Module

Hate Speech in India

Introduction

Michel Rosenfeld defines 'hate speech' as 'speech designed to promote hatred on the basis of race, religion, ethnicity or national origin'. As he notes, the issue of hate speech 'poses vexing and complex problems for contemporary constitutional rights to freedom of expression'.[1]

In the Indian context, the contemporary meaning of the term 'hate speech' is inextricable from its origins (as a form of legal action) in colonial attempts 'to assume the role of the rational and neutral arbiter of supposedly endemic and inevitable religious conflicts'.[2] Given this historical context, hate speech has primarily been understood in India as referring to speech intended to promote hatred or violence between India's religious communities. Macaulay, in his commentary upon the *Indian Penal Code,* explicitly endorsed this interpretation of 'hate speech' under Indian law, observing that the principle underlying Chapter XV (prohibiting 'offences relating to religion and caste') is that 'every man should be suffered to profess his own religion, and… no man should be suffered to insult the religion of another.'[3]

This module provides an overview of legal, historical and philosophical perspectives on 'hate speech' in India. To this end, it provides guidelines for discussion of the following:

- constitutional aspects of hate speech in India;
- legal provisions prohibiting or restricting hate speech in India;
- the historical background of prohibitions on hate speech in India;
- a discussion of critiques of dominant understandings of 'hate speech', presented as an introduction to philosophical debates regarding hate speech;
- a comparative constitutional analysis of hate speech, noting the constitutional and legal provisions regarding hate speech in the United States and Canada;
- two case studies of hate speech controversies in India and internationally.

Each module is accompanied by prescribed readings and questions for further discussion.

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[1] Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis* (2002-2003) 24 CARDOZO LAW REVIEW 1523, 1523.

[2] Asad Ali Ahmed, *Specters of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial Predicament* in Raminder Kaur and William Mazzarella (eds), CENSORSHIP IN SOUTH ASIA: CULTURAL REGULATION FROM SEDITION TO SEDUCTION, Indiana University Press, 2009, 173.

[3] Thomas Macaulay, INDIAN PENAL CODE*,* 1838, 2002 reprinting, 101.

1. Constitutional and International Aspects of Hate Speech

Readings:

- *Chandmal Chopra v State of West Bengal and ors* (1988 Cri. L. J 739) (Calcutta High Court).
- *Ramji Lal Modi v State of Uttar Pradesh* (AIR 1957 SC 620) (Supreme Court of India).
- *Gopal Vinayak Godse v Union of India and ors* (AIR 1971 Bom 56) (Bombay High Court).
- Human Rights Council Resolution 13/16, *Combating Defamation of Religions*, UN Doc. A/HRC/RES/13/16 (Apr. 15, 2010).
- Govind Nihalani (director), *Tamas* (1987).

Article 19(1)(a) guarantees the right of all citizens 'to freedom of speech and expression'. This right, however, is not expressed in absolute terms (as in the American Constitution). Rather, it is subject to article 19(2), which allows the State to make laws imposing 'reasonable restrictions' upon freedom of speech and expression 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'. It is under the ground of 'public order' that India has prohibited and penalized 'hate speech'.

The Supreme Court have justified the restrictions on free speech imposed by article 19(2) on utilitarian grounds: some restrictions on freedom may be necessary so that others may also enjoy their liberties. As noted by Sastri J in *A. K. Gopalan* (1950):

> 'Man, as a rational being, desires to do many things, but in civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals… Liberty has, therefore, to be limited in order to be effectively possessed.'[4]

As defined in *Ram Manohar Lohia* (1960), such public order is necessary for citizens to 'peacefully pursue their normal avocations of life.'[5] As the Supreme Court put it in *Praveen Bhai Thogadia (Dr)* (2004), the right to freedom of expression 'may at times have to be subjected to reasonable subordination to social interests, needs and necessities to preserve the very core of democratic life – preservation of public order and rule of law.'[6]

In stark contrast to the United States,[7] 'public order' restrictions upon free speech in India may include 'content based' restrictions, penalising speech

[4] *A. K. Gopalan v. State of Madras* AIR 1950 SC 27, 69.
[5] *Superintendent, Central Prison v. Ram Manohar Lohia* AIR 1960 SC 633.
[6] *Baragur Ramachandrappa and ors v State of Karnataka* (2007) 3 SCC 11.
[7] *Police Department of Chicago v Mosley,* 408 US 92 (1972); *Boos v Barry,* 485 US 312 (1988); *R. A. V. v City of St Paul,* 505 US 377 (1992).

based upon the opinions or ideologies expressed within in the interests of public order.[8] 'Hate speech' may hence be lawfully prohibited or restricted.

Whereas the prohibition of 'certain (racist) forms' of speech inciting violence have been found invalid in the United States in *R. A. V. v City of St Paul* (on the grounds that, by specifically targeting certain forms of vilifying speech, the State unlawfully engaged in 'viewpoint discrimination'), [9] equivalent restrictions upon racial and religious vilification have been upheld in India. Such measures have been adjudged necessary for the 'maintenance of communal harmony', [10] irrespective of the truth or untruth of such statements.[11]

Nazi demonstrations, though constitutionally-protected in the United States[12] (on the ground that speech causing offence cannot be restricted on that basis alone[13]), may hence be prohibited in India on the grounds of 'public order'. As noted by John H. Mansfield, speech with 'deliberate and malicious intention of outraging religious feelings' has a tendency to disrupt public order and hence falls within the scope of article 19(2).[14]

India's departure from the US approach may reflect its Constitution's unique emphasis upon the preservation of the rights of minorities[15] and the State's duty to ensure a social order for the promotion of the welfare of the people.[16] To this end, the Supreme Court has concluded that 'the public interest' must 'without a doubt have preeminence over any individual interest'.[17]

The approach of the Indian judiciary towards issues of 'hate speech' (as they intersect with questions of 'public order') has been exemplified, and in many senses established, by the cases of *Ramji Lal Modi v State of Uttar Pradesh* (1957) and *Gopal Vinayak Godse v Union of India and ors* (1969).

In *Ramji Lal Modi,* the Supreme Court of India upheld the constitutionality of section 295A of the *Indian Penal Code* as a 'reasonable' restriction upon free speech 'in the interests of' public order. The Court rejected the need for any

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[8] *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620 ("*Ramji Lal Modi*"); *Virendra v State of Punjab* AIR 1957 SC 896; *V. Vengan and ors, In re* (1951) 2 MLJ 241.
[9] *R. A. V v City of St Paul,* 505 US 377 (1992).
[10] *Virendra v State of Punjab* AIR 1957 SC 896.
[11] *Rajagopal v. Province of Madras* AIR 1948 Mad 326. There is, however, conflicting authority upon this point: see *Lalai Singh Yadav v State of Uttar Pradesh* (1971) Cri L J 1773; *Shalibhadra Shah v Swami Krishna Bharati* (1981) Cri L J 113.
[12] *Collin v. Smith,* 578 F.2d 1197 (7th C) (1978).
[13] *Street v. New York,* 394 US 576, 592 (1969); *Cohen v. California,* 403 US 15, 21 (1970).
[14] J. H. Mansfield, *Religious Speech under Indian Law* in M. P. Singh (ed), COMPARATIVE CONSTITUTIONAL LAW*:* FESTSCHRIFT IN HONOUR OF PROFESSOR P. K. TRIPATHI, Eastern Book Co, 1989.
[15] Articles 29 and 30, Constitution of India.
[16] Article 38, Constitution of India.
[17] *Baragur Ramachandrappa v State of Karnataka and ors* Appeal (crl) 1228 of 1998 (2 May 2007).

nexus between acts possessing 'a tendency to cause public disorder' and the actual occurrence of such public disorder.[18] Furthermore, the Court noted the relatively limited scope of section 295A:

> '[Section] 295A does not penalize any and every… insult to or attempt to insult the religiou or the religious beliefs of a class of citizens but it penalizes only those acts [or] insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetuated *with the deliberate and malicious intention of outraging the religious feelings of the class*' (emphasis added).[19]

Such intentional insults, as distinct from 'insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention', possess a clear 'calculated tendency' to 'disrupt the public order'.[20]

In *Gopal Vinayak Godse,* a book ("*Gandhi-hatya Ani Mee*") was confiscated by the Judicial Magistrate (First Class) of Poona, 'on the ground that the book contained matter which promoted feelings of enmity and hatred between Hindus and Muslims'.[21] Gopal Godse, author of *Gandhi-hatya Ani Mee,* was the brother of Nathuram Godse, and was convicted for taking part in the conspiracy to assassinate Mahatma Gandhi. His book directly concerned the assassination of Gandhi and, more broadly, controversies surrounding Partition.

The Bombay High Court noted the limited extent to which courts may 'read down' statutory provisions which, on their face, confer very broad power upon the legislature to restrict 'hate speech':

> 'It may be good policy to balance the width of a power by the width of a remedy afforded to prevent the abuse of that power. But that is for the Legislature to consider. A Court called upon to construe the nature and content of a remedy is bound by the language of the Section which prescribes the remedy. What is sound policy may not be a safe-guard to the true construction of a section.'[22]

The Court rejected the petitioners' contention that section 99A of the *Code of Criminal Procedure* (under which copies of his book were confiscated) is violative of the freedoms of speech, property and profession. To this end, the Court (in declaring the use of national, rather than regional or sectional, restrictions, to be non-arbitrary) placed significant weight upon then-recent Indian history:

> 'Promotion of hatred between different classes of citizens, as for example, Hindus and Muslims or deliberate, malicious acts intended to outrage the religious feelings of any class by insulting its religion or

[18] *Ramji Lal Modi*, 867 (Das CJ).
[19] Ibid.
[20] Ibid.
[21] *Gopal Vinayak Godse v Union of India and ors* (AIR 1971 Bom 56) ("*Gopal Vinayak Godse*").
[22] *Gopal Vinayak Godse,* at [27].

> religious beliefs are not purely local problems. Recent history shows that these tendencies constitute a serious danger to the very way of life to which we are pledged under the Constitution.'[23]

In upholding such national restrictions, the Court similarly turned its mind towards practical considerations, in order to afford the relevant provisions their due substance. To ban 'objectionable' literature in one State, and not another, would merely allow such copies as were 'legally' printed 'to trickle into the neighbouring State', as well as potentially allowing communal disturbances in one state to flow over into other states (despite the prohibition upon objectionable material in such other states).[24]

In deciding the actual merits of the matter (whether *Gandhi-hatya Ani Mee* actually amounted to material likely to disrupt public order), the Court adopted a similarly broad approach, explicitly endorsing the notion that 'adherence to the strict path of history is not by itself a complete defence to a charge under section 153A.'[25] Indeed, rather than a mitigating factor, this was presented as a possible *exacerbation* of the harmful effects of the text: 'greater the truth, greater the impact of the writing on the minds of its readers, if the writing is otherwise calculated to produce mischief.'[26] Despite such, however, the Court ultimately rejected the prohibition of the book, turning in large part upon 'the intention of the writer' – although hastening to add that 'the intention of the writer is not relevant if the writing is otherwise of a nature described in section 153A.'[27] Again, the immediate *public* consequences of hate speech were stressed: that 'the book does not purport to deal with… any contemporary problem of communal significance to Hindus or Muslims in India',[28] with hence limited potential to provoke public disorder.

It is significant that, even in *Gopal Vinayak Godse,* the judiciary adopted a very broad view of what may amount to 'hate speech'. There are, however, limits to the Indian judiciary's broad interpretation of 'hate speech'. Article 19(1)(a) must be read in light of other constitutional provisions, such as article 25 (freedom of conscience and free profession, practice and propagation of religion). This demand for holistic interpretation was highlighted in *Chandmal Chopra v State of West Bengal and ors* 1988 Cri. L. J 739 (Calcutta High Court), in which an attempt to ban the Quran (on the grounds that it 'incited violence, disturbed public tranquility, promoted… feelings of enmity, hatred and ill-will between different religious communities and insulted the religion or religious beliefs of other communities in India') was rejected based upon, among other reasons, the Court's duty to protect religious freedom: 'Any attempt to impugn [the] Koran in the manner as has been sought to be done would infringe the right to freedom of religion

[23] *Gopal Vinayak Godse,* at [43].
[24] *Gopal Vinayak Godse,* at [44].
[25] *Gopal Vinayak Godse,* at [64].
[26] Ibid.
[27] *Gopal Vinayak Godse,* at [244].
[28] *Gopal Vinayak Godse,* at [250].

including the right to profess, practice and propagate religion'.[29] The Court's duty to respect religious feelings similarly led it to deny its capacity to decide such a case: 'Such adjudication of the religion [of Islam] itself is not permissible. Similarly, the Courts cannot and will not adjudicate on theories of philosophy or of science or scientific principles.'[30]

Though the Indian Constitution, unlike the American Constitution, prescribes explicit grounds upon which speech may be restricted, one should not therefore assume that the Indian judiciary have universally treated freedom of speech with any less reverence than American judges. The judgment of Krishna Iyer J in *Raj Kapoor v State* AIR 1980 SC 258, written with regard to a film accused of 'moral depravity', is illustrative in this respect:

> 'The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konarks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists [proscribe] heterodoxies.'[31]

Similarly, in *Ramesh s/o Chotalal Dalal v Union of India and ors* (1988), the Supreme Court rejected an appeal against the Bombay High Court's decision to allow broadcast of *Tamas,* a serial covering the events of Partition. In contrast to the Court's approach in *Gopal Vinayak Godse* (noted above), where 'truth' was regarded as a potential exacerbation, the Court in *Ramesh s/o Chatalal Datal* placed a far higher emphasis upon the beneficial effects of even unpleasant truths:

> 'Tamas takes us to a historical past-unpleasant at times, but revealing and instructive. In those years which Tamas depicts a human tragedy… of great dimension took place in this sub-continent – though 40 years ago – it has left a lasting damage to the Indian psyche…'[32]

The Court continued to take an equivocal approach to truth: 'It is true that in certain circumstances truth has to be avoided… All schools alike are forced to admit the necessity of a measure of accommodation in the very interests of truth itself.'[33] Despite such, the Court noted that, '[j]udged by all standards of a common man's point of view of presenting history with a lesson in this film, these boundaries appear to us [to] have been kept in mind.'[34] As such, even though perhaps less absolutist in its approach to free speech than courts under the United States Constitution, the jurisprudence of Indian courts with regard to free speech cannot be easily caricatured as unduly submissive to state interests.

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[29] *Chandmal Chopra v State of West Bengal and ors* (1988 Cri. L. J 739) at [35] ("*Chandmal Chopra").*
[30] *Chandmal Chopra,* at [34].
[31] *Raj Kapoor v State* (AIR 1980 SC 258).
[32] *Ramesh s/o Chotalal Dalal v Union of India* (1988) SCR (2) 1011, 1022-1023 ("*Ramesh s/o Chotalal Dalal"*).
[33] *Ramesh s/o Chotalal Dalal,* 1022-1023.
[34] *Ramesh s/o Chotalal Dalal,* 1023.

Under article 51 of the Indian Constitution (a Directive Principle, requiring that the state 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'), international human rights instruments and conventions may be used in the interpretation of the Indian Constitution.[35] To this extent, the following aspects of international human rights law are relevant:

- article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination,* whereby States Parties 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 racial or group of persons of another colour or ethnic origin';
- article 7 of the *Universal Declaration on Human Rights,* whereby all people are 'entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

These provisions must be read in the context of resolutions by international bodies regarding 'defamation of religion'. The first such resolution was articulated by the UN Commission on Human Rights in 1999, with similar resolutions passed by the Commission every year until 2005; the UN Human Rights Council enacted equivalent resolutions from 2007 to 2010.

The most recent such resolution, that of the 13th Session of the Human Rights Commission, is illustrative. We note the following relevant declarations:

> *The Human Rights Council…*
>
> *Stressing* that defamation of religions is a serious affront to human dignity leading to a restriction on the freedom of religion of their adherents and incitement to religious hatred and violence…
>
> *Noting with concern* that defamation of religions and incitement to religious hatred in general could lead to social disharmony and violations of human rights, and alarmed at the inaction of some States in combatting this burgeoning trend and the resulting discriminatory practices against adherents of certain religions and, in this context, stressing the need to effectively combat defamation of all religions and incitement to religious hatred in general and against Islam and Muslims in particular…
>
> 3. *Strongly deplores* all acts of psychological and physical violence and assaults, and incitement thereto, against persons on the basis of their religion or belief…

[35] *Vishaka and ors v State of Rajasthan and ors* (AIR 1997 SC 3011).

5. *Notes with deep concern* the intensification of the overall campaign of defamation of religions and incitement to religious hatred in general…

10. *Deplores* the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination against any religion…

14. *Urges* all states to provide… adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of religions and incitement to religious hatred in general, and to take all possible measures to promote tolerance and respect for all religions and beliefs.

Though this resolution lacks the significance of a Convention ratified by India, it is indicative of the evolution of international legal thought (towards the recognition of defamation of religions and hate speech as a significant form of 'harm'). Given the extent, as noted above, to which international legal norms may be used in the interpretation of the Indian Constitution, the reiterated condemnation of 'hate speech' by the Human Rights Council may similarly foreshadow similarly shifting interpretations of the Constitution by the Indian judiciary.

Questions:

1. Do you believe that the Indian Supreme Court has been justified in adopting a broad construction of the 'interests of public order', as it relates to hate speech?
2. Do you agree that free speech should be protected to different degrees in different nations?
3. 'Some restrictions upon freedom are necessary so that we may all enjoy those same freedoms.' Discuss.
4. Do you believe that the Human Rights Council Resolution 13/16, *Combating Defamation of Religions*, appropriately addresses the need for a balance between freedom of speech and religious freedom?
5. 'The Human Rights Council resolutions on defamation of religion are responses to immediate political and religious controversies, not substantial contributions to international human rights jurisprudence.' Discuss.

2. Statutory Provisions and Hate Speech

Section 153A of the *Indian Penal Code* criminalises the promotion of 'enmity between different groups on grounds of religion, race, place of birth, residence, language etc,' or 'doing acts prejudicial to maintenance of harmony'. The section prohibits, *inter alia*:

- the promotion of 'disharmony or feelings of enmity, hatred or ill-will' between different communities through 'words, either spoken or written, or by signs or by visible representations or otherwise' (section 153A(1)(a));
- acts which are 'prejudicial to the maintenance of harmony' between communities, or which 'distur[b] or [are] likely to disturb the public tranquility' (section 153A(1)(b)).

The broad scope of section 153A is further buttressed by section 153B, which prohibits 'imputations and assertions prejudicial to national-integration'. The section criminalises the use of 'words either spoken or written', signs, 'or by visible representations or otherwise' which, *inter alia:*

- impute to any class of persons (by reason of their membership of a particular community) an inability to 'bear true faith and allegiance to the Constitution of India' or 'uphold the sovereignty and integrity of India' (section 153B(1)(a));
- assert, counsel, advise, propagate or publish that any class of persons, by reason of their membership in any community, shall be denied or deprived of their rights as citizens of India (section 153B(1)(b));
- assert, counsel, advice, plead or appeal concerning the obligations possessed by any class of persons (by reason of their membership in any community), where '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' (section 153B(1)(c)).

These provisions co-exist with other, broader provisions of the *Indian Penal Code,* with significant implications for 'hate speech'. These provisions include the following:

- section 295, which prohibits 'injuring or defiling [any] place of worship with intent to insult the religion of any class';
- section 295A, which prohibits 'deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs';
- section 298, which prohibits 'uttering words, etc, with deliberate intent to wound religious feelings';
- section 505(1), which prohibits 'statements conducive to public mischief';
- section 505(2), which prohibits 'statements creating or promoting enmity, hatred or ill-will between classes'.

These provisions are supplemented by the *Information Technology Act* 2000 and its *Rules*, which govern the electronic dissemination of 'hate speech'.

Under section 66A of the *Act,* publication of material which 'is grossly offensive or has menacing character', or which is broadcast, despite being known to be false, for the purpose of 'causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will', is prohibited.

The *Information Technology (Intermediaries Guidelines) Rules* 2011, functioning in addition to the *Act,* further expand the capacity of the government of India to prohibit 'hate speech'. Significantly, unlike prior 'hate speech' provisions, they explicitly prohibit the 'host[ing], display, upload[ing], modif[ication], publi[cation], trans[mission], updat[ing], or shar[ing]' of any information which, as per clause 3(2)(b) of the *Rules,* is 'blasphemous'; such explicit reference to 'blasphemy' is unprecedented.

In addition, clause 3(2)(b) of the *Rules* prohibit the dissemination of material which is 'racially [or] racially objectionable', or 'otherwise unlawful in any manner whatsoever', while clause 3(2)(i) prohibits material which 'threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or is insulting to any other nation.' These provisions, though broad, clearly permit the prohibition of forms of hate speech within their wide ambit.

3. The History and Purpose of Hate Speech Laws

Readings:

- Asad Ali Ahmed, *Specters of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial Predicament* in Raminder Kaur and William Mazzarella (eds), CENSORSHIP IN SOUTH ASIA: CULTURAL REGULATION FROM SEDITION TO SEDUCTION, Indiana University Press, 2009.
- Lawrence Liang, *Love Language or Hate Speech* (2012) 9(3) TEHELKA, 3 March.
- *Joseph Bain D'Souza and anor v State of Maharashtra and ors* 1995 (2) BomCR 317 (Bombay High Court).

As Rajeev Dhavan notes, India's hate speech offences are largely 'a legacy of the British'.[36] These provisions were viewed, by the British, as a necessary expedient to maintaining security and stability in their colonial territories: 'From the point of view of the British, the purpose of the hate speech provisions was to avoid communal tension, irrespective of who was right or wrong.'[37]

Asad Ali Ahmed further highlights the importance of 'hate speech' laws in legitimating British presence in India, reshaping their role from alien colonial occupiers to neutral arbiters of culture and conflict. In Ahmed's analysis, colonial blasphemy laws 'enabled the colonial state to assume the role of the rational and neutral arbiter of supposedly endemic and inevitable conflicts between what it presumed were its religiously and emotionally excitable subjects.'[38] While this image of Indian colonial subjects as possessing 'especially sensitive religious sensibilities', as Ahmed puts it, was cited by the British to justify the existence of such laws, such laws ironically led to the creation of the state of affairs which supposedly pre-existed and justified their existence: that is to say, 'rather than reflecting primordial religious attachments, the cases before the colonial courts were not only enabled by the law but largely constituted by it.'[39]

The importance of 'hate speech' laws in the British project of maintaining stability in India (necessary for the perpetuation of colonial rule), and the extent to which the British perceived Indian colonial subjects as uniquely vulnerable to religious insults, are made clear by Macaulay's commentary on 'Offences Relating to Religion and Caste' within the Indian Penal Code:

> 'The question[,] whether insults offered to a religion ought to be visited with punishment, does not appear to us at all to depend on the question whether that religion be true or false… The religion may be

[36] Rajeev Dhavan, HARASSING HUSSAIN: USES AND ABUSES OF THE LAW OF HATE SPEECH, Safdar Hashmi Memorial Trust, 2007, 27.
[37] Ibid, 31.
[38] Ahmed, above at n.2, 173.
[39] Ibid.

false but the pain which such insults give to the professors of that religion…'[40]

Macaulay's notion of 'words that wound' is surprisingly prescient. Similar notions emerge in the work of Judith Butler and Kathleen E. Mahoney, considered in the next section. However, the motives and objects of Macaulay's code, as it related to offences relating to religion and caste, were by no means pure. As he himself admits in his commentary, the principal concern of such offences was ensuring basic social stability and security, in the absence of which British rule could not effectively function:

> 'We have provided a punishment of great severity for the intentional destroying of or defiling of places of worship, or of objects held sacred by any class of persons. *No offence in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection*' (emphasis added).[41]

The sentiments expressed in the above extract – the notion of Indians as subject to a unique range of 'prejudices, sensitivities and particularities',[42] to which they were uniquely vulnerable, and incapable of agency beyond an ancient and immutable cultural framework dictating their responses – indicate, as Ahmed puts it, that Macaulay 'shared James Mill's scathing assessment of Indian civilization as despotic, hierarchical, stultifying and mired in superstition.'[43]

What Liang terms the notion of ''emotionally excitable subjects', prone to emotional injury and physical violence' and requiring 'a rational and neutral arbiter (the colonial State)' to govern their relationships,[44] both served to justify the continued presence of the British (as having 'brought peace to, and secured order in, primordial, fractious and antagonistic religious communities' through 'the adjudication of religious disputes'[45]) and amounted to a self-fulfilling prophecy. As Liang puts it, 'once you have a law that allows for the making of legal claims on the basis of charged emotional states, you begin to see the emergence of cases that steadily cultivate a legal vocabulary of hurt sentiments.'[46] It is in this sense that Ahmed notes that attempts to 'regulate wounded attachments and religious passions' through law may 'conversely constitute them'[47] – the creation of a 'legal category' of hatred, its boundaries and content delineated and defined by the law.

Such 'creation' of a 'legal category' of hatred is not solely restricted to the capacity of hate speech litigation to allow 'social groups in organize in order

[40] Macaulay, above at n.3, 101-102.
[41] Ibid, 102.
[42] Ahmed, above at n.2, 178.
[43] Ibid.
[44] Lawrence Liang, *Love Language or Hate Speech* (2012) 9(3) TEHELKA, 3 March.
[45] Ahmed, above at n.2, 177.
[46] Liang, above at n.44.
[47] Ahmed, above at n.2, 177.

to ensure the state takes cognizance of blasphemous events and practices',[48] as Ahmed puts it. To ascribe such a 'neutral' role to the judiciary, above and outside society, ignores the very real roots of legal discourse and the judicial approach to particular matters in contemporary controversies and the social context of the judiciary. As Liang puts it, 'the judiciary itself is not outside the politics of communal hatred.'[49] Given such, adjudication of cases concerning hate speech may serve not merely to inspire hate speech amongst the public, but may itself 'become the site for the production of hate speech.'[50]

The judicial attitudes on display in *Joseph Bain D'Souza v Bal Thackeray* (1995) are illustrative in this respect. The Court, rather than serving as a neutral arbiter of the meaning and potential consequences of hate speech, align themselves with its perpetrators. The rhetoric of the Court frequently mirrors that of the respondent:

> 'The Pakistani infiltrators and the anti-national Muslims and Moulvis and Mullahs poured poison in Bhendi Bazar locality. It is pertinent to note that in the said article criticism is only against Pakistani infiltrators and anti-national Muslims and not Muslims as a whole…'[51]

In this manner, the Court endorses the conspiracy theories of the respondent, abjuring judicial neutrality in order to criticise the 'anti-national or traitors section of Muslims and their selfish leaders who are creating rift between Hindus and Muslims'.[52] The Court further endorsed the notion that '[t]he readers of the editorial are not likely to develop hatred, spite or ill-will against Muslims as a whole but may develop hatred towards those Muslims indulging in anti-national activities'.[53] In doing so, the Court served to legitimize (rather than prohibit) hatred: the extraordinarily broad definition of 'Muslims indulging in anti-national activities' within the impugned materials allows its authors, painting in such broad brushstrokes and encouraging the broader prejudices of the intended audience, to condemn and incite hatred against an entire community.

Fortunately, as Liang notes, 'the Indian judiciary, at least at the appellate levels, have generally been more careful about how to interpret hate speech provisions.'[54] However, the cautionary example of *Joseph Bain D'Souza v Bal Thackeray* serves to discredit the traditional British perspective upon the role of courts in hate speech cases – a conception of the courts as 'pervasive, prohibitory and omniscient',[55] with the state (and its courts) taking the form

[48] Ahmed, above at n.2, 177.
[49] Liang, above at n.44.
[50] Ibid.
[51] *Joseph Bain D'Souza v Bal Thackeray* 1995 (2) BomCR 317 ("*Joseph Bain D'Souza")* at [16].
[52] *Joseph Bain D'Souza,* at [18].
[53] Ibid.
[54] Liang, above at n.44.
[55] Ahmed, above at n.2, 176.

of 'an exterior sovereign that stands above and outside society'.[56] This discourse of state power, in Ahmed's view, enabled (in traditional British jurisprudence) 'a hard and fast distinction to be drawn between state and society'.[57] The clear partisanship of the bench in *Joseph Bain D'Souza* on behalf of one community and one side of a broader debate indicates that the courts, far from acting as neutral arbiters of communal harmony, may be appropriated to serve the interests of a dominant discourse through the mechanism of hate speech laws.

Questions:

1. 'Prohibitions on free speech were introduced as tools of colonial control by the British. They have no relevance in modern India.' Discuss.
2. Do you believe the language of s153A is too broad?
3. Should 'truth' be a defence to hate speech?

[56] Ahmed, above at n.2, 175.
[57] Ibid.

4. Two Critiques of Hate Speech

Readings:

- Judith Butler, *The Sensibility of Critique: Response to Asad and Mahmood* in IS CRITIQUE SECULAR? BLASPHEMY, INJURY AND FREE SPEECH, Townsend Center for the Humanities, 2009.
- Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, UNIVERSITY OF ILLINOIS LAW REVIEW 789 (1996).

Both Judith Butler and Kathleen E. Mahoney challenge the traditional view of restrictions upon hate speech as 'contradictions' or 'restraints' upon freedom of expression. While Mahoney argues that hate speech is not 'legitimate speech' (comprising instead 'a form of harassment and discrimination that should be deterred and punished just like any other behaviour that harms people'[58]), Butler argues that the secular/liberal juridical framework regarding hate speech fails to adequately explain the impact and nature of hate speech in alternate cultural contexts.

4a. Judith Butler

Judith Butler criticises analysis of hate speech purely through the lens of 'free speech' – a 'secular', 'liberal' framework which asks only whether impugned conduct 'is' free speech, and, if so, whether it deserves protection. (Butler also dubs this framework 'the liberal legal imaginary'. [59] The term 'secular/liberal framework will be used here for clarity.) She argues that this framework 'remains indifferent to questions of social history and cultural complexity that reframe the very character of the phenomenon in question'.[60] Butler suggests that the secular/liberal framework is potentially inapplicable outside a very narrow cultural and historical context, given the extent to which this 'moral framework and discourse' draws upon 'Christian discourse and social history' and the historical circumstances surrounding 'the emergence of [the] free speech doctrine' in the West (particularly in its approach to blasphemy).[61]

Blasphemy is understood within the secular/liberal framework as 'a constraint on free speech'. However, Butler challenges the basic assumption that this is a certain and settled conceptualisation of 'blasphemy', arguing that 'the normative question of whether or not we will censor' is driven to an unacknowledged extent not by the content of the material concerned, or of how it could potentially affect certain audiences, but merely how 'we

[58] Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression* (1996) UNIVERSITY OF ILLINOIS LAW REVIEW 789, 793.
[59] Judith Butler, *The Sensibility of Critique: Response to Asad and Mahmood* in T. Asad, W. Brown, J. Butler and S. Mahmood, IS CRITIQUE SECULAR? BLASPHEMY, INJURY AND FREE SPEECH, Townsend Center for the Humanities, 2009, 118.
[60] Ibid, 102.
[61] Ibid, 103.

conceptualise the phenomenon'.[62] The framework of understanding hence limits the range of potential conclusions (as to whether to censor or not censor) which may be drawn.

Butler notes the ensuing 'problem of translation': that, within the context of the Mohammad cartoons controversy, whether 'the moral framework and discourse within which the outrage took place' was 'at odds… in some key ways' with Western discourses surrounding 'blasphemy' and 'free speech'.[63] This fundamental disconnection prevented Western discourses from properly appreciating 'why outrage against the cartoons… was of a certain kind, and of what specific meaning that injury had and has.'[64]

The Western understanding of the offence caused by the Mohammad cartoons, preconditioned by certain free speech-oriented interpretations of 'blasphemy', assumed that the offence felt by many Muslims similarly stemmed from outrage against the 'blasphemy' (*tajdif*) committed – in light of equivalent historical controversies in the West which have shaped the outlook of the secular/liberal framework. Butler, by contrast, suggests that the actual form of offence falls outside the capacity of the Western secular/liberal framework to interpret. She observes that the cartoons were charged with *isa'ah,* 'insult, harm, injury', and were viewed as an attempt to 'coerce disbelief'.[65] Butler argues that the particular horror of attempts to 'coerce disbelief' must themselves be understood in terms of unique Islamic conceptions of faith:

> 'Belief itself is [understood] not [as] a cognitive act, not even the 'property' of a person, but part of an ongoing and embodied relation to God… [Attempts to coerce disbelief are not], in these terms, a quarrel between beliefs or an attack on an idea, but an effort to coerce the break of a bond without which life is untenable.'[66]

It is worth noting that Kathleen E. Mahoney, discussed below, concurs with this critique of the secular/liberal framework as inappropriate to emerging controversies and debates regarding free speech in a multicultural context. As she notes, 'speech issues raised by hate propaganda today are entirely different than speech issues that faced fledgling democracies in the seventeenth and eighteenth centuries.'[67]

Butler's notions of 'blasphemy' provide additional substance to our understanding of sections 295 ('injuring or defiling place of worship with intent to insult the religion of any class'), 295A ('deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs') and 298 ('uttering words, etc, with deliberate intent to

[62] Butler, above at n.59, 116.
[63] Ibid, 103.
[64] Ibid, 101.
[65] Ibid, 117-118.
[66] Ibid, 118.
[67] Mahoney, above at n.58, 796.

wound religious feelings') of the *Indian Penal Code,* particularly in light of the history of such provisions (rooted in Macaulay's notion of wounding words). Ahmed challenges the notion that the 'wounding' nature of words necessarily predates the legal constitution of 'hate speech'. As Ahmed puts it, 'the laws required the plaintiffs to prove that their sensibilities had been wounded'.[68] In this manner, 'the laws' attempts to regulate wounded attachments and religious passions can conversely constitute them.'[69]

Liang, by contrast, while noting that 'the overuse of hate speech laws [may] overdetermin[e] the power of words and images', adopts Saba Mahmood's 'compelling case' for 'tak[ing] the idea of 'moral injury' seriously'. Like Butler (who wrote in response to Mahmood), Liang notes that the 'hate speech' inherent in the Muhammad cartoons controversy was directed (or believed to be directed) against 'a mode of habitation and being that feels wounded'.[70] This conception of hate speech may, however, be antithetical to the legal prohibition of such; Mahmood notes that the 'language' of *isa'ah,* 'coercion of disbelief' as a wound, is 'neither juridical nor that of street protest'.[71] To this end, Mahmood notes that 'the immediate resort to juridical language by participants on both sides' of the Muhammad cartoons controversy was 'an unfortunate consequence' of the prevailing secular/liberal framework,[72] given that 'the performative character of the law' may be entirely at odds with the form of injury experienced by Muslims offended by the Muhammad cartoons.[73]

Questions:

1. Do you agree that the Western secular/liberal framework for understanding free speech is inapplicable to nations with different cultural traditions?
2. 'Secularism functions tacitly to structure and organize our moral responses within a dominant Euro-Atlantic context.' Discuss.
3. 'Subjecting [the sense of injury felt by many Muslims from the Muhammad cartoons] to the language of legal claims and criminal liability entails a risky translation since mechanisms of law are not neutral but are encoded with their own cultural and epistemological presuppositions.'[74] Discuss.

4b. Kathleen E. Mahoney

[68] Ahmed, above at n.2, 173.
[69] Ibid, 177.
[70] Liang, above at n.44.
[71] Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?* in T. Asad, W. Brown, J. Butler and S. Mahmood, IS CRITIQUE SECULAR? BLASPHEMY, INJURY AND FREE SPEECH, Townsend Center for the Humanities, 2009, 78.
[72] Mahmood, above at n.71, 79.
[73] Ibid, 88.
[74] Liang, above at n.44.

Kathleen E. Mahoney makes her views on hate speech very clear from the outset of her piece:

> 'My lecture today can be summed up in one sentence: The harm of hate speech matters. It matters to individuals, it matters to the groups they belong to, it matters to society generally, and it matters to democracy… Hate propaganda is not legitimate speech. It is a form of harassment and discrimination that should be deterred and punished just like any other behaviour that harms people. Free speech cannot be degraded to the extent that it becomes a license to harm.'[75]

Mahoney challenges the dominant paradigm for discussions of free speech in the United States: Oliver Wendell Holmes' ideal of the 'marketplace of ideas'. As expressed by Justice Holmes in his dissenting opinion in *Abrams v United States* (1919):

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[76]

Mahoney identifies this as a 'result oriented' approach to free speech: 'Practical, concrete benefits are said to flow to the community from the protection of speech.'[77] However, she observes serious flaws with the practical application of Holmes' nostrums: '[i]n the case of highly emotive hate speech directed against minorities and women, where the speech seeks to subvert the truth-seeking process itself, a forceful argument can be made that the interests of seeking truth work against, rather than in favour of, speech.'[78]

Similarly, the 'marketplace of ideas' requires, for its proper functioning, reasonable parity of voices (so that all ideas may be evaluated upon their merits, rather than merely conceded owing to their volume). As Mahoney notes, in a world of media conglomerates and significant economic and social inequality, 'untruths can certainly prevail if powerful agencies with strong motives gain a hold in the market.'[79] Such inequalities of access to speech, and of capacities to promote one's views, are particularly virulent in light of the pervasive effects of discrimination: '[T]o assume… that native people have the same access to speech as oil companies or that women and children have the same access as pornographers or that blacks have the same access as whites is to create false equivalences which perpetuate and ensure

[75] Mahoney, above at n.58, 793.
[76] *Abrams v United States,* 250 US 616, 630 (1919).
[77] Mahoney, above at n.58, 795.
[78] Ibid, 799.
[79] Ibid, 800.

inequality and an unfair distribution of speech rights on the basis of race, sex, class and age.'[80]

Mahoney makes two significant conceptual contributions. Her first conceptual argument is that an individualistic, autonomy-focused conception of hate speech ignores the significant role of hate speech as 'a group-based activity'. If hate speech is understood as primarily social, rather than the mere expression of individual views, the exercise of the police powers of the state may hence be justified:

> 'Those who promote hatred, violence or degradation of a group are aggressors in a social conflict between groups. It is a well-established principle that where groups conflict, governments must draw a line between their claims, marking where one set of claims legitimately begins and the other fades away.'[81]

Mahoney's second argument concerns the power of hate speech to act as an injury or a wound in itself, entirely distinct from its potential to incite further violence. (This is equivalent to Butler's analysis of coercive disbelief as '*isa'ah*' in Muslim discourses.) As she puts it, 'hate propaganda' serves to cause its victims to '[become] fearful and withdra[w] from full participation in society':

> 'They are humiliated and degraded, and their self-worth is undermined. They are silenced as their credibility is eroded. The more they are silenced, the deeper their inequality grows.'[82]

Debates over free speech have long assumed that 'speech', in itself, has no detrimental effect. Mahoney challenges this assumption, and hence whether the traditional sanctification of free speech as a virtue to be protected above all else can be applied to hate speech. Butler agrees: 'It is possible to say that [films promoting hate speech through negative portrayals of Muslims] depict violence, but also that they *do* violence, and, most peculiarly, they do both in the name of freedom.'[83]

<u>Questions:</u>

1. 'Hate speech should be understood as part of a social conflict between groups, not as an individual expression of ideas.' Discuss.
2. 'Hate speech is not a contribution to the public debate; it is purely a tool for marginalizing and vilifying other groups.' Discuss.
3. Do you agree that 'words that wound' should be considered akin to any other form of injurious conduct?
4. Do you agree with Mahoney's critique of the operation in practice of the 'marketplace of ideas'? In particular, do you believe that it operates significantly better or significantly worse than at any other time in history?

[80] Ibid, 800-801.
[81] Ibid, 797.
[82] Mahoney, above at n.58, 792.
[83] Butler, above at n.59, 126.

5. Other Nations and Hate Speech

Readings:

- M. Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis', 24 *Cardozo Law Review* 1523 (2002).

5a. Hate Speech in the United States

As mentioned previously, the American judiciary, in interpreting the First Amendment to the United States Constitution, have been exceedingly reluctant to limit free speech on grounds of its 'content' – that is to say, the ideas expressed within. As observed by Jackson J in *American Communications Association v Douds*:

> 'Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.'[84]

This 'absolutist' approach to free speech – allowing for suppression purely on the grounds of clear social disruption or narrowly-defined obscenity, rather than the merit or nature of the speech itself – has not arisen by historical accident. Rather, it reflects the United States Supreme Court's longstanding acceptance of the notion of 'a free market in ideas' – that 'the best test of truth is the power of [a] thought to get itself accepted in the competition of the market',[85] with Government's power to suppress speech on grounds of falsity or abhorrence inferior, in the long run, to the inevitable victory of 'truth'.

Although article 19(1)(a) of the Indian Constitution drew inspiration from the American experience of constitutionalism,[86] the US Supreme Court's general unwillingness to prohibit content due solely to the sentiments expressed within has led to a divergence between the United States and India as to when speech may permissibly be restrained. In part, this has been textual: while the Indian Constitution allows for 'reasonable' regulation of the press, the US Constitution does not. As noted by Douglas J in *Kingsley Corp v. Regents of the University of New York,* '[i]f we had a provision in our Constitution for 'reasonable' regulation of the press such as India has included in hers there would be room for argument that censorship in the interest of [communal harmony or] morality would be permissible.'[87] The 'clear and present danger' test prevailing in the US, stipulating the only circumstances under which free speech may be restricted in the interests of

[84] *American Communications Association v Douds,* 339 US 382, 442-443.
[85] *Abrams v United States,* 250 US 616 (1919).
[86] Statement of Dr Ambedkar, CONSTITUENT ASSEMBLY DEBATES, vol.VII, 40 (4 November 1948).
[87] *Kingsley Corp v. Regents of the University of New York,* 360 US 684 (1959).

public order,[88] has hence been found by Indian jurists to be inapplicable to India, based upon fundamental differences between the US and Indian Constitutions.[89]

The 'clear and present danger' test is a far more stringent test than the 'reasonableness test' applicable under article 19(2).[90] As per *Bridges v California* (1941), it requires that 'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'[91]

Furthermore, the American approach is unique in what Weinstein terms 'the strong protection it affords to some of the most noxious forms of speech imaginable'.[92] As noted above, the 'intense hostility' of American free speech doctrine to 'content-based regulation of public discourse' prevents the prohibition of speech merely due to its objectionable, vilifying, racist or communal content.[93] As noted in *Police Department of Chicago v Mosley* (1972), '[a]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'[94]

In *Brandenburg v Ohio* (1969), the United States Supreme Court distinguished between 'incitement' towards, and 'advocacy' of, violence on racial grounds – prohibiting the former while permitting the latter.[95] This definition was expanded upon in *R. A. V. v City of St Paul* (1992), where the *Brandenburg* test formed the first ground upon which the Supreme Court struck down St Paul's hate-speech ordinance (which prohibited the placement on public or private property symbols known to 'arou[se] anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender', explicitly including burning crosses or Nazi swastikas).[96]

The Court's second ground for striking down the ordinance impugned in *R. A. V.*, however, may be regarded as far more controversial. The Supreme Court found that the criminalization of some forms of incitement (accepting, hypothetically, the placement of a burning cross as 'incitement') based on race and religion, while not criminalising incitement on other bases (such as

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[88] *Terminiello v. Chicago,* 337 US 1 (1949).
[89] *Babulal Parate v. State of Maharashtra* (AIR 1961 SC 884); *Santokh Singh v. Delhi Admin* (1973) 1 SCC 659; *Collector of Customs v. Nathella Sampathu Chetty* (AIR 1962 SC 316); *Ramji Lal Modi*.
[90] *Ramji Lal Modi*.
[91] *Bridges v. California,* 314 US 252 (1941).
[92] J. Weinstein, *An Overview of American Free Speech Doctrine and its Application to Extreme Speech* in I. Hare and J. Weinsten (eds), EXTREME SPEECH AND DEMOCRACY, Oxford University Press, 2009, 81.
[93] Ibid.
[94] *Police Department of Chicago v. Mosley,* 408 US 92 (1972).
[95] *Brandenburg v Ohio,* 395 US 444 (1969).
[96] *R. A. V. v City of St Paul,* 505 US 377 (1992).

homosexuality), the City of St. Paul engaged in 'viewpoint discrimination'. As observed in Scalia J's majority opinion:

> Displays containing some words--odious racial epithets, for example--would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender--aspersions upon a person's mother, for example--would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all "anti Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.[97]

This approach may be criticised in light of Mahoney's rejection of absolutist approaches to free speech (necessarily encompassing protection of 'hate speech'). The notion of a free and frank exchange of ideas (the 'marketplace of ideas' approach to freedom of speech) as socially beneficial in all cases presumes a far greater degree of dialogue and inter-communication than may in fact be the case:

> '[A] problem with the market analogy is that 'more speech' is quite unrealistic or even impossible in the face of much hate propaganda. A dozen heterosexual males pursuing one gay male screaming epithets at him, an anonymous death threat slipped under a door, *burning a cross on another's lawn*, or a dead dog left in a lesbian's mailbox do not constitute situations where 'talking back' is a viable option… Speech in these examples is nothing more than a weapon, used to silence and terrorize victims and deepen their inequality.'[98]

Mahoney's conception of 'hate speech' as bearing no truth value, or contribution to reasoned debates, has long antecedents. Macaulay, in his commentary upon the offences relating to religion and caste in the *Indian Penal Code,* noted that while '[d]iscussion, indeed, tends to elicit truth', 'insults have no such tendency'.[99] Indeed, he outright rejects the notion, dominant in American free speech jurisprudence) that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[100] Instead, Macaulay cynically concludes that '[i]t is as easy to pull down and defile the temples of truth as those of falsehood'.[101] Religious insults, rather than 'eliciting truth', merely tend to 'inflame fanaticism'.[102]

<u>Questions:</u>

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[97] Ibid.
[98] Mahoney, above at n.58, 800.
[99] Macaulay, above at n.3, 102.
[100] *Abrams v United States,* 250 US 616, 630 (1919).
[101] Macaulay, above at n.3, 102.
[102] Ibid.

1. Do you agree with the Court's reasoning in *R. A. V. v City of St Paul?*
2. 'The 'incitement'/'advocacy' distinction ignores the very real sense in which 'advocacy' can prove just as harmful to groups affected by hate speech as the infliction of actual violence.' Discuss.
3. 'The American 'absolutist' approach to free speech should be adopted in India; arguments that India is too 'culturally' different reflect the legacy of Orientalism and colonial perspectives.' Discuss.

5b. Hate Speech in Canada

Michel Rosenfeld observes that there is 'a big divide between the United States and other Western democracies' in their approaches to the restriction and prohibition of hate speech.[103] The Supreme Court of Canada, rejecting the American approach, has condemned hate speech as not merely offensive, but as a serious attack on psychological and emotional health.[104]

The primary Canadian case upon the constitutional legitimacy of hate speech is that of *R v Keegstra* (1990). James Keegstra was a Canadian high school teacher, who repeatedly declared to his students that Jewish people were:

> "treacherous"; "subversive"; "sadistic"; "money loving"; "public hungry"; "child killers"; and that they had "created the Holocaust to gain sympathy". [105]

There was no evidence, however, that Keegstra intended to incite his pupils into anti-Semitic violence. Nonetheless, he was prosecuted under section 319 of the Canadian *Criminal Code,* which prohibits 'the public willful expression of ideas intended to promote hatred against an identifiable group'.

The Supreme Court concluded that Keegstra's speech was unworthy of constitutional protection under the *Canadian Charter of Rights and Freedoms,* given that 'it did more to undermine mutual respect among diverse racial, religious and cultural groups in Canada than to promote any genuine expression of needs or values.'[106] The Court rejected the 'clear and present danger' test, on the basis that 'it was incapable of addressing the harms hate propaganda causes' and hence inapplicable to Canadian constitutional and cultural norms.[107] Hate propaganda was found to have only 'marginal' truth value, outweighed by the significant harm inflicted by hate speech on the constitutional value of 'equality'. As noted in the majority judgment (of Dickson CJ, Wilson, L'Heureux-Dube and Gonthier JJ):

> '[T]he international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of

[103] Rosenfeld, above at n.1, 1523.
[104] *R v Keegstra* [1990] S SCR 697, 744-749.
[105] Rosenfeld, above at n.1, 1542.
[106] Ibid, 1543.
[107] Mahoney, above at n.58, 804.

hate propaganda is incompatible with the guarantee of free expression.'[108]

This judgment, it may be observed, would be well beyond the pale of American jurisprudence, perhaps reflecting the greater concern for 'multiculturalism and group-regarding equality' than with libertarianism, as a value in itself, in the interpretation of legitimate 'free speech'.[109] To some extent, this divergence between the United States and Canada may be attributed to the distinct justifications for free speech prevailing in both nations. In *R v Keegstra,* the Supreme Court of Canada noted the following justifications for free speech as predominant in the Canadian context:

- (1) 'seeking and attaining truth is an inherently good activity';
- (2) 'participation in social and political decision-making is to be fostered and encouraged'; and
- (3) 'diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.'[110]

Rosenfeld observes that 'the Canadian conception of autonomy', as expressed above, 'is less individualistic than its American counterpart, as it seemingly places equal emphasis on the autonomy of listeners and speakers'.[111] In the United States, by contrast, justifications of free speech 'from autonomy' (that is to say, the notion that '[a]ll kinds of utterances arguably linked to an individual's felt need for self-expression ought to be afforded constitutional protection')[112] have traditionally prioritised the self-expression needs of the speaker over those of the 'victims' of such speech. (As Mahoney puts it more negatively, 'reflexive invocation of principles of liberty and free speech' in the United States 'tend to foreclose discussion [of free speech] and close people's minds to new ways of thinking'.[113]) This set of priorities may potentially allow 'self-expression of the powerful' to 'threate[n] the autonomy of those whose voices are being drowned'.[114] By contrast, the Canadian approach – with particular reference to (3) above, the cultivation of diversity – has viewed autonomy in a significantly different light, allowing for suppression of certain noxious forms of free speech in order to protect the self-expression of others.

<u>Questions:</u>

1. What role should other values, such as the promotion of equality and the maintenance of cultural diversity, play in the interpretation of free speech?

[108] *R v Keegstra* [1990] 3 SCR 687.
[109] Rosenfeld, above at n.1, 1541.
[110] *R v Keegstra* [1990] 3 SCR 687, 728.
[111] Rosenfeld, above at n.1, 1543.
[112] Ibid, 1535.
[113] Mahoney, above at n.58, 804.
[114] Ibid.

2. Do you agree with the Court's ruling in *R v. Keegstra?* Explain why or why not.
3. 'The Court's ruling in *R v. Keegstra* allows the State to condemn particular viewpoints that it disagrees with, potentially endangering individual liberty.' Discuss.
4. 'By suppressing particular viewpoints, the State merely prevents debate and discussion of such views, allowing them to survive without open challenge and ultimately proving detrimental to social harmony.' Discuss.

6. Hate Speech Case Study: M. F. Husain

Readings:

- Rajeev Dhavan, *Harassing Husain: Uses and Abuses of the Law of Hate Speech* (2008).

The late artist M. F. Husain was subjected to a prolonged campaign of legal action and allegations of 'hate speech' owing to his depictions of Hindu religious figures and iconography. To present the controversy surrounding his case in such anodyne terms, however, is to ignore the complexities of 'hate speech' controversies in practice. Rajeev Dhavan, writing in defence of Husain, notes significant aspects to the case beyond its mere legal trappings:

- the incitement of public controversy, beginning around 1996, by conservative Hindutva ideologues, despite the fact that many of Husain's paintings had existed without controversy since 1970.[115] Dhavan terms this the 'manufacturing of hate speech' by Husain's opponents;[116]
- the political context of the controversy (which began in 1996, coinciding with the increasing national power of conservative Hindu parties): 'What was being set up by the forces of Hindutva was a general system of censorship to dramatise their hegemony – or, at least, assertions of it';[117]
- the inescapable role of Husain's religion: 'The sacrilege was that Husain was a Muslim! Muslims were being warned off Hindu subjects. Art in India was to be compartmentalized – Hindu art for Hindus and Muslim art for Muslims.'[118]

Ironically, many of the conceptions of hate speech as a form of 'injury' discussed above (by Butler and Mahoney) have been used to discuss the actions of Husain's opponents (those who accused him of hate speech), rather than Husain himself. As Dhavan puts it:

> '[Husain's] Hindutva detractors want to do all that can be done to [him]. They want him to suffer the punishment of the process, force him into apology, make him feel shame, ensure that he feels ashamed and expresses regret, and publicly shame him with the maximum punishment possible in such a way as would help the image of Hindutva but not inspire general sympathy for Husain.'[119]

The controversy, initially provoked in 1996 by Husain's paintings of Hindu goddesses, was re-ignited in 2006 upon allegations that Husain had painted a nude depiction of 'Bharat Mata'. (Husain had not named the painting 'Mother India', and the painting was subsequently withdrawn from bidding by the Apparao Galleries of Chennai). This new controversy led, unlike prior

[115] Dhavan, above at n.36, 12-13.
[116] Ibid, 15.
[117] Ibid, 12.
[118] ibid, 14.
[119] Ibid, 20.

iterations of the Hindutva campaign against Husain, to legal action against the painter. In response to a complaint filed in Madhya Pradesh, a bailable warrant was issued against Husain for offences under s153A. Alternate complaints were issued across India; as a result, Husain sought to have all proceedings transferred to a single court, the High Court of Delhi.

The High Court decided in Husain's favour, in the case of *Maqbool Fida Husain v Raj Kumar Pandey and ors* (2007). Sanjay Kishan Kaul J, in his judgment, stressed the role of analysing the intentions of the artist in determining what is 'offensive' or wounding to the religious feelings of complainants: 'looking at a piece of art from the painters' perspective becomes very important especially in the context of nudes.'[120] In light of this, he concluded that 'the ingredients of section 298 IPC as alleged are not met since there seems to be no deliberate intention on the part of the petitioner to hurt feelings of Indians'. Further to this, Sanjay Kishan Kaul J concluded that 'mere knowledge of the likelihood that the religious feelings of another person may be wounded would not be sufficient.'[121]

In his analysis of s298 of the *Indian Penal Code,* Sanjay Kishan Kaul J stressed the importance of interpreting the statute in light of India's long history of pluralism and tolerance: 'From the dawn of civilization, India has been home to a variety of faiths and philosophies, all of which have coexisted harmoniously.'[122] His conclusions reflect the influence of American ideals of the 'marketplace of ideas':

> 'A liberal tolerance of a different point of view causes no damage. It means only a greater self restraint. Diversity in expression of views whether in writings, paintings or visual media encourages debate. A debate should never [be] shut out. 'I am right' does not necessarily imply 'You are wrong'.'[123]

Questions:

1. Do you agree with the test of 'hate speech' under s295 (intent is required; knowledge is not sufficient) applied by Sanjay Kishan Kaul J?
2. 'Prohibitions on hate speech can prove just as damaging to minority viewpoints as hate speech itself.' Discuss.
3. 'M. F. Husain, as a Muslim, should have displayed greater sensitivity in depicting Indian goddesses and 'Bharat Mata'.' Discuss.
4. What role should cultural and social factors, such as 'India's long history of tolerance' (as cited by Sanjay Kishan Kaul J), play in the interpretation of guarantees of free speech?

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[120] *Maqbool Fida Husain v Raj Kumar Pandey and ors,* CRL Revision Petition No 114/2007 (*"Maqbool Fida Husain"*) at [7].
[121] *Maqbool Fida Husain,* at [107].
[122] *Maqbool Fida Husain,* at [109].
[123] *Maqbool Fida Husain,* at [130].

7. Hate Speech Case Study: Salman Rushdie in Jaipur

Readings:

- Sandip Roy, 'Between Bigg Boss and Un-banning: the Rushdie affair continues', *Firstpost,* 24 January 2012, accessed at http://www.firstpost.com/living/between-bigg-boss-and-un-banning-the-rushdie-affair-continues-191747.html.
- William Dalrymple, 'Why Salman Rushdie's voice was silenced in Jaipur', *The Guardian,* 26 January 2012, accessed at http://www.guardian.co.uk/books/2012/jan/26/salman-rushdie-jaipur-literary-festival.
- Hari Kunzru, 'Why I quoted from The Satanic Verses', *The Guardian,* 22 January 2012, accessed at http://www.guardian.co.uk/commentisfree/2012/jan/22/i-quoted-satanic-verses-suport-rushdie.

On 9 January 2012, Maulana Abdul Qasimi Nomani, vice-chancellor of Darul Uloom Deoband, called upon the central government and the Indian Muslim community to oppose Salman Rushdie's impending visit to India, and his planned appearance at the Jaipur Literary Festival.[124]

The controversy which followed this announcement culminated in the cancellation of Salman Rushdie's appearance at the Festival (originally scheduled for 20 January)[125] and the cancellation of a subsequent planned interview via video link on 24 January.[126] This controversy cannot solely be understood in terms of outrage against Rushdie's allegedly 'blasphemous' sentiments; rather, this controversy illustrates that 'hate speech' cannot be understood as a matter of individual acts and individual hurt sentiments, but draws upon the broader political and social context of such utterances and prevailing competition between social groups. Indeed, as Hari Kunzru notes, the actual content of Rushdie's work was in many respects irrelevant, with Rushdie instead frequently 'misrepresented and caricatured as a sort of folk-devil by people who know little or nothing about his attack.'[127]

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[124] Dipanjan Roy Chaudhury and Naziya Alvi, *Salman Rushdie holds PIO card, doesn't need a visa to visit India*, THE TIMES OF INDIA, 11 January 2012, accessed at http://indiatoday.intoday.in/story/salman-rushdie-darul-uloom-deoband-maulana-abul-qasim-nomani/1/168237.html.

[125] Andrew Anthony, *Salman Rushdie: a literary giant still beset by bigots*, THE OBSERVER, 22 January 2012, accessed at http://www.guardian.co.uk/theobserver/2012/jan/22/observer-profile-salman-rushdie; Vikas Bajaj and Sruthi Gottipati, *A Macabre Start to the Sprawling Jaipur Lit Fest*, THE NEW YORK TIMES – INDIA INK, 20 January 2012, accessed at http://india.blogs.nytimes.com/2012/01/20/a-macabre-start-to-the-sprawling-jaipur-lit-fest/.

[126] William Dalrymple, *Why Salman Rushdie's voice was silenced in Jaipur*, THE GUARDIAN, 26 January 2012, accessed at http://www.guardian.co.uk/books/2012/jan/26/salman-rushdie-jaipur-literary-festival.

[127] Hari Kunzru, *Why I quoted from The Satanic Verses*, THE GUARDIAN, 22 January 2012, accessed at http://www.guardian.co.uk/commentisfree/2012/jan/22/i-quoted-satanic-verses-suport-rushdie.

Numerous analyses of the Jaipur festival controversy have pinpointed the seemingly incongruous interplay of key philosophical issues – free speech, religious freedom, and communal harmony – with prosaic conflicts for political advantage in advance of the Uttar Pradesh state elections. Abhishek Gaur notes the confusion of delegates and organisers as to the sudden surge in controversy, given that 'Rushdie has come to [the Jaipur Literary Festival] in the past'.[128] William Dalrymple resolves this seeming contradiction by reference to the fact that the Festival coincided with 'a razor-edge election in the all-important north Indian state of Uttar Pradesh, a poll in which the vote of the Muslim community was deemed to be crucial.'[129] (The actual results of the election are less important, for present purposes, than the belief at the time that they *would* be close.) Andrew Anthony drily notes that, under such circumstances, 'the governing Congress party clearly decided that it was no time to demonstrate spinal fortitude.'[130]

Anant Rangaswami puts it most bluntly:

> 'Those who protest the loudest against Rushdie's proposed visit to Jaipur wouldn't have heard this phrase wouldn't have heard of Voltaire… indeed, they wouldn't even have heard of Rushdie… All they know is that Rushdie's visit offers them an opportunity to affect votes in the upcoming assembly elections, notably the Uttar Pradesh elections, where a swing in the Hindu and Muslim votes could be a deciding factor… It's not about Rushdie and his writing, it's about politics and politicians raising a bogey about law and order.'[131]

Other writers have sought to place the controversy within a perceived trend towards repressiveness and intolerance for dissenting voices in India. Vikas Bajaj and Sruthi Gottipati, for *The New York Times,* situate the cancellation of Rushdie's appearance as 'the latest in a string of setbacks for free speech in India'.[132] Dalrymple observes that, since 2007, '[t]he commitment of Indian politicians to maintaining artistic and intellectual freedom seem[s] to be becoming ever weaker.'[133] As Kunzru puts it, '[t]his situation has arisen in India at a time when free speech is under attack… [T]hese are not good times for those who wish to say unpopular things in the world's largest democracy.'[134]

In light of this framing of the controversy (as a 'free speech' issue, within a continuum of equivalent controversies of free speech in Indian history), the

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[128] Abhishek Gaur, *At Jaipur, Salman Rushdie is already the talking point*, DAILY NEWS AND ANALYSIS*,* 20 January 2012, accessed at http://www.dnaindia.com/india/report_at-jaipur-salman-rushdie-is-already-the-talking-point_1639890.
[129] Dalrymple, above at n.126.
[130] Anthony, above at n.125.
[131] Anant Rangaswami, *Why Salman Rushdie should not go to Jaipur*, FIRSTPOST*,* 18 January 2012, accessed at http://www.firstpost.com/india/why-salman-rushdie-should-not-go-to-jaipur-186116.html.
[132] Bajaj and Gottipati, above at n.125.
[133] Dalrymple, above at n.126.
[134] Kunzru, above at n.127.

conflict was frequently framed by Rushdie's defenders in absolutist terms, equivalent to Ahmed's notion of the blasphemy discourse's 'cultural work of essentializing difference and perpetuating seemingly immutable oppositions'.[135] The controversy was depicted as one of free speech versus violence;[136] tolerance versus intolerance;[137] modernity versus medievalism; and those with an interest in promoting 'truth' and cross-cultural harmony versus its opponents. With regard to this final discourse, Hari Kunzru's rhetoric echoes that of Justice Holmes and other advocates of the truth-finding function of free speech:

> 'Just as I reach out my hand to Salman Rushdie, I do so to [Hyderabad MP Asaduddin Owaisi], and to Maulana Abul Qasim Nomani… in the hope that, as fellow believers in the vital importance of words, we can resolve our differences – or at least come to understand them correctly – through speech and writing, instead of violence and intimidation.'[138]

William Dalrymple, intriguingly, adds another dichotomy: of India's aspirations towards democracy ('[o]nly when freedom of expression can be taken for granted can India really call itself the democracy it claims so proudly to be') versus the deadening weight of India's colonial heritage (politicians, 'rather than protecting… writers and artists', have utilised 'draconian colonial legislation intended to stop religious riots to silence the creative voice'.[139]) This contrast of 'outdated' laws, versus the bright and implicitly liberal and secular future of India, might be considered a 'modern' take on traditional discourses of blasphemy, whereby accusations of blasphemy 'are understood as an irruption of medieval irrationality and religiosity that threatens political modernity.'[140] In place of the 'medieval', irretrievably backward and repressive other, Dalrymple substitutes the 'colonial state' as arbitrary and dictatorial. In both cases, the demonized past is characterized in terms of cultural difference.

Kunzri's ringing paean to the healing and uniting power of words must be placed in the context of debates over the real 'truth' value of alleged hate speech. (In this respect, it must be stressed that both Rushdie, and Rushdie's critics, must be considered co-accused of hate speech in this analysis; as Nilanjana Roy's petition calling for the revocation of the ban on *The Satanic Verses* notes, '*The Satanic Verses* has not incited violence anywhere; others have used the novel's existence to incite violence to suit their political

[135] Ahmed, above at n.2, 173.
[136] Dalrymple, above at n.126: 'If you give in to the intimidation, you put at risk all the principles upon which literary life is based: what is the point of having a literary festival, a celebration of words and ideas, if you censor yourself and suppress an author's voice?'
[137] Anthony, above at n.125: 'Political cynicism still wears the clothes of multicultural sensitivity and the posture of tolerance continues to genuflect to intolerance.'
[138] Kunzru, above at n.127.
[139] Dalrymple, above at n.126.
[140] Ahmed, above at n.2, 172.

ends.'[141] As Butler notes, the fact that 'freedom in certain European contexts [has] come to define itself as the freedom to hate', entirely distinct of questions as to whether 'hateful speech is part of free speech', is not a productive development,[142] particularly given that hate speech, even where done 'in the name of freedom', may be said to '*do* violence.'[143] Kunzri's willingness to 'reach out my hand' to both Rushdie and his critics (including those who have criticized Kunzri himself) arguably affords to those who have been accused of hate speech a far higher status than those who have otherwise, as Mahoney argues, engaged in forms 'of harassment and discrimination', equivalent to 'any other behaviour that harms people'.[144] The civil libertarian 'orthodoxy' espoused by Kunzri is, in Mahoney's analysis, 'increasingly outdated, as it ignores harm to target groups'[145] – including Kunzri himself, and Rushdie's other defenders.

Before concluding, the actual role played by Rushdie at the Jaipur Literary Festival must similarly be assessed in light of hate speech's historical antecedents in India. As Sandip Roy notes, 'Salman Rushdie would have been the biggest literary celebrity at Jaipur. But in his absence, he became even bigger, hovering over the festival like Banquo's ghost. It was hard to find a session that didn't mention the man.'[146] This monumental presence, though depicted as a surprising development by Roy, is nothing new. As Ahmed notes, late-nineteenth and early-twentieth-century cases regarding hate speech frequently emerged as '*causes celebres*', allowing for the 'constitution of publics oriented around highly symbolic issues'.[147] In this manner, a 'community' of 'believers' (in the secular/liberal ideal of free speech) may be regarded as having been constituted by the persecution of Rushdie, just as his opponents may be regarded to have gained impetus and unity through their shared opposition to his writings. By establishing such communities of thought and pitting both against one another, Ahmed's dictum that 'rather than reflecting primordial religious attachments, [cases of hate speech] were not only enabled by the law but largely constituted by it'[148] accrues further contemporary relevance.

Indeed, this latest controversy adds further fuel to Ahmed's remark (prior to the 2012 Jaipur controversy) that '[t]here is a peculiarly South Asian history to the Salman Rushdie affair'.[149]

Questions:

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[141] Sandip Roy, *Between Bigg Boss and Un-banning: the Rushdie affair continues*, FIRSTPOST, 24 January 2012, accessed at http://www.firstpost.com/living/between-bigg-boss-and-un-banning-the-rushdie-affair-continues-191747.html.
[142] Butler, above at n.59, 130.
[143] Ibid, 126.
[144] Mahoney, above at n.58, 793.
[145] Ibid, 796.
[146] Roy, above at n.141.
[147] Ahmed, above at n.2, 173.
[148] Ibid.
[149] Ibid.

1. Analyze Dalrymple's comments (on the dichotomy between Indian democracy and repressive colonial laws) in light of the traditional use of the *IPC* by colonial authorities.
2. 'The actual content of Rushdie's alleged blasphemous remarks was meaningless; the controversy was purely whipped up for political advantage.' Discuss.
3. Did the Rushdie controversy reflect a growing hostility against free speech in Indian politics, or was it an anomalous event?
4. 'The Jaipur Literary Festival owed a duty to the truth and freedom of expression, and to nothing else.' Discuss.