
ONLINE HATE SPEECH: INTERMEDIARY LIABILITY AND THE BALANCING ACT IN INDIA'S REGULATORY FRAMEWORK

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ABSTRACT

The adverse consequences that online hate speech has on the use of the internet is known to all. However, the curtailment of this irritant presents quite a few challenges, especially because there is a potential conflict that could arise vis a vis the fundamental right to freedom of speech and expression enshrined in Article-19 of the Indian constitution. An attempt to check hate speech by means of a provision in the IT Act has in the past been found to contravene this fundamental right, thus causing it to be repealed. This fundamental right does operate within the limits of reasonable restrictions, but as is indicated by the current jurisprudence, it is not always easy to determine whether or not is a given situation falling under the scope of such reasonable restrictions.

Furthermore, the scale at which social media operates in modern times, it is increasingly becoming more and more challenging to identify and punish the culprit for hate speech perpetrated using social media. Given the number of users some of these platforms have, coupled with the fact that these users are located at countries across the globe, it is next to impossible for national authorities and governments to make sure that hate speech content is exterminated on time. Thus, the government of India, by means of legislative provisions and executive rules has shifted the onus on the social media intermediaries. By holding these entities accountable for the content that is shared using their media, hate speech can be regulated far more efficiently and effectively. Rules have been made that lay down the action an intermediary is required to take against hate speech, the timeframe within which such action must be taken and all the preventive mechanisms that such intermediaries must put in place. They have however, also been conferred with legislative protection measures that ensure that intermediaries are not unnecessarily vexed for acts of their users.

Keywords: Intermediary liability, freedom of speech, hate speech, IT Act, 2000, Fundamental rights

Introduction:

Online hate speech refers to any form of expression or communication on the internet that promotes hatred, violence, discrimination, or hostility towards individuals or groups based on inherent characteristics.

While the right to freedom of speech and expression is a key fundamental right enshrined in the constitution of India, it must be subject to certain reasonable restrictions. It is these reasonable restrictions that help prevent the problem of online hate speech, which is increasingly becoming a huge challenge due to the sheer number of internet users in India. Indian law has for long had provisions to tackle hate speech under the penal code. These provisions, when read with the IT Act, 2000 help curtail the same online. ¹

It is important to control online hate speech in a timely and efficient manner because there is a very high chance that it would lead to division of the society and have worse consequences in the real world. In the past, it has been seen to cause riots and violence between groups.

Statement of problem:

There are several key challenges as far as online hate speech is concerned. The most fundamental problem is, the regulation of online hate speech conflicts with the fundamental right to freedom of speech and expression. To determine what constitutes a reasonable restriction is a challenge often faced by courts. Secondly, the sheer number of social media users and the large volume of content that is posted everyday makes it difficult to track and prosecute those who are guilty of online hate speech. This is made worse by the fact that there is often a conflict between data protection laws and revealing the identity of offenders. Moreover, the liability and accountability of intermediary social media platforms for content posted on them is another gray area that has to be carefully navigated by the courts.

Research questions:

1. How do the regulations regarding online hate speech in India interact with the fundamental right to freedom of speech and expression?

¹ Mishra, A. (2023) *Regulating hate speech on social media platforms: Challenges faced by Indian Courts*, A.K. Legal & Associates. Available at: <https://aklegal.in/regulating-hate-speech-on-social-media-platforms-challenges-faced-by-indian-courts/> (Accessed: 20 March 2024).

2. What is the liability of intermediary social media platforms for hate speech content posted on them?

Literature review:

In his paper "*Controlling Hate Speech on the Internet: The Indian Perspective*," Ketan Modh explores the complexities of regulating hate speech in the digital era. He begins by discussing the historical context of censorship of hate speech and the challenges presented by the internet's transnational character. He then describes the ambiguity in defining hate speech, and the difficulties in enforcing regulations in a global online environment. By focusing on the Indian perspective, the paper seeks to offer insights into addressing the delicate balance between safeguarding freedom of expression and combating the spread of hate speech online. His analysis highlights the need for a differential approach to tackle hate speech online, considering the diverse cultural, legal, and technological factors at play in the evolving digital landscape. (Modh K., 2016) ²

Mehvish Ashraf in his work entitled "*Online hate speech in India: Issues and regulatory challenges*" highlights the challenges posed by the rapid dissemination of harmful content across various digital platforms. He has criticized Legislations such as the Information Technology Act for their limitations in providing immediate relief to victims of hate speech due to the slow pace of the judicial system. According to him, there is a recognized need for legislative amendments to better safeguard public interest and address the evolving nature of online hate speech. The constitutional recognition of limitations on freedom of speech and expression highlights how difficult the balance between individual liberties and societal order is. His recommendations include the harmonization of existing laws, incorporation of expert committee suggestions, and amendments to intermediary guidelines to combat online forms of hate speech effectively. He emphasizes upon the importance of independent journalism, fact-checking, and monitoring online content to ensure justice for those impacted by online hate speech. (Ashraf M., 2020)³

In their work titled "*ONLINE HATE SPEECH IN INDIA: LEGAL REFORMS AND SOCIAL IMPACT ON SOCIAL MEDIA PLATFORMS*", the students of Sunrise University, Rajasthan

² Modh, K. (2016) *Controlling hate speech on the internet: The indian perspective*, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783447 (Accessed: 20 March 2024).

³ Ahshraf M. (2020) *Online hate speech in India issues and regulatory challenges*, *International Journal of Law Management & Humanities*. Available at: <https://ijlmh.com/online-hate-speech-in-india-issues-and-regulatory-challenges/> (Accessed: 20 March 2024).

have explored the prevalence, legal frameworks, societal impacts, and potential remedies for online hate speech in India, with a focus on popular social media platforms. They have examined India's legal landscape, strengths, weaknesses, and cultural influences on online discourse. They propose legal and social strategies to combat hate speech while respecting cultural diversity. The research delves into the intricate dynamics surrounding online hate speech in India, primarily addressing legal reforms and ensuing social impacts within the realm of social media. A key feature of this research is that not only does it conduct an analysis from the legal point of view, but also studies the socio-cultural implications of online hate speech, considering its impact on marginalized communities, social cohesion, and democratic discourse. It explores how online hate speech intersects with broader issues such as identity politics, polarization, and freedom of expression. (Nath et al., 2024)⁴

In “*Regulating Hate Speech on Social Media Platforms: Challenges faced by Indian Courts*”, Ansh Mishra also shares the views of the above authors that while the proliferation of social media platforms has immensely contributed towards improving communication, it has also led to the challenge of hate speech taking large proportions online. He talks about how hate speech regulation evolved from colonial-era laws like Section 153A of the IPC to constitutional provisions balancing free speech with reasonable restrictions. Recent additions like Section 295A and the 2021 IT Rules reflect efforts to adapt to online discourse. Just like Nath et al above, he too recognizes that intermediaries' limited liability complicates accountability, while the sheer volume of online content overwhelms law enforcement. Subjectivity in defining hate speech further challenges regulation, exacerbated by linguistic and cultural diversity. He believes that an effective way to mitigate this would involve a collaborative approach involving government, social media companies, law enforcement, and civil society. Proactive technological solutions, public awareness campaigns, and rigorous law enforcement are essential for fostering a safer digital environment while safeguarding free expression. (Mishra A., 2023).⁵

⁴ Nath, L. P., Mishra, P. K., Singh, R., Jain, S., Singh, A., & Benedict, S. M. (2024). “Online hate speech in India: legal reforms and social impact on social media platforms.” *Social Science Research Network*. <https://doi.org/10.2139/ssrn.4732818> (Accessed: 19 March 2024).

⁵ Mishra, A. (2023) *Regulating hate speech on social media platforms: Challenges faced by Indian Courts*, A.K. Legal & Associates. Available at: <https://aklegal.in/regulating-hate-speech-on-social-media-platforms-challenges-faced-by-indian-courts/> (Accessed: 20 March 2024).

Legal provisions and analysis:

The most nascent stage at which a question regarding hate speech arises is when the constitution guarantees the fundamental right to freedom of speech and expression but subjects it to restrictions that may be reasonable. The courts of the country also saw reason in balancing fundamental rights with societal order. In the 1969 case of “Kedar Nath Singh V. State of Bihar”, the apex court came up with a test to decide when to control hate speech. According to it, when it causes public disorder or incites violence, then it must be curtailed. However, when it is offensive and hurtful but does not have these effects, then there is no reason to curtail it.⁶ Of course, the case being from 1969, the courts would in all probability have foreseen the kinds of proportions hate speech has acquired in the online era. Even the penal code provisions from that era in this regard, namely Section-153A was mostly directed towards inhibiting the spread of speech that directly incited communal violence. Later amendments to the code added section-295A to curtail speech that is directed towards a specific religious group and Section-505 was added to inhibit speech that adversely impacts public order.⁷ These provisions were all generic in nature and none of them specifically dealt with hate speech that is online. Realizing the need to fortify the domestic legislation in this regard, the parliament in 2008 introduced Section-66A to the IT Act, 2000. It prescribed a punishment of 3 years of imprisonment in addition to a fine to be imposed on anyone who posts content involving hate speech online. A landmark example of the IPC provisions acting along with this new section was when two girls were arrested for making a Facebook post consisting of what they claimed to be a political comment.⁸ This case led to several debates, revolving around the issue of freedom of speech and expression. With several similar arrests being made, the issue was ultimately brought before the apex court by means of a PIL.^{9 10} This led to the court declaring it unconstitutional. The reasoning behind such decision was that the law had an adverse impact on the fundamental right to freedom of speech and expression. Any law that touches upon fundamental rights must be specific and accurate in its connotations. However, this was not the

⁶ Mishra, A. (2023) *Regulating hate speech on social media platforms: Challenges faced by Indian Courts*, A.K. Legal & Associates. Available at: <https://aklegal.in/regulating-hate-speech-on-social-media-platforms-challenges-faced-by-indian-courts/> (Accessed: 20 March 2024).

⁷ Mishra, A. (2023) *Regulating hate speech on social media platforms: Challenges faced by Indian Courts*, A.K. Legal & Associates. Available at: <https://aklegal.in/regulating-hate-speech-on-social-media-platforms-challenges-faced-by-indian-courts/> (Accessed: 20 March 2024).

⁸ Vaidyanathan, R. (2012) *India Facebook arrests: Shaheen and renu speak out*, BBC News. Available at: <http://www.bbc.com/news/world-asia-india-20490823> (Accessed: 20 March 2024).

⁹ Modh, K. (2016) *Controlling hate speech on the internet: The indian perspective*, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783447 (Accessed: 20 March 2024).

¹⁰ Shreya Singhal v. Union of India AIR 2015 SC 1523

case with Section-66A. the words by means of which it defined hate speech were broad, ambiguous and subject to wide interpretations, which the court feared would lead to misuse.¹¹

However, this does not mean that India does not have legislation to deal with online hate speech. In addition to the various IPC provisions dealing with hate speech, the government is also empowered under Section-69A of the IT act to block any content or website by means of binding directions issued to social media intermediaries. Also, intermediaries who merely provide a platform for sharing of information are also protected from liability arising out of hate speech posted on them under Section-79 of the IT Act. Furthermore, the guidelines for intermediaries that the central government notified in 2021 has made several provisions for regulating content, including hate speech posted online.¹² It achieves the control of such material by putting the onus to do so on the social media platform hosting the content. Rule-3, which provides for due diligence to be undertaken by intermediaries stipulates that the prominently displayed rules and regulations of the intermediary must suitably inform the users that they shall not transmit or publish any information, which among other things, is in violation of any law, threatens the unity and integrity of the nation or causes injury to any person. Under Section-79(3) of the act, the intermediary is required to take action against such information if and when notified by the government. The action must be taken as early as possible to remove the information and should not be delayed beyond 36 hours from the receipt of information.

Further, in order to aid tracking of users who post content on the social media platform, the intermediary is required to keep a record of all information known about its users for a period of 180 days after cancellation of the registration of such user. If required by the government or police, the information must be furnished within 72 hours for the purpose of investigation. When the intermediary is a “significant social media intermediary”, there are further measures that need to be followed, which includes appointing officers for compliance and giving notice to social media users whenever action is taken. Under rule-16, the government is also authorized to block information if such action is required to be taken expeditiously.

Conclusion:

There is always a lag in the development of law vis a vis the development of society. This gets

¹¹ Change, I. for, Ganapathy, A. and Bernards, N. (no date) *Why India needs a legal instrument to tackle online hate, Bot Populi*. Available at: <https://botpopuli.net/why-india-needs-a-legal-instrument-to-tackle-online-hate/> (Accessed: 20 March 2024).

¹² Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

even more pronounced in the backdrop of the sudden progression in technology and its fast democratization, with every other person being a social media user. This undeniably leads to challenges such as the conflict between the fundamental right to freedom of speech and laws attempting to curtail hate speech. However, given the high worth the constitution attaches to fundamental rights, the courts have acted correctly in balancing the scale in favor of rights over restrictions. Section-66A of the IT act being declared unconstitutional had the potential to give online hate speech a free hand for proliferation, but the enactment of the 2021 IT rules, read with the various provisions of the IPC has been able to effectively control online hate speech. The onus being shifted to the social media intermediary has ensured that the large scale is being managed by someone who is well equipped to do it. Furthermore, the various mechanisms to act against such information will certainly prove useful.