National Law University Delhi

CENTRE FOR COMMUNICATION GOVERNANCE

HATE SPEECH LAWS IN INDIA

Centre for Communication Governance,
National Law University, Delhi
Sector 14, Dwarka
New Delhi 110078

Published in April 2018

Design
Suchit Reddy J

Editing
Shruti Vidyasagar
Kshama Kumar

The research was funded by the John D and Catherine T MacArthur Foundation, USA. The views expressed in the report are those of the authors and not of the Foundation.

Writing Team

Primary

Chinmayi Arun

Arpita Biswas

Parul Sharma

Secondary

Sarvjeet Singh

Smitha Krishna Prasad

Nakul Nayak

Ujwala Uppaluri

Other Contributors

Aditya Singh Chawla

Faiza Rahman

Gale Andrew

Geetha Hariharan

Kasturika Das

Kritika Bharadwaj

Shuchita Thapar

Siddharth Manohar

Vaibhav Dutt

Interns and Research Assistants

Lakshay Gupta

Nivedita Jha

Nivedita Saksena

Shreya Shrivastava

Shruntanjaya Bhardwaj

Siddharth Deb

Vivek Shah

Anant Sangal

Introductory Note and Acknowledgements

This report is an effort to map hate speech laws in India, and attempts to offer a clear overview to anyone interested in the regulation of hate speech in India. It discusses the spectrum of laws, including the specific legal standards developed by the courts, applicable to hate speech in India. It also analyses the relationship between these laws and the constitutional right to freedom of speech and expression.

The laws discussed in this report range from the primary criminal laws to specific statutes that regulate speech in the context of elections, or advertisements. Medium specific laws directed at speech on print media, television, radio and the internet are also discussed here.

The mapping of these laws and the specific standards under each of them was necessary for many reasons. One was so that it would be clear that the proliferation of hate speech in India is not for lack of law regulating hate speech in India. Another was that even though the legal standards have been stated clearly by the judiciary in the context of specific laws, the laws are not actually applied in a manner that is consistent with those standards. We hope that this report will support further research on these questions, offering researchers, journalists, lawyers and members of the government clarity as they try to understand how far speech is covered by these laws.

This report is a result of years of advice, conversations and support from many generous people. It was conceived and executed as a result of a project initiated by Justice A.P. Shah and the questions that he was asking as Chairman of the Law Commission of India. It was informed by our early conversations with Professor Susan Benesch and Mr. Siddharth Narrain, who have been generous with their advice and support through the years that we have worked on it. We also benefited greatly from our conversations with Professor (Dr.) Urs Gasser, Dr. Robert Faris and Mr. Amar Ashar, and others from the Berkman Klein Center for Internet and Society at Harvard University as we worked on this report.

Over the years in which we have written this, we have invited multiple experts to speak with us about hate speech and freedom of expression. Each of these sessions has enabled us to think through the report in a more nuanced manner. We would therefore like to thank Justice Dr. B.S. Chauhan, Justice Sanjay Kishan Kaul, Justice Dr. S. Muralidhar, Mr. Gopal Subramanium, Mr. Shyam Divan, Professor (Dr.) Wolfgang Schulz, Mr. Mihir Desai, Ms. Pamela Philipose, Mr. Harsh Mander, Dr. Cherian George, Mr. Aakar Patel, Professor David Kaye, Dr. Carlos Affonso Souza and Ms. Gayatri Venkiteswaran for their invaluable inputs.

This report was made possible by the generous support we received from National Law University Delhi. We would therefore like to thank the Vice Chancellor Professor (Dr.) Ranbir Singh, and the Registrar, Professor (Dr.) G. S. Bajpai. We also thank the members of the Centre for Communication Governance, National Law University Delhi for the many ways in which they supported the writing team through the difficult process of writing and editing this report.

Contents

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

1

The International Law Governing Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

1

The International Law Governing Hate Speech

1.1 Introduction

This chapter will discuss laws dealing with hate speech at the international level. It outlines international human rights law, which is applicable to India. This may help evaluate the extent to which Indian hate speech laws are consistent with India's international human rights obligations.

In this chapter, we consider the principles of international human rights law in the context of derogatory and hateful speech. International human rights law recognises both the right to freedom of speech and expression, as well as states', duty to prohibit speech which advocates hatred. In this chapter we will discuss important international norms applicable to hate speech.

1.2 UDHR and Hate Speech

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948.[1] It is not binding, but it does offer a framework for other human rights instruments that constitute binding international law.[2] It also serves as a guiding framework for states to frame their policies regarding the protection of human rights in constitutions and treaties.[3]

Article 7 of the UDHR articulates the right to be protected against any form of discrimination, and against incitement to discrimination. It reads, 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

Indian hate speech laws target a spectrum of speech, including certain kinds of incitement to discrimination. It may therefore be argued that laws forbidding incitement to discrimination further the goals of Article 7.

While Article 7 defines the standard for equality,

Article 29 of the UDHR defines the limitations applicable to it, at large. Article 29 states that limitations may be permissible under law for 'meeting the just requirements of morality, public order and the general welfare in a democratic society'.

Several binding international instruments build the basic principles of the UDHR into more detailed, substantive rights. Amongst these is the International Covenant on Civil and Political Rights (ICCPR).

1.3 ICCPR and Hate Speech

The ICCPR, which India has signed and ratified, recognises a right to free speech under Article 19. Article 19 is read with Article 20, and requires states to prohibit advocacy of hatred. The two Articles have been reproduced below.

Article 19 reads as follows:

> **1. Everyone shall have the right to hold opinions without interference.**
>
> **2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**
>
> **3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
>
> **(a) For respect of the rights or reputations of others;**
>
> **(b) For the protection of national security or of public order (ordre public), or of public health or morals.'**

Article 20 reads as follows:

> **1. Any propaganda for war shall be prohibited by law.**
>
> **2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.**

The requirement under Article 20(2) to prohibit advocacy of hatred should be read in consonance with Article 19(3) of the ICCPR, which permits restrictions on rights under Article 19(1), under certain circumstances.

The United Nations Human Rights Committee (UNHRC) has clarified that Article 20 necessitates that states' municipal laws must include clear prohibitions against the propaganda and advocacy described in Article 20.[4]

General Comment No. 34 by the UNHRC discusses how Article 19 and Article 20 are compatible with, and complement each other. Article 19(3) permits states to enact laws that restrict speech, and Article 20 imposes a positive obligation to enact laws that prohibit certain speech acts. Further, any restriction under Article 20 must also comply with Article 19(3).[5] The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has also stated that any restriction on freedom of expression on account of Article 20 of the ICCPR, the International Convention on the Elimination of Racial Discrimination (ICERD), or the Convention on the Prevention and Punishment of the Crime of Genocide, must comply with the three-part test of limitations to the right in Article 19 of the ICCPR.[6]

This test, arising out of Article 19(3) of the ICCPR, mandates that any restriction must be:

> **(a) Provided by law, which is clear, unambiguous, precisely worded and accessible to everyone;**
>
> **(b) Proven by the State as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals;**
>
> **(c) Proven by the State as the least restrictive and proportionate means to achieve the purported aim.**

In an effort to ensure that the terms of Article 20(2) do not lead to misapplication of the law, the UN Special Rapporteur has explained that its formulation includes three key elements[8]:

> **[F]irst, only advocacy of hatred is covered; second, hatred must amount to advocacy which constitutes incitement, rather than incitement alone; and third, such incitement must lead to one of the listed results, namely discrimination, hostility or violence. As such, advocacy of hatred on the basis of national, racial or religious grounds is not an offence in itself. Such advocacy becomes an offence only when it also constitutes incitement to discrimination, hostility or violence, or when the speaker seeks to provoke reactions on the part of the audience.**

The Special Rapporteur has also clarified that Article 20 only requires states to prohibit certain kinds of expression, and not to criminalise them. He has emphasised the need to avoid criminalisation of expression except in instances of serious and extreme instances of incitement to hatred.

The views and findings of the UNHRC in the following cases deal with Articles 19 and 20 of the ICCPR. The first is *Robert Faurisson* v. *France* (1996).[9] This case involved a professor who made continuous efforts to deny and question the truth of the events of the Holocaust. These statements betrayed his antisemitism. He contended that France's law against antisemitism, which prohibits Holocaust denial, restricted his speech by punishing historical research. The UNHRC however found the law to be consistent with the ICCPR. Specifically, the law was found to satisfy the three conditions required for a law to restrict speech under Article 19(3) of the ICCPR, namely, that it must be prescribed by law, must be in pursuance of one of the aims of Article 19(3)(a) and (b), and that the restriction was necessary to achieve this purpose.

The second case worth discussing in the context of hate speech is *Malcolm Ross* v. *Canada*.[10] Here, a Canadian school teacher was found to be circulating and publishing materials against the Jewish community. A complaint was filed against him, citing the creation of a hostile environment for Jewish school children. In response, the school transferred him to a non-teaching position after a short duration of unpaid leave. This was challenged as restriction of his right in violation of Article 19. The UNHRC however held that the restriction was consistent with Article 19(3), since it was carried out with the aim of protecting Jewish children from bias and racism in the school, and that the measures taken to achieve this were minimal and not restrictive of the teacher's right to free speech.

The case of *JRT and the WG Part* v. *Canada* (1984)[11] is an example of the operation of Article 20(2) as a legitimate restriction on the right to free expression under Article 19(1). The case involved a political party in Toronto that attempted to gather supporters through telephonic messages that vilified the Jewish community in Canada, naming them as the

cause for wars, unemployment, and inflation. The UNHRC found that the dissemination of these opinions through the telephone constituted a clear violation of Article 20(2) of the ICCPR, which required the state to prohibit advocacy of racial or religious hatred.

1.4 ICERD and Hate Speech

The ICERD, which India has signed and ratified, imposes clear duties on member states to combat hate speech. Article 4 of the ICERD reads as follows:

> **States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:**
>
> **(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;**
>
> **(b) Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;**
>
> **(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.**

Article 4 was discussed by the UN Committee on the Elimination of Racial Discrimination in the case of *Jewish Community of Oslo* v. *Norway* (2005). The case arose from an incident in which a political group carried out a march commemorating Rudolf Hess, a Norwegian political figure. The speeches held at the march praised Hess as well as Nazi leader Adolf Hitler, and spoke of defending their cause while characterising the Jewish community as plunderers who destroy the country and fill it with 'immoral and un-Norwegian thoughts'.[13] The UN Committee on the Elimination of Racial Discrimination (ICERD Committee) found that the comments were manifestly offensive and qualified as incitement to racial discrimination, violating Article 4 of the ICERD.

In General Comment No. 35 on 'Combating Racist Hate Speech' the ICERD Committee stated that their recommendations were applicable to racist hate speech 'disseminated through electronic media, including the internet and social networking sites'.[14] In this Comment, the application of Article 4 was also discussed. It was stated that the 'reach of the speech' and whether it was 'disseminated through mainstream media or the internet' would determine the criminality of the act.

1.5 CEDAW and Hate Speech

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) is a

1981 treaty which has 189 parties. India became a ratifying member of the CEDAW in 1993. It mandates the prevention and punishment of all acts of gender-based violence. Elimination of other forms of gender-based discrimination is also mandated by the Convention under Article 2, which reads:

> **States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:**
>
> **(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;**
>
> **(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;**
>
> **(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;**
>
> **d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;**
>
> **(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;**
>
> **(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;**
>
> **(g) To repeal all national penal provisions which constitute discrimination against women.**

In 2014, in General Comment No. 31, the CEDAW Committee recommended that states party to the Convention should make efforts to raise awareness against harmful practices against women.[15] The recommendation stated that social media platforms and internet services be utilised as a means of dissemination.[16]

In 2017, in General Comment No. 35, the CEDAW Committee made recommendations on the prevention of harmful and stereotypical portrayal of women in the media and online.[17] The Committee recommended the creation of self-regulatory mechanisms and for the national human rights institutions to establish complaint mechanisms.[18]

The preamble to CEDAW refers to international conventions and treaties such as the UDHR and international covenants on human rights, which were already in place at the time of adoption of CEDAW, i.e. ICCPR (and the International Covenant on Economic, Social and Cultural Rights). Articles 2 and 3 of the ICCPR require member states to ensure that there is no discrimination on the basis of sex, among other things, and that there is equality between men and women.

Articles 2 and 3 of the ICCPR read as follows:

> **Article 2**
>
> **1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised**

in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

The UNHRC's General Comment No. 28 on the ICCPR also deals with prevention of gender-based discrimination. Referring to Articles 2 and 3 of the ICCPR, it requires that states take protective as well as positive measures to ensure that women are able to fully enjoy the rights in the ICCPR. It suggests that member states report on progress made to achieve these goals of ensuring equal enjoyment of rights.

1.6 Rabat Plan of Action

In 2011, the UN High Commissioner for Human Rights held a series of meetings between states' representatives to come up with a set of standards and recommendations known as the Rabat Plan of Action. The proceedings focussed on the relationship between freedom of expression and hate speech, and how to implement legal and non-legal policies protecting the former and preventing the latter.[19] One of the standards was a clear distinction between speech which is criminalised, speech which gives rise to civil action, and speech which raises issues of tolerance and respect.[20] The Plan also reiterates the importance of narrowing restrictions on speech while responding to a pressing social need in a non-intrusive manner, so that its benefits outweigh the harm to freedom of expression.[21]

Other relevant outcomes included the recommendation that national laws dealing with incitement should be framed on the lines of Article 20 of the ICCPR with clear definitions for terms such as 'hatred', 'discrimination', and 'violence'.[22] In addition to the three-part test on legality, proportionality, and necessity, a six-part test was proposed to deal with criminal prohibition of speech—paying regard to the (i) context of the speech, (ii) identity of the speaker, (iii) speaker's intention, (iv) content of the impugned speech, (v) width of audience accessible to the speech, and (vi) likelihood of inciting violence.[23]

Apart from the general guidelines towards aligning national policy with international principles, there were some specific recommendations in terms of policy. This included options such as consultations with various sectors of society before framing law, and non-legal measures to counter instances of hate speech.[24] Other recommendations were

for leaders of influence not to publish messages of intolerance used to encourage violence, for states to promote intercultural understanding, and for education drives focusing on diversity and pluralism.[25]

1 Article 22, The Universal Declaration of Human Rights: 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality' <http://www.un.org/en/universal-declaration-human-rights/> accessed 10 April 2018.

2 Alina Kaczorowska-Ireland, *Public International Law* (5th edition Routledge 2015), p. 527-28.

3 Kaczorowska-Ireland (n. 2), p. 527-28.

4 UN Human Rights Committee, General Comment no. 11: *Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, HRI/GEN/1/Rev.6 (29 July 1983), para 2 <http://www.refworld.org/docid/453883f811.html> accessed 10 April 2018.

5 *Malcolm Ross* v. *Canada*, Communication no. 736/1997, CCPR/C/70/D/736/1997 (UN Human Rights Committee, 2000).

6 Frank La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', A/67/357 (2012), para 41, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement> accessed 10 April 2018.

7 La Rue (n. 6), para 41.

8 La Rue (n. 6), para 43.

9 *Robert Faurisson* v. *France*, Communication no. 550/1993, CCPR/C/58/D/550/1993 (UN Human Rights Committee, 1996).

10 *Malcolm Ross* (n. 5).

11 *JRT and the WG Part* v. Canada, Communication no. 104/1981, CCPR/C/OP/2 (UN Human Rights Committee, 1984).

12 *Jewish Community of Oslo* v. *Norway*, Communication no. 30/2003, CERD/C/67/D/30/2003 (UN Committee on the Elimination of Racial Discrimination, 2005).

13 *Jewish Community of Oslo* (n. 12), para 2.1.

14 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 35: *Combating racist hate speech*, CERD/C/GC/35 (26 September 2013), para 7, <http://www.refworld.org/docid/53f457db4.html>accessed 10 April 2018.

15 UN Committee on the Elimination of Discrimination against Women, Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, (14 November 2014), para 81(b), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement>accessed 10 April 2018.

16 Joint general recommendation no. 31 (n. 15).

17 UN Committee on the Elimination of Discrimination against Women, General Recommendation no. 35: *Gender-based violence against women, updating General Recommendation no. 19,* CEDAW/C/GC/35 (14 July 2017), para 37, <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf>accessed 10 April 2018.

18 General Recommendation no. 35 (n. 17).

19 United Nations High Commissioner for Human Rights, Annual Report on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, A/HRC/22/17/Add.4 (11 January 2013), <http://www.refworld.org/docid/50f925cf2.html>accessed 10 April 2018.

20 Annual Report (n. 19), para 12.

21 Annual Report (n. 19), para 18.

22 Annual Report (n. 19), para 21.

23 Annual Report (n. 19), para 27.

24 Annual Report (n. 19), para 27.

25 Annual Report (n. 19), para 27.

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

2

Constitutional Law and Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

2

Constitutional Law and Hate Speech

2.1 Introduction

This chapter discusses the relationship between hate speech laws and the right to freedom of expression under the Constitution of India. The chapter is divided into five parts. Part 2.2 discusses the constitutional framework for freedom of expression in India. Part 2.3 examines the nexus between hate speech laws and reasonable restrictions listed under Article 19(2) of the Constitution. A closer look at hate speech jurisprudence suggests that the judiciary has a tendency to uphold the constitutionality of hate speech restrictions in the interest of 'public order'.[1] However, in certain cases, courts have used other grounds under Article 19(2), such as 'decency' or 'morality' to uphold restrictions. Consequently, Part 2.4 discusses 'public order' jurisprudence, and Part 2.5 explores 'decency' and 'morality' as justifications for regulating hate speech. Part 2.6 is a conclusion to this chapter.

2.2 Constitutional Framework of Freedom of Speech and Expression

Article 19(1)(a) of the Constitution of India guarantees the right to freedom of speech and expression to all Indian citizens. The right to propagate one's ideas is a part of the right to freedom of expression, and every citizen has the right to publish, disseminate and circulate their ideas.[2] The Constitution does not permit any arbitrary restrictions on speech. Restrictions or limitations are permitted only if the speech falls within one of the eight grounds mentioned in Article 19(2).

Laws criminalising hate speech, such as Sections 153A[3] and 295A[4] of the Indian Penal Code, 1860 (IPC) and Section 95[5] of the Code of Criminal Procedure, 1973 (CrPC), have been challenged for unreasonably restricting free speech. However, the Supreme Court of India has found these laws to be consistent with the Constitution.[6] This is discussed in further detail in Chapter 3.

Article 19(1)(a) reads as follows:

> **Protection of certain rights regarding freedom of speech etc.-**
>
> **1. All citizens shall have the right**
>
> **(a) to freedom of speech and expression.**

Any limitation on this right must be a 'reasonable restriction' falling within the contours of Article 19(2). Article 19(2) reads as follows:

> **Nothing in sub-clause (a) of clause (1) 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.**

A majority of hate speech laws are saved by the 'public order' exception.[7] Other grounds on which hate speech laws have been justified include 'decency', 'morality'[8] and 'incitement to an offence'[9]. Restrictions must not only fall within the grounds in Article 19(2), but must also be 'reasonable'.[10] The Supreme Court has held that limitations to basic freedoms can be viewed as reasonable only in exceptional circumstances, within the narrowest limits, and cannot receive judicial approval as a general pattern.[11]

2.3 Reasonable Restrictions and Hate Speech in India

Part 2.3 examines the extent to which Article 19 of the Constitution permits laws that regulate hate speech. It discusses jurisprudence on the relationship between hate speech law and reasonable restrictions on speech permitted by Article 19(2) of the Constitution. Three things must be noted about the manner in which the Constitution permits restriction of speech. The first is that the grounds specified in Article 19 are exhaustive. This means that speech cannot be restricted for any reason not specified in Article 19(2).[12] The second is that restrictions on speech must be reasonable. The third detail worth noting is that the use of the phrase 'in the interests of' before listing the grounds for restriction permits anticipatory action by the government. We discuss the meaning of 'reasonable' and 'in the interests of' in greater detail below.

2.3.1 Reasonable restrictions

The use of the word 'reasonable' means that restrictions need to be substantively and procedurally reasonable, and not arbitrary or excessive.[13] They must strike a balance between the freedom guaranteed and limitation permitted under Article 19.[14]

Adjudicators must take into account 'the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, [and] the prevailing conditions at the time'.[15] The test of reasonableness must be applied to each individual statute impugned, since the Supreme Court has found that no abstract standard can be made applicable to all cases.[16]

2.3.2. 'In the interests of'

Under Article 19(2), restrictions may be imposed only 'in the interests of' certain specified grounds.

This phrase has been read such that it refers to a proximate relationship between the actual restriction and the exception under Article 19(2) for which it was imposed. In *Ramji Lal Modi* v. *State of UP*[17] (*Ramji Lal Modi*), the Supreme Court explained that while a law may not directly deal with 'public order', it could be read to be 'in the interests of' public order. The phrase has also led the Supreme Court to conclude that anticipatory action, or prior restraint on speech, is permissible as long as it meets the requirements of Article 19.[18]

The *Ramji Lal Modi* standard was refined in *Superintendent, Central Prison, Fatehgarh* v. *Dr Ram Manohar Lohia*[19] (*Lohia-I*). Here, the Supreme Court found that restrictions 'made in the interests of public order' must have a 'reasonable relation to the object to be achieved'.

2.4 Public Order as a Reasonable Restriction under Article 19(2)

Part 2.4 traces the development of the 'public order' exception under Article 19(2) in India. In 1951, 'public order' was added as an exception under the Article, with the first amendment to the Indian Constitution.[20] The 'public order' exception is instrumental in saving some hate speech laws from unconstitutionality. For instance, prior to the amendment, Section 153A of the IPC had been found to be unconstitutional by the Punjab High Court.[21] However, it was later upheld in a challenge before the Patna High Court, on the grounds that the 'public order' exception had been introduced.[22]

Similarly, the Supreme Court upheld Section 295A of the IPC in *Ramji Lal Modi*. The Court found the law to lie within the permissible 'public order' restriction, since it criminalised activities that had a tendency to cause public disorder.

The standard for what constitutes a threat to public order has evolved since the enactment of the Constitution of India. Consequently, the constitutionality of law restricting hate speech must be weighed against these evolving standards.

2.4.1 Public order standard

Sub-part 2.4.1 discusses the evolution of the Supreme Court's jurisprudence on 'public order'. After the addition of 'public order' to Article 19(2), the Supreme Court examined the contours of 'public order' in 1957, in *Ramji Lal Modi*. According to the Court, the 'public order' exception protects laws that regulate any activity that has a *tendency* to cause public disorder, irrespective of whether there is any actual breach of public order. The Court upheld the constitutionality of Section 295A by holding that only 'aggravated forms' of insult to religion have a tendency to disrupt public order.[23] This reading of 'public order' in *Ramji Lal Modi* still stands, and was used recently by the Supreme Court in 2016 to dismiss a petition challenging Section 295A as unconstitutional.[24]

Soon after, in *Virendra* v. *State of Punjab* (*Virendra*), the Supreme Court invoked *Ramji Lal Modi* and created a framework for 'public order' standards. The Court stated: 'The expression "in the interest (*sic*) of" [in Article 19(2)] makes the ambit of the protection very wide, for a law may not have been designed to directly maintain the public order … and yet it may have been enacted "in the interest (*sic)* of" the public order.' [25]

In *Virendra*, the Court adopted a context-driven approach in determining the constitutionality of the law. In determining whether the circumstances at a given time amount to public disorder, the Supreme Court chose to defer to the judgement of the government. The Court reasoned that the state is in charge of preserving law and order. Consequently, it is in 'possession of all material

facts to investigate the circumstances and assess the urgency of the situation that might arise and to make up its mind whether any and, if so, what anticipatory action must be taken for the prevention of the threatened or anticipated breach of the peace'.[26]

The Supreme Court held that no assumptions should be made on how the state government would exercise its statutory powers.[27] Even in the event of abuse, the Supreme Court held that only the state action could be challenged, and not the statute from where the government derived its power.[28]

The Supreme Court then refined this principle in *Lohia-I*. While examining the scope of the 'public order' exception, the Supreme Court read it to mean 'public peace, safety and tranquillity'.[29] It noted that this ground was added to Article 19(2) by the first amendment to the Constitution 'with a view to bring in offences involving breach of purely local significance within the scope of permissible restrictions under cl.(2) of Art. 19'.[30]

The Supreme Court observed that a restriction 'in the interests of' of public order could not be sustained on the basis of 'any remote or fanciful connection' between the impugned statute and 'public order'.[31] Combining its analysis with the added limitation that all restrictions under Article 19(2) must be reasonable, the Supreme Court held: 'The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.' [32] [33]

Following *Lohia-I*, two important judgments of the Supreme Court shed light upon what constitutes violation of 'public order'. First amongst these cases is *Ram Manohar Lohia* v. *State of Bihar*[34] (*Lohia-II*) , where the Supreme Court clarified the meaning of the expressions 'security of state', 'public order', and 'law and order'. This case did not deal with freedom of speech or Article 19(2), but the Court's observations are critical to the understanding of 'public order'. The relevant portion is reproduced here:

> **One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that 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.**[35]

The Supreme Court also discussed the *Lohia-I* standard in *Madhu Limaye* v. *Sub-Divisional Magistrate (Madhu Limaye)*[36], pointing out that 'the overlap of public tranquillity is only partial … the words "public order" and "public tranquillity" overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order'.[37] The Court also adopted the *Lohia-II* test and its concentric circles analogy in *Madhu Limaye.*

2.4.2. Other significant judgments

The cases discussed in sub-part 2.3.1 are decisions of the Constitution Bench of the Supreme Court on 'public order'. It is apparent that the meaning of the term has changed over time and remains broad enough to lend itself to varying interpretation. Additionally, as we noted in sub-parts 2.3.1 and 2.3.2, it is necessary to take into account the meaning of 'reasonable' and 'in the interests of'. In sub-part 2.4.2, we discuss a few recent judgments to demonstrate how the standard has been applied.

In *S. Rangarajan* v. *P. Jagjivan Ram*[38] (*Rangarajan*), the Supreme Court held

that speech could only be curtailed if it was intrinsically dangerous to public interest.[39] Here, the *Lohia-I* proximity test was read to mean that the 'expression should be inseparably locked up with the action contemplated like the equivalent of a spark in a powder keg'.[40]

The Supreme Court's most recent discussion of its own public order jurisprudence was in the context of online speech in *Shreya Singhal* v. *Union of India* (*Shreya Singhal*).[41] The Supreme Court stated that in deciding any 'public order' violation, it must ask itself the question: '[D]oes a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed?'[42] Central to the Court's reasoning in this case is the distinction between discussion, advocacy and incitement.[43] The first two categories, it held, were at the 'heart of Article 19(1)(a)' and hence, Article 19(2) would only apply when speech was a form of incitement.[44] In *Shreya Singhal*, the Supreme Court used the *Ramji Lal Modi* tendency test, *Lohia-I* proximity test, as well the principles in *Lohia-II* and *Rangarajan.*

2.5. Other Grounds under Article 19(2)

Some kinds of hate speech law restrict speech resulting in harm other than public order, such as 'harm by causing hurt or emotional distress'.[45] Part 2.5 explores how the grounds of 'decency', 'morality' and 'incitement to an offence' under Article 19(2) have been used to justify laws prohibiting hate speech.

In *Dr. Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*[46] (*Ramesh Yeshwant Prabhoo*), the Supreme Court examined the constitutionality of Sections 123(3) and (3A) of the Representation of the People Act, 1951, which governs hate speech during elections. Section 123(3) restricts appeals on grounds of religion, race, caste, community, language or religious symbols to garner votes. Section 123(3A) prohibits acts that promote enmity or hatred between classes. The Supreme Court upheld Section 123(3A) as constitutional and reasoned that it amounted to a reasonable restriction not only on the grounds of 'public order', but also in the interest of prevention of 'incitement to an offence'.[47] Further, the Supreme Court held that Section 123(3) was constitutional and a reasonable restriction on the grounds of 'decency'.[48]

In *Pravasi Bhalai Sangathan* v. *Union of India* [49] (*Pravasi Bhalai Sangathan*), the Supreme Court analysed the rationale for the existence of such restrictions on hate speech. The Court identified that the objective of hate speech restrictions is to reduce or eliminate discrimination. It recognised hate speech as an exercise that aims to marginalise individuals and 'reduce their social standing', making them vulnerable to 'discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide' [50]. It has been argued that these arguments are founded upon principles of 'equality' and are not limited to the issue of 'hurt feeling'.

2.6. Conclusion

There has been extensive criticism of the Supreme Court's articulation of permissible restrictions on freedom of expression. As the Court observed in *Virendra*, it is impossible to create a clear universal standard in this context.

The tests to determine the legitimacy of restrictions based on public order have undergone substantial evolution. However, the judiciary tends to read all cases that articulate

'public order' together, and interprets them depending on context. Some judgments such as *Shreya Singhal* have been lauded for their commitment to freedom of expression, while others such as *Subramanian Swamy* v. *Union of India* (*Subramanian Swamy*) have been criticised for interpreting reasonable restrictions so broadly that freedom of expression is threatened.[51]

1 Siddharth Narrain, 'Hate Speech, Hurt Sentiment, and the (Im) Possibility of Free Speech' (2016) 51(17) Economic and Political Weekly 119, p. 122.

2 *Brij Bhushan* v. *State of Delhi*, (1950) 1 SCR 605; *Sakal Papers (P) Ltd* v. *Union of India,* 1962 SCR (3) 842.

3 Section 153A criminalises 'promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony'.

4 Section 295A criminalises 'insults [to] or attempts to insult the religion or the religious beliefs' of a class of people if done 'with [the] deliberate and malicious intention of outraging the religious feelings' of the said class.

5 Section 95 empowers the state government 'to declare certain publications forfeited' if they appear '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)'.

6 See *Ramji Lal Modi* v. *State of UP,* AIR 1957 SC 620; *Piara Singh* v. *State of Punjab*, 1977 AIR 2274; *Debi Soren* v. *The State*, 1954 (2) BLJR 99; *Sagolsem Indramani Singh and Ors* v. *State of Manipur,* 1955 CriLJ 184; *Sheikh Wajih Uddin* v. *The State*, AIR 1963 All 335; *Gopal Vinayak Godse* v. *The Union of India*, AIR 1971 Bom 56; *Manishi Jain* v. *State of Gujarat*, R/CR.MA/22552/2015.

7 Siddharth Narrain (n. 1), p. 122.

8 Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016), p. 159.

9 *Dr Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte,* (1996) 1 SCC 130

10 *Shreya Singhal* v. *Union of India,* AIR 2015 SC 1523, paras 15, 17; *Chintaman Rao* v. *The State of Madhya Pradesh,* 1950 SCR 759; *State of Madras* v. *V.G. Row,* 1952 SCR 597.

11 *Row* (n. 10).

12 *Shreya Singhal* (n. 10), paras 15, 17, 21.

13 *Shreya Singhal* (n. 10).

14 *Rao* (n. 10); *Shreya Singhal* (n. 10).

15 *Rao* (n. 10).

16 *Row* (n. 10); *Virendra* v. *State of Punjab*, AIR 1957 SC 836.

17 *Ramji Lal Modi* (n. 6).

18 *Babulal Parate* v. *State of Maharashtra,* 1961 SCR (3) 423.

19 *Superintendent, Central Prison, Fatehgarh* v. *Dr. Ram Manohar Lohia,* (1960) 2 SCR 82

20 The Constitution (First Amendment) Act, 1951.

21 The Indian Penal Code 1860, section 153A; *see Tara Singh Gopi Chand v. The State*, 1951 CriLJ. 449

22 *Debi Soren* (n. 6).

23 *Ramji Lal Modi* (n. 6), para 9.

24 *Ashish Khetan* v. *Union of India*, Writ Petition(s)(Criminal) No(s). 135/2016 (Supreme Court).

25 *Virendra* (n. 16), para 9.

26 *Virendra* (n. 16), para 12.

27 *Virendra* (n. 16).

28 *Virendra* (n. 16).

29 *Lohia-I* (n. 19), para 11.

30 *Lohia-I* (n. 19), para 10.

31 *Lohia-I* (n. 19), para 12.

32 The Constitution of India 1950, article 19(2).

33 *Lohia-I* (n. 19), para 13.

34 *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740.

35 *Lohia-II* (n. 34), para 65.

36 *Madhu Limaye* v. *Sub-Divisional Magistrate*, (1970) 3 SCC 746.

37 *Madhu Limaye* (n. 36), para 17.

38 *S. Rangarajan* v. *P. Jagjivan Ram,* 1989 SCC (2) 574.

39 *Rangarajan* (n. 38), para 42.

40 *Rangarajan* (n. 38), para 42.

41 *Shreya Singhal* (n. 10), paras 30–41.

42 *Shreya Singhal* (n. 10), para 35.

43 *Shreya Singhal* (n. 10), para 13.

44 *Shreya Singhal* (n. 10), para 13.

45 Narrain (n. 1), p. 120; Bhatia (n. 8), p. 75.

46 *Ramesh Yeshwant Prabhoo* (n. 9).

47 *Ramesh Yeshwant Prabhoo* (n. 9).para 24.

48 *Ramesh Yeshwant Prabhoo* (n. 9) para 30.

49 *Pravasi Bhalai Sangathan* v. *Union of India*, (2014) 11 SCC 477.

50 *Pravasi Bhalai Sangathan* (n. 49), para 7.

51 *Subramanian Swamy* v. *Union of India*, (2016) 7 SCC 221.

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

3

Criminal Laws and Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

3.1

The Indian Penal Code and Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

3.1

The Indian Penal Code and Hate Speech

3.1.1 Introduction

This sub-chapter of the report discusses the hate speech offences in the Indian Penal Code, 1860 (IPC). Laws against hate speech are set out in three different chapters of the IPC: Chapter I relates to 'Of Offences Relating to Religion', Chapter II - 'Of Offences Against the Public Tranquillity' and Chapter III - 'Of Criminal Intimidation, Insult and Annoyance'. The IPC forms the basic legal framework for the administration of substantive criminal law, and is read closely with the Code of Criminal Procedure, 1973 (CrPC).

Sub-chapter 3.1 is divided into five parts. The first part discusses Section 153A of the IPC, which criminalises the promotion of enmity between groups of people on grounds such as religion and race. The second part discusses Section 153B of the IPC, which criminalises imputations and assertions prejudicial to national integration. The third part discusses Section 295 of the IPC, which criminalises the destruction of places of worship or sacred objects. The fourth part discusses Section 295A of the IPC, which criminalises deliberate and malicious acts that outrage the religious feelings of any class of people by insulting their religion or religious beliefs. The fifth part discusses Section 298 of the IPC, which criminalises speech that would hurt the religious sentiments of a person. The sixth part of the sub-chapter discusses Section 505 of the IPC, which criminalises the publication or circulation of certain statements, rumours or reports.

3.1.2 Section 153A- Promotion Of Enmity Between Groups

Section 153A of the IPC criminalises the promotion of enmity between different groups of people on grounds of religion, race, place of birth, residence, language, etc., and acts that are prejudicial to maintaining harmony. It also prescribes enhanced punishment when this offence is committed in a place of worship, or in any assembly engaged in the performance of religious worship or religious ceremonies. In such cases, the punishment may be imprisonment up

to five years and fine.

This part pertaining to Section 153A is further divided into four sub-parts. The first sub-part discusses the three ingredients that make up the offence under Section 153A—intention, class/community hatred, and tendency to provoke enmity. The second sub-part discusses how the defence of truth can be used under Section 153A.

The third sub-part discusses the constitutionality of Section 153A. The fourth-sub part draws upon the ingredients to identify the applicable standard for the offence and concludes the discussion.

> **153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony —**
>
> **(1) Whoever—**
>
> **(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or**
>
> **(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or**
>
> **(c) organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both.**
>
> **Offence committed in place of worship, etc.—(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.**

3.1.2.1 Ingredients of Section 153A

This sub-part discusses the various ingredients of the offence and is further divided into three sub-parts. The first sub-part discusses intention, the second sub-part discusses class/community hatred and tendency to provoke enmity, and the third sub-part discusses the tendency to provoke enmity.

The Bombay High Court, in *Gopal Vinayak Godse* v. *Union of India* (*Gopal Vinayak Godse*), provided a useful outline of the standards to assess the potential criminality of impugned

content under Section 153A.[1] It is worth reproducing in full:

> **'(1) Under Section 153A it is not necessary to prove that as a result of the objectionable matter, enmity or hatred was in fact caused between the different classes. (2) Intention to promote enmity or hatred, apart from what appears from the writing itself, is not a necessary ingredient of the offence. It is enough to show that the language of the writing is of a nature calculated to promote feelings of enmity or hatred for, a person must be presumed to intend the natural consequences of his act. (3) 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. (4) 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 tune. (5) If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under Section 153A that the writing contains a truthful account of past events or is otherwise supported by good authority. If a writer is disloyal to history, it might be easier to prove that history was distorted in order to achieve a particular end as e.g. to promote feelings of enmity or hatred between different classes or communities. But adherence to the strict path of history is not by itself a complete defence to a charge under Section 153A. 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.** [2]

(a) Intention

It appears from a reading of Supreme Court judgments that intention remains central to establishing that a crime under Section 153A was committed.[3] The Supreme Court, in *Balwant Singh* v. *State of Punjab*[4] (*Balwant Singh*), declared that 'intention to cause disorder or incite people to violence is the *sine qua non* of the offence under Section 153A IPC and the prosecution has to prove the existence of mens rea in order to succeed'.

However, the legislative history of Section 153A suggests that this may be an erroneous reading of the law. Section 153A has witnessed several amendments since its insertion into the IPC in 1898.[5] The old section 153A included an explanation that runs as follows,

> **It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of the citizens of India.** [6]

This explanation was deleted in 1961.[7] The language of the law currently does not contain the term 'intention' in its text. The 42nd report of the Law Commission examined the effect of the removal of this explanation.[8] It quotes the minister who sponsored the 1961 amendment omitting the explanation, who said that the rationale behind the move 'was to cast the responsibility on the offender to prove that his intentions were not malafide or malicious'.[9]

This history has not prevented the judiciary

from seeing intention as a critical ingredient of Section 153A. In *Bilal Ahmed* v. *State of Andhra Pradesh* (*Bilal Ahmed*), the Supreme Court reaffirmed the proposition in *Balwant Singh*, that *mens rea* was a necessary ingredient of the offence.[10] The Supreme Court has, in *Manzar Sayeed Khan* v. *State of Maharashtra* [11] (*Manzar Sayeed Khan*) described the importance of the proof of intention under Section 153A as 'the gist of the offence' and even went on to characterise intention to cause public disorder as the '*sine qua non* of the offence'.[12]

The Delhi High Court decision in *Trustees of Safdar Hashmi Memorial Trust* v. *Government of NCT of Delhi*[13], citing Balwant Singh, states:

> **Absence of malicious intention is a relevant factor to judge whether the offence is committed. It can be said to be promoting enmity only where the written or spoken words have the tendency or intention of creating public disorders or disturbances of law and order or affect public tranquillity. *Mens rea* has to be proved for proving commission of the offence.** [14]

(b) Class/community hatred

Before amendment in 1961, Section 153A contained the term 'classes', which was then replaced with the phrase 'religious, racial or language groups or castes or communities' so as to accommodate potential enmity between more diverse groups.[15]

The effect of this amendment is evident from the Supreme Court's judgment in *Babu Rao Patel* v. *State of Delhi* (*Babu Rao Patel*), in which it stated,

> **It is seen that Section 153-A(1)(a) is not confined to the promotion of feelings of enmity etc. on grounds of religion only … but takes in promotion of such feelings on other grounds as well such as race, place of birth, residence, language, caste or community.** [16]

This principle had been upheld by the judiciary even before the amendment. This is evident from the 1922 case of *Emperor* v. *Maniben*, in which the Bombay High Court interpreted the term 'classes' to mean a wide variety of classes not limited to religion or race.[17]

It must however be noted that while divisions such as race, language, place of birth and ethnicity are accounted for, gender finds no mention in the context of Section 153A.

(c) Tendency to provoke enmity

The standard prescribed by Section 153A requires a tendency or intention of creating a disturbance of public order and tranquillity.[18] Speech acts which are purely political comments, which do not promote enmity between classes or communities do not fall within the law. [19]

In *Ramesh s/o Chotalal Dalal* v. *Union Of India*,[20] the Supreme Court determined the standard by which the tendency to provoke enmity would be judged, stating that the 'effect of the words 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'. This standard was reaffirmed in *Manzar Sayeed Khan*.[21]

In *Gopal Vinayak Godse*, the Bombay High Court noted that to determine whether any material violates Section 153A, the natural and probable consequences of the writing must be examined. It is also permissible to consider the class of readers for whom the material is

primarily meant, as well as the state of feelings between the different classes or communities at the relevant time. It is not necessary to prove that enmity was in fact promoted by the material in question.[22]

3.1.2.2 Truth as a defence

This sub-part discusses if truth can be used as a defence when speech is otherwise criminalised under Section 153A. According to the Supreme Court, truth is not necessarily a defence when speech may otherwise be criminalised under Section 153A.

In *Babu Rao Patel*,[23] the Supreme Court dealt with the question of whether feelings of enmity and ill-will can be spread through political theses and historical truth, prohibited as they are from being spoken or published under Section 153A. The Court concluded that the materials published were indeed calculated to promote ill-will, enmity and hatred between the Hindu and Muslim communities in India. It held that 'the guise of political thesis or historical truth' could not be used to pass off work promoting sentiments of ill-will in the community.[24]

In *Gopal Vinayak Godse*, the Bombay High Court stated that 'adherence to the strict path of history is not by itself a complete defence to a charge under Section 153A'. The Court went a step further and stated, 'greater the truth, greater the impact of the writing on the minds of its readers, if the writing is otherwise calculated to produce mischief'.[25]

However, there remains space for controversial truth. Cases such as *Ramesh* v. Union of India (*Ramesh*) recognise value of this kind of speech.[26] Here, the Supreme Court had to rule on whether a television serial depicting Hindu–Muslim and Sikh–Muslim tensions prevailing during the partition of India caused feelings of enmity between communities and violated Section 153A.[27] The Court ruled that speech that 'penetrates behind the scenes and analyses the cause of such conflicts', and speech that had 'great social value' cannot be criminalised under Section 153A. However, the Supreme Court also noted that the 'naked truth in all times will not be beneficial', and that 'in certain circumstances the truth has to be avoided'.[28]

3.1.2.3 Constitutionality vis-à-vis Articles 19(1)(a) and 19(2)

This sub-part discusses the manner in which the Indian judiciary has dealt with cases that challenged the constitutionality of Section 153A in light of the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

Section 153A has been subject to several constitutional challenges. The first instance of such a challenge was decided by the Punjab and Haryana High Court in *Tara Singh Gopi Chand* v. *The State*, soon after the adoption of the Indian Constitution.[29] At the time, Article 19(2) did not contain the public order exception to freedom of speech and expression. The exception was inserted later, via the first amendment to the Constitution. Section 153A therefore had to be defended on the ground that it falls within the exception 'security of, or tends to overthrow, the state' under Article 19(2). In this context, the Court held that Section 153A was overbroad, as it criminalised speech that tends to overthrow the state as well as speech may not 'undermine the security or tend to overthrow the state'.[30] Therefore, the Court found Section 153A

unconstitutional. However, given that Article 19(2) of the Indian Constitution was amended to include the additional exception of 'public order', this ruling now no longer has the same implication.

The next case that examined the constitutionality of Section 153A was *Debi Soren* v. *The State* (*Debi Soren*).[31] The Patna High Court held that Section 153A was indeed constitutional.[32] The Court noted that by the time of its decision, the exceptions to free expression under Article 19(2) had been widened to include restrictions in the interests of 'public order'.[33]

Close on the heels of *Debi Soren*, the Guwahati High Court upheld the constitutionality of Section 153A in *Sagolsem Indramani Singh* v. *The State of Manipur*, using similar reasoning.[34] In *Sheikh Wajih Uddin* v. *The State*,[35] the Allahabad High Court defended the constitutionality of Section 153A, which contained an explanation. Rebutting the argument that Section 153A was ambiguous and overbroad, the Court stated:

> **The language of the section is exact. There is neither any ambiguity nor vagueness about it. What has been made punishable has been stated in unambiguous, precise and clear words. The provision cannot be used to punish anyone except those who either attempt to promote or promote class hatred or class enmity. The language used in the section is not of an all pervading nature and does not suffer from being all embracing with the result that because of language no one who does not either promote or attempt to promote class hatred or enmity can be convicted.**[36]

The Allahabad High Court also rejected the argument that 'the conditions imposed by Section 153A' on the right to freedom of expression guaranteed under Article 19(1)(a) were not reasonable.[37] Accordingly, the constitutionality of Section 153A was upheld. Defending the sweep of Article 19(2) to include exceptions 'in the interest of public order', the Court stated,

> **If people were permitted to freely attempt to commit or commit acts promoting feelings of enmity or hatred between different classes of the citizens of India, the result would be public disorder. There may be riots or commission of offences. There may be disharmony and ill-will between various classes, affecting the peace and order of the society.**[38]

The last constitutional challenge to Section 153A was seen in *Gopal Vinayak Godse*.[39] In this case, the Bombay High Court interpreted Section 153A, as it stood then, to include

> **(a) such acts which have the tendency to promote enmity or hatred between different classes or(b) such acts which are prejudicial to the maintenance of harmony between different classes and which have the tendency to disturb public tranquillity.** [40]

According to the Court, such acts were 'clearly calculated to disturb public order', and it rejected the challenge to the constitutional validity of section 153A.

3.1.2.4 Conclusion

Intention appears to be a crucial element to establish an offence under Section 153A. While legislative history may suggest otherwise, the judiciary has consistently found intention to be central to establishing a crime under Section 153A. The law currently protects classes such as those based on religion, race, or ethnicity but does not address categories based on sex, gender identity, or sexual orientation. Notably, the Law Commission has recommended that this lacuna in the law be addressed.[41]

It is also worth noting that truth may not serve as an absolute defence under Section 153A. The Courts have found value in speech that depicts historical truth, but have also refused to protect truthful representations that have a tendency to engender ill-will and hatred between communities.

Section 153A has been challenged before the Court on multiple occasions, but has been saved by the 'public order' exception under Article 19(2) of the Constitution. Thus, the judiciary has upheld its constitutionality and found that it imposes a reasonable restriction on the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.

3.1.3 Section 153B- Imputation or Assertion Prejudicial to National Integration

Section 153B of the IPC punishes making imputations or assertions prejudicial to national integration. It also stipulates enhanced punishment (imprisonment, which may extend to five years, or fine) when such offences are committed in a place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies.

Section 153B was added to the IPC in 1972[42] to address acts prejudicial to the maintenance of communal harmony and national integrity.[43] It prescribes punishments for imputations and acts propagated by divisive forces with an aim to generate fear, apprehension and insecurity amongst members of a targeted group on the basis of their religion, race, language, region, caste or community.[44]

Section 153B establishes three distinct offences. It criminalises any imputation or assertion regarding a 'class of persons':

1. that by reason of their membership of such class, they fail to bear true faith and allegiance to the Constitution or uphold the sovereignty and integrity of India; or

2. that such class be deprived of their rights as citizens in India; or

3. concerning any obligations of such class, by reason of their being members of any religious, racial, language, or regional group or caste or community, that is likely to cause disharmony or feelings of enmity or hatred or ill-will between such class of persons and others.

This part, pertaining to Section 153B, is further divided into four sub-parts. The first sub-part discusses the common ingredients of the offences under Sections 153B(1)(a), 153B(1)(b) and 153B(1)(c) of the IPC, namely 'making or publishing imputations or assertions and the allusion to a 'class of persons'. The second sub-part discusses the additional element of 'obligation' under Section 153B(1)(c). The third sub-part highlights the ambiguity regarding the role of 'intention' as a necessary element in determining an offence under Section 153B. The fourth-sub part draws upon the ingredients to identify the applicable standard for the offence and concludes the discussion.

153B. Imputations, assertions prejudicial to national-integration—

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise—

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall be liable to fine.

3.1.3.1 Ingredients of Section 153B

All three sub-sections of Section 153(B) have two common ingredients: first, they require the words, signs or visual representation to be directed at members of certain communities. Second, they include the 'publishers' of the statement within the scope of this section. This sub-part is accordingly divided into two further sub-parts, the first of which examines the ingredient of 'publication' and the second examines the ingredient of 'class of persons'.

(a) Makes or publishes

The word 'makes' in the context of Section 153B refers to both the originator of the imputation, i.e. the author, and to someone who repeats, writes or copies it.[45] It is intended to supplement the act of 'publication' which is sine qua non for an offence under Section 153B.[46] The word 'publish' means to make 'public', 'to circulate', 'to make known to people in general', 'to issue' or 'to put into circulation'.[47]

For successful conviction under Section 153B, it is necessary to prove that there was publication to a third party.

(b) Class of persons

The word 'class' refers to 'a homogeneous section of people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like'.[48]

In order to constitute an offence under Section 153B, imputations and assertions which are prejudicial to national integrity have to be made against a class of persons belonging to a particular racial, religious, regional, linguistic or caste-based community.

3.1.3.2 Obligation

Section 153B(1)(c) criminalises statements about the racial, communal, religious, regional or caste-based obligations of a person. Accordingly, this sub-part discusses the additional ingredient under section 153B(1)(c)—it must be established that an assertion, counsel, plea or appeal was made about the obligation of any class of persons by reason of their being members of that class, and such assertion creates or is likely to create disharmony.[49]

The legal position was explained by the *Bombay High Court in Murzban Shroff* v. *State of Maharashtra* (*Murzban Shroff*):

> **Therefore, the said publication of the said assertion, appeal should relate to the said obligation. To give an illustration, in Sikh Religion, it is obligatory for Sikh to wear Turban and carry Kirpan or for Hindu not to eat cow meat or for Muslim to pray Namaz for five times in a day. It is apparent therefore that if the assertion, appeal pertains to any such obligation of the member of a religious group etc. and such a plea, appeal is likely to cause disharmony only then it would fall under sub-clause (c) of sub-section (1) of Section 153-B.**[50]

The High Court went on to state:

> **The word 'obligation' as defined in one of the dictionaries means a legal or moral duty to do or not do something. The word has many wide and varied meanings. It may refer to anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality.**

3.1.3.3 Intention: an ingredient?

Section 153B was enacted with a view to prevent spreading of propaganda that makes imputations or assertions that members of certain communities are unpatriotic, or should be deprived of their rights as citizens, or is prejudicial to maintenance of communal harmony.[51] Neither Section 153B nor the object and reasons prescribed while introducing the amendment[52] comment on the significance of the 'intention' of the speaker or publisher of the statement.[53] Commentaries on Section 153B have argued that the '*bona fide* intention' of the maker or publisher of the statement is irrelevant while assessing his/her liability under this law.[54]

However, the judiciary seems to have taken a different stand on the role of 'intention' while determining offences under Section 153B. In *Murzban Shroff*, the Bombay High Court held that 'the intention to cause disharmony or enmity or hatred' was an integral part of the offence.[55] The High Court further held that it was the burden of the prosecution to *prima facie* establish the 'existence of *mens rea* on part of the accused'.[56] This position was reiterated by the Orissa High Court in *Express Publications* (*Madurai*) *Ltd.* v. *State of Orissa*[57] (*Express Publications*), which held that 'intention' and 'knowledge' are the 'most important factor[s] while determining whether the publication attracted the above-mentioned sections'.[58]

In *Sikkim Social Empowerment Association* v. *Anjan Upadhyaya*, the Sikkim High Court took intention into account while determining whether a provocative publication in a newspaper would fall within the contours of Section 153B.[59] The High Court rejected the publisher's argument that the article was published with a '*bona fide*' intention. It held that the intention in publishing the article is not required to be proved in court; rather, the intention is gathered from the article itself.

Therefore, there seems to exist some contradiction between the legislative intent and judicial interpretation in ascribing a definitive role to 'intention' as an ingredient of the offence under Section 153B.

3.1.3.4 Conclusion

Section 153B supplements Sections 153A and 295A of the IPC, which deal with the creation of enmity, disharmony, ill-will and hatred amongst different groups and communities. Section 153B targets speech directed at certain classes of people, by virtue of their membership or on the basis of the obligations that arise out of their membership. Section 153B also holds publishers of imputations and assertions liable, along with those who reiterate the hateful speech. Lastly, intention has been held to be an important ingredient in some instances, but not in others.

3.1.4 Section 295- Destruction of Sacred Objects

Section 295 of the IPC criminalises the destruction of places of worship or sacred objects with the intention of insulting, or with the knowledge that such an act is likely to be considered insulting to the religious sentiments of a class of persons.

This part pertaining to Section 295 is further divided into two sub-parts. The first sub-part discusses the four ingredients that constitute the offence—the intention to insult or knowledge of likelihood, the act of destruction, damage or defilement, a place of worship, and objects held sacred. The second sub-part draws upon these ingredients to identify the applicable standard of hate speech and concludes the discussion.

> **295. Injuring or defiling place of worship with intent to insult the religion of any class. – Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

The ingredients of an offence under Section 295 are:

1. The accused must have destroyed, damaged or defiled an object or place of worship.

2. The object or place of worship must be considered sacred by a class of persons.

3. The accused must have acted with an intention of insulting the religion or with the knowledge that such action will likely be considered insulting to that class of persons.[60]

Section 295 may affect speech since it can be applied to speech in the context of sacred texts. This is evident from *Bharat Bhushan Sharma* v. *Kundan Kumar* (*Bharat Bhushan Sharma*) in which the Punjab and Haryana High Court had to evaluate whether Section 295 (among other sections of the IPC) might apply to the script from the Sri Guru Granth Sahib Ji.[61] Similarly, in *Ushaben Navinchandra Trivedi* v. *Bhagyalakshmi Chitra Mandir*[62] (*Ushaben*), the court considered a complaint filed under several laws, including Section 295, against a movie for depicting Hindu deities as 'jealous'[63]. The absence of *mens rea* lead to the suit being dismissed by the Gujarat High Court.[64] However, the applicability of Section 295 to a movie was not discussed in the judgment.

3.1.4.1 Ingredients of Section 295

This sub-part discusses the ingredients of the offence and is further divided into four sub-parts. The first sub-part discusses the intention to insult or knowledge of likelihood. The second sub-part discusses destruction, damage, or defilement of object or place of worship. The third sub-part discusses the injury being inflicted on a place of worship, and the fourth sub-part discusses the injury being inflicted on sacred objects.

(a) Intention to insult or knowledge of likelihood

The primary requirement is that the accused must have either intended to insult or have had the knowledge that his action is likely to be considered as insulting to a class of persons. Intention and knowledge are used disjunctively, therefore contemplating both possibilities as offences. For instance, in *Sohana Ram* v. *Emperor*, the petitioner was convicted by the lower court for 'damaging a mosque by placing the rafters of his house on the wall of the mosque' for the purposes of reconstruction.[65] The Lahore High Court found that the petitioner never intended to insult Islam, neither did he know that such damage was going to offend Muslims. His conviction was reversed.

However, the subjectivity involved in determining the intention to insult or the likelihood of knowledge of offence may be problematic. This is evident in the context of violation of customs. If religious scholars hold different opinions regarding whether a particular action 'defiles' or 'pollutes' a sacred object, then that action is not culpable. In *Gopinath Puja Panda Samanta* v. *Ramchandra Deb* , the correct process of making religious food was not followed by a temple.[66] The King of Puri, who was the superintendent of the temple, instructed remedial measures in the form of a short ritual. The petitioners complained under Section 295, stating that the ritual was insufficient and consequently the religious food offered amounted to defilement. The Orissa High Court dismissed the complaint, finding that the king's actions were supported by some religious scholars.

On the other hand, a person who defiles a custom that is well established for many centuries through usage is liable under Section 295. This can be evinced from the 1927 case of *Atmaram* v. *King Emperor*, in which the Nagpur High Court found that when an untouchable deliberately enters the enclosure surrounding the shrine of a certain Hindu god, it would amount to 'pollution' in the eyes of devout Hindus.[67] This was seen as amounting to defilement under Section 295. Although the decision on facts in this case are nullified with the advent of the Constitution of India, the broader principle remains, i.e. violation of a custom with knowledge or intention shall be sufficient for culpability under the law.[68]

In *Zac Poonen* v. *Hidden Treasures Literature Incorporated*[69] (*Zac Poonen*), the High Court of Karnataka held that translations of sacred writings and songs of a Christian group from Norway would not be punishable under Section 295.[70] The High Court stated that there was no intention to hurt religious feelings and that 'doctrinal disagreement' would not constitute an act of outraging or insulting any religion or religious beliefs. No material is placed before the Court below to show that the petitioner has done anything which intended to create or promote enmity, hatred or ill-will against the members of the class of persons under question.[71]

In *South Eastern Railway* v. *State of Jharkhand and Sardar Mahendra Singh* the case dealt with the eviction of the petitioner who was held to have encroached upon the respondents land.[72] The complainant stated that religious photographs had been damaged, an act which

the complainant argued is punishable under Section 295. However, the High Court of Jharkhand held that there was no intention to insult the petitioners religion/damage religious photos and the act would not be covered under Section 295.[73]

It must also be noted that the existence of any custom that prohibits a certain act must be adequately proved.[74]

(b) Destroys, damages, defiles

Injury to the place of worship or sacred object is an important element of Section 295. This injury must amount to destruction, damage, or defilement of the object or place.

The injury does not have to be physical, as is apparent from the use of the term 'defilement'. The judiciary has found that the scope of the term is not restricted to the idea of making something 'dirty', but extends also to ceremonial pollution.[75] However, the alleged pollution needs to be proved by the prosecution to make the act culpable.[76]

Defilement can potentially extend to the position of incorrect reproduction of religious texts. In *Bharat Bhushan Sharma*,[77] the Punjab and Haryana High Court held that misprints and erroneous publication of some extracts of a religious text do not 'lend an offensive colour or distort the original content'.[78] However, this ruling seemed to be based on the fact that there was clearly no intention to insult the religion. Since the charges were framed under multiple sections of the IPC, it is also unclear from the judgment whether the presence of intention would have led to successful prosecution under Section 295.

In *Zac Poonen*, the High Court of Karnataka held that the translation of sacred texts and songs would not be covered by Section 295 due to the lack of intention. It was held that translation would not amount to 'defilement' since it was 'for the purpose of treating the theme in a different manner, to suit a different doctrine propagated by the petitioner'.[79] The High Court also stated that the 'manner in which the said work has been desecrated' had to be detailed in the complaint to reach a conclusion about 'defilement'.

In *Malleshappa* v. *Sri Kumar*,[80] the petitioner spoke at an event, where he made references to experiments carried out by another, about urinating on religious idols. A complaint under Section 295 was filed against him. The High Court of Karnataka held that the petitioner had not 'damaged, defiled or destroyed' any place of worship or object held sacred.[81]

(c) Place of worship

Places set aside or consecrated for worship are places of worship, regardless of the particular place or deity worshipped.[82]

In *Joseph* v. *State of Kerala*, the Kerala High Court categorically held that in order for any prayer hall to qualify as a place of worship, it must have been built on land acquired and possessed legally.[83] The Court found that the person who later occupied the property and removed the pictures of Hindu deities from the wall did not commit any offence. The Court observed that he could not have intended to insult the religious feelings of persons who did not even possess a right over the property.[84]

Similarly, in *Bechan Jha* v. *Emperor*, some persons had attempted to construct a public mosque.[85] Although the plot on which the mosque was to be constructed was in the possession of the tenant, the landlord had not permitted construction. The Court held that such a construction could not have converted the mosque into a place of worship as contemplated by Section 295.[86]

(d) Object held sacred

Apart from places of worship, Section 295 also protects objects that are held sacred by a class of persons. However, not all religious objects will qualify. As the Madras High Court held in *Re: Ratna Mudali*:

> **There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred; as an example of the former, I may refer to a place of sepulture (not actually consecrated, as in the case of ground specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity or where an idol or altar is kept.**[87]

However, the construction of 'object held sacred' in Section 295 is not bound by any express words of limitation. Therefore, its meaning cannot be restricted to include only idols in temples or idols carried in processions on festive occasions,[88] but includes sacred books as well.[89] The idea behind its liberal construction is to satisfy the intention behind the enactment of Section 295: 'To respect the religious susceptibilities of persons of different religious persuasions or creeds.'[90]

In *S. Veerabadran Chettiar* v. *E.V. Ramaswamy*[91] (*Veerabadran*) the Supreme Court held:

> **'In the first place, whether any object is held sacred by any class of persons, must depend upon the evidence in the case….**
>
> **[A]ny object however trivial or destitute of real value in itself, if regarded as sacred by any class of persons would come within the meaning of the penal section. … An object may be held sacred by a class of persons without being worshipped by them.'**[92]

This judicial determination is intrinsically connected to the subjective beliefs of the different classes of citizens. This is evident from the Supreme Court's observation in the same case that 'Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the court.[93]

3.1.4.2 Conclusion

A study of hate speech cases decided under Section 295 demonstrates that while the presence of intention to insult or knowledge of likelihood to insult is a critical ingredient of the offence, it must be accompanied by an injury to the place of worship or sacred object. However, this injury need not always be physical. The term 'defilement' in the text of the Section 295 has been interpreted broadly by the judiciary. Further, apart from places of worship, Section 295 also protects objects that are held sacred by a class of persons.

From the point of view of speech, Section 295 treats sacred images and texts differently from commentary about defilement. This is evident from cases like *Bharat Bhushan*[94] and *Zac Poonen*,[95] in which the speech or publication itself is evaluated to see whether it amounts to an act of defilement. It is important to distinguish these cases from cases like *Malleshappa* in which it is clear that a narration or description of an act of defilement cannot be an offence under Section 295.

3.1.5 Section 295A- Outraging Religious Feelings with Delibrate and Malicious Intent

Section 295A of the IPC criminalises the deliberate and malicious outraging of religious feelings of any class by insulting its religion or religious beliefs. It covers all audio/visual media since it envisages that the offence may occur through words, signs, visible representations or otherwise.

Section 295A was inserted in 1927 and was originally meant to apply to 'scurrilous scribbles' and not to the research work of historians or professionals and artists.[96] It was introduced in the aftermath of the publication of a religious book titled *Rangeela Rasool*.[97] This piece of work had controversial details about Prophet Muhammad's life. Attempts were made to book the author under Section 153A of the IPC.[98] However, Section 153A was not applicable in this instance, since the attacks were made against the leader of a class of people and not the class itself.[99] This gap in the law led to the introduction of Section 295A.[100] It has since been used extensively to arrest people accused of hate speech,[101] but is also infamous for its chilling effect on constitutionally protected speech.[102]

This part discussing Section 295A is further divided into five sub-parts. The first sub-part discusses the ingredients of Section 295A. The second sub-part discusses how truth is used as a defence for this crime. The third sub-part discusses the constitutionality of Section 295A vis-à-vis Article 19(1)(a). The fourth sub-part discusses the constitutionality of Section 295A vis-à-vis Article 25. The fifth sub-part draws upon the ingredients of the offence to identify the standard and concludes the discussion.

> **295A Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs: Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.'**

3.1.5.1 Ingredients of Section 295A

This sub-part discusses the ingredients of this offence and is further divided into four sub-parts. The first sub-part discusses the ingredient of 'deliberate and malicious intention'. The second sub-part discusses the 'classes' of citizens at whom the acts must be directed. The third sub-part discusses 'words, either spoken or written'. The fourth sub-part discusses the ingredient of insulting or outraging religious feelings.

(a) Delibrate and malicious intention

This sub-part discusses the phrase 'deliberate and malicious' intention used in Section 295A, which includes a discussion on the determination by the judiciary.

Section 295A seeks to punish 'aggravated forms of insult to religion'.[103] Unwittingly or carelessly offered insults would not fall within Section 295A. This standard is evident from the Supreme Court's decision in *Ramji Lal Modi* v. *State of U.P.*, discussed later in this chapter.[104]

For an offense to be made out under Section 295A, the accused must have the 'deliberate and malicious intention' of insulting the religious beliefs of a class of citizens. This requirement is conjunctive, requiring that both conditions be

fulfilled.[105] If, for example, an act is deliberate without being malicious, it will not be covered by Section 295A.[106]

(i) 'Deliberate'

Unwittingly or carelessly offered insults would not fall within Section 295A. This standard can be evinced from the Supreme Court's decision in *Ramji Lal Modi*, where it has stated, 'Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It [Section 295A] only punishes the aggravated form of insult to religion'.

In *Narayan Das* v. *The State* (*Narayan Das*), the Orissa High Court explained the standard of 'deliberate intention':

> **Where the intention to wound was not conceived suddenly in the course of discussion, but premeditated, deliberate intention may be inferred. Similarly, 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 deliberate intention may be inferred.** [107]

In *Sujato Bhadra* v. *State of West Bengal* [108] (*Sujato Bhadra*) the Calcutta High Court referred to Black's Law Dictionary and read 'deliberate' to mean well-advised and carefully considered (rather than rash or sudden).[109]

(ii) 'Malicious'

The High Court in *Sujato Bhadra* also commented that the term 'malicious' implies intention to commit an act injurious to another without just cause or excuse.[110] Malice in and of itself cannot be proved directly or tangibly—it necessitates an examination of the surrounding circumstances in any case. As suggested in *Sujato Bhadra*, these circumstances include 'the setting, background and connected facts' to the offending expression.[111] However, it was held that the author in this instance did not display 'deliberate and malicious intent', since her work was critical of religion in general, and was for the purpose of facilitating social reform.

The burden of proof in the context of malice has been read in different ways by different High Courts. On the one hand, the Allahabad High Court held in *Khalil Ahamad* v. *The State* (*Khalil Ahamad*) that malice shall be presumed '[i]f the injurious act was done voluntarily without a lawful excuse',[112] and that the burden of rebutting this presumption would then fall on the accused. On the other hand, the Madras High Court's judgment in *Re: P Ramaswamy*[113] (*Ramaswamy*), delivered around the same time, stated that 'malice must be established … by the prosecution by clear evidence'.[114]

The judiciary has also made interesting observations on some forms of 'deliberate and malicious' intention. For instance, in *Sujato Bhadra*, the Calcutta High Court stated that any insulting expression made knowingly but with the intention of facilitating social reform cannot be considered 'deliberate and malicious'.[115] This is detailed further below.

(iii) Determining intention

At the time of enactment of Section 295A, the insertion of 'deliberate and malicious intention' was recommended to prevent prosecution of insult to religion made in good faith with the object of facilitating social reform.[116] Consequently, 'intention' is a key element of Section 295A that needs to be ascertained to establish the guilt of the accused. The judiciary infers this element of 'deliberate or malicious intention' through an examination of two things. First, from the language of the speaker where 'language

used transgresses the limits of decency and is designed to vex, annoy and outrage the religious feelings of others'.[117] Second, from an examination of all facts and circumstances produced before the judiciary.[118]

- Language used

As stated above, the current standard used to determine the intention of the speaker or author, laid down in *State of Mysore* v. *Henry Rodrigues* (*Henry Rodrigues*), is to verify whether the language used is likely to outrage the religious feelings of a given class.[119] It was also held in this case that the 'liberty to criticise' would not excuse the use of foul language.[120]

- Work should be read as a whole

In *State of Bihar* v. *Shailabala Devi* (*Shailabala Devi*), the Supreme Court examined a restriction imposed under Section 4(1)(a) of the Indian Press (Emergency Powers) Act, 1931 which prohibited 'words or signs or visible representations which incite to or encourage, or tend to incite to or encourage the commission of any offence of murder or any cognisable offence involving violence'.[121]

The Supreme Court, while determining whether a particular document fell within the ambit of Section 4(1)(a), held that the writing must be examined 'as a whole and in a free and fair liberal spirit not dwelling too much upon isolated passages or upon a strong word here and there'.[122] Further, the Court held that 'an endeavour should be made to gather the general effect which the whole composition would have on the mind of the public'.[123]

- Free, fair and liberal spirit

These parameters laid down by the Supreme Court have been used to examine speech in the context of Section 295A.[124] For instance, in *Kanta Prasad Sharma* v. *State of Rajasthan* (*Kanta Prasad Sharma*) forfeiture of seventeen pamphlets was ordered based on their alleged violation of Section 295A of the IPC.[125] The Rajasthan High Court reaffirmed *Shailbala Devi* and held that 'the document must be examined in a fair and liberal spirit without dwelling on isolated passages'.[126] These parameters have been reaffirmed by the judiciary at various instances while examining speech in different forms.[127]

- Nature of language used

The Allahabad High Court also analysed the language used by the speaker to determine intention under Section 295A in *Khalil Ahamad*.[128] In this case, forfeiture of six books had been ordered for offending Section 295A. The Court upheld the ratio laid down in *Kali Charan Sharma* v. *Emperor*[129] (*Kali Charan*) that '[i]f the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce'.[130] The Court found that the central theme of the book was to question the alleged bad character of an individual, who was held in great regard by a religious sect. On examination of the writing, the Court found it to be of such nature that the intention was evident, and it was bound to outrage the religious feelings of the other class.[132]

- Surrounding Circumstances

As outlined above, in addition to the language of the speaker, the judiciary is required to determine intention from an examination of all facts and circumstances produced before it.[133]

The proposition that circumstances should also play a role in determining intention in the context of Section 295A was endorsed by the Calcutta High Court in *Sujato Bhadra* v. *State of West Bengal*.[134] The Court examined

the surrounding circumstances and the text of the book authored by Taslima Nasreen. While fleshing out the ingredients of Section 295A, the Court was of the opinion that 'intention of the author has to be found out from the book itself having regard to the context in which it was written'. The Court held that the existence of deliberate and malicious intention must be gathered from 'the text and the scheme/central theme of the whole book and the surrounding circumstances'.[135] The Court held that in this instance, the intention of the book was to bring out the problems that plagued the society which were often sanctioned by religion.[136] The judges found that it cannot be inferred from the surrounding circumstances or the book itself that the intention was to outrage the religious feelings.[137] Accordingly, the order of forfeiture of the book for violation of Section 295A was set aside.

(b) 'Class' of citizens

The speech also needs to be directed at any definite and ascertainable class of citizens of India, to fall within the scope of Section 295A.[138] The term 'classes' has also been subject to interpretation by the judiciary.[139] For a body of persons to form a class there must be some basis of classification.[140]

(c) 'Words, either spoken or written'

Further, this insult must be committed through words, either spoken or written or through a visible representation. In *Sheo Shankar* v. *Emperor*, the accused had broken the '*janeo*' (sacred thread) that the complainant was wearing.[141] Here, the Oudh High Court held that Section 295A does not apply to instances where the accused has not, either by words used or by visible representation, such as caricature or the like, insulted the religion or the religious beliefs of the complainant.[142]

(d) Insulting/outraging religious feelings

This sub-part discusses the phrase 'insulting and outraging religious feelings'used in Section 295A.[143] This sub-part further discusses the standard of 'outrage' and the 'reasonable person' test.

As the Karnataka High Court noted in *Henry Rodrigues*, Section 295A seeks to 'respect the religious susceptibilities of persons of different religious groups'.[144] In this context, it appears that the judiciary tends to grant some leeway to religious groups while determining the legitimacy of their sensibilities. For example, in *Khalil Ahmad*,[145] the Allahabad High Court extended to Section 295A the principle evolved by the Supreme Court in *Veerabadran* (with regard to Section 295),[146] and observed that the judiciary must be circumspect and decide cases without getting into the merits of the beliefs.[147]

(i) The standard of 'outrage'

The Calcutta High Court has suggested that 'outraging' is a much stronger word than 'wounding', used in Section 298.[148] As a consequence, Section 295A requires a higher standard of harm caused by the statement than that described by Section 298. Mere insults to individuals, or comments directed at a certain section of a class of people would not qualify under the offence as being punishable.[149] The feelings of a class of people as a whole have to be outraged for it to be punishable under Section 295A.[150] The law punishes only those insults that are perpetrated with intention to outrage the feelings of the entire class.[151] Therefore the collective sentiment needs to be attacked to a substantial degree.[152]

(ii) 'Reasonable person' test

It appears that the speech in question is evaluated based on the facts of the case at

hand. For example, in *Sujato Bhadra*,[153] the Calcutta High Court, quoting Pollock J. in *BC Shukla*,[154] held that the effect of the words 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'.[155] In case of a speech, the audience is taken into account.[156] For a book, this would be the intended primary class of readers.[157]

3.1.5.2 Truth as a defence

This sub-part discusses the application of truth as a defence in Section 295A cases.

Indian jurisprudence does not recognise truth as a defence when other ingredients of Section 295A are found to exist.

This is evident from the Karnataka High Court's decision in *Henry Rodrigues*,[158] a case involving writing that criticised practices and beliefs of the Roman Catholic Church for being contrary to the teachings of the Holy Bible.[159] The High Court held that the fact that the author had conducted a 'deep study of the Bible' and was sincerely opposed to the practices and beliefs of the Roman Catholics did not excuse the use of foul and abusive language.[160] The Court relied on *Khalil Ahmed* and held that even though there might have been 'truth' in the work, the language was 'designed to…annoy an outrage the religious feelings of others'. Hence, it would still be actionable under Section 295A.

The application of this principle also depends on the actual language used. This is evident from the Punjab and Haryana High Court's judgment in *Brahamcharani Didi Chetna* v. *State of Punjab*[161] (*Brahamcharani Didi*) where a Jain preacher was prosecuted for her discourse during which she supposedly portrayed Maharishi Valmiki, a saint in Hindu mythology, as a dacoit before his transformation into a saint. Here, while it was noted that this story had been handed down from generations since ancient times,[162] the critical factor was that there was no evidence at all to show that the 'exact words' used by the preacher demonstrated 'deliberate and malicious intention' to outrage religious feelings as contemplated by Section 295A.[163] This assessment appears to have been made on the basis of reports of the actual language used.

The Allahabad High Court applied the *Kali Charan Sharma* v. *Emperor*[164] principle (evolved in the context of Section 153A) to intention under Section 295A, to find that '[e]ven a true statement may outrage religious feelings'.[165] In *Khalil Ahamad*,[166] the Allahabad High Court found that this principle extends even to works of history, adding that:

> **[i]t is true that Muawiya was a historical figure. But we cannot overlook the fact that, there is religious sentiment attached to this name. The six books cannot, therefore, be dismissed as ordinary works on history. The books are essentially of a religious character. They are an attack on Muawiya's character.**[167]

It is therefore clear that it is not just the truthfulness, sincerity of the speaker, or larger purpose of the speech that determines its status under Section 295A, but also the actual language used and the manner in which the content is conveyed.

3.1.5.3 Constitutionality vis-à-vis Articles 19(1)(a) and 19(2)

This sub-part discusses the manner in which the Indian judiciary has dealt with challenges to the constitutionality of Section 295A for interfering with the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

Section 295A has been challenged, and upheld, before the Supreme Court in *Ramji Lal Modi*.[168]

In its November 1952 issue, the magazine *Gaurakshak*, which was dedicated to the protection of cows, published a controversial article leading to the prosecution and conviction of the editor, printer and publisher of the magazine under Section 295A. The lower courts found him guilty of deliberately and maliciously outraging the religious feelings of Muslims and convicted him. He appealed this decision and challenged the constitutionality of Section 295A.

It was argued that Section 295A was overbroad, covering insulting expressions that lead to public disorder and those that do not. The petitioner further argued that Section 295A must be qualified by a requirement of likelihood that the expression will lead to public disorder, and this likelihood must be proximate.

The Supreme Court disagreed, observing that Article 19(2) uses the wide term 'in the interests of', as opposed to the narrower term 'for the maintenance of', to qualify state restrictions on speech.[169] The Court went on to state:

> **If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but 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.[170]**

The Court concluded that Section 295A proscribed only such speech 'perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class',[171] and held that such speech has a 'calculated tendency'[172] to disrupt public order.[173] Section 295A was therefore found to be consistent with the Constitution.

3.1.5.4 Constitutionality vis-à-vis Article 25

This sub-part discusses the manner in which the Indian judiciary has dealt with cases that challenged the constitutionality of Section 295A in light of the right to freedom of religion guaranteed by Article 25 of the Constitution.

In *Sant Dass* v. *Babu Ram*,[174] (*Sant Dass*) the Allahabad High Court upheld Section 295A, stating that a person merely 'practising, propagating or professing' his/her religion would never come within its purview:

> **A person who may be found to be covered by all these ingredients of Sec. 295A of the Indian Penal Code would not be merely 'professing, practising or propagating religion', but going very much beyond the scope of those words.… This Sec. 295A of the Indian Penal Code does not at all, therefore, come in conflict with either Art. 25 or Art. 26 of the Constitution…. If it does impose any restriction, it is within the four corners of the expression 'subject to public order, morality and health'.[175]**

The Court referred to Ramji Modi and reiterated that restrictions may be placed on the right to freedom of religion on the ground of 'public order'.[176] Therefore, the Court concluded that Section 295A was valid.

3.1.5.5 Conclusion

Section 295A requires a high threshold of intention for unlawful speech acts. This is in line with its legislative intent, that good faith critique for social reform should remain protected. For instance, Section 295A requires a higher standard of harm than that described by Section 298. The accused must possess the 'deliberate and malicious intention' of insulting the religious beliefs of a class of citizens. Further, truth is

not recognised as a defence when the other ingredients of Section 295A are proven. Thus, true statements, if presented in incendiary terms, or with the deliberate intention to insult, would not be protected. The Supreme Court has also upheld the constitutionality of Section 295A, upheld against challenges on the grounds of both freedom of speech and freedom of religion.

Even though the high threshold of intention was used to find Section 295A consistent with the Constitution, intention is still read subjectively especially at the stage of filing complaints. It might also be argued that Section 295A is a disproportionate measure since forfeiture and other means of prior censorship are available to the government. The threat of arrest and conviction in this context is not necessary to preserve public order, and it does create a great risk of chilling freedom of expression.[177]

3.1.6 Section 298- Speech with the Intention of Wounding Religious Feelings

Section 298 of the IPC criminalises oral speech, uttered with the intention to wound the religious feelings of any person.

This part of the report is further sub-divided into three sub-parts. The first sub-part discusses the two ingredients of the offense—intention and knowledge of likelihood. The second sub-part discusses the difference between Sections 295A and 298 of the IPC. The third sub-part draws upon the ingredients to identify the applicable standard of hate speech and infer conclusions.

> **298. Uttering, words, etc., with deliberate intent to wound the religious feelings of any person – Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.**

The essence of Section 298 is that it specifically criminalises oral speech that offends religious feelings. In *Shalibhadra Shah* v. *Swami Krishna Bharti*,[178] the Gujarat High Court refused to apply Section 298 to prosecute the editor and publisher of a weekly magazine because it 'relates to oral words uttered in the presence of a person'[179] and does not apply to written material. However, the text of Section 298 also includes placing any religiously offensive object in the sight of a person. This has been read by the judiciary to also include the public display of cow flesh with deliberate intentions of wounding religious feelings.[180] The applicability of Section 298 is limited to religiously offensive oral speech acts against 'any person' as opposed to a 'section or class of people'.[181]

3.1.6.1 Ingredients of Section 298

This sub-part discusses the ingredients of Section 298. It is further divided into two sub-parts. The first sub-part discusses 'intention' and the second-sub-part discusses 'knowledge of likelihood'.

(a) Intention

This sub-part first discusses the phrase 'deliberate intention' used in Section 298, and then examines how such intention is determined.

(i) 'Deliberate intention'

For successful prosecution under Section 298, the state must prove that the accused insulted the religious feelings of the complainant with 'deliberate intention'. The Law Commission

has explained this requirement in the following terms:

> **The intention to wound must be deliberate, that is, not conceived on the sudden in the course of discussion, but premeditated; it must appear not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument, consciously used words likely to wound his religious feelings, but that he entered in to the discussion with the deliberate purpose of so offending him.**[182]

In *Narayan Das*,[183] the Orissa High Court quoted a Privy Council decision, which states that 'intention, which is a state of mind, can never be proved as a fact: it can only be inferred from facts which are proved'.[184] Using this principle as its foundation, the Court stated that 'in doing a particular act a person may have more intentions than one'.[185] Therefore, any finding of criminality for 'deliberate intention' necessitates that intention to be the 'real or dominant intention'. The Court also noted with approval the comments of the Select Committee on Section 295A on 'deliberate intention'. The Select Committee had stated: '[T]he insult to religion or the outrage to religious feelings must be the sole, or, primary, or at least deliberate and conscious intention.'[186]

The *Narayan Das* ruling resulted after a 'Babaji' (holy man) induced a belief in the minds of the villagers that he was a living god. In the incident, the Babaji called Lord Jagannath a mere 'piece of wood'. The Court, while acquitting the accused held as follows:

> **It should be remembered that the Babaji had already induced a belief in the minds of several villagers that he was living God. He was undoubtedly free to preach about the divinity in him and to dissuade people from idol worship. His object in saying that Lord Jagannath at Bonaigarh was merely a piece of wood was to contrast his position as living God with that of the inanimate object at Bonaigarh in furtherance of his preaching against idol worship. The primary or dominant intention was therefore to emphasise his own divinity and not to deliberately wound the religious feelings of others by insulting Lord Jagannath.** [187]

(ii) Determining intention

Deducing 'deliberate intention' under Section 298 requires an examination of the conduct of the parties and the surrounding circumstances.[188] This includes 'the words spoken, the place where they were spoken and the persons to whom they were addressed'.[189] In *Q. E.* v. *Rahman*,[190] the Allahabad High Court found a man guilty under Section 298 after he carried the flesh of a cow around a village openly because 'his Hindu fellow villagers previously endeavoured to induce the zamindar to prevent the slaughter of the cow'.[191] According to scholars, the Court may also take the 'previous manifestation of intention towards a person or his religion' into account.[192]

(b) Knowledge of likelihood

In *Mir Chittan* v. *Emperor*, the Allahabad High Court convicted a man for slaughtering a cow in an old ruined house in a village.[193] The accused argued the lack of 'deliberate intention' of wounding religious feelings as he slaughtered the cow for meat at his wedding feast. The Court rejected the plea, finding a difference between 'motive' and 'intention'. It held that 'intention' may be presumed when a man knows that certain consequences will follow from his acts.[194]

In *Chakra Behera* v. *Balakrushna Mohapatra*,

the accused performed rituals on non-auspicious days against strict customs to avoid an ongoing cattle-epidemic disease.[195] They were charged under Section 298 for wounding the religious feelings of the other villagers. The Orissa High Court acknowledged the general presumption that everyone knows the natural consequences of his acts.[196] At the same time, the Court refused to apply the principle to this case, instead opting for an examination of the effects, stating: 'it is difficult to hold that the natural consequence of the worship of a deity in the proper form, though on an unauthorised date and with the help of an unauthorised priest was to outrage the religious feelings of a section of the public.'[197] The Court thus held that 'mere knowledge of the likelihood that the feelings of other persons might be hurt, would not suffice to bring their act within the mischief of Section 298 IPC'.[198]

In *Narayan Das*, the Orissa High Court had similarly stated: 'A mere knowledge of the likelihood that the religious feeling of other persons may be wounded would not suffice nor a mere intention to wound such feelings would suffice unless that intention was deliberate.'[199] This proposition has been reiterated by the Delhi High Court in *Maqbool Fida Hussain* v. *Raj Kumar Pandey*.[200]

3.1.6.2 Difference between Section 295A and 298

This sub-part discusses the difference between Sections 295A and 298 of the IPC.

Sections 295A and 298, though similar in terms, operate in different spheres of speech acts and are applicable at differing thresholds. From a textual reading, it is evident that Section 295A is viewed as a graver offence than Section 298. In *Sujata Bhadra*, the Calcutta High Court stated that the term 'outraging' in Section 295A is 'stronger' than the term 'wounding' in Section 298.[201] Moreover, Section 298 criminalises utterances to individuals whereas Section 295A criminalises speech directed at a class of citizens.[202]

In *Narayan Das*, the Court noted that whereas Section 298 requires mere 'deliberate intention', Section 295A 'goes further and requires proof of malice'.[203] The way this difference plays out has been articulated in *NgaShew*, where the Court stated:

> **It is no defence to proceedings under S. 298 that religious feelings were deliberately shocked or wounded by the defendant in order to draw attention to some matter in need of reform; because that is not the proper way to secure reforms. There is a constitutional way which the Courts will support, and an unconstitutional way which the Courts will condemn, of giving effect to every legitimate grievance which any one of His Majesty's subjects may entertain. Under Sec. 295-A, however, the prosecution must prove more than under S. 298; they must show insult for the state of insulting and with an intention which springs from malice and malice alone. To a charge under this Section therefore, it would be a defence to say: 'I had no malicious intention towards a class, but I did intend to wound or shock the feelings of an individual so that attention might, however rudely, be called to the reform which I had in view.**[204]

Additionally, the scope of Section 295A is much wider, in that it is applicable to all kinds of expressions, namely written, spoken, signs, or visible representation. However, Section 298 is applicable only against oral speech acts such as utterances, sounds, or gestures.

From these differences, it is evident that Section 295A strikes at a class of expressions that are graver than those in Section 298. Accordingly,

Section 295A contemplates a stronger punishment of imprisonment of up to three years, compared to Section 298, violations of which attract a punishment of imprisonment of only up to one year.

3.1.6.3 Conclusion

A successful prosecution under Section 298 requires the state to prove that the accused insulted the religious feelings of the complainant with 'deliberate intention'. At the same time, the mere knowledge of the likelihood that religious feelings might be hurt would also not be sufficient. This is still a lower standard than that of Section 295A, which requires the intention to be 'deliberate and malicious' in nature. The discussion above also details the difference in impact of Sections 295A and 298—the former is applicable to much graver instances of hate speech. Further, Section 298 applies only to speech against 'any' person, as opposed to a section or class of people.

3.1.7 Section 505- Public Mischief

Section 505 criminalises multiple kinds of speech. This includes statements made with the intention of inducing, or which are likely to induce, fear or alarm to the public, instigating them towards public disorder; statements made with the intention of inciting, or which are likely to incite, class or community violence; and discriminatory statements that have the effect or the intention of promoting inter-community hatred. It therefore covers incitement of violence against the state or another community, as well as the promotion of class hatred.

This part pertaining to Section 505 is divided into three sub-parts. The first sub-part discusses the three ingredients of the offence—intention, class/community hatred, and statement/ report. The second sub-part discusses the constitutionality of Section 505 vis-à-vis Articles 19(1)(a) and 19(2) of the Constitution. The third sub-part draws upon the ingredients to identify the applicable standard for the offence and concludes the discussion.

> **505. Statements conducting to public mischief.**
>
> **(1) Whoever makes, publishes or circulates any statement, rumour or report,-**
>
> **(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such; or**
>
> **(b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; or**
>
> **(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;**
>
> **shall be punished with imprisonment which may extend to three years, or with fine, or with both.**
>
> **(2) Statements creating or promoting enmity, hatred or ill-will between classes- Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial,**

language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(3) Offence under sub-section (2) committed in place of worship, etc.- Whoever commits an offence specified in sub-section (2) in any place of worship or in an assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Exception- It does not amount to an offence, within the meaning of this section when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

Section 505 was inserted in the IPC to prevent the careless spread of rumours with the intention of creating mischief.[205] In *Shib Nath Bannerjee* v. *Emperor*,[206] the Calcutta High Court held that offences such as Section 505 'which deal with the liberty of the subject, as it has often been said rightly, must be construed very strictly in favour of the defence'.[207]

3.1.7.1 Ingredients of Section 505

This sub-part discusses the ingredients of Section 505 of the IPC. It is divided into three sub-parts. The first sub-part discusses the ingredient of intention. The second sub-part discusses the ingredient of class or community hatred, and the third sub-part discusses the ingredient of statement or report.

(a) Intention

Section 505 is worded in such terms that it would cover instances where there is an intention to incite or promote hatred, and where the *effect* of the statements is likely incitement or promotion of hatred. In its landmark judgment in *Bilal Ahmed Kaloo*, the Supreme Court found that *mens rea* was a 'necessary' ingredient in establishing a case under Section 505(2). This, according to the Court, could be 'discerned from the words "with intent to create or promote or which is likely to create or promote" as used in that sub-section [(c)]'.[208]

With respect to Section 505(1)(c), an earlier decision of the Lahore High Court is relevant. In *Deshbandhu Gupta* v. *The Crown* (*Deshbandhu Gupta*), the petitioner, an editor of a newspaper, was convicted by a lower court under Section 505(1)(c) (and Section 153A) for publishing an article on Hindu–Muhammadan disturbances.[209] While reversing the conviction, the Lahore High Court held that 'the prosecution had to establish that it [the article] was published with intent to incite Hindus against Muhammadens or to stir up feelings of hatred and enmity between the two communities'.[210]

(b) Class/community hatred

Section 505(1)(c) covers publications that incite classes or communities to commit offences against each other. In *Shib Nath Banerjee*, the accused, an official in a trade union, was convicted by the lower court for making speeches with the intent of fomenting a strike. As per the Calcutta High Court, based on a summary of the speeches of the accused, he stated 'that they [employees] need not fear losing their jobs because the history of other strikes will show that any person who takes the place of a striker is beaten and so on'. According to the prosecution, the accused 'was inciting the strikers against what are commonly known as "black legs"'. The Calcutta High Court reversed

his conviction. Judge Henderson remarked that Section 505(1)(c) 'was intended to deal with real classes and real communities and not to purely imaginary people. At the time the speeches were delivered, there were no strikers and no black-legs, and, as far as I know, possibly there will not be a strike'.[211]

Section 505(2) applies to discriminatory publications that have the effect of promoting hatred between different communities. In *Bilal Ahmed Kaloo,* the Supreme Court held, in the context of Section 505, that for the fulfilment of the offence 'it is necessary that at least two such [religious/racial/language/regional] groups or communities should be involved'.[212] The Court elaborated that '[m]erely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections'.[213]

(c) Statement/report

In *Bilal Ahmed Kaloo*, a landmark decision of the Supreme Court in 1997, the appellant was a Kashmiri separatist accused of spreading news that the Indian army was committing atrocities on Kashmiri Muslims.[214] He was charged under Sections 153A and 505(2) among other laws. The Court, after a lengthy discussion and comparative analyses of the two offences, found that the offences were not made out against him.

According to the Supreme Court, a major distinction between Sections 505(2) and 153A is that the publication of the expression is '*sine qua non* under section 505'. The Court justified this reading in the following terms:

> **The words 'whoever makes, publishes or circulates' used in the setting of Section 505(2) cannot be interpreted disjunctively but only as supplementary to each other. If it is construed disjunctively, anyone who makes a statement falling within the meaning of Section 505 would, without publication or circulation, be liable to conviction. But the same is the effect with Section 153A also and then that Section would have been bad for redundancy. The intention of the legislature in providing two different sections on the same subject would have been to cover two different fields of similar colour.** [215]

The Supreme Court further supported its argument by pointing out that Section 505(2) and the current language of Section 153A have their genesis in the same amendment: Act 35 of 1969.[216] The Court cited a Calcutta High Court judgment that interpreted the words 'makes or publishes any imputation' as words that supplement each other.[217] Accordingly, '[a] maker of imputation without publication is not liable to be punished under that section'. The Court then extended this principle to the terms of Section 505(2), 'makes, publishes or circulates'.

In *Abdul Rashid* v. *State of M.P.* (*Abdul Rashid*) the prosecution filed an application to charge the accused for an offence under Section 505(2).[219] The accused was said to have been possessing 'objectionable literatures [and] pamphlets'. The Madhya Pradesh High Court held that publication was a necessity under Section 505(2) and dismissed the application.[220]

3.1.7.2 Constitutionality vis-à-vis Articles 19(1)(a) and 19(2)

This sub-part discusses the manner in which the Indian judiciary has dealt with challenges to the constitutionality of Section 505 in light of the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

In *Kedar Nath Singh* v. *State of Bihar* (*Kedar Nath*) after summarising all the offences under Section 505, the Supreme Court concluded: 'It is manifest that each one of the constituent

elements of the offence under s. 505 has reference to, and a direct effect on, the security of the State or public order'.[222] Therefore, the Court expressly located the constitutionality of Section 505 in the listed exceptions of Article 19(2), that of security of the state and public order.

In an older case, the Orissa High Court had located the justification of Section 505 as attempting to restrict speech that amounted to 'incitement to an offence', which is one of the reasonable restrictions under Article 19(1)(a).[223] It may be noted here that in arriving at this proposition, the Court was dealing with a case under Section 505(1)(c) per se and not Section 505 as a whole.

3.1.7.3 Conclusion

Section 505 seeks to prevent the careless spread of rumours with the intention of creating mischief. Therefore, the text of Section 505 provides for a wider scope and application. It covers both instances: where there is an intention to incite or promote hatred and where the effect of the statements is likely to lead to incitement or promotion of hatred. However, the discussion of hate speech cases above demonstrates that the judiciary has interpreted Section 505(2) conservatively in order to restrict its abusive tendencies. Further, the judiciary has also expressly located the constitutionality of Section 505(2) in the reasonable restriction of 'public order', under Article 19(2) of the Constitution.[224]

3.1.8 Conclusion

IPC prohibits and penalises hate speech across three different chapters: 'Of Offences Relating to Religion', 'Of Offences Against the Public Tranquillity' and 'Of Criminal Intimidation, Insult and Annoyance'. Further, hate speech restrictions are spread across Sections 153A, 153B, 295, 295A, 298, and 505 of the IPC. Section 196 of the Criminal Procedure Code requires 'prior sanction' to be acquired before a magistrate takes cognisance of any of the above mentioned offences. This procedure has been discussed in detail in Chapter 3.2 of the Report (on the Criminal Procedure Code).

This chapter outlines how these offences seek to prohibit and punish different types of hate speech by requiring different degrees of intention and harm caused. While the standard may differ across offences, the judiciary has consistently found intention to be central to hate speech under the IPC. For instance, even truthful statements may be unlawful under Sections 153A and 295A, if they are likely to, or made with the intention of, engendering ill-will and enmity. The judiciary has also interpreted the harms caused by hate speech in a broad manner. For instance, the actual occurrence of violence is not a necessary requirement under Sections 153A and 153B, and even the attempt to cause disharmony would be unlawful. Further, an expansive interpretation of 'defilement' under Section 295 allows the law to cover speech acts against sacred images and texts.

Recently, as a part of its 267th Report, the Law Commission has recognized the discrimination faced by groups based on 'sex, gender identity and sexual orientation', and recommended that such categories of people also be afforded protection under hate speech laws.[225] Further, the hate speech cases discussed above highlight that the Indian judiciary has always held that these offences within the IPC impose 'reasonable restrictions' on fundamental rights.

1 *Gopal Vinayak Godse* v. *Union of India* AIR, 1971 Bom 56.

2 *Gopal Vinayak Godse* (n. 1), para 64.

3 Ritika Patni and Kasturika Kaumudi, 'Regulation of Hate

Speech' (2009) NUJS Law Review 741, p. 771.

4 *Balwant Singh* v. *State of Punjab,* (1995) 3 SCC 214, para 9.

5 The Indian Penal Code (Amendment) 1898, section 5.

6 The Indian Penal Code 1860, section 153A.

7 The Indian Penal Code (Amendment) Act 1961.

8 Law Commission, *Indian Penal Code* (42nd Report, 1971), p. 166-169.

9 See Law Commission (n. 8), quoting Lok Sabha Debates, Second Series (21 August 1961 – 1 Sepember 1961), Vol. 57, col. 6220.

10 *Bilal Ahmed Kaloo* v. *State of Andhra Pradesh,* (1997) 7 SCC 431, para 11.

11 *Manzar Sayeed Khan* v. *State of Maharashtra,* (2007) 5 SCC 1.

12 *Manzar Sayeed Khan* (n. 11), para 11.

13 *The Trustees of Safadar Hashmi Memorial Trust* v. *Government of NCT of Delhi,* 2001 CriLJ (Delhi) 3689, para 13.

14 *Balwant Singh* (n. 4)

15 Singhal and Sabiha, *An Analytical and Exhaustive Commentary on the Indian Penal Code, 1860* (2nd edn, Premier Publishing 2007), p. 411.

16 *Babu Rao Patel* v. *State of Delhi,* (1980) 2 SCC 402, para 3.

17 *Emperor* v. *Maniben Liladhar Kara,* AIR 1922 Bombay 65, para 3.

18 *Balwant Singh* (n. 4), para 12.

19 *Shiv Kumar Mishra v. State of Uttar Pradesh*, 1978 Allahabad Law Journal 79, 80 (Allahabad).

20 *Ramesh s/o Chotalal Dalal* v. *Union Of India,* 1988 AIR 775.

21 *Manzar Sayeed Khan* (n. 11), para 13.

22 *Gopal Vinayak Godse* (n. 1).

23 *Babu Rao Patel* (n. 16).

24 *Babu Rao Patel* (n. 16), para 7.

25 *Gopal Vinayak Godse* (n. 1), para 64.

26 *Ramesh* v. *Union of India*, (1988) 1 SCC 668, para 23.

27 *Ramesh* (n. 26), para 21.

28 *Ramesh* (n. 26), para 20.

29 *Tara Singh Gopi Chand* v. *The State*, 1951 CriLJ (Punjab and Haryana) 449.

30 *Tara Singh* (n. 29), para 16.

31 *Debi Soren* v. *The State*, 1954 (2) BLJR 99.

32 *Debi Soren* (n. 31), para 12.

33 *Debi Soren* (n. 31), para 12.

34 *Sagolsem Indramani Singh* v. *State of Manipur, 1*955 CriLJ 184, paras 19, 20.

35 *Sheikh Wajih Uddin v. The State,* AIR 1963 All 335.

36 *Sheikh Wajih Uddin* (n. 35), para 3.

37 *Sheikh Wajih Uddin* (n. 35), para 3.

38 *Sheikh Wajih Uddin* (n. 35), para 4.

39 *Gopal Vinayak Godse* (n. 1).

40 *Gopal Vinayak Godse* (n. 1), para 61.

41 Law Commission, *Hate Speech* (267th Report, 2017), p. 51-52.

42 *See* The Criminal Law Amendment Act 1972, section 2, as quoted in K.D. Gaur, *Commentary on The Indian Penal Code* (Universal Law House 2006), p. 1463.

43 Gaur (n. 42), p. 1463.

44 R.P. Kataria and S.K.A. Naqvi, Batuk Lal's *Commentary on the Indian Penal Code, 1860* (1st edn 2007), p. 614.

45 Gaur (n. 42), p. 1464.

46 Gaur (n. 42), p. 1464.

47 *See Black's Law Dictionary*, p. 1397 *as quoted* in Gaur (n. 42), p. 1464.

48 Gaur (n. 42), p. 1464.

49 *Murzban Shroff* v. *State of Maharashtra,* Criminal Application No.992 of 2010 (Bombay).

50 *Murzban Shroff* (n. 49).

51The Criminal Law Amendment Act 1972, statement of objects and reasons.

52 The Criminal Law Amendment Act 1972, section 2.

53 The Criminal Law Amendment Act 1972, statement of objects and reasons.

54 Gaur (n. 42), p. 1404; Sarkar and Justice Khastgir, *Indian Penal Code,* vol 1 (S. P. Sen Gupta ed, 3rd edn, Kamal Law House 2015), p. 576; Bholeshwar Nath, Indian Penal Code, vol 1 (3rd edn, 2007), p. 368.

55 *Murzban Shroff* (n. 49).

56 *Murzban Shroff* (n. 49), para 10.

57 *Express Publications (Madurai) Ltd.* v. *State of Orissa* 2006, CriLJ (Orissa) 2548.

58 *Express Publications* (n. 57), para 8.

59 *Sikkim Social Empowerment Association* v. *Anjan Upadhyaya,* 2014 CriLJ (Sikkim) 2534.

60 The Indian Penal Code 1869, section 295.

61 *Bharat Bhushan Sharma* v. *Kundan Kumar* 2013 SCC Online (Punjab and Haryana) 4421.

62 *Ushaben Navinchandra Trivedi* v. *Bhagyalakshmi Chitra Mandir,* AIR 1978 Guj 13.

63 *Ushaben* (n. 62), para 8.

64 *Ushaben* (n. 62), para 8.

65 *Sohana Ram v. Emperor*, 67 Ind Cas 586.

66 *Gopinath Puja Panda Samanta* v. *Ramchandra Deb*, AIR 1958 Ori 220.

67 *Atmaram* v. *King Emperor*, AIR 1924 Nagaland 121.

68 *See* Constitution of India 1950, article 17.

69 *Zac Poonen* v. *Hidden Treasures Literature Incorporated,* 2001 (4) KCCR 2361.

70 *Zac Poonen* (n. 69), para 10; *S.K. Sarvaria, R.A. Nelsons's Indian Penal Code 2* (9th edn, Lexis Nexis 2003), p. 2574.

71 *Zac Poonen* (n. 69), para 10.

72 *South Eastern Railway* v. *State of Jharkhand and Sardar Mahendra Singh,* MANU/JH/0263/2012.

73 *South Eastern Railway* (n. 72), para 7.

74 *Durairaj v. State*, 1988(2) MadWN (Cri) 64; *Kuttichami Moothan v. Rama Pattar*, AIR 1919 Mad 755 (Ayyar, J).

75 *Moothan* (n. 74), para 5, per Napier, J.

76 *Moothan* (n. 74), para 5, per Napier, J.

77 *Bharat Bhushan Sharma* (n. 61).

78 *Bharat Bhushan Sharma* (n. 61), para 8

79 *Zac Poonen* (n. 69), para 10.

80 *Malleshappa* v. *Sri Kumar,* 2015(3) AKR 309.

81 *Malleshappa* (n. 80), para 6.

82 Gaur (n. 42), p. 2329.

83 *See Joseph* v. *State of Kerala*, AIR 1961 Ker 28, para 6.

84 *Joseph* (n. 83), para 10.

85 *Bechan Jha* v. *Emperor*, AIR 1941 Patna 492.

86 *Bechan Jha* (n. 85), para 10.

87 *Re: Ratna Mudali,* (1887) ILR 10 Mad 884, para 3.

88 S. *Veerabadran Chettiar v. E.V. Ramaswamy* 1959 SCR 1211, para 7; See also Siddharth Narrain, 'Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech' (2016) 51(17) Economic and Political Weekly 119, p. 121.

89 *Veerabadran* (n. 88), para 7.

90 *Veerabadran* (n. 88), para 7.

91 *Veerabadran* (n. 88).

92 *Veerabadran* (n. 88), para 6,7.

93 *Veerabadran* (n. 88), para 7.

94 *Bharat Bhushan Sharma* (n. 61).

95 *Zac Poonen* (n. 69).

96 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(3) The Indian Economic and Social History Review, p. 317.

97 Ratanlal and Dhirajlal, *Indian Penal Code* (32nd edn, Lexis Nexis 2010), p. 1248.

98 *Rajpaul* v. *Emperor*, AIR 1927 Lah 590.

99 *Rajpaul* (n. 98).

100 Siddharth Narrain, 'The Harm in Hate Speech Laws: Examining the Origins of Hate Speech Legislation in India' in Rina Ramdev, Sandhya D. Nambiar, Debaditya Bhattacharya (eds) *Sentiments, Politics, Censorship* (Sage Publications 2015).

101 Ratna Kapur, 'Who Draws the Line? Feminist Reflections on Speech and Censorship' (1996) 31(16/17) Economic and Political Weekly, p.17.

102 Nair (n. 96), p. 330; Shivprasad Swaminathan, 'Scribblers, Scholars in the Same Boat' (2014) *The Hindu* (India, 25 February 2014) <http://www.thehindu.com/opinion/lead/scribblers-scholars-in-the-same-boat/article5723012.ece?> accessed 14 April 2018.

103 *Ramji Lal Modi* v. *State of* UP, AIR 1957 SC 620, para 9.

104 *Ramji Lal Modi* (n. 103), para 9.

105 *Sujato Bhadra* v. *State of West Bengal*, 2006 CriLJ 368, para 8.1.

106 *King v. Nga Shwe Hpi*, AIR. 1939 Rang 199, para 3.

107 *Narayan Das* v. *State,* AIR 1952 Orissa 149, para 7.

108 *Sujato Bhadra* (n. 105).

109 *Sujato Bhadra* (n. 105), para 8.

110 *Sujato Bhadra* (n. 105), para 8.1.

111 *Sujato Bhadra* (n. 105), para 8.2.

112 *Khalil Ahamad* v. *State,* AIR 1960 All 715, para 32.

113 *Re P. Ramaswamy,* (1962) 2 MLJ 210.

114 *Ramaswamy* (n. 113), para 4.

115 *Sujato Bhadra* (n. 105), para 7.1; See also Iqbal A. Ansari, 'Free Speech-Hate Speech: The Taslima Nasreen Case' (2008) 43(8) Economic and Political Weekly 15, p. 18.

116 Patni and Kaumudi (n. 3), p. 774; See also V. Eswaran, 'Advocacy of National, Racial and Religious Hatred: The Indian

Experience' in Sandra Coliver (ed), *Striking A Balance Hate Speech, Freedom Of Expression And Non-Discrimination* (ARTICLE 19, 1992), p.175.

117 N.D. Basu, *Commentary on Indian Penal Code* (10th ed. 2007), p. 1056.

118 Patni and Kaumudi (n. 3), 774.

119 *Henry Rodrigues*, 1962 CriLJ 564, para 5.

120 *Henry Rodrigues* (n. 119), para 5

121 *State of Bihar* v. *Shailabala Devi,* AIR 1952 SC 329.

122 *Shailabala Devi* (n. 121), para 9.

123 *Shailabala Devi* (n. 121), para 9.

124 *Kanta Prasad Sharma* v. *Govt. of Rajasthan*, 2005 CriLJ 2713, para 3.

125 *Kanta Prasad Sharma* (n. 124).

126 *Kanta Prasad Sharma* (n. 124), para 3.

127 *See Bobby Art International v. Om Pal Singh*, AIR 1996 SC 1846; *Debi Soren* v. *The State* AIR 1954 Pat 254; *Nand Kishore v. State of Bihar*, AIR 1986 Pat 98, para 21.

128 *Khalil Ahamad* (n. 112).

129 *Kali Charan Sharma* v. *Emperor,* AIR 1927 All 649.

130 *Khalil Ahamad* (n. 112), para 29.

131 *Khalil Ahamad* (n. 112), para 25.

132 *Khalil Ahamad* (n. 112), para 25.

133 Patni and Kaumudi (n. 3), p. 774.

134 *Sujato Bhadra* (n. 105), para 8.2.

135 *Sujato Bhadra* (n. 105), para 103.

136 *Sujato Bhadra* (n. 105), para 63.

137 *Sujato Bhadra* (n. 105), para 8.2; Basu (n. 117), p. 1058.

138 *Lalai Singh Yadav* v. *State of Uttar Pradesh*, 1971 CriLJ 1773, para 19.

139 Joseph Minattur, *Freedom of the Press in India: Constitutional Provisions and Their Application* (Springer 1961), p. 38.

140 Ratanlal and Dhirajlal (n. 97), p. 1246.

141 *Sheo Shankar* v. *Emperor*, AIR 1940 Oud 348.

142 Gaur (n. 42), p. 732.

143 Ratanlal and Dhirajlal (n. 97) p. 1252.

144 *Henry Rodrigues* (n. 119), para 5.

145 *Khalil Ahamad* (n. 112).

146 *Veerabadran* (n. 88).

147 *Khalil Ahamad* (n. 112), para 34; *See also Veerabadran* (n. 88), para 7.

148 *Sujato Bhadra* (n. 105), para 8.2.

149 *Khalil Ahamad* (n. 112), para 25.

150 *The King* v. *Nga Shwe Hpi* (n. 106), para 3.

152 *The King* v. *Nga Shwe Hpi* (n. 106), para 3.

153 *The King* v. *Nga Shwe Hpi* (n. 106), para 3.

154 *Bhagwati Charan Shukla* v. *Provincial Government*, AIR 1947 Nag 1.

155 *Sujato Bhadra* (n. 105), para 8.2.

156 *Debi Soren* (n. 31), para 15.

157 *Sujato Bhadra* (n. 105), paras 12, 68.

158 *Henry Rodrigues* (n. 119), para 5.

159 *Henry Rodrigues* (n. 119), para 5.

160 *Henry Rodrigues* (n. 119), para 5.

161 *Brahamcharani Didi Chetna @ Chelna (Jain Sadhvi)* v. *State of Punjab*, Punjab & Haryana High Court, CRM.M.41015 of 2012 (O&M).

162 *Brahamcharani Didi* (n. 161), paras 17,18.

163 *Brahamcharani Didi* (n. 161), para 18.

164 *Kali Charan* (n. 129).

165 *Khalil Ahamad* (n. 112), para 27.

166 *Khalil Ahamad* (n. 112), para 28.

167 *Khalil Ahamad* (n. 112), para 28.

168 *Ramji Lal Modi* (n. 103).

169 *Ramji Lal Modi* (n. 103), para 9.

170 *Ramji Lal Modi* (n. 103), para 9.

171 *Ramji Lal Modi* (n. 103).

172 The 'Tendency' test has been discussed in detail in Chapter 2 of this Report.

173 *Ramji Lal Modi* (n. 103).

174 *Sant Dass Maheshwari ˆBabu Ram Jodoun*, AIR 1969 All 436

175 *Sant Dass* (n. 174), para 11.

176 *Sant Dass* (n. 174), para 13,14.

177 Rajeev Dhavan, *Publish and be Damned*, (Tulika Books 2008), p.140-141

178 *Shalibhadra Shah* v. *Swami Krishna Bharti*, (1980) GLR 881, para 7.

179 *Shalibhadra Shah* (n. 178) para 7.

180 *Q.E.* v. *Rahman* (1893) 13 AWN 144; *Mir Chittan* v. *Emperor, AIR 1937 Alla 13; Kitab Ali Munshi* v. *Santi Ranjan Deb*, AIR 1965 Tripura 22.

181 *The King* v. *Nga Shwe Hpi* (n. 106), para 3.

182 H.S. Gour, *Penal Law of India* (11th edn, Law Publishers India 2011), p. 2620.

183 *Narayan Das* (n. 105), para 7.

184 *Sinnasamy Selvanavagam v. The King*, 1951 A C 83.

185 *Narayan Das* (n. 107), para 9.

186 Select Committee Report, Gazette of India dated 17th September, 1927, cited in *Sujato Bhadra* (n. 105), para 7.5; and *Narayan Das* (n. 107), para 7.

187 *Narayan Das* (n. 107), para 15.

188 *Chakra Behera* v. *Balakrushna Mohapatra*, AIR 1963 Ori 23, para 4.

189 *Narayan Das* (n. 107), para 7.

190 *Q.E.* v. *Rahman*, (1893) 13 AWN 144.

191 *Q.E.* v. *Rahman,* (1893) 13 AWN 144 as quoted in Gour (n. 182), p. 2621.

192 Gour (n. 182), p. 2621.

193 *Mir Chittan* (n. 180).

194 *Mir Chittan* (n. 180), para 2.

195 *Chakra Behera* (n. 188).

196 *Chakra Behera* (n. 188), para 5.

197 *Chakra Behera* (n. 188), para 5.

198 *Chakra Behera* (n. 188), para 5.

199 *Narayan Das* (n. 107), para 6.

200 *Maqbool Fida Hussain* v. *Raj Kumar Pandey*, 2008 CriLJ 4107, para 107.

201 *Sujato Bhadra* (n. 105), para 9.

202 *Sujato Bhadra* (n. 105), para 9.

203 *Narayan Das* (n. 107), para 7.

204 *The King* v. *Nga Shwe Hpi* (n. 106), para 3.

205 Gour (n. 182), p. 4887.

206 *Shib Nath Bannerjee* v. *Emperor,* 40 CWN 1218

207 *Shib Nath Bannerjee*, (n. 206) para 1, per Cunliffe J.

208 *Bilal Ahmed* (n. 10), para 10.

209 *Deshbandhu Gupta* v. *The Crown*, AIR 1924 Lah 502.

210 *Deshbandhu Gupta* (n. 209), para 4.

211 *Shib Nath Bannerjee,* (n. 206), para 8, per Henderson J.

212 *Bilal Ahmed* (n. 10), para 15.

213 *Bilal Ahmed* (n. 10), para 15.

214 *Bilal Ahmed* (n. 10).

215 *Bilal Ahmed* (n. 10), para 12.

216 *Bilal Ahmed* (n. 10), para 12.

217 *Sunilakhya Chowdhury* v. *H.M. Jadwet,* AIR1968 Cal 266.

218 *Bilal Ahmed* (n. 10), para 12.

219 Abdul Rashid v. State of MP, 2015 (1) MPHT 349.

220 *Abdul Rashid* (n. 219), para 5.

221 *Kedar Nath Singh* v. *State of Bihar,* AIR 1962 SC 955; Eswaran (n. 114), p. 175.

222 *Kedar Nath* (n. 222), para 41.

223 *Kali Charan Mohapatra v. Srinivas Sahu*, AIR 1960 Ori 65, para 5.

224 This has been discussed in detail in Chapter 2 of this Report.

225 Law Commission (n. 41).

3.2

The Code of Criminal Procedure and Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

3.2

The Code of Criminal Procedure and Hate Speech

3.2.1 Introduction

This sub-chapter of the report discusses those regulations of the Code of Criminal Procedure, 1973 (CrPC) that affect hate speech. The CrPC sets out a basic procedural framework for the administration of substantive criminal law and is therefore read closely with the Indian Penal Code, 1860 (IPC). In sub-chapter 3.1, we have discussed parts of the IPC that prohibit hate speech. In this sub-chapter (3.2), we discuss procedural powers under the CrPC corresponding to the IPC offences that permit the government to take various kinds of action.

Sub-chapter 3.2 of the report is divided into three parts. The first part analyses Sections 95 and 96 of the CrPC, which govern the power of the state government to declare certain publications to be forfeited. The second part discusses Section 196, which acts as a procedural safeguard when a case is sought to be registered under hate speech offences set out in the IPC. The third part discusses ancillary CrPC sections such as Section 178, Section 144, Section 107 and Section 151, which have a direct or indirect impact on speech.

3.2.2 Section 95 and Section 96

Sections 95 and 96 of the CrPC authorise the state government to forfeit any 'book, newspaper or document', the publication of which is punishable under Section 124A, Section 153A, Section 153B, Section 292, Section 293, and Section 295A of the IPC. Consequently, they empower the state government to order the forfeiture of any publication which contains specified forms of 'hate speech'. The police carry out the actual seizure of publications, in addition to acquiring orders from magistrates where necessary to search premises while looking for forfeited publications. The CrPC also makes it possible to file an appeal against an

order of forfeiture.

This part is further divided into six sub-parts. The first sub-part discusses the conditions under which a valid order of forfeiture may be issued under Section 95 of the CrPC. For example, the requirement that the publication must contain 'matter which promotes or is intended to promote feelings of enmity or hatred between different classes of citizens', and that the order must offer a properly reasoned opinion to establish this.

The second sub-part explains when such an order may be passed, and discusses both the evaluation of the offending publication and external circumstances such as the law and order situation. The third sub-part discusses the implementation of the order. The fourth sub-part discusses the right to appeal to set aside such an order (which is provided under Section 96). The fifth sub-part discusses the constitutionality of Sections 95 and 96. The sixth sub-part is the conclusion.

Section 95 of the CrPC is as follows:

> **Section 95. Power to declare certain publications forfeited and to issue search warrants for the same.**
>
> **(1) 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.**
>
> **(2) In this section and in section 96,—**
>
> **(a) 'newspaper' and 'book' have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867);**
>
> **(b) 'document' includes any painting, drawing or photograph, or other visible representation.**
>
> **(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 9.**

Section 95 (then numbered 99A) was first enacted in 1898. It was similar in essence to the present Section 95, and was amended to reflect the present language of Section 95 in 1971.[1] The amendment achieved greater brevity by removing descriptive portions of the law and replacing them with references to other statutes.[2] Judicial decisions on the old Section 99A remain relevant, and apply to Section 95, since the judiciary has found that the old and new law have a common purpose.[3]

3.2.2.1 Requirements for a valid order of forfeiture

While the IPC defines and criminalises hate speech, Section 95 of the CrPC allows the

state to curtail such speech by seizing 'books, documents or publications'. State governments may do this by publishing an 'order of forfeiture', which allows district magistrates and police officers to seize publications specified in the order. Since forfeiture could be restrictive of the freedom of expression, there are safeguards in place to ensure proper use. Certain guidelines have emerged through judicial interpretation of this law. State governments should comply with these guidelines to ensure that an 'order of forfeiture' is valid.

The *State of Uttar Pradesh* v. *Lalai Singh Yadav* (*Lalai Singh Yadav*) is a landmark judgment that discussed the forfeiture of a book titled *Ramayan: A True Reading*.[4] The judgment discussed the contents of a valid 'order of forfeiture' at length, and the Supreme Court formulated guidelines that the state government had to comply with before publishing a valid forfeiture order. These guidelines specify that the state must be of the opinion that the publication contains matter punishable under Sections 153A and 295A and should also state the grounds for its opinion. The following sub-part discusses these guidelines and their application through case-law.

(a) Containing matter promoting enmity or hatred between different classes of citizens

The 'book, document or publication' contains any *matter which promotes or is intended to promote feelings of enmity or hatred between different classes of citizens*.[5] This standard is in line with the standard laid out in Sections 153A and 295A of the IPC. For an 'order of forfeiture' to be valid, specific details of the groups affected should be mentioned. The order should identify the groups, draw attention to the 'enmity' and how the publication affected the relationship between the groups.[6] An oft-cited reason for invalidating an order is the non-specification of the 'groups' affected.[7]

In *Sangharaj Damodar* v. *Nitin Gadre,* (*Sangharaj Damodar*) a book titled *Shivaji: Hindu King in Islamic India* was seized by the state government.[8] While determining the validity of the order, the Bombay High Court stated that it was necessary for the order to mention the groups affected by the book.[9] The Associate Advocate General claimed that the two groups were people who revered Shivaji and people who did not revere Shivaji.[10] The 'Sambhaji Brigade', a group of people who revered Shivaji, had 'agitated' against the Bhandarkar Oriental Research Institute, an educational institution which had assisted the author with research for the book.[11] The Bombay High Court stated that a group of employees from the research institute could not be viewed as a 'group' under Section 96. The 'order of forfeiture' was reversed, since 'there was no material to show that the publication has resulted in disturbance of public tranquillity or maintenance of harmony between various groups'.[12]

A forfeiture order must highlight each material reason in the order itself.[13] In *Arun Ranjan Ghose* v. *Union of India,* (*Arun Ranjan Ghose*) the Calcutta High Court set aside the 'order of forfeiture' for being silent on the issue of the 'classes' affected by the publication.[14] The Court stated: 'Unless the class is specified, it is impossible to see whether the opinion of the Government that the book contains matter which is intended to outrage the feelings of a class of citizens is justified.'[15]

(b) A statement of the grounds of government's opinion

To declare a publication forfeited, Section 95 requires the state government to order such forfeiture by way of a 'notification, stating the grounds of its opinion'.[16] Consequently, the

state government has to form opinions on certain 'grounds', which must be mentioned in the order.[17] This basic requirement, amongst others, was set out in *Lalai Singh Yadav* and has been reiterated in other judgments.[18]

(i) Grounds of opinion

It has been held in several judgments that absence of clear grounds on which the state government's opinion is based would render an order void.[19] In a few instances, orders of forfeiture merely 'recited' phrases from Section 95 or the relevant sections of the IPC, in an attempt to establish grounds of opinion.[20] The judiciary has held that these would not amount to grounds of opinion.

The grounds forming the opinion should be mentioned in detail in the order, and not the appendix.[21] In *Lalai Singh Yadav*, the grounds were considered insufficient by the Supreme Court. The Supreme Court was of the opinion that forfeiture would amount to a 'drastic restriction on the right of a citizen'. The right was considered 'too basic to be manacled without strict and manifest compliance with the specific stipulations of the provisions'.[22]

(ii) Distunguishing between grounds of opinion and grounds for action taken

Under Section 95, a valid order of forfeiture must state the 'grounds of opinion'. However, in a few instances, forfeiture orders stated the 'grounds for action taken', and not the 'grounds of opinion'.[23]

The judiciary has clarified the difference between the two in *Arun Ranjan Ghose* and *Anand Chintamani Dighe* v. *State of Maharashtra*[24] (*Anand Chintamani Dighe*). In *Arun Ranjan Ghose*, the Calcutta High Court explained the difference between 'grounds' and 'opinions'.[25] The grounds of opinion are based on facts and must be stated in the order of forfeiture. They also lead to formation of the 'grounds for action taken'. The 'grounds for action taken' are necessary to implement the order, but a valid forfeiture order must include the 'grounds of opinion' as well. An order stating the 'grounds for action taken' and not the 'grounds of opinion' would be invalid under Section 95.[26]

The 'grounds of opinion' refer to the content of a specific passage in a book or document, and the manner in which that passage infringed Sections 153A and 295A of the IPC. That the passage violated Sections 153A and 295A would be the opinion, which 'would furnish a ground to the government for taking action contemplated'.[27] These grounds are the 'grounds for action taken'. The Calcutta High Court declared the forfeiture order to be invalid since it stated the 'grounds for action taken' and not the 'grounds of opinion'.

In *Anand Chintamani Dighe*, the forfeiture of a script titled *'Mee Nathuram Godse Boltoy'* (translates as 'I am Nathuram Godse Speaking') was under deliberation. The forfeiture order stated that the play was likely to 'disturb the public tranquillity, promote hatred or ill-will among different groups' and was 'written with a deliberate and malicious intention'.[28] The Bombay High Court was not satisfied with these grounds, stating that they were merely reiterations of IPC regulations.[29] The Court said that the 'nature of the act' leading to disturbance of public tranquillity, along with the 'the part of the play' that infringed upon the IPC regulations, had to be stated.[30] This would construe the 'grounds of opinions'.

3.2.2.2 When can forfeiture be ordered

Forfeiture may be ordered when it appears to the state government that the 'document, newspaper or book' contains any matter, the publication of which is punishable under specified sections

of the IPC. This raises two questions. First, what are the factors that must be taken into consideration while making this assessment about the publication in question? Second, since most of the related IPC sections apply only if there is a law and order problem necessitating forfeiture, what are the circumstances under which such an order is made?

(a) Factors to be taken into consideration while assessing publication

The judiciary, while assessing a publication, considers both the nature of the publication and reads the publication as a whole. While considering the nature of the publication, its form and content are scrutinised. In addition, if a publication is of a historic nature, it may raise different considerations and may not attract Section 95 of the CrPC.[31] A publication must also be considered as a whole before passing an order of forfeiture.

(i) Nature of publication

- Form and content of publication

The judiciary scrutinises form and content of the material to make a decision and when it is unsure about the potential inflammatory nature of a publication, the distinction between form and content helps it decide.

High Courts have held that form takes precedence over content in cases such as *Shivram Das Udasin* v. *State of Punjab* (*Shivram Das Udasin*)[32] and *Azizul Haq* v. *State*.[33] In both cases, the content of the text was potentially problematic, but since the language was seen as 'mild and temperate', orders of forfeiture were set aside by the judiciary.[34]

- Historical Works

The judiciary has expressed opposing views with regard to forfeiture orders issued against historical works. That there is no *bright-line* rule for such publications as demonstrated by the two cases discussed below.

In *Gopal Vinayak Godse* v. *Union of India*[35] (*Gopal Vinayak Godse)* a book titled *Gandhi-hatya Ani Mee* (Gandhi's Assassination and I), which contained references to the lives of Mahatma Gandhi and Nathuram Godse, was under scrutiny.[36] The Bombay High Court, while deliberating upon the validity of the forfeiture order, stated in passing that 'adherence to the strict path of history is not by itself a complete defence to a charge under section 153A'.[37] 'Truthful accounts of past events' would not be a defence under Section 153A, if they were intended to promote enmity between groups of people.[38]

However, in *Varsha Publications* v. *State of Maharashtra*[39] (*Varsha Publications*) the Bombay High Court held that historical works could be treated as exceptions, even if they lead to or might lead to enmity between classes/communities.[40] In this case, a historical publication stated that Hinduism influenced Arabia in the pre-Islamic period. The author had established that the work was well-researched, citing fifteen scholarly references.[41] The 'order of forfeiture' was set aside, stating that when historical publications come under the scope of Section 153A, there have to be different tests applied to them.[42] A blanket ban would lead to over-banning, the Court said.[43] Relying on *Gopal Vinayak Godse*, the Bombay High Court stated that 'we do not think that the scope of Section 153-A can be enlarged to such an extent with a view to thwart history'.[44]

(ii) Considering the publication as a whole

While determining the validity of an 'order of forfeiture', the relevant material should 'be dealt with as a whole'.[45] Publications need to be

considered as a whole and an 'order of forfeiture' should not be passed on an isolated reading of controversial content.[46]

(b) Circumstances in which a forfeiture order may be passed

Under Section 95, forfeiture orders can only be passed in circumstances enumerated in sub-part 3.2.2.1. These circumstances arise when there are threats to 'public order' or when there is a 'clear and present danger'.[47]

In the *Lalai Singh Yadav*, while discussing the foundation of Section 99A and the danger of the state curbing fundamental rights, the Supreme Court stated that the American doctrine of 'clear and present danger' could be useful for judges.[48] While discussing restrictions on constitutionally protected speech, the 'proximity and degree' of the language used to create a 'clear and present danger' was discussed.[49] This test, along with other relevant standards has been discussed in the chapter on the Indian Penal Code, in this publication. In addition, the 'public order' restriction in the Constitution of India has been discussed in Chapter 2 (Constitution Law).

3.2.2.3 Seizing forfeited publications

Once the state has issued a forfeiture order, search and seizure orders may be obtained from magistrates, to implement the forfeiture order. These search and seizure orders are governed by Section 100 of the CrPC.

In *Sadhu Singh Hamdard Trust* v. *State of Punjab* (*Sadhu Singh Hamdard Trust*),[50] the Punjab and Haryana High Court discussed application of mind by magistrates while giving directions under Section 95.[51] The petitioners claimed that the guidelines issued by the state government (mentioned below) would interfere with the magistrates' authority and lead them to enforce orders mechanically.[52] Section 95 was thought to be 'quasi-judicial' and guidelines of any sort would interfere with the 'quasi-judicial' functioning of the order. The guidelines formulated by the state government under discussion in this case were:

> **[I]ndicated below by way of guidelines, are certain classes of items which may be held to attract the provisions of Section 95 of the Criminal Procedure Code:**
>
> **...**
>
> **(ii) Obituary notices for bhog ceremonies that the dead person is a martyr in the struggle for Khalistan or for an independent Sikh State and which contain names of known terrorists and terrorist related organisations as sponsors of the advertisement.**
>
> **(iii) Publication of threats of any sort by terrorist organisations to any person or class of persons.**
>
> **(iv) Publication of any code of behaviour or social practice decreed by terrorists or terrorist related organisation.**

These guidelines allegedly went beyond the scope of criminal activity mentioned by the IPC sections cited in Section 95 of the CrPC. The petitioners objected to the specific clauses in the guidelines, namely, 'publication of any code of behaviour or social practice', 'obituary notices for *bhog* ceremonies', etc., stating that they would not constitute activity prohibited under Section 153A, since the acts must have the effect of instigating violence.[54] Social codes of conduct could not lead to violence.[55] However, the Punjab and Haryana High Court stated that these acts contribute to a system of 'organised terrorism'. The writ petition was dismissed, stating that, 'Items (i) to (v) of the impugned instructions take care of a situation where the incitement or instigation to violence is not only

implied but also explicit'.[56]

With regard to the nature of the guidelines, the Punjab and Haryana High Court said there was still enough room for district magistrates to apply their minds as the guidelines were not mandatory.[57] The guidelines would help the magistrates take 'uniform action'.[58]

3.2.2.4 Challenging an order of forfeiture

Although Section 95 enables government censorship of publications, all orders passed under Section 95 may be challenged using the procedure laid down in Section 96. Therefore, the CrPC itself contains a review mechanism for forfeiture orders under Section 95. This sub-part is further divided into two parts, the first part discusses 'who can appeal against an order of forfeiture' and the second part discusses the High Court's authority to review an order of forfeiture.

Section 96 may be used by 'any person having an interest' in the publication to file an appeal against an 'order of forfeiture', within two months of the forfeiture order being published in the official gazette. 'Any person' in this context could be a publisher or a book owner.[59] It may be those who purchase books or to a wider audience for books, since Indian citizens have a right to be informed.[60]

> **Section 96-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.**
>
> **(2) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three Judges, such Special Bench shall be composed of all the Judges of that High Court.**
>
> **(3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.**
>
> **(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub- section (1) of section 95, set aside the declaration of forfeiture.**
>
> **(5) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.**

(a) Who can appeal against an order of forfeiture

Section 96 states that 'any person' with 'any interest' in a publication can appeal against the 'order of forfeiture'. This includes publishers, but may also extend to all citizens since they arguably have an interest in acquiring and

reading publications. This broad reading was supported by the Bombay High Court in *Sangharaj Damodar* v. *Nitin Gadre*, which contradicted the Madhya Pradesh High Court's judgment in *Ramlal Puri* v. *State of Madhya Pradesh* (*Ramlal Puri*).

In *Ramlal Puri*, a case dealing with the forfeiture of *Agni Pariksha*, a religious book, the Madhya Pradesh High Court stated that purchasers of a book would also have a right to appeal.[61] The High Court stated that 'even one copy of a book is property and deprivation of that property by an order of the State must enable the owner thereof to challenge the order'.[62]

The Madhya Pradesh High Court drew a distinction, in passing, between religious books and literary works.[63] Followers of a religion were seen as having a 'substantial interest' in a book, which would qualify them under Section 96. However, the Madhya Pradesh High Court felt that 'substantial interest' in the publication would not apply to readers of literary works. The High Court stated that 'every reader of a literary work cannot claim that they have a personal interest'.[64]

In *Sangharaj Damodar*, a forfeiture order was passed against James Laine's book, Shivaji: Hindu King in Islamic India, which allegedly gave rise to enmity between different groups.[65] Relying on *Ramlal Puri*, the respondents stated that the petitioners were merely 'readers of the book' and did not have *locus standi* to appeal the order. The High Court of Bombay however held that the petitioners, comprising Anand Patwardhan, a film-maker whose documentaries had 'democratic and secular messages',[66] a social activist and lawyer with an interest in public activism could appeal against an 'order of forfeiture'.[67]

The High Court of Bombay held that the term 'any person having an interest' should be broadly interpreted, stating further that 'the right of a citizen to be informed is a part of our cherished fundamental right of freedom of speech and expression'.[68]

Since *Sangharaj Damodar* is more recent than *Ramlal Puri* and both judgments were passed by three-judge benches, the broad interpretation of the Bombay High Court in *Sangharaj Damodar* would be currently applicable.

(b) High Court's review of order of forfeiture

An important aspect of Section 96 is the judiciary's review of the 'order of forfeiture'. While it lays down the High Court's authority to review orders of forfeiture, the limitations of the High Court's authority have not been set out.

Relying on *Baijnath* v. *Emperor*[69] (*Baijnath*), the Supreme Court in *Harnam Das* v. *Union of India* (*Harnam Das*)[70] held that the High Court's authority to review a forfeiture order is limited to checking if the 'document comes under the mischief of the offence charged'.[71] The Supreme Court made it clear that the High Court's review should be limited to the grounds stated in the forfeiture. For instance, if the order states that a publication attracts Section 153A of the IPC, the judiciary's review should be limited to that section and it should not consider whether the document could attract other sections of the IPC.

Similarly, if the order is wholly silent on the grounds and merely recites the sections of the IPC or Section 95, the court should set aside the order as invalid.[72] In *Virendra Bandhu* v. *State of Rajasthan* (*Virendra Bandhu*), relying on *Gopal* Vinayak Godse the Rajasthan High Court stated that they could not go beyond their authority and conduct an inquiry by 'visualising'

the state government's opinions.[73]

3.2.2.5 Constitutionality of Section 95 and 96

Sections 95 and 96 are constitutionally valid according to the judiciary, which has found the procedural safeguards sufficient.[74]

In *Lalai Singh Yadav*, the Supreme Court stated that Section 99A would not contravene the right to freedom of speech guaranteed under Article 19 of the Constitution.[75] The Supreme Court reasoned that the requirement to state the 'grounds of opinion' under Section 99A would act as a necessary safeguard against its reckless use.[76] This reasoning would also apply to Section 95, since it is similar to Section 99A, as discussed previously.

In *Piara Singh Bhaniara* v. *State of Punjab*[77] (*Piara Singh*) , a writ petition was filed by the petitioner, who was the author of a forfeited book.[78] First, the petitioner argued that the 'order of forfeiture' did not disclose grounds to validate the order.[79] In this regard, the High Court of Punjab and Haryana referred to the Supreme Court's decision in *Lalai Singh* and found that stating grounds was a 'mandatory' requirement.[80]

The High Court stated that Section 95 was a 'reasonable restriction' on the right to freedom of speech and expression under Article 19(2).[81] However, it was 'imperative' to follow the procedure or manner of the law to ensure that fundamental rights were protected.[82] In response to the petitioner's argument that Section 95 and 96 do not afford the aggrieved a chance to be heard, which goes against the principle of natural justice, the High Court stated that the regulations were preventive and their utility would not suffer without 'natural justice'.[83]

3.2.2.6 Conclusion

On one hand, it is a matter of concern that orders of forfeiture enforce censorship and prior restraint by their very nature. On the other, it appears that efforts have been made to restrict the use of these orders. A forfeiture order can only be passed when the state government is of the opinion that certain 'books, documents or publications' would lead to enmity between different groups of people under Section 153A and Section 295A of the IPC. The grounds for reaching this opinion must be stated in the forfeiture order and the validity of the order is contingent upon stating these grounds.

The process of judicial review, under Section 96, establishes safeguards against the misuse of Section 95. The judiciary's authority is limited to scrutinising the grounds for forfeiture. It is possible for the general public to also appeal against orders of forfeiture, as discussed in sub-part 3.2.2.4, where the Bombay High Court interpreted 'any person' under Section 96 in *Sangharaj Damodar* to include the general public.[84] Wider use of Section 96 by the general public would ensure that state governments remain accountable.

While there is a requirement (under Section 95) to publish orders of forfeiture in the gazette, there is no collation of these orders that is mandated. This could be problematic from the perspective of readers and publishers since it would be difficult to comply with the law and err on the side of caution. A law which mandates 'search and seizure' should require stricter safeguards.

It remains to be seen how widely orders of forfeiture are announced and how much time is offered between forfeiture orders and actual seizure of publications, to allow space for a challenge of Section 96 before actual damage

is done.

3.2.3 Section 196

Section 196 of the CrPC is a part of the chapter on 'Conditions Requisite for Initiation of Proceedings'.[85] It acts as a procedural safeguard against frivolous prosecution for 'hate speech' offences, such as those under Sections 153A, 295A, 505 and 153B of the IPC.

Specifically, Section 196 does not permit the magistrate to take cognisance of offences listed in it without prior order of sanction from the appropriate authority, i.e. the central government or the state government or the district magistrate, as applicable.[86] 'Cognisance' of an offence refers to the stage at which the magistrate takes judicial notice of an offence and is prior to the stage of commencement of judicial proceedings.[87]

Under Section 196, a magistrate cannot take cognisance of offences punishable under Sections 153A, 295A, 505 and 153B of the IPC (amongst others) without the requisite permission. These are hate speech offences under the IPC and are discussed in detail in sub-chapter 3.1. (Indian Penal Code). Section 196 therefore offers a procedural safeguard that permits the appropriate authority to deny permission to proceed with prosecution where it feels that there is no case necessitating such prosecution.

This part of Sub-chapter 3.2 is further divided into three sub-parts. The first sub-part examines the scope of the procedural safeguards under Section 196. The second sub-part examines the stage at which the 'sanction' comes into play, that is, prior to cognisance of an offence. The third sub-part examines the ingredients of a legally valid 'sanction' under Section 196.

Section 196 of the CrPC is as follows:

Section 196 - Prosecution for offences against the State and for criminal conspiracy to commit such offence

(1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under Section 153A, Section 295A or sub-section (1) of Section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in Section 108A of the Indian Penal Code (45 of 1860),except with the previous sanction of the Central Government or of the State Government.

(1A) No Court shall take cognizance of -

(a) any offence punishable under Section 153B or sub-section (2) or sub-section (3) of Section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceeding:

Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction under sub-section (1) or sub-section (1A) and the District Magistrate may, before according sanction under sub-section (1A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155.

3.2.3.1 Scope of Section 196

The object of Section 196 is to prevent frivolous prosecutions[88] of 'hate speech' offences under the IPC, as they are regarded as offences of a 'serious and exceptional nature' that impact 'public peace and tranquillity'.[89]

In addition to offences prohibiting hate speech, Section 196 applies to 'offences against the state'[90] and offences of criminal conspiracy punishable with imprisonment of less than two years.[91] Cognisance of these offences can only be taken with the prior sanction of the state government, the central government, or the district magistrate.

The central government or state government or district magistrate may order a preliminary investigation by the police before granting the sanction.[92] This sub-section was incorporated into Section 196 to clarify that preliminary investigation was permitted, despite the court not having taken cognisance of the offence.[93]

3.2.3.2 Stage at which sanction is required

Section 196 requires prior sanction before the Court takes cognisance of an offence. This sub-part examines when a court is considered to have taken 'cognisance' to determine the stage at which prior sanction from authorities is required.

An inquiry into what amounts to 'cognisance' came up before the Supreme Court in *State of Karnataka* v. *Pastor P. Raju*[94] (*Pastor P. Raju*). In this case, a first information report was filed against the respondent for appealing to Hindus to convert to Christianity. The respondent was arrested and remanded to judicial custody. The Supreme Court ruled that 'cognizance takes place when a magistrate first takes judicial notice of an offence'. 'Judicial notice' is the judicial application of mind by a magistrate with a view to take further action.[95] This may be done upon receiving a complaint, a police report, or information from a person other than a police officer or on its own as highlighted in Section 190 of the CrPC. In the absence of any such complaint, report or information, a mere remand to judicial custody does not amount to taking cognisance of the offence.

The position laid down in *Pastor P. Raju* was subsequently adopted by the Andhra Pradesh High Court in *Akbaruddin Owaisi* v. *The Government of Andhra Pradesh.*[96]

The judiciary's reading of Section 196 is significant, since it means that the law does not prevent registration or investigation of the criminal case, submission of a report by the investigating authorities or arrest of an accused.[97] The requirement of sanction only arises at the stage of cognisance of the offence by a court of law.

3.2.3.3 Ingredients of sanction under Section 196

A valid sanction under Section 196 has two important components. The first is that sanction must be given, and the second is that the form of sanction must be consistent with the requirements of Section 196 and jurisprudence developed over the years. This sub-part examines these requirements.

(a) Sanction from relevant authority

The requirement of sanction from the relevant authority is critical to any proceeding under Sections 295A, 153A, 153B and 505 of the IPC. The absence of sanction is fatal and the entire proceedings are liable to be quashed in such a case.[98]

In *Manoj Rai* v. *State of Madhya Pradesh*, the Supreme Court summarily quashed proceedings under Section 295A when the state conceded that it had not received sanction from the prescribed authority.[99] Similarly, in *Arun Jaitley* v. *State of Uttar Pradesh*[100] (*Arun Jaitley*), proceedings under Sections 124A and 505 of the IPC were quashed as the judicial magistrate had taken *suo moto* cognisance by issuing summons without prior sanction. In this case, the Allahabad High Court held that 'cognizance taken under either of clauses (a), (b) or (c) of Section 190(1) would have to conform with the requirements of Section 196'. In *Aveek Sarkar* v. *State of West Bengal* (*Aveek Sarkar*), prosecution brought under Sections 295 and 120B of the IPC was quashed for want of prior sanction from the requisite authorities.[101] The Supreme Court held that Section 196 with the use of expressions 'shall' and 'previous' is specific and couched in mandatory terms, making any prosecution without previous sanction unauthorised.

Therefore, prior sanction is a mandatory requirement under Section 196 and the absence of this sanction can vitiate the entire proceedings. A contention that there is no valid sanction cannot be raised for the first time before the Supreme Court and must be raised before the lower courts.[102]

(b) Form of sanction

'Sanction' requires application of mind by the competent authority, which must be apparent from the order.[103] An order of sanction without application of mind is not valid.[104]

In *Vali Siddappa* v. *State of Karnataka*, the state government sanctioned the prosecution of cases under Sections 153A and 295A of the IPC and simultaneously ordered investigation under Section 196(3).[105] The Karnataka High Court held that the sanction was illegal since it lacked application of mind by the authority. The High Court reasoned that since further investigation was ordered under Section 196(3), the authority clearly found the material placed before it insufficient for the sanction order. It assumed that the authority intended to grant the sanction after consideration of all the material (including material collected from further investigation). Therefore, it concluded that an order simultaneously granting sanction and ordering further investigation means that the concerned authority has failed to apply his/her mind.

Sanction orders must demonstrate that the sanctioning authority was aware of the facts alleged to constitute the offence.[106] In *Inguva Mallikarjuna Sharma* v. *State of Andhra Pradesh* (*Inguva Mallikarjuna Sharma*), an order by the state government sanctioning prosecution based on the preliminary chargesheet was found to be valid, even though the government was not in possession of the final chargesheet.[107] The

Andhra Pradesh High Court held that 'what is essential is whether the authority competent to sanction the prosecution was appraised [*sic*] of all the necessary facts constituting the offences for which sanction is accorded'.

In the *Public Prosecutor* v. *Mulugu Jwala Subrahmanyara*, the accused was charged with an offence under the first clause of Section 294A of the IPC but the facts set out in the order constituted an offence under the second clause of Section 294A.[108] This complaint was held to be unauthorised by the Andhra Pradesh High Court. Accordingly, under Section 196, the magistrate was barred from taking cognisance.

3.2.3.4 Conclusion

Section 196 of the CrPC acts as a procedural safeguard to prevent frivolous prosecution for hate speech, and other offences. A valid sanction requires application of mind by the authority to facts of the case and must be submitted prior to cognisance of an offence, otherwise the proceedings are void. However, this requirement of prior sanction is not a bar to investigation of the offence, including arrest for the purpose of such investigation.

It is significant to note that according to the National Crimes Record Bureau, 941 people were arrested in 2015 under the category of 'offences promoting enmity between different groups'.[109] It is also important to note that despite the existence of this safeguard in relation to the offence of sedition, the law on sedition continues to be applied indiscriminately.[110] This makes it clear that Section 196 does not prevent harassment through investigation and arrest, even if eventually the authority does not grant sanction for prosecution. This means that this law does very little to mitigate the chilling effect of hate speech laws.

3.2.4 Ancillary CrPC Sections

This part briefly discusses those portions of the CrPC which have an indirect impact on speech and inflammatory speech in particular. This part of sub-chapter 3.2 is further divided into three sub-parts. The first sub-part discusses Section 178, which permits cases pertaining to speech offences set out in the IPC to be filed at multiple locations. The second sub-part discusses Section 144, which permits the issuance of temporary orders in urgent cases of nuisance or apprehended damage. The third sub-part examines Sections 151 and 107, which empower the police with preventive powers. Section 107 empowers a magistrate to require persons to execute bonds to the effect that they will maintain peace and Section 151 permits the police to arrest someone without a warrant in order to prevent the commission of a cognisable offence. The third sub-part examines the scope of these powers and their impact on speech.

3.2.4.1 Section 178

Section 178 deals with jurisdiction and enables cases to be filed at multiple locations, especially for speech offences, in instances where the speech is published across multiple jurisdictions.

This law is the exception to the ordinary rule of jurisdiction contained in Section 177 of the CrPC. Under Section 177, the court in the area in which the offence is committed has jurisdiction. Section 178 applies when the location of an offence is uncertain, and these cases may be inquired into or tried by a court having jurisdiction over any such local areas.[111]

Section 178 reads as follows:

> **Section 178 - Place of inquiry or trial**
>
> **(a) When it is uncertain in which of several local areas an offence was committed, or**

> **(b) where an offence is committed partly in one local area and partly in another, or**
>
> **(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or**
>
> **(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.**

This law permits prosecution to be initiated against the accused at multiple locations. The Supreme Court has held that if the accused persons did not object to trial taking place at multiple locations and were represented by lawyers at these different locations, they could not claim that the trial was unfair.[112]

In *Maqbool Fida Hussain* v. *Raj Kumar Pandey* (*Maqbool Fida Hussain*), the Delhi High Court had occasion to consider the problems that arise when Section 178 is applied to speech offences.[113] Summons and arrest warrants were issued against eminent artist M.F. Hussain from courts across the country. Hussain approached the Supreme Court and managed to get the cases gathered in a consolidated petition before the Delhi High Court. The Delhi High Court acknowledged that the advent of technology meant that any person in any jurisdiction could access information online, increasing the possibility of multiple complaints. The High Court found it imperative that in such cases 'jurisdiction be more circumscribed so that an artist like in the present case is not made to run from pillar to post facing proceedings'. It underscored the need for circumscribing jurisdiction by highlighting the large number of incidents brought to light by the press which had made artists run 'the length and breadth of the country to defend themselves'. However, the High Court refrained from issuing any directions to this effect, merely recommending that the legislature examine the possibility of changing the law.[114]

(a) Conclusion

Section 178 is applicable in instances where the location of an offence is not circumscribed. It has notably been used by people from different jurisdictions to file complaints against artists, for the same work of art.

Despite the Delhi High Court's unequivocal acknowledgment of the threat to speech contained within Section 178 in *Maqbool Fida Hussain,* and its recommendations, there has been no legislative change addressing the threat to freedom of expression.

3.2.4.2 Section 144

Section 144 has been used many times to curb speech. For instance, the Tamil Nadu government used it to ban the film *Vishwaroopam,*[115] and various state governments across India have used this law to order internet shutdowns (discussed in further detail in Chapter 7 - Online Hate Speech).[116] This sub-part examines the scope of powers under section 144.

Section 144 is as follows:

> **Section 144 - Power to issue order in urgent cases of nuisance or apprehended danger**
>
> **(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by**

Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safely, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this Section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.

(3) An order under this Section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this Section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this Section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this Section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5), or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

The first sub-part examines the requirements for a valid order under Section 144, the second sub-part discusses the grounds on which orders are justifiable and the third sub-part discusses the satisfaction of the magistrate. The fourth sub-part discusses instances in which the judiciary can interfere and the fifth sub-part discusses the constitutionality of Section 144.

(a) Requirements of a valid order under Section 144

This sub-part examines the requirements of a valid order under Section 144. It is further divided into three sub-parts. First, the order must be in writing and definite in its terms, which should specify the 'persons, places and acts'. Second, the order must be based on material facts. Third, order must be passed in case of an 'emergency' and the duration of the order must

be coextensive with the emergency.[117]

(i) Order must be in 'writing' and 'absolute and definite in its terms'

Section 144 specifies that the order under it must be a 'written order'.[118] It has been held that since Section 144 permits magistrates to interfere with the liberty of individuals, the order must be in writing and in clear terms to enable people to know exactly what they are prohibited from doing.[119] Accordingly, the order must be absolute and definite in its terms.[120] In addition, an order can only be 'negative' and not 'positive', which implies that it should direct people to abstain from certain acts and not direct them to do certain acts.[121]

- Order must specify 'persons, place and act'

The order must provide details of 'specific persons' in addition to the 'the place and the act'.

As far as the 'place and the act' are concerned, the details must not allow for any ambiguity and should be 'clear and definite'. For instance, an order cannot merely specify that an assembly at a 'public place' is disallowed; it should specify the place mentioned.[122] Additionally, an order which merely states that acts carried out in breach of 'public order' are prohibited, without specifying what those acts are, would not be stating the material facts and would amount to an invalid order.[123]

Orders must also state the duration for which they apply.[124] However, an omission will not invalidate an order. In the case of an omission, the default duration of 2 months under sub-section 4 will be in place.

(ii) Order must be based on 'material facts'

In *Ramlila Maidan Incident* v. *Home Secretary, Union of India and Ors.* (*Ramlila Maidan Incident*), the Supreme Court acknowledged that any order passed under Section 144 has the direct consequence of placing a restriction on people's fundamental rights. Consequently, it found that such orders must be in writing and based on material facts in order to be valid.

The Supreme Court held that existence of sufficient grounds was essential for passing an order under Section 144. In this case, permission had been granted to hold a protest camp, which was withdrawn later and the police charged into the area to disperse the crowds. Based on these facts, the Court held that the order issued was arbitrary. The Court held that the government was unable to show that any material information, fact or event had occurred to compel them to withdraw the permissions granted earlier. The Court noted, 'Thus, in case of a mere apprehension, without any material facts to indicate that the apprehension is imminent and genuine, it may not be proper for the authorities to place such a restriction upon the rights of the citizen'.[125]

The Supreme Court further held that reasonable notice/time for execution of the order is a prerequisite under Section 144, except in cases of emergency, as enforcement of orders with undue haste may cause greater damage.

(iii) Order must be passed in case of 'emergency' and duration to be co-extensive with emergency

Section 144 is intended to be used during emergencies.[126] An order under Section 144 is justified only when there is a need for 'immediate prevention or speedy remedy' in the opinion of the magistrate,[127] and these orders are to be issued sparingly.[128] It has been held that an order must show that there is an emergency in response to which the order has been issued,

without which the order cannot be sustained.[129]

The duration of an order passed under Section 144 must be co-extensive with the period of emergency.[130] A repetitive order under it, which extends the duration of the order beyond two months, is not permissible.[131]

(b) Grounds on which orders are justifiable

Order passed under Section 144 will only be valid if they are directed to prevent 'annoyance, injury to human life and safety, and disturbance to public tranquillity'.[132]

'Annoyance or nuisance' under this requirement has to be considered to lead to 'a breach of peace' or 'nuisance endangering life or health'.[133] The defamatory act or the nuisance cannot solely be considered as a justifiable ground for an order, it must only be considered as a ground if it meets the above mentioned requirements. Publications in newspapers can be considered a justifiable ground if the act could foreseeably lead to 'incitement to breaches of the peace'.[134]

To establish that there could be a disturbance to public tranquillity, one must establish a 'reasonable or proximate' connection between the prohibited act and the disturbance.[135] The connection cannot be 'merely speculative or distant'.[136]

(c) Satisfaction of the magistrate

The Magistrate in question has to be of the opinion and has to be satisfied of the fact that an order under Section 144 is necessary for a 'speedy remedy' or 'immediate prevention'.[137] The order must reflect the magistrate's opinion and satisfaction.[138] Unlike orders of forfeiture passed under Section 95, orders passed under Section 144 are not rigid in their terms.[139] For instance, an order will not be rendered void if it does not state the material facts, as long as there is material on record justifying such an order.[140]

The magistrate's baseless apprehension of certain events cannot be the grounds for a valid order under Section 144, the apprehension must be rooted in evidence for it to form the grounds of a valid order.[141] Such an order must not be made on the mere report of a police officer, or a complaint.[142] A magistrate is bound to take evidence, though it is not necessary that the information on which they act should be on record.[143]

(d) Interference by judiciary

In *Ramlila Maidan Incident*, the Supreme Court stated that Section 144 gives the executive some freedom to determine its application. The Court held that the judiciary ought not to interfere with this power 'unless the decision making process is *ex facie* arbitrary or is not in conformity with the parameters stated under Section 144 of the Code of Criminal Procedure'.[144]

In addition, they can examine the 'correctness, legality and propriety' of the order. As far as the evidence is concerned, the judiciary will consider upon a 'fair view' if the requirements are met. If they are not satisfied, they have the liberty to examine if the order is based on sound facts and if the grounds are justifiable.[145]

(e) Consitutionality of Section 144

Section 144 is often used to suppress speech and it has been weighed against the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. This sub-part evaluates the constitutionality of Section 144.

The Supreme Court considered the constitutionality of Section 144 in *Babulal Parate* and found it to be consistent with the Constitution.[146] Section 144 was saved by the

Court's reading that it fell within one of the permissible restrictions (public order) of Article 19(1)(a). The Court inferred this from the fact that an order under Section 144 is made in the interest of 'public order' for the purpose of preventing obstruction, annoyance or injury, or causing danger to public tranquillity, or a riot or an affray, as specified in the law. These factors were seen as limiting the exercise of state power under this law.[147]

The Supreme Court examined the constitutional validity of Section 144 in 1971 again, in *Madhu Limaye* v. *Sub-Divisional Magistrate, Monghyr* (*Madhu Limaye*).[148] In this case, a seven-judge bench of the Supreme Court upheld Section 144, stating that the law was a reasonable restriction to be used in urgent situations and it incorporated sufficient safeguards to protect persons unreasonably affected by it.[149]

The constitutionality of Section 144 was challenged again in *Ram Manohar Lohia* v. *State of U.P.* (*Ram Manohar Lohia*), where an order was passed by the District Magistrate of Agra, in response to attempts by some political parties to organise a state-wide strike or shutdown of public transport, commercial enterprises, etc.[150] In addition to restrictions on processions, demonstrations and assembly, the order required that 'no person shall indulge in any inflammatory speech as may be likely to cause disturbance of the public peace'. The order further prevented persons from shouting or using slogans in public places 'likely to cause a breach of the peace'. The petitioners, who were arrested under this order, challenged the constitutionality of Section 144 on the grounds that it violates freedom of expression and the powers exercised under it are so wide that it places an unreasonable restriction on fundamental rights. The challenge by the petitioners was confined to that portion of Section 144 relating to 'the power of issuing directions considered likely to prevent or tends to prevent disturbance of the public tranquillity'. The Allahabad High Court held that this question had been decided by the Supreme Court in *Babulal Parate* where the restrictions placed by Section 144 were held to be reasonable, as they were issued in the interest of 'public order'.[151] It held that the term 'public order' should be given a 'large meaning' and 'at least comprehends within itself "public tranquillity" even if it cannot be equated with public tranquillity'.[152] Therefore, Section 144 survived this challenge.

In *Ramlila Maidan Incident*, the Supreme Court examined Section 144 against the backdrop of fundamental rights. The Court upheld the constitutionality of Section 144 since it empowers authorities to pass orders to prevent 'disturbances of public tranquillity'.

(f) Conclusion

An order under Section 144 can only be passed where there is a need for 'immediate prevention' or 'speedy remedy' where danger is imminent. The order must be in writing and based on material facts. In addition, the duration of the order must be co-extensive with the duration of the emergency. Further, the order must clearly indicate which actions are prohibited. Otherwise, the order will fall foul of Article 19 of the Constitution.

There are identifiable characteristics of Section 144 that enable its expansive use. It appears for example, that the judiciary has accepted that the executive will have some freedom to determine the application of Section 144.[153]

Despite the requirement that Section 144 be used only used in case of emergencies, it is pertinent to note that this law has been used with increasing frequency to curb speech. Section 144 has been invoked across India to order internet shutdowns, for instance in Gujarat, Bihar

and Kashmir.[154] This law has also been used in various other forms to restrict speech, including bans on loud speakers,[155] movies,[156] academic lectures[157] and inflammatory speeches.[158]

3.2.4.3 Section 151 and Section 107- preventive detention

Section 151 of the CrPC empowers the police to arrest a person without a warrant in order to prevent the commission of a cognisable offence. Sections 153A, 153B, 295A and 505 are all cognisable offences that fall within the scope of this law. Therefore, an arrest may be made to prevent the occurrence of a hate speech offence. Section 107 of the CrPC permits a magistrate to require persons to execute a bond to the effect that he/she will maintain the peace. Both sections 151 and 107 of the CrPC are designed to be preventive and not punitive in nature.[159]

An arrest under Section 151 can only be made for 24 hours. If detention in custody is required for more than 24 hours, proceedings under Section 107 must be launched simultaneously.[160] A prominent example of use of this law was the arrest in 2011 of Anna Hazare, the anti-corruption activist, under Sections 151 and 107 of the CrPC, since it was anticipated that he would breach a prohibitory order under Section 144.[161]

Sections 151 and 107 read as follows:

> **Section 151 - Arrest to prevent the commission of cognizable offences**
>
> **(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.**
>
> **(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.**
>
> **Section 107 - Security for keeping the peace in other cases**
>
> **(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond [with or without sureties] for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.**
>
> **(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.**

The first sub-part discusses the ingredients of Section 151. The second sub-part discusses the 'imminent danger' standard.

(a) Components of Section 151

The Supreme Court has stated that an arrest under Section 151 can only be made if two conditions are satisfied.[162] In the first sub-part,

we discuss the 'knowledge of design' necessary under Section 151, and in the second sub-part we discuss the necessity of 'imminent danger'. If these conditions are not fulfilled, such an arrest would violate fundamental rights guaranteed under Articles 21 and 22 of Constitution.[163]

(i) Knowledge of design

In *Prahlad Panda* v. *Province of Orissa*[164] (*Prahlad Panda*), the High Court of Orissa discussed the 'knowledge' of a design under Section 151. In this case, the petitioner was detained for his alleged criminal plans because of his allegiance with certain political parties. However, in this instance, the order written by the sub-inspector did not reflect any of these concerns or prove that he had knowledge of the 'designs' to commit these offences.[165] It was held that 'general information' of the tendency of the political group to commit offences did not meet the standard under Section 151.[166] There must be 'knowledge of the design' and there should also be a connection between the arrested person and the offence.[167] Similarly, in *Balraj Madhok v. The Union of India*, the Court held that a mere apprehension is not the same thing as knowledge, and would not be sufficient under the provision.[168] Further, it held that even the knowledge that a person would endanger peace or tranquillity need not result in a cognisable offence.

(b) 'Imminent danger'

In 2011, the Supreme Court in *Rajender Singh Pathania* v. *State of N.C.T. of Delhi*, while setting aside an order of the Delhi High Court, held that Section 151 should only be invoked 'when there is imminent danger to peace or likelihood of breach of peace under Section 107 Code of Criminal Procedure'.[169] The Court held that jurisdiction vested under Section 107 should only be exercised in emergency situations. Therefore, proceedings under Section 107 must only be initiated in emergency situations and arrests, when a prevention detention order must be issued; and proceedings under Section 151 can only be initiated if there is no other avenue to prevent the crime.

3.2.4.4 Conclusion

In 2001, the Law Commission of India had recognised that a large number of persons were being arrested under preventive laws such as Section 107 and Section 151. The Law Commission noted that 'preventive arrests are far higher in number than the arrests made for committing substantive offences'.[170] It recommended that no arrests should be made under Section 107.[171] However, a similar recommendation was not made for Section 151.[172]

Section 151 allows for arrests without a warrant where the police officer is aware of a 'design' to commit a cognisable offence and the offence cannot be prevented by other means. Section 107 empowers a magistrate to order persons to execute bonds where they apprehend a breach of peace. These procedures are used to prevent certain kinds of speech, consequently playing a role in the regulation of hate speech.

3.2.5 Conclusion

Various portions of the CrPC directly or indirectly affect hate speech and its regulation. Section 95 of the CrPC empowers the state governments to order forfeiture of publications containing speech criminalised by the IPC. This permits censorship of publications without any

judicial determination of whether the speech constitutes an offence under the IPC. It also enables censorship through executive orders. Section 96 of the CrPC establishes a system of review, through which forfeiture orders can be challenged before the judiciary. Under this law, forfeiture orders are published in official gazettes and 'interested parties' are allowed to challenge them up to 2 months after their publication. However, as per the existing system, there is no official collation of forfeiture orders. This makes compliance difficult since those looking to comply have to find each applicable forfeiture order.

Similarly, Sections 144, 151 and 107 enable executive orders that censor speech to prevent apprehended danger or to maintain peace and public order.

The CrPC also lays down procedural safeguards to limit the abuse of powers. For instance, Section 196 mandates prior sanction before a magistrate takes cognisance of a hate speech offence under the IPC, in order to limit frivolous prosecution. This 'prior sanction' must be acquired from either the central government, state government or the district magistrate. However, it does not prevent investigation or arrest prior to cognisance of the offence.[173] Despite this requirement of 'prior sanction', indiscriminate arrests are still made under this law, as has been discussed earlier.[174]

Other procedural safeguards, such as written and reasoned orders are also articulated in the CrPC; however, Sections 95, 144 and 151 continue to be used widely, and allow for indiscriminate arrests and restrictions on free speech. Unlike Section 95, which has stricter conditions for valid orders of forfeiture, Section 144 allows for forfeiture orders to be passed even in the absence of material facts. Lastly, by virtue of Section 178, speech-related cases are often filed in multiple jurisdictions. As has been discussed earlier, this allows for frivolous prosecution. Often multiple cases are filed for a single offence, as was the case in *Maqbool Fida Hussain.*

1 The 37th and 41st Law Commission Reports discussed the merits of amending Section 99A to replace words of the IPC sections with 'Section 124A or Section 153A or Section 153B or Section 292 or Section 293 or Section 295A of the Indian Penal Code'.

2 Law Commission, *The Code of Criminal Procedure* (41st Report, 1969), p. 45.

3 *Virendra Bandhu* v. *State of Rajasthan*, AIR 1980 Raj 24, para 5; *Harnam Das* v. *Union of India*, a pre-amendment case has been relied on in post-1971 cases, such as *Anand Chintamani Dighe* v. *State of Maharashtra and Azizul Haq* v. *State*, proving that the two sections are in *pari materia.*

4 *State of Uttar Pradesh* v. *Lalai Singh Yadav,* (1977) 1 SCR 616.

5 *Lalai Singh Yadav* (n. 4), para 4.

6 *Lalai Singh Yadav* (n. 4), para 9.

7 *Sangharaj Damodar* v. *Nitin Gadre*, (2007) CrimLJ 3860; *Gopal Vinayak Godse* v. *State of Maharashtra*, (1961) 3 SCR 440.

8 *Sangharaj Damodar* (n. 7).

9 *Sangharaj Damodar* (n. 7), para 8.

10 *Sangharaj Damodar* (n. 7), para 8.

11 ' 'Maratha' activists vandalize Bhandarkar Institute' *The Times of India* (Pune, 6 January 2004) <http://timesofindia.indiatimes.

com/city/pune/Maratha-activists-vandalise-Bhandarkar-Institute/articleshow/407226.cms> accessed 17 April 2018; Vasantha Surya, 'Heritage Destroyed' *The Hindu (India*, 1 February 2004) <http://www.thehindu.com/thehindu/mag/2004/02/01/stories/2004020100200300.htm> accessed 17 April 2018.

12 *Sangharaj Damodar* (n. 7), para 8.

13 Sohoni, *Code of Criminal Procedure,* vol 1 (21st edn, Lexis Nexis 2015), p. 577.

14 *Arun Ranjan Ghose* v. *State of West Bengal,* (1955) 59 (Cal) WN 495.

15 *Arun Ranjan Ghose* (n. 14), para 4.

16 *Sohoni* (n. 13), p. 577.

17 *Lalai Singh Yadav* (n. 4), para 4.

18 *Uday Pratap Singh* v. *State of M.P.,* AIR 1982 MP 173; *Narayan Das Indurkhya* v. *State of M.P.,* AIR 1972 SC 2086*; P. Venkateswarlu* v. *State of A.P.,* 1982 CrLJ 1950 (AP) FB.

19 S.C. Sarkar*, Code of Criminal Procedure,* vol 1 (10th edn, Lexis Nexis 2012), p. 231.

20 *Hemlatha* v. *Government of Andhra Pradesh*, AIR 1976 AP 375; *Mohammed Khalil* v. *Chief Commissioner,* AIR 1968 Del 13.

21 S.C. Sarkar (n. 19), p. 232.

22 *Lalai Singh Yadav* (n. 4), para 9.

23 *Chinna Annamalai* v. *State of Tamil Nadu,* AIR 1971Mad 448; *Harnam Das* v. *State of Uttar Pradesh,* (1962) 2 SCR 371; Sohoni (n. 13), p. 577.

24 *Anand Chintamani Dighe* v. *State of Maharashtra,* (2002) 1 (Bombay CR) 57.

25 *Arun Ranjan Ghose* (n. 14), para 5.

26 *Arun Ranjan Ghose* (n. 14), para 9.

27 *Arun Ranjan Ghose* (n. 14), para 5.

28 *Anand Chintamani Dighe* (n. 24), para 13.

29 *Anand Chintamani Dighe* (n. 24), para 14.

30 *Anand Chintamani Dighe* (n. 24), para 14.

31 Ratanlal Dhirajlal, *Code of Criminal Procedure,* vol 1 (19th edn, Lexis Nexis 2010), p. 176; Sohoni (n.13), p. 574.

32 *Shivram Das Udasin* v. *State of Punjab,* AIR 1955 AIR P H 28.

33 *Azizul Haq* v. *State,* AIR 1980 All 149.

34 *Shivram Das Udasin* (n. 32), para 34.

35 *Gopal Vinayak Godse* v. *Union of India,* AIR 1971 Bom 56.

36 *Gopal Vinayak Godse* (n. 35), para 1.

37 *Gopal Vinayak Godse* (n. 35), para 64.

38 *Gopal Vinayak Godse* (n. 35), para 64.

39 *Varsha Publications* v. *State of Maharashtra,* (1983) Crim LJ 1446.

40 Ratanlal Dhirajlal*, Code of Criminal Procedure,* vol 1 (18th edn Lexis Nexis 2010), p. 158.

41 *Varsha Publications* (n. 39), para 8.

42 *Varsha Publications* (n. 39), para 12.

43 *Varsha Publications* (n. 39), para 12.

44 *Varsha Publications* (n. 39), para 12.

45 S.C. Sarkar (n. 19), p. 235.

46 *Baragur Ramchandrappa* v. *State of Karnataka*, 1999 (1) ALD Cri 209.

47 *Lalai Singh Yadav* (n. 4).

48 *Lalai Singh Yadav* (n. 4), paras 9, 14.

49 *Lalai Singh Yadav* (n. 4), para 14.

50 *Sadhu Singh Hamdard Trust* v. *State of Punjab,* (1992) Crim-LJ 1002.

51 *Sadhu Singh Hamdard Trust* (n. 50), para 2.

52 *Sadhu Singh Hamdard Trust* (n. 50), para 4.

53 *Sadhu Singh Hamdard Trust* (n. 50), para 4.

54 *Sadhu Singh Hamdard Trust* (n. 50), para 5.

55 *Sadhu Singh Hamdard Trust* (n. 50), para 6.

56 *Sadhu Singh Hamdard Trust* (n. 50), para 6.

57 *Sadhu Singh Hamdard Trust* (n. 50), para 7.

58 *Sadhu Singh Hamdard Trust* (n. 50), para 7.

59 *Ramlal Puri* v. *State of Madhya Pradesh*, AIR 1971 MP 152.

60 *Sangharaj Damodar* (n. 7).

61 *Ramlal Puri* (n. 59), para 30.

62 *Ramlal Puri* (n. 59), para 30.

63 *Ramlal Puri* (n. 59), para 13.

64 *Ramlal Puri* (n. 59), para 13.

65 *Sangharaj Damodar* (n. 7).

66 *Sangharaj Damodar* (n. 7), para 2.

67 *Sangharaj Damodar* (n. 7), para 5.

68 *Sangharaj Damodar* (n. 7), para 5.

69 *Baijnath* v. *Emperor*, AIR 1925 All 195.

70 *Harnam Das* (n. 23).

71 *Harnam Das* (n. 23), para 10.

72 *Virendra Bandhu* v. *State of Rajasthan*, AIR 1980 Raj 241.

73 *Virendra Bandhu* (n. 72).

74 *Durga Das Basu, Code of Criminal Procedure Code,* vol 1 (4th edn Lexis Nexis 2010), p. 387.

75 *Lalai Singh Yadav* (n. 4), paras 9-14.

76 *Sohoni* (n. 13), p. 571.

77 *Piara Singh Bhaniara* v. *State of Punjab,* (2009) 3 PLR 766.

78 *Piara Singh* (n. 77), para 3.

79 *Piara Singh* (n. 77), para 3.

80 *Piara Singh* (n. 77), para 8.

81 *Piara Singh* (n. 77), para 8.

82 *Piara Singh* (n. 77), para 8.

83 *Piara Singh* (n. 77), para 3.
84 *Sangharaj Damodar* (n. 7), para 5.

85 The Code of Criminal Procedure 1973, chapter XIV.

86 *Arun Jaitley* v. *State of UP, 2016* (1) Allahabad Criminal Law Ruling 890 (Allahabad).

87 *Sohoni, Code of Criminal Procedure,* vol 3 (21st edn, Lexis-Nexis 2015), p. 8.

88 *Inguva Mallikarjuna Sharma* v. *The State Of Andhra Pradesh*, 1978 CrimLJ (Andhra Pradesh) 392.

89 *State of Karnataka* v. *K. Rajashekara, 2010 (87) AIC 479 (Karnataka); Akbaruddin Owaisi* v. *The Govt. of A.P., 2014 Crim-LJ (Andhra Pradesh) 2199.*

90 The Code of Criminal Procedure 1973, sections 196(1), 196(1A), and 196(3).

91 The Code of Criminal Procedure 1973, sections 196(1), 196(1A), and 196(3).

92 The Code of Criminal Procedure 1973, sections 196(1), 196(1A), and 196(3).

93 Sohoni (n. 87), p. 241.

94 *State of Karnataka* v. *Pastor P. Raju*, (2006) 6 SCC 728.

95 *See, Narayandas Bhagwandas Madhavdas* v. *The State of West Bengal,* 1960 (1) SCR 93 (India); *Darshan Singh Ram Kishan* v. *State of Maharashtra*, 1972 (1) SCR 571; *Kishun Singh* v. *State of Bihar*, 1993(2) SCC 16. .

96 *Akbaruddin Owaisi* v. *The Govt. of A.P.*, 2014 CrimLJ (Andhra Pradesh) 2199.

97 *Pastor P. Raju* (n. 94).

98 *Manoj Rai* v. *State of M.P.*, AIR 1999 SC 300; *Kandi Buchi Reddy* v. *State of Andhra Pradesh* 1999 (3) Andhra Legal Decisions 193 (Andhra Pradesh High Ct., India); *Arun Jaitley* v. *State of U.P.,* 2016 (1) Allahabad Criminal Law Ruling 890 (Allahabad); *Aveek Sarkar* v. *State of West Bengal* (2014) 4 S.C.C. 257 (India).

99 *Manoj Rai* v. *State of M.P.,* 1999 CriLJ 470 (1999).

100 *Arun Jaitley* v. *State of U.P.*, 2016 (1) Allahabad Criminal Law Ruling 890 (Allahabad).

101 *Aveek Sarkar* v. *State of West Bengal*, (2014) 4 SCC 257.

102 *Tulsi Ram* v. *State of U.P.*, AIR 1963 SC 666.

103 *Inguva Mallikarjuna Sharma* (n. 92); *Vali Siddappa* v. *State of Karnataka,* 1998 CrimLJ 1879.

104 *Vali Siddappa* (n. 103).

105 *Vali Siddappa* (n. 103).
.
106 *Inguva Mallikarjuna Sharma* (n. 103).

107 *Inguva Mallikarjuna Sharma* (n. 103).

108 *The Public Prosecutor* v. *Mulugu Jwala Subrahmanyara,* 1957 CrimLJ (Andhra Pradesh) 1389.

109 National Crimes Record Bureau, *Persons Arrested under IPC Crimes and Percentage Variation in 2015 Over 2014 (All India)* (30 November 2016), <http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Table%2012.1.pdf> accessed 17 April 2018.

110 Maninder Dabas, '165 People Arrested For Sedition In Last 3 Years With Maximum From Bihar, Only One Case In *J&K' India Times* (India, 23 July 2017) <https://www.indiatimes.com/news/india/165-people-arrested-for-sedition-in-last-3-years-with-maximum-from-bihar-only-one-case-in-j-k-326249.html> accessed 17 April 2018.

111 *Sujata* v. *Prashant,* AIR 1997 SC 2465

112 *Harihar* v. *State,* (1972) 3 SCC 89.

113 *Maqbool Fida Hussain* v. *Raj Kumar Pandey*, 2008 CrimLJ (Delhi) 4107.

114 *Maqbool Fida Hussain* (n. 113).

115 'Stage set for *Vishwaroopam* release' (2013) *The Hindu* (Chennai, 5 February 2013) <http://www.thehindu.com/news/national/tamil-nadu/stage-set-for-vishwaroopam-release/article4378419.ece.> accessed 17 April 2018.

116 Nakul Nayak, 'The Anatomy of Internet Shutdowns – III (Post Script: Gujarat High Court Verdict)' (*CCG NLU Delhi,* 19 September 2015) <https://ccgnludelhi.wordpress.com/2015/09/19/the-anatomy-of-internet-shutdowns-iii-post-script-gujarat-high-court-verdict/.> accessed 17 April 2018.

117 B.B. Mitra, Code of Criminal Procedure (21st edn, Kamal Law House 2011), p. 537.

118 *Ramlila Maidan Incident* v. *Home Secretary, Union of India*, (2012) 5 SCC 1.

119 *Sorab Shavaksha* v. *Emperor,* AIR 1935 Bom 33 (C)*; Ram Manohar Lohia* v. *State of U.P.,* 1968 CrimLJ (Allahabad) 281.

120 B.B. Mitra (n. 117).

121 *Kusum Kumar Devi* v. *Hem Nalini Debi,* AIR 1933 Cal 724; *Shiv Dutt Shanna* v. *State of Rajasthan* 1972 WLN 825

122 *Thokchom Angon Singh* v. *Union Territory of Manipur,* AIR 1961 Mani 12; Sohoni (n. 87), p. 1303

123 Sohoni (n. 87), p. 1303.

124 *Ramnath Chaudhari* v. *Emperor,* ILR 34 Cal 847 (FB); Sohoni (n. 87), p. 1336

125 *Ramlila Maidan Incident* (n. 118).

126 *Umulkulus* v. *Executive Magistrate,* 1991 CrimLJ (Kerala) 262.

127 The Code of Criminal Procedure 1973, section 144(1).

128 *Sujikumar* v. *State*, 2007 CrimLJ (Gauhati) 2700.

129 B.B. Mitra (n. 117).

130 B.B. Mitra (n. 117).

131 *Acharya Jagdisharanand Avadhut* v. *Police Commissioner,* 1984 SCR (1) 447.

132 Sohoni (n. 87), p. 1298.

133 Sohoni (n. 87), p. 1298.

134 *Re Bandi Butchaiah* AIR 1952 Mad 61; Sohoni (n. 87), p. 1298.

135 *Sujato Bhadra* (n. 103), para 103.

136 Sohoni (n. 87), p. 1299.

137 Sohoni (n. 87), p. 1299.

138 Sohoni (n. 87), p. 1301.

139 Sohoni (n. 87), p. 1301.

140 *Hrishikesh Acharya* v. *Balaram Pati*, AIR 1967 Ori 72.

141 Sohoni (n. 87), p. 1298.

142 *Chandra Kanti Kanji Lal* v. *King-Emperor,* 20 CWN 981.

143 *Elavarisu Vanamamali Ramanuja Jeeyarswami* v. *Vanamamali Ramanuja Jeeyar,* ILR 3 Mad 354.

144 *Ramlila Maidan Incident* (n. 117), para 70.

145 Sohoni (n. 87), p. 1347.

146 *Babulal Parate* v. *State of Maharashtra,* (1961) 3 SCR 423 (India).

147 *Babulal Parate* (n. 146).

148 *Madhu Limaye* v. *Sub-Divisional Magistrate*, Monghyr, (1971) 2 SCR 711.

149 *Madhu Limaye* (n. 148).

150 *Ram Manohar Lohia* (n.119)

151 *Babulal Parate* v. *State of Maharashtra*, (1961) 3 SCR 423 (India).

152 *Ram Manohar Lohia* (n. 119).

153 *Ramlila Maidan Incident* (n. 117).

154 Centre for Communication Governance, 'Incidents of Internet Shutdown in India (2010 Onwards)' (*National Law University, Delhi*) <https://drive.google.com/file/d/0BwkVG7IkYz7Ac0ZZMHh-CeUc3Nkt- 0d0U4cURvY0hRTkxLY3pj/view> accessed 23 April 2018.Chinmayi Arun, 'Demarcating a safe threshold' *The Indian Express* (India, 24 February 2016) <http://indianexpress.com/article/opinion/columns/demarcating-a-safe-threshold/> accessed 17 April 2018; Tanvi Nalini, 'Section 144 imposed, internet banned in Saran after deity desecration video goes viral' *The Times of India* (Chhapra, 6 August 2016) <http://timesofindia.indiatimes.com/city/patna/Section-144-imposed-internet-banned-in-Saran-after-deity-desecration-video-goes-viral/articleshow/53571544.cms> accessed 17 April 2018.

155 'Section 144 imposed' *The Tribune* (Bathinda, 13 July 2016) <http://www.tribuneindia.com/news/bathinda/section-144-imposed/265016.html> accessed 17 April 2018.

156 'Ram Rahim Singh's "Messenger of God" screening banned in Punjab, section 144 imposed in Sirsa after protest' *The Indian Express* (Mukstar, 20 January 2015) <http://indianexpress.com/article/india/india-others/messenger-of-god-controversy-tension-in-pockets-of-sirsa-section-144-imposed-at-places/> accessed 17 April 2018; The Hindu (n. 122).

157 'Srinagar: Police ban academic lecture citing Section 144' *The First Post* (India, 10 July 2014) <https://www.firstpost.com/india/srinagar-police-ban-academic-lecture-citing-section-144-1612419.html> accessed 17 April 2018.

158 'Section 144 CrPC imposed in Dibrugarh' *The Assam Tribune* (Dibrugarh, 30 July 2016) <http://www.assamtribune.com/scripts/detailsnew.asp?id=jul3116/state060> accessed 17 April 2018.

159 *Rajender Singh Pathania* v. *State of N.C.T. of Delhi,* (2011) 13 SCC 329.

160 S.K. Ghosh, *Freedom of Speech and Assembly and Public Order* (Ashish Publishing House 1993), p. 68.

161 Dean Nelson, 'Indian anti-corruption activist Anna Hazare arrested in widespread crackdown' *The Telegraph* (New Delhi, 16 August 2011) <http://www.telegraph.co.uk/news/worldnews/asia/india/8703808/Indian-anti-corruption-activist-Anna-Hazare-arrested-in-widespread-crackdown.html> accessed 17 April 2018; Former Prime Minister of India Dr. Manmohan Singh, 'Statement in the Lok Sabha' (17 August 2011). <http://archivepmo.nic.in/drmanmohansingh/speech-details.php?nodeid=1046> accessed 17 April 2018.

162 *Ahmed Noormohmed Bhatti* v. *State of Gujarat,* (2005) 3 SCC 647.

163 *Ahmed Noormohmed Bhatti* (n. 162).

164 *Prahlad Panda* v. *Province of Orissa,* AIR 1950 Ori 107.

165 *Prahlad Panda* (n. 164), para 2 and 9.

166 *Prahlad Panda* (n. 164), para 11.

167 *Prahlad Panda* (n. 164), para 11.

168 *Balraj Madhok* v. *Union of India,* AIR 1967 Del 31.

169 *Rajender Singh Pathania* (n. 159).

170 Law Commission of India, Law Relating *To Arrest* (177th Report Annexure III, 2001), p. 21.

171 Law Commission of India (n. 170), p. 115.

172 Law Commission of India (n. 170).

173 *Pastor P. Raju* (n. 94).

174 NCRB (n. 109); Maninder Dabas (n. 110).

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

4

Other Laws Governing Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

4

Other Laws Govering Hate Speech

4.1 Introduction

This chapter will discuss other legislations that affect hate speech in India and is divided into seven parts. Each part discusses legislation that has an impact on hate speech in India. Part one discusses the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which prohibits discriminatory behaviour against marginalised communities. Part two discusses the Protection of Civil Rights Act, 1955, which prohibits practices relating to 'untouchability'. Part three analyses the Customs Act, 1962, which among other aspects, governs the import and export of goods into India. Part four analyses the Indecent Representation of Women (Prohibition) Act, 1986, which prohibits the 'derogatory' portrayal of women across different mediums. Part five discusses the Religious Institutions (Prevention of Misuse) Act, 1988, which ensures that religious institutions are used for their intended purpose and not for political purposes. Part six focuses on the National Security Act, 1980, a statute which prohibits activities contrary to 'public order' for the maintenance of national security. Lastly, part seven briefly discusses the new HIV/AIDS (Prevention and Control) Act, 2017.

4.2 The Scheduled Castes and Schedules Tribes (Prevention of Atrocities) Act, 1989

4.2.1 Introduction

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('Atrocities Act') was enacted to protect the dignity of members of the scheduled castes and scheduled tribes (SC/ST) community.[1] It is intended to prevent indignities, humiliation and harassment of the members of SC/ST community.[2]

The Atrocities Act criminalises certain kinds of speech that are considered harmful to the dignity of marginalised groups, that the Atrocities Act is meant to protect. Section 3(1)(x) of the Atrocities Act is most relevant to the discussion on hate speech. It reads as follows:

> **3. Punishments for offences of atrocities--**

> **(1) Whoever, not being a member of a Scheduled Caste or Scheduled Tribe,--**
>
> **…**
>
> **(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe, in any place within public view:**
>
> **…**
>
> **shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.**

Accordingly, the components of the speech are:

1. The accused are not members of a SC or ST.

2. The accused knew that the complainant was a member of a SC or ST.

3. The accused intentionally insulted or intimidated the complainant with the intent to humiliate her as a member of a SC or ST.

4. The insult or intimidation occurred in public view.[3]

Since this is a criminal office, the law on insult or intimidation under the Atrocities Act must be interpreted in a strict manner.[4] Therefore, *all* the components set out above must be established for the speech to qualify as an offence, and before a conviction can take place.[5] In the past, the Supreme Court has dismissed a complaint under Section 3 because the complaint did not state that the accused was not a member of the SC or ST community.[6] The burden of proof lies on the prosecution to prove all the ingredients of Section 3(1)(x).[7]

This part of the chapter is further divided into three sub-parts. The first sub-part examines the first two ingredients, the accused not being SC/ST members and the knowledge that the complainants were SC/ST members. The second sub-part examines the requirement of 'intentionally insulting' under Section 3(1)(x), and the third sub-part examines the requirement of 'public view'.

4.2.2 Afiliation with SC/ST community

As mentioned above, for a complaint to be valid under Section 3 of the Atrocities Act, the accused cannot themselves be SC/ST members. In addition, the accused should have had knowledge about the complainant being a member of the SC/ST community. In *State of Karnataka* v. *Irappa Dhareppa Hosamani*[8] (*Dhareppa Hosamani*), the High Court of Karnataka acquitted the accused, stating that there was no apparent 'knowledge' that the complainants were SC/ST members.[9] The High Court also stated that 'in the absence of knowledge…the question of intention to insult or intimidate the victims as members of the Scheduled Caste does not arise at all'.[10] This implies that it is necessary to establish both the status of the complainant as SC/ST members, and knowledge of such status to make out an offence under Section 3(1)(x).

4.2.3 'Intentionally insult or intimidates with intent to humiliate'

This sub-part discusses the requirement to 'intentionally insult' under Section 3. The first sub-part discusses the definitions of these terms, the second sub-part discusses the determination of 'intention', and the third sub-part discusses popular meanings conferred upon these terms.

4.2.3.1. Definitions

The terms 'insult' or 'intimidate' have not been defined in the Atrocities Act. The Calcutta High Court, in *Subal Chandra Ghosh v. State of West Bengal* (*Subal Ghosh*), referred to dictionaries,

and defined the word 'intent' as 'having the mind bent on an object, 'intentional' means done purposely'.[11] The High Court defined the term 'insult' as,

> **[T]o treat with abuse, insolence, or contempt; to commit an indignity upon, as to call the man liar. A gross indignity offered to another whether by act or by word is known as 'insult'. An insult is an indolent attack. It is more easy to imagine an affront where none was intended than an insult.**[12]

Humiliation, the High Court said, meant 'to lower the dignity of, painfully humbling, the state of being humble and free from pride. As per Oxford dictionary 'humiliate' means to cause a person to feel disgrace, humble condition or attitude of mind.'[13]

Certain caste names are used as insults that meet the standard under the Atrocities Act. This is illustrated by the case of *Arumugam Servai v. State of Tamil Nadu* (*Arumugam Servai*), in which the accused addressed the complainant during an altercation, saying 'you are a pallapayal and eating deadly cow beef'.[14] The Supreme Court found that the complainant belonged to the 'pallan' caste, and the word, which while denoting a specific caste, is also used as an insult. The Court held that the term 'pallapayal' was 'even more insulting' and constitutes an offence under Section 3 of the Atrocities Act.[15]

4.2.3.2. Intentionally insult

The intention must be for the speech to 'insult' or 'intimidate with intent to humiliate' the recipient who is from a SC or ST. In other words, the *mens rea* ingredient of this offence makes it necessary that there must be 'an element of *intentionally* committing the insult [emphasis added]'.[16]

The Supreme Court of India has interpreted intention in a manner that takes into account the history and purpose of the SC/ST Act. In *Swaran Singh* v. *State* (*Swaran Singh*), the Supreme Court pointed out that Section 3(1)(x) must be interpreted bearing in mind the purpose for which it was enacted.[17] The court found that calling a person 'Chamaar' (which is a caste name) is abusive language and is highly offensive, and that the use of the word these days is not to denote a caste but to intentionally insult and humiliate someone.[18] It compared the offensiveness of the work to the use of the word 'nigger' in America and stated that the word would certainly attract Section 3(1)(x), if from the context it appears to have been used in a derogatory sense to insult or humiliate a member of a SC/ST.[19]

Some of the High Courts have arguably not borne this in mind in their interpretations of Section 3(1)(x), which have been rather strict in the reading of 'intention'.

For example, the Punjab and Haryana High Court stated in *Dr Onkar Chander Jagpal* v. *Union Territory*[20] (*Onkar Chander Jagpal*), that:

> **It is a matter of common knowledge that such [abusive] words in a quarrel between the two enemies at a spur of moment, are common and in routine and cannot possibly be taken to be an offence under the Act. That means, merely uttering such words in the absence of intention/ mens-rea to humiliate the complainant in public view, every such quarrel or altercation between the members of non-scheduled caste & scheduled caste and if the imputations are grossly vague and perfunctory, would not, ipso facto, constitute acts of commission of offence, which are capable of cognizance under the Act.** [21]

The Calcutta High took a similar position in *Subal Chandra Ghosh* where it stated that merely

calling the complainant by his caste name does not constitute an offence under Section 3(1)(x), if there is nothing to show any intention of insulting or humiliating the complainant.[22]

4.2.3.3. Popular meanings

The Supreme Court did clarify that in ascertaining what constitutes an insult, the judiciary will not just look into the 'etymological meaning', but go beyond and take into account the 'popular meaning … which it has acquired by usage'.[23] The Supreme Court held in *Swaran Singh* that 'If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.'[24] The High Courts that chose not to see the use of caste names as intentional insults did not address this distinction directly. It is therefore difficult to say whether their ruling was a result of the popular meaning of the caste names in those particular cases not being insults.

4.2.4. 'In any place within public view'

This sub-part discusses the meaning of 'public view' as required by Section 3. It is further sub-divided into first, a comparison of public view and public place, followed by an examination of the terms 'public' and 'view' under Section 3.

4.2.4.1. Public view

Section 3(1)(x) requires the speech to have been uttered 'in any place within public view'. The Supreme Court has clarified that 'public view' is not the same as 'public place'. In *Swaran Singh*, it held that

> **[A] place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaonsabha or an instrumentality of the State, and not by private persons or private bodies.[25]**

The Supreme Court clarified that the gate of a house is within public view, as is a lawn that can be seen from the road. It further clarified that an offence committed inside a building, not ordinarily in public view, may be found to be in public view if some members of the public are present.[26]

The Supreme Court in *Asmathunnisa* v. *Andhra Pradesh*,[27] quoted the Kerala High Court's reasoning in *Krishnan Nayanar* v. *Kuttappan*[28] which argues that for a person to have been insulted in 'public view', the public must view the person being insulted. This implies that the person being insulted has to be present when the words are uttered.

The High Court analysed the term 'public view' by comparing it with Section 3(1)(ii) of the Atrocities Act, which criminalises insult to a member of a SC/ST 'by dumping excreta … in his premises or neighbourhood'. The High Court held that,

> **The words 'within public view', in my opinion, are referable only to the person insulted and not to the person who insulted him as the said expression is conspicuously absent in Sub-section (ii) of Section 3 of Act 3/1989. By avoiding to use the expression 'within public view' in Sub-section (ii), the Legislature, I feel, has created two different kinds of offences; an insult caused to a member of the Scheduled Castes or Scheduled Tribes, even in his absence, by dumping excreta etc. in his premises or neighbourhood, and an insult by words caused to a member of the Scheduled Castes or Scheduled Tribes 'within public view' which means at the time of the alleged insult the person insulted must be present as the expression 'within public view' indicates**

> **or otherwise the Legislature would have avoided the use of the said expression which it avoided in Sub-section (ii) or would have used the expression 'in any public place'.**
>
> ...

In *Gayatri* v. *State*, the Delhi High Court deliberated upon the possibility of a Facebook post with casteist slurs being in the 'public view'.[29] The accused had posted casteist slurs on their Facebook 'wall' and the privacy setting of their Facebook account was set to 'public'. The accused stated that while the content was set to 'public', it would only be considered to be public if members of the public had actually viewed it. In this instance, the accused alleged that only Facebook friends of the accused would have viewed the content, thereby excluding the post from the purview of 'public view' under Section 3(i)(x).[30]

The High Court stated that regardless of the settings being 'private' or 'public', insulting content on a Facebook 'wall' would be in 'public view'. In support of their opinion, the High Court relied on *Daya Bhatnagar* v. *State*[31] (*Daya Bhatnagar*), stating that 'public view' is understood to mean a place where public persons are present, howsoever small in number they may be'.[32] By extension of this argument, casteist content distributed over closed social media platforms like WhatsApp could also be in the 'public view'.[33] However, in the given case, an offence under Section 3(i)(x) could not be established, one of the reasons being that insulting content was considered to be directed at SC/ST communities largely, and not at the complainant specifically.[34]

4.2.4.2 'View'

In *Daya Bhatnagar*, the Delhi High Court provided an exhaustive account of the meaning and scope of 'public view'.[35] The High Court expanded the dictionary meaning of 'view' to include 'sight or vision and hearing', including both visual and aural aspects. The High Court also quoted with approval the view of Justice B.A. Khan, who was a part of the division bench of the Delhi High Court in the *Daya Bhatnagar* case, that 'public view' includes 'knowledge or accessibility also'. Therefore, the 'public' need not necessarily be present at the time the offending utterances were made, so long as they have 'knowledge or accessibility' of the utterances.

4.2.4.3 'Public'

On the universal legal meaning of the word 'public', the High Court admitted that judges have been confounded by it for several years.[36] However, in the context of the Atrocities Act, the High Court provided an added qualification that the 'public' must mean independent and impartial persons not interested in either of the parties. The High Court held that persons closely associated with the complainant would necessarily be excluded.[37] Quoting Justice B.A. Khan again, the High Court held that 'public' does not include persons 'linked with the complainant through any close relationship or any business, commercial or any other vested interest'.[38]

4.2.5. Conclusion

The Atrocities Act uses an interesting formula for hate speech, which seems unique in comparison to other Indian laws attempting to regulate hate speech. This Act only punishes speech directed at a defined marginalised group, the Scheduled Caste or Scheduled Tribe community. In addition, it only criminalises such speech if uttered by someone who is not a member of the marginalised group. The speaker and the target of the speech are therefore defined, bearing historic violence and oppression in mind.

The ingredients of the hate speech offence contained in Section 3(1)(x) of the Atrocities Act are also worth considering in some detail. The 'public view' requirement makes it clear that inter-personal offences are not being addressed. Some ingredients of the offence are likely to make it difficult for the prosecution to prove the offence. The *mens rea* component for example, has led to the judiciary dismissing cases in which members of the SC/ST community were called by caste names. Similarly, the interpretation of 'public' to exclude those closely associated with the complainant might also exclude cases in which a person is insulted and humiliated in front of their extended family, neighbours or co-workers.

It is also important to bear in mind that the burden of proof rests on the prosecution to prove the ingredients of Section 3(1)(x). Poor documentation or record-keeping by the state would mean that members of SC/ST communities get no redress for insult.

Recently, the scope of the Atrocities Act has been expanded to include content posted on social media websites as well. This judgment (*Gayatri* v. *State*) has been discussed in sub-part 4.2.4.1 above.

Therefore, although the law is broadly worded and unique in its recognition of the disparity in power between those it protects and non-members of this group, the procedure to prove and prosecute an offence is onerous and in control of the state.

4.3. Protection of Civil Rights Act, 1955

4.3.1. Introduction

The Protection of Civil Rights Act, 1955(PCR) prohibits the preaching or practice of untouchability.[39] Under this statute, insulting or attempting to insult any person of a schedule caste on the grounds of untouchability is a punishable offence.[40] Inciting or encouraging any person, class of persons or the public to practice untouchability is also an offence.[41] This part of the chapter will explore the applicability of the PCR to speech acts.

> **Section 7 - Punishment for other offences arising out of 'untouchability'**
>
> **(1) Whoever--**
>
> **(c) by words, either spoken or written, or by signs or by visible representations or otherwise, incites or encourages any person or class of persons or the public generally to practice 'untouchability' in any form whatsoever; [or]**
>
> **(d) insults or attempts to insult, on the ground of 'untouchability', a member of a Scheduled Caste;**
>
> **shall be punishable with imprisonment for a term of not less than one month and not more than six months, and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees.**
>
> **.....**
>
> **[Explanation II.—For the purpose of clause (c) a person shall be deemed to incite or encourage the practice of 'untouchability'--**
>
> **(i) if he, directly or indirectly, preaches 'untouchability' or its practice in any form; or**
>
> **(ii) if he justifies, whether on historical, philosophical or religious grounds or on the ground of any tradition of the caste**

systetm or on any other ground, the practice of 'untouchability' in any form.]

There are two separate offences emerging from Section 7 of the PCR that could be applicable to hate speech. These are Section 7(1)(c), which punishes incitement or encouragement to practice untouchability, and Section 7(1)(d) which punishes insulting a member of a Scheduled Caste on grounds of untouchability. There is not much case law that discusses Section 7(1)(c) of PCR. One of the few instances of Section 7(1)(c) being used was in *Sarita Shyam Dake* v. *Sr Police Inspector.* The Bombay High Court in this case ruled that 'merely because somebody is insulted by referring to his caste or otherwise, it cannot be said to constitute an offence under Section 7(1)(c) of The Civil Rights Act'.[42]

The sub-parts below discuss Section 7(1)(d) of the PCR. In the first sub-part, we discuss the standard of 'inciting or encouraging the practice of untouchability', in the second sub-part we discuss 'insulting or attempting to insult on grounds of 'untouchability' and in the third sub-part we discuss the requirement of *mens rea*.

4.3.2. Inciting or encouraging the practice of untouchability

In *Laxman Jayaram* v. *State of Maharashtra* (*Laxman Jayaram*), the Bombay High Court examined the question of whether every insult to a member of the schedule caste amounts to an offence under Section 7(1)(d) of the PCR.[43] The High Court held that it does not, unless such an insult or attempt to insult a member of the schedule caste is on the grounds of 'untouchability'. In this case, the accused referred to the complainant by his caste 'mahar'. The Court held that use of this term, without intending to preach or practice untouchability,[44] is not an offence under Section 7. It was held that the words used had to be examined in their context and background. The Court also examined Section 12 of the statute, which creates a presumption that the insult intended by the accused was on the grounds of 'untouchability'. The High Court held that Section 12 treats the onus on the prosecution as discharged if it proves the case by a 'preponderance of probability'. The prosecution did not have to prove the applicability of Section 12 beyond reasonable doubt.

4.3.3. Insulting or attempting to insult on grounds of 'untouchability'

In *M.A. Kuttappan* v. *E. Krishnan Nayanar*, the respondent allegedly referred to the petitioner (an MLA) as 'that Harijan MLA' at a public event.[45] The Court considered whether this act would amount to an offence under Section 7(1)(d). It was held that the act would not amount to an offence, since the submission was unable to establish that the effect of the words was to insult the petitioner on the grounds of untouchability.

Further, the Court held that the speech would not be covered under Section 7(1)(d) since there was no indication of the words 'encouraging his audience to practice untouchability (*sic*)'. The Court also stated that the speech did not establish that the respondent practiced untouchability himself.

4.3.4. *Mens rea*

Although the word intention is not used in Section 7 of the PCR, the requirement of *mens rea* is read into it by the judiciary. In *Laxman Jayaram*[46], the Bombay High Court stated that 'there must be specific intention of the person to insult or attempt to insult. He must have *mens rea* to that effect. It is an insult of a species. Such insult or attempt to insult must be referable to preaching and practice of untouchability'.[47]

4.3.5. Conclusion

The standard under PCR requires the insult or attempt to insult to be with the intent to preach or practise untouchability. Further, the complainant must prove by a 'preponderance of probability' that the accused acted in such a manner.

The language used under the PCR extends to all kinds of speech that reinforce and perpetuate discrimination against members of the Scheduled Castes. Arguably the fact that this speech is only punishable when spoken by a non-member of a Scheduled Caste should operate as a safeguard.[48]

However, the case law may be seen as an illustration of the pitfalls of using the law to protect a marginalised community, while the legal institutions remain captured by the communities with power. The burden of proof in the PCR rests with the prosecution, over which the complainant has limited control. The cases suggest that the judiciary has read *mens rea* into Section 7 and has managed to undo even the presumption of intention created by Section 12. It remains unclear what kind of case would meet the threshold for an offence under Section 7(1)(c) since it has proved difficult to find reported cases from the Supreme Court or from High Courts that suggest that the judiciary has found that such an offence has been committed. This is at odds with the broad language used in the statute, and with the widespread practice of untouchability in India.[49]

4.4. Customs Act, 1962

4.4.1. Introduction

Among the lesser known laws used to pre-censor information in India, is the Customs Act, 1962 (Customs Act). This legislation lays down rules and regulations that permit the Central Government to prohibit the export or import of goods of specified description for purposes specified in the Customs Act. Section 11(2)(b) of the was most famously invoked in 1988 to prohibit the import of Satanic Verses, Salman Rushdie's controversial novel.[50] Days after the book was released in the UK, the central government used Section 11 to prevent copies of the book from making their way into the country.[51]

The Customs Act also provides details regarding the detection and prevention of such prohibited acts.

4.4.2. The power to prohibit the importation of publications

Section 11(1) of the Customs Act confers the power to prohibit import of goods and reads as follows:

> **(1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.**

Section 11(2) lists the purposes for which import may be banned. Among these purposes is Section 11(2)(b) the 'maintenance of public order and standards of decency or morality'. Therefore, Section 11 permits the central government to prohibit the import of goods of a specified description for the maintenance of public order through the publication of a notification in the gazette.

The first sub-part discusses the central government's power to prohibit the import of

publications and the second sub-part discusses the confiscation of prohibited goods.

4.4.2.1. Power of the central government to prohibit importation of publications

Another prominent example of a publication being pre-censored occurred in 1978, when the writings of Mao Zedong, imported from China were prohibited. These writings were confiscated under Section 111 of the Customs Act for being in violation of a notification prohibiting their import.[52] Details regarding the confiscation of prohibited goods that have already been imported may be found in Section 111 of the Customs Act.

Although the Customs Act only permits the government to prohibit the import of goods of 'specified description', the actual notifications prohibiting the import of books containing potentially harmful speech are very broadly worded.

For example, notification no. 99 dated 9 June 1955 prohibits the import of:

> **any book, magazine, pamphlet, leaflet, newspaper or other like publication which consists wholly or mainly of stories told in pictures (with or without the addition of written matter), being stories-**
>
> **(i) portraying the commission of offences; or**
>
> **(ii) portraying acts of violence or cruelty; or**
>
> **(iii) portraying incidents of a repulsive or horrible nature; or**
>
> **(iv) glorifying vice;**
>
> **in such a way that the publication as a whole would tend to corrupt any person under the age of twenty years into whose hands it might fall (whether by inciting, or encouraging him to commit offences or acts of violence or cruelty or by rendering him irresponsive to the finer side of human nature or to moral values or in any other manner whatsoever)**

Similarly, notification no. 77 dated 22 September 1956 prohibits the import of:

> **Any newspaper, news-sheet, book or other document containing words, signs or visible representations which are likely to :**
>
> **(i) incite or encourage any person to resort to violence or sabotage for the purpose of overthrowing or undermining the Government established by law in India or in any State thereof its authority in any area; or**
>
> **(ii) incite or encourage any person to commit murder, sabotage or any offence involving violence; or**
>
> **(iii) incite or encourage any person to interfere with the supply and distribution of food or other essential commodities or with essential services; or**
>
> **(iv) seduce any member of any of the armed forces of the Union or of the police forces from his allegiance or his duty or prejudice the recruiting of persons to serve in any such forces or prejudice the discipline of any such forces; or**
>
> **(v) promote feelings of enmity or hatred between different sections of the people of India; or**
>
> **(vi) which are grossly indecent, or scurrilous or obscene or intended for blackmail.**

4.4.2.2. Confiscation of prohibited goods

Goods imported in violation of Section 11 are liable to be confiscated under Section 111 of the Customs Act.

The Supreme Court has clarified that where notifications are worded as broadly as the examples stated above, the confiscation order must specify or refer to the words or portions having the effect contemplated by the notifications. Failing this, the confiscation order is not sustainable.[53]

4.4.3. Conclusion

Broadly worded notifications permitting customs officers to confiscate publications have existed for decades in India. The Supreme Court missed the opportunity to question the broadly worded notification and confined itself to a discussion of the confiscation order in *Gajanan Visheshwar Birjur* v. *Union of India.*[54] As a result of this, it remains open to customs officers to issue such confiscation orders.

It should also be noted that it took eighteen years for the case about Mao Zedong's writings to reach the Supreme Court.

4.5. Indecent Representation Of Women (Prohibition) Act, 1986

4.5.1. Introduction

This part discusses the law within the Indecent Representation of Women (Prohibition) Act, 1986 relevant to hate speech. The Indecent Representation of Women (Prohibition) Act prohibits 'derogatory, denigratory or depraved' portrayals of women in books, advertisements, paintings and pamphlets, amongst other media.[55] The definition of 'indecent representation of women' includes depictions which are 'likely to deprave, corrupt or injure the public morality or morals'.[56] 'Indecent representation' inciting violence or the likelihood of violence is not addressed in the statute.

4.5.2. Instances of 'hate speech'

In 2013, local authorities in Mumbai attempted to ban the display of lingerie-clad mannequins, stating that they contributed to 'sex crimes' against women.[57] The matter died down after the municipal corporation held that only the state government would have jurisdiction to order such a ban and not local councillors (members of the Brihanmumbai Municipal Corporation).

Under the Indecent Representation of Women's (Prohibition) Act, the judiciary has also laid out how indecent representation can be prohibited in various media. In *Suo Moto* v. *State of Rajasthan*, the High Court of Rajasthan laid down how various news agencies and cable television channels could ensure compliance with the law.[58]

4.5.3. Conclusion

While the Act does not directly address hate speech, there have been discussions about introducing safeguards in the Act to prevent violence against women. In a Parliamentary Standing Committee Report on the Indecent Representation of Women (Prohibition) Amendment Bill, 2012, the committee made recommendations about the pending bill.[59] They agreed with assertions made by certain organisations in this regard. For instance, the Ahmedabad Women's Action Group suggested that the 'use of women's body in a manner that propagated stereotypes' should be prohibited.[60] They stated that stereotypes of that nature were one of the 'crucial factors for the continued perpetration of violence against women'.[61]

4.6. The Religious Institutions

(Prevention Of Misuse) Act, 1988

4.6.1. Introduction

The Religious Institutions (Prevention of Misuse) Act, 1988 was enacted to prevent the misuse of religious institutions for political and other purposes.[62] The Act proscribes religious institutions from promoting disharmony, enmity, hatred or ill-will between various classes of people. This Act has been invoked in instances where religious institutions have been used to propagate hate speech. Section 3 of the Act, which reads as below, is relevant.

> **3. No religious institution or manager thereof shall use or allow the use of any premises belonging to, or under the control of, the institution--**
>
> **…**
>
> **(g) for the doing of any act which promotes or attempts to promote disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or**
>
> **(h) for the carrying on of any activity prejudicial to the sovereignty, unity and integrity of India.**

This legislation was enacted by the Parliament in the wake of Operation Blue Star where the Indian army took control of the Golden Temple in Amritsar, a place of worship for Sikhs, since the premises of the Golden Temple were being used to store ammunition.[63]

4.6.2. 'Use' of any premises

In *K.P.S. Sathyamoorthy* v. *State of Tamil Nadu, through the Inspector of Police*, *Protection of Civil Right Unit, The District Superintendent of Police*, the petitioner filed a complaint against the accused for a press statement in the nature of a circular, alleging that the entire statement was to create enmity, hatred and ill-will between different religious classes, castes and communities.[64] The complaint was filed under Section 3(g) of the Religious Institutions (Prevention of Misuse) Act. While dismissing the petition, the Madras High Court held that Section 3(g) would not come into play since the use of the premises or religious institution as a place or instrument for promoting disharmony or hatred or ill-will is a key ingredient of Section 3(g). The High Court held that,

> **That the framers of law have not intended an isolated event or utterance but made use of the term 'use', which would mean habitual, well-designed with continuity making use of the premises or institution for repeated commission of the act in the usual manner and therefore an isolated or casual utterance or reference made cannot be construed to mean using the premises or the religious institution since the term 'use', at this juncture, has got wider connotation in the context of the case.**

The High Court further held that a reading of the remarks indicates that they were made with an honest intention to promote harmony. Since the use of religious institution was not established, the complaint under Section 3(g) was dismissed.

4.7. The National Security Act, 1980

4.7.1. Introduction

The National Security Act, 1980(NSA) permits the government to order preventive detention of people in the interest of 'public order'.[65] This part discusses the relevant portion of the NSA as may be applicable to hate speech. It

lays down the standards used by the judiciary to establish instances of hate speech that are threats to national security such that they meet the threshold for action under this statute.

Section 3(2) lays down the power of the central and state governments:

> **3. Power to make orders detaining persons:**
>
> **(2) The Central Government or the State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State Government or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.**

Preventive detention of this nature is protected under Article 22(3) of the Constitution. While Article 22(1) and 22(2) prohibit detention without procedural safeguards, Article 22(3) makes an exception for preventive detention laws.

In 2009, an order was issued under Section 3(2) of the NSA to detain politician Varun Gandhi for his communal remarks. Gandhi's remarks allegedly called for and led to violent attacks as well.[66] The reason offered for invoking the NSA was that Gandhi was disturbing 'public administration and peace'.[67] In 2016, Kamlesh Tiwari, a member of a Hindu organisation was detained under the NSA for circulating disparaging cartoons of Prophet Mohammed.[68]

Commentators have been very critical of preventive detention and have argued that the NSA is a colonial relic, used in the past to detain 'freedom fighters', and hence lacks appropriate safeguards.[69] The judiciary has seen a provocative public speech during a communally tense period to be prejudicial to the maintenance of public order as envisaged by Section 3(2).[70]

This part is further divided into two sub-parts; the ingredients of Section 3(2), the procedural requirements and the conclusion. The first sub-part is further divided into the ingredients like subjective satisfaction and the maintenance of public order. The second sub-part discusses the procedure to implement a preventive detention order.

4.7.2. Ingredients

This sub-part discusses the ingredients of Section 3(2) of the NSA. It is further divided into first, the ingredient of 'subjective satisfaction' and second, the 'maintenance of public order'.

4.7.2.1. 'Subjective satisfaction'

In *Shafiq Ahmed* v. *District Magistrate, Meerut*, the Supreme Court considered the validity of a detention order for Shafiq Ahmed, who had allegedly made communal remarks.[71] The Court considered the 'subjective satisfaction' of the district magistrate and whether prompt action against Ahmed was taken in the face of communal violence.[72] One of the issues was whether the state government had acted promptly and whether prompt action validates a detention order. It was held that 'prompt action was imperative in a situation of communal tension'.[73] The Supreme Court held that a delay in passing the order of detention implied that the district magistrate's decision was not based on 'real or genuine' subjective satisfaction.[74]

The judiciary does not seem to have identifiers or standards for 'subjective satisfaction'.

4.7.2.2. 'Maintenance of public order'

In *Sujeet Kumar Singh* v. *Union of India*, the definition of 'public order' was deliberated upon.[75] In doing so, this Court goes into the difference between 'law and order' and 'public order'. The Supreme Court stated that even if an act is not against the law and order of society, it could be held to be against the 'public order'. According to the Supreme Court, when communal tensions are high, seemingly harmless activities could be harmful.

4.7.3. Procedural requirements: 'application of mind' by the detaining authority

This sub-part is further divided into – first, the judiciary's review of detention orders. Second, the functioning of the advisory board and third, the right of the detained person to appear before the advisory board.

In *State of Punjab* v. *Sukhpal Singh*, the respondent had been detained for making provocative communal speeches.[76] The respondent, who was already in jail, was detained under Section 3, read along with Section 14A.[77] Section 14A states that an order of detention can be extended beyond 3 months, without the opinion of the advisory board. The order can be extended to prevent the detained person from acting in a manner prejudicial to the 'defence of India, the security of India or the security of the State or the maintenance of public order'.

Sukhpal Singh argued that since there was no criminal complaint filed against him when the speeches were delivered, there was no 'application of mind' or 'subjective satisfaction' to support the state's apprehension.[78] He implied that if the state believed that he would continue to affect the maintenance of public order, they would have filed a criminal complaint.[79] The Punjab and Haryana High Court accepted this argument.

The Supreme Court discussed whether filing a criminal charge against the detained was a sign of the state 'applying its mind' and whether it proved the urgency of the detention.[80] The Court held that the state's apprehension would not have to be proved by a criminal charge; its 'suspicion or reasonable probability' would suffice.[81] It further stated that 'the anticipated behaviour of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention'.[82] Lastly, the Court stated that a criminal prosecution might not have been effective since the detained person might have 'influence over witnesses' and a situation could arise where no one would be willing to depose against him.[83] Under these circumstances, preventive detention was justified.

In *Abdul Majeeth* v. *The State of Tamil Nadu* (*Abdul Majeeth*), the High Court of Madras set aside a detention order based on its finding that there was no material and no valid grounds for the detention order.[84] This was in the context of a single declamatory speech where the detaining order did not contain material to support the grounds of detention.

4.7.3.1. Reviewing detention orders

In *Abdul Majeeth*, the High Court of Madras discussed the power of the judiciary to review a detention order passed by the executive.[85] The respondents, relying on *Hemlata* v. *State of Maharashtra* (*Hemlata*),[86] stated 'that the court's jurisdiction in cases of this kind begins and ends with finding out whether the detention procedures have or have not been complied with'.[87] The High Court admitted:

> **that detention orders are exclusively the province of the executive Government, and their subjective satisfaction cannot**

> **be substituted by the Court's own satisfaction. But preventive detention, as a permitted mode of depriving a man of his personal liberty is yet subject not only to the severe conditions and safe-guards in the enabling statute itself, but also the guarantee laid down in the Constitution.**[88]

However, they eventually held that the judiciary does have the power to review the contents:

> **It is all very well to say that detention is a matter of subjective satisfaction of the executive. But subjective satisfaction cannot do away either with the detenu's constitutional guarantees or the jurisdiction of the courts to enforce them…. It becomes clear therefore, on principle, that the superior courts who have the responsibility to administer the constitutional provisions must always have the doors of perception open in order to exercise their jurisdiction.**[89]

4.7.3.2 Functioning of the advisory board

Section 8 states that the detained person must be informed of the 'grounds of the order of detention' within five days of being detained and in exceptional circumstances, within 10 days. Knowledge of the grounds of the order of detention is necessary for the detained person as it forms the basis of their representation to the advisory board. The advisory board includes 3 members, 'who are, or have been, or are qualified to be appointed, as Judges of a High Court'.[90]

Under Section 10, the appropriate authority must provide the grounds of the order of detention, along with the representation made by the detained, to the advisory board, within three weeks of the detention date. The advisory board then, 'submits a report to the appropriate Government within seven weeks from the date of detention of the person concerned'.[91] The appropriate Government considers the findings in the report to confirm the order of detention.

4.7.3.3 Right of the detained person to appear before advisory board

In *State of Punjab* v. *Jagdev Singh Talwandi*, the Supreme Court deliberated upon the grounds of detention and the respondent's right to contest the order of detention.[92] In this case, the respondent was detained for his 'provocative' speeches, allegedly inciting followers of the Sikh religion to act violently against the police force. As a consequence, the state government of Punjab ordered his detention.

According to Article 22(5) of the Constitution, detained persons have the following rights:

> **(1) To be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority and (2) to be afforded the earliest opportunity of making a representation against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation which on being considered may obtain relief to him.**

The respondent stated that the grounds of detention were not supplemented with enough material for him to present his case to the advisory board. The Supreme Court held that in this instance, the detained respondent had 'sufficient particulars to enable him to make a representation', stating that even though supplementary material was not provided, the particulars given mentioned an entire 'gamut of facts' for the detained to make a well-informed representation.

4.7.4. Conclusion

This part lays down the standards established by the judiciary to ascertain whether certain speeches or demonstrations would be dangerous to national security, and whether preventive detention was justified in such cases. In determining this, the judiciary relied on 'prompt action' taken by the government, rights of the detained person and 'application of mind' by the detaining authority.

The NSA is used to arrest protesters[93] and has also been used to apprehend citizens for 'cow slaughter'.[94] These arrests have been criticised for being outside the scope of the NSA.[95] In addition, there is no scheme in place to award compensation to those wrongfully detained.

4.8. The HIV/AIDS Act, 2017

The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (HIV/AIDs Act) was drafted to regulate welfare benefits available to people with HIV/AIDS.[96] Prior to the HIV/AIDs Act, such benefits were only available through executive orders.[97] The law also seeks to prohibit hateful and discriminatory propaganda against people with HIV/AIDS.[98] Section 4 of the HIV/AIDs Act lays down the relevant portion:

> **Prohibition of Certain Acts. –**
>
> **No person shall, by words, either spoken or written, publish, propagate, advocate or communicate by signs or by visible representation or otherwise the feelings of hatred against any protected persons or group of protected person in general or specifically or disseminate, broadcast or display any information, advertisement or notice, which may reasonably be construed to demonstrate an intention to propagate hatred or which is likely to expose protected persons to hatred, discrimination or physical violence.[99]**

'Protected persons' include any person who is HIV positive, anyone who lives cohabits or resides with a person who is HIV positive, or has lived, cohabited or resided with a person who is HIV positive.[100] The HIV/AIDs Act is an important step toward ensuring protection for certain minority communities. The Statement of Objects and Reasons specifies that HIV/AIDS is 'concentrated' amongst 'female sex workers, men-who-have-sex-with-men and injecting drug users'. Similarly the Joint United Nations Programme on HIV/AIDS has stated that the groups of people most affected by HIV/AIDS in India are 'sex workers', 'gay men and other men who have sex with men' and 'transgender people', among others.[101]

These groups of people do not have adequate legal protection or a concrete recognition of their rights in the country. For 'sex workers', the only form of protection available is The Immoral Traffic (Prevention) Act, 1956, which criminalises trafficking, but does not offer protection from discrimination. This statute has been criticised for conflating sex work with trafficking, and infringing on the rights of sex workers.[102] Sex workers in India are routinely subject to societal stigma, discrimination and violence.[103] This is further exacerbated for those living with HIV/AIDS.[104] In addition, members of the LGBTQI community are often subject to violence and face discrimination as well.[105]

In 2017, the Law Commission of India released a report on hate speech. This report also addressed the LGBTQI community, with recommendations to prohibit hate speech on the grounds of 'sex, gender identity and sexual orientation'.[106] Both the recommendations made by the Law Commission, and the HIV/

AIDs Act apply the standard of 'incitement to discrimination' for speech to qualify as hate speech, and not merely incitement to violence.[107]

1 *Swaran Singh* v. *State*, (2008) 8 SCC 435.

2 *Swaran Singh* (n. 1).

3 *Dr Onkar Chander Jagpal* v. *Union Territory*, Crl M. No. M – 54307/2006, decided on 23 January 2012, High Court of Punjab & Haryana, para 13; See also, *Subal Chandra Ghosh* v. *State of West Bengal* C.R.R. No. 2485 of 2014, High Court of Calcutta, para 17.

4 *Rakeysh Omprakash Mehra* v. *Govt of NCT of Delhi,* W.P.(CRL) 1188/2009, para 9

5 *Mukesh Kumar Saini* v. *State (Delhi Administration),* 2001 CrlLJ 4587, para 7.

6 *Gorige Pentaiah* v. *State of Andhra Pradesh,* Criminal Appeal No. 1311 of 2008 (Arising out of SLP (Crl.) No. 3743/2007), para 8.

7 *State of Karnataka* v. *Irappa Dhareppa Hosamani,* 2001 CriLJ 3566, para 9,10,11; R.N. Choudhry and S.K.A. Jaisi Naqvi, *Commentary on the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* (2nd edn, Orient Publishing Company 2012), p. 63.

8 *Dhareppa Hosamani* (n. 7).

9 *Dhareppa Hosamani* (n. 7), para 9.

10 *Dhareppa Hosamani* (n. 7), paras 10-11.

11 *Subal Ghosh* (n. 3), para 20.

12 *Subal Ghosh* (n. 3), para 20.

13 *Subal Ghosh* (n. 3), para 20.

14 *Arumugam Servai* v. *State of Tamil Nadu* (2011) 2 SCC (Cri) 993.

15 *Arumugam Servai* (n. 14).

16 *Subal Ghosh* (n. 3), para 20.

17 *Swaran Singh* (n. 1).

18 *Swaran Singh* (n. 1), para 21.

19 *Swaran Singh (*n. 1), para 30.

20 *Dr Onkar Chander Jagpal* v. *Union Territory,* Crl M. No. M – 54307/2006, decided on Jan. 23, 2012, High Court of Punjab & Haryana, para 15.

21 *Onkar Chander Jagpal* (n. 20), para 16.

22 *Subal Ghosh* (n. 3), para 21.

23 *Swaran Singh* (n. 1), para 22.

24 *Swaran Singh* (n. 1), para 22.

25 *Swaran Singh* (n. 1), para 28.

26 *Swaran Singh* (n. 1), para 28.

27 *Asmathunnisa* v. *State of A.P.,* (2011) 11 SCC 259, para 9.

28 *E. Krishnan Nayanar* v. *M.A. Kuttappan,* 1997 CriLJ 2036, paras 12-13, 18.

29 *Gayatri* v. *State,* 2018 ALL MR(Cri)95.

30 *Gayatri* (n. 29), para 21.

31 *Daya Bhatnagar* v. *State,* 109 (2004) DLT 915.

32 *Daya Bhatnagar* (n. 31), para 42.

33 *Abhinav Garg,* 'Social Media slurs on SC/ST punishable: HC' *The Times of India* (New Delhi, 14 July 2017) <https://timesofindia.indiatimes.com/india/social-media-slurs-on-sc/st-punishable-hc/articleshow/59432794.cms> accessed 19 April 2018.

34 *Daya Bhatnagar* (n. 31), para 37.

35 *Daya Bhatnagar* (n. 31).

36 *Daya Bhatnagar* (n. 31), para 17.

37 *Daya Bhatnagar* (n. 31), para 19.

38 *Daya Bhatnagar (*n. 31), para 19, quoting Justice B.A. Khan.
.

39 Protection of Civil Rights Act 1955, preamble.

40 *M.A. Kuttappan* v. *E. Krishnan Nayanar,* (2004) 4 SCC 231.

41 Protection of Civil Rights Act 1955, section 7(1)(c).

42 *Sarita Shyam Dake* v. *Sr Police Inspector*, 2008(3) MhL 385, para 14

43 *Laxman Jayaram* v. *State of Maharashtra* 1981 CriLJ 387.

44 *Laxman Jayaram* (n. 43).

45 *Kuttappan* (n. 40).

46 *Laxman Jayaram* (n. 43).

47 *Laxman Jayaram* (n. 43), para 12.

48 *State of Karnataka* v. *Shanthappa*, 1997 CriLJ 2802, para 8.

49 Seema Chishti, 'Biggest Caste Survey: One in four Indians admit to practicing untouchability' *The Indian Express* (New Delhi, 29 November 2014) <http://indianexpress.com/article/india/india-others/one-in-four-indians-admit-to-practising-untouchability-bigest-caste-survey/> accessed 19 April 2018.

50 Priscilla Jebaraj, 'Only import of book prohibited, say legal experts' The Hindu (New Delhi, 23 January 2016) *The Hindu* <http://www.thehindu.com/news/national/only-import-of-book-pro-

hibited-say-legal-experts/article2826248.ece> accessed 19 April 2018.

51 Jebaraj (n. 50).

52 *Gajanan Visheshwar Birjur* v. *Union of India*, (1994) 5 SCC 550.

53 *Gajanan Visheshwar Birjur* (n. 52), para 8.

54 *Gajanan Visheshwar Birjur* (n. 52).

55 The Indecent Representation of Women (Prohibition) Act 1986, section 2(c).

56 The Indecent Representation of Women (Prohibition) Act 1986, section 2(c).

57 Sharwari Patwa, 'To fight sex-crimes, ban lingerie mannequins: BMC' *The Indian Express* (Mumbai, 29 May 2013) <http://archive.indianexpress.com/news/to-fight-sex-crimes-ban-lingerie-mannequins-bmc/1121529/> accessed 19 April 2018.

58 *Suo Moto* v. *State of Rajasthan* 2005 AIR Raj 30.

59 Department Related Parliamentary Standing Committee on Human Resource Development, *The Indecent Representation of Women (Prohibition) Amendment Bill, 2012* (Rajya Sabha, Report No. 258, 2012) para 3.17.

60 Parliamentary Standing Committee on Human Resource Development (n. 59).

61 Parliamentary Standing Committee on Human Resource Development (n. 59).

62 The Religious Institutions (Prevention of Misuse) Act 1988.

63 C. Christine Fair and Sumit Ganguly (ed.), *Treading on Hallowed Ground: Counter insurgency operations in sacred spaces* (Oxford University Press, 2008).

64 *K.P.S. Sathyamoorthy* v. *State of Tamil Nadu*, *through the Inspector of Police*, Protection of Civil Right Unit, The District Superintendent of Police 2003(2) CTC 666.

65 The National Security Act 1980, section 3.

66 Subhash Mishra, 'NSA slapped on Varun Gandhi' *India Today* (Lucknow, 29 March 2009) <http://indiatoday.intoday.in/story/NSA+slapped+on+Varun+Gandhi/1/34428.html> accessed 17 April 2018; 'UP government withdraws NSA against Varun Gandhi' NDTV (New Delhi, 15 May 2009) <http://www.ndtv.com/india-news/up-government-withdraws-nsa-against-varun-gandhi-394219> accessed 17 April 2018.

67 'Varun Gandhi booked under National Security Act' *Hindustan Times* (India, 29 March 2009) <http://www.hindustantimes.com/india/varun-gandhi-booked-under-national-security-act/story-4rVU3oHp82EevbpUVAZW7H.html> accessed 19 April 2018.

68 Manish Sahu, '"Anti-Prophet" remarks: Allahabad High Court quashes NSA against Hindu Mahasabha leader' The Indian Express (Lucknow, 19 October 2016) <http://indianexpress.com/article/india/india-news-india/anti-prophet-remarks-allahabad-high-court-quashes-nsa-against-hindu-mahasabha-leader-3058995/> accessed 19 April 2018.

69 Alok Prasanna Kumar, 'Kamlesh Tiwari's arrest for anti-Prophet remark shows why India needs to revisit colonial-era laws' Scroll.in (India, 14 October 2016) <http://scroll.in/article/818717/kamlesh-tiwaris-arrest-for-anti-prophet-remark-shows-india-why-it-needs-to-revisit-colonial-era-law> accessed 19 April 2018.

70 *Shafiq Ahmed* v. *District Magistrate, Meerut*, 1989 SCR Supl. (1) 56; *State of Punjab* v. *Sukhpal Singh*, 1989 SCR Supl. (1) 420.

71 *Shafiq Ahmad* (n. 70).

72 *Shafiq Ahmad* (n. 70), paras 4, 5.

73 *Shafiq Ahmad* (n. 70), paras 6.

74 *Shafiq Ahmad* (n. 70), paras 6.

75 *Sujeet Kumar Singh* v. *Union of India* 2006 (64) ALR 877.

76 *Sukhpal Singh* (n. 70).

77 *Sukhpal Singh* (n. 70), para 3.

78 *Sukhpal Singh* (n. 70), para 6.

79 *Sukhpal Singh* (n. 70), para 6.

80 *Sukhpal Singh* (n. 70), para 8.

81 *Sukhpal Singh* (n. 70), para 8.

82 *Sukhpal Singh* (n. 70), para 9.

83 *Sukhpal Singh* (n. 70), para 9.

84 *Abdul Majeeth* v. *The State of Tamil Nadu* 1983 CriLJ 912.

85 *Abdul Majeeth* (n. 84).

86 *Hemlata* v. *State of Maharashtra* 1982 CriLJ 150.

87 *Hemlata* (n. 86), para 5.

88 *Hemlata* (n. 86), para 6.

89 *Hemlata* (n. 86), para 6.

90 The National Security Act 1980, section 9.

91 The National Security Act 1980, section 11.

92 *State of Punjab* v. *Jagdev Singh Talwandi* 1984 SCR (2) 50.

93 'Farmers Rights Activist Akhil Gogoi arrested under National Security Act' *The Wire* (New Delhi, 26 September 2016) <https://thewire.in/181523/assam-farmers-rights-activist-akhil-gogoi-arrested-under-national-security-act/> accessed 19 April 2018.

94 'Uttar Pradesh Police books three men under National Security Act for cow slaughter in Muzaffarnagar' *FirstPost* (Muzaffarnagar, 16 August 2017) <http://www.firstpost.com/india/uttar-pradesh-police-books-three-men-under-national-security-act-for-cow-slaughter-in-muzaffarnagar-3936735.html> accessed 19 April 2018.

95 Ravi Nair, 'National Security Act: Obscuring the Flaws in India's Criminal Justice System' *The Wire* (India, 5 March 2018) <https://thewire.in/caste/national-security-act-obscuring-flaws-in-dias-criminal-justice-system> accessed 19 April 2018.

96 'Cabinet Approves Amendment to HIV/AIDS Bill' T*he Economic Times* (New Delhi, 5 October 2016) <http://economictimes.indiatimes.com/news/politics-and-nation/cabinet-approves-amend-

ment-to-hiv/aids-bill/articleshow/54693650.cms> accessed 19 April 2018.

97 'Cabinet Approves Amendment to HIV/AIDS Bill' *The Economic Times* (n. 96).

98 The HIV/AIDS (Prevention and Control) Act 2017, section 4.

99 The HIV/AIDS (Prevention and Control) Act 2017, section 4.

100 The HIV/AIDS (Prevention and Control) Act 2017, section 2(s).

101 UNAIDS, 'Country Overview: India' <http://www.unaids.org/en/regionscountries/countries/india> accessed 17 April 2018.

102 Rasheeda Manjoo, 'Report of the Special Rapporteur on Violence Against Women its causes and consequences' A/HRC/26/38/Add. 1 (Human Rights Council 26th session, 11 December 2014), para 20.

103 Manjoo (n. 102).

104 NSWP, 'Briefing Paper: Stigma and Discrimination Experienced by Sex Workers Living with HIV' <http://www.nswp.org/sites/nswp.org/files/Stigma%20and%20Discrimination%20Experienced%20by%20Sex%20Workers%20Living%20with%20HIV%2C%20NSWP%20-%20December%202015.pdf> accessed 19 April 2018.

105 Meenakshi Ganguly, 'Dispatches: Tackling India's Archaic LGBT Law' (*Human Right Watch 6 January 2016*) <https://www.hrw.org/news/2016/01/06/dispatches-tackling-indias-archaic-lgbt-law> accessed 17 April 2018; Anish Goel and Elise-Carlson Reiner, 'India: A Microcosm of Tensions on LGBT Rights' Foreign Policy (India, 10 December 2015) <http://foreignpolicy.com/2015/12/10/india-a-microcosm-of-tensions-on-lgbt-rights/> accessed 17 April 2018.

106 Law Commission, *Hate Speech* (267th Report, 2017), p. 52-53.

107 Law Commission (n. 106), p. 33-37.

5

Hate Speech in Election Laws

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

5

Hate Speech in Election Laws

5.1 Introduction

Laws that regulate the conduct of elections in India are contained in the Representation of the People Act, 1951 (RoPA), along with Articles 324–329 of the Constitution of India and the Conduct of Election Rules, 1961. For the purpose of this report we will restrict our discussion to RoPA.

Restrictions on hate speech are found in two distinct units of RoPA. The first is Section 123(3A) under Chapter I of Part VII, 'Corrupt Practices', and the second is Section 125 under Chapter III of Part VII, 'Electoral Offences'. Electoral hate speech is one of the 'corrupt practices' listed under RoPA. An electoral candidate committing a 'corrupt practice' risks disqualification, while a candidate committing an 'electoral offence' risks criminal liability.

Chapter 5 is divided into five parts. Part 5.2 discusses Section 123(3A) of RoPA, along with its objective and ingredients. Part 5.3 discusses Section 125 of RoPA, and how it differs from Section 123(3A). Part 5.4 discusses the difference between electoral hate speech and penal hate speech. Part 5.5 forms the conclusion.

5.2 Section 123(3A) of RoPA: Corrupt Practices

The consequence of violating Section 123(3A) of RoPA is that the candidate is disqualified from voting or contesting elections. Part 5.2 discusses Section 123(3A) of RoPA. It is further divided into five sub-parts. Sub-part 5.2.1 discusses the background in which Section 123(3A) of RoPA was introduced. Sub-part 5.2.2 discusses the ingredients of 'corrupt practices'. Sub-part 5.2.3 discusses the standard of proof, while sub-part 5.2.4 discusses the application of truth as a defence. Sub-part 5.2.5 discusses the constitutionality of Section 123(3A) vis-à-vis Article 19(1)(A) and Article 25.

Section 123(3A) reads as follows:

> **The following shall be deemed to be corrupt practices for the purposes of this Act:—**
>
> **…**
>
> **(3A) 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.**
>
> [Author's emphasis]

5.2.1 Background

Section 123(3A) was introduced through an amendment to RoPA in 1961, to accompany Section 153A of the Indian Penal Code, 1860 (IPC).[1] While Section 153A of the IPC served a general purpose, Section 123(3A) of RoPA was introduced for election-specific speech.[2]

The Supreme Court discussed the Parliament's objective in inserting Section 123(3A) in *Dr Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte* (*Ramesh Yeshwant Prabhoo*), in 1961.[3] The Court's views were as follows:

> **The provision in the I PC (Section 153A) as well as in the RoPA for this purpose was made by amendment at the same time. The amendment in the RoPA followed amendments made in the Indian Penal Code to this effect in a bid to curb any tendency to resort to narrow communal or linguistic affiliations. Any such attempt during the election is viewed with disfavour under the law and is made a corrupt practice under sub-section (3A) of Section 123.**[4]

Earlier, in *Ziyauddin Bukhari* v. *Brijmohan Mehra* (*Ziyauddin Bukhari*), the Supreme Court had discussed the need for Section 123(3A), stating[5]:

> **It is evident that, if such propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others. It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed, such prohibitions are necessary in the interests of elementary public peace and order.**[6]

At another point in its judgment, the Supreme Court briefly discussed the object of Section 123(3A) in light of India's political, historical and constitutional context. Characterising India as a secular democratic republic, the Court concluded:

> **It seems to us that section 123, sub s. (2), (3) and (3A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories. The line has to be drawn by the Courts, between what is permissible and what is prohibited.**[7]

5.2.2 Ingredients of 'corrupt practices'

Sub-part 5.2.2 discusses the ingredients of the offence of 'corrupt practice', and is further divided into three sub-parts. Sub-part 5.2.2.1 clarifies who must commit the act for it to amount to a corrupt practice. Sub-part 5.2.2.2 discusses the likely effect of the speech on the voters and sub-part 5.2.2.3 discusses the ingredients of class hatred.

5.2.2.1 Act must be done by candidate/ agent

First, for speech to amount to a 'corrupt practice', it should be made by a candidate or their agent.[8] It was held in *Ramakant Mayekar* v. *Smt Celine D'Silva*[9] (*Ramkant Mayekar*) that the inflammatory speech in question would not amount to 'corrupt practice' if it were made by the speaker prior to their actual candidature.[10] Sub-section (3A) also criminalises 'corrupt practices' committed by people other than the candidate or their agent, on behalf of the candidate, as long as the candidate or their agent had consented to the act. In *Ramesh Yeshwant Prabhoo*, the fact that the candidate was present when the speeches were delivered was enough to amount to 'implied consent'.[11]

5.2.2.2 Likely effect of speech

The 'likely effect' a speech has on its voters is an important factor in determining whether the speech is transformed into 'corrupt practice'. The Supreme Court has said:

> **[T]he question for decision is whether the speech delivered by the appellant promoted or attempted to promote feelings of enmity or hatred between different classes of the citizens of India on the ground of religion. A speech, though its immediate target is a political party, may yet be such as to promote feelings of enmity or hatred between different classes of citizens. It is the likely effect of the speech of the voters that has to be considered.**[12]

In *Ziyauddin Bukhari*, the speaker made an appeal on the basis of religion, stating that his opponent was not true to the cause of Islam. The Supreme Court held that the language used by the speaker, when considered in the given context, 'was sufficiently unrestrained and irresponsible so as to promote feelings of hostility between different classes of citizens of India on the ground of religion'.[13]

In *Ebrahim Suleiman Sait*, the appellants argued that the allegedly inflammatory speech was directed against a political party, and not a 'class' of citizens as specified under sub-section 3A. The Supreme Court clarified that regardless of the target of the speech, if its likely effect is to promote feelings of enmity or hatred between different classes of citizens, it would fall under the ambit of sub-section 3A.[14] However, after examining witness testimonies, the Supreme Court held that the speech did not create 'feelings of enmity or hatred' in the voters, stating:

> **It seems to us that the speech sought to criticise the wrong policy of the Muslim League (Opposition) in aligning with parties that were allegedly responsible for atrocities against the Muslims and not just to emphasise the atrocities. In our opinion it cannot be said that the speech falls within the mischief of Section 123(3A) of the Act; we have reached this conclusion keeping in mind the well-established principle that the allegation of corrupt practice must be proved beyond reasonable doubt.**[15]

The Supreme Court also held in *Ramesh*

Yeshwant Prabhoo that a 'mere reference' to religion in a speech would not satisfy the standard under sub-section 3A.[16] The Court stated that the words must be considered in context and not in 'abstract' and that other elements, such as the 'meaning and purport of the speech and the manner in which it was likely to be understood by the audience had to be considered', to reach a conclusion.[17]

It must also be noted that while discussing hate speech laws in general, including Sections 125 and 123(3A) of RoPA, the Supreme Court, in *Pravasi Bhalai Sangathan* v. *Union of India*,[18] referred to a previous judgment of the Court in *Ramesh* v. *Union of India*[19] (*Ramesh Dalal*) and stated that the 'effect of the words 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'.[20]

In *Ziyauddin Bukhari*, the Supreme Court relied on the 'likely effects test'. In this regard, the Court stated 'we have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of this country in every case of alleged corrupt practice of undue influence by making statements.' [21]

5.2.2.3 Class hatred

Sub-section 3A mentions an 'attempt to promote, feelings of enmity or hatred between different classes of the citizens of India'. In *Das Rao Deshmukh* v. *Kamal Kishore Nanasahebkadam*[22] (*Das Rao Deshmukh*) the appellants contended that the 'appeal to vote for Hindutwa [*sic*] should not be confused with appeal to vote only for a member of one community namely the Hindus'.[23] The appellants stated that they were merely criticising the partisan treatment Hindus had been subject to and were not attempting to create animosity between different groups of people.[24] The Supreme Court did not discuss this argument at length and reached a conclusion by relying on other factors.

According to the judiciary, speeches addressing 'Hindutva' or 'Hinduism' do not always refer to a particular 'class' of people on the ground of religion.[25] The Supreme Court in *Ramesh Yeshwant Prabhoo* stated that there is no fixed meaning which can be attributed to the terms 'Hindu', 'Hindutva' and 'Hinduism'.[26] These terms, according to the Court, cannot simply be restricted to the limits of religion. While deliberating on 'Hindutva', they described it as a 'way of life', 'state of mind' and a concept similar to 'Indianisation'.[27] The Court further stated that it is the context of the speech that determines if a particular speech is segregating people on the basis of their religion and therefore violating Section 123(3A) of RoPA.[28]

An example of this can be found in *Manohar Joshi* v. *Nitin Bhaurao Patil*, in which the candidate successfully relied on 'Hindutva' as a justification to establish Maharashtra as the first 'Hindu state'.[29] In this case, the Supreme Court opined that this was an expression of 'hope for the future' and was not necessarily a way to segregate people on the basis of their religion.[30]

In 2017 in *Abhiram Singh* v. *C.D. Comachen*, the Supreme Court held that elections were a 'secular exercise' and that any appeal to religion would not be permitted.[31]

5.2.3 Standard of proof

Sub-part 5.2.3 discusses the standard of proof required for establishing the culpability of a hate speech violation under election laws.

Hate speech cases under election laws follow

the criminal law standard of proof, requiring any violation to be established beyond reasonable doubt.[32] In *Borgoram Deuri* v. *Premodhar Bora* (*Borgoram Deuri*), the evidence presented by the parties was in dispute.[33] On the standard of proof for the evidence presented, the Supreme Court held that 'the allegations of corrupt practice … are considered to be quasi-criminal in nature'.[34] Therefore, unlike in a civil action, the charges have to be proved 'beyond a reasonable doubt' and not by a 'preponderance of possibilities'. The Supreme Court has advocated for this high standard due to the severity of the accompanying punishment, where the candidate may lose their seat and can also be disqualified from contesting elections for up to six years.[35]

In *Haji Mohammad Koya* v. *T.K.S.M.A. Muthukoya*[36] (*Haji Mohammad Koya*), the Supreme Court, relying on the decision of the Court in *Mohan Singh* v. *Bhanwarlal*,[37] held: 'The publication of the materials promoting hatred between two classes of citizens is undoubtedly a corrupt practice and it is well settled by long course of decisions of this Court that such practices must be clearly alleged with all the necessary particulars and proved not by the standard of preponderance of probabilities but beyond reasonable doubt'.[38]

In *Ebrahim Suleiman Sait*, the Supreme Court found that the statements in question did not violate Section 123(3A) of RoPA, 'keeping in mind the well-established principle that the allegation of corrupt practice must be proved beyond reasonable doubt'.[39]

The Supreme Court in *Ziyauddin Bukhari* deliberated upon the suitability of relying on tape-recorded speeches as evidence.[40] The Court held that if there is a dispute over the contents of a speech, an authentic recording of the speech is the best form of evidence. It is necessary to ensure that the records were 'prepared and preserved safely by an independent authority'. It is also necessary to make sure that, the 'transcripts … were duly prepared under independent supervision and control', and that, 'the police had made the tape records as parts of its routine duties in relation to election speeches and not for the purpose of laying any trap to procure evidence'.[41]

5.2.4 Truth as defence

Sub-part 5.2.4 discusses the application of truth as a defence in cases where speech may be prohibited under Section 123(3A).

Truth is not a defence in hate speech prosecutions under the RoPA. In *Ebrahim Suleiman Sait*, the Supreme Court rejected the argument that the appellants would not be liable if the statements were based on facts. According to the Court the relevant test is whether the statements promoted feelings of enmity. If the answer is in the affirmative, 'then it is immaterial whether what was said was based on facts or not, especially when in this case the events mentioned occurred years ago'.[42]

5.2.5 Constitutionality of Section 123(3A) vis-à-vis Articles 19(1)(A) and 25

Sub-part 5.2.5 discusses the manner in which the Indian judiciary has dealt with cases that challenged the constitutionality of Section 123(3A) of RoPA as being inconsistent with the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

The Supreme Court considered the constitutionality of Section 123(3A) in *Ramesh Yeshwant Prabhoo*. The Court found that Section 123(3A) was consistent with Article 19(1)(a) since it fell within the permissible exceptions of 'public order' and 'incitement to an offence' listed under Article 19(2). According to the Supreme Court, the element of prejudicial effect on public

order is implicit in Section 123(3A). The Court explained its reasoning saying 'such divisive tendencies promoting enmity or hatred between different classes of citizens of India tend to create public unrest and disturb public order'.[43]

5.3 Section 125 of RoPA: Electoral Offences

Sub-part 6.3 discusses the 'electoral offence' of 'promoting enmity between classes'. This is a crime and is potentially punishable with imprisonment. Sub-part 5.3 also discusses the difference between Sections 123(3A) and 125 of RoPA.

Section 125 of RoPA reads as follows:

> **Any person who in connection with an election under this Act promotes or attempts to promote *on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India* shall be punishable, with imprisonment for a term which may extend to three years, or with fine, or with both.**
>
> [Author's emphasis]

It is pertinent to note that the speech concerned with 'electoral offences' under Section 125 has been considered by some commentators to be similar to speech that would constitute a 'corrupt practice' under Section 123(3A).[44]

5.4 Difference Between Electoral Hate Speech and Penal Hate Speech

Sub-part 5.4 discusses the differences between electoral hate speech and penal hate speech. While Sections 123(3A) and 125 are similarly worded, the consequences of the offences they prescribe are different, as are their ingredients.

5.4.1 Consequences of offences

The consequences of violating Section 123(3A) and Section 125 of RoPA are different.[45] Section 125 creates an offence and the consequence of its violation is criminal liability,[46] whereas violation of Section 123(3A) may result in disqualification from voting or contesting elections.[47] Another distinguishing feature is that an offence under Section 125 can be taken cognisance of upon its commission, like any criminal activity according to the Code of Criminal Procedure, 1973 (CrPC), whereas under Section 123 (3A) redress can only be sought after the results are announced.[48]

5.4.2 Ingredients of offences

Second, the ingredients of 'corrupt practice' and 'electoral offence' are different. The Supreme Court, in *Ebrahim Suleiman Sait*, outlined the difference between the ingredients of Sections 123(3A) and 125 of RoPA. The Court said:

> **[T]o attract 123(3A) the act must be done by the candidate or his agent or any other person with the consent of the candidate or his agent and for the furtherance of the election of that candidate or for prejudicially affecting the election of any candidate, but under section 125 any person is punishable who is guilty of such an act and the motive behind the act is not stated to be an ingredient of the offence.**[49]

Therefore, under Section 123(3A), the offence of electoral 'corrupt practice' is made out when the candidate, his agent or a third person, with

the consent of the candidate, makes a speech promoting enmity between different classes of citizens. However, under Section 125, the motive behind the act of promoting hatred or enmity is not an ingredient of the offence. Nor is any consideration given for *when* the offence was committed, since there is no prescribed period during which one is absolved from liability under Section 125, as opposed to Section 123(3A).

5.5 Conclusion

Commentators have suggested certain reforms to RoPA.[50] One of them is to consider a candidate's conduct prior to their nomination.[51] The Supreme Court held in *Indira Nehru Gandhi* v. *Raj Narain* that since one attains the status of a candidate on the day the nomination papers are filed, no one can be held liable for a 'corrupt practice' for an act done before they become a candidate.[52] This is even true for acts which would otherwise constitute a 'corrupt practice'. [53] The concern is that candidates tend to conduct inflammatory or divisive campaigns before they file their nomination papers, and take a measured approach later.[54] This enables them to circumvent the threat of disqualification while continuing to stoke communal fires. Anil Nauriya has argued that a period of 12 months prior to the filing of papers should also be assessed, and incendiary corrupt practices such as those prescribed by Sections 123(3) and 123(3A) within this period should be penalised.[55]

1 Section 153A criminalises 'Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony'

2 For more information on Section 153 of the IPC, please refer to Chapter 3 in this Report.

3 *Dr. Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*, (1996) 1 SCC 130.

4 *Ramesh Yeshwant Prabhoo* (n. 3), para 20.

5 *Ziyauddin Bukhari* v. *Brijmohan Mehra*, (1976) 2 SCC 17.

6 *Ziyauddin Bukhari* (n. 5), para 41.

7 *Ziyauddin Bukhari* (n. 5), para 12.

8 *Ebrahim Suleiman Sait* v. *M.C. Muhammad*, 1980 SCR (1) 1148, para 2.

9 *Ramakant Mayekar* v. *Smt Celine D'Silva*, 1996 SCC (1) 399.

10 *Ramakant Mayekar* (n .9), para 6.

11 *Ramesh Yeshwant Prabhoo* (n. 3), para 30.

12 *Ebrahim Suleiman Sait* (n. 8), para 6.

13 *JZiyauddin Bukhari* (n. 5), para 13.

14 *Ebrahim Suleiman Sait* (n. 8), para 5.

15 *Ebrahim Suleiman Sait* (n. 8), para 8.

16 *Ebrahim Suleiman Sait* (n. 8), para 8.

17 *Ramesh Yeshwant Prabhoo* (n. 3), para 27.

18 *Pravasi Bhalai Sangathan* v. *Union of India*, (2014) 11 SCC 477, para 10.

19 *Ramesh Dalal* v. *Union of India*, (1988) SCC (1) 668.

20 *Ramesh Dalal* (n. 19), para 13.

21 *Ziyauddin Bukhari* (n. 5), para 10.

22 *Das Rao Deshmukh* v. *Kamal Kishore Nanasahebkadam*, 1995 SCC (5) 123.

23 *Das Rao Deshmukh* (n. 22), para 12.

24 *Das Rao Deshmukh* (n. 22), para 12.

25 V.S. Rama Devi and S.K. Mendiratta, *How India Votes: Election Laws, Practice and Procedures* (3rd edn, LexisNexis 2014), p. 976–978.

26 Devi and Mendiratta (n. 25).

27 Devi and Mendiratta (n. 25).

28 Devi and Mendiratta (n. 25).

29 *Manohar Joshi* v. *Nitin Bhaurao Patil*, (1996) 1 SCC 169.

30 Devi and Mendiratta (n. 25), p. 978.

31 *Abhiram Singh* v. *C.D. Comachen*, C.A. No. 37/1992.

32 Devi and Mendiratta (n. 25), p. 978.

33 *Borgoram Deuri* v. *Premodhar Bora*, C.A. No. 1300/2003.

34 *Borgoram Deuri* (n. 33), para 4.

35 *Manmohan Kalia* v. *Shri Yash*, AIR 1984 SC 1161; *Surinder Singh* v. *Hardial Singh*, AIR 1985 SC 89.

36 *Haji Mohammad Koya* v. *T.K.S.M.A. Muthukoya*, AIR 1976 SC 154.

37 *Mohan Singh* v. *Bhanwarlal*, (1964) 5 SCR 12.

38 *Haji Mohammad Koya* (n. 36), para 38.

39 *Ebrahim Suleiman Sait* (n. 8), para 9.

40 *Ziyauddin Bukhari* (n. 5) para 22.

41 *Ziyauddin Bukhari* (n. 5) para 22.

42 *Ebrahim Suleiman Sait* (n. 8), para 9.

43 *Ramesh Yeshwant Prabhoo* (n. 3), para 21.

44 Devi and Mendiratta (n. 25), p. 982.

45 Devi and Mendiratta (n. 25), p. 947.

46 Representation of the People Act 1951, s. 125.

47 Devi and Mendiratta (n. 25), p. 947.

48 Devi and Mendiratta (n. 25), p. 947.

49 *Ebrahim Suleiman Sait* (n. 8), para 6.

50 Anil Nauriya, 'Politics of Religious Hate Beyond the Bills' (1993) 28(37) Economic & Political Weekly, p. 1907.

51 Nauriya (n. 50).

52 *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299.

53 *Harjit Singh Mann* v. *Umrao Singh*, AIR 1980 SC 701.

54 Nauriya (n. 50).

55 Nauriya (n. 50).

6

Media Laws Governing Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

6

Media Laws Governing Hate Speech

6.1 Introduction

This chapter will discuss media laws that affect hate speech in India. It is divided into three parts. Part one will analyse the Cinematograph Act, 1952, which governs film censorship and certification in India. Part two focuses on the Cable Television Networks (Regulation) Act, 1995, which deals with the licensing and regulation of cable television operators. Part three analyses the Press Council of India Act, 1978, which governs news agencies and their functions.

6.2 The Cinematograph Act, 1952

6.2.1. Introduction

The exhibition of cinema in India is governed by the Cinematograph Act, 1952, and regulated by the Central Board of Film Certification (CBFC), established under the Ministry of Information and Broadcasting of the Government of India.[1] A film cannot be exhibited in India unless it is certified by the CBFC,[2] according to the Cinematograph Act read with the Cinematograph (Certification) Rules, 1983, and the central government guidelines under Section 5B of the Cinematograph Act (Certification Guidelines).[3] This part discusses the legal framework governing cinema in India and is further divided into sub-parts. The first sub-part discusses the standard for censorship of cinema. The second sub-part discusses the constitutionality of the Cinematograph Act, 1952 and the third sub-part discusses recommendations made by government committees.

The CBFC has the power to not only certify films, but also the power to direct excisions or modifications to the film or even refuse sanction if necessary.[4] Section 5B of the Cinematograph Act 1952 reads:

> **5B. (1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against 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 involves defamation or contempt of court or is likely to incite the commission of any offence.**
>
> **(2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition.**

The central government has issued the Certification Guidelines under Section 5B (2). According to the Certification Guidelines, the CBFC is required to ensure that 'visuals or words contemptuous of racial, religious or other groups are not presented'.[5] The CBFC must also ensure that 'visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitude are not presented'[6] and 'public order is not endangered'.[7]

Any person who is aggrieved by any order of the CBFC can appeal to the appellate tribunal.[8] The central government also has the power to suspend or revoke the certificate of the film, after giving the person concerned an opportunity to be heard.[9]

6.2.2. Standard for censorship

A film can be censored before it is released, under Section 5B of the Cinematograph Act, or after its public exhibition, under Section 5E of the Cinematograph Act, 1952. This sub-part is further sub-divided – first, censorship under Section 5B is discussed and second, the suspension of exhibition under Section 5E is discussed.

6.2.2.1. Censorship under Section 5B of the Cinematograph Act, 1952

The censorship of films for hateful speech, as well as other reasons under the Censorship Guidelines, is often challenged before the judiciary. In evaluating whether a film may be censored, the judiciary takes a few factors into account, which are discussed in this sub-section. The first sub-section discusses the judiciary's stance on considering the work as a whole, the second sub-section discusses its likely effect on viewers. The third sub-section discusses whether the judiciary makes allowances for artistic and creative expressions and the fourth sub-section analyses the judiciary's reasoning on a film being a threat to law and order. This is discussed in greater detail below.

a. Work should be seen as a whole[10]

In assessing whether a film is in accordance with the Censorship Guidelines, the judiciary must view the film in its entirety and examine its overall impact.[11]

In *Directorate General of Doordarshan* v. *Anand Patwardhan* (*Anand Patwardhan*)[12], the broadcast of a documentary titled 'Father, Son and Holy War' was prohibited by the Prasar Bharti.[13] The Supreme Court however, stated that the documentary should be broadcast since it did not seem likely to affect public order or lead to the incitement of a communal offence.[14] To support this decision, the court stated that the film must be looked at 'as a whole and not in

bits',[15] and that 'the message of the filmmaker cannot be gathered by viewing only certain portions of the film in isolation but one has to view it as a whole. There are scenes of violence, social injustices but the film by no stretch of imagination can be said to subscribe to the same'.[16]

The Supreme Court also observed that under Section 292 of the Indian Penal Code,[17] the standard of 'obscenity' was to view a work as a whole, and not in parts.[18]

In *S. Rangarajan* v. *P. Jagjivan Ram*[19] (*Rangarajan*), the Supreme Court had to evaluate whether a film on the government's reservation policy (policies based on affirmative action) was correctly withheld from exhibition. The Supreme Court held that criticism of government policies such as reservation is not a ground for restricting expression. The Supreme Court, while overturning the decision of the Madras High Court, held that 'it is not proper to form an opinion by dwelling upon stray sentences or isolated passages disregarding the main theme'.[20] Similarly, *in Bobby Art International* v. *Om Pal Singh Hoon* [21] (*Bobby Art International*), the Supreme Court reiterated the principle that the film must be evaluated as a 'whole'.[22] The Court held that the message of the film must be recognised, and it must be examined whether the individual scenes advance the message of the film.

In *Rakeysh Omprakash Mehra* v. *Govt. of NCT of Delhi*[23] (*Rakeysh Omprakash Mehra*), one of the points of contention was whether the film was in consonance with the CBFC guidelines. Specifically, whether the film refrained from showing 'visuals or words contemptuous of racial, religious or other groups'. The Delhi High Court also had to decide whether the film violated the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 owing its depiction of a member of a scheduled caste. The scene depicted the character of a lady sweeper being insulted and beaten by the police. The Court held that the work should be seen as a whole and not in individual parts. It found that the depiction was empathetic and merely 'illustrated evils prevalent in our society',[24] with a clear message that discriminatory practices should be curbed.[25]

b. The standard of the 'reasonable person'[26]

The judiciary has examined the issue of whose perspective or standpoint should be considered while evaluating a film. In *Rakeysh Omprakash Mehra*,[27] the Delhi High Court held that courts must consider 'what effect the movie is likely to produce on the minds of its viewers for whom the movie was intended'.[28] In *Rangarajan*,[29] the Supreme Court held that the standard applied by the CBFC for judging a film 'must be from the standpoint of a common man and not a hyper-sensitive person'.

Further, this standpoint of the viewer must not be presumed to be unreasonable and wavering. In *Ramesh* v. *Union of India*[30] (*Ramesh*), the Supreme Court adopted the test laid down in *Bhagwati Charan Shukla* v. *Provincial Government*[31] *(Bhagwati Charan Shukla)*, in 1946. According to the Supreme Court,

'the effect of the words 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.' [32]

The Delhi High Court developed this jurisprudence in *Prem Mardi* v. *Union of India*[33] *(Prem Mardi)*. A film titled 'MSG 2 The Messenger' was sought to be banned for insulting tribals (or *'adivasis'*), since the trailer referred to *adivasis* as devils and the protagonist as a rescuer

who would civilise them through violence. The petitioners sought the ban under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The High Court however characterised the film as 'fantasy', since it depicted the lead character as possessing supernatural powers and sought to transport the audience to an imaginary world.

Consequently, it held that Indian viewers of the film have the ability to distinguish between reality and fantasy, stating that the film would not incite a 'reasonable person' to indulge in violence. Further, any inference that viewers would start imitating the fantasy would undermine the average intelligence of an Indian citizen. The High Court also examined the meaning of the term *adivasis* and held that it does not refer only to SC/STs, and has a much broader connotation.[34]

c. The balance between artistic expression and social purpose[35]

The Supreme Court, in *K.A. Abbas* v. *The Union of India*[36] *(K.A. Abbas)*, recognised the need to give weight to artistic expression. Similarly, the Certification Guidelines also provide that the objective of certification is to ensure that 'artistic expression and creative freedom are not unduly curbed'.[37]

In *Ajay Gautam* v. *Union of India*[38] (*Ajay Gautam*), the Delhi High Court analysed a film alleged to insult the practices of the Hindu religion and concluded that it was a satire on religion, and was permissible. The Delhi High Court relied on *K.A. Abbas* to hold that the scope of freedom in artistic expression is wide, and covers humorous expressions of societal elements.

In the *Anand Patwardhan* case, the Supreme Court held that Doordarshan should broadcast the documentary 'Father, Son and Holy War'. The Supreme Court stated that even though the documentary depicted scenes of violence, the portrayal of these 'social vices' was to put forward 'a real picture of crime and violence against women'.[39]

d. Threat to law and order[40]

In *Rangarajan*, the Supreme Court had to evaluate whether a film would disturb the law and order of the state of Tamil Nadu. Although the state government submitted an affidavit alleging threats made by various organizations to disrupt law and order, the Court held that:

'If the film is unobjectionable and cannot constitutionally be restricted under Article 19(1), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence'.

The Supreme Court allowed the film to be exhibited, holding that it is the duty of the state to protect freedom of expression and it could not permit an intolerant group of people to hold the state to ransom.

In *Ajay Gautam*, the exhibition of a film was challenged in the Delhi High Court on the grounds that the film insulted the practices of a religion, and that its screening would cause a law and order situation. The High Court held that there was no foreseeable law and order situation arising from the screening of the film, using the clear and imminent danger test from *Schenck* v. *United States.*[41] It held that a humorous take on a religion was not enough to provoke the kind of violence which would justify censorship.

In *Prakash Jha* v. *Union of India*[42] *(Prakash Jha),* the Uttar Pradesh government attempted to suspend the exhibition of a film titled 'Aarakshan' stating that it violated Section 6(1) of the Uttar Pradesh Cinemas (Regulation) Act, 1955. The state government claimed that the screening of this film would incite the public to commit

violent acts. The Supreme Court held that the ruling of the expert body (the CBFC) would take precedence. According to the Court, if the CBFC did not consider that the film would lead to a breach of violence, then the state government's verdict on the film would not be relevant.[43]

6.2.2.2. Suspension of exhibition of films

Under Section 5E of the Cinematograph Act, exhibition of films may also be suspended after the film is cleared by the CBFC. There are state legislations such as the Uttar Pradesh Cinemas (Regulation) Act, 1955 and the Tamil Nadu Cinemas (Regulation) Act, 1955, which also allow for the suspension of exhibition of films on certain grounds, for instance, a 'breach of peace'. One such instance has been discussed below.

The Supreme Court, in *Prakash Jha*, pointed out that the very term 'suspension of exhibition' presupposes that public exhibition has already taken place, is ongoing and the need has arisen to 'suspend' any further exhibition. Secondly, passing an order for suspension after or during public exhibition would also enable the authorities to arrive at a proper assessment of the apprehended breach of public order or its likelihood, since the film is in the public domain, being exhibited and actual public reaction can be garnered and assessed. This case was filed under the Uttar Pradesh Cinemas (Regulation) Act, 1955, which gives powers to the state government or district magistrate, in addition to the central government, to suspend exhibition of films in case breach of peace is anticipated.[44] Other states are also empowered by similar regulations.[45]

6.2.3. Constitutionality of the Cinematograph Act, 1952

The constitutionality of Part II of the Cinematograph Act, 1952 and the Certification Guidelines was challenged before the Supreme Court in *K.A. Abbas*.[46] The Supreme Court first examined whether censorship of motion pictures and pre-censorship in particular violates the right to freedom of speech and expression guaranteed by the Constitution of India. It held that motion pictures must be treated differently from other forms of art and expression as 'motion pictures are able to stir emotions more deeply than any other product of article'.[47] The Court was of the opinion that the impact of motion pictures is greater than the impact of reading a book or hearing a speech, and consequently motion pictures could be held to a different standard.[48] The Court held that censorship was required to balance individual interests with societal interests, and that the latter necessitated strict regulation.[49] Therefore, the censorship regime for films (including pre-censorship) was held to be a reasonable restriction under Article 19(2).[50]

The Supreme Court then examined the extent of restrictions and how they should be imposed. The Court analysed the restrictions placed by the statute and the Certification Guidelines and held that the restrictions were definite and not vague.[51] However, the Court did take exception to the fact that as per the directions issued under Section 5B(2), 'artistic as well as inartistic presentations are treated alike and also what may be socially good and useful and what may not'.[52] The Court stated that that there is a need for directions from the central government that would protect the artistic and social value of a representation. Therefore, the constitutionality of the Cinematograph Act, 1952 and the regime of pre-censorship for motion pictures was upheld by the Supreme Court.

In *Rangarajan*,[53] the Supreme Court similarly held that a 'movie has unique capacity to disturb and arouse feelings' and cannot be equated with other modes of communication. Consequently, the Court held that censorship by prior restraint

is 'not only desirable but also necessary'.[54] The Court also held that any prior restraint 'must necessarily be reasonable that could be saved by the well accepted principles of judicial review'.[55]

6.2.4. Conclusion

Exhibition of cinema is governed by the Cinematograph Act, 1952, the rules framed under it, and legislations that usually empower the state governments to suspend exhibition in certain circumstances. The standard for censorship of cinema requires a host of factors to be taken into consideration, including artistic expression and social purpose, the film as a whole, and the 'reasonable person' test. Further, a mere threat of violence cannot be a reason to censor a film that is otherwise unobjectionable.

These standards continue to be upheld by the judiciary. In recent judgments like *Rashtravadi Shiv Sena* v. *Sanjay Leela Bhansali Films Pvt. Ltd.*[56] (*Sanjay Leela Bhansali Films*), the film 'Ramleela' was being examined to see whether it might hurt religious sentiments of certain groups of people. The Delhi High Court stated that whether or not this film would hurt religious sentiments could be 'judged from the standards of a reasonable, strong minded'[57] person. In addition, judgments like *Kirankumar Devmani* v. *State of Gujarat*[58] have held that while determining if a film is 'objectionable', the dialogue would have to be considered 'as a whole' and not in isolation.[59]

Recently, film censorship has been on the rise in India.[60] In 2016, the Shyam Benegal Committee was set up to 'lay down a holistic framework for certification of films'.[61] Amongst other recommendations, the committee recommended that there should be a move from 'censorship to certification'.[62] However, the recommendations of the committee have not led to substantial changes. Members of the CBFC have reportedly gone beyond the scope of the Cinematograph Act to censor films.[63] Prominent instances of censorship over the last few years include 'Lipstick Under My Burkha' and 'The Argumentative Indian'. In the first instance, the CBFC initially refused to certify the film for its sexual overtones and stated that it was 'lady-oriented'.[64] In the second instance, in a documentary featuring economist Amartya Sen, the filmmaker was asked to censor words such as 'cow', 'Gujarat', 'Hindu' and 'Hindutva'.[65]

In 2017, a film titled 'Padmaavati' was under criticism for its depiction of historical figures and for its alleged communal nature.[66] The controversy surrounding this film was also due to the fact that several state governments had declared their intention to ban the screening of the film prior to the CBFC certifying it.[67] In addition, petitions were moved to stop the exhibition of the movie in other jurisdictions.[68] Following this, in *Manohar Lal Sharma* v. *Sanjay Leela Bhansali* (*Manohar Lal Sharma*),[69] the Supreme Court warned public officials against 'pre-judging the issue and making public utterances'[70] regarding the legality of the film, and whether or not it should be banned.

In this case, the Supreme Court also commented on the 'artistic licence' that should be granted to filmmakers, while taking into account restrictions applicable on free speech as well.[71]

6.3 Cable Television Networks (Regulation) Act, 1995

6.3.1. Introduction

This part analyses the relevant portions of the Cable Television Networks (Regulation) Act, 1995 (Cable Television Act) governing hate speech as well as the rules that govern hate speech. Hate speech on cable television is

regulated through the Cable Television Act along with the Programme Code[72] and Advertisement Code[73] set out in the Cable Television Network Rules, 1994 (Cable Television Rules). The Cable Television Act regulates the operations of cable television operators and the content they broadcast, and creates a licence framework for them.[74]

Additional regulation of speech may take place through the self-regulatory bodies governing cable television (Indian Broadcasting Foundation and Broadcasting Content Complaints Council). This has been discussed in further detail in Chapter 8 on 'self regulation'.

The first sub-part discusses Section 20 of the Cable Television Act and the various instances in which it has been invoked. The second sub-part discusses the Programme Code listed under the Cable Television Rules. The third sub-part discusses the role of the Ministry of Information and Broadcasting in regulating content and the fourth sub-part discusses the constitutionality of the Cable TV Act and Rules.

6.3.2. Section 20 of the Cable Television Networks (Regulation) Act, 1995

6.3.2.1. Introduction

The Central government has the power to prohibit the operation of any cable television network under Section 20 of the Cable Television. It can, among other things, do this when it thinks it 'necessary or expedient' to do so in the interests of 'public order, decency or morality'.[75] The Central Government can also regulate or prohibit the transmission or re-transmission of any programme that it considers to not be in conformity with the Programme Code or the Advertisement Code.[76] Section 20 of the Cable Television Act states:

20. Power to prohibit operation of cable television network in public interest. —

> **[1] Where the Central Government thinks it necessary or expedient so to do in public interest, it may prohibit the operation of any cable television network in such areas as it may, by notification in the Official Gazette, specify in this behalf.**
>
> **[2] Where the Central Government thinks it necessary or expedient so to do in the interest of the—**
>
> **(i) sovereignty or integrity of India; or**
>
> **(ii) security of India; or**
>
> **(iii) friendly relations of India with any foreign State; or**
>
> **(iv) public order, decency or morality,**
>
> **it may, by order, regulate or prohibit the transmission or re-transmission of any channel or programme.**
>
> **(3) Where the Central Government considers that any programme of any channel is not in conformity with the prescribed programme code referred to in section 5 or the prescribed advertisement code referred to in section 6, it may by order, regulate or prohibit the transmission or re-transmission of such programme.**

In *Court on its own Motion* v. *State*,[77] the central government prohibited the transmission/re-transmission of a channel 'Janmat TV-Live India' under Section 20, stating that it was involved in a sting operation surrounding a prostitution racket. The contents of the sting operation being broadcast also contravened the Programme Code.

In *Kal Cables* v. *Secretary, Ministry of Information and Broadcasting*,[78] the legitimacy of cancelling

the registration of Multi-System Operators (MSO) under Section 20 was discussed. The petitioner's registration as an MSO was cancelled because they had not gained clearance from the Ministry of Home Affairs, and could hence be a threat to national security. The High Court of Madras held that Section 20 could only be invoked to 'regulate or prohibit the transmission or retransmission of any channel or programme' and not to cancel MSO registrations.

The government has been known to take action when its instructions to television channels on hate speech are ignored. For example, the news channel AajTak was held guilty by an inquiry committee of the Uttar Pradesh Assembly, headed by MP Satish Kumar Nigam, for inciting violence between communities by conducting a 'sting operation' during the Muzaffarnagar riots.[79] This 'fake' news sensation allegedly instigated riots between the communities, as concluded by the inquiry committee set up by the Uttar Pradesh government.[80] The committee recommended that representatives of AajTak and Headlines Today be 'booked' under Sections 153A and 295A of the IPC, amongst other sections.[81] The report also stated that AajTak's conduct was in contravention of Section 20 of the Cable Television Act. However, the Supreme Court later stated that the inquiry committee did not have the jurisdiction to reach such conclusions or to hold the representatives of AajTak guilty.[83]

6.3.3. The Programme Code

The Cable Television Act forbids the transmission of any programme that is not in conformity with the Programme Code.[84] The Programme Code in turn prohibits content which 'attacks religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes'[85] and 'is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes,'[86] amongst others.

When broadcasters are found to be in violation of the Programme Code, the Ministry of Information and Broadcasting (MIB) issues warnings, advisories and orders.[87] This sub-part will first discuss instances of violation of Rule 6(1)(e) of the Programme Code and will then discuss Rule 6(6) of the Programme Code.

6.3.3.1. Rule 6(1)(e) of the Programme Code

This rule prohibits any transmission that is 'likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes'.

In 2015, the Ministry of Information and Broadcasting issued an advisory to the news channel AajTak, asking them to ensure strict compliance with the Programme Code.[88] The news channel had aired a conversation between alleged terrorists, in the aftermath of the hanging of Yakub Memon. The prohibited content was said to be in contravention of Rule 6(1)(e). However, the advisory does not mention any reasons to support this claim.

Similarly, the MIB also issued an advisory to the news channel 'ABP' for broadcasting the above-mentioned content. The advisory stated that the prohibited content was in contravention of the afore-mentioned rule prohibiting content 'likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes'.[89]

The MIB also issued a warning to the Sathiyam TV Channel in 2015, asking them to ensure strict compliance with the Programme Code.[90] The Sathiyam TV Channel had broadcast a religious talk delivered by a preacher, which contained content which could 'potentially give rise to a communally sensitive situation and incite the

public to violent tendencies'.[91] In this instance, Rule 6(1)(e) along with 6(1)(c), which deals with content that 'contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes' were seen to have been violated.

6.3.3.2. Rule 6(6) of the Programme Code

The hate speech principles in the Programme Code are often used during crises. For example, in July 2016, the channel Peace TV was being broadcast in India without government permission,[92] and its content was believed to incite violence in certain communities.[93] The channel was not licensed in India. The Ministry of Information and Broadcasting flagged the broadcast, stating that they did not have permission to downlink. It also stated in an advisory that the transmission was in contravention of Rule 6(6) of the Programme Code, which states that 'No cable operator shall carry or include in his cable service any television broadcast or channel, which has not been registered by the central government for being viewed within the territory of India'. The controversy also highlighted the government's limited capacity for monitoring the illegal telecast of unlicensed television channels.[94] This may imply that the state is not entirely efficient in implementing the licensing system and Programme Code.

It appears that the state is more easily able to control licensed channels. For example, in September 2016, the Karnataka state government asked news channels to 'rein in' the broadcasting of incidents of violence during the Cauvery water dispute.[95] This was done through a Ministry of Information and Broadcasting advisory to news channels, asking them to comply with the Programme Code and refrain from broadcasting news which could lead to further violence.[96] Following the advisory, the General Secretary of the Broadcast Editors Association commented on the guidelines, clarifying that they were not mandatory, and that broadcasters followed advisories in public interest.[97] The General Secretary stated: 'If the advisory is in consonance with democratic and media freedom and comes at a time when public tranquility is disturbed, broadcasters adhere to it'.[98]

6.3.4. Role of the Ministry of Information and Broadcasting in content regulation

In *Star India Private Limited* v. *Union of India*,[99] a TV show titled 'Sach Ka Saamna' was under scrutiny for contravening Section 20 of the Cable Television Networks (Regulation) Act. The Ministry of Information and Broadcasting was of the opinion that the content was not in line with the Programme Code. After the initial notice, the ministry issued a warning to Star India Private Limited, stating that the inter-ministerial committee was also of the opinion that the content of the show was not in accordance with the law.

Although the Delhi High Court ruled in favour of the respondent, the petitioner's argument on the functioning of the inter-ministerial committee is noteworthy. It stated that the composition of the committee was not appropriate to adjudicate upon matters related to programming. To highlight the inadequacy of the decision-making capacity of the inter-ministerial committee, the petitioner drew attention to the Broadcasting Content Complaints Council (BCCC), a self-regulatory body established shortly after the commencement of these proceedings. The High Court stated that the Ministry of Information and Broadcasting itself had started relying on a 'broad-based expert' body (BCCC) for content regulation as opposed to the inter-ministerial committee, which highlighted the inadequacy of the decision-making capacity of the committee.

6.3.5. Constitutionality under Article 19(1)(a)

In *Aamoda Broadcasting Company* v. *Union of India*,[100] a dispute arose over cable distribution in the context of the creation of Telangana state. Telangana's multi system operators (MSOs) stopped the transmission of certain Telugu telecasts, stating that the content 'denigrated' Telangana legislators. The petitioners, Aamoda Broadcasting Company had filed a writ petition in the High Court of Judicature at Hyderabad for the States of Telengana and Andhra Pradesh. The content was blocked by a private intermediary of its own accord, and not on the basis of a government order. Therefore, the petitioner alleged that such stoppage of transmission by the MSOs (private entities) violated their fundamental right of the freedom of speech and expression and the concomitant right of citizens to receive and impart information under Article 19(1)(a) of the Constitution. To this end the petitioner cited the Supreme Court case, *Secretary, Ministry of Information and Broadcasting* v. *Cricket Association of Bengal*.[101] The writ petition was therefore dismissed stating that these bodies were not instruments of the state, and as a result, had no public duty. It is worth noting since, that the outcome of such a decision is that similar coalitions of private party gatekeepers could be emboldened to make censuring decisions about channels and content.

6.3.6. Conclusion

The Cable Television Networks (Regulation) Act and Rules are often invoked to curb instances of hate speech. The system of content regulation is intricate, involving different bodies (the Ministry of Information and Broadcasting, BCCC and others), which can have varied effects on free speech. Commentators have argued that these governing bodies, acting on the aforementioned regulations have sometimes enforced strict censorship orders which would have a negative impact on free speech.[102]

6.4 Press Council of India Act, 1978

6.4.1. Introduction

In India, the print media is co-regulated through the Press Council of India (PCI), a statutory body set up in 1966 to oversee the functioning of the press, maintain journalistic standards and prescribe guidelines for government officials.[103] Since the PCI is a statutory body set up under the Press Council Act, 1978,[104] all newspapers and periodicals come within its jurisdiction.[105]

Section 12 of the Press Council Act details the 'objects and functions' of the Press Council. The objects include 'helping newspapers and news agencies … maintain their independence'; 'building a code of conduct for newspapers' and 'keeping under review any development likely to restrict the supply and dissemination of news of public interest and importance'.[106]

This part sets out the relevant portions of the Press Council Act that affect speech, and discusses the functionality of the regulatory body. The first sub-part discusses the procedure for the composition of the press council, the second sub-part discusses the power of the PCI to censure and the third sub-part discusses the procedure for lodging a complaint.

6.4.2. Procedure for composition of the council

The procedure for the composition of the Council and the powers of the Council are detailed below.

Section 5 of the Press Council of India Act lays down the procedure for the composition of the

council. According to Section 5, the Council has to consist of a Chairman and twenty-eight (28) members. The Chairman is nominated by a Committee. This Committee consists of the Chairman of the Rajya Sabha, the Speaker of the Lok Sabha and a member nominated by the twenty-eight (28) members, from amongst themselves.[107]

The twenty-eight members will comprise thirteen (13) journalist members, by a process chosen by working journalists. Of these thirteen (13) members, six (6) of them must be editors and the other seven (7) must be working journalists.[108]

Six (6) members should be nominated by a process chosen by those who own or run the business of management of newspapers. Of the six (6), two (2) members must be representatives of big newspapers, two (2) must be representatives of medium newspapers and two (2) must be representatives of small newspapers.[109]

One member shall be nominated by a process chosen by those who manage news agencies.[110]

Three members shall be chosen on the basis 'of special knowledge or practical experience in respect of education and science, law and literature and culture of whom respectively one shall be nominated by the University Grants Commission, one by the Bar Council of India and one by the Sahitya Academy'.[111]

6.4.3. Power to 'censure'

Under the Press Council of India Act, the Council has the 'power to censure' any newspaper or news agency.

Section 14 of the Press Council Act discusses the 'power to censure':

> **(1) Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct, the Council may, after giving the newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may be :**
>
> **Provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry.**
>
> **(2) If the Council is of the opinion that it is necessary or expedient in public interest so to do, it may require any newspaper to publish therein in such manner as the Council thinks fit, any particulars relating to any inquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.**
>
> **(3) Nothing in sub-section (1) sha11 be deemed to empower the Council to hold an inquiry into any matter in respect of which any proceeding is pending in a court of law.**
>
> **(4) The decision of the Council under sub-section (1), or sub-section (2), as the case be, shall be final and shall not be questioned in a court of law.**

6.4.4. Procedure for lodging a complaint

The PCI serves as a quasi-judicial adjudicatory body,[112] by addressing complaints against the press regarding violation of journalistic norms as well as complaints by the press about violation of their freedom of expression.[113]

The Press Council (Procedure for Inquiry) Regulations, 1979 lay down the process of lodging complaints, issuing notices and the rules governing the Inquiry Committee's inquiry and decision making powers.

Complaints must first be made in writing to the concerned editor, before they are adjudicated by the PCI.[114] If the editor does not write back, or if the complaint has not been resolved after communicating with the editor, the complainant can take the matter forward with the PCI. In their complaint to the PCI, the complainant is required to provide 'the name and address of the newspaper, editor or journalist against whom the complaint is directed' along with a clipping of the objectionable material and a statement explaining why it is objectionable. According to a notification published in the gazette of India on the 14 November, 1979, complaints regarding publication or non-publication must be lodged with the PCI within 2 months for 'dailies, news agencies and weeklies' and within 4 months in all other instances.[115] The PCI has the power to only censure newspapers or editors, and not the power to impose any punitive sanctions.[116]

In *Jagran Prakashan* v. *Press Council of India*[117] (*Jagran Prakashan*), the Allahabad High Court discussed the necessity of complying with the procedure under the Press Council Act. The company Jagran Prakashan, publisher of a newspaper titled Dainik Jagran, had been served a notice by the Press Council of India for its coverage of a religious controversy involving Hindu and Muslim communities. Jagran Prakashan claimed that the Press Council had not complied with the procedure set out, since it was not notified of the alleged transgression. Under Regulations 3(2) and 5 of the Press Council of India Regulations, it is a duty of the Press Council to notify the newspaper, news agency or editor of any complaint lodged against them. Regardless of the procedural mandate, it was held that notifying the petitioner was also necessary to comply with the rules of natural justice.

6.4.5. Conclusion

This sub-part discusses the composition of the council, its powers to 'censure' and the procedure available for lodging a complaint. Section 5 of the PCI Act lays down the procedure for the composition of the council. The council must be composed of a Chairman and 28 members. These members range from journalists to representatives of newspapers, in addition to others involved in print media.

Under Section 14 of the PCI Act, the PCI has the 'power to censure', on the basis of complaints made against newspapers or news agencies for offending journalistic ethics and public taste, among others, or even otherwise. Section 14 also states that the concerned 'newspaper, or news agency, editor or journalist' may be given an opportunity to be heard, after which the council has the authority to hold an inquiry and censure the concerned party, if they are satisfied of its necessity. In addition, the Press Council (Procedure for Inquiry) Regulations, 1979 lays down the rules on the Inquiry Committee's powers and functions. As a result of the composition and the objects and powers, the PCI functions as a quasi-judicial adjudicatory body, and the implementation of its powers have been discussed in detail in chapter 8 of the report on self-regulation.

1 Cinematograph Act 1952, section 3.

2 Cinematograph Act 1952, section 4.

3 Cinematograph Act 1952, section 5, Guidelines for Film Certification.

4 Cinematograph Act 1952, section 4(1)(iii).

5 Guidelines for Film Certification, Guideline 2(xiii).

6 Guidelines for Film Certification, Guideline 2 (xiv).

7 Guidelines for Film Certification, Guideline 2 (xviii).

8 The Cinematograph Act 1952, section 5D; The Cinematograph Act 1952, section 5C.

9 The Cinematograph Act 1952, section 5E.

10 Madhavi Goradia Diwan, *Facets of Media Law* (1st supp, 1st edn, Eastern Book Company 2010), p. 286.

11 See, for instance, *Bobby Art International* v. *Om Pal Singh Hoon* (1996) 4 SCC 1, para 22; See also, *Rakeysh Omprakash Mehra* v. *Government of NCT of Delhi* WP (Crl) 1188/2009 & Crl MA 9918/2009.

12 *Directorate General of Doordarshan* v. *Anand Patwardhan*, CA No 613 of 2005.

13 Prasar Bharti is the public service broadcaster in India. It is governed by the Prasar Bharti Act, 1978; Diwan (n. 10), p. 286.

14 *Anand Patwardhan* (n. 12); Diwan (n. 10), p. 286.

15 *Anand Patwardhan* (n. 12), para 20.

16 *Anand Patwardhan* (n. 12).

17 Section 292 of the IPC criminalizes the 'Sale of obscene books'. This section also lays down the standard of 'obscenity' in India, stating that books and pictoral representations, amongst others, would be 'deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person'.

18 Anand Patwardhan (n. 12), para 38.

19 *S. Rangarajan* v. *Jagjivan Ram*, 1989 SCC (2) 574.

20 *Rangarajan* (n. 19).

21 *Bobby Art International* v. *Om Pal Singh Hoon*, (1996) 4 SCC 1.

22 *Bobby Art International* (n. 21), paras 8, 16, 20.

23 *Rakeysh Omprakash Mehra* v. *Govt. of NCT of Delhi*, 197 (2013) DLT 413.

24 *Rakeysh Omprakash Mehra* (n. 23), para 40.

25 *Rakeysh Omprakash Mehra* (n. 23).

26 *Diwan* (n. 10).

27 *Rakeysh Omprakash Mehra* (n. 23), para 30.

28 *Rakeysh Omprakash Mehra* (n. 23).

29 *Rangarajan* (n. 19).

30 *Ramesh* v. *Union*, AIR 1988 SC 775.

31 *Bhagwati Charan Shukla* v. *Provincial Government*, AIR 1947 Nag 1.

32 *Ramesh* (n. 30).

33 *Prem Mardi* v. *Union of India*, WP (C) No 8883/2015.

34 *Prem Mardi* (n. 33), para 17.

35 *Diwan* (n. 10), p. 282.

36 *KA Abbas* v. *Union of India* AIR 1971 SC 481.

37 Guidelines for Film Certification, Guideline 1(ii).

38 *Ajay Gautam* v. *Union of India*, 217 (2015) DLT 297.

39 *Anand Patwardhan* (n. 12), para 15.

40 *Diwan* (n. 10), p. 282.

41 *Shenck* v. *United States*, 249 US 47 (United States of America).

42 *Prakash Jha* v. *Union of India*, (2011) 8 SCC 372.

43 *Diwan* (n. 10), p. 288.

44 The Uttar Pradesh Cinemas (Regulation) Act 1955, section 6.

45 The states of Tamil Nadu, Kerala, Punjab, Karnataka, Assam, Gujarat, Maharashtra, Rajasthan, Madhya Pradesh, Himachal Pradesh, West Bengal have enacted similar regulations, where the suspension of exhibition is allowed on the grounds of 'breach of peace'.

46 *K.A. Abbas* (n. 36).

47 *K.A. Abbas* (n. 36), para 20.

48 *K.A. Abbas* (n. 36), para 20.

49 *K.A. Abbas* (n. 36), para 41.

50 *K.A. Abbas* (n. 36), para 41.

51 *K.A. Abbas* (n. 36), para 47.
52 *K.A. Abbas* (n. 36), para 48.

53 *Rangarajan* (n. 19).

54 *Rangarajan* (n. 19).

55 *Rangarajan* (n. 19).

56 *Rashtravadi Shiv Sena* v. *Sanjay Leela Bhansali Films Pvt. Ltd*, WP (C) 6384/2013.

57 *Sanjay Leela Bhansali* (n. 56).

58 *Kirankumar Rameshbhai Devmani* v. *State of Gujarat*, 2014(5) GLR 3845.

59 *Kirankumar Rameshbhai Devmani* (n. 58), para 27.

60 Pankaj Butalia, 'Film censorship continues and spreads in India' *The Indian Express* (India, 8 June 2016) <http://indianexpress.com/article/opinion/columns/censor-board-shyam-benegal-headed-committee-udta-punjab-2840005/> accessed 2 April 2018.

61 Press Information Bureau, Government of India, Ministry of Information and Broadcasting, 'Shyam Benegal Committee submits its report on Cinematograph Act/Rules to Shri Jaitley' (India, 26 April 2016) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=142288> accessed 2 April 2018.

62 Butalia (n. 60).

63 Butalia (n. 60).

64 PTI, 'Lipstick Under my Burkha: CBFC refuses to certify Prakash Jha film' *The Indian Express* (India, 23 February 2017) <http://www.hindustantimes.com/bollywood/lipstick-under-my-burkha-cbfc-refuses-to-certify-prakash-jha-s-film/story-bHkjpxbfZ7EzFK6Ye5nV4J.html> accessed 2 April 2018.

65 Santanu Chowdhury, 'Don't use "cow", "Gujarat" in Amartya Sen documentary: Censor Board' *The Indian Express* <http://indianexpress.com/article/india/dont-use-cow-gujarat-in-amartya-sen-documentary-censor-board-4748211/> accessed 2 April 2018.

66 'After Rajputs, Muslims want ban on Padmavati for showing them in "negative light" ' *Hindustan Times* (India, 2 January 2018) <https://www.hindustantimes.com/jaipur/now-padmavati-hurts-muslim-sentiments/story-t4nSqsLwkxMgBRiMjNFogL.html> accessed 23 April 2018.

67 Smriti Kak Ramachandran and Hiral Dave, 'Padmavati: Gujarat bans Deepika Padukone film, second state after MP' *Hindustan Times* (India, 22 November 2017) <https://www.hindustantimes.com/bollywood/padmavati-gujarat-second-state-to-ban-deepika-padukone-film-after-madhya-pradesh/story-dHoCYjFwRvQ6VBQFjFaZJJ.html> accessed 23 April 2018; 'Padmavati row: States can't ban movie before censor board certification, says former CBFC chairman Pahlaj Nihalani' *New Indian Express* (Mumbai, 21 November 2017) <http://www.newindianexpress.com/nation/2017/nov/21/padmavati-row-states-cant-ban-movie-before-censor-board-certification-says-former-cbfc-chairman-p-1706654.html> accessed 23 April 2018.

68 'Padmavati row: Bihar, UP, Gujarat and other states where Sanjay Leela Bhansali's film faces hurdles' *Hindustan Times* (India, 29 November 2017) <https://www.hindustantimes.com/bollywood/padmavati-row-bihar-up-gujarat-and-other-states-where-sanjay-leela-bhansali-s-film-faces-hurdles/story-N6qcNFQwX4HmHSdJXs5fKP.html> accessed 23 April 2018.

69 *Manohar Lal Sharma* v. *Sanjay Leela Bhansali*, WP (Criminal) No. 191 of 2017.

70 *Manohar Lal Sharma* (n. 69), para 9.

71 *Manohar Lal Sharma* (n. 69), para 10-15.

72 Cable Television Network (Regulation) Rules 1994, rule 6(1): Programme Code. – (1) No programme should be carried in the cable
service which:-
(a) Offends against good taste or decency;
(b) Contains criticism of friendly countries;
(c) Contains attack on religions or communities or visuals or words
contemptuous of religious groups or which promote communal attitudes;
(d) Contains anything obscene, defamatory, deliberate, false and suggestive
innuendos and half-truths;
(e) is likely to encourage or incite violence or contains anything against
maintenance of law and order or which promote anti-national attitudes;
(f) Contains anything amounting to contempt of court;
(g) Contains aspersions against the integrity of the President and Judiciary;
(h) Contains anything affecting the integrity of the Nation;
(i) Criticises, maligns or slanders any individual in person or certain groups,
segments of social, public and moral life of the country ;
(j) Encourages superstition or blind belief;
(k) Denigrates women through the depiction in any manner of the figure of a
women, her form or body or any part thereof in such a way as to have the
effect of being indecent, or derogatory to women, or is likely to deprave,
corrupt or injure the public morality or morals;
(l) Denigrates children;
(m) Contains visuals or words which reflect a slandering, ironical and snobbish
attitude in the portrayal of certain ethnic, linguistic and regional groups ;
(n) Contravenes the provisions of the Cinematograph Act, 1952.
(o) is not suitable for unrestricted public exhibition.

73 Cable Television Network (Regulation) Rules 1994, rule 7(1): Advertising Code - (1) Advertising carried in the cable service shall be so
designed as to conform to the laws of the country and should not offend morality,
decency and religious susceptibilities of the subscribers.
(2) No advertisement shall be permitted which(i)
derides any race, caste, colour, creed and nationality;
(ii) is against any provision of the Constitution of India.
(iii) tends to incite people to crime, cause disorder or violence, or breach of law or
glorifies violence or obscenity in any way ;
(iv) presents criminality as desirable;
(v) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or a State dignitary;
(vi) in its depiction of women violates the constitutional guarantees to all citizens. In particular, no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasises passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The cable operator shall ensure that the portrayal of the female form, in the programmes carried in his cable service, is tasteful and aesthetic, and is within the well established norms of good taste and decency;
(vii) exploits social evils like dowry, child marriage.
(viii) promotes directly or indirectly production, sale or consumption of(A) cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants;
(…)

74 Statement of Object and Reasons to the Cable Television Networks (Regulation) Act, 1995.

75 Cable Television (Network) Regulation Act 1995, section 20 Power to prohibit operation of cable television network in public interest.—
(2) Where the Central Government thinks it necessary or expedient so to do in the interest of the—
(iv) public order, decency or morality, it may, by order, regulate or prohibit the transmission or re-transmission of any channel or

programme.

76 Cable Television (Network) Regulation Act 1995, section 20.

77 *Court on its own Motion* v. *State*, 146 (2008) DLT 429.

78 *Kal Cables* v. *Secretary, Ministry of Information and Broadcasting*, (2014) 7 MLJ 204.

79 Omar Rashid, 'UP probe panel indicts AajTak for fake sting operation' *The Hindu* (Lucknow, 16 February 2016) <http://www.thehindu.com/news/national/other-states/up-probe-panel-indicts-television-channel-for-fake-muzaffarnagar-riot-sting-operation/article8245270.ece> accessed 2 April 2018.

80 *The Hindu* (n. 79).

81 Faisal Fareed, 'Muzaffarnagar riots sting: House summons staff of 2 TV channels' *The Indian Express* (Lucknow, 24 February 2016) <http://indianexpress.com/article/cities/lucknow/muzaffarnagar-riots-sting-house-summons-staff-of-2-tv-channels/> accessed 2 April 2018.

82 *The Indian Express* (n. 81).

83 Utkarsh Anand, 'Muzaffarnagar Riots: SC stays proceedings against TV networks, pull up UP House' *The Indian Express* (New Delhi, 5 March 2016) <http://indianexpress.com/article/india/india-news-india/muzaffarnagar-riots-sc-stays-proceedings-against-tv-network-pulls-up-up-house/> accessed 2 April 2018.

84 Cable Television Network (Regulation) Rules, 1994, rule 6(1): Programme Code. – (1) No programme should be carried in the cable service which:-
(a) Offends against good taste or decency;
(b) Contains criticism of friendly countries;
(c) Contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes;
(d) Contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths;
(e) is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes;
(f) Contains anything amounting to contempt of court;
(g) Contains aspersions against the integrity of the President and Judiciary;
(h) Contains anything affecting the integrity of the Nation;
(i) Criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country ;
(j) Encourages superstition or blind belief;
(k) Denigrates women through the depiction in any manner of the figure of a women, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals;
(l) Denigrates children;
(m) Contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups ;
(n) Contravenes the provisions of the Cinematograph Act, 1952.
(o) is not suitable for unrestricted public exhibition.

85 Cable Television Network (Regulation) Rules 1994, rule 6.

86 Cable Television Network (Regulation) Rules 1994, rule 6.

87 Cable Television (Network) Regulation Act 1995, section 20.

88 Ministry of Information and Broadcasting, *Advisory issued to Aaj Tak* (7 June 2016) <http://mib.gov.in/sites/default/files/aaj_Tak_news_advisory_7th_June.pdf> accessed 2 April 2018.

89 Ministry of Information and Broadcasting, *Advisory issued to ABP* (7 June 2016) <http://mib.nic.in/sites/default/files/ABP_News_advisory_7th_June.pdf> accessed 2 April 2018.

90 Ministry of Information and Broadcasting, *Warning issued to Sathiyam TV Channel* (12 May 2015) <http://mib.nic.in/sites/default/files/Warnning_Sathiyam_TV_Channel_12th_May_2015.pdf> accessed 2 April 2018.

91 Ministry of Information and Broadcasting, *Sathyam Tv Channel* (n. 90).

92 IANS, 'Zakir Naik's Peace TV has no permission to downlink: I&B ministry' *Hindustan Times* (India, 9 July 2016) <http://www.hindustantimes.com/india-news/zakir-naik-s-peace-tv-has-no-permission-to-downlink-i-b-ministry/story-opO7oYuXyUGx-5lT5IDBsrN.html> accessed 2 April 2018.

93 Ministry of Information and Broadcasting, *Advisory, Transmission of un-authorized TV channels by Cable Operators*, No. 9/213/2016-DAS (8 July 2016) <http://mib.nic.in/sites/default/files/Advisory_to_MSO_and_LCO.pdf> accessed 2 April 2018.

94 Smriti Kak Ramachandram, 'Government Clueless about Unauthorized Channels' *Hindustan Times* (New Delhi, 13 July 2016) <http://www.hindustantimes.com/india-news/zakir-naik-s-peace-tv-row-govt-clueless-about-unauthorised-channels/story-9f8S2KQsg9kKck7I6xQceL.html> accessed 2 April 2018.

95 DHNS, 'State govt to rein in TV news channels' *Deccan Herald* (Bengaluru, 14 September 2016) <http://www.deccanherald.com/content/570277/state-govt-rein-tv-news.html> accessed 2 April 2018.

96 Ministry of Information and Broadcasting, *Advisory on Cauvery Issue* (13 September 2016) <http://mib.nic.in/sites/default/files/Advisory_on_cauvery_issue.pdf> accessed 2 April 2018.

97 HT Correspondent 'Use shots of Cauvery, avoid live telecast of violence: Government tells TV channels' *Hindustan Times* (India, 13 September 2016) <http://www.hindustantimes.com/india-news/centre-asks-media-to-show-restraint-while-covering-cauvery-issue/story-mf5a3eNuKp62kDr7gQgGRO.html> accessed 2 April 2018.

98 *Hindustan Times* (n. 97).

99 *Star India Private Limited* v. *Union of India*, W.P. No. (C) 879/2010.

100 *Aamoda Broadcasting Company* v. *Union of India*, W. P. No. 17389 of 2014.

101 *Secretary, Ministry of Information and Broadcasting* v. *Cricket Association of Bengal*, 1995 SCC (2) 161.

102 Bhairav Acharya, 'India's Long History of Television Censorship' *The Wire* (India, 12 November 2016) <https://thewire.in/79531/india-long-history-of-television-censorship/> accessed 2 April 2018.

103 Press Council's Powers, Practices and Procedures *Press Council of India* <http://presscouncil.nic.in/Content/65_1_Press-Procedures.aspx> accessed 24 April 2018; Kartik Sharma, Ashley Tomlinson, Maura Finn, *Freedom of the Press: Using the Law to Defend Journalists* (Human Rights Law Network 2009).

104 Press Council of India Act 1978, section 12; the Press and

Registration of Books Act 1867, section 1.

105 Press Council of India Act 1978, section 12; the Press and Registration of Books Act, 1867, section 1.

106 Press Council of India Act 1978, section 12.

107 Press Council of India Act 1978, section 5(2).

108 Press Council of India Act.

109 Press Council Act 1978, section 5(3)(b).

110 Press Council Act 1978, section 5(3)(c).

111 Press Council Act 1978, section 5(3)(d).

112 Press Council of India Act 1978, chapter II.

113 Press Council of India Act 1978, chapter III.

114 Press Council Act 1978, chapter III.

115 Press Council Act 1978, chapter III.

116 Press Council Act 1978, chapter III.

117 *Jagran Prakashan* v. *Press Council of India*, AIR 1996 All 84.

7

Online Hate Speech

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

7

Online Hate Speech

7.1 Introduction

Chapter 7 of the Report discusses online hate speech. It analyses the extent to which the current legal and regulatory framework is applicable to online hate speech. Methods used by the Indian state to tackle online hate speech can be categorised under three broad heads.[1] First, criminal action may be taken against the author (or at times, the intermediary) responsible for such content. Second, the offending content may be blocked, filtered and/or taken down. Third, access to the internet may be blocked. Chapter 7 explores each of these methods. A significant trend in the recent years has been self-regulation by web-based platforms to cope with harmful speech. We discuss this self-regulation in Chapter 8 of the Report.

In the context of online hate speech, the Information Technology Act, 2000 (IT Act) is the principal Indian legislation governing online communication. The IT Act gives effect to some of the Indian state's strategies to control online hate speech. This does not however restrict the applicability of laws such as the Indian Penal Code, 1860 (IPC) or the Code of Criminal Procedure, 1973 (CrPC) to online speech (in addition to offline speech). These laws are discussed in other chapters of the Report.[2] Chapter 8 focuses on the IT Act and other (existing or proposed) statutes that apply exclusively to online content.

Chapter 7 is divided into three parts. Part 7.2 discusses the criminalisation of online hate speech and action that may be taken against those who create or share such content. Part 7.3 discusses the ways in which blocking, filtering and taking down of content is used to regulate online hate speech. Part 7.4 discusses the use of internet shutdowns to control the circulation of online hate speech.

7.2. Criminalisation of Hate Speech under IT Act, 2000

Online hate speech was criminalised via Section 66A of the IT Act, the medium-specific law applicable to online content. Section 66A was struck down as unconstitutional by the Supreme Court in 2015. Following this, the

Indian government has attempted to fill the void by drafting a new law to criminalise harmful speech online.[3] This law was in draft form at the time this report went to print.

Part 7.2 deals with Section 66A and the new regulation that may replace it, and is further divided into two sub-parts. The first sub-part discusses Section 66A of the IT Act and the second sub-part discusses the most recent draft of the proposed regulation for online hate speech.

7.2.1. The unconstitutional Section 66A of IT Act

Section 66A was added to the IT Act in 2008.[4] The state was concerned that increased use of the internet had led to new forms of crime, including 'offensive messages through communication services'.[5] As a result, it decided to include penal provisions in the IT Act, IPC, CrPC, and the Indian Evidence Act, 1872 (Evidence Act) to punish such crimes.[6] Section 66A was amongst several amendments to the IT Act, and it specifically dealt with offensive and misleading messages. It reads as follows:

> **Section 66A: Punishment for sending offensive messages through communication service, etc. Any person who sends, by means of a computer resource or a communication device:**
>
> **(a) any information that is grossly offensive or has menacing character; or**
>
> **(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or**
>
> **(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,**
>
> **shall be punishable with imprisonment for a term which may extend to three years and with fine.**
>
> **[Explanation: For the purpose of this section, terms 'electronic mail' and 'electronic mail message' means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.]**

The constitutionality of Section 66A was questioned before the Supreme Court after several controversial arrests.[7] For instance, in one highly publicised case in 2012, the police arrested two young women for merely posting and 'liking' a Facebook post about political figures in the Indian state of Maharashtra.[8]

In March 2015, the Supreme Court, in *Shreya Singhal* v. *Union of India* (*Shreya Singhal*), held Section 66A to be unconstitutional and struck it down.[9] The Supreme Court first affirmed that freedom of speech available online should be accorded the same level of constitutional protection as the freedom afforded offline. It then examined Section 66A vis-à-vis the fundamental right to freedom of speech and expression granted under Article 19(1)(a) of the Constitution.[10] In this regard, it found that Section 66A placed an arbitrary and disproportionate restriction on the right to free speech. It ruled that Section 66A was inconsistent with Article 19(1)(a) of the Constitution and fell beyond the ambit of reasonable restrictions permissible

under Article 19(2).[11]

7.2.2. Proposed criminalisation of online hate speech

Subsequent to the Supreme Court's order striking down Section 66A, there have been reports of attempts to bring back some elements covered by it.[12]

In December 2015, the Parliamentary Standing Committee on Home Affairs recommended changes to the IT Act in its 189th Report. The report proposes that issues of online hate speech and spoofing be dealt with separately through two new sections under the IT Act.[13] Specifically it recommends amendments to the IT Act to criminalise online content that 'promotes ill will, hatred and enmity amongst communities, race, religions etc.', similar to Sections 153A and 153B of the IPC.[14]

The proposed section is framed as follows:

> **Whoever, by means of a computer resource or a communication device sends or transmits any information (as defined under 2(1)(v) of IT Act)**
>
> **a) which promotes or attempts to promote, on the ground of religion, race, sex, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between religious, racial, linguistic or regional groups or caste, or communities, or**
>
> **b) which carries imputations that any class of persons cannot, by reason of their being members of any religious, racial, linguistic or regional group or caste or community bear true faith and allegiance to constitution of India, as by law established or uphold the sovereignty or integrity of India, or**
>
> **c) which counsels, advices or propagates that any class of persons shall or should be by reason of their being members of any religious, racial, language or religion group or caste or community or gender be denied or deprived of their rights as citizens of India, or**
>
> **d) carries assertion, appeal, counsel, plea concerning obligation of any class of persons, by reasons of their being members of any religion [sic], racial, language or religion group or caste or community or gender and such assertion, appeal, counsel or plea causes or is likely to cause disharmony or feeling of enmity or hatred or ill-will between such members or other persons.**
>
> **shall be punishable with ….** [15]

Further, the report advocated stricter penalties than those prescribed in the IPC for hate speech under Sections 153A and 153B, due to the 'fast and wider spread' of online material and its tendency to lead to severe consequences.[16] The report also recommended that any transmission of information by a person claiming to only 'innocently forward' such information should also be charged with the same offence as the originator of the information.[17]

7.2.3. Conclusion

Section 66A of the IT Act was struck down in 2015 for being inconsistent with the Constitution.[18] The Supreme Court in *Shreya Singhal* found that the restriction of speech by Section 66A was inconsistent with the right to freedom and expression guaranteed by Article 19(1)(a) of the Constitution.[19] In the aftermath of its repeal, there have been discussions about further amending the IT Act to introduce similar provisions, in line with Sections 153A and 153B of the IPC.[20]

7.3. Blocking and Takedown of Online Content

The state can also regulate the circulation of online hate speech by ordering intermediaries to block or take down harmful content. Section 69A of the IT Act empowers the central government to direct the blocking of access to online information. The procedure to be followed for blocking of access is contained in the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules). Section 79 of the IT Act exempts intermediaries from liability for content subject to certain conditions. This section, read along with the Information Technology (Intermediaries Guidelines) Rules, 2011(Intermediaries Guidelines), creates a mechanism to ensure that online intermediaries take down 'unlawful' content.

Part 7.3 discusses two forms of limiting access to content and has been divided further into two sub-parts. The first sub-part discusses blocking of content under the IT Act and the second sub-part discusses taking down of content.

7.3.1. Blocking access to content under Section 69A

Section 69A specifies that in certain circumstances, the government may block public access to information available via a computer resource. It is reproduced below:

> **Section 69A: Power to issue directions for blocking for public access of any information through any computer resource.—**
>
> **(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.**
>
> **(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.**
>
> **(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an [sic] imprisonment for a term which may extend to seven years and shall also be liable to fine.**

The Blocking Rules prescribed under this section set down detailed procedures to be followed by the government before issuing orders directing the blocking of access to information.

7.3.1.1. Grounds for blocking hate Speech

Section 69A states that blocking of access to information may be directed only when the government is of the view that it is 'necessary or expedient' so to do in the interest of one or more of the six specified grounds. Of the grounds enumerated, 'public order' is the ground on which hate speech is most likely to be blocked. This is significant because it means that the blocking order can, in theory, be challenged if it does not fall within the contours drawn by the Supreme Court for the restriction of speech in the interest

of 'public order' (discussed in Chapter 2 of this Report).

(a) Who may block hate speech?

The Blocking Rules do not offer private individuals or entities a mechanism through which they may directly request intermediaries to block access to any content. The Blocking Rules require private persons to send their complaints to 'nodal officers' of the organisations in question.[21] The term 'organisations' has been defined to mean any ministries and departments of the central government, or any agency of the state, union territory, or central government that may be notified.[22]

Subsequent to receiving the request, if the organisation is satisfied of the need to block access, it may forward the complaint through its nodal officer to the 'designated officer', appointed by the central government.[23] The designated officer is the only person authorised by the IT Act to issue directions for blocking on the administrative side.[24]

7.3.1.2. Process for blocking hate speech

All requests received by the designated officer must be examined within seven working days by a committee consisting of the designated officer and representatives from the ministries of law and justice, home affairs, information and broadcasting, and the Indian Computer Emergency Response Team (CERT-In).[25] The committee must determine whether the request is covered under one or more of the grounds mentioned in Section 69A and should give specific recommendations on the request received.[26]

According to the Blocking Rules, the designated officer should make efforts to identify the person, or the intermediary, or the computer resource that hosted the information requested to be blocked.[27] Such person or intermediary in control of the computer resource must be given the opportunity to be heard and file their response to the complaint.[28]

The recommendations of the committee, along with the initial details sent by the nodal officer must be submitted to the Secretary of the Department of Information Technology for approval.[29]

The Blocking Rules also provide for a separate process in case of an emergency.[30] In such a situation, the designated officer can examine the request and submit their recommendations to the Secretary of the Department of Information Technology.[31] If the Secretary is satisfied, they can pass interim directions to block access to the information.[32] However, the request for emergency blocking has to be brought before the committee mentioned above within 48 hours of interim directions given by the Secretary.[33] The Secretary, based on the recommendations of the committee, can revoke the interim directions for blocking and ask for the content to be unblocked.[34]

The Blocking Rules specify that any agency of the government or intermediary can be directed to block content.[35] In practice, the Department of Telecommunication has been known to issue orders to licensed internet service providers (ISPs) to block content.[36] There has also been communication to intermediaries through government agencies, including CERT, to restrict content.[37]

7.3.1.3. Review of blocking orders

The Blocking Rules also specify that a review committee must meet at least once every two months in order to review whether all blocking orders are compliant with Section 69A of the IT Act.[38] The review committee is constituted under Rule 419A of the Indian Telegraph Rules, 1951.[39]

The rules mandate that the committees must be constituted at the Centre, as well as for every State, and further prescribes the composition of such committees.[40]

The review committee can set aside a blocking order if it is of the opinion that the order is not in conformity with Section 69A.[41] However, if at the time of review, the content in question is ostensibly blocked in India, it is unclear what provisions (if any) are made to ensure that the committee has access to the content to determine whether the blocking order conforms to the requirements of Section 69A.[42]

7.3.1.4. Constitutionality of Blocking Rules under Article 19(1)(a)

The constitutionality of the Blocking Rules was challenged in *Shreya Singhal*. Among the grounds of challenge were the contentions that (a) the rules provided no 'pre-decisional hearing' to the 'originator' of information,[43] and (b) the rules require that strict confidentiality should be maintained with regard to all requests received for blocking any orders passed subsequently.[44] The Supreme Court rejected the challenge, observing that 'Section 69A unlike Section 66A is a narrowly drawn provision with several safeguards'.[45]

The Supreme Court noted that first, the central government can only resort to blocking if it is satisfied that it is necessary so to do. Second, the necessity is 'relatable' only to some of the permissible categories of reasonable restrictions set out in Article 19(2) of the Constitution of India, which have been provided under Section 69A. Third, the reasons for issuing the blocking orders must be recorded in writing, which means these orders and their reasons can be challenged before the courts.[46] The Supreme Court also noted that the Blocking Rules offer affected parties the right to be heard by the committee before finalising its decision. It clarified that the right to a hearing is offered not merely to the intermediary who hosts the content, but also to the person who creates or posts such content.[47]

Despite the clarifications provided by the Supreme Court, problems with the process followed to block online content persist. The entire process is still shrouded in secrecy since the Blocking Rules require that blocking requests and implementation be kept confidential.[48] Though some analysis of the judgment has suggested that blocking orders should be publicly available, the Supreme Court did not examine the issue explicitly.[49] Some commentators believe that the entire process is still confidential.[50]

The Supreme Court has also overlooked the fact that the committee is comprised solely of members from the executive branch of the government. The entire process is authorised, executed and reviewed by the executive. As a result, its ability to act independently and create robust checks and balances against misuse of power is questionable.[51]

7.3.2. Takedown of content under Section 79

Section 79 of the IT Act, which contains 'safe harbour' protection from liability for intermediaries, was amended in 2008. The amended Section 79 enables a wide range of intermediaries to seek safe harbour protection from liability for any third-party content even when such content is in breach of other Indian laws.[52] It reads as follows:

> **79. Intermediaries not to be liable in certain cases:**
>
> **(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be**

liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or authorise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

[Explanation — For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.]

7.3.2.1 Immunity contingent on taking down content

The immunity from liability granted by Section 79 is contingent upon intermediaries (a) merely 'providing access to communication system'[53] and functioning as a platform and not a speaker, (b) refraining from 'initiating transmission, selecting the receiver of the transmission or selecting or modifying the information contained in the transmission'[54] and (c) observing 'due diligence'.[55]

The due diligence obligations of intermediaries are listed in the Intermediaries Guidelines and broadly require (a) the publication of rules, policies and user agreements, (b) the obligation to refrain from knowingly hosting, publishing or transmitting infringing information, and (c) the obligation to take down infringing information upon receiving actual knowledge of it. Of these, grounds (b) and (c) are discussed in this sub-part.

The obligation of intermediaries specified under clauses (b) and (c) in the paragraph above raises questions about when an intermediary can be said to have such 'knowledge'. The Supreme Court has held that intermediaries are only required to take down content 'upon receiving actual knowledge from a court order, or on being notified by the appropriate government or its agency'[56] and not on the basis of user complaints.[57] This means that it is only a government notice or court order, not a user notice, that can be used to ensure that

the intermediary 'receives knowledge' of illegal online content.

Google's Transparency Report indicates that it received 466 content removal requests from January to June 2017, of which the highest number (116) related to defamation, which made up 25% of the removal requests and 10 requests related to hate speech, which made up 2% of the removal requests.[58] Facebook's Government Requests Report indicates that 1228 pieces of content were restricted between January and June 2017. The report states that the majority of content restricted was 'alleged to violate local laws relating to defamation of religion and hate speech'.[59]

Under the Intermediaries Guidelines, if an intermediary fails to disable access to prohibited information upon 'actual knowledge' as described above, it will not be granted the safe harbour protection. This will leave it open to prosecution under the various laws criminalising hate speech, as discussed in other chapters in this Report. Intermediaries have also been taking steps to self-regulate in the context of harmful speech. This is discussed in Chapter 8 of this report.

7.3.2.2 Conclusion

The blocking of online content is regulated by Section 69A of the IT Act, read along with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. Section 69A specifies that the central government may issue directions for blocking if it is 'necessary or expedient' to, and in certain circumstances, including threats to 'public order'.[60] Under the Blocking Rules, private individuals can request 'nodal officers' to block content.[61] The Blocking Rules do not allow private parties to directly approach intermediaries.

Rule 14 of the Blocking Rules establishes a review committee, which reviews blocking orders to ensure that they are in compliance with Section 69A of the IT Act.

In *Shreya Singhal*, the constitutionality of the Blocking Rules was questioned. The Supreme Court found that the Blocking Rules were constitutional, stating among other reasons that a right to be heard was available to intermediaries and those who created content.[62] In addition, blocking orders could only be issued in line with the grounds mentioned under Section 69A.[63] However, blocking orders are confidential and the process has been criticised for its seemingly opaque nature.[64]

Section 79 of the IT Act specifies 'safe harbour' protection available to online intermediaries. Under Section 79, intermediaries are only absolved from liability if they function as platforms and not speakers, and if they do not 'initiate, select the receiver or modify' information being transmitted.[65] In addition, intermediaries are required to observe 'due diligence', the standards for which are specified in the Intermediaries Guidelines.[66]

Among other obligations, the Intermediaries Guidelines specifies that an intermediary must take down infringing material upon receiving 'actual knowledge'.[67] The Supreme Court in *Shreya Singhal* clarified that 'actual knowledge' was in relation to information received through a 'court order or on being notified by an appropriate government or its agency'.[68] Failure to comply with such orders and notices implies that intermediaries will not be granted 'safe harbour' protection.

7.4. Internet Shutdowns to Regulate Hate Speech

Part 7.4. discusses the role played by internet shutdowns in regulating hate speech. State governments across India have increasingly shutdown all access to information in response to perceived threats to law and order.[69] Incitement to violence can sometimes create such a threat to law and order. For instance, internet services have been suspended when a Facebook post allegedly 'sparked communal tension and violence',[70] or when a viral video of an idol being desecrated led community members to gather at the accused's residence and demand their arrest.[71]

Between January 2010 and April 2018, there have been over 164 instances where access to the internet was shut down in a particular region in the country.[72] Owing to lack of official communication from the state and/or central governments, it is difficult to determine with certainty the specific laws under which the shutdowns were ordered. News reports suggest that the CrPC and the Telegraph Act, 1957 are most frequently used to implement internet shutdowns.[73]

Section 144[74] of the CrPC is often used to implement internet shutdowns.[75] This sub-part discusses Section 144 and internet shutdowns. It also discusses the 'Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017' along with the constitutionality of Section 144.

7.4.1. Internet shutdowns under Section 144 of CrPC, 1973

Section 144 of the CrPC gives the power to a District Magistrate to:

> **direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management through a written order if such order is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray.**

Under Section 144, a District Magistrate can impose an internet shutdown in her own district.[76] An order under Section 144 must be written,[77] based on material facts and be 'absolute and definite in its terms'.[78] According to the law, such an order can only be passed for 'immediate prevention' and in a manner which is co-extensive with the duration of an emergency.[79]

In August of 2017, the Department of Telecommunications issued rules applicable to shutdowns, titled 'Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017' (Temporary Suspension Rules). These rules have instituted a system to implement shutdowns. According to these rules, only the 'Secretary to the Government of India in the Ministry of Home Affairs in the case of Government of India or the Secretary to the State Government in-charge of the Home Department in the case of a State Government' can issue directions for shutdowns.[80] In exceptional circumstances, orders may be issued by 'an officer, not below the rank of a Joint Secretary to the Government of India'.[81] These rules have also instituted a review committee which will evaluate these orders within the following working day.[82] These rules were issued in August of 2017. From August, 2017 till April, 2018, over 30 instances of internet shutdowns have been reported.[83]

7.4.1.1. Constitutionality of Section 144

The constitutionality of the vaguely worded Section 144 was questioned before the Supreme Court in *Madhu Limaye* v. *Ved Murti,* where the Court held that the likelihood of misuse would not

be reason enough to strike down the section.[84] On other occasions, the Supreme Court has noted that the purpose under Section 144 is the 'urgency' of the situation, and its likelihood of being able to prevent harmful occurrences.[85] The Supreme Court has also clarified that the 'subjective satisfaction' of the officers must be based on reasonable standards and should be minimal.[86] It has held that the threat perceived must be real and not be 'quandary, imaginary or a merely likely possibility'.[87]

In a public interest litigation (PIL) challenging a ban on mobile internet services in Gujarat effected under Section 144 of the CrPC, the Gujarat High Court found that the areas of application of Section 69A of the IT Act and Section 144 of the CrPC were different. It ruled that while Section 69A could be used to ban specific websites, Section 144 of the CrPC could be used to issue directions to ban access to the internet.[88] This ruling failed to engage in a satisfactory manner with the effect of overbroad and blanket suspensions of mobile internet services on the freedom of expression and access to information.[89] The matter is yet to be substantively considered by the Supreme Court, which refused to admit a special leave petition challenging the decision of the court in the Hardik Patel case.[90]

The United Nations Human Rights Council has condemned internet shutdowns in a resolution passed in 2016, noting that human rights apply online just as they do offline (a sentiment that echoes *Shreya Singhal)*.[91] The internet shutdowns in India fall foul of this resolution.

7.4.2. Conclusion

Section 144 of the CrPC is used to implement internet shutdowns. In addition, the Telegraph Act has also been known to be used to implement such shutdowns.

The constitutionality of Section 144 has been challenged in a few cases. The Supreme Court has upheld its constitutionality, stating that it is to be implemented in 'urgent' situations.

Recently, the 'Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017' issued under the Telegraph Act have established a procedural framework for implementing shutdowns. However, the number of reported internet shutdowns continues to be high, suggesting that more thought needs to be given to how the use of shutdowns to regulate harmful speech online can be limited to 'urgent' situations.

7.5. Conclusion

This chapter discusses Indian law applicable specifically to online hate speech. As can be seen in Chapters 3 and 4 in this Report, it is typical for the Indian state to criminalise, censor and remove from circulation speech that it sees as harmful. These strategies are visible in the IT Act and in state action directed at online speech.

Although Section 66A is no longer in force, the government has been examining other ways in which harmful speech online may be criminalised again.

Blocking of content online is used often to prevent the circulation of online hate speech. The process of issuing blocking orders is opaque, and the reasoning offered in orders is not subject to public scrutiny.[92] This lack of transparency means there are few avenues available for the public to hold the executive accountable for misuse of its power to block online content.[93]

The increasing use of internet shutdowns as a response to threats to law and order is alarming

and disproportionate. However, if the blocking of 22 social media platforms in Kashmir in April, 2017 is any indication of what is to come, there is a possibility that state governments will move on to using Section 69A to block entire platforms such as Facebook, Twitter and WhatsApp instead of suspending internet services.[94]

1 Chinmayi Arun and Nakul Nayak, 'Preliminary Findings on Online Hate Speech and the Law in India' (2016) *Berkman Klein Center Research Publication* No. 2016-19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882238> accessed 19 April 2018.

2 For a detailed discussion on offences relating to hate speech under these legislations, please refer to Chapters 3 and 4 in this Report.

3 Salman SH, 'Government looking to modify IPC sections instead of bringing back Section 66A: Report' *MediaNama* (India, 24 August 2017) <https://www.medianama.com/2017/08/223-mha-recommends-tweaking-ipc-sections-to-bring-back-section-66a/> accessed 19 April 2018.

4 Information Technology (Amendment) Act 2008.

5 Information Technology (Amendment) Act 2008, Statement of Objects and Reasons

6 Information Technology (Amendment) Act 2008, Statement of Objects and Reasons; The Information Technology Amendment Bill 2006 <http://www.prsindia.org/uploads/media/Information%20Technology%20/1168510210_The_Information_Technology__Amendment__Bill__2006.pdf> accessed 20 April 2018.

7 See PTI, 'Two Mumbai Girls Arrested for Facebook Post against Bal Thackeray Get Bail' *India Today* (Mumbai, 19 November 2012) <http://indiatoday.intoday.in/story/2-mumbai-girls-in-jail-for-tweet-against-bal-thackeray/1/229846.html> accessed 19 April 2018; Patrick Bohler, 'Indian Women Arrested Over Facebook Post' *Time* (19 November 2012) <http://newsfeed.time.com/2012/11/19/indian-woman-arrested-over-facebook-like/> accessed 19 April 2018; A. Srinivasa Rao, 'PUCL Leader Jaya Vindhyala Sent to Judicial Custody for Objectionable Facebook Post on Tamil Nadu Governor K. Rosaiah' *India Today* (Hyderabad, 13 May 2013) <http://indiatoday.intoday.in/story/pucl-leader-jaya-vindhayala-remanded-judicial-custody-objectionable-posts-tn-governor-india-today/1/270867.html> accessed 19 April 2018; 'Activist Held for Facebook Post' *The Times of India* (Chirala, 13 May 2013) <https://timesofindia.indiatimes.com/india/activist-held-for-facebook-post/articleshow/20022377.cms> accessed 19 April 2018.

8 Nikhil Pahwa, 'Questions That Report of Arrests for Facebook Comment Raise About Indian Law' *MediaNama* (India, 22 November 2012) <http://www.medianama.com/2012/11/223-questions-that-report-of-arrests-for-facebook-comment-raise-about-indian-law/> accessed 19 April 2018; PTI, 'Two Mumbai Girls Arrested for Facebook Post against Bal Thackeray Get Bail' *India Today* (Mumbai, 19 November 2012) <http://indiatoday.intoday.in/story/2-mumbai-girls-in-jail-for-tweet-against-bal-thackeray/1/229846.html> accessed 19 April 2018; ET Bureau, 'Shaheen Dhada's arrest triggered by pressure from Shiv Sainiks' *Economic Times* (Mumbai, 21 November 2012) <https://economictimes.indiatimes.com/news/politics-and-nation/shaheen-dhadas-arrest-triggered-by-pressure-from-shiv-sainiks/articleshow/17300332.cms.> accessed 20 April 2018.

9 *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1.

10 For a detailed understanding of this right, please refer to Chapter 2 in this Report.

11 Freedom House, 'Freedom on the Net 2015: India, Legal Environment', (*Freedom House*, 2015) <https://freedomhouse.org/report/freedom-net/2015/india> accessed 20 April 2018; Ujwala Uppaluri and Sarvjeet Singh, 'Supreme Court Ruling on Section 66A: As Much Online as Offline' *Economic Times* (India, 25 March 2015) <http://blogs.economictimes.indiatimes.com/et-commentary/supreme-court-ruling-on-section-66a-as-much-online-as-offline/> accessed 6 July 2017.

12 PTI, 'Section 66A: MHA to Set up Panel to Address Security Concerns Following SC Order' *DNA* (India, 13 April 2015) <http://www.dnaindia.com/india/report-section-66a-mha-to-set-up-panel-to-address-security-concerns-following-sc-order-2077236> accessed 20 April 2018; Surabhi Agarwal and Aman Sharma, 'In Bid to Fight Terror on Social Media, Draconian Section 66A May Be Back in a Softer Form' *Economic Times* (New Delhi, 26 February 2016) <http://economictimes.indiatimes.com/news/politics-and-nation/in-bid-to-fight-terror-on-social-media-draconian-section-66a-may-be-back-in-a-softer-form/articleshow/51146719.cms> accessed 20 April 2018.

13 Parliamentary Standing Committee on Home Affairs, *189th Report on 'Action Taken by the Government on the Recommendations/Observations Contained in the 176th Report on the Functioning of Delhi Police'*, 7 December 2015, paras 3.5.5–3.5.8.

14 Parliamentary Standing Committee on Home Affairs (n. 13), para 3.5.8.

15 Parliamentary Standing Committee on Home Affairs (n. 13), para 3.5.8.

16 Parliamentary Standing Committee on Home Affairs (n. 13), para 3.5.8.

17 Parliamentary Standing Committee on Home Affairs (n. 13), para 3.5.7.

18 *Shreya Singhal* (n. 9).

19 *Shreya Singhal* (n. 9).

20 Parliamentary Standing Committee on Home Affairs (n. 13), para 3.5.8.

21 Blocking Rules, rule 6(1).

22 Blocking Rules, rule 2(g).

23 Blocking Rules, rule 6(2).

24 Blocking Rules, rule 5.

25 Blocking Rules, rule 7.

26 Blocking Rules, rule 8(4).

27 Blocking Rules, rule 8(1).

28 Blocking Rules, rule 8(1).

29 Blocking Rules, rule 8(5).

30 Blocking Rules, rule 9.

31 Blocking Rules, rule 9(2).

32 Blocking Rules, rule 9(2).

33 Blocking Rules, rule 9(3).

34 Blocking Rules, rule 9(4).

35 Blocking Rules, rule 5.

36 Department of Telecommunications, 'Direction to block Internet Website' (14 February 2013) No. 813-7/25/2011-DS(Vol.-11)-11 <http://www.medianama.com/wp-content/uploads/blocking-instruction-II-14-Feb-2013.pdf> accessed 23 April 2018; Department of Telecommunications, (31 July 2015) No. 813-7/25/2011-DS (Vol.-V) <http://cis-india.org/internet-governance/resources/dot-morality-block-order-2015-07-31/view> accessed 23 April 2018.

37 'Government Requests Report: India' (Facebook, 2018) <https://transparency.facebook.com/country/India/2017-H1/> accessed 23 April 2018; 'Transparency Report: India' (Twitter, 2016) <https://transparency.twitter.com/en/countries/in.html> accessed 23 April 2018.

38 Blocking Rules, rule 14.

39 Blocking Rules, rule 2(i).

40 The committee constituted by the central government consists of the Cabinet Secretary, the Secretary to the Department of Legal Affairs, and the Secretary to the Department of Telecommunications. The review committees constituted by state governments consist of the Chief Secretary, the Secretary Law/Legal Remembrancer Incharge, Legal Affairs and the Secretary to the State Government (other than the Home Secretary).

41 Blocking Rules, rule 14.

42 Chinmayi Arun and Sarvjeet Singh, 'NOC Online Intermediaries Case Studies Series: Online Intermediaries in India' (*National Law University, Delhi*, 18 February 2015), p. 16 <http://ccgdelhi.org/doc/CCG-at-NLUD-NOC-Online-Intermediaries-Case-Studies.pdf> accessed 24 April 2018.

43 *Shreya Singhal* (n. 9), para 108.

44 *Shreya Singhal* (n. 9), para 108.

45 *Shreya Singhal* (n. 9), para 109.

46 *Shreya Singhal* (n. 9), para 109.

47 *Shreya Singhal* (n. 9), para 110.

48 Blocking Rules, rule 16.

49 Chinmayi Arun, 'The Case of the Online Intermediary' *The Hindu* (India, 7 April 2015) <http://www.thehindu.com/opinion/op-ed/shreya-singhal-case-of-the-online-intermediary/article7074431.ece> accessed 20 April 2018.

50 Chinmayi Arun (n. 49); Sunil Abraham, 'Shreya Singhal and 66A: A Cup Half Full and Half Empty' (*Economic & Political Weekly*, 11 April 2015), p. 15, <http://cis-india.org/internet-governance/blog/shreya-singhal-judgment.pdf> accessed 20 April 2018; Apar Gupta, 'But What about Section 69A?' *Indian Express* (India, 27 March 2015) <http://indianexpress.com/article/opinion/columns/but-what-about-section-69a/> accessed 20 April 2018; Sunil Abraham, 'Big Win for Freedom of Speech. Really?' *Bangalore Mirror* (India, 29 March 2015) <http://bangaloremirror.indiatimes.com/columns/views/freedom-of-speech/article-show/46730694.cms> accessed 20 April 2018.

51 Arun and Singh (n. 42), p. 14.

52 For instance, the Copyright Act, 1957 and the Patents Act, 1970 as mentioned in Section 81, Information Technology (Amendment) Act, 2008.

53 The Information Technology Act 2000, section 79(2)(a).

54 The Information Technology Act 2000, section 79(2)(b).

55 The Information Technology Act 2000, section 79(2)(c).

56 *Shreya Singhal* (n. 9), para 119.

57 *Shreya Singhal* (n. 9), paras 117–119.

58 'Government Requests to Remove Content: Google Transparency Report' (*Google*, June 2016) <https://www.google.com/transparencyreport/removals/government> accessed 20 April 2018.

59 'Government Requests Report: India January 2017 – June 2017' (*Facebook*, 2018) <https://transparency.facebook.com/country/India/2017-H1/> accessed 23 April 2018.

60 The Information Technology Act 2000, section 69A(1).

61 Blocking Rules, rule 6(1).

62 *Shreya Singhal* (n. 9), paras 108-109.

63 *Shreya Singhal* (n. 9).

64 Arun and Singh (n. 42); Sunil Abraham (n. 50); Apar Gupta (n. 50).

65 The Information Technology (Amendment) Act 2008, section 79(2)(b).

66 The Information Technology Act 2000, section 79(2)(c).

67 Intermediaries Guidelines, rule 3(4).

68 *Shreya Singhal* (n. 9), para 119.

69 TNN, 'Net Banned in Udaipur after "Abusive" Post on Facebook' *Times of India* (Jaipur, 20 April 2017) <http://timesofindia.indiatimes.com/city/jaipur/net-banned-in-udaipur-after-abusive-post-on-facebook/articleshow/58271116.cms> accessed 20 April 2018; 'Sikar Tense after Clash, Section 144 Imposed, Mobile Internet Suspended' *Outlook* (Jaipur, 31 March 2017), <http://www.outlookindia.com/newswire/story/sikar-tense-after-clash-section-144-imposed-mobile-internet-suspended/967573> accessed 20 April 2018.

70 Tanima Biswas, 'As Charges Fly, Odisha's Bhadrak Still

Simmers after Communal Violence' *NDTV* (Odisha, 21 April 2017) <http://www.ndtv.com/india-news/as-charges-fly-odis-has-bhadrak-still-simmers-after-communal-violence-1679747> accessed 20 April 2018.

71 Tanvi Nalin, 'Section 144 Imposed, Internet Banned in Saran after Deity Desecration Video Goes Viral' *Times of India* (Patna, 6 August 2016) <http://timesofindia.indiatimes.com/city/patna/Section-144-imposed-internet-banned-in-Saran-after-deity-desecration-video-goes-viral/articleshow/53571544.cms> accessed 20 April 2018.

72 Centre for Communication Governance, 'Incidents of Internet Shutdown in India (2010 Onwards)' (*National Law University, Delhi*) <https://drive.google.com/file/d/0BwkVG7IkYz7Ac0ZZMH-hCeUc3Nkt0d0U4cURvY0hRTkxLY3pj/view> accessed 23 April 2018.

73 Nalin (n. 71); PTI, 'Internet Services Suspended in Kashmir for One Month' *The Economic Times* (India, 26 April 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/internet-services-suspended-in-kashmir-for-a-month/articleshow/58379499.cms> accessed 20 April 2018.

74 Refer to Chapter 3.2 for the text of Section 144.

75 Arun and Nayak (n. 1); Centre for Communication Governance (n. 72).

76 Arun and Nayak (n. 1), p. 12.

77 *Ramlila Maidan Incident* v. *Home Secretary, Union of India*, (2012) 5 SCC 1.

78 B.B. Mitra, *Code of Criminal Procedure*, (21st edn, Kamal Law House 2011), p. 537.

79 *Umulkulus* v. *Executive Magistrate*, 1991 (Kerala) CrimLJ 262; Mitra (n. 78).

80 Temporary Suspension Rules, rule 2(1).

81 Temporary Suspension Rules, rule 2(1).

82 Temporary Suspension Rules, rule 2.

83 Centre for Communication Governance (n. 72).

84 *Madhu Limaye* v. *Ved Murti*, 1971 SCR (1) 145.

85 *Ramlila Maidan Incident* (n. 77), para 38.

86 *Ramlila Maidan Incident* (n. 77), para 47.

87 *Ramlila Maidan Incident* (n. 77), para 47.

88 *Gaurav Sureshbhai Vyas* v. *State of Gujarat*, W.P. (Civil) No. 191 of 2015, order dated 15 September 2015.

89 Nakul Nayak, 'The Anatomy of Internet Shutdowns – III (Post Script: Gujarat High Court Verdict)' (*Centre for Communication Governance Blog*, 19 September 2015) <https://ccgnludelhi.wordpress.com/2015/09/19/the-anatomy-of-internet-shutdowns-iii-post-script-gujarat-high-court-verdict/> accessed 20 April 2018.

90 *Gaurav Sureshbhai Vyas* (n. 88); Arun and Nayak (n. 1); Samanwaya Rautray, 'Supreme Court Upholds Internet Ban by States' *Economic Times* (India, 12 February 2016) <http://tech.economictimes.indiatimes.com/news/internet/supreme-court-upholds-internet-ban-by-states/50955292> accessed 20 April 2018.

91 United Nations General Assembly, Human Rights Council, Thirty-second session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 27 June 2016, A/HRC/32/L.20

92 Arun and Singh (n. 42), p. 25.

93 Arun and Singh (n. 42), p. 25.

94 *Economic Times* (n. 73).

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

8

Self- Regulation and Other Non-State Intervention

- THIS PAGE IS INTENTIONALLY LEFT BLANK -

8

Self-Regulation and Other Non-State Intervention

8.1 Introduction

The previous chapters of this report have discussed state-led regulation, in the form of laws created and implemented by the state. Chapter 8 examines the restrictions on hate speech that emerge from regulation by non-state entities.

This chapter is divided into five parts. The first part introduces the different forms of regulation other than traditional state-led law making. The second part discusses regulation of hate speech in the print media. The third part discusses regulation of hate speech in broadcast media. The fourth part discusses restrictions on hate speech in advertising and the fifth part of this chapter discusses the self-regulatory policies of social media platforms.

8.2 Forms of Regulation

This part of the chapter discusses the broader idea of regulation, which moves away from the state-centric notion of regulatory processes. This idea of regulation is based on the notion that regulation can also be carried out by a variety of non-state organisations. Further, this part will also discuss forms of regulation other than traditional state-led law making.

The traditional legal perspective on regulation considers laws, rules and regulations enforced by the state as the paradigmatic form of regulation. However, a broader understanding of regulation regards all forms of social control, whether imposed by the state or by any other social institution, as regulation.[1] This broader notion of regulation challenges the state-centric approach to regulatory processes in two ways. First, it emphasises that non-state actors such as corporations, organised interest groups and non-governmental organisations (NGOs) also influence social behaviour and serve as fora for public deliberation. Second, it highlights the limitations of legal rules and demonstrates the increasing use of alternative means of policy

implementation.[2]

According to this perspective, regulation can be carried out by the state or by a variety of non-state organisations, such as corporations, trade organisations, professional bodies, consumers and NGOs. Further, these non-state bodies may sometimes be subject to varying degrees of state control or supervision.[3] Based on the degree of control or supervision exercised by the state, regulation by such bodies can broadly be divided into two categories: (i) self-regulation and (ii) co-regulation.

A commonly used form of non-governmental regulation is self-regulation.[4] Some of the advantages of self-regulation are: (i) it is convenient for the government to rely on the expertise of the industry; (ii) it is easier for a self-regulatory association to remain flexible and adapt to changing circumstances than it is for the government; (iii) it provides greater incentive for compliance, since regulations are designed by peers after accounting for various perspectives; and (iv) it reduces the government's expenses by shifting the cost of developing and enforcing rules to self-regulating associations.[5]

The disadvantage of self-regulation is that it could lead to undue influence by private parties, anti-competitive practices, and lack of transparency and accountability. Therefore, co-regulatory arrangements are often adopted to address the weaknesses of the self-regulatory model.[6] Co-regulation refers to a set-up where codes and standards have statutory backing. Co-regulation can be implemented in various forms, including legislative delegation of authority to industry to regulate and enforce norms, statutes prescribing voluntary or compulsory codes, or statutes laying down minimum standards.[7]

Media regulation uses these non-state forms of regulation extensively. The following parts detail how various kinds of self-regulatory and co-regulatory frameworks have been used to regulate hate speech.

8.3. Print Media

This part of the chapter discusses the regulatory mechanism for hate speech in the Indian print media.

In India, the print media is co-regulated through the Press Council of India (PCI). The PCI is a statutory body established to oversee the functioning of the press, maintain journalistic standards and prescribe guidelines for government officials.[8] Since the PCI has statutory backing,[9] all newspapers and periodicals come within its jurisdiction. We have discussed the composition of the Council and the procedure for complaints in Chapter 6 of this report.

The PCI has issued norms for journalistic conduct,[10] which include pre-publication verification,[11] eschewing violence[12] and obscenity,[13] and upholding national interest.[14] In the context of references to caste, religion and communities, these norms advise the press against 'publishing any fictional literature distorting and portraying the religious or well known characters in an adverse light offending the susceptibilities of large sections of society who hold those characters in high esteem'.[15] The guidelines also state that it is the 'duty of the newspaper to ensure that the tone, spirit and language of a write up is not objectionable, provocative, against the unity and integrity of the country, spirit of the constitution, seditious and inflammatory in nature or designed to promote communal disharmony'.[16]

While covering events of communal tension, people's confidence in the law and order machinery of the state should not be undermined

and styles of reporting that are likely to aggravate tension should be avoided.[17]

The PCI has also issued case- or context-specific guidelines for journalists and government officials during communal disturbances in 1969, 1991 and 1993.[18] For instance, the 1991 guidelines suggest that any writing which 'might spark off tension, destruction and death' should be monitored by the government, and brought to the notice of the PCI.[19] These guidelines state that language used in the news be temperate,[20] and avoid provocative and sensational headlines.[21] However, the guidelines cautioned state governments against using vindictive measures such as restrictions in advertisements[22] and required any action against erring editors or publishers to be within the bounds of law.[23]

Set out below are some relevant extracts from the guidelines issued in 1993:

> **Guidelines Issued by the Press Council on January 21-22, 1993 in the Wake of the Ram Janambhoomi-Babri Masjid Dispute:**
>
> **Guidelines for guarding against the commission of the following journalistic improprieties and unethicalities.**
>
> **1. Distortion or exaggeration of facts or incidents in relation to communal matters or giving currency to unverified rumours, suspicions or inferences as if they were facts and base their comment, on them.**
>
> **2. Employment of intemperate or unrestrained language in the presentation of news or views, even as a piece of literary flourish or for the purpose of rhetoric or emphasis.**
>
> **…**
>
> **7. Emphasising matters that are apt to produce communal hatred or ill-will, or fostering feelings of distrust between communities.**
>
> **…**
>
> **10. Making disrespectful, derogatory or insulting remarks on or reference to the different religions or faiths or their founders.**

The PCI also serves as a quasi-judicial adjudicatory body,[24] by addressing complaints against the press regarding violation of journalistic norms as well as complaints by the press regarding violation of their freedom of expression.[25] The Press Council is a 29-member body, chaired by a retired judge of the Supreme Court of India,[26] with 28 other members nominated from various backgrounds, such as the media sector, members of the Parliament, and members from 'cultural, literary and legal fields as nominees of the Sahitya Academy, University Grants Commission and Bar Council of India'.[27] Complaints must first be made in writing to the concerned editor, before they are adjudicated by the PCI.[28] If the editor does not write back, or if the complaint has not been resolved after communicating with the editor, the complainant can take the matter forward with the PCI. In their complaint to the PCI, the complainant is required to provide 'the name and address of the newspaper, editor or journalist against whom the complaint is directed' along with a clipping of the objectionable material and a statement explaining why it is objectionable. According to a notification published in the Gazette of India on the 14 November 1979, complaints regarding publication or non-publication must be lodged with the PCI within two months for 'dailies, news agencies and weeklies' and within four months in all other instances.[29] The PCI has the power to only censure newspapers or editors, and does not have the power to impose any punitive

sanctions.[30]

In one case, *Panchjanya*, a Hindi weekly, had published an allegedly false, distorted and provocative news item. The publication titled 'Bangladesh Infiltrators Organize Bloody Game – Assam on Fire – Anti-National Politics of Sonia Party'[31] read:

> **After Bangladesh separated from Pakistan, its Intelligence agency ISI hatched a conspiracy to make Assam a Muslim-majority state and pave the way for its secession from India. After emergence of Bangladesh as an independent nation, Muslim infiltrators in lakhs entered Assam and most of them are still living there. These Bangladeshi infiltrators are targeting India.**[32]

The complainant argued that such reporting would inflame communal tensions and increase hostility between communities.[33] The matter came up before the inquiry committee of the PCI, which opined that 'while the newspaper was entitled to its analysis and views, it was simultaneously incumbent on the press to ensure that it be cautious against such publication creating communal enmity or hostility'.[34] The PCI adopted the report of the inquiry committee and dismissed the petition.[35]

In another case before the PCI, it was alleged that a newspaper, *Kutch Uday*, had published a highly objectionable news item 'to break the unity and to develop mistrust in the general members of Kutchi Bhanushali Community against its leaders'. It was further alleged that the newspaper used offensive and objectionable language against this community and its leaders. The matter came up before the inquiry committee, which examined the facts of the case and asked the respondent to publish an apology, to which the respondent agreed. The PCI adopted the report of the inquiry committee accordingly.[36]

The report released by PCI, for the period April 2014–March 2015, highlights that the co-regulatory framework has been used effectively to resolve a number of complaints. The report states that 1,249 complaints were instituted in the PCI, of which 199 were instituted by the press 'against authorities of the government for violation of press freedom' and 1,050 'were directed against the press for breach of journalistic ethics'.[37] Out of the 199 matters regarding threats to press freedoms, 13 were adjudicated.[38]

Along with the 1,050 cases regarding violation of journalistic norms, 821 such cases were pending from the previous year, of which the PCI had adjudicated 66 matters by the end of March 2015.[39] Out of the 66 cases, the outcomes were a mix of settlement, assurances given by the newspaper, admonishment, and censuring of the newspaper.[40]

In addition to these cases, 121 cases were pending as of 31 March 2014. 188 cases were decided under the proviso to Regulation 5(1) of the Inquiry Regulations, 1979 and as of 31 March 2015, 117 of these cases were pending.[41] The complaints regarding threats to press freedom were divided between 'harassment of newsman' and withdrawal or denial of 'facilities to the press' (government advertising, accreditation).[42] A majority of the cases were dismissed for default and in one instance related to denial of 'facilities to the press', the Information and Public Relation Department in Uttar Pradesh gave their assurance to the *Adhunik Awashyta* publication.[43]

8.4. Broadcast Media

This part of the sub-chapter discusses the

regulatory framework through which restrictions on hate speech are enforced in the broadcast media in India, consisting of television and radio. This part is subdivided into two sub-parts. The first sub-part discusses the self-regulatory framework that regulates television content and second sub-part discusses the combined framework of government-backed and self-regulatory mechanisms to regulate radio broadcasts.

8.4.1 Television

The content regulation framework for television has been criticised for certain directions, such as the word 'beef' being censored out of television shows.[44] Television content is regulated by a self-regulatory framework, and the discussion in this chapter is divided into two sub-parts. The first sub-part discusses the regulatory framework that restricts hate speech on television news networks and the second sub-part discusses the regulatory framework that restricts hate speech on non-news television networks. While television news is governed by the News Broadcasters' Association (NBA), the non-news channels are regulated by the Indian Broadcasting Foundation (IBF).

8.4.1.1. Television news and the NBA

The NBA has a Code of Ethics and Broadcasting Standards that requires channels to ensure impartiality, objectivity, respect privacy, eschew obscenity, and keep national security in mind.[45] The code requires that care be taken not to broadcast visuals that would inflame sentiments or prejudice certain groups of people.[46]

In addition to its general code of ethics, NBA issues guidelines during elections to regulate hate speech. For instance, for the general elections to the sixteenth Lok Sabha, the guideline regulating hate speech read:[47]

> **News broadcasters must not broadcast any form of 'hate speech' or other obnoxious content that may lead to incitement of violence or promote public unrest or disorder as election campaigning based on communal or caste factors is prohibited under Election Rules. News broadcasters should strictly avoid reports which tend to promote feelings of enmity or hatred among people, on the ground of religion, race, caste, community, region or language.**

The Election Commission endorsed the same guidelines during elections in other states.[48]

It is important to note that the NBA is a voluntary association of 26 private TV news broadcasters and has jurisdiction only over its members.[49]

The NBA's News Broadcasting Standards Regulations[50] constitute a News Broadcasting Standards Authority (NBSA) to adjudicate content-related complaints. The NBSA is a nine-member body, chaired by an eminent jurist, and consisting of four editors and four other members with special knowledge or experience in law, education, medicine, health, environment and consumer affairs, amongst other fields.[51]

The NBA follows a two-tier complaint mechanism, in which a complaint is first made to the concerned broadcaster and only escalated to the NBSA if the broadcaster does not respond in a satisfactory manner.[52] The NBSA follows processes of notification and response, and conducts an inquiry under the News Broadcasting Standards Regulations. Since this is a self-regulatory body, there is no scope for appeal.[53] However, members of the NBA have granted the NBSA the power to admonish or censure broadcasters, and fine them up to Rs. One Lakh.[54]

In 2011, the NBSA received a number of

complaints about a show called 'Gay Culture Rampant in Hyderabad' aired on TV9 news channel.[55] The news channel focused on a number of men in an allegedly gay club and interviewed them about their personal lives and sexual preferences.[56] The broadcast showed un-morphed photographs of the interviewees.[57] The NBSA found that the programme was not in the public interest and had violated the privacy of the men in the visuals. The channel was strongly censured, fined Rs. One Lakh and ordered to run an apology scroll for three consecutive days.[58]

It appears that prominent news channels are able to flout the NBSA's orders. Zee News for instance, was said to have flouted the NBSA's orders in March of 2018.[59] The effectiveness of NBSA's orders has also been called into question, on account of close to 400 private news channels not being in its jurisdiction.[60]

8.4.1.2. Non-news television networks

The non-news networks in television are also regulated through a self-regulatory framework. The Indian Broadcasting Foundation (IBF), which is an association of private non-news television channels in India, provides guidelines and standards for broadcasters. The IBF is a voluntary organisation, whose members manage over 350 channels.[61] It is the largest association of television channels in India.

The IBF Content Code and Certification Rules, 2011 (IBF Content Code), updated in December 2014,[62] contains guidelines for different subjects, such as the standard for displaying violent, obscene, or religious content and the restrictions on their presentation.[63] These guidelines state that in the event that a film or programme is not required to be certified by the CBFC or a competent-authority, it should be self-certified by the broadcast service provider (BSP).[64] A 'Programme Categorization System' is listed under the guidelines, which describes the nature of content that should not be broadcast. This includes certain types of content pertaining to crime and violence, religion and community, and harm and offence among others. Specifically, in the context of religion and community, the guidelines state as follows:

> **Subject Matter Treatment: The subject-matter treatment of any program under all categories shall not in any manner: 1. Defame religions or communities or be contemptuous of religious groups or promote communal attitudes or be likely to incite religious strife or communal or caste violence. 2. Incite disharmony, animosity, conflict, hatred or ill will between different religious, racial, linguistic groups, castes or communities. 3. Counsel, plead, advise, appeal or provoke any person to destroy, damage or defile any place of worship or any object held sacred by any religious groups or class of persons.**
>
> …
>
> **Audio – Visual Presentation: The audio visual presentation of any content will be given in a responsible and aesthetic manner, subject to the condition that the following shall not be included under all categories a) Distort or demean or depict in a derogatory manner the physical attributes or social customs and practices of any ethnic, linguistic, religious groups or any caste or communities. b) Distort or demean or depict religious or community symbols or idols or rituals or practices in a derogatory manner.**

The language used in these guidelines is broader than the language used for similar conduct that constitutes offences under the IPC. For instance, while Section 153-A of the IPC

prohibits 'promotion of … disharmony or feelings of enmity, hatred or ill-will', the guidelines prohibit incitement to 'animosity' and/or 'conflict'. Further, the guidelines on showing crime and violence prohibit any content that would 'incite violence against specific groups identified by race, national or ethnic origin, colour, class, religion, gender, sexual orientation, age or mental or physical disabilities'.[65]

This standard is monitored and enforced through a two-tier self-regulation mechanism under the IBF Content Code. First, the BSP[66] at the individual level will address the complaint. According the guidelines, every BSP should set up a Standard and Practice department.[67]

A complaint may be filed with the BSP Standard and Practices Department with a content auditor,[68] or directly to the BCCC. The BCCC is a thirteen member body, chaired by a retired judge of the Supreme Court or a High Court and consisting of broadcaster members (from the IBF), media experts, social workers, and representatives from government bodies such as the National Commission for Women and National Commission for Scheduled Castes.[69] The BCCC is also responsible for advising channels and ensuring their compliance with the IBF Content Code. In this regard, the procedure followed includes issuing notice to the broadcaster and giving them the opportunity to be heard before passing orders. However, no specific appeal process has been provided for.[70]

The complainant can choose between lodging a complaint with the BSP or the BCCC. There are a few differences between the two procedures, one of them being the time limit for lodging a complaint (a week from the broadcast for the BSP and fourteen days from the broadcast for BCCC). In addition, the BCCC has a wider range of recourse available.

When the BCCC concludes that a broadcaster has violated the IBF Content Code, it may issue a warning, pass 'cease and desist' orders, order display of apology scrolls, and impose fines up to Rs. Thirty lakhs against the broadcaster.[71] The BCCC also has the power to pass interim orders when a channel is found to be telecasting 'any objectionable unauthorized content, messages, or communication inconsistent with public interest or national security or if its continued telecast may create a serious law and order problem or incite violence'.[72] It shall then seek a response from the BSP in the next twenty four hours.[73] The BSP has to send a justification within this time period for the BCCC to pass a final order. If the channel defies the order of the BCCC, the matter may be referred to Ministry of Information & Broadcasting within the next twenty four hours for appropriate action.

In October 2015, the BCCC responded to a complaint about a television show where characters were depicted as misbehaving with the protagonist who was from a 'lower caste', and advised the channel to be 'extremely sensitive' in its depiction of caste in future episodes.[74] Similarly, in June 2015, a complaint was filed against a television show for using derogatory language about a particular caste and hurting social sensibilities. The programme aired the dialogue *'Naam tumhara Sikandar hai aur batein chamaron waali* (Your name is Sikandar, but you talk like a *chamaar*)'. The channel submitted that the dialogue had no intention of portraying any community negatively, and was only spoken to 'condemn the etiquette of a person who was trying to blackmail the male protagonist'. The BCCC held that such language was in contravention of Indian laws and that it should never be repeated. It also directed the channel to furnish a written apology.[75]

In May 2015, the BCCC received a complaint about a television show in which a person declared that 'Assamese and Northeast people

are everywhere seen in hotels as servers and bill collectors' and used the racist epithet '*chinkies*' to refer to people from these states. The BCCC held that making 'derogatory or uncharitable' remarks about anyone was a criminal offence and directed the channel to display an apology scroll.[76]

In another case, a complaint was filed about a television show depicting a woman being disrobed and forced to walk across a village for an entire episode. Although the editors claimed that they were trying to highlight such derogatory practices to their viewers, the BCCC found the length of such a depiction objectionable, and directed the channel to display an apology scroll four times in the next episode.[77] In another matter, the BCCC directed that a television show about a love story in the backdrop of India's partition should no longer be aired, since it had the potential of causing unrest due to its theme, which was inimical to Indian interests.[78]

There are also occasions in which the BCCC has refused to intervene. For example, when the word '*kachcha*' (underwear), a significant symbol in the Sikh community was used, the BCCC cautioned against making disparaging references to the word, but refused to intervene as long as it was being used for 'humor and light-hearted banter'.[79] The BCCC also refused to intervene in a complaint under the theme of 'harm and offence' against Masterchef Australia, a programme that showed 'cooking beef', which was objectionable to the complainant because the cow holds a special place of reverence in Hindu culture. The BCCC did not find anything objectionable.[80]

The BCCC dismissed a complaint about a show that objected to the historically inaccurate use of the names Hasan and Hussain, holy names of Prophet Mohammad's grandsons, for Akbar's sons. However, the episode was found inoffensive, especially since the show broadcast a disclaimer stating that the episode was not a true and historic representation.[81]

Other than such directives and orders in response to specific complaints, the BCCC also issues advisories. For instance, the BCCC directed that telecasting sensitive content on minorities should be with the objective to 'create an atmosphere congenial to communal harmony, peace and amity without telecasting content that hurts the sentiments of communities and religious groups'.[82]

8.5. Radio Broadcasting

Radio broadcasting in India is government-backed as well as private. All India Radio (AIR) is state-regulated, as it functions under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990.[83] AIR has 420 stations, broadcasts in 23 languages and reaches nearly 99 per cent of India's population.[84]

AIR has its own broadcast code, which prohibits attacking religions or communities, inciting violence, acts against the maintenance of law and order, and casting aspersions against the nation, its institutions or its functionaries.[85]

Further, AIR has an advertisement code, which lays down standards to promote and develop healthy advertising practices.[86] No advertisement that 'tends to incite people to crime, cause disorder or violence, or breach of law or glorifies violence or obscenity in any way' is permitted to be broadcast.[87] Advertisements must avoid indecent, vulgar, suggestive, repulsive or offensive themes or treatment. This prohibition includes advertisements that are not objectionable in themselves, but which advertise objectionable books, photographs, etc. and lead to their sale and circulation.[88] AIR is also

governed by the self-regulating code of the Advertising Standards Council of India (ASCI), since it applies to all broadcast and print media. This code is supported by the Cable Television Networks Rules, 1994.[89]

Private radio operators are licensed to operate by the Ministry of Information and Broadcasting (MIB). This is executed through a Grant of Permission Agreement (GOPA) through which private radio operators agree to follow the same programme and advertisement codes as AIR.[90] Consequently, the broadcast and advertising codes along with the self-regulation code of the ASCI discussed above apply to private radio operators also.

The MIB also issues advisories regarding content on private FM radio channels. In October 2012, it issued an advisory stating that it had come to light that many private FM radio channels were airing vulgar, objectionable, indecent and offensive material, and directed the channels to follow the advertisement and programme codes, applicable to them by virtue of Clause 11.2 of the GOPA, and directed them to strictly follow the terms of the GOPA.[91] The advisory also stated that 'attack on religious communities' and 'incitement to violence or anything against maintenance of law and order' were prohibited, and a gross violation of the GOPA.[92]

The regulatory framework restricting hate speech in broadcasts—both on television and radio—is predominantly self-regulatory in character. The only exception is the All India Radio, which is a state-regulated radio broadcaster.

8.6. Advertising in the Media

This part of the sub-chapter discusses the framework of regulation carried out by non-state actors, that restricts and monitors hate speech in advertisements across various media platforms such as print, broadcast and the internet.

Advertisements across media platforms (print and broadcast and internet) are self-regulated by the Advertising Standards Council of India (ASCI), which is supported by advertisers, advertising agencies, media (broadcasters and press), and others bodies such as public relations agencies or market research companies.[93]

The ASCI has a Code for Self-Regulation in Advertising (ASCI Code), and one of its fundamental principles is to ensure that advertisements are not offensive to generally accepted standards of public decency.[94] Accordingly, advertisements must be honest and truthful and non-offensive to the public. They should contain 'nothing indecent, vulgar, especially in the depiction of women, or nothing repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave and widespread offence'.[95] Further, no advertisement that tends to incite people to crime, or promote disorder and violence or intolerance is permitted.[96]

The ASCI checks for violations of its standards through the National Advertising Monitoring Service (NAMS),[97] an initiative under which ASCI-trained personnel support a market research company in tracking advertisements nationally across print and broadcast media.[98]

The ASCI has also established the Consumer Complaints Council (CCC), to adjudicate complaints about violation of the ASCI Code.[99] Complaints may be made to the CCC by individuals, consumer groups, government regulators, or institutions in the advertising industry.[100] The CCC makes recommendations about advertisements against which complaints are made, but does not pre-censor or pre-approve them, nor are its recommendations

binding.[101] The CCC may also take *suo moto* cognisance of advertising content suspected of violating the ASCI Code.[102] Monitoring and enforcement of the ASCI Code is done through an informal self-regulation mechanism where respondent advertisers are given an opportunity to address and rectify the complaint made against them.[103] Further, the CCC permits a review of its recommendations under certain conditions, such as the discovery of new evidence, or credible reasons for justifying non-response in case of an *ex-parte* decision.[104] At present, there are twenty seven members in the CCC, including six ASCI members.[105]

The ASCI also looks at potentially obscene and offensive content. In one such instance, a complaint was made about a clothing brands billboard in Bengaluru. The advertisement displayed the image of a woman in shorts, bending over a car, and posing for the camera with the text in uppercase 'WHAT AN ASS'. The CCC concluded that the text in the advertisement, along with the representation of the woman, was 'indecent, vulgar and objectifying women, and also likely to cause grave and widespread offence, contravening Chapter II of the ASCI Code'.[106]

Another case was the advertisement for Aquawhite toothpaste. In this advertisement, the lead actors were purportedly talking about the traits of the product without mentioning the product. A few complaints were lodged for the removal of this advertisement. The CCC upheld these complaints, stating that the women in the advertisement are involved in 'a crude and sexually suggestive conversation, which, in light of generally prevailing standards of decency and propriety, is likely to cause grave and widespread offence'.[107]

Recently, however, a public interest litigation was filed in the Delhi High Court challenging the role of the ASCI as a self-regulatory body and the extent of its powers.[108] The CCC found the advertisements of a company, Pratham Education to be 'misleading and deceptive', in response to which the company filed a PIL 'questioning their competence' to do so. The case is currently pending and notice has been issued to the ASCI.[109]

Significantly, the ASCI Code does not cover advertisements of a political nature or non-commercial government advertisements.[110] The Directorate of Advertising and Visual Publicity (DAVP), which is attached to the MIB, is responsible for undertaking multimedia advertising and publicity for various ministries and departments of government of India. This is an instance of quasi-regulation. In June 2016, the DAVP released a new advertising policy with regard to print media,[112] stating that the DAVP would avoid releasing advertisements to newspapers and journals that incite or tend to incite communal passion, preach violence, offend the sovereignty and integrity of India or socially accepted norms of public decency and behaviour.[113] Similarly, for broadcasts by all cable and satellite television channels, the MIB issued amended policy guidelines in October 2015,[114] which explicitly state that the DAVP will not release advertisements to channels that incite or tend to incite communal passion, preach violence, offend the sovereignty and integrity of India or socially accepted norms of public decency and behaviour.[115]

Various regulatory frameworks led by non-state bodies have been put in place to restrict hate speech in media advertising. While commercial advertisements are regulated, monitored and enforced through a self-regulatory framework, the regulation of critical government advertisements and advertisements of a political nature are still supervised by the state through a quasi-regulatory framework.

8.7 Social Media Platforms

8.7.1 Introduction

Hate speech on social media platforms has been a prominent concern over the last few years. In 2016, Facebook, Twitter, YouTube and Microsoft signed the European Union Code of Conduct on Hate Speech. According to this code, these social media companies have made 'public commitments' to curtail hate speech on their platform.[116]

In 2017, Germany passed an anti-hate speech law, which imposes fines on social media companies for their failure to take down hate speech within a certain time period.[117] Social media companies affected by this new law, like Facebook, have criticized it stating that the platform 'should not be tasked with state responsibilities'.[118] Following from the code of conduct and the legislation, there has been speculation over ways in which platforms regulate their own content.[119] Platforms have also been criticized for not taking into account cultural sensitivities and failing to 'reflect the interests of individuals at risk' as a part of their regulation policies.[120]

This part of the chapter discusses the ways in which social media platforms regulate 'hate speech'. It focusses on each platforms guidelines and moderation methods. The first sub-part discusses Facebook's community standards and moderation policies. The second sub-part discusses YouTube's policies and guidelines and their 'trusted flagger' system. The third sub-part discusses Twitter content moderation policies and the fourth sub-part briefly discusses WhatsApp's guidelines to prohibit hate speech.

8.7.2 Facebook

8.7.2.1 Community guidelines

Facebook has a set of 'community guidelines' that users must adhere by.[121] These guidelines set out specific standards for 'hate speech'.[122] This social media platform has internal moderators and external moderators who review and take-down reported content.

Facebook defines 'hate speech' as 'a direct attack on people based on what we call protected characteristics – race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, gender identity and serious disability or disease'.[123]

An 'attack' is defined as 'violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation'.[124]

Facebook has also clarified that their regulation policy strives to allow 'clear attempts at humour or satire that might otherwise be considered a possible threat or attack'[125] and also attempts to 'balance concerns about free expression and community respect'.[126]

Early in 2017, the guidelines by which Facebook's moderators determine valid content were leaked.[127] This leak contained several documents describing actions to be taken in relation to specific types of content, including but not limited to, hate speech, revenge porn and terrorism.[128] According to the document on 'hate speech', this social media platform has three categories for the purpose of moderation: protected categories, quasi-protected categories and non-protected categories.[129]

The protected category includes users towards whom hateful speech is directed on the basis of 'religious affiliations and sexual orientation', quasi-protected categories includes hateful speech on the basis of a user's immigrant or

refugee status and non-protected categories refer to users who are exposed to hateful speech for their 'social class, appearance and political ideology'.[130]

Facebook has internal moderators and also external moderators, who are independent contractors working for the social media platform.[131]

8.7.2.2 Outsourcing content moderation

Similar to the external moderators, Facebook works with other external bodies to specifically target online extremism and hate speech. The Online Civil Courage Initiative works with Facebook, targeting extremist speech on the platform by 'countering' it.[132] The OCCI has a publicly available set of guidelines called the Information Pack on Counter Speech Engagement.[133] The guide categorizes comments as 'supportive, negative, constructive, antagonistic' and suggests ways in which comments should be addressed.[134]

8.7.2.3 Publication of internal guidelines

In late April 2018, Facebook updated its community standards to include the internal guidelines used by Facebook staff to moderate content.[135] These internal guidelines have been incorporated into the community standards in order to explain to users where and how Facebook draws the line on removal of content.[136] In the context of hate speech, the updated standards divide hate speech 'attacks' into 3 tiers, and provide examples of the types of speech that would be considered hate speech in each category.[137]

The community standards also acknowledge that in certain cases content that would typically fall under the category of hate speech may be permitted on the platform. For example, content containing another individual's hate speech is shared for the purpose of raising awareness or educating others, or words or terms that might breach the standards are used 'self-referentially or in an empowering way'.[138]

8.7.3 YouTube

8.7.3.1 Hate speech policy

YouTube's community standards discourage users from uploading hate speech on their platform.[139] The policy also states that users should report hateful content by flagging videos or file abuse reports if they wish to report against another user.[140]

According to their community guidelines, the YouTube staff review reported videos and decide whether they should be age-restricted, removed or whether the account should be terminated.[141] Users are allowed to moderate comments posted on their videos.[142]

YouTube's Ad content guidelines also state that content that discriminates or 'disparages or humiliates an individual or group of people on the basis of the individual's or group's race, ethnicity or ethnic origin, nationality, religion, disability, age, veteran status, sexual orientation, gender identity, or other characteristic that is associated with systemic discrimination or marginalization is not eligible for advertising'.[143]

In April 2018, YouTube introduced a Reporting History Dashboard that allows each user to access the status of content they have reported for review.[144] It also released its first quarterly Community Guidelines Enforcement Report, in an attempt to provide greater transparency over its content moderation practices.[145] It further announced plans to eventually provide additional data such as 'data on comments, speed of removal, and policy removal reasons.'[146]

8.7.3.2 'Trusted flaggers'

YouTube has a Trusted Flaggers Program, which rewards users with points for reporting 'inappropriate content' share knowledge.[147] As users gain more points, they gain access to 'filtering tools', which gives them the ability 'mass flag' videos and moderate content. The program, briefly titled 'YouTube Heroes', faced criticism from users for ostensibly allowing 'mobs' to rule over the platform.[148]

8.7.4 Twitter

8.7.4.1 Hateful conduct policy

Twitter's General Policy prohibits 'hateful conduct' on their platform.[149] This includes speech directed against a user on the 'basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease'[150]. Examples of hateful conduct also includes 'behaviour that incites fear about a protected group'[151] and 'repeated and/or or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone'.

Reports of violation are accepted from all users, however, Twitter states that sometimes the reports may need to be verified by the person targeted.[152] The policy also explains that while the number of reports received in relation to particular content does not impact whether or not the content is removed, it may impact the priority such content is given in the review cycle.[153] Depending upon the severity of the violation, and previous records of violation by the user, Twitter may ask the user to remove the content (before being allowed to tweet again), or even suspend the user's account.[154]

In December 2017, in the aftermath of widespread criticism relating to transparency[155], the Twitter Rules were updated. A majority of the policies and rules in relation to 'hateful conduct' were retained, however a few additions were made.[156] The new policy states that abuse or threats, directed through a user's profile information, which includes 'multiple slurs, epithets, racist or sexist tropes' could lead to permanent suspension of accounts.[157]

In addition, 'hateful imagery' will be removed.[158] 'Hateful imagery' in this context includes 'logos, symbols, or images whose purpose is to promote hostility and malice against others based on their race, religion, disability, sexual orientation, or ethnicity/national origin'.

As a part of the update, Twitter's policy on 'Violence and Physical Harm' was also updated.[159] This is relevant for a discussion on hate speech since it targets 'accounts that affiliate with organizations that use or promote violence against civilians to further their causes'.[160]

Twitter's policy on advertisements also prohibits 'hate speech', including but not limited to speech which is against an individual, organization or protected group based on race, ethnicity, national origin, colour, religion, disability, age, sex, sexual orientation, gender identity, veteran status or other protected status, inflammatory content which is likely to evoke a strong negative reaction or cause harm.[161]

8.7.5 WhatsApp

WhatsApp does not specifically address the issue of communication of hate speech over its platform. However, the terms of use provide that users must access and use the social media platforms services only for legal, authorised and acceptable purposes.[162] The terms of use also prohibit content that is 'illegal, obscene, defamatory, threatening, intimidating, harassing, hateful, racially, or ethnically offensive, or instigate or encourage conduct that would be

illegal, or otherwise inappropriate, including promoting violent crimes' .[163]

The terms of use do provide that a user account, or access to the account may be modified, suspended or terminated for any reasons, including violation of the 'letter or spirit' of the terms.[164] It also states that 'creation of harm, risk, or possible legal exposure' for WhatsApp can lead to the modification, suspension or termination.[165] However, there is no reporting or other enforcement mechanism specific to 'hate speech.'

8.8 Conclusion

This sub-chapter details the various regulatory frameworks led by non-state entities that have been adopted to restrict hate speech in the print and broadcast media and advertising, as well as monitoring and enforcement mechanisms in place to regulate and adjudicate upon instances of hate speech. The discussion also classifies the various regulatory frameworks based on the nature and degree of involvement of the state in the framework.

1 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2007), p. 3, 4.

2 Morgan and Young (n. 1).

3 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) p. 137.

4 Peter P. Swire, 'Markets, Self-Regulation and Government Enforcement in the Protection of Personal Information, Privacy and Self-Regulation in the Information Age, in Privacy and Self-Regulation in the Information Age by the U.S. Department of Commerce' (1997), p. 7 <http://ssrn.com/abstract=11472> accessed 23 April 2018.

5 Angela J Campbell, 'Self-Regulation and the Media' (1990) 51(3) Federal Communications Law Journal 711, p. 715-717.

6 Campbell (n. 5), p. 714; OECD, *The OECD Report on Regulatory Reform: Synthesis* (1997) <https://www.oecd.org/gov/regulatory-policy/2391768.pdf> accessed 23 April 2018.

7 Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems, p. 11.

8 'Press Council's Powers, Practices and Procedures' (*Press Council of India*) <http://presscouncil.nic.in/Content/65_1_Press-Procedures.aspx> accessed 23 April 2018.

9 Press Council of India Act 1978.

10 'Principles and Ethics' (*Press Council of India*) <http://press-council.nic.in/Content/62_1_PrinciplesEthics.aspx> accessed 23 April 2018.

11 Principles and Ethics (n. 10), guideline 2.

12 Principles and Ethics (n. 10), guideline 19.

13 Principles and Ethics (n. 10), guideline 17.

14 Principles and Ethics (n. 10), guideline 23.

15 Principles and Ethics (n. 10), guideline 22(iv).

16 Principles and Ethics (n. 10), guideline 22(iv).

17 Principles and Ethics (n. 10), guideline 20.

18 'Guidelines on Specific Issues' (*Press Council of India*) <hhttp://presscouncil.nic.in/Content/63_1_GuidelinesIssues.aspx> accessed 13 April 2018.

19 'Guidelines Issued by the Press Council for Observance by the State Governments and the Media in Relation to Communal Disturbances' (*Press Council of India,* 1991), guideline (i) <http://presscouncil.nic.in/Content/63_1_GuidelinesIssues.aspx> accessed 23 April 2018.

20 'Guidelines Issued by the Press Council for Observance by the State Governments and the Media in Relation to Communal Disturbances' (n. 19), guideline (x).

21 'Guidelines Issued by the Press Council for Observance by the State Governments and the Media in Relation to Communal Disturbances' (n. 19), guideline (iv).

22 'Guidelines Issued by the Press Council for Observance by the State Governments and the Media in Relation to Communal Disturbances' (n. 19), guideline (iii).

23 'Guidelines Issued by the Press Council for Observance by the State Governments and the Media in Relation to Communal Disturbances' (n. 19), guideline(ii).

24 Press Council of India Act 1978, chapter II.

25 Press Council of India Act 1978, chapter III.

26 Press Council's Powers, Practices and Procedures (n. 8).

27 Press Council's Powers, Practices and Procedures (n. 8).

28 Press Council's Powers, Practices and Procedures (n. 8).

29 Press Council (Procedure for Inquiry) Regulations 1979, rule 3(1)(f)(i).

30 Press Council of India Act 1978, chapter III.

31 *Shri L S Herdenia* v. *The Editor, Panchjanya*, S. No. 27, F. No. 14/635/12-13-PCI (2 June 2014) <http://presscouncil.nic.in/WriteReadData/Pdf/AdjudicationGOA.pdf#67> accessed 23 April 2018.

32 *Herdenia* v. *Panchjanya* (n. 31).

33 *Herdenia* v. *Panchjanya* (n. 31).

34 Press Council of India, *36th Annual Report: April 1, 2014-March 31, 2015*, p. 154 <http://presscouncil.nic.in/WriteReadData/userfiles/file/AR2014.pdf> accessed 23 April 2018.

35 *Herdenia* v. *Panchjanya* (n. 31).

36 *Shri Damji Bhanushali* v. *Editor, Kutch Uday*, F.No.14/345/11-12-PCI, <http://presscouncil.nic.in/WriteReadData/Pdf/AdjudicationGOA.pdf#42> accessed 23 April 2018.

37 Press Council of India (n. 34), p. 13.

38 Press Council of India (n. 34), p. 128.

39 Press Council of India (n. 34), p. 128.

40 Press Council of India (n. 34), p. 128.

41 Press Council of India (n. 34), p. 128.

42 Press Council of India (n. 34), p. 143-144.

43 Press Council of India (n. 34), p. 144.

44 Shilpa Jamkhandikar, 'TV fights a bleeping battle with censors in India' Reuters (Mumbai, 1 June 2012) <http://in.reuters.com/article/india-television-censor-bollywood-tv-idINDEE84T03L20120601> accessed 23 April 2018.

45 News Broadcasters' Association, *Code of Ethics & Broadcasting Standards* <http://www.nbanewdelhi.com/assets/uploads/pdf/code_of_ethics_english.pdf> accessed 23 April 2018.

46 *Code of Ethics & Broadcasting Standards* (n. 45).

47 National Broadcasting Standards Authority, *Guidelines for Election Broadcasts* (3 March 2014), guideline 9 <http://www.nbanewdelhi.com/assets/uploads/pdf/12_Guidelines_for_Election_Broadcasts_3_3_14_E.pdf> accessed 23 April 2018.

48 Election Commission of India, *General election to Legislative Assemblies of Assam, Kerala, Puducherry, Tamil Nadu and West Bengal - 2016*, No. ECI/PN/20/2016 (10 March 2016), para 7 <http://eci.nic.in/eci_main1/current/PN20_10032016.pdf> accessed 23 April 2018.

49 News Broadcasters' Association, <http://nbanewdelhi.com> accessed 23 April 2018.

50 News Broadcasters' Association, *News Broadcasting Standards Regulations*, clause 1 <http://www.nbanewdelhi.com/assets/uploads/pdf/2_News_Broadcasting_Standards_Regulations_1_4_08.pdf> accessed 13 April 2018.

51 News Broadcasting Standards Regulations (n.50), clause 2.

52 'Guide To Complaint Redressal' (*News Broadcasters' Association*) <http://www.nbanewdelhi.com/guide-to-complaint-redressal> accessed 23 April 2018.

53 *News Broadcasting Standards Regulations* (n. 50), clauses 7, 8.

54 *News Broadcasting Standards Regulations* (n. 50), clause 7.

55 *In the matter of M/s. Associated Broadcasting Company Pvt. Ltd. Hyderabad – Telecast of programme titled "Gay Culture Rampant in Hyderabad" on TV9 news channel on 22 February 2011*, Complaint no. 5 (2011 – SM) News Broadcasting Standards Authority, (21 March 2011) <http://www.nbanewdelhi.com/assets/uploads/pdf/2011_2_ORDER_NO_5_DT__21_3_11.pdf> accessed 23 April 2018.

56 *In the matter of M/s. Associated Broadcasting Company* (n. 55).

57 *In the matter of M/s. Associated Broadcasting Company* (n. 55).

58 *In the matter of M/s. Associated Broadcasting Company* (n. 55).

59 Geeta Seshu, 'Cocking a snook at the NBSA - self regulation is not working' *The Hoot* (India, 18 March 2018) <http://www.thehoot.org/media-watch/law-and-policy/cocking-a-snook-at-the-nbsa-self-regulation-is-not-working-10559> accessed 24 April 2018.

60 Geeta Seshu (n. 59).

61 'About IBF' (*Indian Broadcasting Foundation*) <http://www.ibfindia.com/about-ibf> accessed 23 April 2018.

62 Indian Broadcasting Foundation, *Indian Broadcasting Foundation's Self-Regulatory Content Guidelines for non-News and Current Affairs Television Channels*, <http://www.ibfindia.com/sites/default/files/IBF%20Self%20Regulating%20Guidelines%20new%20dec%202014_0.pdf> accessed 23 April 2018.

63 Indian Broadcasting Foundation (n. 62).

64 Indian Broadcasting Foundation (n. 62).

65 Indian Broadcasting Foundation (n. 62),p.21.

66 The IBF's Content Code and Certification Rules, 2011 defines 'Broadcaster/Broadcast Service Provider' any person who provides a content broadcasting service and includes a broadcasting network service provider when he manages and operates his own television channel. The Indian Broadcasting Foundation's Self-Regulatory Content Guidelines for non-News and Current Affairs Television Channels uses the terms TV channel/Broadcaster and Broadcast Service Provider interchangeably.

67 Indian Broadcasting Foundation (n. 62), p. 8.

68 Indian Broadcasting Foundation (n. 62), p. 8.

69 Indian Broadcasting Foundation (n. 62), p. 10.

70 Indian Broadcasting Foundation (n. 62).

71 Indian Broadcasting Foundation (n. 62), p. 14.

72 Indian Broadcasting Foundation (n. 62), p. 13.

73 Indian Broadcasting Foundation (n. 62), p. 13.

74 Indian Broadcasting Foundation, *Action by BCCC on Complaints Received from 16 April 2014 to 20 June 2016,*

75 BCCC - Indian Broadcasting Foundation (n. 74), S. No. 314.

76 BCCC - Indian Broadcasting Foundation (n. 74), S. No. 314.

77 BCCC - Indian Broadcasting Foundation (n. 74), S. No. 79.

78 *In the matter of complaints against the Pakistani Programme "Waqt Ne Kiya Kya Haseen Sitam" aired on Zindagi TV Channel for episodes on 08/04/15 and 09/04/15 and various other episodes*, BCCC (2 June 2015) <http://www.ibfindia.com/sites/

default/files/Order_Zindagi.pdf> accessed 23 April 2018.

79 BCCC - Indian Broadcasting Foundation (n. 74), S. No. 19.

80 Indian Broadcasting Foundation, *Details of Complaints Pertaining to Theme "Harm and Offence" From July 2012 To August 2015*, S. No. 115 <http://www.ibfindia.com/sites/default/files/Annexure%20A%20--harm%20and%20offence%20complaints%20%20new.pdf> accessed 23 April 2018.

81 BCCC - Indian Broadcasting Foundation (n. 74), S. No. 404.

82 BCCC, *Advisory on Telecast of Content Sensitive to Minorities* (14 August 2013) <http://www.ibfindia.com/sites/default/files/BCCC_Advisory_Minorities_0.pdf> accessed 23 April 2018.

83 Prasar Bharti (Broadcasting Corporation of India) Act 1990, section 12; AIR Home, (All India Radio) <http://allindiaradio.gov.in/Default.aspx> accessed 23 April 2018.

84 AIR Home (n. 83).

85 'AIR Broadcast Code', (*All India Radio*) <http://allindiaradio.gov.in/Information/AIR%20Code/Pages/default.aspx> accessed 23 April 2018.

86 'Code for Commercial Advertising over All India Radio', (*All India Radio*) <http://allindiaradio.gov.in/Information/Commercial%20Code/Pages/default.aspx> accessed 23 April 2018.

87 Code for Commercial Advertising over All India Radio (n. 86), rule 2.

88 Code for Commercial Advertising over All India Radio (n. 86), rule 26.

89 Cable Television Networks Rules 1994, rule 7(9).

90 *Grant of Permission Agreement between Ministry of Information and Broadcasting and Private Radio Operator for Operating FM Radio Broadcasting Service (Phase-II)*, Clause 11.2 <http://mib.nic.in/sites/default/files/per1.pdf> accessed 23 April 2018.

91 Ministry of Information and Broadcasting, *Advisory regarding broadcast of content of FM Radio Channels* No. 804/183/2012 – BC-III (15 October 2012) <http://mib.nic.in/sites/default/files/advisory221012.pdf> accessed 23 April 2018.

92 Ministry of Information and Broadcasting (n. 91).

93 'About ASCI', (*The Advertising Standards Council of India*) <https://ascionline.org/index.php/mission.html> accessed 23 April 2018.

94 About ASCI (n. 93).

95 The Advertising Standards Council of India, *The Code for Self-Regulation in Advertising*, Chapters I and II, <http://www.ascionline.org/images/pdf/asci_code_new.pdf> accessed 23 April 2018.

96 *The Code for Self-Regulation in Advertising* (n. 95), Chapter III.

97 'National Advertising Monitoring Service (NAMS)', (*The Advertising Standards Council of India*) <http://www.ascionline.org/index.php/nams.html> accessed 23 April 2018.

98 National Advertising Monitoring Service (n. 97).

99 The Advertising Standards Council of India, Complaints Procedure <https://ascionline.org/images/pdf/ccc_procedure.pdf> accessed 23 April 2018.

100 *Complaints Procedure* (n. 99).

101 *Complaints Procedure* (n. 99).

102 *Complaints Procedure* (n. 99).

103 *Complaints Procedure* (n. 99).

104 *Complaints Procedure* (n. 99).

105 'CCC Members', (*The Advertising Standards Council of India*) <https://ascionline.org/index.php/asci-ccc-members.html> accessed 23 April 2018.

106 'CCC Members', (*The Advertising Standards Council of India*) <https://ascionline.org/index.php/asci-ccc-members.html> accessed 23 April 2018.

107 ASCI Recommendations (n. 106).

108 *Pratham Education* v. *Department of Consumer Affairs* [WP(C) 8930/2016]; Priyanka Mittal, 'Delhi HC to hear challenge to ASCI's role as regulator' Live Mint (New Delhi, 10 October 2016) <http://www.livemint.com/Politics/Gb6qBRiXJuZZigBUy5kKbP/Delhi-HC-to-hear-challenge-to-ASCIs-role-as-regulator.html> accessed 23 April 2018.

109 Priyanka Mittal (n. 108).

110 *The Code for Self-Regulation in Advertising* (n. 95), p. 19.

111 'About Us, Directorate of Advertising and Visual Publicity', (*Bureau of Outreach and Communications*) <http://www.davp.nic.in/about_us_new.html> accessed 23 April 2018.

112 Directorate of Advertising and Visual Publicity, 'The Print Media Advertisement Policy of the Government of India – 2016' (*Bureau of Outreach and Communications)* <http://www.davp.nic.in/Newspaper_Advertisement_Policy.html> accessed 23 April 2018.

113 The Print Media Advertisement Policy of the Government of India (n. 112).

114 Directorate of Advertising and Visual Publicity, *Amendments in the policy guidelines for empanelment of private C&S TV channels for Government advertisement by DAVP and other duly authorized agenices of the Ministry of I&B-reg,* File No. 22204/2/2012-AV (Part 2), (21 October 2015) <http://davp.nic.in/writereaddata/Policy211015.pdf> accessed 23 April 2018.

115 Directorate of Advertising and Visual Publicity (n. 114), annexure A.

116 Alex Hern, 'Facebook, YouTube, Twitter and Microsoft sign EU hate speech code' *The Guardian* (31 May 2016) <https://www.theguardian.com/technology/2016/may/31/facebook-youtube-twitter-microsoft-eu-hate-speech-code> accessed 23 April 2018.

117 Jefferson Chase, 'Facebook slams proposed German 'anti-hate speech' social media law' Deutsche Welle (Germany, 29 May 2017) <http://www.dw.com/en/facebook-slams-proposed-german-anti-hate-speech-social-media-law/a-39021094> accessed 23 April 2018.

118 Chase (n. 117).

119 Amar Toor, 'Germany Passes Controversial Law to fine Facebook over Hate Speech' *The Verge* (30 June 2017) <https://www.theverge.com/2017/6/30/15898386/germany-facebook-hate-speech-law-passed> accessed 23 April 2018.

120 Centre for Communication Governance, *Response to Call for Submissions on "Content Regulation in the Digital Age*" (February 2018).

121 'Community Standards', (*Facebook*) <https://www.facebook.com/communitystandards> accessed 23 April 2018.

122 'Community Standards - Hate Speech' (*Facebook*) <https://www.facebook.com/communitystandards/objectionable_content/hate_speech> accessed 23 April 2018.

123 Community Standards - Hate Speech (n. 122); Marne Levine, 'Controversial, Harmful and Hateful Speech on Facebook' (*Facebook*, 28 May 2013) <https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054/> accessed 23 April 2018.

124 Community Standards - Hate Speech (n. 122).

125 'What does Facebook consider to be hate speech?' (*Facebook*) <https://www.facebook.com/help/135402139904490?helpref=uf_permalink> accessed 23 April 2018.

126 Levine (n. 123).

127 'Hate speech and anti-migrant posts: Facebook's rules'*The Guardian (24 May 2017)* <https://www.theguardian.com/news/gallery/2017/may/24/hate-speech-and-anti-migrant-posts-facebooks-rules>accessed 23 April 2018.

128 *The Guardian* (n. 127).

129 *The Guardian* (n. 127).

130 *The Guardian* (n. 127).

131 John Naughton, 'Facebook and Twitter could pay the price for Hate Speech' *The Guardian* (19 March 2017) <https://www.theguardian.com/commentisfree/2017/mar/19/john-naughton-germany-fine-social-media-sites-facebook-twitter-hate-speech> accessed 23 April 2018; Saqib Shah, 'Facebook is outsourcing its battle against Hate Speech in Germany' Digital Trends (15 Jaunary 2016) <https://www.digitaltrends.com/social-media/facebook-hate-speech-germany/> accessed 23 April 2018.

132 Federico Guerrini, 'Facebook Launches New Initiative Against Online Extremism and Hate Speech', *Forbes* (19 January 2016) <https://www.forbes.com/sites/federicoguerrini/2016/01/19/facebook-launches-new-initiative-against-online-hate-speech-in-europe-and-beyond/#3b5bedea2952> accessed 23 April 2018.

133 The Online Civil Courage Initiative, *Information Pack on Counter Speech Engagement* <http://www.strategicdialogue.org/wp-content/uploads/2016/06/OCCI-Counterspeech-Information-Pack-English.pdf> accessed 23 April 2018.

134 *Information Pack on Counter Speech Engagement* (n. 133), p. 6.

135 Monika Bickert, 'Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process' (*Facebook*, 24 April 2018) <https://newsroom.fb.com/news/2018/04/comprehensive-community-standards/> accessed 24 April 2018.

136 Bickert (n. 135).

137 Community Standards - Hate Speech (n. 122).

138 Community Standards - Hate Speech (n. 122).

139 'Hate speech policy' (*YouTube*) <https://support.google.com/youtube/answer/2801939?hl=en> accessed 23 April 2018.

140 Hate speech policy (n. 139).

141 'Community Guidelines' (*YouTube*) <https://www.youtube.com/yt/policyandsafety/communityguidelines.html#communityguidelines-enforce> accessed 23 April 2018.

142 'Moderate & review comments' (*YouTube*) <https://support.google.com/youtube/answer/111870?hl=en> accessed 23 April 2018.

143 'Advertiser-friendly content guidelines: Content that is not suitable for most advertisers' (*YouTube*) <https://support.google.com/youtube/answer/6162278?hl=en> accessed 23 April 2018.

144 'More information, faster removals, more people - an update on what we're doing to enforce YouTube's Community Guidelines' (*YouTube*, 23 April 2018) <https://youtube.googleblog.com/2018/04/more-information-faster-removals-more.html> accessed 23 April 2018.

145 YouTube Community Guidelines enforcement' (*Google*, <https://transparencyreport.google.com/youtube-policy/overview>

146 YouTube (n. 144).

147 'YouTube Trusted Flagger Program' (*YouTube*) <https://support.google.com/youtube/answer/7554338?hl=en> accessed 23 April 2018.

148 Fruzsina Eordogh, 'YouTubers fear Mob Rule with New YouTube Heroes Initiative' *Forbes* (16 September 2016) <https://www.forbes.com/sites/fruzsinaeordogh/2016/09/26/youtubers-fear-mob-rule-with-new-youtube-heroes-initiative/#5ac48175b57d> accessed 23 April 2018.

149 'Twitter Rules and policies' (*Twitter*) <https://help.twitter.com/en/rules-and-policies#twitter-rules> accessed 23 April 2018.

150 'Hateful conduct policy' (*Twitter*) <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> accessed 23 April 2018.

151 Hateful conduct policy (n. 150).

152 Hateful conduct policy (n. 150).

153 Hateful conduct policy (n. 150).

154 Hateful conduct policy (n. 150).

155 Madeline Buxton, 'Is It Too Late for Transparency? Twitter Hopes Not' *Refinery29* (3 November 2017) <http://www.refinery29.com/2017/10/177317/twitter-rules-changes-unwanted-sexual-advances> accessed 23 April 2018.

156 Hateful conduct policy (n. 150).

157 Hateful conduct policy (n. 150).

158 Hateful conduct policy (n. 150).

159 'Violent extremist groups' (*Twitter*) <https://help.twitter.com/en/rules-and-policies/violent-groups> accessed 23 April 2018.

160 Violent extremist groups (n. 159).

161 'Ad Policy: Hateful Content' (*Twitter*) <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/hate-content.html> accessed 23 April 2018.

162 'WhatsApp Legal Info - Key Updates' (*WhatsApp*) <https://www.whatsapp.com/legal/#key-updates> accessed 23 April 2018.

163 *WhatsApp* (n. 162).

164 *WhatsApp* (n. 162).

165 *WhatsApp* (n. 162).

CENTER FOR COMMUNICATION GOVERNANCE
at National Law University, Delhi
Sector 14,Dwarka,New Delhi - 110078, India

E-mail: ccg@nludelhi.ac.in

Visit us at :
www.ccgdelhi.org
www.ccgtlr.org
www.nludelhi.ac.in


facebook.com/ccgnlud


@ccgnlud