Supreme Court of India
Amish Devgan vs Union Of India on 7 December, 2020
Author: Sanjiv Khanna
Bench: S. Abdul Nazeer, Sanjiv Khanna

REPORTABL

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 160 OF 2020

AMISH DEVGAN ..... PETITIONER

VERSUS

UNION OF INDIA AND OTHERS ..... RESPONDENT(S

JUDGMENT

SANJIV KHANNA, J.

Applications for intervention are allowed.

2. 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, Date: 2020.12.07 16:48:52 IST Reason:

at around 7:30 p.m., the petitioner had hosted and anchored a debate on the enactment1 which, while excluding Ayodhya, prohibits conversion and provides for maintenance of the religious character of places of worship as it existed on 15 th 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 details of the FIRs are as under:

S.No. FIR No. Sections Police Station / S

1.	78/2020	153B, 295A, 298 IPC 66F of Information Technology Act, 2000	Dargah, Ajmer (Rajasthan)
2.	50/2020	153B, 295A, 298 IPC 66F of Information Technology Act, 2000	Makbara, Kota (Rajasthan)
3.	173/2020	295A IPC	Bahadurpura, Hyderabad City (Telangana)
4.	218/2020	295A IPC	Itwara, Nanded (Maharashtra)
5.	217/2020	153A, 295A, 505(2) IPC	Paidhuni, Mumbai (Maharashtra)
6.	674/2020	295A IPC	Originally registe P.S. Omati, Jabalp (Madhya Pradesh) and subsequently o 30th June 2020 was transferred to P.S Sector-20, Gautam Buddh Nagar (Uttar Pradesh)

The Places of Worship (Special Provisions) Act, 1991.

7.	337/2020	295A IPC	Naya Nagar, Thane (Maharashtra)

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.

5. The petitioner, as per the writ petition, claims that post the telecast he was abused and given death threats on his phone, Twitter, Facebook and other social media platforms. Fearing for his life and limb, the petitioner had filed FIR No. 539 of 2020 dated 20 th June, 2020 at P.S. Sector-20, Noida, Uttar Pradesh, and submitted the links to the threats received through social media platforms.

6. On or about 22nd June, 2020, the present writ petition was filed under Article 32 of the Constitution of India with an application for interim relief. This writ petition came up for hearing on 26 th June, 2020 whereby notice was issued with a direction to the petitioner to implead the

informants in the respective FIRs/complaints. An interim order was passed directing that till the next date of hearing there would be a stay on further steps/action on the FIRs mentioned in the writ petition, relating to the telecast dated 15 th June, 2020, and the petitioner was protected against any coercive process arising out of or relating to the said FIRs.

7. Pursuant to the aforesaid liberty, the writ petition was amended to implead the complainants. Thereafter, the writ petition was amended on a second occasion. The prayers made in the last amended writ petition to this Court are:

> (a) for issue of writ of certiorari, quashing the complaints/FIRs referred to above or any other FIR or criminal complaint which may be filed thereafter relating to the telecast in question dated 15 th June, 2020;
>
> (b) strictly in the alternative, transfer and club the FIRs mentioned above or elsewhere in the country with the first FIR, i.e. FIR No. 78, P.S. Dargah, Ajmer, Rajasthan;

(c) issue a writ of mandamus to the effect that no coercive process shall be taken against the petitioner in the FIRs so lodged or subsequent complaint or FIRs on the subject broadcast; and

(d) direct the Union of India to provide adequate safety and security to the petitioner, his family members and his colleagues at various places in the country.

8. The petitioner, in his submissions, claims that he has faith in Banda Nawaz Hazrat Khwaja Moinuddin Chishti and has also gone on Ziyarat pilgrimage to Ajmer Sharif to offer respects and to worship. Expressing regret, the petitioner claims that the attributed words were uttered inadvertently and by mistake; in fact, the petitioner wanted to refer to Alauddin Khilji and not Gareeb Nawaz Khwaja Moinuddin Chishti. Realising his mistake and to amend the inadvertent error, and to dispel doubts and vindicate himself, the petitioner had promptly issued a clarification and an apology vide a tweet dated 17th June 2020. A video with similar clarification and apology was also telecast by the news channel on the very same day. Contention of the petitioner is that in a whirl, he had taken the name of Chishti though he had no such intention, and he laments his lapse as he did not wish to hurt anybody. Accordingly, he had apologised to anyone who had been hurt. In addition, a number of submissions have been made by the petitioner, which are summarised as under:

Multiple FIRs arising out of the same incident are abuse of law, and violate fundamental rights of the petitioner and freedom of press, causing a chilling effect on the freedom of speech and expression.

The FIRs are meant to harass and intimidate the petitioner; no part of cause of action has arisen in the areas where the FIRs were lodged.

On interpretation of Sections 153A, 295A, and 505(2) of the Indian Penal Code, 1860 (in short, the Penal Code) and Section 66-F of the Information Technology Act, 2000, (in short, the IT Act), no offence whatsoever can be made out; the allegations are based upon utterances in isolation by picking up select words and not on the programme as a whole; the petitioner did not have any malicious intent and mens rea to outrage religious beliefs and feelings; the programme has to be judged from the standard of a reasonable and strong-minded person and at best the words exhibit carelessness without any deliberate and malicious intent, which fall outside the ambit of Sections 153A, 295A and 505(2) of the Penal Code. In the alternative, it is submitted that a case of trifle or minor harm is made out, which would be covered by Section 95 of the Penal Code.

Again, in the alternative, it is submitted that all the FIRs should be clubbed and transferred to Noida or Delhi.

Counsel for the petitioner has relied upon the following decisions in support of his contention Arnab Ranjan Goswami v. Union of India and Others,2 Balwant Singh and Another v. State of Punjab,3 Bhagwati Charan Shukla s/o. Ravishankar Shukla v. Provincial Government, C.P. & Berar,4 Bilal Ahmed Kaloo v. State of A.P.,5 Brij Bhushan and Another v. State of Delhi,6 Devi Sharan Sharma v. Emperor,7 Emperor v. Sadashiv Narayan Bhalerao,8 Gopal Vinayak Godse v. Union of India,9 Her Majesty the Queen v. James Keegstra,10 Niharendu Dutt Majumdar v. The King-Emperor,11 K.A. Abbas v. Union of India (2020) SCC Online SC 462 (1995) 3 SCC 214 AIR 1947 Nagpur 1 (1997) 7 SCC 431 AIR 1950 SC 129 AIR 1927 Lah 594 AIR 1947 PC 82 AIR 1971 Bom 56 (1990) 3 SCR 697 1942 FCR 38 and Another,12 Kedar Nath Singh v. State of Bihar,13 Lalai Singh Yadav v. State of Uttar Pradesh,14 Lalita Kumari v. Government of Uttar Pradesh and Others,15 Mahendra Singh Dhoni v. Yerraguntla Shyamsundar and Another,16 Manzar Sayeed Khan v. State of Maharashtra and Another,17 P.K. Chakravarty v. The King,18 Pravasi Bhalai Sangathan v. Union of India and Others,19 Queen-Empress v. Bal Gangadhar Tilak,20 R. v. Zundel,21 R. P. Kapur v. State of Punjab,22 Ramesh S/o Chhotalal Dalal v. Union of India and Others,23 Ramji Lal Modi v. State of U.P.,24 Romesh Thappar v. State of Madras,25 Saskatchewan (Human Rights Commission) v. Whatcott,26 Shreya Singhal v. Union of India,27 State of Bihar and Another v. P.P. Sharma, IAS and Another,28 State of H.P. v. Pirthi Chand and Another,29 State of Haryana v. Bhajan Lal,30 State of U.P. v. (1970) 2 SCC 780 AIR 1962 SC 955 1971 Crl.L.J. 1773 (2014) 2 SCC 1 (2017) 7 SCC 760 (2007) 5 SCC 1 AIR 1926 Calcutta 1133 (2014) 11 SCC 477 ILR (1898) 22 Bombay 112 [1992] 2 SCR 731 AIR 1960 SC 866 (1988) 1 SCC 668 AIR 1957 SC 620 AIR 1950 SC 124 [2013] 1 SCR 467 (2015) 5 SCC 1 1992 Supp. (1) SCC 222 (1996) 2 SCC 37 1991 Supp (1) SCC 335 O.P. Sharma,31 Veeda Menez v. Yusuf Khan and Another,32 Neelam Mahajan v. Commissioner of Police and Others,33 Superintendent of Police, CBI and Others v. Tapan Kumar Singh,34 Superintendent, Central Prison, Fatehgarh and Another v. Dr. Ram Manohar Lohia,35 T.T. Antony v. State of Kerala and Others,36 and Virendra/ K.Narendra v. State of Punjab and Another.37

9. The prayers made by the petitioner are opposed by the states of Maharashtra, Rajasthan, Telangana and Uttar Pradesh, and the private respondents. The informants submit that the petitioner is a habitual offender and has on numerous earlier occasions offered similar apologies. The petitioner had twice repeated the words aakrantak Chishti aya, followed by the words lootera Chishti aya. This assertion on three occasions conveys and reflects the intention of the petitioner,

who had described Khwaja Moinuddin Chishti as an invader, terrorist and robber who had come to India to convert its population to Islam. The pretext of inadvertent mistake is an afterthought and a sham and unreal defence. (1996) 7 SCC 705 1966 SCR 123.

1993 (27) DRJ 357.

(2003) 6 SCC 175 AIR 1960 SC 633 (2001) 6 SCC 181 AIR 1957 SC 896 Respondent No.9, namely, Saber Chausa Mohd. Naseer, in his affidavit has stated that the name of Khwaja Moinuddin Chishti as a Sufi Saint was taken by one of the panelists when the topic of conversion was being debated. The panelist had gone on record to state that the conversions at the time of Khwaja Moinuddin Chishti happened for moral, religious and spiritual reasons and the devotees and followers of Khwaja Moinuddin Chishti were inspired by his teachings. The affidavit also states that the discussion at that time was not in relation to Mughals or with reference to Aurangzeb or Allaudin Khilji. Further, the petitioner had tampered with the broadcast of the debate uploaded on YouTube on 16 th June, 2020, by deliberately deleting the part wherein the petitioner had used the word aakrantak Chishti (twice) and lootera Chishti. These acts of sieving out of offensive portions, and the subsequent apology were after the petitioner had learnt about the protests and registration of the FIRs at Ajmer and other places. The respondents claim that the apology is not genuine but an act of self-defence. FIR at Ajmer was registered on 16 th June, 2020 at 11:58 p.m. whereas the first apology (via Twitter) of the petitioner appeared on 17th June, 2020, at 12:12 a.m., i.e., nearly 30 hours after the live telecast of the show where offensive words were uttered by the petitioner.

10. The points raised by the respondents can be summarised as under:

The petition ought to be dismissed as Article 32 has been invoked in a cavalier manner. Remedy under section 482 of the Code of Criminal Procedure, 1973 (hereafter referred to as, Criminal Code) was available to the petitioner. 38 The offending words were uttered thrice by the petitioner, which shows his ill intention.39 The intention of the petitioner was to create disharmony between the two faiths/groups and to incite disorder.40 The debate was a staged program, where no experts or historians were on the panel; the program was staged to malign the Muslims and to promote hatred.41 The themes of the programs hosted by the Petitioner are communal.42 The conduct of the petitioner was against norms of journalistic standards.43 Petitioner uploaded an edited version of the video on Youtube, where he had removed the part containing the offensive speech. This was done after FIR was lodged as an attempt to tamper/destroy the evidence.44 I.A. by Haji Syed Chisti, Khadim of Dargah; RESPONDENT NO. 9, I.A. by Haji Syed Chisti, Khadim of Dargah; Respondent no. 9, Respondent no. 6 I.A. by Haji Syed Chisti, Khadim of Dargah I.A. by Sajid Noormohammad Sheikh r/o Nashik, Maharashtra Respondent no. 9, Respondent no. 10 Respondent no. 6 Respondent no. 9 The Petitioner claimed that inadvertently he uttered Chishti in place of Khilji, but there is no relation between these two historical figures. Khwaja Chishti came to India in 1136 when Md. Ghori was defeated by Prithvi Raj Chauhan for the first time in the battle of Tarain. Whereas, Khiljis ruled in India from 1290 to 1320. So Khilji and Khwaja Chishti were neither contemporaries nor related to each other.45 Apology by the Petitioner was an afterthought. It came only after the registration of FIR.46 The petitioner did not apologize initially and let the followers of Khwaja Chishti be outraged, in order to gain popularity.47 The two persons, whose credentials the petitioner

has mentioned in the petition, to press that the members of the community have forgiven him, is false. These two people as TV personalities and nowhere represent the devotees of Khwaja Chishti.48 FIR need not have an encyclopaedia of the event. Even if only material facts have been disclosed, it is enough to continue with criminal proceedings.49 Respondent no. 9 I.A. by Haji Syed Chisti, Khadim of Dargah; Respondent no. 9, I.A. by Haji Syed Chisti, Khadim of Dargah; Respondent no. 9, Respondent no. 9 Respondent no. 9 Some communal elements in Maharashtra, after the broadcast of the utterances by the Petitioner, used this opportunity and started circulating this video to spread hatred. 50 Article 19(1)(a) of the Constitution is subject to express limitations under Article 19(2) of the Constitution. The police should be permitted to file report under Section 173 of the Criminal Code and court should frame the charges. Then only the petitioner would get the opportunity to defend himself in the court.51 Section 19 of the Cable TV (Regulation) Act prohibits cable TV network to broadcast any content that promotes hate or ill will. 52 The broadcast was throughout the nation and thus cause of action arose in Ajmer too, where the intervener resides and serves as khadim to Dargah of Khwaja Chishti.

Respondent no. 5, State of Uttar Pradesh, 53 reiterated the facts of the FIR lodged at the instance of informant Amish Devgan. Also, it has been mentioned that one FIR which was filed in Jabalpur against the Petitioner Amish Devgan was transferred by Jabalpur police to Gautam Budhh Nagar.

State of Rajasthan54 submitted:

> (a) apology tendered by the petitioner would not dilute the offence. Also, it was after 30 hours of the broadcast of the show.

Respondent no. 9 Respondent no. 9 and Respondent no. 6 I.A. by Sajid Noormohammad Sheikh r/o Nashik, Maharashtra sworn by DSP/ ASST. Commissioner, Noida Respondent no. 3

(b) Allegations and counter allegations of facts are matter of trial.

(c) Transfer all FIRs to Ajmer as one of the FIRs is there, and matter also relates to Ajmer.

State of Telangana55 submitted:

> (a) Complainants/informants came to the P.S. Bahadurpura, Hyderabad and made a complaint that the petitioner has dishonoured Khwaja Chishti.
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> (b) As per State of Orissa v. Saroj Kumar Sahoo,56 probabilities of prosecution version cant be denied at the early stages.
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> (c) Normal course of investigation cannot be cut-short in casual manner. Also, the accused has a remedy under 482 of the Criminal Code.

The Show and Debate

11. Before we examine the first prayer, we must take notice of the fact that the transcript filed by the petitioner with the original writ petition and the amended writ petitions is not the true and correct transcript. As per these transcripts the petitioner is stated to have only uttered the words Akranta Chishti came... Lootera Chishti came after then religion changed. However, in the transcript filed by the petitioner on 8th July, 2020, it is accepted that the petitioner had used the words Akranta Chishti not once but twice. This is the Respondent no. 4 (2005) 13 SCC 540 correct version. The petitioner accepts that the topic of debate was relating to the challenge posed by a Hindu priest organisation to the Places of Worship (Special Provisions) Act, 1991, according to which the de facto position of religious places as on 15 th August, 1947 could not be changed or altered, though Ayodhya was kept out of the ambit of the Act, and this petition was opposed by a Muslim organisation stating that if notice is issued there would be widespread fear among the Muslim community. After the prelude initiating the debate, the petitioner, as per the transcript, had stated Today, this will be the key issue of the debate... Ayodhya Verdict delivered, Why Kashi-Mathura issue left unresolved?... asking Hindu Priests!. The petitioner as per the transcript had then declaimed:

> Now analyse the legal position of Kashi Mathura issue...Hindu Priest organisation has reached Supreme Court against Places of Worship (Special Provisions) Act, 1991...According to this Act of 1946, the de facto position of any religious place could not be altered in any condition...According to Act a mosque could not be changed into temple or a temple could not be changed into mosque...This is impossible...The Ayodhya issue was out of this ambit as it was already in litigation. The Ayodhya issue was 100 year old dispute...The priest organisation says that Places of Worship (Special Provisions) Act, 1991 is against the Hindus...Today we are not debating the issue of Kashi or Mathura...we are debating the Places of Worship (Special Provisions) Act, 1991...What changes should be made in this Act?...if the arguments of Hindu Priests to be believed.

12. We must also at this stage itself reproduce portions of the debate, including the portion which the petitioner seeks to rely upon:

> I dont want to make this debate a hot topic between Hindu-Muslim community...I would like to discuss the provisions of this Act...First, I am going to ask questions to Mahant Naval Kishore Das Ji...Naval ji...Why do you want a change to the provisions of this Act?...The indication is clear...Ayodhya Jhanki Hai...Mathura Kashi Baaki Hain...This was the slogan of RSS, VHP and BJP...
>
> xx xx xx Atiq-Ur-Rehman: Amish Ji, Im welcoming your statements that you said you dont want the Hindu- Muslim saga on the matter. And I pay respect to Mahant Ji as well. He put his thoughts in a well- behaved manner. The Mahant Ji raised the question; a mole in the thiefs beard (darta wo hai jinki dadi me tinka hota hai).
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> xx xx xx
>
> Amish Devgan:

Point Number-2: You have said that with a clever step...Atiq-Ur-Rehman Ji Ive listened your statement, you talked around 2-2½ inutes. You said that the verdict on the Ayodhya case came on the board cleverly. But, I want to refresh your memory; in the year of 1991-92 when there had the slogan for the Ayodhya in the air the Sant Samaj, VHP, Rashtriya Swayamsevak Sangh and authentic persons of the Hindu Samaj used to say Ayodhya jhanki hai, Kashi-Mathura baki hai.

So the demand is very old. The wish is too old. But when the Ayodhyas wish was fulfilled then definitely after that verdict you are raising the question on your own ways. That is your take. Now Im moving to Dr. Sudhandhu Trivedi, Jamiat Ulema-e-Hind are saying that if these types of petitions to be heard then thee will be a danger to the Muslim worship places.

xx xx xx Amish Devgan: Dr. Trivedi, you made your point. Im moving to Maulana Ali Kadri, he is senior guy. Kadri Sahab; Im asking you straight. The Saints/Pujaris/ Purohits/Mahants have a constitutional right that they file the writ in the Supreme Court against the 1991 Act. And they have right to talk about the Kashi and Mathura. But, if there is the Dukan is the convcern, Dar ki Dukan to pahle hi khol di. In that petition had said if there was a notice on it the Muslims would feel that their worship places were not safe. They feel fear. Jamiat Ulema-e-Hinds petition says then who is opening the Dar ki Dukan. The Dar ki Dukan has already opened. This is the constitutional right?

xx xx xx Amish Devgan: Ali Qadri Sahab, why the Jamiat Ulema- e-Hind is hiding its failure? Why the organisation is saying that there will be a fear in the Muslims for their worship places due to the notice? If you want to show Dr. Sudhandhu Trivedis partys failure and wish to expose the RSS and VHP, then please tell in 20 seconds.

xx xx xx Amish Devgan: Mr. Vinod Bansal, there is a symbol of Om is showing behind you. Om, the symbol of peace. But Maulana Ali Kadri is saying; you want to spread Ashanti. You have defeated by corona and now seeking a base from the Mathura-Kashi issues. After these issues you will raise the Jama Masjid matter and Taj Mahal will be in your hit list.

xx xx xx Amish Devgan: Then how the Kashi-Mathura issue came into limelight?

Vinod Bansal: There is clearly written that the 1947s status to be maintained. Despite of that why the properties had transferred to the Waqf Board in a large level? Waqf Board asked properties on the name of Mazars, Mosques and Graveyards several times. Is all the things are belong to their father (Ye sara inka, inke Baap ka hai?) This is not the right way.

The first thing is, if the law had implemented, it should complete in a shape.

And the second one is...is it not true that thousands of the Hindu temples had demolished? The Hindu had converted and humiliated in a large scale. There should be needed to rectify the historical wrongs. Why they are trying to escape from the reality.

Amish Devgan: The historical wrong should rectify. Though several historians said the Eidgah and Krishan Janam Bhoomi in Mathura are situated adjacent to each other. Several historians claimed that in the 17 th century emperor Aurangzeb had demolished a temple and had built a mosque on the very same place. VHPs Giriraj Kishor also said the same thing that on the place where the mosque is situated in Mathura, the Lord Krishnan had birthed on the same place. Besides that, he said several things. Now I want to move to Shadab Chauhan. He wishes to say something. Please go ahead.

Shadab Chauhan: Peace Party pay respect to the Constitution of India and the social harmony. So, we have filed the curative petition for the justice. Now we will talk about Kashi and Mathura. After defeating from the coronavirus, government is trying to divert the nations attention by raising the issue of Kashi and Mathura.

And now Im saying with the challenge that there should not be any nanga-nach like the 1992, on the name of worship place. We respect the 1991 law. I deeply said that my elder brother Sudhanshu Trivedi Ji said, that the temples which had built after August 15, 1947, will be removed. Are you talking about demolishing the temples? The Ram Mandir which will be constructed, have you will demolish it as well?

And the second thing is, the Ram Mandir verdict came on basis of the faith and we are not satisfied with the decision. So we moved to the court. This is the matter of justice not of any religions issue. Now we will not allow any goon to insult the saffron colour. The terror was made with demolishing the Babri Masjid.

Amish Devgan: What you said? Repeat it. The insult of the saffron colour...we...any...what did you say? Shadab Chaudhary: Listen...insult of the saffron colour. We dont allow any goon to demolish any worship place and dont allow kill the innocents.

Amish Devgan: No...You cant say goons to the Sant Samaj. I objected completely. Shadab Chauhan you said a wrong thing. You said Indias Sant Sama/Purohit- Pande of the country are goons.

Mahant Nawal Kishor Das: These people should apologise. You invite such people for the debate? They didnt pay respect to their ancestors too. Due to the fear they converted in the other religion.

Shadab Chauhan: They are goons.

xx xx xx Amish Devgan: You are wrong...we do not have any problem with Muslims...we do not have problems with Abdul Kalam, we do not have problem with Dara Shikoh but yes...we do have problem with AURANGZEB...being a Hindustani we should have problems with Aurangzeb.

xx xx xx

Maulan Qadri: I will answer Sudhandhu

Sahab...Sudhanshu has said that the Ram Mandir decision was not merely based on faith...A few days before today, Shivlinga got excavated there, after that I do not want to name anything else and there was an idol of someone there...So it should be decided if there was a Ram temple or Jain temple, it can be disseminated to you...the excavation says another story...if talk about name of Shadab Chauhan or anybody else...we are proud to said that after Khawaja Moinuddin Chisti...a lot of Indians converted to Islam and saw Moinuddins execution and converted to Islam by seeing his life...but not all the Muslims who are in India are converts.

Amish Devgan: Maulana sahib, you took the name of Chishti...Now tell me, you are in todays age, after watching Donald Trump, he is a Christian, you will not change your religion, will not change religion after seeing Prime Minister Narendra Modis religion...

xx xx xx Maulana Ali Qadri: Seeing the implementation of Khwaja Moinuddin Chishti...Seeing the Talimat of Islam that all live together, there is no inferiority...Seeing Moinuddins life, people accepted Islam...

Amish Devgan: Dr. Sudhanshu Trivedi...Akranta Chishti came...Akranta Chisti came...Lootera Chishti came after then religion changed.

Maulana Qadri: No man accepted Islam at the edge of the sword...He became a Muttasir from Islam and accepted Islam by liking the teachers of Islam...I would like to say that to you...

xx xx xx Amish Devgan: Vinod ji, I got your point...Why Jamiat is creating fear mongering among Muslim community...Jamiat is creating false perception that their place of worship is closing...

xx xx xx Ateeq-ur-Rehman: Amish lets discuss the Act only...in the beginning of the show, you mentioned that Hindu- Muslim slugfest should not happen...We are adhere to this...Vinod Bansal is now saying that 1991 Acts provision should be discussed again...Is it not insult to Parliament...The Act was passed in Parliament when BJP was also present in the House...Why they have not discussed this issue before Ram Mandir verdict...Why they were silent...

Vinod Bansal: This case was in consideration before Ram Mandir issue.

Ateeq-ur-Rehman: Amish ji...Mahant ji talking about Hindu pride...What about Buddhist pride...

xx xx xx Amish Devgan: I am stopping for break Sudhanshu ji Sudhanshu ji I am staying for break but on public demand, Shadab Chauhan will apologize after the break...I will go to Shadab Chauhan after the break...He will apologize to the whole saint society...I am coming back after the break and if he dont apologise, he will have to get out of this debate.

xx xx xx Amish Devgan: Yes or no...I am not giving a chance to say yes or no...You will either apologize, your audio will open. If you do not apologize, I will say thank you...Thank you for

coming...

Shadab Chauhan: The son of the farmer says that he... Amish Devgan: The son of a farmer is not a matter of a son of a farmer, it is a matter of saints...

Shadab Chauhan: I leave the debate...They are goons, they are goons...Those who fight in the name of religion are goons...

Amish Devgan: I will not ask for forgiveness...keep shouting I do not matter...I will not ask for forgiveness... Shadab Chauhan: No...Farmers son wont apologise. Amish Devgan: So get out again...You get this person out of debates...Turn off the audio of this...I never say that to any guest...But you spoke derogatory words...Show this person show a full frame...You are a foolish man...Open the audio, what is he saying... Shadab Chauhan: And but goons will be called goons... Amish Devgan: Apologise to the saint community... Shadab Chauhan: I respect all religions but goons will be called goons...

Amish Devgan: Same respect for all religions, everybody spoke about religion...Nobody called anything derogatory to Jamiat Ulema Hind...No one spoke...The saints who are putting up a social petition would be called goons...goons?..

Shadab Chauhan: There are hooligans who break religious places...There are goons who break the Constitution are goons who destroy the Constitution... Amish Devgan: Shut up and get out. You are out...You are not fit to sit in this debate. You are out...Turn these out. Turn off the audio. Keep eating the minds of your family...get out of here...I am asking you Qadri sahib...the words used by Shadab Chauhan, were they wrong or right?

Maulana Ali Qadri: See...the use of such derogatory words for any religion is not approved by me or by anybody...

Amish Devgan: Thanks.

Maulana Qadri: It is necessary to respect the Guru of any religion. I believe it to be yours and it is a request from you also that do not use the word Islamic terrorism...because terror has no religion...

xx xx xx Amish Devgan: Thank you very much...Mahant ji, I am sorry, I will not be able to give more time than this...Thank you very much...for keeping your point in our discussion...Finally, I will always I conclude... But in conclusion today, I want to say something that we should respect all religions...But many people wrote that Shadab Chauhan should not be called in this debate, such people are abusive...See we cant judge people on the basis of their face...He had done wrong...we put him out of debate...but it is very important to boycott such people...and thats why we boycotted them in this debate...Namaskar... A. First Prayer Whether the FIRs should be quashed?

(i) Cause of Action

13. We reject the contention of the petitioner that criminal proceedings arising from the impugned FIRs ought to be quashed as these FIRs were registered in places where no cause of action arose. Section 179 of the Criminal Code provides that an offence is triable at the place where an act is done or its consequence ensues. It provides:

> 179. Offence triable where act is done or consequence ensues: When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued. The debate-show hosted by the petitioner was broadcast on a widely viewed television network. The audience, including the complainants, were located in different parts of India and were affected by the utterances of the petitioner; thus, the consequence of the words of the petitioner ensued in different places, including the places of registration of the impugned FIRs.

Further, clause (1) of Section 156 of the Criminal Code provides that any officer in-charge of a police station may investigate any cognizable case which a court having jurisdiction over the local limits of such station would have the power to inquire into or try. Thus, a conjoint reading of Sections 179 and 156 (1) of the Criminal Code make it clear that the impugned FIRs do not suffer from this jurisdictional defect.

(ii) Defence of causing slight harm

14. The petitioner has relied upon the decision of this Court in Veeda Menez and the decision of the High Court of Delhi in Neelam Mahajan to plead the defence of trifle under Section 95 of the Penal Code. We are not inclined at this stage to entertain this defence of the Petitioner. Section 95 is intended to prevent penalisation of negligible wrongs or offences of trivial character. Whether an act, which amounts to an offence, is trivial would undoubtedly depend upon the evidence collated in relation to the injury or harm suffered, the knowledge or intention with which the offending act was done, and other related circumstances. These aspects would be examined and considered at the appropriate stage by the police during investigation, after investigation by the competent authority while granting or rejecting sanction or by the Court, if charge-sheet is filed. The present case cannot be equated with either Veeda Menez or Neelam Mahajans case where the factual matrix was undisputed and admitted. It would be wrong and inappropriate in the present context to prejudge and pronounce on aspects which are factual and disputed. The content by itself without ascertaining facts and evidence does not warrant acceptance of this plea raised by the petitioner. The defence is left open, without expressing any opinion.

(iii) 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 Councils 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 Europes 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 Miltons 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 trust, 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 Schenek 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

21. Michel Rosenfeld in his essay 63 states that primary function of free speech has taken different forms in four historical stages. The first stage, dating back to the War of Independence, established protection of people against the government as the dominant function of free speech. In the second stage, as democracy became entrenched in the USA, free speech was meant to protect proponents of unpopular views against the tyranny of the majority. Stage three, panning between mid-1950s to 1980s when there was widespread consensus on essential values, saw the main function of free speech shift from lifting restraints on speakers to ensuring that listeners remain open-minded. Finally, with the rise of alternative discourses such as feminist and critical race theories attacking mainstream and official speech as inherently oppressive, the primary role of free speech became the protection of oppressed and marginalised discourses against the hegemony of discourses of the

powerful. Accordingly, there are suggestions that imminent lawless action fails to take into consideration and is prone to undermine the autonomy or self-respect of those whom the hate speech targets. Critics emphasise on the threat posed by unconstrained speech by the hegemony of dominant discourses at the expense of discourses of others, which as a result may only Hate Speech in Constitutional Jurisprudence: A Comparative Analysis by Michel Rosenfeld, 24 Cordozo L. Rev. 1523 2002-2003 exacerbate the others humiliation and denial of self-respect and autonomy. Counter approach reflects on the impact of hate speech on target and non-target audiences. The targeted audiences could experience anger, fear, concern and alienation. The non-targeted audiences may have different experiences from reversion to mixed emotions to downright sympathy for the substance of the main hate message, if not the form. This has long-term effects even on the non-targeted audiences, as even when they do not agree, they tend to accept as normal the message of hate over a period of time.

22. The Canadian jurisprudence on the subject proceeds on the basis of inviolability of human dignity as its paramount value and specifically limits the freedom of expression when necessary to protect the young and the right to personal honour. Canadian approach emphasises on multiculturalism and group equality, as it places greater emphasis on cultural diversity and promotes the idea of ethnic mosaic. The Canadian Supreme Court in James Keegstra had upheld the criminal conviction of a high school teacher for anti-Semitic propaganda on the ground that it amounts to wilful promotion of hatred against a group identifiable on the basis of colour, race, religion or ethnic origin. It was observed as under:

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged;

and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. The Canadian position, therefore, considers the likely impact of hate speech on both the targeted groups and non-targeted groups. The former are likely to be degraded and humiliated to experience injuries to their sense of self-worth and acceptance in the larger society and may well, as a consequence, avoid contact with members of the other group within the polity. The non-targeted members of the group, sometimes representing society at large, on the other hand, may gradually become de-sensitised and may in the long run start accepting and believing the messages of hate directed towards racial and religious groups. These insidious effects pose serious threats to social cohesion rather than merely projecting immediate threats to violence. Dixon, C.J., in Canada (Human Rights Commission) v. Taylor,64 had observed:

> ...messages of hate propaganda undermine the dignity and self-worth of targeted group members and, more generally, contribute to disharmonious (1990) 3 SCR 892 relations among various racial, cultural and religious groups, as a result eroding the tolerance and open mindedness that must flourish in a multicultural society which is committed to the idea of equality.

23. Saskatchewan (Human Rights Commission) had laid down three tests to determine whether an expression could qualify as hate speech or not. First, courts must apply the hate speech prohibitions objectively by applying the test of a reasonable person. Secondly, the legislative term hatred or hatred or contempt must be interpreted to mean the extreme form of the emotions, i.e. detestation and vilification. Thirdly, the effect of the expression on the targeted group should be determined by the Court. Canadian laws attempt to restrict false and discriminatory statements that are likely to lead to breach of peace. In R. v. Zundel the Court observed that publishing and spreading false news that was known to be false is likely to cause injury to public interest and multiculturalism.

24. In Australia, the position of law is substantially aligned with that in Canada. The Australian Federal Court, in the case of Pat Eatock v. Andrew Bolt65 followed the dictum in Keegstra in holding that the right to freedom of expression could be restricted vide legislation which made racial hatred a criminal offence. The (2011) FCA 1103 Federal Court quoted with approval the observations in Keegstra that had examined and rejected the underlying rationale theory, to hold:

(a) The justification from pursuit of truth does not support the protection of hate propaganda, and may even detriment our search for truth. The more erroneous or mendacious a statement, the less its value in the quest of truth. We must not overemphasise that rationality will overcome all falsehoods.

(b) Self-fulfilment and autonomy, in a large part, come from ones ability to articulate and nurture an identity based on membership in a cultural or religious group. The extent to which this value furthers free speech should be modulated insofar as it advocates an intolerant and prejudicial disregard for the process of individual self-development and human flourishing.

(c) The justification from participation in democracy shows a shortcoming when expression is employed to propagate ideas repugnant to democratic values, thus undermining the commitment to democracy. Hate propaganda argues for a society with subversion of democracy and denial of respect and dignity to individuals based on group identities.

25. The South African position regards dignity as paramount constitutional value and the law and the courts are willing to subjugate freedom of expression when the latter sufficiently undermines the former. The constitutional provision, therefore, enjoins the legislature and the court to limit speech rights and the exercise of those rights which deprive others of dignity.

26. The position in the United Kingdom has shifted over the years from reinforcing the security of the government to checking incitement to racial hatred among non-target audience with the aim of protecting targets against racially motivated harassment. The Race Relations Act, 1965 makes it a crime to utter in public or publish words which are threatening, abusive or insulting and which are intended to incite hatred on the basis of race, colour or national origin. The Act focuses on incitement to hatred rather than incitement to violence but requires proof of intent for conviction. It also distinguishes between free speech and protects expression of political position but checks and criminalises illegal promotion of hate speech on basis of race, colour or national origin. 66 Hate Speech in Constitutional Jurisprudence: A Comparative Analysis by Michel Rosenfeld, 24 Cordozo

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27. Germany, on the other hand, and by contrast, believes that freedom of expression is one amongst several rights which is limited by principles of equality, dignity and multiculturalism. Further, value of personal honour always triumphs over the right to utter untrue statements or facts made with the knowledge of their falsity. If true statements of fact invade the intimate personal sphere of an individual, the right to personal honour triumphs over the freedom of speech. If such truth implicates the social sphere, the court once again resorts to balancing. Finally, if the expression of opinion as opposed to a fact constitutes a serious affront to the dignity of a person, the value of person however triumphs over the speech. But if damage to reputation is slight, then again, the outcome of the case will depend on careful judicial balancing. Therefore, German application strikes a balance between rights and duties, between the individual and the community and between the self-expression needs of the speaker and the self- respect and dignity of the listeners. It recognises the content- based speech regulation. It also recognises the difference between fact and opinion.67 See Hate Speech in Constitutional Jurisprudence: A Comparative Analysis by Michel Rosenfeld, 24 Cardozo L. Rev. 1523 2002-2003.

28. The United States and France saw birth of democracy vide 18 th century revolutions that strove to guarantee rights to individuals. However, the situations were quite different. In France, the revolution sought to limit, if not abolish the prerogatives of rich and powerful catholic church. The French Parliament defined religious freedom in individual terms and in August, 1789 adopted the declaration des Droits de lHomme et du Citoy en, which declared no one may be disturbed for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law. In 1905, Declaration of Laïcité, freedom of conscience, the freedom to believe or not believe, was enshrined in the Constitution. The principle recognises freedom to practice religion, in private or in public, as long as the manifestation of the practice does not disturb the peace. The State guarantees equality to all citizens regardless of their philosophical or religious conviction as all persons are born and remain free and equal in right. Everyone is free to express their own particular convictions and adhere to it. Laïcité confederates and reinforces the unity of the nation by bringing citizens together by adhering to values of the republic which includes the right to accept differences. 68 In accordance with the Declaration for Laïcité Observatoire de la laicite (Republique Francaise) above principle, the French recognise and accept the right to offend as an essential corollary to freedom of expression which should be defended or upheld by other means, than by causing an offence. France does have hate speech laws against racism and xenophobia, which includes anti-religious hate crimes, to protect groups and individuals from being defamed or insulted on the ground of nationality, race, religion, ethnicity, sex, sexual orientation, gender identity or because they have a handicap. However, the French law gives primacy to freedom of expression, which it believes is meaningless without the right to offend, which would to some not only include the right to criticise and provoke but also the right to ridicule when it comes to ideas and beliefs, including religious beliefs.

29. Andrew F. Sellars, in his essay Defining Hate Speech 69 has examined the concept of hate speech in different democratic jurisdictions, and refers to attempts to define hate speech by scholars and academics, including Mari J. Matsuda, Mayo Moran, Kenneth D. Ward, Susan Benesch, Bhikhu

Parekh and others. The Author has formulated common traits in defining hate speech observing that this would be helpful and relevant in considering Andrew F. Sellers, Defining Hate Speech, published by Berkman Klein Center for Internet & Society at Harvard University how the society should respond. These can be categorised as follows:

(a) Hate speech targets a group, or an individual as a member of the group. The word group has been traditionally used with reference to historically oppressed, traditionally disadvantaged or minority, but some prefer not to look for a defined group but to see whether the speaker targets someone based on an arbitrary or normatively irrelevant feature. The expression group would include identification based upon race, ethnicity, religion, gender, sexual orientation, sexual identity, appearance, physical ability, etc.;

(b) Content of the message should express hatred. Hostility towards a group in the spoken words reflects the intent of the speaker. One should be able to objectively identify the speech as an insult or threat to the members of the targeted group, including stigmatising the targeted group by ascribing to it qualities widely disregarded as undesirable;

(c) Speech should cause harm, which can be physical harm such as violence or incitement and true threats of violence and can include deep structural considerations caused by silent harm because of the victims desperation that they cannot change the attribute that gives rise to hatred. The speech could permeate and impact the victims relationship with others, cause denial of oneself and result in structural harms within the society;

(d) Intent of the speaker to cause harm or other bad activity to most is an essential feature of hate speech. In some statutes it can be even tacit inherent component. However, what the speaker should intend to constitute hate speech is subject to varied positions. Intent may refer to non-physical aspects like to demean, vilify, humiliate, or being persecutorial, disregarding or hateful, or refer to physical aspects like promoting violence, or direct attacks. However, speakers can lie about their intent not only to others but to themselves. Intent may be disguised and obscured;

(e) Speech should incite some other consequence as a result of the speech. Incitement could be of non-physical reactions such as hatred, or physical reactions such as violence. Certain jurisdictions require that the incitement should be imminent or almost inevitable and not too remote;

(f) Context and occasion of the speech is important. This requirement means looking into the factors such as the power of the speaker, place and occasion when the speech was made, the receptiveness of the audience and the history of violence in the area where the speech takes place. It requires examination whether the statement was made in the public to the view of the targeted group as an undesirable presence and a legitimate object of hostility. In certain contexts, at home speeches may themselves amount to hate speeches as the said speeches are now uploaded and circulated in the virtual world through internet etc.; and lastly

(g) Speech should have no redeeming purpose, which means that the speech primarily carries no meaning other than hatred towards a particular group. This is necessarily subjective and requires

examination of good faith and good motives on the part of the speaker. No legitimate purpose principle being abstract has difficulties, albeit is well documented. Good faith and no legitimate purpose exclusions are accepted as a good exception. C. Decisions of this Court and High Courts interpreting Article 19(1)(a) and 19(2) of the Constitution, and Sections 153A, 295A and clause (2) of Section 505 of the Penal Code

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 Modis 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 petitioners 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 Bhalerao, 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 Niharendus 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 elutriated that criticism and comments on governments action in howsoever 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 Niharendus 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 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.

36. In Madhu Limaye v. Sub-Divisional Magistrate, Monghyr and Others,70 a seven Judge Constitution Bench of this Court has rejected challenge to the constitutional validity of Section 144 and Chapter VIII of the Code of Criminal Procedure, 1873 holding that the impugned provisions properly understood were not in excess of the limits laid down in the Constitution for restricting the freedoms guaranteed under Article 19(1) clauses (a), (b), (c) and

(d). The Constitution Bench was required to interpret clauses (2), (3), (4) and (5) to Article 19 and whether the provision under challenge when interpreted would be protected in the sense that they would fall within the interest of ..public order occurring in clauses (2), (3) and (4) and interest of.. general public occurring in (1970) 3 SCC 746 clause (5). Noticing that the phrase in the interest of public order, enacted with retrospective effect vide the First Amendment in 1951, has been interpreted as expanding the scope of restrictions, which was earlier restricted to aggravated activities calculated to endanger the security of the State only, reference was made to the decision in Dr. Ram Manohar Lohia which had also quoted judgments of the Supreme Court of the United States in which it had been held that public order is synonymous with public peace, safety and tranquillity. Hidayatullah, C.J., however, observed that 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. Public order no doubt requires absence of disturbance of state of serenity in society but goes further and means ordre publique, a French term which means absence of insurrection, riot, turbulence or cry of violence. The expression public disorder includes all acts which endanger the security of the State as also acts which are comprehended by the expression ordre publique but not acts which disturb only the serenity of others. 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. Interpreting the requisites of Section 144, it was held that it was meant and concerned with power with the State to free the society from the menace

of serious disturbances of grave character, that is to say that the annoyance must assume sufficiently grave proportions to bring the matter within the interest of public order. Rejecting the contention that the language of Section 144 was overbroad, reference was made to Section 188 of the Penal Code to hold that mere disobedience of the order is not sufficient to constitute an offence; there must be in addition obstruction, annoyance, or danger to human life, health or safety or a riot or an affray for an offence to me made out under the penal provision. Thus, the offence under Section 188 of the Penal Code is restricted and confined by the legislative mandate. The general order under Section 144 is justified on the ground that it may be necessary when number of persons is so large that distinction between them and general public cannot be made without the risk mentioned in the section. A general order is thus justified, and if the action is too general, the order may be questioned by appropriate remedy provided in the Criminal Code.

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.

38. In Shreya Singhal, this Court has struck down Section 66A of the Information Technology Act on various grounds, including unreasonableness of the restriction, absence of requirements of clause (2) to Article 19, including public order; having chilling effect and over-breadth; vagueness etc. Referring to the public order aspect of clause (2) of Article 19 and the reasonable restriction mandate, it was observed that they connote limitation on a person in enjoyment of the right, and should not be arbitrary and excessive in nature, beyond what is required by the specific clause applicable in the said case. Reference was made to several judgments, including Chintaman Rao v. State of Madhya Pradesh,71 State of Madras v. V.G. Row,72 N.B. Khare (Dr.) v. State of Delhi73 and Mohammed Faruk v. State of Madhya Pradesh and Others,74 to hold that the reasonable restriction test must be satisfied both in substantive and in procedural aspects. This test of reasonableness should be applied to each individual impugned statute, as no abstract standard or general pattern of reasonableness is applicable to all cases. Reasonableness always AIR 1951 SC 118 AIR 1952 SC 196 AIR 1950 SC 211 (1969) 1 SCC 853 has reference to evil sought to be remedied and requires examination of the proportion of the imposition.

39. In Shreya Singhal, to exposit the public order stipulation in clause (2) of Article 19, reference was made to Arun Ghosh v. State of West Bengal75 wherein the test as laid down in Dr. Ram Manohar Lohia was applied to hold that 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. Disturbance of public order is to be distinguished from the acts directed against individuals which do not disturb the society to the extent of causing general disturbance of public tranquillity. This was explained by way of examples:

> 3…Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different…

(1970) 1 SCC 98 …It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique… In Arun Ghosh, it was held that a line of demarcation has to be drawn between serious and aggravated forms of breaches of public order which affect life of the community or forms of breaches of public order which endanger the public interest at large, from minor breaches of peace which do not affect the public at large. Acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity do not subvert public order, but are law and order issues. Referring to Dr. Ram Manohar Lohias case, it was observed that similar acts in different context may affect law and order in one case and public order in the other. It is always the degree of harm and its effect on the community. 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.

40. In Anuradha Bhasin v. Union of India and Others,76 this Court, while dealing with the suspension of internet services in the area of Jammu and Kashmir in the background of public order and security concerns, interpreted the term reasonable under clause (2) of Article 19 of the Constitution. It was expounded as under:

> 37. The right provided under Article 19(1) has certain exceptions, which empower the State to impose reasonable restrictions in appropriate cases. The ingredients of Article 19(2) of the Constitution are that:

(a) The action must be sanctioned by law;

(b) The proposed action must be a reasonable restriction;

(c) Such restriction must be in furtherance of interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

38. At the outset, the imposition of restriction is qualified by the term reasonable and is limited to situations such as interests of the sovereignty, integrity, security, friendly relations with the foreign States, public order, decency or morality or contempt of court, defamation or incitement to an offence. Reasonability of a restriction is used in a qualitative, quantitative and relative sense.

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]

41. The second prong of the test, wherein this Court is required to find whether the imposed restriction/ prohibition was least intrusive, brings us to the question of balancing and proportionality. These concepts are not a new formulation under the Constitution. In various parts of the Constitution, this Court has taken a balancing approach to harmonise two competing rights. In Minerva Mills Ltd. v. Union of India and Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.], this Court has already applied the balancing approach with respect to fundamental rights and the directive principles of State policy.

41. Anuradha Bhasins case refers to the principle of proportionality as formulated by this Court in Modern Dental College and Research Centre and Others v. State of Madhya Pradesh and Others77 in the following words:

(2016) 7 SCC 353 ...a limitation of a constitutional right will be constitutionality permissible if: (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (proportionality stricto sensu or balancing) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right. Subsequently, the principle was reiterated in the Aadhaar judgment reported as Justice K. S. Puttasamy v. Union of India (2).78 We need not elaborate on this principle in view of the limited controversy involved in the present case, albeit the formulation recognises the benefit and need for least intrusive measure when it comes to curtailment of fundamental rights and for this purpose the court can examine the reasonableness of the measures undertaken and whether they are necessary, in that there are no alternatives measures that can achieve the same purpose with a lesser degree of restriction. Secondly, there has to be proper proportionality or balance between the importance of achieving the proper measure and social importance of preventing the limitation on the constitutional right.

(2017) 10 SCC 1

42. The expression reasonable restriction has been elucidated in numerous decisions which have been quoted in Subramanian Swamy v. Union of India and Others79 to connote that the restriction cannot be arbitrary or excessive and should possess a direct and proximate nexus with the object sought to be achieved. Sufficient for our purpose would be reproduction of the observations of P.N. Bhagwati, J. (as His Lordship then was) in Maneka Gandhi v. Union of India80 wherein he had referred to the authority in Rustom Cowasjee Cooper v. Union of India81 and Bennett Coleman & Co. v. Union of India,82 to observe:

20. It may be recalled that the test formulated in R.C.

Cooper case merely refers to direct operation or direct consequence and effect of the State action on the fundamental right of the petitioner and does not use the word inevitable in this connection. But there can be no doubt, on a reading of the relevant observations of Shah, J., that such was the test really intended to be laid down by the Court in that case. If the test were merely of direct or indirect effect, it would be an open-ended concept and in the absence of operational criteria for judging directness, it would give the Court an unquantitiable discretion to decide whether in a given case a consequence or effect is direct or not. Some other concept-vehicle would be needed to quantify the extent of directness or indirectness in order to apply the test. And that is supplied by the criterion of inevitable consequence or effect adumbrated in the Express Newspapers case. This criterion helps to quantify the extent of directness necessary to constitute infringement of a (2016) 7 SCC 221 (1978) 1 SCC 248 (1970) 2 SCC 298 (1972) 2 SCC 788 fundamental right. Now, if the effect of State action on fundamental right is direct and inevitable, then a fortiori it must be presumed to have been intended by the authority taking the action and hence this doctrine of direct and inevitable effect has been described by some jurists as the doctrine of intended and real effect.

43. The decisions in Rustom Cowasjee Cooper and Maneka Gandhi are also relevant for our purpose as they have considered the interrelation between the rights enshrined in Article 21, Article 14 and Article 19 and had made a departure from the majority view in A.K. Gopalan v. State of Madras83 to hold that these freedoms contained in Part III shade and merge into each other and are not watertight compartments. They weave a pattern of guarantees on the basic structure of human rights and impose negative obligations on the State not to encroach on individual liberty in its different dimensions. The rights under Part-III are wide ranging and comprehensive, though they have been categorised under different heads, namely, right to equality, right to freedom of expression and speech, right against exploitation, right to freedom of religion, cultural and educational rights, and right to constitutional remedies. Each freedom has a different dimension and merely because the limits of interference with one freedom are satisfied, the law is not free from the necessity to meet the challenge of another AIR 1950 SC 27 guaranteed freedom. Secondly, in Maneka Gandhi, it was held that the expression personal liberty in Article 21 is of the widest amplitude and it covers a variety of rights which go on to constitute the personal liberty of a man, though some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Article 21 does not exclude Article 19 or vice-versa, or for that matter the right to equality under Article 14 of the Constitution. Thus, Part III of the Constitution is expansive and its connotative sense carries a collection or bouquet of highly cherished rights. In Subramanian Swamy, this Court referred to Charu Khurana and Others v. Union of India and Others84 wherein it has been ruled that dignity is the quintessential quality of personality and a basic constituent along with honour and reputation of the rights guaranteed and protected under Article 21. 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 (2015) 1 SCC 192 dignity as a part of Article 21 have their own significance. The aforesaid proposition has been reiterated by Dr. D.Y. Chandrachud, J., in India Young Lawyers Association and Others (Sabarimala Temple, In RE.) v. State of Kerala and Others,85 which decision refers to the four precepts which emerge from the Preamble, namely, justice, in its social, economic and political dimensions; individual liberty in the matter of thought, expression, belief, faith and worship; equality of status and opportunity amongst all citizens; and sense of fraternity amongst all citizens that assures the dignity of human life. Individual dignity can be achieved in a regime which recognises equality with other citizens regardless of ones 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. Constitutional interpretation must bring a sense of equilibrium- a balance, so that read individually and together, the provisions of the Constitution exist in a contemporaneous accord. Thus, effort should be made to have synchrony between different parts of the Constitution and different rights should be interpreted together so that they exist in harmony. Freedoms elaborated in Part III are (2019) 11 SCC 1 exercised within the society which are networked. Freedoms, therefore, have linkages which cannot be ignored. In Subramanian Swamy, this Court had referred to a compendium of judgments dwelling on balancing of fundamental rights when the right of a citizen comes in conflict with a different fundamental right also granted by the Constitution as each citizen is entitled to enjoy each and every one of the freedoms together and the

Constitution does not prefer one freedom to another. In Ram Jethmalani and Others v. Union of India and Others,86 this Court has observed that rights of citizens under Article 19(1) have to be balanced against the rights of citizens and persons under Article 21 and the latter rights cannot be sacrificed as this would lead to detrimental consequences and even anarchy. Constitutional rights no doubt very important, possibly are not made absolute as they may come into conflict with each other and when competing they have to be qualified and balanced. In Noise Pollution (V), In Re.87 it was observed that Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21 as if one claims to right to speech, the others have the right to listen or decline to listen. A person speaking cannot violate the rights of (2011) 8 SCC 1 (2005) 5 SCC 733 others of peaceful, comfortable and pollution free right guaranteed by Article 21.

44. Right to equality enshrined in Article 14 is recognition that the principle of equality is inherent in the rule of law. In the positive sense, it means absence of any privilege for particular individuals and in the negative sense, no one can be discriminated against; and anybody and everybody should be treated as equals. The latter is the essence and core of right to equality and imposes obligation on the State to take necessary steps so that every individual is given equal respect and enjoys dignity as others, irrespective of caste, creed, religion, identity, sexual preference etc. Right to equality is embodied not only in Article 14, but also finds different manifestations in Articles 15 to 18 of Part III, and Articles 38, 39, 39A, 41 and 46 of Part IV. Thus, right to equality has many facets, and is dynamic and evolving.88

45. It is not only the Preamble and Articles 14, 21 and others referred to above which affirms the right to dignity of the individual. Clause

(e) to Article 51A, which incorporates fundamental duties, states that it will be the obligation of every citizen to promote harmony and the spirit of common brotherhood amongst all the people of Indira Sawhney v. Union of India, (1992) Supp. 3 SCC 217 and Amita v. Union of India, (2005) 13 SCC 721 India, transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women. Clause (f) states that we must value and preserve the rich heritage of our composite culture.

46. At this stage, it is necessary to clarify what is meant by the expression dignity in the context of hate speech for an expansive meaning, if given, would repress and impede freedom to express views, opine and challenge beliefs, ideas and acts. Dignity, in the context of criminalisation of speech with which we are concerned, refers to a persons basic entitlement as a member of a society in good standing, his status as a social equal and as bearer of human rights and constitutional entitlements. 89 It gives assurance of participatory equality in inter-personal relationships between the citizens, and between the State and the citizens, and thereby fosters self-worth.90 Dignity in this sense does not refer to any particular level of honour or esteem as an individual, as in the case of defamation which is individualistic. The Supreme Court of the United States of America in Beauharnais v. Illinois,91 while upholding conviction for hate speech, had emphasised that such speech should amount to group defamation which though See Pat Eatock v. Andrew Bolt ONeill at (160) (161) and Hill v. Church of Scientology of Toronto, (1995) 2 S.C.R. 1130 (117) and 343 U.S. 250 (1952) analogous to individual defamation has been traditionally excluded from free speech protection in

America. Loss of dignity and self- worth 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 affects an individual as a member of a group. 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. Manzar Sayeed Khan, taking note of the observations in Bilal Ahmad Kaloo, records that common features of Sections 153A and 505(2) being promotion of feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes or communities, involvement of at least two groups or communities is necessary. Further, merely inciting the feeling of one community or group without any reference to any other community or group would not attract either provision. Definition of hate speech as expounded by Andrew F. Sellars prescribes that hate speech should target a group or an individual as they relate to a group.

47. Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the nation. 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 individuals 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. Such threats not only insidiously weaken virtue and superiority of diversity, but cut-back and lead to demands depending on the context and occasion, for suppression of freedom to express and speak on the ground of reasonableness. 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.

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 speakers 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 hateful speech: A primer of the legal landscape 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.

49. On the aspect of content, Ramesh states that the effect of the words must be judged from the standard of reasonable, strongminded, firm and courageous men and not by those who are weak and ones with vacillating minds, nor of those who scent danger in every hostile point of view. The test is, as they say in English Law, the man on the top of a Clapham omnibus. Therefore, to ensure maximisation of free speech and not create free speakers 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. It is almost akin or marginally lower than the prudent mans test. The test of reasonableness involves recognition of boundaries within which reasonable responses will fall, and not identification of a finite number of acceptable reasonable responses. Further, 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.

50. Richard Delgado93 has proposed a definition of hate speech as language that was intended to demean a group which a reasonable person would recognise as a racial insult. Mari J. Matsuda94 has referred to hate speech as a message of racial inferiority, prosecutorial, hateful and degraded. Kenneth Ward 95 has analysed hate speech as a form of expression, through which the speaker primarily intends to vilify, humiliate or incite hatred against their targets. As explained below, content has relation with the subject-matter, but is not synonymous with the subject-matter. Content has more to do with the expression, language and Words that Wound: A tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.- C.L.L.rev. 133 (1982) Public Response to Racist Speech: Considering the Victims Story, 87 Mich.L.Rev. 2320 (1989) Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag Burning and Hate Speech, 52 U.Miami K. Rev. 733 (1998) message which should be to vilify, demean and incite psychosocial hatred or physical violence against the targeted group.

51. The context, as indicated above, has a certain key variable, namely, who and what is involved and where and the occasion, time and under what circumstances the case arises. The who is always plural for it encompasses the speaker who utters the statement that constitutes hate speech and also the audience to whom the statement is addressed which includes both the target and the others. Variable context review recognises that all speeches are not alike. This is not only because of group affiliations, but in the context of dominant group hate speech against a vulnerable and discriminated group, and also the impact of hate speech depends on the person who has uttered the words.96 The variable recognises that 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. Latter may be driven by anger, emotions, wrong perceptions or mis-information. This may affect their intent. Impact of their speech Hate Speech in Constitutional Jurisprudence: A Comparative Analysis by Michel Rosenfeld, 24 Cardozo L. Rev. 1523 2002-2003 would be mere indifference, meet correction/criticism by peers, or sometimes negligible to warrant attention and hold that they were likely to incite or had attempted to promote hatred, enmity etc. between different religious, racial, language or regional groups. Further, certain categories of speakers may be granted a degree of latitude in terms of the State response to their speech. 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. In such a situation, it is likely for persons from these communities to reject the tenet of civility, as polemical speech and symbols that capture the emotional loading can play a strong role in mobilising. 97 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. Nevertheless, such speech Myra Mrx Ferree, William A. Gamson, Jurgen Gerhards and Dieter Rucht, Four Models of the Public Sphere in Modern Democracies, published in THEORY AND SOCIETY, Vol. 31, No. 3 (June, 2002), pp. 289-324 should not provoke and incite as distinguished from discussion or advocacy hatred and violence towards the targeted group. Likelihood or similar statutory mandate to violence, public disorder or hatred when satisfied would result in penal action as per law. Every right and indulgence has a limit. Further, when the offending act creates public disorder and violence, whether alone or with others, then the aspect of who and question of indulgence would lose significance and may be of little consequence.

52. Persons of influence, keeping in view their reach, impact and authority they yield on general public or the specific class to which they belong, owe a duty and have to be more responsible. They are expected to know and perceive the meaning conveyed by the words spoken or written, including the possible meaning that is likely to be conveyed. With experience and knowledge, they are expected to have a higher level of communication skills. It is reasonable to hold that they would be careful in using the words that convey their intent. The reasonable-mans test would always take into consideration the maker. In other words, the expression reasonable man would take into account the impact a particular person would have and accordingly apply the standard, just like we substitute the reasonable mans test to that of the reasonable professional when we apply the test of professional negligence. 98 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.

53. Further, the law of hate speech recognises that all speakers are entitled to good faith and (no)-legitimate purpose protection. Good faith means that the conduct should display fidelity as well as a conscientious approach in honouring the values that tend to minimise insult, humiliation or

intimidation. The latter being objective, whereas the former is subjective. The important requirement of good faith is that the person must exercise prudence, caution and diligence. It requires due care to avoid or minimise consequences. Good faith or no-legitimate purpose exceptions would apply with greater rigour to protect any genuine In Bolam v. Friern Hospital Management Committee, [1957] 2 All E.R. 118, it was observed:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art...Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. academic, artistic, religious or scientific purpose, or for that matter any purpose that is in public interest, or publication of a fair and accurate report of any event or matter of public interest. 99 Such works would get protection when they were not undertaken with a specific intent to cause harm. These are important and significant safeguards. They highlight importance of intention in hate speech adjudication. Hate speech has no redeeming or legitimate purpose other than hatred towards a particular group. A publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention. However, opinions may not reflect mala fide intention.

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 Racial and Religious Tolerance, 2001 (Victoria, Australia) 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 governments 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. The Constitutional Bench decision of this Court in Kedar Nath Singh and the subsequent decisions have clearly and uniformly held that there is difference between government established by law and persons for the time being engaged in carrying on administration and that comment or criticism of the government action in howsoever strong words must be protected and cannot be a ground to take penal action unless the words written or spoken, etc. have pernicious tendency or intention of creating public disorder. Without exciting those feelings which generate inclination to cause public disorder by acts of violence, political views and criticism cannot be made subject matter of penal action. Reference to later decision in Arun Ghosh drawing distinction between serious and aggravated from of breaches of public order that endanger public peace and minor breaches that do not affect public at large would be apposite. In consonance with the constitutional mandate of reasonable restriction and doctrine of proportionality in facts of each case it has to be ascertained whether the act meets the top of Clapham omnibus test and whether the act was likely to lead to disturbance of the current life of the community so as to amount to disturbance of public order; or it may affect an individual or some individuals leaving the tranquillity of the society undisturbed. The latter and acts excluded on application of the top of Clapham omnibus test are not covered. Therefore, anti-democratic speech in general and political extremist speech in particular, which has no useful purpose, if and only when in the nature of incitement to violence that creates, or is likely to create or promotes or is likely to promote public disorder, would not be protected.

55. Sometimes, difficulty may arise and the courts and authorities would have to exercise discernment and caution in deciding whether the content is a political or policy comment, or creates or spreads hatred against the targeted group or community. This is of importance and significance as overlap is possible and principles have to be evolved to distinguish. We would refer to one example to illustrate the difference. Proponents of affirmative action and those opposing it, are perfectly and equally entitled to raise their concerns and even criticise the policies adopted even when sanctioned by a statute or meeting constitutional scrutiny, without any fear or concern that they would be prosecuted or penalised. However, penal action would be justified when the speech proceeds beyond and is of the nature which defames, stigmatises and insults the targeted group provoking violence or psychosocial hatred. The content should reflect hate which tends to vilify, humiliate and incite hatred or violence against the target group based upon identity of the group beyond and besides the subject matter.

56. Our observations are not to say that persons of influence or even common people should fear the threat of reprisal and prosecution, if they discuss and speak about controversial and sensitive topics relating to religion, caste, creed, etc. Such debates and right to express ones views is a protected and cherished right in our democracy. Participants in such discussions can express divergent and sometimes extreme views, but should not be considered as hate speech by itself, as subscribing to such a view would stifle all legitimate discussions and debates in public domain. Many a times, such discussions and debates help in understanding different view-points and bridge the gap. Question is primarily one of intent and purpose. Accordingly, good faith and no legitimate purpose exceptions would apply when applicable.

57. On the aspect of truth or true facts, reference can be made to the decision of this Court in K.A. Abbas, which pertained to the documentary called A Tale of Four Cities portraying contrast between the lives of rich and poor in the four principal cities of the country. The challenge was to the grant of certificate for exhibition restricted to adults. It was observed that audience in India can be expected to view with equanimity the different historical facts and stories. There is no bar in showing carnage or bloodshed which have historical value and depiction of such scenes as the sack of Delhi by Nadir Shah may be permissible, if handled delicately as a part of an artistic portrayal of confrontation with Mohd. Shah Rangila. Clearly, the restrictions were not to be reduced to the level where the protection to the least capable and the most deprived amongst us would be applicable. In Ebrahim Suleiman Sait v. M. C. Mohammed and Another,100 it was observed that speaking the truth was not an answer to the charge of corrupt practice and what was relevant was whether the speech had promoted or had sought to promote feelings of enmity or hatred. The likelihood must be judged from healthy and reasonable standard thereby accepting the position that historical truth may be a relevant and important factor. However, the historical truth must be depicted without in any way disclosing or encouraging hatred or enmity between different classes or communities. In Lalai Singh Yadav and (1980) 1 SCC 398 Another v. State of Uttar Pradesh,101 the Allahabad High Court had observed that the book written by Dr. B. R. Ambedkar throwing light on the oppression and exploitation of Dalits and suggesting conversion to Buddhism was couched in a restrained language and did not amount to an offence. Rational criticism of religious tenets, wis acceptable as legitimate criticism, is not an offence for no reasonable person of normal susceptibilities would object to it. In Ramesh, challenge to the serial Tamas was rejected on the ground that it was an instructive serial revealing an evil facet of history within permissible extent of examination even if it depicted pre-partition communal tension and violence. A hurt, which is a product of a benevolent intent, may incite negative attitudes to the victim but would fall short of criminal hurt, i.e. hatred. Watching the bloodshed that accompanied partition, the average person will learn from the mistakes of the past and realise the machinations of the fundamentalists and will not perhaps commit those mistakes again. Knowledge of tragic experiences of the past would help fashion our present in a rational and reasonable manner and view our future with wisdom and care. Quoting Lord Morley, Mukharji, J. noted in paragraph 20:

20...It has been said by Lord Morley in On Compromise that it makes all the difference in the 1971 Cri LJ 1773 (FB) (Allahabad) world whether you put truth in the first place or in the second place. It is true that a writer or a preacher should cling to truth and right, if the very heavens fall. This is a universally accepted basis. Yet in practice, all schools alike are forced to admit the necessity of a measure of accommodation in the very interests of truth itself. Fanatic is a name of such ill-repute, exactly because one who deserves to be so called injures good causes by refusing timely and harmless concession; by irritating prejudices that a wiser way of urging his own opinion might have turned aside; by making no allowances, respecting no motives, and recognising none of those qualifying principles that are nothing less than necessary to make his own principle true and fitting in a given society. Judged by all standards of a common man's point of view of presenting history with a lesson in this film, these boundaries appear to us could (sic to) have been kept in mind. This is also the lesson of history that naked truth in all times will not be beneficial but truth in its proper light indicating the evils and the consequences of those evils is instructive and that message is there in Tamas according to the views expressed by the two learned Judges of the High Court. They

viewed it from an average, healthy and commonsense point of view. That is the yardstick. There cannot be any apprehension that it is likely to affect public order or it is likely to incite into (sic) the commission of any offence. On the other hand, it is more likely that it will prevent incitement to such offences in future by extremists and fundamentalists." It should also be noted that contrary to the positivist claim of singularity and absoluteness of truth, it may, in actuality, be a subjective element, making it one persons relative truth over anothers. Cultural value system, historical experiences, lived realities of social systems and hierarchies all these are determinants in how an individual perceives the truth to be. George Bernard Shaw has said that our whole theory of freedom of speech and opinion for all citizens rests not on the assumption that everybody was right, but on the certainty that everybody was wrong on some point on which somebody else was right, so that there was a public danger in allowing anybody to go unheard. 102 Many so-called truths have been rectified and corrected because they were disputed scientifically or economically, socially and politically. One should not rule out possibility of divergency between truth and popular belief or even situations that are described as epistemological problem of the post truth era, which is not that people do not value truth, but some may believe and accept falsehoods.103 Nevertheless, in many ways, free speech has empowered those who were marginalised and discriminated and thus it would be wholly incorrect and a mistake to assume that free speech is an elite concept and indulgence.

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 George Bernard Shaw, Socialism off Millionaires, 16(1901) Joseph Blocher, Free Speech and Justified True Belief, Harvard Law Review, Vol. 133, No.2, December 2019.

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 makers instigation is required. This aspect has been examined subsequently while interpreting the penal provisions.

59. We have repeatedly referred to the word tolerance, and noted that the expression who refers to both the speaker and the targeted audience; and will subsequently refer to the ratio of the Calcutta High Court judgment in P.K. Chakravarty v. The King,104 that something must be known of the kind of people to whom the words are addressed. Similarly, in paragraph 49, we have observed that

a tolerant society is entitled to expect tolerance as they are bound to extend to others. The expression tolerance is, therefore, important, yet defining it is problematic as it has different meanings. We need not examine the philosophies or the meanings in detail, and would prefer to quote Article 1 from the Declaration of Principles of Tolerance by the Member States of the United Nations Educational, Scientific and Cultural Organisation adopted in its meeting in Paris at the 28th session of the General Conference, which reads as under:

> Article 1 - Meaning of tolerance 1.1 Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.

AIR 1926 Cal. 1133 1.2 Tolerance is not concession, condescension or indulgence. Tolerance is, above all, an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others. In no circumstance can it be used to justify infringements of these fundamental values. Tolerance is to be exercised by individuals, groups and States.

1.3 Tolerance is the responsibility that upholds human rights, pluralism (including cultural pluralism), democracy and the rule of law. It involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments. 1.4 Consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that ones views are not to be imposed on others. 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 ones ability to judge the beliefs and actions of others. 105 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 Internet Encyclopaedia of Philosophy, Toleration by Andrew Fiala, ISSN 2161-0002 no lack of commitment to ones own belief but rather it condemns oppression or persecution of others. 106 Interpreted in this sense, there is no paradox of toleration. 107 The paradox whether those who express their views or activities that are themselves intolerant should be tolerated is answered by making evaluative judgment predicated on rational universal principles. 108 The test accepts rational argument principle to keep intolerant philosophies in check. Thus, tolerance is not to accept things that are better to overcome,109 or when practices reflect intolerance within themselves, like disregard for human rights and principles of equality and fraternity. Further, there may even be unjustified religious beliefs in relation to morality, politics, origin of humanity, social hierarchies, etc. which should not be tolerated. 110 The argument can also be grounded on comprehensive moral

theory. 111 Tolerance also means developing an overlapping consensus between individuals and groups with diverse perspectives to find John F. Kennedy Karl Popper in The Open Society and Its Enemies, who has observed:

> ...If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them... According to Martin Packer, at least since Immanuel Kant and David Hume, morality has been seeing as needing to take the form of rational, universal principles that would guide the autonomous individual. These principles would necessarily transcend the many dictates of specific societies and cultures; the dictates are contingent while morality and the good must be universally compelling.

Marjoka Van Doorn, the Nature of Tolerance and the Social Circumstances in Which it Emerges, Current Sociology Review, 2014, Vol. 62(6) 905-927 Sam Hariss, The End of Faith Michael Sandel Democracys Discontent (1998) reason to agree about certain principles of justice. 112 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.

(iv) Interpretation of the statutory provisions

60. We would now interpret Section 153A of the Penal Code, which reads as under:

> 153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony. (1) Whoever
>
> (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or John Rawls, Theory of Justice (1971). Rawls idea of justice as fairness is based upon principle that justice is political and not necessarily on moral principles.

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or

(c) organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity, for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both. Offence committed in place of worship, etc. (2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

61. In the present case, we are not concerned with clause (c) to sub-

> section (1) to Section 153A and hence we would not examine the same. Section 153A has been interpreted by this court in Manzar Sayeed Khan and Balwant Singh and other cases. It would be, however, important to refer to the legislative history of this Section as the same was introduced by the Indian Penal Code (Amendment) Act, 1898 on the recommendation of the Select Committee. The Section then enacted had referred to words, spoken or written, or signs or visible representation or other means that promote or attempt to promote feeling of enmity or hatred between different classes of citizens of India which shall be punished with imprisonment that may extend to two years or fine or with both. The explanation to the said Section was as under:
>
> Explanation. It does not amount to an offence within the meaning of this section to point out without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce, feelings of enmity or hatred between different classes of Her Majestys subjects. The original enacted Section was amended with clauses (a) and (b) by the Criminal Law (Amendment) Act, 1969 and clause (c) was subsequently inserted by the Criminal Law (Amendment) Act, 1972.113
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> 62. The Calcutta High Court in P.K. Chakravarty had delved into the question of intention and had observed that the intention as to whether or not the person accused was promoting enmity is to be collected from the internal evidence of the words themselves, but this is not to say that other evidence cannot be looked into.

The Wounded Vanity of Governments in Republic of Rhetoric: Free Speech and the Constitution of India by Abhinav Chandrachud, Penguin Books India (2017) Likewise, while examining the question of likelihood to promote ill-

> feelings the facts and circumstances of that time must be taken into account. Something must be known of the kind of people to whom the words are addressed. Words will be generally decisive, especially in those cases where the intention is expressly declared if the words used naturally, clearly or indubitably have such tendency. Then, such intention can be presumed as it is the natural result of the words used. However, the words used and their true meaning are never more than evidence of intention, and it is the real intention of the person charged that is the test. The judgment rejects the concept of constructive intention. Similarly, the Lahore High Court in Devi Sharan Sharma had observed that intention can be deduced from internal evidence of the words as well as the general policy of the paper in which the concerned article was published, consideration of the person for whom it was written and the state of feeling between the two communities involved. In case the words used in the article are likely to produce hatred, they must be presumed to be intended to have that effect unless the contrary is shown. The Bombay High Court in Gopal Vinayak Godse has observed that the intention to promote enmity or hatred is not a necessary ingredient of the offence. It is enough to show that the language of the writing is of the nature calculated to promote feelings of enmity or hatred, for a person must be presumed to intend the natural consequences of his act. The view expressed by the Bombay High Court in Gopal Vinayak Godse lays considerable emphasis on the words itself, but the view expressed in P.K. Chakravarthy and Devki Sharma take a much broader and a wider picture which, in our opinion, would be the right way to examine whether an offence under Section 153A, clauses (a) and (b) had been committed. The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter or what is implied in that matter or what is inferred from it. A particular imputation is capable of being conveyed means and implies it is reasonably so capable and should not be strained, forced or subjected to utterly unreasonable interpretation. We would also hold that deliberate and malicious intent is necessary and can be gathered from the words itself-
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> satisfying the test of top of Clapham omnibus, the who factor-
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> person making the comment, the targeted and non targeted group, the context and occasion factor- the time and circumstances in which the words or speech was made, the state of feeling between the two communities, etc. and the proximate nexus with the protected harm to cumulatively satiate the test of hate speech.

Good faith and no legitimate purpose test would apply, as they are important in considering the intent factor.

63. In Balwant Singh this Court had accepted that mens rea is an essential ingredient of the offence under Section 153A and only when the spoken or written words have the intention of creating public disorder for disturbance of law and order or affect public tranquillity, an offence can be said to be committed. This decision was relied on in Bilal Ahmed Kaloo114 while referring to and interpreting sub-section (2) to Section 505 of the Penal Code. Similarly, in Manzar Sayeed Khan, the intention to

promote feeling of enmity or hatred between different classes of people was considered necessary as Section 153A requires the intention to cause disorder or incite the people to violence. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published.

64. In the context of Section 153A(b) we would hold that public tranquillity, given the nature of the consequence in the form of punishment of imprisonment of up to three years, must be read in a restricted sense synonymous with public order and safety and not normal law and order issues that do not endanger the public Bilal Ahmed Kaloo was overruled on a different point in Prakash Kumar Alias Prakash Bhutto v. State of Gujarat, (2005) 2 SCC 409 interest at large. It cannot be given the widest meaning so as to fall foul of the requirement of reasonableness which is a constitutional mandate. Clause (b) of Section 153A, therefore, has to be read accordingly to satisfy the constitutional mandate. We would interpret the words public tranquillity in clause (b) would mean ordre publique a French term that means absence of insurrection, riot, turbulence or crimes of violence and would also include all acts which will endanger the security of the State, but not acts which disturb only serenity, and are covered by the third and widest circle of law and order. Public order also includes acts of local significance embracing a variety of conduct destroying or menacing public order. Public Order in clause (2) to Article 19 nor the statutory provisions make any distinction between the majority and minority groups with reference to the population of the particular area though as we have noted above this may be of some relevance. When we accept the principle of local significance, as a sequitur we must also accept that majority and minority groups could have, in a given case, reference to a local area.

65. Section 295A and clause (2) of Section 505 of the Penal Code reads as under:

295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

xx xx xx

505. Statements conducing to public mischief. xx xx xx (2) Statements creating or promoting enmity, hatred or ill-will between classes. Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both. The two provisions have been interpreted earlier in a number of cases including Ramji Lal Modi, Kedar Nath, Bilal Ahmed Kaloo. It could be correct to say that Section 295A of the Penal Code encapsulates of all three elements, namely, it refers to the content-based element when it refers to words either spoken or

written, or by signs or visible representation or otherwise. However, it does not on the basis of content alone makes a person guilty of the offence. The first portion refers to deliberate and malicious intent on the part of the maker to outrage religious feeling of any class of citizens of India. The last portion of Section 295A refers to the harm-based element, that is, insult or attempt to insult religions or religious belief of that class. Similarly, sub- section (2) to Section 505 refers to a person making publishing or circulating any statement or report containing rumour or alarming news. Thereafter, it refers to the intent of the person which should be to create or promote and then refers to the harm-based element, that is, likely to create or promote on the ground of religion, race, place of birth, residence, language, cast, etc., feeling of enmity, hatred or ill-will between different religions, racial language, religious groups or castes or communities, etc.

66. In Bilal Ahmad Kaloo, this Court had drawn a distinction between sub-section (2) to Section 505 and clause (a) to Section 153A of the Penal Code observing that publication is not necessary in the latter while it is sine qua non under clause (2) of Section 505. Clause (2) of Section 505 of the Penal Code cannot be interpreted disjunctively and the words whosoever makes, publishes or circulates are supplemented to each other. The intention of the legislature in providing two different sections of the same subject vide single amending act would show that they cover two different fields of same colour.

67. Clauses (a) and (b) to sub-section (1) to Section 153A of the Penal Code use the words promotes and likely respectively. Similarly, Section 295-A uses the word attempts and sub-section (2) to Section 505 uses the words create or promote. Word likely as explained above, in our opinion, convey the meaning, that the chance of the event occurring should be real and not fanciful or remote (Tillmanns Butcheries Pty Ltd. v. Australasian Meat Industry Employees Union115). The standard of not improbable is too weak and cannot be applied as it would infringe upon and fall foul of reasonable restriction and the test of proportionality. This is the mandate flowing from the catena of judgments of the Constitutional Benches which we have referred to earlier and also the decision in Shreya Singhal drawing distinction between advocacy, discussion and incitement and that only the latter, i.e. the incitement, is punishable whereas the former two would fall within the domain of freedom to express and convey ones thoughts and ideas. Incitement is a restricted term under the American Speech Law which has been adopted by us and as per Brandenburg applies when the incitement is imminent or almost (1979) 27 ALR 380 inevitable. There has been some criticism that the said test is too strong, nevertheless, it conveys that the standard has to be strict. Instigation must necessarily and specifically be suggestive of the consequences. Sufficient certainty to incite the consequences must be capable of being spelt out to be incitement. Further, it is for the prosecution to show and establish that the standard has been breached by leading evidence, which can be both oral and documentary. Promote does not imply mere describing and narrating a fact, or giving opinion criticising the point of view or actions of another person it requires that the speaker should actively incite the audience to cause public disorder. This active incitement can be gauged by the content of the speech, the context and surrounding circumstances, and the intent of the speaker. However, in case the speaker does not actively incite the descent into public disorder, and is merely pointing out why a certain person or group is behaving in a particular manner, what are their demands and their point of view, or when the speaker interviews such person or group, it would be a passive delivery of facts and opinions which may not amount to promotion.

68. The word attempt, though used in Sections 153-A and 295-A of the Penal Code, has not been defined. However, there are judicial interpretations that an attempt to constitute a crime is an act done or forming part of a series of acts which would constitute its actual commission but for an interruption. An attempt is short of actual causation of crime and more than mere preparation. In Aman Kumar v. State of Haryana,116 it was held that an attempt is to be punishable because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. Further, in State v. Mohd. Yakub,117 this Court observed:

> 13...What constitutes an attempt is mixed question of law and fact depending largely upon the circumstances of a particular case. "Attempt" defies a precise and exact definition. Broadly speaking all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage he makes preparation to commit it. The third stage is reached when the culprit takes deliberate overt act or step to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence... (2004) 4 SCC 379 (1980) 3 SCC 57.

On the scope of proximity, it was elucidated that the measure of proximity is not in relation to time and place but in relation to intention.

In the context of hate speech, including the offences related to promoting disharmony or feelings of enmity, hatred or ill-will, and insulting the religion or the religious beliefs, it would certainly require the actual utterance of words or something more than thought which would constitute the content. Without actual utterance etc. it would be mere thought, and thoughts without overt act is not punishable. In the case of publication, again a mere thought would not be actionable, albeit whether or not there is an attempt to publish would depend on facts. The impugned act should be more than mere preparation and reasonably proximate to the consummation of the offence, which has been interrupted. The question of intent would be relevant. On the question of the harms element, same test and principle, as applicable in the case of likely would apply, except for the fact that for intervening reasons or grounds public disorder or violence may not have taken place.

69. Having interpreted the relevant provisions, we are conscious of the fact that we have given primacy to the precept of interest of public order and by relying upon imminent lawless action principle, not given due weightage to the long-term impact of hate speech as a propaganda on both the targeted and non-targeted groups. This is not to undermine the concept of dignity, which is the fundamental foundation on the basis of which the citizens must interact between themselves and with the State. This is the considered view of the past pronouncements including the Constitution Bench judgments with which we are bound. Further, a hate speech meeting the criteria of clear and present danger or imminent lawless action would necessarily have long-term negative effect. Lastly,

we are dealing with penal or criminal action and, therefore, have to balance the right to express and speak with retaliatory criminal proceedings. We have to also prevent abuse and check misuse. This dictum does not, in any way, undermine the position that we must condemn and check any attempt at dissemination of discrimination on the basis of race, religion, caste, creed or regional basis. We must act with the objective for promoting social harmony and tolerance by proscribing hateful and inappropriate behaviour. This can be achieved by self-restraint, institutional check and correction, as well as self-regulation or through the mechanism of statutory regulations, if applicable. It is not penal threat alone which can help us achieve and ensure equality between groups. Dignity of citizens of all castes, creed, religion and region is best protected by the fellow citizens belonging to non-targeted groups and even targeted groups. As stated earlier, in a polity committed to pluralism, hate speech cannot conceivably contribute in any legitimate way to democracy and, in fact, repudiates the right to equality.

70. Majority of the cases referred to by the petitioner were cases wherein after charge-sheet and trial, this Court had come to the conclusion that no offence had been proved and established under Section 153A, 295A or sub-section (2) to Section 505 of the Penal Code. We do not deem it necessary to reproduce the facts of those decisions and apply their ratio in the present case. However, we would like to refer to judgments where this Court has at the initial stage itself quashed the proceedings arising out of the FIR, namely, Manzar Sayeed Khan, Mahendra Singh Dhoni, Ramesh as well as Balwant Singh to clarify the ratio.

71. In Balwant Singh, this Court, allowing the appeal, had set aside convictions under Sections 124A and 153A of the Penal Code. While we are not concerned with Section 124A, this Court significantly observed that the appellants were never leading a procession or raising slogans with the intent to incite people, indicating that the Court did take into account the who factor as the appellants were unknown and inconsequential. This is of consequence as far as Section 153A of the Penal Code is concerned. Both the content and context, given the occasion, were highly incriminating and possibly warranted conviction, but as per paragraphs 10 and 11, the court was not convinced that the prosecution witnesses had spoken the whole truth and what slogan(s) was/were actually shouted. Lastly, the harm effect or impact was also taken into account. What is acceptable speech in one case, it could be well argued, should be acceptable in another, and therefore the ratio in Balwant Singh must be applied with caution as the decision had proceeded on failure of the prosecution. The who factor as a variable had weighed with the court. Besides there was no impact or harm.

72. Manzar Sayeed Khan was a case wherein the appellants had published a book titled Shivaji: Hindu King in Islamic India authored by Prof. James W. Laine, a Professor of Religious Studies in Macalester College, United States of America, which had led to registration of FIR against the Indian Publisher and a Sanskrit scholar whose name had appeared in the acknowledgement of the book for having helped the author by providing him some information during the latters visit to Pune.

The primary reason according to us why the appeal was allowed and the proceedings arising from the FIR were quashed at the initial stage are reflected in paragraph 19 of the judgment which notes that the author was a well-known scholar who had done extensive research before publishing the book. Further, he had relied upon material and records at Bhandarkar Oriental Research Institute

(BORI), Pune. It was highly improbable to accept that any serious and intense scholar like the author would have any desire or motive to involve himself in promoting or attempt to promote any disharmony between communities, castes or religions within the State. Good faith and (no) legitimate purpose principle was effectively applied. These principles were also applied by this Court in Ramesh holding that the T.V. Serial Tamas did not depict communal tension or violence to fall foul of Section 153A of the Penal Code and/or was the serial prejudicial to national integration to fall under Section 153B of the Penal Code. Reliance was also placed on the test of Clapham omnibus referred to above. Mahendra Singh Dhoni was a case in which prosecution under Section 295A was initiated by filing a private complaint on the ground that the photograph of the well-known cricketer, as published in the magazine, was with a caption God of Big Things. It was obvious that prosecution on the basis of content was absurd and too farfetched by any standards even if we ignore the intent or the hurt element.

(v) Validity of First Information Reports (FIRs)

73. Acronym FIR, or the First Information Report, is neither defined in the Criminal Code nor is used therein, albeit it refers to the information relating to the commission of a cognisable offence. This information, if given orally to an officer in-charge of the police station, is mandated to be reduced in writing. Information to be recorded in writing need not be necessarily by an eye-witness, and hence, cannot be rejected merely because it is hearsay. Section 154 does not mandate nor is this requirement manifest from other provisions of the Criminal Code. Further, FIR is not meant to be a detailed document containing chronicle of all intricate and minute details. In Dharma Rama Bhagare v. State of Maharashtra,118 it was held that an FIR is not even considered to be a substantive piece of evidence and can be only used to corroborate or contradict the informants evidence in the court.

74. In Lalita Kumari, a Constitution Bench, of five judges of this Court, has held that Section 154 of the Criminal Code, in unequivocal (1973) 1 SCC 537 terms, mandates registration of FIR on receipt of all cognisable offences, subject to exceptions in which case a preliminary inquiry is required. The petitioner has not contended that the present case falls under any of such exceptions. Conspicuously, there is a distinction between arrest of an accused person under Section 41 of the Criminal Code and registration of the FIR, which helps maintain delicate balance between interest of the society manifest in Section 154 of the Criminal Code, which directs registration of FIR in case of cognisable offences, and protection of individual liberty of those persons who have been named in the complaint. The Constitution Bench referring to the decision of this Court in Tapan Kumar Singh reiterated that the FIR is not an encyclopaedia disclosing all facts and details relating to the offence. The informant who lodges the report of the offence may not even know the name of the victim or the assailant or how the offence took place. He need not necessarily be an eye-witness. What is essential is that the information must disclose the commission of a cognisable offence and the information must provide basis for the police officer to suspect commission of the offence. Thus, at this stage, it is enough if the police officer on the information given suspects though he may not be convinced or satisfied that a cognisable offence has been committed. Truthfulness of the information would be a matter of investigation and only there upon the police will be able to report on the truthfulness or otherwise. Importantly, in Tapan Kumar Singh, it was held that even if information does not furnish

all details, it is for the investigating officer to find out those details during the course of investigation and collect necessary evidence. Thus, the information disclosing commission of a cognisable offence only sets in motion the investigating machinery with a view to collect necessary evidence, and thereafter, taking action in accordance with law. The true test for a valid FIR, as laid down in Lalita Kumari, is only whether the information furnished provides reason to suspect the commission of an offence which the police officer concerned is empowered under Section 156(1) of the Criminal Code to investigate. The questions as to whether the report is true; whether it discloses full details regarding the manner of occurrence; whether the accused is named; or whether there is sufficient evidence to support the allegation are all matters which are alien to consideration of the question whether the report discloses commission of a cognisable offence. As per clauses (1)

(b) and (2) of Section 157 of the Criminal Code, a police officer may foreclose an FIR before investigation if it appears to him that there is no sufficient ground to investigate. At the initial stage of the registration, the law mandates that the officer can start investigation when he has reason to suspect commission of offence. Requirements of Section 157 are higher than the requirements of Section 154 of the Criminal Code. Further, a police officer in a given case after investigation can file a final report under Section 173 of the Criminal Code seeking closure of the matter.

(vi) Conclusion and relief

75. At this stage and before recording our final conclusion, we would like to refer to decision of this Court in Pirthi Chand wherein it has been held:

> 12. It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the FIR/charge-sheet/ complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognizable offence. After the investigation is conducted (sic concluded) and the charge-sheet is laid, the prosecution produces the statements of the witnesses recorded under Section 161 of the Code in support of the charge-sheet. At that stage it is not the function of the court to weigh the pros and cons of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-

compliance. It would be done after the trial is concluded. The court has to prima facie consider from the averments in the charge-sheet and the statements of witnesses on the record in support thereof whether court could take cognizance of the offence on that evidence and proceed further with the trial. If it reaches a conclusion that no cognizable offence is made out, no further act could be done except to quash the charge- sheet. But only in exceptional cases, i.e., in rarest of rare cases of mala fide initiation of the proceedings to wreak private vengeance [issue of process under Criminal Procedure Code is availed of. A reading of a complaint or FIR itself does not disclose at all any cognizable offence the court may embark upon the consideration thereof and exercise the power.

13. When the remedy under Section 482 is available, the High Court would be loath and circumspect to exercise its extraordinary power under Article 226 since efficacious remedy under Section 482 of the Code is available. When the court exercises its inherent power under Section 482, the prime consideration should only be whether the exercise of the power would advance the cause of justice or it would be an abuse of the process of the court. When investigating officer spends considerable time to collect the evidence and places the charge-sheet before the court, further action should not be short-circuited by resorting to exercise inherent power to quash the charge-sheet. The social stability and order requires to be regulated by proceeding against the offender as it is an offence against the society as a whole. This cardinal principle should always be kept in mind before embarking upon exercising inherent power. The accused involved in an economic offence destabilises the economy and causes grave incursion on the economic planning of the State. When the legislature entrusts the power to the police officer to prevent organised commission of the offence or offences involving moral turpitude or crimes of grave nature and are entrusted with power to investigate into the crime in intractable terrains and secretive manner in concert, greater circumspection and care and caution should be borne in mind by the High Court when it exercises its inherent power. Otherwise, the social order and security would be put in jeopardy and to grave risk. The accused will have field day in destabilising the economy of the State regulated under the relevant provisions. The aforesaid ratio was followed by this Court in O.P. Sharma.

76. In Arnab Ranjan Goswami, this Court in almost identical circumstances had refused to examine the question whether the proceedings arising out of the FIR filed against a journalist should be quashed in exercise of jurisdiction under Article 32 of the Constitution on the ground that the petitioner must be relegated to pursue equally efficacious remedies under the Criminal Code, observing:

> 49. We hold that it would be inappropriate for the court to exercise its jurisdiction under Article 32 of the Constitution for the purpose of quashing FIR 164 of 2020 under investigation at the NM Joshi Marg Police Station in Mumbai. In adopting this view, we are guided by the fact that the checks and balances to ensure the protection of the petitioner's liberty are governed by the CrPC. Despite the liberty being granted to the petitioner on 24 April 2020, it is an admitted position that the petitioner did not pursue available remedies in the law, but sought instead to invoke the jurisdiction of this Court. Whether the allegations contained in the FIR do or do not make out any offence as alleged will not be decided in pursuance of the jurisdiction of this Court under Article 32, to quash the FIR. The petitioner must be relegated to the pursuit of the remedies available under the CrPC, which we hereby do. The petitioner has an equally efficacious remedy available before the High Court. We should not be construed as holding that a petition under Article 32 is not maintainable. But when the High Court has the power under Section 482, there is no reason to by-pass the procedure under the CrPC, we see no exceptional grounds or reasons to entertain this petition under Article 32. There is a clear distinction between the maintainability of a petition and whether it should be entertained. In a situation like this, and for the reasons stated hereinabove, this Court would not like to entertain the petition under Article 32 for the relief of quashing the FIR being investigated at the NM Joshi Police

> Station in Mumbai which can be considered by the High Court. Therefore, we are of the opinion that the petitioner must be relegated to avail of the remedies which are available under the CrPC before the competent court including the High Court.

77. We respectfully agree with the aforesaid ratio. Ordinarily we would have relegated the petitioner and asked him to approach the concerned High Court for appropriate relief, albeit in the present case detailed arguments have been addressed by both sides on maintainability and merits of the FIRs in question and, therefore, been dealt with by us and rejected at this stage. We do not, in view of this peculiar circumstance, deem it appropriate to permit the petitioner to open another round of litigation; therefore, we have proceeded to answer the issues under consideration.

78. We have already reproduced relevant portions of the transcript of the debate anchored by the petitioner. It is apparent that the petitioner was an equal co-participant, rather than a mere host. The transcript, including the offending portion, would form a part of the content, but any evaluation would require examination and consideration of the variable context as well as the intent and the harm/impact. These have to be evaluated before the court can form an opinion on whether an offence is made out. The evaluative judgment on these aspects would be based upon facts, which have to be inquired into and ascertained by police investigation. Variable content, intent and the harm/impact factors, as asserted on behalf of the informants and the State, are factually disputed by the petitioner. In fact, the petitioner relies upon his apology, which as per the respondents/informants is an indication or implied acceptance of his acts of commission.

79. Having given our careful and in-depth consideration, we do not think it would be appropriate at this stage to quash the FIRs and thus stall the investigation into all the relevant aspects. However, our observations on the factual matrix of the present case in this decision should not in any manner influence the investigation by the police who shall independently apply their mind and ascertain the true and correct facts, on all material and relevant aspects. Similarly, the competent authority would independently apply its mind in case the police authorities seek sanction, and to decide, whether or not to grant the same. Same would be the position in case charge-sheet is filed. The court would apply its mind whether or not to take cognisance and issue summons. By an interim order, the petitioner has enjoyed protection against coercive steps arising out of and relating to the program telecast on 15.06.2020. Subject to the petitioner cooperating in the investigation, we direct that no coercive steps for arrest of the petitioner need be taken by the police during investigation. In case and if charge-sheet is filed, the court would examine the question of grant of bail without being influenced by these directions as well as any findings of fact recorded in this judgment.

80. We are conscious and aware of the decisions of this Court in Bhajan Lal, P.P. Sharma and the earlier decision in R.P. Kapur which held that the High Court, in exercise of inherent jurisdiction, can quash proceedings in a proper case either to prevent abuse of process or otherwise to secure ends of justice. These could be cases where, manifestly, there is a legal bar against institution or continuance of the prosecution or the proceedings, such as due to requirement of prior sanction; or where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused; or where the allegations in the FIR do not disclose a cognizable offence; or where the

allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. Another qualifying category in cases where charge-sheet is filed would be those where allegations against the accused do constitute the offence alleged, but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. Application of these principles depends on factual matrix of each case. Strict and restricted as the requirements are, they are at this stage not satisfied in the present case. D. The second prayer multiplicity of FIRs and whether they should be transferred and clubbed with the first FIR registered at P.S. Dargha, Ajmer, Rajasthan

81. We would now examine the second prayer of the petitioner viz.

multiplicity of FIRs being registered in the States of Rajasthan, Maharashtra, Telangana, and Madhya Pradesh (now transferred to Uttar Pradesh) relating to the same broadcast. Fortunately, both the sides agree that the issue is covered by the decision of this Court in T.T. Antony which has been followed in Arnab Ranjan Goswamis case. It would be appropriate in this regard to therefore reproduce the observations in Arnab Ranjan Goswamis case which are to the following effect:

> 28...The law concerning multiple criminal proceedings on the same cause of action has been analyzed in a judgment of this Court in TT Antony v. State of Kerala (TT Antony). Speaking for a two judge Bench, Justice Syed Shah Mohammed Quadri interpreted the provisions of Section 154 and cognate provisions of the CrPC including Section 173 and observed:

20under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus, there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC. The Court held that there can be no second FIR where the information concerns the same cognisable offence alleged in the first FIR or the same occurrence or incident which gives rise to one or more cognisable offences. This is due to the fact that the investigation covers within its ambit not just the alleged cognisable offence, but also any other connected offences that may be found to have been committed. This Court held that once an FIR postulated by the provisions of Section 154 has been recorded, any information received after the commencement of investigation cannot form the basis of a second FIR as doing so would fail to comport with the scheme of the CrPC. The court observed:

18AII other information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and

entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/ statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. This Court adverted to the need to strike a just balance between the fundamental rights of citizens under Articles 19 and 21 and the expansive power of the police to investigate a cognisable offence. Adverting to precedent, this Court held:

27the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution. (Emphasis supplied) The Court held that barring situations in which a counter-case is filed, a fresh investigation or a second FIR on the basis of the same or connected cognisable offence would constitute an abuse of the statutory power of investigation and may be a fit case for the exercise of power either under Section 482 of the CrPC or Articles 226/227 of the Constitution.

29. The decision in TT Antony came up for consideration before a three judge Bench in Upkar Singh v. Ved Prakash (Upkar Singh). Justice N Santosh Hegde, speaking for this Court adverted to the earlier decisions of this Court in Ram Lal Narang v. State (Delhi Administration) (Ram Lal Narang), Kari Choudhary v. Mst. Sita Devi (Kari Choudhary) and State of Bihar v. JAC Saldanha (Saldanha). The Court noted that in Kari Choudhary, this Court held that:

11Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency.

30. In Saldanha, this Court had held that the power conferred upon the Magistrate under Section 156(3) does not affect the power of the investigating officer to further investigate the case even after submission of the report under Section 173(8). In Upkar Singh, this Court noted that the decision in Ram Lal Narang is in the same line as the judgments in Kari Choudhary and Saldanha and held that the decision in TT Antony does not preclude the filing of a second complaint in regard to the same incident as a counter complaint nor is this course of action prohibited by the CrPC. In that context, this Court held:

23. Be that as it may, if the law laid down by this Court in T.T. Antony case is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is

prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimate right to bring the real accused to book. This cannot be the purport of the Code. These principles were reiterated by a two judge Bench of this Court in Babubhai v. State of Gujarat. Dr Justice B S Chauhan observed:

21. In such a case the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the second FIR is liable to be quashed. However, in case the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be conducted. This Court held that the relevant enquiry is whether two or more FIRs relate to the same incident or relate to incidents which form part of the same transactions. If the Court were to conclude in the affirmative, the subsequent FIRs are liable to be quashed. However, where the subsequent FIR relates to different incidents or crimes or is in the form of a counter-claim, investigation may proceed.

[See also in this context Chirra Shivraj v. State of Andhra Pradesh and Chirag M Pathak v. Dollyben Kantilal Patel].

The aforesaid quotation refers to the judgment of this Court in Babubhai v. State of Gujarat and Others119 wherein the test to determine sameness of the FIRs has been elucidated as when the subject matter of the FIRs is the same incident, same occurrence or are in regard to incidents which are two or more parts of the same transaction. If the answer to the question is affirmative, then the second FIR need not be proceeded with.

82. In Arnab Ranjan Goswamis case, the proceedings in the subsequent FIRs were quashed as the counsel for the complainants in the said case had joined the petitioner in making the said prayer. However, in the present case, we would like to follow the ratio in T.T. Antony which is to the effect that the subsequent FIRs would be treated as statements under Section 162 of the Criminal Code. This is clear from the following dictum in T.T. Antony:

18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first (2010) 12 SCC 254 information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than

one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/ statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H the real offender who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.

83. This would be fair and just to the other complainants at whose behest the other FIRs were caused to be registered, for they would be in a position to file a protest petition in case a closure/final report is filed by the police. Upon filing of such protest petition, the magistrate would be obliged to consider their contention(s), and may even reject the closure/final report and take cognizance of the offence and issue summons to the accused. Otherwise, such complainants would face difficulty in contesting the closure report before the Magistrate, despite and even if there is enough material to make out a case of commission of an offence.

84. Lastly, we would also like to clarify that Section 179 of the Criminal Code permits prosecution of cases in the court within whose local jurisdiction the offence has been committed or consequences have ensued. Section 186 of the Criminal Code relates to cases where two separate charge-sheets have been filed on the basis of separate FIRs and postulates that the prosecution would proceed where the first charge-sheet has been filed on the basis of the FIR that is first in point of time. Principle underlying section 186 can be applied at the pre-charge-sheet stage, that is, post registration of FIR but before charge-sheet is submitted to the Magistrate. In such cases ordinarily the first FIR, that is, the FIR registered first in point of time, should be treated as the main FIR and others as statements under Section 162 of the Criminal Code. However, in exceptional cases and for good reasons, it will be open to the High Court or this Court, as the case may be, to treat the subsequently registered FIR as the principal FIR. However, this should not cause any prejudice, inconvenience or harassment to either the victims, witnesses or the person who is accused. We have clarified the aforesaid position to avoid any doubt or debate on the said aspect.

85. In view of our findings, we accept the prayer made in the last amended writ petition and transfer all FIRs listed at serial No. 2 to 7 in paragraph 4 (supra) to police station Dargah, Ajmer, Rajasthan, where the first FIR was registered. We do not find any good ground or special reason to transfer the FIRs to Noida, Uttar Pradesh. Statement of the complaint/informant forming the basis of the transferred FIRs would be considered as statement under Section 162 of the Criminal Code and be proceeded with. Compliance of the above directions to transfer papers would be made by the concerned police station within four weeks when they receive a copy of this order. The above directions would equally apply to any other FIR/complaint predicated on the same telecast/ episode.

E. The third prayer

86. Regarding the third prayer made by the petitioner, following the ratio laid down in Arnab Ranjan Goswami we direct the State of Uttar Pradesh to examine the threat perception for the petitioner and his family members and take appropriate steps as may necessary. Similar assessment be made by the State of Rajasthan and based on the inputs given by its agencies steps as may be necessary be taken on usual terms.

Operative directions

87. In view of the aforesaid discussion, we decline and reject the prayer of the petitioner for quashing of the FIRs but have granted interim protection to the petitioner against arrest subject to his joining and cooperating in investigation till completion of the investigation in terms of our directions in paragraphs 79 and 85 above. We have however accepted the prayer of the petitioner for transfer of all pending FIRs in relation to and arising out of the telecast/episode dated 15th June 2020 to P.S. Dargah, Ajmer, Rajasthan, where the first FIR was registered. On the third prayer, we have asked the concerned states to examine the threat perception of the petitioner and family members and take appropriate steps as may be necessary.

88. The writ petition and all pending applications are, accordingly, disposed of in the aforesaid terms.

.....J.

(A.M. KHANWILKAR) .....J.

(SANJIV KHANNA) NEW DELHI;

DECEMBER 07, 2020.