CYBERHATE IN INDIA – REGULATION AND INTERMEDIARY LIABILITY

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Abstract

Although hate is as old as human beings, with the upsurge of internet, Cyberhate has become a new phenomenon to vilify against other individuals on the ground of religion, race, caste, community, gender, nationality, language, disability or tribe. Considering huge number of internet users, India is leading in expressing online vitriol. Hateful expressions have become multi-faceted these days ranging from trolling to cyber-bullying to mobilizing terror over internet.

Supreme Court of India through its judgment in Shreya Singhal Case has struck down Section 66A of the Information Technology Act. However, that has only exacerbated online hate. Critically analyzing, the desideratum would be to enact a better law or to amend the existing provisions of IT Act appropriately.

The intermediaries monitor and restrict hate speech from their platforms and since they operate under constant fear of sanctions, it creates a chilling effect on the freedom of speech and expressions. In fact, the issue of intermediary liability has not gained enough attention in India as there is a dearth of judicial pronouncement on the subject.

Among other steps to regulate hate in the cyberspace, the European Union Internet Forum has formulated a Code of Conduct to counter hate speech online. Moreover, Law Commission of India recently has suggested amendments in the IPC and CrPC regarding hate speech. Still, much more has to be done against the inertia binding the existing system to ensure information technology keep pace with hate speech laws.

Keywords: Cyberhate, Hate Speech, Intermediary Liability, Online Hate, Section 66A

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1. INTRODUCTION

The upsurge of the internet, a contemporary tool to receive and impart information, and a global means of communication for individual and groups, has stripped away geographical boundaries. Internet magnifies the voice and multiplies the information within reach of everyone who has access to it. Despite the positive aspects of this progress in the sphere of free speech, the internet also provides a ‘platform for the promotion and dissemination of hate’. That is why it is said that ‘Internet contains some of the best written products of humanity, and some of the worst ones’.

2. METHODOLOGY

The research attempted for the purpose of this paper is primarily doctrinal one. It was based on data analysis, perusal of policies, literature and laws. It critically analyses the landmark Supreme Court judgment on the topic. Besides, it is designed on a rationale concerned with deductive and inductive reasoning.

3. CYBERHATE KNOWS NO BORDERS

“Loathing is endless. Hate is a bottomless cup: I will pour and pour.”

– Euripedes, Medea

Hate speech, while not universally accepted in definition, can be understood as the ‘promotion, endorsement and encouragement of a vilification of others based on innate differences’. The definitions of ‘hate speech’ typically depend on the cultural and moral ethos of any society; when societies have been well-defined, for example through geography, it was relatively easier to reach a consensus on such a definition.

Since the internet, ‘knows no borders’ and the hate diffusing in it cannot be bounded, there evolved the phenomenon of ‘cyberhate’ which means nothing but hatred expressed by means of computer networks. To put it simply, it is the hate in the cyberspace. Initially, hate was spread in emails and chat rooms. But now social networking websites is being used as the medium to spread hate.

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Although differences exist among legal traditions as well as within scholarly discussions, a common element throughout the discourse is that hate speech involves disparagement of other groups based on their belonging to a particular group of collective identity. Waldron\(^9\) argues that this kind of speech has two key characteristics: The first is to dehumanize members who belong to another group, and the second is to reinforce the boundaries of the in-group against the out-group by attacking the members from the other group.

### 4. ONLINE HATRED IN INDIA

A recent report\(^11\) states that the number of Internet users in India has reached 450-465 million in June of 2017 which is next only to China and the United States. Internet users in India, largely come from the middle class and the well-heeled, but the affordability of Smartphone in recent years has broadened the class base and narrowed the rural–urban divide in online access. New Media\(^12\) as it is called is witnessing consumption for social media networking sites such as Facebook, YouTube, and Twitter and the micro-messaging services of WhatsApp.

Hatred in India has crisscrossed a long way from the colonial laws around ‘sedition’, caste hostility, public representation of sexuality conditioned in the patriarchal social milieu to the postcolonial politics of religious differences, communal tensions, and that of today’s online hate propaganda through tweets, trolls and deluging timelines in vitriol. And, this social media have thus cemented a culture of colloquialism in the political discourse, providing the communicative context for online wrath to expand. The distinctness of online abusive exchange in India is captured by the emic term *gaali*,\(^13\) which signals the interlocking practices of insult, comedy, shame, and abuse that unfold in a blurred arena of online verbal art.\(^14\)

Odiun is the opium in this digital age. Netizens all over the world keep pouring hate in the endless bottom of internet, consuming hate and getting addicted to it mindlessly. How true that ‘internet is a collective hallucination’?\(^15\)

### 5. FACETS OF HATE IN CYBERSPACE

Hate and hateful expressions existed before the creation of the internet and will continue to exist even if tight regulation of online activity were to be achieved.\(^16\) The issue of online hate is moving in new dimensions, with those who disseminate hate speech finding themselves before

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\(^13\) A Hindi word for abusive language.  
\(^14\) Supra Note 7.  
\(^15\) ‘Collective hallucination’ is attributed to Jonathan L. Zittrain who is an American professor of Internet law at Harvard Law School.  
an array of possibilities to use and abuse the internet for purposes of communication, recruitment and victimisation.\(^{17}\) Internet, apart from being used as a medium to spread hate, social networking websites have gone to the next level and are now used for recruiting members for hate groups and militants.\(^{18}\) Invariably, anonymity, immediacy and global nature of the Internet have also made it an ideal tool for extremists and a hatemonger’s paradise to promote hate.

Online users showed repetitive and formatted abuse that clogs their Twitter feeds and Facebook timelines. Comments sections of organized media are similarly filled with online vitriol of swearwords, name-calling and put-downs.\(^{19}\) It must be noted that those who spread hate speech may use the internet to harass the victims of their rhetoric directly, to communicate amongst themselves and build up a ‘sense of belonging and social identity’\(^{20}\) to a unified movement, but also to recruit new members through the dissemination of their ideology to unsuspecting users who may be confronted with such speech through, amongst others, web links or emails.\(^{21}\)

Further, interpersonal cyber victimizations with hateful expressions including bullying, trolling, cyber stalking, creation of ‘fake avatars’, obscenity, online grooming etc.,\(^{22}\) are on the increase. No less is the ‘bad talk’\(^{23}\) which can be defined as talk or speech which generates harassment for the recipient; or which instigates people to get indulged in violent activities like mob violence which may lead to mass killing, religious or racial riots etc; or which may actually aid in terrorism. By comprehending the monstrous dimension in which hate is propagated online, we may realize as to how true was Eric Schmidt\(^{24}\) who once stated that ‘Internet is the largest experiment in anarchy that we have ever had’.

6. SHREYA SINGHAL CASE

In 2015, the Hon’ble Supreme Court of India in a landmark judgment\(^{25}\) struck down Section 66A\(^{26}\) of the Information Technology Act, 2000. This particular provision was not a part of the original Act.\(^{27}\) Section 66A was inserted to the main Act through the amendment made in 2008 which revamped the Act to regulate several types of the internet crimes including sending of

\(^{17}\) Natalie Alkiviadou, ‘Regulating Internet Hate: A Flying Pig?’\(^{,}\) *JIPITEC*, Vol.7 (2016), p.216, para 33.
\(^{19}\) Supra Note 7.
\(^{23}\) Ibid.
\(^{24}\) Eric Emerson Schmidt is an American software engineer, a businessman, and the Executive Chairman of Alphabet, Inc. which is the parent company of Google and several former Google subsidiaries.
\(^{25}\) *Shreya Singhal vs. Union of India*, AIR 2015 SC 1523.
\(^{26}\) Inserted in the year 2008.
\(^{27}\) The Information Technology Act, 2000 (also known as ITA-2000, or the IT Act) is an Act of the Indian Parliament (No.21 of 2000) notified on 17th October, 2000.
offensive messages through the internet and digital communication services, publishing sexually explicit materials in the internet, video voyeurism, leakage of confidential data by intermediary, cyber terrorism, economic crimes like phishing, identity theft etc.  

The petitioner in the case of *Shreya Singhal vs. Union of India*[^29], contended that Section 66A provision does not define specific terms, is extremely vague in defining what are ‘annoying etc speech’ and gives vast powers in the hands of the police to chill freedom of speech without laying down specific reasons, it should be declared unconstitutional and should be removed from the Act. The Supreme Court finally held that Section 66A as *ultra vires* the Constitution. In response, advocates of free speech argued that ‘it thus puts an end to the irony of a modern statute bearing a primitive content’[^30].

### 7. CRITICAL ANALYSIS OF STRIKING DOWN SECTION 66A

At the outset, *Shreya Singhal* judgment did not look into or rather left unattended while judging the need of the existence of Section 66A. Post striking down of Section 66A the issue of hate speech and its ramifications in the internet has not reduced, rather increased manifold. Supreme Court should have considered a thorough amendment of Section 66A, rather than scrapping it sullied[^31] leading to numerous criticisms against the judgment.

Firstly, the type of ‘information’ that may not be considered as open to be viewed by cyber bystanders[^32]. If such information consists of speech which may turn its character from a ‘free speech’ to a dangerous information due to such viral nature of the internet, the person who makes such speech must be made liable for punishment depending upon his prior knowledge about the consequence of such use of internet[^33].

Secondly, the Information Technology Act, 2000 has vested responsibility of investigation of ‘any’ case under this Act to ‘any officer not below the rank of an inspector’.[^34] Also, cases punishable with three years imprisonment or more had been made cognizable offences[^35]. It is an inconvenient truth that largely the police officers in the rank of inspectors in India lack proper training to handle cyber hate cases. The court ought to have paid more consideration on the effect of these provisions while deciding the fate of Section 66A.

[^28]: See para 2 of the Bill to amend the Information Technology Amendment Act, 2006.
[^29]: AIR 2015 SC 1523.
[^32]: Ibid.
[^33]: Ibid.
[^34]: Section 78 of IT Act, 2000, (amended in 2008).
Thirdly, the aspect of therapeutic jurisprudence of Section 66A has never been tested by the Supreme Court and in contrary, was totally ignored. The law has rather become ‘anti-therapeutic’.

Lastly, on a critical note, Section 66A could have been re-designed to define the term ‘cyber bullying’ and ‘trolling’ basing on the behavioral traits of the bully and trolls. The judgment may be futuristic as everyone claim, especially the libertarians, but it is lacking sight of the grim realities.

8. INTERMEDIARY LIABILITY

Hate speech discourse predefines the effects of hate speech as negative and damaging, and its regulatory rationale is thus of control and containment. The state is the largest actor in this effort, but Internet intermediaries also increasingly monitor and restrict speech from their platforms. The IT Act defines the term ‘Intermediary’ with respect to any particular electronic records as “any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”.

An intermediary may escape liability for any third-party information, data, or communication link hosted on its forums or websites if it proves that: the function of the intermediary was limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or the intermediary did not initiate the transmission; or it did not select the receiver of the transmission; or it did not select or modify the information contained in the transmission; or the intermediary exercised due diligence while discharging its duties under the IT Act and also observed guidelines of the Central Government, if any.

These exemptions do not apply if the intermediary conspired, abetted, aided, or induced the commission of the unlawful act or if, after receiving actual knowledge or notification from the government about any information, data, or communication link being used to commit an unlawful act through the intermediary, the intermediary fails to expeditiously remove or disable access to that material. The Central Government may ask an intermediary to block access to specific hosted content in the interest of the sovereignty and integrity of India, India’s national defence, security of the State, maintaining friendly relations with foreign States, keeping public order, or preventing incitement of the commission of any cognizable offence. If the

37 Supra Note 7.
38 Information Technology (Amendment) Act, 2000 at Section 2 (1) (w).
39 Id. at Section 79 (2).
40 Id. at Section 79 (3).
41 Id. at Section 69A (1).
intermediary fails to comply with such a government order, it may be punished with up to seven years of imprisonment and also be liable for a fine.  

The petitioner in *Shreya Singhal* case argued that the presence of such provisions gave rise to a chilling effect on private speech. However, Supreme Court took note of the difficulties faced by intermediaries such as Google and Facebook, since hundreds of removal requests were made every day and under the existing policy they were required to judge the legitimacy of each one. Applying Principle 2 of the Manila Principles, the Supreme Court ruled that Section 79 did not render intermediaries liable for illegal content unless they failed to comply with a court order, as opposed to a mere request made by a private party.

During times of riots and civil unrest, the government proactively imposes blocks on websites, accounts of individuals, and hateful content to prevent hate speech from exacerbating an already volatile situation. As a consequence, risk-averse intermediaries often erred on the side of caution by complying with private removal requests and taking down content. Therefore, frivolous complaints could be used by private parties to suppress legitimate expression without fear of repercussions; in addition, in the absence of provisions for reinstatement of content, the harms to the creator could be irreversible.

Undoubtedly, intermediaries are business-driven entities who are averse to getting embroiled in legal battles when it does not further their financial interests. Since intermediaries operated under the constant fear of sanctions, it created a chilling effect on the freedom of speech and expression. Presently, there are several hate videos on YouTube and hateful comments on Facebook that violate India’s anti-hate speech laws. No action has yet been taken against the uploaders or the hosting intermediaries. However, since requests for removal can be made at any time, intermediaries must remain constantly prepared to handle this unpredictability. If they fail to remove the material after a takedown request has been made, they may be held liable even though the material would have already been seen by a large number of people before the request was made.

42 Id. at Section 69A (3).
43 *Shreya Singhal vs. Union of India*, AIR 2015 SC 1523.
45 Manila Principles on Intermediary Liability, Available at: [https://www.manilaprinciples.org/](https://www.manilaprinciples.org/) (accessed May 30, 2017), at Principle 2 (Content must not be required to be restricted without an order by a judicial authority).
48 Id. at p.14.
The issue of intermediary liability and hate speech has not gained enough attention in India. There is an absence of practical and theoretical studies that clearly establish a link between online hate speech and physical manifestations of violence. Neither are there judicial judgments on the issue that explain this relationship. This has created a lack of knowledge which must be addressed in order to make the government reconsider its policy towards intermediaries. However, this problem is not unique to India; it is an issue that is still being debated around the world.  

9. LEGAL REGULATIONS OF ONLINE VITRIOL

The experiential salience of instantaneity, rapid reaction loops, affordances for relative anonymity, and the possibility to automate trolls and invite attention of interested bystanders through tags and retweets have amplified the conditions for confrontational encounters on online media. The discourse of online speech as a form of ‘risk’ and ‘threat’ is also used increasingly by governments to rhetorically legitimize securitization and control over their citizens’ communicative practices. However, the internet has brought about ‘socio-technological and legal dilemmas that are difficult to handle from a legal point of view’.  

It is the anonymity of the internet which deeply hampers the implementation of traditional legal procedures and enforcement of traditional laws, as the perpetrator cannot readily be determined; whilst the global nature of the internet means that, even if a perpetrator can be identified, bringing him or her to justice may not be possible due to jurisdictional limitations.  

The First Amendment to the Indian Constitution, passed in 1951, allows the government to impose ‘reasonable restrictions’ on a citizen’s right to freedom of speech and expression, in order to protect ‘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’. The means to impose these ‘reasonable restrictions’ are described in several sections of the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC).  

Under the IPC, there are several offences punishable and inter alia are offences like words uttered ‘with the deliberate intent of wounding religious feelings’; addressing ‘intentional insult with intent to provoke breach of peace’; or deliberate and malicious acts, intended to outrage

51 Ibid.
52 Supra Note 7.
57 Article 19 (2) of the Constitution of India.
58 Section 298 of the IPC.
59 Section 504 of IPC.
religious feelings\textsuperscript{60}; or any speech or act that question any social, religious or linguistic group’s allegiance to the Constitution of India.\textsuperscript{61}

Similarly, Section 144 of CrPC which allows a magistrate to ‘direct any person to abstain from a certain act’ if such orders are likely to prevent violence; the same Section empowers the magistrate to disallow a citizen to enter a specified area for up to two months, with a provision for state governments to extend such bans to six months. Further, Section 95 of the CrPC empowers state governments and police to seize ‘any newspaper, or book, or any document’ deemed to violate the statutes of the IPC mentioned above.

The International Covenant on Civil and Political Rights (ICCPR) addresses hate speech indirectly. In particular, Article 19 of ICCPR provides for the right to freedom of expression, while Article 20 expressly limits this right in cases of ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. This can be interpreted as a regulation of unlawful hate speech. However, it does not mention the online hate.

On 7\textsuperscript{th} December, 2015, the Parliamentary Standing Committee on Home Affairs presented a status report bearing Report No.189 (‘Action Taken Report’)\textsuperscript{62} to the Rajya Sabha. One of the issues highlighted in the said report was the manifest shortcomings in the Information Technology Act and it noted that the IT Act needed to be reviewed regularly. Further, the Action Taken Report notes that as a result of the striking down of Section 66A, some online conduct has gone outside the purview of regulation. One such example the report cites is ‘spoofing’ which is the dissemination of communications on the internet with a concealed or forged identity. The Report goes on to provide a working definition for ‘spoofing’ and proposes to criminalize it. If this proposal falls through, spoofing will be an instance of an internet-specific offence.\textsuperscript{63} The Report also states that all online hate speech must be covered under the IT Act through an exclusive provision and has even suggested categorically the wordings of online hate offences.

Later, on May 31, 2016, Facebook, Microsoft, Twitter and YouTube, which are involved in the European Union Internet Forum, formulated a Code of Conduct on countering illegal hate speech online.\textsuperscript{64} In an act of balancing competing interests, the IT companies set out in the Code of Conduct\textsuperscript{65} several public commitments, some of which are: (i) To have in place an effective process to review notifications regarding illegal hate speech on their services so that they can remove or disable access to such content; (ii) To review the notifications for removal of illegal

\textsuperscript{60} Section 295A of IPC.
\textsuperscript{61} Section 153B.
\textsuperscript{62} Available at: http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/189.pdf (accessed May 30, 2017).
\textsuperscript{63} Available at: http://www.legallyindia.com/views/entry/parliamentary-standing-committee-on-a-new-online-hate-speech-provision (accessed 30, 2017).
\textsuperscript{64} Available at: http://www.thehindu.com/opinion/op-ed/Hate-free-speech-vs.-free-hate-speech/article14397700.ece (accessed May 29, 2017).
hate speech in less than 24 hours; (iii) To educate and raise awareness with the users about the types of content not permitted under their Rules and Community Guidelines; (iv) To encourage via partnerships with civil society organizations the provision of notices and flagging of content that promotes incitement to violence and hateful conduct.

Very recently, the Law Commission of India in its Report No.267 gave suggestions under the title ‘Hate Speech’ which enclosed The Criminal Law (Amendment) Bill, 2017. It attempted to insert a new Section 153C in IPC prohibiting incitement to hatred. Further, the Commission has suggested inserting new Section 505A after Section 505 in IPC. The Section 505A deals with fear, alarm, or provocation of violence in certain cases. Although the suggestion of Law Commission of India does not specifically mention the words ‘online hate’, the implications of its report if materializes would be far reaching.

Legal measures against hate speech may not prove sufficient to restrain the flood of online publications. It would take also to work together with ISPs, who should adopt a policy of removing offensive content, and also use filtering techniques and other innovative technologies to detect and remove such content from the Web. For instance, IIIT-Hyderabad’s Informational and Retrieval Extraction Lab (IREL) has developed an automated system using Artificial Intelligence chatterbots that can detect hate speech in tweets.

10. CONCLUSION

The Internet is a vast ocean of knowledge, data, ideologies and propaganda. It is omnipresent, interactive, fast and decentralized. The ease of access to the Internet, its low cost and speed, its chaotic structure, the anonymity which individuals and groups may enjoy, and the international character of the world-wide-web furnish all kinds of individuals and organizations an easy and effective arena for their partisan interests. The borderless nature of internet in conjunction with the restrictive provisions of expression enshrined in the Constitutional parchment may be ‘like

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66 Report No.267 of the Law Commission of India titled ‘Hate Speech’ was submitted before the Ministry of Law in March, 2017.
67 Proposed Section 153C of IPC reads as: ‘Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe - (a) uses gravely threatening words either spoken or written, signs, visible representations within the hearing or sight of a person with the intention to cause, fear or alarm; or (b) advocates hatred by words either spoken or written, signs, visible representations, that causes incitement to violence shall be punishable with imprisonment of either description for a term which may extend to two years, and fine up to Rs 5000, or with both.’.
68 Proposed Section 505A of IPC reads as: ‘Whoever in public intentionally on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe- uses words, or displays any writing, sign, or other visible representation which is gravely threatening, or derogatory; (i) within the hearing or sight of a person, causing fear or alarm, or; (ii) with the intent to provoke the use of unlawful violence, against that person or another, shall be punished with imprisonment for a term which may extend to one year and/ or fine up to Rs 5000, or both’.
chasing cockroaches, squashing one does not solve the problem when there are many more waiting behind the walls – or across the border’.72

Although hate speech and its cognates have had a checkered course of protection and restriction, the Parliament may consider bringing a better law. The desideratum is that all the stakeholders including free speech activists, academicians, practitioners, intermediaries, and the government need to act against the inertia hindering the existing system to ensure that India’s information technology laws coupled with hate speech laws keep pace with the rapid growth of the Internet and intermediaries.