REPORT

HATE SPEECH RESTRICTIONS

A Primer

Methodology and Objective

This paper examines [ ] It uses the terms speech and expression interchangeably – as the aim of regulation if any would be to regulate both if motivated by hate.

In doing so the paper examines briefly approaches to hate speech restrictions in International Convention and in the legal systems of some countries. The United States, Canada and South Africa are examined as presenting different approaches to imposing restrictions on the freedom of speech.

The paper then looks at hate speech restrictions as they inhabit the world of Indian laws. Hate speech as terror, as sedition and [ ] are squarely rejected as interpretations of hate speech restrictions. It is a small – the paper takes as a necessary given that hate, hate speech and its concomitants will always be and rightly so subjective making the work of laws, law enforcement and courts that much harder. The paper also acknowledges that in the face of a State that is openly communal or otherwise biased, hate speech restrictions, like all other laws including terror laws, public nuisance sections becomes weapons in the hands of the administration.

Finally the paper concludes that hate speech restrictions are over and above all other theories and debates – the most important approach to hate speech laws is that which places it in the Constitutional context – for us the Constitution of India. It further concludes that what Canadian theorists have called multi-culturism and secular in our own context not only allows hate speech restrictions but imposes a duty on the State to prevent hate speech.

Table of Contents

Introduction

> [“They say music can alter moods and talk to you.
> But can it load a gun for you and cock it too?”[1]]

In 2002 the US President called Iran, Iraq and N. Korea the axis of evil and followed up by adding Cuba, Libya and Syria as ‘rogue’ states.

The Canadian Human Rights Tribunal in *Nealy v. Johnson*[2] *discussed the concepts of hatred and contempt*:

> “With "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one "hates" another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of "looking down" on another or others. It is quite possible to "hate" someone who one feels is superior to one in intelligence, wealth, or power. None of the synonyms used in the dictionary definition for "hatred" give any clues to the motivation for the ill will. "Contempt" is by contrast a term which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings.”

The Canadian Supreme Court in *R. v. Keegstra* (1990) 3 S.C.R. 697 discussing these provisions developed the following definition of hatred:

> “Hatred connotes an emotion of an intense and extreme nature that is clearly associated with vilification and detestation. It is an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.”

The definition of hate speech is as elusive as that of hate itself. We know its effects or in any case potential effects – that it promotes fear, incites violence, articulates identities as divisive, indoctrinates prejudice and promotes discrimination. It is commonly directed against groups/persons based on unalterable shared characteristics like history, race, religion, caste, language, gender, sexual orientation, livelihood, etc.
It has several forms including:

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1 Eminem, ‘Sing for the Moment,’ available at [Records]
2 [?]

- advocating violence against one or more persons because they are a member of one of the above protected groups (i.e. “kill them”);
- saying that violence would be acceptable (i.e. “they ought to die”);
- saying that they deserve violence (i.e. “they had it coming”);
- dehumanizing or degrading them (perhaps by characterizing them as guilty of a heinous crime, perversion, or illness) such that violence may seem acceptable or inconsequential;
- making analogies or comparisons suggesting any of the above (i.e. “they are like murderers”).

This form of speech may occur in different setting public and private as conversations between persons, casual group discussions, public speeches (at community centres, in mosques, before political groups) and in the media (on the radio, on television, on websites, in newspapers and pamphlets). It is safe to say that in matters of legal concern it is the latter two contexts that are of the most concern.

There have been several attempts at the definition of hate speech. It has been variously defined as:

an expression, which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination[3];

any form of expression deemed offensive to any racial, religious, ethnic, or national group.[4]

a generic term that has come to embrace the use of speech attacks on race, ethnicity, religion, and sexual orientation or preference.[5]

speech that includes insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of colour as animal-like and requiring extermination[6];

Speech or conduct aimed at a group of historically disenfranchised people; speech that reviles, ridicules, or puts in an intensely negative light a person or group on

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3 Natan – is there a right to hate speech - Sandra Coliver’s Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination defines hate speech as:

4 Hate Speech: Definitions - (Dee Speaking) - Reference: See Walker's Hate Speech, p. 8 [In his history of the hate speech controversy, Samuel Walker tells us that There is no universally agreed-on definition of hate speech. Traditionally it included], Smolla Free Speech in an Open Society, p. 152, Matsuda in Words that Wound, p. 23, 36, and the introduction to The Price We Pay edited by Lederer and Delgado.

5 Rodney Smolla tells us that “Hate Speech is the

6 Mari Matsuda writes that, “The hate - Later, Matsuda specifies three identifying characteristics of the worst racist hate messages:

1. The message is of racial inferiority
2. The message is directed against a historically oppressed group
3. The message is persecutory, hateful, and degrading.

account of who they are - this is what we are calling "racist speech" or "hate propaganda."[7]

While there is no agreed definition or perhaps even understanding of the concept of hate speech, the above definitions do convey the flavour and essence of what the nature of speech that is of concern for its propensity to violence and discrimination - whether directly or indirectly. While there is some consensus that such speech should be restricted, whether it is by informal structures (typically associated with education, enlightenment, tolerance etc.) or by legal actions with the direct involvement of the State in determining whether and what kind of speech and expression is harmful is the crux of the debate and controversy raging around hate speech restrictions.

In entering this debate, this paper uses the term speech loosely to include non verbal expressions, whether they be writing reflecting the above or symbols, in discussing their role in violence and discrimination.

7 Laura Lederer and Richard Delgado offer the following definition – "

Hate speech, violence and discrimination

One of the main difficulties and one that detractors of hate speech restrictions use quite effectively to argue against hate speech restrictions is that hate is a difficult concept to define let alone regulate – it is an emotion rather than a concrete act and speech that reflects or embodies such hatred certainly does not convert it into a tangible and clear action against another person or category of persons that can or should be regulated by law.

At the heart of this understanding is of course the children's playground adage – 'sticks and stones may break my bones, but words can never hurt me.' "The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[8]
An understanding rejected by persons belonging to groups that have traditionally, historically, socially, economically and politically faced discrimination and violence.

The Canadian SC while discussing hate propaganda discussed the concept of hate thus:

> "Hatred connotes an emotion of an intense and extreme nature that is clearly associated with vilification and detestation. It is an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."[9]

Implicit in the definition is a continuum from hate propaganda to discrimination to physical violence in the worst-case scenario.[10]
The Cohen Committee Report[11] *that led to the enactment of hate speech restrictions in Canada* noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and strong pressure to renounce the cultural differences that mark them as distinct. The Committee also observed that hate propaganda can operate to convince listeners, even if subtly, that members of certain racial or religious groups are inferior and predicted that the result may be an increase in acts of discrimination… and even incidents of violence[12].

8 Chaplinsky
9 Keegstra?
10 [Canada hate prop article]
11 Citreon v Zundel - *Canada (Human Rights Commission) v. Taylor*
12 To check - 1981 Report Arising Out of the Activities of the Ku Klux Klan in British Columbia by John D. McAlpine, the 1984 report of the Special Committee on Participation of Visible Minorities in Canadian Society, entitled Equality Now!, the Canadian Bar Association's Report of the Special

Defenders of the freedom of speech of course question the link between hate speech and violence. That even if used, hate speech does not necessarily lead to actions, and that where actions are carried out, the speaker of those words cannot be held responsible for the actions of others.[13] Some experts however argue that violence is not an instinctive human behaviour – it is learned[14] as is who to direct the violence against. Historical truths, most notably the holocaust, the role of hatred and its promotion through speech and propaganda are often quoted in support of this stand.

Discussing the emergence of the holocaust, one study of destructive messages determines, “

> [In late nineteenth-century Germany, for example, the foundations of the Holocaust were already beginning to emerge from long-established anti-Jewish sentiment. Traditional stereotypes based on religious differences developed into more deeply rooted, academically endorsed racial stereotypes, as evidenced by the linguistic shift from “anti-Judaism” to “anti-Semitism” (coined in the 1870s by Wilhelm Marr). Pseudoscientific studies establishing Aryan superiority became fodder for members of the intellectual elite seeking a scapegoat for an economic downturn. Anti-Semitic attitudes leapt from academic to political rhetoric, grew latent around the turn of the century, then reemerged full-throttle in a pamphlet entitled Protocols of the Elders of Zion during Germany’s post–World

Committee on Racial and Religious Hatred, also released in 1984, and the 1986 Working Paper 50 of the Law Reform Commission of Canada, entitled Hate Propaganda. - The 1981 Report Arising Out of the Activities of the Ku Klux Klan in British Columbia by John D. McAlpine noted evidence of racism and racial violence in British Columbia, and among its conclusions recommended the strengthening of existing remedies, including the criminal offence of the wilful promotion of hatred. The 1984 report of the Special Committee on Participation of Visible Minorities in Canadian Society, investigated, among many topics, legal and justice issues pertaining to and affecting members of visible minority groups in Canada. The Committee suggested a wider ranging prohibition in s. 319(2), most notably by removing reference to the mental element of wilfulness, as a response to the threat to equality and multiculturalism presented by hate propaganda (Recommendations 35-37). Also in 1984, the Canadian Bar Association's Report of the Special Committee on Racial and Religious Hatred found that the law had a role to play, both at the criminal and civil level, in restricting the dissemination of hate propaganda (p. 12). With regard to s. 319(2), this conclusion was affirmed two years later in Working Paper 50 of the Law Reform Commission of Canada, entitled Hate Propaganda (1986).

13 Word IQ

14 **Psychology of the School Shootings** - Testimony presented at the House Judiciary Committee Oversight Hearing to Examine Youth Culture and Violence May 13, 1999 by Dewey G. Cornell, Ph.D., Curry School of Education, University of Virginia. [Repeated exposure to messages of violence and hatred over time desensitize many young people, distort their perceptions of personal safety, and erode inhibitions against harming others. Scientific studies provide overwhelming evidence that television violence encourages aggressive behavior and has a long-term effect on children (see reviews in Berkowitz, 1993; Donnerstein, Slaby, & Eron, 1995; Hughes, & Hasbrouck, 1996). Someone taught the kids in the Trenchcoat Mafia to admire Hitler and how to make pipebombs rather than to tolerate differences and respect others.]

> War I decline. Protocols, which was exposed as a forgery a year after its 1920 publication, nevertheless maintained momentum well into the 1930s as evidence of a Jewish conspiracy for world domination. Reaffirming ideas previously planted within the social consciousness, Nazis seized upon a new wave of sensationalist propaganda, gaining widespread support not for discrimination, but for destruction of the Jewish race.[15]]

In our own context, several commissions of inquiry established to inquire into riots, communal and caste violence, massacres and progroms have highlighted the role of speech in promoting and inciting violence. The Sri Krishna Commission Report into the 1992-93 Bombay riots discussing the violence in January of 1993 concludes:

> "Turning to the events of January 1993, the Commission's view is that though several incidents of violence took place during the period from 15th December 1992 to 5th January 1993, large scale rioting and violence was commenced from 6th January 1993 by the Hindus brought to fever pitch by communally inciting propaganda unleashed by Hindu communal organizations and writings in newspapers like `Saamna' and `Navakal'. It was taken over by Shiv Sena and its leaders who continued to whip up communal frenzy by their statements and acts and writings and directives issued by the Shiv Sena Pramukh Bal Thackeray." [emphasis added]

Understanding how speech works

An interesting aspect of hate speech is understanding how speech really works. We are instinctively aware of how and why we say certain things – the use of certain vocabulary, tone, etc. all have a substantial effect on the meaning of our speech. The same words may sound like an abuse or a compliment depending on the circumstances, the speaker, the listener and several other variables. It is this subjectivity that makes speech so difficult to regulate but its impact as discussed above and later in this paper, pushes the argument that difficult as it would be for laws and courts to determine which speech should be restricted, it may be a necessary task in the furtherance of [democracy/equality].

In a case before the Canadian Human Rights Tribunal, a language expert outlined for the Tribunal "a number of specific ways in which meaning

15 Destructive messages – Book notes – Harvard Law Journal - Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements. By Alexander Tsesis. New York: NYU Press, 2002. Pp. 250. $40.00, cloth.

permeates an intended message and allows the recipient to make sense of what they have heard or read:

a) Specific techniques, such as generalization or the use of scare quotes, can inject an additional layer of content beyond the obvious;
b) The choice of vocabulary can reflect the author's view of a particular group or event;
c) The use of repetition may enhance the credibility of the author or persuade the audience of the veracity of a particular fact or assertion;
d) A particular group may be singled out or targeted;
e) Coding and the use of metaphor can establish a series of negative associations and interchangeable references or associations;
f) Inversion strategies where commonly held views are inverted, so that for example the traditional victim becomes the aggressor and the aggressor the victim;
g) Metonymy or extreme generalization ascribing negative characteristics to a broad range of behaviour or group of individuals based on an individual action or example.

In the case, the expert examined various documents on a website that claimed inter alia that the holocaust was a lie and made statements/allegations about Jews. “The expert determined that the documents revealed a repeated pattern of singling out Jews, and ascribing extremely negative characteristics to them as a group and as individuals.” The expert also noted that, “there were no specific citations or references for factual, or historical references, and assertions were made that went beyond the logical extension of the material relied upon. Nonetheless, the academic tone of these documents lends an air of legitimacy to these documents and informs the context in which subsequent messages are communicated.”

Cohen - Additionally, we cannot overlook the fact, because it [403 U.S. 15, 26] is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures - and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." Baumgartner v. United States, 322 U.S. 665, 673 -674 (1944).

Hate Speech, freedom of speech and equality

"I disapprove of what you say but I will defend to death your right to say it." –
- Voltaire

The classic paradigm of the hate speech debate pits it against the freedom of speech and expression. [JS Mill on liberty and freedom of speech – According to Mill any doctrine, no matter how immoral it may appear to others should see the light of day – "If all mankind minus one were of the opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind." However, even Mill cannot argue for a limitless freedom of speech and his limitation takes the form of what is now known as the Harm Principle i.e. "…the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." So the question really is what form of speech can cause harm – and what harm are we speaking of imminent, physical, emotional? – to add discussions on the harm principle]

[It has also been argued that the harm principle sets too high a standard. Joel Feinberg argues instead for the 'offence principle' i.e. some forms of expression should be barred as they are very offensive. The problem, of course, is what standard to apply. From whose point of view should the speech be offensive. If one were to take the lowest common denominator we may end up judging from the viewpoint of an overly sensitive person.

[While the above arguments take the freedom of speech and expression as the highest principle and try to carve out exceptions from it, the 'democratic citizenship' or equality argument places the freedom of speech and expression against other principles. "…The task [then] is not to arrive at hard and fast principles that govern all speech, but to find a workable compromise that gives due weight to a variety of values."[16]]

These debates are not simply legal in terms of recognition of rights and freedoms and their restrictions. The larger discussion – often philosophical- entails understanding or attempting to in any case, understand and define the ideal of a 'democratic' and 'free' society and the path to this ideal. The following section discusses briefly the arguments [typically] posited in the free speech and hate speech restrictions debate.

<u>Against</u>

Interferes with Freedom of speech & expression.

16 Stanley Fish in Freedom of Speech, Stanford Encyclopaedia of Philosophy.

The most important argument that free speech supporters posit is that of the undeniable link between democracy and free speech. It is free speech that allows citizens to properly exercise their votes, to understand and debate political decisions, hold public officers accountable and so on. Defenders of free speech believe that unless this right is guarded zealously, the State will censor all forms of speech and [ ] According to the UN Special Rapportuer on freedom of speech and expression, "[F]reedom of opinion and expression not only benefits from a democratic environment; it also contributes, and is indeed pivotal to the emergence and existence of sound and functioning democratic systems."[17]

The United States Supreme Court, considered the vanguard of free speech in 1931 attributed the democracy and independence of the United States to free speech - , "Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?'[18]

Similarly the Canadian Human Rights Tribunal reflecting the assertions of the Canadian Supreme Court on free speech stated, "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be overemphasized…The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern society."[19]

Advancing autonomy

Free speech is considered integral to individual liberties and in particular the advancement of autonomy of individuals. A US SC judge noted that the freedom of speech and expression, "serves not only the needs of the polity but also those of the human spirit -- a spirit that demands self-expression."

Marketplace of Ideas

17 CHECK - 'Civil and political rights, including the Question of freedom of expression - The right to freedom of opinion and expression,' Report of the Special Rapporteur Mr. Ambeyi ligabo, submitted in accordance with commission resolution 2002/48, E/CN.4/2003/67, 30 December 2002

18 Mineesota law 1931 case

19 Citreon.

The concept of the ‘marketplace of ideas’ emerged from the dissent of Justice Oliver Wendell Holmes in [Abrams v. United States] where he stated 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.”

This view of course assumes [a fallacy of most capitalist thinking] that all ideas will indeed enter the marketplace, with equal force, representation and freedom.[20] And even if this were to happen, nothing in human history supports the conclusion that truth will indeed finally triumph or form the basis of the actions of persons. Speech, as discussed above, is complex in its reflection not just of truths and falsehoods, but also of emotion, faith, superstition and so on.

Slippery Slope

“The slippery slope argument is that we should not limit free speech because once we do we will slide our way into tyranny and censorship.”[21] The problem of course with pointing out deficiencies in the free speech model means that we end up with a situation where it is the State that plays a deciding factor in what speech is acceptable and which is not. And from here springs the argument that government will inevitably abuse power to prosecute ideas, invent charges and twist people's words in order to convict them. It is the slippery slope of speech restrictions, which critics of these restrictions argue will lead to ultimately complete or at least significant State control over **all** speech.

‘Chilling effect’

The argument that hate speech restrictions lead to a ‘chilling effect’ on the freedom of speech and expression has been used in US and Canadian cases with of course separate effects.

In Citreon v. Zundel, the Canadian Association for Free Expression acting as Intervener opined before the Canadian Human Rights Tribunal that journalists are afraid of losing their livelihood, and that editors are fearful of the prospect of an accusation that they are anti-Semitic and the application of hate speech restrictions would mean that he, himself, for instance would rather take down his magazine’s website than face such complaints or accusations. He gave an instance of when he was the editor and a story was published on residential schools that resulted in a complaint being made before the Alberta Human Rights Commission under an anti-hate clause. The objectionable part of the story suggested that for some Indians, the residential schools were not as bad as they were normally portrayed. The Tribunal similarly heard from other

20 See propaganda model below.

21 David Van Mill, Freedom of Speech, Stanford Encyclopaedia of Philosophy, [IMPORTANT: Freedom of Speech]

witnesses how the restriction on hate speech particularly in the realm of the Internet had impeded their freedom of speech and expression. For instance, one witness spoke of shutting down his ISP business due to the accusation that he was a hate monger by virtue of the websites he hosted for his clients.

In the Canadian case the Tribunal noted that the evidence or otherwise of a chilling effect on freedom of speech was irrelevant to their decision about the constitutional validity of hate speech restrictions. They further noted that the instances given by the witnesses were in fact those where other persons or moral/public pressure and not the fear of complaints under human rights legislation had resulted in the 'chilling effect.'

Vagueness - Defining hate speech

As discussed in the [Introduction] there are many definitions of hate speech and as we will see below in legal [discourse] these range from the narrowest (fighting words) to the broadest where hate speech is treated not only as a crime but as discrimination.

As some ask, "is the definition in terms of what the speech reflects, such as bigotry, bias, prejudice, anger, ignorance, and fear? Or what the speech conveys: intimidation, vilification, subjugation, eradication? Does it matter whether the speech occurs in a face-to-face encounter, in an online diatribe, in a novel, in a newscast, during a classroom presentation, or as part of a political candidate's campaign? Can hate speech be defined as a list of words, or does the context of those words count? Which is more important in determining hate speech, the intent of the speaker or the reaction of the audience?"[22]

The problem arises not just in definitions but also in the practical applications of hate laws. Is there really an objective way in which hate laws can be applied? Will convictions (assuming these are criminal laws) depend on the vagaries of the judges? If there is no objective way to determine what amounts to hate speech what deterrent value could it possibly have?

Hate speech restrictions do not deal with hate

An important argument against hate speech restrictions is that they do not change the ideas or the hate behind them. Worse, it is argued, "driving a bad idea underground gives it an aura of martyrdom and allows its advocates to claim that those who suppress it can't afford to let it be heard."[23] The only way to deal with hate speech is really through debate and discussion and not through legal regulation for such debates and discussions it must be allowed to surface.[24]

22 Must a civil society be a censored society – firstamendmentcenter.org

23 [?]

24 The only way to end hate speech is to change the hearts and minds of people around the globe. - Mathew Cantrall

This is drawn from Tocqueville's argument that people may be hesitant to speak freely not because of fear of government retribution but because of social pressures. When an individual announces an unpopular opinion, he or she may face the disdain of their community or even be subjected to violent reactions.[25] It is argued that distinctions must be drawn between hate speech, hate crimes and the silencing of victim groups and while hate cause these, hate speech does not necessarily cause them and hate speech restrictions accordingly cannot be the answer for them.[26]

Critics of this position hold that such position depends on the presumed goodwill of those purveying hate speech. It assumes (sometimes without proof) that one can avoid incitement to murder and genocide by discussion alone.[27]

Promoting tolerance

Another explanation is that it is integral to tolerance, which should be a basic value in our society. Professor Lee Bollinger is an advocate of this view and argues that "the free speech principle involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters." The free speech principle is left with the concern of nothing less than helping to shape "the intellectual character of the society."
This claim is to say that tolerance is a desirable, if not essential, value, and that protecting unpopular speech is itself an act of tolerance. Such tolerance serves as a model that encourages more tolerance throughout society. Critics argue that society need not be tolerant of the intolerance of others, such as those who advocate great harm, even genocide. Preventing such harms is claimed to be much more important than being tolerant of those who argue for them.

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Laws against hate speech would obviate the benefits of such speech — and there are benefits. Hate speech uncovers the haters. It exposes the ignorance, fear, and incoherence in their views. It warns, prepares, and galvanizes the targets. It provides the police with suspects and the prosecutors with evidence in the event of a crime. It enlivens the bystanders. It demands response. And it demonstrates the strength of our commitment to the tolerance of intolerance and the primacy of freedom of expression.

Political Correctness Campaign

25 Word IQ
26 Must a civil society be a censored society – firstamendmentcenter.org
27 Word IQ

And finally, it is argued that hate speech restrictions represent nothing more than a political correctness campaign gone horribly wrong. It is argued that they have emotional and symbolic appeal with little or no utility.[28]

For

Democratic citizenship or equality

Catherine Mackinnon in discussing feminist [ ] is most notably linked to the introduction of the 'equality' argument in promoting restrictions on pornography which is defined as "…the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context which makes these conditions sexual."[29] She argues that pornography portrays women in a manner that undermines their eqaul status as women. She states for instance giving the example of giving a command to a dog to attack that in such cases it is not only difficult but [ ] to distinguish the speech from the violence it results in. ["Women as a group have rights against the consumers of pornography, and thereby have rights that are trumps against the policy of permitting pornography...the permissive policy is in conflict with the principle of equal concern and respect, and that women accordingly have rights against it"][30]

The Canadian and South African Constitutions, cases and laws that reflect 'multiculturalism' embody this principle. The equality argument simply states that hate speech acts as a [ ]. In arguing for the right to equality and non-discrimination and for hate speech restrictions, these thinkers are saying that the freedom of speech and expression is not *the* paramount value in a democratic society. They argue that this right cannot be used to violate the right to life, dignity and equality equally important values that must be upheld. These arguments unlike those that view hate speech restrictions, as exceptions to free speech do not rely on harm or offence or even any direct, causal or indirect link to violence.

[Canadian case law: In *Oakes*,[31] the Canadian SC discussing the rights and freedoms under the Charter laid down the test to determine whether restrictions placed on them were valid. According to the Test, Courts would have to determine, first, whether the objective of the challenged measure was

28 Must a civil society be a censored society – firstamendmentcenter.org
29 Mackinnon in Stanley Fish in Freedom of Speech, Stanford Encyclopaedia of Philosophy.
30 Rae Langton in ibid
31 [?]

sufficiently important to warrant limiting a *Charter* right and freedom, and second, the issue of proportionality, whether the impugned measure is well suited to carry out its objective, and whether the impact upon an entrenched right or freedom is not needlessly or unacceptably severe.[32] In *Taylor*, The Canadian Supreme Court examined Section 13(1) of the Canadian Human Rights Act in light of this test. The Court found that the purpose of the legislation was the promotion of equal opportunity…unhindered by discriminatory practices based on, inter alia, race or religion - which informs the objective of s. 13(1).

The Court concluded that hate messages "undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations … as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality" and that accordingly the restriction was sufficiently important to restrict a Charter freedom. The Court further held that once the detrimental effect of hate speech on the principles of the Human Rights Act is acknowledged, "there remains no question that s. 13(1) is rationally connected to the aim of restricting activities antithetical to the promotion of equality and tolerance in society" and that the human rights legislation with a cease and desist order against hate propaganda "reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance."]

["The decision in *Taylor* recognizes that hate propaganda presents a serious threat to society."[33] The Court stated that Section 13(1) addressed two harms: first it is responsive to the potential impact of hate messages on those listening to them. The Act therefore, censures the incitement of hatred and the possible actions including further acts of discrimination in employment, housing etc, that might flow from the intense emotions of ill will towards others that is contemplated by s. 13(1). "Thus, although those who listen to "hate messages" may or may not act on the emotions aroused by the communication in question, the communication creates a barrier to the advancement of social harmony and tolerance." Second, these messages "might produce fears that they will lead to actual abuse or discriminatory practises by those to whom the message is communicated. Equally important, there is an "intensely painful reaction" experienced by individuals subjected to the expression of hatred."]

Thus, every citizen is entitled to an atmosphere free from harassment, intimidation and violence. Hate speech leaves targeted communities feeling isolated, vulnerable and unprotected by the law. By making persons fearful, angry and suspicious of other groups and of the power structure that is

32 Citreon
33 Citreon

supposed to protect them they are denied their right to democratic citizenship on an equal footing.[34] “Messages of hate propaganda undermine the dignity and self-worth of target groups members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.”[35]

Law may be only one among tools to address hatred with ‘education’ and social change – but is an important tool where the other tools do not work. Legislation, sends a message to our multicultural society about values of decency and tolerance accepted as the norm by our government and vast majority of citizens.[36]

Of course in societal terms how speech works – whether as direct incitement or slow burn makes it difficult for regulation to determine what speech should be restricted.

[In any case, whether it is in the freedom of speech or right to equality paradigm, the exception of violence i.e. speech that is linked to violence or what JS Mill would refer to as harm is a clearly recognised exception. It is the degree that is really up for debate. While the US SC restricts this to fighting words, multiculturists argue that speech that results in discrimination should also be subject to regulation. It is how we understand violence – whether there is a continuum of hate, discrimination and violence that would really determine the restriction.]

[RAV v Paul - One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," ibid., but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs, because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." Brief for Respondent 25. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.]

[The US SC does admit however that laws that help ensure the basic human rights of members of groups that have historically been subjected to discrimination. . . ." is a compelling state interest but one that is not served by content based discrimination. The US SC argued that the same result could be achieved without the grounds specified in the law negativing the argument of

34 [?]
35 Taylor -
36 South Africa paper

the State that the law sent a specific message to persons of different and minority races that speech against them is not tolerated by the State.]

The US SC basically said that while the State may regulate or restrict all forms of fighting words, it may not identify, for instance, race or gender only as grounds for the application of laws as it, "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." The US SC then goes on to discuss situations where, what it terms as 'content based discrimination' in regulation regarding speech may be allowed where the speech being proscribed is associated with particular "secondary effects." In this category of justifiable restrictions the Court then mentions speech that amounts to sexual harassment or "sexually derogatory "fighting words," among other words, may produce a violation of …[the] general prohibition against sexual discrimination in employment practices. [This, however, is the very argument used for general hate speech restrictions – that hate speech in and of itself is a violation of the right against non discrimination.]

Is free speech really free?

One of the foremost assumptions in any defence of the freedom of speech and expression is the presumption of 'freedom' – of the fact that there really exists a free exchange of ideas – in 'free and democratic' societies in any case. The free speech defenders argue that, "most of an individual's beliefs, including his scientific beliefs, are justified by his perception that they have emerged unscathed from the free confrontation of ideas and the unrestrained search for facts."[37] However, an incidental question is whether free speech is really free. In his second general report, the current Special Rapportuer on the Freedom of Speech and Expression noted,

> "The Special Rapporteur is especially concerned about the concentration of large media groups, dominant in a given market, in the hands of a few business corporations. Reversing this phenomenon will allow the emergence of a more pluralistic approach to information…The Special Rapporteur encourages Governments to ensure that the exercise of the freedom of opinion and expression through the media is open and accessible to various actors of the civil society, local communities and minorities, vulnerable groups, in addition to economic and political groups."[38]

37 In defense of Hate Literatur (Sort of), Pierre Lemieux
38 Spl Rapp – second general report

Speech and expression, however, are as much a function of [ ]. The propaganda model is a theory advanced by Edward S. Herman and Noam Chomsky that seeks to explain systematic biases of the mass media in terms of structural economic causes. First presented in the book *Manufacturing Consent: the Political Economy of the Mass Media*, the theory views the private media as businesses selling a product - readers and audiences rather than news - to other businesses (advertisers). It postulates five "filters" that sort out the type of news that finally gets published. These are: ownership, funding, sourcing, flak, and anti-communist ideology the first three being the most important.

[Add Meme theory]

International Conventions and Covenants

The Universal Declaration of Human Rights in Article 19 recognises the right to freedom of speech and expression.[39] The International Covenant on Civil and Political Rights which is binding on all State parties that are signatory to it similarly recognises this freedom.[40] However in Article 20(4) it also states that,

"[A]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Article 4 of the International Convention on Elimination of All Forms of Racial Discrimination elaborates State obligations to:

? condemn all propaganda and all organizations based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred & discrimination in any form,
? make dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin an offence
? declare illegal and prohibit all organizations and organized and all other propaganda activities, which promote and incite racial discrimination, and participation in such organizations/activities to be an offence

The Human Rights Committee which is charged with the interpretation and application of the ICCPR has in various general comments elaborated the obligations on States to ensure the full recognition and enjoyment of the rights enumerated in the ICCPR. In General Comment 11, the HRC discusses Article 20(4) and states that, "[I]n the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities." The HRC identifies the restriction recognised in Article 20(4) as "contrary to public policy." In General Comment 23, the HRC notes that the right to equality and non-discrimination governs the exercise of all other rights. In General Comment 22 discussing the freedom of conscience, the Committee notes that, "no manifestation of religion or belief may amount to…advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

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39 "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19, Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 available at [ ].

40 Article [ ]?

In 1993, the Committee on the Elimination of Racial Discrimination reiterated that the prohibition on the dissemination of ideas based upon racial superiority or hatred is incompatible with the right to freedom of opinion and expression, as embodied in Article 19 of the UDHR.

? In his first general report the latest UN Special Rapportuer on the freedom of speech and expression [41] has observed in imposing restrictions or introducing measures to restrict speech, "[I]nter alia, the measures must be strictly limited in time, provided for in a law, necessary for public safety or public order, serve a legitimate purpose, not impair the essence of the right and conform with the principle of proportionality."

[In 1994, the UN General Assembly adopted two resolutions – one dealing with contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the second expressing alarm at the increasing incidents of violence, intolerance and discrimination based on religion or beliefs.- To check]

Nuremberg Trials

Charter of the International Military tribunal for Germany

Streicher

Streicher is indicted on Counts One and Four. One of the earliest members of the Nazi Party, joining in 1921, he took part in the Munich Putsch. From 1925-1940 he was Gauleiter of Franconia. Elected to the Reichstag in 1933, he was an honorary general in the SA. His persecution of the Jews was notorious. He was the publisher of Der Stuermer, an anti- Semitic weekly newspaper, from 1923 to1945 and was its editor until 1933.

Crimes against Peace

Streicher was a staunch Nazi and supporter of Hitler's main policies. There is no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders. Although he was a Gauleiter there is no evidence to prove that

[Page 101]

he had knowledge of those policies. In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment.

41 'Civil and political rights, including the Question of freedom of expression - The right to freedom of opinion and expression,' Report of the Special Rapporteur Mr. Ambeyi ligabo, submitted in accordance with commission resolution 2002/48, E/CN.4/2003/67, 30 December 2002

Crimes against humanity

For his 25 years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as "Jew-Baiter Number One" In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German People to active persecution. Each issue of Der Stuermer, which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.

Streicher had charge of the Jewish boycott of 1st April, 1933. He advocated the Nuremberg Decrees of 1935. He was responsible for the demolition on 10th August, 1938, of the synagogue in Nuremberg. And on 10th November, 1938, he spoke publicly in support of the Jewish pogrom which was taking place at that time.

But it was not only in Germany that this defendant advocated his doctrines. As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of Der Stuermer between 1938 to 1941 were produced in evidence, in which extermination "root and branch" was preached. Typical of his teachings was a leading article in September, 1938, which termed the Jew a germ and a pest, not a human being, but "a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind" Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that 50 years hence the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate" Streicher, in February, 1940, published a letter from one of Der Stuermer's readers which compared Jews with swarms of locusts which must be exterminated completely. Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination. A leading article of Der Stuermer in May, 1939, shows clearly his aim:

> "A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect: Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch."

As the war in the early stages proved successful in acquiring more and more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are 26 articles from Der Stuermer, published between August, 1941 and September, 1944, twelve by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms.

He wrote and published on 25th December, 1941:

> "If the danger of the reproduction of that curse of God in the Jewish blood is finally to come to an end, then there is only one way the extermination of that people whose father is the devil."

And in February, 1944, his own article stated:

> "Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate, annihilation, death."

[Page 102]

With knowledge of the extermination of the Jews in the Occupied Eastern Territory, this defendant continued to write and publish his propaganda of death. Testifying in this trial, he vehemently denied any knowledge of mass executions of Jews. But the evidence makes it clear that he continually received current information on the progress of the "final solution" His press photographer was sent to visit the ghettos of the East in the spring of 1943, the time of the destruction of the Warsaw ghetto. The Jewish newspaper, Israelitisches Wochenblatt, which Streicher received and read, carried in each issue accounts of Jewish atrocities in the East, and gave figures on the number of Jews who had been deported and killed. For example, issues appearing in the summer and fall of 1942 reported the death of 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Rumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all of Poland. In November, 1943, Streicher quoted verbatim an article from the Israelitisches Wochenblatt which stated that the Jews had virtually disappeared from Europe, and commented "This is not a Jewish lie." In December, 1942, referring to an article in the London Times about the atrocities, aiming at extermination, Streicher said that Hitler had given warning that the second World War would lead to the destruction of Jewry. In January, 1943, he wrote and published an article which said that Hitler's prophecy was being fulfilled, that world Jewry was being extirpated, and that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors.

In the face of the evidence before the Tribunal it is idle for Streicher to suggest that the solution of the Jewish problem which he favored was strictly limited to the classification of Jews as aliens, and the passing of discriminatory legislation such as the Nuremberg Laws, supplemented if possible by international agreement on the creation of a Jewish State somewhere in the world, to which all Jews should emigrate.

Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War crimes, as defined by the Charter, and constitutes a Crime against Humanity.

Conclusion: The Tribunal finds that Streicher is not guilty on Count One, but that he is guilty on Count Four.[42]

Streicher according to the tribunal was not in any way linked to Hitler or the Nazi party – however in determining his guilt the Tribunal had previously addressed the issue of incitement as provided in the charter thus, “"Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan.[43] The tribunal after finding Streicher responsible for [ ], thus held him guilty of crimes against humanity and sentenced him to death by hanging.

Convention on Genocide

Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948 makes the direct and public incitement to commit genocide punishable.

Kofi Anan, 2004 – “By all these means, and more, we must attack the roots of violence and genocide: hatred, intolerance, racism, tyranny, and the dehumanizing public discourse that denies whole groups of people their dignity and their rights.”

Charter of the International Criminal Tribunal for Rwanda

Regional Agreements/Charters

The European Union[44]

The European Convention on Human Rights proclaims a broad range of human rights include the right to freedom of speech and expression embodied in Article 10.[45] The Convention specifies that restrictions on the rights may be

42 p.103 c.f. ‘The Nizkor Project,’ available at http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-defendants-streicher.html

43 http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-law-conspiracy.html

44 Word IQ – freedom of speech defn

45 "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of

imposed iof they are necessary in a democratic society or in the interest of public safety or for the prevention of disorder or crime. [46]

The Council of Europe was conceived to deal with Internet crimes including racist websites. The COE wrote a treaty that has been signed by [12] countries so far, to put a stop to hate websites. The Council said in its report on the new protocol, that it is a necessary response to the fact that the emergence of international communication networks like the Internet provides certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas. (Ramastry 2003).

[To check others]

broadcasting, television or cinema enterprises."

46 Article ?

International approaches to hate speech restrictions

Approaches to hate speech restrictions differ across legal systems, interestingly more as historical accidents/ with laws or Constitutions enshrining the freedom of speech and expression and recognising limitations on it depending much on history, time period and circumstances. The recognition of a seemingly absolute right to freedom of speech and expression in the United States Constitution, leaving it to the United States Supreme Court to carve out narrow and very strict exceptions to this right appears to flow from the revolutionary backdrop of the adoption of the US Constitution. Canadian and South African approaches differ significantly as they recognise equality or 'multiculturalism' as the backbone of their societies and human rights frameworks.

Canada

Canadian laws deal with hate speeches and propaganda under different laws. While the Canadian Criminal Code details punishments for 'hate propaganda', the Canadian Human Rights Act deals with hate speech that it classifies as discrimination and customs and immigration laws empower the authorities to prevent materials and even persons ('hate mongers') from entering Canada in an attempt to prevent the spread of hate.

Canada adopted its Charter (or Constitution) of Rights and Freedoms in 1982. [to add sections]. **The purpose of the Canadian Human Rights Act contained in Section 2 clearly emphasises that it is meant to give effect to the "principle** that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…"[47] Within this paradigm, discriminatory and hate messages are identified as discriminatory acts.[48] The Act operates

47 Discrimination is prohibited on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

48 Section 12 reads: Publication of discriminatory notices etc. - It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that

(a) expresses or implies discrimination or an intention to discriminate, or

(b) incites or is calculated to incite others to discriminate

if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

Section 13(1) reads – "**Hate messages** - It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."

within a limited sphere of hate and discriminatory speech activity prohibiting the publication or display of a notice, emblem or other representation that indicates the intent to discriminate or incites discrimination and the communication via telecommunications (telephones, computers, internet etc.) of any matter likely to expose a person or persons to hatred. The regulations under this Act then do not link the speech to violence or truth and define such acts in the context of equality and non-discrimination only.

The Canadian Criminal Code addresses the hate speech and violence connection as 'hate propaganda.' The Criminal Code makes punishable the advocacy or promotion of genocide[49] the public incitement of hatred[50] and the 'wilful promotion of hatred'[51] A Court may also order the seizure of hate propaganda materials including those available on the Internet (by ordering that the material is no longer stored or made available through a computer system).[52]

[BOX – with excerpts from the current website] In *Citreon v. Zundel* the Canadian Human Rights Tribunal determined whether messages posted on a website were prohibited by the Canadian Human Rights Act and whether such a prohibition entailed an unreasonable restriction on the freedom of speech and expression. Referring to Taylor, the Tribunal said that in enacting the *Canadian Human Rights Act*, Parliament has recognised the importance of advancing the goals of equality, and has legislated specific prohibitions to ensure respect for individual dignity and autonomy.

Zundel argued that the fact that the reach of the Internet was so broad meant that any restriction on the freedom of speech and expression was not a minimal one and had an extensive reach and presented witnesses who argued that of the chilling effect that the restriction had on Internet service providers, magazine websites and so on.[53] The Tribunal stated that, "once

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49 Section 318 of the Canadian Criminal Code: genocide is defined as the killing of members of a group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction with the intent to destroy in whole or in part any identifiable group (any section of the public distinguished by colour, race, religion or ethnic origin).

50 I.e. the communication ("communicating" includes communicating by telephone, broadcasting or other audible or visible means) of statements ("statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations) in any public place ("public place" includes any place to which the public have access as of right or by invitation, express or implied) that incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.

51 i.e. the communication of statements, other than in private conversation that wilfully promotes hatred against any identifiable group. [Section 318]. Truth, religious opinion in good faith and discussions for public benefit on a matter related to public interest where the person making the statements reasonably believes them to be true constitute inter alia defences in the wilful promotion of hatred. For the public incitement of hatred motive or intention are irrelevant; the fact that the statements did incite hatred that may have resulted in a breach of peace is sufficient for the crime.

52 Section 320, Canadian Criminal Code.

53 See section [ ] on hate speech, freedom of speech and equality – arguments against restrictions at p.

it is accepted that hate speech is antithetical to *Charter* values, the means of expression, in our view, is not a controlling factor so long as it is within the constitutional jurisdiction of Parliament."

The Tribunal in a similar vein as that of the Canadian Supreme Court also noted that the, "aim of human rights legislation, and of s.13(1) is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensation of the victim."

The Tribunal ordered that Ernst Zündel, and any other individuals who act in the name of, or in concert with him cease the discriminatory practise of communicating…or causing to be communicated …matters of the type… found on the Zundelsite, or any other messages of a substantially similar form or content that are likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination, contrary to s. 13(1) of the *Canadian Human Rights Act*.

[Criticisms – to add]

United States

As compared to the laws of other countries, the most stringent protection of the freedom of speech and expression is found in the US legal system. The First Amendment to the United State Constitution reads:

> "Congress shall make no law…abridging the freedom of speech."[54]

The US Constitution itself provides no grounds on which this right can be restricted. It has been left to the US SC to carve out narrow and strict restrictions so that federal or state laws may regulate only a few limited categories of speech and expression, such as obscenity, defamation, and fighting words. The laws of several States relating to hate crimes and hate speech have been repeatedly struck down by the US SC as not meeting the strict standard required by the Constitution in protecting the freedom of speech and expression. Thus, the US while signing the International Convention on the Elimination of All forms of Racial Discrimination made a reservation regarding the conflict of the provisions of the Convention and the First Amendment.

54 [?]

In 1931 the US SC examining a Minnesota law that restricted publications that were obscene, lewd and lascivious or malicious, etc. and discussing the restrictions on the freedom of speech and expression noted that the "security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force."

Dealing with the argument that the law was in the interest of social order, the Court quoted with approval New Yorker Staats-Zeitung v. Nolan, 89 N. J. Eq. 387, 388, 105 A. 72 where it was held that 'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent it circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and, if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

In *Cantwell v. Connecticut*,[55] the US SC articulated the clear and present danger rule i.e. "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."[56]

In *Chaplinsky v. New Hampshire*,[57] the U.S. Supreme Court evolved the concept of 'fighting words' that continues to define the approach of the US legal system to hate speech i.e. "insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In *Brandenburg v. Ohio*,[58] the US SC noted that various decisions had fashioned the principle that law may only proscribe advocacy except, "where

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55 310 U.S. 296, 311

56 "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish."

57 315 U.S. 568 (1942)

58 395 U.S. 444 (1969)

such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Quoting themselves from an earlier case, the US SC said that the "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

In *R.A.V. v. City of St. Paul*,[59] the US SC looked at the St. Paul, Minnesota, Bias-Motivated Crime Ordinance and the majority in this case held that the statute was invalid not for being overbroad or on any other ground (that they did not go into or rule out) but simply because it amounted to content based discrimination. Giving the example of libel, the Court noted that while the government may proscribe libel, it may not make the further content discrimination of proscribing only libel critical of the government.

While the majority agreed that the law was unconstitutional, they did so on varying grounds. The minority argued that the ground of content-based discrimination cast aside all First Amendment jurisprudence for an untried theory whose faults they point out in no uncertain terms. They held the statute unconstitutional for being 'overbroad' as "although the ordinance, as construed, reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that - however repugnant - is shielded by the First Amendment."

Interestingly, US courts have upheld sexual harassment laws that permit suits over perceived offensive speech or expression which are justified as preserving the affected person's self esteem and protecting their right to a non-hostile environment.[to chk]

[Criticisms]

The United States has become a refuge for those in foreign countries whose governments have anti-speech laws. America's free speech laws make it permissible for these groups to base their operations from within America's borders and spread their message of hate, via the Internet, to any where in the world.[60] http://www.zundelsite.org/ whose content was in question in Citreon v. Zundel in Canada is now hosted in the United States.

Tsesis describes a judicial tendency to rest too heavily upon the requirement of an immediate threat and a naïve presumption that people spreading hate messages would be content with mere speech without action. He suggests that judges should consider history, rather than discreet instances of defamation, and

59 505 U.S. 377 (1992) at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=US&vol=505&page=377

60 Mathew Cantral – hate speech

demonstrate a preference for inclusive speech. Ultimately, Tsesis calls for increased judicial and legislative attention to the protection of individual rights. Suggesting that the United States is an anomaly in its extreme protection of free speech, he notes that Austria, Belgium, Brazil, Canada, Cyprus, England, France, Germany, India, Israel, Italy, Netherlands, and Switzerland are among those countries more willing to draw a clear line where unregulated speech may impose upon the rights of others. Additionally, he cites various international treaties addressing the elimination of hate crimes and limiting misethnic speech, to some of which the United States is a signatory (albeit with reservations).[61]

South Africa

The Constitution of South Africa was adopted in 1992. Section 16 of the South African Constitution states that everyone has a right to freedom of expression. Section 16(2) states:

> "2) The right in subsection 1 does not extend to –
> (a) Propaganda for war
> (b) Incitement for imminent violence, or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm"

[Possibly only Constitution that contains this restriction]. The South African Constitution is thus unique in that it has pre-empted any debate on the need for hate speech restrictions and the value of speech no matter how hateful in promoting freedom or infringing equality by simply removing any constitutional protection for this form of speech. The South African government may accordingly introduce legislation controlling such speech without any fear of a freedom of expression challenge. Hate speech is accordingly put completely beyond the purview of the constitutional protection of hate speech allowing the State to enact legislation to regulate the same.

For example, the slogan, "kill the farmer, kill the boer," used by some black nationalists during the fight to overthrow apartheid, was ruled as hate speech by South Africa's human rights body.[62]

[To get cases]

This form of limitation of course attracts the same criticisms that public purpose restrictions in the Indian Constitution that have allowed black laws to

61 Destructive messages – Book notes – Harvard Law Journal - Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements. By Alexander Tsesis. New York: NYU Press, 2002. Pp. 250. $40.00, cloth.

62 Mathew Cantral – hate speech

be introduced and withstand constitutional review. The apparent advantage of the US Constitution is that it states in no uncertain terms what rights the people enjoy leaving it for the rigorous scrutiny of the US Supreme Court to carve out narrow exceptions to these rights.

It is interesting to note and examine that the historical development of a nation may dictate how its laws deal with hatred and hate speech. While the United States Constitution was a reflection of a revolutionary [ ] which at the time it was adopted did not recognise equality of race, gender and so on while Canada and South Africa (whose Constitution itself prohibits certain forms of hate speech) have developed with the understanding of their nations as multicultural, bi-national.

INDIA

The Indian Constitution

What is of primacy in any discussion of how a State views freedoms and restrictions on them is the Constitution. On 26th January 1950, the people of India gave unto themselves a constitution. A Constitution reflects the founding principles of any State and is supreme. The Constitution is the measure by which laws, policies, actions are to be measured and all organs of the State and its peoples are bound by these principles and most importantly the rights and freedoms reflected in the Constitution. In the Constitution of India, the Fundamental Rights chapter and its interpretations by the Supreme Court reflect the bill of rights available to all persons. At times inherent contradictions surface when one right appears pitted against the other or one claims supremacy over all others. The debate over hate speech restrictions reflects one such battle, which unfortunately is not adequately reflected in court decisions.

The Indian law discussions on hate speech restrictions in case law have seldom been within the tradition paradigm of freedom of speech and expression and Courts instinctively apply the 'public interest' exception contained in the Constitution. Article 19 of the Indian Constitution reads:

[ ]

In Bennett Coleman & Co Ltd & ors v. State of Jammu & Kashmir[63] the SC observed

> "We are, however, constrained to observe that the right of freedom of speech which includes the right of communication between individuals is an extremely valuable and precious fundamental right of the citizen, and hence the Government should not play or interfere with this sacrosanct privilege guaranteed by our constitution merely to placate or please the hypersensitiveness of an individual or a body of individuals. The right of genuine criticism is inherent and implicit in the cherished concept of democracy, and if any fair, legitimate or constructive criticism is slashed down or scuttled, we shall be reducing our valuable democracy to an acrimonious farce."

63 1975 CrLJ 211 J&K

•"Enmity or hatred invariably leads to violence and promotion of enmity or hatred is, in substance an incitement to an offence and therefore, the restriction imposed by S. 153-A, Penal Code is valid under Art. 19(2)."
- Allahabad High Court, 1964

Similarly the freedom of religion in Article 25 reads, [ ]

Cases involving restrictions on religious speech have also attempted to challenge the provisions of hate speech restrictions in Indian law on the ground that they impede the freedom of religion. In Ramji Lal v. State of UP[64], the SC held that the

"right to freedom of religion… is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order."

In G.V. Godse v. Union of India (AIR 1971 Bombay 56), The Bombay High Court succinctly pointed out the, "Briefly, the challenge to the constitutionality of Section 153A on the ground that it violates the guarantee of free speech and expression must be rejected because the section seeks to punish only (a) such acts which have the tendency to promote enmity or hatred between different classes or (b) such acts which are prejudicial to the maintenance of harmony between different classes and which have the tendency to disturb public tranquillity. These acts are clearly calculated to disturb public order and so the limitations imposed by Section 153A are in the interests of public order. Article 19(2) would therefore save Section 153A as being within the scope of permissible legislative restrictions on the fundamental right guaranteed by Art. 19(1)(a)."

Indian laws and hate speech restrictions

[The following unique provisions of Indian laws dealing with hate speech (promotion of enmity, outraging feelings) do not exist in other jurisdictions and are fairly broad in their application.]

Indian Criminal Laws

Hate speech restrictions are contained in various Indian laws. [See Table 1]. Under the Indian Penal Code certain forms of speech and expression are restricted as offences relating to religion, offences relating to public tranquillity and as offences of criminal intimidation, insult and annoyance. Under the Indian Code of Criminal Procedure, 1973 publications that appear to contain matter punishable under Sections 153A, 153B and 295A of the IPC may be forfeited by the State Government.[65] The order of

64 AIR 1957 SC 620

65 Section 95 of the CrPC provides: Section 95: "**Power to declare certain publications forfeited, and to issue search warrants for the same.** - (1) Where any newspaper, or book, or any

forfeiture by the State Government may be challenged in accordance with Section 96 of the Cr.P.C before the High Court of that State.[66] Election laws prohibit candidates and parties from promoting enmity [ ] to garner votes. Media laws through various Acts, censorship and codes prohibit and prevent the transmission of speech and expression that is [ ].

Of the IPC provisions, Section 153A is invoked most often in cases related to hate speech. One of the earliest cases to discuss in detail the scope of this section was Shib Sharma v. Emperor[67] where the Oudh High Court examined whether a book entitled 'Chaman Islam ki Sair' was violative of the section [as it stood then]. The author who had been convicted by the lower court contended inter alia that the book was intended to enlighten his own brethren and prevent them from accepting the Mahomedan religion. The Court in determining the matter before it referred to the testimony of the prosecution witnesses who were a scholar in Arabic and Persian and a teacher in theology who stated that the

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document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under …Section 153A or section 153B or …Section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other documents to be forfeited to Government, and thereupon any police officer may seize the same, wherever found in India, and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue, or any such book, or other document may be or may be reasonable suspected to be.

(2) In this section and in section 96, -

"newspaper" and "book" have the same meaning as in the Press and Registration of Books Act 1867 (25 of 1867);

"document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 96.

66 Section 96: "**Application to High Court to set aside declaration of forfeiture.** - (1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of section 95.

(2) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three judges, such Special Bench shall be composed of all the Judges of that High Court.

(3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper, any copy of such newspaper may be given in evidence in aid of proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book, or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of sec. 95, set aside the declaration of forfeiture.

(5) where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges."

67 AIR 1941 Oudh 310

passages and the book were not only hurtful and insulting to Muslims but some were also entirely wrong or distorted to change their meaning. The Court noted that what the author had done on quoting Islamic texts and scriptures was to, "have collected a number of passages which may be perfectly right and harmless in their proper setting, but when disconnected or detached may seem scurrilous, indecent and highly objectionable. Any Mahomedan who reads the passages…must feel them highly painful and excite his anger and disgust."

The Court determined that the main issue before it was the intention of the author and noted that, "The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of such a nature calculated to produce or to promote feelings of enmity or hatred in my opinion the writer must be presumed to intend that which his act is likely to produce. The accused who is a missionary may be entitled to a certain latitude in respect of re-expression of religious opinions, but it cannot for a moment in this case be said that the book was written in a spirit of fair and honest criticism without any malicious intention of producing any hatred."

The Court examined various judgments of the Lahore and Allahabad courts in determining the [ ] of Section 153A. The Court chose to rely on the interpretation of the Allahabad High Court in Charan Sharma v. Emperor where the Judge held that he would look upon the matter as a common or ordinary citizen of India to see if the content of a passage or book would be hurtful or would promote enmity between persons from different religions etc. The Court accordingly held that,

> "There can be no doubt that the passages…must be highly painful to the Mahomedan who reads or hears them and must excite his anger and disgust…I am of the opinion that the intention of the accused was to ridicule the Prophet and his religion and to promote feelings of enmity or hatred between Hindus and Mahomedans."

In Babu Rao Patel v. State (Delhi Administration)[68] the Supreme Court was faced with the task of distinguishing speech violative of Section 153A from political thesis and historical truths, which is what the author of the two articles under scrutiny, claimed they were. It may be noted that truth is not a defence to the offence under Section 153A. The SC examining two articles held that the first entitled, 'A tale of two communalisms,' was "an undisguised attempt to promote feelings of enmity, hatred and ill-will between the Hindu and Muslim communities…The reference to the alleged Muslim tradition of rape, loot, violence and murder and the alleged terror struck into the hearts of Hindu minority in a neighbouring country by periodical killings, in the context of his thesis that communalism is the instrument of a militant minority can lead to no other inference." Similarly on an examination of the second article entitled,

68 AIR 1980 SC 763

‘Lingering disgrace of history,’ purported as a protest against naming of Delhi Roads after Moghul emperors, the SC held that it was convinced that both the articles do promote feelings of enmity, hatred and ill-will between the Hindus and Muslims on grounds of community. The SC noted,

> “Whether communalism is the weapon of an aggressive and militant minority as suggested by the accused or the “shield of a nervous and fearful minority,” the problem of communalism is not solved by castigating the members of the minority community as intolerant and bloodthirsty and a community with a tradition of rape, loot, violence and murder. Whether the Moghuls were rapists and murderers or not and whether the Delhi roads should be named after them or not it was wrong to present the Moghuls as the ancestors of today’s Muslims and to vilify the Muslims as the proud descendants of the “foul” Moghuls.”

In Azizul Haq Kausar Naquvi and another v. The State[69] the Allahabad High Court held that “criminality for the offence of blasphemous libel or criminality under the section [153A] does not attach to the things said or done but to the manner in which it is said or done. If the words spoken or written are couched in temperate, dignified, and mild language, and do not have the tendency to insult the feelings or the deepest religious convictions of any section of the people, penal consequences do not follow.”

In Joseph Bain D’souza and another v. State of Maharashtra and others[70] the Bombay High Court considered a Public Interest Litigation praying for a writ of mandamus to direct the Commissioner of Police, Bombay to register crimes under Sections 153A and 153B of the IPC against the editor and executive editor of Saamna for editorials published during the 1993 Bombay riots and for the State of Maharashtra to grant sanction under Section 196(1) for the prosecution of these cases. The petitioners alleged that although respondents 3 and 4 had violated the law deliberately, no steps were taken to apprehend them by respondents 1 and 2 and this inaction had led to a great deal of disquiet among the minority communities.

In reply the Commissioner of Police denied the allegation of inaction stating that crimes had in fact been registered and that a case could not be registered for each editorial or article. The State Government added that the editorials as a whole except the one for which prosecution had been launched contained criticism only against anti-national muslims and not the muslim community as a whole and that as the situation was now calm, registering cases could cause flare ups. The editor and executive editor of Saamna contended that the petition was not maintainable as the petitioners had an alternate remedy and that giving sanction for the prosecution was a

69 1980-086-CrLJ-0448-All

70 Criminal Writ Petition No. 465 of 1993

discretionary power of the State. They further stated that the purpose of writing the editorials was not to insult the Muslim community as a whole but only anti-national Muslims.

Interestingly, the issue of 'Muslims and anti-national Muslims' raised repeatedly by the respondents finds resonance with the Court. Thus, while the High Court eventually determines that sufficient action was being taken by the police and the matter should not be re-opened, it still examines the articles and editorials in question and makes the following determination: [After examining various judgments on the section, the Bombay High Court determined that while the motive in writing the articles and editorials was irrelevant, the articles would have to be read as a whole to determine their effect. After examining and quoting various passages from all the articles and editorials, the Court concluded as follows:

> "…it appears that criticism is levelled against anti national Muslims, who at the behest of Pakistani agents, poured poison in the minds of local Muslims and developed hatred in their minds against Hindus in Bombay which ultimately resulted in unprecedented riots. According to those articles, by the fissiparous mentality created in the minds of Muslims by the aforesaid anti-social elements, Muslims started drifting from the mainstream of life. According to the said editorials, had the government curbed the anti-national activities of the said Muslims, this would not have resulted in ugly situation. These articles further observed that the appeasing attitude of the Government towards the minority for getting votes created dangerous situation in India. <u>These article do not criticise Muslims as a whole but criticise Muslims who were traitors to India</u>. This attitude of the Government, according to these articles, provided Pakistan an opportunity to create explosive situations like atom bomb in India. <u>The main thrust of these articles is against anti-national Muslims and attitude of police and the Government</u>. In these articles reference is also made to respect holy Koran which according tot he editor, not only belongs to the Muslims but to the whole humanity. In the said editorials appeal was also made to the Muslims to forget the past and to join mainstream of public life in India. It is true that in some of these articles due to emotional outburst high flown and caustic language is used but this per se will not fall within the mischief of Ss 153Aand 153B of the Code." [emphasis added]

The Court then goes on to observe that actions against the respondents in relation to other articles had been taken by the police and stated that considering that "now a lot of time has lapsed and peace, tranquillity and communal harmony…is restored...if steps are taken ... for launching new prosecution by reopening the stale matters, it may result in ill feelings between the two major communities... Taking the experience from

the past events, both the communities have started forgetting the ill feelings thereby creating communal harmony and leading the life as part of the mainstream of this country towards prosperity and, therefore, from this point of view also, it is not desirable to reopen the old issue afresh."

This argument is a familiar one taken by the State and often upheld by the Courts in matters related to hate speech. It is this placing of the State as an arbiter in determining which cases should or should not be prosecuted and in a sense predetermining 'justice' that makes hate speech restrictions in Indian law the most contentious.

[IPC Section 505 - punishing statements conducive to public mischief - every element of the offence has a direct connection with security of State and public order. Section is valid. AIR 1962 SC 953 – In Kedar Nath v. State of Bihar AIR 1962 SC 955 the SC considered the constitutional validity of Section 505]

THE STATE AS ARBITER

What Indian law does clearly more than other jurisdictions is clearly posing the State as arbiter in determining whether hate speeches or hate crimes should even be prosecuted. Within the 'public interest' paradigm and the colonial history of our criminal laws, it appears that the only concern the Indian State has with hate speech relates to its own security or maintenance of security. This becomes evident from the requirement of state sanctions for prosecution. The very real concern with State power or where the slope really gets slippery is evident from Indian laws and [ ].

Interestingly, the Canadian Supreme Court in upholding hate speech restrictions in Canadian law cited similar provisions in Canadian law as safeguards against the misuse of law. However, in India, these provisions are used for political ends rather than [?]. For instance, in the case of editorials and articles in Saamna before and during the Bombay riots, "20 criminal cases were filed against Saamna and Thakeray for their role in the riots of 1992-1993. Prosecution for sanction was granted in only six cases, and in 1996 the BJP-Sena alliance government led by Manohar Joshi withdrew all but two of them. Two first information reports – No. 420 of 1993 and No. 459 of 1993 – charged Thakeray and Raut with inciting communal hatred and seeking to spread disaffection among police personnel…In July 2000 the Democratic Front government dug out the files from the inner recesses of the Maharashtra Home Department, and arrested Thackeray."[71]

71 A Hysterical Campaign, Praveen Swami with Anupama Katakam, Frontline, Volume 18, Issue 17, Aug 18-31, 2001 available at http://www.flonnet.com/fl1817/18170440.htm

In Shalibhadra Shah and others v. Swami Krishna Bharati [72] the Gujarat High Court discussed the reasons behind the requirement for State sanction for prosecution and stated:

> "It is quite possible that in a given case the very filing of a prosecution after tempers have cooled down may generate class feelings which could well be avoided…It may be equally possible that the article complained of pertains to a matter falling within the area of social reform and attacks certain dogmas in a general way without intending to outrage the religious feelings of any class of citizens…the Government may in its discretion refuse to accord sanction because a prosecution a based on such an article would throttle free discussion on the subject."

It further opined "the Government being an independent party not connected with dispute between a complainant and the accused is expected to act fairly and to take an objective decision in the matter…"

In State of Maharashtra v. Mohd Yusuf Noormohammed and others[73] the Bombay High Court considered the application of the State Government to quash two private complaints relating to offences under 153A and 153B of the IPC. [CHK]. The State Government submitted that it was asking for the quashing of the complaints as it apprehended further violence if the prosecutions continued. The respondents submitted that they had a statutory right to file prosecution and it was not permissible for the prosecution to be stifled on the imaginary ground of maintenance of public order or tranquility. The Court in determining the issue, referred to SC decisions on the quashing of prosecutions and determined that prosecutions could be withdrawn by the State on grounds of public order, peace and justice and that the same reasons would apply for quashing of private criminal complaints. The Court further held that there was considerable merit in the argument of the State of apprehended violence and noted that,

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72 1982 Cr LJ 113 Guj. The petitioner was the editor, printer and publisher of 'Aaspass' a Gujarat Weekly. In the 31st July 1977 issue, an article entitled 'Why Acharya Rajnishji leaves Pune?' which allegedly contained scurrilous and defamatory remarks against the said religious leader. The Respondent a devotee of the Acharya filed a private complaint alleging that the publication of the Weekly had violated Sections 295-A and 298 of the IPC. The petitioner filed for quashing the proceedings under the complaint on the grounds that a prosecution under Section 295-A required the previous sanction of the Govt. and that the prosecution re Section 298 was bad in law as the provisions does not apply to written articles but to the wounding of religious feelings by words uttered, sounds or placing an object in the sight of that person. The court on a reading of Section 295-A of the IPC and 196(1) of the CrPC held that the previous sanction from the Central or State Government for prosecutions under the former section were sina qua non as per the latter section, the Magistrates were not entitled to take cognizance of the offence alleged in the private complaint.

73 1990-096-CrLJ-2105-Bom. The petition was filed by the State of Maharashtra for quashing two criminal complaints filed by the respondent under Sections 153, 296 and 298, IPC. The complaints were filed subsequent to various incidents of violence that occurred between Shia and Sunni Muslims during Moharrum. One of the respondents a religious head of the Shia Muslims had at the behest of the State Government issued a statement in an attempt to calm tensions. Some days after the statement was issued Respondents 1 and 2 filed separate criminal complaints against Respondent 3, which were sought to be quashed by the State Government.

> "it can hardly be debated that for wider benefit of maintaining peace, in the larger context of public peace, the justice, the rights of individual to file private prosecution has to be curtailed… continuation of prosecution initiated by respondents…would do great harm to the maintenance of peace and order in this City and, therefore, it is a fit case where powers under S. 482 of the Code of Criminal Procedure ought to be exercised. We are conscious that the exercise of powers should be in exceptional cases and powers should not be exercised to stifle the prosecution, but on the facts and circumstances of the present case, we have no hesitation in concluding that the prosecution must be quashed."

It is interesting to note submissions of the State Government as quoted in the decision

> "…the Government is not concerned with the merits of the pending prosecution but has approached this Court seeking relief under Section 482 of the Code of Criminal Procedure as the Government apprehends that continuance of the prosecution would foul the atmosphere and break the spirit of settlement arrived at. It was contended that as the issue involved led to violent action, the Government had to intervene to bring about amicable settlement and continuance of the prosecution would defeat the purpose…every offence has a social, economic or religious cause and after careful consideration, the Government has come to the conclusion that elimination or eradication of these causes of the crime would be better served by not proceeding with the prosecution…Shri Advocate General also submitted that the observation of the Additional Chief Metropolitan Magistrate while issuing process that the Court is the best place to resolve various controversies is entirely incorrect. In case the controversy is reopened then it would lead to bitterness between the two factions and the public tranquility would be jeopardized."

The Supreme Court in Thakur Ram v. State of Bihar[74] observed that, "The criminal law is not to be used as an instrument of wrecking private vengeance by an aggrieved party against the person."

At this stage some discussion on the role of the State, administration and local authorities would be useful. Riots, carnage, and the like it is clear from independent and government inquiries over the years cannot occur without the involvement of the administration. So embedded is the administrative structure left behind by the British that it is impossible for events to unfold, particularly violent events, without the knowledge, if not active involvement of administrative agencies. Accordingly, it is when they take swift and immediate action that violence is prevented. [Add from Sikh carnage – police stations that resisted and those that didn't.] The effectiveness of local administration is

74 AIR 1966 SC 911

perhaps well demonstrated by the drama surrounding Pravin Togadia's speeches across the country in 2002-2003. [See Box 2]. In several States, Mr. Togadia was prevented by local administration from making his 'speeches' on the ground that they incited violence and unrest. When challenged in the SC [discussed elsewhere], the SC too pointed out the centrality of local administration in preventing and controlling violence.

Does this recognition of their role conflict with the discomfort over State approvals for sanctions of cases where there is an attempt to access justice for speech that has promoted hatred? But the scenarios are very different. In the latter as in the case of Mr. Togadia, the administration acts to prevent what it perceives as propensity for violence. [to complete argument.] In the case of incidents of hate speech, the role of the State in sanctioning or otherwise prosecutions allows them to predetermine who has access to justice and who doesn't. Justice – peace!

Elections laws

Elections in India are regulated under the Representation of Peoples Act [ ].
In Dr. Das Rao Deshmukh v. Kamal Kishore Nanasaheb Kadam and others (1995) 5 SCC 123 the Supreme Court considered a poster where the appellant appealed for votes to "teach a lesson to Muslims." The SC held that, "Such appeal, to say the least, was potentially offensive and was likely to rouse passion in the minds of the voters on communal basis. Such appeal to teach a lesson was also likely to being disharmony between the two communities namely the Hindus and the Muslims and offended the secular structure of the country." The SC noted that speeches delivered in elections had to be appreciated dispassionately keeping in mind their context as the atmosphere is often surcharged with partisan feelings and emotions. Keeping these factors in mind, the SC found that the poster "cannot be justified in any manner even by giving reasonable latitudes in election speeches."

In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra and others ((1976) 2 SCC 17), The SC noted:

"Our Constitution-makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

It seems to us that Section 123, sub-sections (2), (3) and (3A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilsed political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low herd instincts and animosities or irrational fears between groups to secure electoral victories. The line has to be drawn by the courts, between what is permissible and what is prohibited, after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made.

"As already indicated by us, our democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy. That spirit was characterised by Montesquieu long ago as one of "virtue". It implies, as the late Pandit Jawaharlal Nehru once said, "self-discipline". For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda on professedly religious grounds directed against a candidate at an election may be permitted in a theocratic State but not in a secular republic like ours. It is evident that, if such propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others. It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed such prohibitions are necessary in the interests of elementary peace and order."

After discussing the meaning and implication of the term 'secular' in philosophy, religion and personal spheres, the SC said, "The Secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. Maitland had pointed out that such a State has to ensure, through its laws, that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practice of any particular religion. Therefore, candidates at an election to a Legislature, which is part of "the State", cannot be allowed to tell electors that their rivals are unfit to act as their representatives on grounds of their religious professions or practices. To permit such propaganda would be not merely to permit undignified personal attacks on candidates concerned but also to allow assaults on what sustains the basic structure of our Democratic State."

Interestingly, these observations of the Court, based primarily on the nature of the secular state were made prior to the Constitutional amendment adding the word 'Secular' to the Preamble of the Indian Constitution. Of course, the SC had previously in Keshavanand Bharti's case declared 'secularism' a basic unamendable part of our Constitution. The issue of secularism has however continued to dog the SC and its understanding and explanations have varied and blurred over the years. The issue of

secularism becomes relevant to hate speech restrictions as religion has over the years been a primary [center] for hate speech particularly during elections. How the SC looks at secularism impacts how law looks at hate speech restrictions particularly in the light of equality.

Pratap Bhanu Mehta: If the insult is to one's religion, or an exhortation is made in the name of religion, we are incapable of receiving the expression on our own terms; incapable of managing our own responses, condemned to receiving these expressions unfreely and helplessly, incapable as it were of self discipline. We can manage our impressions, exercise our religious choices and practice judgment, only when left alone. Hence the court's emphasis that the right to freedom of religion just means the right to freedom from other people's religion. Our choices are impaired, or faculties numbed, more so because we have undeveloped minds. This is the 'secret' rationale behind both anti-conversion legislation and the RPA.

Hate speech and sedition

Historically hate speech law in India has evolved from seditious libel - against Christianity - breakdown of society.

Today - judgments leave the two concepts vague which if interspersed with reality means this:

Islamic criticism could imply sedition - well they dont really like the country anyway.

•*Hate Speech and Sedition*
–Historically controlling hate speech began with controlling speech against the government
–Indian law, introduced by the British and evolved from their Sedition laws
–Does the connection between hate speech, sedition and public order reinforce ideas of anti-nationalism in speeches by minority group leaders
•*Hate Speech and anti conversion laws*
–Prohibition of conversion by force, fraud, inducement
–'Force' includes threats of divine punishment or displeasure
–'Inducement' includes offer of gift or gratification to include 'intangible benefits.'

Today hate speech restrictions appear in 'black' laws traditionally used to tackle sedition and 'terrorism' when the crimes connected to them are so great as to overawe the State machinery requiring 'special' powers and procedures to assist law enforcement in controlling and preventing such crimes. Thus, the Unlawful Activities Prevention Act provides…Provisions relating to speech and hate speech exist in the Punjab Security of State Act 1953 (extended to Manipur), The Disturbed Areas (Special Courts) Act, 1976 [Scheduled Offences include 153A and B, 295A and 298 - summary trial by Special courts for acts committed in a 'disturbed area' i.e. where tensions, disharmony etc. exist.],

Between the Unlawful Activities Prevention Act, POTA and case law under 153A, the effect of the law is such that in [ ]'s case, if the author of Chaman Islam ki Sair been part of an organisation declared unlawful under the Unlawful Activities prevention Act, and in possession of an unlicensed gun, he would then face the [ ]

Saamna

“The Muslims in India are behaving as if they are Pakistani citizens. It is as if there are two countries within this one. Hindus, open your eyes and see what is going on! Your funeral pyres are burning.”

January 14: “Our tolerance has limits. All this was started by the traitors. The Hindus went back four steps and then displayed their strength. That’s when the traitors put up white flags on their armed strongholds. Why should we die without fighting? And at the hands of traitors like (police officers) Khan and Ghafoor?”

January 23 – Thakerey: “I have nurtured a new, fiery generation of Hindus in the form of the Shiv Sena, and Saamna has been instrumental in this task….Hindus woke up in Hindustan after December 6 (1992), and it is time we all burned like a torch. Anti-national traitors should be burned to ashes in this flame.”

A Hysterical Campaign, Praveen Swami with Anupama Katakam, Frontline, Volume 18, Issue 17, Aug 18-31, 2001 available at http://www.flonnet.com/fl1817/18170440.htm

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From "Burning Pyres", editorial, Saamna, January 11, 1993:

* Hindus have been burned alive in Jogeshwari, and that is why they have taken to the streets. Dawood Ibrahim's man (ACP) A.A. Khan has tried to shoot these people. There is no justice, for fanatic traitors go scot-free while the terrorist Khan fires at Hindus. The people and the police have been fired at from mosques with Pakistani weapons. Why are we protecting them? It is not fair that you should allow them to do namaaz on their streets and let their loudspeakers blare out while our maha aa rtis are stopped. There should be equal justice.

* Muslims in India are behaving as if they are Pakistani citizens. It is as if there are two countries within this one. The police are waiting for orders to shoot these people. Even they feel the anguish of innocent citizens. When the Muslims had finishe d what they want to do and when the Hindus decided to retaliate, (Chief Minister) Sudhakarrao Naik, Babanrao (Pachpute) and their Khan gangster friends including (ACP) Khan descended upon the Hindus. Hindus, open your eyes and see what is going on! Your funeral pyres are burning.

* Innocent Hindu boys are being killed, and you wait for orders to destroy the fanatic traitors in Bhendi Bazaar (a Muslim area in south Mumbai)? Have the police also become playthings in the hands of politicians? We predict that these traitors will kill you also. Since the police had not done anything, our young boys retaliated for the murders of Hindus on January 6. And what do we get? You kill those brave boys.

* (Sharad) Pawar and the police will never be able to live in peace from this moment on, because they have received the curses of these dead boys. It is easy to face people when they are alive, but the embers from their funeral pyres will be impossible t o confront. You could kill these children, but how will you stop these embers... People will spit on your corpses.

From "They Were Turned Into Lambs", editorial, Saamna, January 14, 1993:

* Religious fanatics brought their religion on to the road, and made life miserable for innocent citizens. The government supported this. But when Hindus reacted against this terrorism, and brought their religion on to the roads, the government, politici ans and traitors were turned into lambs... In spite of Thackeray's appeal for peace, the riots did not stop. All we have to say about this is that if it was not for his appeal, the entire city would have been reduced to ashes and not one religious fanati c traitor would have lived. Even government servants like Ghaffoor and Khan came out to help these fanatics. We have stopped for now, and will be quiet for the moment.

* We are tolerant, but our tolerance has limits. All this was started by the traitors. The Hindus only went back four steps and then displayed their strength. That's when the traitors put up white flags on their armed strongholds... We have to defend our selves, since the Khans and Ghaffoors, in whom the government has vested the responsibility for our protection, are hand-in-glove with the traitors. And so, we will have to be careful. Why should we die without fighting? And at the hands of religious tra itors like Khan and Ghaffoor?

* The government sent Syed Bukhari, the son of the Imam of the Juma Masjid, to Mumbai despite the situation. He had started the anti-national Adam Sena, which had shaken the government. This is the same snake who asked for military protection the minute he landed at the Mumbai airport, because he does not trust the police. Is this Bukhari India's President, to ask for military protection? We congratulate the police for having sent this anti-national parcel back to Delhi... Before leaving he had spoken t o A.A. Khan on the phone, and we are sure of this news... He gave Khan's unit the responsibility of killing patriotic Indians. We have been saying this again and again. The people must know about the conspiracy between Khan and the Imam's son. When Mumba i was burning, how could they allow this kind of explosive to land at the Mumbai airport? They should have been stopped. But no! If they are stopped, what will the Muslims think of the government?... Dilip Kumar will be playing cricket in Dubai for inter national peace. We say, you should tell his fanatic brothers in Bhendi Bazaar, Dongri and Behrampada to maintain peace... If the Muslims had stopped their leaders, none of this would have happened.

From "Behrampada Reverberates to a Maha Aarti", report, Saamna, January 21, 1993:

* The whole of Behrampada reverberated to a maha aarti performed at the Ganesh Temple today afternoon. The Sthaniya Lokadhikar Samiti announced that Behrampada would henceforth be called Rampada... "Pull out all the Bangladeshis and Pakistanis from Behra mpada," says Bamanrao Mahadik, "they are the ones who are ruining our country." "It's time to send these green hordes back to their country"... Shiv Sena leader Madhukar Sarpotdar said, "Javed Khan, A.A. Khan and Hassan Ghaffoor Khan, these three Khans, have murdered only Hindus. But remember that Hindus can also kill cruelly. You are bound to burn to ashes in the fire that you have lit".... Shiv Sena MLA Ramdas Kadam says, "If it was not for Shiv Sena Pramukhs and the Shiv Sena, Mumbai would have becom e Pakistan. Those who love Pakistan should be sent back there. If they can take the law into their hands, we will do so too."

From "Hindu Pride Must Be Upheld: The Country and Hindu Dharma Must Triumph", editorial, Saamna, January 23, 1993:

* Today is Saamna's fifth birthday. We would have liked to celebrate this event as we have done every year. The situation does not permit us to do so because fanatics have killed large numbers of our Hindu brothers and sisters. All of them have gi ven their lives for the holy war to keep this nation alive... Saamna and I have fought like real men in this holy war, regardless of the consequences.

* Some people suggested that we tone down the sharpness of our language, but we in turn ask, why? What will they do? Throw me in prison? I have kept my bags and all my medicines ready. I am not bothered by the thought of going to prison... If I am arrest ed, if the government takes any rash decision, while only Mumbai has seen rioting so far, then the whole of the country up to Jammu and Kashmir will rise up. I am prepared. This is not a threat. I am just telling the truth. The country has enough problem s. Don't add to them by arresting me. I am not saying this out of vanity. If a holy war is to begin because of me, than so be it.

* I have nurtured a new, fiery generation of Hindus in the form of the Shiv Sena, and Saamna has been instrumental in this task... Hindus woke up in Hindustan after December 6 (1992), and it is time we all burned like a torch. Anti-national traito rs should be burned to ashes in this flame... In some police stations there are monsters who are pulling out the nails from the hands and feet of our young children, and slapping false cases against them. (ACP) Khan has become famous because of (municipa l corporator) Milind Vaidya. Muslims started rioting in Vaidya's area, Mahim, and everyone knows what kinds of religious fanatics they are. Vaidya is a responsible Corporator and is on the peace committee of the area, but Khan has attacked Vaidya, and pu t him behind bars on a false charge of murder. This is Khan's law!

* The government tells us 1,75,00,000 Bangladeshi infiltrators are living in this country. Why are you giving us these numbers? What kind of security are you maintaining at the borders? We have trouble coming to Mumbai from Delhi. How then do Bangladeshi Muslims manage to get here? Vasant Saraf said that while he was the Director-General of Police, he had warned the government that a large number of Bangladeshi Muslims had entered India... Earlier, there was only one Bhendi Bazaar. Today there is Deonar , Govandi, Behrampada, Mahim. This is precisely where rioting took place and innocent people were killed.

From "Keep the Nation Alive", editorial, Saamna, January 9, 1993:

* Whoever comes is preaching to Hindus as if it is we who started the riots. What do we have with us to start riots with? All we have are rags dipped in kerosene! In Bhendi Bazaar, Dongri and Behrampada weapons brought from Pakistan and Bangladesh are be ing used. These weapons have been used to kill cruelly everyone from little babies who have not yet opened their eyes to old people. (ACP) Mundkur and (ACP) Khan have actually attacked unarmed Hindus in Dharavi and Kurla. They should go to Bhendi Bazaar and stop their brothers there. Now we can clearly see their real colours and their real loyalties. Whatever we had predicted has come true. A Muslim, irrespective of his country or status, will remain a Muslim. His religion and

his community come before his country. The attacks on patriots over the last two days are an insult to the nation.

* Even policemen say this government is made up of gandus (an abusive term). They have their service revolvers with them but all they can do is count corpses. That is the only work the government is doing... The Indian and Maharashtrian people spi t on this government. The government is wearing a green burkha and standing at the Bhendi Bazaar crossroads wearing bangles.

* I am not provoking people. I am only expressing anguish.

Translations by Archana Chaudhary (The Hindu Business Line, Mumbai).

From What Saamna Said, Frontline, Volume 17, Issue 16, August 5-18, 2000 available at http://www.flonnet.com/fl1716/17160160.htm

The argument of multiculturalism is to an extent reflected in the Togadia judgment. The SC noted, "Our country is the world's most heterogeneous society, with rich heritage and our Constitution is committed to high ideas of socialism, secularism and integrity of the nation. As is well known, several races have converged in this sub-continent and they carried with them their own cultures, languages, religions and customs affording positive recognition

Our country is the world's most heterogeneous society, with rich heritage and our Constitution is committed to high ideas of socialism, secularism and the integrity of the nation. As is well known, several races have converged in this sub-continent and they carried with them their own cultures, languages, religions and customs affording positive recognition to the noble and ideal way of live: 'Unity of Diversity'. Though these diversities created problems, in early days, they were mostly solved on the basis of human approaches and harmonious reconciliation of differences, usefully and peacefully. That is how secularism has come to be treated as a part of fundamental law and an unalienable segment of the basic structure of the country's political system.

As noted in *S.R. Bommai v. Union of India etc., (1994(3) SCC 1)*, freedom of religion
is granted to all persons of India. Therefore, from the point of view of the State, religion, faith or belief of a particular person has no place and (is) given no scope for imposition on individual citizen(s). Unfortunately, of late, vested interests fanning religious fundamentalism of all kinds, vying with each other, are attempting to subject the constitutional machineries of the State to great stress and strain with certain quaint ideas of religious priorities to promote their own selfish ends, unfettered and unmindful of the disharmony it may ultimately bring about, and even undermine national integration achieved with much difficulty and laudable determination of those strong spirited savants of yesteryears.

Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of a welfare State. Religion sans spiritual values may even be perilous and bring about chaos and anarchy all around. It is, therefore, imperative that if any individual

Conclusion

Perhaps the appeal of Canadian law is in that attempts to address discrimination itself and in doing so Is perhaps more accurate in its ability to recognise discriminatory acts. The laws for instance place little emphasis on penal consequences. [**Based on the discussion of hatred and contempt in *Nealy* the Court held that this did not form an unreasonable impairment on the freedom of speech and expression despite the lack of exceptions for truth and lack of intention as it was necessary to address systemic discrimination. The fact that the action taken against hate [speech] was a cease and desist order and imprisonment only as contempt of that order**

was cited as a reason for holding that lack of a requirement for intention did not make the statute overbroad. [Lack of emphasis on imprisonment, sanctions]]

It is clear that Indian laws or rather their interpretation by courts tend to prove the case against hate speech restrictions. The test case of Togadia and the evidence it provides to show the ability of administrative and judicial action to thwart violent speech notwithstanding…It is not the purpose of this paper to support existing hate speech restrictions or suggest amendments to Indian penal, election or media laws in favour of hate speech restrictions. Rather it tries to present a slightly different argument than that presented by censorship debates. That the role of speech, symbols, written words in inciting violence is clear is perhaps not in issue. As stated early in this paper, despite this role, those favouring free speech tend to argue that the benefits of free speech or the grave dangers of censoring speech outweigh the effect of speech on violence. This well articulated position however, become fuzzy when equality and non-discrimination become the planks supporting hate speech restrictions.

The argument then does not dwell on or get lost in trying to prove the immediate or remote links to violence – did the phrase Kill the Sikhs broadcast on national televisions after Indira Gandhi's assassination really cause the massacre of Sikhs that took place in the following days? Is it perhaps sufficient to show that while not a single witness or murderer in that massacre would directly attribute their actions to those words, they were sufficient to instil a fear psychosis within a community and further justify and make acceptable to others the actions that followed? The Canadian approach that clearly identifies hate speech as discrimination reflects…

Lawrence Liang argues for caution in the regulation of hate speech, "We need to be a little cautious in our responses to forms of speech that offend our liberal sentiments. Very often the assumption of desirable forms of speech presumes a pre-tailored relationship between media and the properly constituted public sphere (much like the imagination of the seamless web), and a plea to the State to rule out undesirable forms of speech abandons the site of politics and converts it into a site of regulation that will merely heighten the crisis rather than resolve it."[75] Successive commissions of inquiry, judgments and our own experience would show that this is not an issue of liberal sentiments. As the Canadian SC/Human Rights Tribunal has noted…This very real connection to discrimination and equality let alone violence is overlooked in these debates. Perhaps more empirical data to support the feeling of isolation and fear that targeted communities feel is required. Perhaps it is that, like me, though I read and understand these discussions have never really felt the fear of being a 'minority', of being branded terrorists, of having to look for ghettoes to live in to feel secure amongst my own,

75 Liang, Lawrence, 'Reasonable Restrictions and Unreasonable Speech,' Sarai Reader, 2004: Crisis Media, p. 439

"Most people agree that, in the age of the Internet, censorship could only be a symbolic gesture."[76] Undoubtedly. As the case of the Zundelsite (See Box) illustrates, its shut down in Canada only resulted it in being hosted from the US, the vanguard of free speech. Was the upholding the right to equality and non discrimination merely a 'symbolic gesture' or one with tangible effects on the security and [ ] of survivors of the holocaust – perhaps it would be argued that this is as imaginative as the harms that hate speech cause.

Technology was indeed meant to be the ultimate leveller – the anarchy hoped for and dreamed of by web activists that would oppose all centers and cultures of oppression – but centers of power work as insidiously with technology and so technology continues to be controlled to manipulate…

A classic argument opposing hate speech restrictions when connections to violence are pointed out is that the person who committed the violence must be punished – for consuming the hate in the speech and putting it into action. The speaker merely uttered words – the power of suggestion surely is not to be criminalized in the manner actual violence, killing and sexual assault is. "Image blaming can easily turn the criminal agent into a victim and absolve the person of any responsibility for his/her actions." For instance, "Instead of helping the woman, the 'porn-made-me-do-it' argument is only likely to harm her."[77]

Poverty and discrimination – India religion census – Muslims figure in most dismal statistics of literacy, work participation etc. Many argue that the non economic dimensions of poverty are linked to discrimination, fear and exploitation. The Hindutva Judgments

In Dr. Ramesh Yeshwant Prabhoo v. Multiculturism

76 Ghosh, Shohini, 'Censorship Myths and Imagined Harms,' Sarai Reader, 2004: Crisis Media, p. 447

77 Shohini, p. 449