THE JUSTICE KT DESAI MEMORIAL LECTURE

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Central Court Room

Bombay High Court

Mumbai

"Time for a Penal Code Fit for India"

Lord Lester of Herne Hill QC

Introductory

It is a great honour and personal pleasure to give the eleventh lecture in memory of the late Justice K.T. Desai. I am most grateful to his daughter, Justice Sujata Manohar and the Centenary Committee, for having given me this privilege.

I never met Justice K.T. Desai but I know he was renowned as a brilliant lawyers' lawyer, Judge of the Bombay High Court, and Chief Justice of Gujarat, and I read the gracious tribute paid to him by Justice R.C. Lahoti, the former Chief Justice of India when he gave a lecture in this series last year.

I am fortunate to have known Sujata Manohar for more than three decades and have followed her career with admiration – an internationally renowned jurist and a beacon of liberal enlightenment and hope in our troubled world.

This is among the oldest Courthouses in India. It was here in 1897, that Tilak – called by the British "Father of the Indian unrest" - was tried, and convicted under the Indian Penal Code, ("the IPC") emerging from prison to be revered as a martyr and national hero.

He was tried here again in 1909 because he defended revolutionaries in his paper, *Kesari.* He was accused of sedition, and of bringing or attempting to bring into hatred or contempt disaffection against the Government, and of exciting or attempting to excite feelings of enmity or hatred between different classes of His Majesty's subjects. They remain vague and sweepingly broad speech crimes in India to this day.

Tilak was convicted, fined and transported to Mandalay, where he was imprisoned for six years. Mr Justice Davar condemned the articles as "seething with sedition." He described Tilak as a man with a "diseased and perverted mind." "You hail the advent of the bomb in India" he said "as if something had come to India for its good. I say such journalism is a curse to the country."

The Secretary of State for India, Lord Morley, disapproved of the trial and sentence. Morley wrote prophetically to the Governor that

> "the mischief of the trial and the condemnation of Tilak would be greater than if you had left him alone."

It was fitting that, half a century later, Chief Justice Chagla, unveiled a tablet in this courtroom to Tilak's memory. He said;

> "We have met here today to make atonement for the suffering that was caused by these convictions to a great and distinguished son of India. That disgrace tarnished our record and we are here to remove that disgrace."

In 2013, Shri Ashok Desai SC, a former distinguished Attorney General for India, gave a previous lecture in this series. It was a well-aimed critique of problems of judicial *over*-reach in India in the context of what he described as, "increasingly a weak Executive and a dysfunctional Legislature" with the judiciary having "the Constitutional obligation or the dharma to ensure that Fundamental Rights are not breached."

I believe that, apart from judicial over-reach there is a problem of judicial under-reach in India - giving excessive deference to mid-Victorian values imposed by the British Raj in the IPC, and to the influence of the English dogma of Parliamentary sovereignty, and by not subjecting the offences to strict scrutiny where they threaten fundamental rights. That problem is compounded by the passivity in this area of successive Governments and Parliaments.

The IPC applies not only in India but, often in amended and more repressive form, throughout South Asia and South-East Asia where the British ruled. It is some forty-four years since the Indian

Law Commission reviewed the IPC as a whole. I submit that the time is over-ripe to make it fit for the needs of the world's largest democracy.

I take as my examples crime and punishment, first, for one's sexuality and secondly, for the exercise of free expression. I shall focus on the IPC's provisions on the crimes of consensual adult male homosexuality, and on its broad speech crimes. Both these raise issues of international concern to the admirers and friends of your nation.

The Genesis and Continuation of the Indian Penal Code

The IPC was not Indian; nor was it a gift from God. It has no divine sanctity. It was the handiwork of the English Utilitarians, inspired by Jeremy Bentham. Thomas Babington Macaulay drafted the Code almost single-handedly. As Eric Stokes observed,

> "His pictorial imagination, like the Evangelical mind, saw only in terms of black and white, and knew nothing of half tones." [1]

In codifying British India's criminal law, the English Utilitarians achieved what they could not achieve in England. They secured the enactment in 1860 of the Code that they considered appropriate for the condition of the subject peoples of British imperial rule under the Queen, later Empress, of India.[2]

[1] The English Utilitarians and India, Oxford (1959), 224.
[2] The Code came into force on 1st January 1862.

The Indian Constitution provides that "All the laws in force … immediately before the commencement of the Constitution are to continue in force until altered, repealed or amended."[3] That includes the IPC. During the making of the Constitution there was no scrutiny of the IPC. It was simply carried forward as an existing law, with the power to amend vested in Parliament.[4]

The Constitution provides that all laws in force at the commencement of the Constitution that clash with the exercise of the fundamental rights protected by Part III of the Constitution shall, to that extent be void.[5] That includes the IPC. It also provides that the protection of freedom of speech and expression is subject to the operation of existing laws. That too includes the IPC.

Consensual Sex between Adult Men

Section 377 of the IPC provides that

> "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment … for a term which may extend to ten years, and shall also be liable to a fine. "

Section 377 criminalizes homosexual sex and other acts of sodomy with another human being or an animal. Blackstone's *Commentaries* described sodomy as an "abominable and detestable

[3] Article 372. "All the laws in force in the territory of India immediately before the commencement of the Constitution are to continue in force until altered, repealed or amended." All matters included in the Penal Code are in the Concurrent List, List III, in the Seventh Schedule to the Constitution.
[4] Article 246.
[5] Article 13.

crime against nature". The concept of sexual offences against the order of nature was essentially Western and Christian.[6]

Macaulay was not a Sanskrit scholar. "We must at present do our best to form a class", he wrote, "who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and colour, but English in taste, in opinion, in morals, and in intellect."[7] He proposed that an immediate halt be put to the printing of Arabic and Sanskrit books, and that both Sanskrit College in Calcutta and the Madrassa be closed down. We may be sure that, when he wrote Section 377 of his Code, he had not studied the *Karma Sutra*, of which at that time there was no English translation.[8]

A year after the enactment of the IPC, the Westminster Parliament made it an offence for any man, in public or in private, to commit an act of "gross indecency" with another man,[9] and four years later, the "Labouchere Amendment" outlawed in addition every homosexual act short of sodomy.[10]

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[6] Commentaries on the Laws of England, Vol., Chapter 15, "Of Offences against the Persons of Individuals"..

[7] Minute of Education, cited by John Clive, Thomas Babington Macaulay: The Shaping of the Historian, Secker & Warburg (1973), 376.

[8] Macaulay came from a strict Evangelical background. He never married and had a close relationship with two of his sisters. *Ibid.* Chapter 10.

[9] The Offences Against the Person Act 1861, Section 11

[10] By Section 11 of the Criminal Law Amendment Act 1885, gross indecency was made a crime. It was under this provision that Oscar Wilde was convicted and sentenced to two years' hard labour, and Dr Alan Turing, the brilliant mathematician, father of modern computing, and code-breaker, was convicted and sentenced to experimental chemical castration. Turing's conviction had a devastating effect upon him. He took his own life after undergoing chemical castration. In December 2013, at the request of the Minister of Justice, Turing was granted a pardon under the Royal Prerogative of Mercy, by the Queen.

It is instructive to compare what has happened since the mid-nineteenth century, in the UK and elsewhere with what has happened and not happened in India.

Gay Liberation in England and Beyond

In England, in September 1957, the Report of the Departmental Committee on Homosexual Offences and Prostitution, better known as the Wolfenden Report, after Lord Wolfenden, who chaired the Committee, recommended that "homosexual behaviour between consenting adults in private should no longer be a criminal offence".[11] It gave rise to a debate between Professor HLA Hart and Lord Devlin about the enforcement of morals.[12] In 1967 homosexual offences were repealed in England and Wales[13], but they remained in force in Northern Ireland and the Republic of Ireland.

The European Court of Human Rights ruled that, the mere existence of the legislation interfered with the right to respect for private life because of the chilling effects of the risk or threat of prosecution.[14] As a result, the law was reformed in Ireland, North and South, and in Cyprus.

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[11] Wolfenden Report, 'Report of the Departmental Committee on Homosexual Offences and Prostitution in Great Britain' (4 September 1957)
[12] Lord Devlin, The Enforcement of Morals, Oxford (1968); HLA Hart, Law, Liberty and Morality, Oxford (1968)
[13]The Sexual Offences Act 1967.
[14] *Dudgeon v United Kingdom (1981) 4 EHRR 149; Norris v Ireland* (1988) 13 EHRR 186. See also *Modinos v Cyprus* (1993) 16 EHRR 485.

The American Supreme Court[15] and the Constitutional Court of South Africa[16] have struck down laws making homosexual love between consenting adults in private a crime. They have regarded it as contrary to the protection of privacy and equality in their constitutional Bills of Rights. The legislatures of Australia, Canada, and New Zealand have also done so, and so has the People's Republic of China.

But the obnoxious crime is alive in parts of Commonwealth Africa, Asia and the Caribbean that were under British colonial rule. And, because of the Supreme Court's judgment, it remains a crime in India chilling the private lives and love of gay couples.

In the UK we have gone well beyond simply removing this blatant discrimination and intrusion on privacy from our criminal law. We have legislated to make sexual orientation discrimination unlawful[17] and to permit gay and lesbian couples to enter into civil partnerships[18] and to enable them to marry.[19] The American Supreme Court came to a similar conclusion in June,[20] as did the `European Court of Human Rights in July.[21]

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[15] *Lawrence v Texas* 539 U.S. 558 (2003), overruling *Bowers v Hardwick* 478 U.S. 186 (1986).
[16] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517.
[17] Equality Act 2010.
[18] Civil Partnership Act 2004.
[19] Marriage (Same Sex Couples) Act 2013.
[20] *Obergerfell v Hodges* 576 U.S. (2015) that ruled that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.
[21] *Oliari and Others v Italy* (application number 18766/11) 21 July 22, 2015.

Macaulay's Homophobic Legacy

The Indian Law Commission's 42nd Report of June 1971 examined the IPC in some detail.[22] As regards Section 377, the Law Commission concluded that[23]

> "in this highly controversial field, the only safe guide is what would be acceptable to the community. We are inclined to think that Indian society, by and large, disapproves of homo-sexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private."

The Law Commission's timorous approach meant that a highly vulnerable minority would continue to be subject to severe criminal penalties for having consensual sex because of homophobic hostility to what they do in bed: an example of John Stuart Mill's "tyranny of the majority".

A generation later, in 2000, the Law Commission recommended substituting a new provision in place of Section 377 of the IPC[24], but the Report was concerned with rape rather than consensual sex and it is unclear whether it was intended to reverse the Law Commission's previous view once its recommendations had been put into effect.[25]

The High Court's Judgment

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[22] Paragraphs 16.24-26.
[23] Paragraph 126.
[24] 172nd Report: Review of Rape Laws, March 2000.
[25] The Criminal Law (Amendment) Act 2013 made a number of reforms, though it did not amend the Penal Code to forbid marital rape. Rape in marriage was criminalized in Scotland in 1982 and in England in 1991. This is another example of the Penal Code being unfit for use a modern democracy that is committed to the protection of fundamental human rights.

On 2nd July 2009, Justice S. Muralidhar, sitting with Chief Justice Shah in the Delhi High Court, delivered a landmark judgment. They concluded that Section 377 violated Articles 21, 14 and 15 of the Constitution in criminalizing consensual sexual acts of adults in private. The judgment accorded with international human rights law and the way in which courts in other common law countries, including the United States, have interpreted their constitutions as requiring the crime to be struck down. It was a *tour de force*.

The Supreme Court's judgment

But a two-judge Supreme Court overturned the judgment, describing it as "legally unsustainable". With respect I submit that that description would more appropriately be given to the Supreme Court's reasoning.

The Supreme Court emphasized the importance of judicial self-restraint when dealing with challenges to the constitutionality of law, manifested in the presumption of constitutionality.[26] It described this as "founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution." And it applied the principle to pre-Constitution laws adopted by Parliament and used without amendment.

[26] §28.

The Supreme Court recalled the history of Section 377, including Macaulay's view that it was within "an odious class of offences respecting which it is desirable that as little as possible be said" about what he described as "this revolting subject".[27] It referred to the High Court's reliance on judgments from other jurisdictions, but considered that they could not be applied blindfolded in deciding the constitutionality of the law enacted by the Indian legislature."[28] The Supreme Court concluded that Section 377 does not suffer from the vice of unconstitutionality,[29] and that it was a matter to be left to the legislature.[30]

Justice Leila Seth wrote an article in *The Times of India*[31] with the title "India: You're Criminal if Gay" explaining that her eldest son, Vikram, the fine novelist, is now an unapprehended felon. I cannot improve on her words:

> "What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization or, worse, to recriminalize it is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt that in the constitutional scheme it is the judiciary that is the ultimate interpreter."

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[27] §37.
[28] §52.
[29] §54.
[30] §56.
[31] 20 March 2014.

Her words fell on deaf ears. The Attorney General for India and others submitted a Petition seeking to review the Supreme Court's judgment on a number of grounds.[32] But the application was dismissed without reasons.

The Supreme Court's approach is out of step with the approach taken by every other senior common law court in the United States and the Commonwealth. It has no regard to India's international treaty obligations under the UN International Covenant on Civil and Political Rights. And it treats Macaulay's Code and Section 377 as though the Indian Parliament had discussed and approved them. It is difficult to understand why a high degree of judicial deference is called for simply because Macaulay's IPC was continued as an existing law after independence.

The Supreme Court could have explained why the present situation is unlawful and cries out for legislation, but it chose to pass the buck to the politicians. Navi Pillay, the UN High Commissioner for Human Rights criticized the judgment [33] while UN Secretary General Ban Ki Moon expressed hope for reform.[34] It seems that the Central Government and Parliament have no appetite to amend Section 377 and to bury at last this unsightly and archaic relic of Macaulay's work. Perhaps a differently

[32] Article 137 of the Constitution.
[33] Pillay dismayed at re-imposition of criminal sanctions for same-sex relationships in India, UN OCHR Press Release, 12 December 2013
[34] UN chief calls for equality for lesbians, gays and bisexuals, 12 December 2013, Deccan Chronicle

composed Supreme Court may yet remove the stain from India's international reputation.

There are other examples. As Leila Seth points out in her collection of essays, *Talking of Justice*, marital rape is a crime in Australia, Canada, South Africa and the UK but not in India because exception 2 in Section 375 of the Penal Code says "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." The late Justice Verma's Commission recommended that marital rape should be a crime, but the Central Government did not agree.

Speech Crimes

I turn to freedom of expression and the IPC's many speech crimes, including causing outrage to religious feelings,[35] defiling "sacred" objects[36], defamation[37], sedition[38], promoting enmity between different groups[39] and insult.[40]

Under British rule there were many repressive measures to censor the press and curtail or restrict free speech, as Tilak knew. The founders of your Constitution ensured that there would be robust protection for your citizens. Article 19 in its original form protected free speech and expression with few exceptions.

[35] Section 295A
[36] Section 295
[37] Section 499.
[38] Section 124A.
[39] Section 153A.
[40] Section 66A of the Information Technology Act 2000 creates the offence of causing "annoyance or inconvenience" via the Internet.

But Article 19 was weakened in 1951 in the first of many constitutional amendments. During the previous year, in *Romesh Thappar's* case a full bench of the Supreme Court struck down as incompatible with Article 19 a ban on a left-wing magazine in the State of Madras for having published criticism of the Nehru administration.[41] The ban was imposed by the Madras legislature under a power conferred by the Government of India Act 1935 in the interests of "securing public safety". The Nehru government retaliated against the judgment by introducing amendments against what were described as the "abuse" of freedom of speech and expression.

In its current form, Article 19 protects the free speech rights only of *citizens*, and makes free speech subject to vague and broad exceptions for the operation of any existing law, and laws that impose "reasonable restrictions" in the interests, among other things, of "public order, decency or security, or in relation to contempt of court, defamation or incitement to an offence."

Foreign and Indian publishers from the print and electronic media, as well as NGOs need to understand the Indian legal system and to know how the exceptions to the right to free speech are likely to be interpreted. The Indian police and others also need to understand the state of the law.

[41] *Romesh Thappar v The State of Madras* 1950 SCR 594.

The former Attorney-General, Shri Soli Sorabjee SC, has warned about the divisive effects of these speech crimes. He wrote that,

> "experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance." [42]

The Westminster Parliament heeded his warning when we abolished the crime of blasphemy in England and Wales, instead of acceding to demands to extend it to all religions.

Examples abound that illustrate the arbitrary nature of the current situation and the wisdom of Soli Sorabjee's warning. Last March a group of Kashmiri students in Meerut city, Uttar Pradesh, were initially charged with sedition and suspended by the University for applauding the Pakistani cricket team.[43] They were also investigated for disrupting communal harmony.[44] It is reported that[45]

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[42] Cited in the Report of the House of Lords Select Committee on Religious Offences in England and Wales, HL Paper 95-1, 10th April 2003, §52.
[43] Kashmiri students charged with sedition, freed after controversy erupts, The Times of India, 6 March 2014
[44] India drops sedition charge for Kashmiri students in cricket row, BBC, 6 March 2014
[45] Nikhil Moro, "Web Freedom and Criminal Libel In India", Policy Report No. 4, The Hindu Centre for Politics and Public Policy, 2013, 21-12.

- Mumbai police obtained a warrant against the president of Rationalist International, upon a complaint by the local Catholic Church after he challenged a 'miracle' in an interview.
- Mumbai police arrested a political cartoonist on a charge of seditious libel after he depicted national emblems negatively.
- Mumbai police arrested two college students, one for posting on Facebook and the other for 'liking' the post, upon complaint by a political leader.
- The Government of Tamil Nadu banned the screening of *Vishwaroopam*, a feature film cleared by the Central Board of Film Certification, upon complaints from some Muslim groups.
- Religious fundamentalists have increasingly accused Indian artists of blasphemy, calling for the banning of their works, which have triggered protests and invited death threats.
- A noted scholar, MM Kalburgi, former Vice-Chancellor of Kannada University, aged 77, was shot dead, allegedly by Hindu fundamentalists, for condemning idol worship.
- Christian groups in Mumbai are up in arms over a play, *Agnes of God*, which they say belittles their religion. They want to ban the play from being performed.

There are also reports that the Tamil Nadu government has filed numerous defamation complaints against political opponents and the media with chilling effects on freedom of speech and public debate. The Maharashtra government issued guidance to the police about when they could arrest a person on sedition

charges under Section 124A of the Penal Code that appeared to suggest that criticism of the government could amount to sedition.

Events like these cause great concern to friends of India across the world. The issues they raise about the relationship between the speech crimes and the Constitution that are not hypothetical or academic. They are not clarified by my reading of the textbooks or your extensive case law. Here are some perplexing examples.

The exception in Article 19 for "the operation of any existing law" covers the entire Indian Penal Code, including its speech crimes. Does this exemption for the operation of any existing law mean that the courts have no power to nullify those crimes because of their impact upon the right to free speech and expression?

What is the test for deciding whether a restriction is "reasonable"? Is it the test of necessity and proportionality? And must the restriction comply with the principle of legal certainty?

Does the fact that Article 19 protects only citizens mean that foreign publishers via the print or electronic media have no constitutional protection when they are alleged to have been guilty of defamation or other speech crimes?

These questions are not merely academic, especially in the digital age of global communication via the worldwide web exchanging ideas and information.

The Westminster Parliament has made major reforms to the common law tort of defamation to strike a better balance between free speech and reputation.[46] It has also abolished the common law offences of defamation,[47] blasphemy,[48] sedition,[49] scandalizing the judiciary,[50] and the public order offence of using "insulting" language,[51] as well as ensuring that the offences of inciting religious and homophobic hatred are carefully tailored to the protection of freedom of expression.[52]

The IPC contains all of those offences, and the Contempt of Courts Act 1971 gives statutory force to the offence of scandalizing the judiciary.[53] But it seems unlikely that the Government and Parliament will abolish these archaic crimes. In April, the government sought a report from the Law Commission regarding whether defamation should be decriminalized.[54] The Law

[46] See the Defamation Act 2013. The Act came into force in England and Wales on 1st January 2014.
[47] The Coroners and Justice Act 2009, s73.
[48] The Criminal Justice and Immigration Act 2008, s. 29 (applicable only to England and Wales.
[49] The Coroners and Justice Act 2009, s73.
[50] Coroners and Justice Act 2009, s73.
[51] The Crime and Courts Act 2013,s57.
[52] The Coroners and Justice Act 2009, s73.
[53] The Contempt of Courts (Amendment) Act 2008 provides that no court shall impose a sentence under the Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere, with the due course of justice.
[54] See *Times of India*, 11 April 2015

Commission issued a consultation on the subject[55]. Respondents "overwhelmingly expressed dissatisfaction with the present state of defamation law".[56] Some called for the repeal of sections 499 and 500 of the IPC. Only a very small number argued for the retention of criminal provisions for defamation.

The Law Commission also sought opinions on reviewing the law on contempt of court, including the offence of "scandalizing the judiciary". It noted that this has ceased to be an offence in the UK, and that there have been repeated calls in India for reform of contempt of court laws. The Law Commission asked what further changes were needed to ensure freedom of the press, and whether scandalizing or tending to scandalize the court should continue to be a ground for contempt of court. Many who responded thought it should be repealed, or narrowed.

India has been party to the UN International Covenant on Civil and Political Rights since 10th April 1979.[57] But the Covenant has not be made part of the laws of India, and successive governments have failed to accept the jurisdiction of the UN Human Rights Committee to receive individual complaints of breaches of the Covenant.

[55] See Government of India, Law Commission of India, Consultation Paper on Media Law, May 2014

[56] See National Consultation on Media Laws, Overview of Responses, 27 and 28 September, 2014 Law Commission of India and National Law University, Delhi

[57] But not to the Optional Protocols to the Covenant.

Article 19 of the Covenant, unlike Article 19 of the Indian Constitution, protects the right of *everyone*, and not only the State's citizens, to the right to freedom of expression, regardless of frontiers. I wonder whether it is legitimate to interpret the Constitution as protecting foreigners despite its plain language confining it to citizens, and, if not, how can India comply with the Covenant in this respect.

Because the exercise of the right to free expression carries with it special duties and responsibilities, Article 19 (3) of the Covenant provides that it may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary

> (a) for the respect of the rights or reputations of others; or
> (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

In July 2011, the UN Human Rights Committee gave guidance to States on what freedom of expression means in practice.[58] It reaffirmed the States' obligation to ensure that everyone is protected from private actors whose conduct impairs the right to free expression.[59] It highlighted the need for States parties to be proactive in putting in place "effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression."[60] That would include protecting authors and publishers, like Salman Rushdie and Penguin Books, against intolerant mob attacks.

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[58] General Comment No. 34 on Article 19 of the ICCPR, 21 July 2011.
[59] §7.
[60] §23.

The Human Rights Committee has emphasized that

> "When a State party invokes a legitimate ground for freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[61]

That would involve the political branches of government as well as the judiciary interpreting Article 19 of the Constitution and the IPC's speech crimes consistently and in accordance with the principles of legal certainty and proportionality.

The UN Human Rights Committee called on States parties to consider the decriminalization of defamation, and recommended that a public interest in the subject matter of criticism of public figures should be recognized as a defence. [62]

As regards prohibitions of lack of respect for a religion or other belief system, the Human Rights Committee explained that they are incompatible with the Covenant except in narrow circumstances, and that it is impermissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[63]

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[61] §35.
[62] §47.
[63] §48.

Can and should Article 19 of the Constitution, and the IPC, if possible, be read and given effect by the Courts in a way that is compatible with Article 19 of the Covenant? If that is not possible, does the Supreme Court have the power and the will to declare speech crimes in the IPC to be incompatible with India's international legal obligations?

Where it is possible to read and give effect to the language of Article 19 of the Constitution in a way that is compatible with Article 19 of the Covenant, there would appear to be no constitutional or other inhibition to prevent the Supreme Court from doing so. The reference to "reasonable" restrictions on freedom of speech and expression can be read and given effect in accordance with the principles of legal certainty and proportionality.

Where it is not possible to read and give effect to Article 19 of the Constitution in that way, for example, in its protection only of citizens and not of everyone within India's jurisdiction, there would appear to be no constitutional or other inhibition preventing the Supreme Court from declaring that Article 19 is to that extent incompatible with the Covenant, leaving it to the political branches of government to decide how to respond.

The political branches, like the judiciary, have obligations under the Covenant to secure the rights and freedoms it protects, and to ensure that effective remedies are available. They must

ensure that the rights contained in Article 19 of the Covenant are given effect in domestic law in a manner consistent with the UN Human Rights Committee's guidance in General Comment No. 31.

Root and branch reform of the Penal Code by the Central Government and Parliament is unlikely. It is a matter to which only the Law Commission and the judiciary may respond. I respectfully submit that each of the speech crimes in the Code could and should be subjected to careful scrutiny to ascertain whether it suffers from the vices of vagueness or over-breadth in breach of Article 19 of the Constitution.

The Supreme Court's decision in *Shreya Singhal v Union of India* [64] is encouraging. It decided that Section 66A of the Information Technology Act 2000 concerning offensive online communications was unconstitutional because it suffered from vagueness and over-breadth, and was liable to be used in a way that would chill free speech.[65] The Supreme Court had regard the persuasive reasoning of United States jurisprudence, but did not refer to India's international obligations under the ICCPR, and the UN Human Rights Committees interpretation of what free speech means in practice. It was apparently unconcerned by the vagueness and over-breadth of the speech crimes in the IPC.

[64] *Shreya Singhal v Union of India* W.P. (Crim.) No 167 of 2012
[65] Paras 76, 82, 90

The pending legal challenges to Sections 499 and 500 of the Penal Code, which define the criminal offence of defamation and prescribe its punishment, as well as some provisions of the Code of Criminal Procedure 1973, give the Supreme Court new opportunity to interpret India's constitutional safeguards robustly to better protect free expression. The fact that the Supreme Court has stayed criminal defamation proceedings until it has decided whether Sections 499 and 500 meet the requirements of the Constitution gives hope that the opportunity will be taken.

DNA India reported, on 2 October 2015, that Joseph Diaz, head of Mumbai's Catholic Secular Forum, had said "Many countries in the West are open to ideas of homosexuality and nudity but India is not yet culturally or socially ready for it."

DNA India spoke with a different voice in an editorial of 6 October 2015 headed "Ban be damned". It wrote: "The ban culture in India is yet to peak, but its consequences are felt far too often in a deepening culture of intolerance. Religious groups and political parties have made an industry out of perceived insults to their sentiments and beliefs. By taking to the streets, issuing fatwas, sending threatening letters, and resorting to vandalism, they have unleashed fear among writers and artistes. …. One only has to look at the developments of the past few years to detect the dangerous trend of proscribing books, films, paintings and plays through strong arm tactics."

It is in the best interest of the peoples of India for the media to be free, uncensored and unhindered in informing them about public issues and holding their governors to account, subject only to foreseeable and proportionate restrictions. It is in the best interests of India as the world's largest democracy to demonstrate its commitment to the international rule of law and the effective protection on human rights. That was the promise of India's independence Constitution, but the promise cannot be fulfilled until the flawed British imperial legacy is replaced – whether by the Courts of Parliament - by a Penal Code that is fit for modern India.