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The Haridwar hate assembly: The answer to divisive politics is not law alone, but also civil society mobilisation

BY SUKUMAR MURALIDHARAN — JANUARY 11, 2022

India and the world have a long way to go in legislating a practical set of principles on hate speech. Standards of civility are meanwhile under challenge as citizens of even the most stable liberal democracies retreat into narrow ghettos of identity, and respect for the dignity of the "other" disappears, writes **SUKUMAR MURALIDHARAN**

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A three-day festival of hate speech in Haridwar has prompted a phase of extreme investigative diligence by the Uttarakhand police. Few are holding their breath since the transformation of investigation into obfuscation is already apparent.

Explicit video recordings of the Haridwar event, rather pretentiously called a Dharm Sansad, began circulating over social media soon after it concluded on December 19. Police in Uttarakhand and elsewhere received complaints demanding action under applicable statutes against the celebration of violence and the calls for the mass killing of people from minority faiths. Yet, beyond the cursory initial move of "first information reports", there was little further action.

In some dismay, legal scholars wrote of an abundance of statutes available to bring the culprits to book. Senior military officers and bureaucrats, including former chiefs of the defence forces, warned that the rhetoric of hate could cause "serious breaches in internal security (and also) tear apart the social fabric of our nation". And normally quiescent faculty and students from the Indian Institutes of Management and other educational institutions wrote to the Prime Minister, stating what seemed the obvious: "Your silence on the rising intolerance in our country … emboldens the hate-filled voices and threatens the unity and integrity of our country".

Civility and social concord are built up over the years and their observance is a matter of custom, only inviting the force of law when a violent rupture is imminent. Yet, the force of law diminishes when votes could potentially be harvested by promoting embitterment. Power is meant to be exercised under the law, but the process through which power is constituted often takes lawless forms. When the retention of power at all costs becomes a consuming object, agencies of the law could be directed to abet in endemic lawlessness.

This distinction between "hate speech" as actual incitement and as part of the background conditions in which the crime of genocide occurs, creates further ambiguities. It gives rise to a possibility, in the judgment of the ICTR, of "hate speech that does not instigate violence". Again, diligent observance of these distinctions may well ensure that interventions are too late to stop an outbreak of violence.

Rhetorical violence as a precursor to the disenfranchisement of those seen to not "belong" within the nation, is a recognised means for extreme populists to fire up core constituencies and attract new adherents. Constitutional democracies could devise remedies to these frailties in practice, but these are in turn to be implemented by an executive agency constituted in electoral competition. This raises the age-old question: who will educate the educators?

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In general, the limits on speech are observed as part of an unstated code, with legal restraints prior to the speech act normally being frowned on. If violent consequences follow from speech acts, there is a plethora of laws available for enforcing accountability in varying degrees of rigour.

Force was employed in blatantly lawless manners to crush dissent in December 2019, as streets in Delhi began to teem with protests against highly questionable amendments in India's citizenship law. The protests occurred at a particularly delicate juncture, since elections to the Delhi state assembly were approaching. Intent on doing what they do best, campaigners from the Bharatiya Janata Party (BJP) raised the pitch of the rhetoric as the campaign intensified, with explicit exhortations for further violence against the demonstrators. The BJP lost the Delhi election decisively and a visit soon afterwards by U.S.

President Donald Trump was no deterrent, as waves of vengeful violence broke out in a working class suburb of the capital city on a scale unseen for three decades. A petition before the Delhi High Court, demanding immediate FIR's against the politicians for their words of incitement, led to immediate notices to the local police and the abrupt transfer of the judge involved. The matter has since languished with little prospect of being settled, even two years since the events.

Exception to free speech

All legal systems recognise hate as a necessary exception to free speech, but as with other issues where culture plays a role, no agreed global standard on the matter exists. The US First Amendment introduced constitutional protections for free speech towards the end of the 18th century, but immediately wrote in a series of exemptions for acts of "seditious" and "blasphemous" libel. In the 20th century came the Espionage Act, another powerful impediment to free speech.

Established governments have always legislated on speech in ways to sustain themselves. It was only in the 20th century when the news media and creative arts were themselves institutionalised within the fabric of democratic societies, that more expansive interpretations of free speech gained traction.

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This shift in judicial standards has since been consolidated. In 1952, in a brief retraction the Supreme Court of the United States (SCOTUS) upheld in the case of Beauharnais v Illinois, a token penalty against a white supremacist who railed against "mongrelisation" and a determined pushback against the "rapes, robberies, guns, knives and marijuana of the negro". Subsequent rulings though have tilted towards an absolutist interpretation of the free speech right.

In 1969, in a case involving a Ku Klux Klan leader calling for the "return" of the "nigger" to Africa and the Jew to Israel, SCOTUS unanimously held conviction by a lower court unlawful and instituted a two-part test for assessing when an act of speech breached constitutional boundaries: both the intent to incite violence and the connection with any such consequent action had to be established. This was a high bar to clear for any form of prior restraint on

speech: a test that came to be known, after the defendant in the case, as the Brandenburg test.

In 1977, in what seemed a step too far in free speech licence, a US Court of Appeals held that local government ordinances to stop a neo-Nazi demonstration in the village of Skokie near Chicago, were unconstitutional. It did not seem of any material importance that the town in question had a substantial Jewish population including survivors of Nazi death camps, or that the leader of the Skokie march was credited with the view that "Hitler should have completed the job". SCOTUS subsequently declined to hear the case, allowing the Appeals Court's decision to stand.

Are these standards acceptable as general principles? Safeguards are essential since prior restraint is a two-edged sword, which could be used to crack down on speech advocating on behalf of the disadvantaged. As Anthony Lewis points out in a "biography" of the First Amendment: freedom of speech as a constitutional guarantee "is meant to assure Americans that they can believe what they will and say what they believe. But repeatedly, in times of fear and stress, men and women have been hunted, humiliated, punished for their words and beliefs".

Yet, giving effect to the Brandenburg standards is a practically fraught process, seemingly requiring an accurate means of judging "intent" and an ability to foretell when it would result in real violence. One would be an ex ante test, premised solely upon the evidence of a speech act and the context of its commission. The other would be an ex post test to be applied in case there violence in close temporal proximity to the speech act.

In Charlottesville in the U.S. state of Virginia, a conglomerate of forces including fringe and neo-Nazi groups, mobilised for a "Unite the Right Rally" in 2017, to protest the removal from a prominent public space, of a relic from the age of slavery. Explicit slogans celebrating white supremacy were raised, and as counter demonstrators mobilised, a right-wing rallyist ploughed through their ranks in a car, killing one. The car-borne killer was later tried and sentenced on a homicide charge, but were the antecedent conditions that led to the violence preventable? Did free speech as a fetish rather than value, actually contribute to a climate of violence and the needless loss of one life?

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The philosopher Jeremy Waldron, who often uses that intangible value of human "dignity" to construct his arguments, is in fundamental disagreement with the standards inherent in the Brandenburg and Skokie cases. "The issue", he says in a recent book, is "the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and semi-permanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship". Waldron recognises that a hate speech code could conceivably endanger "vigorous dissenters" with punishment. That was not a hazard to be discounted, but to focus on this possibility alone, while ignoring "other ways in which waves of public hysteria (could) threaten freedom" was fairly useless. Majoritarian bullying, for instance, has become a potent threat to free speech in recent times, though it often escapes being called out because it claims a higher moral value.

International law against genocide

More stringent standards than those applicable in the US have been specified in international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide, called the CoG for short, the International Convention on the Elimination of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR).

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The CoG for instance, makes the "direct and public incitement" to commit genocide, in turn defined with a fair measure of rigour, a punishable crime. CoG was applied in a real-life situation after the horrific mass violence against the Tutsi tribal group by Hutus of Rwanda in 1994, when between 500,000 to 1,000,000 were killed in the space of three months. This was

a campaign of violence that was aided by virulent messages of racial hatred broadcast over Radio Rwanda.

An International Criminal Tribunal for Rwanda, set up to deal with this genocide, came up in 2003 with a formulation of what constituted "direct and public incitement". The ICTR recognised the role of mass media in "contributing to a hateful campaign against the Tutsis". "The direct element of incitement should be viewed in the light of its cultural and linguistic content", the Tribunal ruled: "Indeed, a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience".

This distinction between "hate speech" as actual incitement and as part of the background conditions in which the crime of genocide occurs, creates further ambiguities. It gives rise to a possibility, in the judgment of the ICTR, of "hate speech that does not instigate violence". Again, diligent observance of these distinctions may well ensure that interventions are too late to stop an outbreak of violence.

Other international instruments, such as the ICCPR, opened for signature in 1964 and ratified by India in 1979, enjoins member states to prohibit by law, "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". ICERD, opened for signature in 1967 and ratified by India in 1969, has an article which specifically bans speech advocating discrimination on grounds of identity.

The elusive principles

"Hate speech" as a term is rarely if ever used in the Indian legal system, though there is a seeming surfeit of laws dealing with like offences. Apart from the general guarantees under fundamental rights, specific protections based on identity are available for indigenous communities and those traditionally disadvantaged under the caste system: Dalits and Adivasis in common terminology. Though all forms of discrimination are prohibited under the fundamental rights, the Constitution adds an additional layer of protection with the formal abolition of untouchability under Article 17.

This seeming redundancy is clearly a safeguard against ambiguities in interpretation. A later enactment, the Protection of Civil Rights Act of 1955, provides for sanctions when the dignity of citizens covered by the ban on untouchability is undermined. This does not mean that other citizens do not have civil rights, only that the disabilities inflicted on certain classes of

citizens deserve special attention. The passage of the Prevention of Atrocities on Scheduled Castes and Scheduled Tribes Act in later years, created a special category of protection for two traditionally disadvantaged classes of citizens.

Protections based on religious identity are absent in the Indian constitutional scheme, since there is an element within it of the French revolutionary idea, the "Jacobin" denial of religion as a political fact. Section 153 of the Indian Penal Code though, does criminalise the "promotion of enmity between different groups" on grounds of identity. Likewise, a more explicit prohibition of insults to religion or religious belief was written in with Section 295A, after the Rangeela Rasool controversy of the 1920s.

Yet, these provisions of the statute remain empty without authoritative judicial interpretations. If the touchstones of violence and public disorder were applied, a case that literally called out for prosecution involved Bal Thackeray, leader of the Shiv Sena, after he used the party newspaper Saamna to exhort his cadre into a ten-day long rampage in the city of Mumbai (then Bombay) in 1993. There was little ambiguity here, nor any effort to disavow responsibility as the front page of the newspaper, day after day, carried orders for battle for Shiv Sena cadre. As the violence raged, a group of public-spirited individuals filed a petition before a city court demanding Thackeray's prosecution for words – printed and spoken — that contributed directly to the violence.

Mumbai city police opposed the petition on the grounds that the matter fell within the jurisdiction of the Press Council of India – an unwieldy and inept body crippled at birth, with no more than the power of censuring delinquent behaviour in the press. The petition filed in the public interest was thrown out at that point, but later revived when an official commission of inquiry in 1998, held Thackeray guilty of inciting violence. A symbolic arrest was effected but the case was held void under the statute of limitations.

In 2009, Varun Gandhi, a BJP candidate contesting for the Lok Sabha from Pilibhit constituency in the Uttar Pradesh terai, was recorded exhorting the voters of the Hindu faith to vote for him as a matter of religious obligation. Any hand that was raised with intent to harm a Hindu, he warned, would be ruthlessly cut off. In a constituency with a substantial number of voters of other faiths, Gandhi ended his speech with a particularly gross reference to the religious ritual of circumcision. A similar pejorative, not quite as crass, was also hurled at those of the Sikh faith.

Gandhi spent 20 days in prison on charges of incitement to violence and other provisions of criminal law. He returned to campaign and won his seat by over 300,000 votes, among the largest victory margins in that electoral round. He was acquitted in subsequent trial proceedings, with one witness after another turning hostile and the prosecution showing a marked disinterest in pursuing a credible strategy.

It was later revealed through a sting operation carried out by a web-based news portal and broadcast over a widely watched news channel in 2013, that the whole trial had been a charade orchestrated by local power-brokers cutting across party lines.

Majoritarian bullying, for instance, has become a potent threat to free speech in recent times, though it often escapes being called out because it claims a higher moral value.

Clearly, India and the world have a long way to go in legislating a practical set of principles on hate speech. Standards of civility are meanwhile under challenge as citizens of even the most stable liberal democracies retreat into narrow ghettos of identity, and respect for the dignity of the "other" disappears. Without those vital elements of respect and dignity – inherently matters that cannot be legislated — no legal system, however well drafted, will serve the cause of civic concord. In the acrimony that prevails today, the law of majoritarian force will continue to be deployed in electoral campaigning until civil society can mobilise for a determined pushback against divisive politics.

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