

## COUNTERING HATE SPEECH IN INDIA: LOOKING FOR ANSWERS BEYOND THE LAW

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### *Abstract*

*The regulation of hate speech has proven to be a challenging endeavour. The anti-hate speech law is contested because of its clash with the freedom of speech and expression of an individual. In practice, the law is always treading the treacherously thin line between regulation and complete restriction. But despite adopting strict laws, cases of hate speech are still on the rise. To curb this, even more stringent laws were proposed by the Law Commission of India in 2017. This has led to a situation of plethora of laws and a state of overcriminalisation of speech related offences. In light of the obvious harm that hate speech causes, it is time to go beyond the current framework and look for best practices that can be adopted to address the problem of hate speech in addition to the legal framework. Two such approaches of using alternate means of settlement in hate speech cases and employing counterspeech are discussed herein.*

### **I. Introduction**

### **II. A Case of Over-criminalisation of Speech**

### **III. Towards an Effective Response to Hate Speech**

### **IV. Conclusion**

### **I. Introduction**

Many reports, worldwide, have declared 2018 as the “year of online hate”<sup>1</sup>, Facebook, the social media giant, in its ‘Transparency Report’ disclosed alarming statistics wherein it ended up taking down 3 million hateful posts from its platform<sup>2</sup>, Youtube, which allows free sharing

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<sup>1</sup> Geoffrey A. Fowler , Drew Harwell *et. al*, “2018 was the year of online hate. Meet the people whose lives it changed” , *The Washington Post*, Dec. 28, 2018.

available at : [https://www.washingtonpost.com/business/technology/2018-was-the-year-of-online-hate-meet-the-people-whose-lives-it-changed/2018/12/28/95ac0558-f7dd-11e8-8c9a-860ce2a8148f\\_story.html?noredirect=on&utm\\_term=.89512577b520](https://www.washingtonpost.com/business/technology/2018-was-the-year-of-online-hate-meet-the-people-whose-lives-it-changed/2018/12/28/95ac0558-f7dd-11e8-8c9a-860ce2a8148f_story.html?noredirect=on&utm_term=.89512577b520) (last visited on January 25, 2019).

<sup>2</sup>Facebook, Community Standards Enforcement Report (November, 2018) available at : <https://transparency.facebook.com/community-standards-enforcement#hate-speech> (last visited on January 25, 2019).

of video content on its site, removed 25,000 videos in a single month alone.<sup>3</sup> These statistics are only the tip of the iceberg and indicative of how the situation is inching towards spiralling out of control. In its aggravated form, hate speech has led to horrendous hate crimes like we have recently witnessed in India, such as communal riots, series of violent clashes between religious communities<sup>4</sup> all arising as a result of inflammatory speech propagated by divisive groups.<sup>5</sup> Incidents of gruesome killings were widely reported wherein ‘hate’ for another group/community took a particularly perverse form of violence in the form of mob lynching.<sup>6</sup> In these situations, words were employed in their most dangerous form, "...as weapons to ambush, terrorize, wound, humiliate and degrade"<sup>7</sup> individuals and groups.

The meaning of hate speech, in contemporary times, has travelled beyond mere offensive speech; it encompasses speech that is insulting, derogatory, discriminatory, provocative or even such that it incites and encourages use of violence or results in violent backlashes. It results in disturbing the harmony and order in society at large. But more importantly, hate speech becomes a particularly heinous type of hate crime causing direct physical and psychological harm to the victims of hate crime. It affects its victims in intangible ways leading to chilling effect on the victims right to free speech and expression, resulting in exclusion from participation in the democratic process and public discourse.<sup>8</sup>

The first task this article endeavours to achieve is to establish the case for necessity of controlling hate speech in light of its obvious harm; next it looks into the legal landscape of hate speech laws that exist in India. It is the author’s assertion that when it comes to legal

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> FP Staff, “Muzaffarnagar riots: The inciteful speeches that fanned rioters' fury”, *First post*, Sept.13, 2013. available at: <https://www.firstpost.com/politics/muzaffarnagar-riots-the-inciteful-speeches-that-fanned-rioters-fury-1103789.html> ; also see <https://www.hindustantimes.com/lucknow/muzaffarnagar-riots-fir-against-politicos-for-hate-speeches/story-ymsW4fi9MUtf3Dia3fkz0M.html> (last visited on January 25, 2019).

<sup>5</sup> Harsh Mander, “The mob that hates”, *Indian Express*, July 19, 2018. available at: <https://indianexpress.com/article/opinion/columns/supreme-court-on-mob-lynching-law-against-lynching-case-social-media-whatsapp-rumuors-5265173/> ; also see : <https://www.hindustantimes.com/india-news/sc-condemns-mob-lynchings-asks-parliament-to-make-law/story-QqEIgLfpmJZZCjeU4XyTMI.html> , (last visited on January 25, 2019).

<sup>6</sup> Alison Saldanha, “2017 : A year of hate crimes in India: Number of violent incidents related to cows, religion is rising”, *First Post*, Dec. 28, 2017. available at: <https://www.firstpost.com/india/2017-a-year-of-hate-crimes-in-india-number-of-violent-incidents-related-to-cows-religion-is-rising-4278751.html> (last visited on January 25, 2019).

<sup>7</sup> Thomas J. Webb, “Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System” 50 *Washburn L.J.* 445 (2011).

<sup>8</sup> Parliamentary Assembly, Council of Europe, Recommendation 1805 “Blasphemy, religious insults and hate speech against persons on grounds of their religion” (2007) available at : <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en> (last visited on January 25, 2019).

regulation of hate speech, it is a classic case of overcriminalisation, which is in urgent need of addressal by means beyond just penal laws. This becomes necessary because the harm in hate speech is so widespread that it travels beyond the obvious and pervades the human psyche to leave behind permanent damage which outlasts the physical. Therefore, the approach to tackling hate speech needs to necessarily evolve as a more nuanced and sophisticated response that can begin to tame the multi-headed Hydra monster form that hate speech has become today. By way of policy suggestions for regulation of hate speech, two approaches of counterspeech and mediation that have proved successful in other jurisdictions are discussed in the conclusion.

### ***Why Regulate Hate Speech?***

The term ‘hate speech’ eludes a universal definition. It derives its significance from the particular context it operates in formed through the influence of peculiar sensibilities, “identities” and “assessments” in particular contexts.<sup>9</sup> Black’s Law Dictionary identifies hate speech as the “speech that carries no meaning other than expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence”.<sup>10</sup> Therefore, it can be said that hate speech is “speech that is, broadly speaking, derogatory towards someone else”.<sup>11</sup>

Most common grounds of hate speech across countries are race, ethnicity, religion or class. India presents a peculiar case for regulation of hate speech with its rich diversity of language, caste, race, religion, culture and beliefs. The words either spoken or written, or employing signs or any kind of visual representation qualifies as ‘speech’. If such speech offends the religious, ethnic, cultural, racial groups by vilification and is capable of spreading ‘hatred’ among the heterogeneous populace, we categorise it as ‘hate speech’.

In the introduction to this article, it was emphasised how words employed have significant detrimental impact, both, on the individual and the society at large. Jeremy Waldron states

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<sup>9</sup> Marcello Maneri (ed.), “#Silence Hate : Study on hate Speech Online in Belgium, Czech Republic, Germany and Italy”, BRICKS Building Respect on the Internet by Combating Hate Speech Project available at : [https://www.bricks-project.eu/wp/wp-content/uploads/2016/10/relazione\\_bricks\\_eng2-1.pdf](https://www.bricks-project.eu/wp/wp-content/uploads/2016/10/relazione_bricks_eng2-1.pdf) (last visited on January 25,2019).

<sup>10</sup> *Black's Law Dictionary*, 9<sup>th</sup> edition, 2009.

<sup>11</sup> Gautam Bhatia, *Offend, Shock Or Disturb : Free Speech Under The Indian Constitution* 139 (Oxford University Press, Delhi, 1<sup>st</sup> Edn., 2016).

that targeting a person's "immutable characteristics, ethnic background or religious identity causes a harm".<sup>12</sup> Thus, to protect individual liberty, freedom and to ensure dignity it is essential that speech that targets a person's identity, based on ethnicity, race, religion etc., be not allowed to be propagated untrammelled. As victims of hate speech, such individuals "feel fear, may be nervous to enter public spaces or participate in discourse and may change their behaviour or appearance in an attempt to avoid hate speech."<sup>13</sup> In this way, hate speech constructs its targets as those who are not only "discriminated against but are also seen by others as undesirable target and legitimate objects of hostility."<sup>14</sup> Such intangible effects of hate speech are the most insidious and damaging to an individual's sense of security and right to live with dignity.

However, most democracies in the world today ban hate speech today on the capacity of such incendiary words to not only cause harm but also disrupt public order by the power of hate speech which is capable of leading to violent consequences such as hate crimes amongst other violent results. Recently, while examining the scope of hate speech laws in India, the Law Commission in its report published in 2017 recommends further introducing new provisions within the penal code that specifically punish incitement to violence in addition to the existing ones.<sup>15</sup> Perhaps this standard of 'incitement to violence' is seen as being a more concrete basis for prohibiting speech by means of legislation. Incitement to violence demands a greater level of harm to be demonstrated in comparison to other forms of hate speech (discussed previously) and therefore justifiably be the subject of censure by criminal law. As far as criminalisation of speech is concerned, it remains a debatable issue with the legal scholars divided between what kind of speech should ideally be criminalised; should only a certain type of hate speech be banned and whether all hate speech be made punishable by criminal law or it can be dealt under civil law.<sup>16</sup> However, it is agreed that hate speech which is shown to be able to incite violence is a serious case and merits stern action to prevent any further damage.<sup>17</sup> Therein, criminal sanction is seen as most suitably employed to curb hate .

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<sup>12</sup> Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, United States of America, 2012).

<sup>13</sup> Tanya D'souza, Laura Griffin, *et.al.*, "Harming Women With Words: The Failure Of Australian Law To Prohibit Gendered Hate Speech" 41(3) *UNSW Law Journal* 943 (2018).

<sup>14</sup> *Ibid.*

<sup>15</sup> Law Commission of India, 267<sup>th</sup> Report on Hate Speech (March 2017).

<sup>16</sup> *Supra* note 13 at 945.

<sup>17</sup> Katharine Gelber, *Speech Matters: Getting Free Speech Right* 84 (University of Queensland Press, Australia, 2011).

While it remains a challenging task to prove that a particular type of words or speech led to violence in its wake or had the capability to do so, neuroscientists have found that the atmosphere created by speech that propagates hate, threatens or incites violence has a direct link to violence. At the time of conducting the study it was concluded that “linguistic threat activates the human amygdala”<sup>18</sup> thereby leading to increase in size of the amygdala, the brain centre that responds to threat. Such exposure makes it difficult for people to gain control over their actions and responses when exposed to threatening speech.<sup>19</sup> An individual, therefore, finds it easier to react in a violent manner in response to hate speech. Criminologist, Jack Levin also notes this connection between violence and hate speech and states that “hate speech at the top influences hate crimes at the bottom”.<sup>20</sup>

Study by a group of psychologists revealed that when there is division of population between “us” and “them” as rivals only served to increase the distrust between these groups.<sup>21</sup> The likelihood of aggressing against the rival group member was also self-reported as part of this study. Exposed to such divisive tendencies by way of hate speech increases the impulse to violence in such a scenario.

Thus, it becomes a matter of urgent concern to not only regulate hate speech but to adopt such practices in doing so that are able to undo the damage that hate speech causes.

### ***The Indian Legal Framework***

In the matter of regulating hate speech, Benoit Frydman has identified two broad approaches that are adhered to by the various countries.<sup>22</sup> One, is the “slippery slope”<sup>23</sup> approach which is largely seen in the case of United States which has a strong and persuasive First Amendment jurisprudence and, on whose test, any kind of fetters on freedom of speech and expression fails. A ban on hate speech would inevitably run foul of the First Amendment and would be for certain measure, a tricky endeavour. Thus, United States has no anti-hate speech

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<sup>18</sup> N. Isenberg, D. Silbersweig, *et.al.* “Linguistic threat activates the human amygdala”, Proceedings of the National Academy of Sciences (Aug 1999).

available at : <https://www.pnas.org/content/96/18/10456.short> (last visited on January 25, 2019).

<sup>19</sup> *Ibid.*

<sup>20</sup> Zoe Mathews, "Hate speech at the top influences hate crimes at the bottom", Gloucester Daily Times, Nov. 28, 2018.

available at : [https://www.gloucestertimes.com/news/local\\_news/hate-speech-at-the-top-influences-hate-crimes-at-the/article\\_5802769d-b069-54bd-9bd3-828cfa7c3564.html](https://www.gloucestertimes.com/news/local_news/hate-speech-at-the-top-influences-hate-crimes-at-the/article_5802769d-b069-54bd-9bd3-828cfa7c3564.html) (last visited 25<sup>th</sup> January, 2019).

<sup>21</sup> Mina Cikara, *et al.*, “Us Versus Them: Social Identity Shapes Neural Responses To Intergroup Competition And Harm” 22(3) *Psychol Sci.* 306 (2011).

<sup>22</sup> *Supra* note 9.

<sup>23</sup> *Ibid.*

law so to speak of, the only restriction being on speech that incites imminent lawless action. Second is the “fatal slope”<sup>24</sup> approach that is commonly followed by a majority of jurisdiction like Europe wherein hate speech is expressly banned by way of laws that prohibit speech because of the danger that it may incite violence and lead to mass scale killings and other hate crimes.

India subscribes to the latter approach and bans hate speech on the basis of religion, ethnicity, culture or race. Though the term “hate speech” does not find mention anywhere but its different forms are identified across the laws that address this kind of speech. Most importantly and primarily the Indian Penal Code under Sections 153A, 153B, 295A, 298, 505(1) and 505(2)<sup>25</sup> declares that word, spoken or written, or employing signs or any kind of visual representation that ‘promotes disharmony, enmity, hatred or ill-will’ or ‘offends’ or ‘insults’ on basis of religion, ethnicity, culture, language, region, caste, community, race etc., is a punishable offence. Following this, there are a plethora of laws for instance, The Representation of People Act<sup>26</sup>, Information Technology Act<sup>27</sup>, Unlawful Activities (Prevention) Act, 1967 and several others.<sup>28</sup> This essentially creates a tangled web of legal provisions dealing with one or the other form of hate speech which makes it nearly impossible to comprehend exactly what is that hate speech that is banned within the Indian jurisdiction. Broadly speaking, it is defined in terms of one, “concentrated expression of sectarian-communal ideology”<sup>29</sup> and second as “based on politics of exclusion”.<sup>30</sup> Thus, hate speech is defined in India in terms of the harm to the community at large rather than one which is focused on the violation of an individual’s right to freedom of speech and expression and the harm done unto her as result of hate speech. And such laws are also accorded constitutional protection by way of a ‘reasonable restriction’ under Article 19(2) of the

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<sup>24</sup> *Ibid.*

<sup>25</sup> The Indian Penal Code, 1860 (Act 45 of 1860).

<sup>26</sup> The Representation of People Act, 1951 (Act 43 of 1951), ss. 8, 123(3A), 125.

<sup>27</sup> Information Technology Act, 2000 (Act 21 of 2000), ss. 69, 69A.

<sup>28</sup> Some of them are : Protection of Civil Rights Act, 1955, s.7 ; Religious Institutions (Prevention of Misuse) Act, 1980, ss.3, 6 ; The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; The Cable Television Networks (Regulation) Act, 1995, ss.5, 6,11,12,16,17,19,20 ; The National Security Act, 1980; The Cinematographers Act, 1952, ss. 4, 5B, 7 ; related provisions in Code of Criminal Procedure, 1973, ss. 95,107,144,151,160

<sup>29</sup> Ram Puniyani, “Why Hate Speech?” *Tehelka*, March 27, 2009.

available at : [http://www.tehelka.com/story\\_main41.asp?filename=Ws040409Ram\\_Puniyani.asp](http://www.tehelka.com/story_main41.asp?filename=Ws040409Ram_Puniyani.asp) , (last visited on January 25, 2019)

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

Constitution of India<sup>31</sup>, on the fundamental right of a citizen to freedom of speech and expression.<sup>32</sup>

On the other hand, the incidents of hate speech and related hate crimes have only been on the rise.<sup>33</sup> Though the aim of hate speech laws is to ideally prevent hate speech altogether, they have not been very effective in this aspect and only limited success has been achieved in regulating hate speech in the country. This begs the introspection of our laws and their working and whether the plethora of laws have actually led to a situation of overcriminalisation of hate speech itself in the first place.

## II. A Case of Over-criminalisation of Speech

In 2015, Indian author Perumal Murugan in a dramatic and extremely emotional twist of events announced his literary “death” and withdrew his entire set of published works from public domain, vowing to never write again.<sup>34</sup> This came as result of the violent backlash he faced at the hands of religious and caste-based groups that claimed that his fifth novel titled “*Madhorubagan*” in Tamil or “One Part Woman” offended the religious sensitivities, insulted the Kailasanathar temple, Lord Shiva and female worshippers and appealed to prurient interest amongst other allegations.<sup>35</sup> The novel’s plot revolved around a couple, Kali and Ponna and their struggles with conceiving a child. The objections to the novel were mainly around the fictional portrayal of tradition of annual festival in Tiruchengode revering the Ardhanareeswarar Temple’s presiding deity. While the novel was published in 2010 to critical acclaim, the protests started years later with burning copies of the book culminating in police advising the author to leave his own home when all ‘peace-talks’ with the groups failed. He was forced to apologise and withdraw his books. Finally, when the matter reached the Madras High Court in 2016, the Bench was pleased to dismiss the allegations against the book and upheld the artistic liberty and expression of the author. It observed that freedom of speech and expression cannot be sacrificed and give into the demands of the mob so as to

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<sup>31</sup> The Constitution of India, art.19(2).

<sup>32</sup> The Constitution of India, art.19 (1)(a).

<sup>33</sup> Alison Saldanha, “2017 : A year of hate crimes in India: Number of violent incidents related to cows, religion is rising” , *First Post*, Dec. 28, 2017. Available at : <https://www.firstpost.com/india/2017-a-year-of-hate-crimes-in-india-number-of-violent-incidents-related-to-cows-religion-is-rising-4278751.html> ( last visited on January 25, 2019).

<sup>34</sup> Staff, “Author Perumal Murugan has died :Tamil writer withdraws all published work following protests”, *Scroll.in*, January 13, 2015. available at : <https://scroll.in/article/700217/author-perumal-murugan-has-died-tamil-writer-withdraws-all-published-work-following-protests> (last visited on January 25, 2019).

<sup>35</sup> *Ibid.*

maintain law and order.<sup>36</sup> It was only after this judgement in his favour did the author returned to writing.

The above is not the first nor the last in the line of cases that have sparked time and again the debate around the way our laws are built that completely ban, in effect, *any* kind of purported critical speech against religion, group, caste or belief. This poignant case brings to the fore fundamental questions on what is speech that is protected under the ambit of Article 19(1)(a)<sup>37</sup> of the Constitution and what becomes the cynosure of the criminal provisions of the law. Ultimately, this raises certain fundamental questions about the nature of our law itself. Upon closer look, such concerns are germane to the ongoing discussion on the scope and extent of criminalisation of speech.

Sanford Kadish<sup>38</sup> referred to the ‘overcriminalization’ phenomena in criminal law as using the law excessively to cover such conduct that should ideally not be the concern of legislature. In fact, it should be addressed under the ambit of “public policy objectives” rather than criminal law which is “poorly suited” to achieve the purported ends.<sup>39</sup> In fact, a host of academics today warn against expanding the scope of substantive criminal law in light of a “cost-benefit” analysis<sup>40</sup> that ultimately proves too burdensome on the criminal justice system and hence its use, unjustified.<sup>41</sup> Erik Luna specifically points out that the “overcriminalization phenomena” consists of “untenable offences, superfluous statutes, doctrines that overextend culpability crimes without jurisdictional authority, grossly disproportionate punishments and excessive or pretextual enforcement of violations.”<sup>42</sup> It aims to bring in, amongst other culpable behaviour, offences where “harm is merely threatened but the risk has not yet materialised”.<sup>43</sup> Most of the ‘speech’ related offences that criminalise various forms of speech have only burgeoned in scope “by prohibiting a myriad of crime prevention offences that target risk-creating speech”.<sup>44</sup> This holds true for the Indian context as well. It is well recognised that freedom of speech and expression under the

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<sup>36</sup>Gautam Bhatia, “Fault in our speech”, *The Hindu*, July 07, 2016.

available at : <https://www.thehindu.com/opinion/lead/perumal-murugan-book-controversy-and-madras-high-court/article14476037.ece> (last visited on January 25, 2019).

<sup>37</sup>The Constitution of India, art.19(1)(a) .

<sup>38</sup>Sanford H.Kadish, “The Crisis of Overcriminalization” 374 *The Annals of the American Academy of Political and Social Science, Combating Crime* 157 (1967).

<sup>39</sup>*Ibid.*

<sup>40</sup>Erik Luna, “The Overcriminalization Phenomenon” 54 *AM U. L. Rev.* 703 (2005).

<sup>41</sup>William J. Stuntz, “The Pathological Politics of Criminal Law” 100 *Mich. L. Rev.* 507 (2001).

<sup>42</sup>*Supra* note 39 at 716.

<sup>43</sup>Michal Buchhandler-Raphael, “Overcriminalizing Speech” 36 *Cardozo L. Rev.* 1670 (2015).

<sup>44</sup>*Id.* at 1671.

fundamental rights is not absolute and is subject to limitations itself listed in the Constitution. However, despite this, a plethora of offences can be found that impose further restrictions on speech (not only those related to hate speech) of individuals across the length and breadth of the legal landscape that is indicative of the ‘overcriminalisation of speech’ phenomena.<sup>45</sup> The fact that most of these offences are so broadly worded and vague only adds to the list of ailments that plague the existing criminal speech provisions. What we understand as overbreadth today has already been the cause of calling into question and subsequent declaration of statutes as ‘unconstitutional’ in various cases before the Supreme Court. This trinity of vagueness, broadness and the chilling effect in free speech cases have proved to be the undoing of speech-restrictive provisions of the Information and Technology Act, 2000.<sup>46</sup> Most of these speech-related offences in the Indian Penal Code mentioned previously within the legal framework have withstood the constitutional challenge on the basis of preserving “public order”. It is a matter of speculation that would the same laws be able to withstand the judicial scrutiny and muster pass if tested on the touchstone of today’s evolved standard of judging free speech cases that are a healthy mix of judicial borrowings from foreign jurisdictions that lean heavily in favour of individual liberty and freedom of speech.

Yet, the proliferation of ‘criminal speech’ provisions in criminal law seemingly continues unabated without any empirical evidence of its efficacy in actually combating the menace of harmful speech. Illustratively, the Law Commission of India in its report published in 2017 recommends further introducing new provisions within the penal code that specifically punish incitement to violence as well as discrimination.<sup>47</sup> This kind of a framework, therefore, has made the criminal law as the “first response” in curbing hate speech.<sup>48</sup> It stands in stark contrast to the principle of “alternative and least restrictive sanctions” which calls for employing such options for regulation that satisfy the government’s interest of banning a certain type of speech short of making the speech a subject of criminal law which should ideally be the “last resort”.<sup>49</sup>

### **III. Towards an Effective Response to Hate Speech**

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<sup>45</sup>Refer to list of hate speech provisions mentioned under the title “Hate speech law in India” in the preceding section.

<sup>46</sup>*Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

<sup>47</sup>*Supra* note 15.

<sup>48</sup>*Supra* note 43 at 1730.

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

The legal framework employs a variety of methods to curb hate speech in India. Primarily the law, as we have seen in the preceding section, makes it a crime to utter certain types of hate speech. This crime is punishable by imprisonment of varying durations, with or without fine. Most of these provisions are also cognizable as well as being non-bailable and non-compoundable. In effect, this makes the legal provisions very stringent with serious implications. Apart from this, as per the medium of propagation i.e. print, television or internet, hateful content is banned, censored or leads to shutdown of the host site. In case of print, the authorities under the criminal procedure code have power of seizure of the material in question as well.<sup>50</sup> Despite this elaborate framework of law and policy hate speech cases continue to grow. It has been opined that this growth is certainly not because the law is lax rather it is the faulty implementation of the law that needs to be closely examined.<sup>51</sup>

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

### ***Alternative Dispute Resolution of Hate Speech Cases***

Alternative dispute resolution proposes a paradigm shift in the way the legal system administers justice. It shifts the focus from court-centred formal legal proceedings to the settlement of the dispute between parties by way of negotiation, mediation, arbitration and/or conciliation. The importance of this approach for redressal of disputes cannot be

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<sup>50</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 95,96.

<sup>51</sup>National Law University Delhi, Report on Hate Speech Laws in India (April, 2018) .

available at : <https://www.latestlaws.com/wp-content/uploads/2018/05/NLUD-Report-on-Hate-Speech-Laws-in-India.pdf> (last visited on January 25, 2019)

overemphasised in light of the fact that it works in a time bound manner focused at arriving at settlement between parties as opposed to pursuing the matter in a court of law which are already overburdened with the load of cases pending for years, bound by procedural formalities.<sup>52</sup>

Various methods of alternative dispute resolution in context of criminal matters have been employed with success such as “victim-offender mediation, victim-offender panels, victim assistance programs, community crime prevention programs, community service, plea bargaining”<sup>53</sup> etc. in select jurisdictions worldwide. The administration of criminal justice stands to gain greatly from adopting alternate means of resolution in criminal matters. Firstly, it fulfils the ideal of providing restorative justice to the victims of crime by offering a chance of victim-offender reconciliation and begin the process of healing for the victim and expiation for the offender.<sup>54</sup> Secondly, the alternate dispute mechanism has the capacity to be modified as per the goals to be achieved and still continue to function within the form and conditions laid down by law. Thirdly, it is a viable method for the parties from financial point of view as the cost borne by the parties is significantly lower in comparison to the formal process of trial. Fourthly, the flexible procedure allows the parties to arrive at a settlement without suffering the time consuming of specific court proceedings.

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

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

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<sup>52</sup>Law Commission of India, 245<sup>th</sup> Report On Arrears And Backlog: Creating Additional Judicial (Wo)Manpower (July, 2014).

<sup>53</sup> United Nations Office On Drugs And Crime, Handbook On Restorative Justice Programmes (2006) available at : [https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf) (last visited on January 25,2019)

<sup>54</sup> *Ibid.*

laws of the various States. Incitement by speech on grounds of race, colour, descent, ethnic origins is an offence under the criminal code<sup>55</sup> amongst other laws which also include grounds such as religion, sexuality and homosexuality, disability, transgender and HIV/AIDS status as well.

For example, The Racial Discrimination Act<sup>56</sup> which is a federal law and the Anti-Discrimination Act,<sup>57</sup> of Tasmania proclaims as unlawful conduct that “offend, insult, humiliate or intimidate another person or group of people” on any of the specified grounds.<sup>58</sup> It sets up a mechanism wherein an aggrieved individual can lodge a complaint before the empowered Commission or Tribunal as per the law. The empowered body shall then proceed to conduct enquiry into the complaint lodged before it. In case the complaint is found to be valid upon investigation, the next step is calling for a conciliation conference.<sup>59</sup> This order for conciliation may also direct for conciliation of parties through other means of resolution and can be issued either before or after the inquiry has commenced. It is the aim of the conciliation conference to negotiate an agreement which is acceptable to the complainant. If parties agree to a resolution by conciliation, the commission may record the terms of the agreement.<sup>60</sup> This commission also decides upon the appropriate course of action to be pursued to correct the unlawful act committed. In case the alleged accused is found guilty of inciting hatred, the commission has the power to issue orders to desist from further like acts as well as order of redressal of any loss, injury or humiliation suffered by the complainant by the respondent’s act.<sup>61</sup> It may also order for compensation to be paid to the injured party if it thinks appropriate in the given facts and circumstances of the case. In addition, it may require for the accused to apologise to the victim and make any retractions that the commission may consider appropriate.<sup>62</sup> Depending on the nature of the unlawful act committed, this retraction may be asked to be made in public or private.

A study of the Australia’s civil hate speech laws concludes that though the number of cases dealt with under this mechanism is modest but it gains significance in light of the fact that the

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<sup>55</sup> The Criminal Code, 1913, ss.76-80H.

<sup>56</sup> The Racial Discrimination Act, 1975, ss.18B-18F.

<sup>57</sup> The Anti-Discrimination Act, 1998, s.17.

<sup>58</sup> The Anti-Discrimination Act, 1998, s.18C.

<sup>59</sup> The Anti-Discrimination Act, 1998, s.75.

<sup>60</sup> The Anti-Discrimination Act, 1998, s.94.

<sup>61</sup> The Anti-Discrimination Act, 1998, s.89.

<sup>62</sup> The Anti-Discrimination Act, 1998, s.92.

criminal hate speech laws are seldom invoked where civil remedy has been available.<sup>63</sup> The remedy of civil wrong as the prevalent and preferred form of recourse has resulted in the person's availability and willingness as member of the targeted group to "step up" and invoke the legislation. While this may present its own set of problems such as the law not being able to accord uniform protection to all the vulnerable communities that are targets of racism and prejudice but the study concludes that the fact that laws are there makes them feel less vulnerable. The statistics of report show that fewer than 200 complaints were registered. In the decade from 1990 to 2010 that averages to fewer than 4000 complaints. Out of these 2% complaints were the subject of binding determination by court whereas more than half were about common remedy of a court ordered apology or correction or removal of unlawful material. Damage order are rare and where made, the compensation amount is modest. No one has ever gone to jail.<sup>64</sup> These civil mechanisms are attempt to influence the behaviour of the hate speaker, by encouraging them to agree to desist or to apologise or if that fails, by imposing fines. They have provided a framework for direct community advocacy.<sup>65</sup>

The above stands in contrast to the approach of those jurisdictions that emphasize on criminal law like India. When it comes to adjudication of hate speech offences under the Indian criminal law framework, it is mired with time-consuming formalities of procedure. The criminal procedure code mandates that sanction for prosecution by the government is required.<sup>66</sup> The sanction is a threshold limitation on the referral of incidents for criminal prosecution. But this grant sanction is itself based on individual discretion of the official. Once the complaint is registered with the police, the guilt of the accused can only be adjudged by the court after a full-length trial. During trial, there is a heavy burden of proof for the parties to prove that the act had been done with the culpable state of mind directed at inciting hatred, enmity or aimed to offend any group or class of persons. This entire process is time consuming and might take years to conclude. Justice for the aggrieved parties in such cases is but a distant dream.

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<sup>63</sup> Katharine Gelber, "Reconceptualizing Counterspeech in Hate- Speech Policy (with a focus on Australia) in Michael Herz, Peter Molnar (eds.), *The Content and Context of Hate Speech : Rethinking Regulation and Responses* (Cambridge University Press, 2012).

<sup>64</sup> Luke McNamara, Katharine Gelber, "Explainer : How do Australia's laws on hate speech work in practice", *The Conversation*, May 9, 2014. available at : <https://theconversation.com/explainer-how-do-australias-laws-on-hate-speech-work-in-practice-26105> (last visited on January 25,2019).

<sup>65</sup> Katharine Gelber, Luke McNamara, "The Effects of Civil Hate Speech Laws : Lessons from Australia" 49(3) *Law and Society Review* 631-664 (2015).

<sup>66</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s.196.

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

### *Counterspeech*

Counterspeech is, simply put, a response to hateful speech which might alternately call for violence, promote hate or uses incendiary words to provoke or defame others. Counterspeech is a definitive and exacting answer to such speech and is solely aimed at undoing the damage wrought by the hate speech in the first place. On social media, it is understood as “crowd-sourced responses to extremist or hateful content,” that is used to “tone down the rhetoric” in cases of posts containing hate speech by way of a disagreement or agreement as posted by the users.<sup>67</sup> This responsive speech may take myriad forms depending upon the medium used to propagate hateful speech: it may be a direct answer in the form of true facts to a hateful message concocted out of a false claim or fake news; clarification of any dubious claims made or even using sarcasm, humour and cartoons, memes and caricatures to counter and defuse the tension that a hate message aims to promote.

But perhaps what is more important to highlight is the fact that the proponent of counterspeech can be anyone, even the victim herself. The victim may choose to respond to the hateful content in a positive manner and create an atmosphere of dialogue with the perpetrator rather than indulge in free-flying counter accusations at each other.

However, the format of the practice of counterspeech is like free verse : it can be a direct address between the victim and the speaker or it may engage the community or it could also be addressed to all and sundry, depending upon the unique facts and circumstances of each

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<sup>67</sup>Demos, Report on Counter-speech on Facebook (September, 2016).  
available at :file:///D:/Drive%20C/Desktop/PhD/Hate%20Speech/COUNTERSPEECH/Counter-speech-on-facebook-report%20Demos%20reports.pdf ( last visited on January 25,2019).

case. These formats may involve the victim or even common people wishing to set the record right or both can participate as well in support of each other. Counterspeech in this manner involves the parties personally in a dialogue in a language that both comprehend. While this makes it a more flexible and direct response, what is essential is that such speech “fills a purgative role, allowing a dissatisfied message recipient to ventilate his or her thoughts rather than engage in destructive content”<sup>68</sup> possessing the “potential to contribute to the vitality of society”<sup>69</sup>.

The power of counterspeech lies in the fact that if employed in the proper manner, it not only “tackles abusive, hateful and extremist content”<sup>70</sup> but also lays bare “hate, deceit, abuse, stereotypes”<sup>71</sup> while at the same time also giving “clarification, promoting counter narratives, counter values.”<sup>72</sup> The founding philosophy behind counterspeech is “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>73</sup>

The fault line, when it comes to application of counterspeech widely, lies in its as yet untested efficacy. There is still lack of quantifiable data to show that counterspeech works in cases involving the masses at large. However, it has resulted in positive outcomes in various pilot studies in select jurisdictions. Think tank, Demos undertook a two-month study of populist right wing pages from United Kingdom, France, Hungary and Italy on media platform Facebook.<sup>74</sup> Based on their monitoring of these pages some of their findings are highlighted below:<sup>75</sup>

- There was active interaction on these pages and content was not limited to simple text post but ‘links’, ‘photos’, ‘status’ and ‘video’.
- In the United Kingdom only, almost twenty-five thousand counterspeech comments were posted in response to extreme content wherein users were seen engaging in discussion in a constructive manner.

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<sup>68</sup>Robert D. Richards, Clay Calvert, “Counterspeech 2000: A New Look at the Old Remedy for Bad Speech”, 2000 *BYU L. Rev.* 585 (2000).

<sup>69</sup>*Joyce v. United States* 454 F.2d 971, 987 (D.C. Cir. 1971) (United States).

<sup>70</sup> Joseph Reagle, Counter Speech, available at : <https://reagle.org/joseph/2015/07/counter-speech.html> (last visited on January 25, 2019).

<sup>71</sup> *Ibid.*

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

<sup>73</sup>*Whitney v. California* 274 U.S. 357 (1927).

<sup>74</sup> Demos, Report on Counter-speech : Examining Content that Challenges Extremism Online (October, 2015). available at: <https://www.demos.co.uk/wp-content/uploads/2015/10/Counter-speech.pdf> (last visited on January 25, 2019).

<sup>75</sup> *Id.* at 11.

Dangerous speech project reported on the “peace propaganda” employed in Kenya during the national elections of 2013, the first elections in the country since 2007 which was a dark period.<sup>76</sup> The election results of 2007 were disputed and was followed by rampant attacks by divisive forces leading to more than 1,000 deaths and half million people displaced from their homes. As per reports, it was extremist and hateful speech by politicians that fuelled the mass violence.<sup>77</sup> As per Human Rights Watch, communal disputes and grievances again arose in the run up to the 2013 elections with more than 477 people killed due to communal violence during late 2012 and early 2013. Fortunately, the mass outbreak of violence like that of 2007 was avoided in 2013 owing largely to positive speech campaigns. These counter-hate campaigns involved a host of people and organisations from Kenyan celebrities, artists, soccer stars, journalists to even the clergy amongst others, all united in their appeal for unity and not give into divisive politics. The broadcasters in their reporting of the elections urged for peace and calm and minimised stories that could potentially “cause alarm or inflame Kenyans”.<sup>78</sup> Even soldiers of the Kenyan paramilitary force, who were earlier involved in curbing the dissenters with violence, made a music video dancing in their uniform and singing “let hatred not finish us... we forgive and love each other”.<sup>79</sup> These campaigns and a variety of inter-related factors helped counter inflammatory speech and defuse its effects which concluded in a relatively calm election of 2013 in Kenya. As per the report, it was unprecedented measures like these that propagated anti-violent counterspeech to check the hate speech and its corrosive effects that contributed majorly to tackle hate groups and their hateful agenda.<sup>80</sup>

Recently in India, as response to several incidents of mob-lynching, violence and persecution based on religious, racial or ethnic identities of the victims from various part of the country the #notinmyname or “Not In My Name” campaign was launched on social media.<sup>81</sup> This campaign started with the aim of collecting citizen support and countering the hate narrative

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<sup>76</sup> Dangerous Speech Project, *Countering Dangerous Speech to Prevent Mass Violence during Kenya’s 2013 Elections* (February 2014).  
available at: <https://dangerousspeech.org/countering-dangerous-speech-kenya-2013/> (last visited on January 25, 2019).

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.* at 3.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> Web Desk, “What is the not in my name protest?”, *Indian Express*, June 28, 2017.

available at : <https://indianexpress.com/article/what-is/what-is-the-not-in-my-name-protest-lynching-junaaid-khan-4725668/> (last visited on January 25, 2019) .

being propagated that resulted in those violent incidents. With the joining of several prominent public figures, the campaign went viral with public protests being staged across Indian cities deploring the acts of violence.<sup>82</sup> Overall, it was seen as a successful counter initiative and it continues to draw support from several quarters.

#### IV. Conclusion

The above are instances of how the challenge of countering hate speech has been approached outside of the existing legal framework. In both instances, it has seen success by direct and active engagement of the victims and the speakers, be it online or offline. Moreover, by bringing all the parties to the discussion table it may also begin the process of healing the harm caused by hateful speech. By resorting to alternate means of settlement in case of hate speech, it would provide both the parties a space for discussion and possible settlement outside of the formal rigours of the legal system. The outstanding characteristic of these approaches is that they do not impinge on freedom of speech and expression of an individual unlike the criminal anti-hate speech laws. In fact, in the case of counterspeech, it encourages more positive speech in response to speech invoking hate or violence. In this way, it does not act as a restriction on free flow of views in the “marketplace of ideas”<sup>83</sup> in that are to be upheld as sacrosanct in today’s liberal democracies.

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<sup>82</sup> Niharika Lal, “#Notinmyname: Celebrities join protesters in Delhi, Mumbai”, *Times of India*, April 17, 2018, available at : <https://timesofindia.indiatimes.com/city/delhi/notinmyname-celebrities-join-protesters-in-delhi-mumbai/articleshow/63786171.cms> (last visited on January 25, 2019).

<sup>83</sup> Justice Oliver Wendell Holmes of the United States Supreme Court famously used these words in the case of *Abrams v. United States* 250 U.S. 616 (1919) stating that for the attainment of ultimate good, an idea needs to be put out into the market exposed to market forces. In the competitive environment of the market, if that idea is accepted after much debate and deliberation, then it is the best version of truth that there is. This doctrine forms the underlying principle for freedom of speech and expression in modern liberal democracies.