

Govt Must Say 'Enough Is Enough' and Put a Stop to Recurring Incidents of Hate Speech

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An abridged version of Justice Madan B. Lokur and Shruti Narayan's chapter in the anthology Religion, Hateful Expression and Violence is published here with the permission of the Torkel Opsahl Academic EPublisher (TOAEP).

In *Jafar Imam Naqvi v. Election Commission of India*, the issue of political hate speech re-entered the discourse of the Supreme Court during the 2014 parliamentary elections. In this case, the petitioner sought, *inter alia*, that the Election Commission should be directed to derecognize political parties resorting to “illegal” activities, referring to speeches stoking religious tensions. The Supreme Court’s judgment ignored the specific plea made by the petitioner, and instead mainly focused on reasons why it should not enter the legislative field and issue “guidelines”. Despite the clear danger that hate speech presents, the Court essentially abandoned the issue as one that should only be dealt with *post facto*, stating that:

The matter of handling hate speeches could be a matter of adjudication in an appropriate legal forum and may also have some impact in an election dispute raised under the Representation of People Act, 1951. Therefore, to entertain a petition as a public interest litigation and to give directions would be inappropriate.

The Court unfortunately missed an opportunity to lay down the limits of hate speech which gets aggravated during electioneering.

The Supreme Court’s most recent judgment considering the issue of hate speech is *Amish Devgan v. Union of India* (*‘Amish Devgan’*). Devgan, a television journalist, faced criminal charges under various provisions of the IPC. The charges were filed after he referred to a saint in Islám as an “invader, terrorist and robber who had come to India to convert its population to Islam”, during a TV programme hosted by him. The Court refused to quash the criminal cases, which is an affirmation of the adequacy of existing criminal law to recognize hate speech, even if made accidentally or in error, as was claimed by Devgan. In its rather lengthy judgment, the Court embarked on a comprehensive review of Indian and foreign decisions on hate speech while referring to some helpful academic articles.

The Court referred to the guaranteed right to equality in Article 14 of the Constitution and its various facets, including the right to dignity. The Indian Constitution prescribes not just rights but also duties, including the duty of citizens to promote harmony and fraternity, which the Court noted must transcend “religious [...] diversities”. The Court distinguished between dignity which can be protected by criminalizing hate speech and a broader or more individualistic concept of dignity, which is protected by defamation law. In the former

context, the Court held dignity as meaning “a person’s basic entitlement as a member of a society in good standing, his status as a social equal, and as bearer of human rights and constitutional entitlements”. The Court accorded dignity great importance, as being linked to the “unity and integrity of the nation” and held that divisiveness and alienation affects not only the dignity of the target group but also the pluralism and diversity of the country.



The Supreme Court of India. Photo: The Wire

In discussing various subjective factors necessitating evaluation for deciding whether speech is punishable as hate speech, the Court referred to academic articles on the subject, including an essay titled ‘Defining Hate Speech’ which deals with hate speech in various jurisdictions. The Supreme Court broadly accepted that the content of a speech must be coupled with the intent of the speaker to incite or cause harm. The Court also referred to an article which outlined the three elements of hate speech – content, intent, and harm or impact. The problem, in the authors’ opinion, is the unsatisfactory manner in which the Court dealt with the harm or impact that hate speech might have.

On the content aspect, the Court accepted an earlier view 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”. On the intent aspect, the Court accepted the view that:

The intent-based element of ‘hate speech’ requires the speaker’s message to 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.

The Supreme Court also cited various definitions not previously considered by it or by the Law Commission. One of the definitions views hate speech as a racial insult intended to demean a group, while another explains it as expression intended to “vilify, humiliate or incite hatred” against a target.

The Court also affirmed that the freedom of speech may not be arbitrarily restrained by hate speech laws. The Court opined that there is a ‘good faith’ defence available where a speaker displays prudence and caution with his or her expression or content; and that there is also a ‘legitimate purpose’ defence available where the speech has some clear purpose other than just spreading hatred or intent. This is a corollary to the definition of hate speech in Black’s Law Dictionary, which views hate speech as speech with no redeeming purpose other than spreading hatred. The Court held that the “legitimate purpose” defence is particularly applicable in cases of any publication having a genuine public interest purpose.

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.

In the present context, this is an important distinction which needs to be understood by the police. The misuse of these provisions of law to target people making political comments is illustrated in the case of *Patricia Mukhim v. State of Meghalaya*. This case was decided by the Supreme Court on 25 March, 2021, just over three months after the passage of the judgment in *Amish Devgan*. Mukhim is a journalist in the north-eastern State of Meghalaya, where conflicts sometimes occur between tribal and non-tribal communities. In July 2020, Mukhim wrote a Facebook post criticizing 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 went on to note that within India’s multi-cultural society, where citizens enjoy the right to free movement within the country, there is potential for conflict which cannot be ignored. The Court held that:

The fervent plea made by the Appellant for protection of non-tribals living in the State of Meghalaya and for their equality cannot, by any stretch of imagination, be categorized as hate speech. It was a call for justice – for action according to law, which every citizen has a right to expect and articulate. Disapprobation of governmental inaction cannot be branded as an attempt to promote hatred between different communities.



Shillong Times editor Patricia Mukhim. Photo: Facebook

Does the Impact of Hate Speech Need to Be ‘Violent’?

The Supreme Court in *Pravasi Bhalai Sangathan* had already held that the impact of hate speech may include a non-violent psychological impact. This was reiterated by the Law Commission. However, in *Amish Devgan*, the Court noted that speech which goes beyond political criticism and “defames, stigmatizes and insults the targeted group provoking violence or psychosocial hatred” is not protected free speech. The Court elaborated that speech reflecting “hate which tends to vilify, humiliate and incite hatred or violence against the target group upon identity of the group” 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”.

The ‘clear and present danger’ and the ‘imminent lawless action’ tests are two distinct tests in US constitutional law, but have been equated by the Indian Supreme Court. These expressions are employed in the context of public disorder or violence and not simply in the context of promoting feelings of hatred. This equation of the two distinct tests by the Indian Supreme Court has made it simple for the Court to decline any answer to the question as to whether, for example, economic boycott of a particular community falls within the meaning of ‘clear and present danger’ or ‘imminent lawless action’ in the context of public disorder. 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 criminalize speech, it is necessary to establish a proximate nexus with clear and present danger or imminent lawless action and public disorder or violence. The Court appears to recognize this problem but does not provide any satisfactory conclusion, holding:

Having interpreted the relevant provisions, we are conscious of the fact that we have given primacy to the precept of 'interest of public order' and by relying upon 'imminent lawless action' principle, not given due weightage to the long-term impact of 'hate' speech as a propaganda on both the targeted and non-targeted groups. This is not to undermine the concept of dignity, which is the fundamental foundation on the basis of which the citizens must interact between themselves and with the State. [...]. Further, a 'hate speech' meeting the criteria of 'clear and present danger' or 'imminent lawless action' would necessarily have long term negative effect. Lastly, we are dealing with penal or criminal action and, therefore, have to balance the right to express and speak with retaliatory criminal proceedings. We have to also prevent abuse and check misuse.

In the authors' opinion, the Supreme Court has taken a step back from its pronouncement in *Pravasi Bhalai Sangathan* and the recommendation of the Law Commission. 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 the decision 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 the harm or impact on society or a community or an individual.

The Supreme Court in *Pravasi Bhalai Sangathan* pointed out that the existing legal provisions could be used to prosecute and punish hate speech when it occurred. In *Amish Devgan*, the Court refused to quash the criminal case against the journalist accused of making a hate speech. It appears that the judiciary approved the use of existing law to prosecute hate speech. However, upon examining some major contemporary incidents of divisive and hateful speech, it appears that the police are not always proactive in investigating, let alone prosecuting, such incidents.

Contemporary incidents of hate speech, its weaponization

Constitutionally guaranteed free speech in India is at a crossroads. It must be appreciated that hate speech can never be protected, whether it is direct or inferential, whether it is verbal or non-verbal. Therefore, a clear definition of hate speech is necessary. While it is

true that it may eventually be difficult to have a precise definition of hate speech, a beginning is necessary. Time, it is said, is a great healer and the gradual passage of time can also bring about a balance in the definition that may be needed for a clearer understanding of the distinction between free speech and hate speech.

The Supreme Court of India has accepted the content, intent and impact or harm 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 psychosocial 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 recognized.

In this context, it would be worth exploring the possibility of introducing the theory of absolute liability to criminalize 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 possibility 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.

Hate speech in India is resulting in polarization and divisiveness. In the absence of any clear understanding on what constitutes hate speech, the police are virtually having 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 shout out that enough is enough and put a stop to recurring incidents of hate speech, both verbal as well as non-verbal.

The judiciary too should be alive to the consequence of hate speech not being punished suitably and in time. It is often said that 'delay defeats justice'. But what is more problematic with delay in punishing hate speech is not that justice is denied, but that freedoms in a free society get compromised or corroded to the detriment of targeted individuals, groups or communities. The Supreme Court appears to have taken notice of the urgency of policing hate speech. In a petition seeking redress against the proliferation of hate speech, the Court in October 2022 directed three state police forces to take immediate action to register cases against any incidents of hate speech in their jurisdictions, "even if no complaint is forthcoming". The Court extended its order to all states in April 2023. It remains to be seen, however, whether state authorities use this order to prosecute genuine cases of hate speech.

No democracy can afford to have sections of society lose these freedoms and allow hate to take over. Therefore, the time is ripe for India to introspect and take the lead – and the time starts now.