



## HATE SPEECH IN INDIA

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### Introduction

**“Hate Speech is in the ear of the beholder.”- Mark Potok**

The term ‘hate speech’ eludes a universal definition. It derives its significance from the particular context it operates in formed through the influence of peculiar sensibilities, “identities” and “assessments” in particular contexts. Black’s Law Dictionary identifies hate speech as the “speech that carries no meaning other than expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence”. Therefore, it can be said that hate speech is “speech that is, broadly speaking, derogatory towards someone else”. Most common grounds of hate speech across countries are race, ethnicity, religion or class. India presents a peculiar case for regulation of hate speech with its rich diversity of language, caste, race, religion, culture and beliefs. The words either spoken or written, or employing signs or any kind of visual representation qualifies as ‘speech’. If such speech offends the religious, ethnic, cultural, racial groups by vilification and is capable of spreading ‘hatred’ among the heterogeneous populace, we categorize it as ‘hate speech’.

Many reports, worldwide, have declared 2018 as the “year of online hate” Facebook,

the social media giant, in its ‘Transparency Report’ disclosed alarming statistics wherein it ended up taking down 3 million hateful posts from its platform, YouTube, which allows free sharing of video content on its site, removed 25,000 videos in a single month alone. These statistics are only the tip of the iceberg and indicative of how the situation is inching towards spiraling out of control. In its aggravated form, hate speech has led to horrendous hate crimes like we have recently witnessed in India, such as communal riots, series of violent clashes between religious communities all arising as a result of inflammatory speech propagated by divisive groups. Incidents of gruesome killings were widely reported wherein ‘hate’ for another group/community took a particularly perverse form of violence in the form of mob lynching. In these situations, words were employed in their most dangerous form, “...as weapons to ambush, terrorize, wound, humiliate and degrade” individuals and groups. The meaning of hate speech, in contemporary times, has travelled beyond mere offensive speech; it encompasses speech that is insulting, derogatory, discriminatory, provocative or even such that it incites and encourages use of violence or results in violent backlashes. It results in disturbing the harmony and order in society at large. But more importantly, hate speech becomes a particularly heinous type of hate crime causing direct physical and psychological harm to the victims of hate crime. It affects its victims in intangible ways leading to chilling effect on the victim’s right to free speech and expression, resulting in exclusion from participation in the democratic process and public discourse. The first task this article endeavors to achieve is to establish the case for necessity of controlling hate speech in light of its



obvious harm; next it looks into the legal landscape of hate speech laws that exist in India. It is the author's assertion that when it comes to legal regulation of hate speech, it is a classic case of over criminalisation, which is in urgent need of addressable by means beyond just penal laws. This becomes necessary because the harm in hate speech is so widespread that it travels beyond the obvious and pervades the human psyche to leave behind permanent damage which outlasts the physical. Therefore, the approach to tackling hate speech needs to necessarily evolve as a more nuanced and sophisticated response that can begin to tame the multi-headed Hydra monster form that hate speech has become today.

Jeremy Staton stated that targeting a person's "immutable characteristics, ethnic background or religious identity causes harm". Thus, to protect individual liberty, freedom and to ensure dignity it is essential that speech that targets a person's identity, based on ethnicity, race, religion etc., be not allowed to be propagated untrammelled. As victims of hate speech, such individuals "feel fear, may be nervous to enter public spaces or participate in discourse and may change their behavior or appearance in an attempt to avoid hate speech."<sup>1</sup> In this way, hate speech constructs its targets as those who are not only "discriminated against but are also seen by others as undesirable target and legitimate objects of hostility."<sup>2</sup> Such intangible effects of hate speech are the most insidious and

damaging to an individual's sense of security and right to live with dignity.

However, most democracies in the world today ban hate speech today on the capacity of such incendiary words to not only cause harm but also disrupt public order by the power of hate speech which is capable of leading to violent consequences such as hate crimes amongst other violent results. Recently, while examining the scope of hate speech laws in India, the Law Commission in its report published in 2017 recommends further introducing new provisions within the penal code that specifically punish incitement to violence in addition to the existing ones<sup>3</sup>. Perhaps this standard of 'incitement to violence' is seen as being a more concrete basis for prohibiting speech by means of legislation. Incitement to violence demands a greater level of harm to be demonstrated in comparison to other forms of hate speech (discussed previously) and therefore justifiably be the subject of criminal law. As far as criminalization of speech is concerned, it remains a debatable issue with the legal scholars divided between what kind of speech should ideally be criminalized; should only a certain type of hate speech be banned and whether all hate speech be made punishable by criminal law or it can be dealt under civil law<sup>4</sup>. However, it is agreed that hate speech which is shown to be able to incite violence is a serious case and merits stern action to prevent any further damage.

<sup>1</sup> Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, United States of America, 2012).

<sup>2</sup> *Ibid.*

<sup>3</sup> Law Commission of India, 267th Report on Hate Speech (March 2017).

<sup>4</sup> Tanya D'souza, Laura Griffin, et.al., "Harming Women With Words: The Failure Of Australian Law To Prohibit Gendered Hate Speech" 41(3) UNSW Law Journal 943 (2018 ) available at <http://ili.ac.in/pdf/csi.pdf>.



Therein, criminal sanction is seen as most suitably employed to curb hate.

### Legal Approach towards Hate Speech in India

In the matter of regulating hate speech, Benoit Frydman has identified two broad approaches that are adhered to by the various countries. One is the “slippery slope” approach which is largely seen in the case of United States which has a strong and persuasive First Amendment jurisprudence and, on whose test, any kind of fetters on freedom of speech and expression fails. A ban on hate speech would inevitably run afoul of the First Amendment and would be for certain measure, a tricky endeavor. Thus, United States has no anti-hate speech law so to speak of, the only restriction being on speech that incites imminent lawless action.

Second is the “fatal slope” approach that is commonly followed by a majority of jurisdiction like Europe wherein hate speech is expressly banned by way of laws that prohibit speech because of the danger that it may incite violence and lead to mass scale killings and other hate crimes.

India subscribes to the latter approach and bans hate speech on the basis of religion, ethnicity, culture or race. Even though no law in India defines what constitutes hate speech, E Article 19(1) of the Constitution gives all citizens the right to freedom of speech and expression. However, these freedoms are subject to “reasonable restrictions” outlined in Article 19(2). Speech that violates abuses or infringes in any way on “the interests of sovereignty and

integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence” is subject to censure under these restrictions. The Indian Penal Code has several sections that deal specifically with punitive action around these reasonable restrictions. For example, Section 153(A)<sup>5</sup> penalizes the “promotion of enmity based on religion, race, place of birth, language.” Section 298<sup>6</sup> penalizes speech that deliberately intends to wound religious sentiment. Seditious is punishable under Section 124A<sup>7</sup>, and statements concerning “public mischief” under Section 505. Other laws in India that function as exceptions to the right to freedom of expression include the Representation of The People Act 1951, the Code of Criminal Procedure 1973, the Religious Institutions (Prevention of Misuse) Act 1988, and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989. The issue of the right to freedom of expression online was most effectively addressed in *Pravasi Bhalai Sangathan v. Union of India*<sup>8</sup>, upholding the right to free speech, the Supreme Court of India asked the Law Commission if “it deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of ‘hate speeches’ irrespective of, whenever made.” In its report on hate speech (267) released in May 2017, the Commission explained, “The standard applied for restricting Article 19(1)(a) is the highest when imposed in the interest in the security of the state.” It recommended that a restriction under Article 19(2) must have a

<sup>5</sup> The Indian Penal Code, 1860 (Act 45 of 1860).

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> AIR 11 2014 SC 1591.



“proximate and direct” connection to a threat to public order. Although many countries have laws against hate speech, their definitions of it vary significantly. The Law Commission Report says, “The analysis of hate speech in different countries suggests that despite not having a general definition, it has been recognized as an exception to free speech by international institutions and municipal courts.” Efforts to combat hate speech on Facebook are particularly relevant in the Indian context. Several cases that went to court over the last five years involved individuals whose posts on Facebook had been censored or taken down for being offensive to politicians and Parliament, inciting violence, and hurting religious sentiments. These users were arrested or charged under Section 66(A) of the Information Technology Act, which aims to punish “offensive, false or threatening information” through computers and communication devices. However, in *Shreya Singhal v. Union of India*<sup>9</sup>, the Supreme Court declared that the section “arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance Encouraging Counter-Speech by Mapping the Contours of Hate Speech on Facebook in India between such right and the reasonable restrictions that may be imposed on such right.” Thus, due its ambiguous and open-ended nature, the court declared 66(A) “unconstitutional.” Different legal systems draw different distinctions between speech protected by ‘freedom of expression’ and ‘hate speech’. For this report, the researchers have classified speech in two ways:

- More lenient

<sup>9</sup> AIR 2015 SC 1523.

<sup>10</sup> Staff, “Author Perumal Murugan has died :Tamil writer withdraws all published work following protests” available at :

Since some definitions include abusive speech that merely insults individuals, the study marks those instances as well.

- More restrictive

However, it recognizes that stricter definitions of hate speech only limit speech that incites violence or discriminates based on group characteristics.

To better understand the dynamics of hate speech in a cross jurisdictional online environment, the study draws a distinction between personal abuse and hateful speech that incites violence.

### Over-Criminalization of Hate Speech

In 2015 Indian author Perumal Murugan in a dramatic and extremely emotional twist of events announced his literary “death” and withdrew his entire set of published works from public domain, vowing to never write again.<sup>10</sup> This came as result of the violent backlash he faced at the hands of religious and caste-based groups that claimed that his fifth novel titled “Madhorubagan” in Tamil or “One Part Woman” offended the religious sensitivities, insulted the Kailasanathar temple, Lord Shiva and female worshippers and appealed to prurient interest amongst other allegations.<sup>11</sup> The novel’s plot revolved around a couple, Kali and Ponna and their struggles with conceiving a child. The objections to the novel were mainly around the fictional portrayal of tradition of annual festival in Tiruchengode revering the Ardhanareeswarar Temple’s presiding deity. While the novel was published in 2010 to critical acclaim, the protests started years later with burning copies of the book

<https://scroll.in/article/700217/author-perumal-murugan-has-diedtamil-writer-withdraws-all-published-work-following-protests>.

<sup>11</sup> Ibid.



culminating in police advising the author to leave his own home when all ‘peace-talks’ with the groups failed. He was forced to apologise and withdraw his books. Finally, when the matter reached the Madras High Court in 2016, the Bench was pleased to dismiss the allegations against the book and upheld the artistic liberty and expression of the author. It observed that freedom of speech and expression cannot be sacrificed and give into the demands of the mob so as to maintain law and order<sup>12</sup>. It was only after this judgment in his favor did the author returned to writing. The above is not the first nor the last in the line of cases that have sparked time and again the debate around the way our laws are built that completely ban, in effect, any kind of purported critical speech against religion, group, caste or belief. This poignant case brings to the fore fundamental questions on what is speech that is protected under the ambit of Article 19(1)(a) of the Constitution and what becomes the cynosure of the criminal provisions of the law. Ultimately, this raises certain fundamental questions about the nature of our law itself. Upon close look, such concerns are germane to the ongoing discussion on the scope and extent of criminalization of speech. Sanford Kadish referred to the ‘over criminalization’ phenomena in criminal law as using the law excessively to cover such conduct that should ideally not be the concern of legislature. In fact, it should be addressed under the ambit of “public policy objectives” rather than criminal law which is “poorly suited” to achieve the purported ends. In fact, a host of academics today warn against expanding the scope of substantive criminal

law in light of a “cost-benefit” analysis that ultimately proves too burdensome on the criminal justice system and hence its use, unjustified. Erik Luna specifically points out that the “over criminalization phenomena” consists of “untenable offences, superfluous statutes, doctrines that overextend culpability crimes without jurisdictional authority, grossly disproportionate punishments and excessive or pre textual enforcement of violations. “It aims to bring in, amongst other culpable behavior, offences where “harm is merely threatened but the risk has not yet materialized”. Most of the ‘speech’ related offences that criminalize various forms of speech have only burgeoned in scope “by prohibiting a myriad of crime prevention offences that target risk-creating speech”. This holds true for the Indian context as well. It is well recognized that freedom of speech and expression under the fundamental rights is not absolute and is subject to limitations itself listed in the Constitution. However, despite this, a plethora of offences can be found that impose further restrictions on speech (not only those related to hate speech) of individuals across the length and breadth of the legal landscape that is indicative of the ‘over criminalization of speech’ phenomena. The fact that most of these offences are so broadly worded and vague only adds to the list of ailments that plague the existing criminal speech provisions. What we understand as over breadth today has already been the cause of calling into question and subsequent declaration of statutes as ‘unconstitutional’ in various cases before the Supreme Court. This trinity of vagueness, broadness and the chilling effect in free

<sup>12</sup> “Fault in our speech”, available at : <https://www.thehindu.com/opinion/lead/perumal->

[murugan-book-controversy-and-madras-highcourt/article14476037.ece](https://www.thehindu.com/opinion/lead/perumal-murugan-book-controversy-and-madras-highcourt/article14476037.ece).



speech cases has proved to be the undoing of speech-restrictive provisions of the Information and Technology Act, 2000<sup>13</sup>. Most of these speech-related offences in the Indian Penal Code mentioned previously within the legal framework have withstood the constitutional challenge on the basis of preserving “public order”. It is a matter of speculation that would the same laws is able to withstand the judicial scrutiny and muster pass if tested on the touchstone of today’s evolved standard of judging free speech cases that are a healthy mix of judicial borrowings from foreign jurisdictions that lean heavily in favor of individual liberty and freedom of speech. Yet, the proliferation of ‘criminal speech’ provisions in criminal law seemingly continues unabated without any empirical evidence of its efficacy in actually combating the menace of harmful speech. Illustratively, the Law Commission of India in its report published in 2017 recommends further introducing new provisions within the penal code that specifically punish incitement to violence as well as discrimination. This kind of a framework, therefore, has made the criminal law as the “first response” in curbing hate speech. It stands in stark contrast to the principle of “alternative and least restrictive sanctions” which calls for employing such options for regulation that satisfy the government’s interest of banning a certain type of speech short of making the speech a subject of criminal law which should ideally be the “last resort”.

<sup>13</sup> Shreya Singhal v. Union of India, AIR 2015 SC 1523.

<sup>14</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 95,96.

### Effective Response to Hate Speech

The legal framework employs a variety of methods to curb hate speech in India. Primarily the law, as we have seen in the preceding section, makes it a crime to utter certain types of hate speech. This crime is punishable by imprisonment of varying durations, with or without fine. Most of these provisions are also cognizable as well as being non-bailable and non-compoundable. In effect, this makes the legal provisions very stringent with serious implications. Apart from this, as per the medium of propagation i.e. print, television or internet, hateful content is banned, censored or leads to shutdown of the host site. In case of print, the authorities under the criminal procedure code have power of seizure of the material in question as well<sup>14</sup>. Despite this elaborate framework of law and policy hate speech cases continue to grow. It has been opined that this growth is certainly not because the law is lax rather it is the faulty implementation of the law that needs to be closely examined.<sup>15</sup>

The effective and judicious implementation of laws is a challenge that is not easily surmounted. At the same time, the question that begs to be answered is whether the legal framework is enough to address the challenges of regulating hate speech given the delicate balance that needs to be struck in dealing with hate speech cases and meting out justice to the parties involved. The harm that hate speech propagates is not only deleterious but has extremely dangerous

<sup>15</sup> National Law University Delhi, Report on Hate Speech Laws in India (April, 2018 ) available at : <https://www.latestlaws.com/wp-content/uploads/2018/05/NLUD-Report-on-Hate-Speech-Lawsin-India.pdf>.



consequences. The exposition of the legal framework above has shown that it works in a limited sphere. There is no scope for repairing the damage that hate speech does to the society at large neither is there space for victim rehabilitation or any means of redressal. It is the need of the hour, therefore, to look beyond the rigors of criminal law in search of answer to an effective response to hate speech. There are two such approaches discussed below that have worked with success in select jurisdictions and show great promise.

- **Alternative Dispute Resolution of Hate Speech Cases**

Alternative dispute resolution proposes a paradigm shift in the way the legal system administers justice. It shifts the focus from court-centered formal legal proceedings to the settlement of the dispute between parties by way of negotiation, mediation, arbitration and/or conciliation. The importance of this approach for redressal of disputes cannot be overemphasized in light of the fact that it works in a time bound manner focused at arriving at settlement between parties as opposed to pursuing the matter in a court of law which are already overburdened with the load of cases pending for years, bound by procedural formalities.

When it comes to adjudication of hate speech offences under the Indian criminal law framework, it is mired with time-consuming formalities of procedure. The criminal procedure code mandates that sanction for prosecution by the government is required.<sup>16</sup> The sanction is a threshold limitation on the

referral of incidents for criminal prosecution. But this grant sanction is itself based on individual discretion of the official. Once the complaint is registered with the police, the court can only adjudge the guilt of the accused after a full-length trial. During trial, there is a heavy burden of proof for the parties to prove that the act had been done with the culpable state of mind directed at inciting hatred, enmity or aimed to offend any group or class of persons. This entire process is time consuming and might take years to conclude. Justice for the aggrieved parties in such cases is but a distant dream.

- **Counter Speech**

Counter speech is, simply put, a response to hateful speech which might alternately call for violence, promote hate or uses incendiary words to provoke or defame others. Counter speech is a definitive and exacting answer to such speech and is solely aimed at undoing the damage wrought by the hate speech in the first place. On social media, it is understood as “crowd sourced responses to extremist or hateful content,” that is used to “tone down the rhetoric” in cases of posts containing hate speech by way of a disagreement or agreement as posted by the users<sup>17</sup>. This responsive speech may take myriad forms depending upon the medium used to propagate hateful speech: it may be a direct answer in the form of true facts to a hateful message concocted out of a false claim or fake news; clarification of any dubious claims made or even using sarcasm, humor and cartoons, memes and caricatures to counter and defuse the tension that a hate message aims to promote. But perhaps what

<sup>16</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s.196.

<sup>17</sup> Demos, Report on Counter-speech on Facebook available

file:///D:/Drive%20C/Desktop/PhD/Hate%20Speech/COUNTERSPEECH/Counter-speech-onfacebook-report%20Demos%20reports.pdf.



is more important to highlight is the fact that the proponent of counter speech can be anyone, even the victim herself. The victim may choose to respond to the hateful content in a positive manner and create an atmosphere of dialogue with the perpetrator rather than indulge in free-flying counter accusations at each other.

Recently in India, as response to several incidents of mob-lynching, violence and persecution based on religious, racial or ethnic identities of the victims from various part of the country the #notinmyname or “Not In My Name” campaign was launched on social media<sup>18</sup>. This campaign started with the aim of collecting citizen support and countering the hate narrative being propagated that resulted in those violent incidents. With the joining of several prominent public figures, the campaign went viral with public protests being stages across Indian cities deploring the acts of violence. Overall, it was seen as a successful counter initiative and it continues to draw support from several quarters.

### Conclusion

All the types of annoyance towards hatred should be treated with the same zero tolerance as these kinds of actions sometimes take place due to anger and frustration. Although free speech is quite valuable and important in the democracy of any country, it should be restricted only in exceptional circumstances like when it results in murder or violence. The most efficient way to dilute hatred is by the means of Education and Debate. Our prominent schools, public and social media figures have an important role

to play in asserting such hatred, encouraging social benefits and helping to promote understanding and compassion with others. As it is rightly said by Desiderius Erasmus that “**Prevention is better than cure**” so in order to reduce and restrict hatred in the future we should start to build and imbibe the right education in us so that the chances of the occurrence of such kind of barbarity is curbed. Education and Debate not only seeks to prevent hatred in the first place, whereas illegalizing seeks to punish the culprit after he or she has already been involved in the hatred. Although there are many laws regarding hate speeches in the country like India but the laws should be more strict in penalizing the person doing such kind of activities as the most precious thing for an individual are his religious sentiments and beliefs around which the life of an individual revolves and nobody can accept that anyone hurting their religious feelings.

The above are instances of how the challenge of countering hate speech has been approached outside of the existing legal framework. In both instances, it has seen success by direct and active engagement of the victims and the speakers, be it online or offline. Moreover, by bringing all the parties to the discussion table it may also begin the process of healing the harm caused by hateful speech. By resorting to alternate means of settlement in case of hate speech, it would provide both the parties a space for discussion and possible settlement outside of the formal rigors of the legal system. The outstanding characteristic of these approaches is that they do not impinge on freedom of speech and expression of an

<sup>18</sup> Web Desk, “What is the not in my name protest?” Indian Express, June 28, 2017. available at : <https://indianexpress.com/article/what-is/what-is-the->

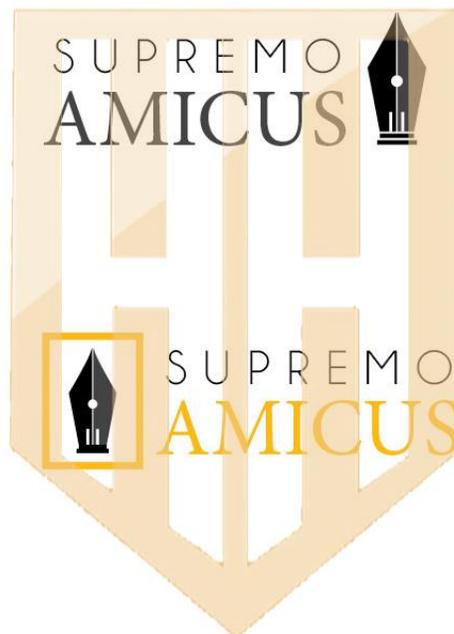
[not-in-my-name-protest-lynching-junaidkhan-4725668/](https://not-in-my-name-protest-lynching-junaidkhan-4725668/)



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individual unlike the criminal anti-hate speech laws. In fact, in the case of counter speech, it encourages more positive speech in response to speech invoking hate or violence. In this way, it does not act as a restriction on free flow of views in the “marketplace of ideas”<sup>19</sup> in that is to be upheld as sacrosanct in today’s liberal democracies.

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<sup>19</sup> Abrams v. United States 250 U.S. 616 (1919)