Hurt and Harm Principles in defining Hate Speech: Judicial Standards and Challenges posed by the New Media

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MASTER OF PHILOSOPHY

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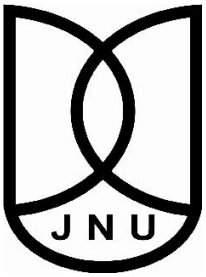

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DECLARATION

I, Shehla Rashid Shora, declare that the dissertation entitled "**Hurt and Harm Principles in defining Hate Speech: Judicial Standards and Challenges posed by the New Media**" submitted by me in partial fulfillment of the award of the degree of Master of Philosophy (M.Phil.) of Jawaharlal Nehru University is my original work. This dissertation has not been submitted so far in part or full, for the award of any other degree in this university or any other university.

Shehla Rashid

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CERTIFICATE

It is hereby recommended that this dissertation be placed before the examiners for evaluation.

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Preface

Our systems are so broken that there is no single way of repairing them. Some of us pursue change by attempting to modernise society through technology. The pitfalls of such an approach (known as technological determinism) in our society have been demonstrated so aptly by Meera Nanda, T. K. Oommen, and others, who show how technological advances built upon an unequal, hierarchical structure may not be able to level inequalities and solve more fundamental problems of structure. Some of us, therefore, rightly seek radical changes, but fundamental change often comes at a huge social cost. Somewhere in between lie those who seek change, most humbly, through policy intervention.

It is true that technology spreads new values in society. Marshall McLuhan's writings are prophecies, ever relevant, as newer technologies alter our sense perceptions, bring in fundamental changes such as the 'instant' communication made possible by the discovery of electricity. In our lifetime, we have seen technological 'advances' coexist with caste discrimination; the percentage of women in the Parliament has never increased; and education continues to be a privilege rather than a right available to all. This is because technologies do not liberate people on their own.

Whether a technology realises its democratising potential or not also depends on the policy framework that governs its use. What became of the radio is not what it was destined to be. Community radio and private players are not allowed to air news, the rules for setting up community radio are cumbersome and existing radio broadcast networks do not serve the purpose of connecting people in remote regions who speak languages other than the broadcast languages. This has meant an exclusive monopoly of the government of India over news, and of powerful players over high-power transmission using FM, which communities and even NGOs cannot afford. That this has not happened to the Internet is no guarantee that it cannot. Corporations are fighting to achieve ever-greater monopolies over the Internet, whereas governments are struggling to regulate it.

The Internet may or may not achieve its emancipatory potential. This will depend upon the policies that govern it, and the societies that use it. Today, when Dalits are flogged or Muslims lynched to death, the perpetrators of the violence film the

lynching using smartphones and circulate the clips over the Internet. We may use the Internet to preach nonviolence, or we may see a future where lynchings are live-streamed. This is the reason why those who seek radical change would describe attempts to solve social problems through technical remedies as being akin to the application of a band-aid over a bullet wound, which requires nothing short of surgery!

One could ask, isn't it the case for policy intervention too? If the law is a reflection of social norms and social solidarity, then how can legal change ever precede social change? To understate its role, policy intervention is neither a band-aid, nor a surgery, but a torniquet that can prevent the system from bleeding to death. To overstate its role, law can also create a more progressive status quo that moulds social values around itself. The abolition of Sati, outlawing of untouchability, the right to alimony for a Muslim woman, universal adult suffrage – all of these are policy changes that have not only preceded social change but also driven it. Appeals to reason today are often made through reference to Constitutional values. Claims to rights are often made by referring to empowering Constitutional guarantees. Each empowering provision of the Constitution has a story to tell – a story of struggle and sacrifice.

While the judiciary has often saved the spirit of the Constitution, there is no guarantee that this will continue to happen in the future, in which case social movements alone can create supporting structures for the Constitution to survive political attacks. While Section 66A was struck down, there is no guarantee that the Right to Privacy will be upheld. By the time this dissertation is submitted, a nine-judge Constitution bench of the Supreme Court will have pronounced its verdict on whether the Right to Privacy is a fundamental right or not. This will determine the course of future citizen action to seek the enactment of a Privacy legislation.

I am optimistic about both technology and policy, and about social change. This dissertation is my humble attempt to develop an effective policy response to hate speech.

Dedication

Liu Xiaobo (1955 - 2017)

Aaron Swartz (1986 - 2013)

Rohith Vemula (1989 - 2016)

To people fighting for freedom of expression everywhere.

Acknowledgements

I'm indebted to Prof. Niraja Gopal Jayal for agreeing to supervise me and for her patience with a diffcult person like myself. It is an honour to have worked with her. Her grace, integrity, professional rigour and intellectual acumen has inspired me to work through very difficult circumstances. I thank her for bearing with me through my long spells of bad health, which even led me to a brief spell of depression. I thank my friends, family and supporters whose love and support through this phase made sure that I do not spiral or succumb to depression. I'd like to thank my mother for everything I am.

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Introduction

'Hate speech' may colloquially be understood as speech that is in bad taste, disrespectful or abusive. However, as a technical term, the term would have to be defined much more precisely. In a democratic society, dissent, criticism and even disrespect must be left out of the scope of being criminal actions. No journalist or cartoonist can be expected to raise difficult questions unless disrespect to institutions, governments and powerful figures is defended. Therefore, the colloquial definition of hate speech must be traded in favour of a more precise definition, for the purposes of serious policy regulation. A major part of this dissertation concerns itself with providing such a definition. Broadly, though, hate speech may be understood as speech that targets groups of people, (or individual people seen as representing a certain identity) on the basis of group characteristics, such as race, religion, sexual orientation, etc. Article 20 of the International Covenant on Civil and Political Rights (ICCPR) states:

> a) Any propaganda for war shall be prohibited by law.
>
> b) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Postwar international instruments such as the UDHR (Universal Declaration of Human Rights) and the ICCPR arose out of a collective memory of the Second World War and the genocide of Jews in Nazi Germany, and were aimed at ensuring that similar atrocities do not recur. Article 20 of the ICCPR is not the lone Article that betrays this zeal. The other Articles in the Covenant, along with its Preamble, and the

history of its enactment are clearly informed by the quest to end discrimination (Art 26), and to establish a 'universal' respect for human life (Art 6), privacy (Art 17), freedom of expression (Art 19) and dignity (Art 10). Therefore, Article 20 must not be read or implemented as a mere "restriction" on the right to freedom of expression, but as a safeguard against the violation of these rights on grounds of ethnic, religious or national origin, etc. What hate propaganda achieves, after all, is the systematic degradation of a certain community to a point where they are seen as unworthy of fair treatment, dehumanised and, in the extreme case, subjected to genocide.

In order to outlaw hate speech, it would have to be shown to constitute either an incitement to crime or to constitute a crime in itself. Thus, hate speech can be conceptually understood as speech that *incites* discrimination, hostility or violence against a target group, or one that *constitutes* discrimination, hostility or violence itself. Thus, the problem of fighting hate speech through the law is essentially one of determining the *link* between speech and action, or of determining when *speech is action* – when these conditions are fulfilled, hateful speech would constitute 'harm.'[1] 'Imminence' is the highest threshold for determining harm. It signifies the likelihood of violence that is about to happen, and, as per US jurisprudence, when hate speech and violence have a relation of imminence, that is the point where speech constitutes grounds for proscription. This is called the Brandenberg test, following the US Supreme Court's verdict in Brandenburg v. Ohio[2] which recommends that the conditions of 'intent', 'likelihood' *and* imminence' [to produce lawless action] must be demonstrated, for speech to lose protection under US First Amendment. In 2011, the

1 By speech is meant 'content' in general – writing, spoken words, artwork, video, etc.
2 395 US 444 (1969)

Supreme Court of India upheld the Brandenberg test, holding that mere "advocacy" of violence does not amount to "incitement".[3] This judgment signals a move away from proscribing speech that is 'offensive' (hurtful) to that which constitutes incitement to *harm*.

Examples from feminist theories of rape will help problematise the concept of harm. While rape constitutes actual violence and harm to women (or, more broadly to the victim/survivor), it is not *the only* harm out there. Rape, it is argued, is a manifestation of a pervasive culture in which the existence of rape is so widely accepted, normalised, trivialised and even denied, that those who participate in the perpetuation of rape culture do not even realise that they are doing so. Buchwald, Fletcher and Roth define rape culture as,

> a complex set of beliefs that encourage male sexual aggression and supports violence against women. It is a society where violence is seen as sexy and sexuality as violent. In a rape culture, women perceive a continuum of threatened violence that ranges from sexual remarks to sexual touching to rape itself. (Buchwald, Fletcher & Roth, 2005, p. xi)

The elements that are thought to comprise rape culture include victim-blaming, mistrust of women's narratives, objectification of women in popular culture, etc. Catherine MacKinnon (1996) goes further to argue that the very pornographic depiction of women itself constitutes rape (regardless of whether it portrays dominance/violence or not). One can immediately see that scholarly consensus around the idea of what constitutes real harm is hard to achieve. As per Catherine MacKinnon, pornography is meant exclusively for the 'male gaze'. Most women would agree that 'words' are enough to constitute sexual harassment. The offender

3 See Arup Bhuyan vs State of Assam at https://indiankanoon.org/doc/792920/

does not have to grope or pinch – abusing one's position to seek a sexual favour, verbally, is enough to constitute harassment, especially and typically in situations where power hierarchy is evident.

While most women would agree that words are enough to constitute harassment, most would disagree that words are enough to constitute rape. While words may be enough to cause mental trauma and inflict psychological harm, it would be something of a logical leap to insist that 'words can rape.' It is possible, however, to argue that the psychological harm and the violation of bodily integrity caused by an incident of rape and an incident of verbal harassment is essentially the same or similar. Both can cause trauma; even then, the causal link between words and harassment would be different from that between words and rape. Catherine MacKinnon's theory of rape does not allow any subjectivity or agency to women, let alone consent. She argues that, in a society dominated by patriarchal notions of sexuality, dominance and ownership, women can have no real choice. Therefore, in Catherine MacKinnon's formulation, there is no difference between heterosexual sex and rape; pornography is essentially a depiction of 'rape' (and not sex), and is, by corollary, rape itself!

While it is true that, in earlier days, the production, distribution and viewing of porn was controlled by men, the invention of the Internet-enabled smartphone has enabled a silent revolution which has turned women into consumers of pornography (which was difficult for women to procure in print, video cassette format or on a shared home PC). Not just that, it has given women the opportunity to virtually organise and critique pornography from a sex-positive feminist lens, rather than simply claiming to

be victimised by it. Discussions on 'feminist porn' are already at an advanced stage, and women are even producing it[4]. Feminist porn not only includes acts and tropes that are non-patriarchal, but also ownership, production and distribution that is controlled by women, on their own terms. (Taormino et. al., 2013) Nivedita Menon provides a most useful framework for thinking about the issue. She writes,

> Rather than assume that pornography only objectifies and commodifies women for the male gaze, what if we were to think of women too, as consumers of pornography; of pornography as arousing not only heterosexual desire but also homoerotic desire; and of pornoraphy not as something fixed and easily recognizable but as diffuse and complex as the sensation it evokes? This way of thinking about pornography opens up liberating ways of thinking about not only female sexuality, but about desire in general.
>
> To take on board these insights is to reconcile with the fact that the only defensible feminist position on pornography is to ensure the proliferation of feminist discourses about sexual pleasure and desire, while also recognizing that what is 'feminist' will itself always be the subject of internal contestation. (N. Menon, 2012, p. 202)

While the term 'rape culture' is widely used in its secondary usage, it is a concept that has not been problematised with enough clarity. Is it rape culture that gives rise to rape, or, rather the structural inequalities between men and women? Would rapespeak have an independent existence outside of these structural inequalities? Since the popular usage of the term 'rape culture' includes several patriarchal practices and beliefs existing in society, how does it differ from one society to another? It seems that the current usage of the term (blaming short skirts, alcohol, etc.) is context-specific to Western liberal democracies. For example, where should one place the 'driving ban' on women in Saudi Arabia, or female genital mutilation? How do we distinguish guardianship or patriarchy from rape culture? Is it structural and cultural

4 Martincic, J. (2017, April 20). Girls on top: The rise of feminist porn. *The Telegraph*. Retrieved from http://www.telegraph.co.uk/women/sex/girls-top-rise-feminist-porn/ on 20 July, 2017.

oppressions like guardianship that give rise to rape culture, or the other way round? These are questions beyond the scope of the present work.

What is within the scope of this discussion is the impact of rapespeak on society. What constitutes advocacy or endorsement of rape (harm) and how direct is the linkage? Is it enough to constitute incitement and how is that to be demonstrated in a court of law? While obscenity is criminalised in most jurisdictions, what happens to comments made by politicians to the effect that "women court sexual assault" or that "it is their fault"? How may policy protect women (or those vulnerable to rape) from the possible effects of such undesirable speech? This question will be explored in Section 1.2.

The vagueness of the term 'rape culture' is perfectly matched by the vagueness of the terms 'Islamophobia' and 'Antisemitism'. Is criticism of the Kingdom of Saudi Arabia (KSA) or Israel the same as Islamophobia or Antisemitism? No. One can criticise the foreign policy of Israel, without denying the Holocaust. One can criticise Saudi Arabia's oppressive gender-biased laws without branding all Muslims as terrorists. Also, one can criticise Islam or Judaism without this amounting to Islamophobia or Antisemitism. This is the (communal) equivalent of Catherine MacKinnon's overbroad definition of 'rape culture', according to which even erotica would qualify as rapespeak.

We must develop certain principles that can set the thresholds for regulation.[5] These principles can't be purely moral or religious because they run the risk of overregulation, especially of works of art or creative writing. A moral or religious argument might outrightly criminalise content or speech produced by, say, sado-masochist interest groups, even though consent, safety and agency may be upheld thoroughly in such content. Groups and sexual practices characterised by the enjoyment of pain, bondage, domination and even humiliation are broadly grouped under the term BDSM (Bondage, Domination and Sado-Masochism). These practicies play on the illusion of non-consent, force and domination, but that is merely an illusion, used to heighten pleasure. Even as such content may be morally shocking, it may not actually constitute advocacy of rape or harm. Most women, in most situations, can distinguish between rape and consensual sex – one is undesirable and abhorrent, while the other is mutually enjoyable and desired. Practices for heightened pleasure would qualify for the latter category. Michael Makai (2013) has written an extensive handbook on BDSM relationships which makes it clear that the dominant and submissive roles taken on by participants are just enactments (and in case of BDSM porn, just representations). Men and women, both, can be either submissive or dominant, a 'Switch' – those who enjoy both kinds of roles.

BDSM practices are all about consent, and there are elaborate discussions on safety, consent and types of submissiveness. The content may come across as shocking to the uninitiated, but is a source of heightened pleasure for the actors – with women being active agents rather than unwilling actors. It may be argued that, BDSM, by enacting

5 I won't go into the debate of whether speech should be regulated or not. This study presupposes the Indian policy framework where regulation of speech is presumed. Even the liberal/American policy framwork regulates speech and expression either overtly or covertly, even as it claims to be unregulated.

non-consent, plays to the existing patriarchal tendencies in society (as C. MacKinnon would argue). One of the earliest writers on the subject of 'rape culture', Dianne F. Herman (1984), argues that the “erotization of male dominance” contributes to the making of a 'rape culture'. However, BDSM, for the first time in popular culture, introduces the concept of explicitly stated consent. In fact, by pushing the boundaries of ordinary discourse, such content might actually establish the supremacy of consent and women's agency even more strongly because 'consent', as a concept, is most controversial, best understood and most helpful in its borderline application. For example, the use of what are known as “safe words” in BDSM genre establishes the contractual nature of consent, and also establishes the fact that consent can be withdrawn at any point, by uttering a “safe word”, which is to be considered sacrosanct by the actors involved.

All these issues are subject to further debate which is beyond the scope of this dissertation. However, the point of the above discussion is that the way in which we choose to define rape is a matter of understanding that what lies at the heart of the issue of 'rape' is not 'morality' or 'obscenity', but 'consent' or the absence of it. Similar, though different, the problem of 'hate speech' can be best clarified by looking at instances of borderline hate speech- those instances of speech that might be provocative or outrageous, but which might not be linked to action; in more technical terms, those that might constitute 'hurt', but not necessarily 'harm'. By placing the most difficult examples (such as sado-masochism, criticism of religion, etc.) at the outset, it is hoped that the confusions around the issue of hate speech will be ironed out with better clarity and a workable policy framework evolved.

The categories used here may or may not correspond to actual legal provisions because some of the concepts being proposed here do not have equivalents in existing policy. Therefore, any policy-based regulation of 'rape advocacy' (or of 'hate speech' in general) foregrounds a need for a very clear understanding of:

a) What constitutes 'harm'?

b) What are the circumstances in which speech and action have a linkage of 'imminence'?

c) Is the linkage between speech and action any different online than offline?

d) What are the principles that help to differentiate prudish attempts to censor speech from a well-meaning policy to protect people from the effects of harmful speech?

1.1 Hurt and Harm

What must be the higher standards/principles to refer to while formulating a policy framework to deal with hate speech? John Stuart Mill ([1859] 2011) pin-pointed the problem by presenting a defence of liberty that is consistent with the regulation of harmful speech. While making a case for the highest standards of protection for speech (and even for practice of one's beliefs in one's personal life), Mill clarifies:

> ... even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the

> more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. (ibid., p. 52)

The difference between 'hurt' and 'harm', in relation to speech, can be said to correspond to the difference between 'offence' and 'hate speech'. At the core of this dissertation lies the argument that, in Indian jurisprudence, the two concepts have not been conceptually separated. In fact, there has been a conflation of the two concepts that often leads to artists, filmmakers and writers being targeted for causing mere offence under (what are currently understood as) hate speech laws. **Section 153A of the Indian Penal Code (IPC) 1860 deals with speech and forms of expression that could potentially lead to inter-community conflict (broadly, harm), whereas Sec 295A deals with offence caused to religious sentiments (hurt).** The history and case law around these sections will be discussed in Sections 2.1.1 and 2.1.2. Of the two, the one that is closer to being a hate speech provision is Sec 153A as it deals not with mere hurt or offence, but social disharmony. Siddharth Narrain (2016, p. 120) writes: "Sections 295A and 153A are often used together, showing that the police presume a link between "outraging religious feeling" and "promoting enmity between religions."" This points to a conflation of the concept of hurt with the accompanying concept of harm. However, this had not necessarily always been the case. Narrain (ibid., p. 120) points out that "the focus of the law shifted from promoting enmity between religions to outraging the religious feelings of a class of citizens." after the Rangeela Rasool controversy – in which an Indian publisher was tried and later killed for depicting the Prophet of Islam in a derogatory manner – and the enactment of Sec 295A which is the closest that Indian law comes to having an anti-blasphemy provision (Sorabjee, 2006; Bhatia, 2016).

Sec 153A has a horizontal definition of 'community', 'caste', etc. and, thus, it fails to take into account the fact that hate speech is made possible within an existing societal context of inequality and discrimination. As per Sec 153A, any community is equally likely to incite violence against any other community. The provision does not take into account the fact that it is rarely in the interest of the non-dominant community to provoke violence or enmity. Bhatia (2016, p. 167) records that an Australian Federal Magistrate held an aborigine woman not guilty of hate speech under the Racial Discrimination Act as it sought to 'protect vulnerable minority groups.' Bhatia further observes,

> it is historically (and currently) oppressed minority groups who are most vulnerable to assaults upon their dignity, and who stand most to lose from a hostile public culture and environment. Hate speech codes – and judicial interpretation – ought to be sensitive to this fact. (ibid., p. 168)

A hate speech provision that doesn't capture the essence of the nature of hate speech, as stemming from and occurring within an existing context of discrimination and inequality, cannot be an effective hate speech provision. Rina Ramdev, Sandhya Devesan Nambiar and Debaditya Bhattacharya (Eds.) (2016, p. xxxvi) further nuance this position by differentiating a hurt claim made from a minoritarian perspective against an offending majority, from that made by a minority against its own dissenting members. While the first, they argue, falls within an affirmative discourse, the latter doesn't, as the minority complicates its position of subalternity by taking on the role of the sovereign in attempting to expunge both the dissent and the dissenter. The latter alludes to instances of reform and dissent within religion. While the distinction made by Ramdev et. al. does not correspond to a legal category, in the sense that the law

that is written down does not differentiate between an offence to religious sentiments caused by a member from within the community and that caused by a member from without, Siddharth Narrain (2016, p. 122) observes that the judicial doctrine in India has been to generally protect reformist tendencies, although Narrain adds that the doctrine has not been applied consistently.

Narrain (ibid., p. 120) argues that, generally speaking, while deciding cases of hate speech, the judiciary in India has taken into account the "internal" factors – the tone, tenor and artistic/academic sophistication of the work – as well as the "external factors", such as the prevailing environment, ongoing communal tensions, etc. In short, while deciding cases of hate speech, it is not simply the text but also the 'context' that counts. Due to the essentially subjective nature of 'hurt' claims, it is not always possible to sieve through these and separate genuine hurt from those that are not genuine. If the aforementioned principle of protecting scholarly, reformist and scientific work were to apply consistently, works of art and reformist critiques of religion would generally be protected under Article 19(1). However, this position is further complicated by various commentaries on the nature of critique itself. (Asad, Brown, Butler & Mahmood, 2009; Waldron, 2012) Also, in Indian jurisprudence, the strict separation between offense and critique is made difficult with the nature of Sec 295A that privileges hurt claims over the search for truth or rationality, leading one to ask a more fundamental question: does the state need to protect believers against hurt? This is a normative question that will be dealt with in the Conclusion.

However, even if one were to hold the view that the state's role is to protect against harm and not hurt, it leaves open the discussion of what constitutes harm. This is a matter of much scholarly and doctrinal debate. As per the liberal principle outlined by

Mill ([1859] 2011, p. 52), only speech that causes '*harm to others*' may be legally proscribed. The term 'harm' is used to mean only physical harm or public nuisance in Mill. Feinberg (2003), however, increases the scope of the liberty-limiting principles to include, in addition to *harm* (*to others* or *to oneself*), the causing of '*offense to others*', in the interest of plural democracy. Feinberg rejects the other two principles (legal paternalism and legal moralism) as constituting bases for proscription.

Moving beyond the classical categories of hurt, harm and offense is Jeremy Waldron's (2012) argument of social inclusivity as a 'public good' in multicultural societies, which gets undermined by the effects of hate speech. This approach widens the scope of the concept of harm to include social, psychological and moral harm. It also differs from postmodernist critiques of critique (Asad et. al., 2009), as it focuses on protection of persons from exposure to greater discrimination or hostility or psychosocial harm, rather than protecting their religious beliefs from attack. Such an approach can be seen as reflected in the judgment of the Canadian Supreme Court in Sasketchewan (Human Rights Commission) v. Whatcott,[6] which defines hate speech as

> an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

6 [2013] 1 SCR 467: [2013] SCC 11

More approaches to defining hate speech will be discussed in Section 1.6. Hate speech, as is clear from the definition above, has the effect of incitement to discrimination, hostility or hatred against a vulnerable social group. Another effect of hate speech is incitement to violence – a problem essentially of 'imminence.' This will be discussed in the subsequent section. However, before moving on to the next section, following is a note on the linkage between hate speech and discrimination.

1.1.1 Hate Speech as Discrimination

The principle that must inform the elimination of hate speech is the quest for a more tolerant society, not for increased criminalisation of speech. A caveat, an important one, that must be added here is that the mere elimination of politically incorrect or embarrassing speech from the public sphere is neither possible nor intended. Hate speech, is to be understood as a form of discrimination, not merely as an enactment of it. This equivalence of harmful speech with discrimination should not be seen as the application of harsh standards to speech. On the contrary, such an equivalence would require, in the policy framework, an application of higher thresholds before speech is criminalised or categorised as 'hate speech.' In that sense, it affords better protection to speech that does not meet such thresholds. In simpler words, having a clearer definition of what hate speech is, also leads us to a clearer definition of what hate speech is not.

Hate speech is embedded in a larger socio-economic context where advocacy of harm (preaching hatred) against a vulnerable group becomes possible. It is difficult to

imagine members of a vulnerable group taking to public platforms to incite hatred or violence against a dominant group. If they did, there would be immediate repercussions for the vulnerable group. Doing the same may have no immediate repercussions at all for a dominant majority/community. So, whereas hate speech by a weak minority is structurally disincentivised, the same by a dominant community (or its members) carries little or no immediate repercussions – precisely why it calls for policy regulation. Policy, therefore, cannot be blind to the power relations and inequalities among communities/actors. A point that is easy to miss, and must, therefore, be outlined, is that the problem of hate speech is also a problem of one party essentially enjoying impunity for all its utterances and actions, and another party(ies) bearing the repercussions of such speech. If it weren't for these differences, the issue of hate speech would be one without real-life consequence. However, the issue of hate speech is one of real consequence precisely because speech and action have linkages, because differences exist in power and vulnerability, because one enjoys relative impunity and another one relative powerlessness. It is time to take the blindfold off the eyes of the law and read vulnerability and power relations into policies.

Policy, law and law-enforcement agencies must stress the ideals of non-discrimination (rather than invoking the authority of the state to censor) while implementing regulation. This will go a long way in ensuring that the broader principles of pluralism, tolerance and non-discrimination are popularised in society. Unless governments, judiciary and law-enforcement insist that a certain decision was taken in the interest of the health of plural democracy and justify such decisions in the light of higher principles rather than plain state power or with a spirit of vengeance, it is very

difficult to popularise and obtain widespread acceptance for the principles that ought to guide how people express themselves. If the state speaks a language of vengeance, authority and violent censorship while regulating speech (“will be culled”, “iron hand”, “won't be tolerated”, etc.), then the state itself reinforces a language of vendetta, thus fueling hate speech rather than establishing dialogue and plurality.

It was pointed out above how it is easier (and relatively consequence-free) for a dominant group to preach hatred against a vulnerable group. So, the problem might pose itself as a chicken-and-egg puzzle, as to whether discrimination prevalent in society must be eliminated first or the resultant hate speech emerging out of contexts of societal discrimination. As is the case with all forms of policy, what is aimed at is not revolution, but a way to work with problems and 'avoid the worst outcome'. Having said this, one could envision a more optimistic aim for a policy framework that deals with hate speech – a 'more' pluralistic and peaceful society. When hate speech is seen as being embedded in socio-economic discrimination, the project of elimination of hate speech must also be accompanied by and be seen as part of the process of elimination of discrimination.

1.2 Speech and Action

American jurisprudence clearly privileges speech over action, upholding a distinction between speech and action, whereby speech must not be proscribed until and unless there is an intent to incite lawless action along with the imminence of lawlessness. This is summed up in the Brandenberg test. Even various actions, such isolated acts of

Quran burning or Flag Burning, are unlikely to attract charges, unless violence is imminent[7]. The same is not true of Indian jurisprudence where, for every crime, there is a corresponding speech act (incitement to commitment of an offence or threat) that is punishable. Having said so, the Indian judiciary has, as a matter of precedent, afforded greater protection to speech, unless the imminence of action based on that speech is plausible enough, except, of course, in case of provisions like Sec 295A of the IPC where the only requirement for prosecution is the demonstration of 'hurt' caused.

1.2.1 Imminence, Incitement and Vulnerability

The imminence of action on the basis of speech can be understood with reference to the famous observation made by the judge in Schenck v The United States, 249 U.S. 479 (1960):

> The law's stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre, and causing panic. It does not even protect a man from an injunction against uttering words that may have all the **effect of force**... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree. (emphasis added)

The observation above does not refer merely to the truth value or the criminality of the false alarm, not even to the disturbance caused to public order, but to the inability of the actors present on the scene to rationally process the truth of the claim. They have no practical choice but to act upon the call. Amid a tense situation, a rumour or a

7 See Texas v. Johnson, 491 U.S. 397 (1989) and United States v. Eichman, 496 U.S. 310 (1990)

call to do harm might produce action. If an excited mob looking for a lost child is told that an elderly widow has abducted the child and that she is hiding the child inside her house, it is totally possible for the mob to ransack her house, without verifying the truth of the claim. If the members of the mob, on not finding the child, believe, or are made to believe, that the woman is a cannibal or a witch, and has eaten the child, there is great likelihood of her being attacked, harmed and even lynched by the mob. What Mill ([1859] 2011, p. 52) describes using the corn-dealers example[8] is essentially a lynch mob. A lynch mob may act on the basis of information that may be true or false, and proceed to harm, maim or even kill a person/group of persons who have been identified as a target. In a situation like this, the actors present on the scene do not usually have the ability or the time to process the truth value of the claims being made by an instigator. In a situation like this, the 'truth' has the ability to do as much, if not more, harm than 'falsehood' – a principle followed by the Indian judiciary when the truth is in poor taste or sheer dangerous. (Narrain, 2016, p. 122)

It is a question of further deliberation whether such mob action in a society is possible without a fairly high degree of existing ageism and sexism. As pointed out in the previous section, hate speech has to be seen as embedded in a structure. For the actors in the lynch mob to believe that old women are witches, there has to be a pre-existing indoctrination, perhaps generations of folk tales that portray widows or lone women as witches. Such cultural indoctrination may be passed on subconsciously for generations before being brought to life by a public hate propaganda. The 'publicness' of hate propaganda against vulnerable persons serves a very insidious purpose. The

8 Mill ([1859) 2011), p. 52 : Handing out pamphlets to an angry mob assembled outside the house of a corn-dealer that say, "corn-dealers are the starvers of the poor."

fact that stories of hate propaganda are being told openly in the public brings legitimacy to propaganda, a confidence that only truth exudes. Making vile folk tales public, engaging in public vilification of a vulnerable group which may not have the resources to counter such propaganda, gives propaganda the force of truth. On the contrary, any counter claim made by a member of the vulnerable group against the dominant group will be met with a defamation complaint, a prompt legal notice – tactics that will make the target group's claims look doubtful. Thus, the vulnerable group becomes associated with a negative stereotype, without having the means to counter it. For a person of the dominant group on the scene to act upon the information that a woman is a witch, there have to be prior meanings assigned to terms; and prior information of 'actions' to be taken against witches, or the treatment that they deserve. Symbols and terms do not have inherent meanings; meanings are assigned; no word in our social vocabulary can be explained without referring to other words or concepts. At a traffic signal, it is a shared understanding of symbols and prior information of 'actions' associated with these symbols (Red – Stop; Green – Go; Yellow/Orange – Wait) that ensures that all the drivers act in unison and at the same time. A lynch mob cannot act against an elderly lady if the actors do not:

a) share similar degrees of heightened ageism and sexism,

b) believe that witches need to be killed or paraded, and

c) have reasons to believe that the woman has stolen a child, or has eaten it.

This example is very important in understanding why hate speech laws need to address vulnerability and why imminence is a function of context.

1.2.2 When is speech violence?

While the act of speaking is an 'act' in the most ordinary sense, can speech be considered equivalent to action in the ordinary sense of things? If yes, how does one argue for a certain exceptionalism in favour of speech acts? While discussing the various ways in which performative utterances constitute action, J. L. Austin ([1955] 1975, 109) makes an important point. Focusing on nomenclature, Austin notes that, while we can describe speech acts per se, physical acts are almost always described in terms of their natural consequences (p. 112). For example, if someone shoots a donkey using a gun, the 'minimum physical act' that could be described is, "He moved his finger". However, the moving of the finger is just that – a 'minimum physical act' whose consequence would be to cause the person to tug at something or lift something, or, in the case of pulling the trigger of a loaded gun that is aimed at a donkey, kill the donkey. In this sense, physical acts are inseparable from their consequences. This is not the case for speech acts which are named verbatim, in most cases. Austin argues,

> we do not seem to have any class of names which distinguish physical acts from consequences: whereas with acts of saying something, the vocabulary of names for acts seems expressly designed to mark a break at a certain regular point between the act (our saying something) and its consequences (which are usually not the saying of anything), or at any rate a great many of them. (Austin, [1955] 1975, p. 112)

One could counter this by citing an example of speech that clearly constitutes hurt. For example, a statement such as, "You are ugly" is most certainly going to cause hurt (consequence). However, Austin argues that the nature of causality itself is different for speech acts than for physical acts. (Austin, [1955] 1975, p. 112, footnote I) Speech

(even illocutionary or perlocutionary) does not 'cause' things in the same way as physical acts do. The consequence of physical acts is real and palpable in a manner that does not leave much to interpretation or ambiguity (the donkey is either killed or not killed). However, the link between speech and its consequences is not so clear. A statement such as, “You are ugly” is clearly designed to hurt. However, whether it results in actual hurt is a matter of subjectivity, depending, to a large extent, if not entirely, upon the recipient of the speech. A person who is very confident of their 'good' looks may laugh off such a statement. However, someone who is really underconfident about their physical appearance, could actually be hurt by the statement. Add to this scenario the variable of race, and a historical context of oppression based on skin colour, and the same statement can be perceived in a very negative way and might actually constitute hate speech, based on the race relations and inequalities between the identity represented by the speaker and that represented by the recipient, the dominant norms of 'beauty', the tone in which the statement is made, the gravity or volatility of the situation in which it is said, the accompanying aggression or gestures, the influence of the person making the statement, the nature and size of the gathering in which the statement is made, and so on. The same statement, made in a political rally may have a very different societal impact than that made in a (comedy) roast. Austin argues that illocutionary speech constitutes action, since it is backed by convention. (Austin, [1955] 1975, p. 114 – 116) Judith Butler (1997, p. 16) calls a speech act that is not backed by convention a 'failed performative', since it may not be effacacious. Explaining pages 107 – 109 of Austin (op. cit.), Butler writes,

> The illocutionary act is one in which in saying something, one is at the same time doing something; the judge who says, "I sentence you" does not state an intention to do something or describe what he is doing: his saying is itself a kind of doing. Illocutionary speech acts produce effects. They are supported,

> Austin tells us, by linguistic and social conventions. Perlocutionary acts, on the other hand, are those utterances that initiate a set of consequences: in a perlocutionary speech act, "saying something will produce certain consequences;' but the saying and the consequences produced are temporally distinct; those consequences are not the same as the act of speech, but are, rather, "what we bring about or achieve by saying something:' (109) Whereas illocutionary acts proceed by way of conventions (107), perlocutionary acts proceed by way of consequences. Implicit in this distinction is the notion that illocutionary speech acts produce effects without any lapse of time, that the saying is itself the doing, and that they are one another simultaneously. (ibid., p. 17)

The condition of illocutionary speech acts being backed by convention explains why hate speech is produced within a context of discrimination (convention). A hurtful statement that is not backed by a context of discrimination (lack of convention) may only constitute a 'failed performative'. A perlocutionary act, on the other hand, convinces. Thus, in the context of hate speech, while illuctionary speech acts are related to incitement to discrimination (or discrimination itself, depending on the rigidity of the structural oppression), perlocutionary speech acts are related to incitement to violence.

In case of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, verbal insults made against a member of the Scheduled Castes (Dalits) could constitute a hate crime. The requirement to invoke the provision is not the high thresholds of 'incitement to violence' or 'incitement to discrimination', but the comparatively lower threshold of 'insult' – considering that insult has the force of discrimination in a context of caste injustice. It is not the case that such a verbal insult constitutes an 'incitement' (perlocutionary) or sets in motion a series of effects; instead, the act of saying an insulting thing is, at once, is discrimination (illocutionary). The consequence of the insult is what is understood as 'humiliation'.

The concept of humiliation is not constructed merely as hurt, but as one of structural injustice, insofar as such behaviour, repeated endlessly throughout the body of the social fabric, leads to exclusion, discrimination and social boycott of the marginalised community in question (whether SC or ST) from the public sphere, purging their existence from the dominant discourse, invisibilising them, and thus, reinforcing the historical injustices meted out to them over the centuries. This is what is meant by understanding hate speech as discrimination, as pointed out in Section 1.1.1. Thus, the issue at hand moves beyond 'hurt' and becomes one of justice. (Baxi, 2009)

While the Dalit and tribal communities (corresponding roughly to the governmental categories, SC and ST) are recognised as being 'historically marginalised', the marginalisation of Muslims is more of a contemporary phenomenon rather than a historical one. For a simple verbal insult to qualify as a hate crime, it would either have to be demonstrated that the Muslim community has undergone systematic disadvantage based on economic and social exclusion, or marginality; and vulnerability would have to be read into Section 153A of the Indian Penal Code 1860. The Muslim community in India has faced systematic oppression and exclusion after two significant historical occurrences- one being the bloody aftermath of the anti-British Mutiny of 1857 in which Muslims were at the forefront; the second being the violent partition of British India into India and Pakistan. The last three decades, in particular the last three years, have seen alarming levels of hate speech against Muslims prevalent in the public sphere[9], amid a context of rising hate crimes against Muslims. (Hasan, 2000) This is frequently accompanied by official denials of even

9 Editorial. (2015, May 21). Hindus to the fore. *The Economis*t. Retrieved from https://www.economist.com/news/special-report/21651334-religious-pluralism-looking-less-secure-hindus-fore on 11-07-2017

the minority status of Muslims.[10] This presents a fundamental difficulty in defining targeted hate speech against minorities in India in an effective manner. While the law is heavily preoccupied with protecting *beliefs* (Ahmed, 2009; Nair, 2013; Stephens, 2013), *hate speech* against members of the minority Muslim community in India has gone largely unnoticed, undocumented, under-researched and unprosecuted [the fundamental hurt-harm conflation].

Also, this discussion raises a further question. What if a political leader, in response to an incident of rape, says that women are responsible for rape? Considering the structural inequalities and the force of convention (patriarchy) itself, isn't such speech, that too by a political leader, illocutionary, and, hence, constituting harassment in itself? In light of the above discussion, it is. Hate speech against women is a fact that is usually underplayed and denied, with the counter that 'women do not constitute a group'! This effectively means that women are denied any identity beyond their communal and caste identities. Communal disharmony provisions in India (Sections 295A and 505(2) of the IPC) are never used against those who engage in hate speech against women. This is a question that needs to be taken up in future research on the topic of hate speech.

10 Ghosh, A. (2014, May 28). 'Muslims too many to be called minority, it's Parsis who need special attention'. *The Indian Express*. Retrieved from http://indianexpress.com/article/india/politics/muslims-too-many-to-be-called-minority-its-parsis-who-need-special-attention/

1.3 The new 'public'

Hate speech, as shown in Section 1.2.1, plays on the status quo, on existing societal biases and magnifies these to advocate hatred and violence, hostility and harm. It is, therefore, very widespread generally speaking, and can only be countered, in the long run, by civic education, establishment of social harmony and values of tolerance. However, for the humble purposes of policy regulation, what forms a bigger matter of concern is *public* instances of hate speech which work to normalise it. Harm can be advocated privately, but, in that case, it assumes the nature of a conspiracy in that case (murder conspiracy, for example). Private conspiracies cannot be accessed and regulated. These do not, therefore, form the subject matter of hate speech legislation.

The subject of hate speech legislation or regulation is essentially one related to public advocacy of harm (violence/discrimination/hostility) based on group characteristics. However, the issue of what constitutes the 'public' is one that itself requires elaboration in the social media age, the age of the Web 2.0, where speech is rendered increasingly 'public'. What characterises 'public' speech in this day and age is a question of fundamental importance and will be treated separately in Section 4.2.4. This is a crucial question that informs the application of law to the increasingly crucial cyberspace, and a misplaced understanding of this issue can lead to bad application of the law.

The Internet has made all kinds of speech more visible and potentially viral, and self-publishing is what characterises the Web 2.0. Therefore, issues of free speech, hate

speech, online abuse, privacy, etc. have become raging topics of public debate in India. People have organised to keep the Internet free and open, in keeping with its basic philosophy.[11] Civil society activism aimed at keeping the Internet free and open has meant that the most difficult questions with respect to free speech advocacy have inevitably been thrown up, highlighted, contested and deliberated upon. Advocates of free speech have often had to deal with questions of child pornography and hate speech as constituting actual harm, and, thus, the fight against censorship has entailed a careful filtering out of those kinds of speech that we do not believe should be protected under Article 19(1).

1.4 Has the Internet rendered hate speech more visible?

Has hate speech always been around? What has changed with the Internet, if at all anything has? Why have discussions of online hatred become more mainstream than discussions of hate speech offline ever were? Two of the leading brains in the business, top executives at Google Inc., Eric Schmidt and Jared Cohen (2013) have provided an early answer which nearly[12] anticipated the crisis by saying, in a section titled 'Fewer Genocides, More Harassment', that

> massacres on a genocidal scale will be harder to conduct, but discrimination will likely worsen and become more personal. Increased connectivity within

11 While technology policy ensured that radio could not become a medium of self-publishing, the speed of the evolution of the Internet has been such that technology has driven policy to a great extent. Or, to put it another way, policy has trailed technology in case of Internet. Social media and self-publishing had caught on before the Information Technology Act (2000) was enacted in India. While amateur radio (or 'Ham Radio') has remained, at best, an underground movement in India, Internet users and social media companies have been very careful not to let that happen to the Internet.

12 '*nearly*', because hate speech against women and vulnerable groups on the Internet has been around because of the relative anonymity that the Internet provides. The crisis is not new. However, after the explosion of speech on social media, it has become more exacerbated.

> societies will provide practitioners of discrimination, whether they are official groups or ones led by citizens, with entirely new ways to marginalize minorities and other disliked communities, whose own use of technology will make them easier to target. (ibid., p. 184)

This 'personalisation' of hatred plays out in the online sphere in the form of hateful, vile propaganda that may or may not come from official heads of government, but has either the tacit support or active complicity of the state machinery working in its favour. Activists campaigning against anti-women and anti-Muslim hate speech made by supporters of the Prime Minister of India, Mr. Narendra Modi, have pointed out how the PM's official Twitter account 'follows' some of the abusive Internet trolls. (Karnad, 2017; Chaturvedi, 2017, p. 15 - 43)

Schmidt and Cohen have predicted such proxy harassment by governments,

> Governments that are used to repressing minorities in the physical world have a whole new set of options in the virtual world, and those that figure out how to combine their policies in both worlds will be that much more effective at repression. (op. cit., p. 184)

Hinting specifically at the potential for increased Islamophobic behavior on the Internet, they further write, in fairly alarming terms,

> The world's first virtual genocide might be carried out not by a government but by a band of fanatics. ... ... It's not hard to imagine that a rabidly anti-Muslim activist with strong technical skills might go after his local Muslim community's websites, platforms and media outlets to harass them. This is the virtual equivalent of defacing their property, breaking into their businesses and shouting at them from street corners. (ibid., p. 188)

Schmidt and Cohen quote a former neo-Nazi (currently an anti-hate activist) on the subject,

> Online intimidation by hate groups or extremists is more easily perpetrated because the web dehumanizes the interaction and provides a layer of anonymity and 'virtual' disconnection ... ... Having the Internet as an impersonal buffer makes it easier for the intimidator to say certain things that

> might not normally be said face-to-face for fear of peer judgment or persecution. (ibid., p. 188)

The point of the above discussion is not to advocate stricter regulation of speech for, or because of, the Internet, but to show how the explosion of speech on the Internet has highlighted the contours of the hate speech discourse. The specific benefit to be derived from the visibility of hate speech – and of the discussions around it – is to clarify, for our own sake, certain jurisprudential principles that can help us address hate speech online as well as offline. The UDHR (Universal Declaration of Human Rights) and the ICCPR (International Covenant on Civil and Political Rights) make it clear that the choice of medium does not constitute grounds for putting additional curbs on freedom of expression.[13] This principle, known as medium neutrality – if saying something isn't illegal offline, it shouldn't be illegal online – will be used throughout this dissertation.

1.5 Internet and Hate Speech

When the Supreme Court of India struck down the contentious Section 66A of the Information Technology (Amendment) Act, 2008 for its overbroad and unconstitutional curbs on freedom of expression, the judgment that pronounced the decision noted the Additional Solicitor General's suggestion of making Sec 66A workable by reading into it, among other things, a "hate speech" provision. The Supreme Court refused to read into the section anything that wasn't originally

13 There is one qualitative change though – the normalisation of rife hate speech on the Internet runs the risk of making it look and sound more acceptable. Also, medium-neutrality holds only for protected speech. For speech that is not protected under Article 19(1), medium neutrality doesn't have to apply.

intended, and struck down Section 66A altogether, but the definition of hate speech, as suggested by the Additional Solicitor General (ASG) is reproduced in the judgment and it gives one an insight into the mind of the judiciary and, perhaps even the State, as to what this phrase signifies:

> 48. (vii) Information which promotes hate speech i.e.
>
> 1) Information which propagates hatred towards individual or a groups, on the basis of race, religion, religion, casteism, ethnicity,
>
> 2) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.
>
> 3) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.[14]

One is forced to pay attention to this definition because, while scholarly definitions of the term "hate speech" abound, there is little or no jurisprudence in India that defines it explicitly. There is, of course, an entire body of jurisprudence that alludes to this idea of "hate speech", and that is what forms the subject matter of this dissertation, but neither the Constitution of India nor the Indian Penal Code (IPC) 1860 defines such a provision *per se*. Therefore, the definition above can give us an insight into the anxieties of the state insofar as speech and expression on the Internet is concerned.

Some of the provisions that the ASG has listed as "hate speech" are already dealt with under existing provisions, not to mention the overbroad nature of the various clauses of the suggested provision. One important addition is supremacism in clause no. 2. It is interesting, however, that India does not criminalise race and caste "supremacism"

14 Shreya Singhal and ors. V Union of India (2015) 5 SCC 1 para 48

per se, and the ASG recommended that only online race/caste supremacism be penalised, making no recommendations at all to deal with supremacism offline. Newspaper matrimonials in India still blatantly advertise the requirement of "tall, fair and upper caste" brides/grooms. There is no fair housing policy in India, and advertisements for occupancy often include the disclaimer: "No Muslims, please!"[15] The election of Hindu supremacist party BJP to power in 2014 has emboldened Hindu right-wing groups to lead campaigns to convert Muslims and Christians to Hinduism, along with campaigns against inter-faith marriage.[16] The ASG's submission to the Supreme Court is a welcome acknowledgement of supremacism, but it is a folly to think that supremacism is an online phenomenon. Further, this definition fails to solve the problem of providing an accurate definition of hate speech because it leaves out one of the most important aspects of hate speech- incitement to violence on the basis of identity or group characteristics.

Redundancy and ambiguity had been the two major arguments on the basis of which the repeal of Section 66A of the IT Act was being sought. The petitioners, in addition to the overbroad nature of 66A, pointed out, that the other provisions (which weren't overbroad) were already dealt with under existing legal provisions. Had the Supreme Court bench accepted the ASG's suggestion to read this particular definition of hate speech into Sec 66A, it would have reintroduced these very elements – redundancy and ambiguity – back into the (now repealed) provision. After all, the usage of ambiguous phrases in this proposed definition (such as "something which is

15 See. Rashid, O. (2015, May 27). No flat for her in Mumbai because she is Muslim. *The Hindu*. Retrieved from http://www.thehindu.com/news/national/no-flat-for-her-in-mumbai-because-she-is-muslim/article7248607.ece on 20 July, 2017

16 See Nair, R. & Jack Daniel, F. (2014, Sep 5). 'Love Jihad' and religious conversion polarise in Modi's India. *Reuters*. Retrieved from http://in.reuters.com/article/india-religion-modi-idINKBN0GZ2OC20140904 on 17 July, 2017; See also, Verma, L. (2014, Sep 10). A BJP-led govt in UP can stop love jihad, says Adityanath. The Indian Express. Retrieved from http://indianexpress.com/article/cities/lucknow/a-bjp-led-govt-in-up-can-stop-love-jihad-adityanath/ on 17 July, 2017

considered sacred or **inviolable**", "**lack of reverence**", "inflammatory remarks against religion/race/caste") in the proposed definition is what had initially triggered alarm against the Section 66A (usage of phrases such as "grossly offensive", "causing annoyance, inconvenience, insult", etc.)

1.5.1 Internet and growing consciousness of hate speech

The ASG's suggestion is an attempt to turn Section 66A into a 'hate speech' provision, even though it wasn't intended as one. Even if Section 66A were intended as a hate speech provision, there was no 'offline' equivalent of the same law. That is, various types of speech deemed illegal under Section 66A of the Information Technology (Amendment) Act, 2008 would not be illegal if said offline. This provision had the effect of imposing restrictions on the exercise of free speech in the online sphere that did not exist in the offline sphere because these weren't covered under the set of 'reasonable restrictions' on free speech that are placed by Article 19(2) of the Constitution of India. Any constraints on free speech must conform to the constraints outlined in Article 19(2).

The incumbent government, UPA-II, till the very end, continued to defend Section 66A of the IT Act on the basis of the anxiety that the nature of the Internet is 'different' and that it requires more stringent curbs than offline speech. This triggered a debate on whether the nature of online content is radically different from that of offline communication. Different experts found themselves at different positions with respect to this debate. Some argued that the nature of the medium cannot be made a

basis for curbing speech, and that ‘online’ and ‘offline’ speech is fundamentally the same, whereas others pointed out that the nature of the moving image (film) has always been made a pretext for having different laws govern new forms of media. In that sense, the term ‘new media’ does not fully capture the novelty of the Internet as a medium, but it is used in this dissertation to connote not only the Internet but also the speech-intensive and interactive nature of social media websites and apps, news media, the virality of image and video, the visual nature of laser projections, etc. As pointed out in footnote no. 12, medium neutrality does not apply in case of speech that is not protected. This will be explained at length in Chapter 3.

This research seeks to examine the way(s) in which existing jurisprudence on hate speech in India has been influenced by the emergence of the Internet and interactive media. One can already see a clear connection in the Shreya Singhal judgment where the ASG’s suggestions to make Section 66A workable include the introduction of a ‘hate speech’ clause.

1.6 Defining Hate Speech

The problem of defining hate speech is fundamentally one that involves determination of the kind(s) of speech that may or may not be allowed in a democratic society where the rule of law is upheld. It is assumed that criticism of governments or criticism of political opponents should be allowed. It is also assumed that criticism of social practices is allowed, in order to move toward social reform. What, then, is the purpose

of hate speech laws and proscriptions? Is criticism of religion or religious practices or religious figures protected under Constitutional guarantees of freedom of expression? When does this cross the line and become hate speech? Also, what is the specific need to define hate speech distinctly in a country like India where various forms of prohibited speech are defined by various penal provisions relating to speech that offends religious believers or causes insult to oppressed castes, etc.? Is there a difference between offence, insult, injury, hurt and incitement? Since insult and offence on grounds of religion is already covered under various penal provisions, what is the specific need to understand or define hate speech laws? At the core of these questions lies the recognition of hate speech as discrimination or hate speech as atrocity. This means that hate speech occurs in a social context of discrimination and violence, and that the context is important to determine whether a certain kind of word or phrase or statement qualifies as hate speech or not. Unless and until hate speech is understood as taking place in a social context where discrimination is rife or atrocities against a particular section of society are possible, the concept will continue to be conflated with other such concepts as offence or blasphemy or hurt sentiments, etc.

Laws regulating speech vary from one country to another. In the USA, the First Amendment to the Constitution removed all restrictions from speech. This is a classical liberal position, reflecting the "I disapprove of what you say, but I will defend to the death your right to say it", argument, often attributed to Voltaire. The state, in such an arrangement, adopts a "hands off" approach to speech and writing. On the contrary, the first amendment in India, among other things, placed restrictions on speech. Article 19(1) of the Indian Constitution guarantees, to all Indian citizens,

the right to freedom of speech and expression. However, Article 19(2) places several restrictions on the right to freedom of expression. These "reasonable restrictions" can be placed on the grounds of "sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence". The Constitution of India empowers the State to enact laws, prohibiting speech based on these grounds. Mill ([1859] 2011) presents a liberal defence of free speech while drawing the line at nuisance and imminence of actual violence. This position has been further elaborated by Waldron (2012) who argues for regulation of harmful speech in the USA, while maintaining a defence of free speech. Apart from the potential of inciting violence, Waldron also concerns himself with the harm caused to the "dignity" or "social standing" of persons.

Most jurisdictions have a commitment, no matter how weak or strong, to protection of free speech and expression. In India, Article 19 of the Constitution guarantees every citizen the right to freedom of speech and expression. The same provision also limits this expression on various grounds. However, rather than viewing the proscription of hate speech as a restriction on free speech, or as a limiting case of Article 19, it should be seen as an enabling provision that allows various sections and members of society to express their views freely

Very often, the discussion of a need for acting against hate speech is seen as an effort to censor political speech. This is because, in the name of curbing hate speech, one often witnesses an attack on artistic, scholarly and political freedoms. This is because

of a lack of understanding of what hate speech constitutes and what it seeks to protect. However, when understood in the correct sense, curbing hate speech is essential to the promotion of free speech, for safeguarding the social standing and political participation of vulnerable groups and, by implication, the safeguarding of their right to exercise freedom of speech and expression. While free speech is a fundamental right protected by Article 19 of the Constitution of India, hate speech is that speech which has the effect of violating Article 15 of the Constitution of India which embodies a Constitutional guarantee of freedom from discrimination. Article 15 prohibits discrimination on grounds of "religion, race, caste, sex or place of birth." Although progressive in thrust, this provision leaves out some vulnerable identities such as the disabled, the gender minorities (transgenders) or sexual minorities, etc.

Nevertheless, the structure of Article 15 is that of a non-discrimination provision, and it is more useful to approach hate speech as being derived from Article 15 rather than Article 19(2), in so far as incitement to discrimination and hostility is concerned. When it comes to 'incitement to violence', the 'public order' restriction mentioned in Article 19(2) is often invoked to label speech and expression as being problematic. For example, religious groups often threaten violence or disorder, seeking curtailment of blasphemous or irreverent speech/books/movies, making a self-conscious claim that such speech will lead to violence. However, incitement to violence is to be understood in a more nuanced way. "Incitement" cannot be understood as the violent group's proof of speech having the potential to incite violence. This would give any group the green signal to indulge in violence or disorder in order to manufacture proof of certain speech having "incited" them to be violent. On the contrary, "incitement to violence" as a qualifier of hate speech must be understood as "public announcements

or pronouncements that contain a call to violence against a certain group of living persons, usually but not necessarily minorities". Thus, hate speech cannot merely be described as the violent group's definition that it is "speech that offends us so much that brings out the worst in us" or "writing that offends us so much that we might kill the author" or "art that is so shocking to our sentiments that we can vandalise the house of the artist." Causing offence, therefore, does not constitute hate speech, neither does blasphemy alone, and nor does nudity alone. Because the term is so widely abused, a discussion on hate speech also needs a discussion of what hate speech is not.

A call for violence or discrimination may be given in terms of a description of group characteristics (infidels, parasitic, incestuous, and other forms of insult levelled at communities), habits (gluttons, womanisers, alcoholics, homosexuals, atheists, etc.), broad accusations (committing 'love jihad', stealing cows, stealing 'our daughters', traitors, informers, stealing our jobs, etc.), immediate events ('they killed' our leader, we will avenge this, they have insulted us, etc.) and, more rarely, as explicit calls to violence in the name of nation, religion, honour, etc.

The Supreme Court in Pravasi Bhalai Sangathan v. Union of India (2014) quoted the Canadian Supreme Court's definition of hate speech in Sasketchewan (Human Rights Commission) v. Whatcott which says,

> Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable

> that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

Rajeev Dhavan writes,

> Very broadly, 'hate speech' includes any speech which targets individuals, groups or classes and seeks to ridicule, annoy, insult or defame such individual groups or classes or portray them in a manner that lowers their reputation or self-esteem. Hate speech may incite or may have the potential to incite hatred towards certain people which could result in such individuals or groups being targeted and victimised, resulting in violence against them or other hostilities that could result in a breach of peace. (Dhavan, 2008, p. 223)

This definition covers most aspects of hate speech. A look at the hate speech laws of various countries shows an emphasis on comments that incite racial discrimination or have the potential to incite racial violence, especially against vulnerable groups. Article 15 of the Indian Constitution prohibits discrimination on grounds of "religion, race, caste, sex and place of birth." The non-discrimination provision in India, thus, does not cover disability and sexual orientation.

The Criminal Code of Canada prohibits incitement of hatred or genocide against "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation." (Braun, 2004) Once again, disability is not covered in this definition.

The definition of hate speech in South Africa is remarkably nuanced, as it is perhaps the only definition that differentiates between hurt, harm and propagation of hatred. Also, it is more comprehensive, as it specifically prohibits discrimination, hate speech or harassment on grounds of "race, gender, sex, pregnancy, family responsibility or

status, marital status, ethnic or social origin, HIV/AIDS status, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

1.7 Hate Speech Legislation in India

On 12th March, 2014, a three-judge bench of the Supreme Court of India, while dismissing a writ petition filed by the Pravasi Bhalai Sangathan (Migrant Welfare Organisation), requested the Law Commission of India to consider undertaking the exercise of providing an accurate legal definition of "hate speech", as the Supreme Court was of the view that it is not a function of the judiciary to enact law.[17] The Law Commission submitted its report on hate speech in March, 2017, and it recommends[18] the amendment of the Indian Penal Code 1860 to include provisions to counter hate speech, which, as per the proposed amendments, primarily refers to two kinds of speech: a) incitement to hatred; and, b) incitement to discrimination.[19] The Law Commission's report was submitted to the Minister of Law and Justice while this research was underway. The report concludes that, in several cases, the courts are unable to prosecute hate speech successfully, because of "absence of clear provisions in IPC".[20] It further notes that "there is no water tight compartment to deal with the various acts relating to hate speech which generally overlap."[21] The Supreme Court's direction to the Law Commission to provide a definition of hate speech is an acknowledgment of the ambiguity of what constitutes hate speech. Through this research, I attempt to point out the ambiguities in the existing definition of hate speech, by analysing the existing legal provisions in light of various principles,

17 AIR 2014 SC 1951, para 28
18 Law Commission of India. (2017). Report No. 267. 'Hate Speech.', para 6.33
19 Ibid., Annexure A
20 Ibid., para 6.24
21 Ibid., para 6.30

especially the 'hurt' and 'harm' principles. The Law Commission's recommendation that a new legal provision to deal with hate speech is needed is an acknowledgment that existing provisions do not cover the matter of hate speech.

The amendments proposed by the Law Commission are progressive in their thrust and these, in fact, reflect a much broader understanding of marginality and vulnerability than most of the other provisions in the IPC or even the Constitution of India, insofar as sexual orientation and disability are explicitly listed as grounds. The original petitioner, Pravasi Bhalai Sangathan had approached the Supreme Court seeking judicial recourse against "hate/derogatory speeches made by people representatives/political/religious leaders on religion, caste, region and ethnic lines."[22]

This shows that, while proponents of free speech in India oppose the draconian nature of legislation dealing with speech and expression, proponents of non-discrimination feel that the law is inadequate to deal with hate speech. This apparent paradox has its root in the fact that the pretexts for criminalisation of speech abound, but effective legal remedies to harmful speech are missing. This indicates, not just a disproportionate crackdown on dissenting voices and inequality of power, but also, at a more basic level, a conflation of the very concept of 'hate speech' with 'offensive speech', of 'hurt' with 'harm'. Censorship of various forms of speech, especially art and history writing, through law, is an issue to which much writing has been dedicated. (Kaur & Mazzarella, 2009; Bhatia, 2016; Ramdev et. al., 2016) At the same time, hate speeches made by politicians often go unpunished. The proposed addition of two new provisions relating to hate speech by the aforementioned report of the Law Commission, therefore, should not be seen as "yet another" pretext for criminalisation of speech. The amendments suggested have a progressive thrust

22 AIR 2014 SC 1591, para 1 (a).

which, if understood correctly, could lead, not to more criminalisation of speech, but to a better recognition of principles that define what constitutes hate speech and what doesn't. However, the report of the Law Commission once again conflates 'offence' and 'harm'. This issue will be dealt with in the Conclusion. In the absence of provisions dealing with hate speech, anything could be passed off as hate speech and criminalised. Legal remedies for hate speech should, therefore, be consistent with better understanding of free speech rather than with more censorship. This is the understanding on which this research is premised.

2

Evolution of law and jurisprudence related to hate speech in India

This chapter attempts to present a brief history of laws related to speech, under what circumstances these were enacted, and how they were used in some important cases. The limitation of this chapter is that it does not cover case law under SC/ST (Prevention of Atrocities Act), as case law around the provision is not enough to draw conclusions from its use. Such an effort can be part of future, more in-depth research.

One of the first instances of control or restriction on free speech was the Press Act of 1857. This Act prohibited publication of any sort, without a prior license from the government. The Indian Penal Code (IPC) when it was first enacted in 1860 did not include the offences of sedition or the promotion of enmity between classes. What the Penal Code did criminalise, however, were the offences defined under Section 153 and Section 298. Section 153 of the IPC criminalises any act that is likely to cause a riot. Section 298 criminalises the act of uttering words or making gestures which are likely to wound religious feelings. Clearly at this time, the intent was to criminalise acts which were likely to cause violence in a very immediate sense. Over time, Sections 505, 153A, 153B and 295A were added to the Penal Code to cover acts that are likely to cause enmity between communities, incite one community against the other, or to offend religious feelings. In fact, it is these later provisions which have been sought to be used more often to prevent communal violence.

Forfeiture of printed material under Section 95 of the Code of Criminal Procedure, 1973 permits the government to effectively ban any work which 'appears to violate' these provisions. Bhatia (2016, p. 148 – 150) argues that this procedural power in the hands of the administration is dangerous for the exercise of free speech, as the burden of proving that the material *does not violate* the communal speech provisions rests upon the author of the work.

A review of reported judgments to cull out the evolution of these laws in India is instructive, because it is the pronouncements of High Courts and the Supreme Court which lay down the law regarding the operations of these hate speech provisions and these are as such appropriate to study the evolution of the law. Such a study does not, however, provide us with definite information on the number of prosecutions under these sections or how the lower judiciary has applied the law laid down by the higher courts. This disclaimer is important as access to the higher courts is limited to the more privileged sections of Indian society. Therefore, the fact that the higher judiciary has largely extended protection to those approaching it cannot be seen as conclusive of the incidence or manner of prosecutions under these sections.

Revisiting the definition provided by Dhavan, hate speech can broadly be defined as,

> any speech which targets individuals, groups or classes and seeks to ridicule, annoy, insult or defame such individual, group or class, or portray them in such a way that lowers their reputation or self-esteem, or incites or may have a tendency to incite, hatred towards them which could result in such individuals, persons or groups being negatively targeted or victimised or to cause violence against such persons or excite hostilities to threaten the breach of peace. (Dhavan, 2008, p. 223)

As per this definition, hate speech laws in India would not be confined only to the laws in the Indian Penal Code 1860 which criminalise the act of promoting enmity, violence or outrage. Defamation law as well as election laws and pre-censorship powers provided by the Cinematograph Act would all be considered to be under the wider conspectus of 'hate speech laws'.

Hate speech provisions have also turned up under various other laws and enactments both during the colonial and post-colonial periods. One of the first laws to govern publishing of material was the Press and Registration of Books Act, 1867 which was passed to enable the government to regulate printing presses and newspapers. It provided for compulsory registration and, as such, provided to preserve copies of books and other literature printed in India. In fact, it was mostly used by the government to check the tendency of writers towards political commentary. (Darnton, 2001)

Apart from the function of this new law to ensure that all printed material was known to the government, this law also included a far-reaching provision which has become one of the most potent means of controlling speech in this country. This statute makes the identity of the editor and publisher public and makes them, along with the author, legally responsible for the contents of the book or newspaper, as the case may be.[23] A major amendment was carried out to the Indian Penal Code of 1860 in 1898 with the introduction of Section 153A and Section 505 of Indian Penal Code. These provisions

[23] Section 7 of the Press (Registration of Books) Act.

were later expanded further. Also, the Law Commission's March 2017 report seeks to expand these further (See Conclusion).

The Press (Emergency) Powers Act, 1931 again empowered the government to act against members of the press for carrying out ‘mischievous acts’. Under Section 4 of this law, a ‘mischievous’ act could be anything from inciting hatred or contempt against the government, inciting enmity between classes, or inciting a public servant to resign or neglect his duty. In subsequent laws including the Defence of India Rules, certain powers were arrogated to the State to be used against the press in the interests of the safety and security of the State. While these could be broadly be termed as hate speech laws insofar as they were concerned with internal public order, it is the provisions of the Penal Code and election laws which have been the scene of most contested debates in this area.

2.1 Hate Speech under the Indian Penal Code

Hate speech laws are a late addition to the Indian Penal Code. The provisions of the Penal Code which criminalise hate speech are as follows:

2.1.1 Section 153 A, Section 153 B and Section 505 of the Indian Penal Code

Sections 153 and 505 were added in 1898 to the Indian Penal Code of 1860. It penalises ‘promotion of enmity between different groups on grounds of religion, race,

place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony'. Although it originally only criminalised promotion of enmity between 'different classes' the section was broadly reworded and expanded in 1969 through Act 35 of 1969 (the Criminal and Election Laws Amendment Act, 1969). A further amendment in 1972 also added Section 153B which criminalises any act which is "prejudicial to the maintenance of harmony between religious, racial or language groups". If any act which is an offence within the definition of this section were to be done within a place of religious worship, it would be termed an aggravated offence. This expansion of the offence was clearly a reaction to ongoing attempts to provoke violence amongst communities. The same act also amended Section 505 of the Indian Penal Code to bring in the spreading of rumours within the purview of criminal law. Section 505(1) and 505(2) of the IPC penalised the publication or circulation of any statement, rumour or report causing public mischief and enmity, hatred or ill-will between classes. It's one of the oldest hate speech provisions in the Penal Code.

Section 153A is rarely used by itself, and was famously held to be not applicable in the case of Rajpal v. Emperor[24] (the Rangeela Rasool case) by the Lahore High Court which held that while 'Rangeela Rasool' may have hurt the sensibilities of the Muslims, it did not excite or cause enmity between communities. This shows a clear awareness of the 'hurt' versus 'harm' principles, before Section 295A was enacted. It may be mentioned that Section 295A was enacted after the publisher of Rangeela Rasool was murdered by a Muslim fanatic, Ilm-ud-Deen, and it was argued by

[24] AIR 1927 Lah 590.

Muslim groups that there is no law to protect their beliefs from hurt! The colonial government obliged, by granting Section 295A as a recourse.

However, the interpretation in the Rajpal (Rangeela Rasool) case was disagreed with by at least one contemporaneous Allahabad High Court judgment. In Kali Charan Sharma v. King Emperor[25] the issue was similar to that of Rangeela Rasool. A book called "Vichitra Jiwan" was authored by Pandit Kali Charan Sharma. The contents of this book are not reproduced in the judgment as the judge observed that reporting its contents may give 'further publicity' to the contents of the book which would excite further enmity. As for the Rangeela Rasool judgment, it was quite handily, if politely, disagreed with by the Allahabad High Court holding that,

> The learned Counsel who argued this revision showed me a copy of a judgment of an honourable Judge of the Lahore High Court (A.I.R. 1927 Lah. 590) on a similar book "Rangila Rasul" (a gay prophet) issued in the Punjab. Possibly the judgment was cited as both books appeared to have been issued in prosecution of the same Hindi propaganda. With all respect to the learned Judge, I am not prepared to agree with the nice distinction he has drawn between a book which may hurt the feelings of Mahomedans and a book which may cause feelings of enmity or hatred between different classes of His Majesty's subjects. Speaking for myself I look at such a matter not as a somewhat learned Judge of a High Court, but as a common or ordinary citizen of a town in India.[26]

The distinction between 'hurt' and 'harm' that was drawn by the Lahore High Court found no favour in the Allahabad High Court. Narrain (2016, p. 120) has pointed out this conflation between hurt and harm, post the Rangeela Rasool controversy.

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25 AIR 1927 All 654a.

26 Kali Charan Sharma v. King-Emperor AIR 1927 All 654a, para 4

Section 153A was again used by the Allahabad High Court in 1936 to uphold the ban on the Hindi translation of the Communist Manifesto.[27] In the same order, the Court refused to ban a translation of Lenin's "*Imperialism, the highest stage of Capitalism*". The High Court did not find Lenin's work very objectionable holding that it mentioned the British Indian government only in passing and did not include a call for violence, although it concluded that violence may be inevitable. It also concluded that there was no question of this book causing enmity between classes as there was no identifiable body of bankers or capitalists in India so as to make them a class. While denying the existence of a capitalist class, the Court, however, ended up affirming the existence of the working class. In the same order, the Communist Manifesto, however, found no such favour,

> There is a pointed reference to the methods often adopted by the proletariat in destroying property, smashing machinery to pieces and setting factories ablaze and restoring by force the former status of the workman. It points out that in this clash, the contest has often broken out into riots. It lays down that the immediate aim is the conquest of political power by the proletariat, and asserts that "the wresting" of capital from the bourgeoisie cannot be expected except by means of despotic inroads on the rights of property, and shows how by means of a revolution the proletariat can sweep away by force old conditions and make itself the ruling class. Their feelings are excited by the reference to the use of floggings and bullets sometimes made against the working classes.[28]

The Court clearly found one work more dangerous than the other. The reasoning was clearly specious and dependent on the political fears of the time. Section 153A was used by courts to ban "*Imperialism, the Highest Stage of Capitalism*", but not "*Rangeela Rasool*", because the former was politically inconvenient to the Empire. It was not used to ban a moderate work of Lenin's which did not address the Indian situation but was used to ban the Communist Manifesto. In all these judgments,

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27 M.L. Gautam v. Emperor AIR 1936 All 561

28 Ibid., para 18

expediency seems to be the most important factor in the Court reaching its decision. Interestingly, a logic very similar to that used in Rangeela Rasool was used by the Supreme Court of India, much later, in the case of Bilal Kaloo v. State of Andhra Pradesh in 1997 where the accused was charged with having spread news of the Indian army's atrocities in Kashmir. Acquitting Kaloo of the charges under Sections 153A and 505 (as well as of sedition), the Supreme Court observed that,

> The common feature in both sections being promotion of feeling of enmity, hatred or ill-will "between different" religious or racial or language or regional groups or castes and communities it is necessary that atleast two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections.[29]

The distinction drawn in case of Rangeela Rasool by the Lahore High Court was used to free a man who had been charged with sedition and communal incitement. This judgment also tries to draw a distinction between Sections 153A and 505(2),

> the main distinction between the two offences is that publication of the word or representation is not necessary under the former, such publication is sine qua non under Section 505. The words "whoever makes, publishes or circulates" used in the setting of Section 505(2) cannot be interpreted disjunctively but only as supplementary to each other. If it is construed disjunctively, any one who makes a statement falling within the meaning of Section 505 would, without publication or circulation, be liable to conviction. But the same is the effect with Section 153A also and then that Section would have been bad for redundancy. The intention of the legislature in providing two different sections on the same subject would have been to cover two different fields of similar colour. The fact that both sections were included as a package in the same amending enactment lends further support to the said construction.[30]

Section 505 of the Penal Code is a testament to the haphazard development of the Code. It is really an adjunct to Section 153A and need have no independent existence.

29 Bilal Ahmed Kaloo v. State of Andhra Pradesh, AIR 1997 SC 3483, para 10
30 Ibid., para 12

Post-independence, Section 153A was declared unconstitutional and void by the High Court of the old Patiala and East Punjab States Union in the case of Tara Singh Gopi Chand v. State.[31] Justice Weston declared that both the offence of sedition and the offence under Section 153 A were void holding that,

> In the English text-book definitions of sedition or seditious libel the substance both of S.124A and of Section 153A is usually embodied; and, as I have mentioned earlier, Section 153A may be considered of the nature of a lesser offence in relation to Section 124A. The gist of the offence under Section 153A is the promotion or attempt to promotion of feelings of enmity or hatred between different classes of citizens of India. As in the case of Section 124A, no doubt many acts falling under Section 153A will be acts undermining or tending to overthrow the State. But there can equally be no doubt that many acts made punishable by Section 153A will not in any way undermine the security of or tend to overthrow the State; and here again the unsuccessful attempt may well have no result whatever. It seems that Section 153A must follow Section 124A and, therefore, this section also has become void as providing an unwarranted restriction on the freedom of speech and expression.

Section 153A was resurrected after "public order" was included as grounds for restricting the freedom of speech of Indian citizens. When it was sought to be used against Adivasi leaders seeking statehood for Jharkhand in 1953, they were first convicted by the lower courts but were then acquitted by the High Court which took a progressive view of their speeches.[32] It was also sought to be used against the editor of an Urdu newspaper 'Sangam' who was also convicted by the Magistrate's court before being acquitted by the higher courts.[33] His supposedly objectionable words were as follows:

> I want to tell the Government when the Act for preservation of cattle has been passed, what is the hitch in enforcing it? The world knows that the Government of C.P., U.P., Bihar, etc., have imposed restrictions on cow slaughter having respected the religious feelings of the majority community. The false show of preservation and improvement of cattle is known to all.

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31 Tara Singh Gopi Chand v. State 1951 Cr LJ 449, para 16

32 Debi Soren v. State AIR 1954 Pat 254

33 State v. Ghulam Sarwar AIR 1965 Pat 393

> Then, what is preventing the Government from enforcing the Act? On the one side the Government show to the world that they (Government) have not enforced it. On the other side the Government explain to the majority community that the law has been passed and the Governor's assent has been obtained. Thus, circumstances have been created to crush the minority. The minority community thinks that it is within its legal right to slaughter and the majority community thinks that now, the Act has already been passed, the minority should be prevented from making slaughter. They feel not the least hesitation in cutting the throats of their brothers and sisters for cow slaughter. They have always given preference to human lives over animal lives and they are still giving the same preference. Then, why are the Government preparing ground for our killing and destruction due to their negligence?

The High Court stated that Ghulam Sarwar's grouse seemed to be against those who valued a cow's life over a human life. However, the fact that Debi Soren in the Adivasi case and Ghulam Sarwar in this case were both convicted in the first instance shows that the more nuanced understanding of political speech which the High Court seems to have displayed did not necessarily percolate down to the lower judiciary.

Regardless of its political use, this provision of the law was found to be quite ineffective in dealing with hate speech. Although there is no clear authority which states the same, the expansion of Section 153A and the introduction of Section 153B (through an amendment dated 4th September, 1969) may very well have been provoked by a judgment of the Bombay High Court on 6 August, 1969.[34] This was a case related to the forfeiture of a book written by Gopal Godse about Gandhi's assassination on the grounds that its contents violated Section 153A of the IPC. The court summarised the contents of the book as follows:

> Our attention was then invited to passages at pp. 29, 57, 86, 91, 137, 171, 172, 203, 221, 224 and 225 of the book as showing that before and after the partition the Hindu community had to undergo great sufferings on account of the policy adopted by the Congress under the leadership of Gandhi ji that the

[34] Gopal Vinayak Godse v. Union of India AIR 1971 Bom 56

> Muslims should be appeased at all costs. The passages at pages 20, 21, 101, 128, 129 130, 131, 144 and 250 were relied upon as showing that the danger to India's security, unity and freedom still persists because of the creation and existence of Pakistan, as the Muslims in India are generally Pakistanis at heart, that the Government is still persisting in the policy of appeasing Muslims and that the Muslims exploit that policy. Lastly, reliance is placed on the passages occurring at pages 5, 78, 35, 48, 49, 57, 68, 50, 63, 80, 81, 82, 83, 89, 91, 148, 149, 156, 189, 220 and 221 as showing that a political assassination in such circumstances is justified and praise worthy and that even bloody action of revenge against Pakistan and against those who are Pakistanis at heart is justified and would be praiseworthy. It is said that the passages at pages 5 and 78 from out of the passages cited above justify the crime as of a high moral quality and worthy of emulation. To praise the motive of an act as it has been praised at page 78 is said to be an invitation to the common man to emulate the act.[35]

The Bombay High Court went on to state that none of this could contravene Section 153 A as the allegations and imputations were made against the government and not against the Muslims. Interestingly, the judgment may very well have been different under the expanded Section 153A and the new Section 153B which was introduced by an amendment just a month later. The book was then banned under the amended law.

The same provision of law was famously sought to be used against the Shiv Sena newspaper *Saamna*[36] where the Court held that *Saamna*'s editorials were only intended against ant-national Muslims and as such on a reading of the whole article could not be considered to be violative of Section 153A. Perhaps the fact that a criminal investigation was sought against Bal Thackeray weighed with the Court, where the State government, under Congress rule at the time backed Bal Thackeray and Saamna to the hilt before the Bombay High Court. This was in stark contrast to

35 Ibid., para 101

36 Joseph Bain D' Souza v. State of Maharashtra 1995 CriLJ 1316

the case of Babu Rao Patel v. State of Delhi[37] where the author had referred to Muslims as 'a basically violent race' and had included vituperative phrases and paragraphs such as,

> To have a street named after this Mughal bastard in New Delhi, the capital of India, is not only a disgrace to the Hindus but a crying insult to the brave community of Sikhs. Had the Muslims been insulted thus, they would not only have burnt every house on the road named after the tyrant but also set fire to the whole damned city. The Muslims know how to guard their traditions.[38]

This was held to be calculated to rouse enmity between communities. The defence of historical truth was ignored as the Court refused to go into the question of whether the Mughals were good rulers or not. Despite the reasoning adopted by the Court the effect of its order was rather muted because of the fact that the sentence awarded to the offender was a fine of Rs. 500, which although not paltry in 1980, could not and did not have the effect of controlling this manner of hate speech.

The Saamna case was instructive in that it shows the reluctance of the law, in an atmosphere of deep communal distrust and violence, to take a strict view of the law itself. Where the judgment holds that the article must be read as a whole, it is seeking to make excuses about the name-calling that Saamna had indulged in. The relevant extract from Saamna was as follows:

> 'Municipal Deputy Commissioner Mr. Khairnar risked his life to use the bulldozer in Bhendi Bazar which has become a heaven of Pakistani infiltrators and anti-national Muslims. Moulvis and mullah have corrupted Bhendi Bazar. The poision of treachery (anti nationalism) is flowing through every vein (lane) of Bhendi Bazar. Is Bhendi Bazzar a part of India (let alone Bombay) at all?[39]

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37 AIR 1980 SC 763.

38 Ibid., para 5

39 From Samna', 2nd December 1992, quoted in Ibid., para 16

The above was held by the Court to be offset by the following,

> We respect all religions. We salute sacred scriptures of all religions with humility. Religion is a code of sustenance which gives humanity an identity and stability. Religion does the work of creating a society and giving it support. The word Dharma (Religion) is derived from the derivative Dhru and it means "that which sustains in Dharma. Religious book is not of the ownership of Paigambar or of a particular religion. It belongs to the entire world. The entire humanity has claim over it. Religion is permanent and eternal. Members of Muslim League who are creating chaos in the corporation should say which code of conduct of the religion are the traitors of Bhendi Bazar following. After the unauthorised stalls were demolished copies of Kuran were thrown there. Those who then pretended that the holy Kuran was insulted have themselves insulted holy Kuran.[40]

Clearly, there was an attempt to weigh and balance the article against itself. However, the judgment notes further passages from the journal,

> And which is this minority community? The Muslim traitors who have partitioned this country and have not even allowed us to breathe ever since then.[41]

There is a further call that Muslims should learn their lessons or that they would face the same fate which befell the Babri Masjid. The fact that the Court considered itself to be carrying out an act in public interest is stated in the judgment itself,

> We have already expressed that these articles do not come within the mischief of S. 153Aand 153B of the Code. We are further of the opinion that looking at the recent monstrous riots and the result thereof, both the communities must have realised that path of ill-will, spite and hatred against each other will benefit none but surely destroy both. Taking the experience from the past events, both the communities have started forgetting the ill feelings thereby creating communal harmony and leading the life as a part of the mainstream of this country towards prosperity and, therefore, from this point of view also, it is not desirable to reopen the old issue afresh.[42]

40 quoted in Ibid., para 16
41 Ibid., para 17
42 Ibid., para 32

There is a time when the judicial and legal systems of a country have to stand by their principles. The systems failed spectacularly on this occasion. The State government colluded with the accused and the judiciary excused their "emotional outburst high-flown and caustic language". In a time when the choice was between the provision of justice by use of State powers and brushing the entire issue out of sight, an unfortunate choice was made to choose the latter.

As the law stands, it seems that calling Muslims anti-nationals and traitors does not offend the mandate of Section 153A, even after the expansion of the law. Further, calling Muslims inherently violent is only punishable with a light fine. This is a disturbing state of affairs for a country with such a high prevalence of identity-based violence.

It must, however, be noted here that by and large the Courts have refrained from acting against persons on the basis of Section 153A. There have been a couple of instances where the issues involved under Section 153A have pertained to intra-Muslim disputes or to other communities. For instance, The Madras High Court in 1971 ruled that a poster by an orthodox Hindu depicting the DMK's anti-religious activities would not fall afoul of Section 153A because all the parties involved were Hindus.[43]

[43] Chinna Annamalai vs State Of Tamil Nadu AIR 1971 Mad 448. This case was about forfeiture of posters for violating Section 153A and Section 295A of the IPC. The posters showed cartoons in which E. V. Ramaswami Naicker was 'raising chappal to beat Gods Rama and Muruga by his right hand and and the heading of the poster read "*Ramanaiyum Muruganiayum seruppal adithavanin silaigalai thirandha seedarukka ungal vottu*" (roughly translated, try again if you dare).

This was a simplistic reading of the law, firstly negating atheism as an identity and atheists as a class of people against whom hate speech could be directed. Further, the judgment did not build on the premise of free speech. In restricting itself to technicalities like the contents of the government notification an opportunity to develop the law regulating hate speech was lost.

Noteworthy was the Bombay High Court's decision in Varsha Publications v. Maharashtra[44]. The High Court was asked to adjudicate on the forfeiture of a weekly known as "Shree" which had published an article that argued that pre-Islamic Arabia displayed major Vedic influences. Holding the work to be that of a historian based on research the Court concluded that,

> We do not think that the scope of Section 153-A can be enlarged to such an extent with a view to thwart history. For obvious reasons, history and historical events cannot be allowed to be looked as a secret on a specious plea that if the history is made known to a person who is interested to know the history, there is likelihood of someone else being hurt. Similarly, an article containing a historical research cannot be allowed to be thwarted on such a plea that the publication of such a material would be hit by Section 153-A, Otherwise, the position will be very precarious. A nation will have to forget its own history and in due course the nation will have no history at all.[45]

Of similar effect was the order of the Gujarat High Court when the Gujarat government tried to ban Jaswant Singh's book on Mohammed Ali Jinnah.[46] In an acerbic opinion, the High Court held that the person who had issued the notification had clearly not read the book and had only read *about* the book. Section 153A, either as a penal provision or as a ground for forfeiture of books or other printed material has thus been used quite sparingly in India. More often than not, attempts to prosecute

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44 1983 CriLJ 1446

45 Ibid., para 12

46 Manishi Jani v. State of Gujarat AIR 2010 Guj 30

under Sections 153A and B have been sought by the minority against the majority. It is difficult to conclude whether the low rate of judicial cognizance under these sections is indicative of a tendency that is somewhat insensitive to minority concerns or whether these are expressions in support of the freedom of speech and expression. This could be a matter of future research, but is beyond the limited scope of the present work. This aspect is also crucial if we are to look up to Section 153A as a redeemable hate speech provision, which is better than India's 'blasphemy' law, Section 295A and more elaborate than Section 505(2).

On the question of cultural dissent and cultural difference, a progressive interpretation by the Madhya Pradesh High Court is quite noteworthy.[47] Dealing with a case where the publication of a book called '*Agni Pariksha*' based on the *Jain Ramayana* had led to riots in Raipur, the High Court struck down the order of forfeiture stating that,

> As the Jain religion does not believe in idolatry, the Jain Ramayana does not treat Rama and Sita as incarnations.[48]

The book, in one of its chapters blames Rama's other wives for spreading rumours about Sita. This was an instance where a differing interpretation of religion and mythology – cultural dissent – being upheld by a court.

47 Ramlal Puri v. State of Madhya Pradesh AIR 1971 MP 152
48 Ibid., para 8

2.1.2 Offence and hurt to religious feelings – Section 295 A and section 298

Section 295A of IPC criminalises 'deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs'. Section 298 on the other hand penalises 'uttering, words, etc., with deliberate intent to wound the religious feelings of any person'. What is criminalised by Sections 153A and B is the causing of enmity. Sections 295A and 298 criminalise the mere act of causing offence. In a sense, Sections 295A and 298 go beyond what is considered hate speech. In criminalising outrage to religious feelings or the wounding of religious feelings, these provisions of the Indian Penal Code go above and beyond protecting the vulnerable. They are aimed in a very real sense at keeping the peace at the cost of free speech and perhaps even scientific enquiry.

As discussed in the previous section, Section 295A of the Indian Penal Code was enacted in 1927 as a reaction to the *Rangeela Rasool* controversy. A tract published in Urdu which made many aspersions against the Prophet Muhammad, *Rangeela Rasool* became the reason for the enactment of this quasi-blasphemy law in India. The publisher of *Rangeela Rasool* was acquitted by the Lahore High Court on the grounds that this book did not result in causing enmity between communities, although it might well have been blasphemous. One Ilm-ud-din killed the publisher of Rangeela Rasool on the premises of the Court. The British responded by enacting Section 295A thereby criminalising the act of causing outrage to religious feelings. Section 298 of the Indian Penal Code which existed on the statute books already only criminalises

wounding religious feelings by words or gestures. It could not be used against a printed work's publisher or author.

The constitutionality of Section 295A was challenged and the Supreme Court in Ramji Lal Modi upheld it on the grounds of maintenance 'public order'.[49] As discussed in the Introduction, the tests criminalisng speech over time have evolved over time and gone much beyond public order. In view of the Constitution Bench judgment of the Supreme Court in Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, AIR 1960 SC 633, there needs to be a close and proximate connection between the restriction of speech and public order for it to qualify as a reasonable restriction, and a mere "tendency" is not sufficient. As mentioned in the Introduction, the Supreme Court in Arup Bhuyan v. State of Assam in 2011 raised the bar by upholding the Brandenberg test. Currently, this section along with other hate speech sections of the Penal Code are under challenge before the Supreme Court in a constitutional challenge by BJP leader, Subramanian Swamy.

Contentions around Section 295A

The First Amendment to the US Constitution, which guarantees to its citizens the freedom of speech, reads,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[49] Ramji Lal Modi v. Union of India, (1989) 2 SCC 574

Most democracies have laws similar to India's, where the Constitution, or any other law, does not incorporate such a wide prohibition of anti-free speech laws. All countries, however, impose restrictions on the freedom of speech and expression, for a variety of reasons. These restrictions may be imposed only on the grounds of defamation, copyright violation or child pornography, as in the US, or may extend to essentially all political discussion and 'obscene' material as in Saudi Arabia, denial of Holocaust in Europe, etc. The struggle to find a balance between free speech and allowable restrictions is being played out in every nation and society. Offence to religious feelings is an arena which is so subjective that it cannot but be mis-applied.

For instance, if one considers the test of “tendency to influence public order” as proposed by the Supreme Court in Ramji Lal Modi, criminality is now no longer attached to the act of outrage itself but to the likely consequences, in terms of reactions from the persons whose religious feelings are so outraged. To put it simply, a law that was enacted in response to a threat of violence from one community, continues to be obsessed only with such threats.

It is not that prosecutions under Section 295A are rife or that the courts do not step in when it seems that this section has been used unathorisedly. In a case related to the banning of Taslima Nasreen’s 'Dwikhandita' by the West Bengal Government, the Calcutta High Court observed,

> It requires no further mention that the parameters for bringing a book within the scope of Section 95 of the Cr. PC read with Section 295A of the IPC are now well-established. Reading the book we are unable to share the view, that, though it contains harsh language against the Prophet, that there was deliberate and malicious intention of the author to outrage the religious feelings or beliefs of the Muslim citizens of India. To put it in another way - the author did not

> pen down the book which is written in the circumstances and the background of the country other origin -with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India and thus, the book cannot be brought under the ambit of Section 295A. Therefore, in the instant case Section 295A is wholly inapplicable.[50]

The prevailing standard seems to be to be read the 'offending material' as a whole. Much like the test followed in the Joseph Bain D' Souza case (the *Saamna* case)[51], the Patna High Court was asked to adjudicate on two works "*Madhyakalin Arab*" and "*Vishwa Itihas* (*Pratham Bhag*)" written by the same author where it reached differing conclusions about either book. "*Madhyakalin Arab*" in Hindi was declared forfeited by the Government on the ground that it contained 'derogatory references' about Prophet Muhammad which outraged the religious feelings of the Muslim community and was as such within the ambit of the offence described under Section 295A of the Penal Code The other book '*Vishwa Itihas* (*Pratham Bhag*)' was written by the same author as per the Syllabus of the State Board. Regarding *Vishwa Itihas* the Court opined that the author had relied on 'authoritative historical works' like the "*Outline of History*" by RG., Wells, the "*Muhamad at Madina*" by W.M.G. Watt and the "*Middle East*" by S.N. Fisher etc. The Court observed that,

> In discussing the Muhammadan religion he had used his dispassionate expertise as a teacher of history and in fact had praised Prophet Hazrat Mohammad when there was occasion to do so.[52]

The Court goes on to quote a passage where the author praises Muhammad effusively. There is stated to be a five-line paragraph which is critical of Muhammad but is not reproduced in the judgment. What is mentioned in the judgment however is that,

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50 Sujato Bhadra v. State of West Bengal (2005)3 CALLT 436 (HC), para 102

51 *Supra*.

52 Nand Kishore Singh And Etc. vs State Of Bihar AIR 1986 Pat 98, para 2

> it seems to follow inexorably that the solitary five line paragraph in "Vishwa Itihas" in its true context cannot possibly be said to contain matter which would be punishable under the stringent requirements of Section 295-A of the Penal Code.[53]

As such the test seems to be that of a solitary paragraph against the thrust of the whole work.

Regarding the second book, the claimed offensive passages rested on the offensive paragraphs in pages 55 to 57 of the book '*Madhyakalin Arab*'. So, in terms of volume of offensive material, where there was a paragraph of 'offensive material' in 'Vishwa Itihaas', there seems to be a couple of pages of it in this book. The High Court observes,

> A plain reading thereof can leave no manner of doubt that these are offensive in the extreme and particularly so in the context of being made with regard to the founder and head of one of the greatest religions of the world. Though marginally some shelter is sought to be taken under the opinions of foreign historians, the author herein in his own personal assessment has categorically projected the personal and private life of the Prophet in terms patently derogatory and denigratory. Apart from direct allegations, the passages equally contain innuendoes which leave little doubt about the author's intent to put it in a lurid light.[54]

This case provides an intriguing insight into the application of the law. Should the fact that the author has been found to be a fair historian not have weighed with the Court? Is hate speech quantifiable in terms of pages and passages – five line paragraph against two pages in Vishwa Itihaas? To put it more simply, where the questionable material was less in terms of pages covered, it was held to be not hate speech. Where it was more, it was held to be hate speech and thus liable for proscription. This

53 Ibid., para 21
54 Ibid., para 22

judgment is indicative of the problems faced by a legal system, based on rigid rules of evidence and proof, when it is faced with such illusory concepts like outrage. How do we measure outrage? The answer is that we cannot, except by giving in to the heckler's veto. Outrage is related to performance of outrage. Absence of protest is, then, by implication, acquiescence or complicity, even if what is being dished out is vile hate speech (as is frequently the case with speeches made by politicians). There cannot but be a bargaining process which every Court has to indulge in to figure out whether outrage was intended and indeed whether it was caused. If the legal system's claim is an objective decision, this area of law makes the treatment of the law compulsorily subjective.

This is further illustrated by a case where the editor was let off a charge although the reporter was forced to endure prosecution. In *Kamla Kant Singh v. Chairman/Managing Director, Bennett Coleman and Co. Limited and Ors.*[55], the petitioner asked for the newspaper to be prosecuted for carrying a story that criminal activities were being carried out in an Ashram. This article also alleged that a girl had been molested there. Refusing to interfere, the Allahabad High Court held that to attract Section 295A and 298, there must be a deliberate intention to outrage religious feelings, whether of the class or of a person. The term outrage, it was held, is wider than hurt, and not restricted under Article 19(2). However, while letting the newspaper editor go scot-free, the High Court made no interference in the prosecution against the reporter, which had not been challenged before the Court. The reporter who carried a story against an Ashram regarding some criminal activities there was

[55] 1987 AllLJ 1508

left to face trial under Section 295A.[56] Although the freedom of speech of the editor was prioritised, the reporter by reason of the technicality of not having challenged his order, lost out!

2.1.3 Other laws

A recent development that may yet have a very clear effect on the laws regulating speech in India has been the recent judgment of the Supreme Court in Abhiram Singh vs C.D. Commachen (Dead) By Lrs.& Ors on 2 January, 2017. Here, the Supreme Court has held that an appeal to any person's religion would count as a corrupt practice under the Representation of the People Act, 1951. Sections 123 (3A) and Section 125 of the Representation of People Act, 1951 prohibit promotion of enmity on grounds of religion, race, caste, community or language in connection with election as a corrupt electoral practice. According to earlier Supreme Court decisions, the bar was only regarding the candidate's own religion. For instance, if a Muslim candidate asked people to vote for him because he's a Muslim, that was held to be a corrupt practice but appealing to the religion of his voters was not considered a corrupt practice. The recent Supreme Court judgment changes that and even prohibits seeking votes in the name of language and caste. If implemented properly, it could result in elections being free of any reference to religion, caste and language. One of the effects of such a judgment is also clearly that it militates against identity politics which is why three judges out of seven disagreed with it. The case law under Act is very weak, with broad inconsistencies going beyond the hurt-harm conflation that

[56] In this case allegations were that one Mahru Verrna was killed at the instance of some criminals who used to take shelter in that Ashram, and also regarding the molestation of a minor daughter of one Shankar Mahto.

characterises the case law under Section 295A and 153A. Ranajoy Sen (2010) in his book 'Articles of Faith' has dealt with the inconsistencies in detail in the third chapter titled 'In the Name of God'. Pratap Bhanu Mehta (2017) called it a dubious law. In any case, the scope of the law is limited only to elections and candidates. It does not, therefore, form a major part of the concerns of this dissertation.

Other laws which prohibit hate speech include the Cinematograph Act, the Scheduled Caste (Prevention of Atrocities) Act and the Cable Networks Regulation Act. The Cinematograph Act relies on pre-censorship. However, the Cable Networks Act and the Prevention of Atrocities Act criminalise the act of insulting anybody based on caste and causing violence between communities. These provisions of law have been dealt with in a similar manner as the hate speech provisions under the Indian Penal Code and are used in conjunction with them. The tests to be applied and the procedures to be adopted are much the same.

One law which, however, did go further was the now-unconstitutional Section 66A of the Information Technology Act.[57] This was struck down by the Supreme Court in

[57] "66-A. Punishment for sending offensive messages through communication service, etc.-Any person who sends, by means of a computer resource or a communication device,-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.- For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system,

Shreya Singhal v. Union of India[58]. The Court held that the wide amplitude (content of menacing or offensive character) which had been criminalised was too wide and vague. It was held that it would lead to a "chilling effect" on free speech. Content, whether it is sent through e-mail or Whatsapp, is not exempt from the provisions of general law, that is, the Indian Penal Code. The effect of the Information Technology Act was to go beyond the definition of the hate speech offences under Indian law, that is, Sections 153A, 153B, 295A, 298 and 505 of the IPC, violating the principle of medium neutrality which will be discussed in the next chapter. It's fairly important to note that prosecutions under Sections 153A, 153B, 295A and 505 cannot be initiated without the previous sanction of the government. One cannot simply go into a police station and expect prosecution to start. The police can investigate these offences but before taking them to Court, the police needs prior sanction from the government to do so.[59] However, with 66A, there was no such need!

Hate speech is only one part of the problem in a country where regular killings occur on the basis of the victim's identity. In fact, when actual violence occurs, the maker of the provocative speech and the writer of the provocative words may even be tried as an abettor or conspirator of the violence. Until actual violence is penalised, mere speech that has a tendency to incite violence will continue to be tolerated socially and legally. Hate speech laws have grown in number but have not been used in many deserving cases. The legal tests remain the same as they had been under the colonial rule. The material has to be read as a whole. The true intention of the author has to be

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computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."

58 AIR 2015 SC 1523.

59 Section 196 of the Code of Criminal Procedure, 1973.

culled out. However, more often than not the application of the law seems to be in sync with the prevailing politics of the times[60]. This is not to say that persons like Ashok Singhal have not been prosecuted under Section 153A but the trend of the law keeping up with politics is hard to ignore. In an interesting case from the Bombay High Court, this reasoning is gladly admitted to by the Court. In a case relating to hate speech between Sunnis and Dawoodi Bohras, perhaps the Court did not feel the need to be so coy about its processes.[61] The trouble started when a Shia cleric allegedly made some remarks suggesting a sense of extreme displeasure known as "*Laanat*" on the Caliphas of Sunni Muslims namely Hazarat Abu Baker Siddiqui, Hazarat Umar and Hazarat Usman Ghani and also on Hazarat Aiyasha. Not only that, he directed his followers who had assembled there to repeat and utter the said 'Laanat' three times which the followers did and this was also broadcast on the loud speakers on high volume. This again agitated the Sunnis who had gathered in their respective mosques in that locality who took serious objection. This led to violence and even murder.

The High Court, in its wisdom, did not allow the prosecution to continue, noting,

> The apprehension of the State Government that continuation of prosecution would re-open the bitter feelings and would lead to another round of riots cannot be discarded as imaginary. Indeed, it is desirable that the wound suffered by the members of community due to utterances of the cleric should be set at rest and should not lead to another inning of violence. The State Government is acting pro-bono-publico and it is not the contention of Shri Bhat that the State Government is motivated to seek quashing of prosecution for any other oblique reason.[62]

60 Bal Thackeray is let off when he is in the ascendant and the Communist Manifesto was banned by the British.

61 State Of Maharashtra v. Mohammed Yusuf Noormohammed (1990) 92 BOMLR 196

62 Ibid., para 11

This observation goes to the heart of the issues related to hate speech. If Bal Thackeray cannot be prosecuted, neither can a Muslim Imam. The prevalent test for hate speech laws in India is clearly the test of expediency. There is no legal standard for acceptable speech, just a deep anxiety about consequences of the application of the law.

3

Evolution of the Medium[63]

As discussed in the Introduction, for speech protected by law, the mere choice of medium cannot be a basis for imposing additional curbs. This principle, called 'medium neutrality' will be elaborated below, in order to clarify the basic principles of Internet governance, before we move on to address the 'lawmaker's anxiety' about the 'changed nature of the Internet.' Even as the principle of medium neutrality is highlighted, any meaningful engagement with the nature of the Internet and the specific problems that it poses must move beyond two dismissive, dogmatic, binary approaches. The first approach is an essentially liberal approach that insists that nothing has changed with the advent of the Internet, since every phenomenon – pornography, gambling, stalking, etc. - has had analogies in the pre-Internet era. The Internet may have made it easier to do these things at a magnified scale and instantaneous speed, but the Internet hasn't really invented a new crime. This approach corresponds to what is known as “tool-neutrality” - a refusal to accept that there are qualitative changes brought about by technology (perhaps driven by the anxiety that such an acknowledgement could pave the way for greater regulation of the medium, and, thus, greater censorship. The second approach is what Ben Wagner (2013, p. 390) calls a “techno-deterministic” approach that holds technology responsible “for negatively affecting social norms and public morality”. This approach, corresponding to what is known as technological determinism, can also swing the other way to insist that the Internet (or, technology, in general) is a leveller

63 Unless otherwise specified, the term 'medium' or 'media' is used to mean modern media of communication.

and it has a logic of its own and that it drives social change rather than follow custom. The first approach tends to insist that old laws are enough to govern the Internet (since nothing has fundamentally changed), while the second approach insists that old laws cannot govern the Internet at all.

None of these two approaches is entirely productive, because both of these tend to gloss over the nuances. The truth lies somewhere in between. As with any other sociological phenomenon, there are breaks and continuities, and the challenge at hand is to highlight what has changed and what builds upon existing structures. This chapter will attempt to map the changes that are represented by the Internet, discuss how these are (or, are not) qualitatively different from the changes that (say) film – as a medium – represented, and will also look at some future trends. The point of such an analysis is to derive insights that could inform policymaking in 21st century India – policy that is neither oblivious of the changes that mark the 'Internet era', nor is overly anxious about its (often overstated) subversive potential. It is also hoped that such an analysis will further our understanding of the Internet and, possibly, throw up ways of combating hate speech other than pure legal regulation. It was pointed out in the Introduction how the Internet has led to an increased visibility of speech, an increased consciousness of hate speech, as well as a heightened awareness of the right to free speech. The challenge for policymaking today is to leverage this increased consciousness to develop a more nuanced approach to speech-related issues online and offline.

The printing press, the moving image, radio, the telephone, fax, the television, paging services and the Internet – all of these have stirred up their share of controversy by disrupting either the speed, the scale or the form of communication. All of these have been subjected to country-specific, medium-specific regulations, operator fees, geographical barriers, and so on. (Wagner, 2013; Wu, 2010) The Internet, it may be safely said, has been the freest of them all, so far (if not absolutely free). It has rendered frontiers and distances irrelevant, made communication instant and sharing of knowledge possible, and, above all, given millions of users worldwide, for the first time, the chance to express themselves, through blogs and forums, and many other forms of creative expression. However, none of this is incidental. The inventor of the World Wide Web, Tim Berners Lee, has been a vocal advocate of keeping the Internet free and open for all users[64]. Free and unrestricted access has been one of the foundational philosophies of the Internet, guiding the architecture, protocols and evolution of the medium. This has led to people having a sense of ownership about the Internet, a sentiment that is unprecedented, a zeal that could not have been mobilised by the fax machine and is matched in history only by the sentiment of writers, readers and publishers toward the printing press. Hence, the continued use of the term 'free press' and the sentiment that it evokes. This view is backed by Douglas S. Robertson who places the development of the Internet at par only with three other developments in human history – the development of language, the invention of writing, and the invention of the printing press. (Robertson, 1998) Viewed in succession – the development of language, the invention of writing, the invention of the printing press, and now the Internet seem to have unlocked a "degree of freedom" - to borrow a phrase from Bishakha Datta (2010) – each.

64 Recognise the Internet as a human right, says Sir Tim Berners-Lee as he launches annual Web Index. *World Wide Web Foundation*. Retrieved from http://webfoundation.org/2014/12/recognise-the-internet-as-a-human-right-says-sir-tim-berners-lee-as-he-launches-annual-web-index/ on 19 July, 2017

Even today, when a printing press is raided, a book pulped or copies of a newspaper seized, the loss of freedom is personally felt by a lot of people, each reader being a stakeholder in their own right. The offence taken is much more personal, and is remembered for a very long time to come. Crackdown by a despotic government on the press is recalled for decades, even centuries. Next to genocide, violent action on protesters, and economic depression, if anything is remembered for a long time, recounted in movies and popular culture, passed on as memory to future generations, it is the crushing of the Press. The only other medium which summons such sentiment to life and commands such sense of ownership, and does so to a much greater degree, is the Internet, because of the manifold increase in the number of stakeholders. In 2009, Peter Sunde and three other founders of the popular file-sharing site, The Pirate Bay, were convicted by a Swedish court for copyright violations, sentenced to one year each in prison and were ordered to pay 30 million Swedish kronor to various foreign entertainment giants such as Warner Bros., Sony Music Entertainment, EMI and Columbia Pictures. Their trial and conviction were marked by protests outside the court by supporters and users of TPB – popular acronym for The Pirate Bay – who called the verdict a "judicial murder"[65]. The Pirate Party of Sweden which had organised the protests reported a 20 per cent rise in membership[66]. In jail, Peter Sunde received letters of support from "all over the world", including from a supporter who thanked him for "all the porn he had downloaded"[67] using TPB. It is this sentiment around the Internet that makes medium neutrality a contentious issue. At the court, the defendants in The Pirate Bay trial argued that, holding the creators of a file sharing

65 The Associated Press. (2009, April 18). Swedes protest convictions of 'Pirate Bay' organizers. *CTV News*. Retrieved from http://www.ctvnews.ca/swedes-protest-convictions-of-pirate-bay-organizers-1.390495 on 20 July, 2017

66 Supra

67 Goldberg, D., & Larsson, L. (2014). Pirate Bay co-founder Peter Sunde: 'In prison, you become brain-dead'. *The Guardian*. Retrieved from https://www.theguardian.com/technology/2014/nov/05/sp-pirate-bay-cofounder-peter-sunde-in-prison on 20th July, 2017.

website guilty for copyrighted content shared by users is akin to holding car manufacturers guilty for overspeeding by drivers[68].

Terms like 'Netizen' and 'Internetional' signal something of an unprecedented global solidarity around the Internet marked by a shared ethic of freedom and autonomy. These 'netizens' are fighting hard to save the Internet from being restricted simply on account of being 'different' or new. In India, in 2012, as part of the 'Save Your Voice' campaign, in a strange mix of clicktivism[69] and traditional forms of activism, there were protests on ground against Internet censorship, with protesters wearing Guy Fawkes masks, while the hacker group 'Anonymous' – also identified by the Guy Fawkes mask as an assertion of the right to privacy – attacked government of India websites to make a point against censorship of online content[70]! Even stranger was the launch of a hunger strike by social activists against the government notified rules for Section 79 of the Information Technology Act – better known as the 'IT Rules' – a set of intermediary liability guidelines that require internet intermediaries – those companies that do not produce content, but merely host it, such as Facebook, Twitter, YouTube (Google), etc. - to remove user-generated objectionable content that is brought to their notice within thirty six hours of receiving a complaint from an affected party. If they fail to remove the content, the intermediaries can face

68 Schofield, J. (2009). Pirate Bay Day 11: trial ends, verdict awaited. *The Guardian*. Retrieved from https://www.theguardian.com/technology/blog/2009/mar/03/pirate-bay-last-day on 20 July, 2017

69 Shorthand for armchair activism using the Internet, such as signing petitions, running online campaign pages, etc. Can be used as a derogatory term too. 'Slacktivism' was a clearly derogatory term for the same thing. Clicktivism is redeemable, as campaigns move online in a major way, and authorities respond to online campaigns.

70 -, (2012, June 9). Anonymous' protests in Delhi against Internet censorship. *NDTV*. Retrieved from http://www.ndtv.com/india-news/anonymous-protests-in-delhi-against-internet-censorship-487538 on 19 July, 2017

prosecution in a court of law. The range of content that is deemed objectionable under the IT Rules includes

> "information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling"

and so on. This must have been the very first time that an Indian legal provision explicitly used the term "blasphemy"! There are no safeguards to ensure that content protected under Article 19(1)(a) of the Indian Constitution would not be removed under the IT Rules, and it has been argued that intermediaries are likely to err on the side of caution, and remove even protected speech, in order to avoid prosecution. In fact, a 'policy sting' conducted by the Bangalore-based Centre for Internet and Society showed that the intermediaries did, in fact, comply with frivolous complaints and tended to remove content that is perfectly legal. (Dara, 2011) Also, the IT Rules put intermediaries in the position of an arbiter to decide the legality of content – function entirely in the domain of judiciary. The activists who went on hunger strike against these intermediary liability guidelines argued that the IT Rules, among other things, violated the Constitutional guarantees of freedom of speech and expression by allowing for private censorship and by infringing upon the privacy of users[71]. The lead campaigner, Aseem Trivedi, had been earlier charged with 'sedition' for drawing cartoons depicting the government's corruption and his website taken down owing to the irrational Intermediary Liability rules that allowed the user no right to appeal, or say in the takedown.

71 Gupta, M. (2012, May 20). Hunger strike of Aseem Trivedi and Alok Dixit from Save Your Voice. *Youth Ki Awaaz*. Retrieved from https://www.youthkiawaaz.com/2012/05/hunger-strike-of-aseem-trivedi-and-alok-dixit-from-save-your-voice/ on 19 July, 2017

Even though the existing provisions on the books (such as sedition itself) were already draconian enough, there was a clearly visible zeal to protect the Internet from laws that create a chilling effect on the right to freedom of expression. One could expand the phrase 'Save Your Voice' to read 'Save your voice, at the very least, on the Internet'! There was a newfound 'voice' online that needed guarding against bad laws and censors. Even as the lawmakers continued to insist on the dangers of the Internet[72], assertive Internet users started to organise to save the freedoms afforded by the Internet. Many of these 'freedoms' were afforded, not by lenient Internet regulation, but by greater access, increased proliferation of self-publishing, cohesion among interest groups committed to saving their spaces and the geeky ethic of open access that informs the perspectives of the founding fathers of the Internet, like Vint Cerf and Tim Berners Lee, to this day. The increased stakes of people in the Internet and the controversial nature of the Internet itself – both have made the argument for medium neutrality an important one in present day governance discourse.

3.1 Medium neutrality

Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of expression as a right that includes the right "to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers." (emphasis added) The principle of medium neutrality, most broadly, means that the medium through which a person chooses to express themselves cannot be a basis for putting additional curbs on their right to

72 -, (2012, Sep 11). Kids mostly watch porn on internet, says Sibal. *Times of India*. Retrieved from http://timesofindia.indiatimes.com/india/Kids-mostly-watch-porn-on-internet-says-Sibal/articleshow/16344454.cms on 19 July, 2017

speech and expression. This principle assumes importance whenever, in society, new media evolve.

Debates about medium neutrality are a recurring urban phenomenon. As pointed out in the discussion above, each new technological disruption rakes up a debate on the novelty and peculiarities of the medium. Writing in the 1960's, Marshall McLuhan, in his seminal essay, 'Medium is the Message', most eloquently pointed out,

> The effects of technology do not occur at the level of opinions or concepts, but alter sense ratios or patterns of perception steadily and without resistance. The serious artist is the only person able to counter technology with impunity, just because he is an expert aware of the changes in sense perception. (McLuhan, [1962] 1994, p. 18)

Who can deny, for example, the alteration of attention spans, the upheaval in privacy norms and the tendency to think in 140 characters that has been brought about by social media such as Facebook and Twitter respectively? There is no denying the fact that the Internet has brought in various qualitative changes, and, therefore, a discussion on medium neutrality is complete only with a discussion of the specificities of this medium.

India is a signatory to the ICCPR (International Covenant on Civil and Political Rights) whose Article 19 states that:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, **regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice**.

(emphasis added)

In September 2011, the UN Human Rights Committee (UNHRC), a treaty monitoring body for the ICCPR, issued General Comment No 34[73] which states that:

1. Article 19 of ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and internet-based modes of expression.[74]
2. States parties to the ICCPR must consider the extent to which developments in information technology, such as internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.[75] In particular, the legal framework regulating the mass media should **take into account the differences between the print and broadcast media and the internet, while also noting the ways in which media converge**.[76]

   (emphasis added)

The last part of the General Comment no. 34 (para 39) clearly mentions that the signatory states should take into account the differences between various media, while looking for convergences. So, clearly, medium-neutrality is not a rigid blanket principle that curbs the states' ability to regulate content.

In 2011, the UN Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Dunja Mijatović, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, Catalina Botero Marino, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information,

73 General Comment No. 34, CCPR/C/GC/34, adopted on 12 Sep 2011
74 General Comment No. 34, para 12
75 General Comment No. 34, para 15
76 General Comment No. 34, para 39

Faith Pansy Tlakula, in their Joint Declaration[77] on Freedom of Expression and the Internet declared that regulatory approaches in the telecommunications and broadcasting sectors cannot simply be transferred to the Internet[78]. In particular, they recommend that tailored approaches for responding to illegal online content should be developed, while pointing out that specific restrictions for material disseminated over the internet are unnecessary[79]. They also promote the use of self-regulation as an effective tool in redressing harmful speech[80].

While recognising the need for tailored approaches, the four special mandates on freedom of expression clearly differentiate between illegal content and legal content. This is the basis of the principle of medium neutrality – while the principle of neutrality doesn't have to apply in case of speech that is not protected under Constitutional guarantees of freedom of expression or domestic law, the sheer choice of medium cannot be made a basis for putting additional curbs on freedom of expression. It may not be immediately clear why this principle needs emphasising. On the face of it, it seems only obvious that laws dealing with the Internet should not "invent" new crimes. However, this point has implications for at least three concern areas of Internet governance: censorship, anonymity, and intermediary liability.

77 La Rue, F., Mijatović, D., Marino, C. B., & Tlakula, F. P.. (2011, June 1) 'International mechanisms for promoting freedom of expression: Joint Declaration On Freedom Of Expression And The Internet'. Retrieved from http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf on 17 July, 2017

78 General Principle 1. c.

79 General Principle 1. d.

80 General Principle 1. e.

3.1.1 Censorship and medium neutrality

Content on the Internet has often elicited knee-jerk responses from law enforcement and legislators alike. This is best exemplified by the debate around Section 66A of the IT Act which was enacted in the year 2008 and struck down by the Supreme Court in 2015 on grounds of being unconstitutional.[81] Section 66A of the IT Act was an overbroad provision that allowed the law enforcement agencies to arrest, without warrant, anyone who sent, through electronic means, any information that "is grossly offensive or has menacing character". It also sought to penalise the spread of false information with the "purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device" and "any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages" (emphasis added). The provision was very vaguely worded and its misuse very widely reported[82]. It is clear from the wording above that acts which would not ordinarily constitute offences were deemed illegal in relation to the Internet. Section 66A invented new crimes and, not surprisingly, had an abysmal conviction rate for as long as it lasted[83]. Even as it seems that one of the purposes of the law might have been to curb spam, this is not stated clearly and, hence, the provision ended up being a one-stop solution for reporting anything even mildly

81 Shreya Singhal v. Union of India, (2015) 5 SCC 1.

82 -, (2015, March 24). Flashback: List of cases where Section 66A of IT Act was misused. *News18*. Retrieved from http://www.news18.com/news/india/flashback-list-of-cases-where-section-66a-of-it-act-was-misused-977016.html on 17 July, 2017

83 Shora, S. (2012, December 20). Post-Guidelines India: 8 reasons why the new Section 66A guidelines are not enough. *Internet Democracy Project*.

outrageous on the Internet and a ready tool to seek political vendetta, especially against artists.

3.1.2 Intermediary liability and medium neutrality

While the ICCPR, UDHR and the UNHRC are united on insisting that regulations on speech must be medium neutral, there, once again, seems to be a conflation about the underlying principle in Indian jurisprudence. While the Supreme Court struck down Section 66A of the IT Act for being ultra vires of the Constitution, it didn't strike down Section 79 of the IT Act – which deals with intermediary liability – and which was also simultaneously being challenged and which has been argued to violate this principle of medium neutrality, among other desirable free speech standards. (Shora, 2013)

3.1.3 Privacy and medium neutrality

The above discussion shows that medium-neutrality as a principle has not been consistently upheld in Indian jurisprudence. In case of surveillance and privacy, this is so much more the case. The relative anonymity afforded by the Internet to the ordinary user has been at the heart of anxieties around Internet freedom, and it is an argument often used by governments to seek extra powers of surveillance. The NSA (United States National Security Agency) leaks provided a sneakpeek into the pervasive surveillance activities of the US government[84], codenamed the 'PRISM'

84 Global Surveillance Disclosures https://www.theguardian.com/us-news/the-nsa-files

program. Inspired, perhaps, by the PRISM program, the Indian government has been building its own mechanism of surveillance known as the 'Central Monitoring System' (CMS) with unspecified powers to collect information for unspecified purposes (Litton, 2015). In the absence of specific legislation to deal with privacy concerns, the tests of necessity, proportionality and legality that are required, as per global free speech standards, before citizens could consent to such pervasive surveillance mechanisms, are hard to apply or uphold in a court of law. At the time of writing, a nine-judge Constitution bench of the Supreme Court is hearing various petitions to decide, for the third time in Indian jurisprudential history, whether the right to privacy is a fundamental right or not. The re-opening of the question for consideration by a Constitution bench, once again, signals the heightened awareness of free speech rights due to the arrival of the Internet.

Privacy concerns are often brushed aside with the commonsensical retort, "If you have nothing to hide, why are you worried about privacy?"[85] Of the many possible answers to the argument, one that is rarely offered as a response is the principle of medium neutrality. Over the years, Facebook's real-name policy has evolved tremendously to discourage people using fake identities online[86]. Offline, while walking on the street, or while travelling on a train, we are not expected to wear placards with our name, email and social media passwords written on it. It is only when the ticket collector asks for an ID that we are expected to part, momentarily, with our privacy. However, this exchange has rules. The declaration of identity by a

85 Abdo, A. (2013). You May Have 'Nothing to Hide' But You Still Have Something to Fear. ACLU. Retrieved from https://www.aclu.org/blog/you-may-have-nothing-hide-you-still-have-something-fear on 17 July, 2017

86 What names are allowed on Facebook? https://www.facebook.com/help/112146705538576

passenger serves, in that context, a specific purpose. The production of an ID proof is necessary for the stated purpose (proving one's identity). The amount of personal detail sought is proportionate to the stated aim. So, if we are not expected to trade with our privacy offline, why should we be expected to do the same while we are online? Why is a lowered standard of privacy taken as a given on the Internet, more particularly, social media?

3.2 Film and the Internet – what does 'new media' mean today?

Film censorship in India has been the norm rather than the exception. Higher scrutiny, including prior restraint, for the medium of film, compared to, say, print, has always been justified, be it in terms of protection of public morality, impressionability of the masses, the heightened influence of the moving image or the sheer maintenance of 'standards', etc. and such censorship has not been justified either in terms of harm to others or even offence to others, but on the basis of sheer paternalism and moralism carried over from the colonial state into the present. (Ganti, 2009, p. 96 – 112; Bhatia, 2016, p. 179 – 185; Chowdhry, 2000, p. 17 – 27)

Because of the arrival of the Internet, the old 'new media' (such as film) are no longer being thought of as 'new'. Filmmaker Pankaj Butalia is seeking exemption for the 'documentary' form on grounds that the 'awe' attributed to the moving image in its early days is no longer applicable or relevant[87]. This is because the medium has

87 Pankaj Butalia v CBFC & Ors., WP (Civil) No. 675 of 2015 (hereafter *Pankaj Butalia v CBFC*)

evolved so much beyond the 'moving image', that 'video' as a form is more ubiquitous, commonplace and mundane than unique. Further, self-publishing on the Internet itself has rendered the censors irrelevant. More than once, films that were denied certification by the CBFC (Central Board of Film Certification) – better and rather tellingly known as the Censor Board – have been uploaded to YouTube and Vimeo by filmmakers. In any case, the circulation of videos over Whatsapp and other mobile apps is practically free from any scrunity, while serious noncommercial documentary filmmaking continues to go through the painful process of film certification. It is interesting that, despite the heavy prior regulation that films go through, Pankaj Butalia insists upon a certain kind of medium neutrality for film. He writes,

> The Cinematographic Act governs the certification and circulation of films. It states categorically that no restriction can be imposed on cinema that is beyond the 'Reasonable Restrictions' imposed on free speech as specified in Article 19(2) of the Indian Constitution. Yet, no member of the CBFC is aware of or is informed about this over-arching restriction. The Supreme Court as well as various High Courts have repeatedly intervened and asked the CBFC and other censoring authorities to restrict free speech as little as possible but this is regularly ignored both in letter and spirit by members of the CBFC who feel they are above reproach and judicial scrutiny.
>
> ... ...
>
> The current chief of the CBFC realizes that it is unfair to only control film while leaving television or the Net out of the ambit. Yet his solution is not to lessen control on film but to extend it to all electronic media. (Butalia, 2015)

It is clear from the argument being made by Butalia that, in view of the new developments, particularly the explosion of all forms of speech on the Internet, that norms of censorship which have been acceptable for decades are also now being challenged – another proof of how the Internet and its new standards of openness have made us conscious yet again of our right to free speech. More importantly, the change is reflected not only amongst the filmmaker community, but is being echoed by the judiciary. In Pankaj Butalia v CBFC, Justice Rajiv Shakdher granted a 'Universal'

certificate to Butalia's documentary film on Kashmir, and also cited, among various other verdicts, the Supreme Court's verdict in Shreya Singhal v Union of India that struck down Section 66A of the IT Act, in the concluding paragraphs, signalling, once again, a case of Internet freedom having a precedential impact on jurisprudence related to free speech and new media.

The petitioner, Pankaj Butalia (ibid.) has also highlighted the discriminatory treatment meted out to documentary filmmakers, even as they do not enjoy the perks of commercial cinema. If at all the peculiarities of the medium are to be taken into consideration, then the regulation for documentary should, in fact, be more relaxed, considering its limited viewership. In fact, for a very long time in the US, commercial speech did not enjoy protection under the First Amendment. (Franks, 1977) However, the possible pitfalls of such an approach include the unsustainability of the distinction among documentary, commercial and art film, especially in the age of YouTube where it is possible to monetise video content. On the whole, this framework for film regulation does not seem completely implausible, even as it may be ridden with difficulties, most importantly viewpoint discrimination.

It is interesting how the Internet tends to render the distinction among various media irrelevant, thereby pushing the debate on medium neutrality further. Butalia writes,

> Ironically the desire to stop the viewing of the two ‘cuts’ turned out to be completely counter-productive when an online portal decided to post the ‘censored’ clips of my documentary alongside an interview with me. Last time I checked, the clips had over 58,000 hits. This means 58,000 people had seen the banned clips of my film online – without the so-called ‘redeeming’ structure of the rest of the film whereas I would have considered myself lucky if over the next ten years, the total viewership for the completed film reached 10,000. (ibid.)

Examples related to censorship (film and Internet), intermediary liability and privacy underscore the need to highlight medium neutrality as a desirable principle, not just for the Internet but also for film and other media. More than our country's commitment to international covenants, the single most important reason why medium neutrality should be stressed upon is the sheer level of stake that formerly dispossessed groups have in keeping the Internet free and open, in preserving it as a space where publishing and being read is a possibility for everyone, where a liberal exchange of views can take place[88]. Medium neutrality is being stressed, of course, for content/behaviour that does not otherwise constitute a crime. However, this also raises a further question. Should hate crimes or hate speech be downplayed when they occur on the Internet? This question will be discussed in the concluding chapter.

88 A counter to this view is offered by Jurgen Gerhards and Mike S. Schafer who argue that public discourse on the Internet does not differ significantly from offline debate in the print media. See. Gerhards, J. & Schafer, M. S. (2009). Is the Internet a better public sphere? Comparing old and new media in the US and Germany. *New Media and Society*. XX(X), pp. 1 -18.

4

Nature of the Internet

4.1 Is the Internet a neutral technology?

The underlying argument in advocating medium neutrality is that the medium does not modify the message; it is the policy equivalent of '(don't) shoot the messenger.' However, this position needs to be nuanced, as it is an ahistorical position that suggests that the Internet is neutral. One still needs to know where the nerve centres of the Internet lie, how policy shapes its use, and how politics has and can affect it in the future. At the beginning of this chapter were pointed out two dogmatic approaches that tend to cloud our understanding of Internet – one that insists that nothing has changed; and, the other one that attributes a world revolution to the development of the Internet. An objective look at the history and the nature of the medium is important to understand the possibilities and limitations of the Internet. In one sense, the possibility itself is the limitation. For the precise reason that the Internet has revolutionised communications, businesses and even private lives, those who have been left out of its reach or its full potential are doubly disadvantaged compared to their peers who are part of the 'digital revolution', so to speak. The digital divide in India has not been bridged even decades after the arrival of the Internet at the scene[89].

89 Krishnan, A. (2017, March 26). How many Indians have Internet? *The Hindu*. Retrieved from http://www.thehindu.com/business/how-many-indians-have-internet/article17668272.ece on 17 July, 2017

The effects of technology are clearly mediated by existing social relations, even as it drives change. Even pure sciences have been shown, especially by critical and feminist standpoint theorists, to be determined by global power equations or dominant social relations (Rose, 1994). What becomes of a certain technology, whether it realises its democratising potential, whose interest it serves – all this depends on the policy framework that governs its use, the social relations upon which it is built, the underlying values and socio-economic, geographical and political divides. Technology, in itself, does not liberate people. However, it can create spaces for subversion.

Women in various Indian villages are not allowed by the traditional village councils to use mobile phones. However, this also points to the fact that women in these areas are using the handheld device to subvert and assert their independence (precisely why the phone is perceived as a threat by patriarchs). People who participate in vigilante action use smartphones to film the victims of the lynching. But this has also meant that these actions come to light and shock people into resisting and organising against vigilante violence. The same mechanisms that make irrigation possible also make possible the invention of water cannons to be used against protesting citizens. While pepper spray is portrayed in the mainstream media as the harbinger of the next sexual revolution, the same is used on protesting citizens, be it against the anti-WTO demonstrations in Seattle in 1999 or the anti-government protests in Kashmir or Syria. It is impossible to attribute value-neutrality to the scientists in Nazi Germany who built the gas chambers, or to the scientists on the Manhattan Project who built the nuclear bomb.

Timothy Garton Ash (2016, p. 21) and Evgeny Morozov (2011) acknowledge a deep imprint of Cold War politics in the very development of the Internet. In fact, Morozov (ibid., p. xii) terms the Internet as the West's answer to the Cold War (just as the nuclear bomb was thought to be). He further suggests that it might well be in the interest of the Internet giants to continue to play a false Cold War equivalence, in order to ensure a continuing favourable policy environment and publicity. (ibid., p. 305) Following Morozov (ibid., p. 314-318), Garton Ash (2016, p. 20) rejects both 'technological determinism' as well as its opposite tendency - 'tool-neutrality'. Both argue that, instead of being neutral or revolutionary, what technology really possesses are "affordances". However, while Morozov stresses the importance of the Internet in a strategic or imagined dispute marked by a Cold War hangover, Garton Ash stresses the particular imprint of American libertarian traditions on the Internet. As per Garton Ash, the most crucial affordance possessed by the Internet is that it has made it easier to make things public and difficult to keep things private. (Ibid., p. 20) Morozov quotes an important question posed by Eli Noam,

> "For all the rhetoric of an Internet 'free trade zone,' will the United States readily accept an Internet that includes Thai child pornography, Albanian tele-doctors, Cayman Island tax dodges, Monaco gambling, Nigerian blue sky stock schemes, Cuban mail-order catalogues?" asked Noam on the pages of the New York Times. The answer was no in 1997, and it's a much more resounding no today. (Morozov, 2011, p. 222-223)

Overall, the Morozov school of thought, if there were one, views the attitude of the US government toward the Internet as an extension of its foreign policy, marred by a global double standard about dictators and allies, an evangelistic zeal to liberate, contradictions between 'free trade' and copyright regimes, a Cold War hangover, and good old Orientalism. Unless one views the US as a neutral actor in world politics, it is impossible to view the Internet as a neutral technology. It may not be so much the

defense project that it started out as, but the imprint of that history on Internet policy is unmistakable. The US government's control of some of the key institutions that control the Internet, most notably the ICANN (Internet Corporation for Assigned Names and Numbers), that controls the system of assigning domain names (such as, .com, .org, .net, .in, .uk, .ca, etc.), has always meant a US monopoly over how the system works, even if justified in technocratic terms of efficiency and reliability. This is the cyber version of American exceptionalism. Timothy Garton Ash writes that the underlying ideology of the Internet has, to a vast extent, been shaped by the attitude of the engineers who first got together to design it as a defense project.

> These engineers did not just have tools, they had views – and generally their views had a strong libertarian strain. 'We reject kings, presidents, and voting', one of them famously observed. 'We believe in rough consensus and running code.' ... ... An informal organisation called the Internet Engineering Task Force has played an important role in shaping the internet ever since. (Garton Ash, 2016, p. 21)

An important question arises here: Could these Silicon Valley engineers have 'rejected' the US President? Given how crucial the ICANN's role in assigning domain names globally is, the US government's control of IANA (Internet Assigned Numbers Authority) – a subgroup of ICANN which functions as a 'nerve centre'[90] of the Internet – has been one of the most controversial issues in Internet governance[91]. In 2005, the Bush administration blocked the creation of the .xxx domain name, intended for use by pornographic websites, arguing that it would become a virtual 'red light

90 Duncan, G. (2014, March 19). Why is the U.S. surrendering control of the Internet? (And why should you care?). *Digital Trends*. Retrieved from https://www.digitaltrends.com/web/u-s-surrendering-control-internet/ on 18 July, 2017.

91 Before the expiry of Brack Obama's second Presidential term, the control of IANA was handed over from the US government's Department of Commerce to ICANN, symbolically ending the control of US government over the nerve centre of the Internet. See the announcement here: https://www.icann.org/news/announcement-2016-10-01-en

district' on the Internet[92]. The .xxx domain was finally created in 2011. This just goes on to show how a change of power in the US affects decisions about global Internet governance. The ICANN has survived controversies by claiming a certain superior rationality, a technocratic 'neutrality' and 'efficiency' – claims that aren't entirely unfounded. On the controversy over granting a country code Top Level Domain (ccTLD) name to Palestine, the ICANN has attempted to maintain a somewhat neutral stance[93]. This has not meant the absence of controversies though. In 2011, when the ICANN opened up for proposals to reserve generic top level domain names (gTLDs), it found itself drawn into a protracted controversy with France over the domain names, .wine and .vin. An American tech startup known as 'Donuts' submitted a proposal to reserve, among 300+ other gTLDs, the generic name .wine (read: dot wine). This was vehemently opposed by the French government, which insisted that, since 'wine' also happens to be a geographical indicator for the product 'wine', a foreign company could not hold the generic name dot wine[94]. This difference arose because of the difference in the European and American understanding of what constitutes intellectual property rights – region or process. Donuts finally won the auction and the American ethic prevailed! The controversy over the generic name dot indians (.indians) was arrested midway when Reliance Industries withdrew its ambitious bid for the .indians domain name[95]. However, had the row taken a different turn, the outcome would have signalled a different set of implications for gTLD

92 McCullagh, D. (2005, Aug 15). Bush administration objects to .xxx domains. *CNET*. Retrieved from https://www.cnet.com/news/bush-administration-objects-to-xxx-domains/ on 18 July, 2017.

93 -, (2000, March 22). IANA Report on Request for Delegation of the .ps Top-Level Domain. *IANA*. Retrived from http://www.iana.org/reports/2000/ps-report-22mar00.html on 18 July, 2017

94 Namazi, C. (2014, May 14). .WINE and .VIN: Where Does Stand? *ICANN*. Retrieved from https://www.icann.org/news/blog/wine-and-vin-where-does-icann-stand on 18 July, 2017

95 Murphy, K. (2014, August 27). GAC kills .indians and two more dot-brands die. *Domain Incite*. Retrieved from http://domainincite.com/17227-gac-kills-indians-and-two-more-dot-brands-die on 18 July, 2017

requests that infringe upon sovereignties. The .gov gTLD existed far before the auction for generic top level domain names was opened up, and it has been available only for US government websites, and this continues to be the case, even after the end of US government's formal role in the ICANN. Governments of all other countries have to suffix their country specific domain name (ccTLD) to their governmental websites (such as .nic.in for India, .gov.ps for Palestine, .go.jp for Japan, etc.). Moreover, the ICANN is still subject to US law, by virtue of being a Florida based company.

Further, social media and Internet giants (Facebook, Twitter, Wikipedia, Google, etc.) continue to be headquartered in the US. It also means that the Internet is almost completely monopolised by a few firms at best. (McChesney, 2013, p. 131) Since 27th June, 2017, Google holds the distinction (earlier held by Intel) for having been slapped with the largest ever fine of €2.42bn by the competition commission of the European Union for abusing its search engine monopoly to promote its own shopping service over others[96]!

The above discussion should make it abundantly clear that any discussion on the neutrality of the Internet is a non-starter. It is important to clarify these aspects of the Internet before a discussion on the peculiarities of the Internet is attempted, as it will be important in understanding how policies made in the US and technological innovations rolled out in that part of the world affect policy and society globally, and

96 -, (2017, June 27) Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service. *European Commission.* http://europa.eu/rapid/press-release_IP-17-1784_en.htm

how the medium, in future, might well be employed to modify the message. (Wagner, 2013; Wu, 2010)

4.2 What is new about 'new media'?

The Internet is different things to different people – to a *developer*, it is an endless canvas of design possibilities; to a *blogger*, it is an international literary festival where their work can be put up on display instantaneously and across regional boundaries; to the *campaigner*, it is the new 'grassroots', it is where people are, it is where people get influenced by campaign material, make up their minds, sign a petition, donate to a cause, vote in online polls, and so on; to a *music company*, it is a profitable trade route, albeit with pirates in high seas waiting to raid; to a *gaming enthusiast*, it is a paradise of endless gaming genres, a wonderland that has made gaming interactive and 'real'; to a *regulator*'s mind, a mass of unruly citizens in dire need of paternalistic control; to an *ordinary social media user (OSMU)*, a public place where they can freely associate with other citizens and groups of citizens, especially in India where the idea of a truly public social space is pathetically lacking, and is marred by hierarchies of caste, gender and class, wherever they exist. (Phadke, Khan & Ranade, 2011, p. 68) It is this perspective – of the ordinary social media user (OSMU) – that matters most, if we are to conceptualise the Internet as a social space where people can *simply be.* A bench in a public park, a public square, a public library, etc. – these are places where people can just be.

Michael Walzer, in a 1986 essay defined the public space as,

> Public space is space we share with strangers, people who aren't our relatives, friends, or work associates. It is space for politics, religion, commerce, sport; space for peaceful coexistence and impersonal encounter. Its character expresses and also conditions our public life, civic culture, everyday discourse. (Walzer, 1986, p. 470)

Differentiating between single-minded and open-minded public spaces, Walzer draws our attention to the commercialisation of public spaces. He writes,

> the fast-food restaurant is single-minded, the cafe or pub or cafeteria, where people are encouraged to linger, is open- minded; the motel or motor inn is single-minded, the urban hotel, with its public rooms, bars, restaurants, shops, and its ready access to the surrounding streets, is open-minded; the airplane is single-minded, the long-distance train or ship is open-minded: one can write a novel about what happens on trains and ships, but not about what happens on planes.
>
> ... ...
>
> The square or piazza is the epitome of open-mindedness. Here public space is surrounded by a mix of public and private buildings: government offices, museums, lecture and concert halls, churches, shops, cafes, residences. Some of these have single, some have multiple uses, but joined together they give to the space they enclose and create a vital and receptive quality. In the square itself, people meet, walk, talk, buy and sell, argue about politics, eat lunch, sit over coffee, wait for something to happen. (ibid., p. 471)

Although Walzer does not make a value judgment on single-minded or open-minded spaces, and insists that the distinction represents more a continuum than a break, there is a rough correspondence of single-minded spaces to commercial spaces, and of open-minded spaces to those that have a mix of commercial and noncommercial activity. The Internet can be thought of as the biggest International Public Square of our times. Whether the Internet will continue to be a public park or a shopping mall is a matter of policy choices. Professor Tim Wu (2010) and Lawrence Lessig (2000) warn that this is only a matter of time. The very architecture of the Internet that

renders it open and 'public' can also be coded to act differently. There is a very real possibility of the Internet metamorphosing into a space dominated by government control and corporate regulation. (R. MacKinnon, 2013)

The term 'new media' generally refers to interactive social media (as opposed to, say, those early static webpages of the Internet that only provided for one-way dissemination of information). 'New media' is also often called the “Web 2.0”. The World Wide Web started out as being a collection of webpages linked to one another through hyperlinks. These webpages were put on servers connected to the Internet, so that these could be accessed publicly, but not modified by viewers. This changed with Web 2.0 – the explosion of user-generated content on websites that did not primarily produce content themselves (such as MySpace, Orkut, Facebook, Twitter, YouTube, Instagram, Quora, etc.). The distinction tends to get blurred today, as more and more websites have integrated interactive sections, but generally, the term 'new media' refers to online social media where content is primarily produced by third-parties rather than by website developers themselves. Before discussing the various qualitative changes that mark the Internet enabled 'new media', it would be worthwhile to discuss the gendered nature of regulatory claims.

4.2.1 Women versus Freedom of Expression?

Regulation of the Internet, whether by corporate players or government agencies is a double-edged sword. If one were to think of the reasons why regulation is needed, the foremost thought that comes to mind is the protection of women from harm, such as

leaked photos, voyeurism and 'revenge porn', fake online profiles that solicit sex using a woman's identity thereby putting her in danger, making addresses and phone numbers public, etc. In fact, this is the reasoning offered by lawmakers when confronted on questions related to Internet censorship. (Padte, 2013) Feminist writers, however, have highlighted the importance of 'loitering' and just being about in the public spaces, even if it means encountering harm because it is a theoretical fallacy to assume that women are "safe" in the private sphere and exposed to harm in the public. (Vance, 1984; Phadke, 2010; N. Menon, 2012) Governments often seek increased regulatory powers in the name of protection of women and children. However, with governments themselves coming under attack for aiding and abetting online harassment, and politicians riding a wave of online harassment to power, it is hard to take these claims at face value. (Kovacs et. al., 2013; Chaturvedi, 2017; Karnad, 2017; Hess, 2017) The same individuals, groups and social forces that engage in online abuse against women also engage in abuse against ethnic and religious minorities, often at the behest of ruling parties[97]. This also complicates the government's claims of helplessness or non-involvement in online abuse by anonymous trolls. It will be discussed in Section 4.2.5 how anonymity is only a matter of degree nowadays, with Internet Service Providers and Social Media companies using various forms of authentication. Indian journalist Swati Chaturvedi in her recent book titled 'I am a Troll' recounts her experience after having filed a police complaint against organised, abuse by pro-government trolls on Twitter in 2015. She writes,

> My criminal complaint was the first of its kind filed by an Indian journalist under the sections of the Indian Penal Code that dealt with stalking, sexual harassment, transmitting obscene material over the Internet and outraging the modesty of a woman. Response was swift. Amid widespread media coverage,

97 See Kovacs et. al.; See also "Violence" Online In India: Cybercrimes Against Women & Minorities on Social Media, available at https://feminisminindia.com/wp-content/uploads/2016/05/FII_cyberbullying_report_website.pdf; See also *Supra* note 4;

> both national and international, Twitter suspended the handle for slander and harassment. It also gave the Delhi Police the IP address and email address of the *anonymous* slanderer. Unfortunately, there has been no arrest till date as the accused allegedly has powerful backers in the government. (Chaturvedi, 2017, p. 4) (emphasis added)

This shows that the '*anonymity*' does not arise because of the architecture of the Internet, or because of the 'ungovernable' nature of the Internet. Twitter, according to Chaturvedi, provided the IP address of the user to the police, but the police did not act. The problem here is not so much online anonymity, but **political impunity**. Such instances, in view of the discussion above, demonstrate that censorship in the name of women must be resisted. Women, on the Internet, are agents, they express political views, they criticise governments – they are not simply passive users waiting for the next round of online abuse. Women need freedom of expression and regulation just as much as other vulnerable groups on the Internet. The question of regulation needs to be posed as one of 'harm' and 'access' rather than of 'obscenity'. Shilpa Phadke (2010) argues that "the perception of danger is often sufficient to prevent women from accessing public space". Kovacs et. al. (2013) show that online abuse (and the absence of recourse) tends to drive women off the Internet or self-censor and avoid 'controversial' topics[98]. Hate speech against women and its regulation is not, therefore, a question of *censoring someone's freedom*, but of ensuring that *women can access theirs*. The best recipe for curbing hate speech against women is a combination of sheer defiance, support from fellow users, strict and ethical community guidelines on online platforms, a shared public ethic that denounces verbal abuse of women, and properly defined laws.

98 Also see Rinu Srinivasan's comment: "I'm not scared to express myself but I won't write anything about politicians," ... "I'll be like, 'I had a coffee today, I'm going to sleep, good morning, good afternoon'. That's all." in Vaidyanathan, R. (2012, November 26). India Facebook arrests: Shaheen and Renu speak out. *BBC*. Retrieved from http://www.bbc.com/news/world-asia-india-20490823 on 20 July, 2017

Section 4.2 highlighted the need of the right of an OSMU (ordinary social media user) to “simply be” on the Internet. This right must include the right to have political views and to express them. Women on the Internet are often abused, vilified and made targets of ugly hate campaigns for having a viewpoint – against patriarchy, against the status quo, against religious extremists, or against the government. (Kovacs et. al., 2013) Therefore, campaigns against online abuse must also defend the right of women to express their views, including 'controversial', 'political' views. Freedom must include the freedom to express unpopular opinions, organise and take political action.

4.2.2 Everyone is a potential broadcaster

The foremost change that has taken place with the advent of the Internet, especially with that of Web 2.0 – the new media – is that every person can potentially broadcast. In fact, the term 'podcast' self-consciously alludes to the fact that every individual is a broadcaster. Of course, the actual reach will depend on the number of subscribers (which, in turn, depends on the popularity of the user or the popularity of the content), hence the qualifier 'potential'. A podcast can be thought of as a private radio transmission service using which a podcaster can push audio files over the Internet which can be listened to by users, at their convenience, or subscribed to, so that the content is automatically downloaded to their device (iPod or computer or phone application) whenever it is connected to the Internet. The automatic download is also called 'Synchronisation' – sync, for short. Thus, if a podcaster has a thousand subscribers online, it means that the audio files that they put out are being pushed to

1,000 devices. This is also called 'audioblogging'. Podcasts can be news snippets, short definitions or explanations to popularly asked questions or full-length lectures.

Similarly, YouTube users can create 'Channels' which can be accessed at any point or subscribed to. This is called 'videoblogging'. As per YouTube statistics, there are over one billion users – representing one-third of the total number of Internet users and one-sixth of the total population of the world[99]. Videobloggers with diverse sets of expertise create video tutorials on Yoga, fitness and cooking, fashion and make-up, DIY (do it yourself) home decor and renovation, Philosophy, Mathematics, technological quick-fixes and troubleshooting, use of software and cross-platform compatibility, website design, typography, religion and spirituality, child care, maternal care, embroidery, and so on. Much of it is monetised through advertisements shown before or during the videos, but much of it is not monetised. The videobloggers may be either amateur or professional filmmakers. Marginalised groups use the platform to get the word out about their own narratives and stories about political action. (Jain, 2016)

Recently, YouTube and Facebook have introduced their 'Live' services – whereby any Facebook or Twitter user can record a video while it is transmitted to their followers in real time, that is, instantaneously. Airing live video is no longer the prerogative of TV channels alone. Any user with a smartphone, a robust data connection and a story to tell, can *go live* with a story – the tremendous subversive potential that this offers, as data services and speeds improve, is unmatched. Although this has not happened

99 Source: https://www.youtube.com/yt/about/press/

yet, marginalised groups such as Dalits could seize the opportunity to create a countrywide round-the-clock news channel, streaming live news to their followers all over the globe through reporters and supporters based in various parts of India that are ignored by mainstream press. An existing model is CGNetSwara – world's first cell-phone based community news service, created by BBC journalist Shubhranshu Choudhary, who sensed a crying need for accurate reportage from conflict-torn areas[100]. However, any such effort will always be subjected to the regulations of the medium – another area where marginalised groups often tend to lose out.[101]

Before video content became popular due to ever-increasing Internet speeds, 'gifs' – animated image files in .gif file format – were more popular. However, with 3G and 4G speeds on smartphones becoming a reality, video itself is becoming a very popular means of dissemination of information online. There is, always, of course, the good old blog post or a predominantly text-based webpage that has always served as a broadcast platform. In in its pre- social media avatar, the Internet had rendered one-to-many communication (broadcast) virtually free of cost through blogs and discussion forums.

With the decline in attention spans, and because of the sheer amount of time that people spend on microblogging sites such as Twitter, it is becoming an increasing

100 Smith, R. (2014, June 18). Shubhranshu Choudhary: Giving a Voice to a Ravaged, Neglected Region. *National Geographic*. Retrieved from http://news.nationalgeographic.com/news/innovators/2014/06/140617-shubhranshu-choudhary-india-maoists-citizen-journalism/ on 20 July, 2017

101 See, YouTube flip flop: Dalit Camera taken down, then restored http://www.newindianexpress.com/states/telangana/2017/feb/01/youtube-flip-flop-dalit-camera-taken-down-then-restored-1565679.html

trend to make longer arguments on Twitter. While Facebook, over time, has increased the word limit for the posts, Twitter has never increased the word limit (although images now do not take up any space in a tweet). People on Twitter would often write series of tweets numbered 1, 2, 3 ... or 1/n, 2/n, ..., n/n. Now, the trend has changed to 'Twitter threads', whereby a user starts by writing one tweet, 'replies to it' with a second tweet, and 'replies to' the second tweet with a third tweet, and so on. 'Replies to' a certain tweet appear underneath it – a link to this can be shared and the sequence of tweets could read like a thread. Policy analysts on Twitter often use the 'Twitter thread' to put out timely, concise views for others to read and share. Following grows over time depending on a user's consistency, wit and engagement, mentions in the Press, and so on.

The subscriber-driven model is not the only way in which online content gets visibility. One does not have to have a million subscribers on social media to be viewed a million times. A single public post or video, if it manages to strike a chord at the right time, can be shared and reposted millions of times, making it go mainstream, with absolutely no additional overhead, no extra effort on part of the original author of the post. This phenomenon, called virality, will be explained in the next section. If there is one true change represented by the Internet, it is this. The capability to broadcast. Everything else has equivalents or analogies in the pre-Internet era, in one way or the other. But, never before have ordinary people had the ability to broadcast their views worldwide in such a connected manner. 'Connectedness' – another unprecedented trait of new media, is somewhat of a derivative of this ability to broadcast, and will be discussed in Section 4.2.6.

4.2.3 Virality

As discussed above, it does not take a million subscribers to garner a million views. A publicly visible video on YouTube, a Facebook post visible to 'Everyone', a tweet from a 'public' Twitter account can be shared (or, 'retweeted' in case of tweets) thousands of times over the Internet, even though the author of the post may have a following of only hundreds. In fact, it is content from non-celebrity accounts that is considered to have '*gone viral*', if it crosses its typical audience and comes to mainstream notice. Celebrity accounts and their posts are anyway usually 'viral' – in that these are noticed, followed and shared by a large number of people across diverse interests, ideologies, regions and walks of life. For non-celebrity accounts, saying something important at a crucial time – a rare policy insight or an appeal for peace – for example, or sharing video content that is unique, cute or funny can make a post go viral. However, at times, there is simply no logic to virality. A music video may go viral because of its absurdity, subverting cultural arbitraries and finnesse, baffling connoisseurs of art, critics of culture and music lovers alike. Examples include the Korean pop video, 'Gangnam Style' by a Korean artist named 'Psy' which was initially shared by international viewers because of its flashy style, horse-dancing, dancing on the toilet seat, etc. *Gangnam Style* did not pretend to appeal to any finer music sense. From 'hilarious' to 'bizarre', all sorts of adjectives were used to describe it. All this led to the video gaining two billion views in under two years, and it also became the first video on YouTube to reach a billion views[102]. Not only that, there were numerous parodies of the song, with users adapting it to their own versions and performing the 'Gangnam Style' dance, including mainstream celebrities. In dance clubs across the

102 Source: http://observer.com/2015/02/the-10-most-important-videos-in-youtube-history/

world, Gangnam style is mandatorily played by the DJs. Some commentators have pointed out that the song is actually a cultural critique of South Korea's 'Hollywood' district celebrities. However, it is hard to attribute its glaring success to its sophisticated cultural critique.[103]

In the Indian context, a recent example is a song by an artist who calls herself 'Pooja Dhinchak'. The song which practically lacks a music beat and is totally unimaginative as far as lyrics are concerned, is the latest viral hit on the Indian music scene. The song '*Selfie mein ne le li aaj*' (literal: I took a selfie today) has earned Pooja Dhinchak abuse, hate, ridicule, and above all, popularity[104].

The controversy over a movie titled 'Innocence of Muslims' posted on YouTube by a nondescript user in 2012 is well-known for having 'provoked' violence, protests and outrage all over the world and for being the subject of a huge diplomatic row that involved scores of national governments, Internet corporations, and so on. Timothy Garton Ash writes of the video (and the controversy),

> a sleazy little video posted on YouTube by a convicted fraudster in Southern California had dictated the agenda of the US president, secretary of state and chairman of the joint chiefs of staff; prompted YouTube to exercise arbitrary private censorship; given the Salafists a card to play against the Muslim Brotherhood in Egypt; become the occasion or pretext for violent demonstrations in many countries, resulting in the death of more than 50 people; and brought a $100,000 price on the filmmaker's own head, offered for transparently political reasons by a Pakistani government minister. That in turn led a British-based Pakistani politician from the same party to demand 'a

103 See https://islandsidechronicles.wordpress.com/2012/10/04/absurdly-mocking-the-absurd-gangnam-style/ for a straightfoward and informative critique of the song's subversive cultural message, as well as the probable reasons for its popularity.

104 Sadhwani, B. (2017, June 10). Hate Her All You Want But Dhinchak Pooja's Earnings From Selfie Maine Le Li Will Make You Weep! *India Times.* Retrieved from http://www.indiatimes.com/entertainment/celebs/hate-her-all-you-want-but-dhinchak-pooja-s-earnings-from-selfie-maine-le-li-will-make-you-weep-323551.html on 20 July, 2017

> once-for-all stop for this blasphemous action'—presumably also in Britain, where I watched the video and wrote these lines. Welcome to cosmopolis. (Garton Ash, 2016, p. 80)

Muslims all over the world were taking offence privately and publicly to the video, indulging in violence and outrage, to the extent of issuing death threats against filmmakers. All the three examples above seem to suggest that virality is a mixture of innovation, freshness, hate, outrage, sensationalism, brashness, irreverence, and so on. While virality of the 'Gangnam Style' variety is harmless, that of 'Innocence of Muslims' is a complex affair. Timothy Garton Ash (ibid.) further points out that it wasn't all the diplomatic requests by scores of nations, but a minor copyright claim that finally led Google to take the video off YouTube. There are several questions that immediately arise here:

a) **Is virality a post-Internet phenomenon?** This is essentially a question of degree, frequency and speed, rather than a 'Yes' or 'No'. Karl Marx certainly did not publish *Capital* or *The Manifesto of the Communist Party* over the Internet. Yet, these texts continue to inspire people across temporal, geographical, racial and even class barriers to lead and participate in revolutions, mass strikes, etc. It can be argued that the 'virality' of the Communist Manifesto can be attributed to the invention of the Printing Press, to which a possible counter can be the question of popularity of ancient religions which gained worldwide popularity much before the Printing Press was invented. A possible counter to that is the fact that almost all religions have had a 'Book' – some kind of coherent ideological text circulated widely, either in handwritten or oral format – even when mechanised printing was totally out of question. It then follows that virality and cult following is not a new phenomenon at

all. However, there is an unmistakable frequency with which things go viral now. Each day, something or the other is 'going viral', 'making waves'. Virality represents more of a continuity than a break. Of course, the scale, speed and attention spans are radically different now. So, a social media post could be viral one day, and forgotten the next. Lawmakers should worry, not about spontaneous virality, but organised hate propaganda that takes place on the Internet.

b) How is it possible to predict virality? It isn't! That is the point of the above examples. A regulator (intermediary or government or judiciary) cannot predict what will go viral and what will spark outrage. It is the limiting case rather than a rule. Frivolous content does not always go viral. And virality alone cannot be a basis for criminalising a social media post or video. It has to constitute a crime. What a regulator – state or non-state – can definitely have is higher thresholds for ordinary social media users (OSMUs), as opposed to public figures, or those with a large following online, as the likelihood of both impact and virality increases manifold if an 'influential' user posts the content. Again, this must not violate the Constitutional guarantees of freedom. As speech and expression moves online at an unprecedented scale, law enforcement agencies need to be educated about the guarantees and restrictions. A concept of 'threshold' becomes very important. Gone are the days when only government could broadcast news, only established media houses could distribute news and opinion pieces, only certain TV channels were authorised to telecast entertainment and news shows. Anyone can say what they want on the Internet and not everything needs to be dealt with in a reactive manner. If at all governments are worried about unruly behaviour on part of citizens, then the government should take steps to educate the population about the importance of being

nice to one another. 'Netiquette' should be made part of primary school textbooks, public education programmes and should reflect, most of all, in the behaviour of heads of states themselves, and their deputies, and followers. Public figures should disown and actively discourage abusive and venomous propaganda – even if, and, especially, when such propaganda is launched *in their defence*.

c) **What if 'offensive' content from a non-authoritative source goes viral**? This has to do with the right not to be offended. Although Indian law has provisions to protect people from getting offended, it is counterproductive to give in to the heckler's veto. No one should have a right not to be offended. (Dworkin, 2006) Also, courts must differentiate 'provocation to kill' from 'incitement to kill' – ***provocation is a call made to one's opponents; incitement is a call made to one's supporters***. There is perhaps no justification for acting on provocation. Yes, the state must curb 'group defamation', as proposed by Jeremy Waldron (2012), as that is what hate speech provisions are meant to do. But 'hate propaganda' and 'group defamation' needs to be distinguished from 'causing offence.' What if Muslims stopped taking offence? A video like 'Innocence of Muslims' would have remained relegated to some shady corner of cyberspace and several casualties could have been avoided. Also, it doesn't seem like a very wise strategy to defend oneself or one's community against accusations of being violent *by resorting to violence*! Timothy Garton Ash, who has extensively traced the controversy, writes of Syed Mahmood who posted a video response to *Innocence of Muslims*,

> But there was another video, high in the YouTube clickstream, which would give some encouragement to those who shared the classic liberal belief that the best answer to hateful speech is more and better speech. Titled 'A Muslim's reaction to Muhammad Movie Trailer', it was posted on 12 September, just a day after the first violent protests, by someone called Syed Mahmood.

> A quiet-spoken, bespectacled young man with a distinct British accent talks to his home computer camera. He says he has just viewed the video and is 'a bit upset' by it but urges his fellow Muslims not to react violently. For, he argues, that is exactly what 'this guy named imbecile, sorry, this imbecile named Sam Bacile' wants them to do. 'He wants Muslims to go crazy about this . . . so by reacting, I would say you are going to make him successful, you are going to make him happy actually'. In what seems an entirely spontaneous way, Mahmood suggests that his fellow believers should not again fall into the familiar role of the 'Offended Muslim'. 224 'This movie is intended to hurt your feelings, so don't let it succeed', he appeals. 'Don't let it succeed by being violent'. By mid-October, this improvised message from a totally unknown young British Muslim, who according to his profile had only started uploading stuff to You-Tube a fortnight before, had been viewed more than 485,000 times.
>
> ... ...
>
> A devout Muslim, adhering to the Hanafi school of Islamic jurisprudence, he cited to me several Qur'anic verses to underpin his argument that his fellow Muslims should not react violently. These things will happen, he said. 'If it's offensive, don't watch it, don't be offended'. If Muslims reacted calmly, relations between them and non-Muslims would get better over the next 30 years, 'and it's up to us Muslims to do that'. (Garton Ash, 2016, p. 81 - 82)

This is the principle that lawmakers need to stress, when confronted with the question of 'offensive content' on the Internet: ***the response to a cartoon is a cartoon, the response to a book is a book, the response to a video is a video***[105]. Of course, the situation is complicated in India where the chances of a politician being elected rise exponentially with charges of hate speech! (Manoj K, 2016)

4.2.4 Complicating the public-private divide

In 2012, following the death of the cult leader of the ethnoreligious supremacist party '*Shiv Sena*', two girls in Mumbai – a *Shiv Sena* stronghold – saw themselves bullied, harassed, attacked, slapped and even arrested – overnight – over an innocuous post written on Facebook! The two girls – Shaheen Dhada and Rinu Srinivasan – were

105 And for a video such as Innocence of Muslims, a no-response might have been a better strategy.

arrested “for their own safety” (lest the *Shiv Sena* mobs attacked them!). The Facebook post written by Shaheen Dhada questioned the shutdown of state machinery over Bal Thackeray's natural death,

> "Every day thousand of people die. But still the world moves on... Just due to one politician dead. A natural death. Every one goes crazy... Respect is earned not given out, definitely not forced. Today Mumbai shuts down due to fear not due to respect."[106]

The same fear that she had questioned came to haunt her within 20 minutes of having written the post. A screenshot of the post was circulated among the local *Shiv Sena* supporters who thronged the streets in protest, attacking property belonging to Shaheen Dhada's family, and demanding the arrest of her and her friend Rinu Srinivasan who had 'Liked' the post and written a comment on it (which she had later deleted).

To put things in perspective, Bal Thackeray was a ethnoreligious supremacist leader, known to make anti-Muslim and anti-immigrant statements, and his supporters often engaged in violence and vandalism against the said groups. Thackeray never faced prosecution; in fact, he was given a state funeral by the state government of Maharashtra, despite having 30 odd cases of hate speech filed against him since 1993, as per responses to RTI applications filed by Meena Menon over several years. Thackeray was never prosecuted. In all of these matters, the cases were either withdrawn or were pending government permission to arrest or chargesheet! (M. Menon, 2012) While Thackeray himself never faced prosecution for hate speeches made against minorities and immigrants, two young girls had to spend a night in jail

106 Supra note 92

for a Facebook post that merely alluded to Thackeray, in most civilised terms (by any standard). *The Hindu*, citing Meena Menon's research, wrote of Thackeray,

> *While Union Minister for Communications and Information Technology Kapil Sibal wants to crack down on hate speech over the internet and his Ministry last week granted sanction to prosecute Facebook, Google and other websites for "instigating enmity between different groups of people," the coalition government run by his Congress party in Maharashtra has been dragging its feet on prosecuting Shiv Sena leader Bal Thackeray for hate speech crimes that are much more serious.*
>
> *Unlike the postings on Facebook and elsewhere, which the government apprehends might instigate enmity and violence, Mr. Thackeray's writings were considered by the Srikrishna Commission incendiary material for the violence which wracked Mumbai in 1992 and 1993, taking the lives of several hundred people.*
>
> *After the communal riots in Mumbai following the Babri Masjid demolition on December 6, 1992, many cases were filed against Mr. Thackeray, also the editor of* Saamna*, the Shiv Sena newspaper, but most of them resulted in no action. Even before and after the riots, police registered cases under section 153 A of the Indian Penal Code (IPC) for promoting enmity but little came of them. Information obtained under the Right to Information (RTI) Act in 2011 after a prolonged battle with the authorities and several appeals has revealed the status of some of the cases which were made available by the police. Simply put, neither the Shiv Sena-BJP government which was in power from 1995 to 1999 nor the Congress — which has been in power for three consecutive terms after that — has shown any interest in the prosecution. Cases have either been closed or are awaiting government permission to arrest the accused.*[107] (emphasis original)

The point of quoting this analysis is to demonstrate the mistaken priorities of the government. While Thackeray was actually indicted for having had a role in inciting violence, various governments – whether avowedly secular or avowedly communal – have not dared to act against him, while they are quick to arrest and attack the most vulnerable – a young, defenceless, Muslim girl and her friend. While 'public' hate

107 Book Extract. (2012, January 19). Hate speech the Congress forgot about. *The Hindu*. Retrieved from http://www.thehindu.com/opinion/lead/Hate-speech-the-Congress-forgot-about/article13370962.ece on 20 July, 2017

speeches made by public figures go unpunished even after the 30th case, governments show concern about social media postings by OSMUs (ordinary social media users) and the desire to regulate it. This shows, once again, how the focus in Indian hate speech laws is on hurt rather than harm (and how politics trumps the rule-of-law). This example also shows how problematic it is to equate criticism of an 'icon' figure to a criticism of the entire group that holds him up as a rolemodel. Usually, such an 'icon' himself will have desecrated several other 'icons' held up as rolemodels by other groups[108].

It is unclear whether Shaheen Dhada's Facebook post was visible only to her Facebook friends or to anyone with a Facebook account. However, the way her post was circulated outside as a screenshot to audiences who wouldn't normally have come across it, is a violation of her privacy and an instance of Mill's corn-dealer example – an incitement to violence against a living person with actual imminence involved (attack on Shaheen Dhada's uncle's clinic; mob attack on Rinu Srinivasan outside the police station; police having to lock them up for their own safety). While the act of the girls, which constituted no criminal offence except 'manufactured *offence*', the *Shiv Sena* mobs did not face any action because our laws do not capture the essence of hate speech – that is, incitement to violence. The threat of violence was not present in Shaheen Dhada's post, even if the post was public.

A Facebook account belonging to an OSMU (ordinary social media user) cannot be treated as public, even if it is publicly accessible. It is not until someone outrages over it that the post starts getting read. Even as social media have rendered the public-

108 Rattanani, L. (1992). Thackeray's tongue. *India Today*. Retrieved from http://indiatoday.intoday.in/story/shiv-sena-chief-bal-thackeray-angers-dalits-over-ambedkar/1/307788.html on 20 July, 2017.

private distinction unclear, it is a matter of political will, rather than an irresoluble regulatory dilemma, to determine what needs to be treated as public and what as private. Even as existing law does not make such a distinction explicit, this distinction needs to be made in (our non-existent) hate speech legislation, because it is public advocacy of harm that should be the target of hate speech legislation.

4.2.5 Anonymity

A great many studies about Internet behaviour around the turn of the millennium harped on the question of anonymity. (See Lessig, 1998, 2006 and Postmes, 2001) There are two reasons for this: first, this is the time when interactive online communication was taking its first steps, developments that led, later on, to the rise of Web 2.0. However, the concept of "authentication" had not caught on till then. As a result, it was possible to sign in to chat rooms without signing up. This led cartoonist Peter Steiner, to remark, quite famously, in his 1993 cartoon "On the Internet, nobody knows you're a dog.", published in The New Yorker.

Peter Steiner, 5-07-1993, TNY

Kaamran Hafeez, 23-02-2015, TNY

However, the nature of anonymity itself has changed remarkably now, as some form of authentication is required by almost every website. Facebook, especially, has a "real-name" policy which, to a large extent, compels people to use their real identity. Also, with smartphones and tablets offering a seamless experience of working across platforms, devices and physical locations, it is the norm to 'Sync' various accounts – email, Facebook, Whatsapp, Instagram, etc. - with the device, so that your smartphone or iPad knows exactly who you are. With the advent of sites such as Facebook and Twitter, hyper-individualism has become the norm, rather than early Internet avatars and usernames that revealed nothing about a user's personal information. That change is reflected in a recent cartoon, 22 years later, in the same publication (TNY), that reads, "Remember when, on the Internet, nobody knew who you were?" This cartoon by Kaamran Hafeez aptly captures the changed nature of anonymity on the Internet, two decades after Steiner's cartoon was published.[109] As exemplified by the case of Swati Chaturvedi, discussed in Section 4.2.1, social media companies are very likely to comply and provide data related to abusive accounts on the Internet. Even if one uses a VPN (virtual private network, used to mask the I.P. address which identifies an Internet user), it is possible to trace down a user. Anonymity, then, is only a matter of degree.

Also, Facebook real name policy is very intrusive. Requiring users to upload an ID card for verification is problematic. Many women may be able to use Facebook only under a fake name, if the family or community is hostile to free expression of views by women on Facebook. Writers have always published under pen names, often for

[109] In fact, it is popular now for pets to have social media profiles. One example of an immensely popular pet profile is that of Mark Zuckerberg's dog, named 'Beast'!

fear of backlash or hostility. In the name of protecting women from fake profiles, Facebook might, in fact, be putting more women at risk. Facebook's real name policies[110] as well as its obscenity filters[111] have also come under severe criticism for being racist, patriarchal, anglocentric and heteronormative in their approach.

4.2.6 Global Connectedness

The Internet, over the years, has turned into a livelier place, with users having the ability to browse other people's profiles, add people to groups based on common interest, take collective action, invite people to events, invite people to share and collaborate in the creation of joint projects, and so on. This is more a feature of Web 2.0 – the new media – where posts from 'new' people keep popping up on your homepage. However, this was not always the case. Every feature that Facebook rolled out met with considerable shock and opposition from users who were concerned about the impact of each such new change on their privacy. It seems normal today that Facebook should show to others 'who liked whose post'. Some years ago, this was a controversial change.

Even Google's predictive search was a shocking change and it wasn't easily accepted. Facebook and Google have had to roll back several changes at times, after backlash, only to bring these back at an opportune time, when resistance to such changes would

110 Grinberg, E. (2014, September 18). Facebook 'real name' policy stirs questions around identity. *CNN*. Retrieved from http://edition.cnn.com/2014/09/16/living/facebook-name-policy/ on 17 July, 2017

111 Toor, A. (2016, Oct 12). Facebook still has a nipple problem. The Verge. Retrieved from https://www.theverge.com/2016/10/12/13241486/facebook-censorship-breast-cancer-nipple-mammogram on 17 July, 2017

be less. This is akin to muscle training – social media giants would propose changes, then implement them all of a sudden, then roll them back or modify them in case of backlash, and then roll them out again. The resistance was much lesser next time. Earlier, for example, a Facebook profile picture would be visible only to 'Friends' and, even though one could choose to make it public, this could be perceived as attention-seeking behaviour in many cultures. This setting was changed several times. Now, Facebook explicitly states that the 'current profile picture' is always 'Public'.[112] Now, there is Instagram where it is not uncommon to find public profiles of girls flaunting their 'Hijab' pictures, signalling a clear shift in cultural norms. To a digital native (the next generation), it won't be a shock anymore that Facebook recognises people in pictures, and provides suggestions to tag them. However, when this feature (Facial Recognition) was first proposed, it came as no less a shock to digital migrants. Facebook has effectively pushed a culture where sharing photos is no longer taboo, but a rather casual way of being online. 'Friend suggestions' on Facebook and 'Follow Suggestions' on Twitter ensure that we *run into* other people. It is like being at a round-the-clock social hub where people meet, talk, share, collaborate and organise.

Connectedness has also meant the possibility of taking political action online. Online petitioning is only one way of doing so. Now, politicians themselves are active users of Twitter and Facebook and, hence, direct petitioning is possible. It is a boon for celebrities to connect with their supporters without the interference of a third party, and it is a boon for fans to be able to directly tag their favourite celebrities. Twitter certainly is more public than Facebook in this sense. On Facebook, you can 'Block'

112 More recently, facebook has come up with something called a 'Profile Picture Guard' – a rather tacky looking blue coloured frame that prevents other users from downloading other people's profile pictures.

someone, and Blocking is quite effective. On Twitter, although you can 'Block' and 'Mute' undesirable accounts, but they can still 'Mention' your Twitter handle along with that of other users, so that even when someone else (not on your block list) replies to the conversation, you are *tagged* and, effectively *dragged*, into the conversation. This is what Lessig (2006) meant by 'Code is Law'. The coding architecture of a platform determines what it looks and feels like.

Quite obviously, connectedness also means exposure to harm. However, there are two kinds of social responses generated to this phenomenon. One is the development of 'Community Guidelines' – unique to each platform – which is like the 'law of the land' on a certain platform. Community Guidelines determine what is acceptable and what is unacceptable on a certain platform. Users, especially women's collectives, can lobby the platform for changes to make the platform safer[113]. Thus, women organise and assert their agency, rather than simply receive and experience abuse and harm on the Internet. The second kind of response is seen when women own their body and sexuality, thereby taking away the power of the abuser who exploits the shame associated with the female body to abuse, troll, shame and silence women[114].

All these changes represented by new media renew and refresh our understanding about hurt, harm, shame, consent, agency and community, and strongly suggest the need for a mix of legal and nonlegal strategies to fight back harm online. It is hoped that this will help us develop a fresh approach to 'hate speech' – online and offline.

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113 See this online petition by Indian singer Chinmayi Sripada to Twitter CEO asking for mass suspension of abusive Twitter accounts, signed by over 200,000 people as of 20 July, 2017 https://www.change.org/p/jack-large-scale-shut-down-of-accounts-which-tweet-rape-threats-against-women-rapethreatsnotok

114 See, for example, Woman stands up to cyber blackmailer with a brave Facebook post http://indianexpress.com/article/trending/trending-globally/woman-stands-up-to-cyber-blackmailer-with-a-brave-facebook-post-3098908/

5
Conclusions and Recommendations

It is clear from the discussion above that a need for a proper hate speech legislation in India is the need of the hour. Timothy Garton Ash (2016, p. 219) argues that there is scant evidence that those countries which have enacted hate speech legislation are more tolerant, but agrees that hate speech legislation can serve as a social statement of tolerance and plurality. This is true. Laws prohibiting murder have been around for the longest time. This has not, however, meant an absence of murder in modern society (or, any society). However, it would be unacceptable to repeal the legislation related to murder simply because it doesn't stop murder. The legislation is a statement that, in this society, murder is not acceptable; it is a crime. However, if legislation does not stop crime, then what will? Along with the elimination of inequality and discrimination, the establishment of rule-of-law, certainty of punishment, improvement of investigation techniques and conviction rates, and abolition of the death penalty, the establishment of civic codes among the population that instill not just a fear of the law, but a respect for human life, are needed to bring down the murder rate. A hate speech charge against Adolf Hitler could not have prevented the atrocities unleashed on Jews because Hitler was but a manifestation of the status quo that ushered him into power. Therefore, along with laws, we need a commitment to democracy on part of both governments and communities that are easily offended – one's violence feeds into that of the other. As pointed out in the Introduction, the final aim of having a hate speech legislation is not to further criminalise speech, but to establish a more tolerant society.

Therefore, the first recommendation that one must make is for the citizenry to actively denounce hate speech and hate crimes. The second recommendation is for leaders, public figures and social media influencers to disown and discourage hateful, vile abuse dished out in their name by their supporters to their opponents. The US lost the war in Vietnam when it lost support for the war in the eyes of the public back home. The recently held '#NotInMyName' protests by Indian citizens at home and abroad were a referendum against hate crimes (in the form of mob lynching) committed against Muslims. The protests were followed by the Prime Minister of India denouncing the hate crimes too.[115]

The third recommendation for the government is civic education. Education on the importance of plurality must be included in school and college curricula for everyone growing up in India. A public commitment to pluralism is needed now more than ever. The normalisation of hate speech through the Internet, mostly in the name of the government, is a dangerous phenomenon which precedes the spike in hate crimes against Muslims.

Coming to the question of law, this research started out with an aim to study the adequacy of the law against hate speech laws in India. There are three important points to be made with respect to laws in India:

115 See, Protest Diaries: Not in My Name, Break the Silence and More: A Live Compilation of Citizen Voices against Lynching. *EPW,* 52(25-26), 24 June, 2017. Retrieved from http://www.epw.in/journal/2017/25-26/web-exclusives/not-my-name-protests-against-mob-lynching-cow-slaughter.html on 20 July, 2017

a) Section 295A of the IPC is a provision which has been used to hound dissidents, artists and political opponents. Even with the Brandenberg test being upheld by the Supreme Court of India in Arup Bhuyan v. State of Assam, the very wording of Section 295A carries a promise of persecution. While the socially powerful get away with crimes (See Section 4.2.4), the weaker sections can have their speech criminalised even for raising a voice against oppression by a dominant community, as the definition of 'hurt' is wide and subjective. Even if conviction does not occur, the sluggish judicial process itself is the punishment. Also, and more importantly, it is not the state's job to protect people's religious beliefs against attack. Religious beliefs, just as political beliefs, must be open to critique, rationale an debate. Often, this process also involves a substantive interpretation on the part of courts as to what constitutes offence and what constitutes belief. One person's belief itself may cause offence to another person. A certain interpretation of a text by the Shia community may be different from that of the Sunni community. Although those sects with large followings are safer, what happens to splinter sects which are not very well-known? Will we, like a theocracy, then, purge the speech by an Ahmedia sect, for example, on the grounds that it constitutes a hurt to the dominant Sunni community? The state must not get involved in this web of substantive meanings, as it did in the case of deciding the Babri Masjid – Ramjanmabhoomi property dispute (Vardarajan, 2010) or in the case of Sri Baragur Ramachandrappa v. State of Karnataka[116] (Bhatia, 2016, p. 141 – 143). Thus, Section 295A often ends up becoming a tool of cultural regulation, handy for suppression of alternative versions and interpretations of faith. **It is a section best done away with**.

116 Sri Baragur Ramachandrappa v. State of Karnataka (2007) 3 SCC 11

b) The obvious argument that arises here is that hate speech can often be masked as criticism of religion. The answer to this lies in the reform of Section 153A of the IPC. As pointed out in the Introduction, Section 153A is closer to being a hate speech provision, as it protects people, not divine entities, from hate propaganda. However, Section 153A does not recognise vulnerability. It was discussed in Section 1.1 how that is crucial for a provision to qualify as a hate speech provision, as it is minorities that are often at the risk of facing communal violence. Of course, the definition of minorities will vary from state to state and from context to context. (Killan, 1996) Also, as gender- and sexual-minorities in India assert their identity, a backlash is likely. Therefore, the law, must recognise the various attributes that render a group vulnerable. To sum up, **Section 153A must be amended, in order to read vulnerability (minority status, sexual orientation, disability, caste, gender, etc.) of various kinds into it, to cover hate speech against women and other vulnerable groups. Also, it should have provisions to protect dissenters or critics of religion who are not engaging in hate propaganda, because the individual constitutes the minority of one against a group**.

c) As pointed out in Section 1.6, Article 15 of the Indian Constitution prohibits discrimination on grounds of "religion, race, caste, sex and place of birth." The non-discrimination provision in India, thus, does not cover disability and sexual orientation. Therefore, **Article 15 of the Indian Constitution should be amended to cover disability and sexual orientation**.

d) The Law Commission of India, in March, 2017 proposed a Criminal Law Amendment (2017) [Annexure A, Law Commission of India. (2017). Report No. 267. 'Hate Speech'.] which recommended the introduction of the following sections:

> 1) Prohibiting incitement to hatred-
>
> "153 C. Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe-
>
> (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or
> (b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence
>
> shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs 5000, or with both."
>
> 2) Causing fear, alarm, or provocation of violence in certain cases.
>
> "505 A. Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe-
>
> uses words, or displays any writing, sign, or other visible representation which is gravely threatening, or derogatory;
>
> (i) within the hearing or sight of a person, causing fear or alarm, or;
> (ii) with the intent to provoke the use of unlawful violence, against that person or another, shall be punished with imprisonment for a term which may extend to one year and/or fine up to Rs 5000, or both."

While these are welcome additions, they leave much to be desired, in terms of defining imminence, context, vulnerability, and so forth. Further, the Law Commission's report falls into the old trap of confusing offence with incitement. There needs to be more dismissal of 'offence' and more recognition of 'incitement' and its careful separation from 'provocation'. As pointed out in Section 4.2.3, courts must differentiate 'provocation to kill' from 'incitement to kill' – ***provocation is a call made***

to one's opponents; incitement is a call made to one's supporters. Proscription of speech cannot be justified in terms of it having constituted a provocation, as in: “I got provoked by his writing, so I rioted.” This cannot be a basis for depriving speech protection under Article 19(1)(a). If a group riots against constitutionally protected speech/writing/art, etc., it cannot be considered to have contained “imminence” of violence. Imminence is when riots occur at someone's command. Provocation is when riots occur against someone. (in context)

e) The laws and amendments related to hate speech must include the context, especially the public position of the speaker. This is not reflected even in the proposed amendments as of now. The law must include, as punishment, several proportionate levels of punishment against hate speech: public apology, temporary suspension from public office, attending classes on diversity and pluralism, so that conviction is easier and more certain.

f) Internet intermediaries in India must take greater steps against organised hate propaganda. Community guidelines need to be strengthened in consultation with women's groups and a fresh look at anonymity needs to be taken, including and especially from a feminist perspective. Intermediaries should invest in public education campaigns to foster a more pluralistic social media space. In the long run, jointly developed community guidelines might be more instrumental in curbing hate speech and pushing progressive values, as politics becomes increasingly polarised.

g) Courts should follow the six-part test outlined by Article 19 – a British human rights organisation working on free speech – to determine whether hate speech is harmful, which states:

> All incitement cases should be strictly assessed under a uniform six-part incitement test, examining the:
>
> • Context of the expression;
> • Speaker/proponent of the expression;
> • Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;
> • Content of the expression;
> • Extent and Magnitude of the expression (including its public nature, its audience and means of dissemination);
> • Likelihood of the advocated action occurring, including its imminence.[117]

Steps must, of course, be taken, in India, to improve policing and the rule-of-law. Independence of the police – that is, its ability to function freely without influence from political actors – is a huge area of research which is well beyond the scope of the present work and its humble set of recommendations.

117 Prohibiting incitement to discrimination, hostility or violence. Policy Brief by Article 19. (December, 2012) Available at https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf Retrieved on 20 July, 2017

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