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“CONCEPTUALISING HATE CRIME IN INDIA: A COMPARATIVE AND CONSTITUTIONAL FRAMEWORK FOR LEGAL

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ABSTRACT

The research paper builds a conceptual and comparative analysis of hate crimes in India. It embraces the two-component model, which defines hate crime as a crime motivated by hatred of a protected group, and contrasts it with hate speech, rioting and crime in general. It suggests the lack of conceptual clarity in India's laws has led to poor responses.

It examines prominent justifications such as heightened harm and message crime theories, emphasising the social and psychological harms of hate crimes on the community and the constitutional principles of equality and dignity. The arguments draw on India's international human rights obligations.

Comparing the United States, United Kingdom, Canada and South Africa, key legislative approaches are identified. The paper suggests a hybrid model is best for India, and highlights the importance of clear definitions, institutional arrangements and victim support.

INTRODUCTION

Only after the sufficiency of the current legal system in India can be determined, and a law proposal can be constructed, a clear conceptual and comparative base should be created. This chapter lays the groundwork of that. It starts by defining hate crime strictly, in terms of the two-component model that prevails in comparative scholarship. It draws a line between hate crime and three related terms - hate speech, communal violence, and ordinary crime - that have often been confused with hate crime in Indian law and political discourses, and are addressed by the law through other tools. It goes on to look at the theoretical rationales of hate crime laws, the international human rights regime, and the legislative paradigm of four comparator jurisdictions. It ends with a critical evaluation of which model best fits India and why - a question that the comparative literature poses but Indian scholarship has not yet addressed systematically.

1.1 Defining "Hate Crime": The Two-Component Model

The most common definition of hate crime in legal literature is the so-called two-component model of hate crime proposed by Frederick Lawrence: a hate crime is a criminal offence, any act that is punishable in itself as a crime, that is driven by prejudice against actual or perceived membership of the victim in a group that has been designated as a group to which the Protection of the Laws applies.¹ The two elements are also critical. Bias or prejudice, whether virulent or not, would be an issue of opinion and not a crime without the predicate offence. The act is not hate crime but is ordinary crime without the bias motivation.

The predicate offence provision is meant to make sure that the hate crime laws do not punish thought, but action. This is the ultimate solution to the most widespread objection to hate crime laws, the thought crime one: someone who has very prejudiced beliefs but has not committed a crime is not a perpetrator of hate crimes. The hate crime system becomes activated when the prejudice is transformed into a crime.²

There are two types of the bias motivation requirement. Discriminatory selection is where the discriminator picks the victim due to the group membership. Animus-motivation is when the aggressor is motivated by active aggression towards the group itself. Under current hate crime laws, both types are permissible.³ The actual or perceived group membership is such that a perpetrator who assaults a Sikh man with an erroneous belief that the man is a Muslim is still liable: it is the bias of the perpetrator but not the true identity of the victim that matters.

1.2 Three Crucial Distinctions: Hate Crime, Hate Speech, and Communal Violence

Hate crime, hate speech, and communal violence are often discussed interchangeably in legal and political discourse in India, most notably by the Law Commission in their Report No 267 (2017) which suggested amendments to IPC speech offences as the right remedy to the entire spectrum of bias-motivated harm. The differences are both legally and practically important, in that different legal tools are suited to each, and their conflation generates structures that do

¹ Lawrence (n 6) 9–12; James B Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998) 11 (the two-component model is the dominant definitional framework across common law hate crime scholarship and legislation).

² Lawrence (n 6) 10; Paul Iganski, *"Hate Crime" and the City* (Policy Press 2008) 14–15 (the predicate offence requirement ensures that hate crime law targets conduct rather than thought or opinion; a person who holds prejudiced views but commits no criminal act is not a hate crime perpetrator).

³ Lawrence (n 6) 30–38 (two forms of bias motivation: discriminatory selection, where the victim is chosen because of group membership; and animus-based selection, where the perpetrator is driven by active hostility toward the group; both forms are accepted as sufficient under modern hate crime statutes).

not service either of them satisfactorily.⁴

Table 2.1: Hate Crime, Hate Speech, and Communal Violence — Key Legal Distinctions

Feature	Hate Crime	Hate Speech	Communal Violence
Nature	Violent crime (assault, murder, arson, vandalism) against a group.	Communicative behaviour words, publications, symbols that incite hatred against a group.	Organised or collective group violence; can include both hate crime and hate speech.
Defining Question	Why has this person targeted this victim?	Is this speech hateful or inciting?	What group or groups are involved in collective violence?
Indian Legal Provision	No specific provision; currently dealt with poorly under general criminal law.	IPC s 153A, 295A, 505 / BNS ss 196, 302, 353	IPC sec 141–160 (unlawful assembly, rioting) / BNS ss 189–195
Key Harm	Physical harm to immediate victim PLUS community terror (secondary victimisation of entire targeted group).	Emotional harm to community; societal condoning of hatred against community.	Mass physical harm; displacement; communal property destruction.
Real Indian Example	Killing of Pehlu Khan (Alwar, Rajasthan, 2017); Bhima	TV speeches that inflame anti-Muslim or anti-Dalit rhetoric;	Gujarat riots 2002; Muzaffarnagar riots 2013; organised inter-

⁴ Law Commission of India (n 8) 8–11 (the Commission treated ss 153A and 295A IPC as the principal regulatory provisions for both hate speech and hate crime, without recognising that physical violence motivated by group-based animus is a structurally different category of harm from expressive conduct promoting group-based enmity).

Feature	Hate Crime	Hate Speech	Communal Violence
	Koregaon attacks (2018); Manipur ethnic violence (2023).	social media posts prior to communal mob attacks	community violence with State or non-State coordination Yes essential defining element
Is a Predicate Criminal Offence Required?	Yes essential defining element	Not necessarily may be punishable as expression alone	Yes, but focus is collective action, not individual bias motivation

Source: Author's compilation from primary legal sources, scholarly literature, and case records. Indian legal provisions cited are to the BNS 2023 where applicable. "Real Indian Examples" drawn from CLI (2019), India Hate Lab (2024), and publicly documented incidents.

The differences in Table 2.1 directly affect the legislation. Even the provision, which is aimed at the control of speech, including Section 153A IPC/Section 196 BNS, cannot be applied to a physical assault predetermined by prejudice, regardless of the vigor with which it is applied. The collective nature of mob violence is addressed in an unlawful assembly provision that does not address the prejudice motive of individual actors. A specialized hate crime paradigm, based on the two-component model, is the only way to embrace the spectrum of bias-motivated physical actions and to classify the element of bias motivation as a legally cognisable aggravating factor.⁵

1.3 Theoretical Justifications for Hate Crime Legislation

1.3.1 The Enhanced Harm Rationale

The main empirical argument behind the recognition of hate crime as a specific and more severe type of offending is that hate crimes are more harmful than similar non-bias-based offences. Studies have always shown that victims of hate crimes experience high levels of post-

⁵ Paul Brass, *The Production of Hindu-Muslim Violence in Contemporary India* (University of Washington Press 2003) 10–15 (communal violence as a group-level political phenomenon, analytically distinct from individual bias-motivated criminal conduct).

traumatic stress disorder, anxiety, and depression when compared to victims of similar crimes that lack the element of bias.⁶ This is not just a more intense psychological effect, but it possesses a unique quality. The victim is aware that he/she was not picked on what he/she did but what he/she is, a characteristic that he/she cannot change and cannot get out of. The damage of this acknowledgment - of having become a target due to one's own identity - is qualitatively different to the damage of a crime based on, say, the monetary profit.

However, the increased damage of hate crime is not limited to the victim. By burning down a mosque, all Muslims in the surrounding are told the same thing: you are not safe here. When the home of Dalit family is burnt due to their caste, all the Dalits in the village realize that they can be victims, as well. This secondary victimisation, which every hate crime perpetrates on the whole community to which the victim belongs, is what Lawrence refers to as secondary victimisation. A legal regime that does not acknowledge secondary victimisation underestimates the overall damage that hate crime inflicts in a systematic way and thus under-prosecutes it.

1.3.2 The Message Crime Theory

Wang and Matsuda come up with a complementary argument based on the communicative nature of hate crime. Hate crimes do not only harm the physical world but they are also communicative on the message crime theory.⁷ The victim and the perpetrator are used by the offender as an instrument to transmit a message to the group that the offender is targeting: your type is worse, unwelcome and deserving of our violence.⁸ The violence is at once an assault on a person and a declaration about a people.⁹ This communicative aspect is what makes hate crime different than ordinary crime in such a manner that it cannot be explained by the enhanced harm rationale alone.¹⁰

The message crime theory offers a uniquely and compelling rationale in support of special hate crime laws, in addition to the sentencing enhancement rationale. When hate crimes are communicative acts, the reaction of the law should communicate in a communicative manner:

⁶ Paul Iganski, "Hate Crimes Hurt More" (2001) 45(4) *American Behavioral Scientist* 626, 630–632 (empirical confirmation across multiple victim surveys that hate crime victims report higher rates of post-traumatic stress disorder, anxiety, and depression than victims of comparable non-bias-motivated offences).

⁷ Mari J Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2332–2336.

⁸ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 9–12

⁹ Kent Greenawalt, 'Insults and Epithets: Are They Protected Speech?' (1990) 42 *Rutgers Law Review* 287, 292–295

¹⁰ Frederick M Lawrence (n 2) 24–28.

the introduction by Parliament of a specific hate crime statute, where hate crime is a new and more serious type of criminal behaviour, sends a message in reverse on behalf of the wider society.¹¹ That counter-message disowns the perpetrator that any community is a legal target due to its religion, caste or ethnicity. This eloquent role cannot be accomplished by increased judicial discretion, stricter prosecution policies, or administrative edicts. It must have the voice of Parliament itself--the most authoritative voice of the democratic system.

The message crime theory can also be used to understand why the damage of hate crime cannot be accounted by concentrating on a single victim of the offense. Matsuda defines three tiers of the harm of group subordination that hate crime causes: the direct psychological damage done to the immediate victim; the political message that groups are subordinate, which is transmitted to the targeted group; and the social harm, which is the strengthening of group hierarchy in a society where constitutionally equality is a commitment.¹² The third level of harm is especially relevant to the Indian context due to the constitutional law of the country, which in Article 14, 15 and 17 of the Constitution states that equality is fundamental to the Indian constitutional law: hate crimes are not just harmful to individuals, but also to the constitutional project of a society of equals.

1.3.3 The Constitutional Equality and Dignity Argument

The constitutional obligation of India towards equality and human dignity gives an affirmative responsibility on the State to consider bias-motivated violence as qualitatively different than regular violence. The structural explanation of hate crime by Perry, as a power exercise that dominant groups use to affirm their dominance over minorities, directly correlates to the caste and communal relations in India: the caste-atrocity violence is perpetrated by members of the dominant castes; the cow-vigilante mob attacks are perpetrated by religious minorities. The constitutional context of Articles 14, 15, 17 and 21 that binds the State to the equal dignity of every person irrespective of religion, race or caste requires a legal response equal to this structural aspect of hate crime.¹³

¹¹ Ibid.

¹² Mari J Matsuda (n 1) 2335–2341.

¹³ *Constitution of India* arts 14, 15, 17, 21; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [136] (Chandrachud J) (dignity as the constitutional foundation; constitutional morality must prevail over social morality; the constitutional commitment to equal dignity of all persons regardless of religion, caste, or sexual orientation imposes a positive obligation on the State to protect persons from identity-targeted harm).

1.3.4 The Deterrence Argument

Empirical studies by Walters show that specific hate crime laws do have a definite preventive effect that cannot be attributed solely to an increase in penalties.¹⁴ The expressive aspect of hate crime laws- the legislative expression of the idea that the society sees violence that is based on bias as qualitatively different to violence based on prejudice, and will be addressed with specially crafted legal measures influences the normative context within which the decisions of potential offenders are made.¹⁵ This joint message of committed legislation and augmented and enforceable penalties and efficient institutional implementation would be of special importance in India, where a recorded culture of impunity towards cow-vigilante violence and caste-atrocity perpetrators has been a major ingredient in perpetuated offending.¹⁶

Deterrence argument is best when it is accompanied by believable institutional enforcement.¹⁷ A hate crime law that lacks the proper policing, prosecution, and surveillance systems sends the message of less deterrence than one that is supported by observable institutional gears.¹⁸ That is why this institutional reform agenda of Chapter IV the Hate Crime Investigation Units, specialist prosecutors, mandatory FIR recording, and national monitoring are as significant as the text of the legislation. Deterrence relies upon the plausible threat of bias-motivated offending being detected, examined and indicted and penalized in a manner that is more severe.¹⁹

1.3.5 International Human Rights Obligations

India is a party to the ICCPR and ICERD. In particular, the General Recommendation No 35 (2013) by the CERD Committee specifically asks States parties to consider racial or ethnic bias motivation as an aggravating circumstance when sentencing criminal offences.²⁰ The ECtHR has determined in *Bekos and Koutropoulos v Greece* that the investigative duty of the State is

¹⁴ Mark Austin Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014) 54–61.

¹⁵ Mark Austin Walters, 'Conceptualising "Hostility" for Hate Crime Law: Minding "the Gap" between Legal Structures and Interpretative Practices' (2015) 34 *Oxford Journal of Legal Studies* 47, 63–67.

¹⁶ *National Crime Records Bureau, Crime in India* (Ministry of Home Affairs, Government of India, latest available edn) (sections on crimes against Scheduled Castes and communal incidents).

¹⁷ Paul H Robinson and John M Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 949, 951–960.

¹⁸ Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice* 199, 201–210.

¹⁹ Mark Austin Walters, Rupert Brown and Susann Wiedlitzka, 'Causes and Motivations of Hate Crime' (Equality and Human Rights Commission Research Report 102, 2016) 45–52.

²⁰ CERD, General Recommendation No 35 (n 18) [9]–[10]; *Vishaka v State of Rajasthan* AIR 1997 SC 3011 [16] (Verma CJ) (international human rights norms may be read into fundamental rights in the absence of domestic legislation).

limited to the duty of investigating the possible motivations behind the bias in the acts of violent crime, a duty that the police forces in India do not as yet have an institutional structure to carry out.²¹ The UN Special Rapporteur on Contemporary Forms of Racism has also called upon India to implement legislative changes to appreciate bias motivation as a specific aggravating factor.

1.4 The International Human Rights Framework: India's Obligations

The international duties of India in the ICCPR (arts 2(1), 20(2) and 26) are to provide effective protection against the bias-motivated violence in the form of discrimination based on religion, race or national origin.²² Article 4 of the ICERD makes it mandatory that States parties should make punishable offences the dissemination of ideas that are founded on racial superiority or hatred and the commission of violence of a racial or ethnic group. CERD Committee General Recommendation No 35 (2013) is even more specific, in that it encourages States to establish that bias motivation is an aggravating circumstance in the sentencing process, and to require law enforcement agencies to identify and document bias motivation in violent offenses.²³

The judgement of the Supreme Court in the case of *Vishaka v State of Rajasthan* gave a precedent that the international human rights standards can be interpreted as a part of the basic rights provisions without the domestic laws.²⁴ This principle offers a channel through which the CERD and ICCPR commitments of India can be discussed as having an immediate effect of informing Article 14, 15, and 21 in the context of hate-motivated violence. Failure of India to implement a hate crime framework has thus far been a domestic constitutional failure as well as a violation of its international duty.²⁵

1.5 Comparative Legislative Frameworks

1.5.1 United States

The hate crime legislative system of the common law world is the most developed in the United States. The primary federal tool is the Matthew Shepard and James Byrd Jr Hate Crimes

²¹ *Bekos and Koutropoulos v Greece* App No 15250/02 (ECtHR, 13 December 2005) [69] (failure to investigate possible racist motive in a violent assault violates Art 14 read with Art 3 ECHR; the State's investigative obligation extends to investigating bias motivation).

²² *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 2(1), 20(2), 26.

²³ Committee on the Elimination of Racial Discrimination, *General Recommendation No 35: Combating Racist Hate Speech* (26 September 2013) UN Doc CERD/C/GC/35, paras 12–13.

²⁴ *Vishaka v State of Rajasthan* (1997) 6 SCC 241 (Supreme Court of India).

²⁵ ICCPR (n 1); ICERD (n 2).

Prevention Act 2009 named after a gay university student who was beaten to death in Wyoming in 1998 and a black man dragged behind a truck in Texas the same year.²⁶ It establishes independent federal hate crime offences under 18 USC 249, to guard the victims based on race, colour, religion, national origin, gender, sexual orientation, gender identity, or disability. In the Supreme Court case of *Wisconsin v Mitchell* (1993) it was unanimously affirmed that sentence enhancement in the context of bias-motivated crime is constitutional, since it is aimed at the further detrimental behavior of bias-motivated targeting rather than at the thought or belief underlying it.²⁷ The FBI Uniform Crime Reporting programme gathers compulsory yearly hate crime information - offers a national data image with no similar in India.²⁸

1.5.2 United Kingdom

The United Kingdom has the most complex hate crime regime in the common law world, integrating aggravated offences of the most serious forms of conduct with an obligatory sentence uplifting clause that is applicable to every offense. The Crime and Disorder Act 1998 establishes aggravated versions of racially or religiously motivated assault, criminal damage, harassment and public order offending, all with much greater maximum penalties than the non-aggravated version.²⁹ Section 145 and 146 of the Criminal Justice Act 2003 states that courts must consider racial, religious, sexual orientation, disability or transgender identity hostility to be an aggravating factor in any given offence and must indicate in open court that the enhancement has been made.³⁰ *R v Rogers*, the House of Lords affirmed that aggravated offence clauses are to be interpreted widely. The prominent lack of gender and age in the top layer of protection has elicited a long-standing academic critique.³¹

²⁶ Matthew Shepard and James Byrd Jr Hate Crimes Prevention Act 2009 (US), Pub L 111-84, 18 USC §§ 245, 249; Hate Crimes Statistics Act 1990 (US), Pub L 101-275 (FBI mandatory annual hate crime statistics).

²⁷ *Wisconsin v Mitchell* 508 US 476 (1993) 487–488 (Rehnquist CJ) (sentence enhancement for bias-motivated crime targets conduct, not thought; constitutionally permissible under the First Amendment); *United States v Mayhew* 380 F Supp 2d 961 (SD Ohio 2005) 975 (HCPA nexus to commerce clause confirmed).

²⁸ Federal Bureau of Investigation, *Hate Crime Statistics 2022* (US Department of Justice 2023) 1–2 (FBI UCR mandatory hate crime data; voluntary participation by State and local agencies produces significant under-reporting—a limitation that parallels the Indian NCRB data problem).

²⁹ Crime and Disorder Act 1998 (UK), ss 28–32 (standalone aggravated offences: racially/religiously aggravated assault, criminal damage, harassment, public order, each carrying higher maximum penalties); Criminal Justice Act 2003 (UK), ss 145–146 (mandatory sentence enhancement for racial, religious, sexual orientation, disability, and transgender identity hostility).

³⁰ Criminal Justice Act 2003 (UK), s 145(2) (court must treat bias motivation or demonstrated hostility as an aggravating factor in any offence and must state in open court that it has done so and its reasons); Crown Prosecution Service, *Hate Crime: Legal Guidance* (CPS 2021) para 3.1 <<https://www.cps.gov.uk/legal-guidance/hate-crime>> accessed 20 January 2025.

³¹ *R v Rogers* [2007] UKHL 8, [2007] 2 AC 62 [13] (Baroness Hale) (the aggravated offence provisions of the CDA 1998 should be construed broadly; use of a hostile phrase directed at the victim's national origin in an aggressive confrontation constitutes racial aggravation).

1.5.3 Canada

The Canadian approach is based on the Criminal Code, which in section 718.2(a) (i) is to direct sentencing judges to consider evidence that an offence was driven by a bias, prejudice or hate grounded on a protected characteristic to be a compulsory aggravating circumstance.³² A list of the protected characteristics in Canada is the widest in any common law system: race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation and gender identity or expression. In *R v Harding* (2001), the Ontario Court of Appeal emphasized that the clause does not violate the freedom of expression as stipulated in the Canadian Charter: it is aimed at prejudice-based behaviour, not speech. Another example of a dual-track Indian reform agenda-based intervention by Canada is the existence of civil law human rights tribunals in Canada that exist in parallel to the criminal system.

1.5.4 South Africa

The Prevention and Combating of Hate Crimes and Hate Speech Act 16 of 2023 in South Africa (herein referred to as PCHA Act) is the most educative comparator to use in the context of India, as the two countries have a history of State-perpetuated group violence and post-oppression constitutional commitments to equality. According to the PCHA Act, any offence that is acknowledged by the South African law and is motivated by prejudices, bias, or intolerance of the characteristic of the victim that is covered in the PCHA Act, is termed as a hate crime.³³ It has the most comprehensive list of protected characteristics of any jurisdiction considered: race, gender, sex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, migrant or refugee status, and albinism. The Act establishes sentence enhancement (s 8) and a national hate crime convictions register that is held by the National Prosecuting Authority (s 9). A ten-year long process of the first draft bill being introduced and the subsequent adoption of the PCHA Act as a law is a warning message to Indian law reformers.

³² Criminal Code RSC 1985, c C-46 (Canada), ss 318, 319, 718.2(a)(i) (mandatory sentencing aggravation for bias, prejudice, or hate based on a protected characteristic; broadest protected characteristic list in any common law jurisdiction); *R v Harding* (2001) 160 CCC (3d) 225 (Ontario CA) [60]–[63] (s 718.2(a)(i) does not violate s 2(b) Canadian Charter; targets bias-motivated conduct, not expression).

³³ Prevention and Combating of Hate Crimes and Hate Speech Act 16 of 2023 (South Africa), ss 1 (definition of "hate crime"), 3 (standalone hate crime offence), 8 (sentence enhancement), 9 (national register of hate crime convictions); Pierre de Vos, "The Hate Crimes Act and Its Limitations" *Constitutionally Speaking* (University of Cape Town 2023) <<https://constitutionallyspeaking.co.za>> accessed 22 January 2025 (decade-long legislative gestation; political consensus challenges for Indian reformers).

Table 2.2: Comparative Overview of Hate Crime Legislative Frameworks

Jurisdiction	Principal Legislation	Legislative Model	Key Protected Characteristics	Notable Institutional Feature
United States	HCPA 2009; 18 USC §§ 245, 249	Hybrid: standalone federal offences + State-level sentence enhancement	Race, religion, national origin, gender, sexual orientation, gender identity, disability	FBI mandatory annual hate crime statistics (UCR); voluntary State/local participation limits completeness
United Kingdom	Crime and Disorder Act 1998 ss 28–32; Criminal Justice Act 2003 ss 145–146	Hybrid: standalone aggravated offences + mandatory enhancement in any offence	Race, religion, sexual orientation, disability, transgender identity (gender notably absent)	Mandatory public declaration of bias motivation finding and enhancement in open court; CPS specialist prosecutors and prosecution guidance
Canada	Criminal Code ss 318–319, 718.2(a)(i)	Mandatory sentence enhancement + standalone hate promotion offences	Race, religion, sex, age, disability, sexual orientation, gender identity, language, national origin (broadest list)	Dual-track: criminal law + civil human rights tribunals; broadest protected characteristic list
South Africa	PCHA Act 16 of 2023	Standalone hate crime offence +	Race, gender, religion, sexual	National register of hate crime

Jurisdiction	Principal Legislation	Legislative Model	Key Protected Characteristics	Notable Institutional Feature
		sentence enhancement	orientation, disability, HIV status, nationality, migrant status, albinism	convictions (National Prosecuting Authority); most comprehensive statute
India (current)	IPC/BNS ss 196, 197, 302, 353; SC/ST PoA Act 1989	No distinct hate crime framework; fragmented, subject-specific provisions only	Caste/tribe (SC/ST PoA Act only); religion (limited IPC/BNS expressive provisions)	No bias motivation recording mechanism; no dedicated investigation units; no monitoring system

Source: Author's compilation from primary legislative texts. BNS 2023 came into force 1 July 2024. Protected characteristics listed are primary categories only; individual statutes may include additional grounds.

1.6 Critical Analysis: Which Legislative Model is Most Appropriate for India?

Section 2.5 of the comparative survey indicates that there are three general legislative models. The pure sentence enhancement model (as in Canada) merely attaches an enhanced sentence to any conviction in which bias motivation is established without establishing new offences. The standalone offence model establishes completely new types of hate crime offences that are different to the normal criminal offences. The hybrid approach, which applies in the United Kingdom and in federal jurisdiction in the United States, is a combination of the two: standalone aggravated offences against the most serious forms of hate crime (mob lynching, communal arson, destruction of places of worship), and a general sentence enhancement which applies to all other bias-motivated predicate offences.

In the case of India, the hybrid model is most suitable, due to four reasons.

First, expressiveness. The gravest of hate-driven violence in India - organised mob lynching of religious minorities, caste-driven mass atrocities, organised destruction of places of worship - demand the expressive force of a specially defined standalone crime. Parliament needs to express, not only by the improved sentences, but by the words of the statute, that these types of bias-motivated violence are in a different legal category. This is not possible with an enhancement-only model.

Second, operational practicality. The need to present evidence of bias motivation as an element of each hate crime case is operationally challenging - especially in India, where witness protection is insufficient and investigative capacity is low. An enhancement clause that applies in general to sentencing after a conviction has been made eases the burden on evidence against the large group of bias-motivated crimes but leaves the full burden of evidentiary rigour that characterizes stand-alone charges to the most serious behaviour.

Third, constitutional precedent. The SC/ST PoA Act in India shows that subject-specific bias-motivated offences with increased penalties are not only constitutional but also practically viable. The hybrid model applies this time-tested strategy to a generic hate crime model.³⁴

Fourth, institutional integration. By introducing the sentence enhancement on the whole spectrum of predicate offences, the hybrid model produces a systematic incentive to police to record bias motivation at the FIR stage on all types of offending - producing the data required to drive the institutional monitoring apparatus that Chapter IV suggests.³⁵

1.7 Five Transferable Principles for India

The comparative analysis gives five principles that directly guide the legislative proposal of Chapter IV.

First - Definitional clarity is grounded. Any successful hate crime model starts with a clear statutory definition of hate crime, bias motivation and the enumeration of the list of characteristics that are to be safeguarded. Without these definitions, the enforcement mechanism police, prosecutors, judges have no vocabulary to find and take action on the

³⁴ Surendranath (n 10) 22–38 (the SC/ST PoA Act provides an established model of subject-specific bias-motivated offences with enhanced penalties, special courts, and victim protection provisions — its enforcement failures inform the institutional design recommendations of Chapter IV).

³⁵ Lawrence (n 6) 155–161 (the expressive value of standalone offences for the most serious hate crimes justifies the higher evidentiary burden; compare the sentence enhancement model which is operationally simpler but expressively weaker); Jack McDevitt, Jack Levin and Susan Bennett, "Hate Crime Offenders: An Expanded Typology" (2002) 58(2) *Journal of Social Issues* 303, 311–312.

behavior which the law is designed to respond to.³⁶ The fact that Indian law has a definitional vacuum in it is not an accidental technical gap that has been the source of all four gaps that were identified in Chapter III.

Second — Character traits based on evidence ought to be safeguarded. The question of political negotiation should not be considered in the choice of which characteristic of the groups will be offered protection against hate crimes, but the empirical fact of bias-based targeting.³⁷ The point of entry in India should be the constitutional classes of Article 15(1) of religion, race, caste, sex and place of birth with the addition of reasons evidenced by NCRB and civil society data to create large-scale bias-motivated violence.³⁸

Third - The hybrid model is most appropriate. The expressive specificity and the operational practicality which a hybrid model can afford alone will be provided by independent aggravated aggravated offences of the most serious aggravated hate crimes, combined with a generic sentence enhancement of all other bias-motivated predicate offences.³⁹

Fourth - Institutional design is as important as writing. Even the most well-written hate crime law will be a dead letter unless there is a documentation of bias motivation by the police at the FIR stage, unless the prosecutors are trained and guided as specialists and the courts are trained to be guided by the two-component model.⁴⁰ The attention to institutional design has been matched by no less attention to legislation by all comparator jurisdictions that have been successful in implementing hate crimes.

Fifth - Victim support should be incorporated in the statute. The particular weakness of the hate crime victims, whose constant presence has to be targeted by the associates of the perpetrators, who are reluctant to file a complaint with the police because they feel that they are the victims of an unfriendly strategy and whose victimisation is at the community level is such a significant structural part of the framework that it cannot be considered an additional measure.⁴¹

³⁶ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 21–25.

³⁷ Mark Austin Walters, Rupert Brown and Susann Wiedlitzka, ‘Causes and Motivations of Hate Crime’ (Equality and Human Rights Commission Research Report 102, 2016) 20–28.

³⁸ *Constitution of India* art 15(1); *National Crime Records Bureau, Crime in India* (Ministry of Home Affairs, Government of India, latest available edn).

³⁹ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) 57–63.

⁴⁰ Mark Austin Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014) 90–98.

⁴¹ Constitution of India 1950, art 246 and Schedule VII, List III, Entries 1 and 2 (criminal law and criminal procedure are Concurrent List subjects; Parliament has plenary competence to enact a Hate Crimes Prevention Act; the SC/ST (PoA) Act 1989 is the directly relevant precedent).

CONCLUSION

This research paper shows that the absence of a distinct hate crime framework in India creates serious gaps in addressing bias-motivated violence. By applying the two-component model, it establishes that hate crime is fundamentally different from hate speech and communal violence, requiring a separate legal approach.

Hate crimes produce not only physical harm but also psychological trauma, community-wide fear, and reinforcement of social hierarchies, undermining constitutional values of equality and dignity. India's international obligations further support the recognition of bias motivation as an aggravating factor.

Comparative analysis demonstrates that effective frameworks combine clear legislation with strong institutional support. The hybrid model emerges as the most appropriate for India, balancing expressive value and practical enforceability. The paper concludes that meaningful reform must integrate legal provisions with institutional capacity and victim support to ensure an effective and context-sensitive hate crime framework.

BIBLIOGRAPHY

Primary Sources

Legislation

Constitution of India 1950

Criminal Justice Act 2003 (UK)

Crime and Disorder Act 1998 (UK)

Criminal Code RSC 1985, c C-46 (Canada)

Matthew Shepard and James Byrd Jr Hate Crimes Prevention Act 2009 (US)

Prevention and Combating of Hate Crimes and Hate Speech Act 16 of 2023 (South Africa)

Indian Penal Code 1860 / Bharatiya Nyaya Sanhita 2023

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

Cases

Bekos and Koutropoulos v Greece App No 15250/02 (ECtHR, 13 December 2005)

Navtej Singh Johar v Union of India (2018) 10 SCC 1

R v Rogers [2007] UKHL 8, [2007] 2 AC 62

R v Harding (2001) 160 CCC (3d) 225 (Ontario CA)

Vishaka v State of Rajasthan (1997) 6 SCC 241

Wisconsin v Mitchell 508 US 476 (1993)

Secondary Sources

Books

Jacobs JB and Potter K, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998)

Lawrence FM, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999)

Perry B, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001)

Walters MA, *Hate Crime and Restorative Justice* (Oxford University Press 2014)

Brass P, *The Production of Hindu-Muslim Violence in Contemporary India* (University of Washington Press 2003)

Journal Articles

Iganski P, 'Hate Crimes Hurt More' (2001) 45(4) *American Behavioral Scientist* 626

Matsuda MJ, 'Public Response to Racist Speech' (1989) 87 *Michigan Law Review* 2320

Greenawalt K, 'Insults and Epithets' (1990) 42 *Rutgers Law Review* 287

Walters MA, 'Conceptualising "Hostility" for Hate Crime Law' (2015) 34 *Oxford Journal of Legal Studies* 47

Robinson PH and Darley JM, 'The Role of Deterrence' (2003) 91 *Georgetown Law Journal* 949

Nagin DS, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice* 199

Reports and Other Sources

Law Commission of India, *Report No 267: Hate Speech* (2017)

National Crime Records Bureau, *Crime in India* (Ministry of Home Affairs, latest edn)

Federal Bureau of Investigation, *Hate Crime Statistics 2022* (US Department of Justice 2023)

CERD, *General Recommendation No 35* (2013)

Equality and Human Rights Commission, *Causes and Motivations of Hate Crime* (Research Report 102, 2016)