

Amish Devgan v. Union of India

2020 SCC OnLine SC 994

Decided on 07.12.2020

Background: The two-judge bench of the Supreme Court of India refused to grant relief in a writ petition to dismiss criminal proceedings against a television journalist, Amish Devgan, who had used derogatory language against a revered Muslim saint. The Court conducted a thorough analysis of the Indian legal framework on hate speech as well as providing an overview of comparative jurisprudence on the issue. Throughout the judgment the Court emphasized the importance of protecting free speech while also protecting group dignity and the unity of the nation by proscribing speech which threatens that dignity and unity.

Excerpts:

The writ petitioner, Amish Devgan, is a journalist who, it is stated, is presently the managing director of several news channels owned and operated by TV18 Broadcast Limited, including News18 Uttar Pradesh/Uttarakhand, News18 Madhya Pradesh/ Chhattisgarh and News18 Rajasthan.

3. The petitioner hosts and anchors debate shows ‘Aar Paar’ on Signature Not Verified Digitally signed by Jatinder Kaur News18 India and ‘Takkar’ on CNBC Awaaz. On 15th June, 2020, at around 7:30 p.m., the petitioner had hosted and anchored debate on the enactment which, while excluding Ayodhya, prohibits conversion and provides for maintenance of the religious character of places of worship as it existed on 15th August, 1947. Some Hindu priest organisations had challenged vires of this Act before the Supreme Court, and reportedly a Muslim organization had filed a petition opposing the challenge.

4. Post the telecast as many as seven First Information Reports (FIRs) concerning the episode were filed and registered against the petitioner in the States of Rajasthan, Telangana, Maharashtra and Madhya Pradesh.”

The gist of the FIRs is almost identical. The petitioner, while hosting the debate, had described Pir Hazrat Moinuddin Chishti, also known as Pir Hazrat Khwaja Gareeb Nawaz, as “aakrantak Chishti aya... aakrantak Chishti aya... lootera Chishti aya... uske baad dharam badle”. Translated in English the words spoken would read – “Terrorist Chishti came. Terrorist Chishti came. Robber Chishti came - thereafter the religion changed,” imputing that ‘the Pir Hazrat Moinuddin Chishti, a terrorist and robber, had by fear and intimidation coerced Hindus to embrace Islam.’ It is alleged that the petitioner had deliberately and intentionally insulted a Pir or a pious saint belonging to the Muslim community, revered even by Hindus, and thereby hurt and incited religious hatred towards Muslims.”

The petitioner filed the present writ petition for quashing FIRs.

Hate Speech

15. Benjamin Franklin, in 1722, had stated:

“Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as public Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or control the Right of another; And this is the only Check it ought to suffer, and the only Bounds it ought to know.” Two centuries later it remains difficult in law to draw the outmost bounds of freedom of speech and expression, the limit beyond which the right would fall foul and can be subordinated to other democratic values and public law considerations, so

as to constitute a criminal offence. The difficulty arises in ascertaining the legitimate countervailing public duty, and in proportionality and reasonableness of the restriction which criminalises written or spoken words. Further, criminalisation of speech is often demarcated and delineated by the past and recent significant events affecting the nation including explanation of their causes.

Therefore, constitutional and statutory treatment of 'hate speech' depends on the values sought to be promoted, perceived harm involved and the importance of these harms. 57 Consequently, a universal definition of 'hate speech' remains difficult, except for one commonality that 'incitement to violence' is punishable.

16. This Court in 2014, in Pravasi Bhalai Sangathan had requested the Law Commission of India to examine the possibility of defining the expression 'hate speech', and make recommendations to the Parliament to curb this menace, especially in relation to electoral offences. This Court had expressed difficulty in 'confining the prohibition to some manageable standard'. The Law Commission, in its 267th Report on Hate Speech had recommended amendments to the criminal laws for inserting new provisions prohibiting incitement to hatred and causing fear, alarm, or ..

Hate Speech in Constitutional Jurisprudence: A Comparative Analysis by Michel Rosenfeld, 24 Cardozo L. Rev. 1523 2002-2003 provocation of violence in certain cases, but these have not yet been accepted by the government. Referring to the Constituent Assembly Debates and the Constitution, the Report observes that the right to speech was not to be treated as absolute, but subject to restrictions on the grounds like sedition, obscenity, slander, libel and interest of public order. If the State is denied power to restrict speech on the basis of content, it might produce debates informed by prejudices of the public that would marginalise vulnerable groups and deny them equal space in the society.

The mode of exercise of free speech, the context and the extent of abuse of freedom are important in determining the contours of permissible restrictions. The Commission also felt that laying down of a definite standard might lead to curtailment of free speech; a concern that has prevented the judiciary from defining hate speech in India. However, this is not to deny that the courts while adjudicating each case have to inevitably apply an objective test in terms of the legislative provisions. This is an inescapable legal necessity to ensure certainty and to prevent abuse and misuse, as failure to do so would curtail and subjugate the right to free speech and expression to occasional whims and even tyranny of subjective understanding of the authorities. Difference between free speech and hate speech in the context of the penal law must be understood.

17. The Law Commission report analysed the legal standards under various instruments of international law that lay down the regime for controlling and preventing hate speech, which we will encapsulate. Article 20(2) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Similarly, Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD), prohibits '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...'. The Human Rights Council's Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in the context of internet content, states that freedom of expression can be restricted on grounds like hate speech (to protect rights of affected communities), defamation (to protect the rights and reputation of individuals against unwarranted attacks), and 'advocacy' of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others). Article 10 of the European Convention of Human Rights guarantees the right to freedom of expression, subject to certain 'formalities, conditions, restrictions or penalties' in the interest of ... public safety, for the prevention of disorder or crime... for the protection of the reputation or rights of others...'. Further, Article 17 of the Convention prohibits abuse of the right by 'any State, group or person'. The Council of Europe's Committee of Ministers to Member States on Hate Speech has defined 'Hate Speech' as 'covering all forms of expression which spread, incite, promote

or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.' The Law Commission report notes that pluralism, tolerance, peace and non-discrimination have been termed non-derogatory values by the European Court of Human Rights in ascertaining the extent of free speech allowed under the Convention; speech propagating religious intolerance, negationism, homophobia etc. has been excluded from the ambit of Article 10 of European Convention of Human Rights and the importance of responsible speech in a multicultural society has been stressed by the court in several cases. The Law Commission report has noted that in recent years, the European Court of Human Rights has moved from a strictly neutral approach, wherein not every offensive speech was considered illegitimate, by holding that interference is not to be solely judged on legitimate aim test but also whether such interference was necessary in a democratic society. This moderation takes into account that affording protection to all kinds of speech, even offensive ones, many times vilifies the cause of equality.

18. We will now succinctly refer to the American position which discloses a strong preference for liberty over equality, and commitment to individualism, predicated on the belief that:

*"...Truth was definite and demonstrable and that it had unique powers of survival when permitted to assert itself in a "free and open encounter." [...] Let all with something to say be free to express themselves. The true and sound will survive; the false and unsound will be vanquished. Government should be kept out of the battle and not weigh the odds in favor of one side or the other. And even though the false may gain a temporary victory, that which is true, by drawing to its defence additional forces, will through the self-righting process ultimately survive."*⁵⁸ Frederick Siebert writing on John Milton's *Areopagitica*, 1644, in *The Libertarian Theory of the Press*, in *FOUR THEORIES OF THE PRESS* 39, 44-45

19. *The American framework on hate speech is based upon four major philosophical justifications.*⁵⁹ Justification from democracy is based on the belief that free speech enables a democratic self-government by allowing citizens to convey and receive ideas. This rationale does not grant protection to speech that is anti-democratic in general, and hateful or political extremist in particular. Another justification comes from the social contract theory, which requires that 'fundamental political institutions must be justifiable in terms of an actual or hypothetical agreement among all members of the relevant society.' The third justification – pursuit of the truth, is based on the utilitarian philosophy. Popularly known as the justification based on 'free marketplace of ideas,' it is grounded in the notion that truth is more likely to prevail through open discussion, and that the society will be better able to progress if the government is kept out of adjudicating as to what is true or false, valid versus invalid, or acceptable against abhorrent. The fourth justification comes from the idea of autonomy, and is primarily individualistic, unlike the previous three that value collective good. According to this, free speech enables individual autonomy, respect and well-being through self-expression. "Justification from democracy, the justification from social contract, the justification from the pursuit of the truth, and the justification from individual autonomy." – Cardozo L.Rev.1523 2002-2003 (HeinOnline).

20. *The threshold or the standard in American jurisprudence to determine the circumstances under which the First Amendment freedoms of speech, press and assembly should be restricted has with time moved from the 'bad tendency test' i.e., prohibiting speech if it has tendency to harm public welfare, to the test of 'clear and present danger',⁶⁰ and to finally the test of 'imminent lawless action'. Mr. Justice Douglas in his concurring opinion in Brandenburg v. Ohio⁶¹ had adumbrated that the 'clear and present danger' precept in pronouncements during World War I and to check Marxism had moved away from the First Amendment ideal as in Dennis v. United States⁶² 'not improbable' standard was followed. The 'imminent lawless action' test has three distinct elements, namely – intent, imminence and likelihood. In other words, the State cannot restrict and limit the First Amendment protection by forbidding or proscribing advocacy by use of force or law, except when the speaker intends to incite a violation of the law – that is both imminent and likely.*

Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47 (52), has described the test as:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 395 U.S. 444 (1969) 341 U.S. 494

30. *In Ramji Lal Modi, a Constitution Bench of five Judges, relying upon the earlier decisions in Romesh Thappar and Brij Bhushan, had upheld the constitutional validity of Section 295A, a provision which criminalises the act of insulting religious beliefs with the deliberate intention to outrage religious feelings of a class of citizens. Ruling that the right to free speech is not absolute as Article 19(2) of the Constitution envisages reasonable restrictions, this court observed that the phrase 'public order', as a ground for restricting the freedom of speech, incorporated in Article 19(2) vide the Constitution (First Amendment) Act, 1951 with retrospective effect, reads 'in the interest of public order', which connotes a much wider import than 'maintenance of public order'. This distinction between 'maintenance of public order' and 'in the interest of public order' was reiterated by another Constitution Bench of five Judges of this Court in Virendra/K.Narendra.*

31. *Even so, in Ramji Lal Modi Section 295A of the Penal Code was interpreted punctiliously observing:*

"9...Section 295-A does not penalise any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class..." Import of Section 295A of the Penal Code, Ramji Lal Modi holds, is to curb speech made with 'malicious intent' and not 'offensive speech'. Criminality would not include insults to religion offered unwittingly, carelessly or without deliberate or malicious intent to outrage the

religious feelings. Only aggravated form of insult to religion when it is perpetuated with deliberate and malicious intent to outrage the religious feelings of that group is punishable. Notably, this court had already dismissed the Special Leave Petition and upheld Ramji Lal Modi's conviction under Section 295A for having published an article in a magazine against Muslims. It was specifically noticed that even earlier, the journalist in question had printed and published an article or a cartoon about a donkey on which there was agitation by Muslims in Uttar Pradesh, which after prosecution, however, had eventually resulted in petitioner's acquittal by the Allahabad High Court.

32. In Kedar Nath Singh, a Constitution Bench of five Judges of this Court had interpreted Sections 124A and 505 of the Penal Code post amendment to clause (2) to Article 19 of the Constitution widening its ambit by incorporating the words- 'in the interest of' ... 'public order'. Reference was made to the difference in approach and interpretation by Sir Maurice Gwyer, C.J., speaking for the Federal Court in Niharendu Dutt Majumdar and the decision of the Privy Council in Sadashiv Narayan Bhale Rao, which had approved the elucidation by Strachey, J. in Bal Gangadhar Tilak. This court held that the exposition of law by the Federal Court in Niharendu's case would be apposite and in conformity with the amended clause (2) of Article 19. Specific reference was made to the dissenting opinions of Fazl Ali, J., in Romesh Thappar and Brij Bhushan, to observe that the difference between the majority opinion in the two cases and the minority opinion of Fazl Ali, J. had prompted the Parliament to amend clause (2) of Article 19 by the Constitution (First Amendment) Act, 1951 with retrospective effect. Fazl Ali, J. had held that the concept of 'security of state' was very much allied to the concept of 'public order' and that restrictions on the freedom of speech and expression could validly be imposed in the interest of public order. At the same time, this court had cautioned that the two penal provisions, read as a whole together with the explanation, aim at rendering penal only those activities which would be intended, or have the tendency, to create disorder or disturbance of public peace by resort to violence. It was elucidated that criticism and comments on government's action in however strong words would not attract penal action as they would fall within the fundamental right of freedom of speech and expression. The penal provisions catch up when the word, written or spoken etc., have the pernicious tendency or intention of creating public disorder. So construed, the two provisions strike the correct balance between individual fundamental rights and the interest of public order. For interpretation, the court should not only have regard to the literal meaning of the words of the statute but take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress.

33. With reference to Section 505 of the Penal Code, Kedar Nath Singh observes that each of the three clauses of the Section refer to the gravamen of the offence as making, publishing or circulating any statement, rumour or report – (a) with the intent of causing or which is likely to cause any member of the Army, Navy or Air Force to mutiny or otherwise disregard or fail in his duty as such; or (b) cause fear or alarm to the public or a section of the public which may induce the commission of an offence against the State or against public tranquillity; or (c) incite or which is likely to incite one class or community of persons to commit an offence against any other class or community. Constituent elements of each of the three clauses have reference to the direct effect on the security of the State or public order. Hence, these provisions would not exceed the bounds of reasonable restriction on the right to freedom of speech and expression.

34. We have referred to the judgment in Kedar Nath Singh, for it interprets clause (2) of Section 505 of the Penal Code and also lays down principles and guidelines to interpret a penal provision in the context of the fundamental right to freedom of speech and expression. Secondly, and more importantly, this decision affirms the view of the Federal Court in Niharendu's case that the expression 'government established by law' has to be distinguished from the 'persons for the time being engaged in carrying on the administration'. The former is the visible symbol of the State, which gets enwrapped when the very existence of the State will be in jeopardy if the government established by law is subverted. Written or spoken words etc. that bring the State into contempt or hatred or create disaffection fall within the ambit of the penal statute when the feeling of disloyalty to the government established by law or enmity to it imports the idea of tendency to public disorder by use of actual

violence or incitement to violence. Equally, strongly worded expression of disapprobation of the actions of the government, even elected government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence would never be penal. Further, disloyalty to the government by law and comments even in strong terms on the measures or acts of the government so as to ameliorate the condition of the people or to secure cancellation or alteration of those actions or measures by lawful means, without exciting of those feelings of enmity and disloyalty which imply excitement to public disorder or use of force, is not an offence. Another significant advertence is to the principle that recognises that if two views are possible, the court should construe the provisions of law penalising 'hate speech' in the way that would make them consistent with the Constitution, and an interpretation that would render them unconstitutional should be avoided. Interpreting the sections under challenge, the provisions were read as a whole to make it clear that the aim is to render penal only such activities as would be intended, or have a tendency, to create public disorder or disturbance of public peace by resort to violence. As a sequitur it follows that the courts should moderate and control the ambit and scope of the penal provisions to remain within and meet the constitutional mandate. Interpretation and application that is distant and beyond the superior command of the permissible constitutional limitation vide clause (2) to Article 19 is unacceptable.

35. The decision in *Ramji Lal Modi* and the later decision in *Bilal Ahmed Kaloo*, which had examined Sections 153A and 505(2) of the Penal Code, had primarily applied the 'Bad Tendency test' as propounded by the American jurists. In *Dr. Ram Manohar Lohia*, the Constitution Bench of five Judges, referring to the words 'in the interest of... public order' in clause (2) to Article 19 had observed that order is a basic need in any organised society. It implies orderly state of society or community in which the citizens can peacefully pursue their normal activities of life. This is essential as without order there cannot be any guarantee of other rights. Security of the State, public order and law and order represent three concentric circles: law and order being the widest, within which is the next circle representing public order and the smallest circle represents the security of the State. The phrase 'security of the State' is nothing less than endangering the foundations of the State or threatening its overthrow. It includes events that have national significance or upheavals, such as revolution, civil strife, war, affecting security of the State but excludes breaches of purely local significance. The phrase 'minor breaches' refers to public inconvenience, annoyance or unrest. The phrase 'in the interest of...public order', in the context of clause (2) to Article 19, would mean breaches of purely local significance, embracing a variety of conduct destroying or menacing public order. Public order, in view of the history of the amendment is synonymous with public peace, safety and tranquillity. Further, any restriction to meet the mandate of clause (2) to Article 19 has to be reasonable, which means that the restriction must have proximate and real connection with public order but not one that is far-fetched, hypothetical, problematic or too remote in the chain of its relationship with public order.

Restriction must not go in excess of the objective to achieve public order. In practice the restriction to be reasonable, should not equate the actus with any remote or fanciful connection between a particular act of violence or incitement to violence. This Court upheld the decision of the Allahabad High Court striking down Section 3 of the U.P. Special Powers Act, 1932 as the section within its wide sweep had included any instigation by words, signs or visible representation not to pay or defer payment of any extraction or even contractual dues of the government authority, land owner, etc. which was treated as an offence. Even innocuous speeches were prohibited by threat of punishment. It was observed there was no proximate or even foreseeable connection between such instigation and the public order sought to be protected. Similarly, the argument of the State that instigation of a single individual in the circumstances mentioned above may in long run ignite revolutionary movement and destroy public order was rejected on the ground that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. The argument that in a democratic society there is no scope for agitational approach and the law, if bad, can be modified by democratic process alone was rejected on the ground that if the same is accepted it would destroy the right to freedom of speech.

However, what is important is the finding that public order is synonymous with public safety and tranquillity, in the sense that the latter terms refer to the former. The terms refer to absence of disorder, involving breaches of local significance in contradiction to national upheavals affecting security of the State. Yet they have to be serious enough

like civil strife and not mere law and order issues. Further, the 'proximate nexus test' in the 'interest of public order' should be satisfied.

37. Recently, this Court in *Shreya Singhal*, accepting the constitutional challenge and striking down Section 66A of the Information Technology Act, 2000, had differentiated between categories and adopted the scales test when offensive speech would be criminalised, observing:

"13...There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc..." This judgment relies upon the American principles of 'clear and present danger' and 'imminent lawless action' wherein to criminalise speech, proximate nexus should be established, that is, causal linkage between the words spoken with the 'clear and present danger' and 'imminent lawless action'.

39. It has been argued by the counsel for the petitioners that the restrictions under Article 19 of the Constitution cannot mean complete prohibition. In this context, we may note that the aforesaid contention cannot be sustained in light of a number of judgments of this Court wherein the restriction has also been held to include complete prohibition in appropriate cases. [*Madhya (2020) 3 SCC 637 Bharat Cotton Assn. Ltd. v. Union of India*, *Narendra Kumar v. Union of India*, *State of Maharashtra v. Himmatbhai Narbheram Rao*, *Sushila Saw Mill v. State of Orissa*, *Pratap Pharma (P) Ltd. v. Union of India* and *Dharam Dutt v. Union of India*.]

40. The study of the aforesaid case law points to three propositions which emerge with respect to Article 19(2) of the Constitution. (i) Restriction on free speech and expression may include cases of prohibition. (ii) There should not be excessive burden on free speech even if a complete prohibition is imposed, and the Government has to justify imposition of such prohibition and explain as to why lesser alternatives would be inadequate. (iii) Whether a restriction amounts to a complete prohibition is a question of fact, which is required to be determined by the Court with regard to the facts and circumstances of each case. [Refer to *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*]

48. Before referring to provisions of the Penal Code, we would like to refer to an article by Alice E. Marwick and Ross Miller of Fordham University, New York (USA),⁹² elucidating on three distinct elements that legislatures and courts can use to define and identify 'hate speech', namely – content-based element, intent-based element and harm-based element (or impact-based element). The content-based element involves open use of words and phrases generally considered to be offensive to a particular community and objectively offensive to the society. It can include use of certain symbols and iconography. By applying objective standards, one knows or has reasonable grounds to know that the content would allow anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender. The intent-based element of 'hate speech' requires the speaker's message to intend only to promote hatred, violence or resentment against a particular class or group without communicating any legitimate message. This requires 'Online harassment, defamation, and subjective intent on the part of the speaker to target the group or person associated with the class/group. The harm or impact-based element refers to the consequences of the 'hate speech', that is, harm to the victim which can be violent or such as loss of self-esteem, economic or social subordination, physical and mental stress, silencing of the victim and effective exclusion from the political arena. Nevertheless, the three elements are not watertight silos and do overlap and are interconnected and linked. Only when they are present that they produce structural continuity to constitute 'hate speech'.

54. The present case, it is stated, does not relate to 'hate speech' causally connected with the harm of endangering security of the State, but with 'hate speech' in the context of clauses (a) and (b) to sub-section (1) of Section

153A, Section 295A and sub-section (2) to Section 505 of the Penal Code. In this context, it is necessary to draw a distinction between 'free speech' which includes the right to comment, favour or criticise government policies; and 'hate speech' creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity (as explained above) and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference etc. Freedom to express and speak is the most important condition for political democracy. Law and policies are not democratic unless they have been made and subjected to democratic process including questioning and criticism. Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The 'market place of ideas' and 'pursuit of truth' principle are fully applicable. Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain. This justification is also premised on the conviction that freedom of speech serves an indispensable function in democratic governance without which the citizens cannot successfully carry out the task to convey and receive ideas. Political speech relating to government policies requires greater protection for preservation and promotion of democracy. Falsity of the accusation would not be sufficient to constitute criminal offence of 'hate speech'.

58. On the question of harm, the legislations refer to actual or sometimes likely or anticipated danger, of which the latter must not be remote, conjectural or farfetched. It should have proximate and direct nexus with the expression 'public order' etc. Otherwise, the commitment to freedom of expression and speech would be suppressed without the community interest being in danger. In the Indian context, the tests of 'clear and present danger' or 'imminent lawless action' unlike United States, are identical as has been enunciated in the case of Shreya Singhal.

The need to establish proximity and causal connection between the speech with the consequences has been dealt with and explained in Dr. Ram Manohar Lohia in great detail. In the case of actual occurrence of public disorder, the cause and effect relationship may be established by leading evidence showing the relationship between the 'speech' and the resultant 'public disorder'. In other cases where public disorder has not occurred due to police, third party intervention, or otherwise, the 'clear and present danger' or 'imminent lawless action' tests are of relevance and importance. 'Freedom and rational' dictum should be applied in absence of actual violence, public disorder etc. Further, when reference is to likelihood, the chance is said to be likely when the possibility is reasonably or rather fairly certain, i.e. fairly certain to occur than not. Therefore, in absence of actual violence, public disorder, etc., something more than words, in the form of 'clear and present danger' or 'imminent lawless action', either by the maker or by others at the maker's instigation is required. This aspect has been examined subsequently while interpreting the penal provisions.

It is being fair to allow reasonable consensus to emerge despite differences. In essence, it implies non-discrimination of individuals or groups, but without negating the right to disagree and disapprove belief and behaviour. It signifies that all persons or groups are equal, even when all opinions and conduct are not equal. It also means use of temperate language and civility towards others. In the correct and true sense, undoubtedly 'tolerance' is a great virtue in all societies, which when practiced by communities, gets noticed, acknowledged and appreciated.

Criminality would not include insults to religion offered unwittingly, carelessly or without deliberate or malicious intent to outrage the religious feelings. Only aggravated form of insult to religion when it is perpetuated with deliberate and malicious intent to outrage the religious feelings of that group is punishable. [1]

Criticism and comments on government's action in howsoever strong words would not attract penal action as they would fall within the fundamental right of freedom of speech and expression. [2]

Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The 'market place of ideas' and 'pursuit of truth' principle are fully applicable. Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain. (...) Political speech relating to government policies requires greater protection for preservation and promotion of democracy. Falsity of the accusation would not be sufficient to constitute criminal offence of 'hate speech'.

Security of the State, public order and law and order represent three concentric circles: law and order being the widest, within which is the next circle representing public order and the smallest circle represents the security of the State. The phrase 'security of the State' is nothing less than endangering the foundations of the State or threatening its overthrow. It includes events that have national significance or upheavals, such as revolution, civil strife, war, affecting security of the State but excludes breaches of purely local significance. The phrase 'minor breaches' refers to public inconvenience, annoyance or unrest. The phrase 'in the interest of...public order', in the context of clause (2) to Article 19, would mean breaches of purely local significance, embracing a variety of conduct destroying or menacing public order.[3]

A speech by 'a person of influence' such as a top government or executive functionary, opposition leader, political or social leader of following, or a credible anchor on a T.V. show carries a far more credibility and impact than a statement made by a common person on the street. (...)The reasonable-man's test would always take into consideration the maker. (...) This is not to say that persons of influence like journalists do not enjoy the same freedom of speech and expression as other citizens, as this would be grossly incorrect understanding of what has been stated above. This is not to dilute satisfaction of the three elements, albeit to accept importance of 'who' when we examine 'harm or impact element' and in a given case even 'intent' and/or 'content element'.

The terms 'public order' and 'public tranquillity' do overlap to some extent but are not always synonymous as 'public tranquillity' is a much wider expression and its breach may even include things that cannot be described as public disorder. (...) For breach of public order, it is not necessary that the act should endanger the security of the State, which is a far stricter test, but would not include every kind of disturbance of society. Accepting that 'law and order' represents the largest circle within which is the next circle representing 'public order' and inside that the smallest circle representing the 'security of the State' is situated, it was observed that State is at the centre and the society surrounds it. Disturbances of society can fall under broad spectrum ranging from disturbance of serenity of life to jeopardy of the State. Therefore, the journey travels first through public tranquillity then through public order and lastly to the security of the State.[4]

Public order would embrace more of the community than law and order. Public order refers to the even tempo of the life of the community taking the country as a whole or even a specified locality.[5] (...) The test which is to be examined in each case is whether the act would lead to disturbance of the current life of the community so as to amount to disturbance of public order, or does it affect merely an individual leaving the tranquillity of the society undisturbed. The latter is not covered under and restriction must meet the test of ordre publique affecting the community in the locality.

Dignity is a part of the individual rights that form the fundamental fulcrum of collective harmony and interest of a society. While right to speech and expression is absolutely sacrosanct in the sense that it is essential for individual growth and progress of democracy which recognises voice of dissent, tolerance for discordant notes and acceptance of different voices, albeit the right to equality under Article 14 and right to dignity as a part of Article 21 have their own significance.[6]

Individual dignity can be achieved in a regime which recognises equality with other citizens regardless of one's religious beliefs or the group to which one belongs. Religious beliefs and faiths ensure wider acceptance of human

dignity and liberty, but when conflict arises between the two, the quest for human dignity, liberty and equality must prevail.[7]

Dignity of individual and unity and integrity of the nation are linked, one in the form of rights of individuals and other in the form of individual's obligation to others to ensure unity and integrity of the nation. The unity and integrity of the nation cannot be overlooked and slighted, as the acts that 'promote' or are 'likely' to 'promote' divisiveness, alienation and schematism do directly and indirectly impinge on the diversity and pluralism, and when they are with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law. The purpose is not to curtail right to expression and speech, albeit not gloss over specific egregious threats to public disorder and in particular the unity and integrity of the nation.

To ensure maximisation of free speech and not create 'free speaker's burden', the assessment should be from the perspective of the top of the reasonable member of the public, excluding and disregarding sensitive, emotional and atypical. (...) This does not mean exclusion of particular circumstances as frequently different persons acting reasonably will respond in different ways in the context and circumstances. This means taking into account peculiarities of the situation and occasion and whether the group is likely to get offended. At the same time, a tolerant society is entitled to expect tolerance as they are bound to extend to others.

Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common masses and law-abiding citizens. This invariably leads to State response and, therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public disorder tend to trample upon liberty and freedom of others.

Communities with a history of deprivation, oppression, and persecution may sometimes speak in relation to their lived experiences, resulting in the words and tone being harsher and more critical than usual. Their historical experience often comes to be accepted by the society as the rule, resulting in their words losing the gravity that they otherwise deserve. (...) Such speech should be viewed not from the position of a person of privilege or a community without such a historical experience, but rather, the courts should be more circumspect when penalising such speech. This is recognition of the denial of dignity in the past, and the effort should be reconciliatory.

Loss of dignity and selfworth of the targeted group members contributes to disharmony amongst groups, erodes tolerance and open-mindedness which are a must for multi-cultural society committed to the idea of equality. It is however necessary that at least two groups or communities must be involved; merely referring to feelings of one community or group without any reference to any other community or group does not attract the 'hate speech' definition.

There are multiple justifications for 'tolerance', which include respect for autonomy; a general commitment to pacifism; concern for other virtues such as kindness and generosity; pedagogical concerns; a desire for reciprocity; and a sense of modesty about one's ability to judge the beliefs and actions of others. However, tolerance cannot be equated with appeasement, permissiveness, or indifference. It is also not identical to neutrality. Toleration requires self-consciousness and self-control in a sense that it is a restraint of negative judgment that is free and deliberate. It implies no lack of commitment to one's own belief but rather it condemns oppression or persecution of others.