

Navigating the Meaning of Hate Speech and Seditious in India

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Free speech laws in India have been weaponized, with the establishment permitting hateful, provocative and incendiary speech, while simultaneously targeting disagreement, dissent and criticism. An inconsistent application of law has resulted in the weakening of the rule of law and the judiciary, which in turn has encouraged polarization, intolerance and religious extremism. The present policy brief analyses the Supreme Court of India's ('Supreme Court') jurisprudence on hate speech and seditious (a colonial law used to target dissent against the British empire in India), and elucidates how the lack of a clear understanding of these laws has resulted in unbridled discretion of law enforcement authorities with respect to the prosecution of alleged hate speech, resulting in a chilling effect on the right to free speech.

1. The Constitution of India and Legislation on Speech and Hatred

Article 19 of the Constitution of India ('Constitution') guarantees freedom of speech and expression as a fundamental right. Reasonable restrictions on Article 19 have enabled the existence of provisions and laws restricting hate speech, such as Section 153A of the Indian Penal Code (1860) ('IPC') and other legislations such as the Protection of Civil Rights Act (1955), the Representation of the People Act (1951), and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (1989). Reasonable restrictions on freedom of speech are permissible under Article 19 in so far as such restrictions are in the interest 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.

Courts in India face a dilemma in applying criminal law provisions relating to hate speech, since those accused of engaging in hate speech claim that their speech does not fall within the reasonable restrictions envisaged under Article 19 and often resort to Indian jurisprudence which has tended to protect and, where necessary, expand the meaning of free speech. The lack of a unanimous definition of hate speech further exacerbates the problem. In the absence of a definition of hate speech, the Supreme Court and other Indian courts have been unable to formulate an unambiguous and comprehensive response to cases involving allegations of hate speech.¹ As such, law enforcement authorities arbitrarily use their discretion to arrest those persons whose views are unpalatable, but take no action against others whose verbal speech or non-verbal communications are demeaning and inflammatory, particularly in the context of religion.

¹ Supreme Court of India, *Pravasi Bhalai Sangathan v. Union of India*, Judgment, 12 March 2014, Writ Petition No. 157/2013, (2014) 11 SCC 477, para. 25 ('*Pravasi Bhalai*') (<https://www.legal-tools.org/doc/6drbwq/>).

2. Hate Speech in India: A Definitional Overview

The Supreme Court has, on occasion, acknowledged the need for a constitutionally acceptable definition of hate speech. While doing so, the Court has adverted to Article 20(2) of the International Covenant on Civil and Political Rights (1966) and Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965). The Court also referred to the 267th report of the Law Commission of India² which attempted to define 'hate speech', as well as the United Nations Strategy and Plan of Action on Hate Speech.³

2.1. *State of Karnataka v. Praveen Bhai Thogadia*

The jurisprudence of the Supreme Court over the years has enabled the State to prevent hateful speech, without specifically criminalising hate speech. In 2004, the Supreme Court upheld the restriction imposed by the State on one Praveen Bhai Thogadia,⁴ a political leader associated with a right-wing Hindu religious group, from participating in any gathering in a certain district for about two weeks. The State's reasoning was that the atmosphere in the district was "communally sensitive". Thogadia had recently made an "inflammatory speech which incited communal feelings" and it was likely that he would disturb communal harmony in the district. The Court noted that the restriction was justified since public order was threatened, which in turn threatened secularism which the State had a positive obligation to protect.

2.2. *Pravasi Bhalai Sangathan v. Union of India*

In *Pravasi Bhalai Sangathan ('Pravasi Bhalai')*,⁵ a public interest litigation seeking action against politicians making hateful speeches or otherwise demeaning remarks along religion, caste, region and ethnic lines, it was contended that the existing law was insufficient to deal with the menace of hate speech. The Supreme Court held that there already existed "sufficient and effective" measures for the

² Law Commission of India, "267th Report on Hate Speech in India", 23 March 2017 ('Law Commission Report on Hate Speech') (<https://www.legal-tools.org/doc/l6puhr/>).

³ United Nations Secretary-General, "United Nations Strategy and Plan of Action on Hate Speech", May 2019 (<https://www.legal-tools.org/doc/5rrb5b/>). For more information on efforts made by the international community to combat hate speech, readers may refer to the concept note of the Centre for International Law Research and Policy's project titled 'Religion, Hateful Expression and Violence', available at <https://www.cilrap.org/events/220408-09-florence/>.

⁴ Supreme Court of India, *State of Karnataka v. Praveen Bhai Thogadia*, Judgment, 31 March 2004, Criminal Appeal No. 401/2004, (2004) 4 SCC 684 (<https://www.legal-tools.org/doc/apmao9/>).

⁵ *Pravasi Bhalai*, see above note 1.

prosecution of hate speech, that the “root of the problem is not the absence of laws but rather a lack of their effective execution”, and declined to issue any guidelines to supplement existing law. However, while sounding a note of caution about defining hate speech and confining it to a manageable standard, the Court provided a working definition of hate speech based on a review of domestic and foreign law:

an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. [...] Hate speech also impacts a protected group’s ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.⁶

This definition recognizes the psychological harm to an individual’s self-worth or self-esteem and provides a helpful platform for building strong civil rights protections against hate speech. In a significant step, the Court noted that hate speech “lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide”.⁷ In India, we see that hate speech has gone through the range from discrimination to violence and a call for ethnic cleansing and perhaps genocide.

While discussing existing legal provisions to deal with hate speech, the Court also referred to the offence of *sedition* defined under Section 124A of the IPC as bringing or attempting to “bring into hatred or contempt [...] the government established by law” by words, either spoken or written, or by signs, or by visible representation, or otherwise. Quite clearly, sedition is an act against the State, and the incorporation of the word ‘hatred’ in the law would not bring it within the meaning of ‘hate speech’ as understood judicially. The Court’s reference to sedition seems to have unwittingly provided an occasion for the police to distort the law and allege sedition in cases related to alleged hate speech.

The Supreme Court also requested the Law Commission of India, which was already considering the powers of the Election Commission with regard to political parties or their members engaging in hate speech during election campaigns, to consider a definition for hate speech and make recommendations to Parliament.⁸

2.3. The Law Commission Report

In deference to the request of the Supreme Court, the Law Commission prepared Report No. 267 in March 2017 on the subject of Hate Speech (‘Report’) in which it examined the issues referred to it in *Pravasi Bhalai*.⁹ Pertinently, the Report noted that incitement to violence cannot be the sole or determinative test for identifying hate speech and that in international law, both incitement to violence and to discrimination are recognised as grounds for interfering with freedom of expression. The Report also reviewed the Supreme Court’s jurisprudence on hate speech and noted the insufficiency of existing laws in dealing with less overt forms of hate speech. The Law Commission concluded by proposing that new provisions of law be enacted to deal with hate speech. The suggested draft Criminal Law (Amendment) Bill (2017) proposes the insertion of two new offences that criminalise simply the act of expressing hate and not necessarily causing incitement to violence but having an impact on the intended target. This could mark an important progression in Indian law, away from requiring the act to have incited public

⁶ *Ibid.*, para. 7.

⁷ *Ibid.*

⁸ *Ibid.*, para. 28.

⁹ Law Commission Report on Hate Speech, 2017, para. 1.6, see above note 2.

disorder, violence, or some other breach of law. The recommendations of the Law Commission, however, are yet to be implemented by Parliament.

The decision in *Pravasi Bhalai* and the Report make it quite clear that violence or the possibility of violence is not an essential element of hate speech. In the authors’ opinion, this is as good a starting point as any for defining hate speech.

3. Contemporary Developments in Law: Missed Opportunities

In *Jafar Imam Naqvi v. Election Commission of India*,¹⁰ the Supreme Court passed up an opportunity to lay down the limits of hate speech which gets aggravated during election campaigns. In this case, the petitioner sought the de-recognition of political parties engaging in “illegal” activities – speeches stoking religious tensions – by the Election Commission of India. The Supreme Court did not go into the merits of the case and refused to entertain the petition, stating that the issue should only be dealt with *post facto*. The Court noted that it would be inappropriate for it to enter the legislative field and issue directions since the matter of hate speech could be subject to adjudication in an appropriate forum and may also be considered in an election dispute under the Representation of the People Act (1951).

In its judgement in *Amish Devgan v. Union of India* (*Amish Devgan*),¹¹ the Supreme Court embarked on a comprehensive review of Indian and foreign decisions on hate speech, and a few academic articles on the subject. Devgan, a television journalist, faced criminal charges under various provisions of the IPC on the basis of his statements referring to a saint in Islam as an “invader, terrorist and robber who had come to India to convert its population to Islam” during a television programme hosted by him. The Court refused to quash the criminal cases against him, which affirmed the adequacy of existing criminal law to recognise hate speech, even if made accidentally or in error, as was claimed by Devgan. The Court observed that hate speech constituted three elements – content, intent, and harm or impact – and that the content of a speech must be coupled with the intent of the speaker to incite or cause harm.

As far as the content of hate speech is concerned, the Court reaffirmed its earlier position 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”.¹² As for the intent aspect, the Court noted that the speech must “intend only to promote hatred, violence or resentment against a particular class or group without communicating any legitimate message. This requires subjective intent on the part of the speaker to target the group or person associated with the class/group”.¹³ The Court also emphasized that the freedom of speech may not be arbitrarily restrained by hate speech laws. The Court opined that defences of ‘good faith’ (in cases wherein speakers display prudence and caution with their expression or content) and ‘legitimate purpose’ (where the speech has some clear purpose other than just spreading hatred or inciting violence) were available to those accused of engaging in hate speech. This is a corollary to the definition of hate speech in Black’s Law Dictionary, which was referred to by the Court in *Pravasi Bhalai*: “Speech that carries no meaning other than the expression of hatred

¹⁰ Supreme Court of India, *Jafar Imam Naqvi v. Election Commission of India*, Judgment, 15 May 2014, Writ Petition (Civil) 429/2014, (2014) 15 SCC 420 (<https://www.legal-tools.org/doc/7oun1u/>).

¹¹ Supreme Court of India, *Amish Devgan v. Union of India*, Judgment, 7 December 2020, Writ Petition (Criminal) No. 160/2020, (2021) 1 SCC 1 (*Amish Devgan*) (<https://www.legal-tools.org/doc/lrh6yj/>).

¹² Supreme Court of India, *Ramesh v. Union of India*, Judgment, 16 February 1988, Writ Petition (Civil) No. 107/1988, (1988) 1 SCC 668 (<https://www.legal-tools.org/doc/bweb1s/>).

¹³ *Amish Devgan*, para. 48, see above note 11.

for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence”.¹⁴

4. Hate Speech and Fair Criticism of Government

In *Amish Devgan*, the Court sought to clarify the law on restraining free speech by holding that speech which threatens the security of the State is not the same as speech prohibited by other provisions of the IPC. Even within the context of speech relating to government and public administration, the Court reaffirmed that the right to “favour or criticise” government policies is within the right to free speech, and such “political speech” does not constitute hate speech.

At this juncture, it is important to underscore this distinction in light of the potential for misuse of provisions of the IPC. Shortly after the passage of the judgment in *Amish Devgan*, the Supreme Court passed a judgment in *Patricia Mukhim v. State of Meghalaya*.¹⁵ In July 2020, Mukhim, a journalist in the north-eastern state of Meghalaya, wrote a Facebook post criticising the “apathy” of the State government functionaries in not taking any action in relation to an incident where certain persons attacked non-tribals. She was charged in a criminal case accusing her of promoting enmity between groups on grounds of religion and race as well as promoting hatred or ill-will. The Supreme Court quashed the criminal case against Mukhim. In its judgment, it held that the Facebook post was an attempt to “highlight the discrimination against non-tribals in the State of Meghalaya” and in fact “pleads for equality of non-tribals in the State of Meghalaya”. There was no discernible intent to promote hatred of any community. The Court noted that “[d]isapprobation of governmental inaction cannot be branded as an attempt to promote hatred between different communities”.¹⁶

5. The Impact of Hate Speech

The Supreme Court in *Pravasi Bhalai* had held that the impact of hate speech may include a non-violent psychological impact. This was reiterated by the Law Commission in its Report. However, in *Amish Devgan*, the Court took a step backward by proclaiming that speech reflecting “hate which tends to vilify, humiliate and incite hatred or violence against the target group based upon identity of the group”¹⁷ can be punished. In doing so, the Court appears to be veering towards the view that hate speech must extend to incitement to violence, if not violence itself. It was observed that in the absence of actual violence or public disorder “something more than words, in the form of ‘clear and present danger’ or ‘imminent lawless action’, either by the maker or by others at the maker’s instigation is required”.¹⁸

The ‘clear and present danger’ and ‘imminent lawless action’ tests are two distinct tests in the United States’ constitutional law, but have been equated by the Supreme Court.¹⁹ These expressions are employed in the context of public disorder or violence and not simply in the context of promoting feelings of hatred. The Supreme Court did not elaborate on how the ‘clear and present danger’ and the ‘imminent lawless action’ tests may be applied to evaluate whether a given speech would promote feelings of hatred against a particular community without extending to physical harm. The Court merely accepted an earlier view that to criminalise speech, it is necessary to establish a proximate nexus with ‘clear and present danger’ or ‘imminent lawless action’ on the one hand and public disorder or

¹⁴ “Hate Speech”, Black’s Law Dictionary, 9th ed., 2009, p. 1529.

¹⁵ Supreme Court of India, *Patricia Mukhim v. State of Meghalaya*, Judgment, 25 March 2021, Criminal Appeal No. 141/2021, 2021 SCC OnLine SC 258 (<https://www.legal-tools.org/doc/sbc4ep/>).

¹⁶ *Ibid.*, para. 15.

¹⁷ *Amish Devgan*, para. 55, see above note 11.

¹⁸ *Ibid.*, para. 58.

¹⁹ Supreme Court of India, *Shreya Singhal v. Union of India*, Judgment, 24 March 2015, Writ Petition (Criminal) No. 167/2012, (2015) 5 SCC 1 (<https://www.legal-tools.org/doc/gvk8zj/>).

violence on the other.

In the authors’ opinion, incitement to a non-violent reaction to hate speech is as much an offence as any. For example, an economic boycott of members of a minority community amounts to discriminatory treatment with an intent to humiliate and is, therefore, punishable under the existing legal provisions. Such an action is a direct manifestation of feelings of hate. While the Court in *Amish Devgan* does not expressly state as much, its silence is likely to be taken as an indication that only incitement to violence or a likelihood of violence will matter for prosecution under the law. Such an interpretation would go against the hate speech jurisprudence somewhat ambiguously elucidated in *Amish Devgan* itself. To avoid any doubt as to understanding speech as hate speech, it may be preferable to introduce specific provisions making hate speech an offence as proposed by the Law Commission in its Report, regardless of its harm or impact.

The Supreme Court’s decisions in *Pravasi Bhalai* and *Amish Devgan* highlight that the existing legal provisions can be used to prosecute and punish hate speech. However, an examination of major contemporary incidents of divisive and hateful speech reveals that the police are not always proactive in investigating, let alone prosecuting, such incidents. Notwithstanding the adequacy of the law as it now stands, vested interests and the complacency and complicity of the establishment play a role in determining whether incidents of hate speech are prosecuted in India.²⁰

6. Sedition: An Enduring Colonial Legacy

As noted earlier in this policy brief, sedition as defined under Section 124A of the IPC is a serious offence. Given the nature of the accusation and the possibility of life imprisonment on conviction, bail is not usually granted by courts, thereby effectively punishing a person regardless of whether the offence has been committed or not. This is unlike hate speech and hate crimes, which are usually punishable with imprisonment for up to three years and for which bail is granted relatively easily.

The offence of sedition appears under Chapter VI of the IPC, which deals with ‘Offences against the State’. Section 124A is the sole section under this Chapter which focuses on speech. Sedition does not constitute a ground for reasonable restrictions on freedom of speech under Article 19(2) of the Constitution. The Supreme Court in *Kedar Nath Singh v. State of Bihar*²¹ (*Kedar Nath Singh*) ‘read down’ this provision in order to ensure that it was consistent with Article 19 of the Constitution. The Court held that mere speech would not amount to sedition. Only acts “involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence” could be punished for sedition.

In *Balwant Singh v. State of Punjab* (*Balwant Singh*),²² two men were convicted of the offence of sedition for raising an objectionable slogan in a public space. The context of the slogan was the assassination of the former Prime Minister of India Smt. Indira Gandhi. The Supreme Court overruled their conviction, holding that “[r]aising of some lonesome slogans, a couple of times by two indi-

²⁰ For a detailed account of various contemporary incidents which exemplify the manner in which hate speech has been weaponized in India, demonstrating the apathy of the law enforcement authorities and the complicity of the government, readers may refer to the chapter titled “Reflections on Freedom of Expression, Hate Speech and Sedition in India”, in Morten Bergsmo and Kishan Manocha (eds.), *Religion, Hateful Expression and Violence*, Torkel Opsahl Academic EPublisher, Brussels (forthcoming at the time of publication of this brief).

²¹ Supreme Court of India, *Kedar Nath Singh v. State of Bihar*, Judgment, 20 January 1962, Criminal Appeal No. 169/1957, AIR 1962 SC 955 (<https://www.legal-tools.org/doc/yw74ig/>).

²² Supreme Court of India, *Balwant Singh and Ors. v. State of Punjab*, Judgment, 1 March 1995, Criminal Appeal No. 266/1985, (1995) 3 SCC 214 (<https://www.legal-tools.org/doc/im09cn/>).

viduals, without anything more, did not constitute any threat to the Government of India as by law established nor could the same give rise to feelings of enmity or hatred among different communities or religious or other groups”.

Despite the reading down of the offence by the Supreme Court in *Kedar Nath Singh* and *Balwant Singh*, sedition law is flagrantly misused in India by law enforcement authorities to target dissenting or opposing voices, particularly journalists who criticize government policies or decisions. Since 2010, as many as 867 cases of sedition have been filed against more than 13,000 Indians. Since 2018, as many as 40 journalists have been accused of sedition for reporting about, among other things, COVID-19, a gang rape and murder, the Citizenship (Amendment) Act (2019), and for being critical of the government.²³ It is hoped that the Court will take action on the several petitions challenging the constitutional validity of the offence of sedition which are pending before it.²⁴

At this juncture, it is important to delineate the distinction between sedition and hate speech. In August 2018, the Law Commission released a Consultation Paper (‘Paper’) to study the “pros and cons” of the offence of sedition.²⁵ The Paper highlighted that sedition is an offence against the State and not against an individual. The State is capable of employing the law whenever it finds it necessary. Therefore, sedition is subject to higher standards of proof for conviction, which are necessary to “protect fair and reasonable criticisms and dissenting opinions from unwarranted State suppression. Legitimate speech must be protected and care must be taken that the grounds of limitation are reasonable and just”.²⁶ In contrast, hate speech is essentially an offence against an individual or a group of individuals, as distinct from the State – hence, the potential for misuse of hate speech laws is lesser.

The distinction between sedition and hate speech is sometimes blurred by courts when they are dealing with broad issues of freedom of speech and expression. The Supreme Court has included sedition within its discussion in both *Pravasi Bhalai* and *Amish Devgan*, even though the questions before the Court pertained only to hate speech. Discussing sedition and hate speech in the same decision could confuse, and be potentially problematic, for courts dealing with cases of only hate speech. As discussed previously, violence is not a necessary ingredient of hate speech. It should also not be artificially imported into hate speech jurisprudence. Broadening the concept of hate speech to include dynamic forms of derogatory speech and behaviour is now necessary to protect the equality and dignity of all, given the rising tide of hate speech (particularly on religious grounds) in India today.

7. Absolute Liability for Hate Speech: A Way Forward?

The need of the hour is a definition of hate speech within the Indian legal framework to prevent the misuse of laws by law enforcement

²³ “A Decade of Darkness: The Story of Sedition in India”, *Article 14* (available on its web site).

²⁴ “Constitutionality of Sedition: SG Vombatkere v. Union of India”, in *Supreme Court Observer* (available on its web site).

²⁵ Law Commission of India, “Consultation Paper on Sedition”, 30 August 2018 (<https://www.legal-tools.org/doc/dx3aom/>).

²⁶ *Ibid.*, para. 7.3.

agencies and to chalk out a clear and unambiguous response by the judiciary regarding allegations of hate speech. The Supreme Court has accepted the content, intent and impact or harm tests as a working module for defining hate speech. This must be carried forward, although the authors believe that the ‘impact or harm’ factor as understood by the Supreme Court is narrow. Hate speech need not result in violence or a possibility of violence. Hate speech can disturb the mental equilibrium of any person who is targeted and this can manifest itself in psycho-social problems and trauma. These are not visible manifestations of the impact or harm caused by hate speech, but are nevertheless quite real and must be recognised.

In this context, it would be worth exploring the possibility of introducing the theory of absolute liability to criminalise hate speech. The Supreme Court has observed that hate speech has no redeeming or legitimate purpose other than hatred towards a particular group (or an individual). If that be so, with the introduction of absolute liability, the likelihood of harm or an adverse impact on a group or a person loses its relevance. As long as the content test and the intent test are met, it might be possible to successfully prosecute the maker of hate speech.

Notwithstanding potential means to ensure a deterrent effect on hate speech, the absence of any clear understanding on what constitutes hate speech means that the police virtually have a free hand on whom to prosecute and to let off. This also puts the courts in a quandary, especially in matters relating to the grant of discretionary bail. Unless hate speech is checked immediately, its impact will be long-term and dangerous to society and perhaps the country itself. It is time for the executive arm of the government as well as the political governance structures to display sagacity and put a stop to recurring incidents of hate speech, both verbal as well as non-verbal.

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