Hate Speech in India: A Primer

Abstract

The following narration is a brief primer aimed at informing the general public about the legislative history, circumstances, scope and present conditions surrounding hate speech legislation in India. It discusses various sections of the Indian Penal Code (IPC) as they pertain to the governance of hate speech and how they criminalise hate speech under certain circumstances in India.

1 Introduction

Sections 153A and 295A, among other similar provisions,[1] are IPC provisions which govern speech and acts that have the potential to promote hate on different grounds in India. These two provisions seek to criminalise hate speech in the "interest of public order."

But, where the speech does not lead to disorder, it could still be sanctioned by the need to maintain "decency and morality" or with a view to protect "sovereignty."(as is done by S.153B).[2] The restrictions on speech so imposed by the mentioned IPC provisions are nevertheless, considered as "reasonable restrictions" and therefore, come within the ambit of Article 19(2) of the Constitution.

2 Nature of hate speech laws in India

The laws can be divided into two types based on the nature of its restrictions. So the types of restrictions are:[3]

- Content-based restrictions - Restrict speech on the basis of its message.

[1]The other provisions include: S.153B - Imputations and assertions prejudicial to national integration. S.295 - Injuring or defiling a place of worship with the intent of insulting the religion of any class S.296 - Disturbing religious assembly S.297 - Trespassing on burial places etc. S.298 - Uttering words, etc. with the deliberate intent to wound religious feelings. S.505 - Statements conducive to public mischief (statements creating or promoting enmity, hatred, ill-will b/w classes)

[2]S.153B of IPC - "Imputations and assertions prejudicial to national integration."

[3]Advocate Gautam Bhatia, "Political advertising on private property: The Delhi High Court's strange and disturbing judgment," from Public Order Archives, Indian Constitutional Law and Philosophy Blog - https://indconlawphil.wordpress.com/about-this-blog/

- Content-neutral restrictions - Also known as "Time/place/manner regulations" - Regulate speech on the basis of its effects, irrespective of content. Eg. rule prohibiting use of loudspeakers after a certain time.

These restrictions cannot per se be called as restrictions on free speech because they merely restrict the manner of delivery of speech as opposed to speech itself. Hence, such restrictions cannot be justified under Art.19(2).[4]

Hate speech can be categorised into two classes according to the parties it involves (both, in terms of the person making the speech and the person at the receiving end of it)

- That which is made by *electoral candidates* and members of political parties.
- That which is made by the *common citizens* in general.

The laws too differ on this basis. Therefore, accordingly, we have in India the following laws:

- Representation of People Act, 1951 -This is applicable only to political candidates and only during elections (a type of content-based restriction justified on time/place/manner grounds because although election laws impose restrictions on the content of speech, they do so only at certain times and on the manner in which it is made)
- IPC provisions - They are applicable at all times and to everyone generally.

As far as IPC provisions are concerned, hate speech is divided into the following offences -

- Offences against Public Tranquility - Under Chapter VIII
- Offences relating to Religion - Under Chapter XV
- Offences Of Criminal Intimidation, Insult and Annoyance -Under Chapter XXII

3 Hate speech jurisprudence in India

Power structure - Courts take special note of the person making the hate speech.

[4]"Nothing in sub clause (a) of clause (1) (of Article 19) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

3.1 Was it a citizen or was it a political leader?

When speech which has the potential to incite violence is made by a person in power, it has a wider reach and consequently, a bigger and a much more dangerous impact. This becomes an important point while taking account of the fourth factor - "impact or consequences of the hate speech."

- Context - Courts have considered this factor to be more important that the content of the speech itself because all speech which instigates violence is not hate speech. To determine what amounts to hate speech, the context in which it was made is crucial. Was the atmosphere in which it was made already tense, whereby the speech added fuel to fire?
- Intention - There must necessarily be the intention (or any other relevant mens rea) to cause violence by the speech.
- Consequences - This factor is used as a means to measure the impact and thereby determine the extent of liability.
- Target audience - The two aforementioned laws are invoked when speech/ act is targeted at a person, not in his individual capacity, but as a member of a group. This is different from the way defamation laws work. In case of defamation, the victim is perceived as an individual or at most his standing in public. But, not as a member of a particular community.

4 Section 153A (Promoting enmity between different groups)

Elements of provision:

- If by words (spoken or written), signs, visible representations or otherwise
- Anyone promotes or attempts to promote disharmony or feelings of enmity, hatred or ill-will
- Between different groups (religious, racial, linguistic, casteist or regional)
- On grounds of religion, race, residence, place of birth, language, caste or community or
- Commits any act prejudicial to maintenance of harmony and
- Which disturbs or is likely to disturb public tranquility, then he shall be punished with imprisonment upto three years and/or fine.

This Section does not deal with what is said or done, but how it is said or done. So focus is not on the content that would offend another's feelings but the manner of its delivery or communication (a type of content neutral restriction). Reason - while taking cognizance of the matter, a prima facie case is to be made

out. So, if the speech so made was made in such manner that was so obviously of such nature as to instigate hatred, it would be taken up for trial. Necessary mens rea to invoke punishment under this section is intention. Such intention must be malicious i.e, such as to cause disorder or incite people to violence.

The actual result does not matter. If the speech had the potential (can be inferred from the use of the words "likely" to disturb public tranquility) to cause hate, it is sufficient. Therefore, an attempt is also punishable even though it does not lead to violence.

Publication of the words or representation is not necessary. This is the distinguishing factor between S.153A and S.505(2) for which publication is an essential requisite.

Reference to feelings of the opposing faction against whom the speech was made must be made as they existed then i.e, when the speech was made. So, when a hate speech is made, say, immediately after a riot, its effect is estimated on the mutual hatred of the opposing factions as was prevalent then. The gravity of the speech is calculated by considering the amount of hate that has always been existing between the two groups and the subsequent "hate added" to it by the speech. Hence, context in which the speech was made becomes a relevant factor.

Example: Speech made by VHP President, Ashok Singhal in the aftermath of Godhra: "Gujarat has been a successful experiment. Godhra happened on Feb.27 and the next day, 50 lakh Hindus were on the streets. We were successful in our experiment of raising Hindu consciousness, which will be repeated all over the country now." The emotions were already high and his remarks added fuel to fire.

5 Section 295A of the Indian Penal Code

5.1 Legislative History[5]

Background

1924 - The introduction of the provision in IPC is set up against the backdrop of the failure of the Non Cooperation- Khilafat movement, whose aim was to attain swaraj within one year. A pamphlet called "Rangila Rasool" was making the rounds at this time when the Hindu-Muslim unity was under considerable strain. The pamphlet contained information pertaining to the life of Prophet Muhammad. This pamphlet gained traction when Mahatma Gandhi mentioned it in an article on Hindu-Muslim unity that he wrote in Young India. He rebuked the author (who, at the time was unknown to Gandhi) saying that not only was the title in itself offensive (which translates to "Colourful Prophet") but so was its content. "I have asked myself what the motive possibly could be in writing

[5]Neeti Nair, "Beyond the "communal" 1920s: the problem of intention, legislative pragmatism, and the making of Section 295A of the Indian Penal Code," The Indian Economic and Social History Review, Vol. 50, No. 3, September 2013, 317-340. Also available at: https://neetinair.files.wordpress.com/2014/02/nair-ieshr-sec295a.pdf

or printing such a book except to inflame passions. Abuse and caricature of the Prophet cannot wean a Musalman from his faith, and it can do no good to a Hindu who may have doubts about his own belief. As a contribution therefore to the religious propaganda work, it has no value whatsoever. The harm it can do is obvious". Initially a thousand copies had been sold. Later, in June 1924, there was a call for the ban of the pamphlet as well as prosecution under S.153A.

The author, Mahashe Rajpal, while defending himself before the First Magistrate Court, Lahore stated that his main aim of publishing the pamphlet was to stress on the "evils of polygamy, concubinage, mutas, and gross disparity of age in marriage" by making a reference to these in the life of the Prophet. He considered this awareness to be important in leading a civilized life. He further maintained that he did nothing new and that there have been many such previous writings by European writers as well. Rajpal defended his work by saying that the language used in the pamphlet was in fact, moderate and "sober, restrained and dignified," thereby essentially stating that he had no intentions to stir the passions of the people and promote hatred between two communities (requisite elements of the S.153A). He insisted that the reason for the unrest, was not his pamphlet but because of Gandhi's discussion of it in Young India. In the Courts of the District Magistrate and the Sessions judge, he was found guilty of promoting enmity between classes. But, the Punjab HC reversed the decision. The reasoning adopted by this Court was that although the pamphlet was a "scurrilous satire" of the founder of the religion, it was not in any way an attack on the religion itself or its followers. The Court regarded this personal attack on the religious founder to be ultra vires of S153A. It was of the opinion that if this section were to be interpreted so, then it would even censor the serious works of historians who would describe the Prophet's principles and pass judgement on him. The Court also held that the pamphlet in question may merely offend the sentiments of a community but falls short of causing any real enmity. So, Rajpal was acquitted.

The Muslim Outlook demanded that an inquiry be held to look into the circumstances under which Judge Dalip Singh of the Punjab HC acquitted Rajpal and that he resign. There were widespread condemnation of the acquittal from all quarters. There was a demand from the Muslim community that the Governor of Punjab, Malcolm Hailey take action. The Governor sympathised with them and said that the legal advisors of the government had suggested bringing about changes to the law to prevent future religious controversies as the HC had suggested. The editor of the Muslim Outlook, D.S Bukhary was then pulled for Contempt of Court as he was persistent in his demand for Dalip Singh's resignation. He was convicted. Bukhary had however, been supportive of the observations made by Justice Dalal of the Allahabad HC who was particularly critical of the Punjab HC's distinction between 'a book which may hurt the feelings of Muslims and a book which may cause feeling of enmity or hatred between different classes of His Majesty's subjects.' Maulana Muhammad Ali, while addressing a gathering of Muslims openly declared a threat that the only way the lives of the offenders could be protected is by introducing changes to the penal laws to prevent such offense against the Prophet.

Meanwhile, another case had come up before the court - that of an Amritsar journal, Risala Vartman, carrying content against the Prophet. This time however, several prosecution witnesses had clearly testified that it was written with an intent to promote hatred between the two communities.

In this case, the Counsel for the Prosecution argued that: To determine the nature of what was written, reference should be made of how it was perceived by the common man who is the target audience and not by the highly intellectual. To determine the intention of the accused, the time of publication must also be taken into account as was laid down in the Tilak sedition case. The Counsel for the accused contended: It was the posters that drew attention to the journal and its content and that the content by itself did not incite violence (similar to what was contended in the Rangila Rasool case). So, it was not the content but its widespread dissemination which was the cause, thereby implicitly stating that the intention of those who spread the content must have been malicious and not that of the writer. Distinction must be made between 'hatred' and 'contempt' because all the Prosecution witnesses expressed contempt, not hatred.

To determine whether offence was to be taken or not, the judge must decide not by putting himself in the shoes of the common man, but as a judge. That there were writings in the past against Dayanand Saraswati and that those writers had not been prosecuted. That the article was critical of the Prophet in his individual capacity and not as a member of the the Muslim community. While the case was being heard, the posters were still not taken down. It was put up even in areas that had Sikhs and Hindus in minority. Their lives became difficult as they were asked to leave or live on certain conditions like, not charging interest on loans that they advanced. This prompted the constitution of a special two member bench of the Punjab HC to look into whether Section 153A covered cases of insult to the founder of a religion.

Meanwhile, in the Vartman case, the Court convicted the accused writer and the printer to rigorous imprisonment with fine. The evacuation of the Hindus and Sikhs urged the Legislative Assembly to push for an amendment to the existing law. At the time, the Assembly had the aim of accommodating diverse interests - it had to cater to the religious communities, the press, academia and the lawmakers. So the conflicting interests of religion and freedom of speech had to be balanced. "These debates reveal the negotiation of very contrary understandings of 'religious beliefs', 'freedom of expression' and the role of the state as arbiter to arrive at the consensus that was section 295A of the IPC.

Given the abuses of section 295A today it is worth underlining that this consensus entailed making a distinction between the researches of historians of religion, the work of social and religious reform and the 'scurrilous scribbles' of bazaar polemicists." The Bill introduced in the Assembly emphasized on how there was a need for 'intention' to be proved in order to hold a person guilty under the new law. One of the opinions expressed in the Assembly was that while the gist of the offence is "insult to religion," a distinction had to be made between that and an "insult to a Prophet" because only in the former, is it an offence in the criminal law sense of the term- that of being an offence against the State. Certain legislators in the minority, opined that the power to

initiate prosecution in such cases must be given to the individuals and not the government. This is an important point for consideration given the fact that this very factor has led to the modern-day abuse of the law.

Amendments suggested - The words 'deliberate and malicious' were inserted so that the section was 'both comprehensive and at the same time of not too wide an application'. NC Kelkar, a member of the select committee suggested the adding of an exception, explaining what would not come within the purview of the section in order to act as a 'good guide to the judge.' This exception, he said would express the following: "It would not be an offence under this section to criticize the principles, doctrines or tenets or observances of any religion, with a view to investigate truth, or improve the condition of human society, or to promote social and religious reform." There were opinions on how the Bill did not protect the 'honest publisher' or the 'honest printer.' NC Kelkar agreed with this and said that the Bill must seek to protect even the 'apparently merciless satirist who uses the knife but only in the spirit of a surgeon when performing what may be a necessary operation for the good of society.' Finally, Jinnah's suggestion of making the offence under S.295A non bailable, as was the offence under S.153A, was accepted.

5.2 Section 295A as it stands today

Deliberate and malicious acts intended to outrage religious feelings -

Elements - Deliberate and malicious intention Of outraging religious feelings Of any class of citizens By words, signs or visible representations Insults or attempts to insult Religion or religious beliefs of that class

Punishment: Imprisonment upto three years and/or fine.

Its constitutional validity - Supreme Court upheld the constitutional validity of Section 295A in Ramji Lal Modi v. State of U.P[6] and held the following-

This section does not penalise every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. It only punishes the aggravated form of insult to religion. How this is determined - The calculated tendency of the aggravated form of insult must be clearly to disrupt the public order. Art.19(2) protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression "in the interests of" public order, which is much wider than "for maintenance of" public order. If, therefore, certain activities have a tendency to cause public disorder, however remote, a law penalising such activities can be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order. The law thereby creates a legal fiction - it presumes that a "state of affairs exists for legal purposes, whether or not it actually does."[7]

[6] 5 April, 1957. Equivalent citations: 1957 AIR 620, 1957 SCR 860. https://indiankanoon.org/doc/553290/

[7] Advocate Gautam Bhatia,"'Blasphemy' law and the Constitution," Livemint, March 19,

In Superintendent, Central Prison, Fatehgarh v Ram Manohar Lohia[8] - The Court made two important observations - Public order is "synonymous with public safety and tranquillity" : "It is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State." Reasonable restriction - "Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public order." Thus, the Court rejected the view laid down in the the Ramji Lal Modi case. The connection must not be remote or fanciful. So, the Court dismissed the claim made by the State in the Ram Manohar Lohia case that the provocative speech urging people not to pay taxes may lead to a revolution, as being far-fetched.

In S. Rangarajan v P. Jagjivan Ram[9] - The court held thus: "Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

6 Preventive actions

Forfeiture by government - u/s 95[10]and 96[11]of Cr.PC - While those were instances where the Court was called upon to see whether the offensive speech or

2016. http://www.livemint.com/Sundayapp/TFCMsqPVQ8rK6dJj2E2kSN/Blasphemy-law-and-the-Constitution.html

[8]21 January, 1960. Equivalent citations: 1960 AIR 633, 1960 SCR (2) 821. Available at: https://indiankanoon.org/doc/1386353/

[9]30 March, 1989. Equivalent citations: 1989 SCR (2) 204, 1989 SCC (2) 574. Available at: https://indiankanoon.org/doc/341773/

[10]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.

[11]Application to High Court to set aside declaration of forfeiture. (1) 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.

writing did in fact lead to public disorder and whether the law was reasonable to impose restrictions on them, there have been cases where the Court was called upon to determine whether the preventive actions so taken in the interest of public order were reasonable.

U/s 95, the State government can order for the forfeiture of a book if it is, in its opinion that it has content which would lead to an offence u/s 295A or other such similar offences. Once the forfeiture is ordered, the person can challenge the order u/s 96 before the High Court which would then see whether the government had applied its mind to the forfeiture.

In Sri Baragur Ramachandrappa v State of Karnataka[12] the petitioner's novel on Basaveshwara, was forfeited by the State government as it appeared to be objectionable, inflammatory, hurtful and insulting to the sentiments and feelings of the Veerashaivas and the followers of Basaveshwara. The Court referred to S.Rangarajan v P. Jagjivan Ram to elaborate on the standard to be applied to determine whether the matter is offensive and would likely to lead to public disorder. It "..... should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man." However, it further held that there should be "considerable circumspection on. . . ...the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation." It also endorsed the opinion that u/s 95, the State government, to order the forfeiture, need not "prove" that all the necessary elements of the offence u/s 295A were present. Therefore, it need not prove that the publication was with the malicious intention to incite public disorder. It is enough if, to the state government the elements 'appeared' to be present.

Perumal Murugan case - Author Perumal Murugan announced his literary obituary on his Facebook page after there were incessant demands to ban his book, "Mathorubhagan" (translated into English as One Part Woman), and protests by some caste groups. He even tendered an apology as a settlement with the hecklers and withdrew the unsold copies. The "peace talks" were facilitated by the police as a knee-jerk reaction to the situation spiralling out of control. Finally, PUCL filed a PIL in the Madras HC to set aside the "coercive" settlement. There was a demand for the ban on three grounds: Obscenity (u/s 292), defamation and derogatory and hurtful to the religious sentiments of the Hindus (u/s295A) Section 153-A(1)(b) was invoked on the ground that the author had committed acts which disturb or are likely to disturb public tranquillity.

Observations -

The Court noted that he conducted extensive research on the book and decided to "follow the facts to where they led," without regard to any consequences. So, his intention was not malicious in the sense that he did not intend to incite disorder. The fact that the novel won many awards brings into question as to whose perspective should "intention to incite disorder" be seen from- the

[12] 2 May, 2007. Available at: https://indiankanoon.org/doc/1494506/

hypersensitive who take offence to everything or the ordinary man of common sense?[13] "The fundamental problem is that the actual storyline is something different, while based on a couple of paragraphs extracted from the novel, the opponents seek to project a storyline based only on those paragraphs, ignoring the main storyline of the book." By saying so, the Court emphasized on the need to look at the controversial book in its context and as a whole. Courts do not have the authority to ban books. They can only consider whether the government had applied its mind while banning them. But, in this case, the Court did not address this issue[14].

The Court in this case, like in Ranjit Udeshi v State of Maharashtra[15], took it upon itself to become the literary critique to decide whether the book was a violation of Ss.292, 295A or 153A rather than letting itself be influenced by the opinion of the experts in that field.[16]

"In the matter at hand, the author faced a challenge from the mob gathered outside the Collectorate, coupled with the pressures of a bandh and a strike in the town called for by these elements. In such simmering circumstances, it was the bounden duty of the State Government to ensure that the law and order situation does not go out of hand and non State players cannot be allowed to determine what is permissible and what is not." The Court essentially states that to judge whether the book should be banned in public interest, the consequences it brings about is not always a conclusive test. The police should not have forced a settlement on Perumal by yielding to the "heckler's veto."[17]

"The State has to ensure proper police protection where such authors and artists come under attack from a section of the society."

Summary - when it comes to restrictions on speech and artistic work under Ss.153A and 295A of IPC and consequently the government action under S.95 of Cr.PC., the test to determine whether there is intention to incite public disorder or outrage religious feelings of a community is a subjective one - one dependent on the satisfaction of the government. To issue an order under S.95 of Cr.PC., the government must be satisfied that the conditions of the offences under the said IPC provisions are fulfilled. This it can do, only by taking into account the situation on the ground (protests, burning of effigies, assault, attacks etc.) This

[13] In Maharashtra v. Sangharaj Damodar Rupawate, 9 July, 2010 - the Court observed that "the effect of the words used in the offending material must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view." Available at: https://indiankanoon.org/doc/1466814/

[14] Advocate Gautam Bhatia, "The fault in our speech," The Hindu, July 7, 2016. Available at: http://www.thehindu.com/opinion/lead/perumal-murugan-book-controversy-and-madras-high-court/article14476037.ece

[15] 19 August, 1964. Equivalent citations: 1965 AIR 881, 1965 SCR (1). Available at: https://indiankanoon.org/doc/1623275/

[16] Advocate Gautam Bhatia, "The Madras High Court's Perumal Murugan Judgment: Some Concerns," Indian Constitutional Law and Philosophy blog, July 7, 2016. Available at: https://indconlawphil.wordpress.com/2016/07/07/the-madras-high-courts-perumal-murugan-judgment-some-concerns/

[17] http://www.thehindu.com/opinion/lead/perumal-murugan-book-controversy-and-madras-high-court/article14476037.ece

is dangerous as the test to ascertain the mischievous tendency of the speech is entirely dependent on consequences irrespective of whether they were truly the effect of the book or the violence was merely a reaction brought about by the hypersensitive men. Therefore, it targets not just the "scurrilous scribbler" but even informed religious critique.

7 Elaboration on public order based restrictions

When speech is of such nature as to lead to public disorder, the individual right must give in to the larger public interest.

Public disorder defined - Simply put, public disorder is the absence or the lack of public order. Public order defined - Public order refers to maintenance of public peace and tranquility[18]something more than mere maintenance of law and order. "More than mere maintenance of law and order" - In Ram Manohar Lohia, the SC stressed on what is called the "concentric circles theory." According to this, "One has to imagine three concentric circles, the largest representing 'law and order', the next representing 'public order' and the smallest representing 'security of State.'An act may affect 'law and order' but not 'public order,' just as an act may affect 'public order' but not 'security of the State.'"

A rough timeline of the changes in the way courts have perceived public disorder as a ground for restriction -

Tendency Test - Ramji Lal Modi case - This case laid down that there's no need for proximity between the act and public disorder. If the act has tendency to cause disorder, it can be legitimately restricted.

Proximate Connection Test - Ram Manohar Lohia case - Where the Court decided that one should not give in to Heckler's veto. So, one cannot simply restrict speech in the interest of public order but must consider its reasonableness i.e, there must be a proximate connection between the act/speech and disorder.

Spark in the Powder Keg Test - Rangarajan case - reaffirmed the proximate connection test - The speech/ act to be restricted, must be of such nature as to act like a spark in a powder keg.

American Test - Arup Bhuyan's case[19] - adopted the American standard of "incitement to imminent lawless action."

8 Identifying Criteria of Hate Speech[20]

1. The extremity of the speech - Is the speech offensive enough to evoke the extreme form of emotion?

[18]Ram Manohar Lohia case - "'public order'..... must be demarcated from the other grounds and ordinarily read in an exclusive sense to mean public peace, safety and tranquility in contradistinction to national upheavals, such as revolution, civil strife and war, affecting the security of the State."

[19]Arup Bhuyan vs State Of Assam, 3 February, 2011. Available at: https://indiankanoon.org/doc/792920/

[20]"Hate Speech," Report No.267, Law Commission of India, New Delhi, March 2017 . Available at: http://lawcommissionofindia.nic.in/reports/Report267.pdf

2. Incitement - In Shreya Singhal v Union of India, the SC drew a distinction between speech which is confined to mere discussion or advocacy and that which leads to incitement. It is only 'incitement' which can act as a ground for restraining free speech. This means that to restrict speech under Art.19(2), the speech must have reached the threshold of "incitement." The speech must be an incitement to-

   - Imminent violence[21] - example - The events that led to the mass exodus of Northeastern people: "where in May 2014, Bodo militants had killed 32 Muslims in the Baksa and Kokrajhar districts. These images were accompanied with messages threatening retaliatory violence against persons from the North East living in cities like Bangalore. The reportage by newspapers in the North East about the threats in Bengaluru further fueled panic, with many parents asking their children who were studying in cities like Bangalore to return home."[22] or
   - Discrimination

   3. Status of the author of the speech - As speeches made by persons in power tend to have a wider scope of impact, the SC was approached in Pravasi Bhalai Sangathan, to declare speeches by elected representatives, political and religious leaders as unconstitutional. The Court referred the matter to the Law Commission.

   4. Status of victims of the speech (target audience)

   5. Potentiality of the speech - This is an important factor to determine the mens rea of the speaker i.e, his state of mind while giving the speech. This is especially useful to ascertain the validity of the restriction. Eg. In Ramesh v Union of India, potential of the movie to generate an impact on the audience was considered to determine the validity on its restriction.

   6. Context - to subject hate speech to the reasonable restriction, the context in which it was made is a necessary element to consider because a person cannot be held liable for all kinds of hate speech.

[21] Arup Bhuyan v. State of Assam

[22] Siddharth Narrain, "Dangerous Speech in Real Time: Social Media, Policing, and Communal Violence," Economic and Political Weekly, 24 August, 2017. Available at: http://www.epw.in/engage/article/dangerous-speech-real-time-social-media-policing-and-communal-violence#_ednref2

9 Some other laws under which people have been prosecuted

9.1 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

S.3(1)(x) - "intentionally insulting or intimidating with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view."

Swaran Singh v. State[23] - the Supreme Court held that calling a member of a Scheduled caste "chamar" in public view would attract Section 3(1)(x).

Arumugam Seervai v. State of Tamil Nadu[24] - the Supreme Court upheld the prosecution under this provision for using the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with the intent to insult. The historical context of the impugned words was examined in this case.

However, this provision would be invoked only if the insulting comments were made against an individual of a particular community (SC/ST) and not when made against the whole community.[25]

9.2 The Representation of People's Act, 1951

S.125 - This Section makes it an electoral offence for any person to, in connection with the election, promote feelings of religious enmity or hatred between different classes of citizens.

S.123(3A) - (similar to S.153A of IPC) - "The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate" would constitute a corrupt practice (making election of such candidate invalid).

10 The Hindutva Judgments

Consists of two erroneous judgements delivered by Justice JS Verma.

[23](2008) 8 SCC 435.

[24](2011) 6 SCC 405

[25]https://timesofindia.indiatimes.com/india/social-media-slurs-on-sc/st-punishable-hc/articleshow/59432794.cms - Casteist remarks were made against the Dhobi community on the Facebook wall. The Delhi HC ruled that since it was not aimed at any particular individual, the complaint cannot stand. But, held that the "wall" was a public place, irrespective of whether the privacy settings were set at "private" or "public." And that the presence of the victim of verbal abuse is not necessary at the time of making the comment. It could've been made behind his back, but in public view.

In a case against Bal Thackeray- a petition was filed against him on the grounds that he violated the provisions of S.123(3)[26] by openly urging people to vote for a Hindu candidate to teach Muslims a lesson. "Anybody who stands against the Hindus should be worshipped with shoes," Thackeray had said. "Under every mosque there is a Hindu temple. They should bear in mind that this is a country of Hindus."

Dr. Ramesh Yashwant Prabhoo v Shri Prabhakar Kashinath Kunte and Others[27]"It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for votes for a Hindu candidate on the ground that he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of sub-section (3) or (3A) of Section 123. It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant."

In a case against Manohar Joshi (colleague of Thackeray) - (charged under the same provision) as he promised to transform Maharashtra into a Hindu Rashtra.

Manohar Joshi v. Nitin Bhaurao Patil & Anr.[28]the Supreme Court observed that a statement by a candidate during election that first Hindu State will be established in Maharashtra "cannot be considered a corrupt practice under section 123(3) of the RPA, 1951 as: [the statement] by itself [was] not an appeal for votes on the ground of his religion but the expression, at best, of such a hope. However, despicable be such a statement, it cannot be said to amount to an appeal for votes on the ground of his religion."

The errors:

These judgements failed to take into account the decision of the SC that the Court should not undertake theological explorations of Hinduism while interpreting Section 123 (3).[29] They did not take into account the context in which the declarations were made - The BJP's Ram Janmabhoomi movement was at

[26]"The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate: 2 [Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.]"

[27]1 December, 1995. Equivalent citations: 1996 AIR 1113, 1996 SCC (1) 130. Available at: https://indiankanoon.org/doc/925631/

[28]11 December, 1995. Equivalent citations: 1996 AIR 796, 1996 SCC (1) 169. Available at: https://indiankanoon.org/doc/1215497/

[29]Saurv Datta, "SC's decision to review old 'Hindutva' judgements could change Indian politics for the better," Scroll.in, March 3, 2014. Available at: https://scroll.in/article/657520/scs-decision-to-review-old-hindutva-judgements-could-change-indian-politics-for-the-better
Ritika Patni and Kasturika Kaumudi,"Regulation of Hate Speech." Available at: http://docs.manupatra.in/newsline/articles/Upload/7DC55D84-1D0D-4EEF-AFFF-9196528CFA54.pdf

its peak at the time the speech was made.[30]

These judgements were called for review at a time when BJP's Abiram Singh's case involving hate speech was pending before it on appeal from a Bombay HC judgement which set aside Singh's election to the Maharashtra assembly in 1990, for which he sought to rely on these flawed Hindutva judgements for his defence.

Recent developments[31] - several former Judges, jurists, scientists, police officers and businessmen have made a plea for taking suo motu action against those holding constitutional positions and in the government for making hate speech. This, they said was important as many from the ruling party are "stoking these dangerous sentiments that amount to nothing else than incitement to violence."

Flawed Law[32]

The problem with the provisions of the RPA is that neither do they nor the Model Code of Conduct governing the political candidates come into operation until the elections are announced by notification. So, any inflammatory speeches made before then will be governed by the criminal provisions. However, they do not have the effect of disqualifying the potential candidates. For example, the speech made by Varun Gandhi as an electoral candidate of the BJP from Pilibhit before the 2009 general elections in which he said that he would not hesitate to "cut off the hands that are raised against Hindus" was enough to disqualify him. But, he could not be disqualified as the existing laws do not provide for it. Also, technically, he wasn't a "candidate" when he made the hate speech as he had not filed his nomination papers then and so no action could be taken against him under the election laws. The Election Commission merely issued an advisory to the party not to field him as a candidate. But, the BJP did not pay heed as it was non-binding. Disqualification is necessary since by virtue of their position, such speeches made by them are far more dangerous than those made by ordinary citizens. Added to this problem is that once the elections are over, the EC becomes functus officio and so cannot take any disciplinary action or otherwise against the erring parties or their members. So, it cannot de-recognize such parties.[33]

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[30] *ibid.*

[31] Apoorva Mandhani, "Former Judges, Senior Lawyers write to CJI demanding suo motu action against Hate Speech," LiveLaw.in, MArch 5, 2016. Available at: http://www.livelaw.in/former-judges-senior-lawyers-write-cji-demanding-suo-motu-action-hate-speech/

[32] Soli J. Sorabjee, "Who'll silence Varun?" The Indian Express Archive, March 27, 2009. Available at: http://archive.indianexpress.com/news/wholl-silence-varun/439578/0

[33] Livelaw research team, "Supreme Court dismisses petition to derecognize Shiv Sena & MNS on the ground of Hate Speeches by their leaders," LiveLaw.in, July 25, 2016. Available at: http://www.livelaw.in/supreme-court-dismisses-petition-derecognize-shiv-sena-mns-ground-hate-speeches-leaders/

11 Section 196 of the Criminal Procedure Code - A Roadblock to Effective Enforcement

This provision requires the prior sanction of the Central government or the State government for the prosecution of any person accused of an offence under S.153A and S.295A. The reasoning adopted by the Legislature for such a policy is that these offences being against public tranquility and peace with which the State government is concerned, the prosecution should be instituted only on the authority of the government. However, it is this policy that has led to the ineffective enforcement of Ss.153A and 295A.

For example: Hate speech case against Yogi Adityanath:

Yogi Adityanath (who was then a local MP) was accused of having triggered the 2007 Gorakhpur riots through his incendiary speech which provoked members of Hindu Yuva Vahini and other Hindutva groups. FIR was registered against him as Case Crime No. 43 of 2007, accusing him of offences under Sections 147, 295, 297, 436, 506 and 153A of IPC. The Gorakhpur police, after completing investigation filed a chargesheet for all offences mentioned except S.153A. The CJM took cognizance of all offences on 14.06.2007 except for the offence under S.153A for the reason that prior sanction was necessary as per S.196 of CrPC for doing so. The police then sought for sanction which was granted after which a supplementary chargesheet was filed exclusively for the offence u/s 153A. The CJM then took cognizance of this on 22.12.2009. But the accused filed a revision petition in the Sessions Court against the order of granting sanction. It was allowed and the order was set aside. The matter was then sent back to the CJM for fresh consideration. The main contention of the accused for setting aside of the order was that it was not given by the competent authority. Although this was accepted, the Sessions Court was wrong in setting aside both orders - dated 14.6.2007 and 22.12.2009 because it is only the latter order (which took cognizance of offence u/s 153A) which required sanction. This was challenged in the Allahabad HC. The HC accepted the Sessions Court's view and upheld its order. Challenging the decision of the HC, the matter was taken to the SC which ultimately remitted the matter to the Magistrate, directing it to pass a fresh and reasoned order.

In the meantime, a petition was also filed in the HC for the investigation to be conducted by an independent agency such as the CBI rather than the CID and for the quashing of the order dated 3.5.2017 which refused to grant sanction to prosecute a Chief Minister (as Adityanath had taken over as CM by then).

From this it is clear that requiring sanction for prosecution of offence u/s 153A is nothing short of a major roadblock for its enforcement especially where the accused happens to be a political leader and member of the ruling party in the State. The policy goes against the principles of natural justice as the person who has to grant sanction is the same person who is at fault and for whose prosecution the sanction is sought for. Although there may be instances where the refusal to grant sanction is made by applying the mind and on merits, the very likelihood of bias is sufficient to make the move a colourable one. Justice

after all, must not only be done but also seen to be done.