‘Hurt Sentiments’ and the Law in Independent India: Liberal Rights, Censorship and the Politics of Redressal

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Phoolan, Savitrimai, Fatima, Jhalkari and infinite Bahujan mothers including Radhika Amma, Fathima Ammi and my own— fiercest dissenters and enablers, I **dedicate** this dissertation to you.

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Note: Post-2015 amendment of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989, section 3(1)(x) was replaced by section 3(1)(r). This dissertation uses section 3(1)(x) (presently section 3(1)(r)) to refer to the provision to maintain uniformity across the dissertation except when case laws refer to the post-2015 amendment.

LIST OF CASES

1. Asmathunnisa v. State of Andhra Pradesh, 2011 SCC OnLine SC 518.
2. Abrams v. the United States, 1919
3. Amish Devgan v. Union of India & others, (2021) 1 SCC 1.
4. Anand Patwardhan v. Central Board of Film Certification and another, 2003 SCC OnLine Bom 417.
5. Brij Bhushan And Another vs The State Of Delhi 1950 SCR 605.
6. D.P. Vats v. State & others, 2002 (64) DRJ 29 (DB).
7. Daya Bhatnagar & Ors. v. State, 2004 SCC OnLine Del 33.
8. Dr Subhash Kashinath Mahajan v. the State of Maharashtra, 2018 SCC OnLine SC 243.
9. Hitesh Verma v. the State of Uttarakhand and Another, (2020) 10 SCC 710.
10. Ms. Gayatri @ Apurna Singh v. State & Anr., 2017 SCC OnLine Del 8942.
11. N. Radhakrishnan alias Radhakrishnan Verenickal v. Union of India and Others, 2018 SCC OnLine SC 1349.
12. Raghu Nath Pandey and Anr. v. Bobby Bedi and Ors., 2006 SCC OnLine Del 221.
13. Ravindran Pillai vs. Union of India, 1996 OnLine Ker 319.

14. Romesh Thappar vs The State Of Madras 1950 SCR 594.

15. Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.

16. State of Uttar Pradesh v. Lalai Singh Yadav 1976 SCC (Cri) 556.

17. Subal Chandra Ghosh & Ors v. The State of West Bengal & Anr., 2015 SCC OnLine Cal 6518.

18. Swaran Singh and others v. State through standing council and Another, 2008 SCC OnLine SC 1245.

19. Tamizh Nadu Brahmin Association v. Central Board of Film Certification, 2013 SCC OnLine Mad 1637.

LIST OF ABBREVIATIONS

Abbreviations	Full Form of the Abbreviation
AIDWA	All India Democratic Women's Association
APPSC	Ambedkar Periyar Phule Study Circle
BJP	Bhartiya Janta Party
CBFC	Central Board of Film Certification
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CrPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECRI	European Commission Against Racism and Intolerance
ECtHR	European Court on Human Rights
FCAT	Film Certification Appellate Tribunal
FIR	First Information Report
GOI	Government of India

HCU	Hyderabad Central University
HRDC	Human Resource and Development Centre
IANS	Indo-Asian News Service
ICCPR	International Covenant on Civil and Political Rights
IDSN	International Dalit Solidarity Network
IIT	India Institute of Technology
IPC	Indian Penal Code
LCI	Law Commission of India
NCDHR	National Campaign for Dalit Human Rights
NCERT	National Council of Education, Research and Training
NCRB	National Crime Record Bureau
NGO	Non-Governmental Organisation
OBC	Other Backward Classes
OP	Opposite Party
PCR	Protection of Civil Rights

POA	Prevention of Attrocities
PTI	Press Trust of India
PwD	Person With Disability
RPI	Republic Party of India
RSF	Rajput Shaurya Foundation
RSS	Rashtriya Swayamsevak Sangh
SC	Scheduled Caste
SCC	Supreme Court Cases
ST	Scheduled Tribe
TB	Twice-Born
YSS	Yuva Shakti Sangathan

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Chapter-1:

Introduction

The right to free speech and expression is enshrined in Article 19 of the Indian Constitution and constitutes one of our fundamental rights. The right to free speech and expression is highly valued as this freedom enables the citizenry to both realise and exercise their meaningful rights. Since such freedom is highly valued, its abuse and curtailment, both become contentious in nature. Indian Constitution recognises that liberty ought to be subjected to reasonable restrictions and should not be misused to the detriment of democracy. The grounds for reasonable restrictions are laid down in article 19(2) of the Indian Constitution which provides a context for the assessment of hate speech. The issue of hate speech has gathered a lot of attention in contemporary times and invites a critical assessment of the right to free speech and expression and consequently regarding the scope and horizons of its 'reasonable' restrictions. Given the plural nature of our society, the issue that becomes salient is that of the boundaries beyond which certain kinds of speech and expressions are not permissible. The role of the state then is to assess the context of the freedom being exercised and also the extent of abuse so that the right to liberty is not misused to inflict hatred and indignities on its people. The question, then, arises: what if the offence in question is beyond the purview of article 19(2) and yet comes in the way of the realisation of transcendental humanitarian principles such as equality and dignity. The exercise of free speech is often challenged owing to hate speech. Hurt sentiment claims are often invoked to demand state intervention for its redressal against hate speech. As the title suggests, this research analyses the juxtaposition of the hurt sentiment claims and liberal rights to arrive at an understanding of the way hate speech has been adjudicated by the Indian Judiciary.

Hate speech has not been defined explicitly in the Indian legal system which in turn, invites a whole lot of complexities. Hate speech does not qualify under the ambit

of the limits prescribed by Article 19(2) whereas public order does. What happens to the speech which does not necessarily incite violence (or disrupt public order) but has the potential to provoke and perpetuate discrimination? The hate speech jurisprudence is found to limit hate speech mainly on the grounds of public order, which has been identified as one of the many grounds of reasonable restrictions stipulated in article 19(2). The courts have interpreted it to read "in the interest of public order" if it passes the test of reasonableness in relation to the objective it aims to achieve. The state, then, begins to take pre-emptive actions while forfeiting the offensive material in question in a bid to contain the threats of disruption of public order. This, thus, invites us to a paradigm where anticipatory actions such as prior restraint become the norm. In this paradigm, the overwhelming salience of direct incitement to public order overshadows the issue of structural power relations. Consequently, both, the critical dissenting voices against the hegemonic structures of power and the derogatory expressions targeted at the marginalised social groups, are accorded equal status to qualify as hate speech. This equal protection status for the sections of society which are hierarchically placed perpetuates inequality and discrimination.

To problematise the equal protection status, this research attempts to foreground the category of "social" to highlight the impact of the universalising force of the existing legal provisions, which are invoked while dealing with matters of hate speech. It is through the differential claims of hurt sentiments, by both the marginalised and the dominant, that the social is foregrounded to reassess the contours of free speech and its implications for the free speech principle. It has been asserted by the Law Commission of India and international bodies (see detailed discussion in Chapter 2) that the 'incitement to discrimination' or hatred needs to be understood as the fundamental premise of the hate speech principle. But, hate speech provisions in India, as they today stand, primarily focusing on threats to public order and ignoring the inherent tendencies of hate speech to facilitate a discriminatory and hostile environment, are seemingly unequipped to meet the challenges posed by hate speech. It is evident through the recent trends of hate speech controversies in both the popular and legal domains. In the recent Haridwar hate speech issue, a religious 'parliament' (*Dharm Sansad)* was organised by right-wing social outfits where some of its members were heard giving calls for genocide of Muslims in a bid to make India, a *Hindu Rashtra* (The Wire Analysis

2021). One of the prime accused, Sadhvi Annapurna (general secretary of Hindu Mahasabha), stated, "if you want to finish off their population then we are ready to kill them…even if a hundred of us are ready to kill twenty lakhs of them, then we will be victorious" (Scroll Staff 2021). Dharamdas Maharaj, another accused, was heard calling for the murder of former Prime Minister, Mr Manmohan Singh while accusing him of saying that "minorities of country have the first claim on the resources of the country" (ibid.). The editor-in-chief of Sudarshan News, Suresh Chavhanke, who also attended the event, was heard inciting people to "die and kill…to make India a Hindu Rashtra" (Scroll Staff 2021). Yati Narsinghanand, the main organiser of the *Dharm Sansad, '*offered one crore to anyone willing to become Prabhkaran or Bhindrewala to target Muslims' (Iyer 2022). Multiple videos of their speeches surfaced on social media. The outright murderous and Islamophobic intent of their speeches was condemned by oppositional leaders, Muslim organisations and individuals while also questioning the government's inaction. After mounting pressure, some of the organisers and participants were arrested. In this matter, Justice Rohinton Nariman in his recent lecture on "Constitutional underpinnings of the rule of law" at DM Harish School of Law stated that 'the silence of the ruling party ought to be read as an endorsement of the hate speech (Scroll Staff 2022). The "political patronage and ideological complicity", Bhatia argues, adds to the impunity enjoyed by the hatred-enablers. (Bhatia 2022).

In another instance, Sudarshan TV's program, Bindas Bol, invited furore over the nature of its content. The show was focused on what it called "UPSC Jihad" alleging the increasing 'infiltration' of Muslims from Jamia Millia Islamia University in civil services. Sudarshan TV and its editor-in-chief, Suresh Chavhanke, remained in news for spewing hatred and inciting communal violence on many occasions. Justice Chandrachud, while hearing the matter, stated, "…as judge of the Constitutional Court, I have a constitutional duty to protect human dignity, which is as important as our duty to protect free speech. We respect the right of freedom of speech but we are absolutely concerned about these kinds of attacks against a community" (Mohamed and Rathod 2020). Similar instances of hate speech which attracted our attention emerged in the form of online 'auctioning' of Muslim women on the digital platforms, namely, Sulli Deals and Bulli Bai, where the pictures of many eminent Muslim women were circulated online in an attempt to 'sell' them (Salim 2022). To everyone's surprise,

those operationalising these deals were found to be youngsters ranging from the age of 17-24. It presents a worrisome scenario, that these young men and women are engaged in such extreme manifestations of bigotry. Their social media presence is a telling account of their routine indulgence in spewing hate, Islamophobic slurs (*Sulli* and *Bulli, for example)*, Hindu supremacy and misogyny. The usage of caste slurs and other forms of caste hate speech is an everyday affair in our caste society. Slurs like *Chamar, Chuda, Bhangi* and so on are routinely used to inflict humiliation on people belonging to Scheduled Castes in north India. Other forms of caste hate speech which is commonplace in Indian higher educational institutions include taunts to the students from the reserved categories, like– *Oh! you are a reserved category student, you will easily get through any examination* or *you have age relaxation, you can keep appearing for examinations etc (based on personal experience).*

During the occurrence of such instances, it is important to strike a fair and proportional balance between the right to free speech and other values deemed equally important in a democratic setup. The instances described above make it difficult to choose the free speech principle above the counter values being threatened. The import of such hate narratives by the dominant creates an environment which promotes humiliation, Islamophobia, violence and discrimination. These narratives are examples of events and processes that foster an atmosphere where caste-based humiliation and Islamophobia is normalised and makes space for more of such expressions and acts. The potential effect of such expressions is that it endangers their right to free speech and discourages participation in the public sphere thus silencing the marginalised and the minorities. Hate speech also has the potential of targeting the dignity and threatening the personal security of their targets by inciting violence in many instances. The right to free speech is a complex of multiple values, including freedom from incitement to hatred, discrimination and violence. There are intrinsic values of the free speech principle which finds universal acceptance by scholars across the globe. First, it encourages the participation of citizens in a democracy. Second, the free speech principle enables an individual to realise and exercise her autonomy. Third, liberty is considered vital for the self-fulfilment of an individual. The misuse of speech for the advocacy of violence has the effect of dehumanising an entire community and owes no defence. The speech and expressions stated above have an effect of inciting

discrimination, hatred and violence thus, keeping an entire community and its individuals from realising their comprehensive rights. The incitement to hatred and discrimination through hate speech goes a long way as the harm associated with it has a systemic and structural nature. The equal protection status to such expressions at par with the expressions challenging the structural relations of power would amount as injustice to the marginalised. Despite repeated use of the term hate speech in the public domain and in the court of law, there remains no consensus over its exact form and nature.

The above-stated instances suggest how hate speech manifests in an affirmation of the caste/religious supremacy by the dominant. The impact of the hate speech is such that it inflicts a self-silencing effect on the marginalised in two ways: firstly, religious supremacy works in a way that declares the majoritarian religion and its sentiments as the only legitimate sentimental order of the nation and any assertion, whatsoever, challenging that supremacy could potentially result in violent consequences; and, secondly, the affirmation of caste supremacy works a little differently and attempts to coerce the marginalised castes into accepting their subjugated places in the caste hierarchy. It is observed that free speech is a potential tool in the hands of the marginalised to expose their discrimination and to voice their dissent against the institutional discrimination. To equate the affirmation of caste supremacy at par with the assertion of the marginalised, against caste-based indignities, humiliation and harassment, as equal offences would lead to a hostile environment where marginalised are not at equal footing to make their voices heard. Hence, the contemporary instances stated above invite us to rethink our position on free speech in the light of shrinking spaces for democratic deliberation and critical dissent for the marginalised. In the light of this discussion, the study foregrounds section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for its enquiry of the hurt sentiment claims of the marginalised. The rationale for choosing section 3(1)(x) is owing to its peculiar nature which recognises caste hate speech as caste atrocity thus penalising it as an offence. Casteist speech is the only form of hate speech which finds explicit recognition in the law. The legal recognition of caste hate speech aims to contain routine caste-based discriminatory references to its victims and foster robustness of the public sphere.

Most academic works on censorship and hurt have focussed on the right to speech and expressions of the speaker but have neglected the structural relations between the speaker and the recipient of the speech. Foregrounding the structural power relations enables enquiry into hate speech as something *not* deserving of equal protection as any other speech and expression. In this light, the assessments of hate speech as mere minor offences to be tolerated in the larger interests of the value of liberty becomes problematic. The marginalisation of the 'social' results in an unchecked notion of religious/caste supremacy which goes against the constitutional order of being. The preoccupation with equal protection to hate speech has led to the notions of supremacy simmering for long before it finally manifested in the form of calls for genocides. The principle of neutrality by the state only adds to such a hostile environment which fosters discriminatory attitudes against the marginalised. The harm embedded in hate speech has been observed to incite discrimination and injures the dignity of its subjects as the actors involved in hate speech inflict a derogatory image of the identity of its victim into their eyes and in the eyes of others too. The liberty, as is the right to freedom of speech and expression, does not come without responsibility nor grants absolute immunity for those engaging in a language that incites violence or even discrimination, for that matter.

Therefore, this study explores the politics of hurt sentiments to highlight the 'social' which enables us to work through some of the limitations posed by previous studies on censorship and hate speech.

Chapter two, '*Understanding the Limits of Liberalism: Hurt-Sentiments vis-à-vis Free Speech*' lays down the conceptual framework of politics of 'recognition' and 'difference', to understand the tyranny of the universality and neutrality, configuring itself as the 'liberal' principles. The struggles for recognition of the difference in identities enable us to understand the dangers and limitations posed by the preoccupation of liberalism with universalism and neutrality. The assessment of politics of hurt sentiments, in the popular and legal realm, further helps us to foreground the difference in the nature of hurt sentiment claims to understand the underlying structures. This enables us to understand the relation of differential claim of hurt in relation to the right to liberty in order to problematise the way in which hurt sentiment

claims are understood and thus, adjudicated. The chapter provides a broader conceptual framework to assess the research problem.

Chapter three, '*Differentiating the Nature of Hurt-Sentiment Claims, Caste-Hate Speech and the Laws Therein',* elaborates specifically on the caste hate speech. The question of dignity, as evident through the claims of marginalised, helps us to foreground how the formation of identity has a relation to the histories of domination and subjugation. The discussion on the politics of domination enables us to comprehend the differential nature of the claims of hurt sentiments. It further elaborates on the specific legal protections accorded against slurs or Hate speech vis-à-vis the right to free speech and expression as specified in the form of legal rights and other provisions in both, India and worldwide. The chapter maps how international guidelines, convention reports and legal provision have the force of guiding principles and shapes the legal understanding.

Chapter four, '*The Adjudication of Hurt Sentiments Claims and the Limits of Free Speech Principle',* is an attempt to answer the research question: whether the Indian judiciary remained sensitive to the power asymmetry between communities in Indian society and the difference in the nature of hurt-sentiment claims presented by communities belonging to different positions in the social hierarchy? It problematises the classical understanding of the free speech principle while foregrounding the importance of harmonising other competing values such as equality, dignity, autonomy, non-discrimination and so on. It highlights how preoccupation with universalism and neutrality embedded in the adjudication of the free speech principle is discriminatory for those who are not socially and economically well placed to make their voices heard. It further elaborates on the way anti-caste struggles for recognition of structural differences resulted in the creation of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Act paved the way for protective measures against caste-based atrocities. It also recognises the specific nature of caste hate speech as discriminatory and thus, penalises the Casteist slurs. It further assesses the nature and context of hurt sentiment claims of both, marginalised and dominant, through the analysis of the prayers in the petitions. The chapter specifically focuses on adjudicating the hurt sentiment claims and whether the Indian Judiciary has tried to harmonise the

right to free speech with other comprehensive rights enlisted in part III of the Constitution.

This study foregrounds the category of hurt sentiment to highlight the negligence regarding the role of social structures in the way free speech is generally understood. The introduction of hurt sentiment as an analytical frame enables us to delve into the questions that problematises the way hate speech is adjudicated by the Indian Judiciary. The study planned to look at the police complaints, executive orders and the case laws to understand the formation of the juridical category of hurt sentiment. A police complaint is the primary document wherein the first-hand account of the offence is elaborated in detail. An executive order helps us to look into the pre-emptive measures undertaken by the administration in a bid to contain law and order problems. Case-law finally helps us to look into the legal reasoning and the way an offence is adjudicated in the court of law. It is through the study of these documents that we aim to arrive at a holistic understanding of the issue. However, owing to the Pandemic induced restrictions, only FIRs dealing with claims of hurt by the marginalised could be traced and looked into. The nature of high-profile cases of the dominant also added to the part of the problem wherein the issues of accessibility were involved. This research, alternatively, focuses on the issues in popular domains and the landmark case laws dealing with the subject matter of this research. Section 3(1)(x) of the POA Act, 1989 is studied in detail and what it entails for the right to free speech and expression. The rationale for choosing this Act is owing to its peculiar nature which recognises the violence of caste and makes us rethink the regulatory role of the state. The Act deals with questions of caste and ethnicity and only one of which is caste could be explored in this research. The study of ethnicity would require a different conceptual frame which is beyond the scope of this research currently.

Chapter-2:

Limits of Liberalism: Hurt-Sentiments vis-à-vis Free Speech

Article-19(1) of the Indian Constitution stipulates

> All citizens shall have the right — (a) to freedom of speech and expression…

whereas Article 19(2) states that

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions (emphasis added) on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Similarly, section 3(1)(x) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 states,

> [w]hoever, not being a member of a Scheduled Caste or a Scheduled Tribe — intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view — shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

The right to freedom of speech and expression has been the cornerstone of all liberal democracies in the world and has also been duly recognised as an inalienable fundamental right by the Indian Constitution. Since humans are communicative beings, they make use of language and other symbolic gestures to express themselves and also to understand each other. Undoubtedly, the right to speak and express has been accorded the highest value amongst the varied human interests. However, the practical application of this freedom brings about various kinds of contestations depending on its social context. It has been agreed upon by various democratic governments that not all communicative acts deserve equal protection under the law of the land. The Indian Constitution has also undertaken the onerous task to censor/restricting some forms of speech and expressions, leading to the form and extent of hurtful speech and offensive expressions being a vigorously contested issue in discussion in the contemporary liberal landscape.

Given the context of the right to freedom, and, yet restriction, the questions which arise are: What does the value of freedom of speech and expression in light of

reasonable restrictions, as enumerated in Article 19(2) of the Constitution, and Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 entail for free speech jurisprudence in India? What are the limits/ restrictions on the freedom of speech that are deemed justifiable for a free and liberal democratic society like ours? Why did our Parliamentarians conclude that it is necessary to criminally sanction the casteist slurs (but not every other kind of 'derogatory or hurtful speech and expressions')? Can such criminal sanctions be attributed to the reasonable restrictions on freedom of speech and expression; and, what are the implications of the regulation of public discourse? These questions serve as the starting point of this research and invite us to the enquiry of the trade-off between liberalism and pluralism. Some of these questions have found expressions in free speech legal doctrines and the free speech jurisprudence in India, which are examined in Chapters 2 and 3.

A tradition of scholarship in the defence of free speech has argued that for the truth to triumph, there ought to be a multiplicity of competing ideas in a free and fair manner. This rationale has come to be known as the 'marketplace of ideas' and was first referred to by Justice Oliver Wendell Holmes in *Abrams vs United States (1919)*. It was argued that even flawed arguments should be allowed to stand the test to arrive at the truth with greater clarity. Another is the argument based on 'autonomy'- for it was believed that the intrinsic value of freedom of speech and expression lies in being able to express ourselves freely, to be able to get heard and to access the information freely. Regulation of any kind downplays the value of autonomy. This line of argument in favour of absolute free speech opposes all kinds of censorship by arguing in support of 'more speech' as counter practice against the regulation or criminalisation of hurtful speeches (Menon and Narain, 2015).

In contemporary times, it is widely accepted by the democratic governments, even including the scholars who have argued in defence of free speech, that the right to free speech is limited. John Stuart Mill in his seminal essay, *On Liberty*, elaborates on the *Harm principle* and thus, on the need to limit this freedom to prevent the tyranny of majoritarianism in a democratic setup (Mill 2010, 17). For instance to give a false alarm and shout fire in a crowded theatre hall or to give a public call for genocide ought not to be protected under speech liberty. He also differentiates between *harm* and

offense to illustrate the difference between the conduct which poses harm and the ones which are disagreeable in nature – the offence – but pose no harm (Mill 2010, 79).

Various kinds of speech have already been subjected to regulation namely defamation, obscenity, sedition and so on. Some kinds of regulation are regarded as justifiable, however, their form and content remain a matter of contestation amongst the scholars. When hate-speech is concerned, the matter is debated between the interests/values advanced by the right to free speech and expression and the right to a dignified life without humiliation and the effects of prejudice.

In a similar vein, another dominant view is that of Eric Heinze (2016), who argues that in a democratic setup, one can prevent discrimination and violence against the marginalised without having to censor the speakers or enablers of hateful speech. This particular view of thinking calls for an elaboration on the harm associated with the hate-speech against the marginalised. Hate-speech, in contemporary times, has become a legitimate tool to inflict both physical and psychological harm on the marginalised. The absolute freedom of speech, in a society where cases of caste killings and mob lynching are routinely perpetrated, does not account for who suffers the harm and is at the receiving end of the bigotry, prejudice and violence. The law designed is such that its liberal and objective pretence of neutrality amongst both sides fails to recognise the asymmetrical power relations in our society.

Contrariwise, those who support the regulation of hate speech are critical of the defence of absolute free speech because their moral vocabulary is restricted only for the defence of free speech and poses no challenge to the hate speech hurled against the marginalised groups. Those supporting the regulation of hate speech believe that the uninhibited exercise of liberty of speech also has serious ramifications and has only further added to the degradation of the lives of the marginalised against whom the hate speech is directed at. They believe words can cause serious hurt or wound to individuals and communities and compromises the right to equality and dignified existence.

The 'more speech' was assumed to be a better argument for the greater amount of unhindered speech to combat the challenges posed by hate-speech. Bhikhu Parekh, while acknowledging the importance of 'the marketplace of ideas', exposes the limits of the practice of more speech as counter practice. He argues that this view is an

exaggeration to the effect that 'it does not provide a level playing field and operates against the backdrop of prevailing prejudices in a society' (Parekh 2012, 48). According to Parekh, "ideas do not operate in a social vacuum" nor do they have equal access to the market (ibid.). Catherine A MacKinnon (1996, 25-32), a feminist legal scholar, differs from the traditional understanding of 'the marketplace of ideas' as it does not guarantee 'free' and 'equal' speech. The doctrine assumes that competitive speeches will determine the truth. However, it results in constructing a reality which becomes the 'operative truth' of the paradigm for those who can speak the most. She highlights the fundamental tension between the free speech principle and the right to (social) equality by studying the case of pornography. On the same line, she elaborates on the relationship between the right to equality and the right to free speech while problematising social dominance. The discussion on this relationship is important as it enables us to also understand the question of caste hate-speech in a meaningful way. MacKinnon's view was refuted by C. Edwin Baker to argue that the only possible harm that can result from the competing ideas is 'offence' and "offence is a minor harm that society must tolerate to achieve the benefits of free speech" (Baker 1994, 1183).

'More speech' as a counterargument against hate speech in an unequal society disproportionately burdens the marginalised communities who are the victims of hurtful speeches while also exposing their vulnerabilities with no state intervention protecting their well-being. 'More speech' as a counter-measure can only co-exist with state intervention and protection of the victims while enabling them institutionally, materially and educationally for the counter-practices such as speaking back or more speech. This highlights the challenges posed by the existing debates in the defence of free speech. Other challenges were brought to light by the critical race theorists.

Charles R. Lawrence III, Mari J. Matsuda, Kimberle Williams Crenshaw and Richard Delgado belong to the then emergent Critical Race Theory tradition and have highlighted the fact that their work, *Words that Wound: Critical Race Theory, Assaultive Speech and First Amendment* (2018), is grounded in their own experiences as people of colour and which in turn had shaped their understanding of both, racism and law. Their understanding of free speech, racist remarks/ slurs and violence is derived from the historical and contextual analysis of the law and criticise the First Amendment Absolutists (those who defend absolute free speech) for having no regard

for historical contexts and regard "racism as just another idea deserving of constitutional protection" (Matsuda et al. 2018, 15). Matsuda argues, "racism is a mechanism for structural domination of a group based on the idea of racial inferiority" (Matsuda 2018, 36). She considers "racist speech as harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship", (ibid.) and, 'the racist speech needs legal redress to prevent the further perpetuation of racism' (Matsuda 2018, 50). Judith Butler (1996, 218), on the other hand, criticises MacKinnon and Matsuda on the grounds

> "… that the prosecution of hate speech in a court runs the risk of giving that court the opportunity to impose a further violence of its own. And if the court begins to decide what is and is not violating speech, that decision runs the risk of constituting the most binding of violations".

In the general understanding, the repressive functions of the state and its institutions are highlighted as the "natural enemy of freedom" and censorship is one of its main repressive functions when the right to freedom of speech is concerned. Owen M Fiss is critical of this view and believes that the "State, rather, can be a source of freedom" (Fiss 2009, 2). He draws a distinction between the libertarian and democratic theories of speech to substantiate his argument. As opposed to the understanding of liberalism during earlier times, which assumes the primacy of individual liberty and the limited government, contemporary liberalism, however, has the role of the modern state in securing both liberty and equality. Similar to the preoccupation with civil rights measures, contemporary liberalism also remains committed to meeting the bare minimum by providing ration, housing, education, employment and so on to the marginalised, the economically downtrodden. It is also evident through various modern welfare policies adopted by the modern state. The democratic politics, on the other hand, necessitates the conditions of equality for the realisation of freedom. In the adjudication of the matters dealing with free speech, the court is caught between balancing the two conflicting interests − the value of free expression versus the interests advanced by the state to support regulation. The state is now, for instance, allowed to censor casteist slurs but not the advocacy of ideas, in general. Amidst this conflict, Fiss (2009, 15) views the "State-led regulation as furthering, rather than limiting, of the value of free speech". He believes that the importance of regulation is especially when the state aims to restrict some speeches with the objective of equalising so that the speech does not end up becoming a luxury for the few. The politics of hurt sentiment

highlights the issues of liberalism in addressing the problem of hate speech. The following sections delve deeper into the limits of liberalism in securing and balancing the right to free speech and other values. This is done by invoking the analytical category of hurt sentiments and the politics around them.

2.1 Understanding Liberalism and its Limitations Through the Two Controversies

India has a history of conflicts over hurt sentiments, in law to politics, and public discourse. Amidst those, two different controversies that are chosen are centred around the politics of hurt sentiments. First, the debate that shook the Parliament in May 2012 over Ambedkar′s cartoon controversy is discussed in detail. Second, the controversy over the Padmavat movie in 2017 and the assault faced by the makers of it is reviewed. Through these incidents, the limits of liberalism vis-à-vis freedom of speech and expression in the context of hurt sentiments are explored. The two episodes chosen here were publicly deliberated upon by the scholars, civil society actors and even the politicians for a long time. This enables us to highlight the backdrop of the context of structural power relations in/against which the debates on liberalism are assessed. The claims of hurt sentiments have different bearings in the domain of popular politics and law. Hence, foregrounding the importance of contextualising hurt-sentiments.

2.1.1 *Ambedkar′s Cartoon Controversy*

K. Satyanarayan in an interview with Dalit Camera argued:

> In this controversy, what Dalits are saying -- there is a cartoon and there is a problem in the cartoon. They are simply saying that Ambedkar's contribution to making of the Constitution is not fully appreciated in this cartoon and textbook. It doesn't represent Ambedkar properly. There is something wrong. In fact, the controversy did not start with the parliament. It started two months earlier with RPI. Till then you did not do anything until the state banned it. For you, the context is state banning; for me, the context is Ambedkar's cartoon… Satyanarayan (2012).

The political controversy began with the reproduction of Shankar’s cartoon, where Dr B.R. Ambedkar was being whipped by Jawaharlal Nehru for the delay in the writing of the Indian Constitution, in the NCERT political Science textbook. The cartoon was being published in the NCERT textbook ever since 2006 but was only brought to attention in Parliament in 2012. The cartoon in the NCERT textbook was held hurtful and objectionable by the Dalit communities at large and thus several calls were made

for its withdrawal. Apart from the uproar in the Parliament, many public thinkers and Dalit scholars responded to this controversy. Thorat Committee constituted by the then Minister for Human Resources Development, Kapil Sibal, for the review of offensive cartoons in the NCERT textbooks, recommended the removal of the cartoon. Some believed that the cartoon belonged to the upper caste worldview and denigrated Ambedkar and his contributions. For them, the cartoon re-enacted the historical derogation and violence meted out against Dalits. It is in this context, that Syama Sundar (2016) believes, that humour is not bereft of power relations and is reflective of the existing caste prejudices in the society. Henceforth, the assessment of the Ambedkar cartoon should be assessed in such light while also keeping in mind other cartoons drawn on Ambedkar. Many thinkers, academicians and politicians commented on the context, purpose and pedagogical intent of the cartoon. Rodrigues, being critical of the commotion in the house of Parliament due to the controversy, argued that the market and the industry have shown no shift in the inclusive policies for which Ambedkar fought all his life (Rodrigues 2012, 21). Wankhede (2012, 31) argued that the controversy has painted the assertive Dalit challenges as a trivial symbolic-emotive issue, without having set any concrete agenda for emancipatory Dalit politics. Others, however, assessed the pedagogic intent of the cartoon in the NCERT textbook and held it as “politically incorrect but not educationally inappropriate” (Pandian 2012). Many lamented the removal of the cartoon from the NCERT textbook and have regarded it as the ‘victory of intolerance’ (Ritika Chopra), ‘disturbing’ (K M Panikkar), and so on.

2.1.2 *Padmavat Movie Controversy*

Sandhya Rajput, women′s youth president of Karni Sena, said,

> [t]his is just karma for Mr. Bhansali. He was warned, but did what he wanted to. This gives us the liberty to do whatever we want. The idea of insulting something so pure as ′Johar′ makes us sick. The threats issued are correct and should not be retracted. He should have thought before walking over our religious sentiments (Dhanarajani 2017).

The Supreme court dismissed the plea seeking a ban, imposed by four states, on the release of Sanjay Leela Bhansali’s movie Padmavati and requested CBFC to consider all aspects while granting the certification for its release. Bhansali was assaulted by members of Karni Sena, sets were vandalised and Deepika Padukone was threatened to meet the fate of Shurpnakha (a character whose nose was cut by Lakshman in the epic Ramayana) ‘for violating the rules and cultures of India’. Various protests were staged

in different parts of the country under the pretext of portraying Rajputs in a bad light and distorting the image of the Rajput queen, Padmavati. The Rajput sentiments were allegedly hurt because the misrepresentations amounted to an assault on the glory of the Hindu culture in general, and Rajput culture, in particular. People on the other side of the spectrum defended the movie against censorship but also criticised it for other reasons that the movie glorified Johar on screen as it was considered that "an honourable death is preferable to sexual violence, a message that only reaffirms the shameful stigma attached to victims and survivors of such crime" which only implied affirms the idea of rape as a dishonour to the survivor (Dutt, 2018). Another contention was its portrayal of Muslims as barbaric and savage.

2.1.3 *Analysing the Implications of Two Controversies on Liberalism*

The 'hurt' looming around in the politics being played out in two controversies, the Ambedkar cartoon controversy and the *Padmavat* movie controversy, has varied implications for the right to freedom of speech and expression. The two controversies set the debate over the extent to which the offending material in question is allowed to constitute regulation on the right to freedom of speech and expression. The claims of hurt sentiments emerge from different social locations and are differently argued for. The claims of justice also differ. The liberal preoccupation with universalism equalises the interests and rights of different particular groups. The neutrality poses yet another problem by aiding the process of invisiblisation of the social context. The two examples illustrated here are to bring forth not the social context alone but also purport to problematise the way the legal provision in India tends to equalise the hurt sentiments (as well as the legal remedies available) emerging from the different locations in the social hierarchy.

It is observed that with the unfolding of events like these,

> … a dynamic emerges wherein the sentiments of a (particular) community are set up against civil liberties including the right to free speech of general [public] (Kumar 2016, 164).

This politics of recognition guides us through the complexities posed by such circumstances. On one hand, the idea of 'difference' enables us to understand the 'particular' specificities of various communities and their claims. On the other hand, the idea of 'universalism' offers us to look at the right to liberty as an 'equal' right

entitled to every citizen. In a society ridden with inequalities of various kinds, cherishing formal civil liberties remain a distant dream. Without ‘recognising’ the ‘social’ locations, the immunities and the legal provisions are incapable of catering to the redressal of the hurt-sentiments of various communities and individuals.

In this regard, Sunalini Kumar analyses the hurt sentiment as a political thing in the contemporary public sphere. She argues, “sentiment only appears to become public when it is always already 'hurt' thus it appears as a political reality simultaneous to its being wounded; and never previous to it” (Kumar 2016, 165). To investigate the hurt-sentiment in the light of politics, it is important to first analyse the implications of sentiments in the political realm. The politics of hurt-sentiments ought to be studied in the light of how liberalism has come to be. Kumar, in this context, urges us to first comprehend “the disappearance of the language of sentiment from liberalism, modern liberal state and the public sphere” (ibid.). This disappearance had its basis rooted in the liberal idea of ‘neutrality’. ‘Neutrality constitutes one of the important aspects of political liberalism, one of the leading philosophies to shape the foundations of modern constitutional democracies’ (Rawls 1993). Maintaining neutrality while assessing the competing conceptions of ‘good’- is one of the foremost conditions for political liberalism. It then becomes difficult to distinguish the ‘good’ speech from those which are not. Marxist philosophy has discarded the idea of neutrality on the grounds that it only furthers the class interests of the bourgeoisie or the powerful. However, with the affirmation of neutrality as an ideal, the language of liberal rights (seemingly) distanced itself from the sentiments only to be further replaced by the ‘unsentimental’ language of individual liberal rights (Kumar 2016, 177). The promise of liberal rights, thus, restructured the whole moral order of being to be enforced by a welfare state. The liberal commitment to the idea of neutrality has resulted in muting the articulations of ‘difference’ between the identity of interests. In such contexts, all expressions are assumed to have a similar status which, very often, creates an environment which is discriminatory for the marginalised and minorities of a society, who are generally not well placed to find equal socio-economic opportunities to make their voices heard. In the light of the glaring disproportionate distribution of power and wealth, formal equality of free speech and expression further results in substantive discrimination in

the marketplace of ideas. This invites us to a discussion on the faultlines of Liberalism underlying a pluralistic society like ours.

The primary criticism of liberalism that is relevant here is "the liberal focus on 'merely' formal political equalities which have ignored or even encouraged inequalities in social and economic life" (Phillips 1994, 74), which connects to what Dr Ambedkar, in his concluding speech to the Constituent Assembly, had said:

> On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.

This tension highlights the anxieties of our modern liberal democracy. In the liberal understanding, the idea of difference and diversity is mostly limited in terms of the coexistence of different beliefs and diverse ideas. However, Mahajan (2013, 129) notes that "the diversity was considered as the distinctive attribute of India… natural expression of who "we" are as a people". She further argues that the value that diversity holds did not seemingly succumb to the logic of liberalism or the principle of gender equality or individual autonomy. The unique nature of liberalism that shaped democratic discourse in India held diverse communities or collective or social groups as central to the political domain. The "individual-in-community" or the individual embedded in the community figured as the dominant political actors. Hence, "the community was not external to the self but, nor was it identical to the self" (Mahajan 2013, 132). Even the idea of formal equality assumed not only the treatment of all individuals as equal but also recognised the need for equality of various communities and social groups.

Taylor's conception of good life assumed liberal society to be divided between the two kinds: one, which upholds the conception of the shared idea of a good life and another, which does not. The former is dedicated to providing equal rights and immunities to everyone. The latter, on the other hand, affirms equality before the law and yet provides for the basic rights of the marginalised. Mahajan (2013, 134) categorised the third kind to depict the Indian liberal society, as the one which did not endorse the shared conception of the good life but the substantive conception of the

good life. Thus, keeping the diverse communities in mind, any particular conception of the good life was not endorsed but, rather, the diversity of different religions and cultures was valued. The neutrality of the state was affirmed as not siding with any religion. Yet the aspiration for equality of all communities was translated into special consideration for minorities to arrive at *their* conception of the good life and to preserve the same. In the grand experiment of *diverse* communities and cultures living together, Waldron argues, individuals (-in-communities)

> … should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others. When this assurance is conveyed effectively, it is hardly noticeable; it is something on which everyone can rely, like the cleanness of the air they breathe or the quality of the water they drink from a fountain. This sense of security in the space we all inhabit is a public good (Waldron 2012, 4).

And this idea of the public good is shared by all, irrespective of their affiliation in the respective communities or collectives. The affirmation of this public good is a way of assurance of the membership and the dignity, of the marginalised and the minorities, in the larger political community. This primarily is the consequence of the development of the new notion of identity where universal dignity was central in a way in which identity was being understood. The 'public good', rights, immunities and entitlements were equalised and were not without their share of problems as they did not cater to the distinctive needs of various groups. This problem of difference-blindness was highlighted by the politics of difference which affirms the particularities of various individuals and groups. In a quest for understanding Indian society, scholars "absolutised difference" which provided a distorted understanding of different cultural groups and their membership (Mahajan 2013, 4). She argues that the "plurality" of the culture and society was not accounted for and ignored the hierarchy within the cultural groups. In other words, this ended up "essentialising the culture" (ibid.). This discussion is further elaborated in the section which follows.

Hate-speech, according to Justice Oliver Wendell Holmes, undermines this public good by intimidation, discrimination and violence (Waldron 2012, 4). Hate-speech aims to undermine the dignity of those against whom it is directed, in their own eyes and the eyes of the entire society. With the affirmation of formal equality, of not individuals alone, but of diverse religious communities and caste and tribal groups, the role of the Indian State as a neutral arbiter made it difficult to protect and preserve

Holmes's idea of the *public good.* The preoccupation with formal equality without substantive conditions makes it impossible to realise and cherish the value of public good in its true sense. The role of the state here assumes importance in allocating the necessary resources to enable and also regulate when needed. In this regard, Gautam Bhatia has highlighted how control over means, resources and infrastructure of speech is 'irrevocably linked to economic power'. In various free speech issues presented today, *Sakal Papers v. Union of India (AIR 1962 SC 305)* case presents an interesting, yet problematic, view of the state regulation of the marketplace to avoid monopoly over the market. The court struck down the regulations imposed by the government and argued that it limited the circulation of newspapers which amounts to an infringement of Article 19 (1) (a) of the said petitioner. Bhatia (2018, 23) argues that

> … the heart of the dispute is a question of infrastructure and access. The contested regulations were aimed at equalising access to the infrastructure of the communication by redistributing the resources that made such access possible.

It is important to note that for the realisation of *equality of opportunity,* enabling background conditions are essential means to the substantive democratic ethos, to protect the freedom of expression of the new entrants in the marketplace and to realise Holmes's idea of the public good.

Public order is yet another public good (value) which is considered to be an essential condition for cherishing our rights. However, a paradox exists when the state, in the garb of advancing this value, starts routine censorship on the grounds of endangering public order. In this context, Sidharth Narrain (2016) sums up the tension as follows:

> … the problem with this approach is that the threat of disruption of public order trumps the promise of free speech…..and has encouraged heckler's veto, where every time the government gives in to the threat of disruption of public order.

The liberal state, here, is caught in guaranteeing both liberty and security (or, law and order). The problem in this approach, according to Bhatia (2018, 23) arises when no attempt is made in articulating "appropriate or good intervention" which constitutes a major problem in the governing philosophy of liberalism. In the *State of Uttar Pradesh v. Lalai Singh Yadav (1976 SCC (Cri) 556),* Justice Krishna Iyer said/ upheld "ordered security as a constitutional value" (1976 SCC (Cri) 556, para 13) which has guided the free speech jurisprudence and shaped the contours of Article 19(1)(a).

The discussion on two controversies highlights the need for the contextual analysis of the claims of hurt sentiments and the demand for recognition of the difference in the identities of different communities. This is important because the particularity of hurt sentiments is discredited by the generalised defence of free speech. It has also highlighted the need to better equip ourselves to understand the hurt sentiments through the concepts of 'recognition' and 'difference' and the threats posed by liberal values such as universalism and neutrality.

2.2 Understanding Hurt Sentiment through the Politics of 'Recognition' and 'Difference': Perils of 'Universalism' and 'Neutrality'

The politics of hurt sentiment, according to Sunalini Kumar, "is a politics about propinquity" (Kumar 2016, 165). To enter the realm of politics and the public sphere, the *claims* of hurt sentiment need to be visiblised and vocalised in the public sphere. This serves three purposes: firstly, the politics of emotion requires us to understand the nature and context of the emotion. Secondly, this becomes an entry point for the recognition and redressal of hurt sentiments. Thirdly, it challenges the notion of objectivity as 'emotionless' and thereby, the quest for the neutrality of the liberal public sphere began to crumble when the politics of emotions required foregrounding the nature and context of the said emotions. The public performance of emotion, and hurt sentiment, in this case, has been able to mobilise the effective communities. This also enables us to investigate the "distance and proximity" of the liberal state and public sphere (ibid.). The use of the language of sentiment for putting forth the claims of hurt sentiment has enabled the restructuring of the boundaries of the liberal public sphere as well as the legal-juridical sphere. As the state began to adapt to the language of sentiments, there was an arrival at a "specific social contract" which recognised certain injuries and resentment and not all kinds (Kumar 2016, 165) (also, it presumed that certain injuries have to be constitutionally corrected or rectified). "An appeal to sentiment is not the same thing as an appeal to hurt sentiment in terms of the historical trajectories", argues S. Kumar (ibid.). The politics of recognition enables us to identify the context of distinctive histories of various communities and the role that social and historical context play in shaping and understanding the conception of the self (identity). In this regard, Taylor (1994, 25) makes a compelling thesis in his discussion on the politics of recognition:

> … our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves".

The misrecognition of this kind strips a person of her dignity. A similar concern is voiced by James Waldron in *The Harm in Hate-speech* to argue that

> … the actual harm in hate-speech lies in inflicting self-hatred in the eyes of society as well as against whom it is targeted at, thus compromising dignity (Waldron 2012, 5).

This modern preoccupation with dignity and identity is interlinked and is now imagined to be a fundamental part of a liberal-democratic setup. This creative transformation from the historical-social hierarchies to the modern-day idea of equal dignity is at the centre of the contemporary liberal tradition. Democracy has enabled the universal *demand* for the recognition of the dignity of all citizens wherein, the politics of equal recognition emphasised equalisation of rights and entitlements. With the further articulation of the identities, the politics of recognition arrived at a new set of meanings, the meanings were articulated in terms of differences in identities and interests of individuals and groups. The fundamental premise of Saba Mahmood's (2016, 209) understanding rests on the fact that "each social and political inequality has a distinct history, institutional locus and experience; each, therefore, requires a distinct analytic". Taylor emphasised the universal acknowledgement of the equal recognition of all (equal rights and immunities) whereas, the politics of difference foregrounds the inequalities that were glossed over with the universalism of rights-based discourse. The politics of difference required "differential treatment" against the forcible hegemonic character of universalism which negates the particularism of identities. Taylor, however, warns us of the dangers of liberal neutrality that are inherent in the politics of difference. The violence embedded in neutrality is exercised by the invisibilisation of historical trajectories of identity in favour of dominant interests. This becomes the moment for the consolidation of the identity of the "disenfranchised body" forcibly contained in the singular discourse of liberalism. Such invisibilisation foregrounds the language of sentiments to create a counter-public sphere to visibilise and articulate their exclusion and discrimination.

The force of hurt sentiment claims of marginalised is directed towards the acknowledgement of historical injustice, which is the source of hurt. (Ramdev and Bhattacharya 2016, xxxiii) in their discussion in *The State of Hurt* argues,

> in its originary moment that puts 'pain' beyond the experiential and into the historical—the idea of 'hurt' posits an affective community that binds and works as an adhesive force to empower and grant political agency to a neglected public.

With the lack of ethical, political and communicative practices to make this injury intelligible, what follows often is the recourse to violence by the affective communities. In this context, Mahmood asks an important question, "what are the conditions of intelligibility that render certain moral claims legible and others mute" (Asad and Mahmood 2009, 71). The question of access and infrastructure to popular and legal gains salience here. In the economy of blame, the liberal state offers greater recourse of popular and legal to the dominant ones as they have the means and resources for the redressal of hurt. Such are the manifestations of the embedded violence of neutrality that certain claims are rendered *more legible* than others. In such a context it is difficult to then imagine 'appropriate state intervention or regulation' to foster the interests of liberty, equality and freedom, the fundamental promise of liberal democracy.

Matsuda (2018, 39) elaborates on how hate-speech poses threats of structural domination and thereby enacting as a wagon to reinforce historical vertical subordination. In the Foucauldian frame, foreseeing the state regulations on hate-speech, the state assumes the role of neutral arbiter and grants itself the agency to be the source of hurt as well as the sole guarantor for the redress (Ramdev and Bhattacharya 2016, xxii). In an attempt to redress the hurt of the marginalised, the state begins to censor the hurt claims of the marginalised by keeping a check on the rise of rising hurt claims and identity assertions by invoking security threats to the resistance offered. In other words, the court of the law becomes the sole producer of hurt by sanctioning what is speakable and unspeakable. This flags the issue of contemporary hurdles faced while accessing justice in the court of law. The present-day equal immunities to the communities in the form of IPC provisions when hurt-sentiments are concerned further accentuate the problem. Hence, this discussion aimed at foregrounding the importance of difference in the articulation of the identities and the difference in their claims of justice. This study takes important insights from the critical reading of politics of recognition as well as carefully engages with the dangers of neutrality embedded in the politics of difference. It requires careful navigation in and through both the given frameworks.

2.3 Interrogating Hurt Sentiments in the Popular

An enquiry into hurt-sentiments requires us to offer a contextual study of the claims of hurt sentiments of the dominant and the marginalised. It is important because the early idea of liberalism required a universal conception of rights and the same principles of evaluation for all irrespective of their socioeconomic placement in society. This universalising tendency does not recognise the structural inequalities and violence embedded in the hierarchy and can only provide a limited remedy for the injustice meted out due to structural inequalities. The 'politics of difference', however, affirms the significance of group differences when domination, conflict or privileges/ advantages are concerned. Young describes a different version of the politics of difference as "the politics of positional difference" which accounts for historical oppressions, and institutional and structural injustices and cannot be merely reduced to the differences in culture alone. The culture, thus, becomes an important site of contestation. In this context, Parekh (2012, 41) argues,

> …every form of speech occurs within a particular historical and cultural context, and its content, import, insinuations, and moral and emotional significance are inseparable from, and can only be determined in the light of, that context.

The importance of Parekh's argument lies in his articulation of the context of free speech. It is important because the violence of the speech and expressions not only leaves marks of superiority on the bodies of the marginalised but also perpetuates and reproduces the legitimacy of this superiority. The injuries thus caused portray and attempt to legitimise the cultural evaluation of their social standing in the society. According to Veena Das (1995, 176), "pain is the medium available to an individual through which a historical wrong done to a person can be represented" and the hurt or injury is, thus, the location of that pain.

How does the legal evaluation, then, differ? The constitutional promise of the individual as a rights-bearing citizen thus enables these bodies to articulate and foreground their wounds/injury. The *imagined collective* of various classes, caste, religion, gender and so on determine the 'sovereign authority of sentimental claims'(hurt in this case). (Ramdev and Bhattacharya 2016, xxv). As the liberal state grants political legitimacy to the collective, the communitarian claims of hurt sentiments mobilise an affective community to redress the shared historical wrongs on

which the contemporary social structure rests. Here, the shared experiences gain prominence over shared ideals of a liberal democratic society and thus, challenge the privileges of dominant cultural and religious beliefs prevalent in the popular domain.

In interrogating the entry of hurt into the popular domain, Ahmed (2014, 1-4) elaborates on how the narratives/ images which are circulated in the public domain and identified as the source of hurt, work in a way which aligns the reader/ receptor with collectives and this is done by attributing 'other' as the source of their feelings. The narratives/ images are carefully crafted to put to work the process of 'othering' by positing 'other' as "someone who is not 'us' and in not being us endanger 'what is ours'" (ibid.). The 'other' in the Indian context, as identified by Guru, are those who are not 'the twice-born' and are situated lower in the caste hierarchy (Guru and Sarukkai 2017, 16). The unique feature of 'graded inequality' in the Indian caste structure, as identified by Ambedkar, confers the undoubted advantage to 'the twice borns' over those who are placed below them. Such 'other', according to Ahmed (2014, 1-4) threatens to take away 'what you have' as the legitimate subject of the nation, "the one who is the true recipient of national benefits" (ibid.).

The process of "othering" in India is usually carried out in two ways: (1) women and Dalit/ Bahujans as the other; and, (2) minorities as the other. The othering of Dalits/ Bahujans and women finds its legitimate sanction in the coded religious texts which entails 'structural advantage to the top of the twice-born (TTB), which is the upper layer of social hierarchy in India and thus consolidating their privileged positions (Guru and Sarukkai 2017, 16). The procedure and justification for committing violence against Dalits find legitimate sanction in these religious texts. The bodies of the Dalits marked by the violence of caste-based atrocities signifies how the relationship with their bodies and mind has been fractured time and again are the evidence of the way the social programme of caste superiority is inscribed on the mind and the body which are hurt/ injured. What is more interesting is how 'the hurt has not led them to passively submit to the social program but mobilised affective communities to articulate hurt/ injury to claim redressal'. (Das 1995, 190)

One of the many ways of 'othering' Muslim minority in India is through crafting narratives of hate by invoking threats to 'their' glory and religious sanctity, as they

portray themselves as "the legitimate subject of the nation". Rajagopal (2000,6) explains the role of television in establishing the traditional base of Hindu nationalism. The institutionalised production and circulation of various symbols and images, through the national broadcast of the Hindu epic, *Ramayana,* tried to homogenise the beliefs of people by invoking the imagery of a 'wounded nation' in need of protection from the 'other'. The image of the 'wounded nation' was put in everyday dialogue which insisted on the demolition of Babri Masjid to right a historic 'wrong'. BJP's militant anti-Muslim campaign propagated aggression and hatred toward the 'other', an increasingly endangered minority, which ultimately resulted in the demolition of Babri Masjid (Rajagopal 2000, 148).

The alignment of family, history, religion and caste is very powerful and works to transform dominant's ties into a form of Hindu patriarch kindred which recognises the 'other' as "the bodies out of place" (Ahmed 2015, 1-4). The narratives in the popular discourse are addressed to Hindu patriarchs and equate the vulnerability of a Hindu nation with the vulnerability of the Hindus, at large.

The narratives in the public domain, which some perceive as beneficial while others as harmful or hurtful, depend not on the inherent attributes of the narrative but rather depend on "how our contact with the object shapes our emotions" (Ahmed 2015, 202). The primacy of invoking the notion of 'contact', here, is to account for the subject as well as its histories that come before the subject. According to Eric Wolf,

> …theoretically informed history and historically informed theory must be joined together to account for populations specifiable in time and space. Here, in this process, both the people who claim history and to whom history has been denied emerge as participants in the same historical trajectory (Wolf and Eriksen, 1982).

The study of "hurt" involves the enquiry of how we experience 'hurt'. It involves "the attribution of meaning through experience, as well as different associations with different kinds of negative or adverse feelings" (Ahmed 2015, 23). Hence, the study of hurt does not necessarily involve what amounts to bodily damage. The 'lived experience' of hurt involves active recognition of the difference in the hurtful experience' to avoid the risk of universalising hurt. The 'hurt' is involved in the production of uneven effects in the sense that hurt does not produce a homogeneous group of bodies who are hurt together. Various scholars like Mazzarella, Sperner who employed a biopolitical framework to study 'hurt' did not seemingly delve into the

specific experiences of hurt, the context of hurt and the reasons for hurt whereas words of Ahmed (2015, 33),

> …reading claims of hurt/injury requires rethinking the relation between present and past. The emphasis on the past, here, does not mean conservation of the past.

The "sanitised history from the standpoint of the present" is not what is attempted in this study, instead, the task is to revisit the context of hurt in the then-existing socio-economic hierarchies and analyse the wilful negation of the context. (Ray 2016, 134).

2.4 Situating the Claims of Hurt Sentiments by 'Marginal' and 'Dominant' Communities in the Context

Before we foreground the importance of the contextual study of the claims of dominant and marginalised communities, it is essential to provide a backdrop of the way democratic ideals such as equality are figured in the modern conception of rights in a plural society like ours. The democratic discourse on equality required the identification of various structures of inequality; the groups, collectives or communities who were discriminated against or the marginalised (Mahajan 2013, 128). The pursuit of equality led to the mobilisation of these communities or groups for the transformation of the hierarchical structures of oppression (Mahajan 2013, 129). However, going back to the struggles against the colonialism, it has been observed that the story of the sovereignty of the spiritual domain against colonial domination is simultaneously the story of the subjugation of the subaltern social groups like lower castes, women, marginal linguistic regions, etc. by the national elite. The numerous references to 'the greatness of the Vedic civilisation and the glorious past also carry an unstated hierarchisation of different social groups and communities that goes into the modern project of nation-making (Pandian 2002, 1736). Pandian problematises the dominant thinking of Indian democratic discourse to argue,

> …the so-called sovereign domain of the culture uncolonised by the west remained a domain to affirm the elite upper caste culture/spirituality as the culture of the nation…act of mobilising a part of the national to stand for the whole not only inferiorised vast section of lower castes as inadequate citizens-in-the-making, but also significantly delegitimised the language of caste in the domain of politics by annexing it as part of the cultural (Pandian 2002, 1737).

For a very long time, the post-colonial angst regarding the ambivalence toward modernity rendered caste (communities) illegitimate in the favour of a "single,

determinate, demographically enumerable form of the nation" (Chatterjee 1993, 238). The legitimation of caste as the natural order of things denies it any historical and socio-cultural specificity and to excavate caste from the naturalised domain requires a step outside modernity where a politics of difference can articulate itself (Pandian 2002 1737).

However, the founding fathers of the Indian Constitution used modern concepts like freedom, equality, fraternity and so on to codify the language of rights. This did not mirror western modernity in its entirety; instead, they reimagined it by the specificities of the then prevailing ideas, historical experiences and political vision for the future. It is in this context, Mahajan argues,

> the concept of *culturally embedded self,* which informs the project of indigeneity, ought to be abandoned in favour of a *historically situated self* in order to meaningfully access and understand the project of modernity and to avoid any possibility of cultural essentialism (emphasis added) (Mahajan 2013, 8).

The claims of self and the identity, Guru (2017, 1) argues, "are often grounded in specific experiences", and the specificity of the experiences seemingly determines the varied notion of the self and the community. Despite the attempts by Postmodernists to theorise the idea of experience, the idea of individual or group experience remained hugely Eurocentric as it did not dwell much on the difficult terrains of invoking other conceptual frameworks available in traditions such as Indian, Chinese, African, and so on (Guru 2017, 17). In a quest to understand this, *Out There* (1999), an edited volume conceptualises 'marginalisation' in a manner which goes beyond the Western, binary frame of positing marginalised as the historical other. The authors argue on the other hand, that minorities have their independent histories, cultures, etc. Such a conceptualisation goes beyond having to succumb to any possibility of positing 'marginalisation' as the process of othering. Baxi cautions us against employing such a Western framework for understanding the specific experience, as such a framework would amount to a distorted conception of self and society (Baxi 2011, 61).

Ferguson provides us with a different understanding of marginality. He questions: "when we say marginal, it is important to ask, marginal to what?" (Ferguson and West 1999, 9). This question takes us to the enquiry of centre-periphery, marginal-dominant, inclusion-exclusion relationships but the centre from which the power is being exercised argues Fergusson, "is often a hidden place" (ibid.). The insistence of

historically marginalised groups to have an identity of their throws up challenges to the authority of the centre. As the sustenance of the centre is to the large extent dependent on the "relatively unchallenged authority" and if the authority of the centre/ canon is shattered, there remains no measure of the relativity of the ‘other' (Ferguson and West 1999, 10). In such a context, Said opines that as a Palestinian,

> …we can read ourselves against another people’s pattern, but since it is not ours…we emerge as its effects, its erratas, its counter-narratives. Whenever we try to narrate ourselves, we appear as dislocations in their discourse (Said 1986, 140).

The narratives in ‘mainstream’ tend to incorporate counter-narratives of various kinds to avoid the threats of exposing the whole structure to any challenge. In such an attempt, various artists, and authors tend to associate themselves with ‘glamorised otherness' to identify themselves as ‘marginalised' and thereby their work as ‘marginalised activity'. Such a tradition poses an “ambiguous relationship with those who have not chosen marginalisation but have had it thrust upon them” (Ferguson and West 1999, 11). The association of artists and authors with the ‘glamorised otherness’ often reinvents marginalisation in a way which then, amounts to the misrepresentation of the marginalised. This, in turn, becomes the starting point for the demand for censorship of the source of the ‘hurt’. The demand for state intervention has to be understood in the light of the power relations embedded in the differential claims put forth by the dominant and the marginalised communities. The system of domination rests on the impunity enjoyed by it because of its dominant position. The protests by the marginalised, in the words of Wankhede (2012, 29),

> … have unfolded the claims for radical structural changes by invoking identity question based on values of equality, social justice and representation.

Some enquiries into the politics of hurt-sentiments have elaborated not only on the political register of their claims of hurt but also on how it has foregrounded the question of identity concerning other democratic values. Sperner (2016, 111), in interrogating the logic of politics of hurt-sentiments, analyses the short story, *Dudh ka dam* by Premchand and the context which led to the story being excluded from an NCERT Hindi textbook for Class 11. The ‘controversy’ around *Dudh ka dam* is based on its offensive or ‘hurtful’ content as was claimed by Dalits. Sperner (2016, 109) relied on the framework offered by the biopolitical functions of the censorship in the hands of the state, which does not delve into the enquiry of the reasons (the problematic

portrayal of the leading Dalit character of the story and complex history of such a portrayal) of the 'hurt'. Dalit critics attributed the lack of Dalit consciousness in Premchand which in turn led Premchand to portray Dalits as the subject of upper caste sympathy and pitiful benevolence. The register of the claim of "hurt" however resulted in the removal of the story from the NCERT textbook(Ramdev and Bhattacharya, 2015).

Guru foregrounds the argument for the struggle for a 'generic identity', and in doing so, he reflects on how the Indian Constitution formally elevated Dalits as right-bearing citizens of the country but such formal elevation did not transform into the democratic idea of 'one person-one value' (Guru 2011, 222).

The above-mentioned discussion forms the background of this research study. It needs to be foregrounded to arrive at the main theme of the study which is discussed in the following section.

2.5 Impact of Legal Admission of 'Hurt Sentiment' in Independent India in Relation to Censorship

This study argues that the way injury is caused is not situated in any particular moral form or ethical position and escapes the limitations of the bipolarity of good and evil and situates the issue in the political. The effects that this study deals with are 'humiliation', 'indignation' and 'manufactured victimhood'. In the court of law, it is assumed that there is no place for emotions and the cases are adjudicated based on the precedents set by the learned judges in the previous case laws. It is, however, challenged in this study and follows that 'emotions pervade the law and the emotions are barely suppressed by the legal filters designed to mute its force' (Bandes ed. 1999, 1). Emotions have had a significant place in Indian law ever since the colonial drafting of IPC and the subsequent amendments that followed. Conventionally speaking, emotion has a narrowly defined place in law and is relegated mostly to criminal courts in cases concerning sedition, hate-speech, obscenity, and, so on. The legal admission of the claims of hurt-sentiments makes explicit the difficulties in defining hurt-sentiment as a monolithic, easily definable entity. Contrariwise, the main thrust of the study is to offer a contextualised understanding of the complex interplay of the differential claims of hurt-sentiments about legality.

Ahmed opines, that the way ‘hurt’ sentiments take recourse to legality involves understanding ‘the culture of compensation’ which then, requires studying “the relationship of innocence and guilt” (Ahmed 2015, 32). The assumption here is that the burden of ‘injury’ can be relegated to an individual or a collective. The legal domain homogenises this injury and relegates the ‘difference’ in the nature of the injury beyond the framework of legality. Such homogenisation produces normative subjects who in considering their injury as entitlement make the entitlement of injury available to others. Now, even a caste Hindu patriarch becomes a wounded subject in the nationalist discourse, as the one who has been ‘hurt’. In this respect, Ramdev (2015, xxii) argues, “the terms of Indian law promote a culture of offence as the legitimate guarantor of justice while on the other hand, discouraging any effect of 'difference' (in opinion or identity) as evidence of punishable deviance or disharmony” (ibid.). Given that “the subjects have unequal relation to entitlement”, in this view of legality, “the more privileged subjects will have greater recourse to the narrative of injury” (Ahmed 2015, 32). In this prelude, Srivastava (2015) argues, that the claim of hurt sentiments serves the interests of the powerful and prevents social change and cultural progress. He also points towards an important insight that in the narratives of ‘hurt’, the very assumption of a homogeneous community with similar interests is a myth. Henceforth, the nature and context of hurt assume greater importance especially when the hurt sentiment is both, pursued politically and legally adjudicated to avail justice.

The claims of hurt sentiments allow a marginalised group to register a political claim of their grievances. The redressal of such claims involves the acknowledgement of the hurt sentiment followed by legal sanctions such as removal or censorship of the offending material in question. The claims of hurt sentiments are an important mode of protest available to the marginalised especially in the light of the lack of the economic, political and social infrastructure required for the redressal. The individuals and (particular) communities seeking redressal of hurt involve addressing historical injustices that inform the contemporary conflicts and political tensions in the society. The process of redressal is central to the functioning of democracy. In this context, Barkan (2006, 5) argues,

> … theory of redress for historical injustices has to underscore both morality and democratization and incorporate the shift in contemporary moral philosophy from

> classical liberal notions of individual liberty to include sociological insights about the place of the community and the role of specific identity.

The hurt redressal is a part of the system of the claims of hurt sentiments for social regulation, reparations and accountability of the crime perpetrated. It assesses the social and power relations between the perpetrators and the victims and aims to restitute the dignity and equality of the victims. Restitutive justice does not necessarily involve the radical distribution of material resources but even the symbolic and moral condemnation holds extreme significance for the victims. However, even the moral victory, alongside legal battles, in the face of structural inequalities and discrimination re-asserts their dignity to its rightful place.

The legal recognition of the category of 'hurt' sentiment in various provisions of IPC and CrPC in Indian Law has been studied in great detail by various legal practitioners and scholars like Sidharth Narain (2016), Srinivas Burra (2014), Rajeev Dhavan, Abhinav Chandrachud (2017) and so on.

Narain (2016) analysed the evolution of hate speech laws through chronological developments. One of the central arguments is that courts, in colonial as well as in post-colonial India, have taken pragmatic positions. Hence the judgements, in this regard, have been inconsistent. He suggests legal reforms dealing with the cases of hurt-sentiments and hate speech. Baxi however, argues that "the Indian Constitutional combination of fraternity and dignity wages war against the dignity of caste-based apartheid" (Baxi 2011,72). This point towards a paradox, about the legal admission of 'hurt', on the one hand, the Constitution emerged as a guarantor of fundamental rights as the substantive condition for the rule of law whilst on the other hand, the formal requirement of the rule of law confers the burden, on Indian Judiciary, of applying the universal tests when the cases of 'hurt' is in question. Chandrachud, while analysing various provisions concerning the freedom of speech and expression in colonial and post-colonial India, argues that

> …the enactment of the Constitution did not make a significant difference to the right to free speech here, that Articles 19(1)(a) and 19(2) belonged to the status quo aim of the Constitution, not the transformational one. The enactment of the Constitution made a rhetorical change, not a substantive one, to the right to free speech in India (Chandrachud 2017, 25).

In this regard, Chandrachud makes an important observation concerning "two competing goals of the Indian Constitution", one being 'social transformation' and

another, to preserve the long-standing ‘status quo’ of the feudal and patriarchal socisocietiese ours (Chandrachud 2017, 6). The paradox highlighted by Chandrachud can be observed in terms of existing legal provisions of IPC which aim at dismantling the evils of hate speech on one hand, and on the other, the neutral preoccupation of these provisions does not attempt to analyse the power relations between various individuals or communities. The understanding of the context of power relations between various social groups is an essential condition for realising the aim of social transformation. The concern of social transformation flagged by Chandrachud is very important for the realisation of the relationship between free speech and the social structures of society. This can only be done by making a contextual analysis of the claims of hurt sentiments in both, the political and legal realms. The following chapter tries to address the same.

Chapter- 3:

Legal Proscriptions on Free Speech and Caste Hate Speech: Differentiating the Nature of Hurt Sentiment Claims

The rage of the oppressed is never the same as the rage of the privileged.
- hooks (1995, 30)

3.1 Introduction

Hurt-sentiments operate in different settings, take different forms and have varied consequences for different sections of society. The ones referred to here involve communication, mostly speech, gestures, representation and so on. Hurt-sentiment is usually not understood as inherently amounting to structural injustice. It is, thus, important to highlight the nature and the source of the hurt-sentiment to differentiate the claims invoking structural injustice from others. Furthermore, the claims of hurt-sentiment are not self-evident or self-reflective of its nature. It is only when claims are vocalised in public are the first steps invoked towards its **redressal** or else in multiple everyday instances 'hurt-sentiments' go unrecognised or unacknowledged. The nature and content of the hurt are informed by its context. As Indian society is marked by the evils of the caste system, hurt-sentiment includes casteist speech. The claims of hurt-sentiments against caste hate speech when put forward by an individual from a Scheduled Caste or Scheduled Tribe call out the structural hierarchy, inequality and embedded violence of the caste system. Hurt is caused in such cases not merely by the virtue of verbal slurs alone but by its embeddedness in the history of oppression and injustices meted out to people belonging to Scheduled Castes and Scheduled Tribes.

However, the claims of dominant communities are differently placed and argued for. The dominant communities/ individuals perceive their privileges as naturally given which accord them the benefits and privileges beyond the purview of any social standing in a socio-economic structural hierarchy. Their sense and claim of victimhood are derived from their saviour complex to protect their culture and traditions against any attempts to critique or reform their cultural practices. They view any such criticism and dissent as an attack on their religious worldview and, thus, take it upon themselves to mend it. They accord themselves the duties of the guardianship of the

Hindu social order and any criticism whatsoever of the same is perceived as an attack on dominant caste Hindu(s) and consequently, it also provides justification to the Hindu social order. This chapter elaborates: (a) on the differential claims of hurt sentiments by both marginalised and dominant communities, the nature and context of its difference, and (b) on the legal reasoning for the proscription of free speech and thus, caste-hate speech. This discussion assumes importance for the holistic understanding of the way hurt sentiments are legally adjudicated in the court of law which is the subject matter of discussion in chapter 4.

3.2 Foregrounding Caste-hate Speech

This section elaborates on the definitional aspects of casteist speech and expressions to provide a background. It also throws light on how various academic scholars of race, and religion have articulated hurt-sentiment vis-a-vis freedom of speech and expression and thereby, it is also a feeble attempt to understand and theorise caste hate speech.

Slurs, Hill (2008, 49) argues, can ʻwoundʼ, injure or ʻcutʼ. Critical Race theory argues that ʻslurs are visibilised by an everyday vernacular performative ideology which means that the words can perform actions.' According to Hill, 'to call someoneʼs utterances a slur is in itself a charge of racism' (ibid.).

In the context of Indian society, slurs usually emerge in interpersonal conversations, jokes, anger and moments of violence, when people belonging to Scheduled Castes/Scheduled Tribes are concerned. The defenders of absolute freedom of speech and expression would understand slurs only as emblematic of the right to unhindered expression whereas, for many, slurs are the object of fascination and pleasure so much so that despite being censored, slurs remain active through jokes, in humorous conversations amongst the people of dominant elite castes etc.

The claims of hurt-sentiment by the marginal community/or an individual belonging to a marginalised community is a protest against the violation of their dignity and assault on their self-respect. Caste-hate speech report by International Dalit Solidarity Network (IDSN) defines Caste-hate speech as (2021, 1),

> ... any communication form such as speech, writing, behaviours, codes, signs, or memes that manifest hierarchies, invoke humiliation, serve to dehumanise, incite discrimination, degrade self-worth or perpetuate discrimination and are often the sources of physical, mental or material violence to a person or a group based on caste identity.

The term caste-hate speech finds explicit mention in the IDSN report. The term caste-hate speech recognises casteist speech as one of the forms of hate speech. The discourse on hate speech while foregrounding identity-based crimes has neglected the manifestation of caste realities in India. According to the IDSN report, humiliation, incitement and perpetuation of discrimination, dehumanisation, and degradation of self-worth or dignity are important features of caste hate speech. It also clearly states that caste hate speech inflicts physical, mental and material violence on the target. The routine social interaction amongst various caste groups informs the caste relations and thus, the Hindu social order. Caste is reinforced through various forms of communication such as casteist abuses, name-calling, casteist slurs and other symbolic gestures. In this respect, one can argue that caste-hate speech has become an integral part of the system of domination. It is routinised and woven into everyday language through which the self-worth and dignity of the marginalised are assaulted on an everyday basis.

The right to dignified existence constitutes the core of the right to life and, thus, the protests against the violation of dignity need to be understood as an affirmation of the right to life and dignified existence. Caste-hate speech negates that minimum moral consensus and intrinsic worth of being treated as an equal human being that had been declared with the coming of the Constitution of India as, "one man, one vote, one value". One man, one vote, yes. Political equality is now cherished but one value, no and henceforth, the very aspiration of social equality remains a distant dream.

The focus of this discussion is limited to casteist slurs. Caste-hate speech is a broad category which would invite discussion on varied aspects of caste-based insults which derogate marginalised caste communities. For instance, routine usage of the reservation to mock students availing of reservation policy does not necessarily come under the purview of section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989. It, however, injures the dignity of students availing of the reservation. Casteist slurs and Casteist speech have been used interchangeably at many points in this study to draw the focus on the implications of

caste-based insult on the Scheduled castes largely. However, the term casteist slur is used for specificity. Caste-based slurs and abuses which are criminalised under the purview of section 3(1)(x) of the POA Act are the subject matter of analysis for this research.

Hurt can occur without denigrating a person or a community at large but a violation of dignity, demeaning, damaging one′s self-respect, violating one′s dignity and thereby, reaffirmation of their caste superiority is essential for the moral hurt when caste-hate speech is concerned. Challenges to caste hierarchy are often articulated as hurtful because it has injured the long-standing glory of the superiority of the dominant. However, the deflation of casteist pride of the dominant cannot be equated with the sub-human treatment, through words and gestures, meted out on the marginalised.

The caste system gains its legitimacy from the Hindu religious texts and codes. Parekh (2009, 33) describes various measures through which caste-based institutionalised humiliation becomes an integral part of society. Firstly, legitimacy is required to institutionalise hierarchies, and inequalities and perpetuate discrimination. Once it is institutionalised, it becomes part of the common sense of the society and becomes a legitimate part of the organised society. Secondly, the boundaries distinguishing the dominant from the subjugated ought to be guarded and reinforced through various mechanisms and any transgressions have to be duly punished. Such mechanisms require the dominant to coerce the dominated to accept and believe their place in the hierarchical caste system. Lastly, he highlights the role of the state to coerce the subjugated against any organised resistance or protests. All these strategies co-ordinated together to reinforce the enclosed nature of the caste such that any attempts to transgress the existing economic status do not alter the social realities of the caste system substantially (ibid.).

The rule of law puts limitations on the arbitrary excesses of the dominant and the state and it also provides mechanisms for the redressal of the hurt whereas, it has failed to cater to the existing inequalities, substantively, in the social realm. The rule of law in our country lacks the enabling conditions to wholly cherish the fundamental rights enshrined in the Constitution. While the Indian Constitution was being drafted, there was a transformative vision of society, geared toward equality, freedom and

dignity, that the rule of law intended to achieve. The rule of law was committed to altering the relationship between the individual and the state (in contrast to the relation between the colonial state and its subjects) and between the individuals too.

It is important to highlight the formal and the substantive aims of the rule of law as it essentially reflects "how India is socially, politically and legally organised, … and the behaviour of its people in social and political interactions" (Narsappa 2016). The distinctive formulation of the Rule of Law in India was contingent upon the factors, both political and social, as the Constitution was being drafted in the context of the political struggle for freedom. However, there also was a parallel anti-caste movement, evident in the works of Dr B.R. Ambekdar, Jotiba Phule, Savitribai Phule, Fatima Sheikh, Periyar and so on, against the caste prejudices, discrimination and the violation of basic human dignity and self-respect. This context shaped the craftmanship of the Indian Constitution. Indian Constitution marked the marching of the Indian society towards the ideals, imbibed in the Preamble, of liberty, equality and freedom. However, there was a parallel Hindu social order (read, rule of caste), which is hierarchical, unjust and unequal, which governed the social realm of our society and thus, hindering the realisation of the ideals of the Constitution.

3.3 Politics of and Against Domination

Since at the very centre of this research lies the study of claims of the dominant and the marginalised and thus, it is important to highlight how we understand politics of and against domination.

Domination, according to the Stanford Encyclopaedia of Philosophy, is primarily understood as an imbalance of power which systematically enables the interests of those who are powerful/dominant to sustain their dominance, on one hand, and control others and their actions, at their will, on the other hand (McCammon 2018). Domination often manifests in the subjugation of weaker sections of society by those in the position of power. Shapiro argues that the "to accuse someone of domination is to question the legitimacy of a power relationship" (Shapiro. 2016, 23).

Here, the claim of hurt sentiment by the marginalised communities ought to be understood as a complaint against the hierarchical power relationships that caste

structures entail and also calls for its redressal. Domination is, thus, believed to be "an unjust or morally illegitimate form of social power" (McCammon 2018). To dominate is to injure the dignity and cause resentment to those at the receiving ends. Resisting the Hindu social order of domination is to attain freedom from the oppressive and multi-layered structures of caste and to also transform the cultural aspects of the caste system where those who are not twice-born are considered inferior. The legal measures opted to mend/reform the evils of the caste system are necessary but are not sufficient in themselves to alter the cultural values which shape/inform the power relationships in the society. The upside-down hierarchies, according to Shapiro, were equally vulnerable to domination and amount to injustice even when domination is not being actively exercised at the moment (Shapiro 2016, 27). The historical context of domination informs and shapes the relationship with the dominant. The very reason to "moralise domination" here is owing to what domination can do to people? or what had people in obvious dominant positions done to those marginalised (McCammon 2018)? There are numerous cases to substantiate our case here. Feudal landlords exploit the labour of their subjects; in a patriarchal setup, men assault and inflict violence on/over women; majoritarian individuals/groups lynch people belonging to the minority background; twice-born castes harass, kill, and inflict atrocities of various nature on those belonging to marginalised castes and so on. This power is legitimised by various religious sanctions and local social norms. Thus, this authority or 'legitimate power' is used by the dominant to abuse their power to inflict injustices of various kinds with impunity. This legitimation of dominance is in fundamental contradiction with the Constitutional values of equality, liberty, fraternity and justice. However, the legal norms, which regulate the excesses of both the state and the dominant, did not prevent the atrocities against the marginalised/oppressed sections of society. The loopholes in the laws are abused by the dominant to preserve their positions of power and sustain the status quo of their dominance.

To make sense of the dominant Hindu hurt, one ought to refer to the attempts at resisting colonial interventions, by the dominant Hindu community, in their personal/domestic sphere during colonial rule. The dominant Hindu hurt, here, emerges from their commitment to an unreformed way of Hindu life divorced from the impacts of liberal reform practices and movements. Tanika Sarkar, in *Hindu Wife, Hindu*

Nation, elaborates in great detail how this resistance against colonial interventions, as well as liberal reform movements, in the Hindu domestic sphere gave rise to “militant nationalism” (2010, 191). This militant nationalism used explicit nationalist rhetoric and mobilised Hindus in the name of the defence of a Hindu way of life, which is ‘wounded’ owing to colonial interventions in the Hindu private sphere. This Sarkar observes as “a defence of Hindu patriarchy” (2010, 192). The political unfreedom caused anxieties of losing out on all kinds of autonomous spheres where the dominant Hindus could lay claims to power. This explains the shift to the insistence on the governance of autonomous domestic and spiritual domains. The narratives on the grandness of the autonomous spiritual sphere were placed in the then-emerging public sphere which ought to be protected against the foreign rule. Sarkar argues militant nationalists used the rhetoric of nationalism coupled with wounded Hindu conjugality and in doing so maintained and legitimised the domestic structures of exploitation even during the colonial rule (ibid.).

She is critical of Edward Said’s conception of Orientalism which assumed ‘colonised subjects as an unstratified, monolithic identity which is devoid of power and thus, their active agency in reproducing and maintaining the structures of power is absolved in such a narrative’ (Sarkar 2010, 193). She is critical of ‘the understanding of those who assume that all colonial power, being on one side versus all protesting voices, on the other’(ibid.). For Sarkar, various forms of nationalism, including those which challenged colonialism, remained complicit with power and domination in the domestic sphere (Sarkar 2010, 194). The complicated, graded and multilayered domination, as observed above, makes an interesting case even when the structures of power are challenged.

Kannabiran, in her work *Tools of Justice,* emphasises how the craftsmen of the Indian Constitution seemingly “displaces the unfreedoms internal to the society as well as the unfreedom of colonization”, the tension and the cohabitation (of the two) have also been explored by Sarkar. These tensions shape our understanding of how we come to understand the right to liberty about the conditions of unfreedoms. In an attempt to study this relation, a thorough analysis of free speech and its varied forms of restrictions in the legal framework is required. It is spelt out in the following sections. Casteist speech is recognised as a penal offence and is unprotected by the free speech legal

regime. The detailed study of the forms and nature of legal restrictions on free speech helps us to delve into the necessity to proscribe speech and expressions deemed 'hurtful' in the Indian context. However, it is important to note that not all forms of hurtful communication are penalised under the law of the land. Some are regulated to strike a balance between freedom and other constitutional values.

3.4 Various Forms of Legal Restrictions on Free Speech in Indian Constitutional and Legislative Framework

Law requires channelising of emotions necessary for the civil conduct of social, political and economic affairs. There are various attempts to trivialise the issues around 'hurt-sentiments' and other emotions but the context of the history of hierarchies and discrimination remains neglected. The free speech legal regime across the globe has devised mechanisms, legal and in the form of recommendations, to cater to the sentiments of humiliation and hurt of different communities vis-à-vis freedom of speech and expression to which we shall come in the next section. Likewise, in India, we have legal mechanisms, some of which are in line with international conventions and the social context we are situated in.

The Constitution (First Amendment) Act, 1951 and the Constitution (Sixteenth Amendment) Act, 1963 have an important bearing on the way free speech was understood and crafted by the framers of the Indian Constitution. The two amendments imposed 'reasonable' restrictions, via clause 2 of article 19, in the interests of (i) the security of the State and sovereignty and integrity of India, (ii) friendly relations with foreign States, (iii)public order, (iv) decency or morality, or, about contempt of court, defamation or incitement to an offence. The highest standard applied while restricting article 19(1)(a) is when the security of the State is concerned. Sections 124A of the Indian Penal Code (IPC), 1860 criminalises seditious utterances. The original draft that was discussed in the Constituent Assembly consisted of the word 'sedition' as the ground for restricting free speech which was later removed after discussions in the Constituent Assembly. The leaders of the freedom struggle were tried under this provision and consequently, members of the Constituent Assembly were sceptical of whether to include the word 'sedition' as the ground for limiting free speech owing to the misuse of the provision under colonial rule. This backdrop of the independence

movement informed the drafting of the Constitution. Soon after the birth of the Indian Constitution, the two Supreme Court cases, *Romesh Thapar* and *Brij Bhushan* were concurrently heard in 1950. Both the cases dealt with printing and circulation of magazines namely, Crossroads and Organiser, and a pre-emptive ban imposed on both the magazines fearing dangers owing to public order. Romesh Thapar, a communist, was the editor and publisher of the Crossroads which was critical of Nehru′s foreign policies. Also fearing that Crossroads could provide an impetus to the then growing communist forces, the Madras government imposed a ban on the circulation of the magazine. In another matter, Brij Bhushan was the publisher of the RSS-run magazine, Organiser, and it was feared that it could incite communal riots and could, thus, endanger public order, thus, prior restraint was imposed on it. The two cases flagged important concerns regarding the interpretation of article 19(1) of the Indian Constitution and the imposition of Constitutional limits on the power of the State. The laws invoked to examine and eventually curb the freedom of the press under the tropes of 'public order' and 'public safety'— pertinent sections of the Madras Maintenance of Public Order Act and the East Punjab Public Safety Act—were challenged and declared ultra vires by the Supreme Court of India owing to the violation of the right to free speech. The court was to determine the relationship between 'public safety, 'public order', 'sedition' and 'undermining the security of the State'. Justice Fazl Ali's dissenting opinion in both cases is "a classic example of overbreadth analysis" (Bhatia 51, 2018). It was held that both 'sedition' and 'undermining the security of the State' amount to an act against public order (a state of tranquillity) and public safety, but not every circumstance could potentially lead to undermining the security of the State. A debate about establishing the right causal connection between the words, expressions and consequential actions was brought up. The Supreme court decided in favour of freedom of speech and expression and discarded the government's opinion that public safety is the same as the security of the state or if the security of the state could be in peril with a dissenting or critical opinion piece. The two verdicts were widely lauded for upholding civil liberties and keeping the excesses of the state in check. The Nehru-led-government introduced the First Amendment, owing to the apprehensions about undermining friendly relations with other States (especially. Pakistan, in the wake of the emergency), the sovereignty of the State and public order (communal tensions) following the two Supreme Court decisions. First Amendment had far-reaching

consequences for the free speech jurisprudence in our country with the introduction of 'public order', 'friendly relations with foreign States', and 'incitement to an offence' in the clause (2) of articles 19 and 19(2) was also amended to include the word 'reasonable' before the word restrictions.

In the Indian Penal Code chapter titled, 'Of Offences Against the Public Tranquility', section 153A penalises 'Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony. It was supposedly a preventive measure which aimed to battle class animosities and the apprehensions of public order, given India is not a country with a homogeneous population. According to Narrain, "Section 153A governed the relationship between different communities, a relationship that was mediated by the State" (2016, 45). Along with 153A, it is important to note that section 95 of CrPC (describes the procedure) enables the state governments to confiscate materials that are deemed punishable under 153A. By its implications, several materials were forfeited and censored by the state and never met the eyes of the public, owing to the apprehensions of public order. Section 95 CrPC raised another debate about handing over way too much power in the hands of executives. The background of partition required the executives to check the circulation of publications which could enrage communal tensions (read law and order or Public order) but it outweighed the considerations that it would rest too much power in the hands of executives. The Constitution (First Amendment) Act, 1951 brought forth this tension explicitly.

Hate-speech provisions can be traced in the following chapters of IPC namely; "Of Offences Relating to Religion", "Of Offences Against Public Tranquility", "Of Criminal Intimidation, Insult and Annoyance"

The Indian Penal Code chapter titled, 'Of Offences Relation to Religion', elaborates in section 295A that it is a legal offence, "…whoever, with the *deliberate* and *malicious intention* of *outraging* the religious *feelings* of any *class of citizens of India,* by words, either spoken or written, or by signs or by visible representations, *or otherwise* insults or attempts to *insult* the religion or the religious *beliefs* of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both". Given the presumption of state neutrality

with regards to religion, state is understood as secular in nature meaning abstaining from the domain of religious sensitivities. However, Mahmood has argued that "none of the laws is neutral mechanisms for mediating across different concepts and practices of religiosity but, as instruments of secular power, they demarcate and performatively produce normative notions of religion and religious subjectivity" (2009, 150). The principle of neutrality requires the Indian Judicial system to apply the law mechanically and the technical language of the law clouds the biases it can potentially perpetuate. The adjudication of legal cases under the purview of 295A makes no distinction between the majoritarian/dominant and minority population and consequently, actively produces and reaffirms the power relations between them. Section 298 of the Indian Penal Code criminalises uttering words with deliberate intent to wound religious feelings.

Indian Penal Code chapter titled, 'Of Criminal Intimidation, Insult and Annoyance', deals with Section 505(1) and (2) which penalise publication or circulation of any statement, rumour or report causing public mischief and enmity, hatred or ill-will between classes.

Hate-speech matters in India are usually caught up in two important lines of arguments- (a) speech that could potentially incite violence and thus, disrupt public order situation (b) speech that could potentially harm and cause hurt. The discussion on the public order is explained above in this section, and the discussion on the harm principle is elaborated in chapter 1. However, the third line of argument which has not been legally recognised or adjudicated upon is– the speech could lead to 'incitement to discrimination'.

IPC provisions, detailed above, dealing with hate speech fail to take account of the context, power relation between the speaker and the target, the historical, cultural and contemporary context of both, the power relations and the speech uttered. The provisions relating to hate speech empower the state to regulate some forms of hate speech and restore 'public order' in society. Now, the primary obligation of the state is to protect the 'public'. However, certain words and expressions carry the historical baggage of violence and oppression and continue to remain markers of subordination. Existing provisions underscore the importance of structural power relations in terms of

identities and further grant disproportionate advantages to those already in privileged positions. It has severe ramifications for those in the minority who are deprived of their right to protect their dignity from assault. It also violates the democratic principle of equality. Thus, the Judicial system in India remains burdened with the interpretation of existing constitutional provisions and the statutory laws and thus, prejudiced against identity-based crimes as it fails to assess the interaction of identities, sociologically, which are deeply embedded in the complex power dynamics of Indian society.

3.4.1 Legislations Censoring Free-speech and Expression

The statutory laws are enacted by our legislatures and consist of the rules made, by our elected representatives, for the better governance of the country. Various statutory laws enacted in India have put some forms of limitations on the exercise of free speech. Some of which directly aim to contain the harms of hate speech. These provisions are not without their limitations but are nevertheless detailed below to make sense of the existing laws curtailing free speech and conduct. Legislations censoring free speech is not necessarily about recognising hurt sentiments, it instead aims at balancing other constitutional values.

The Statutory norms such as section 123(3A) of 'The Representation of The People Act, 1951' relating to corrupt practices intend to differentiate between the permissible political speech and the impermissible ones, concerning election, as a measure of corrupt electoral practice. The said Act aims to regulate free political speech in the interests of conducting free and fair elections. Any whatsoever promotion or appeal on the grounds of religion, race, caste, community or language, except for when the appeal was intended to correct a historical or constitutional wrong or was intended to preserve and protect fundamental entitlements under the Indian Constitution, in connection with the election is said to be a corrupt electoral practice and the candidature of the candidate is liable to cancellation. Permissible political speeches were thought to be the ones which are anchored in the secular mandate/ethos of our Constitution.

Section 8 of the said Act disqualifies a person from contesting an election if he is convicted of indulging in acts amounting to the illegitimate use of freedom of speech and expression.

Another Statutory provision is the 'Protection of Civil Rights Act, 1955' which penalises hate speech against historically oppressed Dalits and only reaffirms the Constitutional mandate of abolishing untouchability. Section 7 of the said Act penalises incitement to, and encouragement of untouchability in any form whether through words, either spoken or written or by signs or by visible representations or otherwise by any person or class of persons or the public, in general. The protection accorded to Dalits through this provision is in continuum with the fundamental rights enlisted in Part-III of the Indian Constitution.

Section 3(g) of 'The Religious Institutions (Prevention of Misuse) Act, 1988' provides for a self-regulatory mechanism to prohibit religious institutions or its manager to allow the use of any premises belonging to, or under the control of, the institution for promoting or attempting to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, language or regional groups or castes or communities through words or actions.

Sections 5 and 6 of the 'Cable Television Network Regulation Act, 1995' prohibits transmission or re-transmission of a programme through a cable network in contravention to the prescribed programme code or advertisement code. The part of the problem arises as it is only when the program is aired, that the content which is held objectionable as per the Programme Code comes to notice. Hence, it is upon the channel to ensure that the content conforms with the ethical standards laid down in rules 6 and 7 of Cable Television Network Rules, 1994. For example, rule 6 prohibits airing of a program that "contains an attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes". These pre-emptive measures are taken up the censorship by the government, some argue, are beyond the judicial scrutiny and the burden of overturning the ban is solely upon the channel or the speaker (Bhatia 2016, par. 10).

Sections 4, 5B and 7 of 'The Cinematograph Act, 1952' empower the Board of Film Certification to prohibit and regulate the screening of a film. The said Act has invoked debates around pre-censorship vis-s-vis creative freedom of expression and how the Act vests undue power and excessive discretion to the CBFC; risks of propagation, through cinema, of the ideology of the government in power. Here, in Section 5B of the Cinematograph Act, 1952 the CBFC is required to assess the

cinematography in the light of 'reasonable restrictions' mandated in article 19(2) of the Indian Constitution. The members of CBFC, a quasi-judicial body, are appointed by the Central government directly and are required to regulate the cinematography in line with the principles of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency, morality, defamation, contempt of court or incitement to an offence.

It is observed that hate speech codes and legislations aim at balancing liberty and equality and also protecting the dignity of its individuals. The Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989, is key legislation in this regard, which is discussed in great detail in chapter 3.

3.5 Rationale For the Defence of Free Speech and its Limitations

This section examines the rationale for limiting free speech and highlights what the substantive freedom of speech and expression entails vis-à-vis the right to use slurs. The next section elucidates upon the laws and conventions, both international and domestic, which have highlighted the problematics and legal proscription for hate speech, in general, and casteist speech, in particular, which forms the legal paradigm for substantive and responsible free speech. The last section looks at other forms of restrictions and censorship to finally arrive at an understanding of the free-speech jurisprudence which is elaborated in chapter 3.

Freedom of speech is undoubtedly the most significant principle in any democratic society. All contemporary democratic societies understand and cherish the ideals of freedom of speech and expression. For the very reason that it is highly valued, any curtailment becomes contentious/ controversial. It is important to highlight why the free-speech principle is accorded such great value. One, it is thought to be important for the discovery of the truth. Second, the public ought to have access to information to make informed choices. Third, it provides autonomy essential for the wholesome development of human life. However, it is important to note that almost all societies place limitations on the exercise of freedom of speech and expression in the interests of other competing constitutional values. The context of competing values varies from society to society depending on its nature and character, the kind of inequality that exists, and so on. Academic literature on free speech has now long established that the

freedom of speech cannot be equated with unlimited speech or unrestricted speech. International conventions have placed huge stress on freedom of speech and expression but the same conventions have also placed restrictions on the speech and expressions, which can cause harm owing to unlimited speech. Free speech encapsulates various forms of communication such as speaking, writing, artistic expression, singing, gestures, advertising, slurs, defamation, criticism, protests and so on. Some of these forms of communication are valued more than others. For example, the right to dissent against a government policy is valued over the right to use slurs against the marginalised. Here, one form of communication is prioritised over another thus, one can clearly say that there is no such thing as unlimited speech. The right to slur adds no value to the knowledge system nor is important for any meaningful conversation to arrive at the truth; rather, it discriminates against a section of people. All forms of communication, including slurs, are situated in a social, political and economic setting and thus anything which devalues/ undermines the realisation of autonomy of an individual ought to be limited/ restricted. If the freedom of speech is essential for the smooth functioning of a democratic society, then, anything which undermines this value of democracy owes no defence. It, however, does not suggest that the importance of free speech in principle should/ can be devalued or undermined.

What is the relationship between Freedom of speech and expression and the social structure of a society? What if unlimited freedom of speech and expression authorises a person to attack and hurt the dignity of an individual belonging to a marginalised group and thus, perpetuate discrimination? Social structure is important to highlight/ foreground to prevent the socially marginalised from being further discriminated against. Any speech that incites discrimination against the marginalised most likely emerges from the dominant or the powerful, and, hence, ought to be restricted to enable the society to cherish other competing ideals like democratic equality, autonomy, and the right to a dignified existence and so on. What are the attempts by the government to bring about social order (of equality, liberty, fraternity) in our society and not just focus on the aspects of speech and expressions that disrupt public order? In free-speech jurisprudence, public order is accorded great value. Justice Krishnaswamy Iyer, in *Lalai Singh case (1976 SCC (Cri) 556)*, the ordered security was upheld as an important constitutional principle without which, freedom would be

meaningless. In the entire discussion on public order, nowhere is the *egalitarian social order* given its due importance in the absence of which, discrimination is perpetuated.

3.5.1 Other Hate Speech Codes in Indian Context and Global

The Indian legal system never had a formally recognised category of hate speech. The arguments on hate speech predate the Indian Constitution itself. Hate speech debates and the existing codes today have their origins in the policy of our colonial rulers. It was premised on their understanding of Indians as susceptible to religious excitement. This understanding of susceptibility towards religion was also founded in the Indian legal provisions dealing with hurt sentiments, intentional insult and incitement to violence. However, the background of the partition of India also informed this discussion in the Constituent Assembly. Narrain (120, 2016) notes, that Indian Penal provisions relating to the regulation of hate speech do not differ greatly in terms of the content they seek to regulate. The debate then was premised on the fact that the then-existing laws can settle the debate on whether the insult to religious figures is equivalent to the religion itself. This was debated in three cases of similar nature, *Kali Charan Sharma, Devi Sharan Sharma* and *Raj Paul* (popularly known as the Rangeela Rasool case). In the former two cases, they were found guilty of violating section 153A of the IPC but in the case of Raj Paul, they were found guilty of violating section 153A. Colonial rulers then brought about section 295A of the IPC which read, "deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs". The debate was then shifted from what section 153A read, "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc." to outraging religious feelings of any citizen. The two provisions are very commonly used together assuming a connection between promoting enmity between religions and outraging religious feelings. The judiciary deliberated on these debates in many cases which later followed. However, the reasoning of the court did not remain consistent in dealing with matters of similar nature.

Hate speech in India is primarily restricted on the grounds of 'public order' and 'sovereignty and integrity', owing to limitations stated in article 19(2). The First Amendment broadened the scope of 19(2) adding "in the interest of public order" to

the clause. The concern of the court now shifted to the idea of greater public interest which outweighed other important intrinsic values of the free speech principle.

Restrictions under sections 153A and 295A of the IPC have been held constitutionally valid on the grounds of public order. However, LCI (2017, 39) is of the view that if hate-speech intends to insult or hurt religious feelings, it can invoke 'decency and morality' clause under article 19(2). However, in the case of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocity) Act, 1989, the form of hate-speech is insult, intimidation and humiliation as is specified in Section 3(1)(x). The contextual enquiry of the identity of the speaker and the target, the power relation between the two and the contextual analysis of the speech/words uttered are important in determining the hate-speech under the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989. The contemporary debate rests on the universal entitlement of the right to free speech to all its citizens, on the one hand, and the lack of access to the medium of expression, capabilities to participate in the public sphere, and social and economic infrastructure of the communication, on the other.

This concern is also flagged by Katharine Gelber in her book *Speaking Back*, wherein she employs capability theory in the arena of policy-making on speech. According to Gelber, this can provide a 'reconciliation between a theory in defence of free speech and in recognising the harms embedded in hate-speech' (2002, 6). For it provides for a framework which offers requisite institutional, education and material help to enable people for communicative action if the participation in speech-act of some is restricted or hindered by others.

The question now arises, why is hate-speech not covered under reasonably restrictive measures of 19(2) which restricts free-speech owing to sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or about contempt of court, defamation or incitement to an offence. Our discussion, here, is limited to the hate-speech principle, in general, and caste-hate speech, in particular. Hate-speech is not defined by any law in India. However, there are certain provisions in different legislations which restrict certain forms of speech as exceptions to the free speech principle. One amongst many described above is Section 3(1)(x) of the Scheduled Caste and Scheduled Tribe

(Prevention of Atrocities) Act, 1989 which proscribes "intentionally *insulting* or *intimidating* with an intent to *humiliate* a member of a Scheduled caste or Scheduled Tribe in any place within public view" (emphasis added). Law Commission of India's (LCI, hereafter) Report number 267 on Hate Speech describes hate-speech (2017, 38) as

> …expression which is abusive, insulting, intimidating, harassing or which incites violence, hatred or discrimination against groups identified by characteristics such as one's race, religion, place of birth, residence, region, language, *caste or community*, sexual orientation or personal convictions (emphasis added).

LCI's report places stress on the importance of "incitement to discrimination" to argue that incitement to violence cannot be the sole test for determining hate-speech. Also, the speech that does not incites violence is capable of "perpetuating discriminatory attitudes" against the communities which are already marginalised. Hence, the incitement to discrimination is also a prominent factor in the identification of hate-speech, at large (2017, 37). Numerous International Conventions and human rights documents have contributed to flagging the increase in hate-speech worldwide as a global human rights issue. The international articulation of human rights has a limited yet important bearing on the human rights discourse as it enables new conversation and dialogue on human rights at the domestic level in the sphere of politics, law, public sphere, media, academics, civil society and so on. The international enforcement mechanisms and processes both, monitor the domestic communication on human rights affairs as well as initiate international and transnational dialogues on the protection of the rights. In the matters of hate speech, many democratic societies including ours are caught up in the tradeoff between their commitment to the protection of free speech and the prevention of discrimination against the historically marginalised. Amidst this, it is important to look at the international consensus on the way hate speech has been defined and understood. The rationale for invoking definitions and international norms relating to hate-speech is to understand how hate-speech has been globally understood and constituted as an anti-human rights issue.

United Nations Strategy and Plan of Action on Hate Speech (2019, 2) document understands hate-speech as,

> …any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or *discriminatory language* concerning a person or a group based on who they are, in other words, based on their religion, ethnicity, nationality, race, colour, *descent*, gender or *other identity factor* (emphasis added).

Their assessment of the impact of speech concerns (ibid.)

> …human rights protection; *prevention of atrocity crime*; preventing and countering terrorism and the underlying spread of violent extremism and counter-terrorism; preventing and addressing gender-based violence; enhancing protection of civilians; refugee protection; *the fight against all forms of racism and discrimination*; protection of minorities; sustaining peace; and engaging women, children and youth (emphasis added).

The document clearly states that their intent is not to advocate for the prohibition of freedom of speech instead the aim is to prohibit incitement to discrimination, hostility and violence. The document particularly stresses 'incitement' as a very dangerous form of speech as it could potentially lead to atrocity crimes. It also states that the speech which does not qualify to incite discrimination need not be proscribed by the States but proscribed or not, hate speech could be harmful.

Similarly, Article 20 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that states must prohibit by law "any advocacy of national, racial, or religious hatred that constitutes *incitement to discrimination*, hostility, or violence" (emphasis added).

Article 10(1) of the European Convention on Human Rights (ECHR) states,

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The guarantee of freedom of speech here is also not without an exception as stipulated in clause 2 of article 10 which reads as,

> The exercise of these freedoms, since it carries with it duties and *responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the *protection of health or morals*, for the *protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (emphasis added).

The Committee of Ministers of the Council of Europe has defined Hate-speech as the following,

> …shall be understood as covering all forms of expression which spread, *incite,* promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, *discrimination and hostility* against minorities, migrants and people of immigrant origin (emphasis added).

European Court of Human Rights (ECtHR) while adjudicating the cases related to hate-speech has ascertained the extent of free speech in line with the values highlighted in the Convention (ECHR). Another important aspect highlighted by ECtHR, in many cases related to hate-speech, is the significance of *responsible speech* (Hate Speech Report 2017, 20). ECtHR has also stressed that in an unequal society granting protection to all kinds of speech, including hate-speech, often compromises their commitment to non-discrimination and equality (ibid.).

European Commission Against Racism and Intolerance (ECRI) general policy recommendation no. 15 on Combating Hate-speech adopted on 8 December 2015 defines hate-speech which,

> …entails the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes *race*, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation (emphasis added).

ECRI, while reaffirming the fundamental significance of freedom of opinion and expression, tolerance and respect for the dignity of all individuals for a plural and democratic society, also notes that freedom of expression and opinion is not an unqualified right and ought to be exercised in a way consistent with the rights of others. It aims to combat all forms and manifestations of racism and intolerance.

In 2008, the Council of the European Union adopted a Framework Decision on combating certain forms and expressions of racism and xenophobia using criminal law. It states that anything that '*incites violence or hatred* against a group of persons or members of a group defined by reference to race, colour, religion, *descent* or national or ethnic origin' is punishable under the EU criminal law (2008, L 328/56) (emphasis added).

The Framework Decision (ibid.) elaborates that the term 'descent' should be understood as

> … referring mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as *race* or *colour*), but not necessarily all of these characteristics still exist. Despite that, because of their descent, such persons or groups of persons may be subject to hatred or violence"

The scope of the word, ‘descent’ was extensively debated, by eminent sociologists, political scientists, civil society (NGOs), and social and political activists during and after the 2001 UN World Conference against Racism held at Durban, South Africa (also, referred to as Durban Conference), on whether or not the term ‘descent’ can incorporate caste. There were opinions in favour and against the inclusion of ‘caste’ in the agenda of the 2001 UN World Conference against Racism. The government of India opposed the evaluation of caste discrimination in the Durban Conference on the following grounds: firstly, they argued caste is not a race and maintained that Scheduled Caste and Scheduled Tribe do not qualify under the purview of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) where ‘descent’ only means ‘racial descent’ and thus, caste discrimination ought not to be assessed with the racial discrimination and racial intolerance. Secondly, they argued that the prevailing ‘internal’ mechanisms in our country to combat casteism are sufficient and hence, they do not need ‘external’ International human rights mechanisms to intervene. GOI’s stand was met with strong resistance by social and political activists, some academicians and civil society. National Campaign for Dalit Human Rights (NCDHR) refuted GOI’s arguments saying that “caste may not be race, but caste discrimination, like racism, is a violation of human rights. NCDHR emphasised recognising “caste as a fundamental basis for the violation of human rights against Dalits in South Asia”. They criticised GOI’s stand saying that “they have reduced the entire matter to semantics”. Another criticism against GOI’s position that caste is an internal matter was fiercely criticised by everyone, including NCDHR. NCDHR stated that ‘GOI’s argument is simply unacceptable because GOI recognises and is a party to international conventions for human rights and thus, it hardly makes any sense as to why one cannot appeal to international bodies for caste atrocities’(ibid.). They also believed that the resistance by GOI is due to the risk of being exposed for their lackadaisical attitude towards caste discrimination. Following this an eminent scholar, Andre Beteille resigned from the National Committee which was working on a draft to be presented at the Durban Conference. Beteille argued that treating caste as a form of race is “politically mischievous and scientifically nonsensical” (Kannabiran 2001, par. 3). He faced backlash for his statements both from the academic community and Dalit rights activists. Macwan along with a majority of activists opined in line with Beteille, that caste is not a race, but also urged that the issue of caste discrimination

ought to be raised at the Durban conference. Kannabiran rejected Beteille's argument on scientific validation of caste, she instead argued that race is socially constructed and is derived from racism and not the other way round. The commonality of experiences of prejudices, systematic oppression and institutionalised discrimination underlie the force of the assertion by Dalit rights activists to flag the issue at the World Conference Against Racism. Omvedt argued, "[t]he most haunting lacuna of contemporary Indian sociology remains the lack of data with which to do this [assess the validity of the claim made by Dalit organisations that caste oppression remains very much a reality in contemporary Indian society, and the apparent lack of concern for even gathering data".

In matters of hate speech, international norms are often subsumed with racial, religious and ethnic concerns and barely take explicit account of the underlying caste realities in our country. However, global free speech norms set a discursive tone by foregrounding 'discrimination', 'hierarchy', 'dignity' and so on as important characteristics while defining and elaborating on the various characteristics of hate speech. It is important because free speech doctrine recognises the right of the speaker whereas, the impact of the hurtful speech on its target barely finds any mention. The international norms though only suggestive in nature unveils this tension underlying the discourse on hate speech. Many countries have adopted various domestic legislative measures which conform with the international norms to address the evils of hate speech depending on the context of the societies. Having discussed this, the last section elaborates on the slurs and the social impact on their targets. This is done by invoking the question of dignity embedded in the hurt claims of the marginalised.

3.6 Slurs, its legal status and implications

This section highlights the way academic scholars conceptualised slurs which have come under the purview of law and therefore, their implications. It also briefly deals with the response of different quasi-legal bodies, ministries and committees before and after slurs was finally legally proscribed.

International norms advocate hate speech or slurs based on descent, colour, birth, religion and so on. Slurs, many believe, can cause real physical hurt or damage and are not merely expressions which are available for judgement as to right or wrong. According to Hill, proponents of the Speech Act theory understand words as "acts" and

are not expressions necessary for the discovery of truth and thus, argue that slurs should be proscribed like physical assault and ought not to be protected like speech (Hill 2008, 55). Protection of slurs as speech compromises our constitutional commitment to non-discrimination, right to equality and right to life.

For some, the meanings of slurs can be recaptured from their ugly denotations and be reinvented to endow them with positive, "identity-enhancing connotations" (2008, 57). Hill elaborates on Butler's critique wherein she argues that the slurs are, instead, acts which are "productive and constitutive of the subjectivity" and this "subjectivity is produced in the act of naming/labelling and also in the act of being named/labelled" (Hill 2008, 57). Butler believes that the discourse on slurs is linked with the history and cannot be separated from it thus, any attempt to punish/criminalise the speaker stands in vain as the slur cannot be singled out from the discourse and proscribed and its censorship would only encourage "unintended proliferation" (Hill 2008, 58). In such a situation, the best political strategy, according to Butler, is to endow the slurs with "new kinds of subjectivity" (ibid.). The perfect example that comes to mind, here, is the usage of the word 'Harijan', for people belonging to Scheduled Castes, meaning children of God. Gandhi had employed this popular vaishnavite term 'Hari' to avoid and counter strongly stigmatised words like, 'untouchables', '*chamar*', '*bhangi*' and so on to present them as more acceptable to the upper castes (Ramanathan 2015). Gandhi believed Hinduism should be reformed within and bring Harijans into the realm of Hindu social order. Dalits were critical of this understanding of their upliftment as per Hinduism. For they believed the Hindu social system is primarily the reason for their distress. There was huge resistance against the usage of Harijan to refer to people of Scheduled caste as they thought of the word 'Harijan' as condescending and patronising in nature and also perceived it as an attempt to avoid the real problems faced by them. The word, Harijan, was repeatedly used by most of the Parliamentarians during the discussions in Lok Sabha and Rajya Sabha debates over the Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Bill, 1980. Ambedkar protested strongly against the word, and Harijan and even, the Centre for Dalit Human Rights have objected against it for a very long. (ibid.) Later on, the Parliamentary Committee took notice of it and recommended that the Ministry of Social Justice and Empowerment issue instructions to all the state governments and other official

departments to prevent using the term, Harijan (ibid.). The committee even suggested penalising those who continued to use it (ibid.). Many official directions were issued to the government departments to prevent the circulation of the word. Thus, the attempts to create "new kinds of subjectivity" by endowing them with new meanings, which are reflective of pride and solidarity, have been met with strong criticism and resistance and were considered a gross misappropriation and manipulation of their identities. Butler's idea of endowing new meanings and subjectivities to the slurs using 'more speech' offers a promising approach yet it remains very limited in matters of practical application.

In India, routine caste-based humiliating references have been recognised as caste atrocity in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It affirms the understanding that caste-based hate crimes and caste hate speech reinforce each other. No caste society exists without caste hate speech. Caste hate speech is an essential condition for a thriving caste society. At the very heart of the legislation is the question of human dignity. The POA Act carefully recognises various forms of violations of dignity. In this context, the POA Act functions both, to prevent caste atrocities and imagine a new human who is both a citizen and an individual with human dignity.

3.6.1. The Prominence of Dignity and Self-respect

Almost all kinds of marginalised identity-based slurs have time and again articulated that slurs amount to an assault on their dignity and self-respect in their own eyes and the eyes of others. This section attempts to foreground dignity and self-respect which primarily is a result of the response to slurs and thereby, their articulation which primarily highlights the concept of dignity and self-respect.

Recently learned judges in the *Amish Devgan vs. Union of India [(2021) 1 SCC 1]* case defined dignity, in the context of hate speech as

> ...refers to a person′s basic entitlement as a member of society in good standing, his status as a social equal and as a bearer of human rights and constitutional entitlements…assurance of participatory equality in interpersonal relationships between the citizens, and between the State and the citizens, and thereby fosters self-worth ((2021) 1 SCC 1, 68 para).

The importance of self-respect and dignified existence lies in acknowledging it as an ideal worth achieving collectively. Parekh (2009, 34-39) extensively discusses the Kantian notion of self-respect which he understood as "the duty of man to himself" and the reasoning by which a man has a duty to respect oneself is also extended as a duty towards respecting others. Here, an individual is understood as a human being, like every other human being deserving equal respect. Parekh, however, is critical of this homogenisation and goes beyond to provide reasoning for the respect towards 'individuality' and 'difference' that shapes an individual identity. He argues that

> …individuals are human beings possessing certain distinctive capacities, by virtue of which they belong to an ontologically privileged species and deserve respect. They are also distinct centres of self-consciousness, each unique in his or her experiences, history, background, talents, sensibilities, and ways of looking at the world. They pursue their own purposes, dream their dreams, understand and organize their lives in their own different ways, build their own world of social relations, cherish different ideals, and forge distinct identities in terms of which they define their self-respect. They also grow and are shaped by particular cultural, ethnic, religious and political communities. Insofar as they identify with and define themselves in terms of some or all of these, their membership of them becomes an important part of their individual identity and self-respect. Their self-respect is attacked not only when they are attacked as human beings but also as Jews, Christian, women, blacks or Frenchmen. This is why they might rightly say in certain situations that as 'self-respecting' Jews, Hindus, or Englishmen, they will not allow themselves to be treated in certain ways and their individual or communal identity to be mocked and belittled (Parekh 2009, 36).

Both the aspects of self-respect, universal and particular, hold great significance. The universal dimension of self-respect implies that one accords self-respect to oneself and other human beings by asserting equality with all others and resisting any attempt towards its negation (Parekh 2009, 37).

At the same time, one demands respect from others and does nothing to demean/belittle the self-respect of others. The self-respect of an individual who defines oneself in a particular way, is the carrier of a particular identity and associates/belongs with a particular community (religious, cultural, ethnic, political, social and so on) are the dimensions which are equally worthy of respect. These multi-faceted aspects of life shape a unique identity based on difference and the demands of respect are not by the virtue of being a human being but rather, as distinct factors that forge one's identity (Parekh 2009, 38).

Rohith Vemula, a research scholar from the Hyderabad University had to take his life after having to suffer continuously from institutional harassment and discrimination owing to his caste identity, wrote in his last letter, "…the value of a man

was reduced to his immediate identity and nearest possibility. To a vote. To a number. To a thing. Never was a man treated as a mind. As a glorious thing made up of stardust. In every field, in studies, in streets, in politics, and in dying and living" (The Wire Staff 2019). His self-respect and dignity were repeatedly assaulted for belonging to particular marginalised caste identity. His identity was reduced to his ascribed caste status, to which he was born. These are the many ways in which the structural hierarchy of ascribed caste status is reinforced. Kantian optimism miserably fails in everyday affairs where people are defined within the clutches of institutionalised categories. The utopia of common humanity can only be achieved when such ideals are cherished and embedded in the institutions and their practices too. The notion of universal self-respect for the virtue of being a "transcendental and noumenal self" was never accorded to Rohith and all the attempts at resisting attacks on his self-respect were never translated into justice (Guru 2009, 36). It is important to note that in India the caste identity and status are fixed at birth and one can never transcend the marker and the associated degradation of the marginalised castes to which one is born. The difference in caste identities then becomes the permanent markers of identities and thus, the grounds as well as the justification for the kind of treatment one receives. In India, caste is a huge barrier to the realisation of self-respect and the dignified existence essential to wholly cherish the right to life.

3.7 Conclusion

An attempt to study the claims of hurt reveals that the marginalised articulate hurt sentiment as claims of humiliation against the violation of their dignified existence as an equal right-bearing citizen whereas, the claims of hurt by the dominant caste elite are articulated in terms of caste pride, outrage and victimhood. On one hand, Caste's pride is a definite source of incitement to discrimination. For it is a reminder of caste hierarchy for both, the dominant and those at the margins. Caste pride affirmation is also the declaration of the inferior status of those at the margins of the caste hierarchy. It is normalised and considered a legitimate form of being while also disguising caste as a credible multicultural thing to be projected to the world. The claims of victimhood by the dominant can be traced back to the critique of Hinduism and its practices by the missionaries and the social reformers. The dominant caste elites, as argued by Guru, "struggle for the affirmation of what is in the past, a belief which is deeply Brahmanical

in nature and hence, inherently hierarchical and which faces a challenge from the lower strata of the society"(Guru 2009, 213). In other words, "their struggle is to retain or reproduce the hierarchical past in the cultural present" (ibid.). Earlier, it was a defensive reaction against the attempts to reform Hindu practices but gradually, it can be observed that their hurt in no time translates into outrage, enmeshed with victimhood. Their victimhood has the constant "other" as Muslims, Dalits and other marginalised sections of the society who allegedly pose threats to their Hindu tradition and culture. The claims of hurt by the dominant caste elites have only proven to be what Cherian George has observed to be a "versatile political strategy" for the mass mobilisation of 'Hindus' in contemporary times (George 2016, 2957). On the other hand, the notion of 'dignity' is foregrounded in the struggles against all kinds of caste-based violence including caste hate speech. It is observed that the question of dignity is embedded in the way regulation of hate speech is worded in the international laws, by civil society groups, by academic scholars and in the domestic laws. The relationship between social structures and free speech is central to understanding hate speech while navigating through the burden of neutrality.

Chapter-4:

The Adjudication of Hurt Sentiments Claims and the Limits of the Free Speech Principle

> Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative
>
> - Dr. B.R Ambedkar, November 25, 1949,
>
> B.R. Ambedkar's last address to the Constituent Assembly

4.1 Introduction

The right to freedom of speech and expression has been understood as vital liberty, however, its practical application in definite situations has been subjected to contestations. It is a widely accepted fact that almost all democracies have observed sharp disagreements over the nature and scope of the right to free speech regarding matters of hate speech, pornography, public order, sedition, and so on. The opinions of free speech advocates and critics are highly divided on where to draw a boundary so that other competing values, such as equality, the right to a dignified life, and non-discrimination, are not threatened. In the 267th report on Hate Speech, the Law Commission of India (LCI), highlights that "liberty and equality are complementary and not antithetical to each other" (Hate Speech 2017, 33). The intent of equality is not to suppress liberty; instead, it aims at balancing the two so that the rights of the marginalised are not infringed upon. Similarly, freedom of speech intends to provide an equal voice in society. The neutrality of the state in dispensing the status of "formal" equality to all kinds of speeches often perpetuates discriminatory attitudes as minorities and marginalised are not well placed in the society to make their voices heard. The LCI report, thus, recognises "incitement to discrimination" as the fundamental principle of hate speech (ibid.). The discussion on free speech also lays bare the 'problem of freedom' which is evident through the hate speech jurisprudence. It requires the assessment of the constitutional right to liberty about the "conditions of unfreedoms" (Kannabiran 2012, 5). Ambedkar was deeply concerned with this entrenched norm of discrimination which constituted the undemocratic order of being. Keeping in mind, the deeply embedded power relations operating in our society, Ambedkar, along with

others in the Constituent Assembly, debated and finally, formalised the prohibition of untouchability, the right to equality, and so on to confer meaningful and substantive rights on to the citizens. Article 15 of the Indian Constitution provides for both, horizontal and vertical application of rights. Hence, discrimination would mean a citizen/person subjected to any disability, liability, or restriction on the grounds of race, caste, sex, place of birth, or any of them. Discrimination, Kannabiran (2017, 12) opines, "is a curtailing conduct that operates indirectly as well as directly, the remedy also necessitates the creation of special provisions to combat discrimination." The understanding of liberty in article 15 rests on the way provision is substantiated to mean freedom of no citizen can be curtailed on the grounds specified in article 15(2). Article 17 further bans untouchability and its practice in any form both by, citizens and the state. The shifting strategies of discrimination, exclusion and the inadequacies of the then-existing provisions and legislations necessitated the enactment of special legislation of its kind. Understanding liberty in the backdrop of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is an integral part of this research, which we shall arrive at in the following sections. 'Discrimination' as we understand is an infringement upon the right to dignified life and 'incitement to discrimination', by extension would mean a threat to the right to life with dignity. The varied aspects of derogation of life are enlisted in section 3 of the Act which according to the Act constitutes atrocities.

To begin with, this discussion is based on the assumption that "not all speech is free" meaning free speech is constrained by, what Kannabiran calls, conditions of unfreedoms (Boler 2004, 3). In other words, the free speech principle is deeply mediated by the institutionalised forms of power inequities such that it compromises the right to equality, one of the fundamental values of a democratic society. For example, when obscenity or pornography is in question, structural subordination between man and woman assumes great importance. Whereas in matters regarding hate speech, IPC does not recognise the structural power relations embedded in our society. The flattening of differences in identities has severe implications for those who are institutionally discriminated against and do not have equal access to resources. The absence of appropriate conditions required to cherish liberty provides for the context to perpetuate discrimination. These conditions of unfreedom constituted the

contradictions that shaped India's political modernity which was caught in the conflict between the then-existing status quo and constitutional morality. Constitutional morality is aimed at displacing the unfreedoms inherent in our society while upholding the values of freedom, non-discrimination, equality, and justice. For Ambedkar, the entrenchment of constitutional morality amongst all the citizens was an essential condition as it necessitated free citizens as indispensable to the free state. The Act, while applying the "structural inequality approach to a politics of difference", as propounded by Young, to differentiate people who suffer discrimination on account of caste from those who do not, recognises the social fault lines underlying our society (Young 2009, 366). However, in the adjudication of claims of discrimination under section 3(1)(x) of the Act, we observe that the interpretation of the claims in the court of law is not elaborated in the light of other foundational values. In this regard, Kannabiran (2017, 25) proposes to employ "purposive and progressive strategies for the interpretation of the fundamental rights" which might allow for "the enlargement rather than an abridgement of the protections". This calls for a detailed analysis of the role of the state, and free speech jurisprudence vis-á-vis differential claims of hurt.

4.2 Rethinking the Regulatory Role of State

There are a lot of apprehensions regarding the intervening role of the state in matters regarding free speech as it invites an assessment of where to draw a limit to the state's authority. The accurate position of this limit has varied in time and space, amidst contexts, between various courts and also, amongst various judges but has primarily reflected a balance of conflicting interests, i.e., the value of free speech and expression versus the "countervalues" advanced by the state while regulating the speech. The courts are caught in weighing the right to free speech against the countervalues the state-led regulation seeks to achieve. It is indeed a slippery slope as when one authorises the state to censor, it is difficult to assess what is permissible and what is not.

The principle of state neutrality in the matters of free speech brings in a paradox of the kind which does not demarcate the kind of content being used in a speech, it instead relies on whether or not the speech poses potential threats to law and order, sovereignty and so on. Since our discussion is primarily focused on hate speech, we

need to assess what State-led regulation implies for hate speech. Similar apprehension is flagged by Narrain (2017), who argues, "since, hate speech laws are designed to be invoked by the government in power against those who violate the law, but the question is what happens when hate speech has the tacit support of those in power, or if it is the government itself that is producing hate speech?" The concerns raised here are legitimate yet worrisome as our public sphere today is facing the challenges raised by Narrain. But on the flip side, Parekh (2012, 44) observes that

> when hate speech is allowed uninhibited expression, its targets rightly conclude that the state either shares the implied sentiments or does not consider their dignity, self-respect, and well-being important enough to warrant action.

The conflict, thus, here is

> between the criminalisation of a swathe of speech in a situation where hurt sentiment and offensive speech are constantly produced … and protecting the rights of vulnerable communities, ensuring that they are not scared into silence on the pretext of free speech (Narrain 2017).

The state often uses the threat to public order as an argument to justify its regulation of hate speech. There are multiple facets to this argument. Since the provisions of IPC, which are invoked in matters of hate speech, take no account of the structural basis of identities. Thus, what follows is repression of voices when the State succumbs to threats of violence, it can lead authors, artists, and journalists to self-censor the unpopular, subverting, and dissenting opinions. The state, in the garb of maintaining law and order, also preserves the social status quo. State giving in to the threats, of the dominant, of public violence, further perpetuates the self-silencing effect on the marginalised. However, what is least discussed in the critique of the free-speech doctrine is that 'the derogatory speech can have a silencing effect on the marginalised groups, making them feel less entitled to voice their opinions in the public sphere'. Needless to say, they already have lesser recourse to the public sphere owing to the affordability of economic and social infrastructure to actively participate in the public sphere. The self-silencing effect can empower those already privileged and whose expressions assume the inferiority of the targeted groups. Such expressions are couched within the dominant ideology of caste superiority and perpetuate the mistaken belief that no dissenting opinion has been voiced or the opinion of the dominant has not been challenged so far. To remove such impediments, Owen M Fiss (2009, 18) argues that "..sometimes we must lower the voices of some to hear the voices of others". In other

words, he proposes to regulate the dominant voices to enhance the voices of the marginalised. The idea is to regulate or censor the Casteist expressions used by Casteist minds and not to regulate the general advocacy of ideas or the ideas which challenge casteism. It is in this regard, that Parekh makes an observation,

> …although law must be our last resort, its intervention cannot be ruled out for several important reasons. Most obviously, assuming meaningful levels of enforcement and compliance, the direct prohibition would reduce or eliminate speech that causes very real harm to the targets of such speech (Parekh 2012, 46).

The liberal apprehensions over the regulatory role of the state are shattered when caste hate speech is concerned as the legislation accounts for the embedded structural social relations. It happens because the countervalues advanced by the state, in this case, have an unusually compelling character.

4.3 Hurt Sentiment Claims of Marginalised Communities Against the Caste Hate Speech

The claims of being hurt by the marginalised are emanating from the structural inequalities present in society. In this context. The claims of humiliation thus ought to be understood both, as an assertion of their right to political equality, i.e., of "One Man, One Vote, One Value" and as well as a reminder of duty, to those in the dominant positions, to consider and treat everyone as equals. There is an inherent belief that the marginalised challenging dominant ideologies rooted in the hierarchy will result in altering the person's and group's attitudes that are ignorant of the constitutional values such as freedom and equality. It functions to rectify/correct the systematic discrimination committed against the marginalised/subordinated voices. Hurt sentiment claims by the marginalised are also the claims of democratic values such as equality and non-discrimination as the notion of a democratic society under the pretext of routine subordination of Dalits and Adivasis stands fractured. The neglect of routine caste atrocities by the officials, and not invoking the law specially designed for caste-based atrocities keeps perpetuating the caste atrocities on an everyday basis. Such everyday atrocities on Dalits have one thing in common- atrocities primarily serve as a task of teaching assertive Dalits a lesson. The dominant openly flaunt the impunity granted to them by the virtue of their caste. In other words, as Nicolas Jaoul (2008, 1-

32) points out, 'it is constitutive of a public statement by dominant castes that their caste rule was above and beyond the law'. Several instances validate these arguments. In one such instance at IIT Kharagpur, an associate professor named Seema Singh, who was teaching English preparatory classes for SC, ST, OBC (Other Backward Class), and PWD (Persons with Disabilities) students, was found calling her class students, "bloody bastards" for not standing for the national anthem in a video which went viral. She was also found calling her students and their parents "dumb" and even openly dared her students to go to the Minority Affairs Committee or Ministry of Education for the same (LiveWire 2021). To this, an IIT Bombay-based study circle named Ambedkar Periyar Phule Study Circle (APPSC) responded,

> She knows that the savanna-dominated IIT administration will protect her from any backlash. She uses hyper-nationalism to cloud her casteist mentality and forces the students to stand up for the national anthem which the Supreme Court of India had declared is not mandatory. However, even when students complied with her demand, she still uses it to abuse and throws casteist slurs at them again and again (LiveWire 2021).

The act of Seema Singh is rooted in the light of upper caste belief which treats reservations as anti-meritocratic in nature and, therefore, the students (including their parents) taking admission through quota are "dumb". The educational aspiration amongst the Bahujan community is met with institutional and structural humiliation routinely in higher educational institutions which had been identified as sites of caste-based discrimination (Sitlhou 2017). Similar stories from premier educational institutions find mentioned on an everyday basis. The claims of humiliation, which people belonging to SC, ST, and OBC have to undergo in their everyday lives, are rooted in highlighting normalised forms of systematic discrimination and casteist mentality of the oppressor communities and the kind of impunity they can avail for perpetuating the casteist crimes.

In another incident where Vandana Katariya, a Dalit woman who is an Indian field hockey player, and her family were hurled casteist slurs and abuses by the Rajput men who were found dancing and firing crackers only to mock her and her family at her native home in Roshnabad, Haridwar. This incident occurred in the backdrop of the Indian women's team losing a Hockey match to Argentina in the Tokyo Olympics, 2021. It was stated that the team lost the match because it had "too many Dalit players in it" (PTI 2021). Vandana is the only Indian woman to ever score a hat-trick at the

Olympics in Hockey. Vandana's tremendous performance at the Olympics did nothing to alter the deep-seated caste prejudices against her and other Dalit counterparts. Neeraj Ghaywan, a film director tweeted in response (Tripathi 2021)

> No matter how much we achieve in life, how many of our generations prosper, how rich & powerful we become, the burden of Caste will always rear its ugly head. It is the rock we carry up the Sisyphusian mountain of dignity. It is the one #VandanaKatariya carries.

The idea of dignified life which is time and again denied to Dalits and yet again asserted by them is a telling example of the way their claims are rooted in upholding the substantive democratic values.

In another instance, a comedian named Neville Shah was criticised for using casteist comedy while mocking the entire community who avail affirmative action policy. He was accused of being blinded by his caste privilege and for being an ableist as he mocks a doctor (who walked with a limp) by highlighting his incompetency that he made a Venn diagram instead of a kidney. Referring to the doctor, he further stated, *"Ya toh ye Dr House hai aur mummy bach gayi (either he's Dr House and my mother is saved)…or quota admission"* (The Quint 2021). Several Twitter users condemned his remarks saying that his comedy is premised on the logic and narrow understanding of merit which perpetuate casteist microaggressions and reinforce caste-based stereotypes against marginalized communities who have been historically subjugated. Some even questioned his ignorance asking how does he know that the said doctor did not come through the management seat or barely scraped through private school? Some, while arguing that his understanding of merit lacked research, termed his comedy as "average *savarna* 'meritorious' comedy", "ableist, casteist and nauseatingly unfunny" (The Quint 2021).

In one of the incidents a well-known cricketer Yuvraj Singh, while on online chat with Rohit Sharma, was found using the casteist slur "*bhangi*" while referring to his colleague, Yuzvendra Chahal. Yuvraj's derogatory comment received flak for abusing his caste privilege and being blinded by it. The casteist remark has allegedly 'humiliated people coming from the Valmiki community and all those castes who are involved in sweeping, manual scavenging across the country'. Following this, #युवराज_सिंह_माफी_मांगो began to trend on Twitter. Many Twitter users resorted to Yuvraj's defence saying the furore on social media was an overreaction and the

comment was made in a friendly chat as it was "a playful banter between two friends which should be kept as it is" (Staff 2020).

In another similar incident, Munmun Dutta, a casting star from a daily soap, *Tarak Mehta ka Ulta Chashma,* was seen saying "I am coming to youtube and I want to look good and don't want to look like a *bhangi*". Twitter users started a trend, #ArrestMunmumDutta, and demanded that she be booked under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. She was criticised for uttering casteist and unconstitutional words and being a celebrity, accountability was therefore demanded of her. She was also criticised for being ignorant of the crime committed and it was further said, "She being a popular actor, accountability is required here. Crime can't be just excused if you simply don't know the crime" (Quint Neon 2021).

Justice D.Y. Chandrachud, while delivering the 13th B.R. Ambedkar Memorial Lecture on *Conceptualising Marginalisation: Agency, Assertion, and Personhood,* highlighted how "the professional achievements of the upper caste individuals can wash away their caste identities, it will never be the same for an individual from the marginalised community" (Dwivedi and Kumar 2021). He further stated, "Castelessness is a privilege that only the upper caste can afford…members of the lower caste have to hold on to their caste identity to avail the protection of laws such as reservation" (ibid.). The following remarks substantiate the claims of hurt sentiments by the marginalised individuals and groups. The ignorance of caste privileges as highlighted in the claims made above has a peculiar demand for recognition and respect as equals. The demand for social equality and non-discrimination is inherent in their claims.

Anupama Rao notes, 'the history of Indian democracy is inseparable from the history of caste and the anti-caste resistance which rendered a salient feature to caste i.e. the practice of inequality'(Rao 2009, xii). Caste, once believed to be a form of social organisation, which is "representative of backwardness and underdevelopment" is currently "a vibrantly contested political category and identity" (Rao 2009, xiii). In Indian democracy, Scheduled Castes (or Dalits) have figured as an important category in the Indian civil rights discourse as an embodiment of, both, suffering and resistance seeking social, economic, and political emancipation. The anti-caste resistance is/was

an effort to transform the static democratic ideas into substantive and meaningful political categories such as equality, freedom, and citizenship. The language of rights in such a context altered the meaning and understanding of rights where equality had come to mean a right to equality of all persons while not evading the differences which can potentially cloud the existing inequalities. Anupama Rao explains the transformation of Dalit as a stigmatized subject into a citizen. The idea of equality and of equal citizens, which figured prominently in the anti-caste struggles, "has developed in relation to the efforts to overcome the inequities produced by various forms of embodied 'difference'" (Rao 2009, xiv). The form of democracy in any society is shaped by the forms of inequality that come to define an existing social order. While foregrounding Indian democracy, it is important to note how liberalism was shaped in India and was, partly, a result of the paradox of political recognition: seeking emancipation by identifying with historical vulnerability. POA Act is an essential constituent of the pursuit of rights and recognition by the anti-caste struggles.

4.4 Providing a Backdrop to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

The caste system has always been an integral and defining feature of Indian society, it is however only during the colonial period that caste was systematically theorised, governmentalised and also forcefully challenged. While caste is primarily identified as the essential feature of Hinduism, it is, however, replicated across religions and cultures in the entire sub-continent. Dr B.R Ambedkar was of the main forerunners in the battle against the caste system and one of the first who systematically theorised the caste system. He argued that the caste system and its by-product, untouchability primarily rests upon the "naturalisation of inherent violence" of the caste system (Gandee 2015, 16). According to Ambedkar, the edifice of the caste system stands on its two inseparable pillars i.e. "graded inequality" and naturalisation of the caste system (ibid.). In a seminal paper on caste, *Castes in India: Their Mechanism, Genesis and Development,* Ambedkar claimed that "there is no such thing as caste. There are only castes." (Ambedkar 1917, 13) This simple statement, as it appears, forms the core principle of the way Ambedkar understood caste. In other words, the system of caste

cannot function without the plurality of castes wherein, each caste is defined against each other in terms of ritual purity. He further argued that the caste system provides an incentive to every caste in the hierarchical order, i.e., for every caste, there are other caste(s) which are placed below in the hierarchy thus, incentivising caste(s) in its (de)graded order. This incentive, Ambedkar believed, was the greatest hindrance to any social change, as every caste was determined to defend its privilege in comparison to the degraded castes placed lower in hierarchical order. An interrelated aspect of graded inequality was the naturalisation of caste violence across society. By naturalisation of the caste violence, Ambedkar meant the internalisation of the privileges, by every caste, accorded due to the relative hierarchy of castes. It is through this process of naturalisation of caste order, that caste violence gets normalised and the system of caste manufactures consensus and legitimacy for its preservation. In Anupama Rao's observation Ambedkar′s repeated use of the phrase ″illegal laws of Hindus" to refer to what passes as caste-based violence (legitimised by the religion) to denote the way "regularised structural violence passes for legitimate law"(Rao 2009, 166). This is similar to what Weber understands as 'legitimate violence'. Now, what follows is the legitimacy of violence (both, physical and symbolic) of caste mirroring into an appearance as something naturally given and, thus, qualifying as the legitimate social order of being. The law-like nature of violence of caste was not an aberration it was instead an important tool for muting the caste contradictions and also disciplining the Hindu society.

Ambedkar′s genius lies not only in his systematic understanding of the caste system and the mechanisms through which the consent and legitimacy of the caste social order are manufactured but also in reinterpreting both, physical and symbolic, forms of caste violence. Ambedkar′s interest in studying caste was not merely restricted to academic purposes, for his aim was to bring concrete and material changes in the lives of Dalits who were at the receiving end of caste violence. He interpreted the 'social' in caste violence in terms of specific 'material'(economic) disadvantages (Gandee 2015, 16-32). According to Rochana Bajpai (2011, 116), Ambedkar redefined "untouchability as socio-economic deprivation". This reinterpretation serves an important task of translating the redressal in terms of policies and legislation to mitigate the socio-economic deprivations. In this regard, Ambedkar opined that it is ″through

political action, through appropriate law…. You can make the government provide for you what you are denied- food, clothing, shelter, education, etc."(Jaffrelot 2006, 52). This is reflective of his legal training and pragmatism to approach the question of caste violence from a material basis.

It is through such reinterpretation of 'caste of violence', Ambedkar believed, that a change can be observed by making appropriate legislations. This optimism of Ambedkar stems from his legal training and his belief in the modern secular idea of the state, which he believed could emancipate Dalits and other downtrodden groups. His early attempts to establish the recognition of violence of caste in the Indian society had some success. However, it was only during the Constituent Assembly that he was formally able to codify the myriad manifestations of violence inherent in the caste system. Ambedkar had a holistic understanding of the caste system and believed that to destabilise the structural violence inherent in the caste, the symbolic acts of violence also needed a formal recognition as criminal acts. It is because of his efforts that the constituent assembly passed Article 17 which prohibits untouchability and hence, putting it at par with the criminal offences. The constituent assembly also passed Article 23, prohibiting '*begar*' (forced labour). These prohibitions intend to force the state to recognise that the untouchability rested upon 'disability' and with this recognition, an obligation was placed on the state to enforce criminalisation. To mitigate the evils of untouchability, the Protection of Civil Rights Act, of 1955 was brought about.

4.4.1 The Protection of Civil Rights Act, 1955

The enactment of the Protection of Civil Rights Act,1955 (PCR Act, hereafter) was to enforce the abolition of "untouchability" under Article 17 of the Indian constitution. The Act penalises all those offences which are (both, direct and indirect) manifestations of untouchability and its practices in different forms including prohibition into places of worship, denying access to shops, hospitals, water supply, and other public places. This Act also prohibited insulting someone based on his or her caste identity. The shortfall of the PCR Act was that it did not account for violence perpetrated against Dalits by the members of the upper caste. These acts of violence against Dalits were being tried at par with other violent crimes under IPC. There was no recognition of caste in the violence being perpetrated by the upper castes. For a very

long period, the criminal justice system in India did not recognise the caste basis of violence, a defining characteristic of the brutality against Dalits. It was only during the enactment of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989, that the caste basis of atrocities was recognised by the Indian State.

4.4.2 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (Act, hereafter) was enacted by the Indian State to overcome the inadequacies of the PCR Act. The Act came into effect on 11 September 1989 and the Statement of Objects and Reasons of the Act states,

> …to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for [Special Courts and the Exclusive Special Courts] for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

It further states.

> …when the Scheduled Castes and Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty…under the circumstances, the existing laws like the Protection of Civil Rights Act, 1955 and the normal provisions under Indian Penal Code have been inadequate to check these crimes.

This was the first Act of its kind which recognised the caste basis of atrocities and also defined it as a criminal offence. The very enactment of this Act presented an acknowledgement on the part of the Indian state that caste abuses against Dalits in their most degraded and violent forms are still prevalent even decades after independence. The language reiterated in the Act (for example, the use of self-respect), resembled the language of Dalit struggles which informed the craftmanship of the POA Act. The response to Dalit massacres at Kilvenmani (1968) in Tamil Nadu; Belchi (1977) in Bihar and Karamchedu (1985) in Andhra Pradesh inaugurated new conversations about various forms (physical, non-physical, symbolic) of caste violence. Dalit movements raised new questions of dignity or self-respect. It was observed that the PCR Act was inadequate to deal with the caste atrocities. The POA Act effectuates the demands raised for the formulation of a new law to deal with the new forms of violence of the caste. A cursory glance at the offences that were made punishable under this Act provides a glimpse into the degrading and inhumane treatment Dalits receive at the hands of the caste Hindus. The offences as stipulated under section 3 are: forcing

members of the Scheduled Caste or Scheduled Tribe to drink or eat any inedible or obnoxious substance, dumping excrement, waste matter, carcasses, or any other obnoxious substance in their premises or neighbourhood; forcibly removing their clothes and parading them naked or with painted face or body; interfering with their land rights; compelling a member of a Scheduled Caste or Scheduled Tribe into forms of forced or bonded labour; corrupting or fouling the water of any spring, reservoir or any other source ordinarily used by the members of Scheduled Castes or Scheduled Tribes; denying the right of passage to a place of public resort; and using a position of dominance to exploit a scheduled caste or scheduled tribe woman sexually.

The POA Act was enacted by our parliamentarians to serve a salutary cause towards the realisation of the constitutional rights of the Scheduled Castes and Scheduled Tribes. Satynarayan (2020, 42) observes, “SC/ST Act marks a shift from the old framework of “civil rights” in the PCR Act to the protection of human dignity”. This observation is important as PCR Act articulates untouchability in terms of ‘disability’ as opposed to the myriad forms of violence of caste perpetrated by non-SC and STs articulated as ‘atrocities’ in the POA Act. It marks, acknowledges and restores the bygone dignity of the persons belonging to Scheduled castes and Scheduled tribes. The POA Act is a dynamic legal document requiring sensitive and dynamic interpretation rooted in the spirit of the Constitution. The study of hurt sentiment claims in the purview of the said act necessitates the critical engagement of the social with the executive as well as the domain of law to comprehend the holistic understanding of how atrocities are routinely perpetrated on the people belonging to SC/ST communities. It is in this context important to highlight how people from Scheduled Castes and Scheduled Tribes face insurmountable hurdles even to get their complaints registered under the Act. There are various factors which contribute to it namely- the apathy of the executives, discouragement by threatening with consequences if the complaint is registered (hostile environment), pressurising for mutual settlement more often bargaining with money, lack of social and economic infrastructure required to pursue a legal case and so on. This is not an exhaustive list of the obstacles faced by the Scheduled Castes and Scheduled Tribes in accessing justice. They are further victimised, during investigation and prosecution, owing to the inaccurate record of allegations, ‘shoddy investigations', and undue delay in trials. SC/ST suffer enormously

due to procedural lapses in the Criminal Justice System in India right from filing a complaint until the conclusion of a trial (PTI, 2021). During the adjudication of the claims of hurt sentiments of the Scheduled Castes and Scheduled Tribes, they are further met with the challenges posed by the thresholds set up in the very law specifically designed to mitigate the atrocities inflicted on them sometimes, by the virtue of the challenges to the constitutionality of the provision laid down to address the humiliation inflicted by the caste hate speech. In *Ravindran Pillai vs. Union of India (*1996 OnLine Ker 319), the petitioner challenged the validity of section 3(1)(x) as violative of articles 15 and 21 of the Indian Constitution. The Kerala High court, while dismissing the petition upheld the said provision as legal and valid and stated that the court "does not find any legal infirmity in Section 3(1)(x) of the Act to hold that the same is oppressive and unconstitutional" (1996 OnLine Ker 319). It further stated,

> Article 17 of the Constitution of India provides that untouchability and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with the law. Article 17 makes the practice of untouchability an offense read with article 35 (a)(ii) which confers upon Parliament the exclusive power to make law prescribing punishment for those acts which are declared to be offences under Part III of the Constitution. Article 17 is a significant provision particularly from the point of view of equality of law. It guarantees social justice and dignity which were denied to a vast section of the society for centuries (1996 OnLine Ker 319, para 4).

In 2015 the Act was amended to include casteist slurs/casteist remarks by non-members of Scheduled Castes and Scheduled Tribes as a criminal offence. The amendment also denied anticipatory bail to the accused thus, making the Act more stringent. The Supreme court, in March 2020, passed a judgement in *Subash Kashinath Mahajan v. State of Maharashtra (2018 SCC OnLine SC 243)* which, in effect, allegedly diluted the Act. The judgement was passed under the pretext of safeguarding the rights of innocent persons from being booked under false cases, thereby preventing the misuse of the law. Following are the important observations in the case law:

(a) For lodging an FIR under the Act, preliminary enquiry is to be conducted by none less than the rank of Deputy Superintendent of Police (DySP).

(b) The provision which stipulated immediate arrests in the complaint filed was done away with.

(c) The blanket ban on anticipatory bail in cases registered under the Act was lifted.

The Supreme Court expressed strong concern in the *Subash Kashinath Mahajan vs. State of Maharashtra* case regarding the misuse of the Act. The bench stated that "there are instances of abuse of the Act by the vested interests against political opponents in Panchayat, Municipal or other elections to settle private disputes arising out of the property, monetary disputes, employment disputes, and seniority disputes" (2018 SCC OnLine SC 243, para 66). The court, in conclusion, introduced the procedural safeguards to avoid the misuse of the law and its false implication. The apprehension regarding the misuse of the Act was based on the low rate of conviction and high rate of acquittal in the cases under the Act. The court referred to the National Crime Record Bureau (NCRB) data of 2015 according to which out of all the cases registered under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 15% to 16% were closed after the preliminary inquiry and around 75% of the cases that reached the courts, the accused were acquitted for the lack of evidence or cases were withdrawn or dismissed. The judgement attributed the lower conviction rate in the offences against the SC/ST to the misuse of the Act.

The reasoning of the Supreme Court in the said case is deeply problematic and highly superficial. In other words, it reflects the mechanical reading of the law without situating the law in its social universe. Satyanarayan (2020, 48) observes it as an attempt to "invisiblise the role of caste in psychological and moral violence against Dalits…reinforcement of the sub-human status of SC and ST". The Supreme court did not consider the social context while using the low rate of conviction under the Act as an argument for its misuse. Ram Kishore Sen (2012, 21), states that "the conflation of the acquittals with the false case is a cause of concern" and also highlighted that the basic fact of the law is that 'acquittal does not necessarily prove innocence- it may also point to the lack of adequate investigation or procedural infirmities'.

4.5 Applicability of Section 3(1)(x) of The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities Act), 1989

Section 3(1)(x) of POA Act, 1989 states, "[w]hoever, not being a member of a Scheduled Caste or a Scheduled Tribe — intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within

public view — shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

Following are the thresholds required to meet the applicability of section 3(1)(x) of the said Act;

(a) intentional insult to a person belonging to Scheduled Caste or Scheduled Tribe by a member who is not a Scheduled Caste or Scheduled Tribe

(b) intent to humiliate a member of Scheduled Caste or Scheduled Tribe and the accused should be aware of the caste of the victim

(c) insult must occur within the place of public view

Let us analyse the case laws about the thresholds interpreted by the honourable courts. The facts of the cases, the arguments of the petitioner and the contenders, and the question of law before the court are spelt out on a case-by-case basis to have a holistic understanding of the way the claims to hurt sentiments are spelt and thus, adjudicated. The slurs used here are kept as it is as it constitutes an essential subject matter of the research.

In the following three cases, one of the essential ingredients of the offence, "the place within public view" is dealt with in great detail by the courts.

In a Supreme Court case, *Swarn Singh and Anr v. State through Standing Counsel and Anr (2008 SCC OnLine SC 1245),* the complainant and first informant, Vinod Nagar had filed a complaint stating he was insulted by caste names such as *Chuda-Chamar* by the appellants (Swarn Singh, including his wife, Simran Kaur and daughter, Tarjeet). He works as a driver for an employer, who resides in the same building as the appellants, and would often stand near the car which is usually parked at the gate of the building. He was told that since he is *Chuda-Chamar*, he better not come in their way. Vinod further alleged that the mother and the daughter threw dirty water on him and told him, that they were making him take bath. The incident occurred while he was standing near the car and when he tried complaining about the matter to Swarn Singh, he misbehaved and used the same slurs against him. Vinod further stated that he is hurt by the incident and is thinking of quitting the job which he had taken up due to compulsion as he belongs to a poor family. The question before the court was to

determine whether or not calling a person "chamar" amounts to an intentional insult with an intent to humiliate a person belonging to Scheduled Caste. The court, while dismissing the appeal, stated that during the interpreting of section3(1)(x) the purpose of the enactment of the Act should be kept in mind. It was meant to

> prevent indignities, humiliation, and harassment to the members of SC/ST community as is evident from the Statement of Objects and Reasons of the Act. Hence while interpreting Section 3(1)(x) of the Act, we have to take into account the popular meaning of the word "chamar" which it has acquired by usage and not the etymological meaning. If we go by etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation." (para 22) It was also stated that, "calling a person 'chamar' today is nowadays an abusive language and is highly offensive. In fact, the word 'chamar' when used today is not normally used to denote a caste but to intentionally insult and humiliate someone (2008 SCC OnLine SC 1245, para 21).

The court further elaborated,

> this is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of the Constitution and is part of its basic features. Hence, in our opinion, the so-called upper castes and OBCs should not use the word 'chamar' when addressing a member of Scheduled Caste, even if that person, in fact, belongs to the 'chamar' caste because the use of such a word will hurt his feelings (2008 SCC OnLine SC 1245, para 23).

The court in fact, also highlighted that the context of the slur used would determine whether or not there was an intent to insult or humiliate (2008 SCC OnLine SC 1245, para 24). SC/ST are equal citizens and by that virtue are, also, entitled to a right to a dignified life as is evident through the interpretation of Article 21. In this regard, the court provides a contextualised understanding by invoking the word 'nigger' to further elaborate on the problematic usage of casteist slurs-

> to use the word 'nigger' today for an African-American is regarded as highly offensive and is totally unacceptable, even if it was acceptable 50 years ago…even if the word 'chamar' was not regarded offensive at one time in our country, today it is certainly a highly offensive word when used in a derogatory sense to insult and humiliate a person…the use of word 'chamar' will certainly attract section 3(1)(x) of the Act if from the context it appears that it was used in a derogatory sense to insult or humiliate a member of SC/ST" (2008 SCC OnLine SC 1245, para 30).

Another point of deliberation for the court to determine is to determine what would constitute the "place within public view". The court opined, the expression "place within public view" should not be confused or equivocated with "public place". The court, in this regard, held "a place can be a private place but yet within the public view" (2008 SCC OnLine SC 1245, para 28).

In *Daya Bhatnagar (2004 SCC OnLine Del 33)* case, there was a difference of opinion, on the expression, "public view", amongst the judges in the Division Bench of the Delhi High Court [2004 SCC OnLine Del 33, para 6,7,10,15,19,21]. A dispute arose between the petitioners and the complainants who are neighbours and live in the same complex which resulted in cross complaints. One of the complaints was regarding the offence under section 3(1)(x), where the petitioners of the case entered his residence and called him, "Chura Chamar Babu Lal Chura Chamar". On the other day, 25-30 women entered Babu Lal's house and said, "Churi Chamari come out of the house, you are not up to our standard and you cannot live in this block". She felt "humiliated and insulted on the basis of her caste" (2004 SCC OnLine Del 33, para 2) and became unwell and had to see a doctor then after. The question before the court was to determine whether the ingredients of the offence under section 3(1)(x) are satisfied or not. The main deliberation was over the meaning of "public view", to which court while keeping in mind the aims and objectives of the Act held, the expression 'public view' in section 3(1)(x) of the Act has to be interpreted to mean

> within the view which includes hearing, knowledge or accessibility also, of a group of people of the place/locality/village as distinct from few who are not private and are as good as strangers and not linked with complainant through any close relationship or any business, commercial or any other vested interest and who are not participating members with him in any way. If such group of people comprises anyone of these, it would not satisfy the requirement of 'public view' within the meaning of the expression used" (2004 SCC OnLine Del 33, para 19).

With this, the petition for quashing the FIR was dismissed by the court.

In *Gayatri Singh @ Apurna vs. State & Anr.(2017 SCC OnLine Del 8942)*, the complainant accused her co-sister (both of whom married to two brothers) of harassing and abusing her, based on her caste, on Facebook. The mother-in-law had severed the relationship with the complainant and disowned them from the property.

The petitioner had allegedly used words like "cheap, *kutta*, donkey etc for *Dhobis*" and since the complainant belonged to the Dhobi caste, references like these had come as insulting and dominating to her. The petitioner had made the following "public" posts on her Facebook wall:

> — "*Pehla Gadha: Yaar Main Jis Dhobi Ke Ghar Kaam Karta Hoo, Vo Mujhe Bahut Marta Hai.*
> *Doosra Gadha: Tu Ghar Chor Kar Bhaag Kyo Nahi Jata.*
> *Pehla Gadha: Kya Batau Yaar Dhobi Ki Ek Ladki Hai, choti DHOBAN Vo Jab Bhi Shararat Karti Hai To Dhobi Kehta Hai Ki Teri Shaadi Kisi Gadhe Se Kar Dunga.*

> *Bas Yeh Soch Kar Ruka Hua Hoo*.
> Moral of the story that Dhoban is Brand ambassador of fools & donkeys and only they r follow her always"
>
> — "*U hv find many DHOBI jokes on biggest social site of Google like DHOBI ka kutta na ghar ka na ghaat ka, u understand na what I want to say so please increase ur level of education first bcoz I am not a Kid I am a daughter of Rajput – feeling super.*"
>
> — "Joke: *one Fb user apne dost se apne dushman ke bare mein baat karte hue kahta hai who hamesha mera fb account check karta rahta hai aur mujhe follow karta hai par mujhe to yein sab karne mein koi interest nahi ...*
> *Kamina Dost: agar tum bhi uska fb account check nahi karte rahte ho to how do u know that he checked always?*
>
> Moral of the story: for example, If u can eat ashirwad mill flour so that's not mean that nobody can eat that bcoz every one prefer brand 1st who live the life with hight standard always but low standard people always try to prove it and speak again & again that I hv standard. It's called cheap people and only one brand available for these people: DHOBI BRAND – feeling naughty." (2017 SCC OnLine Del 8942)

The court was once again to decide on the applicability of section 3(1)(x) of the Act. Since the petitioner had blocked her co-sister(complainant) on Facebook. The complainant had accessed the petitioner's account using a fake id named, Veronica. The court, while quashing the complaint and the proceedings, upheld that the complaint does not satisfy the necessary ingredients of the offences constituted section 3(1)(x) of the Act. The court, however, made an important observation regarding the same. The court stated that the casteist remarks posted on Facebook, private or public, would constitute an offence under the Act unless such posts fall under the limitations prescribed in *Daya Bhatnagar(2004 SCC OnLine Del 33)* case i.e.

> if any of the befriended facebook members of the author of the offending post is an independent and impartial and not interested in any of the parties, i.e. is not a person having any kind of close relationship or association with the complainant. Therefore, to my mind, it would make no difference whether the privacy settings are set by the author of the offending post to "private" or "public". Pertinently, Section 3(1)(x) of the Act does not require that the intentional insult or intimidation with the intention to humiliate a member of the Scheduled Caste or Scheduled Tribe should take place in the presence of the said member of the Scheduled Caste or Scheduled Tribe. Even if the victim is not present, and behind his/ her back the offending insult or intimidation with an intention to humiliate him/ her – who is a member of the Scheduled Caste or a Scheduled Tribe takes place, the same would be culpable if it takes place within public view (2004 SCC OnLine Del 33, para 43).

In the following cases, the court deliberated and settled the matters regarding the meaning of "intent", "intentional", "humiliation", "presence of the victim" and what "knowing the caste of a victim" entails in constituting an offence.

In *Subal Chandra Ghosh & Ors. vs. State of West Bengal & Anr.(2015 SCC OnLine Cal 6518, para 20)*, there was a matter of property dispute, between the

petitioners and the OP (opposite party) of which the petitioners and the father of the OP were the co-owners, which was pending before the civil court. OP alleged that the accused petitioners came to the disputed land, armed with lathis, hockey sticks, and other weapons, and had threatened them to kill while also hurling casteist remarks intending to lower their social prestige before the villagers. The hurled casteist remarks were: "*Sala Bouri Chotolok, Jomi kine nijeke khub Baro Bhahchis, ei Jomi amra todar kach theke thik kere nebo na dile toder sobaike Jane mere debo, bouri hoye tora gosh det songe parbi na"* which can roughly be translated to mean- "*Sala Bouri chhotlok*, you think yourself to be great after buying land, we'll take away this land from you, if you resist we'll kill all of you, being Bouris you can't fight Ghosh". The court was to determine the applicability of section 3(1)(x) here. The court deliberated upon the meanings of "intentional", "insult" and "humiliation", which were not defined in the Act, to argue,

> As per Webster Dictionary, the word "intent" means having the mind bent on an object, "intentional" means done purposely. The term "intentional" has been used in relation to act done by or with intention, which means to do wrong with intent. As per law Lexicon, a person who, by his declaration, act or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the Statute. As per Webster, "to insult" is to treat with abuse, insolence, or contempt; to commit an indignity upon, as to call the man liar. A gross indignity offered to another whether by act or by word is known as "insult". An insult is an indolent attack. It is more easy to imagine an affront where none was intended than an insult. As per Webster, in common Parlance, the word "humiliation" means to lower the dignity of, painfully humbling, the state of being humble and free from pride. As per Oxford dictionary "humiliate" means to cause a person to feel disgrace, humble condition, or attitude of mind. In the background of the definition of the aforesaid words, to prove the offence under the aforesaid section, there must be an element of intentionally committing the insult or intimidating with intent to humiliate a member of Scheduled Caste and for that, the evidence of the witness should be consistent and reliable (2015 SCC OnLine Cal 6518, para 20).

The court in this case, partly allowed the application of the petitioner, and held that there was no intention to abuse and humiliate the OP simply for him being a member of a Scheduled Caste and cannot constitute an offence under section 3(1)(x) of the Act.

In a High Court case, *Dr. Onkar Chander Jagpal & Another vs. Union Territory, Chandigarh and Another(2012 SCC OnLine P&H 1734),* the original complain stated a matter of tenancy dispute took a turn where petitioner had allegedly made casteist remarks at the complainant and the family saying, "*Chura- chamar neich jati de kutte log*" and had further used threatening language saying, "he can get me

liquidated so that in future I may not be able to see any "*chammar*" in the locality. When the complainant's brother was trying to pacify the petitioner of the case, he shouted saying, "*chuda-chammar saab equtha ho gaya hai*". The complainant stated they had felt very ashamed as these were uttered in full public view and they felt so ashamed that they are unable to step out of their house. The petitioner was not satisfied with the FIR and sought quashing of the FIR. The court in this case assessed if all the ingredients required of section 3(1)(x) are met. To which the court stated, since the FIR did not establish the petitioner-accused was not a member of Scheduled Caste as is required under section 3(1)(x). In the view of the court,

> merely, the alleged utterances by the petitioners in the verandah of the house (not within public view) appears to be the result of the fit of anger and emotion and not with the intention to insult the complainant party as a member of Scheduled Caste or Scheduled Tribe. It is a matter of common knowledge that such words in a quarrel between the two enemies at a spur of the moment, are common and in routine and cannot possibly be taken to be an offence under the Act. That means, merely uttering such words in the absence of intention/mens-rea to humiliate the complainant in public view, every such quarrel or altercation between the members of non-scheduled caste &scheduled caste and if the imputations are grossly vague and perfunctory, would not, ipso facto, constitute acts of commission of offence, which are capable of cognisance under the Act (emphasis mine) (2012 SCC OnLine P&H 1734, para 16).

The court, while highlighting the "growing tendency of the people to convert purely civil disputes into criminal cases", quashed the FIR and all other subsequent proceedings.

In *D.P Vats vs State & Others [2002 (64) DRJ 29 (DB)]*, on a ministerial visit to Sultanpuri area, the minister while listening to the narration of performance of Horticulture department, the petitioner got furious and said, "*chude chamaron tumhe maar dunga main tumse nahin darta*" which invited section 3(1)(x) of the POA Act. Petitioner here challenged the FIR and the court held, the word "a member" is of significance here as it entails targeting an individual member (not directed against crowd or public) belonging to SC/ST to invite section 3(1)(x) of the Act. The court held, since the petitioner had no knowledge of the caste of the members in the crowd and the casteist remarks, "*chude chamaron tumhe maar dunga main tumse nahin darta*" were "used in generalised terms", hence the FIR be partly quashed.

In *Asmathunnisa v. Andhra Pradesh (2011 SCC OnLine SC 518.)*, the appellant and her husband were being prosecuted for an offence under section 3(1)(x) of the Act and filed a petition to quash the proceedings. In the original complaint, the complainant

was unhappy due to the sound pollution caused by an adjacent school and submitted a complaint to the authorities regarding the sound pollution. Upon this, the appellants (members of school management) of this case created more noise, and when the complainant was unable to reside in that house any further invited press to express her grievances. On reading the news, the infuriated appellant and her husband came to their house, when the complainant's husband was not there, and the appellant's husband used abusive and filthy language saying, "AA LAMBADODU". The court quashed the criminal proceedings stating that the ingredients required of offence under section 3(1)(x) are not made out. Since the appellant only accompanied her husband and did not utter the offending words cannot be held guilty of the offence. The court further held the following grounds to quash the proceedings: the husband of the complainant upon whom the offending words were targeted was absent at the time of incident hence, the court held, "*in the absence of the real aggrieved person, at that point of time, no offence under the section can be made out*"(emphasis added) (2011 SCC OnLine SC 518, para 7b); it was not established in the complaint that the offender was not a person of Scheduled Caste or Scheduled Tribe; the incident occurred inside the residence and not in "the place of public view". The complaint was quashed while the court upheld that the person insulted should be present at the time of insult.

In another recent Supreme Court case, *Hitesh Verma vs State of Uttarakhand and Another [(2020) 10 SCC 710],* an appeal was made against a High court order which upheld the crime under section3(1)(r) (section 3(1)(x) previously) of the POA Act. The original complaint was a matter of property dispute where the applicants were disallowed to work on their fields and the accused entered the four walls of their house and had given death threats and caste abuses to the applicant and the family and also took away construction material of the house they had intended to build on their field. The detailed complaint also stated that the accused said, "you are persons of bad caste and that we will not let you live in this mohalla/vicinity". The appellant, in this case, sought quashing of charge-sheet on the ground that the allegation does not constitute an offence under the said Act merely because someone is a Scheduled Caste since the property dispute was also not on account of respondent being a Scheduled Caste. With regards to section 3(1)(r), the court dealt with whether the ingredients of the offences enumerated in the said provision are met or not. The court upheld since the report does

not disclose the caste of the informant nor that the caste abuses were made in public view. The court in this case particularly stressed upon, 'the offending words are not necessarily purported to be made for the reason that someone is a person belonging to Scheduled Caste' [(2020) 10 SCC 710, para 6]. The court declared the findings of the investigation "inconsequential" which suggested that the appellant was aware of the caste of the victim and quashed the chargesheet on the grounds that the ingredients of the offence under section 3(1)(r) are not made out as the allegations of 'offending words' was not on account of the respondent being a member of Scheduled Caste.

There are a few pointers as observed from the case laws are highlighted below:

First, the judgement pronounced in *Hitesh Verma [(2020) 10 SCC 710]* and *Subal Chandra Ghosh [2015 SCC OnLine Cal 6518]* case sets dangerous precedents and is violative of the Statement and object of the Act. The ingredients of the offence require that the accused be aware of the caste of the victim so as to establish that the crime was caste motivated to cause indignities, harassment, and humiliation to the victim. This very reasoning is important in the context of caste, a hierarchical social order when the accused is fully aware of the caste and finds it very well in the realm of the caste order to inflict indignities and humiliation on the victim. The judgment above declares that knowing the caste of the victim is inconsequential/devoid of the crime committed and thus, for the crime to invite the invocation of the said Act, the complaint and the findings have to clearly state that the crime was purely on the account of the caste of the victim. If we hold the court's reasoning that knowing the victim's caste is inconsequential to the crime then, it 'practically' becomes nearly impossible to establish how crime conducted was caste-coloured. The said judgement in *Hitesh Verma [(2020) 10 SCC 710]* case bypasses the intent and purpose of the legislation to check the caste-based crimes and overlooks the humiliation, threats, and abuse inflicted on the dignity of the victim. The judgement was criticised by many for "disregarding the intent and purpose of the legislation" and was accused of the "absurdity" in the interpretation of the Act (Jeenger 2020). Some held such absurd interpretation is owing to the "lack of lived-experiences" of caste degradation and "caste-sensitisation" on the part of judges(ibid.). All India Democratic Women's Association (AIDWA) being critical of the said judgement released a statement saying (AIDWA 2020),

this interpretation is wrong since the manner in which the accused tried to dispossess the complainant by using casteist abuse and physical violence cannot be seen as not being influenced by the complainant's caste and is the manner in which the upper castes wield power over SCs and STs and browbeat them in such cases with impunity" and "AIDWA feels that any casteist slur and abuse is an affront to the dignity of an individual and is made to insult and intimidate whether it is in a private or a public place. For instance, several domestic workers interact with their employers in private spaces and can be easily subjected to casteist abuse and harassment to humiliate them. AIDWA, therefore, demands the removal of the words "within public view" from Section 3(1)(r) of the SC-ST Act. In the meanwhile, the Supreme Court judgment in Hitesh Verma should be reviewed.

Second, section 3(1)(x) stipulates a threshold that the offence should have taken place in the place within public view. In other words, it penalises humiliation and indignities which have occurred in the "place of public view" and not in the "private place". Since the meaning of "place within public view" is not defined in the legislation, the meanings have evolved through the interpretation of the courts on a case-by-case basis. In *Swaran Singh [2008 SCC OnLine SC 1245]*, the courts distinguished the meaning of "public place" and the "place within public view". The rationale is owing to the burden of proof lies with the complainant, the offence committed in the private spheres is difficult to prove. This serves as a check against any misuse of the law. In *Daya Bhatnagar (2004 SCC OnLine Del 33),* the meaning of "public" was dealt with in a manner that elaborates on who is the audience of the offence whose presence is vital for the determination of the atrocity. In determining the public as "strangers" and not merely the presence of one or more persons in *Daya Bhatnagar (2004 SCC OnLine Del 33) ,* Venkatesan believes, "the courts have insulated caste-based humiliation from being punished in private spaces" (Venkatesan 2020). Humiliation, she opines, traverses both in public and private spheres. The humiliation inflicted due to the caste hate speech remains the same regardless of the sphere, public or private. The courts have reasoned that since it is penalising offence, the threshold for inviting an offence must remain high.

Third, the legal interpretation of section 3(1)(x), as observed in the case laws above, are mostly caught up in the technical grounds/threshold laid down in the Act. The case laws, as observed above, primarily focused on the adjudication of procedural issues and the facts of the matter required for the applicability of section 3(1)(x) of the Act. The interpretation of section 3(1)(x) by the courts is mechanical in nature such that it finds no deliberation on the relationship of section 3(1)(x) with the right to freedom of speech and expression, right to equality, autonomy, right to a dignified life and so

on. Hence, the jurisprudence around caste hate speech remains limited until today. Consequently, it also rules out the question (raised earlier) of the inclusion of caste hate speech as one of the grounds for reasonable restrictions as stated in article 19(2).

The POA Act is promising legislation requiring dynamic interpretations in consonance with contemporary social realities. It offers us a possibility of interpreting our constitutional commitment towards non-discrimination. Exceptionally, in *Swarn Singh (2008 SCC OnLine SC 1245)* case, Justice Katju had thrown light on the importance of the interpretation of the Act keeping in mind the intent and purpose of the Act. The case extensively highlights the importance of the context of the casteist remarks during the adjudication of offences under section 3(1)(x). Learned Justice, though briefly, also reflected on the impact of caste hate speech as violative of their rights as equal citizen and their right to a dignified life.

Fourth, the apprehensions of the court regarding the misuse of the Act by falsely implicating the members who are not Scheduled Castes or Scheduled Tribes under the POA Act has alarming ramifications as such apprehensions have no substantive basis for the argument. An argument such as this has been reiterated in *Dr. Onkar Chander Jagpal (2012 SCC OnLine P&H 1734)* and quite extensively in *Dr. Subhash Kashinath Mahajan (2018 SCC OnLine SC 243)* which serves to reinforce the already deep-seated caste prejudices. The lower conviction rate and a higher rate of acquittals are the grounds elaborated for such reasoning. This reasoning is problematic for various reasons. Firstly, the complainants face huge obstacles in registering their cases, and consequently, they do not opt to file a complaint fearing social boycott in many situations. Secondly, the magnitude of threshold(s) required for invoking section 3(1)(x) is high which makes it difficult to invoke the section in the first place. Thirdly, the shoddy investigations, the collusion of police with the perpetrators, lack of evidence, counter-cases, the problem of witnesses (as the witnesses fear the wrath of the dominant), lack of economic and social infrastructure, etc. are primarily the reasons for the lower rate of conviction. The violence against Dalits and Adivasis in contemporary times is not a hidden fact or constructed narrative. To equate the caste atrocities with vengeance or vested interests undermines the very intent and purpose of the legislation and reinforces the stereotypical and regressive takes on the Act by some terming the Act as “draconian” in nature.

Fifth, another important observation, during this research, is the pattern revealing the way only charges of conviction, by the "accused", under section 3(1)(x) have been found to be appealed against in the higher courts. No case against acquittal, in the lower courts, was challenged in the higher courts. This speaks volumes about the way lack of economic and social infrastructure constitutes the "conditions of unfreedoms" which are a hindrance in their struggle for accessing justice. However, the lower conviction rates in the cases of atrocities are often accorded to the loopholes in the legislation. In a similar vein, it is argued that the legislation is being put to misuse such that members of SC/ST falsely implicate others (who are not SC/ST).

Last, one of the criticisms of the legislation is owing to the complex power relations operating in different settings. As some castes are classified as Other Backward Class (OBC) in one state are enlisted as Scheduled Caste in another, given the kind of power relations that function in a particular setting. It invites a whole lot of complexities as section 3(1)(x) requires a non-member of Scheduled Caste to use offending words against a Scheduled Caste member.

Venkatesan (2020) argues, "the ambiguities, exceptions, and restrictions built into the Act, dilutes its effectiveness as a tool of social engineering and transformation". Despite that, section 3(1)(x) entails a punishable offence, the interpretation of the legislation ought to meet the stated objectives of the Act. Keeping the threshold as high and wide as they are, the interpretation of the courts ought to serve the transformative role that was intended through this legislation. The legislation is a protective and welfare measure, it should best serve the interests of its beneficiaries.

4.6 On Manufactured Victimhood in the Claims of Hurt by the Dominant

This section highlights the peculiar nature of prayer dealing with the hurt sentiments, by the people belonging to dominant communities, in the legal complaint. The nature of hurt by the dominant is time and again reiterated in terms of the loss of glory and superiority of their esteemed dominant status.

To provide a background to the argument, let us first look at the cases pertaining to the hurt sentiments of the dominant which have surfaced in the popular domain. An NGO, based in Ahmedabad, named Human Resource and Development Centre

(HRDC) had invited applications for the post of sweepers. The advertisement further stated that the preferences shall be given to people belonging to Brahmin, Kshatriya, Vaniya, Patel, Jain, Saiyad, Pathan, Syrian Christian, and Parsi communities. The application went viral on social media and had invited a lot of outrage from the said communities. The NGO stated that the application was invited under the pretext of the ongoing *Swachh Bharat Abhiyan* which claims to be inclusive and aims at *Sabka Sath, Sabka Vikas.* Hence, the application purported to providing an opportunity to people belonging to all the communities and not restrict it to a particular community. Following this, Hindu social outfits, Rajput Shaurya Foundation (RSF) and Yuva Shakti Sangathan (YSS), vandalised the NGO office. The application invited was termed as *denigrating* to the communities and were asked to withdraw the application and render an unconditional apology for the same and were threatened to face the consequences (IANS, 2016).

It was also claimed that the advertisement has hurt their religious sentiments. In another instance, Fabindia received flak over revealing its Diwali collection named as *Jashn-e-Riwaaz.* Some even went to an extent to call it 'Abrahamisation' or de-Hinduisation of the Hindu festival as models were seen without bindis. The matter started trending on Twitter calling out for its boycott as it allegedly hurts Hindu sentiments. Following this, Fabindia took down all the *Jashn-e-Riwaaz* branding posts from all the social media handles and websites (Deka 2021).

In a similar event, Sabyasachi faced backlash over its Mangalsutra advertisement campaign. The ad campaign had shown models, wearing Sabyasachi mangalsutra along with brassiere, in the intimate position which has allegedly *dishonoured Hindu dharma and hurt Hindu sentiments*. (Team EastMojo 2021). Another instance deal with the Karnataka State Brahmin Development Board taking offence to certain passages in the school textbooks which stated: "food scarcity was caused in the Vedic period due to sacrifices of agricultural animals and offerings of milk and ghee to the fire god during "havans" done by Brahmins" (Express Webdesk 2020). The passage had allegedly hurt the sentiments of the Brahmin community and demanded the revision of the school textbooks (ibid.).

The cultural politics of emotions explains the way in which the individual and their worldview is shaped through the way hate generates narratives as a defence

against hurt/injury (Ahmed 2015, 42). It is through Ahmed's framework of cultural politics of emotions, we can explain how the defensive use of hurt sentiment is put to work. Analysing the instances stated above and close reading of the ways in which the dominant has articulated and foregrounded hurt sentiments, the twice-born (TB) Hindus (TB) (the Hindu nationalist, the average Hindu man, the Hindu wife, the Hindu citizen) are being endangered by the others subverting the hierarchical Hindu social order. In being endangered, the real threat lies not only in taking away the jobs, wealth, and security but the real threat lies in taking the place of their status which is accorded to them by the virtue of them being TB Hindus. In the dominant Hindus' narratives of hurt, they position themselves both as the founder and guardian of the imagined Hindu nation and also, project themselves as the victims, who are being damaged by the challenges to Hindu social order. The imagined subjects of the Hindu nation produce the normal, the ordinary. The hurt sentiment animates the normalcy in crisis and the legitimate Hindu subjects as the real victims who are collectively hurt. Such defensive usage of hurt sentiment results in both, the manufacturing of the victimhood and the mobilisation of the dominant Hindu. This reaffirms Cherian George's argument of hurt sentiment being a strategy for mass mobilisation (George 2016, 2956).

Let us now look at the hurt sentiment claims by the dominant which has found expressions like prayers in the legal petitions. In *The State of Uttar Pradesh vs. Lalai Singh Yadav (1976 SCC (Cri) 556)*, a Hindi translation of a book, authored by Periyar, *Ramayan: A True Reading,* State of Uttar Pradesh claimed the impugned book as, "sacrilegiously, outrageously objectionable" as it defiled the image of Ram, Sita, and Janak who are worshipped and venerated by the Hindu community. The State of Uttar Pradesh by order, under section 99 A of CrPC, forfeited the book on the grounds of being violative of section 295A. Section 99A necessitates the government to assess the matter according to the clear and present danger it constitutes as per the grounds laid down in section 295A. Following this, the respondent approached the High court and the government order was quashed by the High Court. The "aggrieved State" appealed to the Supreme Court stating how

> … the impugned book makes a foul assault on the sacred sentiments of the Hindu population of the State since the author anathematised in unvarnished language the great incarnations like Sree Rama and disdainfully defiled the divinely epic figures like Sita and Janak all of whom are worshipped or venerated by the Hindu commonalty *(1976 SCC (Cri) 556, para 2)*.

It was further contended by the counsel for the appellants that "*the references in the book are so loudly repulsive and malevolently calumnious of Sree Rama, Sita, and Janak that the court must vicariously visualise the outraged feelings of the Hindus of Uttar Pradesh*" *(1976 SCC (Cri) 556, para 5)*. Here, the paternalism of the aggrieved State is quite evident and it seeks to protect the alleged injury inflicted on the Hindus and, thus, prevent any possibility of disruption of law and order. The case law further reiterates and reaffirms the nature of secular State not siding with any religion but is obligated to

> … preserve and protect society against breaches of the peace and violations of public order…to create conditions where the sentiments and feelings of people of diverse or opposing beliefs and bigotries are not so molested by ribald writings or offensive publications as to provoke or outrage groups into possible action (ibid. para 6).

It was further stated*, "…good government necessitates peace and security and whoever violates by bombs or books societal tranquillity will become the target of legal interdict by the State*" (ibid., para 6). It is interesting to note how the hurt sentiment claims are couched with the threats to law and order. The aggrieved State's sentiments are purely Hindu in nature and yet the secular nature of the State and the importance of the public order was impressed upon by the learned judges in the said case.

In *Anand Patwardhan vs. Central Board of Film Certification (2003 SCC OnLine Bom 417)*, two cuts and an addition were suggested by Film Certification Appellate Tribunal (FCAT, hereafter) to a documentary film named "War and Peace" for the public exhibition of the said documentary. The petitioner believed that the changes recommended were unjustified and affected the freedom of speech and expression of the filmmaker. The respondent's counsel while justifying the suggested changes also submitted that the public exhibition of the documentary if remained unchanged will disrupt public order. One of the two issues assumes importance for our analysis. One of the recommended cuts, one from the speech of Bhai Sangare, a sentence where he was found saying "this is your culture" was suggested for deletion. FCAT responded to this saying, "*it hurts not the Hindus alone but all those who are proud of, adhere to, and believe in the culture represented by Rama, Shankar, and Vishnu*" (2003 SCC OnLine Bom 417, para 12). In response to this, the counsel appearing for the petitioner submitted that "*the speech is that of a Dalit leader who is unhappy of the atomic explosion of the device on Buddha Jayanti*" (ibid.). It was further

submitted that 'the Hindu Gods have weapons in their hands to avoid injustice and Bhai Sangare's speech was not to belittle them instead what Bhai Sangare wanted to convey was clear that whereas Hindu Gods have weapons in their hands, Gautam Buddha did not have any and the bomb should not have been exploded on his birthday' (2003 SCC OnLine Bom 417, para 12,). It was asserted that '*the reaction of a Dalit leader, who was a follower of Gautam Buddha, is entitled to his comment whereas the counsel of the respondent justified the deletion of the sentence from Sangare's speech on the grounds of maintenance of the public order*' (ibid.) While observing whether the excerpt of the speech can be criticised as affecting public order, the court consequently upheld that Bhai Sangare is entitled to his expression.

In a case law in Rajasthan High Court, *Sanjay Leela Bhansali & Ors. Vs. State of Rajasthan & Ors. (2018 SCC OnLine Raj 283)* , a complaint was filed by a person who claims to have received the information that the petitioners of the said case have begun shooting a film on 'Maharani Padmavati' while hurting and distorting the historical facts and events and thereby, allegedly hurting the feelings and sentiments of 'Rajput Samaj'. It was further alleged that Maharani Padmavati was a pious historical icon whose courageous act of 'Jauhar' was inscribed in the glorious annals of the history of Rajasthan as well as the entire country and thus, by depicting the iconic character in songs, love scenes etc. of the movie the reputation and honour of Maharani Padmavati was maligned and resultantly feelings and sentiments of the 'Rajput Samaj' and the entire Hindu community were hurt because of such portrayal. The movie allegedly depicts fictional love scenes whereas Maharani Padmavati had taken the courageous step of committing "Jauhar" with 16000 other females to save their honour from the untoward advances of Allaudin Khilji and his army. According to the complainant, the pride, valour, and courage of the Rajput rulers and Maharani Padmavati, in particular, and the community as a whole was, both, glorified and fortified in the film.

Here, the Rajput claims are such that they had accorded religiosity to a historical icon and tried invoking section 295A which reads "…deliberate and malicious intent to outrage religious feelings of any class by insulting its religion or religious belief". Needless to say, the purity of the women was glorified to an extent that the complainant,

including the court, valorised the pride of Rajput women in committing Jauhar against Khilji's attempts at defilement of their purity and chastity.

Another Supreme Court case is *N Radhakrishnan alias Radhakrishnan Varenickal Vs Union of India and Ors. (2018 SCC OnLine SC 1349)*, A writ petition was filed under article 32 of the Constitution seeking a ban on the novel named, Meesha (meaning Moustache) which appeared in the popular Malayalam weekly, Mathrubhumi published from Kozhikode, Kerala, and was circulated in India and abroad. It was claimed that "*the said literary work is insulting and derogatory to temple-going women and hurts the sentiments of people belonging to the Hindu faith*" *(2018 SCC OnLine SC 1349, para 6)*. It was further stated that "the portion of the book, Meesha, published in Mathrubhumi depicts temple-going women in a bad light and has a disturbing effect on the Hindu community and has the potential to disturb public order, decency, and morality (grounds for invoking reasonable restrictions)"(2018 SCC OnLine SC 1349, para 7&10). It was also claimed that worshipping deities by visiting the temples with the purity of body and mind is an integral part of the Hindu religion. Charlie Hebdo incident was invoked by the petitioner to argue that such instances have the potential to invite similar kinds of backlash and ought to be regulated and prohibited.

In *Raghunath Pandey & Anr. Vs. Bobby Bedi (2006 SCC OnLine Del 221)* , a movie named "Mangal Pandey- The Rising" was produced by Bobby Bedi and released in both, India and abroad. The lead character of the film, Mangal Pandey was depicted as a great freedom fighter but the contention arose over five scenes where Mangal Pandey was shown in close proximity with a prostitute, Heera. The petitioners emphasised that "*Mangal Pandey was a bachelor, a Brahmin and a puritan who died at 26 and the film falsely projects his love affair with a girl that too a prostitute, whom he married*" (2006 SCC OnLine Del 221, para 11). It was claimed, that even if the character of Heera was fictionalised, the fictionalisation "*amounts to even distorting the family tree of the plaintiffs by introducing a prostitute in the Pandey clan*" (2006 SCC OnLine Del 221, para 5). The court, regarding defamation of Mangal Pandey and his successive generations, held '*he was young and brilliant, Brahmin by caste, who loved his religion more than his life…was a bachelor and he was pure in his personal life but the scenes depicted in the movie in no way amounts as violence to his caste or even his purity*' (2006 SCC OnLine Del 221, para 18&20). Despite rejecting the plea

for defamation, the notion of caste purity was affirmed in the legal judgment as the film was based on a historical event which was fictionalised and was neither a work of documentary nor biography. The legal affirmation to the notion of caste purity further legitimises and reinforces the hierarchical Hindu social order and also has a devastating impact on democratic values such as equality and commitment to non-discrimination.

Another similar matter dealing with Brahmin hurt is *Tamizh Nadu Brahmin Association Vs. Central Board of Film Certification (2013 SCC OnLine Mad 1637)*. The contention is over the title of the film named, Madisar Mami and the scenes which allegedly demeaned and denigrated the Brahmin community. The matter was consequently challenged and an injunction was sought for the same. The petitioner of the case challenged the certification of the film, Madisar Mami, and demanded that the exhibition of the film be restrained. The Madras court granted an interim injunction restraining the release of the said movie with a condition that the respondents can change the title of the movie and release it. The petitioner claimed that

> … the film, Madisar Mami would exhibit un-cooth, defamatory scenes chiding and making mockery about the traditional and religious practices of Brahmins. 'Madisar' is a traditional way of saree dressing by Brahmin ladies. The way of dressing is criticised and the Brahmin women wearing the traditional dress is fond of having sadistic and vulgar desire. If the film is exhibited with the above scenes, the Brahmin community would be denigrated, defamed, and degraded in the eye of the public. Their traditional, religious and cultural practices, which have been followed by them from time memorial cannot be a subject matter of ridicule, mockery and humor (2013 SCC OnLine Mad 1637, para 9, 703).

Time and again, the notion of caste purity and gender purity is foregrounded as sacred which cannot be a subject to challenge. Madras court granting interim injunction for such claims having caste and gender purity at stake explains the ways in which such notions are perpetuated, legitimised, and reinforced to have a longstanding impact on the attitudes of the Hindu population, at large. Another important observation is regarding the apparently similar nature of facts in Mangal Pandey and Madisar Mami case and yet the final verdict pronounced vary.

In *Anna M Vetticad & Ors. Vs. State & Ors. [2020(3) RLW 2310 (Raj.)]*, in Rajasthan High Court Mr Jack Dorsey, Chief Executive Officer of Twitter and Ms Anna M Vetticad, a journalist are the petitioner in the said case. Mr Jack Dorsey was invited to a social event in which he was found holding a placard that reads "Smash Brahmanical Patriarchy" and the picture taken at the event was posted on social media

by the petitioner, Anna M Vetticad. The point of contention was the inscription of a slogan in the placard, “Smash Brahmanical Patriarchy” which the respondent claims to have “*maligned the Brahmin society, at large and also acted in a manner likely to create rift and factions in the society and induce religious hatred towards, the Brahmin community as a whole”* [2020(3) RLW 2310 (Raj.), para 2, 2311]. The complainant Mr. Rajkumar Sharma submitted a complaint stating that “*he belongs to Brahmin community and has immense religious faith”*. It was further claimed that the Brahmin community is highly respected in the society at large as it was responsible for the formulation of social rites and customs. Various Shastras were the original creation of Brahmins who were keeping the Indian culture alive (here, Hindu culture, laced with inequalities was equated with the Indian culture) for ages. Politicians, social workers, artists, industrialists, and even people from other countries seek guidance and blessings from Brahmins before beginning any auspicious work. It was alleged that some people were indulging in tarnishing the image of the Brahmins in society. The petitioner, here, elaborated on the sociological meaning attributed to the concept of Brahmanical patriarchy *“is intended to enforce effective sexual control over women to maintain not only patrilineal succession but also caste purity, the institution unique to Hindu society (quoted from Uma chak. article)”*. The learned judges in the case was in conformity with the arguments of the petitioner’s counsel that the slogan inscribed on the placard cannot be constituted to have hurt the sentiments of any citizen of this country instead it can only be regarded as the feelings of the person strongly opposed to the Brahmanical patriarchal system and desirous of denouncing the same [2020(3) RLW 2310 (Raj.)para 8, 2313]. The impugned FIR was quashed for not constituting any necessary ingredient of any cognisable offence but directed the petitioner Ms Anna M Vetticad to furnish an unconditional apology for the same.

It is interesting to note how the pride of the Brahmin culture was reiterated, in the prayers of the complaint, to the extent that it was equated at par with the Indian culture by the complainant, at one point and thus, the hurt of the Brahmin community comes as the injury of the entire Indians. The claims of victimhood in the said case were not limited to the legal domain alone and created quite a furore on social media. The post was called out for constituting “hate speech”, the Smash Brahmanical Patriarchy poster was called a “hate poster” and one of the journalists, Advaita Kala

went to the extent of comparing Brahmins with Jews saying, ‘constant hitting out against minority Brahmins, who constitute only 5% of the population, is similar to what Nazis did to Jews as the latter were also a minority and were touted for being privileged’. She further even went on to argue that casteism was mitigated through state policies such as reservations and India voted for an OBC prime minister in 2014. The argument of the journalist Advaita Kala is ill-founded and distorted in ways more than one. Firstly, Brahmins are the minority. Secondly, hitting out against Brahmins is similar to what Nazis did to Jews. The qualifiers, “Brahmanism” and “Brahmanical” have gained a lot of significance in contemporary times. In the Presidential address by Dr Babasaheb Ambedkar at G.I.P. Railway Depressed Class Workmen’s Conference, Manmad, Distt. Nashik, 12th and 13th February 1938., he said,

> There are in my view two enemies which the workers of this country have to deal with. The two enemies are Brahmanism and Capitalism. By Brahmanism, I do not mean the power, privileges, and interests of the Brahmans as a community… By Brahmanism, I mean the negation of the spirit of Liberty, Equality, and Fraternity. In that sense, it is rampant in all classes and is not confined to the Brahmans alone, though they have been the originators of it.

Uma Chakravarti (1993, 579-585) laid down the concept of Brahmanical Patriarchy in her well-known work, *Conceptualising Brahmanical Patriarchy in Early India: Gender, Class, Caste, and State,* which explores the relationship between caste and gender and the ways in which patrilineal succession and caste purity necessitate the effective sexual control of women. The social organisation of Hindu society is contingent upon the purity of the women to preserve the status quo. Kala’s arguments on Brahmin being a minority is distorted as her argument primarily rests on the understanding of the numerical strength of the Brahmin population. This line of thinking negates the power relations that are manifestations of what constitutes majority and minority. Bardhan (2010, 19-24) specifies a type of minority which is specific to social conditions of India, the type which is separated from the rest of the population, having been subjected to oppression, discrimination, deprivation through ages, has been marked out as a unique depressed and the weaker group as compared to the rest. Scheduled Castes and Scheduled Tribes, according to him, "are not religious or linguistic minorities; instead, are socially oppressed groups whose handicaps and backwardness require special measures to bring them up on par and share in the common democratic endeavour” (Bardhan 2010, 23). One such attempt was made by Ambedkar who reinterpreted minorities to define untouchables as a political minority

as he apprehended the rights of untouchables will be overshadowed by the Hindu majority despite having numerical strength. Ambedkar, however, claimed his affinity with religious minorities but also insisted that untouchables occupy the lowest rung in the hierarchy of minorities in India owing to their specific disadvantages (Rao 2009, 124).

The kind of privileges that Brahmins enjoy in a social, and economic domain are telling examples of their socioeconomic dominance, the parallel/false equivalence if drawn between any other kind of minority (an attempt to claim reverse victimhood) across the globe would only constitute a grossly misplaced argument. Hence, any parallel between anti-Brahmanism and anti-Semitism is highly ill-founded as such parallels only trivialise the issue of structural inequalities embedded in the institution of caste. Such comparisons are only to keep the manufactured victimhood narrative alive while also invisibilising the privileges bestowed upon the Brahmin community.

The surfacing of such matters in the popular domain and a close reading of the ways in which the dominant has articulated and foregrounded hurt sentiments explains much about how the injury of the dominant is the manifestation of the fear of losing their hierarchical caste status as such narratives attempt to subvert the Hindu social order. The Hindu social order, dominant believes is the legitimate order of being and they accord themselves the duty of the guardianship of the Hindu social order. Thus, any whatsoever attempt at challenging Hindu social order is meted out with threats to the "Hindu" nation/Hindu way of being, at large. Any risk of being less superior is met with their aggressive claims of victimhood (*Hindu khatre mein hain*) couched with threats of public order. It is in this way the dominant manufacture their claims of victimhood which are clearly rooted in relations of power as is evident in the way the issue of public order gains salience in the legal adjudication of the matters dealing with the hurt sentiments of the dominant communities.

4.7 Conclusion: Analysing Claims

The popular language of hurt and its redressal unfolds what is at stake in the public staging of the passionate reactions. The claims of hurt sentiments unveil the moral percepts held by different communities namely, marginalised and dominant. The claims of hurt, here, are not merely claims for redressal but are entrenched deeply in

the claims of identity which forms the basis of politics of hurt sentiments. The history of hurt ought to be understood as the history of injustice which is constitutive of identities as they stand today. The importance of reading and understanding differential affect and impact of the hurt is to assess and foreground the relationship between injustice and identity in terms of historical trajectories. It is important because "recognition forges identity, …dominant groups tend to entrench their hegemony by inculcating an image of inferiority in the subjugated" (Taylor 1994, 66). Highlighting the modern preoccupation with identity and recognition is vital as it helps us in demarcating the nature of claims. The dominant has time and again foregrounded the notion of honour as opposed to the modern conception of human dignity advanced by the claims of marginalised. The notion of honour, Taylor believes, is intrinsically linked with inequalities whereas dignity, being compatible with democracy, has to do with universal egalitarianism (*ibid.*, 27).

A close reading of testimonies and case laws stated above reveals some as the object of humiliation while others as repositories of pride and glory. There are caste connotations inherent in hurt sentiments which sometimes enable the relations of dominance and uphold social structure whereas, it also helps marginalised to foreground the claims which represent the moral disapproval of the same relations of domination. The different signs of (repetitive) hurt (for example, chamar) do not carry hurt (humiliation, in this case) inherently but are consequences of histories of its use as derogations, insult, and violence. Few signs or markers of hurt tend to stay/stick, and no liberal counterargument of "more speech" seemingly had the potential to override its effect. Ex-untouchables are often referred to with derogatory names such as *Chamar, Chuda, Lambada, Mahar, Dhobi, Bouri, Pallan, Dom* and so on, to name a few. The routine usage of these caste names is the rituals of public humiliation. It is through their assertion, that the marginalised (Dalits, in this case) sought to "highlight the discrepancies between official values claimed by the Indian nation and the still prevailing caste prejudices" (Jaoul 2008, 1-33). The language of emotion (hurt) effectuated the reframing of social realities through which they could visiblise the horrors of caste meted out on them. The claims of redressal taking recourse to law enabled right-based conversations. The repeated emphasis of constitutional values (equality, freedom, non-discrimination, dignity) in their claims enabled them to frame

their claims (read, assertion) as a defence of the Constitution against the claims in defence of honor and grace by the dominant. This resistance enabled, what Kannabiran calls, "new mediums of constitutional communication" and "new constitutional conversations" as only constitutionalism holds the promise of change for historically oppressed classes. The claims of the dominant, however, had to take recourse in the glory of the rule of caste social order, which they assume is supreme and above law.

In contemporary times, the increasing frequency of appeals to sentiment has raised a lot of apprehensions regarding the intolerance and cultural sensitivities in India. Appeals to sentiments, regarding calls for genocide of Muslims, attacks on universities and libraries, book bans, film censors, followed by violence by the members of the dominant community, who consider themselves as self-appointed guardians of Hinduism, are not the same as caste hate speech labeled as offensive under the POA Act.

From what can be observed from the case law discussion above, the discourse on free speech obscures the context of caste and the power relations it entails. When section 3(1)(x) is invoked, the court has rarely prosecuted caste hate speech even though there exists an explicit provision in the Act which allows for that possibility. It has been proven through data that the rate of conviction under the POA Act is dismal even when grave violence against SC and ST is concerned. There is a routine proliferation of caste hate speech in both public and private domains which assaults the dignity of Dalits. In this regard, Viswanath (2016, 5-6) argues,

> …effects of public disparagement of Dalits have concrete material effects far more consequential than when members of dominant groups are hurt by speech. The ubiquity of offensive speech publicly directed at Dalits compares starkly with the socially and legally enforced prohibition on speech deemed offensive to majoritarian Hindu organizations.

She calls this "preferential regulatory system" as constitutive of "specific economy of offence" (*ibid.*, 6). In this economy of offence, the issue of caste hate speech is trivialised beyond extent and yet section 3(1)(x) continues to flag that "trivialised" issue of caste hate speech and remain as one of the only mechanisms of its kind which lays out the conditions for substantive freedom of speech by treating caste hate speech as an offence. Section 3(1)(x) ought to be read as a speech enhancing measure to inculcate the robustness of free and responsible speech.

Chapter-5:

Conclusion

The nature of a plural and dynamic society like ours requires deliberation on the ambiguities posed by the liberal value system. From what began as the debate between the supporters of free speech and the defenders of regulation of free speech, lies a nuance where "more speech" argument was provided to combat the ill-effects and dangers of both, hate speech and state-led regulation. The liberal notions of individual liberty and limited government require minimal or no state interference and that necessitates liberals to foreground the case for more speech for countering hate speech. In the argument of more speech lies an assumption that everyone is 'equally' entitled to free speech and has all the infrastructures and resources at their disposal, required for accessing and participating in the public sphere. The preoccupation with formal equality invisibilises social and economic inequalities. These social and economic barriers constitute the conditions of unfreedoms for the marginalised which are hurdles in the realisation of that liberty. The control over the means and infrastructures of the public sphere by the caste elites contributes to the regulation of the public sphere. The absence/lack of communicative practices to participate in the public sphere is yet another hurdle/obstruction in the realisation of liberty. These factors combined reveal and affirm that "all speech is not free" and simultaneously, "not all expressions of hostility are equal". The character of hostile expressions is also mediated by the structural relations of power. For example, when the dominant uses hate speech against the marginalised to degrade them in their own eyes and the eyes of the public, it carries a different measure of harm inflicted as opposed to the marginalised challenging the politics of domination itself. Along similar lines, it is observed that claims of hurt sentiments arising out of these unequal hostile expressions are rooted in unequal relations of power. But what happens when the state does not recognise the differences in the nature and context of hurt sentiments? The state's preoccupation with the principle of neutrality mandates the muting/flattening of the difference in the identities (which are manifestations of histories of domination and subjugation). Now, all the voices and expressions are assumed to have a similar status which is discriminatory in

nature to those at the receiving end of the politics of domination. In this context what happens when hurt sentiments take recourse to the law? The incitement to discrimination has been foregrounded, time and again by the International Committees, Human Rights Conventions and so on, as the fundamental premise to hate speech. Yet, the Indian legal system takes no account of the structural relations while adjudicating the cases of hate speech.

What does hate speech do? This question requires understanding how hate speech injures the dignity of its subject in their own eyes and in the eyes of others. It inflicts the degraded sense of being onto its subjects. The introduction of the category of hurt sentiments is to visibilise and vocalise the effects of hurt, by understanding the affective aspects of structural injustice which cannot be comprehended completely in terms of law alone and yet has a peculiar relation to it. The embedded-ness of caste in the politics of hurt sentiments require us to moralise the claims of hurt sentiments to assess whether the claims for redressal are in consonance with constitutional morality. The understanding of how the claims of hurt are constitutive of claims of identities (of both, the subject and the community) also reveals how hurt is involved in unmaking the life of its victims. This does not suggest that injury is the proof of the identity as such a reading would enable essentialism of wound culture. To avoid any possibility of essentialism, the histories of socio-economic relations of violence are foregrounded to make sense of processes of being wounded in contemporary times. This answers how appeals to sentiments in terms of historical trajectories only required constitutional redressal as opposed to all/any kind of appeals to sentiments. This demarcation is studied in this project through the politics of recognition and difference framework. The politics of recognition and difference illustrates how the claims for recognition of caste in the body politic enables the articulation of difference in identities. This also mandates constitutional correction of hurt in the interests of constitutional values being threatened/negated against the universalism of rights and the neutrality of the state.

The sociological assessment of the testimonies of hurt elaborates on how dominant communities aggressively safeguard their place in caste hierarchy whereas Dalits (who are at the bottom and receiving end of Hindu social order) challenge the very idea of caste hierarchy. The claims of the dominant tell us much about the way they guard their caste privileges bestowed upon them by invoking loss of glory, pride

and honour. Whereas the claims of marginalised are claims of redressal of their injured dignity, long due to them. These are both examples of how foregrounding the structural relations help us better understand the politics of hurt-sentiments. Again, it requires locating the claims in their respective histories of domination and subordination. It has been observed that the claims of the dominant reflect manufactured victimhood which has the force of posing the supremacy of the rule of caste as the legitimate/normal order of being. The rule of law as opposed to rule of caste, necessitated the universal idea of right-bearing equal citizens situated in the Constitutional morality/ethics. The claims of humiliation by the marginalised are articulated in terms of rights-based language. The recourse to law, through the language of hurt sentiment and rights, effectuated Constitutional redressal of caste humiliation through enactment of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

The reasonable restrictions, imposed by section 3(1)(x) of the POA Act, falls very well within the realm of democratic framework as it balances the free speech principle with other competing values such as equality, non-discrimination, autonomy, dignity and so on, and aims to further the goal of article 15. The free speech jurisprudence in India has been guided by the issues of public order, sovereignty and so on. The coming of the POA Act warrants the mechanisms of redressal as it unveils the role of caste and violence. The use of the category of hurt sentiment to understand the complex social structures has also equipped us to comprehend the way violence against others involves forms of power which manifests in a way which has both emotional and physical dimensions to it. Section 3(1)(x) of the POA Act penalises the utterances which aim to intentionally insult a member of Scheduled Caste or Scheduled Tribe by the members who are not Scheduled Castes or Scheduled Tribes. As it is a penalising provision, the thresholds enlisted to invoke section 3(1)(x) are very high. The courts interpreted these thresholds through case laws. The adjudication of hurt sentiment claims of the marginalised, however, remains limited to the applicability of the section 3(1)(x). The scope of caste hate speech jurisprudence remains restricted as rarely is the question of caste hate speech (caste-based discriminatory reference) deliberated in the light of other competing values such as liberty, equality, dignity, non-discrimination or its context. The mechanical interpretation of the POA Act raises questions on whether the judicial interpretation of the said Act is consistent with the

intent and object of the Act. The purpose of the Act as it clearly states was to prevent indignities, humiliation and harassment on the account of caste and thus, protect its beneficiaries. Such interpretations, thus, defeat the transformative role the legislation aims at. Furthermore, the enabling conditions for the realisation of the substantive right to free speech and expression is subjected to the dearth of economic and social capital. POA Act is a protective legislation and we are yet to observe the possibility of section 3(1)(x) as an enabling (affirmative) measure.

The task of the project is not to advocate for absolute censorship or to trivialise the right to free speech and expression by any means. This study problematises the free speech principle by placing it in the complex milieu of our social setup. The argument advanced in this research focusses on substantive notion of free speech in consonance with other competing values as equality, non-discrimination and right to dignified life. A case is foregrounded to redress and prevent the perpetuation of humiliation on account of structural and hierarchical relations. Despite all kinds of ambiguousness, exceptions and limitations inherently present in the Act, we imagine a possibility of a new jurisprudence where section 3(1)(x) can amplify the long-silenced voices while also, foregrounding the substantive norms of liberty, equality and fraternity as our constitutional order. This, we hope can contribute to bring about both structural and notional changes in the lives of our people.

This research is not without its varied limitations. The claims of ethnic identity vis-a-vis freedom of speech and expression have not been explored through this research. The research lacks these aspects as only the aspect of caste is foregrounded whereas sociological enquiry of the Act requires analysis of both, caste and ethnic identities. The study of ethnicity required a different conceptual frame to understand their claims as they demand preservation in addition to the preventive measures laid down in the Act.

Another limitation is regarding my inability to traverse through the contours of caste hate speech in the purview of social media which has become a constant site for its rampant perpetuation.

Bibliography

Agarwal, Devika. 2017. “Casteist remarks on social media now punishable: What fighting online hate speech in India entails-India News.” *Firstpost*, 15 July 2017,https://www.firstpost.com/india/casteist-remarks-on-social -media-now-punishable-what-fighting-online-hate-speech-in-india-entails-3815175.html.Accessed 3 Janurary 2021.

Ahmad, Sara. 2015. *The Cultural Politics of Emotion.* New York: Routledge.

AIDWA. 2020. “AIDWA's statement on SC Ruling in Hitesh Verma.” *Aidwa*. https://www.aidwaonline.org/aidwas-statement-sc-ruling-hitesh-verma. Accessed 5 February 2021.

Ambedkar, B. R. 1917. “Castes in India: Their Mechanism, Genesis and Development.” *Indian Antiquary,* XLVI.

Ambedkar, B. R. 2017. “Dr. Ambedkar's Speech at GIP Railway Depressed Class Workmen's Conference, Nashik.” *Velivada*. https://velivada.com/2017/06/03/dr-ambedkars-speech-depressed-class-workmens-conference-nashik/.Accessed 23 March 2021.

Anonymous. n.d. “Caste & Race.” Centre For Education and Documentation. http://www.doccentre.net/docsweb/CasteRace/.Accessed 14 April 2021.

Babbie, Earl R. 2010. *The Practice of Social Research.* Belmont, CA: Wadsworth/Cengage Learning.

Bajpai, Rochana. 2016. *Debating Difference: Group Rights and Liberal Democracy in India.* New Delhi: Oxford University Press.

Baker, C. E. 1994. "Of Course, More Than Words." *The University of Chicago Law Review* 61 (3): 1181-1211.

Bandes, Susan A., ed. 2000. *The passions of Law.* London and New York: NYU Press.

Bardhan, A. B. 2010. *Class Caste Reservation & Struggle against Casteism.* New Delhi: People's Publishing House.

Barkan, Elazar. 2006. "Historical Reconciliation: Redress, Rights and Politics." *Journal of International Affairs Editorial Board* 60 (1): 1-15.

Baxi, Upendra. 2009. "Humiliation and Justice." In *Humiliation: Claims and Context*, 58-78. New Delhi: Oxford University Press.

Bhatia, Gautam. 2016. "NDTV India ban: It's not about just national security." *The Hindu*, November 8, 2016. https://www.thehindu.com/opinion /lead/NDTV-India-ban-It%E2%80%99s-not-about-just-national-security/article62114354.ece.Accessed 19 May 2021.

Bhatia, Gautam. 2018. *Offend, Shock, or Disturb: Free speech under the Indian Constitution.* New Delhi.: Oxford University Press.

Bhatia, Gautam. 2022. "A Quest for Social Consensus against Hate Speech." *The Hindu*, January 13, 2022. https://www.thehindu.com/opinion/ lead/a-consensus-against-hate-speech/article38261144.ece.Accessed 16 June 2022.

Boler, Megan. 2004. "All Speech Is Not Free: The Ethics of "Affirmative Action Pedagogy."" *Counterpoints* 240.

Bombay High Court Writ Petition No. 229 of 2003, Anand Patwardhan v. Central Board of Film Certification and another, 2003 SCC OnLine Bom 417.

Brown, Wendy, Judith Butler, Saba Mahmood, and Talal Asad. 2009. *Is Critique Secular? Blasphemy, Injury, and Free Speech.* Berkeley.: University of California Press.

Burra, Srinivas. 2014. "Decriminalising Creative 'Offence.'" *Economic and Political Weekly* 49 (40): 18-21.

Butler, Judith. 1996. "Burning Acts: Injurious Speech." *The University of Chicago Law School*: Roundtable 3 (1): 199-221.

Butler, Judith. 1997. *Excitable Speech: A Politics of the Performative*. London: Routledge.

Calcutta High Court C.R.R. No. 2485 of 2014, Subal Chandra Ghosh & Ors v. The State of West Bengal & Anr., 2015 SCC OnLine Cal 6518.

Chandrachud, Abhinav. 2017. "Freedom of expression was once wide-ranging in India. Then Jawaharlal Nehru asked for changes." *Scroll.in*. 2021. https://scroll.in/article/849499/freedom-of-expression-was-once-absolute-in-india-then-jawaharlal-nehru-asked-for-changes.Accessed 16 June 2022.

Chandrachud, Abhinav. 2017. *Republic of Rhetoric: Free Speech and the Constitution of India.* Gurugram: Penguin Random House India Private Limited.

Chatterjee, Partha. 1993. *The Nation and its Fragments: Colonial and Post-colonial Histories*. Princeton, Princeton, NJ: Princeton University Press.

EU, Council Acts Adopted Under Title VI Of The EU Treaty Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Acts adopter under EU treaty (Official Journal of the European Union 2008).

Council of Europe. "The European Convention on Human Rights - Convention for Protection of Human Rights and Fundamental Freedoms." 2021 https://www.jus.uio.no/lm/coe.convention.on.human.rights.1950.and.protocols.to.1966.consoloidated/10.html.Accessed 7 September.

Council of Europe. "European Commission Against Racism and Intolerance (ECRI)- ECRI General Policy Recommendation N°15 on combating Hate Speech." https://www.refworld.org/docid/58131b4f4.htm.Accessed 23 October 2021.

Council of Europe. "Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech".https://rm.coe.int/1680505d5b.\.Accessed 12 November 2021.

Daniyal, Shoaib. 2018. "A call to 'smash Brahmanical patriarchy' is not hate speech – it's progressive, anti-caste politics." *Scroll.in*. https://scroll.in/article/902818/a-call-to-smash-brahmanical-patriarchy-is-not-hate-speech-it-s-progressive-anti-caste-politics.Accessed 29 December 2021.

Das, Veena. 1995. *Critical Events: An Anthropological Perspective on Contemporary India.* New Delhi: Oxford India Paperbacks.

Deka, Rifa. 2021. "Fabindia's 'Jashn-e-Riwaaz' sparks controversy, Netizens allege 'Abrahamisation' of Diwali." *EastMojo*. https://www.eastmojo.com/trending/2021/10/18/fabindias-jashn-e-riwaaz-sparks-controversy-netizens-allege-abrahamisation-of-diwali/.Accessed 4 January 2022.

Delhi High Court Criminal Writ Petition No. 704/2001, D.P. Vats v. State & others, 2002 (64) DRJ 29 (DB).

Delhi High Court Crl. W. No. 402 of 2001, Daya Bhatnagar & Ors. v. State, 2004 SCC OnLine Del 33.

Delhi High Court W.P.(CRL) 3083/2016, Ms. Gayatri @ Apurna Singh v. State & Anr., 2017 SCC OnLine Del 8942.

Dhanrajani, Rachna. 2017. “Rajputs gather at Azad Maidan against Padmavati.” *The Hindu*, November 21, 2017. https://www.thehindu.com/news/cities/mumbai/rajputs-gather-at-azad-maidan-against-padmavati/article20607069.ece.Accessed 5 February 2022.

Dhanrajani, Rachna. 2017. “Rajputs gather at Azad Maidan against Padmavati.” *The Hindu,* November 21, 2017. https://www.thehindu.com/news/cities/mumbai/rajputs-gather-at-azad-maidan-against-padmavati/article20607069.ece.Accessed 9 March 2022.

Dr. Nitin. 2019. “Combating Casteism When Free Speech Enables Hate Speech.” *Journal of the Gujarat Research Society* 21 (1): 94-98.

Dutt, Barkha. 2018. “Opinion | 'Padmaavat' is pure misogyny dressed up in diamonds and drama.” *The Washington Post,* February 6, 2018. https://www.washingtonpost.com/news/global-opinions/wp/2018/02/06/padmaavat-is-pure-misogyny-dressed-up-in-diamonds-and-drama/.Accessed 17 March 2022.

EastMojo. 2021. “Sabyasachi faces backlash over Mangalsutra Ad campaign.” *EastMojo*.https://www.eastmojo.com/trending/2021/10/29/sabyasachi-faces-backlash-over-mangalsutra-ad-campaign/.Accessed 11 April 2022.

Express WebDesk. 2020. “Karnataka drops content 'hurting Brahmin sentiment' from school textbooks.” *The Indian Express.* https://indianexpress.com/article/india/karnataka-drops-content-hurting-brahmin-sentiment-from-school-textbooks-7109609/.Accessed 18 May 2022.

Ferguson, Russell, Marcia Tucker, and Félix González-Torres. 1999. *Out There: Marginalization and Contemporary Cultures.* New York: New Museum of Contemporary Art.

Fiss, Owen M. 2009. *The Irony of Free Speech*. Cambridge, MA: Harvard University Press.

Gandee, Sarah. 2015. "Dr Bhimrao Ramji Ambedkar and the Re- Interpretation of 'Untouchability': Legislating Against Caste Violence in Rural India." *Retrospectives* 4 (1): 16-32.

Gelber, Katharine. 2002. *Speaking Back: The Free speech versus hate speech debate.* Vol. 1. Amsterdam / Philadelphia: John Benjamins Publishing Company.

George, Cherian. 2016. "Regulating "Hate Spin": The Limits of Law in Managing Religious Incitement and Offense." *International Journal of Communication* 10:2955-2972.

Guha, Ayan. 2018. "Recent Debate on Landmark Anti-Caste Legislation in India." *International Journal of Discrimination and the Law* 19 (1): 48-63.

Guru, Gopal, and Sundar Sarukkai. 2017. *The Cracked Mirror: An Indian Debate on Experience and Theory.* New Delhi, India: Oxford University Press.

Guru, Gopal. 2009. "Rejection of Rejection: Foregrounding Self-Respect." *In Humiliation: Claims and Context*, 209-225. New Delhi: Oxford University Press.

Guru, Gopal. 2009. *Humiliation: Claims and Context*. New Delhi: Oxford University Press.

Guterres, Antonio. United Nations Strategy and Plan of Action On Hate Speech. May 2019. Raw data.

Hare, Ivan, and James Weinstein. 2010. *Extreme Speech and Democracy*. New York: Oxford University Press.

Heinze, Eric. 2016. *Hate-Speech and Democratic Citizenship*. Oxford: Oxford University Press.

Hill, Jane H. 2008. *The Everyday Language of White Racism.* Chichester: Wiley-Blackwell.

hooks, bell. 1995. *Killing Rage: Ending Racism*. New York.: Henry Holt and Company.

IANS. 2016. “NGO advert seeks sweepers from upper castes, sparks controversys.” *Business Standard*. https://www.business-standard.com/article /news-ians/ngo-advert-seeks-sweepers-from-upper-castes-sparks-controversy-116062301283_1.html. Accessed 23 April 2022.

Iyer, Aishwarya. 2022. “Meet the 25-year-old law student who took on hate speech makers in Haridwar.” *Scroll.in*, January 3, 2022. https://scroll.in/article/1014154/meet-the-25-year-old-law-student-who-took-on-hate-speech-makers-in-haridwar. Accessed 8 June 2022.

Jaoul, Nicolas. 2008. “The ‘Righteous Anger’of the Powerless Investigating Dalit Outrage over Caste Violence.” *South Asia Multidisciplinary Academic Journal* 2.

Jeenger, Kailash. 2020. “Supreme Court in Hitesh Verma Case Fails to Address Caste Discrimination.”*TheLeaflet.* https://www.theleaflet.in/supreme-court-in-hitesh-verma-case-fails-to-address-caste-discrimination.Accessed 9 June 2022.

Kannabiran, Kalpana. 2001. “Race and caste: A Response to Andre Beteille.” *PUCL Bulletin*. http://www.doccentre.net/docsweb/CasteRace/documents_caste/beteille_response.htm.Accessed 9 May 2022.

Kannabiran, Kalpana. 2012. *Tools of Justice: Non-Discrimination and the Indian Constitution: In Honour of K.G. Kannabiran*. New Delhi: Routledge.

Kaur, Raminder, and William Mazzarella. 2012. *Censorship in South Asia: Cultural Regulation from Sedition to Seduction*. New Delhi: Routledge.

Kerala High Court O.P. No. 12612 of 1996, Ravindran Pillai vs. Union of India, 1996 OnLine Ker 319.

Kumar, Akhil, and Sukriti Dwivedi. 2021. “"Castelessness Only An Upper Caste Privilege": Justice D.Y. Chandrachud.” *NDTV.com.* https://www.ndtv.com/india-news/justice-dy-chandrachud-on-caste-based-discrimination-castelessness-only-an-upper-caste-privilege-2639778.Accessed 7 May 2022.

Kumar, Santvana. 2020. “Caste and Gender: A Systemic Obliteration of Justice.” *Akademi Mag.* https://www.akademimag.com/caste-gender-justice.Accessed 15 April 2022.

Kumar, Sunalini. 2016. “Sense and Sentimentality: A Political Fable.” In *SENTIMENT, POLITICS, CENSORSHIP: THE STATE OF HURT*, 163-180. Los Angeles: Sage.

Liang, Lawrence. 2010. “How Sedition crept into the Constitution: Siddharth Narrain.” *Kafila*, December 6, 2010. https://kafila.online/2010/12/06/how-sedition-crept-into-the-constitution/.Accessed 18 April 2022.

Liang, Lawrence. 2012. “Love Language or Hate Speech.” *Tehelka Magazine* 9 (9): 1-4.

LiveWire. 2021. “Caught on Video, IIT Kharagpur Faculty Abuses SC, ST, OBC Students and Those With Disabilities.” *The Wire*, April 27, 2021. 2022.

https://thewire.in/caste/caught-on-video-iit-kharagpur-faculty-abuses-sc-st-obc-students-and-those-with-disabilities.Accessed 11 March.

MacKinnon, Catharine A. 1996. *Only Words*. Cambridge, Massachussets: Harvard University Press.

Madras High Court W.P. No. 14205 of 2013, Tamizh Nadu Brahmin Association v. Central Board of Film Certification, 2013 SCC OnLine Mad 1637.

Mahajan, Gurpreet. 2013. *India: Political Ideas and the Making of a Democratic Discourse.* London and New York: Zed Books.

Mahmood, Saba. 2009. "Reply to Judith Butler." In *Is Critique Secular?: Blasphemy, Injury and Free Speech*, 146-53. Berkeley: University of California.

Mahmood, Saba. 2015. *Religious Difference in a Secular Age: A Minority Report.* Princeton and Oxford: Princeton University Press.

Maitra, Ishani, and Mary k. MacGowan. 2012. *Speech and Harm*. Oxford: Oxford University Press.

Makepeace, Sitlhou. 2017. "India's Universities Are Falling Terribly Short on Addressing Caste Discrimination." *The Wire*, November 21, 2017. https://thewire.in/caste/india-universities-caste-discrimination. Accessed 17 March 2022.

Matsuda, Mari J., Charles R. Lawrence, Richard Delgado, and Kimberle W. Crenshaw. 2018. *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment.* New York and London: Routledge.

Mazzarella, William. 2014. *Censorium: Cinema and the Open Edge of Mass Publicity*. Bloomington and Indianapolis: Orient Longman.

McCammon, Christopher. 2018. “Domination (Stanford Encyclopedia of Philosophy).” *Stanford Encyclopedia of Philosophy.* https://plato.stanford.edu/entries/domination/.Accessed 30 January 2022.

MENON, NIVEDITA, and SIDDHARTH NARAIN. 2015. “The paradoxes of censorship.” *The Hoot.* http://asu.thehoot.org/free-speech/censorship/the-paradoxes-of-censorship-9068.Accessed 12 February 2022.

Mill, J. S. 2010. *On Liberty*. London: Penguin Classics.

Mohamed, Sheerene, and Nihalsing B. Rathod. 2020. “16 key statements by Supreme Court in the Sudarshan TV case.” *TheLeaflet*. https://www.theleaflet.in/16-key-statements-by-supreme-court-in-the-sudarshan-tv-case/.Accessed 16 January 2022.

Molnar, Peter, and Michael Herz, eds. 2012. *The Content and Context of Hate Speech: Rethinking Regulation and Responses.* New York: Cambridge University Press.

Narasappa, Harish. 2016. “Rule of Law in India: A Quest for Reason,” Master's Thesis. Bengaluru: National Law School of India University.

Narrain, Siddharth. 2011. “'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India.” *Economic and Political Weekly* XLVI (8): 33-37.

Narrain, Siddharth. 2016. “Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech.” *Economic & Political Weekly* LI, no. 17 (April): 119-126.

Narrain, Siddharth. 2016. “The Harm in Hate Speech Laws: Examining the Origins of Hate Speech Legislation in India.” In *Sentiment, Politics, Censorship: State of Hurt*, 39-54. New Delhi: SAGE Publications India Pvt.

Narrain, Siddharth. 2017. “Unpacking the Law Commission's Hate Speech Report.” *Socio Legal Review.* https://www.sociolegalreview.com/post/unpacking-the-law-commission-s-hate-speech-report.

Narula, Smita. 2008. “Equal by Law, Unequal by Caste: The Untouchable Condition in Critical Race Perspective.” *Wisconsin International Law Journal* 26 (2): 255-344.

Pandian, M. S. 2002. “One Step Outside Modernity: Caste, Identity Politics and Public Sphere.” *Economic and Political Weekly* 37, no. 18 (May): 1735-1741.

Pandian, M.S.S. 2012. “'Politically Incorrect’ need not be ‘Educationally Inappropriate’.” *Outlook*. https://www.outlookindia.com/website/story/politically-incorrect-need-not-be-educationally-inappropriate/281503.Accessed 26 February 2022.

Parekh, Bhikhu. 2009. “Logic of Humiliation.” In *Humiliation: Claims and Context*, 23-40. New Delhi: Oxford University Press.

Parekh, Bhikhu. 2012. “Is There a Case for Banning Hate Speech?” In *The Content and Context of Hate Speech: Rethinking Regulation.* New York: Cambridge University Press.

Phillips, Anne. 1994. “Dealing With Difference: A Politics of Ideas Or A Politics of Presence?” *Constellations* 1 (1): 74-91.

PTI. 2021. “Atrocities against Members of SC/ST Are Not Thing of Past, Says SC.” *The Hindu.* https://www.thehindu.com/news/national/atrocities-against-members-of-scst-are-not-thing-of-past-says-sc/article37235633.ece.Accessed 20 March 2022.

PTI. 2021. “Caste Slur At Hockey Player Vandana Katariya's Family, 1 Arrested: Report.” *NDTV.com.* https://www.ndtv.com/india-news/casteist-slur-on-hockey-player-vandana-katariya-after-india-loses-olympic-semis-1-arrested-report-2503413.Accessed 13 May 2022.

Punjab and Haryana High Court Crl. M. No. M-54307 of 2006, Dr. Onkar Chander Jagpal & another v. Union Territory, Chandigarh and another, 2012 SCC OnLine P&H 1734.

Quint Entertainment. 2021. "Comedian Neville Shah Criticised for Casteist Comments." *The Quint.* https://www.thequint.com/entertainment/celebrities/neville-shah-comedian-criticised-for-casteist-comments-in-comedy-routine-amazon-prime.Accessed 29 December 2021.

Quint Neon. 2021. "Munmun Dutta Gets Called Out on Twitter for Casteist Slur." *The Quint*. https://www.thequint.com/neon/social-buzz/why-is-arrest-munmun-datta-trending-on-twitter#read-more.Accessed 25 December 2021.

Raghavan, Vikram. 2016. "Taking Free Speech Seriously." *Economic and Political Weekly* 51, no. 32 (August): 24-27.

Rajagopal, Arvind. 2005. *Politics after Television: Religious Nationalism and the Reshaping of the Indian Public*. Cambridge: Cambridge University Press.

Rajasthan High Court S.B. Criminal Misc. Petition No. 2818 of 2019 and 4433 of 2018, Anna M.M. Vetticad & ors. v. State & ors., 2020(3) RLW 2310 (Raj.).

Rajasthan High Court S.B. Criminal Misc. Petition No. 737 of 2017, Sanjay Leela Bhansali & Ors. v. State of Rajasthan & Ors., 2018 SCC OnLine Raj 283.

Ramdev, Rina, Sandhya D. Nambiar, and Debatiya Bhattcharya. Los Angeles. *Sentiment, Politics, Censorship: The State of Hurt*. 2015: Sage.

Rao, Anupama. 2009. *The Caste Question: Dalits and the Politics of Modern India.* Berkeley and Los Angeles, California: University of California Press.

Rep. Hate Speech Laws in India. Delhi, New Delhi: National Law University, 2018.

Rep. No. 267 (2017). Law Commission of India on Hate Speech

Rodrigues, Valerian. 2012. “Politics and Pedagogy: The NCERT Texts and Cartoons.” *Economic and Political Weekly* 47, no. 22 (June): 21-23.

S, Ramanathan. 2015. “Labelling Dalits 'Harijans': How we remain ignorant and insensitive to Dalit identity.” *The News Minute.* https://www.thenewsminute.com/article/labelling-dalits-harijans-how-we-remain-ignorant-and-insensitive-dalit-identity-35486.Accessed 13 November 2021.

Said, Edward W. 1986. *After the Last Sky: Palestinian Lives.* New York: Pantheon Books.

Salim, Mariya. 2022. “'Bulli Bai', 'Sulli Deals': On Being Put Up for 'Auction' as an Indian Muslim Woman.” *The Wire*. https://thewire.in/communalism/indian-muslim-woman-auction-bulli-bai. Accessed 22 May 2022.

Sarkar, Tanika. 2010. *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism*. Bloomington: Indiana University Press.

Satyanarayana, K. 2012. “Ambedkar Cartoons, Dalit Objections and Indian Left liberals.” Interview by Ravi Chandran.” *Round Table India: For an Informed Ambedkar Age*. https://roundtableindia.co.in/index.php?option=com_content&view=article&id=5203:-ambedkar-cartoon-dalit-objections-and-indian-left-liberals-i&catid=119:feature&Itemid=132. Accessed 12 October 2021.

Satyanarayana, K. 2019. “Caste Violence: Free Speech or Atrocity.” In *Violence in South Asia: Contemporary Perspectives*, edited by Anindya S. Purakayastha, Pavan K. Malreddy, and Birte Heidemann. London: Routledge.

Satyanarayana, K. 2013. “The Question of Casteism Still Remains.” *The Hindu*, February 4, 2013. https://www.thehindu.com/todays-paper/tp-opinion/the-

question-of-casteism-still-remains/article4380441.ece. Accessed 25 June 2021.

Scroll Staff. 2020. “Karnataka removes passages 'hurting Brahmin sentiments' from Class 6 textbook.” *Scroll.in*, December 18, 2020. https://scroll.in/latest/981654/karnataka-removes-passages-hurting-brahmin-sentiments-from-class-6-textbook. Accessed 17 May 2021.

Scroll Staff. 2021. “Hindutva leaders call for killing of Muslims at Haridwar and Delhi events.” *Scroll.in*, December 24, 2021. https://scroll.in/latest/1013435/videos-of-seers-calling-for-killing-of-muslims-hindu-rashtra-spark-anger. Accessed 2 January 2022.

Scroll Staff. 2021. “'Open call for murder': 76 Supreme Court lawyers write to CJI on hate speech against Muslims.” *Scroll.in*, December 27, 2021. 2022. https://scroll.in/latest/1013743/open-call-for-murder-76-supreme-court-lawyers-write-to-cji-on-hate-speech-against-muslims. Accessed 17 March

Scroll Staff. 2022. “Ruling party not just silent on hate speech, but endorsing it, says former SC judge Rohinton Nariman.” *Scroll.in*, January 19, 2022. https://scroll.in/latest/1015387/ruling-party-not-just-silent-on-hate-speech-but-endorsing-it-says-former-sc-judge-rohinton-nariman.Accessed 16 June 2022.

Shanmugavelan, Dr Murali. 2021. “Caste-hate speech: Addressing hate speech based on work and descent.” International Dalit Solidarity Network. https://idsn.org/portfolio-items/caste-hate-speech-addressing-hate-speech-based-on-work-and-descent/. Accessed 30 January 2022.

Shapiro, Ian. 2016. *Politics Against Domination*. Cambridge: Belknap Press of Harvard University Press.

Soren, Ram K. 2021. “The New Judicial Amendment to SC/ST (Prevention of Atrocities) Act.” *Economic and Political Weekly* 56, no. 42 (October): 10-12.

Soutphommasane, Tim. 2006. “Liberalism, Harm, and the Limits of Free Speech.” *Australian Institute of Policy and Science* 78 (5): 33-37.

Sperner, Philipp. 2016. “Harmful Speech and the Politics of Hurt Sentiments: Censorship as a Biopolitical Project in India.” *Economic and Political Weekly*, 109-116.

Srivastava, Sanjay. 2015. “Pathology of hurt sentiment.” *The Hindu*, February 12, 2015. https://www.thehindu.com/opinion/op-ed/pathology-of-the-hurt-sentiment/article4404681.ece. Accessed 7 March 2021.

Staff. 2020. “'Yuvraj Singh Apologise' Trends on Twitter After Disparaging Comment on Yuzvendra Chahal.” *News18*, June 2, 2020. https://www.news18.com/cricketnext/news/yuvraj-singh-apologise-trends-on-twitter-after-castiest-slur-on-yuzvendra-chahal-2648687.html. Accessed 15 June 2021.

Sundar, Syama. 2016. “Cartoons that show what BR Ambedkar meant to India's cartoonists.” *Scroll.in*. Accessed 3 May 2020. https://scroll.in/article/806612/cartoons-that-show-what-br-ambedkar-meant-to-indias-cartoonists.

Supreme Court Civil Suit: 1212/2005 & IA: 6787/2005, Raghu Nath Pandey and Anr. v. Bobby Bedi and Ors., 2006 SCC OnLine Del 221.

Supreme Court Criminal Appeal No. 1287 of 2008, Swaran Singh and others v. State through standing council and Another, 2008 SCC OnLine SC 1245.

Supreme Court Criminal Appeal No. 291 of 1971, State of Uttar Pradesh v. Lalai Singh Yadav, 1976 SCC (Cri) 556.

Supreme Court Criminal Appeal No. 416 of 2018, Dr Subhash Kashinath Mahajan v. State of Maharashtra, 2018 SCC OnLine SC 243.

Supreme Court Criminal Appeal No. 707 of 2020, Hitesh Verma v. State of Uttarakhand and Another, (2020) 10 SCC 710.

Supreme Court Criminal Appeal No., 766 of 2011, Asmathunnisa v. State of Andhra Pradesh, 2011 SCC OnLine SC 518.

Supreme Court Writ Petition (C) No. 904 of 2018, N. Radhakrishnan alias Radhakrishnan Verenickal v. Union of India and Others, 2018 SCC OnLine SC 1349.

Supreme Court Writ Petition (Crl.) No. 160 of 2020, Amish Devgan v. Union of India & others, (2021) 1 SCC 1.

Supreme Court Writ Petition No. 331 of 1960 and 67-68 of 1961, Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.

Taylor, Charles, Amy Gutmann, Michael Walzer, Jürgen Habermas, Stephen C. Rockfeller, Anthony Appiah, and Susan Wolf. 1994. *Multiculturalism: Examining the Politics of Recognition*. Germany: Princeton University Press.

The Wire Analysis. 2021. "Hindutva Leaders at Haridwar Event Call for Muslim Genocide." *The Wire*, December 22, 2021. https://thewire.in/communalism/hindutva-leaders-dharma-sansad-muslim-genocide. Accessed 26 January 2022.

The Wire Staff. 2019. "My Birth is My Fatal Accident: Rohith Vemula's Searing Letter is an Indictment of Social Prejudices." *The Wire*. https://thewire.in/caste/rohith-vemula-letter-a-powerful-indictment-of-social-prejudices. Accessed 16 May 2021.

Tripathi, Ashutosh. 2021. “"Shameful": Hockey Captain On Caste Slurs At Vandana Katariya's Family.” *NDTV.com*. https://www.ndtv.com/india-news/vandana-kataria-hockey-player-casteist-slurs-shameful-hockey-captain-rani-rampal-on-caste-slurs-at-players-family-2504928. Accessed 11 May 2022.

U.S. Congress. United Nations Strategy and Plan of Action on Hate Speech. Cong. Doc. New York: UN, 2019.

Unnamati, Syama S. 2016. “Cartoons that show what BR Ambedkar meant to India's cartoonists.” *Scroll.in*. https://scroll.in/article/806612/cartoons-that-show-what-br-ambedkar-meant-to-indias-cartoonists. Accessed 18 June 2021.

Venkatesan, Rashmi. 2020. “Humiliation outside 'public view': A verdict puts focus on a grave flaw in the SC/ST Act.” *Scroll.in*. https://scroll.in/article/978462/humiliation-outside-public-view-a-verdict-puts-focus-on-a-grave-flaw-in-the-sc-st-act. Accessed 20 January 2021.

Viswanath, Rupa. 2016. “Economies of offense: Hatred, speech, and violence in India.” *Journal of the American Academy of Religion* 84 (2): 352-363.

Waldron, Jeremy. 2010. “Dignity and Defamation: The Visibility of Hate.” *Harvard Law Review Association* 123, no. 7 (May): 1596-1657.

Waldron, Jeremy. 2012. *The Harm in Hate-Speech*. Cambridge, Massachusetts, London, England: Harvard University Press.

Wankhede, Harish S. 2012. “Ambedkar, NCERT Textbooks and the Protests.” *Economic and Political Weekly* 47, no. 23 (June): 29-32.

Weinstein, Liza, Pranathi Diwakar, and Advaita Kala. 2018. “Brahmins and Jews: Drawing such a parallel masks systemic oppression, discredits anti-caste efforts.” *Scroll.in*. https://scroll.in/article/903542/why-it-is-utterly-wrong-to-call-brahmins-the-new-jews-of-india. Accessed 15 May 2021.

West, Cornel. 2017. *Race Matters*. Boston: Beacon Press.

Wolf, Eric, and Thomas H. Eriksen. 2010. *Europe and the People without History*. Berkeley: University of California Press.

Young, Iris M. 2009. "Structural Injustice and the Politics of Difference." In *Contemporary Debates in Political Philosophy*, edited by Thomas Christiano and John Christman, 362-84. Malden: Wiley.