HATE SPEECH REVISITED: THE "TOON" CONTROVERSY

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Examining the cartoon controversy which ignited violent protests and ban in various countries, this article examines the contours of "hate speech" in various legal systems. While broadly supporting the case of free speech the authors remind users of free speech to exercise self-restraint. Absolute bans should not be made, but time, person and place constraints may be essential. Ironically, the toon controversy also reveals the silence of the sympathetic majority. Similarly, there is a duty to speak. Even though not enforceable, it remains a duty to democracy.

I. The "Toon" controversy

It began in Holland and spread across and beyond Europe exciting controversy wherever it has travelled. It has come to be known as the "Toon" controversy.[1] Triggered by some cartoons, about the Prophet, Hazrat Mohammed, it resulted in violent protests spreading into riots and deaths. Nation states joined the fray, severing trade links and diplomatic ties with each other. Public opinion was sharply divided. The political leaders of some European nations stoutly defended free speech as an end in itself. Others apologized, recognizing that the cartoons have hurt the sentiments of those who hold the very image of the Prophet to be sacred.

If individual free speech is important to democracy, evolving a collective spirit for living together amidst diversity is no less important. There is a right to

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[1] *See, Toon turmoil spirals across civilizations*, THE TIMES OF INDIA, February 10, 2006; *Toon trauma for Russian media*, THE TIMES OF INDIA, February 19, 2006; *Toon trouble growing into monster in Pak*, THE TIMES OF INDIA, February 27, 2006; *Toons banned in Malaysia*, THE TIMES OF INDIA, February 11, 2006; *Toon protests peak in Pakistan*, THE STATESMAN February 16, 2006; *Bloodiest toon riots flare up in Nigeria*, THE TIMES OF INDIA, February 20, 2006, *Toons: Lucknow up in arms*, THE TIMES OF INDIA, February 20, 2006, *Toon fury erupts on Hyderabad*, THE HINDUSTAN TIMES February 18, 2006; *Toon trouble across India*, THE TIMES OF INDIA, February 18, 2006.

free speech and a right to be spoken about with honesty and respect; a duty to respect even provocative speech and a duty to keep provocation within limits. As the controversy and the protests have progressed, a *fatwa* (declaration) was issued in India that the cartoonists be executed, with a reward of Rs. 51 crores to exhort the faithful into a murderous reaction. Apart from the spatial spread of the controversy, it raises important questions about free speech, democracy and collective good governance which need to be revisited.

No controversy is without a background. How far back do we go? The Crusades? Earlier? If so, we would fall headlong into discussions on Christian and Muslim attitudes being part of an inevitable "clash of civilization" – an idea popularised by Huntington and seemingly a part of the U.S. foreign policy.[2] Or is it entirely necessary to recall debates on "orientalism" to understand how ideological racism permeated global understandings.[3] No doubt cumulative pride and prejudice create, continue and sustain distorted images of the past to carry them into a biased future. But, the newfound racism of the "west" stems from hostility to a multi-racist and multicultural society as a consequence of the migration of many peoples from the "non-white" and non-Christian world into Europe, England and the Americas.[4] Politics fuels this hostility abundantly by reminding the host indigenes of the threat to their jobs, property and cultural purity. Amidst dissent, the demand for high immigration walls is accompanied by increasing intolerance to cultural diversity and the incitement of hatred towards other peoples, their faiths and beliefs. Thus, depicting present-day world events as part of the "clash of civilizations" is both part of a hostile foreign policy and a denigratory latter day racism, which has transited from suspicion to intolerance to hate. This approach has intensified after the attack on the World Trade Centre in New York on the ill-fated September 9, 2000, and serves as a camouflage to try

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[2] SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER (1996).

[3] Edward Said's insights into Orientalism remain a subject of controversy. On Orientalism generally, *see* EDWARD SAID, ORIENTALISM (1978) and for a critique of orientalism, *see* AIJAZ AHMED, IN THEORY 159-217 (1992).

[4] Muslims constitute the majority of immigrants in most western European countries, including Belgium, France, Germany, and the Netherlands, and the largest single component of the immigrant population in the United Kingdom. Exact numbers are hard to come by because Western censuses rarely ask respondents about their faith. However, it is estimated that there are between 15 and 20 million immigrant Muslims, who make up four to five percent of Europe's total population.. *See*, Thomas S. Pettigrew, *Reactions towards the New Minorities of Western Europe*, 24 (77-103) ANN. REV. SOCIOLOGY (August 1998); Robert S. Leiken, *Europe's Angry Muslims*, FOREIGN AFFAIR.S, July/August 2005; Jennifer Hamm, *The Dutch Grapple with Intolerance: Race, religion spur immigration debate*, *available at* www.newsdesk.org, March 07, 2005.

and defend U.S.A.'s invasions and take over of Afghanistan and Iraq. Such attitudes move further and further away from a policy of tolerance amidst cultural differences to one that engenders hate as part of a national and political agenda.

Over the years, there have been innumerable examples of intolerance and hate erupting into divisive campaigns, but there is a distinct change over the past half-decade in the manner in which the debate has been carried out in the public sphere. In 2003- 2004, there was a heated dispute in France about whether a *hijab* (headscarf) can be worn by Muslim schoolgirls or turbans by Sikh schoolboys.[5] The Dutch Parliament has voted in favour of a proposal to ban the wearing of a *burqa* in public.[6] Attempts to justify these campaigns on the basis of the need for uniformity has not taken the socially intimidating sting out of these campaigns which are aimed to identify, target, and incite hatred against peoples of other cultures and religions. There is an unbroken record of racist attacks, woundings and killings amidst an atmosphere of racist hate speech.[7] Politicians are aware that both racists and their victims constitute vote banks. Some political parties and persons have exploited these vote banks by either supporting racism or by being ambivalent towards it. Thus, democracy, for all its virtues, perpetrates a policy of ambivalent racism.[8] What begins to matter is the politics of the vote bank. But the politics of the racist vote bank is volatile and curls into a hate which

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[5] While the ban was on ostensible symbols of religion, and included the banning of all religious symbols such as crucifixes, turbans and headscarves, the public debate was largely centered on the *hijab* as a symbol of the Muslim, and therefore non-secular, identity. *See*, Theodore Dalrymple, *France's Headscarf Problem*, 1(1) CITY J. (Winter 2006); *France: Headscarf Ban Violates Religious Freedom*, Human Rights Watch Press Release, *available at* http://www.hrea.org/lists/hr-headlines/markup/msg01518.html (last visited June 16, 2006); Vaiju Naravane, *Banning the headscarf*, THE HINDU, December 25,2003; *France not to repeal headscarf ban*, THE HINDU, August 31, 2004; *Sikhs to defy headscarf ban*, THE TIMES OF INDIA, September 2, 2004.

[6] As opposed to the French law, which banned the wearing of all religious symbols, the Dutch law has targeted only the *burqa*, and is based on the belief that the *burqa* isolates Muslims, especially women, from the mainstream Western European society. *See*, *Dutch MPs decide on burqa ban,* BBC NEWS, January 16, 2006, *available at* http://news.bbc.co.uk/2/hi/europe/4616664.stm (last visited on June 16, 2006).

[7] The European Monitoring Centre for Racism and Xenophobia (E.U.M.C.) has noted increasing attacks, such as verbal abuse indiscriminately blaming all Muslims for terrorist attacks, women having their *hijab* torn from their heads, male and female Muslims being spat at, children being called "Usama" as a term of insult and derision, and random physical assualts. *See*, EUROPEAN MONITORING CENTRE FOR RACISM AND XENOPHOBIA (E.U.M.C.), *available at* www.eumc.eu.int (last visited on June 16, 2006).

[8] *In recent years, Heads of State, Ministers and elected Public Officers have increasingly made public comments about the backward nature of the Islamic community, the Muslim isolationism and the role of Islam as a conservative force in Western European society. For comments and discussions,* see, Islam is inferior, says Berlusconi, TELEGRAPH,

taunts immigrants about themselves, their life style and their faith; makes fun of the very basis of their religious being and provocatively hopes to embarrass and incite them. Conversely, similar taunts against Christianity are blasphemous. Against non-Christians, such blasphemy is free speech.[9] Free speech needs to be protected. But can societies which are committed to multicultural and multi-religious living in a secular framework be morally ambivalent to the intent and effect of inciteful hate speech? Is ensuring collective living based on fairness to all simply an objective of governance or does it concern all of us?

Over the past few years, there has also been an increase in incidents of violence and attacks. During the 2002 Danish National Election, Pim Fortuyn, a politician known for his controversial views on Islam and his anti- immigration position, was assassinated by a white activist for targetting the Muslim community.[10] In November 2004, the Dutch director, Theo Van Gogh, was murdered and mutilated by second-generation Muslim immigrants. Van Gogh had directed a short movie *Submission*, dealing with the treatment of women in Islamic societies. It showed women with extracts from the Koran painted on their bodies. The scriptwriter, a former Muslim feminist, Ayaan Hirsi Ali, received death threats and had to go into hiding.[11] In Denmark, in 2004, a college professor

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September 28, 2001; Anger over Ministers race remark, BBC NEWS, May 12, 2002, available at http://news.bbc.co.uk/2/hi/uk_news/politics/1984172.stm (last visited June 16, 2006); Falwell comments upset Muslims, UNITED PRESS INTERNATIONAL, May 5, 2005.

9 In England, the protection of the law of blasphemy extends only to the beliefs of the Church of England. *See*, R v. Chief Metropolitan Magistrate, ex parte Choudhury, [1991] 1 Q.B. 429 (Decided that Salman Ruchdie's *Satanic Verses* could not be prosecuted for blasphemy against Islam. There has been a long history of the Christian community taking umbrage to the representation of the Christian religion in the media. In recent years, there have been controversies over *The Last Temptation of Christ*, *The life of Jesus*, *Jerry Springer: The Opera*, *The Da Vinci Code*, *Monty Python's Life of Brian*, *The Ghost*, etc. See *Church fights Da Vinci Code novel*, BBC NEWS, March 15, 2005, *available at* http://news.bbc.co.uk/2/hi/entertainment/4350625.stm (last visited on June 16, 2006); *Protests as BBC screens Springer*, BBC NEWS, January 10, 2005, *available at* http://news.bbc.co.uk/2/hi/entertainment/4154071.stm (last visited June 16, 2006); *Life of Brian: Comedy or Blasphemy*, GUARDIAN, March 28, 2003.

10 On the rise of right wing parties in Western Europe generally and specifically on the ideology and assassination of Pim Fortuyn, *see*, *Right wing leader shot dead*, THE HINDU, May 07, 2002; *A vote for the right*, THE HINDU, May 16, 2002; *Are things far to right in Europe?*, BUSINESS LINE, July 23, 2002; *The rise of the European right*, BBC NEWS, April 22, 2003, *available at* http://news.bbc.co.uk/2/hi/europe/1944157.stm (last visited on June16, 2006).

11 For discussion on the movie *Submission*, Theo Van Gogh's murder and Ayaan Hirsi Ali's going into hiding, *see*, *Murder that shattered Holland's dream*, THE HINDU,

at the University of Copenhagen was attacked for reading the Quran to non-Muslims, and in August 2005, a radio station had its license revoked after it called for the extermination of all Muslims.[12] The immediate background of the cartoon controversy can be traced to an article in the Danish newspaper *Politiken* on September 17, 2005. Titled "Profound Fear of Criticism of Islam", it described the difficulty encountered by writer Kare Bluitgen, who was unable to find anyone to illustrate a children's book on the Prophet.[13]

The fact that artists were unwilling to draw the Prophet for fear of reprisals from extremist Muslim groups, was picked up by the conservative newspaper *Jyllands- Posten*- Denmark's largest selling newspaper. The editor approached 40 cartoonists to draw their representations of the Prophet and finally, 12 cartoonists were willing to provide cartoons of the Prophet. The cartoons included, amongst others, ones of Muhammad with a bomb in his turban, Muhammad prepared for battle, with a short sabre in one hand and a black bar censoring his eyes, flanked by two women in *niqaabs* and Muhammad standing on a cloud, greeting dead suicide bombers with "Stop, stop, we have run out of virgins!", an allusion to the promised reward to martyrs/terrorists. They accompanied a piece of self-censorship and free speech titled "Muhammad's face" and the main thrust of the article was that the Western European tradition of a modern, secular society was threatened by the conservative Muslim influence.

The cartoons created a furore, but the unrest was initially restricted to Denmark. On the complaint of several Muslim organizations, a criminal investigation was started against the *Jyllands-Posten*, under the Danish Criminal Code which prohibits disturbing the public order, and ridiculing or insulting religions.[14] At this time, the foreign ministers of twelve Islamic nations requested

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November 8, 2004; *Gunman kills Dutch film director*, BBC NEWS, November 2, 2004, *available at* http://news.bbc.co.uk/2/hi/europe/1944157.stm (last visited on June 16, 2006); Arnaud de Borchgrave, *Mini clash of civilizations*, WASHINGTON POST, November 15, 2004; Theodore Dalrymple, *Why Theo Van Gogh Was Murdered*, 16(1) CITY J. (Winter 2006).

[12] *See*, *Denmark targets extremist media*, BBC NEWS, August 17, 2005, *available at* http://news.bbc.co.uk/2/hi/europe/4159220.stm (last visited on June 16, 2006).

[13] *See*, Sunanda Dutta Ray, *Taking God Seriously- Journalism versus Propaganda Politics*, THE TELEGRAPH, February 11, 2006; *Exploring the roots of Danish controversy*, YALE DAILY NEWS, February 15, 2006, *available at* http://www.yaledailynews.com/article.asp?AID=31848 (last visited on June16, 2006).

[14] *See*, *Danish paper in eye of cartoons hurricane*, DAILY TIMES, February 13, 2006, *available at* http://www.dailytimes.com.pk/default.asp?page=2006%5C02%5C13%5Cstory 13-2-2006_pg4_12 (last visited on June 16, 2006).

a meeting with the Prime Minister, which was denied.[15] Some of the cartoons were initially reprinted in *El Fagr*, an Egyptian newspaper on October 17, 2005, strongly condemning the representation of the Prophet. In October-November, the cartoons were reprinted in about 10 publications in Netherlands, Germany, Bosnia and Herzegovina, U.S.A. and Romania. [16]

In December 2005, the cartoons almost receded from the public space and were not reprinted by any major publications. However, during this time, Imams from Denmark allegedly toured Egypt, Syria and Lebanon and were also present at the meetings of the Organization of Islamic Countries in Mecca.[17] On January 6, 2006, the criminal investigation against the *Jyllands-Posten* was discontinued because it was felt that the cartoons were protected under the right to free speech.[18] In January, the cartoons again resurfaced and this time they were published by about 14 newspapers in Sweden, Norway, Switzerland, Italy, Mexico, Iceland, Germany, Brazil and Greece.[19]

In February, the cartoons had been picked up by the world media and in the first week of February, they were published in more than 80 newspapers in Saudi Arabia, France, Hungary, Finland, Portugal, Spain, Belgium, Argentina, Uruguay, Bulgaria, Greenland, India, Costa Rica, Honduras, Japan, Fiji, Venezuela, Sweden, Yemen, New Zealand, and others.[20] It is interesting to note that while the controversy has also been publicly debated in the U.S.A. and England, the major newspapers have, on the whole, as compared to newspapers in Continental Europe, refrained from publishing the cartoons. By end-February, the cartoons had been published more than two hundred times in over 62 countries. Amongst these, it had been reprinted and circulated the most in Western Europe - in Netherlands, Germany, France, Italy and Belgium - where it has been published in more than 25 publications.[21] The matter was also exacerbated by the rapid dissemination of

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[15] For a timeline of the cartoon controversy and country-wise list of newspapers who have republished the cartoon, *see* en.wikipedia.org.

[16] *Id*.

[17] *See*, *The cartoon hoax*, The Brussels Journal, February 7, 2006, *available at* http://www.brusselsjournal.com/ node/775 (last visited on June 16, 2006).

[18] *See*, *Danish Muslims divided over cartoon affair*, The Brussels Journal, January 8, 2006, *available at* http://www.brusselsjournal.com/node/646 (last visited on June 16, 2006).

[19] *Supra* note 15.

[20] *Id*.

[21] *See*, *BBC joins cartoon controversy*, Guardian, February 2, 2006; *Cartoon controversy could spin out of control: Rice*, Daily Times, February 13, 2006, *available at* http://www.dailytimes.com.pk/default.asp?page=2006%5C02%5C13%5Cstory_13-2-2006_pg7_49 (last visited on June 16, 2006).

information and misinformation on the Internet. Many of the cartoons and representations which are now being cited bear no relation to the original set of twelve cartoons. Other pictures and representations, often wildly out of context, have been used as examples of the type of material being circulated against Muslims. In December 2005, imams from the Islamic Society of Denmark had visited Egypt, Syria and Lebanon carrying a dossier of supposedly derogatory representations of the Prophet including one of the Prophet shown wearing a pig mask. Later, it was found that many of the representations did not in fact refer to the Prophet or to Muslims, but by this time, these pictures had already become associated with the set of 12 original cartoons.[22]

The controversy over the cartoons became a worldwide issue involving the severing of diplomatic ties, demands for trade sanctions and led to several bans.[23] The governments of several countries called on international organizations to intervene in the matter.[24] The Pakistani Parliament passed a resolution criticizing the newspapers, which had published the cartoons. In many of the countries, including India Russia, Jordan, Yemen, and Algeria, the governments have initiated criminal investigations against editors and journalists who reprinted the cartoons.[25] There was large-scale mobilization and widespread public participation.[26] A large consumer boycott of Dutch products was organised in Saudi Arabia, Kuwait and other Middle East countries.[27] In response to the growing protests, the *Jyllands-Posten* published an open letter in which they apologised for hurting Muslim sentiments.[28] A factor that exacerbated the crisis and the polarisation of the Muslim and the European communities was the insensitivity of the Western establishment to the concerns of the Muslims. In spite of repeated demands from governments of various Arab countries, the Danish government initially refused to intervene or apologize. The Danish Prime Minister Anders Fogh Rasmussen said, "The government refuses to apologize because the government does not control the media or a newspaper outlet; that would be in

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[22] *See,* Manoj Joshi, *Fact and fiction*, The Hindustan Times, February 22, 2006.

[23] *See*, *Toon turmoil spirals across civilizations*, The Times of India, February 10, 2006; Appeals for tolerance fail to pacify Muslims, The Times of India, February 10, 2006.

[24] *See*, *Cartoon controversy spreads through the Muslim world*, Guardian, February 4, 2006.

[25] *See, Toon trauma for Russian media*, The Times of India, February 19, 2006.

[26] *See, 50, 000 Turks rise against cartoons*, Hindustan Times, February 13, 2006; *Toon trouble growing into monster in Pak*, The Times of India, February 27, 2006.

[27] *See*, *Denmark blasts EU firms*, The Times of India, February 11, 2006.

[28] *See*, *Danish paper sorry for Muhammad cartoons*, Guardian, January 31, 2006.

violation of the freedom of speech."[29] Initially, there was an outright refusal of the political and the civil society to condemn the cartoons; many of them were in fact, offensive and insulting. Some individual editors apologised, but the wider civil society stand was that the cartoons were justified in the interests of protecting the right to free speech as an essential feature of European society, as opposed to the conservative and regressive mores of Islamic societies.[30] This stand is at variance with their reluctance to be similarly tolerant of other criticial views.[31]

The intransigence of the Western governments and their support of the newspapers made the matter an issue of conflict between the European Union and the Islamic states.[32] Faced with increasing protests, the Danish Prime Minister, on February 3, called Ambassadors from Muslim countries for discussions, but by that time, violent protests and clashes had already started in various countries on the cartoon issue.[33] There were attacks on the embassies of European counties, and people were killed in the violent protests. On February 4, Danish and Norwegian embassies were set ablaze in Syria and on February 5, the Danish General Consulate in Beirut was set on fire leading to one death.[34] The protests spread from the Middle Eastern states and there were violent demonstrations in counties like Thailand, Malaysia, Afghanistan and Libya.[35] The public mobilization led to government actions such as threats of trade embargos, banning of the republication of the cartoons, and raising of the issue at the U.N. The Danish Embassy in Iran was attacked and Iran announced that it would halt trade with Denmark.[36] On February 11, the Malaysian government banned the republication

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[29] *See*, the statement of the Danish Prime Minister, The Statsministeriat, *available at* www.stm.dk.

[30] *See, Huge chasm between the West and the Muslim world: Badawi,* THE HINDU, February 11, 2006; Norwegian editor apologizes, THE HINDU, February 11, 2006; *Cartoon controversy has widened West-Islam gulf*, DAILY TIMES, February 13, 2006, *available at* http://www.dailytimes.com.pk/default.asp?page=2006%5C02%5C13%5Cstory 13-2-2006_pg7_51 (last visited on June 16, 2006); *Bush supports Denmark over cartoon controversy*, THE TIMES OF INDIA, February 7, 2006.

[31] *See*, *Danish paper rejected Jesus cartoons*, GUARDIAN, February 6,2006; *British historian David Irving was convicted by an Austian Court for denying the Holocaust*, THE TIMES OF INDIA, February 27, 2006.

[32] *See*, *Cartoon row: War of two worlds*, THE TIMES OF INDIA, February 23, 2006; *Cartoon row: Danes face identity crisis*, THE TIMES OF INDIA, February 13, 2006.

[33] *Supra* note 29.

[34] *See, Violence spreads over cartoon controversy*, THE WASHINGTON POST, February 8, 2006.

[35] *See, At least nine killed in Libya as cartoon protests escalate,* GUARDIAN, February 18, 2006.

[36] *See*, *Danish embassy in Tehran attacked,* GUARDIAN, February 6, 2005.

of the cartoons.[37] There have been mass protests and people were killed in the unrest and rioting in Afghanistan, Libya and Pakistan. The latter has also raised the issue of the cartoons at the United Nations.[38] The most violent protests have been in Nigeria, where churches were burnt and more than 20 people were killed in riots.[39] The rising violence caused concern at national and international forums.[40] In the face of these violent protests and the possibility of disruption of trade between the European Union and the Gulf States, on February 16, the Norwegian Prime Minister and the French President finally apologised.[41]

India has a large population consisting of 120 million Muslims. It is the third largest Muslim country in the world. India is no stranger to religious hate speech and has created a legal armoury of preventive, censorial and criminlizing empowerments and procedures to contain and deal with hate speech. The Muslim community in India has not been immune from the protests against the publication of the cartoons. The cartoons were re-printed in India on February 3, by the Patna edition of the *Times of India*, and on February 23, by the weekly *Senior India*. The cartoons themselves have not been widely reprinted in India, in part because of the immdiate action of the government agaist the initial publishers of the cartoons.[42] However, the cartoon issue has become a rallying point for the Muslim community and the rections of the Indian Muslims have mirrored the violence in other countries. There have been violent protests and clashes in Delhi, Srinagar, Hyderabad, Lucknow and in smaller towns.[43] The escalating violence

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[37] *See* news item, *Toons banned in Malaysia*, The Times of India, February 11, 2006.

[38] *See*, *Toon protests peak in Pakistan*, The Statesman, February 16, 2006; *Three dead, dozens injured in cartoon protests in Pakistan*, The Indian Express, February 16, 2006; *Pakistan takes up blasphemous cartoon issue at the U. N.*, The Hindu, February 26, 2006.

[39] *See*, *Bloodiest toon riots flare up in Nigeria*, The Times of India, February 20, 2006; *16 Nigerians die in cartoon riots*, The Hindustan Times, February 20, 2006.

[40] *See, Cartoon row engages UN*, The Statesman, February 27, 2006; *Annan in a bid to quell cartoon violence*, The Hindustan Times, February 22, 2006.

[41] *See, Norway PM apologises to Aziz for cartoons*, The Statesman, February 17, 2006; *Cartoons: Clinton and Chirac say publication a mistake*, The Indian Express, February 18, 2006.

[42] The editor of Senior India was arrested by the Police and *fatwa*s have been issued against him. *See*, *Magazine editor held in Delhi over Prophet cartoons*, The Indian Express, February 23, 2006; *Delhi editor held for publishing Prophet cartoon*, The Statesman, February 23, 2006; *Prophet cartoons: JMM leader puts Rs 50 lakh on editor's head*, The Indian Express, February 2, 2006; *Cartoon row: Editor held,* The Times of India, February 23, 2006.

[43] *See*, *Toons: Lucknow up in arms*, The Times of India, February 20, 2006; *Toon fury erupts on Hyderabad*, The Hindustan Times, February 18, 2006; *Toon trouble across*

and the involvement of the Muslim religious leaders have led the government to take a guarded stand on the issue. The Shahi Imam of Jamma Masjid criticized the political parties for remaining silent. In response, the Government on February 11, issued a statement expressing deep concern over the growing controversy.[44] State governments have reacted by imposing bans on cartoons of the Prophet. On February 24, the Bihar government banned a book, which had a caricature of the Prophet.[45] On February 17, there were violent protests in Hyderabad and on the same day, a Muslim Minister from U.P. offered a reward of Rs. 51 crores to anyone willing to behead the cartoonists. A few days later a *fatwa* was issued against the cartoonists.[46] The issuance of the *fatwa* has been criticized and a criminal complaint has also been filed against the minister, but the *fatwa* has also been supported by sections of the Muslim political and civil society, and there have been other calls for personal retribution against the cartoonists.[47] The protests, while they were on the issue of the cartoons, have also become generalized demonstrations about the dissatisfaction and the discontent of the community towards Western influences. This public expression of umbrage has led the Indian government to diplomatically dissuade the Danish Prime Minister Anders Rasmussen to postpone his pre-scheduled visit to India.[48] Indian Muslim scholars have spoken out in support of the global Muslim position.[49] And mirroring the global liberal position, the academics in India, with some exceptions, have generally been quick to support the rights of free speech and condemn the Muslim reaction as excessive and symptomatic of a problem in the Islamic societies.[50] It

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India, THE TIMES OF INDIA, February 18, 2006; *Protests after prayers at Jama Masjid*, THE TIMES OF INDIA, February 11, 2006.

[44] *See*, *RS condemns Danish cartoons*, THE HINDU, February 21, 2006.

[45] *See, Bihar bans book with prophet cartoon*, THE STATESMAN, February 24, 2006.

[46] *See*, *Rs 51 crore reward for Danish cartoonist's head*, THE INDIAN EXPRESS, February 18, 2006; *Bounty offered on cartoonists*, HINDUSTAN TIMES, February 18, 2006.

[47] *See, Death fatwa on cartoonist*, THE TIMES OF INDIA, February 21, 2006; Barkha Dutt, *Fringe, cut*, THE HINDUSTAN TIMES, February 20, 2006; *Toon bounty: Case filed against Quereshi*, THE HINDUSTAN TIMES, February 22, 2006; *Hang cartoonist: Bihar minister*, THE HINDUSTAN TIMES, February 23, 2006; *Delhi M.L.A. too wants cartoonists head,* THE HINDUSTAN TIMES, February 24; *Minister justified, was only speaking as a Muslim*, THE INDIAN EXPRESS, February 19, 2006.

[48] *See*, *Cartoon row kills Danish PM's visit,* THE HINDUSTAN TIMES, March 18, 2006; *Fearing backlash, Danish PM told to postpone visit,* THE TIMES OF INDIA, March 18, 2006.

[49] *See*, *Man bites God*, OUTLOOK, February 20, 2006; Prem Shankar Jha, *Not this way to Valhalla*, OUTLOOK, February 20, 2006; Javed Anand, *Attacking Islam*, THE TIMES OF INDIA, February 13, 2006.

[50] For articles on both sides of the debate, *see*, Vir Sanghvi, *The Silence of the liberal Muslim*, HINDUSTAN TIMES, February 12, 2006; *Tolerance is the essence of democracy,* THE TIMES OF INDIA, February 10, 2006; Rajeev Dhavan, *Limits of free speech*, THE TIMES

is against this background that it is necessary to examine the nature and implications of hate speech – both generally and in relation to India.

Although we are primarily concerned with the cartoon controversy, attention needs to be drawn to some other contemporary events which may help to work through the problems of hate speech.

II. India's apparatti of Censorship

Most of the controversies about free speech and expression in India have been about the "state" censorship of free speech and the various inglorious attempts by successive political regimes to control newspapers, films and the electronic media. On most occasions the courts have stepped in to provide some kind of balance in favour of free speech but with a regime of constraints and prohibitions. The framework for this protection is India's Constitution, which simultaneously protects "freedom of speech and expression", at the same time permitting "reasonable restrictions in the interest of the sovereignty and integrity of India, 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 offence".[51] There are many problems with this framework. The protection is given only to citizens. The crucial words "... and of the press and media" are missing. The range of restraints is wide and capable of being mechanically applied. Yet, courts have not found these restraints as obviating judicial review. In 1950, the Supreme Court struck down censorship in the name of security of state when it only concerned with public order.[52] In 1951, the Constitution was amended to permit restraints in favour of public order.[53] Undeterred that the freedom of the press and media is not mentioned in Article 19, the Supreme Court has on various occasions defended the institutional rights of the media against attempts of the governments of Nehru, Mrs. Gandhi and Rajiv Gandhi to control the media.[54] The

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OF INDIA, February 16, 2006; Jonathan Power, *It takes two for a clash of civilizations,* THE STATESMAN, February 10, 2006; *Freedom of expression not an absolute right,* THE TIMES OF INDIA, February 10, 2006.

[51] *See* Article 19(1)(a) read with Article 19(1)(2) of the Constitution of India.

[52] Brij Bhushan v. State of Delhi, A.I.R. 1950 S.C. 129; Romesh Thapar v. State of Madras, A.I.R. 1950 S.C. 124.

[53] *See* § 3 of the Constitution (First Amendment) Act, 1951, which introduced a recast Article 19 (2) with retrospective effect.

[54] For judgments on the inclusion of the media under Article 19(1)(a), *see* Sakal Papers v. Union of India, A.I.R. 1962 S.C. 305; Express Newspapers v. Union of India; A.I.R. 1986 S.C. 515; State of Karnataka v. Gowri Narayan Ambiga, A.I.R. 1995 1691; Bennett Coleman v. Union of India, A.I.R. 1973 S.C. 106.

sad stories of the massive and abusive control of the Indian press during the Emergency (1975-77) have not been repeated. While statutory pre-censorship of films has been permitted, it has been generally put in an archaic but more liberal framework.[55] Oddly, the Supreme Court has permitted Government speech to a point where government propaganda has to be carried in film theatres without payment in the form of "must carry" provisions.[56] The occasional decision in the wrong direction has not totally ruptured the protection of the constitutional umbrella towards free speech. State attempts at censorship continue, including – in one instance – the nationalization of cable networks.[57]

However, while courts have been sensitive to broader constitutional questions, they have been a little less sensitive on the day-to-day censorship of everyday life. In 1989, the court put a protective order on a newspaper to ensure that a corporate share issue should take place in a fair atmosphere.[58] The law of contempt has been used variously to silence Chief Ministers of States who have called the judiciary class-biased.[59] Courts seem to want to move towards a "gagging" rule so that media discussions, while a case is in court, are minimized.[60] The Supreme Court has injuncted the press from commenting on court cases beyond the routine reportage of cases and court proceeding.[61] The "gagging writ" is alive and well in defamation cases,[62] even though Indian courts have restrained

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[55] *See* Abbas KA v. Union of India, A.I.R. 1971 S.C. 481; Rangarajan v. Jagjivan Ram, (1989) 2 S.C.C. 574; Bobby Art International v. Om Pal Singh Hoon, 1996 (4) S.C.C. 1; Raj Kapur v. State, (1980) 1 S.C.C. 43.

[56] *See* Union of India v. Motion Picture Assn., (1999) 6 S.C.C. 150.

[57] *See* the Tamil Nadu Acquisition, Transfer and Taking over of the Administration of Cable Networks (including Multiple Service Optical Transport System) Bill, 2006, (L.A. Bill No. 6 of 2006).

[58] *See* Reliance Petrochemicals v. Proprietors of Indian Express, (1988) 4 S.C.C. 592. For a critique of the judgment *see*, Rajeev Dhavan, *Censorship by Courts: Silencing Public Opinion*, (1988) 30 *J.I.L.I.* 88.

[59] *See,* E.M. Sankaran Namboodripad v. T. Narayanan Nambiar, (1970) 2 S.C.C. 325. For other instances when Chief Ministers have been held guilty of contempt for criticizing the judiciary, *see,* Re P.C. Sen, A.I.R. 1970 S.C. 1821; State of Karnataka v. State of A.P., (2000) 10 S.C.C. 607; M.R. Parashar v. Farooq Abdullah, (1984) 2 S.C.C. 343.

[60] *See,* Rajeev Dhavan, Censorship by Courts: Silencing Public Opinion, (1988) 30 *J.I.L.I.* 88.

[61] *See,* Vineet Narain v. Union of India, (1998) 1 S.C.C. 226; Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569.

[62] In *S. Charanjit Singh v. Arun Purie*, (1983) 4 D.R.J. 86, Campa Cola managed to get a "gagging" order on the popular magazine *India Today*. In *Hari Shankar v. Kailash*

public officials from getting relief in matters connected with their official work.[63] No less, courts have not interfered with the kind of customs bans that led to Salman Rushdie's book being banned in India.[64] Amidst some notable exceptions, the Court has generally permitted Union and State governments to ban books.[65] The laws criminalizing obscene anti-communal and anti-national speech have been approved.[66]

So, while judicial sensitivities have been alert on questions of free speech, courts have allowed the judicial process itself to be hostile to free speech in defamation and contempt of court cases. These dilemmas will no doubt continue and many protections due to the press may lie in limbo to be decided conservatively on a case-by-case basis. This is the era of the 'slapp' suit in which

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Narayan, A.I.R. 1982 M.P. 47, the Madhya Pradesh High Court injuncted the *Weekly Gwalior Reporter* from publishing defamatory and insulting material. In *Sonakka Gopalagowda v. U. R. Anantha Murthy*, A.I.R. 1988 Kar. 255, the Karnataka high Court injuncted the publication of novel *Avasthe* and its being converted into a film on the basis that the contents were not very flattering to the memory of a "new-deceased" socialist leader. In *Garden Silk Mills Ltd. v. Vasdev Motwani*, A.I.R. 1989 Del 46, the Delhi High Court injuncted advertisements about the sale of "Garden" sarees as hurting the business interests of the manufacturer.

[63] *See,* R. Rajagopal v. State of Tamil Nadu, (1994) 6 S.C.C. 632 (Also referred to as the *Auto-Shanker's* case).

[64] *See*, Girja Kumar, The Book on Trial: Fundamentalism and Censorship in India, 47-61 (1997); Girja Kumar, Censorship in India 35-43 (1990). For other protests on the ban *see*, The Rushide File, (Lisa Appignanesi and Sara Maitland ed., 1990); Daniel Pipes, The Rushdie Affair: The Novel, The Ayatollah and the West (1990); W. J. Weatherby, Salman Rushdie: Sentenced to Death (1990).

[65] For instances of the Courts upholding the government's ban on books, *see* M.L.Gautam v. Emperor, A.I.R. 1936 All. 561 (Karl Marx's *Manifesto of the Communist Party* on the basis that the latter promoted enmity between classes punishable under the Penal Code); Premi Khem Raj Sharma v. Chief Secretary, A.I.R. 1951 Raj. 113 (Books relating to the Congress's bloody historical background *Congress ka khuni itihas* and Pakistan's hoodlum presence in Punjab '*Punjab mein Pakistani Gundashahi*').

[66] The major exercises of banning and judicial review were primarily concerned with the sensitivities of Hindus and Muslims. *See*, Shiv Ram Dass Udasin v. Punjab State, A.I.R. 1955 Punjab 28 (*Gurmat Vichar Suraj*, which showed disrespect to Sikh Gurus and the Granth Sahib); In Re Rup Lal Kapur, A.I.R. 1956 Madras 429 (Banning the book *The Third Religion*), Baba Khalil Ahamad v. *State*, A.I.R. 1960 All. 715 (The ban on certain books about a Muslim leader of the 8th century was upheld. The forfeited books were: *Ashab-a-Rasool Allah aur Muawiya Ki Sahabiat, Maula aur Muawiya, Radd-e-Fasaile Muawiya, Haq aur Ahi-esla ki Shander fateh, Qaul-e-Faisal* and *Muawiya parahe-Lanat ke Sharai Dalayel*.); Azizul Haq Kausar Naquvi v. The State, A.I.R. 1980 All. 149 (*Munaqib-e-Ahle Bait*, which upset the sensitivities of the Sunni Muslims).

the courts and the litigation process have been co-opted into imposing censorship through the judiciary at the instance of powerful corporates and persons who can fight 'adventure litigation' to silence criticism against them.[67]

It is necessary to recall the pathology of litigation practice and judicial sensitivities to emphasize that many answers to free speech have to be found by civil society within a framework of public dialogue which can handle contemporary issues of "hate speech". Such issues strike a raw nerve in India, which is seemingly unable and unprepared to take the problems of communal, racist and sexist speeches in a more discerning manner.

What is the problem? The problem is both old and new. During British rule, legal provisions criminalized and enabled bans on various forms of obnoxious speech. Apart from the Victorian provisions on obscene speech (which is a form of immoral or offensive speech), the British created the law of sedition to stifle "hate speech" against the empire and colonial rule from 1870.[68] Anxious to consolidate a law and order framework, "hate communal speech" was both criminalized and susceptible to ban by changes in 1898 and 1927.[69] Independent India has further criminalised "hate speech" against untouchables and tribals,

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[67] *See,* Rajeev Dhavan: *You know I know you know I know: Information and Democracy in India,* Paper to the South Asia Free Media Conference, Rawalpindi, Pakistan, January 2004. *See generally*, on the growing literature on SLAPPS, J. A. Wells, *Exporting SLAPPS: International use of the US 'SLAPP' to Suppress Dissent and Critical Speech*, 12 TEMP. INT'L. AND COMP. L. J. 457 (1998); J. E. Sills, *SLAPPS (Strategic Lawsuits against Public Participation) How can the Legal System eliminate their Appeal?* , 25 CONN. L. REV. 547 (1993); C. E. McCarthy, *Case Comment: Citizens cannot be SLAPPed for exercising First Amendment Right to petition the Government – Hometown Properties*, (1998) 31 SUFFOLK U. L. REV. 759; D. Luban, *Taking out the Adversary: the assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003), cited from J. W. Beaty, *A Look Behind the Smoke nine years after Pring and Canan First Yelled 'Fire'!*, 9 J. L. & PUB. POL'Y 85(1997).

[68] § 124 A Indian Penal Code was added at the instance of Sir Barnes Peacock since the Macaulay Indian Penal Code did not provide for sedition as an offence. The law was somewhat harshly interpreted during the years of imperial rule and softened by the Supreme Court in *Kedar Nath Singh v. State of Bihar*, A.I.R. 1962 S.C. 955 (where the accused had made speeches criticizing the Congress Government and tried to entice people to start a revolution to overthrow the Zamindars and advocated the use of violence to topple the Congress Government.). *See generally,* A. G. NOORANI, INDIAN POLITICAL TRIALS: 1775-1947 (2005). *Also see generally*, K. L. GAUBA, FAMOUS AND HISTORIC TRIALS (1946); J. GHOSAL, CELEBRATED TRIALS IN INDIA, VOLS. I and II (1902 and 1911); S. C. SARKAR, NOTABLE INDIAN TRIALS (1948); RAM GOPAL, THE TRIALS OF NEHRU (1962).

[69] *See,* § 153A and 295 of Indian Penal Code added and amended in 1898 and 1927 respectively. Note § 99A of the Code of Criminal Procedure, 1898 (now Section 95 of the new Cr.P.C.).

the indecent depiction of women and onslaughts against the sovereignty and integrity of India. Ban orders can be made in the cases of seditions, anti-national, communal and obscene speech.[70]

In all these cases, the State governments are supposed to act, initiate prosecutions and impose bans which are subject to judicial review. The Union government may impose customs bans if and when they like. This latter power has been indiscriminately used by the Union in a large number of cases. The record is hopelessly uneven.[71] If all these legislations were, in fact, used, there would be bans and prosecutions galore. It would not really matter if the writer or publisher won in the end. To borrow a phrase, "the process is the punishment".[72] To have a free press mired in litigation is surely the death of free speech. What exactly happens? The legislation proscribing "hate speech" against untouchables and the indecent depiction of women was enacted with great fanfare but is not enforced. Perhaps, it is a good thing that it has not been indiscriminatingly used. At the same time, there has been a greater sensitivity in the matter of using the law in respect of communal speech. Of course, prosecutorial and executive discretion is inevitable and necessary. But politics plays an untidy part in all this. To some extent, this is inevitable. When the British used the ban provisions, they did not just respond to the direct interests of the colonial State, but also to the clamour of Indian public opinion. It was, perhaps, on this basis that Katherine

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[70] *See* § 95 of the Code of Criminal Procedure, 1973.

[71] For some instances of bans imposed by the Government, *see,* Gazette of the Government of India, for the following notifications: Ban on import of goods marked with the heraldic emblem of the Red Cross on a white ground, ban on the export of any book, pamphlet, advertisement or other document which is intended or calculated to promote the sale of any medicine, appliance or article for the alleviation or cure of any venereal disease or disease affecting the generating organs or functions of sexual importance or of any complaint or infirmity arising from or relating to sexual intercourse, from India to Kenya or to Uganda (Notification No.23-Cus., dated April 1, 1950), ban on the export of a picture of Jawaharlal Nehru in imperial robes and another picture of Jawaharlal Nehru and other persons with the Red Fort in the background and another picture of Jawaharlal Nehru and other Indian leaders on horseback bearing the caption (in Hindi) "Hamare Rashtra Nirmata" (Notification No.48-Cus., dated April 28, 1951), ban on import of any book, etc. which as a whole would tend to corrupt any persons under the age of twenty years into whose hand it might fall (Notification No.99-Cus., dated June 8, 1955 as amended by Notification No.181-Cus., dated October 19, 1955), ban on export of articles or literature or advertisement relating to any article like Charm, mascot, talisman or any other article of a like nature, (Notification No. 159-Cus., dated July 20, 1957). For a detailed list of bans notified in the Gazette of India, see Rajeev Dhavan, *Censorship and intolerance in India* (Mimeo 2005).

[72] *See,* Malcolm Feeley, The Process is the Punishment (1992).

Mayo's *Mother India* was banned in India. Even in Independent India, many bans were political. Why, otherwise, should there have been a ban in 1951 on the export of a photograph of Prime Minister Nehru riding on horse back in imperial robes? It is suggested that the ban on Wolpert's *Nine Hours to Rama* in Nehru's time was made because it impliedly criticised certain politicians! This is not to tarnish Nehru's liberal image but to expose haphazard censorship that enters the administrative process at the instance of a political flunkey or bureaucrat anxious to please. Once such "customs" bans become part of the system, they become part of the system's repertoire resulting in such bans being imposed with facility.

However, this issue needs to be probed further. If political censorships, bans and prosecutions are made to please, this is equally true of other such instances of censorship where a mixture of partisan social and political pressures prepare the ground for state censorship – partly to please and partly to displease. When, in 1927, the Lahore High Court acquitted the publishers of *Rangeela Rasool* (a book on the Prophet), there was a furore in the Muslim community, and the British government strengthened the criminal and banning law, to enable a stricter and more enabling legal regime to silence anti- communal hate speech.[73] But, what happens when the Government uses these censorial and criminal powers simply to please one or the other social or political constituency and not in the interest of governance? An instance of this is the banning of Salman Rushdie's book, *Satanic Verses*, because Muslims were outraged.[74] The outrage was an effusive reaction. Most – if not all – of the protestors had not even read the book. Nor, indeed, had those in government. This ban changed world events. While there had been protests elsewhere, India's ban led the pack. Eventually, Iran's clergy issued a *fatwa* to kill, against Rushdie.

Thus, there is a clear link between agitation politics and partisan censorship by the State. But while the State has been protective of Muslim sensitivities, this link was strengthened when the Hindu *Sangh Parivar* came into power in Maharashtra and the Union Government. It is important to recognise this because there has been a major change in Indian politics, whereby vote catching and vote gathering has been made on the basis of weaning away, consolidating and

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[73] There were number of cases on the *Rangeela Rasul* book. The author was sought to be prosecuted in *King Emperor v. Raj Pal* A.I.R. 1926 Lah. 195 where the Lahore High Court dismissed the application. *See also*, Devi Sharan Sharma v. Emperor, A.I.R. 1927 Lah. 594. In another unreported case, Justice Dalip Singh of the Lahore High Court, a Christian by faith, absolved the publisher of all charges. While there was a huge amount of controversy generated, the author of the book was eventually stabbed to death. *See* GIRJA KUMAR, *supra* note 64, 47-61.

[74] *Supra* note 64.

strengthening the Hindu majority vote. This has been done in a poignantly shameless way. The desecration of the Babri Masjid in 1992 was, perhaps, the point of no return for fundamentalist politics.[75] Unfortunately, the Supreme Court permitted appeals to *Hindutva* (an old battle cry of the Hindu right!) during elections on the basis that this battle cry of Hindu fundamentalism was akin to making a plea for Indianness![76] When the B.J.P. was in power in the local government of Delhi, the government of Delhi decided to ban Sahmat's "poster" of the different traditions of the *Ramayana* which was part of an exhibition for secular peace and harmony, which had gone on peacefully until some politically led miscreants ransacked the exhibition. This form of pressure was clearly blackmail. The fundamentalist government obliged. Eventually the ban was quashed and lifted by the Delhi High Court years later.[77] More recently, even the Congress-led coalition has decided to ban a scholarly book on the Maratha hero, Shivaji, on the basis that it hurts Hindu sentiment.[78]

Thus, we can see that an important transition has taken place from the *first stage* of a possibly discerning State censorship to the *second stage* of State censorship, which responds to communal politics. But, there is a third and more invidious stage of social censorship. As soon as fundamentalism unleashed itself as politics masqueraded as sentiment, the fundamentalists decided to embark on the third stage of a direct and intimidating social censorship - to brow beat all and anybody who dared to offend fundamentalist sensitivities. Apart from making heroes of those who killed the missionary Rev. Staines in Orissa in 1999,[79] all forms of speech were targeted. A beauty show in Bangalore was abandoned due to protests.[80] The paintings of a celebrated painter, were destroyed.[81] Scholarly works and a library that stored much material and was used to write a book on the

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[75] *See generally*, Government of India, White Paper on Ayodhya (1993); Bharatiya Janata Party, BJP's White Paper on Ayodhya and the Rama Temple Movement (1993); Christopher Jaffrelot, The Hindu Nationalist Movement and Indian Politics: 1925 to the 1990s 449-481.

[76] *Supra* note 64.

[77] *See*, Trustees, Safdar Hashmi Memorial Trust v. Govt. of NCT of Delhi, 2001 Cri.L.J. 3689.

[78] *See*, *Blaming a Book, Mob Destroys Invaluable Pages of History,* The Indian Express, January 6, 2004; Rajeev Dhavan, *Ban Burn Destroy*, The Hindu, January 23, 2004.

[79] *See*, Dominic Emmanuel, *What have the Communalists learnt from Staines' Murder?* , The Hindu, January 22, 2002; *Crime and Punishment: Chronological Events of Staines' Case*, The New Indian Express, May 19, 2005.

[80] *See*, *The Unmasking of an Ugly Agenda*, The Hindu, February 6, 2000; *Bajrang Dal seeks Parties' Clarification*, The Tribune, January 21, 2003.

[81] The artist M. F. Hussain has been subjected to social censorship by Bajrang Dal activists and others who have disrupted his exhibition of paintings. For articles

Maharashtrian hero, Shivaji was ransacked.[82] A recent example is the controversy over the book *Haqeeqat*, written and distributed by Christian missionaries in Kota, in the B.J.P. governed state of Rajasthan.[83] Examples can be multiplied; and there are many.[84] What these examples show is the emergence of direct intimidating social censorship without reference to the apparatus of the State, suborning where necessary the State's power of censorship and relying on communal governments not to interfere even when all hell breaks loose. This is a terrifying phenomenon because of the direct physical and other threats that follow from it. If Khomeini's *fatwa* was an unacceptable face of such politics, Indian

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protesting such censorship, *see, Assault on Art*, FRONTLINE, May 9-22, 1998; Praveen Swami and R. Padmanabhan, *Scathing attack*, FRONTLINE, May 09-22, 1998; *Another Brush with Saffron for Hussain*, THE INDIAN EXPRESS, April 14, 2002.

[82] *Supra* note 80.

[83] The artist M. F. Hussain has been subjected to social censorship by Bajrang Dal activists and others who have disrupted his exhibition of paintings. For articles protesting such censorship, *see Assault on Art*, FRONTLINE, May 9-22, 1998; Praveen Swami and R. Padmanabhan, *Scathing attack*, FRONTLINE, May 09-22, 1998; *Another Brush with Saffron for Hussain*, THE INDIAN EXPRESS, April 14, 2002.

[84] *See,* Rajeev Shukla, *Inside Politics*, *available at* www.rediffnews.com, May 5, 1998; *I only Wanted the Show Stopped*, THE INDIAN EXPRESS, April 28, 1999; *Fundamentalist Hindu Party says Pakistani artists not Welcome*, BBC NEWS, April 27, 1998, *available at* http://news.bbc.co.uk/2/hi/world/s/w_asia/84389.stm (last visited on June 16, 2006); *Sex, Lies and a Super-Censor*, THE HINDU, September 15, 2002; *From the Frying Pan to the Fire*, COMMUNALISM COMBAT, January 1999; Praveen Swami, *Furore over a Film,* FRONTLINE, December 19 – January 01, 1998-9; Jasmine Yuen-Carrucan, *The Politics of Deepa Mehta's Water*, BRIGHT LIGHTS FILM JOURNAL, April 2000, *available at* http://www.brightlightsfilm.com/28/water.html (last visited on June 16, 2006); Arjuna Ranawana, *Bombay's Cultural Wars*, ASIAWEEK, May 1998; Rajiv Shukla, *If Ghulam Ali keeps our Soldiers Protecting the Nation Happy, What Right do Shiv Sainiks have to prevent him from Sing in Bombay?*, *available at* www.rediffnews.com, May 5, 1998; *Cartoonist Irfan was Murdered*, THE INDIAN EXPRESS, March 14, 1999; *Assam defies Ulfa Diktat, to Ban Obscene' Films only*, THE HINDUSTAN TIMES, August 15, 2003; *Ban likely on Printing Gorbani Verses on Cards*, THE HINDUSTAN TIMES, September 2, 2001; *Bengal Bans Taslima's Book*, THE HINDU, November 29, 2003; Bibhuti Bhushan Nandy, *Hypocrism Split Wide Open*, THE HINDUSTAN TIMES, December 8, 2003; *'Wielding' a Plucky Pen'*, THE WEEK, November 23, 2003; *New look for Daler's Controversial Album*, THE TIMES OF INDIA, May 16, 2001; *Ban on Tamil Film, NGO Moves NHRC*, THE HINDU, February 28, 2001; *Unkindest Cut of All*, THE INDIAN EXPRESS, February 28, 2001; *Censors Take Scissors to Stone's Story*, THE INDIAN EXPRESS, April 20, 2001; Madan Kumar, *Film on Rape Scandal hits Legal Hurdle*, THE HINDUSTAN TIMES, March 14, 2003; Mayank Shekhar, *Laloo's Man Vows to Stall Insaaf*, MID-DAY, March 4, 2004; G. C. Shekhar, *TN Rights Body seeks Rethink on 'Indecent' Film*, THE HINDUSTAN TIMES, Sep 20 2003; *Media Watch Groups to monitor Indecent Portrayal of Women*, THE HINDU, March 10, 2003; *New Censor Board to send Recommendations*, THE STATESMAN, 15 February 2004.

examples are no less worrying. The threats are complete, persuading even foreign music bands and performers like Michael Jackson and other seeking the blessings of the fundamentalist Shiva Sena leader before embarking on their music show.[85]

But, all this leaves many unanswered questions about the very nature of hate speech and the manner in which it is being dealt with by the State, politics and social forces. This is why it is necessary to take a closer look at the very concept of hate speech and the issues it gives rise for social and state governance.

III. The contours of "Hate Speech"

Does the entitlement to "free speech and expression" include the right to express and propagate "hate speech". Very broadly, "hate speech" includes any speech which targets individuals, groups or classes and seeks to ridicule, annoy, insult or defame such individual, group or class, or portray them in such a way that lowers their reputation or self-esteem, or incites or may have a tendency to incite, hatred towards them which could result in such individuals, persons or groups being negatively targeted or victimized or to cause violence against such persons or excite hostilities to threaten the breach of peace.[86] This description of hate speech is necessarily over-broad to also cover those forms of "disagreeable" speech which a person, group or class may find annoying, or insulting, or that which may pose a threat to society or any part of it. Any society, which accepts and implements each and every aspect of this definition would necessarily be an intolerant society. The right to unpopular speech would completely disappear in that society. However, such a definition is a useful starting point to initially identify the various "disagreeable" species of hate speech in the widest possible way; and, then, consider the extent and limits to which any particular exercise in hate speech should be permitted or regulated. Eventually, a distinction would have to be

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[85] *See* Arjuna Ranawana, *Bombay's Cultural Wars*, ASIAWEEK, May 1998.

[86] This broad definition of 'hate speech' is not limited to what is sensibly publicly distasteful but includes all kinds of speech which may annoy. The debate on hate speech has generated a rich body of scholarly literature, for instance, see SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992); *Group libel versus free speech: When big brother should butt in*, 23 DUQ. L. REV. 77 (1984); D'Amato, *Harmful speech and the culture of indeterminacy,* 32 WM & MARY L. REV. 329 (1990); Greenwald, *Insults and epithets: Are they protected speech?* , 42 RUTGERS L. REV. 87 (1990); Kretzmer, *Free speech and racism*, 8 CARDOZO L. REV. 445 (1987); Massaro, *Equality and freedom of expression: The hate speech dilemma,* 32 WM AND MARY L. REV. 211 (1990); MICHAEL J SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Stanley Fish, *Boutique multiculturalism or why liberals are incapable of thinking about hate speech*, 23 (2) CRIT'L ENQUIRY (Winter 1997).

made between "disagreeable" speech which people may take exception to and "hate speech" which is narrower in its scope but wider in its social implications.

Typically, many legal systems concern themselves more greatly with the "hate speech" entitlements of individuals – giving a lesser and more prominent recognition to the social concerns of groups and classes. Thus, the law of defamation, in both its civil and criminal variations, defends the right of a person from being the subject of any form of oral or written or other kind of publication which makes untrue or unfair allegations against that person so as to lower his or her reputation in that society.[87] The law of defamation may not be confined in its application to an individual but also extend to a group or class – as long as the person complaining about any publication can show that he or she has also been defamed. Inevitably, defamation has become the sport of the well-off who can afford such litigation and who seek not just huge sums of money by way of recompense but also to obtain "gagging" orders to censor publications in the future.[88] Over the years, the strict law of defamation has given way to more liberal variations in which the *bona fide* speech made in good faith against public persons has been considered as permissible as an adjunct to the importance of free speech in a democratic society.[89]

However, the law of defamation is not the only kind of "hate speech" laws with which we are concerned. Many societies have created laws of "blasphemy"[90] to punish those who insult the gods, the faith and any or all sentiments associated with it. Blasphemy has always been treated as both a social as well legal offence – with many societies refusing to draw distinction between social and legal wrongs. The injunctions against "blasphemy" have been both socially and legally enforced with a savagery, which could make one's blood curdle. In many cases, such savagery continues.[91] Alongside the laws of blasphemy – and, perhaps, no less

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[87] See, Rajeev Dhavan, *Private lives and public reputations: The career and prospects of the law of defamation in India*, (Mimoe 2004).

[88] *Supra* note 61.

[89] *See*, Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, Sup. Ct. Rev. (1974); T. D. Jones, 5(3) Int'l J. Minority & Group Rts. (March 1997); R. Knox-Mawer, *Defamation: Some Indian Precedents and the Common Law*, 5(2) Int'l & Comp. L. Q. (April 1956).

[90]. *See,* Select Committee on religious offences in England and Wales, *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9515.htm#n138 (last visited on February, 2006); Richard Owen, *Pope woos Conservative Expelled for Rebellion*, Times Online, April 21, 2003; Report of Amnesty International, Pakistan: Use and Abuse of Blasphemy Laws (1994).

[91] *See generally,* the following news items: Golnaz Esfandiari, *Iran's Judiciary Revokes Death Sentence for Blasphemy on Academic*, Payvand's Iran News, June 6, 2004, *available*

ancient in their pedigree – are the laws of "sedition" directed towards preventing and punishing any insult to the ruler or inciting discontent and/or strife against the State.[92] Perhaps, as an extension of the laws relating to "blasphemy" and "sedition" (or some secular version of both), there are also various social injunctions and laws directed towards maintaining the moral regime of a society. Such restraints seek to regulate both speech and behaviour. Laws against homosexuality, bigamy or suicide draw strength from the fact that they militate against the moral regime of a society, which may, in some instances, be traceable to a religion, faith or social beliefs.[93]

"Obscene publications" are generally prohibited and subject to punishment as a crime. Such prohibitions are sometimes not limited to pornography but also extend to any kind of incitement of immorality including advocating taking drugs or by portraying violence.[94] However, the restraints on obscene publications were not originally imposed because they depicted "women" in a bad light, but because such publications were contrary to morality. All this invites a wider debate on whether the "law" can or should enforce morals.[95]

But, apart from the general species of "hate speech" encompassed within the laws relating to defamation, blasphemy, sedition and obscenity, there is a further category of "hate speech" that has also engaged the attention of governance and which concerns protecting "groups" and "classes" or persons from being socially targeted and vilified. This is the area of racist, bigoted, communal and

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at http://www.payvand.com/news/04/jun/1012.html (last visited on February 2, 2006); Michael Tierney, *Isoma Daniel – A few Small Words can make a Death Sentence*, THE HERALD, May 16, 2005; Arun Shourie, THE WORLD OF FATWAS OR THE SHARIAH IN ACTION (1995); *The Catholic Church and Council of Trent: Rules on Prohibited Books, available at* http://www.myfortress.org/CouncilofTrent.html (last visited on February 2, 2006); similarly on movie censorship by the Vatican, *see* FRANK WALSH, SIN AND CENSORSHIP: THE CATHOLIC CHURCH AND THE MOTION PICTURE INDUSTRY (1997).

[92] *Supra* note 69.

[93] *See generally,* JUDITH STILL & MICHAEL WORTON, TEXTUALITY AND SEXUALITY: READING THEORIES AND PRACTICE (1993). *See generally*, for the abuse of the Obscene Publications Act, 1959, JOHN SUTHERLAND, OFFENSIVE LITERATURE: DE-CENSORSHIP IN BRITAIN 1960-1982 (1982).

[94] *See* John Calder v. Powell, (1965) 1 Q.B. 509; D.P.P. v. A.B.C. Chewing Gum, (1968) 1 Q.B. 151. On the former *see,* D.G.T. Williams, *The Control of Obscenity*, (1965) CRIM. L. REV. 522; on the latter *see* G. Zellick, *Violence as Pornography,* (1970) CRIM. L. REV. 188.

[95] The interaction of law and morality was the subject of debate between Devlin and Hart. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

sexist speech which not only portrays vulnerable groups in a bad light to create a climate where they cannot live their version of the good life in a dignified way, but also targets such groups so that they are vulnerable to intimidation, coercion and become victims of individual and collective violence. It is this category of "hate speech", which has become the focussed attention of contemporary concern.

There remain many unanswered questions about the extent to which "hate speech" targeting particular individuals, groups or classes can be permitted in a multicultural society in which people are identified both as individuals and as part of a group or class. As long as people are treated and dealt with as members of a group or class, it is inevitable that they will be identified as such. "Black" persons are identified by their "colour" and not just discriminated against but also oppressed and terrorized because of it. Once this process starts, there is no stopping it. We are not dealing with some natural phenomenon bequeathed to us by nature, but social constructs, which serve to give insidious support to patterns of social hegemony. Even the world's imperial masters used concepts of colour as it suited them. As has been observed: "The same individuals of mixed ancestry may be considered to be 'white' in Brazil ... 'coloured' in Barbados and 'black' in Birmingham Alabama ... Similar variations can be found between British and Dutch colonial policies so that ... 'whereas the British always considered themselves so weak that the slightest drop of foreign blood could de-classify their offspring, the Dutch in their colonies followed the opposed rule. They considered themselves so important that any trace of Dutch ancestry (provided it was legal) was sufficient to classify a child as Dutch."[96] Divisive conceptual constructs become oppressive instruments of social and political governance – which are slowly ingrained in the fabric of society. But, they are all the more disconcerting when they are celebrated as consensus arrangements and publicly pronounced as declarations of free speech. Once imbedded in society and its practices, no protest alone can alter them. They can be removed only after a sustained struggle dislodges them, and the social perceptions that enforce and enable their sufferance.

What should a society do about divisive social constructs, which under the guise of recognizing difference, perpetuate "hate", propagate discrimination, provoke disorder and incite violence in attitudes and actions towards particular peoples – both individually and collectively? Is it sufficient to assert that the answer lies in countering ideas for ideas and responding to speech by discourse.[97]

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[96] *See* JOHN STONE, RACIAL CONFLICT IN CONTEMPORARY SOCIETY (1995).

[97] This concept is encapsulated in the discourse on the 'marketplace of ideas' which is one of the central themes in the free speech tradition. *See generally*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992); ERIK ASARD, DEMOCRACY AND THE MARKET PLACE OF IDEAS (1987).

In this, theory is necessarily collapsed by the onslaught of brute facts. The oppression of people and the suppression of ideas operate together to prevent their victims from even stating their case. Those who raise their voices are socially punished and silenced. Those who do not protest continue to suffer anyway. The marketplace of ideas is incapable of providing a corrective answer to the perpetuation of ideologies of hate sustained by the architecture of power. The working of such a marketplace is already spoken for. Subject to its own pressures, which mould it, the currency of exchange in this market place is regulated by influence, bias and authority. Is it really possible for governance in India, to permit exhortations to practise "untouchability" to be preached from the rooftops, in the knowledge that it is a continuing invidious practice which will be brutally directed towards victimizing those who oppose untouchability, including the untouchables themselves? Religious communities, which are targeted as victims of derision and violence cannot seek protection in some mythical market place of ideas to protect themselves. Nor is there any real answer to the baneful influences of pornography in an unregulated marketplace. The answer to nude pictures is not *burqah*-clad women. But, even if the marketplace of ideas creates a forum for providing answers, there remains the more basic question as to whether particular forms of "hate speech" should be permitted at all. And, if so, why and to what extent? Are there particular forms of "hate speech", which should not be permitted at all? And, if permitted regulated to minimize their effect? From the point of view of governance, is the moral justification for proscribing "hate speech" that it is *intrinsically* "bad" or simply that it is not conducive to "good" governance? Or is the justification for such proscription that even though part of the discourse of freedom, hate speech must be regulated because it is a positive threat to the lives of particular people, groups and the collective as a whole. These two arguments have different trajectories even if they overlap.

The general attitude of most legal systems is to create censorship systems, which pursue both the strategy of proscribing what is *intrinsically unworthy* as well as what is perceived as *potentially socially dangerous*. This is a huge and relatively unmanageable debate; and, no less, hugely entangled because of the diversity of approaches and attitudes to it. The "intrinsic unworthiness" approach seeks refuge in positive notions of governance, which require society and the state to uphold a particular kind of moral order, which is part of that society's understanding of governance. Societies, which trace either the validity or legitimacy of governance to certain religious beliefs, seek to sustain the integrity of such religious beliefs with force and fervour. Some versions of such strategies seek to censor all non-conforming ideas resulting in strong laws and punishments for blasphemy resulting in not just prohibitive bans but also imprisonment or

even the death penalty.[98] In other versions of such strategies, a greater leeway is given to the expression of ideas within the conspectus of the belief system as a whole. Many of our laws dealing with obscenity and pornography in the "common law" are really remnants of Christian attitudes to "sexuality" – viewing it an inevitable evil and a threat to the normal functioning of society.[99] Such speech is, therefore, treated as both profane (being unworthy) and potentially dangerous (requiring regulation). In more recent times, various societies have tried to grapple with issues of sexuality in a more defensive and less fearful way. This has largely been dictated by changes in society permitting and requiring men and women to work in greater proximity to each other. The strategy of law and governance has veered away from appeals to the intrinsic unworthiness of pornography to the need to regulate its effect even if primeval fears about sexuality remain. The argument of the intrinsic lack of worth of obscenity is not given up; but mixed up with consequential arguments about the direct and indirect effects of such free expression on society as a whole in its attitude to women. There remains a lack of clarity on addressing issues relating to eroticism as distinct from those relating to obscenity.[100]

Inevitably, attitudes to censorship have changed along with the aims of governance. This has had a significant effect on the policy of censorship, and on striking a balance between what a society regards as "intrinsically unworthy" and what it regards as "socially dangerous". There is a view that in "liberal" societies

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[98] Leonard W. Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie*, 54(3) *Wm. & Mary L. Q.,* 3rd Ser. (July 1997); *South Asia Pakistani Muslim faces death for blasphemy*, BBC News, September 9, 1998, *available at* http://news.bbc.co.uk/2/hi/south_asia/167775.stm (last visited on June 16,2006); *Pakistani sentenced to death for blasphemy*, BBC News, August 18, 2001, *available at* http://news.bbc.co.uk/2/hi/south_asia/1498121.stm (last visited on June 16, 2006); *Bhawalnagar man given death for blasphemy*, Daily Times, August 8, 2003 ; *Iran academic gets death for blasphemy*, Rediff on Net, May 11, 2004, *available at* http://in.rediff.com/news/2004/may/11iran.htm (last visited on June 16, 2006); *Doctor faces death for blasphemy*, Telegraph, August 22, 2001, *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/08/22/wblas22.xml (last visited on June 16, 2006); *Elderly Sufi man sentenced to death for blasphemy*, Amnesty International U.K. Report, September 7, 2000, *available at* http://web.amnesty.org/library/Index/ENGASA330112000?open&of=ENG-PAK (last visited on June 16, 2006); *Iranian writer gets death for blasphemy*, The Indian Express, November 7, 2002.

[99] *See*, Norman St John Stevas, The Church and censorship: To deprave and corrupt (1962).

[100] *See* Lynda Nead, *The female nude: Pornography, art and sexuality*, 15(2) Signs (Winter 1990); Stefan Morawski, *Art and obscenity*, 26(2) J. Aesthetics & Art Criticism (Winter 1967); Stephan Morawski, *Inquiries into the Fundamentals of Aesthetics*, 85(4) Philosophical Rev. (October 1976).

there should never be a constraint on the *content* of ideas on the basis that people have a right to think and say what they like.[101] Thus, it is argued that it is futile to prohibit processes of thought and speech, which, in the long run, enrich society. All that can be done is to impose constraints on how and where such ideas may be expressed. But, although the "contents" doctrine makes an important statement of principle explicating the difference between not interfering with or regulating the "contents" of speech but, selectively regulating its temporal and spatial "expression", such a distinction may become illusory in any given fact situation in the sense that any prohibition that regulates the expression of free speech must necessarily censor ideas. The contents doctrine is important to ensure (i) that people are not punished for their thoughts and words, (ii) that there is no active censorship forcing people either to retract what they say or think or to ensure what they should say or think, and (iii) that a special emphasis attaches to avoiding "content" censorship to the maximal extent possible in any given circumstances. The real arguments over bans and censorship are over wider questions over what a society wishes to censor and why – if at all.

The immediate and long-term aims of governance vary from society to society. In our times, a premium attaches to the right of free speech and expression as a general good, which should not be easily diluted. For our purposes, it is useful to proceed on this basis even if it is contested. However, the purpose of governance is not limited to defending free speech alone. Governance entails certain "collective" commitments for all individuals and groups; and their right to live with safety and dignity to pursue their version of what they believe to be the good life, under conditions of equal respect and concern, whilst seeking to fulfil the equal aspirations of all. Such collective commitments include statements against racism, casteism and sexism. Apart from intimations of personal, social or political vindictiveness, it is these "collective commitments", which influence the censorship policies of any system of governance; and determine how the balance is to be struck between prohibition and regulatory control. Such commitments may also determine which kinds of speech should be regarded as "intrinsically unworthy" or "potentially social dangerous". In a liberal society committed to opposing racism, it is not necessarily contradictory to the aims of such a liberal society to treat racist speech as both "intrinsically unworthy" and "inherently socially dangerous". Likewise, within the framework of India's commitment to removing untouchability as a social evil, a policy to interdict particular aspects

[101] This position is referred to as the 'no content regulation' and for instances *see generally*, Cynthia A. Clark, *Words we love to hate,* 16(1) LAW & PHILOSOPHY (January 1997); Kent Greenawalt, *Free speech in the US and Canada*, 55(1) LAW & CONTEMP. PROBS. *(*COMPARATIVE UNITED STATES/CANADIAN CONSTITUTIONAL LAW, Winter 1992); L. W. SUMNER, HATEFUL AND THE OBSCENE (2004).

of the propagation of untouchability or other forms of discrimination is necessarily founded on both moral and consequentialist assumptions.

Unfortunately, many arguments go awry because of the various ingenious ways in which various governance systems have addressed issues relating to whether the basis of censorship (or any form of it) should be founded on notions of "intrinsic unworthiness" or "inherent social danger." Issues of the moral unworthiness of certain forms of free speech have not always been abandoned in favour of a more pragmatic argument that one should look at the clear and present danger (whether actual or potential) inherent in any exercise of free speech and not at its intrinsic worth or lack of it.[102] American constitutional approaches justify the control of pornography on the high moral argument that "obscene" speech is not a category of free speech at all. Thus, there is a threshold rejection of the very idea that all forms of free speech are morally worthy. From this is evolved the test that what is acceptable must conform to community standards.[103] Such an argument has been accepted in various countries and extended to spheres other than free speech. Thus, the Indian Supreme Court has gone on to extend this moral approach by declaring that trading in gambling, alcohol and the usurious lending of money to the poor should all be treated as constitutionally unworthy.[104] This does not mean that the pursuit of these "trades" is illegal or even prohibited. Much rather, it simply means that who pursue these trades can be subjected to maximal regulation or even prohibited – whilst disentitling those who practice them from protesting that their constitutional rights have been violated. Such "trades" are at the mercy of the law and the policies that may animate it without the benefit of complete constitutional protection.[105] This approach seeks to make

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[102] The accepted standard for the determination of violations in free speech matters is one of strict scrutiny, which includes a compelling government reason and the employment of the least restrictive means. This freedom can be curtailed on the basis of "clear and present danger" and consequentialist censorship of pornography based on danger, especially to young children has been held to fall within the scope of this exception. *See,* Schenck v. United States, 249 U.S. 47 (1919), Abrams v. United States, (1919) 250 U.S. 616; New York v. Feber, (1982) 458 U.S. 747; Osborn v. Ohio, (1990) 495 U.S. 103; Stanley v. Georgia, (1969) 394 U.S. 557.

[103] For the development of American law related to the determination of obscene speech with reference to community standards, *see* Miller v. State of California, (1973) 41 U.S.L.W. 4925; United States v. Orito, (1973) 41 U.S.L.W. 4596; Heller v. State of New York, (1973) 41 U.S.L.W. 5067.

[104] *See*, B. K. Enterprises v. State of Uttar Pradesh, A.I.R. 1999 S.C. 1867; Ashok Lanka v. Rishi Dixit, (2005) 5 S.C.C. 598; State of Punjab v. Devans Modern Breweries, (2004) 11 S.C.C. 26; Government of Madhya Pradesh v. Derokaris Distillery, (2003) 5 S.C.C. 669; State of Bombay v. R.M.D. Chamarbaugwala A.I.R. 1957 S.C. 699.

[105] *Id.*

a *moral and symbolic statement*, which in practical terms may not make an iota of difference to how these trades would be dealt with if they were labelled as constitutionally worthy. In both cases, the trade would be regulated and subjected to reasonable restrictions in public interest. However, India's Supreme Court judges obviously feel the need to make such a symbolic declaration in the light of the collective dispensation of the Constitution. The approach of the U.S. courts declaring "obscene" speech as constitutionally unworthy is also essentially "symbolic" is nature – presumably rooted in Christian sentiment, even though the Constitution separates the church from the State. However, the "symbolic" denial of free speech protection to obscenity was never intended to be a basis for prohibiting all forms of pornography. The court had to back track to make many fine distinctions about what "pornography" was protected by the Constitution and what was not.[106] We have, therefore, to look more closely at the role of "symbolism" in discourses about free speech.

It may be easier and more practical to be morally neutral and take the general view that no forms of free speech are "intrinsically unworthy", but that any exercise of free speech may be regulated if, and to the extent, that it constitutes an inherent (actual or potential) danger to society and those who live in it. However, such an overtly practical attitude makes us drift away from recognizing the role of ideas and ideology to governance. It is not inimical to the goals and objectives of liberal democratic governance to state that a society's collective commitments necessitate making the symbolic assertion that certain activities (including expressions of free speech) are morally unworthy. It would not be wrong for a multi-racial society to make the symbolic statement that racist speech is unworthy. Or, for a society like India to declare that "casteist" speech directed towards "untouchables" should be generally impermissible. Surely, it could not be wrong for an India, faced with religious tension resulting in riots, mayhem and death, to state that there is a constitutional bias against speech, which incites religious strife. This would be equally true of a symbolism of attitude that "sexist"

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[106] For the development of the American law with respect to Constitutional protection of privacy, *see* the following, Roth v. United States, (1957) 354 U.S. 476 (obscene materials do not fall within the scope of free speech); A. Book.... v. Attorney General, (1966) 383 U.S. 413 (the determination of obscenity was to be on the ground whether the items were *utterly without any redeeming value*); Ginsberg v. United States, (1966) 383 U.S. 463 (obscenity laws should be directed at the commercial exploitation of sex); Stanley v. Georgia, (1969) 394 U.S. 557 (there exists a zone of privacy within which an individual is entitled to read and see what he likes); Paris Adult Theatre v. Slapton, (1973) 31 U.S.L.W. 4935 (the zone of privacy was limited to material read at home and did not move along with the individual wherever he went); Miller v. State of California, (1973) 41 U.S.L.W. 1925 (obscenity is to be judged with reference to local community standards and not by national standards).

speech of a kind that demeans women by portraying them in a particular way is, *prima facie*, unworthy of constitutional protection, in the light of the collective commitments of a society. Societies have a right to make statements on the moral unworthiness of certain kinds of activities. This cannot be done indiscriminately. The question of the moral worth of any activity, cannot be decided on the anvil of what people are intolerant towards. If this is accepted, then majoritarian notions, mob rule and lumpen demands will rule the roost. The determination of moral worth draws from the collective commitments of a democratic and secular society, which seeks to guarantee justice for all-especially the more vulnerable.

But, the fact that the collective commitments of a democratic and secular society may require certain forms of free speech to be morally unworthy, is not an invitation to create all embracing invidious forms of censorship in respect of any or all such exercises of free speech. Society must be prepared to accept the freedom of provocative speech and expression even if it is unpopular. It may well be that particular kinds of speech which are, *prime facie*, morally unworthy may be subjected to a greater scrutiny. The purpose of such scrutiny must generally be to enable the free expression of ideas unless the exercise of such speech necessarily constitutes a danger to collective living, or puts lives, fair treatment, property and the public peace in serious jeopardy. Thus, a balance has to be made so that people are assured of their entitlement to free speech, put to notice that certain kinds of inciting speech which eat at the fundamentals of collective living are morally unworthy, and promised that free speech will be interdicted to the minimum extent possible when it is clearly necessary to do so.

As we review the contemporary scene of censorship in India, there are many startling features that emerge. There is very little public discussion on free speech – and, even less so, on crucial issues relating to "hate" speech. This contrasts with the rising tide of socially and politically motivated exercises of "hate speech" which is not only socially divisive but which has resulted in riots and killings. Those who use the vehicle of free speech to incite hate are themselves not interested in free speech but only in gaining social dominance at all costs – including the right to oppress those whom they love to hate. Such people have no hesitation in threatening writers and artists, destroying their work or even destroying the learning stored in libraries and museums if it suits their invidious purposes to do so.[107] Indian governance has no real response to what is going on – at times choosing to hunt with the hounds and at times to run with the hares. Meanwhile, as a consequence, new forms of socially coercive intimidation have emerged which threaten the very basis of India's commitment to a secular democracy founded on the rule of law.

[107] *Supra* note 84.

IV. Responding to Hate Speech

The dilemma of the liberal democrat is complete. If free speech is to be defended at all costs when, if ever, is the cost too high? Can free speech intentionally be used as a bomb to trigger off a self- destructive fury in society, which tears it apart? Under these circumstances, can the "free speaker" claim that he is entitled to the full protection of free speech irrespective of the consequences of his speech acts even where he might have consciously intended the incitement?

We began with the assumption that free speech is both an end in itself, and a social good. It is an end itself in that it recognises the gift of self-expression in all. The right to free speech is not reserved only for Socrates, Galileo, Einstein, Shakespeare, Kalidas, Tolstoy or Premchand, but for all. For small talk and big talk alike. Free speech is a social good because interactive communication enhances individual and collective knowledge and ensures greater accountability within group, society and governance.

However, the very phrase "free speech" is an exercise in "persuasive definition". In fact, "free speech" in our time is not free. "Free speech" is powerfully controlled. Both the print and electronic media are controlled by press barons or state functionaries. To write a book is not to get it published. The decision to publish vests in the hands of powerful corporate publishers. The best of art often fails to be portrayed by galleries or sold at auctions. It is for the media to profile a media event or to downplay a historic injustice. Some news makes the front page, some does not. Within the media, journalists ply for power and position as well as fight for their independence. Along with other forms of expression protests and counter protests all of which are influenced or controlled by social forces, this entire collective and a somewhat mixed up exercise is called "free speech" – and, is not the less honourable for being so. What is published as free speech, in the form of media events, ideas and opinions, is not necessarily free. The very media that fights for free speech controls its freedom within its entrails – not just due to practical constraints but because powerful social forces pointedly and not necessarily profoundly manufacture the facts, ideas, values and fashions of the day. The answer to the question "who speaks" is, more often than not "they do". We often consign controversies to the marketplace of ideas. But, if indeed, there is such a marketplace, it belongs to the most influential. Indubitably there is speech in this marketplace but it is not for that reason free. This is no reason for not defending the right to free speech, but is significant for contemplating its contours.

The issue is whether "free speech" which encloses within its purview the useful, and the useless, the creative and the destructive, the true and the false, the arrogant and the subdued, the pleasing, and the annoying, the brilliant and the commonplace, should also include within its purview perverse forms of "hate

speech" which go beyond mere offensiveness to wound and incite reactions from those whom they target. Should certain forms of perverse or hate speech stand in a class by themselves to be differentially treated? From what point can all this be left to self-regulation or the market place of ideas? At what point should hate speech invite regulation by, and the censorship of, the state.

Earlier, we had started with a working broadband definition to include within the conspectus of hate speech all those forms of speech, which someone else may find "disagreeable". Broadly, the law does seek to assail "disagreeable" speech in a variety of way. Legal interventions have been devised to create a balance between individual, social and state interests. The law of defamation seeks to protect an individuals' interest in their reputation. But, it has been greatly modified to ensure that public persons cannot hide behind actions in defamation in order to evade exposure of their actions and public responsibilities for which they are publicly accountable. The law of obscenity was originally evolved to represent Christian virtue and to prevent people from being "depraved and corrupted". It is now sought to be justified on the basis that pornography is not just not aesthetic but offensive to women who are commodified by it. At the same time, provision is made in some countries for adults to access pornography if they so choose on the basis that their right to choose what they read is a part of both their liberty and right to free speech. Where free speech takes the form of assemblies and demonstrations, it may be subjected to time and place constraints to protect public order. Seditious speech was devised to protect the interests of the State and the Empire; and grossly abused to silence public opinion against government. Racist/communal free speech is proscribed both because it offends the social interest in collective living as well as because of its inflammatory effect.

Indubitably, the broad strategy of the law is to discipline the expression and communication of various forms of disagreeable speech. However, in each case, the strategy of the law is somewhat different. In defamation cases, the law enables the defamed to file cases to get money damages for their loss of reputation. Normally, courts will not ban publications. However, this does happen even though it should not. Khushwant Singh's book was injuncted from publication for a long time until it surfaced after long years in pre-publication exile.[108]

[108] In 1997, Maneka Gandhi successfully prevented the publication of Khushwant Singh's memoirs. A few years later this judgment was reversed. Meanwhile, in the interim, the publication of the book was stopped. (Maneka Gandhi v. Khushwant Singh, Civil Suit No. 2899/1995.) *See also,* the judgment of Justice K. Ramamoorthy in *Maneka Gandhi v. Khushwant Singh*, I.A. NO's 12567/1995, 646/1996. 647/1996 in Suit No. 2899/1995 (unreported) which was reversed on appeal in *Khushwant Singh v. Maneka Gandhi*, A.I.R. 2002 Delhi 58.

Increasingly, the law of defamation is being used to stifle public opinion through 'slapp' suits. However, while such bans may result in individual cases, there is no general demand that all defamatory speech should be criminalised and banned. Criminal defamation does exist in some countries and its processes have been abused in India and elsewhere. In various jurisdictions, the criminal law of defamation is being reformed out of existence. What emerges from this is an important distinction whereby certain forms of disagreeable speech may be the subject of civil litigation and consequential remedies, but are not *a fortiori*, candidates for proscription by ban and criminalization.[109]

Hate speech may be disagreeable. But all disagreeable speech is not hate speech. In one sense, a prescriptive definition of hate speech would be that hate speech consists of those forms of speech which can, and should be, subject to censorship by ban and criminalization. However, this does not define what hate speech is or the basis on which it is segregated from other forms or exercises of free speech. The alleged basis for creating a separate category of what is loosely defined as "hate speech" is that certain forms of speech are totally disagreeable and so intrinsically unworthy that they should be subject to a special regime of restraints and restrictions to protect the social fabric of collective living. The law is not devoid of moral imperatives. There is no inherent right to kill or wound another. But there are only a few such near absolute imperatives, which, too, are hedged in by limitations. The police may shoot to kill in certain circumstances. Nations go to war to commit collective murder – allegedly for a cause. By and large, the imperatives of the law have been malleable. The law may prohibit a person from defaming another except in public interest, but there is no general injunction against lying. The law of contract is directed towards keeping promises but it is only in limited cases that a person can be forced to do so. More generally, the law is founded on a moral basis of "do's and don'ts" but these have been pragmatically crafted to create a play in the joints and without overtly imputing the fall of those who transgress the law to sin. Not all moral regimes created by the law have the same depth and intensity. Some are more high-handed than others, some favour the powerful, and some are hopelessly ineffective in protecting those who most need protection. But apart from vagaries in the design and soul practice of the law, it is arguable that "hate speech" is an identifiable category calling for a separate identification and treatment.

However, treating "hate speech" as a special category of speech inviting a different regulatory response is one thing and, *a fortiori*, denying "hate speech"

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[109] For a detailed examination, see Rajeev Dhavan, *Private lives and public reputations: The career and prospects of the law of defamation in India* (Mimoe 2004).

any form of constitutional protection is quite another. There is an unfortunate tendency in constitutional law to exclude from constitutional protection, certain activities and expressions because they are "intrinsically unworthy of protection". In India, the courts have held that various activities are so intrinsically bad that they are unworthy of protection. This list includes obscene speech, gambling, lotteries, alcohol consumption and rural money lending. If this list is vulnerable to expansion, there is no knowing where it will stop.[110] There is some measure of constitutional hypocrisy in devising this list of unworthy activities. It is not the case that all these activities are banned. They continue to exist – no less with the support of the law by which they are regulated. Even if these activities were brought within the scope of constitutional protection, they would still be subject to constitutionally permissible reasonable restrictions. The decision to declare that certain kinds of activities are constitutionally unworthy of protection has little practical significance. But, it remains a symbolic statement to assert a moral hegemony by those who are untiring in their efforts to establish such hegemony.

The case against various categories of hate speech can be made on the basis that racist, communal, sexist and casteist speech should be placed in a higher regime of limitations, inviting a strong regime of bans and censorship. In our view, it is not necessary to tread the high moral path that there are certain forms of free speech, which should not be treated as a species of free speech at all. All forms of speech must necessarily be included within the conspectus of free speech entitled to constitutional protection. But, this does not mean they cannot be regulated or subjected to ban or criminalization. Nor is it necessarily wrong or contradictory to say that certain forms of speech may be identified as "hate speech" requiring a stronger regime of restraints and restrictions. *Hate speech stands in a separate category precisely because it is socially invidious in that it seeks to target and oppress certain sections of the community, to vilify and incite them, and to prevent them from leading a dignified life with equal respect and concern*. Collective living requires that some premium must attach to not picking on minorities, the sensitivities of peoples' faiths, the predicament of untouchables, and of peoples of different races and castes or women. This justifies treating "hate speech" as a special compendium of various kinds of speech, which may be subjected to strict scrutiny.

Devising special regimes for various kinds of "hate speech" may also be viewed from a practical angle. Take the example of India's legislative law and policy. There are various statutory provisions, which criminalize and seek to ban

[110] *Id.;* R. Knox-Mawer, *Defamation: Some Indian Precedents and the Common Law*, 5(2) Int'l & Comp. L. Q. (1956).

communal, sexist and casteist speech. If all such laws were abolished, there would be a free for all – other than in such situations where there is a clear and present danger threatening public disorder or foreshadowing a riot. Pamphlets, books, pictures, films, e-mails and, indeed, cartoons would freely circulate to offend, insult and incite. Some time and place constraints may exist which would be applied in extreme situations. A carnival of hate speech could perpetrate a social nightmare. The *dramatis personae* in this nightmare would not be individuals seeking self- expression, but politicians playing to vote banks, racist and communal groups pointedly targeting the innocent in the name of religion under the banner of free speech, and the media converting a peaceful society with collective goodwill into one that is fierce, fragmented, furious, and nasty. They would still be entitled to their right to free speech subject to the legal consequences that would follow.

Both in principle and for practical reasons, it may well be that certain forms of hate speech could be more readily identified for criminalization and ban, if after *exacting scrutiny* it is necessary to do so. No doubt, this has to be done in a way that distinguishes between strong offensive, provocative or even insulting speech which would be permissible, and *invidious* hate speech with inciting effect that may be criminalised or banned. Bans should not be absolute, and should be reviewed or even subject to truth and reconciliation. Such a distinction has to be written into the law to limit the scope of state censorship. It is for decision makers to subject any infringement of free speech to "strict scrutiny" in light of the constitutional premium attached to free speech which is seen as a preferred right.[111] A good example of such balancing is Justice Chandrachud's decision in the *Godse case* (1971), where the Court absolved the book *Gandhi Hatya* from ban. The book may have upset sensitivities, but was an exploratory exercise in free speech.[112] No less incisive is the judgment of Justice Krishna Iyer refusing to uphold a ban on the *Periyar Ramayana* which makes provocative statements which would upset many Hindus.[113] Properly tested, Salman Rushdie's *Satanic Verses* provoked but did not fall within the category of invidious and impermissible hate speech. Since the book was banned under the Customs Act, no proper due process or adjudication took place. Nor, indeed, should Laine's writings on Sivaji which

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[111] *Supra* notes 102, 103 and 104.

[112] In this case, proceedings were launched against the publication of Godse's account of the murder of Mahatma Gandhi by Godse. Justice Chandrachud speaking for the Court counselled that a broad overview should be taken so that the work is viewed as a whole without looking at stray passages here and there. According to the courts, there is a vast difference between historical interpretation and the *malafide* distortion of history which has the effect of promote enmity amongst religions. (Gopal Vinayak Godse v. Union of India, A.I.R. 1971 Bom. 56, at ¶ 64.)

[113] State of UP v. Lalai Singh Yadav A.I.R. 1977 SC 202.

includes, interestingly, a translation of a historical text, be banned. From the point of view of free speech, it was unworthy for Justice Hidayatullah to criminalise *Lady Chatterley's Lover* in 1965, by himself playing the conservative, litterateur and art critic all rolled in one. In 1969, the Indian law was changed to admit the defence that a publication was of literary, artistic, scientific or social value.[114] This might redeem *Lady Chatterley's Lover*. But, again, it may not – given the fact that Justice Hidayatullah found the book to be intrinsically unworthy. Hussain's paintings were not intrinsically unworthy. The Hindu sentiment mobilized against them was politically motivated. But accepting that Hindu sentiments may have been hurt, Hussain gracefully withdrew the Saraswati sketch. Even so, a violent reaction followed. Today, there is a price on his head.[115] Pornography has challenged both social and judicial sensitivities. The common law criminalized pornography and the American Supreme Court declared obscenity unfit for constitutional protection. However, there has been an abandonment of these extreme positions. In many such countries, the literary artistic, scientific and social defence has been permitted to decriminalize the erotic. In others, while allowing the defence, a somewhat narrower view has been taken that obscene films and publications should not upset local community standards.[116] The governing principle is that time and place constraints should be imposed. Pornography is not to be flaunted, but should be available to adults who wish to read it. It is these sensitivities which determine whether this form of hate speech that should be banned, and the circumstances under which certain kinds of invidious "hate speech" may be restricted to those who want to read it.

Consistent with the plea for strict scrutiny, pre-publication censorship should not be normally invoked. In 1950, the Supreme Court of India set aside pre-publication bans, and in a 1957 case, indicated outer time limits where it was proposed.[117] However, notwithstanding this, India continues to nurture a system of limitless bans. This is certainly the case with bans under customs legislation. Theoretically, these bans can be recalled. However, there are no time limits in the legislation. Bans by state governments need ratification by judicial proceedings. Once banned with judicial confirmation, the bans became permanent. A most troubling area of pre-circulation bans are to be found in India's legislative apparatus of film censorship through a statutory Board which causes films to be

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[114] *See,* the Exception to Section 292 of the Indian Penal Code, 1860 inserted by Act 36 of 1969.

[115] *Supra* note 82.

[116] *Supra* note 104.

[117] Virendra v. State of Punjab, A.I.R. 1957 S.C. 896, at ¶ 19.

re-edited or banned altogether.[118] It is difficult to set aside these bans – deference being given to the expert opinion of the Board.[119] However, if a film gets a certificate, it is not vouchsafed that the film will be screened. This is what has happened to *Black Friday* – a film about the Bombay riots.[120] Local bans by the administration in the face of worsening law and order are subject to time and place constraints. India needs to review its system on pre-publication bans.

A more serious threat to free speech comes not from State censorship but vicious and violent forms of social censorships. State and social censorship cannot be entirely separated – sometimes both these forms of censorship act in concert. It is increasingly the case that often politically motivated or overzealous fundamentalist social groups assume the power to enforce social censorship at their bidding. Those who do not like a publication are fully entitled to protest against this. Such protests may not be confined to literary discussions or articles in magazines and newspapers. It may travel to the streets. Protests and demonstrations may take place. The effigies of the writers and artistes may be burnt. Speech may be answered by free speech. But, there is a point beyond which free speech cannot go. Protest yes, but not coercive intimidation of the publisher to withdraw a publication or prevent others from reading or seeing it. Nor can such coercion extend to destroying the publication of valuable manuscripts or ransacking houses, threatening the author with violence or ordering *fatwa*s to offer sums of money with exhortations to kill writers, artists and publishers.[121]

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[118] The statutory pre-censorship of films in India is under the control of Censor Board of India and 1970 and such pre-censorship was approved by the Supreme Court in K. A. Abbas v. Union of India, (1970) 2 S.C.C. 780.

[119] Raj Kapoor v. Laxman, (1980) 2 S.C.C. 175. *See also*, Rajeev Dhavan, *Censorship and intolerance in India* (Mimeo 2005).

[120] *Black Friday*, a movie by Anurag Kashyap, on the 1993 serial bomb blasts in Bombay, received clearance form the censors, but its screening was stayed by the Bombay High Court on the ground that it would prejudice and influence the public opinion about the ongoing trials under Terrorist and Disruptive Activities (Prevention) Act. The issue is presently under consideration in the Supreme Court. *See*, Mustaq Moosa Tarani v. Government of India, W.P. (L) No 269 of 2005 (Bombay High Court).

[121] *See* Arjuna Ranawana, *Bombay's Cultural Wars*, Asiaweek, May 1998; *Bengal Bans Taslima's Book*, The Hindu, Novembe 29, 2003; Bibhuti Bhushan Nandy, "Hypocrism Split Wide Open", The Hindustan Times, December 8, 2003; *Wielding' a Plucky Pen*, The Week, November 23, 2003; Rajiv Shukla, *If Ghulam Ali keeps our Soldiers Protecting the Nation Happy, What Right do Shiv Sainiks have to prevent him from Sing in Bombay?*, Rediff on Net, May 5, 1998, *available at* http://www.rediff.com/news/1998/may/05rajiv.htm (last visited on June 16, 2006) ; Rajeev Dhavan, *Ban Burn Destroy*, The Hindu, January 23, 2004; *Blaming a Book, Mob Destroys Invaluable Pages of History,* The Indian Express, January 6, 2004. *See generally*, Arun Shourie, The World of Fatwas or the Shariah in Action (1995).

Finally, there is the question of the response of civil society. Is the principle of free speech, which proceeds on the high moral ground of claiming protection for all free speech, entirely devoid of any ethical considerations on when and how free speech is to be exercised? The answer to this question has two aspects. The first is that the right to free speech does not morally or legally absolve the free speaker if he is utterly irresponsible in his exercise of free speech. Self-restraint and censorship is not a stranger to free speech. It is for those who exercise free speech to evaluate what they say and where and how they should say it. Most *bona fide* exercises in free speech recognise that speech is not just an exercise in expression but also in persuasion. This is not to suggest that free speech cannot provoke, annoy or outrage. Nor does it have to be conditioned by the mores of the day. The right to speech includes the right to make unpopular speech. But, there is a vast difference between *bona fide* unpopular speech and malevolent hate speech where the sole intent is to incite and provoke hate. It is here that self-restraint and self-censorship may be a virtue. In the "Toon" controversy, this self-restraint was missing.

The second aspect confronting the moral dilemmas of free speech is the silence of civil society when confronted with malevolent hate speech. Must civil society be silent? No doubt, no one can tell another that they must believe in God or they will be flogged. However, free speech should be confronted with free speech. Even in the distorted marketplace of ideas, silence is not an option for those who prize free speech as an exchange and underline the need for discourse. In the face of malevolent free speech, should those who disagree with the contents of free speech or the manner in which it is exercised become part of a conspiracy of silence? It is not enough to invoke the Voltairean dictum: "I may disagree with what you say but I will defend your right to say it." Unless a person is wholly equivocal to a particular controversy, it is surely a part of free speech for people to summon the moral courage to offer their response to hate speech, or for that matter any ideas on which they have a view.[122] There is a grim reminder in the oft-quoted statement of Pastor Niemoller that those who do not speak up for others may well be faced with a situation where, when the time comes, they would be all alone because there would be no one to speak for them. People who are vilified by others should not be socially isolated to suffer these sensitivities without even social reprieve. It may well be that many may be frightened to speak for fear of the consequences that may visit them. Negatively, free speech protects the coward who may not wish to say something. More positively, the principles underlying the exercise of free speech should not be driven into moral ambivalence. Those who project free speech as a moral principle should not downgrade it to become

[122] Rajeev Dhavan, *Limits of free speech*, THE TIMES OF INDIA, February 16, 2006.

an optional alternative in a vibrant democracy. Hate speech should not go unanswered. The victims of hate speech should not be pushed into isolation.

In recognizing the phenomena of hate speech, which needs to be addressed by all of us, we are not sacrificing the premium attached to individuals in their struggle against the web of "governmentality" into which we are ineluctably snared.[123] Much rather, we seek to lay some emphasis on that part of our autonomy which recognizes that we live with others with as much passion for our collective pressures as we bring to our individual assertions of self expression.

With this, let us turn to the "Toon" controversy. The entire controversy was an exercise in intentional hate speech – designed to provoke, incite and wound the sentiments of the Muslim community. The repeated re-publication of the cartoons was clearly done with malevolent intent to keep the campaign alive. These controversies do not prove any clash of civilizations. Much rather they constitute support for the U.S.A.'s foreign policy to project and portray all Muslims – indeed, the faith of the Muslims – as a terrorist misfit amongst the "civilised" nations of the world. Such a "foreign" policy prejudices and invites political intransigence.

The Danish Prime Minister's statement that the cartoons were simply an exercise of free speech was simply not enough. As a "responsible" politician he was duty bound as a public figure concerned with governance to state his substantive views on the cartoons. He was playing with divisive vote banks. The cartoons were correctly described as "racist", waiting for an anti-racist response. The various Muslim peoples were right to protest, demonstrate, or cease trade and diplomatic ties with people or countries which were unrepentant in not denouncing the cartoons or did not state their moral concerns – with or without apology. But violent killings, uncontrolled mobs, burning of property, ransacking of houses, killing people and issuing *fatwas* to incite murder against the cartoonists cannot be defended. Some political leaders realised that it was their moral duty to speak, and tendered apologies, which should be accepted with grace even if they were offered as peace offerings for entirely pragmatic reasons. However, in all this, the Muslims were isolated. What the cartoon controversy also teaches us is that there is a large silent majority, which refuses to state what they believe or even consider that they ought to speak up. Alas, those who fight for the right of the courageous to exercise their free speech cannot themselves summon the courage to exercise their own free speech when it is needed most.

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[123] *See*, RANABIR SAMADDAR, THE POLITICS OF AUTONOMY: INDIAN EXPERIENCES (2005).