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# **INTER-RELIGION HATE SPEECH: A CRITICAL SOCIOLOGICAL ANALYSIS**

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## **Abstract:**

We cannot disregard the power of words, which can become the tool for solving difficulty but if it is misused then it will become the creator of crisis. In country like India which is diverse, it is easy to incite immediate breach of peace by using fighting words on the basis of religion and caste and in present era many controversial person for getting unfair advantage have been using their freedom of speech and expression for inciting violence between people belonging to different religion, caste, beliefs and customs. Because of communal hate campaign, India has experienced many communal riots in past as well as in present.

The issue of hate speech has received significant attention from legal scholars and philosophers alike. But the vast majority of this attention has been focused on presenting and critically evaluating arguments for and against hate speech bans as opposed to the prior task of conceptually analysing the term 'hate speech' itself. It goes beyond legal texts and judgments and beyond the legal concept hate speech in an attempt to understand the general concept hate speech. One of its main aims is to explode the myth that emotions, feelings, or attitudes of hate or hatred are part of the essential nature of hate speech. It also argues that hate speech is best conceived as a family resemblances concept. One important implication is that when looking at the full range of ways of combating hate speech, including but not limited to the use of criminal law, there is every reason to embrace an understanding of hate speech as a heterogeneous collection of expressive phenomena. Another is that it would be unsound to reject hate speech laws on the premise that they are effectively in the business of criminalising emotions, feelings or attitudes of hate or hatred.

As we know that media as fourth pillar of the constitution because it is a medium for mass communication but if media allows it to be used as fuel for inciting violence through active propaganda or reporting then there is need to make media understand that it is duty of a media to report communal riot in such a manner that it should harmonize the violence and build people's confidence in the law which exist for solving communal problem. In the present era, we have different law which tells about how media have to report communal dispute. We have different legal provision which provide punishment for inciting violence through words. At last, author and co-author would like to suggest that if we have to solve the problem of hate speech, then media has to understand its duty and government should implement the laws in strict sense.

**Keyword:** Communal riots, hate speech, incitement, offense, freedom of expression, censorship, Role of Media

## INTRODUCTION

A persons' thoughts affect only him/her and not other people unless he/she expresses them or acts them out. Then these thoughts set events in motion which are likely to have effect. Therefore it is always important to take words seriously and listen, because it may become necessary to react when words do not express positive thoughts or views, but harmful, demeaning and hateful opinions towards a specific individual or a group of individuals. If not counteracted, hate speech will gradually be normalised and accepted. We catch new words and shortly they become part of the day to day discourse. Words are also the first tool we use to change attitudes, norms, dos and donts in our society.

Ancient India is known for its skepticism towards religion and its toleration to opposing views. However, the alarming rise of Hindu religious nationalism and Islamic fundamentalism, and consequently, increasing conflict between freedom of expression and religion, have been well noted by both academic and public intellectuals.<sup>1</sup>

The meaning of hate speech, in contemporary times, has travelled beyond mere offensive speech; it encompasses speech that is insulting, derogatory, discriminatory, provocative or even such that it incites and encourages use of violence or results in violent backlashes. It results in

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<sup>1</sup> Amit Singh, "Conflict between Freedom of Expression and Religion in India – A Case Study", Centre for Social Studies, University of Coimbra, 29<sup>th</sup> June, 2018.

disturbing the harmony and order in society at large. But more importantly, hate speech becomes a particularly heinous type of hate crime causing direct physical and psychological harm to the victims of hate crime. It affects its victims in intangible ways leading to chilling effect on the victims right to free speech and expression, resulting in exclusion from participation in the democratic process and public discourse.

In the Indian context, the contemporary meaning of the term ‘hate speech’ is inextricable from its origins (as a form of legal action) in colonial attempts ‘to assume the role of the rational and neutral arbiter of supposedly endemic and inevitable religious conflicts’. Given this historical context, hate speech has primarily been understood in India as referring to speech intended to promote hatred or violence between India’s religious communities. Macaulay, in his commentary upon the Indian Penal Code, explicitly endorsed this interpretation of ‘hate speech’ under Indian law, observing that the principle underlying Chapter XV (prohibiting ‘offences relating to religion and caste’) is that ‘every man should be suffered to profess his own religion, and... no man should be suffered to insult the religion of another.

Conflict between freedom of expression and religion in India is well known. The censoring of books and films by the State, and the victimization of writers, film directors, and academics by Muslim fundamentalist and Hindu religious-nationalist groups are well noted. In this context, the Indian Constitution not only empowers media and free thinkers, but also those who are religiously offended.

Desire among many people to prohibit religiously hurtful speech (or expression) has become a focal point of conflict between religious-fundamentalist groups and free thinkers. Indian Penal Code provisions 298 and 295A have resulted in the harassment of many writers, journalists and academics. In addition, use of violence and fatwa is also being used to suppress freedom of expression by Muslims and Hindu fundamentalist groups.

What does the state, acting on behalf of society as a whole, owe to citizens when it comes to regulating speech or other modes of expression? Some people believe that in answering this question it makes a positive difference whether or not the speech in question is insulting, degrading, defaming, negatively stereotyping or inciting hatred, discrimination or violence against people in virtue of their race, ethnicity, nationality, religion, sexual orientation, disability, gender identity, for example; and that it makes a positive difference because such

speech implicates issues of harm, dignity, security, healthy cultural dialogue, democracy, and legitimacy, to name just a handful of relevant issues. They sometimes use the term ‘hate speech’ to express that general view.<sup>2</sup> Critics of hate speech regulations, by contrast, claim that even though it has become ‘fashionable’ to defend such regulations and even though defenders of such regulations are (according to critics) ‘well-meaning’<sup>3</sup>, in reality hate speech regulations are themselves harmful to self-realization and autonomy, ineffective at best and often counterproductive, and damaging to democracy and legitimacy, amongst other things.<sup>4</sup> Indeed, to defend hate speech regulations (critics maintain) belies an implicit wish to defend the regulation of speech that quite plainly should not be regulated, namely, merely offensive speech.<sup>5</sup> Defenders of (some) hate speech regulations could respond that the critics are being patronising; that it is the critics who are adopting a fashionable and well-meaning yet wrongheaded position. Defenders could even retort that it is the critics who harbour a secret desire to deregulate all speech even speech that quite plainly should not be deregulated. But what exactly are the two sides arguing about here? What is hate speech? Until we can sensibly answer that question it seems that the debate about hate speech regulations has no chance of moving forward, much less of being understood by bemused onlookers. Since every country on the planet has probably witnessed at some point in its history instances of what could be labelled ‘hate speech’, and virtually every legal system in the world contains at least one law that could be interpreted as a ‘hate speech law’, we are all of us caught up in the aforementioned debate whether we like it or not, and whether or not we know what the debate is actually about.

Numerous legal scholars have put forward putative definitions of the term ‘hate speech’.<sup>5</sup>

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<sup>2</sup> Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York, NY: New York University Press, 2002); Bhikhu Parekh, ‘Hate Speech: Is There a Case for Banning?’, *Public Policy Research* 12 (2005-2006): 213–223; Steven J. Heyman, *Free Speech and Human Dignity* (New Haven, CT: Yale University Press, 2008); Alexander Brown, *Hate Speech Law: A Philosophical Examination* (London: Routledge, 2015).

<sup>3</sup> Miklos Haraszti, ‘Forward’, in M. Herz and P. Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012); Martha C. Nussbaum, ‘Law for Bad Behavior’, *The Indian Express*, February 21, 2014. Available at <http://indianexpress.com/article/opinion/columns/law-for-bad-behaviour/>.

<sup>4</sup> C. Edwin Baker, ‘Hate Speech’, in M. Herz and P. Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012); Ronald Dworkin, ‘Reply to Jeremy Waldron’, in M. Herz and P. Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012); Robert Post, ‘Interview’, in M. Herz and P. Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012); Nadine Strossen, ‘Interview’, in M. Herz and P. Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012); Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016).

<sup>5</sup> Robert Post, ‘Hate Speech’, in I. Hare and J. Weinstein (eds.) *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009); James Weinstein, ‘Hate Speech Bans, Democracy and Political Legitimacy’, *Constitutional Commentary*, forthcoming

Unsurprisingly, all of these legal scholars have sought, explicitly or implicitly, to define a legal concept hate speech, meaning a concept that refers to speech that is, or has been at one time or could be in the future, treated as hate speech for the purposes of legal regulation in one form or another. Some of these legal scholars seek to characterise a specific legal concept hate speech that relates to a particular body of law and legal regime, such as incitement to hatred laws in England and Wales. Others characterise a cluster legal concept hate speech that is associated with a class of hate speech laws, such as incitement to hatred laws. Yet others characterise an umbrella legal concept hate speech that implicates a range of different clusters or classes of hate speech law, such as laws proscribing group libel, media regulations limiting negative stereotyping or stigmatization, laws disallowing insult or denigration, laws banning incitement to hatred, and so on.<sup>6</sup> Because these characterisations differ both in terms of whether they are grounded in what has been, what is, or what could be treated as hate speech within a body of law and in terms of the levels of generality at which they operate, they often wind up saying very different, often contradictory things about hate speech. Given that hate speech laws provoke such strong moral reactions, on the part of defenders and critics alike, and given that legal meanings will themselves draw on a range of deeper values and principles about which people reasonably disagree, it is no surprise that there remains such divergence over how to define the very term that stands at the epicentre of the disagreement.

However, we believe that in order to understand how best to respond to hate speech, whether this is via bodies of law and legal regimes and/or through a range of extralegal measures including counter-speech and education, we must pay serious attention to the fact that hate speech is not merely a legal concept, in the narrow sense of a concept that is used and in some cases even defined, explicitly or implicitly, within bodies of law and legal systems; it is also an ordinary concept that is (a) used by people who are not legal professionals or writers about the law, and (b) has a panoply of uses not only within bodies of law and legal systems but also within a range of other social, cultural, political and economic domains. If we focus too hard on a legal concept hate speech we risk prejudging what the right response to the problem of hate speech might be: for, we may have defined the nature and contours of the phenomena in question precisely with legal responses in mind. For defenders of hate speech laws, the danger is that if all one has is a hammer, everything starts to look like a nail. Conversely, for critics of hate speech laws, if one is fixated on the idea that it is wrong to use a sledge hammer to crack a nut, then everything starts to look like a nut. Therefore, we position our analysis much closer to a different scholarly tradition, one that has attempted to analyse the meaning of the term

‘hate speech’ using various techniques of conceptual philosophical analysis.

By way of evidence for this last point, entering the term ‘hate speech’ into Google returns more than eighty million results.<sup>8</sup> No doubt a significant proportion of these results are about the concept hate speech as it pertains to hate speech law. Indeed, it seems likely that the term ‘hate speech’ (and its non-English equivalents) often first comes to the attention of ordinary people through television and radio programmes, newspaper and magazine articles, Internet message boards, social networking websites, and Internet news channels that mention the issue of hate speech in relation to high profile court cases, especially those involving already recognised public figures. Consider well-reported hate speech cases involving the French politician Brigitte Bardot, the Australian journalist Andrew Bolt, the Indian politician Akbaruddin Owaisi, the French comedian Dieudonné M’bala M’bala, the Kenyan politicians Moses Kuria and Junet Mohamed, and the Dutch politician Geert Wilders. These and similar cases around the world have all become trending stories on social media and online news channels.

Nevertheless, the term ‘hate speech’ is also used by people who are not legal professionals and/or writers about the law, and in the course of talking about events that are not connected with legal proceedings and where there is virtually no possibility of legal proceedings. So, for example, at the time of writing, entering the search term ‘hate speech Donald Trump’ into Google returned over four million results. Indeed, a research group funded by the European Union has recently undertaken a survey of the media across Europe using the European Media Monitor (EMM) tool to find hits of the term ‘hate speech’.

Hitherto, the term ‘hate speech’ has been perhaps most often associated with liberal progressives, or people on the left of politics – who use it to highlight and problematise speech that they view as racist, xenophobic, homophobic, Islamophobic, misogynistic, disablist, or in some other way targeted at minority groups in ways that supposedly violate ideals of respect, solidarity, tolerance, and so forth. By contrast, many political and religious conservatives repudiate such uses of the term, and view them simply as crude attempts to close down meaningful debate on what they believe are the evils of open-border policies, the failures of multiculturalism as a social experiment, the lamentable decline of traditional moral values, political correctness gone mad, and so on. Yet even people who are deeply critical of what they see as an inordinate and dangerous obsession with identity-based speech will use the term ‘so-called hate speech’, thereby implicitly acknowledging that the term ‘hate speech’ has an

ordinary meaning – albeit they disapprove of this term given its ordinary meaning. More importantly, some political and religious conservatives have now consciously adopted terms like ‘hate speech’, ‘hate mail’, and ‘hate’ to describe speech on the part of liberal progressives and civil rights activists – speech which, in the eyes of those political or religious conservatives, picks them out and attacks them on the basis of their conservative beliefs.

In addition to this, the ordinary concept hate speech seems to be playing an increasing role in popular culture. Consider the South Park episode from 2005 in which Cartman’s school presentation about ‘ginger kids’ – who it is claimed are suffering from ‘gingervitis’ and have ‘no souls’ – causes Kyle to object, ‘That’s not a lecture, it’s a hate speech.’<sup>6</sup> Or take the furore surrounding the singer Beyonce’s halftime performance at Super Bowl 50 in 2016. Some people – including members of the All Lives Matter social movement – took to social media to describe the fact that Beyonce’s backing dancers were dressed like Black Panther members, along with the content of her recent music videos and public statements in support of the Black Lives Matter movement, as ‘hate speech’.<sup>7</sup> And no doubt there were defenders of Beyonce’s public stance on the injustices faced by people of colour in the United States who viewed the portrayal of Beyonce’s performance and music videos as ‘hate speech’ as itself hate speech. Or bear in mind what the Harry Potter author, J. K. Rowling tweeted after it emerged that Donald Trump won the 2016 presidential election. “We stand together. We stick up for the vulnerable. We challenge bigots. We don’t let hate speech become normalized. We hold the line.”<sup>8</sup>

Many ordinary people have been willing to use the term ‘hate speech’ (and its non-English equivalents) for much the same reason that legal scholars coined the term in the first place, namely, that it provides a rough but nevertheless serviceable term to describe phenomena that have been the subject of legal sanctions, of one kind or another, since the Roman laws on group defamation<sup>9</sup> but that, in all likelihood, have also been present throughout human history beginning with the earliest multiethnic societies of the ancient world<sup>10</sup>, that is, the expressive

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<sup>6</sup> South Park, Season 9, Episode 11, aired on Comedy Central US, November 9, 2005.

<sup>7</sup> Adam Howard, “Beyoncé Super Bowl Performance Inspires Protest, Counter-protest”, *NBC News Online*, February 10, 2016. Available at <http://www.nbcnews.com/news/nbcblk/beyonc-super-bowlperformance-inspires-protest-counter-protest-n515996>.

<sup>8</sup> J. K. Rowling, @jk\_rowling, Twitter, November 8, 2016. Available at [https://twitter.com/jk\\_rowling/status/796252371739430913](https://twitter.com/jk_rowling/status/796252371739430913).

<sup>9</sup> David Riesman, “Democracy and Defamation: Control of Group Libel”, *Columbia Law Review* 42 (1942): 727–780, p. 728.

<sup>10</sup> Lionel Casson, *Everyday Life in Ancient Egypt*, Revised and Expanded Edition (Baltimore: The Johns Hopkins University Press, 2001), pp. 58–59.

dimensions of identity-based envy, hostility, conflict, mistrust and oppression. It is also worth remembering at this point that the term 'hate speech' is only the latest in a succession of terms that historically have been used to refer to forms of speech that attack members of groups or classes people identified by certain protected characteristics, including, for instance, 'race hate', 'group libel' and 'hate propaganda'.<sup>11</sup> So for some time societies have found good use for this family of terms. But what is immediately noticeable, we think, about the term 'hate speech' is its generality, the way it can be used to meaningfully talk about far more protected characteristics and far more varieties of speech than any of its predecessors. Thus it seems to me that it makes a material difference that people use the term 'hate speech' rather than these older terms, and it makes a difference because the term is referring to a much broader and more capacious concept; and this is not necessarily a bad thing.

### **THE ORDINARY CONCEPT HATE SPEECH AS A COMPOSITIONAL CONCEPT?**

Let us begin with the idea that the ordinary concept hate speech might be a complex or compositional concept. To say that a concept is complex or compositional is to say that it is made from or composed of other, simpler concepts. These simpler concepts are more basic or more ordinary concepts in the sense that they include larger classes of things. Complex or compositional concepts are said to be amenable to a method of decompositional conceptual analysis: a process of breaking down the complex concept into its component parts. The standard example is the concept bachelor which is said to be made from or composed out of three more basic or more general concepts: (1) adult human, (2) unmarried, and (3) male. Decompositional conceptual analysis is often used to produce precise definitions, the specification of a set of necessary and jointly sufficient conditions for the application of concepts or for the appropriate use of terms used to refer to concepts. That something falls under each of the more basic or more general concepts that compose the compositional concept is necessary and jointly sufficient for that thing to fall under the compositional concept. Thus, it might be said that something falls under the concept bachelor only if (1) it is an adult human, (2) it is unmarried, and (3) it is male. And that if something is (1) an adult human, (2) unmarried, and (3) male, then it is a bachelor.

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<sup>11</sup> Samuel Walker, *Hate Speech: The History of an American Controversy* (Lincoln, NE: University of Nebraska Press, 1994), p. 8.

To apply this method to the ordinary concept hate speech is to attempt to break down this concept into its component or constituent parts, its more basic, simpler concepts and to use these concepts to produce a precise definition. If the ordinary concept hate speech is a compositional concept, how are its component parts to be identified? One way is to focus on the words that make up the term 'hate speech'. In particular, one could work on the assumption that this term is not simply a compound noun in its grammatical or syntactical form but also a compound noun in its meaning or semantic content. In short, one could treat the meaning of the term 'hate speech' as being a function of the meanings of its constituent parts. Following on from this, one might suppose that in order to divine the meaning of the term 'hate speech' one simply understands the meanings of the two words 'hate' and 'speech' and links those meanings to each other in some appropriate way.<sup>12</sup> For example, one might suppose that the term 'hate speech' is a hyponym of the word 'speech'. So just as the term 'olive oil' denotes a subcategory of oil, the term 'hate speech' denotes a subcategory of speech. What is more, it might be thought that the word 'hate' in 'hate speech' functions semantically to tell us something about the essential nature of the subcategory of speech in question, namely, that it involves or is intimately connected with emotions, feelings, or attitudes of hate or hatred. Indeed, the fact that the compound noun 'political speech' is semantically compositional (it denotes a subcategory of speech that is political in nature) may lead us to assume that the compound noun 'hate speech' adheres to the same principle.

So far I have been assuming that the ordinary concept hate speech is composed of the two more basic concepts hate and speech. However, on further reflection we might think that the concept hate speech is even more complex than the words 'hate' and 'speech' imply. Perhaps the concept hate speech is also composed of other concepts. One possibility is the concept group or class of persons. Most people would instinctively recognise as hate speech, I think, the slogan of the nineteenth century nativist, Denis Kearney: 'To an American, death is preferable to life on a par with the Chinaman'.<sup>13</sup> Part of the reason we would recognise this as hate speech is that it is about or against Chinese people. Similarly, few people nowadays would fail to understand that between the two insults, 'Fuck you!' (one white person to another white person in anger) and 'Fuck you, nigger!' (one white person to a black person in anger), the latter is

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<sup>12</sup> David Boromisza-Habashi, *Speaking Hatefully: Culture, Communication, and Political Action in Hungary* (University Park, PA: Penn State University Press, 2013), pp. 35–36; Gagliardone et al., *Mapping and Analysing Hate Speech Online*, p. 9.

<sup>13</sup> Cited in Elmer Sandmeyer, *The Anti-Chinese Movement in California* (Chicago, IL: University of Chicago Press, 1973), p. 65.

more likely to have the label ‘hate speech’ attached to it. Of course, a racial insult, such as this, can be, and often is, targeted at or directly addressed to only one individual. But where the insult takes the form of a pejorative reference to the individual’s race, the individual may be no more than a representative of an entire group or class of persons in the mind of the hate speaker. If the addressee is interchangeable, in that sense, then the hate speech is really about or against the entire group or class of persons.

## **HATE SPEECH AND FREEDOM OF EXPRESSION: ISSUES AND PROBLEMS**

The regulation of hate speech is largely a post World War II phenomenon.<sup>14</sup> Prompted by the obvious links between racist propaganda and the Holocaust, various international covenants<sup>15</sup> as well as individual countries such as Germany<sup>16</sup>, and in the decade immediately following the war the United States<sup>17</sup>, excluded hate speech from the scope of constitutionally protected expression. Viewed from the particular perspective of a rejection of the Nazi experience and an attempt to prevent its resurgence, the suppression of hate speech seems both obvious and commendable.

Current encounters with hate speech, however, are for the most part far removed from the Nazi case. Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies it is by and large opponents of the government and, in a wide majority of cases, members of marginalized groups with no realistic hopes of achieving political power who engage in hate speech. Moreover, in some cases those punished for engaging in hate speech have been members of groups long victimized by racist policies and rhetoric, prosecuted for uttering race based invectives against those whom they perceive as their racist oppressors. Thus, for example, it is ironic that the first person convicted under the United Kingdom's Race Relations Law criminalizing hate speech was a black man

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<sup>14</sup> Friedrich Kiibler, “How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights”, 27 *Hofstra L. Rev.* 335,336 (1998).

<sup>15</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 20(2), 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2 (1978) (entered into force Mar. 23, 1976) (stating that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”).

<sup>16</sup> Friedrich Kiibler, How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights, 27 *Hofstra L. Rev.* 335,336 (1998).

<sup>17</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding the constitutionality of a statute criminalizing group defamation based on race or religion). Although *Beauharnais* has never been formally repudiated by the Supreme Court, it is fundamentally inconsistent with more recent decisions on the subject.

who uttered a racial epithet against a white policeman.<sup>18</sup>

Like Nazi racist propaganda, some of the straightforward racist invectives heard today are crude and unambiguous. Contemporary hate speech cannot be confined, however, to racist insults. Precisely because of the strong post-Holocaust constraints against raw public expressions of racial hatred, present day racists often feel compelled to couch their racist message in more subtle ways. For example, anti-Semites may engage in Holocaust denial or minimizing under the guise of weighing in on an ongoing historians' debate. Or, they may attack Zionism in order to blur the boundaries between what might qualify as a genuine debate concerning political ideology and what is pure and simple anti-Semitism. Similarly, American racists have on occasion resorted to what appears to be a scientific debate or invoked certain statistics—such as those indicating that proportionately blacks commit more crimes than whites—to promote their prejudices under the disguise of formulating political positions informed by scientific fact or theory.

Even these few observations suffice to establish that not all contemporary instances of hate speech are alike. Any assessment of whether, how, or how much, hate speech ought to be prohibited must, therefore, account for certain key variables: namely who and what are involved and where and under what circumstances these cases arise.

The who is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but the target of that statement and the audience to whom the statement in question is addressed—which may be limited to the target, may include both the target and others, or may be limited to an audience that does not include any member of the target group.<sup>19</sup> Moreover, as already mentioned, not all speakers are alike. This is not only because of group affiliation. Thus, in the context of dominant majority group hate speech against a vulnerable and discriminated against minority, the impact of the hate speech in question is likely to differ

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<sup>18</sup> Anthony SkiUen, "Freedom of Speech", *Contemporary Political Philosophy: Radical Studies*, 139,142 (Keith Graham ed., 1982).

<sup>19</sup> The identity of the audience involved may be relevant for a variety of reasons, including assessing the harm produced by hate speech, and devising effective legal means to combat hate speech. For example, demeaning racist propaganda aimed at a non-target audience may be a necessary step in the creation of a political environment wherein policies of genocide might plausibly be implemented. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954). Thus, the German people might never have countenanced the Nazi policy of extermination of the Jews, had they not been desensitized through years of vicious anti-Semitic propaganda. See FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 87 (1981). Consistent with this, hate speech directed at a non-target audience might well be much more dangerous than if exclusively addressed to a target-group audience.

significantly depending on whether it is uttered by a high government official or an important opposition leader or whether it is propaganda by a marginalized outsider group with no credibility.<sup>20</sup> Furthermore, even the same speaker may have to be treated differently, or at least may have a different impact which ought to be considered legally relevant, depending on whom is the target of his or her hate message. Assuming, for the sake of argument, that black hate speech against whites in the United States is not the equivalent of white hate speech against blacks, what about black anti-Semitism? Ought it be considered as yet another instance of black (albeit inappropriate) response to white oppression?<sup>21</sup> Or as an assault against a vulnerable minority? In other words, is black anti-Semitism but one aspect of a comprehensible resentment harbored by blacks against whites? Or is it but a means for blacks to carve out a common ground with white non-Jews by casting the Jews as the common enemy? And does it matter, if the dangers of anti-Semitism prove greater than those of undifferentiated anti-white hatred?

The what or message uttered in the context of hate speech also matters, and may or may not, depending on its form and content, call for sanction or suppression. Obvious hate speech such as that involving crude racist insults or invectives can be characterized as "hate speech in form." In contrast, utterances such as Holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt, may be referred as "hate speech in substance." At first glance, it may seem easy to justify banning hate speech in form but not hate speech in substance. Indeed, in the context of the latter, there appear to be potentially daunting line-drawing problems, as the boundary between genuine scholarly, scientific or political debate and the veiled promotion of racial hatred may not always be easy to draw. Moreover, even hate speech in form may not be used in a demeaning way warranting suppression.

Finally, where and under what circumstances hate speech is uttered also makes a difference in terms of whether or not it should be prohibited. As already mentioned, "where" may make a difference depending on the country, society or culture involved, which may justify flatly prohibiting all Nazi propaganda in Germany but not in the United States. "Where" may also matter within the same country or society. Thus, hate speech in an intra-communal setting may in some cases be less dangerous than if uttered in an inter-communal setting. Without

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<sup>20</sup> "Counting the Jews", *NATION*, Oct. 3, 1988, at 257.

<sup>21</sup> Because of prevailing social and economic circumstances, it has often been the case that the whites with whom black ghetto dwellers have the most—often unpleasant—contacts, namely shopkeepers and landlords, happen to be Jews. See Vince Beiser, "Surviving The Rage in Harlem", *JERUSALEM REP.*, Feb. 8, 1996, at 30.

minimizing the dangers of hate speech, it seems plausible to argue, for example, that hate speech directed against Germans at a Jewish community center comprising many Holocaust survivors, or a virulent anti-white speech at an all black social club in the United States, should not be subjected to the same sanctions as the very same utterance in an inter-communal setting, such as an open political rally in a town's central square.

Circumstances also make a difference. For *example*, even if black hate speech against whites in the United States is deemed as pernicious as white hate speech against blacks, legal consequences arguably ought to differ depending on the circumstances. Thus, for example, black hate speech ought not be penalized—or at least not as much as otherwise—<sup>^</sup>if it occurs in the course of a spontaneous reaction to a police shooting of an innocent black victim in a locality with widespread perceptions of racial bias within the police department.

More generally, which of the above mentioned differences ought to figure in the constitutional treatment of hate speech depends on the values sought to be promoted, on the perceived harms involved, and on the importance attributed to these harms. As already noted, the United States' approach to these issues differs markedly from those of other Western democracies. Before embarking on a comparison of these contrasting approaches however, it is necessary to specify two important points concerning the scope of the present inquiry: 1) there will be no discussion of the advantages or disadvantages of various approaches to the regulation of hate speech, such as imposition of criminal versus civil liability; and 2) since all the countries which will be discussed below including the United States deny protection to hate speech that incites violence—or, to put it in terms of the relevant American jurisprudence, that poses "a clear and present danger"<sup>22</sup> of violence—what follows will not focus on such speech. Instead, it will be on hate speech that incites racial hatred or hostility but that falls short of incitement to violence. This last limitation is important for two reasons. First, prohibiting hate speech that constitutes a clear incitement to immediate violence hardly seems a difficult decision. Second, criticism of the United States for tolerating hate speech does not always seem to take into account the difference between incitement to violence and incitement to discrimination or hatred. But, unless this difference is kept in mind, the discussion is likely to become confusing. Indeed, the key question is not whether speech likely to lead to immediate violence ought to be protected, but rather whether hate speech not likely to lead to such immediate violence, but capable of

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<sup>22</sup> Schenk v. United States, 249 U.S. 47 (1919).

producing more subtle and uncertain evils, albeit perhaps equally pernicious, ought to be suppressed or fought with more speech.

## CLIMATE OF HATE SPEECH ON RELIGION IN INDIA

Incitement to religious and communal hatred has been an issue of considerable concern in India. The increasing reference to religion during elections has heightened communal tensions and restrictions on the freedom of expression. Hate speech against religious minorities which was encouraged by certain political parties and actors to appeal to voters often became the cause of communal tensions and clashes. These clashes, which have claimed thousands of lives, are seen with concern by many as a part of real and growing threat to the survival of the nation itself as an interrelated and secular body. Meanwhile Prime Minister Narendra Modi has defended India's human rights record<sup>23</sup>, citing the Constitution - which provides freedom of faith and speech to all citizens regardless of their background as the 'real holy book' for his government. On the other hand, the annual report of the US Commission for International Religious Freedom (USCIRF) claimed religious freedom in India was on a negative trajectory in 2015 as religious tolerance had deteriorated while violations of religious freedom had increased. When the Prime Minister said, "800 million of my countrymen may exercise the freedom of franchise once every five years, but all the 1.25 billion of our citizens have freedom from fear which they exercise every moment of their lives", this was clearly not the case for the Bengali poet Sriyato Bandyopadhyay. In March 2017, a police complaint was lodged against him for posting a 12 line poem on social media that allegedly hurt Hindu religious sentiments. The poem, titled 'Abhishaap' ('Curse'), was posted on Facebook on the day Yogi Adityanath was sworn in as the Chief Minister of Uttar Pradesh.<sup>24</sup>

Trends in religion based hate speech and freedom of religion can be explored through four categories, namely: hate speech during elections, hate speech which leads to communal violence, hate speech which hurts religious sentiments, and hate speech related to beef ban.

According to an analysis of self-disclosed crime records of candidates who have contested various elections nationwide over the last 12 years conducted by IndiaSpend, as many as 70

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<sup>23</sup> PTI. (2016, June 08). Freedom of speech and religion enshrined in constitution: PM Modi. Available at <http://economictimes.indiatimes.com/news/politics-and-nation/freedom-of-speech-and-religion-enshrined-inconstitution-pm-modi/articleshow/52661254.cms>.

<sup>24</sup> IANS Feeds. (2017, March 21). Police complaint against Bengali poet for hurting 'Hindu beliefs'. Available at <http://www.india.com/news/agencies/police-complaint-against-bengali-poet-for-hurting-hindubeliefs-1948253/>.

Members of Parliament (MPs) and Members of the Legislative Assemblies (MLAs) have hate-speech cases pending against them. The date comes from their own disclosure to the Election Commission (EC) of India. Notable among them are Minister of State for Food Processing Industries, Sadhvi Niranjana Jyoti; Minister of State for Human Resource Development, Mr. Ram Shankar Katheria; Minister for Micro, Small and Medium Enterprises, Mr. Giriraj Singh; Uttar Pradesh Chief Minister Yogi Adityanath; Bharatiya Janata Party (BJP) MPs Saakshi Maharaj and Raj Kumar Saini; Samajwadi Party MLA Azam Khan; and the BJP National President Amit Shah.

According to the report, 399 candidates with hate speech cases have been fielded by different political parties in various parliamentary and state legislative elections over the past 12 years.<sup>25</sup> Political parties consider religion as a vote bank. Although the Supreme Court had ruled that no political party or contender can seek votes in the name of religion, caste, race, community or language ahead of Uttar Pradesh election. But the data shows that political parties and candidates use religion for collecting votes. In September 2014, the EC reprimanded BJP MP Yogi Adityanath for provoking enmity during his speech in Noida ahead of UP by-polls. The EC criticised him for allegedly invoking religion to appeal for votes on the basis of religious grounds.

### **CASES OF HATE SPEECH-LED COMMUNAL VIOLENCE**

Media reports indicate 296 incidents of communal violence occurring in the first quarter of 2017 in India both online and offline, following 703 incidents in 2016. Data shared by the government in parliament show a decline in communal violence in 2016 as compared to 2015. According to the data, Uttar Pradesh has the highest occurrence of communal violence with 162 incidents in 2016, followed by Karnataka, Maharashtra, and Madhya Pradesh.<sup>26</sup>

There are many cases of hate speech reported in India by numerous media. Abuse or attacks targeting a community verbally on the basis of personal attributes such as race, ethnicity, religion, sexual orientation etc., are amplified online and are commonly categorised as hate speech. Hate speech also covers content which may not be abusive in nature but is sufficient to

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<sup>25</sup> Bijo Abraham, *Trends in Religion-based Hate Speech*, Digital Empowerment Foundation, 2017.

<sup>26</sup> Times News Network. (2017, February 08). Fall in communal clashes in India, but UP more restive than before. Available at <http://epaperbeta.timesofindia.com/Article.aspx?eid=31808&articlexml=Fall-in-communalclashes-in-India-but-UP-08022017014027>.

incite violence against a particular section of the society. In July 2017, an offensive post by a class 11 student on Facebook sparked communal violence in West Bengal.<sup>27</sup> In June 2017, Karnataka police arrested two people for posting hate messages on Facebook which were also circulated via popular messaging services like WhatsApp causing violence against the targeted communities.<sup>28</sup>

In another incident in Mumbai in October 2016, police arrested a person named Barun Kashyap for encouraging enmity between Hindus and Muslims.<sup>29</sup> The accused used social media to circulate false information, provoking vigilante harassment for the same. Later, he was let out on bail and the trial is ongoing. In July 2016, Maharashtrian Hindu nationalist Shiv Sena Party leader, Uddhav Thackeray, during an interview with his party's publication Samana, called for action declaring the country a Hindu state. He affirmed that this would be to prevent attacks on Hindu.<sup>30</sup>

In December 2015, the then Uttar Pradesh Minister Azam Khan was quoted as saying that many Rashtriya Swayamsevak Sangh (RSS) leaders are unmarried because they are homosexuals.<sup>31</sup> In response to his comments, Hindu Mahasabha chief Kamlesh Tiwari made an objectionable comment against Prophet Mohammed which led to his arrest.<sup>32</sup> The protest has led to the Kaliachak riots. In September 2014, Gujarat Police arrested Sunil Jagdishsinha Rajput whose Facebook post provoked Muslims to go on riot. He was booked under IPC 153(C) and 295(C) and denied bail. Vadodara police had banned internet to prevent the spread of hate messages through social media which would inflate the riot.<sup>33</sup>

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<sup>27</sup> Bhattacharya, S., & Chaudhuri, S. R. (2017, July 16). Bengal violence over FB post: Man dies of stab wounds, clashes erupt in Basirhat. Available at <http://www.hindustantimes.com/kolkata/hindu-mandies-in-west-bengal-violence-clashes-erupt-in-basirhat-again/storyO1j8VjMqPCdgSdCYORyVVJ.html>.

<sup>28</sup> Yamunan, S. (2017, July 14). Social media posts fan communal tensions already running high in coastal Karnataka. Available at <https://scroll.in/article/843308/social-media-posts-fan-communal-tensions-alreadyrunning-high-in-coastal-karnataka>.

<sup>29</sup> Firstpost. (2016, October 13). Mumbai leather bag case: Barun Kashyap confesses to making false allegations against driver. Available at <http://www.firstpost.com/india/barun-kashyap-made-wrong-allegationsagainst-auto-driver-to-spark-communal-unrest-in-mumbai-3048844.html>.

<sup>30</sup> IANS. (2016, July 24). Proclaim India a Hindu state: Shiv Sena. Available at <http://www.abplive.in/india-news/proclaim-india-a-hindustate-shiv-sena-386133>.

<sup>31</sup> Tiwari, M. (2015, December 01). RSS volunteers are 'homosexuals', says Azam Khan - Times of India

<sup>32</sup> PNS. (2016, February 01). NSA against Tiwari: ABHM to challenge HC's order. Available at [http://www.dailypioneer.com/print.php?printFOR=storydetail&story\\_url\\_key=nsa-against-tiwari-abhm-tochallenge-hcs-order&ion\\_url\\_key=state-editions](http://www.dailypioneer.com/print.php?printFOR=storydetail&story_url_key=nsa-against-tiwari-abhm-tochallenge-hcs-order&ion_url_key=state-editions).

<sup>33</sup> Internet banned in Vadodara for three days. (2014, September 27). Available at <http://deshgujarat.com/2014/09/27/internet-banned-invadodara-for-three-days/>.

## CASES OF HURTING RELIGIOUS SENTIMENTS

In June 2016, the former MP and current Uttar Pradesh Chief Minister Yogi Adityanath of the BJP stated that Mother Teresa had been on a mission to Christianize India.<sup>34</sup> Many Catholic Bishops termed Adityanath's comments rash and denied that Mother Teresa had ever engaged in conversion. Following Adityanath, some social media users also stated that Mother Teresa had engaged in forcible conversions.

In April 2017, the Delhi BJP spokesperson filed a complaint against senior advocate Prashant Bhushan for his tweets against the Hindu god, Krishna. The complainant, Tajinder Pal Singh Bagga, accused Bhushan of intentionally and deliberately posting "derogatory remarks, for the purpose of insulting and outraging the religious sentiments of Hindu community".<sup>35</sup> Bhushan later clarified his position, stating that his criticism was directed at the Uttar Pradesh government's 'Anti-Romeo' squad. The squad, which was instituted to check eve-teasing, was widely criticised as instituting moral policing.

In April 2017, Odisha police arrested Mohammed Asif Khan for posting derogatory remarks on Hindu deities on Facebook which caused violence in the area. The violence started after derogatory comments about the deities Ram and Sita were posted on a Facebook page which produced severe damage in the area.<sup>36</sup>

In March 2017, police arrested Anuj Gupta from the Lohta area of Varanasi for inciting religious frenzy on WhatsApp. The accused had shared an objectionable post about Prophet Mohammad in several WhatsApp groups.<sup>37</sup>

In March 2017, a police complaint was lodged against the eminent Bengali poet Srijato Bandyopadhyay for posting a 12 line poem on social media that allegedly hurt Hindu religious

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<sup>34</sup> Rai, M. (2016, June 21). BJP MP Yogi Adityanath accuses Mother Teresa of religious conversion. Available at <http://economictimes.indiatimes.com/news/politics-and-nation/bjp-mp-yogi-adityanath-accusesmother-teresa-of-religious-conversion/articleshow/52842431.cms>.

<sup>35</sup> Alavi, A. M. (2017, May 30). BJP files police complaint against Prashant Bhushan for 'insulting' Lord Krishna. Available at <http://www.hindustantimes.com/delhi-news/bjp-files-police-complaint-against-prashantbhushan-for-insulting-lord-krishna/story-M4irS5BFEqfi4LGIPWYbfK.html>.

<sup>36</sup> Biswajeet. (2017, April 06). Tension in Odisha's Bhadrak over offensive remarks on Lord Ram in social media. Available at <http://odishasuntimes.com/2017/04/06/tension-erupts-in-odishas-bhadrak-overoffensive-remark-on-lord-ram-in-social-media/>.

<sup>37</sup> Express News Service. (2017, April 22). Varanasi: WhatsApp message lands teen in trouble. Available at <http://indianexpress.com/article/india/varanasi-whatsapp-message-lands-teen-in-trouble-4623187/>.

sentiments.<sup>38</sup> The poem titled ‘Abhishaap’ (‘Curse’) was posted on Facebook on the day Yogi Adityanath was sworn in as Uttar Pradesh Chief Minister.

On 20 September 2016, a blogger from West Bengal named Tarak Biswas was arrested for criticising Islam after a complaint about hurting religious sentiments was lodged against him by Sanaullah Khan, a Trinamool Congress leader. Human rights activists, while disagreeing with the content of his post, demanded his release, citing the case to be a violation of the right to freedom of speech and expression. He was booked under Section 295A and 298, besides 66, 67 and 67A of the IT Act.<sup>39</sup>

In March 2015, Karnataka police arrested Sriram Yadapadithaya, former telecom company executive, for posting objectionable messages against Christianity on Facebook.<sup>40</sup> The Mangaluru Catholic Diocese lodged a complaint to police, arguing that Yadapadithaya’s comments questioned basic doctrines of Christianity. The case was registered under Section 66 of IT Act and Sections 153A, 153B and 295A of IPC.

In September 2014, a Muslim cleric, Imam Mehadi Hasan, was slapped by a man while being taken to court for allegedly hurting Hindu religious sentiments by making objectionable comments about the festival of Navratri. The cleric had sparked the controversy by calling the state’s most popular festival, Navratri a “festival of demons”. VHP had taken strong objection to the cleric’s comment and sought his arrest. He was booked under IPC Section 295(A).<sup>41</sup>

In August 2013, Bangalore-based writer Yogesh Master was arrested over his derogatory remarks on the deity Ganesha in his Kannada novel Dhundi. The recently published novel had caused public outrage for depicting the goddess Parvati as involved in an illicit relationship. The complaint was lodged by various Hindu groups which accused the author of blasphemy

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<sup>38</sup> IANS Feeds. (2017, March 21). Police complaint against Bengali poet for hurting ‘Hindu beliefs’. Available at <http://www.india.com/news/agencies/police-complaint-against-bengali-poet-for-hurting-hindubeliefs-1948253/>

<sup>39</sup> Mehta, P. (2016, September 21). Blogger arrested in India’s Bengal for criticising Islam on social media. Available at <https://www.wionews.com/south-asia/blogger-arrested-in-indias-bengal-for-criticisingislam-on-social-media-6588>.

<sup>40</sup> Shenoy, J. (2015, March 4). City Police arrest Bengaluru based former telecom executive for hate comments - Times of India. Available at <http://timesofindia.indiatimes.com/city/mangaluru/City-Policearrest-Bengaluru-based-former-telecom-executive-for-hate-comments/articleshow/46459003.cms>.

<sup>41</sup> PTI. (2014, September 24). Muslim cleric Mehadi Hasan slapped for calling Navratri a ‘festival of demons’. Available at [http://zeenews.india.com/news/india/muslim-cleric-mehadi-hasan-slapped-for-calling-navratri-a-festival-of-demons\\_1475045.html](http://zeenews.india.com/news/india/muslim-cleric-mehadi-hasan-slapped-for-calling-navratri-a-festival-of-demons_1475045.html).

and hurting religious sentiments.<sup>42</sup>

In November 2012, Maharashtra Police arrested Shaheen Dhada for questioning the total shutdown in Mumbai for Bal Thackeray's funeral in a Facebook post. Her friend, Renu Srinivasan, was arrested for merely liking the post. The two were charged under Section 295 (A) for hurting religious sentiments, apart from Section 66 (a) of the Information Technology Act 2000, even though no religious issue was involved. The charges under Section 295 (A) were later dropped and the girls were charged with Section 505 (2) of the IPC, which pertains to statements that create or promote enmity, hatred or ill-will between classes.<sup>43</sup>

### **BEEF BAN-RELATED HATE SPEECH**

In July 2017, a BJP leader heading a regional minority cell in Maharashtra was attacked by a group of eight people for allegedly carrying beef. A recorded video of the attack went viral on social media. The police stated that the man was accosted by a group of eight persons while returning home on his two-wheeler. The ground demanded to check what he was carrying and had attacked him when he resisted.<sup>44</sup>

Another incident of violence related to suspicion regarding beef possession occurred in Mandsaur, Madhya Pradesh in July 2016. Two Muslim women were brutally beaten up by members of Bajrang Dal, a Hindu extremist group. A video of the incident shot by an onlooker revealed that the police did nothing to save the women, who were beaten for approximately half an hour. Investigation revealed that the women had been carrying buffalo meat, which was not illegal. Subsequently, the authorities filed a different case against the women for carrying the meat without a permit. The police also arrested four of the attackers, but did not take action against the inaction of the police personnel present during the attack.

In June 2017, a Hindu religious leader, Sadhvi Saraswati, said that beef eaters should be hanged during a meeting of Hindu religious outfits. The meeting, a four day long All India Hindu

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<sup>42</sup> BP Staff. (2013, August 31). Bangalore Writer arrested for blasphemous Book on Lord Ganesha. Available at <http://news.biharprabha.com/2013/08/bangalore-writer-arrested-for-blasphemous-book-on-lordganesha/>.

<sup>43</sup> PTI. (2012, November 19). Two Mumbai girls arrested for Facebook post against Bal Thackeray get bail. Available at <http://indiatoday.intoday.in/story/2-mumbai-girls-in-jail-for-tweet-against-balthackeray/1/229846.html>.

<sup>44</sup> Dahat, P. (2017, July 13). BJP leader beaten for carrying 'beef'. Available at <http://www.thehindu.com/news/national/other-states/manattacked-in-nagpur-for-allegedly-carrying-beef/article19269863.ece>.

Convention, which had been held in Goa caused tension in the Legislative Assembly of Goa, with several politicians calling for the Sadhvi's arrest for hate speech.<sup>45</sup>

In April 2017, Bonditha Acharya, a human rights activist from Assam, was threatened with rape, acid attacks, and death threats on social media for condemning the arrest of three people for possessing beef.<sup>46</sup>

## THE NORMALISATION OF HATE

On 6 December 2017, Mohamed Afrazul, a Bengali Muslim migrant worker, was hacked to death with a meat cleaver in Rajsamand in Rajasthan; his body was then burnt at the scene. The man on trial for his murder, Shambhulal Regar, had the entire attack videotaped and uploaded on YouTube along with a sermon against what he called the “entrapment” of Hindu girls by Muslim men. The video instantly went viral, and many expressed their horror at both the gruesome act of violence and the impunity with which the video was released.<sup>47</sup> At the same time, Regar's deed earned him a band of supporters, particularly from the Vishwa Hindu Parishad who saw him as a hero who acted to stop “love jihad”—a divisive term denoting the marriage of a Muslim man with a Hindu woman, popularised on social media and picked up without critique by many in the mainstream.<sup>48</sup> Crucially, while there were several incendiary tweets across India about so-called love jihad in the months before the attack, none were geotagged within a hundred kilometers of Rajsamand. This implied that the online material that radicalised Shambhulal was unlikely to have been created within his community. Rather, hateful narratives constructed elsewhere were being broadcast and subsequently followed far away

Six weeks after Afrazul's brutal murder, Indian Administrative Service officer RV Singh, the

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<sup>45</sup> IANS. (2017, July 18). Arrest Sadhvi Saraswati for hate speech against beef-eaters: BJP's Goa MLA. Available at <http://www.firstpost.com/politics/arrest-sadhvi-saraswati-for-hate-speech-against-beef-eaters-bjpsgoa-mla-3828081.html>.

<sup>46</sup> The Wire Staff. (2017, April 10). Activist in Assam Threatened With Rape and Acid Attacks For Condemning Beef Arrests. Available at <https://thewire.in/122670/bondita-acharya-beef-bajrang-dal/>.

<sup>47</sup> “Video: Man burnt alive in Rajasthan's Rajsamand after being axed for alleged love jihad”, FE Online, 7 December, 2017. Available at <https://www.financial-express.com/india-news/for-alleged-love-jihad-man-hacked-by-axe-burnt-alive-in-rajasthan-caught-on-camera/964351/>.

<sup>48</sup> The Times of India (TOI) describes the Vishwa Hindu Parishad, or VHP as a conservative Hindu nationalist organization that abides by the ideologies of Hindutva and is often characterized as “militant” for initiating anti-social activities like the Ram Janmabhoomi movement. The Times of India (TOI) describes the Vishwa Hindu Parishad, or VHP as a conservative Hindu nationalist organization that abides by the ideologies of Hindutva and is often characterized as “militant” for initiating anti-social activities like the Ram Janmabhoomi movement.

District Magistrate for Bareilly in Uttar Pradesh asked on his Facebook page why “taking processions through Muslim localities and shouting anti-Pakistan slogans” had become a trend. “Why? Are they Pakistanis?” he asked. His post was triggered by an incident of violence in late January in Kasganj, Uttar Pradesh, where a group of young Hindu men from the Akhil Bharatiya Vidyarthi Parishad, the student wing of the Rashtriya Swayamsevak Sangh (RSS), rode through the predominantly Muslim town on a self-declared “Tiranga Yatra” (“journey with the Tricolor”), shouting slogans. The local Muslim villagers were in the midst of a flag hoisting ceremony to mark India’s Republic Day as the provocative procession rode through. Clashes ensued, in which a Hindu boy died, leading to a social-media outburst of hate against Kasganj’s Muslims. IAS officer Singh’s post, while catalysed by this violence, had also referred to an earlier incident from the summer of 2017 when a group of Kanwariyas—Hindu pilgrims who carry water from the Ganges to their local Lord Shiva shrines—took their rowdy convoy through another predominantly Muslim town of Khailam, in Bareilly district. Singh sought to point to what he saw was an emerging pattern of provocation and violence between Uttar Pradesh’s Hindus and Muslims.

The backlash to Singh’s Facebook post seeking tolerance between communities was swift and harsh. The bureaucrat—presumably upper caste as his name suggests, and privileged, and whose profession is defined by its sworn commitment to the Constitution—was trolled and abused online ruthlessly, until he was accused by the state’s Deputy Chief Minister for speaking on “behalf of a political party.” He would later delete the post.<sup>49</sup> Less than two weeks after the Republic Day incident, local police arrested two people for circulating “inflammatory and communal” messages against Muslims on social media in Kasganj. One of the two was the administrator of a WhatsApp group where the messages had been posted and so was held liable for the content that was posted on it.<sup>50</sup>

The two incidents occurred in two different states within short driving distance from the national capital. Both of these states are governed by the BJP, which also sits in power at the Centre and, as the political vehicle for the RSS’ Hindutva ideology, is accused by opposition

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<sup>49</sup> Pankul Sharma, “Trolled, abused, Bareilly DM takes down FB post, stands by his remarks”, Times of India, 31<sup>st</sup> January, 2018. Available at <https://timesofindia.indiatimes.com/city/bareilly/trolled-abusedbareilly-dm-takes-down-fb-post-stands-by-his-remarks/articleshow/62715214.cms>.

<sup>50</sup> “Kasganj violence: Uttar Pradesh Police arrests 2 for circulating communal messages on WhatsApp”, Indo-Asian News Service, 6 February, 2018. Available at <https://www.firstpost.com/india/kasganj-violence-uttar-pradeshpolice-arrests-2-for-circulating-communal-messages-on-whatsapp4338019.html>.

politicians of being the benefactor towards such violence even before they came to power in 2014. As supporters of the BJP erupted on social media in a cacophony of offendedness and defensiveness, both incidents underscored an emerging domestic security challenge posed by the coalescing of real-world, hyper-nationalist, volatile identity politics with the spaces accorded by digital platforms for open expression. Where does populist, online hate against India's minorities become the sanction for, or a reflection of the violence taking place against them offline, in the real world?

The divisions that bureaucrat RV Singh alluded to in his social media handle are not necessarily new. These faultlines, it may be said, lay dormant for long, only to erupt in recent years and finally crack open years of constitutionally bound principles of political and religious freedoms, freedom of speech, and tolerance towards diversity.<sup>51</sup> In the extant ecosystem, rumours, fake news, propaganda and hate speech online coexist—and not necessarily in a linear fashion—with abuse, radicalisation and violent extremism. What then are the parameters for mapping social media behaviour that contributes to a climate in which violence (verbal and physical) is normalised as a response to religious, political or ideological differences? One post or tweet in defense of perpetrators of such acts, is enough to encourage trolls and bullies—until posts are removed, threats are made, or criminal cases are filed. In a digital universe where bigotry and hate abound, is there a window to roll back? Can India reclaim civility in public discourse? Or is the “offendedness” of the majority leading to another kind of radicalisation altogether?

To be sure, social-media platforms are also used to speak out against violations of the principles that are enshrined in India's Constitution. Yet, in case after case of communal rioting and mob violence, local law enforcement agencies are dealing with a new reality—of factories of rumour-mongers spreading fake news, fanning tensions and bringing them to boiling point. In July 2017, for example, communal violence erupted in North 24 Parganas town Basirhat, after Muslim mobs went on a rampage, angered by a post by a Hindu boy about the return to Hinduism by local families who had converted to Islam. A 65-year-old man was killed in the melee.<sup>52</sup> A few months before the incident, also in West Bengal, the state Criminal Investigation Department arrested the local secretary of the BJP's Information Technology (IT)

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<sup>51</sup> As enshrined in Articles 14, 19 and 21 of the Indian Constitution.

<sup>52</sup> Snigdhendu Bhattacharya, “Teen behind Facebook post that led to Basirhat clashes re-arrested, booked for attempt to murder”, *Hindustan Times*, 15 February, 2018. Available at <https://www.hindustantimes.com/kolkata/teenbehind-facebook-post-that-led-to-basirhat-clashes-re-arrested-bookedfor-attempt-to-murder/story-HDZpLtfMTSVoke6QoEsPdI.html>.

Cell for posting a manipulated video on Facebook with an intention to create communal tension.<sup>53</sup>

For much of 2017, social media giants were forced to answer tough questions on the role they have played in fomenting hate and radicalisation online. Twitter and Facebook, in particular, are being made to account for their blind eye towards polarising fake news reports and computer ‘bots’<sup>54</sup> programmed to widely disseminate such articles on their platforms. However, an equally significant challenge is posed by the algorithms used by these platforms, which distort realities and create alternate ones in echo chambers of like-minded users where beliefs are perpetuated, even those that are premised on hate and lies.<sup>55</sup> In January 2018, a United States Senate Committee summoned representatives from Facebook, Google and Twitter who have long argued that their role is simply that of platforms, not content providers. This narrative has helped these companies avoid both the threat of regulation, and legal liability. Recently, going under fire for their ambiguous responses to questions of how their platforms are being used to spread hate, these companies have scrambled to evolve their community standards to expand definitions of, and check, hate speech.

In response to questions on tackling extremist content on their platforms (especially in the context of terrorist propaganda) these social media companies claim that they have gone beyond simply screening and removing extremist content and are creating more counter-messaging. The US, however, as well as European nations, are pushing them to target, counter and take down not only material for recruitment and propaganda posted by Islamist terror groups like ISIS, but also other extremist content. In fact, the German government has gone one step further and passed laws against hate speech, imposing heavy fines on internet companies if they fail to identify and take down either terrorist content or hate speech within 24 hours of it being posted.

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<sup>53</sup> Koushik Dutta, “BJP IT cell secy held in Asansol for posting ‘fake’ video on social media”, *Hindustan Times*, 13 July, 2017. Available at <https://www.hindustantimes.com/kolkata/bjp-it-cell-secretary-arrested-in-asansol-for-posting-fakevideo-on-social-media/story-GSLBmA1746fQlk5YupJrgI.html>.

<sup>54</sup> David Ingram, “Twitter bars tactics used by ‘bots’ to spread false stories”, *Reuters*, 22 February, 2018. Available at [https://www.reuters.com/article/ustwitter-bots/twitter-bars-tactics-used-by-bots-to-spread-false-storiesidUSKCN1G52R1?utm\\_campaign=trueAnthem:+Trending+Content&utm\\_content=5a8e530304d3013cdbbb1374&utm\\_medium=trueAnthem&utm\\_source=twitter](https://www.reuters.com/article/ustwitter-bots/twitter-bars-tactics-used-by-bots-to-spread-false-storiesidUSKCN1G52R1?utm_campaign=trueAnthem:+Trending+Content&utm_content=5a8e530304d3013cdbbb1374&utm_medium=trueAnthem&utm_source=twitter).

<sup>55</sup> Tomas Chamorro-Premuzic, “How the web distorts reality and impairs our judgement skills”, *The Guardian*, 13 May, 2014. Available at <https://www.theguardian.com/media-network/media-network-blog/2014/may/13/internet-confirmation-bias>.

## DEFINING HATE AND ‘HATE SPEECH’

Categorising and defining “hate” is perhaps one of the most perplexing questions of our times, especially because the definition is uniquely tied to the impact of what has been said. In a socially networked world where comment is free and reactions are instant, lines between violent personal abuse and/or speech inciting violence against a community or group are becoming increasingly blurred. At times, even if intent and language are not explicitly hateful, the implications can be. The Observer Research Foundation study defined “hate” as “expressions that advocate incitement to harm (particularly, discrimination, hostility or violence) based upon the targets being identified with a certain social or demographic group. It may include, but is not limited to, speech that advocates, threatens, or encourages violent acts.” The report also indicates that hate speech may be prone to manipulation at critical times—during election campaigns, for example, or used by those in power to curb legitimate dissent—where hate speech can take on the contours of what Cherian terms “hate spin”.

A UNESCO report published in 2015 defines “hate speech” as that which is situated at “the intersection of multiple tensions. It is the expression of conflicts between different groups within and across societies.” Increasingly, the internet is opening up spaces for ideas and information that transcend geographical and other barriers. Thus, the internet’s transformative potential is providing both opportunities and challenges as it tries to balance the fundamental right to freedom of expression, with the defence of human dignity and protection from violence and discrimination. Multilateral treaties such as the International Covenant on Civil and Political Rights (ICCPR) have sought to define the contours of hate speech. Multi-stakeholder processes like the Rabat Plan of Action have also been initiated to bring clarity and suggest mechanisms to identify hateful messages. The Office of the High Commissioner for Human Rights, for its part, has pointed out that “virulent and hate laden advocacy can trigger the worst of 22 crimes.

Many European countries—which have taken the lead in tackling right-wing radicalisation by proscribing neo-Nazi groups<sup>56</sup>, for example—place value on the principles of civility and respect.<sup>57</sup> Most social media companies, however—each with their own set of standards—are

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<sup>56</sup> The United Kingdom proscribed ‘National Action’ a right wing, Neo-Nazi group as a terrorist outfit in December, 2016.

<sup>57</sup> Whitman, James Q. “Enforcing Civility and Respect: Three Societies”, Faculty Scholarship Series (2000), P. 646. Available at [http://digitalcommons.law.yale.edu/fss\\_papers/646/](http://digitalcommons.law.yale.edu/fss_papers/646/)

headquartered in the US. Unlike India which imposes reasonable restrictions on free speech, the US protects the principle as an absolute, fundamental right even if it may sometimes mean guaranteeing the most offensive, xenophobic or discriminatory language. As a result, cases filed by victims of hate speech and cyber-violence or abuse can end up languishing in the criminal justice system. Magistrates record statements and accept First Information Reports, but unless the perpetrator is a known actor, any access to them is blocked as social media companies delay acting on requests—citing either the danger of violating user privacy, or else, bouncing off the legal provisions of their host countries.

The TK Viswanathan Committee, constituted in 2017, recommended amendments to the Indian Penal Code, the Code of Criminal Procedure and the Information Technology Act that include stringent provisions for online hate speech. “The Supreme Court itself clearly states that hate speech must be viewed through the lens of the right to equality, and relates to speech not merely offensive or hurtful to specific individuals, but also inciting discrimination or violence on the basis of inclusion of individuals within certain groups. It is important to note that it is the consequence of speech that is the determinative factor in interpreting hate speech, more so than even perhaps the content of the speech. This is also broadly reflected in the Law Commission’s report that identifies the status of the author of the speech, the status of victims of the speech, the potential impact of the speech and whether it amounts to incitement as key identifying criteria of hate speech.”<sup>58</sup>

In India today, there is a narrative that seeks to widen the gulf between the country’s majority Hindus and the minorities. Such a narrative embraces a host of patterns, including: the rising incidence of lynchings and “public disorder” over cow slaughter<sup>59</sup>, the questioning of Muslims for their allegiance and patriotism towards India, the drumming up of support to rightly abolish Triple Talaq, while ignoring patriarchy and violence that similarly oppress Hindu women inside marriage, the backlash against inter-faith marriages, the anti-conversion attacks on Christians, the labelling of those speaking out for communal harmony as “terrorist sympathisers”, the overarching anti-Muslim rhetoric on Twitter and Facebook when India was confronted with the challenge of accepting Rohingya refugees fleeing Myanmar, and the

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<sup>58</sup> Amber Sinha, “New Recommendations to Regulate Online Hate Speech Could Pose More Problems Than Solutions”, *The Wire*, 14 October 2017. Available at <https://thewire.in/187381/new-recommendations-regulate-onlinehate-speech-problems/>.

<sup>59</sup> Rupa Subramanya, “Has India become “Lynchistan?””, *ORF*, 1 July, 2017. Available at <https://www.orfonline.org/expert-speak/has-india-becomelynchistan/>.

complete rejection of any conversations around human rights violations against civilian populations in the conflict-ridden Kashmir valley. India has been recognised globally for its negligible statistics on indoctrination and recruitment to pan-Islamist terror groups like ISIS and Al-Qaeda. Yet, armed conflicts within the country lend themselves to peculiar paradigms of hate and violence. Kashmir's complex political history and a legacy of broken political promises, have been reduced to the simplest binary: Hindu vs. Muslim, Nationalist vs. Traitor. The discourse lends no space for a dialogue on ways to end the violence.

In neighbouring Myanmar, right-wing Buddhist extremists<sup>60</sup> have been held liable by the United Nations (UN) for fuelling anti-Muslim hate as hundreds of thousands of Rohingyas find themselves stateless. Meanwhile, a recent report by Amnesty International<sup>61</sup> holds the Arakan Rohingya Salvation Army (ARSA) responsible for the massacre of 99 Hindus. This has fuelled the steady justification<sup>62</sup> used by India's right-wing Hindus to demand that the government deny asylum to refugees. The UN has also censured Facebook<sup>63</sup> for not being prompt in taking down hate speech in the context of the Rohingyas' plight. While there is no question that terror groups like ISIS are attempting to infiltrate refugee camps and recruit from them, there are those who argue that the radicalised Rohingyas comprise a small fraction of the 500,000 of them living in camps in Bangladesh, and the majority are refugees. These voices, however, have come under a volley of now-familiar abuse. As majoritarian groups seek to define clear battle-lines, a large swathe of people caught in the crossfire are either ignored or written off as collateral damage.

In 2006, five years after the 9/11 terror attacks in the US, social scientist Arjun Appadurai defined the concept of "predatory identities" in his seminal work, "The Fear of Small Numbers: An Essay on the Geography of Anger".<sup>64</sup> These identities, Appadurai argues, require the extinction of other, proximate social categories that emerge especially out of pairs that often

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<sup>60</sup> Poppy McPherson, " 'We must protect our country': extremist Buddhists target Mandalay's Muslims", *The Guardian*, 8 May, 2017. Available <https://www.theguardian.com/cities/2017/may/08/buddhistextremists-anti-muslim-mandalay-ma-ba-tha>.

<sup>61</sup> "Myanmar: New evidence reveals Rohingya armed group massacred scores in Rakhine State", Amnesty International, 22 May, 2018. Available at <https://www.amnesty.org/en/latest/news/2018/05/myanmar-newevidence-reveals-rohingya-armed-group-massacred-scores-in-rakhinestate/>.

<sup>62</sup> Krishnadas Rajagopal, "'Illegal' Rohingya refugees pose security threat, Centre tells SC", *The Hindu*, 18 September, 2017. Available at <https://www.thehindu.com/news/national/rohingya-refugees-illegal-pose-security-threat-centre-tells-sc/article19708554.ece>.

<sup>63</sup> Tom Miles, Simon Daniel Lewis and David Ingram, "U.N. investigators cite Facebook role in Myanmar crisis", *Reuters*, 13 March, 2018. Available at <https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN>.

<sup>64</sup> Appadurai, Arjun, *The Fear of Small Numbers*, Duke University Press, 2006, pp.21-23.

have had long histories of contact, some mixing, and even stereotyping. Predatory identities are often majoritarian, based on claims made on behalf of a threatened majority; they could be religious, linguistic or racial. Appadurai argues that these predatory identities “emerge in tension between majority identities and national identities.” Here, it is important to distinguish between “the majority” and “majoritarian identity”. Appadurai defines “majoritarian” as the “objectively larger group in a national polity” striving to close the gap between the majority and “the purity of the national whole.” When does majoritarianism turn violent?<sup>65</sup>

In the case of India, these identities have been hardened by the history and memory of the Partition in 1947 and the ensuing, permanent state of conflict between India and the newly formed Pakistan created as a nation state ostensibly to provide haven for the subcontinent’s Muslims. These predatory identities, therefore, do not take kindly to those in India who advocate for dialogue with Pakistan, or urge the government to address human rights violations by the armed forces as they fight militants and terrorists, whether in the country’s tribal heartland or in the disputed Jammu and Kashmir region. They are labeled ‘Naxals’ or seditious.

Artists and writers, for example— especially those who are not Hindu, and who challenge a public consumed by dogma in the name of faith—are called “anti-Hindu” and therefore “anti-national”. Many have been at the receiving end of a backlash by a growing hyper-nationalist, ultra-religious right wing that has rioted, assaulted or vandalised in retaliation for this perceived persecution.<sup>66</sup> After Jawaharlal Nehru University student Umar Khalid was shot at outside the venue of a public event he was to attend on 13 August 2018, two young men claimed responsibility for it in a video that circulated on social media and claimed, “by attacking Khalid we wanted to give a gift to the people on the occasion of Independence Day.”<sup>67</sup> Even those who may not agree with Khalid’s politics recognise that the relentless baiting and abuse of JNU students as “anti-national” has put a target on his back.<sup>68</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> Sanjay Kumar, “The Rise of the Right Wing”, *The Diplomat*, 23 October, 2011. Available at <https://thediplomat.com/2011/10/the-rise-of-the-right-wing/>.

<sup>67</sup> Alok Singh, “Attack on Umar Khalid: Delhi Police detain duo who claimed responsibility”, *The Indian Express*, 20 August, 2018. Available at <https://indianexpress.com/article/cities/delhi/attack-on-umar-khalid-delhi-police-jnu-5315070/>.

<sup>68</sup> Khalid, along with nine others including former Students union (JNUSU) president Kanhaiya Kumar were expelled in 2016, after being accused of sedition for organising protests against what they called ‘judicial killings’ of Afzal Guru and Maqbool Bhat- the former found guilty in the terror attacks on India’s Parliament in December 2001, and the latter, a Kashmiri separatist leader who formed the Jammu and Kashmir Liberation Front (JKLF). Bhat was hanged in 1984, Guru in 2013. Khalid has challenged his expulsion order in court.

## IMPACT OF HATE SPEECH ON FREEDOM OF EXPRESSION

Right to freedom of speech and expression is one of the most essential liberties recognized by the democratic States.<sup>69</sup> The concept of liberty has been primarily influenced by the principle of individual autonomy. The liberal theory of free speech views speech as an intrinsic aspect of autonomous individual, hence any restriction on exercise of this liberty is always subject to judicial scrutiny. The objective of free speech in a democracy is to promote plurality of opinions. The importance of allowing expression, howsoever, unpopular has been stressed by J.S. Mill in the following words, in his work 'On Liberty': If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.<sup>70</sup>

The importance of allowing diversity of opinion has guided the principles of free speech. Thus, even a speech that is 'vehement, caustic, and sometimes unpleasantly sharp'<sup>32</sup> is protected from State intervention. Hate speech is an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them. There is no general legal definition of hate speech, perhaps the apprehension that setting a standard for determining unwarranted speech may lead to suppression of this liberty.

The philosopher Jeremy Waldron argues that, while purely offensive speech may not justify restrictions, there is a class of injury, amounting to more than hurt sentiments but to less than harm, in the sense of physical injury, that demands restriction in democratic frameworks. Where speech injures dignity, it will do more harm than simply offend its target. It would undermine the "implicit assurance" that citizens of a democracy, particularly minorities or vulnerable groups are placed on the same footing as the majority.<sup>71</sup> While the right to criticise any group should continue to exist, speech that negates the right of a vulnerable group should be regulated.

Free speech has always been considered to be the quintessence of every democracy. The doctrine of free speech has evolved as a bulwark against state's power to regulate speech. The

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<sup>69</sup> See *Handyside v. United Kingdom*, Application no. 5493/72(1976).

<sup>70</sup> J.S. Mill, *On Liberty and Utilitarianism* 4 (Bantam Classic, New York, 2008).

<sup>71</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

liberal doctrine was a measure against the undemocratic power of the state. The freedom of expression was one of the core freedoms that were incorporated in the Bill of Human Rights.<sup>72</sup> The greater value accorded to the expression, in the scheme of rights, explains the reluctance of the law makers and judiciary in creating exceptions that may curtail the spirit of this freedom. Perhaps, this is the reason behind the reluctance in defining hate speech.

The issue of hate speech has assumed greater significance in the era of internet, since the accessibility of internet allows offensive speeches to affect a larger audience in a short span of time. Recognising this issue, the Human Rights Council's 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression'<sup>73</sup> on content regulation on internet, expressed that freedom of expression can be restricted on the following grounds<sup>74</sup>, namely:

- child pornography (to protect the rights of children),
- hate speech (to protect the rights of affected communities)
- defamation (to protect the rights and reputation of others against unwarranted attacks)
- direct and public incitement to commit genocide (to protect the rights of others)
- advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

## IDENTIFYING THE CRITERIA OF HATE SPEECH

Freedom of speech is an essence to a democratic society, and limitations are subject to scrutiny. The Supreme Court of India in *Shreya Singhal v. Union of India* had differentiated between three forms of speech, discussion, advocacy and incitement.<sup>75</sup> It was held by the Court that a speech can only be limited on grounds of exceptions mentioned in article 19(2) when it reaches the threshold of incitement. All other forms of speech, even if offensive or unpopular have to be protected under article 19(1)(a). Incitement is the key to determining the constitutionality of restriction on free speech.

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<sup>72</sup> William A. Schabas, *The Universal Declaration of Human Rights : The Travaux Préparatoires* (Volume I) lxxiii (Cambridge University Press, New York, 2013).

<sup>73</sup> Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 17th Session, A/HRC/17/27 (May 16, 2011), available at : [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

<sup>74</sup> Ibid.

<sup>75</sup> *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

The courts in some countries have refrained from identifying criteria of hate speech. However, through an analysis of the decisions of the different State jurisdictions, certain parameters may be summarised:

- (i) **The extremity of the speech:** In order to qualify as hate speech, the speech must be offensive and project the extreme form of emotion.<sup>76</sup> Every offensive statement, however, does not amount to hate speech. The expressions advocacy and discussion of sensitive and unpopular issue have been termed ‘low value speech’ unqualified for constitutional protection.<sup>77</sup>
- (ii) **Incitement:** In *Shreya Singhal*, the speech must amount to incitement in order to be restricted. This is an accepted norm to limit speech. The imminent threat to lawless action test laid down by United States Supreme Court also echoes the same reasoning.<sup>78</sup> Moreover, incitement to discrimination lies at the heart of hate speech principles. The principles of hate speech have always come into conflict with two concepts, liberty and equality.<sup>79</sup> However, critics of free speech suggest that this concept of neutrality, where all speeches are accorded similar status, often leads to creation of discriminatory environment especially for the minorities and the marginalised, since they are generally not well placed to make their voices heard. They argue that in light of the ‘great disparities of wealth and power, free speech’s formal equality results in massive substantive discrimination in the marketplace of ideas’.<sup>80</sup>

Liberty and equality are complementary and not antithetical to each other. The intent of freedom of speech is not to disregard the weaker sections of the society but to give them equal voice. Similarly, the intent of equality is not to suppress this liberty but to balance it with the necessities of a multicultural and plural world, provided such constraint does not unduly infringe on the freedom of expression. Thus, incitement to not only violence but also to discrimination has been recognized

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<sup>76</sup> [2013] 1 SCR 467.

<sup>77</sup> 315 U.S. 568 (1942).

<sup>78</sup> *Brandenburg v. Ohio* 395 U.S. 44 (1969). The Appellant was convicted under an Illinois statute making it a crime to “Advertise or publish, present or exhibit in any public place ...any lithograph, moving picture, play, drama or sketch, which portrays ... depravity, criminality, unchastity, lack of virtue of a class of citizens, of any race, colour, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots.”

<sup>79</sup> *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972)

<sup>80</sup> J. Weinstein, *Hate Speech, Pornography and Radical Attack on Free Speech Doctrine* 93 (Westview Press, Colorado, 1999).

as a ground for interfering with freedom of expression.

- (iii) **Status of the author of the speech:** European Court of Human Rights has recognized that position of the author of the speech is important in determining the legality of limitation imposed by the State. Thus ‘interferences with the freedom of expression of a politician ... calls for the closest scrutiny on the Court’s part’.<sup>81</sup> The Supreme Court in *Pravasi Bhalai Sangathan*<sup>82</sup> was approached to sanction hate speech on a similar ground. The petitioners sought court’s intervention to declare “hate speeches” delivered by elected representatives, political and religious leaders as unconstitutional. The petition was specifically addressed to the people who held power to influence society on a large scale. The Court recognizing the negative impact of hate speech referred the matter to Law Commission for in depth examination.
- (iv) **Status of victims of the speech:** The status of the targeted audience is also important in determining whether a speech can be limited. European Court of Human Rights in *Lingens v. Austria*<sup>83</sup> distinguished between the status of public and private individuals in this regard and remarked that: ...the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.
- (v) **Potentiality of the speech:** The potential impact of the speech has to be viewed to determine the speaker’s state of mind at the time speech was rendered. In *Ramesh v. Union of India*<sup>84</sup>, Supreme Court examined the validity of the restriction on the basis of the potential of the movie to impact the audience.
- (vi) **Context of the Speech:** Every seemingly hateful speech may not be termed as a hate speech. The context in which the speech was made is essential in determining its permissibility. The context of expression has always been looked into while adjudging the restriction.<sup>85</sup>

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<sup>81</sup> *Incal v. Turkey*, Application no. 41/1997/825/1031 (1998).

<sup>82</sup> AIR 2014 SC 1591.

<sup>83</sup> (1986) 8 EHRR 407.

<sup>84</sup> AIR 1988 SC 775.

<sup>85</sup> See e.g. *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

## BLASPHEMY LAW AND THE FREEDOM OF SPEECH

Blasphemy means an act of insult or contempt or lack of reverence to a deity or things which are held to be sacred or inviolable. There are various blasphemy laws in India the Chief one being Section 295A of the Indian penal Code, 1860 which is used to prevent insult to Christianity, Islam and Hinduism. Article 19(2) of the Constitution only allowed for reasonable restriction upon the freedom of speech in the interest of public order, section 295A of the Indian Penal Code, 1860. However cast its net much wider, by criminalising all speech that was intended to outrage religious feelings. It could be called 'over-breadth' - it covered speech that the state could legitimately regulate under constitution (i.e. speech causing public disorder) and speech that it couldn't (i.e. mere religious insult with no public disorder).

As scholar Neeti Nair records, "It was with a view to control such religiously triggered violence, while assuring religious committee that their 'sentiments' were going to be protected, that Section 295A was drafted".<sup>86</sup> Even at that time, the drafting committee voiced its doubts about wide wording of the section, and predicted that it might come to be used to target not just the 'scurrilous scribbler', but also religious dissent and critique. There are various examples and history has proven those fears justified.

Internationally there has been an infringement of rights and violation of freedoms under many colonial rules and also under brutal regime of Hitler who had created his own ministry in the Nazi governance to centralise the control of German culture and intellectual life that the citizens over there lived.<sup>87</sup> In the, Hitler appointed Joseph Goebbels as the Reich Propaganda Minister. Hitler then appointed Joseph Goebbels as the Minister of Reich Propaganda in the Reich Ministry of Public Enlightenment and Propaganda. The ultimate goal was to create an impression in the minds of other nations that the Nazi party has the backing of the population in all its work and motions and that the news media of Germany was controlled by the Nazi party also that it handled the visual arts, literature, theatre, music and broadcasting. The history has enough evidences of the ministry which aimed only to spread the Nazi ideology in the minds of the people and its consequences.

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<sup>86</sup> For a recent account of the legislative debates leading to the enactment of section 295A; See Neeti Nair, Beyond the 'Communal' 1920s: The Problem of Intention, Communal Pragmatism, and the Making of Section 295A of the Indian Penal Code, 50 Indian Economic Social History Review 317 (2013) available at; <http://ier.sagepub.com/content/50/3/317>, DOI: 10.1177/0019464613494622.

<sup>87</sup> Peter Longerich, Goebbels: A Biography 212-213 (Random House, New York, 2015)

## AN EFFORT TO FIND SOLUTION

Without having free speech in a country, the search for truth is not possible, neither can there be a discovery of truth nor such discovery will be useful. An abuse of freedom of speech which is a thousand folds is better than the complete denial of free speech. An abuse that is rendered may die in a day but the aftermath and denial of it stays on for life of the people affected. It not only tramples upon the rights of the people but also their hopes. Rather than as attempt to draw a conclusion, it is believed that one should never be drawn. The grey area existing between the freedom of speech & expression subject religious sentiments of others must be left undecided. Malleable standards need to be applied to this subject which is as sensitive as religion in this republic and the application of a strait-jacket formula might prove to be counterproductive in the future.

The perennial conflict at hand between freedom of speech and offending the sentiments of people has a special significance in the socio-religious milieu of India. Can it not then be justifiably argued that in a country where something as trivial as the release of a fictional movie can stir up violence and nation-wide protests, there is a greater need of restrictions to be placed on the freedom of speech? Then another question arises as to what exactly these restrictions would be and the extent to which they would be applicable. However, though laws are to be applied equally to all, it is rarely seen that restrictions on speech are placed on the representatives of the government in power. A prime example of this is 'the Saamna', the mouthpiece of the Shiv Sena, known for its rants against the people of Uttar Pradesh, Bihar and the Muslim Community.

The definition of hate speech is still subject to wider intellectual and academic debate. How existing law looks at it is what is at issue. Since it has been laid down in freedom of speech and expression which an important constitutional right, hate speech concept has been manipulated to achieve the ulterior motives in many different ways. Ulterior motives are being achieved through hate speech under the right of speech & expression and in law courts are not able to prosecute hate speeches or its charges brought before them, with success, because of absence of clear provisions of Indian Penal Code.

As provided in the Jakarta Recommendations which is on regional consultation of "Expression, Opinion and Religious Freedoms in Asia", and which also included expert participants such as UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and

expression observed the following:

- There is a need to revise and strengthen the existing anti-discrimination legislation so as to meet universal standards on equality across all groups, communities, men and women;
- To punish incitement of violence and hatred which may result in discrimination & hostility, laws should be enacted and implemented in a transparent, non-selective and non-arbitrary manner.
- The religious minorities', parliamentarians should be enabled to raise issues relating to freedoms of expression and religion, and the intersection of these rights, in the parliament and other platforms.
- Incitement of hatred resulting in violence should be condemned and prevented, also all instances of violations of freedom of speech should be condemned.
- Fight against hate speech cannot be isolated. It should be discussed on a wider platform such as the United Nations. All governments which are responsible or regional bodies and regional and international actors should respond to this threat.

Freedom of speech and expression has been established as a key freedom required for sustaining democracy. However, with every right comes responsibility; and therein, is the need for a limitation on the right to freedom of speech and expression so as to prevent the destructive and regressive effect it could have. The founding fathers of our Constitution were cognisant of the history and the need to highlight the responsibility attached to freedom of speech and expression. Thus, there is a need to convince and educate the public on responsible exercise of freedom of speech and expression.

The Constitution in its working, however, required amendments to article 19 so as to add several new grounds of restrictions upon the freedom of speech and expression; initially, under the Constitution (First Amendment) Act, 1951 followed by the Constitution (Sixteenth Amendment) Act, 1963. The new grounds of restrictions added were (i) friendly relations with foreign states (ii) defamation or incitement to an offence (iii) the sovereignty and integrity of India (iv) security of State (v) decency and (vi) contempt of court.

In pursuance of the aforesaid constitutional provisions, certain provisions such as section 153A, section 153B and section 295A, were added in IPC to deal with particular category of offences which fall in general expression of hate speech. In IPC those provisions of hate speech fall

under the categories of Offences Relating to Religion, Offences Against Public Tranquillity and Criminal Intimidation, Insult and Annoyance. Section 124A penalises sedition, 153A penalises promoting enmity among groups on various grounds and doing acts prejudicial to maintenance of harmony, section 153B penalises imputation assertions prejudicial to national integration, and section 295A penalises malicious acts intended to outrage religious feelings which supplement section 298 which relates to uttering words with intent to wound the religious feelings. Section 505 deals with statements conducing to public mischief.

The reading of above provisions make it clear that there is no water tight compartment to deal with the various acts relating to hate speech which generally overlap. In a particular situation hate speech may become sedition. In the case of *Kedar Nath Singh v. State of Bihar*<sup>88</sup>, the Supreme Court upheld section 124A IPC as constitutionally valid, following the view of the Federal Court in *Niharendu Dutt Majumdar v. Emperor*<sup>89</sup> and did not accept the interpretation given to it by the Privy Council in *Emperor v. Sadasiv Narain Bhalerao*.<sup>90</sup> In *Niharendu*<sup>91</sup>, the Federal Court held that “public order or the reasonable anticipation or likelihood of public disorder” was the gist of the offence of sedition and that in order to be punishable under section 124A, - “the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that was their intention or tendency”. The Supreme Court in *Kedar Nath Singh*<sup>92</sup> interpreted section 124A to mean that an utterance would be punishable under this section only when it is intended or has a reasonable tendency to create disorder or disturbance of the public peace by resort to violence.

Hate speech poses complex challenges to freedom of speech and expression. The constitutional approach to these challenges has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary across jurisdictions. A difference of approach is discernible between the United States and other democracies. In the United States, hate speech is given wide constitutional protection; whereas under international human rights covenants and in other western democracies, such as Canada, Germany, and the United Kingdom, it is regulated and subject to sanctions.

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<sup>88</sup> AIR 1962 SC 955.

<sup>89</sup> AIR 1942 FC 22

<sup>90</sup> AIR 1947 PC 84

<sup>91</sup> AIR 1942 FC 22

<sup>92</sup> AIR 1962 SC 955.

## **TOWARDS AN EFFECTIVE RESPONSE TO HATE SPEECH**

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

The effective and judicious implementation of laws is a challenge that is not easily surmounted. At the same time, the question that begs to be answered is whether the legal framework is enough to address the challenges of regulating hate speech given the delicate balance that needs to be struck in dealing with hate speech cases and meting out justice to the parties involved. The harm that hate speech propagates is not only deleterious but has extremely dangerous consequences. The exposition of the legal framework above has shown that it works in a limited sphere. There is no scope for repairing the damage that hate speech does to the society at large neither is there space for victim rehabilitation or any means of redressal. It is the need of the hour, therefore, to look beyond the rigors of criminal law in search of answer to an effective response to hate speech.

## **ALTERNATIVE DISPUTE RESOLUTION OF HATE SPEECH**

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

overburdened with the load of cases pending for years, bound by procedural formalities.<sup>93</sup>

Various methods of alternative dispute resolution in context of criminal matters have been employed with success such as “victim-offender mediation, victim-offender panels, victim assistance programs, community crime prevention programs, community service, plea bargaining” etc.<sup>94</sup> in select jurisdictions worldwide. The administration of criminal justice stands to gain greatly from adopting alternate means of resolution in criminal matters. Firstly, it fulfils the ideal of providing restorative justice to the victims of crime by offering a chance of victim-offender reconciliation and begin the process of healing for the victim and expiation for the offender.<sup>95</sup> Secondly, the alternate dispute mechanism has the capacity to be modified as per the goals to be achieved and still continue to function within the form and conditions laid down by law. Thirdly, it is a viable method for the parties from financial point of view as the cost borne by the parties is significantly lower in comparison to the formal process of trial. Fourthly, the flexible procedure allows the parties to arrive at a settlement without suffering the time consuming of specific court proceedings.

However, when it comes to adopting to alternative means of resolution in criminal matters, the caveat is obvious: this approach cannot be employed uniformly for all offences. Its efficacy remains to be tested in the class of offences that fall into the category of grave, serious or heinous type of offences. While the adoption in India of alternate means of settlement of criminal matters has been mired with much trepidation and employed with varying degree of success, globally the trend leans towards resolution by alternate means with the courts being the last resort.

The example of Australia is an interesting study when it comes to resolving hate speech cases by means of mediation as an alternative to criminal proceedings. It has done so by providing for a civil mechanism in addition to pre-existing criminal law framework banning hateful speech. Under the federal setup, Australia has both federal laws created by Parliament and laws of the various States. Incitement by speech on grounds of race, colour, descent, ethnic origins

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<sup>93</sup> Law Commission of India, 245th Report On Arrears And Backlog: Creating Additional Judicial (Wo)Manpower (July, 2014)

<sup>94</sup> United Nations Office On Drugs And Crime, Handbook On Restorative Justice Programmes (2006) available at : [https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf)

<sup>95</sup> Ibid.

is an offence under the criminal code<sup>96</sup> amongst other laws which also include grounds such as religion, disability and HIV/AIDS status as well.

For example, The Racial Discrimination Act which is a federal law and the Anti-Discrimination Act, of Tasmania proclaims as unlawful conduct that “offend, insult, humiliate or intimidate another person or group of people” on any of the specified grounds. It sets up a mechanism wherein an aggrieved individual can lodge a complaint before the empowered Commission or Tribunal as per the law. The empowered body shall then proceed to conduct enquiry into the complaint lodged before it. In case the complaint is found to be valid upon investigation, the next step is calling for a conciliation conference. This order for conciliation may also direct for conciliation of parties through other means of resolution and can be issued either before or after the inquiry has commenced. It is the aim of the conciliation conference to negotiate an agreement which is acceptable to the complainant. If parties agree to a resolution by conciliation, the commission may record the terms of the agreement.

A study of the Australia’s civil hate speech laws concludes that though the number of cases dealt with under this mechanism is modest but it gains significance in light of the fact that the criminal hate speech laws are seldom invoked where civil remedy has been available.<sup>97</sup> The remedy of civil wrong as the prevalent and preferred form of recourse has resulted in the person’s availability and willingness as member of the targeted group to “step up” and invoke the legislation. While this may present its own set of problems such as the law not being able to accord uniform protection to all the vulnerable communities that are targets of racism and prejudice but the study concludes that the fact that laws are there makes them feel less vulnerable. The statistics of report show that fewer than 200 complaints were registered. In the decade from 1990 to 2010 that averages to fewer than 4000 complaints. Out of these 2% complaints were the subject of binding determination by court whereas more than half were about common remedy of a court ordered apology or correction or removal of unlawful material. Damage orders are rare and where made, the compensation amount is modest. No one has ever gone to jail.<sup>98</sup> These civil mechanisms are attempt to influence the behaviour of the

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<sup>96</sup> The Criminal Code, 1913, ss.76-80H

<sup>97</sup> Katharine Gelber, “Reconceptualizing Counter-speech in Hate- Speech Policy (with a focus on Australia) in Michael Herz, Peter Molnar (eds.), *The Content and Context of Hate Speech : Rethinking Regulation and Responses* (Cambridge University Press, 2012).

<sup>98</sup> Luke McNamara, Katharine Gelber, “Explainer : How do Australia’s laws on hate speech work in practice”, *The Conversation*, May 9, 2014. available at : <https://theconversation.com/explainer-how-do-australias-lawson-hate-speech-work-in-practice-26105>

hate speaker, by encouraging them to agree to desist or to apologise or if that fails, by imposing fines. They have provided a framework for direct community advocacy.<sup>99</sup>

The above stands in contrast to the approach of those jurisdictions that emphasize on criminal law like India. When it comes to adjudication of hate speech offences under the Indian criminal law framework, it is mired with time-consuming formalities of procedure. The criminal procedure code mandates that sanction for prosecution by the government is required.<sup>100</sup> The sanction is a threshold limitation on the referral of incidents for criminal prosecution. But this grant sanction is itself based on individual discretion of the official. Once the complaint is registered with the police, the guilt of the accused can only be adjudged by the court after a full-length trial. During trial, there is a heavy burden of proof for the parties to prove that the act had been done with the culpable state of mind directed at inciting hatred, enmity or aimed to offend any group or class of persons. This entire process is time consuming and might take years to conclude. Justice for the aggrieved parties in such cases is but a distant dream.

Like Australia, India stands to gain immensely from introduction of alternate means of settlement of disputes for hate speech offences. At the same time, it is pertinent to note that this kind of an approach needs to be suitably modified so as to work within the existing system in India. This could begin with court ordered mediation or conciliation between parties that could greatly contribute to unburdening of the court's case load and arrive at a comparatively early decision in the matter. Moreover, the punishment and penalties attached to the offences would also need a rethink in light of the fact that the existing punishments have not been a deterrent for future cases and do not contribute to the restoration of the harm that hate speech inflicts at large.

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<sup>99</sup> Katharine Gelber, Luke McNamara, "The Effects of Civil Hate Speech Laws : Lessons from Australia" 49(3) Law and Society Review 631-664 (2015).

<sup>100</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s.196.