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# Online Hate Speech in India: Issues and Regulatory Challenges

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## ABSTRACT

*Hate speech has been globally recognized as a grave threat to the society. The issue of hate speech becomes even more serious in the present age of internet with the content reaching swiftly to a massive audience. Therefore, creation and circulation of online content has emerged as a new challenge in way of regulation of hate speech which becomes even more difficult in absence of an efficient legal framework. This calls for a legislative intervention to fill in the gaps in the existing laws. The Supreme Court of India has repeatedly emphasized upon the need for a new law regulating online hate speech in India. Besides, several reports have been put forward by the expert Committees and the Law Commission of India proposing certain amendments in the present laws. The recommendations, however, still remain to be followed. In this backdrop, this paper highlights the need for a robust legal framework covering modern forms of hate content proliferating on the internet in light of the developments taking place across the globe.*

## I. INTRODUCTION

The tribal nature of human beings has been their inevitable feature since the inception of humanity. The collectivist notion of a group based on uniform attributes such as skin color, ethnicity, language and culture inevitably gives rise to the conception of “us” vs “them”. In order to fulfil his different needs, man was eventually forced to interconnect with those different from him on equal terms. This interaction, however, did not completely vanish the discriminatory attitude held by one community against the other.<sup>2</sup> The discriminatory attitude is reflected through different forms the primary being the physical violence and verbal abuse. This gave to rise to a conception of hate crimes recognized by the state. Hate crime is defined as “the commission of a prejudice-motivated crime against an individual by a perpetrator who targets the victim because of the victim’s membership or perceived membership in a certain social group or race including disability, gender identity, sexual orientation and religion”.<sup>3</sup> Hate

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<sup>2</sup> Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (NYU Press, New York, 3rd Edn., 2017)

<sup>3</sup> Hate Crime, <https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx> (last visited on June 30, 2020)

Speech which is a form of hate crime is “a grossly offensive speech directed towards a member of a particular community with a desire to humiliate or incite violence”.<sup>4</sup>

India being a home to different cultures, languages and religions, instances of hate speeches is not a novel phenomenon here. Religious prejudices in particular have been a feature of Indian society since times immemorial. The religious disharmony existed during the colonial rule and continued to exist post partition.<sup>5</sup> The makers of the Constitution chose India to be a secular nation. However, the persistent occurrence of hate crimes poses a great threat to the very idea of secularism among other basic ideals of the Constitution. In order to reduce the conflicts resulting from the existing tension among various groups, the legislature has enacted several laws in this regard. The advent of the internet has, however, given rise to new issues and challenges. With the growth of internet the interaction among the individuals has taken new forms. Since the communication through internet is speedy, instantaneous and reaches out to a huge chunk of audience alongside the feature of anonymity, unification of likeminded people and insufficiency of the existing law to address such matters, this makes it a perfect breeding ground for hate related crimes. The abuses hurled in online forum often spill over and get reflected in the offline world as well. Various instances of mob lynchings, communal riots, and gruesome killings have been witnessed in the recent past owing to some content posted online. In India, anti-minority rhetoric, and campaigns to discredit political opponents, have emerged as two of the most difficult challenges to hate speech online.<sup>6</sup> The ‘Transparency Report’ of Facebook revealed shocking figures with 3 million hateful posts having being taken down in the year 2018.<sup>7</sup> Youtube, admitted to have removed 25,000 videos in a month.<sup>8</sup> These figures reflect the gravity of the situation while highlighting the inadequacy of the existing laws to address the issue.

## II. DEFINING HATE SPEECH

Defining hate speech is one of the most baffling tasks in the present times more so because its definition is subject to the impact that the speech has. There is very little consensus over what amounts to hate speech, given its inevitable intersection with the freedom of speech expression.

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<sup>4</sup> M.K. Bhandari and Mithilesh Narayan Bhatt, “Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty” 5 *PL* 1(2012).

<sup>5</sup> “Did Hindu-Muslim conflicts in India really start with British rule?”, <https://scroll.in/article/880832/didhindu-muslim-conflicts-in-india-really-start-with-british-rule> (last visited on June 30th, 2020, 4:00pm)

<sup>6</sup> Maya Mirchandani, “*Fighting Hate Speech, Balancing Freedoms: A Regulatory Challenge*” 9 *Journal of Indian Law and Society* 47, 50 (2018).

<sup>7</sup> Facebook, Community Standards Enforcement Report (November, 2018), <https://transparency.facebook.com/community-standards-enforcement#hate-speech>. (last visited June 30, 5:00 pm)

<sup>8</sup> Geoffrey A. Fowler, Drew Harwell et. al, “2018 was the year of online hate. Meet the people whose lives it changed”, *The Washington Post*, Dec. 28, 2018.

The complexities of defining “hate speech” become even more stronger with widespread use of internet as a medium of communication since it could be used by anyone anywhere in the world and targeted at anyone anywhere in the world.

However, with a wide gamut of international and domestic content being unfolded on the subject, understanding the idea of hate speech and legally defining it for the purpose of regulating it has become relatively easier. A report by UNESCO published in 2015 defined hate speech as a speech at “the intersection of multiple tensions. It is the expression of conflicts between different groups within and across societies.”<sup>9</sup> The Law Commission of India in its 267<sup>th</sup> Report defines hate speech as “an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like”.<sup>10</sup> It extends the scope of the definition to include “any word written or spoken, signs, visible representations within the hearing or sight of a person with the intent to cause fear or alarm, or incitement to violence”. The report further argues that due consideration shall be given to the status of the parties involved, and the potential of the speech to incite violence while determining whether or not it constitutes hate speech. This points out to the fact that the context of the speech is relevant. The Observer Research Foundation in one of its studies pointed out at how defining hate speech is linked to the implications it would have, more so in cases where the language used is not hurtful but the intent behind it is<sup>11</sup>. It defined hate speech as “expressions that advocated incitement to harm, violence, discrimination and hostility based on targets being identified with a certain social or demographic group protected under the Indian Constitution”.<sup>12</sup> Therefore, in a broad sense hate speech is a “speech that is derogatory towards someone else”.<sup>13</sup> It has been used invariably to denote expression that is insulting, abusive, intimidating, harassing or that incites violence, hatred or prejudice against a particular community identified by certain traits such as language, race, ethnicity, culture, geographical location, religion, caste, class, sexual preferences or similar beliefs.

### III. HATE SPEECH V FREEDOM OF SPEECH AND EXPRESSION

Rights enjoyed by an individual form the basis of his autonomy. In democratic societies rights generally operate as limitations on the powers of the State thereby protecting the individual from the excesses of the government. One such basic rights includes the Freedom of speech

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<sup>9</sup> Countering Online Hate Speech, UNESCO, 2015 .

<sup>10</sup> Law Commission of India, 267th Report on Hate Speech (March 2017).

<sup>11</sup> Maya Mirchandani, Dhananjay Sahai and Ojasvi Goel, *Encouraging Counter-Speech by Mapping the Contours of Hate Speech on Facebook in India*, Observer Research Foundation,

<sup>12</sup> *Ibid.*

<sup>13</sup> Gautam Bhatia, “Offend, Shock Or Disturb : Free Speech Under The Indian Constitution” 139 (Oxford University Press, Delhi, 1st Edn., 2016)

and expression spelled out in article 19 of the Universal Declaration on Human Rights<sup>14</sup> and in the respective Constitutions of the democratic nations. Historically, there have been various instances of suppression of these rights and liberties on account of the existing regimes such as under the barbaric rule of Adolf Hitler, during the Colonial rule so on and so forth. Conscious of the past, the constitution makers placed these rights at a higher pedestal in the Constitution. A series of discussions were held as to the limitations on the right to freedom of speech and expression and whether it should include a speech that is 'likely to promote class hatred'. Initially some of the members of the Constituent assembly suggested that a proviso be added to article 19 which read as

*“Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and tribes.”*

The move, however, faced opposition from majority of the members of the assembly arguing that the proviso diluted the “absolute” nature of the rights. After extensive deliberations on the issue, Dr B.R Ambedkar referring to the legal position in U.S pointed out:

*“ It is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court”<sup>15</sup>.*

He, then went on to quote one such judgment of the Supreme Court in justification of the argument where the Court made the following observation:

*"It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom".<sup>16</sup>*

Therefore, it was agreed that the fundamental rights shall be subject to reasonable restrictions which were later incorporated in the final draft of the constitution.

The notion that allowing speech without any restrictions as to its content would ensure the widest possible debate is flawed, it would inturn lead to a debate prejudicial to the public

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<sup>14</sup> UNGA, Res. 217 A (III), 1948.

<sup>15</sup> Constituent Assembly Debates (Nov. 4, 1948) 1459.

<sup>16</sup> *Gitlow v. New York*, 268 US. 652 (1925).

interest.<sup>17</sup>

There is no denying the fact that a democracy thrives on disagreements and conflicting narratives. Dissent and disagreement is a key to a progressive society. However, it is equally imperative to ensure that the public dialogue does not pave way for a speech that is detrimental to the public order. It is, therefore, the duty of the State to ensure that the individual liberty is not exercised in a manner which is inimical to the societal order.

The Constitution recognizes the fact that rights cannot be exercised in an uncontrollable manner. Therefore, it incorporates certain limitations on the exercise of these rights. Clause (2) of Article 19 authorizes the state to impose reasonable restrictions on the exercise of freedom of speech and expression on certain grounds such as (i) the security of the State and sovereignty and integrity of India, (ii) friendly relations with foreign States, (iii) public order, (iv) decency or morality, or in relation to contempt of court, defamation or incitement to an offence..

#### **IV. INTERNATIONAL LAW GOVERNING HATE SPEECH**

Article 7 of the UNDHR enshrines the right to be protected against any form of discrimination, and against incitement to discrimination.<sup>18</sup> Besides, Article 20 of International Covenant on Civil and Political Rights imposes an obligation on states to prohibit by law advocacy of national, racial or religious hatred that constitutes incitement to violence, discrimination or hostility.<sup>19</sup> Article 19(3) allows the states to enact laws restricting speech for i) respect of the rights or reputations of others; ii) the protection of national security, public order, public health or morals.<sup>20</sup> Further, Article 4 of International Covenant on Elimination of All Forms of Racial Discrimination requires the states to undertake measures to prohibit hatred and discrimination on the basis of race, colour or ethnicity.<sup>21</sup>

Article 4 was discussed by the UN Committee on the Elimination of Racial Discrimination in a case of Jewish Community, *Oslo v. Norway*<sup>22</sup> the speeches made in praise and defence of Rudolf Huess, a Norwegian political figure and Adolf Hitler, while criticizing the Jewish community were condemned by the UN Committee on the Elimination of Racial Discrimination as being offensive thereby violating Article 4 of the ICERD.

In General Comment No. 35 on 'Combating Racist Hate Speech' the ICERD Committee stated

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<sup>17</sup> Owen M Fiss, *Why the State?* 100 Harvard L. R. 785 (1986-1987).

<sup>18</sup> Universal Declaration of Human Rights, 1948, Article 7.

<sup>19</sup> International Covenant on Civil and Political Rights, 1966, Article 20

<sup>20</sup> *Ibid.*

<sup>21</sup> International Covenant on Elimination of All Forms of Racial Discrimination, 1969, Article 4.

<sup>22</sup> *The Jewish Community of Oslo et al v. Norway*, Communication No. 30/2003.

that their recommendations were applicable to racist hate speech ‘disseminated through electronic media, including the internet and social networking sites’. In this comment, the application of Article 4 was also discussed. It was stated that the ‘reach of the speech’ and whether it was ‘disseminated through mainstream media or the internet’ would determine the criminality of the act.

Article 2 of Convention on Elimination All Forms of Discrimination Against Women prohibits all forms of gender based discrimination. In 2017, in General Comment No. 35, the CEDAW Committee made recommendations on the prevention of harmful and stereotypical portrayal of women in the media and online.<sup>23</sup> The Committee recommended the setting up of self-regulatory mechanisms and complaint mechanisms by the national human rights institutions.<sup>24</sup> In 2011, the UN High Commissioner for Human Rights in a series of meetings directed the representatives of the states to lay down a set of standards known as the Rabat Plan of Action. The deliberations focussed on the interface between freedom of expression and hate speech, and the ways to frame laws and policies guarding the former and prohibiting the latter.<sup>25</sup> One of the points of the outcome included a clear distinction between speech which is criminalised, speech leading to a civil action, and speech raising issues of dignity and tolerance.<sup>26</sup> The Plan also emphasizes upon the significance of narrowing limitations on expression while addressing a pressing social need by non-intrusive means, so that its merits outweigh the harm to freedom of speech.<sup>27</sup> Other standards agreed upon include the framing of domestic laws on the lines of Article 20 of the ICCPR putting forward clear definitions of terms such as ‘hatred’, ‘discrimination’, and ‘violence’.<sup>28</sup> Along with the three-part test on necessity, legality and proportionality, a six-part test was proposed to address the issue of hateful speeches, i.e. considering the (i) context of the speech, (ii) identity of the speaker, (iii) intention of the speaker, (iv) content of the speech, (v) width of audience that could access the speech, and (vi) likelihood of inciting violence.<sup>29</sup> Besides, the outcome included some policy measures such as consultations with various sectors of society prior to framing of law.<sup>30</sup> Recommendations were made for the influential leaders not to publish statements of intolerance that could incite

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<sup>23</sup> UN Committee on the Elimination of Discrimination against Women, General Recommendation no. 35: Gender-based violence against women, updating General Recommendation no. 19, CEDAW/C/GC/35 (14 July 2017), para 37.

<sup>24</sup> General Recommendation no. 35 (n.17).

<sup>25</sup> United Nations High Commissioner for Human Rights, Annual Report on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, A/HRC/22/17/Add.4 (11 January 2013),

<sup>26</sup> Annual Report (n. 19), para 12.

<sup>27</sup> Annual Report (n. 19), para 18.

<sup>28</sup> Annual Report (n. 19), para 21.

<sup>29</sup> Annual Report (n. 19), para 27.

<sup>30</sup> *Ibid.*

violence, for states to promote intercultural understanding, and for education drives to emphasize upon the ideas of pluralism, inclusion and diversity.<sup>31</sup>

## V. LAW GOVERNING HATE SPEECH IN INDIA

Broadly speaking, hate speech law in India is driven by two factors- The first is the stratification on the basis of caste, of which the dalits or untouchables are the most vulnerable. The second is the religious disharmony, the seeds of which were sown at the time of the partition of the country in 1947. The hate speech law in India is spread across various subjects depending upon the context of the speech.

There are several provisions in the Indian Penal Code 1860 which restrict freedom of speech and expression on different grounds. Section 153A of the IPC penalizes promoting or attempting to promote “disharmony or feelings of enmity, hatred or ill-will between different groups on the basis of religion, race, place of birth, residence, language, region, caste, or community”. The section is worded in a broad language covering oral, written, or any visible representation through signs or otherwise.

Section 153B penalizes (a)imputations that a class of persons, by virtue of being members of a religious, racial, linguistic, regional group or caste or community cannot bear true faith to the Constitution of India (b) assertion, propagation or publication that any religious, linguistic, regional group or caste or community be deprived of their rights as Indian citizens by virtue of their being a member of that group (c) assertion or publication with regard to the obligation of a class of persons belonging to any such group “that is likely to cause disharmony, or feelings of enmity or hatred, or ill will between such member and other members”.

Section 295A penalizes “deliberate and malicious acts intended to outrage the religious feelings of any class by insulting its religion or religious beliefs”.<sup>32</sup> Similarly, Section 505(2) prohibits making, publication, circulation of any statement or report which is likely to create or promote hatred or feelings of enmity between members of different groups.<sup>33</sup> Any document or book found violating the said provisions may be confiscated by the State government.<sup>34</sup>

The Protection of Civil Rights Act 1955, the objective of which was to fulfil the constitutional mandate against ‘untouchability’ also contains provisions penalizing hate speech against the members of the ‘dalit’ community.<sup>35</sup> Section 7(1)(c) of the Act prohibits the incitement or

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<sup>31</sup> *Ibid.*

<sup>32</sup> Section 295, Indian Penal Code, 1860.

<sup>33</sup> Section 505 (2), Indian Penal Code, 1860.

<sup>34</sup> Code of Criminal Procedure 1973, S. 95.

<sup>35</sup> Constitution of India, Art 17.



encouragement “to practise untouchability in any form”. Similarly, Schedule Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 intended to protect the dignity and honour of the members of Scheduled castes and Scheduled tribes, penalizes intentional humiliation of members these groups<sup>36</sup>

There are also separate electoral laws governing hate speech, although the Election Commission of India has faced widespread criticism for failing to meaningfully implement them.<sup>37</sup> Hate speech is prohibited under two separate chapters in Representation of People Act, 1951. Section 123(3A), Chapter I of Part VII, declares hate speech as one of the corrupt practices.<sup>38</sup> Besides, Section 125 Chapter III of Part VII penalizes promotion of hatred or enmity on the basis of religion, race, caste, community or language, in the process of election.<sup>39</sup>

Besides there are provisions in The Cinematograph Act, 1952,<sup>40</sup> Cable Television Networks (Regulation) Act, 1955<sup>41</sup> and Press Council of India Act, 1978<sup>42</sup> prohibiting any hate content. The Cinematograph Act deals with the certification and censorship of films in India. Cable Television Networks (Regulation) Act governs the functioning of cable operators. Press Council of India regulates the working of news agencies.

These limitations on free speech and expression shall be viewed in light of Art 19(1)(a) of the Constitution..

## VI. ONLINE HATE SPEECH

The issue of hate speech has become even more grave in the present age of internet, since the access to internet allows offensive content reach to a huge audience in no time. While the internet has undoubtedly turned the world into a global village, it has also given rise to uncontrollable forms of expression. The advanced technology allows the internet user to shroud his identity thereby offering the miscreants an easy hand to create and circulate offensive content.

The United Nations Human Rights Council in its report<sup>43</sup> on the promotion and protection of the right to freedom of opinion and expression, acknowledged that the internet is “a key means

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<sup>36</sup> Section 3(1)(x) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

<sup>37</sup> Ritika Patni and Kasturika Kaumudi, *Regulation of Hate Speech* 2 NUJS Law Review 749 (2009).

<sup>38</sup> Section 133(3A), Representation of People Act, 1951.

<sup>39</sup> *Id.*, Section 125.

<sup>40</sup> Section 5b and 5E are relevant for the purpose of hate speech.

<sup>41</sup> Under Section 20, The Central government has the power to restrict objectionable content.

<sup>42</sup> Section 12 of the Press Council Act mentions the ‘objects and functions’ of the Press Council.

<sup>43</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly,

file:///C:/Users/User/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Content.IE5/LORTO LSM/A.HRC.23.40\_EN.pdf, (last visited on June 15, 2020, 11:00 am)

by which individuals can exercise their right to freedom of opinion and expression” but also underlined the fact that existing international human rights framework clearly recognizes certain limitations on this right on the basis of the intent and implications.

While the law has progressed steadily over time by virtue of judicial intervention, the introduction of digital media platforms has given rise to discrete legal and governance issues. Online circulation of hate content poses peculiar challenges in view of the rate and magnitude of dissemination over diverse platforms and multiple formats, that are interconnected.

Hate speech laws in India are neutral- they apply invariably to theatre, radio, broadcasting, print and the internet. However, whenever a media technology gathers popularity, special laws are put forward for its regulation, that are generally on the lines of the provisions penalizing hate speech.

In 2008, a remarkable step was taken by incorporating Section 66A into the Information Technology Act, 2000 to penalize online hate speech. The provision was made applicable to “any information sent by means of a computer resource or communication device that is grossly offensive or menacing in character, or any information that the sender knows to be false but sends anyway, with the intent of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will”.<sup>44</sup> However, the Supreme Court in *Shreya Singhal v. Union of India*<sup>45</sup> struck down the said provision holding it unconstitutional. The Court first declared that freedom of speech available online deserves the same level of constitutional protection as the freedom of speech available offline. It then analyzed Section 66A in light of the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution. The Court noted that Section 66A arbitrarily and disproportionately restricted the right to freedom of speech and expression. The Court ruled that Section 66A did not constitute a reasonable restriction under Article 19(2) and hence was violative of Article 19(1)(a) of the Constitution.

In the instant case two girls were charged under Section 66A of the IT Act for a post on Facebook that was tagged as “hate speech”. The arrest was widely condemned making major headlines in India and around the world, on the ground that the section was too broad and liable to be misused for political designs.<sup>46</sup> After a number of people being charged and arrested under the section, a Public Interest Litigation was filed before the Supreme Court which eventually

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<sup>44</sup> Section 66A, Information Technology Act, 2000

<sup>45</sup> *Shreya Singhal v. Union of India* AIR 2015 SC 1523

<sup>46</sup> India is policing the Internet for all the sad and wrong reasons”; <http://www.firstpost.com/india/india-ispolicing-the-internet-for-all-the-sad-and-wrong-reasons-531235.html>;

declared the provision as unconstitutional.<sup>47</sup>

Besides, Section 69A of the Information Technology Act allows the State to direct “any agency of the Government or intermediary” to block access to any information on any computer resource. For the purposes of this act, a “computer resource” has been defined as a “computer, computer system, computer network, data, computer database or software”.<sup>48</sup> Under this section, the government is empowered to block or filter or otherwise restrict access to any website or source on the internet. Besides the “intermediaries”, who have been defined as any person who “receives, stores or transmits” an electronic message on behalf of another person,<sup>49</sup> are also under the obligation of adhering to the government’s directives to block or filter access to any content available online.

Section 79 of the Act, contains a ‘safe harbour’ provision absolving the intermediaries of their liability for a third party content. This is irrespective of whether such content violates any Indian law. The intermediaries are protected only if they act as platforms and not the speakers, and if they do not ‘initiate, select the receiver or modify’ the content being transmitted. However, it may be noted that the intermediaries have an obligation to observe ‘due diligence’, and the standards for the same have been set out in the Intermediaries Guidelines. The procedure to be observed to limit access to online content is contained in the Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009.

Also, Section 144 of Cr. PC empowers the district magistrate to impose internet shutdown in their respective districts. In *Madhu Limaye v. Ved Murti*,<sup>50</sup> constitutionality of Section 144 was challenged before the Supreme Court. The Court upholding the section held that the possibility of misuse of the provision is not a sufficient ground to strike it down. Supreme Court has noted that the objective of Section 144 is to address urgent situations by avoiding damaging occurrences.<sup>51</sup> The Supreme Court has made it clear that the threat anticipated must be real and not imaginary or based on likelihood.

## VII. OBJECTIONABLE MATERIAL AND INTERNET

The last decade has witnessed a gradual increase in the widespread use of social media in India, due to the affordability of smartphones, data plans, improved broadband penetration. The

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<sup>47</sup>“Supreme Court strikes down Section 66A of IT Act”, <http://timesofindia.indiatimes.com/india/SupremeCourt-strikes-down-Section-66A-of-IT-Act-which-allowed-arrests-for-objectionable-contentonline/articleshow/46672244.cms>. (last accessed on July 03, 2020, 2:00 pm)

<sup>48</sup> Section 2(1), Information Technology Act, 2000

<sup>49</sup> *Ibid.*

<sup>50</sup> *Madhu Limaye v. Ved Murti*, 1971 SCR (1) 145.

<sup>51</sup> *Ramlila Maidan Incident* (n. 77), para 38

current decade in India has seen the emergence of a media discourse that links ‘social media’ to ‘public order disturbances’. From 2010 onwards, several incidents of violence linked to content circulated online have been reported. Such content is now popularly referred to as ‘objectionable’ content. Objectionable content in some form or the other has been disallowed since the colonial period and continues to be so. For instance, in 1918, the Indian Cinematograph Act was passed to regulate cinema in India. The Act was aimed at preventing the screening of objectionable content in the movies.

In March, 2018 the Observer Research Foundation published a study on a statistical mapping of hate speech and counter speech on social media platforms in India. The study showed that most of the hate content in India was based on religion and ‘religio-cultural’ practices related to food and dress. The study noted that there was an increase in such occurrences from 19 to 30 percent over a period of one year (the timeframe of the study). Most of the comments as per the study, are liable to incite violence against the Muslim community which constitutes a minority group of the total population. The matters that induced hate speech ranged from resistance to interfaith marriages, issues related to human rights, cow protection and consumption of beef. While the social media companies repeatedly highlight their contribution towards facilitating positive interactions, the study indicated that a growing segment of users resort to such tools to incite violence.<sup>52</sup>

Social media nowadays is a breeding ground for toxic and hateful conversations. Curbing the menace of hate speech and fake news is an emerging challenge for governments across the globe. Besides being a technological problem, it is also a societal issue. In 2019, a terrorist opened fire in two mosques killing at least 49 worshippers and injuring dozens in Christchurch, New Zealand. The incident was streamed live on Facebook by the perpetrator. Before it took place, a post filled with anti-Muslim propaganda appeared on an anonymous message board which directed users to the Facebook page streaming the attack. Eventually, the video was taken down but only after it had been viewed by all. The attack was followed by a new debate as to how governments and civil society must strive to curb online hate speech.

It is an irrefutable fact that the narratives created on online platforms often have real life implications. In 2018 a series of lynchings were witnessed in rural areas after rumours regarding child traffickers were circulated on popular messaging application WhatsApp.<sup>53</sup> In

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<sup>52</sup> Maya Mirchandani, Dhananjay Sahai and Ojasvi Goel, *Encouraging Counter Speech by Mapping the Contours of Hate Speech on Facebook in India*, Observer Research Foundation.

<sup>53</sup> Vivek Narayanan, Serena Josephine M., *How child trafficking rumours on WhatsApp led to lynching incidents in Tamil Nadu*, The Indian Express, May 14, 2018.

February, 2019, 28-year-old Venkataraman along with his friend Vijay shot a hateful video against the members of Dalit community. "Fight us if you are a real man, you Dalit dogs. You bastards are worthless in front of us. We'll butcher you lowlives," he ranted in the video. The video was allegedly uploaded by a third person after he got hold of it through Vijay. Soon after the video was uploaded, dozens of Dalits attacked Venkataraman's house. A day after the attack, Venkataraman murdered his friend Vijay for having leaked the video. After his release on bail he also committed suicide.<sup>54</sup> More recently, during the election campaign for Delhi legislative assembly elections, an official chanted the slogan "*Desh ke gadaaron ko, Goli maaro saalon ko*".<sup>55</sup> A few days after the rally a young man acting upon these words opened fire on protesters at Jamia Millia Islamia University. Such incidents highlight how hate speech has real consequences.<sup>56</sup>

Hateful content in India is primarily based on sensitive issues such as caste, gender or religion. Moreover, the laws to deal with such issues are insufficient and scattered across multiple regulations such as the Indian Penal Code, the Information Technology Act and Criminal Procedure Code.

More recently the Karnataka High Court dismissed a PIL filed by an NGO seeking action against the political leaders and media houses for making hateful statements against the Muslim community after several members of the Tablighi Jamaat tested positive for Covid 19. The Court noted that "it would be improper to make a substantive analysis or give a concrete definition of "hate speech" in the absence of any specific legislation".<sup>57</sup>

The Division Bench of Justice BV Nagarathna and MG Uma held,

*"In the present scenario, since the Parliament has not yet thought it appropriate to legislate on the concept of 'hate speech', in this writ petition, in the absence of there being any definition of 'hate speech' as such, this Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot issue directions merely on the basis of impact of hate speech on the society in general or certain sections of the society in particular."*

The Court further remarked that it would be improper to exercise its jurisdiction under Article 226 of the Constitution of India to *direct either the Parliament or the State Legislature in the*

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<sup>54</sup> "15 seconds of TikTok: Caste tensions, a murder and suicide", The Indian Express, September 2, 2019.

<sup>55</sup> "Shoot the traitors' slogan raised at Union Minister Anurag Thakur's rally, Delhi CEO seeks report", The Indian Express, Jan, 28 2020.

<sup>56</sup> "Massive Protests After Man Shoots Jamia Student, Shouts 'Yeh Lo Azaadi'" available at <https://www.ndtv.com/india-news/man-waves-gun-at-protesters-near-jamia-university-in-delhi-shouts-yeh-lo-aazadi-2172057>, (last accessed on August 1, 2020, 4:00pm).

<sup>57</sup> "HC declines PIL seeking action against 'hate speeches' The Hindu, May 13, 2020.

issue.

Also, in 2016, a Hyderabad high court<sup>58</sup> in its judgement pertaining to a defamation case filed against Google for content hosted on its blogging platform while acknowledging the immunity enjoyed by the intermediaries following the *Shreya Singhal* case noted that due to the slow pace of the judicial system, “the present law under Information Technology Act is not able to provide such immediate reliefs to the person aggrieved by such defamatory or sexually explicit content or hate speeches”. The court recommended that the law be amended to better safeguard public interest. This points out at the need for legislative intervention to address the issue. In absence of clear legal provisions on the subject, the courts are often reluctant to deliberate on such matters.

### VIII. NEED FOR LEGISLATIVE REFORM

Hate speech indisputably is considered as abuse of freedom of speech and expression and therefore does not fall within the domain of protective discourse. It is inarguable that hateful content has real and disastrous implications on people’s lives while putting their safety at risk. Besides, it is equally detrimental at the societal level. It creates a divide among the communities and hampers social progress. Hate speech can at times lead to disastrous consequences by instigating individuals to carry out acts of mass killings, terrorism, ethnic cleansing, etc.

As victims of hate speech, such individuals “feel fear, may be nervous to enter public spaces or participate in discourse and may change their behaviour or appearance in an attempt to avoid hate speech.”<sup>59</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>60</sup> Such an intangible impact of hate speech is the most insidious and destructive as far as individual’s sense of security and right to live with dignity is concerned.

Most of the governments across the world today prohibit hate speech given its capacity to disrupt public order and lead to hate crimes along with other serious ramifications. In 2017, the Law Commission of India made certain recommendations with respect to hate speech law in India. Its recommendations include incorporation of new provisions penalizing incitement to violence within the Indian Penal Code in addition to the existing ones.<sup>61</sup> As far as criminalisation of speech is concerned, it remains a contentious issue, with the legal scholars

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<sup>58</sup> Google India Private Limited v. M/S Visaka Industries Limited And Ors, 18 November, 2016.

<sup>59</sup> Anandita Yadav, *Countering Hate Speech in India: Looking for answers beyond the law*, 2 Indian Law Institute L.R., (2018).

<sup>60</sup> *Ibid.*

<sup>61</sup> Law Commission of India, 267th Report on Hate Speech (March 2017).

divided as to what kind of speech should ideally be criminalised; whether all hate speech be made punishable or only a certain type or whether it should be dealt under civil law.<sup>62</sup> However, it is indisputable that any act which is capable of inciting violence is a serious case and calls for a stringent action to avoid further harm. Therefore, criminal sanction may be regarded as most suitable to deal with such cases..

Post the Supreme Court's decision striking down Section 66A of The Information Technology Act, there have been few attempts to reintroduce certain components of the provision. In 2018, the Ministry of Home Affairs wrote to the Law Commission of India to prepare a draft bill aimed at curbing the online hate speech in India.<sup>63</sup> This was after the Parliamentary Standing Committee headed by T.K Viswanathan in its report submitted in 2015 recommended stricter provisions to curb online hate speech. The report recommended certain changes to the IT Act and incorporation of provisions criminalizing online hate speech on the lines of Sections 153A and 153B of the IPC.<sup>64</sup>

Further, the report advocated stricter penalties than those prescribed in the IPC for hate speech under Sections 153A and 153B, due to the 'fast and wider spread' of online material and its tendency to lead to severe consequences.<sup>65</sup> The report also recommended that any transmission of information by a person claiming to only 'innocently forward' such information should also be charged with the same offence as the originator of the information.<sup>66</sup> The committee has sought the addition of two provisions- Section 153C and Section 505A in the Indian Penal Code.

The proposed Section 153C of the IPC reads:

*Whoever on the grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe, uses any means of communication to:*

*(a) gravely threaten any person or group of persons with the intention to cause fear injury or alarm; or*

*(b) advocate hatred towards any person or group of persons that causes, or is likely to cause,*

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<sup>62</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 ).

<sup>63</sup> Vijayta Singh, *Centre plans law on online hate speech*, The Hindu, March 19, 2018.

<sup>64</sup> "Expert Panel Tells Government to Amend Laws to Punish Online Hate Speech", <https://thewire.in/law/post-section-66a-central-panel-tells-government-to-amend-ipc-crpc-it-act-to-punish-online-hate-speech>, (last visited on August 12, 2020, 10:00am).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

*incitement to commit an offence shall be punishable with imprisonment of either description for a term which may extend to two years or a fine up to Rs 5000, or with both.*

In the opinion of the committee, Section 153C has done away with the vagueness and ambiguities present in erstwhile Section 66A. The proposed Section clearly defines the kind of speech constituting an offence under the Section, hence leaving a very little scope for any uncertainties.

The other proposed provision, Section 505A reads as:

*Whoever, intentionally, on the grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe, uses any means of communication to communicate*

*(a) highly disparaging, indecent, abusive, inflammatory, false' or grossly offensive information with the intention to cause fear of injury or alarm; or  
(b) gravely threatening or derogatory information with the intent to provoke the use of unlawful violence, against any person or group of persons, shall be punished with imprisonment for a term which may extend to one year and with fine up to Rs 5000, or both.*

The Law Commission was asked to consolidate the recommendations of the Vishwanathan Committee, its own recommendations made in 2017 and that of the MP Bezbaruah committee while framing a “comprehensive draft law”. The [Bezbaruah committee](#) was set up in February 2014 following a series of attacks on those belonging to the northeast region. The committee with a view to curb racial discrimination and violence, recommended the introduction of Section 153C of the IPC penalizing the promotion or attempt to promote acts prejudicial to human dignity and Section 509A penalizing acts, gestures, or words intended to insult members of a particular race.

The proposed amendment is a step in the right direction. However, it is still at a nascent stage form without having yielded any concrete results.

## **IX. LEGAL FRAMEWORK IN OTHER COUNTRIES**

Hate speech has already been recognized by the countries across the world as a threat to the smooth functioning of the society. The First Amendment to the Constitution of United States of America offers a wide protection to freedom of speech that includes within its purview any form of speech including hate speech. In 1996, USA passed the Communications Decency Act which afforded a certain level of protection to social media platforms. The Act stated that “No provider or user of an interactive computer service shall be treated as the publisher or speaker



of any information provided by another information content provider.”<sup>67</sup> This implies that the platform hosting the information is protected from all sorts of liability with regard to any information displayed on such platform that may be unlawful. While the individual who posts a direct true threat such as threatening to kill someone online can be prosecuted,<sup>68</sup> courts in US have applied a reasonable person test in case of hateful speech made online where threats do not seem to be direct. In one of the cases, the US Supreme Court declined to hold a person liable for posting the lyrics of a rap containing threatening statements against his ex-wife on his social media page on the ground that a reasonable person would not find it to be a real threat.<sup>69</sup>

In UK, the Public Order Act is the primary legislation prohibiting all forms of visible representation of hateful content, therefore, also including hate speech made on the internet. Besides, there are other broader laws in place governing online interactions. The Malicious Communication Act, 1988 penalizes sending of any content which is indecent, offensive, false or known to be false through electronic medium with imprisonment for upto 2 years.<sup>70</sup>

The members of the European Union particularly France and Germany have adopted a stringent approach in this regard. Any speech that incites hatred comes under the scrutiny and not merely the speech directly inciting violence as is the position in US. Germany and France have adopted a stringent approach in this regard. Germany, owing to its history of Nazi regime has been sensitive to the issue of hate speech. Faced with increasing backlash against Muslim migrants which gets reflected on social media platforms, Germany has enacted The Act to Improve Enforcement on the Law in Social Networks in October, 2017. The objective of the law is to ensure regulation of illegal content by social media platforms by requiring them to frame effective and transparent complaint mechanisms for the same. The Act requires social media platforms to take down posts that are “manifestly illegal” under the German law within twenty-four hours.<sup>71</sup>

In Japan, hate speech has become a subject matter of legislation in the past decade after the anti-racism activists have opposed ultranationalist movement against ethnic Koreans. The issue was met with a severe criticism from the UN Committee on the Elimination of Racial Discrimination in 2014 which triggered a national ban on hate speech in 2016, with

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<sup>67</sup> The Communication Decency Act, 1996 (47 U.S.C.), s.230.

<sup>68</sup> U.S. v. Morales, 252 F.3d 1070 (9th Cir. 2001).

<sup>69</sup> *Elonis v. United States* 135 S. Ct. 2001 (2015).

<sup>70</sup> The Malicious Communications Act 1988 (c.27), s.1.

<sup>71</sup> Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, <https://www.cfr.org/background/hate-speech-social-media-global-comparisons>, (last visited on July 30<sup>th</sup>, 2020, 2:00 pm)

the Japanese government embracing a framework similar to that of Europe. The law requires the municipal governments “to eliminate unjust discriminatory words and deeds against People from Outside Japan.”<sup>72</sup>

The French laws impose a transparency obligation on the social media platforms requiring them to publish the name and amount paid by the author in case the content is sponsored. To curb the menace of fake news, an 1881 law lays down the criteria to establish that news is fake and being disseminated purposely on a wide scale. A legal injunction is created in such an event to promptly to block the circulation of such content.

These nations are among the most proactive in regulating online content. There is an urgent need to make efforts to match such level of efficacy, while upholding the rights of all those involved.

## **X. NON STATE REGULATIONS**

Besides the law laid down by sovereign states, there are certain guidelines and community standards set up by social media giants such as Twitter, Facebook and Google.

Facebook has formulated certain Community Standards prohibit hateful content on its platform which as per the standards “creates an environment of intimidation and exclusion and in some cases may promote real-world violence.”<sup>73</sup> These standards define hate speech as “a direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability”<sup>74</sup> and an attack as “violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation”<sup>75</sup> The term attack is divided into 3 tiers. Tier 1 attacks include those containing violent and dehumanizing speech, mocking the idea or victims of hate crimes. Tier 2 attacks are those containing expressions of inferiority, contempt and disgust. Tier 3 attacks include attempts to exclude or segregate persons or a group. The standards also disallow expressions used as insulting labels. However, “humor and social commentary related to these topics” is allowed. Besides, sharing of any content for purpose of raising awareness or educating others is permitted. Facebook also allows speech the intent of which is not to offend, but the user may be required to establish the context<sup>76</sup>

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<sup>72</sup> *Ibid.*

<sup>73</sup> Facebook Community Standards – Hate Speech, [https://www.facebook.com/communitystandards/hate\\_speech](https://www.facebook.com/communitystandards/hate_speech), (last visited on July 30, 2020, 3:00 pm)

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

As per Facebook's Governments Requests Report, it restricted 1228 posts containing hateful content between January and June 2017. The majority of these were on the grounds of religion.<sup>77</sup>

Similarly, Twitter has certain Rules and Regulations for its users. Twitter disallows hateful content, the policy states that the user "may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease". And further that the user "may not use hateful images or symbols in your profile image or profile header. Besides, if a user comes across something which in his opinion infringes the policy, it may be reported. Twitter would then review the information and take action accordingly which may include permanent deletion of the account of the user or suspension for a particular period of time."<sup>78</sup>

Also, there is a self-reporting mechanism such as flagging on YouTube, where users can flag material if they violate YouTube's community guidelines. These guidelines are mentioned under categories such as 'hateful content', 'violent and graphic content', 'harmful or dangerous content', 'nudity or sexual content', copyright violations and threats<sup>79</sup>.

## **XI. CONCLUSION AND SUGGESTIONS**

Issues like hate speech are complicated and there is a pressing need to address the same. As they say 'Haters gonna hate' but that does not imply that we cannot do more to deter them to spread their hate. A robust legal framework to cover new forms of hate speeches including online hate speech is the need of the hour. Also, there is a need to review the existing law on intermediary liability which guards the social media companies from any kind of liability for the acts of the users. The degree of protection accorded by the law determines the enthusiasm of these platforms to invest in good quality content moderation.

While the concern of these platforms resorting to over-censorship is understandable, it may be very addressed by engaging well-trained content moderators who are better acquainted with the political and social structure of a diverse nation like India. Activists worldwide have suggested that Facebook must consider framing region specific moderation guidelines rather than following a universal code.

Exponents of hate speech often take shelter under the inefficiency of law enforcement and social media regulations. While trolling is a complex issue, direct threats and incitement of

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<sup>77</sup> Facebook Data Requests Report, 2017.

<sup>78</sup> Twitter Hateful Conduct Policy, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>, last accessed on July 20, 2020, 5:00 pm)

<sup>79</sup> YouTube Community Guidelines.

violence on social media platforms can be effectively addressed. There is a need to develop efficient mechanisms for reporting and addressing such crimes.

Besides, there is a need for harmonization and unification of the existing laws. The recommendations of the Law Commission and Expert Committees need to be incorporated. Moreover, there is a need to amend the draft intermediary guidelines rules to tackle modern forms of hate content that proliferate on the Internet.

Lastly, the need for an independent and quality journalism, which consists of fact-checking, encouraging critical approach, supporting vulnerable groups, monitoring online content cannot be overemphasized. Its only then can we achieve justice for those who are at the receiving end of such crimes.

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