of view.[13]

One of the most striking examples of how courts can get it wrong is the *Dharmakaraana* case.[14] A controversy around the narrative of the book *Dharmakaraana* erupted when the Veerashaiva community, a powerful and politically influential community in Karnataka, took offence to a suggestion in the book that one of the figures they revered could have been born out of wedlock. Besides the irony that reformist figures who had challenged the prevailing orthodoxy were now being used as an excuse to clamp down on artistic integrity, this controversy showed how difficult it is to write about those revered by politically powerful communities. Mehta questions the assumption that there is an inextricable link between attacks on founders of religions or persons who are revered by communities and the civic standing of communities (Mehta 2015). Sensitivities over the depiction of Shivaji are another case in point. James Laine's book, *Shivaji: Hindu King in Islamic India* led to violent protests in Maharashtra, including the ransacking of the Bhandarkar Oriental Research Institute, Pune, by those widely believed to be members of the Shambhaji Brigade. Overturning the case against Laine's publishers, the Supreme Court held that the motive of the author was not to create trouble and that it was the responsibility of the state to ensure law and order and resolve conflicts between communities.[15]

Differing judgments in similar situations add to the problem of outlining a consistent judicial principle in this area. The Indian judiciary's decision in the *Dharmakaraana* case lacks any of the subtlety and nuanced arguments of critics of liberalism such as Talal Asad and Saba Mahmood. While discussing the Danish cartoon controversy, Asad and Mahmood, in conversation with Judith Butler and Wendy Brown, point out

that there is a moral injury which liberals find difficult to recognise (Asad et al 2009). Mahmood refers to the figure of the "icon"—a cluster of meanings that may suggest a person, an authoritative presence, or even a shared imagination, a form of relationality that binds the subject to the imaginary. According to Mahmood, the power of an icon lies in its capacity to allow for an individual to find oneself in a structure that influences how one conducts oneself in the world (Asad et al 2009). At the same time, Mahmood is careful to distinguish between "the sense of moral injury that emanates from such a relationship between the ethical subject and the figure of exemplarity such as Muhammad" from the notion of blasphemy (Asad et al 2009: 78). In the aftermath of the *Charlie Hebdo* attacks, Mahmood Mamdani makes a similar distinction between "blasphemy" and "bigotry," arguing that the *Hebdo* caricatures would fall into the latter category.[16]

Take the case of *Veerabadran Chettiar*.[17] The question before the court was whether breaking the clay idol of the god Ganesha amounted to insulting religious belief if the idol did not belong to a temple or was not part of a religious procession. The petitioner accused the social reformer and leader of the Dravidian movement E V Ramaswami Naicker (Periyar) and two others of violating Sections 295 and 295A of the IPC by insulting the Shaivite religion. The defendants had broken clay images of the god Ganesha in the Town Hall while propagating their rationalist ideology and opposition to idol worship.

The trial court and high court had refused to convict the defendants saying that Sections 295 and 295A required a person to insult religious belief and breaking a clay idol of Ganesha did not amount to insulting religious belief since the idol did not belong to a temple nor was it part of a religious procession. The Supreme Court rejected this line of reasoning, holding instead that the image of Lord Ganesha was held sacred by certain classes of Hindus (Shaivites), even though it may not have been consecrated. The Supreme Court said that by the lower courts' logic even burning, destroying or defiling sacred books like the Koran, Granth Sahib and Bible would not be covered by Section 295A. The Court held that any object, however trivial or devoid of real value, if considered sacred by a class of persons, would be covered by Section 295A.

In 1962, the Madras High Court convicted the editor and publisher of the magazine *Nathigam* under Section 295A for publishing two articles.[18] The first article related to a dialogue between Sita and Draupadi, the heroines of the *Ramayana* and the *Mahabharata*. In this dialogue, Sita and Draupadi vilified the morality of the other and the court said that this conveyed the impression that both were ordinary women devoid of any moral virtue. The second article included poetry related to crimes committed by Christians who profess to follow the tenets of Jesus Christ who, according to the article, was the product of an adulterous union. The court held that "the two articles *ex facie* appear very morbid and most insulting to the two religions Hinduism and Christianity and to those who profess the respective faiths."[19]

Perhaps the court's decision in the *Veerabadran Chettiar* and *Nathigam* cases is a legal recognition of the moral injury to which Asad and Mahmood point.

Right to Critique Religion

Two cases that involved the progressive Lucknow-based publisher Lalai Singh Yadav clearly established the right of authors and publishers to deal with reform and critique of religion. In the first case,[20] the Uttar Pradesh government ordered forfeiture of a book entitled *Samman ke liye dharm parivartan karen* (Revolutionalise religion for the sake of equality), saying it violated Sections 153A and 295A of the IPC. The book was a compilation of B R Ambedkar's Hindi speeches that urged the Scheduled Castes to convert from Hinduism to Buddhism to counter caste oppression. The government claimed that the book promoted disharmony, enmity, hatred and ill-will between Sudras and Harijans and members of the higher Hindu castes and that it deliberately and maliciously outraged the religious feelings of Hindus and insulted their religion.[21]

Rejecting the state government's contention, the Supreme Court held that rational criticism of religious tenets, couched in restrained language, did not amount to an offence either under Section 153A or under Section 295A of the IPC. The Court said that the passages the government was objecting to fell under the category of legitimate criticism. Therefore no reasonable person of normal susceptibilities could possibly object to them. As per the Court, the arguments propounded in the book had to be read in context and they were not meant to offend. The Court held that none of these passages about the scriptures in the book, read in their proper context, contain anything that might be said to insult Hinduism or to promote disharmony and hatred between different castes.[22]

In the second case involving the same publisher,[23] the Supreme Court struck down an Uttar Pradesh government order of forfeiture of a book by Periyar (E V Ramaswamy Naicker) titled *Ramayana: A True Reading* on procedural grounds, for not fulfilling the requirements of Section 99A of the CrPC.[24] The state government claimed that the book hurt the sentiment of Hindus by defiling the figures of Rama, Sita and Janaka, all of whom are venerated by Hindus. While observing that the US Supreme Court mandated "clear and present danger" test does not necessarily apply in India, the court nevertheless quoted from Justice Holmes' decision in *Schenck v The United States:*[25]

> The law's stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre, and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree.[26]

Courts, by and large, have tended to read the content as a whole and not take a line or paragraph out of context. This is in line with other aspects of free speech jurisprudence like obscenity-related rulings. This is an important principle as hate speech claims are often made based on a portion of a larger

text or work. The matter charged as being within the mischief of Section 153A must be read as a whole. One cannot rely on stray, isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.[27]

Interestingly, it is in a case dealing with religion and hate speech where the Court recognises the potential danger in the law itself of inciting hate speech. In *Chandmal Chopra*,[28] the petitioner claimed that the Koran should be proscribed because it violated Sections 153A and 295A of the IPC. The Supreme Court dismissed the petitioner's claims holding that the Koran was a basic religious text or scripture of Islam and Islam was the religion of a large number of persons across the world. Aware of the potentially inflammatory nature of the arguments that could proceed within the courtroom, the Court held that the Koran or its contents could not be subject of any legal proceedings. The Court also said that if it were to proceed with examining the claims of the petitioner, it would only aggravate the mischief sought to be curbed by Sections 153A and 295A. Further, the Court said that Article 25 of the Constitution, which provides for the freedom of religion, threw a protective shield over religious texts from claims of this nature.[29]

Judicial doctrine in India has stressed on reasoned, rational and academic speech as signs of acceptable speech. The sign of hateful speech is speech that is intended to hurt sentiments or outrage feelings and this is evinced from the form of speech. If the form is vituperative, coarse, abusive or offensive, then these are sure markers of hateful speech. Further, historical or other truth is not seen as always acceptable, as truth that is used towards promoting enmity or outraging feelings will continue to fall on the side of unacceptable speech. It is through this division that courts have evolved a broad consensus in the law, that allows for creative speech, and a challenge to heterodoxy, while at the same time protecting religions and religious icons from attack. However, as seen above, courts have not been able to draw this line in a consistent manner, leading to a situation where hate speech law has been used time and again to clamp down on certain forms of speech.

Judicial Doctrine on Hate Speech

Within Indian legal doctrine, there are two diverging strands of thought when it comes to penal provisions regulating insult to religion, hurt community sentiments, and promoting enmity between communities. The first is described by Justice Krishna Iyer in *Lalai Singh Yadav*[30] as "the constitutional value of ordered security." The spectre of public disorder and the constitutional value of ordered security work in tandem, producing the strongest justification for the way the Court has ruled in these cases. Iyer identifies ordered security as a constitutional value that is to be safeguarded, implying that courts should give deference to the state if their intent is to protect safety and peace. Here the principle of ordered security is enunciated as a positive principle, without which creativity and freedom are meaningless.[31]

This principle echoes the words of Jawaharlal Nehru when he defended the enactment of the First Amendment in Parliament. While defending the First Amendment, Nehru identified the horrors of partition and the need for Section 153A in particular as specific reasons for amending Article 19(1)a.

> How many of you remember, or have you forgotten, three and a half years ago, in this city of Delhi in the month of September 1947 in Punjab, in that entire body of western Pakistan, what happened? This constitution was not there, but I am not thinking of the constitution. Where was freedom anywhere—not constitutional freedom but the freedom of normal human impulses—where were those freedoms? Do you think any constitution will prevent me from dealing with such a situation? No. Otherwise the whole constitution goes and the country goes.[32]

Both Nehru and Iyer identify the possibility that the constitutional freedom of speech can only be guaranteed through public order and safety that will help secure the freedom of normal impulses. Nehru and Iyer placed their trust in the state as having the common sense to differentiate between dangerous speech and speech that is in the domain of political criticism, satire, creativity, art, humour and social reform.

Debates on the nature of the Indian constitutional framework reveal that there were contesting points of view on the nature of Indian liberalism. In India, debates around free speech have been influenced by the attempts of the constitutional framers to reinforce and reinvent forms of liberal individualism in a context suffused with communitarian values (Bhargava 1998: 19). Political theorist Rajeev Bhargava (1998: 7) outlines the five most important visions that dominated the discussions in the Constitutional Assembly: Nehru's social democratic vision, Ambedkar's liberal democratic vision, closely related to Nehru's vision, Gandhi's non-modernist, quasi-communitarian vision, the radically egalitarian vision represented by members like K T Shah and the Hindutva or Hindu right-wing vision. The framers of the Constitution reinforced and reinvented forms of liberal individualism but inflected with communitarian values that were not always compatible with individual autonomy (Bhargava 1998: 9). The first strand is a continuation of this hybrid form of liberalism that infused the Indian constitutional framework and was represented most powerfully by the visions of Nehru and Ambedkar.

Within the first strand of judicial thought, the value of truth does not outweigh the need for order. One can see this reflected within the Supreme Court's observations that truth has the potential to cause as much, if not more damage than falsehood,[33] and that the Court will only protect truth claims if they are shown in proper light.[34] It is not the search for truth but the idea of a larger public interest that would prevail, and through this lens, truth and public interest would not always be compatible. This would then be one powerful reason to restrict hate speech, where the overwhelming threat of disruption of public order outweighs the value intrinsic to the circulation of speech, and the search for truth, which can only be possible when the public has access to as many versions of an event or truth claims.

The second strand of doctrine, which would correspond more to the radically egalitarian views of K T Shah and the views of the Hindu right-wing during the Constitutional Assembly debates, is from Justice Bhimasankaran's dissent in

Veerabrahmam, a decision of the Andhra Pradesh High Court.[35] This dissent was penned in a case where the controversy was around a rationalist critique of the Bible and its putative insult to religion. The Andhra Pradesh government ordered the forfeiture of copies of Veerabrahmam's book *Bible Bandaram* (Treasure of the Bible) under Section 99A of the Code of Criminal Procedure (CrPC). The author challenged this, saying that he had dealt with the Bible from a scientific and rationalist point of view. The petitioner also challenged the constitutionality of Section 99A of the CrPC.

The majority observed that the First Amendment had widened the scope of Section 19(2), specifically referring to the term "in the interests of public order" that was introduced through the amendment to provide for a contingency under which speech could be restricted. The Court held that any law penalising activities that have a tendency to cause public disorder is within (the scope of) authorised limits of this provision. The Court said that this pronouncement of the Supreme Court applies equally to Section 99A of the CrPC, since only a matter that would fall either within the ambit of Sections 295A, 124A or 153A of the IPC that would enable the government to take action under 99A. The majority said that in considering whether Section 99A imposes a reasonable restriction, it has to be remembered that Section 99D contains a provision for judicial corrective.[36] The majority held that freethinking does not involve freedom to make scurrilous attacks on the religion and religious beliefs of other sects with impunity.

In his dissent, Justice Bhimasankaran took a very different view. He held that in this case, the petitioners had not established malice on the part of the author, that is even if the author's action were deliberate, there was no malicious intention. The judge said that even though passages in the book may outrage some Christians, there is nothing to show malicious intention to do so on the part of the author. Commenting on the author's intention, the judge said:

> …he may be accused, perhaps, of deficiency in taste or discretion. He may be characterised as a fanatical rationalist. His choice of words may not be considered happy. He is quite clearly contemptuous of what is found in any sacred book. But we live in a country which has guaranteed freedom of expression in its Constitution.[37]

The judge went on to weigh the balance between free speech interests and the interests of those claiming hurt sentiment.

> I am prepared to admit that conditions in India are different from those in other parts of the civilized world in regard to religious beliefs, and that there are classes of people in this country prone to fanaticism, bigotry and superstition. But all the same, we must not forget that we are in a secular State and cannot object to free-thinking. As a people, we must get used as a result of the enjoyment of our fundamental rights to greater tolerance even of intolerance.[38]
>
> That will of course take time but that is no reason why we should not try to keep up in these matters with other advanced countries. One cannot of course be unmindful of the terrible ordeal through which our country has passed for one or two years both before and after the attainment of independence. In spite of it all, our law and Constitution do allow citizens even to offer insults to religion, if such insults are not made with the deliberate and malicious intention of outraging the religious feelings of that class, on the twin principles that curbs on freedom of expression are a greater evil than any consequences that may follow by exercise of such freedom and that one must not be afraid of error so long as truth is free to combat it."[39]

Justice Bhimasankaran's dissent is one of the most powerful articulations of a robust, free speech oriented approach to claims of hurt religious sentiment and is cited repeatedly in case law dealing with hate speech.[40]

To reiterate, the two principles that Justice Bhimasankaran elaborates are:

(i) Curbs on freedom of expression are a greater evil than any consequences that may follow by exercise of such freedom.

(ii) One must not be afraid of error as long as truth is free to combat it.

To put it crudely, the former strand puts public order over free speech, while the latter does not. Justice Bhimasankaran clearly does not trust the state with the ability to differentiate sensibly between dangerous speech and acceptable speech. Further, there is a stress on the truth, that is, freedom of speech is justified by the search for the truth, and from that would spring the inadmissibility of curbs on speech, even of dangerous speech. This view is in keeping with the J S Mill's formulation where the search for truth is one of the crucial justifications for the freedom of speech and expression (Mill: 2006). This view would be much more in accordance with the liberal idea of freedom of speech and expression for which commentators like Mehta have so forcefully argued. This would call for a value in speech that would trump ideological leanings, and demand that those listening are willing to accept speech that they might not like as part of the contract to protect freedom of speech and expression.

Hate Speech and Truth

One of the two basic postulates of Justice Bhimasankaran's line of judicial reasoning will mean rethinking current doctrine where truth is not recognised as an absolute defence. Courts do recognise that sometimes the truth has the potential to cause more damage in the context of hate speech claims. However, courts will protect truth claims when they are shown in the proper light (that is the form is important). For instance, in *Gopal Vinayak Godse*,[41] a case that related to an artistic work, the court reiterated the doctrine on Section 153A. It held that if the writing is calculated to promote feelings of enmity or hatred, containing a truthful account of past events or being otherwise supported by good authority is no defence to a charge under Section 153A. The court observed that in fact, greater the truth, greater the impact of the writing on the minds of its readers if the writing is otherwise calculated to produce mischief. The question here is what this analysis does for the protection of historical and academic work. If one of the main impetuses behind justifying free speech has been truth, then we need to think carefully about what it means for the Court to declare that truth will only be protected if shown in a proper light.

The record of appellate courts shows that the content of works of "academic" or "scholarly" character are usually protected under Article 19(1) a. The only exception to this rule is

when the courts have doubts about whether the work is scholarly or academic. Aware that there are situations where authors could pass off work of dubious quality as scholarly, courts have been vigilant to spot these cases. This is, in turn, linked to the emphasis that courts place on the tenor of language used. If the tenor of language is perceived to be vituperative, coarse and therefore not academic, then courts have treated these cases differently. If the academic or historical work concerned uses offensive and abusive language, it will fall outside of the protection of the law.[42]

Courts have taken into account the audience the academic work is targeted towards. They have differentiated on the basis of the maturity of the audience. This is especially the case in material that is part of the curriculum of schools or colleges.[43] The Supreme Court has held that articles do promote feelings of enmity, hatred and ill-will between the Hindu and Muslim communities on grounds of community and this cannot be done in the guise of political thesis or historical truth.[44]

For judging what are the natural or probable consequences of the writing, it is permissible to take into consideration the class of readers for whom the book is primarily meant as also the state of feelings between the different classes or communities at the relevant time.[45] Here again, there is an assumption that a certain class of persons are more susceptible to the impact of speech than others.

If we begin to take Justice Bhimasankaran's truth protective doctrine seriously, then we will have to reverse this line of judicial thinking and make truth an important factor while deciding if speech amounts to hate speech. This will be in line with the recommendations of the 2012 United Nations Special Rapporteur on Freedom of Speech and Expression that one of the principles governing the regulation of hate speech should be that no one should be penalised for statements that are true.[46]

Limits of Hate Speech

The scholar Susan Benesch (2013) terms "dangerous speech" in the category of speech that has two possibilities—the capacity to harm people directly by humiliating, denigrating, frightening or offending, and also to motivate others to think and act against the member of a group. Benesch (2013) categorises dangerous speech as speech that has a reasonable chance of catalysing or amplifying violence by one group against the other, taking into account the circumstances in which it is disseminated. Most jurisdictions across the world attempt to exclude dangerous speech through laws that are enacted to exclude certain categories of speech, including speech that amounts to "incitement to hatred," "extreme vilification," "fighting words," etc. While "dangerous speech" is not a formal category in Indian law, this category of speech as understood by Benesch would definitely fall outside of the protection of 19(1) a.

When it comes to speech that corresponds to Benesch's "dangerous speech," courts could also take into account the state of feelings between communities at the relevant time. However, the anticipated danger has to be proximate with the expression and possess a direct nexus with it. The nexus should not be remote, conjectural or far-fetched.[47] The expression of thought should be intrinsically dangerous to the public interest, that is the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg."[48] The Supreme Court in *Arup Bhuyan*,[49] has directly incorporated the speech protective standard, the Brandenburg test, into Indian free speech law.[50] Reversing the conviction of an individual for his membership in a banned organisation, the court distinguished between "passive" and "active" membership, thus setting a high threshold for the government to justify restricting speech on the ground of public order. Brandenburg limited punishment to speech that is directed at inciting and likely to incite, "imminent lawless action." In so doing, it held unconstitutional Ohio's criminal syndicalism statute, which had criminalised "advocacy" of violence.

The second category of speech that is currently criminalised needs to be debated in order to ensure that it is kept as narrow as possible. This is the speech that outrages religious feelings with deliberate and malicious intention, wounding religious feelings with deliberate intent, and insulting persons based on their social status, particularly within traditionally excluded sections of the caste hierarchy, the Scheduled Castes and Scheduled Tribes (SC and ST). Since the determination of this category of speech is likely to be very subjective, and the law seeks to bring in an element of objectivity by stressing that such action be "deliberate and malicious" courts have held across the different substantive sections of the law dealing with hate speech, that deliberate intention has to be inferred from the words spoken, the place where they were spoken and the persons to whom they were addressed and other surrounding circumstances. Courts have said that where the intention to wound was premeditated, deliberate intention might be inferred. Deliberate intention may be inferred if the offending words were spoken without good faith by a person who entered into a discussion with the primary purpose of insulting the religious feelings of his listeners.[51]

The problem with this demarcation is that once the public or the listener feels offended, or a group of persons or individual feels that his/her/their feelings are wounded, then the intent of the speaker is often lost within the din of the controversy that follows. The police, even if it is clear that malicious intention was absent, is under pressure to register a case or file charges to placate those who are outraged. This was most evident during the controversy over the printing of the cover of *Charlie Hebdo* in a story by the Urdu newspaper *Avadhnama* referred to earlier in this paper. The controversy that followed resulted in the newspaper being shut down. The editor, Shirin Dalvi, one of the few female editors of an Urdu newspaper in India, went into hiding. Multiple FIRs were filed against Dalvi from three districts across Maharashtra. Despite a public apology and repeated clarifications that there was no deliberate intention to hurt anyone's feelings, the controversy did not die down and the newspaper has not managed to start again.[52]

While this seems to provide protection to speech that is not intended to wound or offend, what this does in effect is to

exclude all creative or artistic work that is aimed to "offend, shock or disturb." The law lays down the rules of the game where speech considered crass or coarse, where the form does not satisfy what a reasonable person would consider to be within acceptable limits of speech, would not be given protection. Thus, there is room for criticism of religion if it is in restrained language appearing to be rational argument.[53] Similarly, there is freedom to express diverse viewpoints and freedom of creativity and art as long as the mode of delivery and the language used does not indicate a deliberate and malicious intention to hurt sentiments or outrage feelings. Academic material likewise is highly protected unless the language used is crude or coarse.

While this distinction seems to satisfy the need for an instinctive and commonsensical divide between what a reasonable person might consider acceptable and unacceptable speech, one wonders whether it would satisfy the stringent requirements of a legal standard and what constitutes the sacred and religious for purposes of Section 295A. Adopting Justice Bhimasankaran's speech protective doctrine would mean that this second category of speech must be construed as narrowly as possible. Everything that does not fall within these two categories should be, by default, construed as falling outside the category of "hate speech" and falling outside the scope of criminal law.

Conclusions

Earlier this year, this writer witnessed the arguments in the Supreme Court related to a constitutional challenge to Section 66A of the Information Technology Act. The government's lawyer was defending the language of the law, which included terms such as "grossly offensive" saying that the courts need to interpret such language strictly. The judges hearing this case began comparing the language of Section 66A to the language of Section 295A, remarking that in the latter, the offence was defined much more clearly. While this may be true, what the judges did not mention were the large number of incidents where this exact provision, along with its sister provision, Section 153A of the IPC, have been invoked to harass, humiliate, and clamp down on artistic expression and free speech. The constitutionality of the penal provisions related to hate speech have been challenged in the Supreme Court by Subramanian Swamy, who faces cases related to hate speech in courts across the country for his provocative anti-minority statements.[54]

While it is increasingly clear that there is an urgent need to clarify, either through directives to the police or through legislative amendments, that certain categories of speech should be exempt from these sections (perhaps categories such as academic speech, historical research etc), it is time that we pause to think about the rationale of these laws. Should the law be dealing with "insult to religion" or "wounded religious feelings" at all? Is the threat to public disorder enough to outweigh the value in speech that may insult religion? The legislative history of hate speech law indicates that the answer to this question is yes. Judicial history, through the second strand of judicial thought underlined in this paper, may provide a way out.

This second judicial strand, which has been subsumed all this while, is a different imagination of speech, where the value of speech and truth are not subservient to the threat of public disorder. Courts need to reappropriate and nurture this strand, and for this there must be a genuine commitment to the value of speech that comes with a commitment to preventing the circulation of a narrow area of speech that would genuinely fall within the definition of hate speech—that is, speech that falls under the category of dangerous speech and a limited and narrow version of the second category of speech, which comprises speech that outrages religious feelings with deliberate and malicious intention, wounding religious feelings with deliberate intent, and insulting persons based on their SC/ST status. Everything outside of this sphere needs to be freed from the shackles of the criminal law. Additionally, hate speech doctrine needs to recognise the claim of truth as an important criterion if not as an absolute defence. Until we move in this direction, democratic debate in India will continue to remain hostage to the heckler's veto, and freedom of speech and expression will remain a vision that we can sight, but never quite grasp.

NOTES

1 Debasish Panigrahi, After Paris Attacks Mumbai Police Block 650 Controversial Posts, *Hindustan Times*, 9 January 2015 available at http://www.hindustantimes.com/india-news/after-paris-attack-mumbai-police-block-650-controversial-posts/article1-1305032.aspx (accessed on 28 February 2015).

2 One of the rare occasions that Indian courts have used the term hate speech was in *Pravasi Bhalai Sangathan* v *Union of India*, Writ Petition (C) No 157 of 2013, a Supreme Court litigation where the Court was asked to respond to speech used to target migrant workers.

3 The First Indian Law Commission drafting the Penal Code (which Thomas Babington Macaulay headed) elaborated on this in Note J in the version of the Code presented before the Governor General of India in Council in 1835, which formed the basis for the 1860 legislation. "... There is perhaps no country in which the Government has so much to apprehend from religious excitement among the people." See Indian Law Commissioners, *A Penal Code Published by Command of the Governor General in Council*, Lawbook Exchange, New Jersey, 2002, p 102. Asad Ali Ahmed, in his work on blasphemy law in colonial India, describes this as a strategy that "enabled the colonial state to assume the role of the rational and neutral arbiter of supposedly endemic and inevitable religious conflicts between what it presumed were its religiously and emotionally excitable subjects." Asad Ali Ahmed, "Specters of Macaulay: Blasphemy, the *Indian Penal Code*, and Pakistan's Postcolonial Predicament," in William Mazzarella and Raminder Kaur (eds), *Censorship in South Asia: Cultural Regulation from Sedition to Seduction*, Indiana University Press, Indiana, pp 172–205 at 173.

4 s 153 A (1): Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc and doing acts prejudicial to maintenance of harmony; s 153B: Imputations, assertions prejudicial to national integration; s 295A: Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs; s 298: Uttering words etc, with the deliberate intent to wound the religious feelings of any person; s 505 (2): Statements conducing to public mischief.

5 s 95 *Code of Criminal Procedure* (CrPC): Power to declare certain publications forfeited and to issue search warrants for the same. Where-(a) any newspaper, or book, or (b) any document, wherever printed, appears to the state government to contain any matter the publication of which is punishable under Section 124A or Section 153A or Section 153B or Section 292 or Section 293 or Section 295A of the *Indian Penal Code* (45 of 1860), the State government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy

of such book or other document to be forfeited to government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may, by warrant, authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

s 96(1) CrPC: Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under Section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub- section (1) of section 95.

6 Sections 8, 8A, 123 (3) A and 125 of the *Representation of People Act,* 1951; Sections 4, 5B and 7 of *The Cinematograph Act*, 1952, Section 7 of *The Protection of Civil Rights Act*, 1955; Codes 2 and 4 of the All India Radio (AIR) and Doordarshan's (DD) *General Broadcasting Code*, Sections 2(iv) and (v) of *Orissa Dramatic Performances Act*, 1962, 2(iv) and (v) of *Karnataka Dramatic Performances Act*, 1964, Sections 2(p) (ii), 10, 11 and 12 of *The Unlawful Activities (Prevention) Act*, 1967, Section 4 (r), (s), (t), (u), (v) and (w) of the *The Scheduled Caste/Schedules Tribes (SC/ST)(Prevention of) Atrocities Act*, 1989; Sections 5, 6, 11, 12, 15, 16, 19 and 20 of *The Cable Television Networks (Regulation) Act*, 1995; Section 69A of the *Information Technology Act*, 2000, Rules 3(2) (b) and 3(2) (i) of *The Information Technology (Intermediary Guidelines) Rules,* 2011, s 3(g) of *The Religious Institutions (Prevention of Misuse) Act*, 1980; Codes 1 and 2 (i) and (iii) of *The General Rules of Conduct in Advertising*, Code 1 of *The Conduct in Connection with Elections; Guideline* 4.10 (c) and 4.11 (b) of *The Community Radio Guidelines 2006*; Chapter III (1) a) and b) of *The Advertising Standards Council of India (ASCI) Guidelines*, and Theme 1 (1), 5 (1), (2) (3) (4) (5), (6) and 6(1) of *The Indian Broadcasting Federation Content Code and Certification Rules*.

7 *Raj Paul v The Emperor*, AIR 1927 Lah 590.

8 *Devi Sharan Sharma & Anr v King Emperor* AIR 1927 Lah 594.

9 *Kali Charan Sharma* v *Emperor*, AIR 1927 All 649

10 Explanation: "It does not amount to an offence within the meaning of this section to point out, without malicious intention, and in honest view to their removal, matters which are producing, or have the tendency to produce, feelings of enmity or hatred between different classed of Her Majesty's subjects."

11 The explanation was dropped through the Criminal Law Amendment Act of 1961 brought changes to both Sections 153A and 295A. See *43rd Law Commission Report on Offences Against the National Security*, 31 August 1971, p 12, available at http://lawcommissionofindia.nic.in/1-50/Report43.pdf, last visited on 15 February 2015.

12 See Neeti Nair, "Beyond the 'Communal' 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code" (2013), 50 *Indian Economic Social History Review* 317.

13 *Manzar Sayeed Khan v State of Maharashtra* (2009) 12 SCC 157.

14 *Baragur Ramchandrappa And Others* v *State Of Karnataka And Another*, 1998 CriLJ 3639; *Sri Baragur Ramachandrappa & Ors* v *State Of Karnataka & Ors*, (2007) 5 SCC 11.

15 *Supra Manzar Sayeed Khan v State Of Maharashtra & Anr.*

16 Vidya Venkat, Interview with Mahmood Mamdani, *Hindu*, 15 January 2015, available at http://www.thehindu.com/opinion/op-ed/charlie-hebdo-cartoons-are-bigoted/article6789470.ece, (accessed on 28 February 2015).

17 *S Veerabadran Chettiar* v *E V Ramaswami Naicker & Ors*, AIR 1958 SC 1032.

18 *In Re P Ramaswami v Unknown* 1962 *CriLJ* 146.

19 Ibid.

20 *Lalai Singh Yadav v State of Uttar Pradesh* 1971 *CriLJ* 1773.

21 Ibid.

22 Ibid.

23 *State Of Uttar Pradesh v Lalai Singh Yadav* AIR 1977 SC 202.

24 Ibid.

25 *Schenck* v *United States* 249 US 47 (1919).

26 *Supra State Of Uttar Pradesh* v *Lalai Singh Yadav.*

27 *Gopal Vinayak Godse v Union of India & Ors* 1971 *CriLJ* 324.

28 *Chandmal Chopra v State of West Bengal* 1988 *CriLJ* 739.

29 Ibid.

30 *Supra State Of Uttar Pradesh v Lalai Singh Yadav* at Para 13.

31 Ibid.

32 *The Parliamentary Debates, Official Report*, Part II, 29 May 1951, p 9628.

33 See section in this paper on "Hate Speech and the Claim of Truth."

34 *Supra Gopal Vinayak Godse.*

35 *Supra N Veerabrahmam v State Of Andhra Pradesh.*

36 Ibid at Para 8.

37 Ibid at Para 71.

38 Ibid at Para 69.

39 Ibid.

40 For instance the Madras High Court, in *In Re P Ramaswamy (Nathigam)* case refers to the dissenting judgment in *Veerabrahmam* but says that in this case malice is apparent from the theme and contents of the articles and the nature and tenor of their captions.

41 *Supra Gopal Vinayak Godse.*

42 *Harnam Das v State of UP,* AIR 1959 All 538. The Court found that the author had stepped far beyond these boundaries. He had characterised the entire Sikh community as "low class people," and said that Sikhism was a religion of "self-seekers, cheats and frauds."

43 *Nand Kishore Singh and Anr v State of Bihar and Anr*, AIR 1986 Pat 98.

44 *Babu Rao Patel v State Of Delhi*, AIR 1980 SC 763, 1980 SCC (2) 402.

45 *Supra Gopal Vinayak Godse.*

46 United Nations General Assembly, Sixty Sixth Session, *Report by Special Rapporteur Frank La Rue on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 7 September 2012, UN Doc A/67/357, Para 50.

47 *S Rangarajan v P Jagjivan Ram*, [1989] 2 SCR 204, *Arup Bhuyan* v *State of Assam*, (2011) 3 SCC 377, *Sujato Bhadro* v *State Of West Bengal,* (2006) 39 AIC 239.

48 Ibid.

49 *Arup Bhuyan* v *State of Assam*, (2011) 3 SCC 377.

50 See Gautam Bhatia, "Goondagiri of the Goonda Act," Outlook.Com, 14 August 2014, available at www.outlookindia.com/article/goondagiri-of-the-goonda-act/291593, last accessed on 26 July 2015.

51 *Narayan Das and Anr* v *State,* AIR 1952 Ori 149.

52 Vinaya Deshpande, "Relief for ex-editor of Urdu Daily," *Hindu*, 10 February 2015, available at http://www.thehindu.com/news/cities/mumbai/govt-restrained-from-taking-action-against-awadhnama-editor/article6874832.ece, last accessed on 28 February 2015.

53 *Harnam Das v State of UP* AIR 1959 All 538.

54 Amit Anand Choudhury, "Subramanian Swamy Challenges Hate Speech Law in SC," *Times of India*, 23 June 2015.

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