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Preliminary Findings on Online Hate Speech and the Law in India

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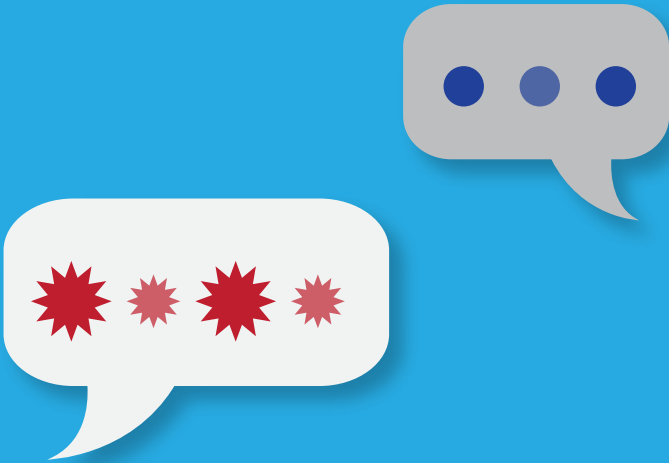
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Hate Speech in India

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PRELIMINARY FINDINGS ON ONLINE HATE SPEECH AND THE LAW IN INDIA

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ABOUT THE CENTER FOR COMMUNICATION GOVERNANCE AT NLU DELHI

The Centre for Communication Governance (CCG) was established in 2013 by National Law University, Delhi to ensure that Indian legal education establishments engage more meaningfully with information law and policy, and contribute to improved governance and policy making. CCG is dedicated to working on the information law and policy and seeks to embed human rights and good governance within communication policy and protect digital rights through rigorous academic research and capacity building. For more information please visit our website at <http://www.ccgdelhi.org>.

ABOUT THE HARMFUL SPEECH ONLINE PROJECT

The Berkman Klein Center for Internet & Society has launched a research, policy analysis, and network building effort devoted to the study of harmful speech, in close collaboration with the Center for Communication Governance at National Law University in New Delhi, the Digitally Connected network, and in conjunction with the Global Network of Internet & Society Centers. This effort aims to develop research methods and protocols to enable and support robust cross-country comparisons; study and document country experiences, including the policies and practices of governments and private companies, as well as civil society initiatives and responses; and build and expand research, advocacy, and support networks. For more information, please visit <https://cyber.harvard.edu/research/harmfulspeech>.

INTRODUCTION

During the 2013 Muzaffarnagar communal riots, in which over sixty people died and thousands were displaced, social media was reported to have played a significant role in spreading rumors and propaganda.¹ In this context, an incendiary video of two men being beaten to death, described (incorrectly) as a video of Hindus being lynched by a Muslim mob was circulated on the Internet.² Similarly, a Muslim man was killed by a mob in Pune following the circulation of morphed images denigrating iconic leaders attributed to him. These images were circulated on Facebook and through Internet messaging applications on smartphones.³

State governments in India have taken to disabling Internet services, especially mobile data services, in response to threats of violence. For example, in June 2016, the Indian government shut down the Internet⁴ in the state of Haryana, fearing potential violence arising from ongoing protests. Internet shutdowns are becoming commonplace – there have been thirty-nine incidents since January 2015.⁵ The alleged reasons for the shutdowns ranged from apprehensions about provocative social media rumors related to the recovery of cow carcasses⁶ to the preven-

tion of cheating during a public government-administered exam.⁷ Many of these justifications offered for Internet shutdowns fall within the umbrella of online hate speech or incitement to violence.⁸

Hate speech is a serious concern in the Republic of India. However, Indian law does not use the phrase “hate speech.” Different forms of what may arguably be called hate speech are covered in different ways by various Indian statutes.

This briefing paper outlines preliminary issues that we noted while conducting a detailed study of hate speech laws in India.⁹ It teases out some of the major concerns that arise in the context of both online and offline hate speech, especially speech as potential incitement to violence. Our upcoming detailed report covers a wider range of what might be called hate speech, and extends to speech that may not act as potential incitement to violence. The report offers a more nuanced and detailed picture of the current state of affairs, as well as the conclusions drawn and recommendations made.¹⁰

1 *Social media fanning communal intolerance, misuse needs checking*: Wajahat Habibullah, DNA India, Jan. 13, 2014, <http://www.dnaindia.com/india/report-social-media-fanning-communal-intolerance-misuse-needs-checking-wajahat-habibullah-1950176>.

2 Sreenivasan Jain, *The Mystery of Kawwal: Were Muzaffarnagar riots based on distortion of facts?*, NDTV, Sept. 14, 2013, <http://www.ndtv.com/india-news/the-mystery-of-kawwal-were-muzaffarnagar-riots-based-on-distortion-of-facts-534608>.

3 Amruta Byatnal, *Techie dies after attack by Hindutva group*, The Hindu, June 4, 2014, <http://www.thehindu.com/news/national/other-states/techie-dies-after-attack-by-hindutva-group/article6082942.ece>.

4 Anand Kumar Patel, *Haryana On Guard As Jats Begin Fresh Agitation Today*, NDTV, June 5, 2016, <http://www.ndtv.com/india-news/haryana-on-guard-as-jats-begin-fresh-agitation-today-1415582>.

5 Sarvejit Singh, *Incidents of Internet Shutdowns in India (2012 onwards)*, Centre for Communication Governance at NLU Delhi, https://drive.google.com/open?id=0BBycAZd9M5_7NOExCRnQ3Q1pqcm8.

6 Cow slaughter is illegal in India and many members

of the Hindu community hold the cow sacred. See Arun Sharma, *Mobile internet services cut to calm tension in Udhampur*, THE INDIAN EXPRESS, Oct. 9, 2015, <http://indianexpress.com/article/india/india-news-india/mobile-internet-services-cut-in-jammu-after-recovery-of-cows-carcasses/>.

7 *4-hour ban on mobile internet in state today*, Times of India, Feb. 28, 2016, <http://timesofindia.indiatimes.com/tech/mobiles/4-hour-ban-on-mobile-internet-in-state-today/articleshow/51175590.cms>.

8 Any discussion of hate speech must begin with acknowledging that there is no clear definition of hate speech. There is plenty of theoretical material on the many approaches to defining hate speech, and the relative merits and demerits of each approach. See Andrew F. Sellers, *Studying Hate Speech Online: Definitions, Assumptions, Continuing Questions, And Challenges*, for a discussion of definitions of hate speech, especially Susan Benesch’s framework on isolating incitement to mass-violence; see also Susan Benesch, *Proposed Guidelines for Dangerous Speech*, *Dangerous Speech Project* (Feb. 23, 2013), <http://dangerousspeech.org/guidelines/>.

9 Forthcoming report on hate speech law in India from CCG at NLU Delhi.

10 Forthcoming report on hate speech law in India from CCG at NLU Delhi.

We begin this paper by discussing hate speech as incitement to violence in India, and then move on to outlining the current legal framework used to cope with hate speech. Since the legal framework has led to the chilling of legitimate speech, this briefing paper discusses the tension between freedom of expression and hate speech laws.¹¹ Further, it examines the impact of hate speech law, followed by strategies other than criminalization that are used to respond to online hate speech in India. We focus on state-led approaches as opposed to non-state actors' efforts at tackling the problem of hate speech.

HATE SPEECH AND VIOLENCE IN INDIA

It is important to understand why Indian policymakers worry about hate speech triggering the eruption of large-scale violence. In 2015, there were 751 recorded incidents of communal violence in India, in which 97 people were killed and 2,264 people injured.¹² These figures are clearly a low estimate, given that states like Manipur and Jammu & Kashmir, commonly known to have regular outbreaks of violence, report an improbably negligible number of incidents to the government.¹³ In addition, the reported number of incidents of caste-based violence cases is also rather high.¹⁴

Therefore, it is unsurprising that many people, including influential government representatives, have expressed concerns about hate speech. For example, in March 2016, the Election Commission of India reportedly discussed political "hate speech" and "provocative adver-

tisements" in a closed-door meeting.¹⁵ At this meeting, the Chief Election Commissioner Nasim Zaidi allegedly said:

...this [hate speech] is one of the issue[s] that we had flagged for the ongoing assembly polls in five states. All political parties have supported and have suggested and have committed that they will ensure that the upcoming elections are conducted with highest standards and decency and with decorum. The Commission is assured by all these political parties. We have also urged and appealed to them.¹⁶

Local and state police frequently attribute communal violence to the malicious effects of online hate speech. For instance, in March 2015, the police drew a causal link between a case of mob-lynching in Dimapur and hateful content on two blogs, arguing that the online content instigated the mob.¹⁷ Similarly, the police have attributed multiple communal clashes in Uttar Pradesh to "objectionable" Facebook posts, and have pointed to the ability of social media to fan hatred.¹⁸ This concern might explain why the Ahmedabad police employed cyber experts to man police control rooms to control the spread of rumors when the Rath Yatra, an important Hindu ritual, took place at the same time as Eid.¹⁹

11 See, for instance, Jayshree Bajoria, *How India's archaic laws have a chilling effect on dissent*, Scroll.in, Mar. 24, 2016, <http://scroll.in/article/808641/how-indias-archaic-laws-have-a-chilling-effect-on-dissent>.

12 Government of India, Ministry of Home Affairs, Rajya Sabha, Unstarred Question No. 46, p. 3, Feb. 24, 2016.

13 Manipur recorded 0 incidents in 2015, while Jammu & Kashmir recorded merely 4. See *Ibid*.

14 In 2006, there were 32,407 reported incidents of caste-based violence across India barring Jammu & Kashmir. See Government of India, Ministry of Home Affairs, Rajya Sabha, Unstarred Question No. 4123, May 5, 2008, <http://164.100.47.234/question/annex/213/Au4123.htm>.

15 Press Trust of India, *EC takes up issue of hate speech, provocative ads with parties*, Indian Express, Mar. 19, 2016, <http://indianexpress.com/article/india/india-news-india/election-commission-nasim-zaidi-hate-speech-provocative-ads/>.

16 *Ibid*.

17 Smita Nair, *In Nagaland lynch mob: airline staffer, ex-sepoy, auto driver and teachers*, INDIAN EXPRESS, Mar. 13, 2015, <http://indianexpress.com/article/india/india-others/in-lynch-mob-airline-staffer-ex-sepoy-auto-driver-and-teachers/>.

18 Ratan Mani Lal, *Rising communal clashes in UP: Social media is to be blamed, says police*, FIRSTPOST, July 1, 2015, <http://www.firstpost.com/india/rising-communal-clashes-social-media-blamed-says-police-2321414.html>.

19 Ujjwala Nayudu, *Cyber experts to monitor social media, check rumour mongering*, Indian Express, Jul. 17, 2015, <http://indianexpress.com/article/cities/ahmedabad/cyber-experts-to-monitor-social-media-check-rumour-mongering/>.

LEGAL FRAMEWORK ON HATE SPEECH IN INDIA

A patchwork of laws governs hate speech in India. Although the term “hate speech” is not actually used, several statutes which criminalize speech conceivably fall under the umbrella of hate speech.

The bulk of hate speech is regulated by the Indian Penal Code (IPC), under which several criminal complaints about hate speech are filed. However, other statutes, such as the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act) of 1989, also criminalize certain categories of hate speech. Medium-specific regulation of speech takes place through statutes like the Cinematograph Act of 1952 and the Cable TV Networks (Regulation) Act of 1995 (Cable TV Act). In addition to the substantive law is procedural law like the Criminal Procedure code, which is used to pre-censor certain categories of speech. Other laws such as the Customs Act of 1962 may also be used to prevent the circulation of publications.

The parts of the IPC that describe speech that falls within the category of hate speech include Sections 153A, 295, 295A, 298, and 505, all of which have their origins dating back to the colonial pre-Constitution era. Some parts of the IPC, like Section 295A, were added in response to particular incidents, whereas other parts of the IPC, like Section 153A, have been amended many times.²⁰ The hate speech law contained within the IPC has been subject to multiple constitutional challenges²¹ and has survived, albeit with certain qualifications. For example, prosecutions under Section 295A will be legitimate only if speech has a “calculated tendency” to

breach public order.²²

There are special statutes that criminalize hate speech directed at certain groups. For example, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act) of 1989 deals with speech directed at people from specific caste groups that have a history of facing discrimination and violence. Chapter 2, Section 3(1)(x) of the statute criminalizes intentional “insults ... with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view.”²³

In addition to statutes like the IPC and the Prevention of Atrocities Act that criminalize speech, procedural law contained within the Code of Criminal Procedure (CrPC) is very influential. The CrPC uses methods that may be described as pre-censorship or prior restraint.²⁴ For example, Section 95 of the CrPC can be used to prohibit the circulation of written material (books, newspapers, etc.) that contains hate speech as defined under specified parts of the IPC.²⁵ This law was used by the Nagaland government to ban Dan Brown’s book *Da Vinci Code* three years

²² *Ramji Lal Modi v. State of UP*, 1957 SCR 860.

²³ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ch.2, 3(1) x.

²⁴ See Section 95, The Code of Criminal Procedure, 1973.

²⁵ These specified parts are Sections 153A, 295A, 124A, and 153B. Section 124A of the IPC in relevant part states:

“Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.”

Section 153B in relevant part states:

“Whoever, by words either spoken or written or by signs or by visible representations or otherwise, makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India ... shall be punished with imprisonment which may extend to three years, or with fine, or with both.”

²⁰ See Neeti Nair, *Beyond the ‘Communal’ 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code*, 50(3) INDIAN ECONOMIC SOCIAL HISTORY REVIEW 317 (2013).

²¹ Section 153A has been challenged several times, but most famously in the Bombay High Court in *Gopal Vinayak Godse v. Union of India & Ors.*, AIR 1971 Bom 56. Section 295A has been challenged in the Supreme Court in *Ramji Lal Modi v. State of UP*, 1957 SCR 860. Section 505 has been challenged in *Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769.

after its release.²⁶ The same law was used by the Central Government to ban *The True Furqan* in 2005, following claims that it mocked Islam.²⁷

Medium-specific regulations are also used to regulate speech. The Central Government has issued guidelines under Section 5B(2) of the Cinematograph Act of 1952, including a guideline that regulates “visuals or words contemptuous of racial, religious or other groups,” and the Central Board of Film Censorship is empowered as a statutory body to partially censor films falling short of this standard.²⁸ Separately, the Cable TV Act has a program code under the Cable Television Networks Rules of 1994 that prohibits the airing of content which “attacks religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes”²⁹ and “is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes.”³⁰

Adding to the patchwork of law governing hate speech in India are regulations such as Indian election laws that cover “promoting enmity or hatred” during elections.³¹ Election laws target corrupt practices and promotion of enmity among classes in connection with elections.³² Candidates may be disqualified from running for office if they are found violating such laws.

The laws described above each have their own history and priorities, ranging from maintenance

of public order to prevention of discrimination. Therefore, it is difficult to craft a taxonomy that adequately describes the many ways in which Indian law regulates hate speech. This is one of the questions that will need careful consideration each time an effort is made at mapping or describing hate speech law in India.

FREEDOM OF EXPRESSION AND HATE SPEECH LAWS

Indian hate speech law has been criticized for encroaching on freedom of expression. For example, a recent Human Rights Watch report³³ says that Indian hate speech laws do not meet the international freedom of expression standards set by the International Covenant on Civil and Political Rights.³⁴ The report argues that broadly defined hate speech offenses in India allow for “arbitrary and abusive application of the law and create an unacceptable chill on the discussion of issues relating to race and religion.”³⁵

The part of the Indian Constitution that arguably enables hate speech law, despite the constitutionally guaranteed right to freedom of expression, is the Article 19(2) “public order” exception to the right to freedom of expression.³⁶ This exception was added to the Constitution in 1951 through the first amendment of the Indian Constitution.³⁷ It has guarded much of the law criminalizing or pre-censoring hate speech, discussed in the previous section, against constitutional chal-

26 *Nagaland awakes, bans bestseller, The Telegraph*, May 24, 2006, http://www.telegraphindia.com/1060524/asp/nation/story_6261949.asp.

27 Hasan Suroor, *You can't read this book*, *The Hindu*, Mar. 4, 2012, <http://www.thehindu.com/books/you-cant-read-this-book/article2953626.ece>. See Central Board of Excise and Customs, Notification No. 78 /2005-Customs (N.T.), <http://web.archive.org/web/20150424042524/http://www.cbec.gov.in/customs/cs-act/notifications/notfns-2k5/csnt78-2k5.htm>.

28 Section 5B(2), Cinematograph Act, 1952.

29 Rule 6, The Cable Television Network (Regulation) Rules, 1994.

30 Rule 6, The Cable Television Network (Regulation) Rules, 1994.

31 Sections 123(3A) and 125, The Representation of the People Act, 1951.

32 *Ibid.*

33 HUMAN RIGHTS WATCH, *STIFLING DISSENT: THE CRIMINALIZATION OF PEACEFUL EXPRESSION IN INDIA* (2016).

34 *Id.*, 63.

35 *Id.*, 64.

36 Article 19(1)(a) of the Constitution states: “19. (1) All citizens shall have the right — (a) to freedom of speech and expression; ...”

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

37 The Constitution (First Amendment) Act, 1951.

lenges. We discuss constitutional challenges of hate speech law here in order to outline the principles used to decide whether or not it encroaches on the right to freedom of expression.

**

In 1957, the Supreme Court declared in *Ramji Lal Modi v. State of UP* that Section 295A of the IPC was constitutional, specifically because it fell within the “public order” exception to the right to freedom of expression.³⁸ Section 295A punishes “insults [to] or attempts to insult the religion or the religious beliefs” of a certain class of people “with deliberate and malicious intention of outraging [their] religious feelings.” In *Ramji Lal Modi v. State of UP*, Section 295A was challenged on the grounds of being overly broad, since the law criminalized hurting religious sentiments irrespective of whether it caused public disorder.³⁹ The Court found that Section 295A regulated those instances of speech hurting religious sentiments that were specifically carried out with the *intention* of outraging the beliefs and feelings of a certain group.⁴⁰ This distinction was used to argue that the tendency of such intentional insult was to cause situations of public disorder.⁴¹ The Court interpreted the phrase “in the interests of” in Article 19(2) to mean that the “public order” exception was wide, extending beyond regulation of actual instances of public disorder to incidents with a tendency to cause public disorder.⁴² The Court therefore interpreted the “public order” exception to be very broad, and ruled that Section 295A of the IPC was a reasonable restriction under Article 19(2).

The “public order” exception was used differently by the Supreme Court in the 1960 case of *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*.⁴³ Here, the Court noted that “public order” was one part of similar restrictions in Article 19(2) like “security of the State,” and was therefore limited to a degree less than “national upheavals, such as revolution, civil

strife, war”⁴⁴ The Court found public order to be “synonymous with public peace, safety and tranquility.”⁴⁵ It interpreted the phrase “interest of public order” to mean that there must be an “intimate connection between the Act and the public order sought to be maintained by the Act.”⁴⁶ Interestingly, the Court clarified that *Ramji Lal Modi* must not be read “to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity.”⁴⁷

The Court recently read “public order” rather narrowly in the landmark case of *Shreya Singhal*.⁴⁸ In determining whether the “public order” exception applies, the Court stated that it must ask itself the question: “does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed?”⁴⁹ Central to the Court’s reasoning in this case is the distinction among discussion, advocacy, and incitement. The Court refers to the first two as being “at the heart of Article 19(1) [a],”⁵⁰ meaning that they would be at the core of the right to freedom of expression. According to the Court, “[i]t is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.”⁵¹ The Supreme Court went on to find Section 66A of the Information Technology Act overly broad and vague, and held that it infringed the right to freedom of expression. Section 66A criminalized a wide range of speech, including speech that is “grossly offensive” or has “menacing character.” The law has been routinely abused to target satire and online dissent in any form.⁵²

It is apparent that Indian hate speech laws have

³⁸ *Ramji Lal Modi v. State of UP*, 1957 SCR 860.

³⁹ *Ibid.*

⁴⁰ *Id.*, ¶9.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*, 1960 (2) SCR 821.

⁴⁴ *Id.*, ¶18.

⁴⁵ *Id.*, ¶11.

⁴⁶ *Id.*, ¶12.

⁴⁷ *Ibid.*

⁴⁸ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

⁴⁹ *Id.* ¶38.

⁵⁰ *Id.*, ¶13.

⁵¹ *Ibid.*

⁵² A summary of famous instances where Section 66A was abused can be found in Nirmalya Dutta, *Section 66A quashed: 10 cases where the law was misused!*, India.com, Mar. 24, 2015, <http://www.india.com/top-n/section-66a-quashed-10-cases-where-the-law-was-misused-328764/>.

an uneasy relationship with international freedom of expression norms and with Indian constitutional principles. While constitutional jurisprudence does clarify the threshold and standards, Indian jurisprudence on this question is not clear or uniform. Upendra Baxi wrote provocatively of the Indian Supreme Court, saying that it exhibits a “growing lack of precedent-consciousness.”⁵³ Although the Supreme Court cases discussing freedom of expression and public order do cite and discuss each other, it remains difficult to say with any certainty how the constitutional standard might apply to executive action taken while implementing hate speech law, or to a new hate speech statute.

IMPACT OF HATE SPEECH LAW

While policymakers and other state actors seem focused on the potential violent effects of certain kinds of hate speech, litigants have expressed contradictory concerns about hate speech in two recent cases before the Supreme Court of India. Some citizens have petitioned the Supreme Court for increased regulation of hate speech while others advocate for the decriminalization of hate speech. One resolved case, *Pravasi Bhalai Sangathan v. Union of India & Others*,⁵⁴ sought stricter regulation of hate speech since the petitioners saw existing legal mechanisms as inadequate. The Court referred the issues raised in this petition to the Law Commission of India for its consideration.

The other case, *Subramanian Swamy v. Union of India and Others*,⁵⁵ seeks a remedy that might erode the legal framework for hate speech. This is a case in which the petitioner has asked the Court to find Sections 153A and 295A unconstitutional. Section 153A criminalizes the promotion of “disharmony or feelings of enmity, hatred or ill-will” between different communities,⁵⁶

while Section 295A criminalizes “insults” to religion.⁵⁷ This second case remains pending before the Supreme Court.

Together, these two cases illustrate the complicated relationship between hate speech laws and Article 19(1)(a) of the Indian Constitution. It is easier to understand why this is so by taking a closer look at the impact of Indian hate speech law. We use two examples below to illustrate contradictions within the system. The first concerns politician Varun Gandhi and his speech in the context of the general elections, and the second focuses on creative, critical speech by artists and authors.

Politician Varun Gandhi gave a widely-reported provocative speech that called for violent action during the 2009 General Elections, but he managed to avoid being convicted for it.⁵⁸ According to news reports, this was achieved by allegedly “silencing” the system and by discrediting or otherwise eliminating video recordings and eighty witnesses.⁵⁹ This would make Varun Gandhi’s case a brazen collapse of the criminal justice system. Despite broadly worded hate speech law that would clearly extend to the speech under question, the legal system

promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities shall be punished with imprisonment for three years, or with fine, or with both.”

- 57 Section 295A in relevant part states: “Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”
- 58 Rahul Kotiyal & Atul Chaurasia, *How Varun Gandhi silenced the system*, Tehelka, May 25, 2013, <http://www.tehelka.com/2013/05/how-varun-gandhi-silenced-the-system/>.
- 59 Rahul Kotiyal & Atul Chaurasia, *How Varun Gandhi silenced the system*, Tehelka, May 25, 2013, <http://www.tehelka.com/2013/05/how-varun-gandhi-silenced-the-system/>.

53 See Upendra Baxi, *On How Not to Judge the Judges: Towards an evaluation of Judicial Role*, 26 JILI 211 (1983).

54 *Pravasi Bhalai Sangathan v. Union of India & Ors.*, (2014) 11 SCC 477.

55 *Subramanian Swamy v. Union of India & Ors.*, Writ Petition (Criminal) 69 of 2015, Supreme Court of India (ongoing).

56 Section 153A(1)(a) of the IPC in relevant part states that: “Whoever by words, either spoken or written, or by signs or by visible representations or otherwise,

failed when confronted with a powerful political figure.

The same broadly worded laws have been used to harass artists in the context of constitutionally protected speech. MF Husain, one of India's greatest artists, was forced to leave the country after dozens of cases were filed against his works in remotely located trial courts across the country.⁶⁰ Similarly, Wendy Doniger's book *The Hindus: An Alternative History*, resulted in a flurry of legal notices and a civil suit filed by Hindu nationalist group Shiksha Bachao Andolan. Penguin Books India agreed to a settlement which included the withdrawal of the publication of the book.⁶¹ Here, even though no adjudication actually took place, the threat of prosecution led to settlement and a chilling effect on speech.

Although the right to freedom of expression is clearly curtailed by Indian hate speech law, hate speech remains a serious concern, especially after new information technologies have transformed the speed at which incitement to violence can spread.⁶² Both concerns seem well founded – that not enough is being done to address hate speech and that hate speech law is affecting freedom of expression in unacceptable ways.

RESPONSES TO ONLINE HATE SPEECH

State and other actors have been using a number of strategies to deal with online hate speech. Certain features of online speech such as anonymity and jurisdictional issues make it difficult for law enforcement or gatekeepers to identify a speaker early on.⁶³ This makes criminal prosecution less effective as the primary response.

Therefore, other strategies such as social media labs, helplines like the one set up by the Mumbai Police,⁶⁴ Internet shutdowns, and counter-speech are employed as a result.

Social media labs are being set up across the country to monitor suspicious online activities, particularly around hate speech. Such labs already exist in Mumbai⁶⁵ and Pune.⁶⁶ In the city of Lucknow, the local police have launched a WhatsApp helpline to enable people to report hate messages to law enforcement authorities.⁶⁷ These are creative, out-of-the box solutions that law enforcement agencies are using to work around the jurisdictional and procedural issues that arise while dealing with social media companies headquartered in other countries.⁶⁸

As mentioned previously, multiple Indian states have cut citizens' access to the Internet, including broadband, mobile, or both when faced with a public order problem that may be exacerbated by rumors or incitement to violence. For example, in August 2015, the Gujarat state government shut down mobile Internet access to curb the increasing violence taking place as a result of agitation by members of the Patidar community who were demanding certain affirmative

60 J. Venkatesan, *Husain fought legal battle against vandals, puritans*, *The Hindu*, Jun. 10, 2011, <http://www.thehindu.com/news/national/husain-fought-legal-battle-against-vandals-puritans/article2091052.ece>.

61 Anita Joshua, *No country for free speech, says Penguin*, *The Hindu*, Feb. 14, 2014, <http://www.thehindu.com/news/national/no-country-for-free-speech-says-penguin/article5688586.ece>.

62 See Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48(3) *Virginia Journal of International Law* 485, 504-505 (2008).

63 Danielle Citron, *Hate Crimes in Cyberspace* (2014).

64 *Helpline to report offensive posts*, *The Free Press Journal*, Jun. 13, 2014, <http://www.freepress-journal.in/mumbai/helpline-to-report-offensive-posts/383695>.

65 *Mumbai gets country's first 'Social Media Lab'*, *The Hindu*, Mar. 17, 2013, <http://www.thehindu.com/news/national/mumbai-gets-countrys-first-social-media-lab/article4516705.ece>

66 Vivek Pai, *Pune Police Social Media Lab to monitor offensive posts and hate speech*, *Medianama*, Mar. 30, 2016, <http://www.medianama.com/2016/03/223-pune-police-social-media-lab/>

67 *Ibid.*

68 In UP for instance, a "false story" about a khap panchayat ordering gang rapes was "busted" through a police managed social media lab. According to one police official, "Rather than appealing to the social media company for takedowns - an onerous process, and one where provocations are often difficult to explain - it is easier to find and deal with the source of the content." Amulya Gopalakrishnan, *Dadri re-opens debate on online hate speech*, *Times of India*, Oct. 9, 2015, <http://timesofindia.indiatimes.com/india/Dadri-reopens-debate-on-online-hate-speech/articleshow/49281467.cms>.

action measures.⁶⁹ Although the shutdown was arguably imposed for an unnecessarily long period of time,⁷⁰ it was intended to prevent any incitement or rumor-mongering among the protestors.⁷¹ Similarly, mobile Internet access was shut down in Haryana in February 2016, when the Jat community's agitations for reservations turned violent.⁷² The state government, with the power of Section 144 of the CrPC, turned the Internet off for over twelve days.⁷³ Such long-term shutdowns affect businesses, especially start-ups and small and medium enterprises that rely exclusively on online business models for their survival. In the wake of the week-long shutdown in Gujarat, several corporate leaders spoke out against the state government's use of this strategy as an effective method of curbing public

disorder while retaining commercial interests.⁷⁴

Internet shutdowns are ordered using very broadly worded procedural law contained within Section 144 of the CrPC⁷⁵, which empowers

69 Mugdha Variyar, *Gujarat Bandh: WhatsApp and Mobile Internet Suspended as Hardik Patel Rally Turns Violent*, August 26, 2015, International Business Times, <http://www.ibtimes.co.in/gujarat-bandh-whatsapp-mobile-internet-suspended-hardik-patel-rally-turns-violent-644221>.

70 Total internet shutdown was observed in the state for close to seven days. See, *Mobile internet ban ends; Ahmedabad, Surat last out*, The Indian Express, Sept. 2, 2015, <http://indianexpress.com/article/india/india-others/mobile-internet-ban-ends-ahmedabad-surat-last-out/>.

71 *Mobile Internet Was Banned During Patel Agitation to Stop Rumours: Gujarat Govt*, Outlook, Sept. 10, 2015, <http://www.outlookindia.com/newswire/story/mobile-internet-was-banned-during-patel-agitation-to-stop-rumours-gujarat-govt/912532>; Sakshita Khosla, *Patel community agitation: WhatsApp, internet, mobile services blocked by Gujarat government after riots in parts of state*, India.com, Aug. 26, 2015, <http://www.india.com/news/india/patel-community-agitation-gujarat-government-bans-mobile-internet-for-63-million-citizens-520564/>.

72 *Jat reservation: Mobile internet services suspended in several Haryana districts*, Indian Express, Mar. 18, 2016, <http://indianexpress.com/article/india/india-news-india/jat-reservation-agitation-mobile-internet-haryana/#sthash.p3FcViLn.dpuf>.

73 *Jat quota violence: Mobile internet blocked in Rohtak, CM Khattar calls all-party meet*, DNA India, Feb. 19, 2016, <http://www.dnaindia.com/india/report-jat-quota-row-mobile-internet-blocked-in-rohtak-cm-khattar-calls-all-party-meet-2179449>; *Ban on mobile Internet, SMS lifted in Sonipat*, Times of India, Mar. 1, 2016, <http://timesofindia.indiatimes.com/india/Ban-on-mobile-Internet-SMS-lifted-in-Sonipat/article-show/51212719.cms>.

74 *Gujarat mobile internet ban: business takes a hit*, The Indian Express, Aug. 29, 2015, <http://indianexpress.com/article/cities/ahmedabad/mobile-internet-ban-business-takes-a-hit-2/>.

75 Section 144 of the CrPC states:

144. Power to issue order in urgent cases of nuisance or apprehended danger

(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area

(4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso

the government to undertake extraordinary measures in urgent circumstances to order such shutdowns. This is a dangerous form of prior restraint that affects all the speech in the area within which a shutdown is ordered, and it comes with inadequate procedural safeguards that might narrow its application. The previously referenced example where mobile Internet access was cut off for fear of use of unfair means in a public examination helps to illustrate this point.⁷⁶

Other less speech-restrictive strategies are also used by state actors to respond to hate speech. For example, the police often use counter-speech in the face of rumors and incitement to violence by sending out credible, reassuring messages to citizens. One example of this was the police response to the small-scale violence that broke out in January 2015 in Mumbai among people of different religions.⁷⁷ Anticipating that the clashes might result in large-scale communal violence, the Mumbai police sent mobile text messages to people across the city advising them to not believe the rumors in circulation.⁷⁸ As referenced earlier, during the infamous Muzzafarnagar riots of 2013, it was observed that one video was being circulated extensively to spread hatred

and incite people to violence.⁷⁹ Although the video was of an unrelated incident that took place years ago in Pakistan, it was misrepresented as a contemporary incident involving the local community.⁸⁰ The police sent text messages to people informing them that the video was false and asking them to keep calm.⁸¹

Counter-speech is a strategy used effectively by non-governmental actors as well. During the recent Jat quota agitations in Haryana, popular political leader Yogendra Yadav appealed for peace and solution through dialogue.⁸² He also asked citizens to not believe online rumors.⁸³ Similarly, celebrities from the Indian film industry spoke up asking citizens to maintain peace in advance of the controversial communally charged *Babri Masjid* judicial verdict which dealt with a dispute over a religious site that triggered multiple rounds of communal violence and resulted in many deaths.⁸⁴ Leaders of various communities and political leaders also did the same.⁸⁵

to sub-section (4)

(7) Where an application under sub-section (5), or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing

76 To beat exam cheats, Gujarat to block mobile internet today, *TIMES OF INDIA*, Feb. 28, 2016, <http://timesofindia.indiatimes.com/india/To-beat-exam-cheats-Gujarat-to-block-mobile-internet-today/articleshow/51173461.cms?from=mdr>.

77 See Mateen Hafeez, *Lalbaug violence: Police counter rumours by sending 50 lakh SMSes*, *THE TIMES OF INDIA*, Jan. 6, 2015, <http://timesofindia.indiatimes.com/city/mumbai/Lalbaug-violence-Police-counter-rumours-by-sending-50-lakh-SMSes/article-show/45783705.cms>.

78 See Divyesh Singh, *Lalbaug Violence: How Cops Limited Damage On Ground And Online*, *Mumbai Mirror*, Jan. 6, 2015, <http://www.mumbaimirror.com/mumbai/others/Lalbaug-violence-How-cops-limited-damage-on-ground-and-online/articleshow/45767384.cms>.

79 Sreenivasan Jain, *The Mystery of Kawwal: Were Muzaffarnagar riots based on distortion of facts?*, *NDTV*, Sept. 14, 2013, <http://www.ndtv.com/india-news/the-mystery-of-kawwal-were-muzaffarnagar-riots-based-on-distortion-of-facts-534608>.

80 Qaswar Ahmed, *Banned Youtube clip from Pakistan triggered riots in Uttar Pradesh*, *India Today*, September 9, 2013, <http://indiatoday.intoday.in/story/muzaffarnagar-communal-clashes-banned-youtube-clip-pakistan-riots-uttar-pradesh/1/309006.html>.

81 Advaita Kala, *The tragedy in Muzaffarnagar is neither green nor saffron*, *Daily Mail*, Sept. 17, 2013, <http://www.dailymail.co.uk/indiahome/indianews/article-2423842/The-tragedy-Muzaffarnagar-green-saffron.html>.

82 Press Trust of India, *Jat quota stir: Yogendra Yadav appeals for peace, harmony in Haryana*, *Business Standard*, Feb. 22, 2016, http://www.business-standard.com/article/pti-stories/jat-stir-yogendra-yadav-appeals-for-peace-116022200023_1.html.

83 Press Trust of India, *Jat quota stir: Yogendra Yadav appeals for peace, harmony in Haryana*, *Business Standard*, Feb. 22, 2016, http://www.business-standard.com/article/pti-stories/jat-stir-yogendra-yadav-appeals-for-peace-116022200023_1.html.

84 Maintain peace after Ayodhya verdict, urges Bollywood, *News18*, Sept. 24, 2010, <http://www.news18.com/news/india/maintain-peace-after-ayodhya-verdict-bwood-349020.html>.

85 *Babri Masjid judgment: leaders appeal for peace*, *The Hindu*, Sept. 23, 2010, <http://www.thehindu>.

CONCLUSION

Hate speech is a serious problem in India with its ongoing communal and caste-related tensions. It is clear that hate speech law is outdated and affects a wider range of speech than is necessary. The law often fails to prevent violence resulting from incitement, and powerful speakers with the capacity to do so are able to avoid punishment. This is in part due to remedies and strategies enabled by the law, and in part because of institutional failure in the implementation of the law. The law has a detrimental impact on the freedom of expression, since it is often misused by the state or used by third parties to intimidate speakers. It is therefore necessary to study not just the immediate, but also the second-order effects of the law on hate speech.

Hate speech online is an emerging problem that parallels India's hate speech issues offline. Indian news reports suggest that incitement to violence through social media is a serious concern. After years of negotiating with online platforms in other jurisdictions, the Indian government has taken to shutting the Internet down to prevent incitement. This is a blunt-instrument strategy that has a disproportionate effect on legitimate speech. Although other strategies such as counter-speech are also used, it is unclear whether they are effective. This is because data on the speed of circulation of rumors and hate speech on social media is not shared with independent researchers who might compare it to the rise of violence to study correlation between speech and violence. Since measures such as the rate of circulation and geographical data are available from social media companies, there are opportunities for researchers to conduct data-driven studies of the relationship between online hate speech and escalation of violence.

The Center for Communication Governance will publish a detailed report studying the Indian legal framework on hate speech comprehensively, identifying and evaluating its standards. We will follow the report with a series of consultations, which will feed a second detailed report on the direct and indirect effects of hate speech law. We hope to be able to identify specific changes in the law that would help the state and other actors respond more effectively to hate speech, while limiting the impact of the law on legitimate speech. However, all of our work on online hate speech will remain anecdotal, unless the global companies that own social media and other platforms that perform a major gatekeeping role in the circulation of hate speech consent to sharing data that is necessary to do a precise study on the effects of hate speech in India.

[com/todays-paper/tp-national/tp-karnataka/babri-masjid-judgment-leaders-appeal-for-peace/article778387.ece](http://www.hindustantimes.com/todays-paper/tp-national/tp-karnataka/babri-masjid-judgment-leaders-appeal-for-peace/article778387.ece). Other examples include, *Sehwag, Vijender request Jats to shun violence in quota stir*, Hindustan Times, Feb. 21, 2016, <http://www.hindustantimes.com/india/vijender-singh-pleads-with-jat-brothers-to-end-violence-in-quota-stir/story-FkkuUSJV9ejw9qGTAE4Stl.html>. See also, *Sunetra Choudhary, Online Attacks On Women To Be Treated As Violence: Maneka Gandhi to NDTV*, NDTV, May 18, 2016, <http://www.ndtv.com/india-news/online-trolling-against-women-will-be-considered-violence-maneka-gandhi-1407271>.