

## IPC 295A: UNCONSTITUTIONAL OR A REASONABLE RESTRICTION?

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*The state has faced a trade-off between the maintenance of public and social order and individual liberties. In India, it has been a judicially established obligation of the state to maintain a balance between the two. The constitution, too, has provisions for both individual liberties and situations where the state may limit individual liberties. It is following these limitations, enshrined between clauses 2 and 6 of Article 19 in the Indian Constitution that Section 295A of the Indian Penal Code 1860 was considered a valid, applicable law despite having been introduced in 1927. Contemporary literature opposes the existence of IPC 295A on grounds that it is anachronistic and unnecessarily restrictive on free speech and expression. The same literature also suggests that the existence of IPC 295A implies the misuse of the law by the executive to retain political control and grow in power. However, recent events, such as the controversy surrounding the interview of BJP Spokesperson Nupur Sharma and the accompanying violence tell us that Indian society continues to be polarised. Free, open speech and debate is an ideal that is possible only among the moderate, literate classes of society. If communal polarization exists, there remains a necessity for laws that prevent communal violence. This paper aims to create a case for the existence of IPC 295A in two ways: (i) by establishing that IPC 295A is not anachronistic and does have a place in Indian polity, and (ii) by outlining the role the judiciary can play in ensuring that the executive does not overstep its mandate during the implementation of IPC 295A.*

### AN INTRODUCTION TO RELIGION IN INDIA

India's diversity is one of its most defining characteristics, and its protection has been declared an obligation of the state. The protection of religious diversity, therefore, is one of the key actions undertaken by the state. This protection manifests as India being a secular state in the sense that all religious groups have equal rights to practice, profess and propagate their own religions without fear of persecution. This was done keeping in mind that in a diverse country, the identity that an individual has which helps them fit into a social group becomes stronger. The diversity that exists makes the identity of individual social groups constituting the larger social group more prominent.

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So, individual identity becomes a defining factor of how one perceives themselves. Further, it also acts as a factor that separates them from others, i.e., it gives them some degree of uniqueness in society. However, since a human is, by nature social animal, they also look for unity *within* the ambit of this uniqueness. This is the role that is fulfilled by social institutions, in that an individual, for instance, starts perceiving themselves to be a Hindu, or a Muslim before perceiving themselves to be an Indian. This is especially true in a country as diverse as India. This is why religious identity becomes such a touchy topic.

This identity manifests itself in society as a *belief*. That is, this identity that the individual has is characterized by a common belief system among all members of the social group (who have the same social identity). Offending this belief, therefore, is perceived to be tantamount to a personal insult to every individual, and therefore leads to tensions. In India, communal tensions are quite common, as has been seen in the past. The 2020 Delhi Communal Riots, the 2002 Gujarat Riots, and the 1989 Babri Masjid Riots are a few prominent examples.

The maintenance of public order is one of the key roles of the state. Therefore, the state, to the best of its capabilities in the context of communal identity, must try to ensure that people of one community do not offend the sentiments of other communities. It is in this interest of social stability and religious/communal tolerance that Section 295 of the Indian Penal Code was introduced, which allows for punishment for words or actions that are likely or have proven to offend religious sentiments. These are the actions that will be referred to as ‘sacrilege’ or ‘blasphemy’. However, at the same time, the state has the democratic obligation to protect free speech and expression as enshrined under Article 19(1) of the Constitution. As ideal as free speech sounds, what with the recent controversy surrounding BJP Spokesperson Nupur Sharma’s statements about Islam, and the murder of at least six people for expressing support for her, the fallacy of absolute free speech becomes glaringly obvious.

For a law restricting fundamental rights, such as IPC 295A, to be constitutional, it must satisfy two tests<sup>1</sup>: one, the restriction must be for the purposes enshrined under clauses 2-6 of Article 19, and two, the restriction must be reasonable. IPC 295A does come within the ambit of 19(2) as far as the objective of its implementation goes. In contexts such as that of the Nupur Sharma controversy elucidated above that this right is subject to reasonable restrictions. The objective

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<sup>1</sup> Romit Srivastava, ‘Test to Determine Reasonable Restrictions under Article 19 of the Constitution of India’ (2012). < <https://ssrn.com/abstract=2135681> > accessed 22 October 2022

of this paper, therefore, becomes to study whether IPC 295A comes under the ambit of 'reasonable restrictions' or not.

*IPC 295A* is aimed primarily at punishing malicious actions aimed at insulting or outraging the religious sentiments of any religious group by insulting their religious beliefs or the religion itself<sup>2</sup>. The section only punishes the action when it is an aggravated form of insult and is perpetrated with deliberate and malicious intent to outrage the sentiments of any religious class of the citizens of India

### **RESTRICTIONS OF FREE EXPRESSION AND IPC 295A**

The primary argument for laws against blasphemy is that the state's function as a protector of public order is more important than its function as the protector of fundamental rights. Of course, this does not give the state the absolute right to restrict fundamental rights but does give the state the right to impose *reasonable restrictions* on the same. In the context of Free Speech and Expression, which is the primary challenge to laws against blasphemy, the provision for reasonable restrictions is enshrined in Article 19(2) of the Indian constitution, which provides for restrictions on the grounds of "interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement"<sup>3</sup>.

In *Ramji Lal Modi v. State of U.P.*<sup>4</sup>, the petitioner – the editor and publisher of a magazine named *Gaurakshak*, dedicated to the protection of cows whose November 1952 issue had a controversial article that allegedly maliciously insulted the Muslim Community. As a result of this, the petitioner was charged under IPC 295A, and in appealing this decision, challenged the constitutional validity of IPC 295A on two primary grounds: First, that provisions preventing speech and expression "in the interest of public order" would only be valid when the said form of expression would definitely lead to a disruption of public order, and, additionally, not all insults to religion would lead to this disruption. Therefore, both constitutionally protected and unprotected speech came under the ambit of 295A, making 295A invalid. Secondly, IPC 295A was in Chapter XV of the IPC (religion-related offences) and did not deal with public tranquillity (Chapter VIII), making offences related to religion irrelevant to public order.

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<sup>2</sup> Indian Penal Code 1860, s 295A

<sup>3</sup> The Constitution of India 1950, Art. 19(2)

<sup>4</sup> *Ramji Lal Modi v. State of U.P.* [1957] AIR 620, [1957] SCR 680

The Court held that the first contention could not stand because of the distinction between maintenance and interest of public order in that “interests” of public order had a significantly wider scope than “maintenance” of public order. Further, the Court also went on to state that Articles 25 & 26, which guarantee the right to religion, are also subject to public order, negating the premise that a law cannot be made in the context of both religion and public order simultaneously. Thus, IPC 295A was held to be valid. However, what this meant was the granting of nearly unfettered powers to the state to draft laws restricting freedom of speech as long as they could prove some degree of proximity to offending religious sentiments. The judgement was, therefore, quite a controversial one, but was held to be the precedential judgement with regard to the constitutionality of IPC 295A.

The judgement of *Ramjilal Modi* was challenged in *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*<sup>5</sup>, where the scope of Article 19(2) was questioned, it was held that there needed to be a degree of proximity between the action taken and the disruption to public order, and evidence that restrictions could help curtail said disruption of public order and such restrictions are proportional to the disruption. In such a scenario, Article 19(2) applies, and the restriction is said to be a reasonable one. The requirement of a nexus is further elaborated in the case of *S. Rangarajan Etc. v. P. Jagjivan Ram*.<sup>6</sup>, where the Supreme Court recommended the usage of the direct and clear danger test along with which the metaphorical equation of a ‘spark in a powder keg’ was provided to indicate that the danger is not irrationally distant or conjectural, but directly connected to the form of expression that is to be restricted. In *Arup Bhuyan v. State of Assam*<sup>7</sup>, it was held that only speech that incited imminent lawless action could be punished.

At such a point there is a dichotomy: the state *can* restrict freedom of speech and expression as long as it fulfilled the standard of *inciting* lawless action. However, the state had the power to decide what the standard for incitement in and of itself was, i.e., what counted as incitement and what did not. It is in this vein that the landmark judgement of *Shreya Singhal v. UoI*<sup>8</sup> occurred, where the state imposed certain unreasonable<sup>9</sup> restrictions under Section 66A of the Information Technology Act. The Supreme Court ruled that there lies a clear difference between *advocacy* and *incitement*. In this context, IPC 295A must operate within a narrow

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<sup>5</sup> *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia* [1960] AIR 633, [1960] SCR (2) 821

<sup>6</sup> *S. Rangarajan Etc. v. P. Jagjivan Ram* [1989] SCR (2) 204, [1989] SCC (2) 574

<sup>7</sup> *Arup Bhuyan v. State of Assam* [2011] 3 SCC 377

<sup>8</sup> *Shreya Singhal v. Union of India* [2013] 12 S.C.C. 73

<sup>9</sup> Information Technology Act 2000, s 66A

field, ensuring that the restriction deals only with the incitement of lawless activities. However, here, a challenge is put forth by opposers of blasphemy law: even assuming that the state is capable of ensuring that incitement to lawlessness is the absolute metric for restriction, IPC 295A operates under the assumption that offending a group's religious sentiments is equivalent to said incitement, which is an unfair assumption. This challenge, however, has been argued to be flawed, in that this does not take into consideration the sensitive nature of religion, which makes offending religious sentiments a possible trigger for unrest, and the state's obligation to protect public order in the context of the same.

Another debatable form of argumentation is that no truly secular country should have laws against blasphemy as the implication of the presence of these laws is that the state recognizes the existence of religion. This, it is claimed, goes against the principles of secularism. However, this may not apply in the Indian context because secularism in India is different from the conventional idea, which advocates for the separation of religion from the state (where the state ignores the very idea of religion.) In India, all religions are recognized by the state and provided equal legal protection to ensure co-existence.

In addition to the internal consequences, there are also external consequences to not having laws against blasphemy. Religion being a characteristic that transcends national boundaries enters the scanner of countries that are dominated by the religion in question. In the controversy centred around BJP spokesperson Nupur Sharma, for instance, the OPEC countries were willing to boycott India if India did not punish Nupur Sharma. The absence of laws that punish blasphemy, therefore, can jeopardize relations with other states. This comes under the ambit of the provisions of Article 19(2) [reasonable restrictions] – i.e., restrictions on the grounds of sovereignty and integrity of India as well as friendly relations with other states.

Another form of argumentation is that there already exists a provision against hate speech in the form of IPC Section 153A, which states: *“Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.”*<sup>10</sup>

This penalises words, signs, symbols, and actions that create disaffection between various social groups, including religious groups. IPC 295A penalises actions that offend religious sentiments, which could fall under the ambit of offending the sentiments of religious groups.

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<sup>10</sup> Indian Penal Code 1860, s 153A

However, the seeming redundancy of the law cannot be considered a strong argument regarding the constitutionality of said law.

### **AMBIT OF REASONABLE RESTRICTIONS**

In the future, as cases under IPC 295A come to Courts, Courts must interpret the disruption to public order from the narrowest possible perspective. This means that the Courts ensure that the restrictions on fundamental rights happen in such a manner that the imposition of such restrictions is minimized and restricted to those situations where they are necessary.

In the context of the necessity of a reasonable restriction, it is helpful to look at the rights granted by the state under Article 19 not as absolute but as subject to reasonable restrictions that represent the rights of others. In other words, if the fundamental rights offered by the state are the claims of the individual derived from society, reasonable restrictions are the rights claimed by society from the individual. Therefore, a major flaw would be to look at the rights as fundamental but not the limitations. The responsibility of the court to maintain this balance was pointed out in *Express Newspapers v. UoI*<sup>11</sup>.

The question, therefore, emerges as to how exactly this ‘reasonable restriction’ can be derived. The test for the same has evolved continuously. In the case of *State of Madras v. V.G. Row*<sup>12</sup>, Sastri CJ had laid down the test of reasonableness that is generally accepted today, saying that: “it is important... to bear in mind that the test of reasonableness, wherever prescribed should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness, can be laid down as applicable to all cases”

This suggests that the test of reasonableness cannot be a general pattern across statutes, even if multiple statutes deal with the restriction of the same fundamental right. Further, he also goes on to state that such a pattern cannot be applicable to all cases, in that the implementation of the law, which may have been acceptable in one case, need not be acceptable in another. In other words, the question as to reasonable restrictions is not specific to the law (unless the law is outright unconstitutional, in which case the law should not stand), but to the implementation of the law in each individual case. Even if the law has been misused by the state in various cases, the constitutionality of the law in and of itself does not change, the constitutionality of the action of the state is what comes under challenge. While examining the constitutionality of

<sup>11</sup> *Express Newspapers v. Union of India & Ors.* [1973] 2 S.C.R.

<sup>12</sup> *State Of Madras vs V.G. Row. Union of India & State* [1952] AIR 196, [1952] SCR 597 (Sastri CJ)

the implementation of IPC 295A, would help courts to follow principles that the Supreme Court has established through various rulings.

First, since reasonable restrictions under Article 19 use the term ‘in the interest of, as opposed to the term ‘for the maintenance of, the test for the constitutionality of the implementation of the law takes on a broader scope. For instance, if a law restricts free speech and expression in the interest of public order, it need not be the primary objective of the law but will remain a valid restriction on free speech so far as it penalises actions that are disruptive to public order.

Second, the preservation of public order, as laid down by the Supreme Court in *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*<sup>13</sup>, would mean the preservation of public peace, safety, and tranquillity. This must be the yardstick for determining the extent to which the objectives of the restriction in cases where IPC 295A have been implemented. Further, the reasonability of the restriction should also be determined based on an objective view of the same, i.e., from the standpoint of the general public and not from that of the accused or from any vague, unspecified principles. The Supreme Court drew upon the dissent by Holmes J. in the landmark case of *Lochner v. State of New York*<sup>14</sup> in warning judges from bringing in their personal beliefs as practitioners of the law in determining what a reasonable restriction is. This reasonability that is expected based on the content of the law is substantive in nature.

Third, the reasonability while enforcing the law must not only be substantive in nature but also procedural. This means that the treatment of the accused, the documentation, etc., must all be according to the procedure dictated by the Code of Criminal Procedure, the Indian Penal Code as well as preceding judgements. For instance, in the case of *Sudheer Rikhari v. State of Goa*<sup>15</sup>, the High Court of Bombay at Goa observed that the police had flouted procedural requirements. First, the police had arrested the individuals not based on any specific evidence but based on suspicion of commission of a crime under IPC 295A – an action directly in contravention to the ruling of the Supreme Court under *Joginder Kumar vs. State of U.P.*<sup>16</sup>. Corollarial to this,

<sup>13</sup> *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia* [1960] AIR 633, [1960] SCR (2) 821

<sup>14</sup> *Lochner v. New York* [1905] 198 U.S. 45 (Holmes J)

<sup>15</sup> *Sudheer Rikhari v. State of Goa* [2020] WPCR [71]-[79]

<sup>16</sup> *Joginder Kumar v. State of U.P.* [1994] AIR 1349, [1994] SCC (4) 260

the police did not inform the accused the reason of their arrest – a requirement cited as necessary under *Arnesh Kumar v. State of Bihar*<sup>17</sup>.

In summary, the courts must ensure that the implementation or enforcement of IPC 295A, which is a form of restriction of Article 19(1) must happen in a manner that is:

- Reasonable in both a substantive as well as formal/procedural sense
- Proportionate to the potential harm that can be caused by the form of expression it restricts.

## CONCLUSION

Irrespective of the demands for free speech, the fact remains that there are portions of Indian society that continue to be polarized in nature and this is especially true in the case of religion. Free speech will lead to conflict if left unchecked in such a context. Absolute freedom leads to anarchy and anarchy takes away freedom. Reasonable restrictions to freedoms, therefore, become imperative. What we have understood about IPC 295A is that the statute itself is not unconstitutional but executive action in enforcing the statute can be unconstitutional, depending on its usage. We have further understood that IPC 295A is important to the smooth functioning of Indian society given how important religion and religious sentiments are to the public. The enforcement of the law, therefore, must be subject to careful judicial scrutiny based on the principles set by precedential judgements of Courts. The objective of the state should continue to be the preservation of peace and harmony in society while providing everyone an opportunity to freely express themselves. It is expected that the judiciary will play a massive role in maintaining this balance.

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<sup>17</sup> *Arnesh Kumar v. State of Bihar* [2014] 8 SCC 273