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Hate crimes: an Indian study

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INTRODUCTION

Hate crimes have been prevalent in our society for centuries. The concept of hate crimes, their nature and their scope are not simple definitions; there are numerous complexities involved in deciphering the conceptualization, legislation, and social impacts of hate crimes. As per McLaughlin, hate crime laws are a 'positive affirmation',¹ which may be seen as an extension of civil rights into the criminal legal arena.² The creation of legislation relating to hate crimes brings hate crimes into the public domain and sends out a clear message to society that hate crimes shall not be tolerated.³

This research is invested in answering if there is a need to include legal provisions on hate crimes under Indian criminal law. That is if the existing Indian criminal legal framework sufficient in tackling the prevailing hate crime concerns in India. This question also significantly brings out the need to first look into the present-day Indian social structures and the inequalities laid therein. The present work takes into account the grounds of religion, race, caste, gender and sexual orientation that are foremost significant to if not pinpoint, demarcate hate crimes in the Indian context. The above-mentioned grounds are relevant for this research considering that the Indian diaspora is a heterogeneous complex with interconnected threads of manyfold intersections and a large population that falls under one or more grounds. While answering the issue of the prevalence of hate crimes in India, it is noteworthy, that even though hate crimes are largely a part of Indian society and may be seen to be rooted in age-old beliefs, customs and practices along with the colonial influence, they are pretty much 'invisible'. Therefore, a deep analysis of the existing social patterns that confirm their point of origin has been incorporated, to develop a deeper and clearer understanding of the extent and deep rootedness.

¹ McLaughlin E. (2002) Rocks and Hard Places: The Politics of Hate Crime. *Theoretical Criminology* 6(4): 493–498.

² Jacobs, J. and Potter. K., (1998) *Hate Crimes: Criminal Law and Identity Politics*, Oxford University Press, New York, Chapter 1, Introduction, 3

³ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press.

For the purpose of this research, a doctrinal, socio-legal approach has been adopted. This work is based on existing literature and data and no empirical work has been undertaken.

By many academics, the law has been understood as a part of a wider social as well as political structure and is therefore quite intricately connected to the socio-political backdrop in numerous ways.⁴ Therefore for a clear and comprehensive understanding and interpretation of any law, it is quite relevant to understand aspects relating to society, culture and politics. The approach undertaken to conduct this research may be seen as explanatory in a wider sense. This work takes into account significant explanations relating to the ‘historical, sociological, psychological, economical and the like’,⁵ to develop a clear and detailed understanding of the Indian context, which is aimed at providing better insights in terms of justifying the need for a hate crime legislation in the country.

The methodology undertaken for this research attempts to be inclusive of aspects of philosophy, history, morality, ethics, sociology, polity and similar social aspects⁶ in the Indian context. While conducting this research, the materials have been collected from vast and varied sources, mostly those relating to the Indian context, which includes literature from different areas relating to caste, race, gender, sexual orientation, and religion, in terms of their historical, political, demographical, legal and cultural (ancient, medieval, pre-colonial and post-colonial era) relevance. A multidimensional literature exploration for this research provided some resistance in terms of its vastness (it was quite unstructured and made it cumbersome to pick and choose) and in the compilation of materials to best suit and provide precise answers to the research question. Although an effort has been made to seek information and include most but not all aspects that assist in understanding and prescribing solutions to the Indian hate crime concerns, further discourses and literature on the subject would greatly assist in developing the concept, nature and law relating to hate crimes concerning India.

⁴ Philip Thomas, Curriculum Development in Legal Studies“ Law Teacher 1986, 20, pp.110; 112; Lorie Charlesworth, (2007), On Historical Contextualisation: Some Critical Socio-Legal Reflections, Liverpool John Moore’s University, Crimes and Misdemeanours 1754-0445

⁵Mark Van Hoecke, (2013) Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? Bloomsbury Publishing Plc, Page 8

⁶ Mark Van Hoecke, (2013) Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? Bloomsbury Publishing Plc, Page 10

The normative legal sections undertaken as a part of this research have been looked into with the help of the existing criminal legal provisions in India (Indian Penal Code, 1860), the Constitution of India (Articles 19, 14 and 21), The Prevention of Atrocities Act, 1898, State legislations and Ordinances that attempt to prevent hate crimes, along with landmark judgements that shine a light on the historical development of the position of criminal law in India, and the more recent judicial pronouncements that depict a dynamic shift to a more open, holistic and intersectional approach taken up the higher most Indian Courts.

A socio-doctrinal research methodology has been preferred over empirical methods primarily in the lack of sufficient literature on hate crimes in the Indian context. It is significant to understand that the concept of hate crimes in the Indian context is quite new and unexplored when compared to other world nations, notwithstanding that this research suggests a significant prevalence of hate crimes in India although in a more invisible form (also, considering the lack of general awareness on hate crimes in India). For the same reason, it seems more relevant to uncover and connect the underlying deep-rooted social threads and legal narratives before diving into empirical work on hate crimes in India. This research aims at providing some groundwork for future empirical work to be followed.

The bulk of the work that deals with specific grounds of hate crimes under chapters two and three are structured in a way to first develop a social understanding of how the age-old inequalities have given way to hostilities and hate in the present time, considering the influence of foreign invasions and colonization, and secondly to discuss the existence of the prevailing law and its effectiveness. The work includes relevant judicial decisions and available data. Although an effort has been made to portray a clear picture of hate concerns in India, considering the vastness of the landscape in terms of population, demographics and diversity, not all instances and scenarios have been covered. This research aims to provide a peek into the ongoing concerns and attempts to seek viable solutions.

This work holds significance for several reasons, firstly the rise in the level of hate crimes around the world has brought the issue into the political and legal domain in many parts of the developed world, with the vast and varied Indian population which accounts for 1.3 billion

approximately, this research would provide an answer and a way through the concerns faced by a large segment of the global population. Secondly, the establishment of the need for legal provisions on hate crimes in India may be seen as a steppingstone, in terms of social development such as public mental health, victim rehabilitation, upholding human rights and better standards of living. Thirdly, India being a very diversified prototype, the establishment of the extent of hate crimes and the development of laws would assist different nation-states in developing hate crime laws. The case study of India would provide answers to several questions that different nation-states have been debating. Fourthly, research based on the Indian case would also bolden and outrightly convey further global confirmation and unify the individual country-wise efforts in tackling hate crimes as a global concern. Larger sampling in the research that would follow, would provide better insights into hate crime data reporting and management globally. The intersectionality in hate crimes, being a serious concern has been addressed in the final chapter, which would assist in developing a broader understanding of the extent of hate crime impacts, enabling better legislative incorporation and implementation. Therefore, this research holds high significance, in terms of setting grounds for further work on hate crimes to follow, providing remedy and relief against hate crimes, upholding universal human rights and being a way forward in establishing laws and policies to reflect democratic values and reduce hate crimes.

The first chapter seeks to understand hate crimes for the purpose of this research. It builds on the European understanding of hate crimes, as the European hate crime law is in its later stages of development which would assist the Indian criminal law, which at this point does not incorporate any specific hate crime legislation, notwithstanding a few existing provisions on ‘incitement of hate’ and the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The 27 European Union States and 29 Indian States share a common ground of diversity in terms of race, ethnicity, religion, linguistic and cultural practices. The heterogenous mix of populations and their varied intersectional identities in Europe and India makes it easier to understand the functioning of law and policy. In the sense, the upcoming hate crime laws in India may pick up much from the European hate crime legislative experiences in terms of implementation, concerns with reporting, data collection and so on. The second part of this chapter focuses on the impacts of hate crimes. It signifies that although hate crimes may seem like parallel crimes, they cause more harm in the physical, psychological and emotional sense. As hate crimes target the victim's identity, it indirectly impacts all individuals sharing specific

identity traits. Therefore, the impacts of hate crimes are widespread, harming the direct victim along with causing harm to all those sharing the victim's identity, their families and communities. The harm caused by hate crimes goes further within the offender community and causes a hostile environment among different community groups. Based on the available literature, this part of the chapter argues that hate crimes hurt more.

The second chapter is categorized into three parts. The first part enshrines light on Indian criminal law in reference to provisions relating to hate crimes. It discusses the fundamental rights guaranteed under the Constitution of India, specifically Articles 14, 19 and 21, within which also lies the scope of an upcoming hate crime legislation in the country. Section 153A under the Indian Penal Code, 1860 has been discussed as it is the closest any Indian legal provision gets to hate crimes (although it only focuses on 'incitement of hate'). This section indicates a lack of adequate provisions to define or tackle hate crimes under Indian criminal law.

The second part of the chapter focuses on hate crimes based on religion in India. It develops on the Indian social setup considering differential historical timelines and the events of Islamic invasions and British colonization moving on to discuss concepts of communal violence, mob lynching and vigilantism in the present time, attempting to enumerate all such acts of religious hate within the scope of hate crimes in the Indian context. This section incorporates a recent Indian Supreme Court judgement,⁷ that has significantly voiced religious hate crime concerns within the country and has also led to the formation of a few State level Ordinances and Legislation specifically focused on mob lynching and religious hate-based communal hostilities. A few Sections from the Indian Penal Code that touch on crimes of religious nature have also been discussed. This section attempts to establish a need for efforts on the federal level to tackle hate crimes based on religion.

The third part of the second chapter focuses on hate crimes based on gender and sexual orientation. It firstly highlights that homosexuality is not new to India and has been socially accepted since ancient times. However, the inclusion of the provision criminalizing

⁷ Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72

homosexuality, under the Indian Penal Code,⁸ brought the concept of homosexuality to light and made it seem immoral, until 2018 when the Indian Supreme Court repealed such provision advocating LGBTQ rights and freedom.⁹ This part entails significant research on the lesbian member community in India and their hate-based victimization. The focus of the chapter moves to the Indian transgender community, and historically discusses the place of transgender people in India, considering how they held a well-respected position in society to more recently where they face hate and bias in their day-to-day life. It also discusses the recently accommodated Transgenders (Protection of Rights) Act 2019 and the provisions therein.

The later part of this third section briefly discusses the ongoing debates on the inclusion and protection of women under hate crime legislation. In the Indian case, although several provisions relating to the rights and protection of women are inlaid under different statutes and the Indian Constitution, it seems significant that the protection of women under hate crime legislation in the Indian context would dully fulfil its symbolic purpose and bring the hate concerns against woman community to the forefront. This section discusses misogyny, in the light of patriarchy and the Indian caste system and their interconnected effect of subjugating women in India. The laws and provisions relating to women have been mentioned, implying that even in the presence of numerous legislations and legal provisions, the prejudice and bias against women in India are deeply rooted and require more efficient legislative tools to tackle concerns.

The third chapter focuses on hate crimes based on caste and race in India. The first part of the chapter deals with hate crimes based on caste in India. The concept of caste has been explained in depth as it is unique to India and assists in developing a clear understanding in terms of the social hierarchical structures quite established within the Indian Hindu community (approximately 80% of the Indian population). Although the caste system has existed in India for centuries, colonization enabled the loss of fluidity among different caste groups. This part focuses attention on the role played by the British colonizers in crystalizing the caste identities and therefore exacerbating the inter-caste hostilities. The concept of ‘Scheduled Caste’, ‘Scheduled Tribes’ and ‘Other Backward Class’ under the Indian Constitutional List have been

⁸ Section 377, Indian Penal Code, 1860.

⁹ Nav Tej Singh Johar v Union of India and Ministry of Law and Justice (2018) 1 SCC 791.

included to shed light on the available legal protection for the lower caste and class sections of the Indian society. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is relevant to this discourse and has been aptly detailed under this section. The POA may be seen as the only piece of Indian legislation that targets and focuses on caste-based hate crimes. A few caste-based hate crimes have been elaborated to expand on the magnitude of caste-based crimes and the lax or non-implementation of the existing law. This section argues that caste-based hate crimes or atrocities in India are one of the primary hate concerns and reflects on a need for better implementation especially considering the aspect of intersectionality, as a large Indian population (although a minority) falls within the lower caste category and is victimized based on more than one identity grounds.

The second part of this chapter elaborates on hate crimes based on race in India. It builds on a case study of the Northeast Indian population that belongs to Mongoloid race (biological race). As a Hindu majoritarian country, the major Indian population is made up of Aryan and Dravidian biological races, and only a segment of Indians who are residents in the Northeastern Indian region appear racially different in terms of their physical attributes, food habits and cultural traditions.¹⁰ For the same differences when the Northeast Indians migrate to different parts of the country for education or employment, they face racial abuse and hate. This section significantly focuses on the colonial influence and elaborates on how the Britishers formulated connections between race and criminality and alienated the Northeast Indian population from the rest of the country. The complex between race and caste has also been brought to light suggesting that the two might intersect at many junctures but may not be used interchangeably. This part of the chapter includes an interesting segment on food cultures and dietary practices and related hate crimes. This section on race-based crimes also brings the concept of intersectional hate crimes to focus, as most racial crimes are committed against the Northeast Indian population, who also belongs to the Tribal community, protected under the Constitutional ‘Scheduled Tribes’ category. ‘Scheduled Tribe’ category also avails protection under the Prevention of Atrocities (Scheduled Caste and Scheduled Tribe) Act, 1989 which specifically targets caste-based hate crimes, thereby diluting the claims made by the Tribal indigenous population, against racial crimes (in the absence of any specific law on race-based hate crimes). Furthermore, a large part of this Tribal population follows Christianity and

¹⁰ Kamei Samson, (2017) North-east and Chinky: Countenances of Racism in India, The Journal of Development Practice, Volume 3

Buddhism, making them vulnerable on multiple intersecting grounds of race, caste or religion. This part of the chapter argues that racial crimes in India are quite invisible and are often understood as a 'lack of tolerance' or 'cultural differences' and require legal means to highlight the issue and prevent future race-based hate crimes.

The fourth and final chapter focuses on the concept of intersectionality, the relevance of which has been developed through chapters two and three. The concept of intersectionality has been developed by feminist studies and discourses in the United States that were seeking to avail protection for African American women and primarily focused on discrimination laws. With the development of literature, this concept of intersectionality has become quite significant in several discourses. In relation to hate crime concerns, the intersectionality approach has much to offer. The first section of the chapter discusses the advancements in the intersectionality debate attempting to focus on the vulnerability of the victim in hate crimes based on multiple identity grounds. The concept of intersectionality when applied to the Indian case reflects multiple interconnected victim group vulnerabilities. This section also entails the single-strand legislative approach in hate crimes, in comparison to an intersectional approach, suggesting an incline towards the latter as in many cases the hate crime victims are targeted not based on a single identity trait. Also, where law and policy seek to locate a singular ground for protecting a hate crime victim, it negates the existence of multiple levels of hate and bias, suggesting an incomplete road to justice in hate crime cases. A recent Indian Supreme Court judgement¹¹ has been incorporated indicating the onset of the required change in looking at hate crimes through an intersectional lens. This section argues on establishing the need for an intersectional approach in legislating hate crimes.

The second part of the chapter focuses on theories of punishment. It entails a brief description on the concepts of retribution and deterrence theories of punishment and their relevance in the hate crime context. A few more recent and hybrid formats of the two theories have been incorporated. This section then details the Restorative Justice approach and its application in hate crime cases, also focusing on the less serious category of hate crimes, which require an understanding of the deep rootedness of the offender's hate and less sentencing. This section

¹¹ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

argues, that hate crimes which are quite diverse in terms of their nature, extent, and impacts, require a more holistic legislative approach. A hate crime legislative approach which is solely retributive, or deterrent would not be sufficient to adequately fulfil the legislative purpose and therefore needs to incorporate elements from retributive, deterrent, and restorative accounts.

CHAPTER 1

INTRODUCTION

This brief introductory chapter focuses on developing an understanding of the concept of hate crimes, how they cause harm and to what extent. It highlights the significance of hate crime laws. The chapter is classified into three parts; the first section attempts to introduce the concept of hate crimes, while the second part focuses on the diverse range of impacts of hate crimes, including those on the individual victims, and community and societal victims, bringing to light the multi-dimensional adverse effects. The following segment of the chapter concentrates on the relevance of hate crime legislation in place. This chapter resonates with the larger academic consensus that hate crimes hurt more.

PART I

UNDERSTANDING HATE CRIMES

This part of the chapter introduces the concept of hate crimes. It attempts to develop a clear understanding of hate crimes, for the purpose of this research. It draws on the existing understanding of hate crimes from different sources of literature and existing legal documents.

Donovan, Macdonald, and Clayton suggest that hate crimes emerge from structural hierarchies of privilege and power and express deep-rooted social exclusion and marginalization. The socio-economic tensions, cultural understanding of some being superior to others along with cultural histories that see minorities as outsiders are responsible for forming the theoretical grounds for the commission of hate crimes.¹² Hate crimes are simple crimes that occur in very

¹² Donovan, C., S. J. Macdonald, and J. Clayton. (2018), New Directions in Hate Reporting Research: Agency, Heterogeneity and Relationality. *Sociological Review*: 24 (2)

ordinary day-to-day situations¹³ and deny civil liberties to different groups and societies.¹⁴ Individuals who do not substantially represent dominance in their society or do not belong to a dominant group are classified as 'different' and are targeted. Brown suggests that hate crimes are mostly committed against underprivileged groups,¹⁵ while Perry's work elaborates that the differential treatment towards underprivileged groups does not appear instantly within a society but is a gradual outcome of years of marginalisation and discrimination, through the creation of a dominant group and the dominated group, on the grounds of gender, race, ethnicity, religion, sexual orientation, disability and other similar grounds.¹⁶

Gerstenfeld¹⁷ points toward the fact that targeted hate victimization is a consequence of 'actual or perceived membership of a social grouping' [based on the discriminatory selection model,¹⁸] implying that it is the victim's group identity that is under attack.¹⁹ Similarly, Wakeman et al. suggest that hate crimes may be understood as an extreme portrayal of societal prejudice²⁰ based on what Mason calls 'the hierarchy of differences' and act as a means to affirm power relations between different groups. Hate crimes may be seen as an affirmation of the perpetrator's position of privilege within the social hierarchy. Furthermore, Perry²¹ elaborates on this notion of 'inter-group conflict' (a consequence of hierarchical social classification) between those who hold a powerful position in society against those who do not. The hierarchies assist in creating 'ingroups' and 'outgroups'; for example, in some societies, heterosexuality is understood as superior, natural and moral, while, homosexuality is understood as inferior, unnatural and immoral, which in turn creates a false dominance of the

¹³ Iganski P, (2017) How Are People Affected by Hate Crimes? <<https://urskola.se/Produkter/200721-UR-Samtiden-Internationella-brottsofferdagen-2017-Stodja-offer-for-hat-och-vald>>; Iganski P, Levin J., (2015), *Hate Crime: A Global Perspective* (Routledge, London), 35

¹⁴ Herek, G., Cogan, J., & Gillis, R. (2002). Victim Experiences in Hate Crimes Based on Sexual Orientation. *Journal of Social Issues*, 58, 319–340; Bell, C. (2002), African American Responses to 9-11 Paper presented at the 110th Annual Convention of the American Psychological Association, Chicago.

¹⁵ Brown C, (2004) Legislating Against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence *Victoria University of Wellington Law Review* 35(3): 595

¹⁶ Perry. B, (2001) *In the Name of Hate: Understanding Hate Crimes*, 1st Edition, Routledge, London.

¹⁷ Gerstenfeld. B, (2010) *Hate Crimes: Causes, Controls and Controversies*, 2nd edn. Los Angeles: Sage; Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

¹⁸ Woods JB, (2008) Taking the 'Hate' Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes, *UCLA Law Review* 56(2): 489–541; Lawrence, F. M. (1999). Punishing Hate: Bias Crimes Under American law. Harvard University Press., 29-39

¹⁹ Perry B (2001) *In the Name of Hate: Understanding Hate Crimes*. London: Routledge

²⁰ Cramer, R. J., Wakeman, E. E., Chandler, J. F., Mohr, J. J., & Griffin, M. P. (2013) Hate Crimes on Trial: Judgments About Violent Crime Against Gay Men. *Psychiatry, Psychology and Law*, 20, 202-215

²¹ Perry B, (2009) The sociology of Hate: Theoretical Approaches. In: Levin B (ed.) *Hate Crimes Volume 1: Understanding and Defining Hate Crime*. Westport, CT: Praeger, 55–76

heterosexual group over the homosexual group.²² This dominant social group reinforces superiority and acts as a regulating mechanism to police social and normative rules and boundaries, keeping the 'outgroups' in place (to not become dominant). For the same reason, more hate crimes are witnessed where outgroups are more active, visible, and assertive.²³ A hate crime may be seen as a two-headed spear that conveys the positioning of specific social groups on the hierarchical social scale, sending out a message to the members of outgroups of their subjugated social status and successfully emphasizing the dominant status of the ingroup.

Furthermore, Cogan submits that hate crimes are quite underestimated (hate crimes require more attention at the legal and policy level).²⁴ Accurately accessing the extent of hate crime incidents, their gravity and typology have numerous fundamental concerns, including victims' reluctance to report incidents and lack of adequate law enforcement and reporting.²⁵ The available law enforcement statistics suggest the prevalence of hate crimes, yet law enforcement highly relies on the victim's willingness to report the hate incident to the authorities.²⁶ Hate crime data heavily depends on the competence and willingness of the police officials to categorise hate crimes accurately,²⁷ while hate crimes are underreported with discrepancies in the application of the law, lack of adequate training and sensitisation of relevant officials in hate crime reporting and data collection in a systematized manner to enable its compilation, categorisation and analysis.²⁸

²² Mason, G. (2008). Hate Crime, In Thalia Anthony and Chris Cunneen (Eds.), *The Critical Criminology Companion*, Sydney, Australia: Hawkins Press, 180- 190.

²³ Mason, G. (2008). Hate Crime, In Thalia Anthony and Chris Cunneen (Eds.), *The Critical Criminology Companion*, Sydney, Australia: Hawkins Press, 180- 190.

²⁴ Cogan, J. (2002) Hate Crimes as a Crime Category Worthy of Policy Attention, *American Behavioral Scientist*, 46, 173-185.

²⁵ Megan Sullaway, (2004) Psychological Perspectives on Hate Crime Laws, *Psychology, Public Policy, and Law*, Vol. 10, No. 3, 250–292

²⁶ Herek, G. M., Cogan, J. C., & Gillis, J. R. (2002), Victim Experiences in Hate Crimes Based on Sexual Orientation, *Journal of Social Issues*, 58, 319-339; Kuehnle, K., & Sullivan, A. (2001) Patterns of Anti-Gay Violence: An Analysis of Incident Characteristics and Victim Reporting. *Journal of Interpersonal Violence*, 16, 928-943.

²⁷ Saucie, D, Brown, T, Mitchel, R, Cawman, A, (2006) Effects of Victims' Characteristics on Attitudes Toward Hate Crimes, *Journal of Interpersonal Violence* Volume 21, 890-909

²⁸ Moshin Alam Bhat, (2018) The Case for Collecting Hate Crimes Data in India, *Law and Policy Brief*, Global Jindal Law School, Volume 4, Issue 9.

Goodey²⁹ suggests a narrow and underdeveloped recognition and legislative acknowledgement of hate crimes within the European Union. It was only in 2003 that the notion of 'hate crime' was for the first time used by OSCE and has generally lacked adequate recognition among different EU states.³⁰ Garland and Chakraborti³¹ have pointed out the growing concerns regarding the risk of victimisation of minorities and marginalised groups in the European Union. Similarly, McClintock³² in 2005, Turner³³ in 2009, and much more scholarly work has been indicating the rising issue of hate crimes, be they concerning immigrants, sexual orientation, religion, disability, or minority community membership within the societies (Roma People, Traveller Community Members, Jewish People etc.). Garland and Chakraborti³⁴ suggest that an approach that is not merely minority centric but instead focuses on the actual harm that the hate crimes cause to society is necessary to tackle concerns. Such would not leave out any vulnerable sections of the society regardless of their belonging to the majority or minority groups, reducing the influence of identity group politics, and would also include members of the society suffering from drug abuse, disabilities, sex workers, homeless, transgender people to mention a few.³⁵

The ODIHR³⁶ provides a broad conceptualisation and a workable definition of hate crimes comprising two elements, namely the constitution of a criminal offence and the intentional targeting of specific individuals based on their group membership against whom the perpetrator feels bias or prejudice. The ODIHR's definition encompasses hate crimes not only committed against minority groups but also those committed by minority groups against the majority

²⁹ Goodey J (2008) Racist Crime in the European Union: Historical Legacies, Knowledge Gaps, and Policy Development. In: Goodey J and Aromaa K (eds) *Hate Crime: Papers from the 2006 and 2007 Stockholm Criminology Symposiums*. Helsinki: European Institute for Crime Prevention and Control, 17

³⁰ Goodey J (2008) Racist Crime in the European Union: Historical Legacies, Knowledge Gaps, and Policy Development. In: Goodey J and Aromaa K (eds) *Hate Crime: Papers from the 2006 and 2007 Stockholm Criminology Symposiums*. Helsinki: European Institute for Crime Prevention and Control, 16–28.

³¹ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

³² McClintock M (2005) *Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America*. New York: Human Rights First.

³³ Turner L, Whittle S and Combs R (2009) *Transphobic Hate Crime in the European Union*. London: ILGA-Europe and Press for Change.

³⁴ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

³⁵ Chakraborti N (2010) Crimes Against the 'Other': Conceptual, Operational, and Empirical Challenges for Hate Studies, *Journal of Hate Studies* 8(1): 9–28.

³⁶ ODIHR [Office for Democratic Institutions and Human Rights] (2010) *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2009*. Warsaw: OSCE Office for Democratic Institutions and Human Rights, 13

groups, i.e., the perpetrator must not necessarily belong to a dominant group. The ODIHR definition focuses on the 'prejudice' factor that is paramount in all hate crimes.³⁷

The significant bodies such as the Council of Europe's Cyber Protocol, understand hate as 'intense dislike or enmity' which is considered a tougher definition in its approach when compared to the notion of bias or prejudice, suggesting that a significant volume of incidents that must be recorded as hate crimes are not.³⁸ As within the EU, the conceptualised working definition of hate crimes provided by the ODIHR has not been adequately brought down to the State level, with some nation-states considering 'hate element' as a strict requirement for crimes to qualify as hate crimes (there also exists EU framework on Combating Racism and Xenophobia³⁹).

In the case of England and Wales, the College of Policing includes includes,⁴⁰ incidents motivated by prejudice or hate that result in the commission of criminal acts and non-criminal hate incidents (with an understanding that even trivial instances of hate may become critical incidents), bringing together a higher number of hate crime incidents when compared to European countries such as Austria, Germany or the Czech Republic which moreover rely on the discretion of the prosecution, Courts, and the investigating authorities,⁴¹ and therefore record less number of hate crime incidents, which in turn creates discrepancy while analysing and consolidating European hate crime data and also acts as a hurdle in deciphering new policies. While the *Lifecycle of a Hate Crime Report* found inconsistencies in the construction

³⁷ ODIHR [Office for Democratic Institutions and Human Rights] (2009a) Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region. Warsaw: OSCE Office for Democratic Institutions and Human Rights, 15; Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

³⁸ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

³⁹ Council Framework Decision on Combating Certain Forms and expressions of Racism and Xenophobia by Means of Criminal Law, (2008), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913>

⁴⁰ The College of Policing, Major Investigation and Public Protection, (2023) Hate Crimes, <https://www.college.police.uk/app/major-investigation-and-publicprotection/hate-crime>; ACPO [Association of Chief Police Officers] (2005) Hate Crime: Delivering a Quality Service – Good Practice and Tactical Guidance. London: Home Office Police Standards Unit, 9

⁴¹ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

of hate crimes in Ireland,⁴² different European countries record hate crime data on different grounds, creating significant inconsistencies in terms of data collection.

Some European States keep hate crimes at a low priority within their national law and policy schemes, producing obstacles to accurately assessing the extent to which hate crimes are prevalent. In his work, McClintock⁴³ notes that the statistical government data on hate crimes provided by a number of EU states are often 'unavailable, highly misleading, or years out of date.'⁴⁴ The ODIHR 2010 Report states that Portugal and Luxemburg did not collect any statistical data relating to hate crimes.⁴⁵ While according to the ODIHR's annual survey in 47 States, only 31 submitted some hate crime data, which was again found to be inconsistent and incomplete in terms of admission on different grounds such as homophobic, transphobic, and disability.⁴⁶ The French, Italian, Polish and Spanish data was found to be non-inclusive of incidents relating to homophobia.⁴⁷

Similarly, the Czech Republic, Austria, Italy, Sweden, and Germany concentrate on collecting 'anti-Semitic' data while only Sweden focuses on anti-Roma offences, while Austria and Sweden collect data on 'crimes against Muslims'. Garland and Chakraborti,⁴⁸ in their work, also suggest a considerable disparity between the number of hate crimes reported under government records and those provided by non-governmental organisations. While McClintock notes five

⁴² Hayne. A. and Scheppe. J, (2017) Lifecycle of a Hate Crime: Country Report for Ireland, ICCL, 54

⁴³ McClintock M (2005) *Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America*. New York: Human Rights First, 17

⁴⁴ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

⁴⁵ ODIHR [Office for Democratic Institutions and Human Rights] (2010) *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2009*. Warsaw: OSCE Office for Democratic Institutions and Human Rights; OSCE, (2018), *The Guide to Addressing Hate Crime at the Regional Level*, <https://www.osce.org/files/f/documents/d/e/402536.pdf>

⁴⁶ ODIHR [Office for Democratic Institutions and Human Rights] (2010) *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2009*, Warsaw: OSCE Office for Democratic Institutions and Human Rights, 13

⁴⁷ ODIHR [Office for Democratic Institutions and Human Rights] (2010) *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2009*, Warsaw: OSCE Office for Democratic Institutions and Human Rights, 13

⁴⁸ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

times more cases of racial murder incidents via non-governmental agencies when compared to the official government figures.⁴⁹

Countries like Belgium are keen to include grounds such as wealth, health and political convictions; Sweden allows a wider connotation to hate crimes and includes the emotional aspect of 'fear' along with hostility or hatred. In contrast, in the case of Germany and Russia,⁵⁰ the hate offences need to qualify as hate-motivated (narrower understanding), which delineates them from the ODIHR's understanding of hate crimes⁵¹ or the rigorous Austrian approach, which restricts to grounds of race, religion and ethnicity or Latvia where hate crimes are moreover understood as hate speech.⁵² Such also suggests that specific prejudices may be more acceptable in different states, which could be attributed to the country's past experiences and other relevant historical factors. Garland and Chakraborti⁵³ understand the above proposition as normal with State's localised histories shaping their legislative needs. Conversely, it may also be seen as the power of the movements that represent specific interest groups and is not simply based on the social acceptability norm, suggesting that some prejudices might be less acceptable compared to others.⁵⁴ However, the lack of some consensus on the general understanding of hate crimes, collection of statistical data and how different States prioritise different policies and practices regulating hate crimes poses several difficulties in accessing the true extent, nature as well as impact of hate crimes.

The 2018, OSCE, Guide to Addressing Hate Crime at the Regional Level, suggests that several hate crime cases remain unreported and unrecorded. This guide mentions the Second European Union Minorities and Discrimination Survey, which found that 90% of the hate crime cases are 'believed not to be reported to the authorities'.⁵⁵ The variation in the conceptualization⁵⁶ along with

⁴⁹ McClintock M (2005) *Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America*. New York: Human Rights First, 20

⁵⁰ McClintock M (2005) *Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America*. New York: Human Rights First.

⁵¹ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

⁵² Haynes. and Schweppe. J, (2017) Lifecycle of a Hate Crime: Country Report for Ireland, ICCL, 55

⁵³ Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51

⁵⁴ Grattet, R., & Jenness, V. (2001). The Birth and Maturation of Hate Crime Policy in the United States, *American Behavioral Scientist*, 45(4), 668-696.

⁵⁵ OSCE, (2018), The Guide to Addressing Hate Crime at the Regional Level, <https://www.osce.org/files/f/documents/d/e/402536.pdf>, 15

⁵⁶ Haynes. A. and Schweppe. J, (2017) Lifecycle of a Hate Crime: Country Report for Ireland, ICCL 2017, 54; Garland. J and Chakraborti. N, (2012), Divided by a Common Concept? Assessing the Implications of Different

underreporting⁵⁷ of hate crimes within the EU poses concerns in terms of providing an effective and inclusive response. For several States within the EU, the notion of hate crimes is short on gaining a strong footing, except for the United Kingdom, where the scholarly and policy work on hate crimes is far more developed. According to Chakraborti,⁵⁸ the landmark case of Stephen Lawrence brought hate crimes in the UK to the mainstream. The other relevant case of David Copeland is also relevant to the hate crime discourse in the UK.⁵⁹ The hate crime framework in England and Wales is considered far more developed and efficient in tackling hate crimes and is adept with comprehensive policies and procedures for recording, sentencing, and data collection.⁶⁰ A similar level of effort in concretizing the efforts from different national States within the EU is required to robustly comprehend the hate crime concerns, in terms of developing literature and evidence of an expansively common and shared understanding of hate crimes.⁶¹ The lack of 'shared understanding' on hate crimes creates difficulties in precisely establishing the level of commission of hate crimes in different States.⁶² The *Life Cycle of a Hate Crime Report*⁶³ adequately and empirically underpins the relevance of a more unified approach across the institutions of the Criminal Justice System, in terms of tackling hate crimes. The report found that in England and Wales, a clear and defined set of policies, guidelines and processes on hate crimes resulted in higher uniformity in terms of a more cohesive and consistent approach towards practice and legal procedures.⁶⁴

For this research, considering similarities between India and the European Union, in terms of diverse races, religions, ethnicities, linguistics, history and politics, the ODIHR definition of hate crimes seems apt. The ODIHR definition of hate crimes incorporates a wider outlook to accurately take into account the varied European history, ethnicities, race, religion, political

Conceptualizations of Hate Crime in the European Union, *European Journal of Criminology* 9(1) 38–51; Schweppe, J (2021) What is a hate crime? *Cogent Social Sciences*, 7:1.

⁵⁷ OSCE, (2018), *The Guide to Addressing Hate Crime at the Regional Level*, <https://www.osce.org/files/f/documents/d/e/402536.pdf>, 15

⁵⁸ Chakraborti N (2010) Crimes Against the 'Other': Conceptual, Operational and Empirical Challenges for Hate Studies, *Journal of Hate Studies* 8(1): 9–28.

⁵⁹ Chakraborti N (2010) Crimes Against the 'Other': Conceptual, Operational and Empirical Challenges for Hate Studies, *Journal of Hate Studies* 8(1): 9–28.

⁶⁰ Haynes. A. and Schweppe. J, (2017) *Lifecycle of a Hate Crime: Country Report for Ireland*, ICCL, 54

⁶¹ ODIHR [Office for Democratic Institutions and Human Rights] (2009a) *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region*. Warsaw: OSCE Office for Democratic Institutions and Human Rights

⁶² Garland. J and Chakraborti. N, (2012), *Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union*, *European Journal of Criminology* 9(1) 38–51

⁶³ Haynes. A. and Schweppe. J, (2017) *Lifecycle of a Hate Crime: Country Report for Ireland* ICCL

⁶⁴ Haynes. A. and Schweppe. J, (2017) *Lifecycle of a Hate Crime: Country Report for Ireland* ICCL, 57-58

ideologies, linguistics, beliefs and customs. As European Union consists of 27 Nation States, and the hate crime laws are still in their stages of development, it seems a good starting point for the Indian hate crime legislative discourse, taking into account, the 29 Indian states and their diverse identity setup.

PART II

IMPACTS OF HATE CRIMES

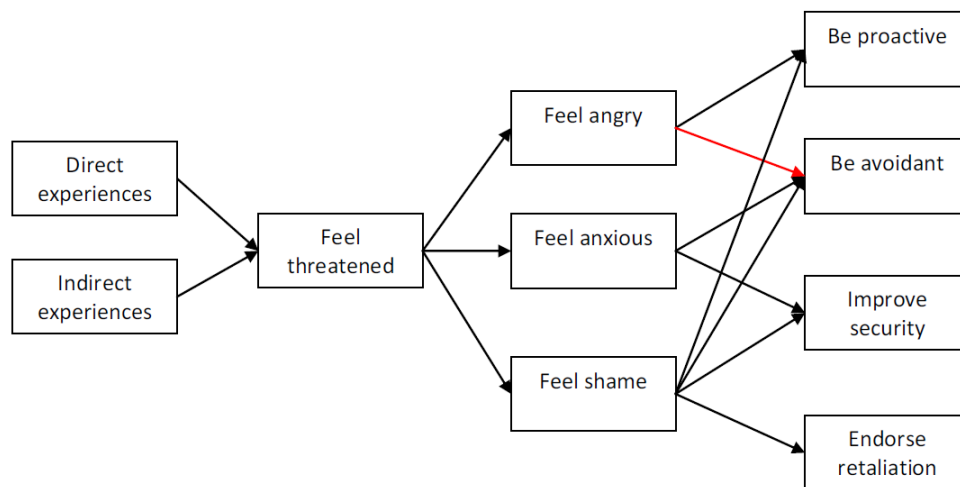
This section of the chapter focuses on the impacts of hate crimes. To understand the gravity of hate crimes it is significant to establish their far-reaching effects. An accurate estimate of the impacts of hate crimes is essential to formulate the legislation and related sentencing, as a more intricate understanding of the adverse impacts of hate crimes assists in accurately penalizing hate crimes, taking into account the damage caused in physical, emotional and psychological terms. This part of the chapter addresses the academic discussions which establish that hate crimes are likely to cause more significant harm when compared to parallel crimes. As hate crimes are unique in terms of targeting the identity of the victim, their impacts may not be simply confined to individual physical harm. The available literature suggests that the harm caused by hate crimes has more to it than mere individual harm, i.e., hate crimes amount to the victimisation of the individual, community, and society. Hate crimes can cause not only physical but psychological and emotional harm. This part of the chapter corresponds to the larger academic understanding that hate crimes hurt more.

In his work on racial violence in 1992, Weinstein affirmed that hate crimes cause three levels of harm; firstly, the harm caused is much greater than physical damage. Secondly, such harm does not only harm the individual victim, but harms the victim's group, and thirdly, such harm has long-term enduring adverse effects on the whole society.⁶⁵ Extending on the same lines, Iganski adds two more levels, i.e., the harm caused to the other similar minority communities and the harm caused to the 'social norms and values.'⁶⁶ The effects of hate crimes have been

⁶⁵ Weinstein J (1992), First Amendment Challenges to Hate Crime Legislation: Where's the Speech? *Criminal Justice Ethics* 11(2) 6–20.

⁶⁶ Iganski, P, (2001) Hate Crimes Hurt More, *American Behavioural Scientist* 45, 626-38.

recently studied through empirical research reflecting on the direct and indirect impacts of hate crimes (Table 1.)⁶⁷



Note. Black lines denote a positive correlation and the red line denotes a negative correlation

DIAGRAM 1. THE SUSSEX HATE CRIME PROJECT REPORT⁶⁸

*The Sussex Hate Crime Project Report*⁶⁹ depicts (above) the extent to which hate crimes affect the victims in terms of direct and indirect victimisation. The chart above portrays that hate crime victims are prone to feel threatened, angry, anxious and feel shame.

PHYSICAL HARM

Research by Iganski and Lagou and Martin,⁷⁰ suggests that hate crimes are no different and are not physically graver. Moreover, Iganski and Lagou⁷¹ suggest that the victims of hate crimes were less likely to suffer physical injuries. Martin's work provides a similar outcome, although,

⁶⁷ Paterson, J., Walters M, Rupert B., and Fearn, H., (2018) *The Sussex Hate Crime Project: Final Report*. Project Report, University of Sussex, 31

⁶⁸ Paterson, J., Walters M, Rupert B., and Fearn, H., (2018) *The Sussex Hate Crime Project: Final Report*, Project Report. University of Sussex, 31

⁶⁹ Paterson, J., Walters M, Rupert B., and Fearn, H. (2018) *The Sussex Hate Crime Project: final report*, Project Report. University of Sussex, 30

⁷⁰ Iganski, P., & Lagou, S. (2014), The Personal Injuries of Hate Crime, in N. Hall., A. Corb., P. Giannasi, & J. Grieve (Eds.) *The Routledge international handbook on hate crime*, London, NY: Routledge, 34-46; Martin, S. E. (1996). Investigating Hate Crimes: Case Characteristics and Law Enforcement Responses, *Justice Quarterly*, 13, 455-480.

⁷¹ Iganski, P., & Lagou, S. (2014). The Personal Injuries of Hate Crime, in N. Hall., A. Corb., P. Giannasi, & J. Grieve (Eds.) *The Routledge international handbook on hate crime*, London, NY: Routledge, 34-46

in his research, the overall injuries in cases of hate crimes and non-hate crimes were both minors.⁷²

Conversely, the larger academic discourse found that the victims of hate crimes were more likely to undergo physical harm,⁷³ and the degree of physical injury caused was found to be much more compared to a parallel crime.⁷⁴ In 2001, Strom, while analysing bias-motivated crimes, found that approximately 60% of bias-motivated crimes induce serious injuries.⁷⁵ Research suggests that there is a higher probability that hate crimes are committed against a person than against property as there are more cases of assault than trespass.⁷⁶ Another research conducted by Pezzella and Fetzer found that hate crimes are committed by more than one individual,⁷⁷ causing a greater degree of harm.⁷⁸ Levin and McDevitt, in 1993, organized research that found that hate crimes result in disproportionately extreme physical injuries; they also found that hate crime victims are more likely to end up in a hospital, suggesting a higher degree of violence involved. In the same light, McDevitt's⁷⁹ work proposes that the victims of hate crimes are three times more likely to need hospitalisation. Fetzer and Pezzella made a similar finding.⁸⁰ More severity and seriousness were found in hate crime cases (27%) compared to non-hate crimes (8%) by Wilson.⁸¹

⁷² Martin, S. E. (1996). Investigating Hate Crimes: Case Characteristics and Law Enforcement Responses, *Justice Quarterly*, 13, 455-480.

⁷³Fetzer and Pezzella, (2019) The Nature of Bias Crime Injuries: A Comparative Analysis of Physical and Psychological Victimization Effects *Journal of Interpersonal Violence*, Vol. 34(18) 3864–3887.

⁷⁴ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, 44

⁷⁵ Fetzer and Pezzella, (2019) The Nature of Bias Crime Injuries: A Comparative Analysis of Physical and Psychological Victimization Effects *Journal of Interpersonal Violence*, Vol. 34(18) 3864–3887; Strom, K. (2001) *Hate crimes reported in NIBRS, 1997-99*. Washington, DC: Office of Justice Programs, Bureau of Justice Statistics, U.S. Department of Justice.

⁷⁶ Akiyama, Y., & Nolan, J. J., (1999) The Hate Crime Statistics Act of 1990: Developing a Process for Measuring and Predicting the Occurrence of Hate Crime, Paper presented at the meeting on Hate Crimes: Research, Policy and Action, Los Angeles.

⁷⁷ Pezzella and Fetzer, (2017) The Likelihood of Injury Among Bias Crimes: An Analysis of General and Specific Bias Types, *Journal of Interpersonal Violence*, Vol. 32(5) 703–729; K M Craig, (2002) Examining Hate-Motivated Aggression: A review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression, *Aggression and Violent Behaviour*, 7(1), 85-101; Levin, J., & McDevitt, (1993) *Hate crimes: The Rising Tide of Bigotry and Bloodshed*, Plenum Press, New York, 11; R F Cook; B E Smith; A V Harrell, (1986) *Helping Crime Victims - Levels of Trauma and Effectiveness of Services - Executive Summary*, Washington, DC: U.S. Department of Justice, National Institute of Justice

⁷⁸ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press; Levin, J., & McDevitt, J (1993). *Hate crimes: The rising tide of bigotry and bloodshed*, Plenum Press, New York

⁷⁹ McDevitt, J., Levin, J., & Bennett, S, (2002) Hate Crime Offenders: An Expanded Typology, *Journal of Social Issues*, 58 303–318.

⁸⁰ Fetzer. M and Pezzella, F. S. (2017), The Likelihood of Injury Among Bias Crimes: An Analysis of General and Specific Bias Types. *Journal of Interpersonal Violence*, 32, 703-729

⁸¹ Fetzer. M and Pezzella. F. S, (2019) The Nature of Bias Crime Injuries: A Comparative Analysis of Physical and Psychological Victimization Effects *Journal of Interpersonal Violence*, Vol. 34(18) 3864–3887; Wilson, M.

PSYCHOLOGICAL HARM

The research conducted by Fetzer and Pezzella⁸² provides significant evidence in the psychological context; the hate crime victims were found to be more likely to experience psychological and emotional trauma when compared to non-hate-based crimes. Victims of hate crime, according to Herek, Gills and Cogan, 'regard the world as unsafe'.⁸³ Hate crimes are not merely physical attacks but an attack on the victim's core identity causing psychological and emotional harm,⁸⁴ as a severe consequence.⁸⁵ 'Humiliation, isolation and self-hatred' are general outcomes in several hate crime cases.⁸⁶ The work by Craig-Henderson and Sloan suggests that there exists a wide range of 'qualitatively distinct 'negative and depressing emotions experienced by the victims of hate crimes based on race.'⁸⁷

To mitigate the identity characteristics, hate crime victims tend to be proactive, enhance security measures, retaliate or become avoidant.⁸⁸ Iganski suggests that hate crime victims are more alert at all times, are not as trustful of others as before (a hate incident), move their house in search of a safer neighbourhood, restrict their movements and avoid visiting certain places (affecting their spatial mobility).⁸⁹ According to the Hate Crimes, England and Wales Home

(2014). *Hate crime victimization, 2004-2012—Statistical Tables*, Washington, DC: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, United States of America.

⁸² Fetzer, M and Pezzella, F. S, (2019) The Nature of Bias Crime Injuries: A Comparative Analysis of Physical and Psychological Victimization Effects *Journal of Interpersonal Violence*, Vol. 34(18) 3864–3887.

⁸³ Herek, G., Gillis, R., & Cogan, J. (1999). Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults, *Journal of Consulting and Clinical Psychology*, 67, 945–951.

⁸⁴ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press; Levin, J., & McDevitt, J. (1993). *Hate crimes: The Rising Tide of Bigotry and Bloodshed*, Vol. 5, New York, NY: Plenum Press; Iganski, P., & Lagou, S. (2014). The Personal Injuries of Hate Crime in N. Hall., A. Corb., P. Giannasi, & J. Grieve (Eds.) *The Routledge International Handbook on Hate Crime*, London, NY: Routledge, 34-46; Lawrence, F. M. (2006). The Hate Crime Project and its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement, Working Paper no. 216, Washington, DC: The George Washington University Law School; Lawrence, F. M. (1999). *Punishing Hate. Bias Crimes under American Law*. Cambridge, MA: Harvard University Press.

⁸⁵ McDevitt, J., Levin, J., & Bennett, S, (2002) Hate Crime Offenders: An Expanded Typology, *Journal of Social Issues*, 58 303–318.

⁸⁶ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, 54

⁸⁷ Craig-Henderson & Sloan, L.R., (2003) After the Hate: Helping Psychologists Help Victims of Racist Hate Crime, *Clinical Psychology: Science and Practice*, 10(4) 481-490.

⁸⁸ Paterson, J., Walters M, Rupert B., and Fearn, H. (2018) *The Sussex Hate Crime Project: Final Report*. Project Report. University of Sussex, 30-31

⁸⁹ Iganski P, (2017) How Are People Affected by Hate Crimes? <https://urskola.se/Produkter/200721-UR-Samtiden-Internationella-brottsofferdagen-2017-Stodja-offer-for-hat-och-vald>.

Office, *Office for National Statistics and Ministry of Justice Report*, between 2012 to 2015,⁹⁰ in comparison to the victims of parallel crimes, hate crime victims were twice as likely to suffer a loss of confidence, feeling of vulnerability, sleeping disorders, panic attacks and depression.⁹¹

Hate crimes add a separate dimension of threat to the lives of the victims. Iganski⁹² points out the psychosomatic and psychological reactions to violent hate crimes that include alcoholism, trouble sleeping, frequent headaches, muscle tension, hypertension, anxiousness, anger, depression, mistrust, and vulnerability. Herek and others also focus on evidence suggesting that it is more likely for hate crime victims to take a longer time to emotionally heal and recover from hate incidents.⁹³

Taking the example of LGBT community victims, hate crime victims, for the reason of their sexual orientation, suffer much more in emotional and psychological terms when compared to other victims of hate crimes.⁹⁴ The enhanced risk of depression, post-dramatic stress, anxiety and fear are manifold.⁹⁵ The stigma attached to the notion of homosexuality has time and again been reinforced through different hateful acts committed against the LGBT community members by individuals not belonging to the LGBT community, and the State (such as anti-LGBT legislation).⁹⁶ The victims of hate crimes, based on their sexual orientation, tend to modify and manage their behaviour and traits to be recognised as heterosexual and avoid

⁹⁰ Corcoran. H, Lader. D, Smith. K, (2015), *Hate Crimes, England and Wales Report*, Home Office, Office for National Statistics and Ministry of Justice

⁹¹ Corcoran. H, Lader. D and Smith. K, *Hate Crime*, (2014) England and Wales, Statistical Bulletin 05/15 http://report-it.org.uk/files/ho_hate_crime_statistics_201415.pdf.

⁹² Iganski P, (2017) *How Are People Affected by Hate Crimes?* <<https://urskola.se/Produkter/200721-UR-Samtiden-Internationella-brottsofferdagen-2017-Stodja-offer-for-hat-och-vald>>; Haynes. A, Schweppe. J, (2017) *Out of the Shadows, Legislating for Hate Crime in Ireland: Preliminary Findings*, Hate and Hostility Research Group.

⁹³ Herek, G., Gillis, R., & Cogan, J. (1999) *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, *Journal of Consulting and Clinical Psychology*, 67, 945–951.

⁹⁴ Meyer, D. (2010) *Evaluating the Severity of Hate-Motivated Violence: Intersectional Differences Among LGBT Hate Crime Victims*, *Sociology*, 44(5) 980-995.

⁹⁵ Cheng Z, (2004) *Hate Crimes, Post Traumatic Stress Disorder and Implications for Counselling Lesbians and Gay Men*, *Journal of Applied Rehabilitation Counselling*, 35 8–9; Herek G M. (2007) *Confronting Sexual Stigma and Prejudice: Theory and practice*, *Journal of Social Issues*, 63 905–925.

⁹⁶ Cramer. R, McNeil. D, Holley. S, Shumway M and Boccellari. A, (2012) *Mental Health in Violent Crime Victims: Does Sexual Orientation Matter?* *Law and Human Behaviour* Vol. 36, 87-95.

becoming targets of violence which has numerous adverse effects in psychological terms.⁹⁷ Research shows that the victims members of minority groups and women have a greater sense of loss and face more significant psychological distress.⁹⁸

INDIVIDUAL HARM

The injuries inflicted during hate crimes are qualitatively more severe as they are multi-dimensional⁹⁹ (physical, psychological, behavioural¹⁰⁰). The corresponding 'sense of violation' for a hate crime victim has been more appropriately compared to that of a rape victim, where the physical harm, no matter how severe, is less than the feeling of violation and breach undergone by the victim.¹⁰¹ In most hate crime cases, the offender's choice of victim is random¹⁰² (unless there is a secondary motive for committing the offence) and is solely based on the victim's identity (affinity to a group, which may be based on race, religion, or sexual orientation). Although the literature suggests that hate crime victims tend to modify their behaviour and traits,¹⁰³ inclined to make themselves 'less visible',¹⁰⁴ in order to avoid future victimisation, such measures only minimise future danger and do not ensure a risk-free life. (Victim identity characteristics are not mutable per se, as in race, ethnicity, and gender). Lawrence states that it is “*an attack from which there is no escape*”, and therefore hate crimes

⁹⁷ Herek, G. M. (2009) Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States, *Journal of Interpersonal Violence*, 24 54–74; Herek G M, (2007) *Confronting Sexual Stigma and Prejudice*, Theory and practice. *Journal of Social Issues*, 63 905–925.

⁹⁸ Herek, G., Gillis, R., & Cogan, J. (1999) Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults, *Journal of Consulting and Clinical Psychology*, 67, 945–951.

⁹⁹ Fetzer. M and Pezzella. F. S, (2019) The Nature of Bias Crime Injuries: A Comparative Analysis of Physical and Psychological Victimization Effects *Journal of Interpersonal Violence*, Vol. 34(18) 3864–3887; Lawrence, F. M. (2009). *Punishing hate: Bias crimes under American law*, Cambridge, MA: Harvard University Press.

¹⁰⁰ Iganski, P., & Lagou, S. (2014) The Personal Injuries of Hate Crime, in N. Hall., A. Corb., P. Giannasi, & J. Grieve (Eds.) *The Routledge international handbook on hate crime*, London, NY: Routledge, 34–46.

¹⁰¹ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, 48

¹⁰² Fetzer. M and Pezzella. F. S, (2017) The Likelihood of Injury Among Bias Crimes: An Analysis of General and Specific Bias Types, *Journal of Interpersonal Violence*, Vol. 32(5) 703–729; Lawrence FM (2002), *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, 45

¹⁰³ Herek, G. M. (2009) Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States, *Journal of Interpersonal Violence*, 24 54–74; Herek G M, (2007) *Confronting Sexual Stigma and Prejudice*, Theory and Practice, *Journal of Social Issues*, 63 905–925; Lim HA, (2009), Beyond the immediate victim: Understanding hate crimes as message crimes. In: Iganski P(ed.) *Hate Crimes: The Consequences of Hate Crime*. Westport, CT: Praeger, 107–122.

¹⁰⁴ Perry. B and Alvi. S, (2012) 'We are all vulnerable' The in-Terrorem Effects of Hate Crimes, *International Review of Victimology*, 18(1) 57-71.

may not be understood as simple crimes that merely cause physical injury but impact the victim's core identity.¹⁰⁵

An interesting theory presented by Janoff – Bulman¹⁰⁶ in the late 70s needs a mention as it may throw some light on the severe impacts of hate crimes on the victims. He suggests that humans generally create a 'comforting illusion of their invulnerability' and take it for granted that the world is a safe and comfortable place where all beings are nice and just. However, such an illusion is 'shattered' when a hate-based attack is inflicted on them. Victims of hate crimes tend to 'self-blame (through their behavioural changes) by somewhat acknowledging that they probably did something wrong. He compared such a hate crime victim to a rape victim, who thinks that they might be wrong to have gone out in the dark or to have not had better security at their place. The theory provides some justifications as to why the victims of hate crimes suffer more, while some 'manage their behaviour' to reduce or minimise similar risks in the future, in many cases where the victimisation is based on race, gender or ethnicity, the victims are left with no means to construct their ideal picture of the world.¹⁰⁷

COMMUNITY HARM

Hate crimes tend to spread intimidation, not only in the victim's family but among all members of the community. Such impact on the community is a distinct feature of hate or bias-motivated crimes. The work by Weinstein in 1992 focused on the in-terrorem effect of hate crimes, i.e., the intimidation that the hate crimes cause not only to the immediate victim but to members of the group and the society, adversely affecting the social equilibrium.¹⁰⁸ As Lawrence states, a single incident of hate is not simply an assault or a violent act but is a 'carrier of message' for

¹⁰⁵ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, 48

¹⁰⁶ Janoff-Bulman, R. (1982) Esteem and Control Bases of Blame: "Adaptive" Strategies for Victims Versus Observers, *Journal of Personality*, 50 180–192; Janoff-Bulman, R. (1979) Characterological Versus Behavioural Self-Blame: Inquiries into Depression and Rape, *Journal of Personality and Social Psychology*, 37 1798–1809.

¹⁰⁷ Janoff-Bulman, R. (1979) Characterological Versus Behavioural Self-Blame: Inquiries into Depression and Rape, *Journal of Personality and Social Psychology*, 37 1798–1809.

¹⁰⁸ Perry, B and Alvi, S, (2012) 'We are all Vulnerable' The in-Terrorem Effects of Hate Crimes, *International Review of Victimology*, 18(1) 57-71; Perry, B., and Dyck, D. R. (2014). 'I don't know Where it is Safe: Trans Women's Experiences of Violence. *Critical criminology*, 22(1), 49-63.

the whole group or community, indicating that they are devalued.¹⁰⁹ The target communities understand the attack on the individual as an attack on themselves directly and feel vulnerable to an equivalent risk.¹¹⁰ Paterson, Brown and Walters¹¹¹ note that hearing about the victimisation of others has the potential to make group members vulnerable. The individuals who share identity traits with the victim tend to view hate crimes as against the group and not just the individual, and therefore, are more prone to respond as a group. Such responses within the community groups are likely to motivate other members to give stronger reactions and be more protective of themselves and the group.¹¹² While several community members relate to the victim with sympathy and anger towards the offender (also the offender community), others relate more to their victimization, feeling sympathy and empathy towards the victim and their family.¹¹³ At the same time, Noelle¹¹⁴ has noted that a few group members also tend to distance themselves from the victim to minimise their own vulnerability disabling intra-community cohesion.¹¹⁵

An interesting landmark case from the United States needs special attention in understanding the multi-layered effects of hate crimes. In the Matthew Shepard murder case,¹¹⁶ one Matthew Shepard, a young gay male, was drawn to consume alcohol by two other males at a bar, who pretended to be gay and was later found tied to a ranch fence, 'beaten, whipped and burned. His victimisation which resulted in his death attracted a lot of media attention. Research conducted by Noelle, based on Matthew Shepard's case, on 29 individuals who attempted to study the

¹⁰⁹ Lawrence, F. M. (2006). The Hate Crime Project and its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement, *Working Paper no. 216*, Washington, DC: The George Washington University Law School.

¹¹⁰ Dunbar, E. (2006). Race, Gender, and Sexual Orientation in Hate Crime Victimization: Identity Politics or Identity Risk? *Violence and Victims*, 21, 323-337; Pezella and Fetzer, (2017) The Likelihood of Injury Among Bias Crimes: An Analysis of General and Specific Bias Types, *Journal of Interpersonal Violence*, Vol. 32(5) 703–729

¹¹¹ Paterson, J. L., Brown, R., & Walters, M. A. (2018). Understanding Victim Group Responses to Hate Crime: Shared Identities, Perceived Similarity and Intergroup Emotions, *Testing, Psychometrics, Methodology in Applied Psychology*, 25, 163- 177.

¹¹² Paterson, J. L., Brown, R., & Walters, M. A. (2018). Understanding Victim Group Responses to Hate Crime: Shared Identities, Perceived Similarity and Intergroup Emotions, *Testing, Psychometrics, Methodology in Applied Psychology*, 25, 163- 177.

¹¹³ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press.

¹¹⁴ Noelle, M. (2002). The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group, *American Behavioral Scientist*, 46, 27-50.

¹¹⁵ Paterson, Brown, and Walters, (2019) The Short- and Longer-Term Impacts of Hate Crimes Experienced Directly, Indirectly, and Through the Media, *Personality and Social Psychology Bulletin*, Vol. 45(7) 994– 1010

¹¹⁶ Noelle, M. (2002). The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group, *American Behavioral Scientist*, 46, 27; Trout, M., (2015), *Federalizing Hate: Constitutional and Practical Limitations to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009*, 52 *Am. Crim. L. Rev.* 131.

impact of this brutal hate crime. It was found that all the individuals, in some form, felt fear and vulnerability; they could connect to Matthew Shephard and felt that they could have been in his place.¹¹⁷ In all, a single incident of hate crime adversely affected their mental health.

The impact of hate crimes on the victim community may be seen as intentional. Craig, in his work, suggests that hate crimes not only carry a definitive intent to harm but also convey a symbolic message to the target community.¹¹⁸ He further states that attached to the symbolic message of hate crimes is the 'instrumental function', i.e. hate crimes have effects on the actions of the victim's group or community and also on the offender's group or community.¹¹⁹ For example, minorities based on sexual orientation, even when not victimised, tend to be stigmatized as to their social identity and develop a self-belief system of devaluing themselves.¹²⁰ They become particularly 'over alert' even in safe surroundings, and suffer anxiety which adversely affects their mental health.¹²¹ On the other side of the spectrum, the members of the offender's group suffer from apprehensions, primarily while interacting with members of the victim's group. It could be said that hate crimes have an instrumental value in restricting the choices and behaviour of a number of individuals belonging to not only the victim's community but also the offender's community.¹²²

Another significant related harm caused by hate crimes is the response to such acts by the victim community, where such victim community understands the perpetrator's group or community as the wrongdoer,¹²³ which results in resentment, making the victim community take up a retaliatory approach. In the 1993 judgement in *Wisconsin v Mitchell*,¹²⁴ the Supreme Court unanimously took the view that bias-motivated crimes are most likely to provoke

¹¹⁷ Noelle, M. (2002). The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group, *American Behavioral Scientist*, 46, 27

¹¹⁸ K M Craig, (2002) Examining Hate-Motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression. *Aggression and Violent Behaviour*, 7(1), 85-101.

¹¹⁹ Berk, R. A. (1990). *Thinking about hate-motivated crimes*. *Journal of Interpersonal Violence*, 5(3), 334-349; K M Craig, (2002) Examining Hate-Motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression. *Aggression and Violent Behaviour*, 7(1), 85-10.

¹²⁰ Kaiser, C., Vick, S, and Major, B. (2006) Prejudice Expectations Moderate Preconscious Attention to Cues that are Threatening to Social Identity, *Psychological Science*, 17 332-338; Herek, G. M., & Berrill, K. T. (Eds.), (1992) *Hate Crimes, Confronting Violence Against Lesbians and Gay Men*, Newbury Park, CA: Sage Publications.

¹²¹ Cramer. R, McNiel. D, Holley. S, Shumway. M and Boccillari. A, (2012) Mental Health in Violent Crime Victims: Does Sexual Orientation Matter? *Law and Human Behaviour* Vol. 36, 87-95.

¹²² Craig. K, (2002) Examining Hate-Motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression, *Aggression and Violent Behaviour*, 7(1) 85-101.

¹²³ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press

¹²⁴ *Wisconsin v. Mitchell* (1993). 113 S. Ct. 2194, p 488

retaliatory crimes and are capable of inciting unrest in the communities, leaving long-term social impacts. The Courts mentioned that provocation of retaliation and social unrest, as some of the significant outcomes of hate crime incidents.¹²⁵

HARM TO THE SOCIETY

In a wider sense, hate crimes affect society by threatening the shared values of righteousness and equality, disturbing the harmony established between different religious, ethnic and cultural community groups living together.¹²⁶ Craig states that the effects of hate crimes are not limited to only interpersonal relations but have adverse impacts on larger social groups. The sense of fear and victimisation is not limited by geographical definition, affecting the members of the group and the relation between the victim and offender groups.¹²⁷ Even though members of society may be sympathizing with the victim community and individual victim, the victim remains isolated and feels vulnerable and is many times reluctant in socializing and sharing their fears,¹²⁸ which in turn devoid the victim's family and the community of the other reasonable members of the society.

Sullaway, in her work, states that in several cases, the victims are reluctant to report the incident to the police, which is primarily due to their doubts if the police and the authorities will be able to understand and be sympathetic towards their victimisation.¹²⁹ She emphasises the case of immigrants from countries where the officials are corrupt and may not be trusted; therefore, when the immigrants, who are more likely to become victims of hate crimes, need to report to the police, tend to draw the same picture of the police to be corrupt and unsympathetic, which in turn affects the entire community.¹³⁰ The community to which the victim belongs remains at higher risk without notice, eroding the fabric of the community, and inflicting a sense of insecurity and vulnerability.¹³¹

¹²⁵ Wisconsin v. Mitchell (1993). 113 S. Ct. 2194, p 488

¹²⁶ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press

¹²⁷ Brown, T. (1997) Hate Crime, Stress, and Bigotry in the Late Twentieth Century: Where are we Headed? African American Research Perspectives, 30 21–29.

¹²⁸ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press

¹²⁹ Sullaway M, (2004) Psychological Perspectives on Hate Crime Laws, Psychology, Public Policy, and Law, Vol. 10 250–292.

¹³⁰ Sullaway M, (2004) Psychological Perspectives on Hate Crime Laws, Psychology, Public Policy, and Law, Vol. 10 250–292.

¹³¹ Lawrence FM, (2002) *Punishing Hate: Bias Crimes under American Law*, Harvard University Press

Although much scholarly work has been done on the multi-dimensional effects of hate crime, more research is underway to accurately establish the impacts of hate crimes on the individuals sharing the identity with the victim.¹³² It is not an easy task to put together the in-terrorem effects of hate crimes, considering the variance of physical, emotional, and psychological harm that affects the individual, victim community and the society at large, mostly as the means to achieve the same are less scientific and speculative to an extent.¹³³ However, in more recent years, a growing body of research is tending to focus more on the aspects of indirect hate crime victimization.¹³⁴

PART III

PURPOSE OF HATE CRIME LEGISLATION

Hate crime legislation is a means to transport the idea of positive action into the criminal law system. The effect of the presence of hate crime legislation may, in some cases, not have an impact on the offenders, but it has an impact on the criminal justice system in a way to be ready to deal with hate incidents. The primary reason that supports the formulation of hate crime legislation, is the symbolic purpose.¹³⁵ Although hate crime legislation has been criticized on the grounds that there already exist several legislations that directly target crimes based on prejudice (bigotry, racism etc),¹³⁶ the symbolic purpose of forming a hate crime legislation is based on a long-term educational approach that assists in evolving the general societal perceptions, empowering the weaker sections of the society,¹³⁷ and setting moral social

¹³² Perry. B and Alvi. S, (2012) 'We are all vulnerable' The in-Terrorem Effects of Hate Crimes. *International Review of Victimology*, 18(1) 57-71; Paterson. J., Walters M, Rupert B., and Fearn, H., (2018) *The Sussex Hate Crime Project: Final Report*. Project Report. University of Sussex.

¹³³ Perry. B and Alvi. S, (2012) 'We are all vulnerable' The in-Terrorem Effects of Hate Crimes. *International Review of Victimology*, 18(1) 57-71.

¹³⁴ Paterson, Brown, and Walters, (2019) The Short- and Longer-Term Impacts of Hate Crimes Experienced Directly, Indirectly, and Through the Media, *Personality and Social Psychology Bulletin*, Vol. 45(7) 994– 1010; Noelle, M. (2002). The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group, *American Behavioral Scientist*, 46, 27-50; Iganski, P., & Lagou, S. (2015). Hate Crimes Hurt Some More Than Others: Implications for the Just Sentencing of Offenders. *Journal of Interpersonal Violence*, 30, 1696-1718; Bell, J. G., & Perry, B. (2015). Outside Looking in: The Community Impacts of Anti-Lesbian, Gay, and Bisexual Hate Crime. *Journal of Homosexuality*, 62, 98-120; Walters, M. A., Paterson, J. L., Brown, R., & McDonnell, L. (2017). Hate Crimes Against Trans People: Assessing Emotions, Behaviours and Attitudes Towards Criminal Justice Agencies. *Journal of Interpersonal Violence*.

¹³⁵ Mason. G, (2014), The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion, *Theoretical Criminology*, Vol. 18(1) 75–92

¹³⁶ Jacobs. J and Potter. K, (1997) Hate Crimes: A Critical Perspective, *Crime and Justice*, Vol. 22, 1-50.

¹³⁷ Mason. G, (2014), The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion, *Theoretical Criminology*, Vol. 18(1) 75–92

grounds, seeking social 're-moralization' challenging the oddly established moral norms that sustain social hierarchies based on religious, racial and other similar claims.¹³⁸

As Mason suggests that a hate crime may not simply be objectively classified as criminal conduct and must be understood as a 'highly politicized criminological construction', needed to tackle related concerns and indicates the moral wrong inlaid in the notion of hate and prejudice.¹³⁹ Further on she states that hate crime laws play a significant role which is indicative of the 'inherent wrong in the idea of prejudice' itself (i.e., without accounting for the display of the criminal act).¹⁴⁰ In their work, Breen and Nel¹⁴¹ consider the symbolic significance of hate crime legislation of 'utmost importance. In the same light, Jacob and Potter suggest that hate crime legislation must not be understood as a mere crime control mechanism; it has much greater significance in symbolic terms.¹⁴²

Schweppe and Walsh¹⁴³ consider the symbolic value of hate crime laws as the primary rationale that holds high relevance. Academics such as Lawrence¹⁴⁴ have been evident in voicing the larger expressive function of hate crime laws that provide a public condemnation of hate-based crimes, while Jacobs and Potter stand by the 'symbolic statement' inlaid under hate crime laws,¹⁴⁵ or the idea of reinforcing the social norms of respect and tolerance towards the out-

¹³⁸ O'Malley P (1999) Volatile and Contradictory Punishment. *Theoretical Criminology* 3(2): 175–196; Parrot A and Cummings N (2006) *Forsaken Females: The Global Brutalization of Women*. Maryland: Rowman & Littlefield Publishers

¹³⁹ Mason, G. (2008). Hate Crime, In Thalia Anthony and Chris Cunneen (Eds.), *The Critical Criminology Companion*, Sydney, Australia: Hawkins Press, 180- 190.

¹⁴⁰ Mason, G. (2014) The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion, *Theoretical Criminology* 18(1) 75-92.

¹⁴¹ Breen, D and Nel, J. (2011), South Africa – A Home for All? The Need for Hate Crime Legislation, *South African Crime Quarterly*, 38 33-43.

¹⁴² Jacob, J. (1992) Implementing Hate Crime Legislation: Crime Control, *Annual Survey of American Law* 541-53.

¹⁴³ Schweppe J and Walsh D (2008) Combating Racism and Xenophobia Through the Criminal Law, Report for the National Action Plan Against Racism, Ireland, 165

¹⁴⁴ Lawrence, F. M. (1999). *Punishing hate: Bias crimes under American law*. Cambridge, MA: Harvard University Press.

¹⁴⁵ Jacobs, J. and Potter, K. (1998) *Hate Crimes: Criminal Law and Identity Politics*, Oxford University Press, New York.

groups as suggested in the work of Jenness and Grattet,¹⁴⁶ including many others¹⁴⁷ who have brought the symbolic function of hate crime legislation to a level of conformity.

Additionally, the presence of hate crime laws makes the collection and reporting of accurate data possible, which assists in better policing, and adequate allocation of resources, improving 'police-community relations'.¹⁴⁸ The role of hate crime legislation is not limited to depicting intolerance of discriminatory violence but extends to supporting such non-legal means that are necessary to deal with the issue of hate.¹⁴⁹

CONCLUSION

Hate crimes are complex crimes that are motivated by hate or prejudice towards the victim for the reason of their belonging to a specific social group, including but not limited to race, religion, sexual orientation, gender, and disability. Such crimes do not only target the individual victim but aim at sending out a clear message to the victim group, about their subjugated social status. The definition provided by the ODIHR, is comprehensive in its approach with its wider scope and understanding, attempting to be inclusive and detailed, however, it has been challenging for different national States to accept and implement the ODIHR definition in a holistic sense. The hate crime laws and policies are yet in their stages of development and require more research and data collection with a view to developing a unified understanding of the concept to ably prevent and penalize hate crimes.

¹⁴⁶ Jenness, V., & Grattet, R. (2001). *Making hate a crime: From social movement to law enforcement*. Russell Sage Foundation.

¹⁴⁷ Mason, G., 'The symbolic purpose of hate crime law: Ideal victims and emotion' (2014), *Theoretical Criminology*, 18(1), pp.75-92; Iganski, P. (2008). *Hate crime and the city*. Bristol, UK: Policy Press, Chapter 4; Jenness, V. and Grattet, R. (2001). *Making Hate a Crime: From Social Movement to Law Enforcement*. Russell Sage Foundation.

¹⁴⁸ ODIHR, (2009) *Hate Crime Laws: A Practical Guide*, OSCE

¹⁴⁹ Sentencing Advisory Council, (2009), *Sentencing for Offences Motivated by Hatred or Prejudice*, 18 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publicationdocuments/Sentencing%20for%20Offences%20Motivated%20by%20Hatred%20or%20Prejudice.pdf>

Through the analysis of the different aspects of hate crime victimization, the diagram I have presented below depicts the multi layered effects of hate crimes and are seen to be far more harm causing when compared to parallel crimes (in the absence of the hate element). The available research and literature sufficiently highlight the adverse consequences of hate crimes. The harm caused by hate crimes is multi-layered and is not merely confined to physical injuries but has short-term and long-term psychological and emotional outcomes, which makes hate crime victimisation many times more severe when compared to parallel crimes.

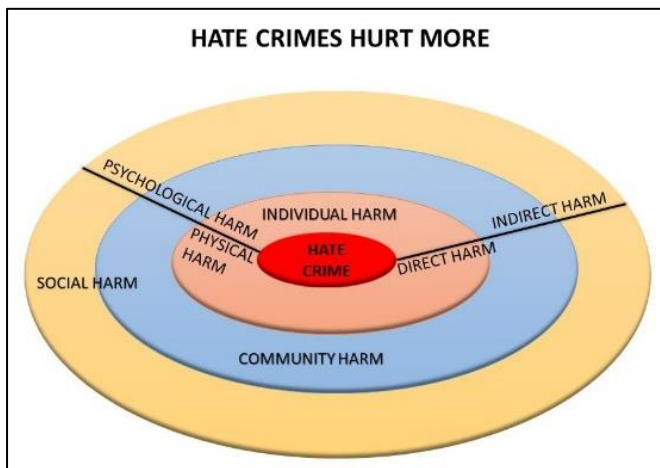


DIAGRAM. HATE CRIMES HURT MORE

In terms of individual harm, hate crimes do hurt more than parallel crimes that lack the element of hate. The individual victim suffers physical, emotional and psychological damage, that creates a deep sense of insecurity and vulnerability, affecting the core identity of the person. Hate crimes qualify as a distinct set of crimes, for the message they aim to send out to the targeted communities, making victims feel vulnerable and insecure as a group. They also have the potential to develop a retaliatory outlook among the victim communities and induce long-term hatred.

A hate crime legislation essentially upholds the symbolic message of the wrong inlaid in the commission of hate crimes. It attempts the re-moralization within the society with a long-term educational perspective and also aims at better reporting and collection of hate crime data.

CHAPTER 2

HATE CRIMES BASED ON RELIGION, SEXUAL ORIENTATION AND GENDER

INTRODUCTION

The connection between law and society is well established, given the complex interconnection of economic, legal, cultural, and historical factors in any given society. An understanding of the societal aspects assists in recognizing the deep-rooted origins of the present-day crisis and the rise in hate crimes in India. This chapter attempts to establish the prevalence of hate crimes in India and identify the typical manifestation of crimes frequently committed against targeted groups. The chapter argues that hate crimes have been prevalent in India for a long time; however, in more recent times, the socio-political situation in the country considering the deeply embedded colonial influences (detailed in the third chapter) and invasions in the country has made hate crimes more common (discussed under religious hate crimes) indicating towards a need for a hate crime legislation at the Central and the State level.

A vast country such as India, with twenty-nine States, eight Union Territories and the second-largest population globally, encompasses enormous diversity in terms of race, religion and culture.¹⁵⁰ India has been ruled by several different rulers in the past. Each such invasion and rule has introduced different streams of culture, religion, and race, which has resulted in India having the diversity it maintains now. On a number of different occasions, natural calamities, the country's partition, and wars between local and regional rulers have forced the country's population to be displaced and have assisted in aiding societal diversification (which has also resulted in conflicts on different occasions) in all parts of the country.¹⁵¹ Most (79.8%)¹⁵² of

¹⁵⁰ R. S Sharma, (2008) *India's Ancient Past*, Oxford University Press, Introduction

¹⁵¹ R. S Sharma, (2008) *India's Ancient Past*, Oxford University Press.

¹⁵² Sahgal. N, Evans. J, Salazar. A, Starr. K, Corchi. M, (2021) Attitudes About Caste, Religion in India: Tolerance and Segregation, PEW Research Center, <https://www.pewresearch.org/religion/2021/06/29/attitudes-about-caste/#fnref-35266-12>

the Indian population follows Hinduism as a religion. Hinduism introduced the caste system to Indian society. It has a significant influence on Indian society and has also negatively affected different communities; the Muslim and Christian communities, along with other minority communities, have been facing issues relating to hate and discrimination from time to time. It is significant to note that hate crimes are not new to the Indian discourse and are not confined to religious hate crimes but include hate crimes based on caste, race, gender, sexual orientation, etc.¹⁵³

Although hate crimes have been prevalent in Indian societies for a long time, Pavri claims that India, as a nation-state, has in the past shown more tolerance towards immigrants, visitors and refugees and has been open to the idea of co-existence of different cultures, languages, religions and ethnicities.¹⁵⁴ However, with the change in the political situation and the rise of ‘Hindutva’ (which will be detailed in the later part of the chapter.), the vulnerability to victimization among immigrants, sexual and religious minorities and women has increased, indicating a turn towards an intolerant attitude.¹⁵⁵

The Indian landscape is a network of diverse complexities based on caste, creed, religion, race and sexual orientation. Several times, there is an overlap of identities causing concerns and victimization, resulting from acts motivated by bias and hate, requiring robust legislation to set new boundaries defining hate crimes in the Indian context and adequately address the problem. This chapter is divided into four parts, the first part focuses on Indian criminal law (Indian Penal Code) to provide an overview of the existing legislative position in India before diving into the socio-political nitty gritty. The Indian Penal Code is the cornerstone of Indian criminal law, that only briefly considers ‘incitement of hate’ on distinct grounds is discussed. The second part of the chapter discusses hate crimes based on the grounds of religion (covering anti-Muslim and anti-Christian hate crimes), existing legislative provisions relating to crimes of religious nature along with the newly formed State legislation relating to hate crimes. The grounds of gender and sexual orientation are covered in the third part of this chapter. Parts two

¹⁵³ Moshin Alam Bhat, (2018) The Case for Collecting Hate Crimes Data in India, Law and Policy Brief, Global Jindal Law School, Volume 4, Issue 9.

¹⁵⁴ Tinaz Pavri, (2018) Is India Becoming More Liberal? Globalization, Economic Liberalization, and Social Values, 13 Journal of Global Initiatives.

¹⁵⁵ Tinaz Pavri, (2018) Is India Becoming More Liberal? Globalization, Economic Liberalization, and Social Values, 13 Journal of Global Initiatives.

and three of the chapter attempt to establish, considering the history, development and recent rise in the number of hate crimes and the existing legal provisions, a significant prevalence of hate crimes in India, their invisibility and the need for hauling the law.

PART I

THE INDIAN CRIMINAL LAW

THE INDIAN PENAL CODE¹⁵⁶ AND THE SCOPE OF HATE CRIMES

The criminal and civil legal tools have been in use from 3000BCE to 1001 CE and beyond; the development of Indian criminal law has been gradual, while the invasions by Sultans, Mughals, and the British have had a significant influence on the law. However, before the foreign invasion and rule, the Indian state was governed by Hindu law. Criminal punishment was awarded for four primary reasons: firstly, to meet the urge of the victim to see the wrongdoers punished; secondly, for revenge or retaliation; thirdly, as a deterrent or a punitive measure and lastly, for reformation purposes.¹⁵⁷ This part of the chapter looks into the provisions of the Indian criminal law that relate to hate crime offences (focusing on Section 153A). It attempts to reflect on the existing provisions and investigates if they are sufficient to tackle hate crime cases or require significant amendments and additions.

List of Legal Provisions Under the Current Indian Criminal Law Concerning Hate Crimes

IPC and CrPC	Legal Provision
1. IPC	Sec. 34 - common intention ¹⁵⁸

¹⁵⁶ The Indian Criminal Law is categorized as substantive law (Indian Penal Code, 1860) and procedural law (Criminal Procedure Code, 1976). The basic premise of the Indian Penal Code, 1860 is in most parts influenced by English law, and has a few significant sections from the Napoleonic Code of 1804 and Louisiana Civil Code of 1825. In the post-independence era, the Indian Penal Code has undergone several amendments.

¹⁵⁷ Keith, A. Berriedale, (2018) The Age of the Rig Veda, in *The Cambridge History of India*, edited by J. Rapson, Vol. I, p. 87

¹⁵⁸ IPC, Sections 34, 141, 149 and CrPC, Section 223 are relevant as several hate-based crimes are committed by more than one individual, hence the Courts are prone to consider Sections under the Indian Criminal law that deal with unlawful group activities or are based on common intention.

2. IPC	Sec. 141 – Unlawful assembly – an assembly of five or more people designated an “unlawful assembly.”
3. IPC	Sec. 149 – Every member of unlawful assembly guilty of an offence committed in prosecution of common object ¹³
4. IPC	Sec. 153A – Incitement of hate
5. IPC	Sec. 295 - Injuring or defiling a place of worship with intent to insult the religion of any class
6. IPC	Sec. 296 – disturbing religious assembly
7. IPC	Sec. 297 – trespass to hurt religious feelings
8. IPC	Sec. 295 A and 298 - Outraging or wounding the religious feelings of persons
9. IPC	Sec. 302 – Punishment of murder
10. CrPC	Sec. 223 – the persons may be charged and tried together, namely (a) Person accused of the same offence committed in the course of some transaction. (b) Person accused of an offence and person accused of abatement of or attempt to commit such offence. (c) Persons accused of more than one offence of the same kind. Within the meaning of sec. 219 committed by them jointly within the period of twelve months

Section 153 A of the Indian Penal Code, 1860 - Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to the maintenance of harmony.¹⁵⁹

¹⁵⁹ *1(a) that ‘whosoever, by words, either spoken or written or by signs or by visible representations or otherwise, 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,*

Or 1(b), by words, either spoken or written or by signs or by visible representations or otherwise, 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,

Or 2(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that

In the pre-independence era, Indian society was undergoing politico-religious turmoil, especially during the partition (1947). The incident took place in 1920 in the State of Punjab (an Indian State bordering Pakistan) which was a chessboard for different competing religions.¹⁶⁰ The Britishers introduced Christian missionaries to Hindu, Muslim and Sikh communities. The missionary schools and religious conversions created a new communal concern by threatening the established Hindu social structure.¹⁶¹ The distribution of pamphlets and tracts was common to spread and propagate ideologies (religious and political) through masses, criticizing the leaders of different religious groups. The *Raj Paul v The Emperor*¹⁶² relates to one such pamphlet named ‘Rangeela Rasool’, meaning the colourful prophet, which was seen as a satirical comment on the life of Prophet Mohammad and led to a protest by the Muslim communities.¹⁶³ The pamphlet was banned¹⁶⁴ and the publisher, Raj Paul, was prosecuted, under Section 153A of the Indian Penal Code, by the Punjab Court.¹⁶⁵ The Magistrate found the accused guilty of creating enmity between classes. However, as the case reached the Lahore High Court, the government contended that Islam had a more radical approach (compared to

the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both. An offence committed in place of worship, etc and (2) Whoever commits an offence specified in sub-section (1) in any place of worship or any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

¹⁶⁰ Raj. R, (2015) A Pamphlet and its (Dis)contents: A Case Study of Rangila Rasul and the Controversy Surrounding it in Colonial Punjab, 1923–29, *History and Sociology of South Asia*, Vol 9(2); Nair. N, (2013) Beyond the Communal, 1920s: The Problem of Intention, Communal Pragmatism and the Making of S.295A of the Indian Penal Code, *Indian Economic and Social History Review*, 50, 317- 340; Ramdev.R, Nambiar. S, Bhattacharya. D, (2015) *Sentiment, Politics, Censorship: The State of Hurt*, Sage Publications, Chapter 1

¹⁶¹ Jones. K, (1968) Communalism in the Punjab: The Arya Samaj Contribution, *Journal of Asian Studies* 28, 39-54; Dua. V, (1999) *Arya Samaj in Punjab Politics*, New Delhi: Picus Books, 163-76; Raj. R, (2015) A Pamphlet and its (Dis)contents: A Case Study of Rangila Rasul and the Controversy Surrounding it in Colonial Punjab, *History and Sociology of South Asia*, Vol 9(2), 1923–29

¹⁶² *Raj Paul v The Emperor*, AIR 1927, Lah 610, para 611

¹⁶³ Raj. R, (2015) A Pamphlet and its (Dis)contents: A Case Study of Rangila Rasul and the Controversy Surrounding it in Colonial Punjab, *History and Sociology of South Asia*, Vol 9(2), 1923–29; Thursby. G, (1975) *Hindu–Muslim Relations in British India*, Leiden: E. J. Brill.

¹⁶⁴ Raj. R, (2015) A Pamphlet and its (Dis)contents: A Case Study of Rangila Rasul and the Controversy Surrounding it in Colonial Punjab, *History and Sociology of South Asia*, Vol 9(2) 1923–29.

¹⁶⁵ Indian Penal Code, 1860, Section 153 A; Nair. N, (2013) Beyond the Communal, 1920s: The Problem of Intention, Communal Pragmatism and the Making of S.295A of the Indian Penal Code, *Indian Economic and Social History Review*, 50, 317- 340; Ramdev.R, Nambiar. S, Bhattacharya. D, (2015) *Sentiment, Politics, Censorship: The State of Hurt*, Sage Publications, Chapter 1

other religions). If such a satirical pamphlet was aimed at a Christian religious icon, it would not have led to such social tension. The Judge found the accused not guilty on the grounds that such work was satirical and did not intend to incite hatred against religious groups and therefore did not fit under Section 153A of the IPC. The judgement caused outrage within the Muslim community, pressuring the judge into resigning.¹⁶⁶

Two similar cases attracted attention; the Allahabad High Court, rejecting the reasoning in the Raj Paul case, banned the book discussing strange and mysterious incidents from the life of the Prophet.¹⁶⁷ While in the other case¹⁶⁸ regarding a published article titled ‘Trip to hell’, the Special Division Bench decided that the published work intended to produce agitation among the Muslim communities and charged the offender under 153A of the IPC.¹⁶⁹

Through several cases, the Courts have been defining the scope of Section 153A. The Court held that the effect caused by the use of words by the accused must be judged from the standard of reasonableness and courage and not by the ‘standard of weak and feeble mind’,¹⁷⁰ “...nor of those who sense danger in every hostile point of view” (suggesting that any work that may be inclined to portray satire, and not intended to hurt religious feelings of others must not be construed as such).¹⁷¹ Furthermore, emphasizing the scope of Section 153A, in a case where the magazine interview by the accused contained some material that had a slight purpose (which prima facie did not instigate hostility but was capable of inciting a disharmonious sentiment) of promoting communal disharmony, did not qualify under Section 153 A of IPC.¹⁷²

The court in the case of Azizul Haq Kausar Naquvi and Anr. Vs The State¹⁷³ stated that the criminality of the offence under Section 153 A is not constituted by spoken words or the acts

¹⁶⁶ Nair. N, (2013) Beyond the Communal, 1920s: The Problem of Intention, Communal Pragmatism and the Making of S295A of the Indian Penal Code, Indian Economic and Social History Review, 50, 317- 340.

¹⁶⁷ Kali Charan Sharma v the Emperor, AIR 1927All 649

¹⁶⁸ Devi Sharann Sharma and Another v Kind Emperor, 1927, 14 AIR 594

¹⁶⁹ Raj. R, (2015) A Pamphlet and its (Dis)contents: A Case Study of Rangila Rasul and the Controversy Surrounding it in Colonial Punjab, History and Sociology of South Asia, Vol 9(2) 1923–29.

¹⁷⁰ Bhagwati Charan Shukla v Provincial Government, AIR 1947 Nag 1 SCC 673

¹⁷¹ State of Maharashtra v. Sangharaj Damodar Rupawate, (2010) 7 SCC 398

¹⁷² Gaur. K. D, (2018) Commentary on the Indian Penal Code, Central Law Publications, 3rd Edition; Nair. N, (2013) Beyond the Communal, 1920s: The Problem of Intention, Communal Pragmatism and the Making of S295A of the Indian Penal Code, Indian Economic and Social History Review, 50, 317- 340.

¹⁷³ AIR 1980 All 149, 1980 CriLJ 448

done but is constituted by the ‘manner’ in which such words are spoken, or the acts are committed (intention to incite hatred). In another significant case, discussing *mens rea* under Section 153A,¹⁷⁴ where one Balwant Singh raised slogans in a public place soon after the death of the then Prime Minister of India, was prosecuted (also under Section 124 A).¹⁷⁵ The Court dismissed the case as his actions, did not lead to any spread of hatred or evoke any negative response from members of any specific community. The Court held that it is up to the prosecution to prove the *mens rea* essential to attract Section 153 A of the IPC. However, in a case¹⁷⁶ where Babu Rao wrote two interconnected articles, while the first went on to discuss communal violence as a tool for minorities, the second detailed the Mughal rule and related history, in his work, he mentioned Muslims as a violent race, was held guilty of an offence under Section 153A of the Indian Penal Code, 1860.

The vague colonial policies and ambiguous complex interpretation of the law (specifically Section 153 A of IPC) by the British colonizers promoted the use of historical and cultural narratives on religious lines, injuring the religious sentiments of the Hindu and the Muslim Indian population.¹⁷⁷ The pre-independence era's criminal law had very little to offer in terms of hate crimes. Section 153A of the Code was activated only in grave cases that led to public protests and outrage. Especially after India's partition, religious hate incidents had become quite frequent, creating social unrest and disharmony between Hindu and Muslim communities. It could be said that religious hatred and ill will were at their peak in Indian history accordingly, Section 153A in itself was unable to provide an adequate remedy, as it was used sparingly and did not directly target hate crime offences but only touched on the symptoms of the prevalence of hate crimes (incitement of hate). In the years following independence, the scope of 153A did not modify much; it has been more often used along with the provisions relating to religious hatred and disharmony (Section 295, 296, 297 and 298 of the IPC).

¹⁷⁴ Balwant Singh and another v State of Punjab 1995 3 SCC 214

¹⁷⁵ Section 124 A Sedition, Indian Penal Code, 1860 - *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 shall be punished.*

¹⁷⁶ Ratanlal and Dhirajlal, (2018) Law of Crimes, The Indian Penal Code, 1860, Bharat Law House, 28th Edition; Babu Rao Patel v. State (Delhi Administration) AIR 1980 SC 763

¹⁷⁷ Raj. R, (2015) A Pamphlet and its (Dis)contents: A Case Study of Rangila Rasul and the Controversy Surrounding it in Colonial Punjab, History and Sociology of South Asia, Vol 9(2) 1923–29.

ARTICLE 19 and SECTION 153A (IPC)

Time and again, the tussle between the right to freedom of speech and expression (Article 19 (1)) and its limitations (Article 19 (2)) in the interest of public order has been ongoing, and the legitimacy of Section 153 A has been questioned. The right to freedom of speech and expression is the cornerstone of any liberal and democratic society. Article 19(1) of the Constitution of India envisages provisions ensuring the same along with the provisos (Article 19 (2)) under which these rights may be curtailed. Article 19¹⁷⁸ states six fundamental freedoms, including freedom of speech and expression, the right to receive and disseminate information, the right to know, and remain silent, and freedom of the press.¹⁷⁹ Clause (2) of the Article provides restrictions¹⁸⁰ on the right to freedom.¹⁸¹ The Article suggests that any form of expression or speech that is not in the ‘interest of public order’¹⁸² is restricted under Article 19 (2).¹⁸³ Any speech or expression, written, verbal, or through action that may suggest, hate or prejudice, against any group or community, based on their caste, creed, sex, race, sexual orientation or disability is prohibited under Article 19(2) of the Indian Constitution as it is necessary to strike a balance between freedom and misuse of the right to expression and speech.

As and when the freedom of speech and expression has been used to promote and incite hatred attempting to infringe the freedoms and rights of other individuals (community or minority group), it crosses the boundary of legitimate constitutional freedoms and is seen as a serious concern for a democratic state. In the case of *S. Rangarajan v P. Jagjivan Ram*,¹⁸⁴ the Court

¹⁷⁸ Article 19, The Constitution of India - (a) *freedom of speech and expression which includes right to receive and disseminate information, right to know, right to remain silent and freedom of press*¹⁷⁸, (b) *freedom of peaceful assembly and without arms*, (c) *freedom to form associations and union*, (d) *freedom of free movement throughout the territory of India*, (e) *freedom to reside and settle in any part of the territory of India*, and (f) *freedom of practicing any profession and to carry on any occupation, trade or business*.

¹⁷⁹ *CBSE v Aditya Bandopadhyay*, (2011) 8 SCC 497; *State of Maharashtra v Sangharaj Damodar Rupawate* 2010 (7) SCC 398

¹⁸⁰ Article 19 (2), The Constitution of India, restrictions to freedom of speech and expression - adversely affects the sovereignty, integrity, security, friendly relations with foreign states, public order, morality and decency, or results in any contempt of court, defamation, and incitement of an offence

¹⁸¹ *Brij Bhushan and Others v State of Delhi* 1950 AIR 129

¹⁸² *Secretary, Ministry of I.& B. v Cricket Association.*, Bengal AIR 1995 SC 1236

¹⁸³ *Romesh Thapar v State of Madras* AIR 1950 SC 124; *State of Bihar v Shailbala Devi* AIR 1952 SC 329; *Superintendent Central Prison v Ram Manohar Lohia*, AIR 1960 SC 633 (The Court found public order to be “synonymous with public peace, safety, and tranquillity)

¹⁸⁴ *S. Rangarajan v P. Jagjivan Ram* (1989) 2 SCC 574; Ratanlal and Dhirajlal, (2018) *Law of Crimes, The Indian Penal Code*, 1860, Bharat Law House, 28th Edition

clarified the compromise required between the right to freedom of speech and expression and special interests. This freedom may not be surpassed in cases where society's safety and the communities are threatened (reasonableness of the use of freedom of expression). However, such danger must not be farfetched or remote and must be proximate and directly a consequence of the use of speech or expression (proximate nexus considering the foreseeability of such adverse consequences).¹⁸⁵

CONCLUSION

Section 153A of the Indian Penal Code, 1860, in its essence, responds to 'incitement of hate' (through speech and expression) and does not directly cover hate crimes, although in the absence of hate crime legislation may be stretched to cover hate crimes in certain cases, yet it does not fulfil the symbolic purpose of a hate crime legislation. Moreover, in the absence of any specific provisions on hate crimes under Indian criminal law, the concepts of incitement of hate and hate speech are as close as the Indian law gets to crimes based on hate and hostility. The existing law is more inclined toward the protection of 'speech and expression' in line with Article 19 of the Constitution of India and does not directly voice hate crime concerns under any existing criminal legal provision. The debate on the freedom of speech and expression and its limitations have been discussed at different legal forums. The Courts have been attempting to decide on the reasonableness of the freedom of speech and expression considering the foreseeability of hostility and disharmony incited through different criminal intentional acts, yet the scope of Section 153A, IPC is quite restrictive to comprehensively accommodate hate crimes.

Although the provision under Section 153 A of the Indian Penal Code, is not in confirmation with the ODIHR's definition of hate crimes, it does provide scope for the development of hate crime laws in India.

¹⁸⁵Superintendent Central Prison v Ram Manohar Lohia, AIR 1960 SC 633

PART II

HATE CRIMES BASED ON RELIGION

INTRODUCTION

During the colonial era, the differences between the Hindu and Muslim communities were aggravated to a great extent. Resentment among people was heightened following the partition of India.¹⁸⁶ Historical struggles and religious and ideological differences gave way to hostilities after the partition.¹⁸⁷ The research conducted by Verghese and Teitelbaum mentions the link between the present-day caste conflict, land inequality and lack of trust in the police in India and the degree of influence by the British (Discussed in detail in the 3rd chapter).¹⁸⁸ The freedom movements against the British did not serve as a means to unite the communities, as it was easier to mobilize individuals based on their religious identities. It is noteworthy that during British rule, religious hate and violence intensified as the colonizers manipulated citizens' sentiments to their advantage.¹⁸⁹

The Muslim community members in India comprised 24.3%¹⁹⁰ (before the partition of India, 1947) of the total population, and there arose an issue of division of political power, government jobs, and other sectors. However, the issue remained unresolved and increased tension between the two communities.¹⁹¹ Later, in Independent India, the socio-economic crisis, the Sino-Soviet war in 1960 and the India-Pakistan war in 1965 again fuelled the tension between the Hindu and the Muslim Communities.¹⁹²

¹⁸⁶ Hussain, S; Usman, A; Amjad, A; Usman, M; Amjad, U., (2018) Violence against Muslims in Contemporary India, *Journal of Indian Studies*, 4 (1), 17-20.

¹⁸⁷ Shabbir Hussain, Ahmed Usman, Ume Habiba, Aaisha Amjad, Uzair Amjad, (2019), Hate Crimes against Muslims and Increasing Islamophobia in India, *Journal of Indian Studie*, Vol. 5, No. 1, 7 – 15; Shah, G. (2007). The condition of Muslims. *Economic and political weekly*, 836-839.

¹⁸⁸ Verghese, A. and Teitelbaum, E. (2019) *Conquest and Conflict: The Colonial Roots of Maoist Violence in India*, *Politics & Society*, 47(1), pp. 55–86.

¹⁸⁹ Chandra. B, (2008) *Communalism in Modern India*, Har-Anand, New Delhi

¹⁹⁰ Graff. V and Galonnier. J, (2013) *Hindu Muslim Communal Riots in India (1947-1986)*, *Violence de masse et Résistance - Réseau de recherche*.

¹⁹¹ Kumar, R; and Bhatia, G. (2018). *India Pursuing the Truth in the face of intolerance*. PEN International, Swedish International Cooperation Agency; Chandra.B, (2008) *Communalism in Modern India*, Har-Anand, New Delhi.

¹⁹² Chandra. B, (2008) *Communalism in Modern India* Har-Anand, New Delhi.

India is a secular country. The 42nd constitutional amendment in the year 1976 inserted the term ‘secular’¹⁹³ into the Preamble of the Indian Constitution, which guarantees rights to all Indian citizens to ‘practice, profess and promote’ the religion of their choice. In the same light, the Indian Constitution prohibits any State from establishing its religion or identifying itself as favouring any specific religion.¹⁹⁴ The Constitution ensures adequate safeguards to protect the country's secular character by checking on any infringement on and prejudice against citizens’ ethnic, religious or linguistic rights.¹⁹⁵

This part of the chapter focuses on hate crimes based on the grounds of religion in India, it looks at the religious social development in India which has led to the present-day hate crime concerns in the country. This section incorporates the concept of communal violence which is well established in India and may be witnessed time and again throughout recent Indian history. In the Indian context, communal violence may be seen as a specific form of hate crime. The other forms of hate crimes discussed in this section are those materialized via vigilantism, such as mob lynching. This section also discusses the change in the Indian political dynamics and its relation to the rise in the number of religious hate crimes. The latter part focuses on the few existing criminal provisions under the Indian Penal Code and recent State legislations on anti-lynching and hate crimes. This Section on religious hate crimes focuses mostly on religious hate and hostilities existing between the Muslim and the Hindu Indian communities from a historical as well as present-day perspective, the later part discusses anti-Christian hate crimes and suggests that religious hate crimes have the propensity to include multiple religious faiths and beliefs and may not be limited to any specific religious sect in particular.

The work by Easwarkhanth and Dubey and others suggest that the present-day Indian Muslim population has descended from the Arabian and Iranian Muslim men who married local Hindu women during the Islamic invasions (and rule) or in some cases through local Hindu group members who converted to Islam.¹⁹⁶ The genetic study of the Indian Muslim population shows

¹⁹³ The Constitution of India, Preamble

¹⁹⁴ M.P Gopalkrishnan Nair V State of Kerala, AIR 2005 SC 2053 (3060)

¹⁹⁵ SR Bommai V Union of India, AIR 1994 SC 1918

¹⁹⁶ Easwarkhanth. M, Dubey. B and others, (2009) Diverse Genetic Origin of Indian Muslims: Evidence from Autosomal STR loci, Journal of Human Genetics, 9 The Japan Society of Human Genetics, 54, 340–348; Shokoohy, M. (2003) *Muslim Architecture of South India: The Sultanate of Ma’bar and the Traditions of the*

varying results, suggesting a considerable possibility of Muslim Indians having significant affinity to the regional Hindu gene pool and also some variances from the aboriginal Indians. It may be said that to a certain extent, the Muslim population in India has been genetically assimilated within the Indian gene pool,¹⁹⁷ however, their social and political assimilation in India is not fully achieved. The majority Hindu population, even today sees the Indian Muslim population as an immigrant race, that originally invaded and looted India and that their cultural and religious loyalties lie elsewhere.¹⁹⁸

RELIGIOUSLY AGGRAVATED HATE CRIMES

It is significant to seek for connection between the political change and the rise in communal violence across India, this section primarily elaborates on the political shift in the country and focuses on the increase in the number of hate-based religious hostilities. It covers right winged politics, the rise of ‘Hindutva’ ideology, and the symbolism around the ‘cow as a sacred animal’ as an elaboration into understanding the attitudinal shift in people's mindset accruing under the disguise of political change. The concepts of mob lynching and vigilantism under the umbrella of communal violence have been touched upon to not completely see through, but to get a glimpse into the vastly concerning hostile interconnections embedded within the Indian society.

THE CONCEPT OF COMMUNAL VIOLENCE

The concept of communal violence is relevant to this research. It may be seen as a form of hate crime which has been prevalent in India, causing enormous hostilities and community harm from time to time. Communalism connotes an ideology that represents a belief system based

Maritime Settlers on the Malabar and Coromandel Coasts (Tamil Nadu, Kerala and Goa), Routledge Curzon, New York.

¹⁹⁷ Easwarkhanth. M, Dubey. B and others, (2009) Diverse Genetic Origin of Indian Muslims: Evidence from Autosomal STR loci, *Journal of Human Genetics*, 9 The Japan Society of Human Genetics, 54, 340–348.

¹⁹⁸ Bose, S. (2018). *Secular States, Religious Politics*. Cambridge, UK: Cambridge University Press.

on certain assumptions about society, its economy and its polity.¹⁹⁹ Chandra refers to Indian communalism, which is fast spreading through the mass population, as a form of fascism that is irrational and based on hatred.²⁰⁰ In the same light, Engineer suggests that communal violence is created by political manipulations. He mentions that the religious and cultural sentiment of the different minority communities is ‘skilfully manipulated by the community’s elites to gain personal benefit socially, politically and economically.’²⁰¹ In contrast, Siddiqui mentions ‘communalism’ as a ‘ruling class politics, as it reflects an underlying relationship between power and class relations.’²⁰² He emphasizes that the differences between the Hindu and the Muslim communities have been exploited by the political parties for their votes, resulting in heightened tensions and communal violence (especially during the pre-election phase, demonstrating how the powerful or dominating groups of society take decisions for the entire society).

In the same light, the members of the political parties have been involved in a number of hate incidents, attempting to mark their dominance such as the Jabalpur Riots, 1962, where the local leaders of the Congress party were involved in an attack against the Muslim community, Bhivandi riots, 1970, where 300 Muslims were targeted by ‘Shiv Sena’ (Hindu political party). Along similar lines, the Judicial Commissions on Violence in Aligarh (1978), Sambhal (1980), and Tellicherry (1971) have criticised the political and religious groups for the incitement of violence against Muslims.²⁰³

The communalist ideology does not support violence and also makes efforts to reduce and restrain violence (It may be noticed that the regions politically administrated by the communalists are less frequent ground for communal violence), however, if communal ideology has had a long-lasting prevalence, especially in cases where it has acquired its

¹⁹⁹ Chandra. B, (1990) Communalism and the State: Some Issues in India, *Social Scientist*, Vol. 18, No. 8/9, 38-47

²⁰⁰ Chandra. B, (1990) Communalism and the State: Some Issues in India, *Social Scientist*, Vol. 18, No. 8/9, 38-47

²⁰¹ Engineer. A, (1984) *The cause of Communal Riots in the Post Partition Period in India*, Chapter 3, p 36

²⁰² Siddiqui. K (2016) A Critical Study of ‘Hindu Nationalism’ in India, *Journal of Business & Economic Policy* - Vol. 3, No. 2.

²⁰³ Siddiqui. K (2016) A Critical Study of ‘Hindu Nationalism’ in India, *Journal of Business & Economic Policy* - Vol. 3, No. 2.

leadership, “*it acquires a life of its own.*”²⁰⁴ The feeling of security in one’s leadership reduces reliance on communal identities. In short, communalism is triggered when one community understands that the other community is getting ahead of them. Instances of religious conversions are also an outcome of communalism. They are not merely due to individuals’ religious or spiritual will to convert but are simply a perception of one community losing in number to another community.²⁰⁵ Chandra suggests that it might take decades for communal ideology to spread and become a material force before it may hatch as communal violence.²⁰⁶ In India, the instances of hate-based communal outbursts are evidence of a long-term spread of communal ideologies that have been manifested and propagated within the societies.

THE POLITICAL SHIFT

In recent years, after the Bhartiya Janta Party (BJP – Hindu Political Party) won the 2014 general elections and came to power at the centre, a rise in hate incidents in the form of attacks on Muslim communities along with other minority communities has become frequent.²⁰⁷ 2014 BJP winning the elections may be a qualitative shift in Hindu nationalism in Indian political history.²⁰⁸ The BJP has allegedly used Hindutva to undermine the democratic principles laid under the Indian Constitution while strengthening its political leadership at the centre.²⁰⁹ Since 2014, there has been approximately a 500% rise in the use of inciteful communal speeches by politicians (such political speech tends to incite communal hate)²¹⁰. Through his empirical work, Basu²¹¹ reflects on the correlation between the BJP’s political win in 2014 and the rise in the number of hate crime cases across India. His work includes estimates suggesting a 514%

²⁰⁴ Chandra. B, (1990) Communalism and the State: Some Issues in India, *Social Scientist*, Vol. 18, No. 8/9, 38-47

²⁰⁵ Engineer. A, (1984) Understanding Communalism: Report on a Seminar, *Economic and Political Weekly*, Vol. 19, No. 18, pp. 752-756

²⁰⁶ Chandra. B, (1990) Communalism and the State: Some Issues in India, *Social Scientist*, Vol. 18, No. 8/9, 38-47

²⁰⁷ Dhattiwala, Raheel, and Biggs. M, (2012) The Political Logic of Ethnic Violence: The Anti-Muslim Pogrom in Gujarat, 2002, *Politics & Society* 40.4, 483-516; Siddiqui. K (2016) A Critical Study of ‘Hindu Nationalism’ in India, *Journal of Business & Economic Policy* - Vol. 3, No. 2.

²⁰⁸ Basu. D, (2021), *Majoritarian Politics and Hate Crimes Against Religious Minorities: Evidence from India, 2009–2018*, *World Development* 146; Bose, S. (2018). *Secular States, Religious Politics*. Cambridge, UK: Cambridge University Press.

²⁰⁹ Siddiqui. K (2016) A Critical Study of ‘Hindu Nationalism’ in India, *Journal of Business & Economic Policy* - Vol. 3, No. 2.

²¹⁰ Viswanath. R, (2021) Hate Crimes Against Minorities in India, Locating the Value of an International Criminal Law Discourse? *Journal of International Criminal Justice* 19, 611–642

²¹¹ Basu. D, (2021), *Majoritarian Politics and Hate Crimes Against Religious Minorities: Evidence from India, 2009–2018*, *World Development* 146.

increase in hate crimes against religious minorities post-2014 (considering data between 2009 and 2019).

According to Amnesty International *Halt the Hate* studies, between 2015 to 2019, there were 902 alleged incidents of hate crimes in the country.²¹² In the same time frame, 244 cases of mob lynching have been recorded by Quint's mob lynching lab,²¹³ of which approximately 50 cases are either pending investigation or were not aptly followed.²¹⁴ At the same time, for the rest where the complaint was filed, the accused were charged under IPC for murder, attempted murder, rioting, voluntarily causing grievous hurt etc (and not under Section 153A or 295 IPC). Excluding three to four cases, all the victims belonged to a lower caste or were Muslims.²¹⁵ More strikingly, although the application of Section 153A and 295 along with criminal provisions for murder and grievous hurt would be more relevant, in order to highlight the element of hatred and bias underlying these crimes, however, none of the criminal charges was based on Section 153A or 295 of the IPC, suggesting that no due significance is being paid to the hate element underlying these crimes, even though they were a direct attack on the identity of the victims, attempting to convey a message to the victim community.²¹⁶ Basu, in his work, also suggests a significant rise in the number of hate crimes annually against the majority of religious communities²¹⁷ suggesting a rise in hostilities between communities.

HINDUTVA

Hindutva may be seen as an unthought and unplanned attempt towards the unification of the Hindus, based chiefly on authoritarianism, without addressing any ongoing social and

²¹² Amnesty International, *Halt the Hate* (2019), available online at <https://amnesty.org.in/wpcontent/uploads/2019/10/Halt-The-Hate-KeyFindings-Amnesty-International-India-1.pdf>

²¹³ Conclusion drawn from the Quint Data Lab, 'Mob Lynching Cases Across India' (updated till September 2019), <https://www.thequint.com/quintl/lynching-in-india/>

²¹⁴ The Polis Project, *The High Cost of Targeted Violence in Northeast Delhi: A list of the deceased* (2020) (updated), <https://www.thepolisproject.com/the-high-cost-of-targeted-violence-in-northeast-delhi-a-list-of-the-deceased/>; Amnesty International, *Halt the Hate* (2019), <https://amnesty.org.in/wpcontent/uploads/2019/10/Halt-The-Hate-KeyFindings-Amnesty-International-India-1.pdf>

²¹⁵ Conclusion drawn from the Quint Data Lab, 'Mob Lynching Cases Across India' (updated till September 2019), available online at <https://www.thequint.com/quintl/lynching-in-india/>

²¹⁶ P. Iganski and L. Spiridoula, (2014) *The Personal Injuries of Hate Crime*, in N. Hall et al. (eds), *The Routledge International Handbook on Hate Crime*, Routledge, 52–64; Viswanath, R. (2021) *Hate Crimes Against Minorities in India, Locating the Value of an International Criminal Law Discourse?* *Journal of International Criminal Justice* 19, 611–642

²¹⁷ Basu, D. (2021), *Majoritarian Politics and Hate Crimes Against Religious Minorities: Evidence from India, 2009–2018*, *World Development* 146.

economic conflicts within the Hindu community.²¹⁸ (There is a significant distinction between the concept of Hinduism, which has been defined as a ‘way of life and is considered a philosophical ideology and asserts tolerance and secular ideas embracing different cultures and traditions within its scope²¹⁹ while Hindutva, which is an ideology prescribing violence and requires ‘a hate - object’ to keep itself functional and alive²²⁰). Unlike Gandhi, who happened to be an assimilationist and believed that different cultures and religions may cohabit and have something to learn from one another, Hindutva describes India as a Hindu State and desires all Indians to be Hindus.²²¹ The three essential pillars of Hindutva are the unity of the Hindus, that India is the land of Hindus and not an amalgamation of different cultural influences and finally, considers the Muslims residing in India as irreconcilable enemies of the Hindu populace.²²²

Hindutva may be seen as a violent means of drastically overthrowing secular ideas to reshape Indian society. It challenges the existing Indian system that practices multilingual, multi-ethnic, and multi-religious views.²²³ Within India, inter-caste and inter-community stereotypes and dogmas are prevalent in all societies. However, religious hostile attitudes centre the nationalistic Hindu ideologies that also aid in concretizing other identity-based stereotypes.²²⁴ In present-day India, the power dynamics among different social divisions have undergone much shift. The dominant Hindu groups in Indian society hold the power to set ground rules for the working of the society.²²⁵ While the Indian sub-continent has not fully recovered from the 1947 partition of India and Pakistan, the memories of the past Hindu-Muslim confrontations are easily manipulated at the hands of the fundamentalists (both in religious and political reference) to achieve an ‘undivided India’.²²⁶

²¹⁸ Banerjee. S (1991) 'Hindutva': Ideology and Social Psychology, Economic and Political Weekly, Vol. 26, No. 3, pp. 97-101

²¹⁹ Banerjee. S (1991) 'Hindutva': Ideology and Social Psychology, Economic and Political Weekly, Vol. 26, No. 3, pp. 97-101

²²⁰ Melanchthon. M, (2002) Persecution of Indian Christians, 41 Dialog.

²²¹ Heredia. R, (2009) Gandhi's Hinduism and Savarkar's Hindutva, Economic and Political Weekly, Vol. 44, No. 29, pp. 62-67

²²² Basu. D, (2021), Majoritarian Politics and Hate Crimes Against Religious Minorities: Evidence from India, 2009–2018, World Development 146.

²²³ Shah. G (2002) Caste, Hindutva and Hideousness, Economic and Political Weekly, Vol. 37, No. 15, pp. 1391-1393

²²⁴ Shah. G (2002) Caste, Hindutva, and Hideousness, Economic and Political Weekly, Vol. 37, No. 15, pp. 1391-1393

²²⁵ Sumanta Banerjee (1991) 'Hindutva': Ideology and Social Psychology, Economic and Political Weekly, Vol. 26, No. 3, pp. 97-101

²²⁶ Heredia. R, (2009) Gandhi's Hinduism and Savarkar's Hindutva, Economic and Political Weekly, Vol. 44, No. 29, pp. 62-67; Sharma. J (2003): Hindutva: Exploring the Idea of Hindu Nationalism (New Delhi: Penguin, Viking).

RASHTRIYA SEVAK SANGH (RSS)

The 'Rashtriya Sevak Sangh' (RSS) emerged in 1920 with strong Hindu ideals and works on the lines of hatred against minority religious groups and has millions of Hindu Indian members throughout the country. RSS, founded by KB Hedgewar since its origin in 1925, works at the grass-root level to look out for the interests of the Hindus and emphasizes uniting all Hindus regardless of their caste (The RSS was initially not based on the ideals of hatred but the unification and upliftment of the Hindu communities). They believe in the caste system as the traditional tool for distributing work in society and suggest that discrimination based on caste is simply an alteration.²²⁷ The organization runs a number of primary-level educational institutions influencing young minds with Hindutva.²²⁸ Although the RSS relies primarily on social work and encouragement as a tool for implementing their agenda, they do not constrict them from using force and violence as and when needed.²²⁹ Hindutva militarism is also being taught at a number of camps run by Hindu fundamentalist groups that organize their cadres and impart training for arms and ammunition.²³⁰ As Shah suggests that over time, the Muslim community in India has been called 'anti-national fundamentalist' and backward, while on the other hand, the Hindus are being persuaded into picking up arms against the 'enemies.'²³¹

Many political leaders are members of the RSS and convey an aggressive approach to achieving a 'Hindu State. The communal sentiment is being openly used during speeches by government officials and members of the parliament, inciting hate within the society.'²³² The Hindu fundamentalists are clear and open regarding their motives and the means to achieve them through open speeches, journal writeups and demonstrations in public are sufficient

²²⁷ Shah. G (2002) Caste, Hindutva, and Hideousness, Economic and Political Weekly, Vol. 37, No. 15, pp. 1391-1393

²²⁸ Oza, R. (2007). The Geography of Hindu Right-Wing Violence in India, in D. Gregory and A. Pred (ed.) *Violent Geographies*, London: Rutledge

²²⁹ Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethnic State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press, 56

²³⁰ Shah. G (2002) Caste, Hindutva, and Hideousness, Economic and Political Weekly, Vol. 37, No. 15, pp. 1391-1393

²³¹ Swami. A (1982), Hindu Samaj Samanvaya, Bharat Seaashram Sangh, Ahmedabad; Shah. G (2002) Caste, Hindutva, and Hideousness, Economic and Political Weekly, Vol. 37, No. 15, pp. 1391-1393

²³² Siddiqui. K (2016) A Critical Study of 'Hindu Nationalism' in India, Journal of Business & Economic Policy - Vol. 3, No. 2.

evidence for the same. For example, one of the RSS members attempting to define 'India' stated that the Indian Nation is a "*Hindu race united together by common tradition, Hindu culture and Hindu language (Sanskrit)*".²³³ He further elaborated that the indigenous and the minority communities must either take up the Hindu ideals of life and merge with the Hindu race and culture or choose to 'live at the mercy of the nation until permitted and must leave the country as and when the Hindu nation so desires'.²³⁴

INDIAN NATIONALISM

Hindutva attempts to promote and practice its activities in the name of 'Nationalism', i.e., it portrays that it speaks for the majority of the nation, which by default may not be anti-national.²³⁵ The proponents of Hindutva believe that as Hindus, they are heirs of mythological heroes and are entitled to exercise their dominance, side-lining individuals following other religions. Therefore, it is taken for granted that Hindus are generally more patriotic compared to Muslim or Christian Indians.²³⁶ Heredia argues that Hindu nationalism in its present form is not specifically religious but is, moreover, cultural nationalism. However, from an initial point, the idea of Hindu nationalism is to mobilise the Hindu population into ethnic groups and politicize them into forming a dominant majority, leaving the non-Hindu groups as a subordinate minority.²³⁷

HATE CRIME INCIDENTS THROUGH THE LAST DECADE

This section of the chapter provides some available data on hate crimes that have been committed and reported in India in the past few years and reflects on the rising number of hate crimes, within the country.

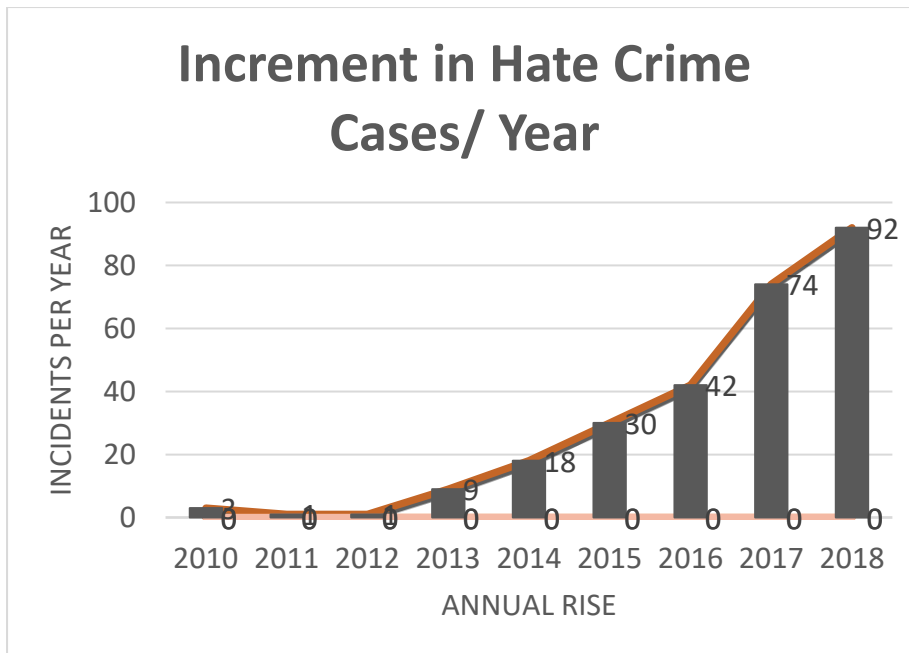
²³³ Race, We: Or Our Nationhood Defined, (1939) Nagpur.

²³⁴ Banerjee. S (1991) 'Hindutva': Ideology and Social Psychology, Economic and Political Weekly, Vol. 26, No. 3, pp. 97-101; Race, We: Or Our Nationhood Defined, (1939) Nagpur.

²³⁵ Shah. G (2002) Caste, Hindutva, and Hideousness, Economic and Political Weekly, Vol. 37, No. 15, pp. 1391-1393

²³⁶ Banerjee. S (1991) 'Hindutva': Ideology and Social Psychology, Economic and Political Weekly, Vol. 26, No. 3, pp. 97-101

²³⁷ Heredia. R, (2009) Gandhi's Hinduism and Savarkar's Hindutva, Economic and Political Weekly, Vol. 44, No. 29. 62-67



GRAPH 1. THE RISE IN HATE CRIME CASES²³⁸

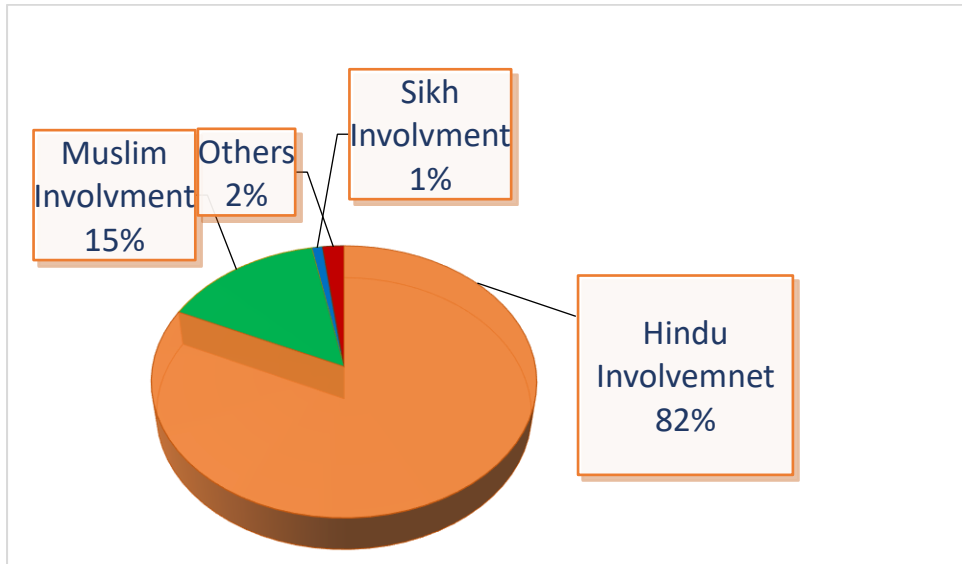
The graph shows the increase in crimes annually based on hate and bias. It includes incidents of hate crimes from the year 2010 to 2018. The data collected by Indiaspend focuses on the rise in the number of hate incidents after the change in the government (the means of data collection is done mostly through news reports). A clear rise may be seen from the year 2014, i.e. when the BJP came to power before which the number of hate crimes on record was quite a few.²³⁹

By April 2019, Indiaspend, Hate Crime Watch monitored 282 cases, of which 64% of the victims were Muslims, 16% Christians and 16% Hindus (the victims' Religion for 30 of the incidents is not known). While on the other hand, in 85 incidents, the perpetrators are not known; however, 58% of perpetrators belonged to the Hindu religion while 12% were Muslim

²³⁸ Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethnic State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press, 59

²³⁹ Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethnic State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press, 59

perpetrators. Of these 282 incidents, 100 resulted in the victims' death and caused injuries to 705 victims.²⁴⁰



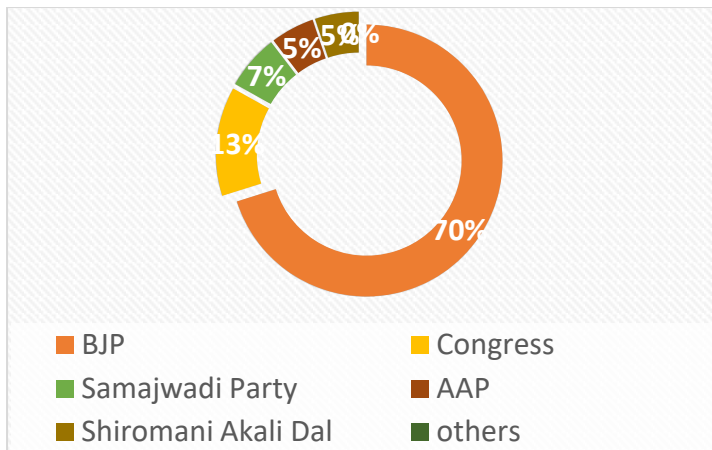
GRAPH 2: RELIGION-BASED INVOLVEMENT IN COMMISSION OF HATE CRIMES²⁴¹

The above pie chart connotes a total of 196 cases that were reported to the police. The Hindus (as offenders) were involved in the commission of hate-based crimes in 81% of cases, while Muslims were involved in 15% of cases, 1% of Sikhs and 1% of individuals from other religions were also found to be involved.²⁴²

²⁴⁰ Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethni State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

²⁴¹ Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethni State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

²⁴² Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethni State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.



GRAPH 3: THE STATE GOVERNMENT DURING THE INCIDENT²⁴³

The above chart shows the number of incidents motivated by hate under different State governments in India. The most being 70% during the term of BJP and 13% during the term of Congress,²⁴⁴ which reflects the correlation between an increase in hate crime cases and the change in the political situation. It also reflects on the lack of adequate legal mechanisms to address hate crime concerns at the State level and the Centre.

COW AS A SACRED SYMBOL

According to Hindu traditions, the cow is a sacred animal²⁴⁵ and therefore beef consumption is against Hindu beliefs. However, Sinha²⁴⁶ claims that 12.5 million Hindus consume beef as it is cheaper compared to other meat sources. Around 91% of the lower caste members (discussed in the 3rd Chapter in detail) make up the Hindu beef-eating population. The laws relating to cow slaughter and beef bans in several Indian States have been in place for quite some time, it was only recently that the implementation of such laws was made very stringent. A few other States introduced new strict laws against cow slaughter and beef consumption in 2015. The such policy change has affected the livelihood of economically deprived and socially

²⁴³ Hate Crime Watch, IndiaSpend; <https://p.factchecker.in/>

²⁴⁴ Hate Crime Watch, IndiaSpend; <https://p.factchecker.in/>

²⁴⁵ Lucian W. Pye and D. N. Jha, (2002) *The Myth of The Holy Cow*, 81 *Foreign Affairs*.

²⁴⁶ Sinha. B, (2017) *The Beef Ban: A Symbol of Hindutva and a Threat to Indian Democracy*, *Berkeley Political Review*, <https://bpr.berkeley.edu/2017/08/16/the-beef-ban-a-symbol-of-hindutva-and-a-threat-to-indian-democracy/>

marginalized communities²⁴⁷ that mostly comprise the Muslim population and the Hindu members belonging to the ‘Backward and Scheduled Caste’²⁴⁸ (who work as butchers or cow breeders, or in the leather industry). Although the government made schemes and policies to provide alternative employment to Indians who are socially and economically affected by a ban on beef, not much has been done in this regard. The Federal government introduced the unique identification numbers for the cattle in 2016, intending to reduce the incidents relating to mob violence and vigilantism pertaining to cows. A twelve-digit number and an ear tag were allotted for every cattle’s accountability. The cow database includes age, sex, breed height, and the owner's name.²⁴⁹

The issue of cow smuggling and cow slaughter has led to a rise in vigilantism and mob lynching.²⁵⁰ The vigilantes (in no official capacity) work on protecting the sacred animal in place of their ‘anti-Muslim agenda’. The incidents involve attacks on individuals (or a household) by a mob, on grounds of suspicion of beef consumption or cow slaughter.²⁵¹ For example, in one incident, a number of young Hindu group members collected outside Akhlaq’s (Muslim persons) house at night, they convinced the nearby temple priest to announce (using a loudspeaker) that Akhlaq had consumed beef, following which they rushed into Akhlaq’s house, unveiled the meat in the fridge and declared it to be beef.²⁵² Akhlaq was then severely beaten and later died at the hospital. His son, who attempted to intervene, was harshly beaten and sustained injuries. The agenda for protecting the cows do not halt at victimising the

²⁴⁷ Sinha. B, (2017) The Beef Ban: A Symbol of Hindutva and a Threat to Indian Democracy, Berkeley Political Review, <https://bpr.berkeley.edu/2017/08/16/the-beef-ban-a-symbol-of-hindutva-and-a-threat-to-indian-democracy/>

²⁴⁸ Sinha. B, (2017) The Beef Ban: A Symbol of Hindutva and a Threat to Indian Democracy, Berkeley Political Review, <https://bpr.berkeley.edu/2017/08/16/the-beef-ban-a-symbol-of-hindutva-and-a-threat-to-indian-democracy/>; Pavri. T, (2018) Is India Becoming More Liberal? Globalization, Economic Liberalization, and Social Values, Journal of Global Initiatives: Policy, Pedagogy, Perspective Volume 13, Number 1 *India: Globalization, Inclusion and Sustainability*; Constitution of India – Scheduled Caste, Schedule Tribe and Other Backward Class Categories

²⁴⁹ Parikh. A, Miller. C. (2019) Holy Cow! Beef Ban, Political Technologies, and Brahmanical Supremacy in Modi’s India, International journal for Critical Geographies.

²⁵⁰ Violent Cow Protection in India, (2019) Human Rights Watch, <https://www.hrw.org/report/2019/02/18/violent-cow-protection-india/vigilante-groups-attack-minorities>.

²⁵¹ Pavri. T, (2018) Is India Becoming More Liberal? Globalization, Economic Liberalization, and Social Values, Journal of Global Initiatives: Policy, Pedagogy, Perspective Volume 13, Number 1 *India: Globalization, Inclusion and Sustainability*

²⁵² Jaffrelot. C, (2019) A de facto Ethnic democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethni State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

(suspected) cow slaughterers but extends to cow breeders.²⁵³ According to a study, cow vigilantism claimed 129 lives between 2015 to 2019.²⁵⁴ In many cases, political party members have been affiliated with the attacking mob.²⁵⁵ The recent cases of mob lynching pose a threat not only due to its violent criminal nature but majorly because they highlight deep social fissures.

An organization that calls itself a cow protector or the ‘Gau Rakshak Dal’ (GRD, The Cow Protection Association) has chapters in eleven out of twenty-nine states. The members of the association take up cricket bats and sticks and patrol the highway, search the carrier vehicles that are likely to be transporting cows, and ‘beat up the drivers if they are Muslims’.²⁵⁶ Although the GRD does not have any legal authority, it has become more prominent, especially after the laws against cow slaughter and sale became a non-bailable offence. However, the authorities have never questioned the GRD. On the contrary, Marvel²⁵⁷ mentions, that the police work hand in hand with the GRD. The work of Marvel states in the words of one of the GRD leaders that ‘The Chief Minister is happy with our work, and we have his blessings and full support (suggesting perceived political support).’²⁵⁸

In the State of Haryana, such official and unofficial policing was supported by the formation of a ‘cow task force’ within the police force of the State. While in the State of Maharashtra, the situation is not any better. Maharashtra, following the law in force since 2015, appointed the Animal Welfare officers who were hired from among the ‘former cow protectors’ (GDR members). These officers have assaulted a number of Muslim animal breeders who had no intention of slaughtering. The incidents of mob violence or lynching reflect, if not always

²⁵³ Jaffrelot, C. (2019) A de facto Ethnic democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethni State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

²⁵⁴ Conclusion drawn from the Quint Data Lab, ‘Mob Lynching Cases Across India’ (updated till September 2019), <https://www.thequint.com/quintlab/lynching-in-india/>; Viswanath, R. (2021) Hate Crimes Against Minorities in India, Locating the Value of an International Criminal Law Discourse? *Journal of International Criminal Justice* 19, 611–642

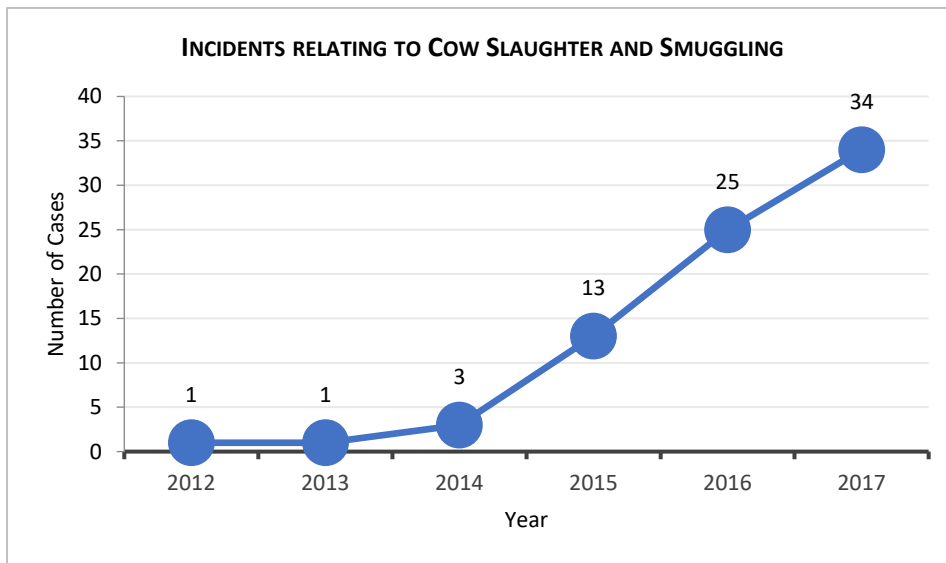
²⁵⁵ Bhat, M. (2018) The Case for Collecting Hate Crimes Data in India, Law and Policy Brief, Global Jindal Law School, Volume 4, Issue 9.

²⁵⁶ Marvel, I. (2016) In the Name of the Mother, How the State Nurtures the Gau Rakshaks of Haryana, *The Caravan*.

²⁵⁷ Marvel, I. (2016) In the Name of the Mother, How the State Nurtures the Gau Rakshaks of Haryana, *The Caravan*.

²⁵⁸ Marvel, I. (2016) In the Name of the Mother, How the State Nurtures the Gau Rakshaks of Haryana, *The Caravan*.

solely, the targeted attack on the victim’s identity.²⁵⁹ In the same light, Bhat²⁶⁰ argues that the pattern envisaged in such lynching and mob violence crimes identifies them as hate crimes as they are crimes motivated wholly or partly by the victim’s perceived or actual identity and membership of a community,²⁶¹ while Joanna Perry suggests that mob lynching and vigilantism might act like a ‘conceptual bridge for the hate crime concept to migrate to the Indian legal system and police practices.’²⁶²



GRAPH 4: INCIDENTS RELATING TO COW SLAUGHTER AND SMUGGLING²⁶³

As per the research,²⁶⁴ 34 incidents (resulting in death or serious injuries) relating to cows took place in 2017 compared to 25 cases in 2016, 13 in 2015, 3 in 2014 and only one incident in 2012 and 2013, of which twenty-four out of twenty-eight were Muslims (Victims). As stated

²⁵⁹ Bhat. M, (2018) The Case for Collecting Hate Crimes Data in India, Law and Policy Brief, Global Jindal Law School, Volume 4, Issue 9.

²⁶⁰ Bhat. M, (2018) The Case for Collecting Hate Crimes Data in India, Law and Policy Brief, Global Jindal Law School, Volume 4, Issue 9.

²⁶¹ Chakraborti. N and Garland. N, (2015) *Hate Crime: Impact, Causes and Responses*, 2nd ed., Los Angeles: SAGE Publications Ltd.

²⁶² Perry. J, (2020) The Migration and Integration of the Hate Crime Approach in India, *Jindal Global Law Review*11(1)

²⁶³ Jaffrelot. C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the Other, Hindu Vigilantes and the Ethnic State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

²⁶⁴ Jaffrelot, C, (2019) A de facto Ethnic Democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethnic State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

in the work of Jaffrelot, the perpetrators make sure that the victim is made to say out loud slogans like ‘Hail the Cow-mother’. In many incidents, the Hindu cow breeders and workers were spared or merely slapped, while the Muslim fellows were beaten and lynched to death or suffered grievous injuries.²⁶⁵

In light of the above information on communal violence, which is incited by means of vigilantism, often leading to mob lynching, may be seen as a form of hate crime prevalent in the current Indian society. The hateful acts committed by a group of individuals (cow vigilantes and groups engaging in mob lynching) belonging to a particular sect against another solely based on the ground of their identity (which may be real or perceived), leaves the victim physically, psychologically and emotionally victimized, along with causing long-term effects on the victim community, in multifarious ways, more generally creating an atmosphere of communal hatred, fear and hostility. In these incidents of hate, that are being carried out in the guise of extreme Hinduism and Hindu nationalism, where one is suspected of cow smuggling (or slaughtering or consuming) and is interrogated by a mob (having no authority), that doesn’t hold back from assaulting, hurting and engaging in acts of lynching the suspect, may seem to be fuelled via current political ideologies that run the country, even though the perpetrators are in no manner legally authorized to carry out hateful hostile activities. It could be said that the absence of adequate law, plays a significant role in aiding the commission of hate-based crimes (by not providing sufficient protective and preventive means).

LANDMARK JUDGEMENT

Following the rise in incidents of mob violence, lynching and vigilantism (in the name of the protection of cow), a Writ Petition was filed by a social activist and was taken up by the Indian Supreme Court affirming that

“...The majesty of law cannot be sullied simply because an individual or a group generate the attitude that they have been empowered by the principles set out in law to take its enforcement into their own hands and gradually become a law unto themselves and punish the violator on

²⁶⁵ Jaffrelot. C. (2019) A de facto Ethnic democracy, Obliterating and Targeting the other, Hindu Vigilantes and the Ethnic State Chapter 2 in Angana P Chaterji, Thomas Blom Hansen and Christophe Jaffrelot, *Majoritarian State, How Hindu Nationalism is Changing India*, Oxford University Press.

their assumption and in the manner in which they deem fit... No act of a citizen is to be adjudged by any kind of community under the guise of protectors of law."²⁶⁶

"The volunteers of the organizations associated with cow protection or compassion for animals as well as other citizens have no right to take law into their own hands to resort to violence or other illegal acts, either collectively or individually, targeted against the individual's undertaking transportation of animals or carrying on the trade in animals/meat, under the guise of cow protection, the protection of the cow progeny or in the name of compassion for animals".²⁶⁷

The Indian Supreme Court²⁶⁸ highlighted and recognized lynching and mob violence as hate crimes when they are aimed at creating intimidation and fear against certain vulnerable communities and emphasized that

*"Hate crimes as a product of intolerance, ideological dominance and prejudice ought not to be tolerated; lest it results in a reign of terror. Extrajudicial elements and non-State actors cannot be allowed to take the place of law or the law-enforcing agency. A fabricated identity with a bigoted approach sans acceptance of plurality and diversity results in provocative sentiments and display of reactionary retributive attitude transforming itself into dehumanisation of human beings."*²⁶⁹

The honourable Chief Justice Deepak Mishra called such acts *"horrendous acts of mobocracy"*²⁷⁰ and stated that there is an urgent need to formulate preventive, remedial and punitive laws and guidelines to check the present situation.

The CJI was clear on locating the responsibility of the State in putting a check on the rising hate crime concerns throughout the country and made significant recommendations for the central and the State governments, which include an award of a maximum sentence in cases relating to lynching and mob violence, State efforts to file appeals against bail or acquittal, disciplinary action in cases of failure to check commission of similar offences, accountability of political parties or other legal entities that have affiliations to collective criminal acts,

²⁶⁶ Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72, Para 1

²⁶⁷ Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72, Para 9

²⁶⁸ Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72

²⁶⁹ Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72, Para 20

²⁷⁰ Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72, Para 42

Sensitization of officials and Courts at all levels with hate crimes and as to their effects on the victims, their families and communities through workshops and seminars engaging activists, lawyers, psychologists and members of societies.²⁷¹

The 2018 case of *Tehseen S. Poonawalla v Union of India* is quite significant and may be seen as an initial step towards law and policy formulation in the hate crime context. The Indian Supreme Court, through this judgement, has aptly conveyed the seriousness of the issue, stating how hate crimes such as mob lynching, communal violence and vigilantism have the potential to ruin the democratic fabric of any welfare nation-state and therefore must be checked in its early stages²⁷², yet most of the recommendations put forward by the Supreme Court have not been acted upon.

ANTI- CHRISTIAN HATE CRIMES

Until 1990, the Christian community in India remained largely unaffected by any incidents of violence of religious nature.²⁷³ This rise in hate incidents against the Christian minority after 1990 may be attributed to the Italian Christian Sonia Gandhi becoming the president (1998) of the Indian National Congress (political party), while some suggest that the Christian evangelical efforts (for example the Joshua Project or the AD 2000 and Beyond)²⁷⁴ that aimed to send out the Christian message around the world (by the millennium end) potentially exacerbated hate against Christian communities in India, however, Bauman, finds only some merit in the above arguments and suggests that the shift in the Indian attitude towards its Christian minority population may be attributed to the Indian economy opening up during the 90s giving way to tangible impacts of globalization and liberalization.²⁷⁵

In India, the Hindu and Christian communities do not have an established history filled with memories of communal tension and violence. The primary reason for the persecution of the

²⁷¹ Bhat. M, (2018) The Case for Collecting Hate Crimes Data in India, Law and Policy Brief, Global Jindal Law School, Volume 4, Issue 9; *Tehseen S. Poonawalla v Union of India*, (2018) 6 SC 72

²⁷² *Tehseen S. Poonawalla v Union of India*, (2018) 6 SC 72, Para 18

²⁷³ Bauman. C, (2013) Hindu-Christian Conflict in India: Globalization, Conversion, And The Coterminal Castes And Tribes, 72 *The Journal of Asian Studies*.

²⁷⁴ Zavos, J. (2001) Conversion and the Assertive Margins, *South Asia: Journal of South Asian Studies* 24(2):73,8

²⁷⁵ Bauman. C, (2013) Hindu-Christian Conflict in India: Globalization, Conversion, And the Coterminal Castes and Tribes, 72 *The Journal of Asian Studies*.

Christian community at the hands of the Hindus originates mainly from caste, class, and religious affiliations.²⁷⁶ The perception that classless ideals and the principles of social equality embedded in the teachings of the Christian ideology act as a threat to the notion of an organized society with a hierarchical caste system of domination according to the Hindu ideals.²⁷⁷ In a broader sense, Christianity relies on a more skill and merit-based approach when referring to social status and class.²⁷⁸ Unlike in the case of Hindu Muslim communalism, Bauman and Leech, in their work suggest no relationship between the attacks on the Christian communities by Hindus and the ruling political party (BJP in this case and the RSS members).²⁷⁹

A number of incidents targeting the Christians in India may be noted during the 90s. In 1998, a number of Christians were beaten up by a group of young Hindus on Christmas day. Following the incident, 24 churches, three schools and six houses were destroyed and burned down, causing severe injuries to nine tribal Christians. There were similar incidents where the body of one Samuel Christian was exhumed, the century-old Christian school in Rajkot was attacked, copies of the New Testament were torn, and many of them were burned. Also, in the year 1998, when four nuns were gang-raped in Jhabua, the RSS secretary stated that such an act was a direct outcome of the rage of the patriotic youth and was a result of the conversion of the Hindu population into Christians by priests.²⁸⁰ A total of 36 cases of anti-Christian attacks were reported in the year 2000.

In 2007 and 2008, Hindu-Christian Riots broke out in Orissa.²⁸¹ The Hindu Kandhas (upper caste group) had been against the Dalit Pana's who had converted to Christianity (became Christian Dalits). The friction between the two communities had existed since the post-colonial era, as the Kandhas were natives of the Kandhamal District. At the same time, the Pana were the working-class migrants that settled in Kandhamal for work. The Hindutva organizations began converting tribals into Hindus' and alleged that the Christian missions were forcefully

²⁷⁶ Bauman. C, (2013) Hindu-Christian Conflict in India: Globalization, Conversion, And the Coterminal Castes and Tribes, 72 *The Journal of Asian Studies*.

²⁷⁷ Bauman. C, (2013) Hindu-Christian Conflict in India: Globalization, Conversion, And The Coterminal Castes And Tribes 72 *The Journal of Asian Studies*; Cf. R. Scrogg, (1993) *The Earliest Christian Community as Sectarian Movement*, in *The Text and The Times* (Minneapolis: Fortress, 1993), 20-45.

²⁷⁸ Bauman. C, (2013) Hindu-Christian Conflict in India: Globalization, Conversion, and the Coterminal Castes and Tribes, *The Journal of Asian Studies*, Vol. 72, No. 3, pp. 633-653.

²⁷⁹ Bauman. C and Leech. T, (2012) Political Competition, Relative Deprivation, And Perceived Threat: A Research Note on Anti-Christian Violence in India' 35 *Ethnic and Racial Studies*.

²⁸⁰ Melanchthon. M, (2002) 'Persecution of Indian Christians' 41 *Dialog*.

²⁸¹ Melanchthon. M, (2002) 'Persecution of Indian Christians' 41 *Dialog*.

converting the Dalit population, side-lining that the long-term caste oppression had made Dalits look for their rights and social respect converting to Christians.²⁸²

As the Pana's (Dalit Christian community) attempted to gain the Scheduled Caste status, to avail protection and rights under the Constitution, the Kandhas became more resentful. The Vishwa Hindu Parishad (A branch of the RSS) began turning two communities in Orissa against each other. As the situation intensified around the August end of 2008, a number of churches in Orissa were set on fire, and orphanage homes and Christian institutions were destroyed. The pastors were attacked, while nuns were harassed, one of the nuns was burnt alive, and another was gang raped. A prominent Christian population fled to the forest to save their lives. The incident was not localized to the Kandhamal district but spread through several districts in Orissa, causing numerous killings and leaving thousands without a home. Around the next day, when four significant members of the Vishwa Hindu Parishad (a branch of the RSS) were killed while celebrating a festival, a 'Christian conspiracy' was to be blamed for it (although another organization claimed to have committed the assassinations).²⁸³

RELIGIOUS HATE CRIMES AND INDIAN CRIMINAL LAW

This Section focuses on the criminal law provisions under the IPC that seek to address offences relating to religious disharmony. The idea of secularism has been prominently embedded under the Preamble to the Constitution inserted through the 42nd Constitutional Amendment.²⁸⁴ The Indian Constitution and the IPC have been enthusiastic in terms of securing religious rights for its citizens and considering the vast religious diversity and the historical events in India, the drafters of the sovereign documents were cautious and foresaw the extensive probability of perpetual religious turmoil and the ill will and hatred such would create against the minority religious communities. The insertion of the Constitutional Articles, 25 to 30 and Chapter XV containing Sections 295, 295A, 296, 297 and 298 under IPC suggests the same.

²⁸² Kanungo. P, (2008) Hindutva's Fury against Christians in Orissa, Economic and Political Weekly, Vol. 43, No. 37, 16-19

²⁸³ Kanungo. P, (2008) Hindutva's Fury against Christians in Orissa, Economic and Political Weekly, Vol. 43, No. 37, 16-19

²⁸⁴ 42nd Amendment Act, 1976, (The Constitution of India) – Inclusion of 'Secular' under the Preamble to the Indian Constitution

Article 25	Freedom of conscience and free profession, practice and propagation of religion
Article 26	Freedom to manage religious affairs.
Article 27	Freedom as to payment of taxes for the promotion of any particular religion.
Article 28	Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

This part of the chapter includes a few former case laws to draw attention towards the Court's preliminary understanding of the Indian religious discourse. The Court's approach has been positive and has from time to time widened the legislative scope under different provisions, clarifying its intentions to provide protection to various religious groups and to create a general social will to respect different beliefs and practices, preventing an upswing in biased and hateful attitudes against distinct sects.

Section 295 obliges the citizens to maintain religious harmony and duly respect different religions and beliefs. Section 295²⁸⁵ relates to “*injuring or defiling place of worship with intent to insult the religion:*” such acts include damage, destruction, and defilement caused to any place of worship. The terms ‘damage, destroy or defile’ include any physical and material destruction caused to a place of worship. It also includes instances where the place of worship is made unclean or dirty with the intention to disrupt and hurt the sentiment of any religious class. The section also applies in cases of insult or damage to any ‘object held sacred’ to any specific class of persons. Much earlier, in 1958, the Court, in the case of *S. Veerabdran Chettiar v E V Ramaswami Naickar*,²⁸⁶ held that there are no prescribed limitations to ‘sacred objects, and if such limitations are set forth, incidents of burning Quran and Bible would not qualify as offences under the Code. The Court has been keen on putting forward ‘religious susceptibilities’ of persons following different religions. The broad scope of the Section provides for the inclusion of “sacred objects” (without limitations), implying its nature to be

²⁸⁵ Section 295, The Indian Penal Code, 1860, - *Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

²⁸⁶ *S. Veerabdran Chettiar v E V Ramaswami Naickar*, 1958 AIR 1032, (where the accused persons destroyed the Hindu worship idol, gave a speech expressly stating their intention to insult the religious feelings of the Hindu community, it amounted to an offence under Section 295 and 295 A)

quite comprehensive in terms of accepting and recognizing different practices and beliefs followed by varied religious communities.

Section 296 focuses on any intended disturbance (with malicious intention to insult and hurt religious feelings) caused at any religious assembly.²⁸⁷ While Section 297 extends to cover trespass to sacred grounds with the intention to insult and does not connote only criminal trespass but includes any trespass prohibited under specific religion. For say, any indecent acts performed at a mosque, or a temple would attract Section 297. The intention to insult and hurt religious feelings through trespass to a burial place or place of worship is necessary to attract the Section.²⁸⁸ The requirement of 'ill intent' of causing insult is essential.²⁸⁹

Section 295A²⁹⁰ and 298²⁹¹ under the Penal Code focus on 'hurt caused to religious feelings (leading to incitement of hate). Section 295A was introduced by the Criminal Law Amendment Act (XXV of 1927) under the Indian Penal Code after the Rangeela Rasul case.²⁹² This Section is protected under Article 19 (2) of the Constitution and does not simply penalize any and every act of insult to religion or religious belief but is aimed at such insult to religion or religious belief which is carried out with 'malicious intention' to outrage the religious feelings of a specific class.²⁹³ The Section makes it necessary for persons of different religions to respect the values and beliefs of other faiths. In the same light, the state also must protect different religions and related values efficiently and justifiably.²⁹⁴

The complete chapter under Indian Criminal law focuses on safeguarding and protecting the rights of different religious groups in India. The Court's approach while dispensing justice under the chapter has been humane and inclusive for a long time and has focused on developing

²⁸⁷ Jaipal Gir v Dharampal, (895) ILR 23Cal 60; see also, Emperor v Aftab Mohammad Khan, AIR 1940 All 291

²⁸⁸ Mustafa Rahim v Moti Lal, 1909)10 CrLJ 160

²⁸⁹ Atta Ullah v Azim ullah, 1890 ILR 12 All 494(FB); Manzur Hussain v Mohammad Zaman (1924) 52 Indian Appeals 61; Mangat v Emperor, AIR 1919 Lahore 433

²⁹⁰ Section 295 A, Indian Penal Code, 1860, - *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.*

²⁹¹ Section 298, Indian Penal Code, 1860, - *Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*

²⁹² Raj Paul v The State, AIR 1927, Lah 610, para 611

²⁹³ Ramji Lal Modi; Public Prosecutor v Ramaswami AIR 1964 Mad 258

²⁹⁴ S. Veerabadran Chettiar v E V Ramaswami Naickar, 1958 AIR 1032

the notion of respect for different religious groups, attempting to prevent and prohibit any incitement of religious hate. The provisions under the chapter are often used along with Section 153 A of IPC and are more dedicated to religious hate speech and not so much to religious hate crimes. In grave offences involving religious hate, the courts employ Sections 295 to 298; however, convictions under Sections 295 to 298 do not account for any aggravated or enhanced sentencing.

Although chapter XV of the Indian Penal Code is dedicated entirely to curbing and checking crimes based on religious hatred, keeping in mind the political and religious dynamics prevalent in the country, considering India's colonial history and the following partition, the provisions do not seem comprehensive enough to provide adequate protection to the minority religious communities, firstly, the existing legal provisions are more attuned to the notion of hate speech than hate crimes, and correspond more to property harm than to bodily harm (which side-lines the focus on the idea of 'severity' inlaid in hate crimes) and secondly, the provisions do not entail any enhancement or aggravation in sentencing. Although the application of Sections under Chapter XV and Section 153A has the potential in dealing with hate crime cases, its usage in the recent past does not seem satisfactory. The gravity and timely occurrence of hate crimes in India suggest that the existing provisions under the Indian criminal Code do not seem to have any potential symbolic effect that a hate crime law needs to prescribe and are not sufficiently capable of removing fear and distress from the minds of the stigmatized vulnerable minority communities or deflecting the hateful actions of the majority.

STATE LEGISLATIONS RELATING TO HATE CRIMES

A more recent state-level legislative transformative approach has attempted to encapsulate laws and guidelines to curb and punish instances of public lynching that have been on a significant rise over the past few years.²⁹⁵ The Supreme Court's decision²⁹⁶ has resulted in four Indian States formulating new laws on lynching; however, the efforts still need to be materialized on

²⁹⁵ Bhat. M, (2018) The Case for Collecting Hate Crimes Data in India, Law and Policy Brief, Global Jindal Law School, Volume 4, Issue 9; Tehseen S. Poonawalla v Union of India, (2018) 6 SC 72

²⁹⁶ Tahseen S Poonawalia v Union of India and Others, (2018) 6 SC 72

the national level.²⁹⁷ Although these States have not received any noteworthy accolades from the Centre regarding their new statutory endeavours, these few States have been putting in an effort to reduce and prevent hate. This part of the Chapter looks at the very few existing State-level legislative pieces and attempts to review them as to their robustness and effectiveness in providing justice and preventing hate crime incidents. The aforementioned legislation and Bill have been formulated keeping in mind the significant Supreme Court decision²⁹⁸ declaring acts of lynching as hate crimes and directing the government to bring in adequate mechanisms to check the same.

Manipur State Ordinance - Protection from Mob Violence Act (3 of 2018)

Manipur is one of the eight Indian States that make up the North-eastern Region (NER), representing the political and geographical division; with a three million population, Manipur consists of a mix of Hindus, Muslims and different tribes. This section attempts to evaluate the recently passed Bill on Protection from mob violence 2018 in the State of Manipur.

The particular law on Protection from Mob Violence is brought in place due to the increasing number of mob violence and lynching incidents that have affected a huge population, in terms of loss of livelihood, deaths, injuries, and the persistent feeling of vulnerability. The two primary objectives of the Ordinance are, firstly, to provide adequate punishment for all sorts of mob lynching and, secondly, to provide rehabilitation to the victims of such hate crimes. The Ordinance has been passed in line with the recent directions provided by the Supreme Court in the case of *Tahseen S Poonawalia v Union of India and Others*.²⁹⁹

Section 2(d)³⁰⁰ of the Act defines ‘*lynching*’ in vivid terms covering a range of grounds for the commission of hate crimes, including any acts of violence that may be ‘spontaneous or planned’ based on the grounds of ‘religion, caste, creed, sex, place of birth, language, dietary practices, sexual orientation, political affiliation, ethnicity or any other related grounds. The

²⁹⁷ Viswanath, R, (2021) Hate Crimes Against Minorities in India, Locating the Value of an International Criminal Law Discourse? *Journal of International Criminal Justice* 19, 611–642; *Tahseen Poonawala v. Union of India*, WP No. 754 of 2016 (Supreme Court of India)

²⁹⁸ *Tahseen S Poonawalia v Union of India and Others*, (2018) 6 SC 72

²⁹⁹ *Tahseen S Poonawalia v Union of India and Others*, (2018) 6 SC 72

³⁰⁰ Section 2(d), Manipur State Ordinance - Protection from Mob Violence Act (3 of 2018); Lynching

law attempts to include all possible grounds of mob violence expansively and consists of any targeted violence based on the difference in language and dietary requirements.

The Act comprehensively defines ‘*hostile environment*’,³⁰¹ which encompasses ‘intimidating or coercive environment’, and includes the boycott of trade, any form of public humiliation or any act of indignity (through exclusion from public services, education, transportation or health), deprive or threaten to deprive individuals of their fundamental rights, use of force on people to leave their place of residence or locality. The definition includes all such hostile acts, even though some do not qualify as an offence by themselves; however, when committed to forming a hostile environment for the commission of lynching, it qualifies as an offence under the Ordinance.

The Act defines ‘*mob*’³⁰² as an assembly of two or more individuals possessing an intention of lynching. Although the definition of ‘mob’ implies less than two individuals for the Ordinance, it leaves out of its scope the hate incidents committed by individual perpetrators. Therefore, an act to be an offence under the Act requires its commission by a group or a ‘mob’.

Chapter II, Section 3 of the Act, requires the appointment of a Nodal Officer in each district of Manipur to constitute a ‘special task force’³⁰³ that would work to acquire all information, to anticipate the commission of such acts of mob violence and lynching and the spread of hate speech along with any fake news and provocative statements. In the same light, the local intelligence units must meet each month to share information regarding any existing ‘tendencies of vigilantism, mob violence or lynching’ in the local region. The Nodal officer is also responsible for ‘eradicating any hostile environment’ against any community or group and shall monitor the investigation.

³⁰¹ Section 2(b), Manipur State Ordinance - Protection from Mob Violence Act (3 of 2018); Hostile environment

³⁰² Section 2(e), Manipur State Ordinance - Protection from Mob Violence Act (3 of 2018)- Mob

³⁰³ Section 3, Manipur State Ordinance - Protection from Mob Violence Act (3 of 2018)- Nodal Officer and Special Task Force

Chapter III of the Act details the prevention of acts leading to lynching. Section 6 of the Act requires every police officer to prevent lynching, which includes ‘incitement, commission and possible spread’ and requires them to ‘identify any existing pattern of violence. In addition, the police must register the First Information Report under Section 153 A of the Indian Penal Code. Chapter V Section 15 details any dereliction of duty by the police officers, which includes failure to provide victims with protection or failure to act on apprehended lynching, or refusal to register any complaint shall attract punishment for one year that may extend to three years along with a fine.³⁰⁴

Generally, when Section 153A of the IPC is applied, it requires a prior sanction from the State government. This provision aids the perpetrators who are politically aligned with the political parties. The Protection from mob lynching Ordinance of Manipur does away with the need for any prior sanction, thereby making the legislation way more powerful. All the offences committed under the law are ‘cognizable, non-bailable and non-compoundable.’³⁰⁵ The IVth Chapter under the Ordinance deals with sentencing in mob violence and lynching cases. The Act holds any persons involved in acts of violence and lynching that cause victimization leading to hurt, grievous hurt, death or threat to any witness and encompasses each such person involved in conspiring, aiding or abetting in the commission of mob lynching.

Relief and rehabilitation of the victims

It is noteworthy that victimization under the Act does not confine to physical and monetary victimization only but includes psychological and mental harm within its scope. As per the law, the State government must form a *mob violence/ lynching victim compensation Scheme*, which would provide compensation to victims. In case of the death of the victims, their next of kin shall avail the compensation. This compensation Scheme shall review each victim's case based on bodily injuries, taking into account psychological and mental injury and any ‘loss of earning including loss of opportunity of employment and education,’ and any expenses towards medical and legal assistance.³⁰⁶

³⁰⁴ Section 15, Manipur State Ordinance - Protection from Mob Violence (3 of 2018)

³⁰⁵ Section 19, Manipur State Ordinance - Protection from Mob Violence (3 of 2018)

³⁰⁶ Manipur State Ordinance - Protection from Mob Violence (3 of 2018)

The government must also make provisions for the accommodation of victims who have been displaced or have suffered damage to their property and establish relief camps where such displacement of victims is over fifty persons until such time that the victims are in a position to relocate or move back to their original residence. Furthermore, Section 29 (3)(a)³⁰⁷ states that special care and due privacy must be ensured to the young girls and women victims in relief camps, along with provisions for adequate food and clean water, security, clothing, medical requirements, adequate sanitation, ‘psycho-social and trauma counselling and psychiatric services, childcare and educational facilities.

The prevention of mob lynching Ordinance in the State of Manipur may be seen as a very initial step towards formulating India’s hate crime legislation. The legislation is comprehensive and does not only look at the offender’s culpability but also prescribes rehabilitation and victim support in detail. In addition, it focuses on the duty and responsibility of the State to efficiently prevent any ‘hostile environment’ and provide adequate relief, support, and protection to the victims and witnesses of mob violence and lynching. Although the Act does not cover individual cases of hate crimes and is more focused on mob violence, it is also less vocal on effective implementation of the provisions yet

may be seen as a first step that would encourage other States and the Centre to frame similar laws to check the rise in hate crimes in India.

The State of Rajasthan, which lies in the Northwest of India, with a population of 68.89 million with 88.49% Hindus, 9.07% Muslims, and 0.14% Christians, along with other minority groups, has also been active in taking the Supreme Court’s directions in the Case of Tahseen S Poonawalia v Union of India³⁰⁸, seriously, the Rajasthan Protection from Lynching Bill (22 of 2019) was brought before the Lower House of the Parliament and was passed after much opposition. However, it is yet to be enforced and awaits approval from the President. The Rajasthan anti-lynching law provisions are quite similar to those laid in under the anti-lynching Ordinance passed in the State of Manipur. The definition clause under the pending Bill's includes

³⁰⁷ Section 29 (3)(a) Manipur State Ordinance – Protection from Mob violence (3 of 2018) – Special measures to safeguard rights of women within relief camps.

³⁰⁸ Tahseen S Poonawalia v Union of India and Others, (2018) 6 SC 72

an elaborate description of ‘hostile environment’, lynching, ‘offensive material’ and victim. Similar to the Manipur Ordinance, it accounts for offences relating to lynching based on ‘religion, caste, creed, sex, place of birth, language, dietary practices, sexual orientation, political affiliation, ethnicity or any other related grounds. It also contains provisions for the relief and rehabilitation of the victims. Interestingly, the law entails the provision to direct the amount collected as a fine from the offender to the victim and due compensation by the State.³⁰⁹

The West Bengal (Protection from Lynching) Bill (21 of 2019), in line with the State of Manipur and Rajasthan following the Supreme Court directions,³¹⁰ encloses a comprehensive definition clause and category of special offences relating to lynching with adequate sentencing. In specific cases where the act of lynching results in the victim's death warrants capital punishment.³¹¹ Unlike the Manipur Ordinance and the Rajasthan anti-lynching Bill, the West Bengal Bill which is in the parliamentary process does not entail provision for setting up relief camps for the victims where acts of hate have victimized fifty or more individuals.

Table 1 below represents the ‘offences’ under different State legislations, while Table 2 embodies sentencing for different offences. Table 3 entails provisions relating to relief and rehabilitation for victims.

OFFENCES	MANIPUR	RAJASTHAN	WEST BENGAL
Cognizable, non-bailable - non-compoundable			
1. Lynching	Section 8	Section 8	Section 7
2. Conspires/ abets/ aides/ attempts	Section 9	Section 9	Section 8
3. Dissemination of offensive materials	Section 11	Section 11	Section 10
4. Damage to any property - movable/ immovable	Section 12	N/A	N/A
5. providing false information/ failure to provide information	Section 14 (1)	N/A	N/A

³⁰⁹ Section 21 read with Section 8, The Rajasthan Protection from Lynching Bill, 2019

³¹⁰ Tahseen S Poonawalia v Union of India and Others, (2018) 6 SC 72

³¹¹ Section 7 (c), The West Bengal (Protection from Lynching) Bill (21 of 2019)

6. dereliction of duty by a police officer	Section 15 (1)	N/A	N/A
7. enforcing a hostile environment	Section 17	Section 12	Section 11
8. obstructing the legal process	N/A	Section 12	N/A

TABLE 1. COMPARATIVE LIST OF OFFENCES UNDER THE STATE LAWS AND PROPOSED BILLS³¹²

SENTENCING FOR	MANIPUR (Section 8)	RAJASTHAN (Section 8)	WEST BENGAL (Section 7)
Whosoever Conspires/ abets/ aides/ attempts to commit the above offences would be considered as if they have committed the offence			
Hurt	7 years with fine	7 years with fine	3 years with fine
Grievous Hurt	10 years with fine	10 years with fine	Life Imprisonment/ 10 Years with fine
Death	Rigorous imprisonment for life with fine	Rigorous imprisonment for life with fine	Capital punishment/ Rigorous imprisonment for life with fine

TABLE 2. SENTENCING UNDER THE STATE STATUTES AND PROPOSED BILLS³¹³

PROVISIONS FOR RELIEF AND REHABILITATION	MANIPUR	RAJASTHAN	WEST BENGAL
1. Treatment	N/A	Section 20	Section 16
2. Compensation	Section 27	Section 21	Section 17
3. Displacement	Section 28	Section 22	N/A
4. Relief Camps	Section 29	Section 23	N/A

TABLE 3. PROVISION FOR VICTIM RELIEF AND REHABILITATION UNDER THE STATE STATUTES AND PROPOSED BILLS³¹⁴

³¹² Table 1 - Comparative List of Offences under the State Laws and Proposed Bills

³¹³ Table 2 - Sentencing Under the State Statutes and Proposed Bills

³¹⁴ Table 3 - Provision for Victim Relief and Rehabilitation Under the State Statutes and Proposed Bills

The comparative outlook on different legislative tools at the State level suggests a similar pattern regarding the offences, sentencing and victim relief and rehabilitation in different States in India. Although the three pieces of legislation seem comprehensive, to introduce strict measures preventing hate crimes relating to lynching, the law only discusses acts committed by a ‘mob’, which within the meaning of the statutes, include ‘groups of two or more individuals, leaving out acts of violence and lynching committed by individual offenders. Similarly, in the State of Uttar Pradesh, the Uttar Pradesh combating of mob lynching bill was brought forward in 2019³¹⁵ however it still awaits an outcome on the grounds that the definition of ‘needs’ to be revisited and that two or three individuals together may not be considered a mob. In the same light, a few other States in India are attempting to implement certain policies and regulations, inserting different Clauses under the existing State-level criminal legislation (The Madhya Pradesh government passed an amendment Act to include sentencing and fine for those who commit offences in the name of cow slaughter 2019).

The procedural delay in the passing of these State level legislative pieces on hate crimes may indicate some political involvement in the issue, however, the political dynamics and their correlation to hate crimes are not the main focus of this work and may be considered for future hate crime research in India. At the State as well as the Central level much work is required in terms of the development of literature, collection of data, definition and grounds for hate crimes. Detailed quantitative and qualitative research considering the local histories, cultures and diversities embedded within different Indian states is significant at this point in order to establish and implement adequate and effective hate crime policy and legal framework.

Taking into consideration the directions given by the Supreme Court in a recent case,³¹⁶ it is noteworthy that of 29 Indian States, only one State (State of Manipur) along with Rajasthan and West Bengal (yet to enforce the law) and a few other legislative insertions under different State statutes, have been actively engaging in the redressal of lynching in public places as a hate crime. On the one hand, the remedial and preventive measures undertaken by the different Indian States to curb hate crimes in the form of lynching do not seem strong enough as they significantly depend on effective implementation. At the same time, the proportion of States

³¹⁵ Seventh Report of State Law Commission (2019) Mob Lynching Uttar Pradesh, Combating of Mob Lynching Bill – 2019

³¹⁶ Tahseen S Poonawalia v Union of India and Others, (2018) 6 SC 72

engaging in formulating localized hate crime legislation is significantly small. Therefore, it cumulatively does not create any political will or pressure on the Centre to take up stern measures to tackle not only hate crimes in terms of public lynching (on the grounds of religion) and cow slaughter (again, religious grounds) but also other hate offences that are based on the grounds of caste, race, gender, sexual orientation, disability and so on.

CONCLUSIONS

Hate crimes in India have been invisibly present in Indian societies for centuries, however, with the current politico-social developments in recent years, a significant rise in the number of religious hate crimes may be noted. There are only a few case laws and statutory provisions that focus on hate crimes, moreover, ineffective implementation, and lack of police sensitization and awareness among the target communities, make the existing laws much less efficient. Hateful acts of mob lynching, related vigilantism and communal violence aptly qualify as hate crimes as they are solely intended to send out clear messages of hostility and hate to the targeted minority religious community and harm the victim's identity. Although there exists a complete chapter relating to religious crimes under the Indian Penal Code along with Section 153A specifically designed to defend against any incitement of hate, there remains a significant gap in the law which needs to be bridged by means of more direct statutory provisions relating to hate crimes along with specific sentencing. A recent shift in the legislative attitude may be noticed following the Supreme Court directions, and a few new legal provisions and upcoming statutes may act as a guiding stick for central-level hate crime legislative efforts, however, there is much work to be done, in terms of firstly acknowledging hate crime, secondly formulating laws and policies and thirdly ensuring effective implementation.

PART III

HATE CRIMES BASED ON GENDER AND SEXUAL ORIENTATION

INTRODUCTION

Gender-based hate crimes are criminal offences motivated by bias against a person's gender. Such crimes are highly dependent on the offender's perception of gender norms. Any deviation in a person's behaviour or attitude that does not conform with the set gender norms causes them to be targeted for hate crimes. Similar to the case of race or religion which reflect on the wide social structures connoting the dominance and submission of specific groups, the case of gender-based crimes is no different in the sense that it reinforces dominance in society by some over others. For example patriarchal societies, Kelly³¹⁷ notes, where men have greater access to resources and power, thereby normalising the subordinate status of women in the society, making the males of the society entitled to the services by the women, which when not complied with results in hate, bias and violence in several forms.³¹⁸

The following part of the chapter discusses hate crimes based on sexual orientation. The first section attempts to look at the present-day issues relating to the LGBTQ community, visiting parts of Indian history that were not restricted by heterosexual norms and were accommodative of all sexual identities including the transgender people, gay and lesbian members and of society. It seeks to analyse the 2018³¹⁹ landmark judgement, in the absence of any specific laws protecting the LGBT minority community. A specific section is dedicated to the transgender community and transphobia in India. A later section highlights misogynistic crimes and focuses on the position of women in Indian society. It enumerates a bulk of legislative tools that deal with different aspects of an Indian woman's life, however, finds them inadequate in terms of dealing with hate crimes against women.

SEXUAL ORIENTATION AND HATE CRIMES

Ruth and Kidwai in their research found that homosexuality has been an integral part of Indian society and has existed in various forms including 'invisibilized partnerships, highly visible

³¹⁷ Kelly, L. (2011) *Violence against Women: Concepts and Approaches, A Conducive Context? Misogyny, Inequality, Violence*, London Southbank University, London, 22

³¹⁸ Renzetti, C. (2008) *Women, Men, and Society*, 4th edition, Englewood Cliffs, NJ: Prentice Hall.

³¹⁹ Nav Tej Singh Johar v Union of India and Ministry of Law and Justice (2018) 1 SCC 791

romance and institutionalized rituals'.³²⁰ Ruth and Kidwai argue stating that homosexuality is thought to be an import, as the subject of same-sex relationships is 'seriously under-researched in South Asia as compared to other parts of the world'.³²¹ Their work also establishes the prevalence of gay homosexual subcultures in different Indian cities. The sculptures at the temples of Konark and Khajuraho along with detailed ancient and medieval text writings are undisputable evidence of a wide range of sexual identities and behaviours that have existed in Indian society.³²² There are no existing records of any execution for sexual behaviour in India.³²³ The ancient Hindu texts and the treatise of pleasure (Kama Sutra),³²⁴ scripted 2000 years ago, clearly indicate the acceptance of the third gender under Hinduism.³²⁵ Similarly, in Indian literature, gay marriage has been acknowledged thousands of years ago.³²⁶

Homosexuality has been in practice in traditional societies, yet the identity politics around sexuality has never been in the limelight.³²⁷ Indian society has witnessed same-sex relationships through time however, men and women have never been narrowed down to fine definitions as gay or lesbian.³²⁸ As stated by Kole, for several Indian males, same-sex relation is for fun and enjoyment, at the same time they never identify themselves as gay.³²⁹ The issue has become sensitive as sexual minority groups seem to be challenging the established private as well as public limitations. Gender-based crimes and crimes based on sexual orientation have become common in India. The level of discrimination and vulnerability faced by the LGBTQ community is multifaceted significantly due to the absence of adequate laws.

³²⁰ Ruth. V and Kidwai. S. (2000) *Same-sex Love in India: Readings from Literature and History*. Macmillan: Basingstoke.

³²¹Ruth. V and Kidwai. S. (2000) *Same-sex Love in India: Readings from Literature and History*. Macmillan: Basingstoke.

³²²Ruth. V and Kidwai. S. (2000) *Same-sex Love in India: Readings from Literature and History*. Macmillan: Basingstoke.

³²³ Shahani. P, (2008) *Gay Bombay: Globalization, Love and (Be)longing in Contemporary India*, Sage Publications, p 48

³²⁴ Fernandez. B (Ed.) Humjinsi, (1999) *A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, p 46

³²⁵ Shahani. P, (2008) *Gay Bombay: Globalization, Love and (Be)longing in Contemporary India* Sage Publications, p 48

³²⁶ Shahani. P, (2008) *Gay Bombay: Globalization, Love and (Be)longing in Contemporary India* Sage Publications, p 48

³²⁷ Fernandez. B (Ed.) Humjinsi, (1999) *A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, p 46

³²⁸ Pradeep K, (2002) *Interventions Among Men Who Have Sex with Men*. In *Living with the AIDS Virus: The Epidemic and the Response in India* Edited by: Samiran. P, Chatterjee. A, Abdul- Qader. A, New Delhi, Sage, 112-29.

³²⁹ Kole. S (2007) *Globalizing Queer AIDS, Homophobia and the Politics of Sexual Identity in India*, *Globalization and Health*, <http://www.globalizationandhealth.com/content/3/1/8>

The LGBT movement in India began in the early 1990s when the writers, (dealing with the subject of homosexuality) were originally Indians but were settled in the United States or the United Kingdom, where the gay and lesbian communities were well established by the time ‘came out through their writings. The first Indian gay magazine was soon published in Bombay. However, this magazine was only aimed at the upper-class elites and did not reach the masses.³³⁰ Along with the literary support, the mobilization of the LGBT and queer community in India was primarily due to the emergence and the fear of the spread of HIV/ AIDS.³³¹ In 1991, the Anti-AIDS Discrimination Movement published a report titled, ‘Less than gay, citizens’ report on the status of homosexuality in India’ and encouraged basic civil rights for the members of the LGBT community.³³² The report demanded amendments in the Special Marriage Act, regarding the right to marry for homosexual community members, along with the AIDS prevention Bill of 1989, rights relating to the decriminalization of homosexuality, provisions for same-sex marriage and parenting rights was also brought in. It also advocated ‘positive homosexuality education’.³³³

Further in 1998, with the release of the film ‘fire’, which is based on the life of two unhappily married women, who were in a lesbian relationship was screened, a number of cinema theatres were destroyed by the right-wing Hindu nationalists, resulting in a ban on the movie in India. On the release of another film based on lesbianism, ‘Girlfriend’, the ruling party at the time, requested the deletion of certain obscene and objectionable scenes, that seemed to be against the Indian culture. It could be said that in the eyes of Hindu nationalists, homosexuality is something ‘un-Indian, alien, imported from the west and a vice of British colonialism’,³³⁴ Kole,³³⁵ quotes the work of Baccheta, stating as per a few internal publications from the RSS and the RSS agencies, ‘one of the pillars of Hindu nationalism rests on ‘queerphobia’, in which

³³⁰ Kole. S (2007) Globalizing Queer AIDS, Homophobia and the Politics of Sexual Identity in India, *Globalization and Health*, <http://www.globalizationandhealth.com/content/3/1/8>

³³¹ Kole. S (2007) Globalizing Queer AIDS, Homophobia and the Politics of Sexual Identity in India, *Globalization and Health*, <http://www.globalizationandhealth.com/content/3/1/8>

³³² AIDS Bhedbhav Virodhi Andolan – ABVA: Less Than Gay: A Citizens' Report on the Status of Homosexuality in India (1991) ABVA, New Delhi.

³³³ AIDS Bhedbhav Virodhi Andolan – ABVA: Less Than Gay: A Citizens' Report on the Status of Homosexuality in India (1991) ABVA, New Delhi.

³³⁴ Kole. S (2007) Globalizing Queer AIDS, Homophobia and the Politics of Sexual Identity in India, *Globalization and Health*, <http://www.globalizationandhealth.com/content/3/1/8>

³³⁵ Kole. S (2007) Globalizing Queer AIDS, Homophobia and the Politics of Sexual Identity in India, *Globalization and Health*, <http://www.globalizationandhealth.com/content/3/1/8>

queer gender and sexualities are constructed outside the Hindu nation and hence must be exiled'.³³⁶ Such are examples of 'extreme homophobic collective violence'.³³⁷

HOMOSEXUALITY IN INDIA

The research conducted by Fernandez and Gomathy is based on the experiences of lesbian individuals from different parts of India. They suggest that lesbian females face domestic violence that includes 'battering, house arrest, coercion into marriage and expulsion from family home'.³³⁸ Such domestic abuse has also led to 'suicide pacts'³³⁹ where lesbians in a relationship, commit suicide together as a pact, for their families would not permit them to live together. In 2000, a lesbian couple in Gadchiroli District committed suicide by jumping into a well, also in 1998 two young lesbian girls in Mumbai committed suicide on the rooftop by consuming poison.³⁴⁰ In more recent times, similar instances of pact suicides from the rural parts of the country are an upcoming concern.

In present-day India, a large population that follows heterosexuality as the general norm understands non-heterosexuality as a disease and even a 'curse' and prescribes 'appropriate means, such as treatment, isolation, medication, rituals and verbal abuse as tools to rectify the problem'.³⁴¹ Lesbianism, in parts of the country, is still considered a form of illness, where homosexual women are treated using shock therapy, medication and in some cases sex change surgery³⁴² (whereas heterosexuals are of a mindset that the only way a woman can be with another woman is by being a man). In the same light in the year 2001, a complaint was filed before the National Human Rights Commission,³⁴³ stating concerns regarding psychiatric abuse of homosexual individuals, by means of administering long-term shock treatment.

³³⁶ Bacchetta. P (1999) When the (Hindu) Nation Exiles its Queers. *Social Text* 61, 17(4):141-66.

³³⁷ Fernandez. B and Gomathy N.B, (2003) The Nature of Violence Faced by Lesbian Women in India, Research Centre on Violence Against Women Tata Institute of Social Sciences, Mumbai.

³³⁸ Fernandez, B. and Gomathy N.B. (2005) Voicing the Invisible: Violence Against Lesbians in India" in Kannabiran, K. (ed), *The Violence of Normal Times: Essays on Women's Lived Realities*, Zed Books/ Kali for Women, New Delhi.

³³⁹ Swarr. A. and Nagar. R, (2004) Dismantling Assumptions: Interrogating "Lesbian" Struggles for Identity and Survival in India and South Africa the University of Chicago Press Vol. 29, No. 2, 491-516.

³⁴⁰ Fernandez. B and Gomathy N.B, (2003) The Nature of Violence Faced by Lesbian Women in India, Research Centre on Violence Against Women Tata Institute of Social Sciences, Mumbai.

³⁴¹ Banerjee S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5.

³⁴² Doongaji, D.R. et. al. (1978). Twelve Transsexuals: A Psychiatric Appraisal of Twelve Patients Seeking Sex Change Surgery. *Journal of Postgraduate Medicine* 24 (4), 195-205.

³⁴³ National Human Rights Commission of India, (2001) Complaint Diary 3920

The very denial of the existence of lesbianism in Indian society, itself is the cornerstone of the problem. The idea of homosexuality is understood as a western influence and is to a greater extent restricted to the urban educated and elite population.³⁴⁴ The place of lesbians in society is directly linked to the status of women in Indian society, notwithstanding their sexual identity. The idea of a woman's sexual freedom and the assertion of such choice turns out to be extremely dangerous.³⁴⁵

Fernandez and Gomathy observed a pattern of 'continued violence' for 50% of the lesbian who suffered some form of abuse, in their research, they found that their initial definition of violence, which included only those acts of hate that are obvious, such as rape, sexual abuse, battering etc, was not comprehensive. They observed that the definition of violence needed a wider scope as the initial definition was inadequate to encompass 'violence and instances of hate that were implicit in acts of omission' for say 'denial or silent repression' and any acts of self-inflicted harm.³⁴⁶ They found that the disclosure of the sexual identities of lesbians was directly linked to hate crimes. The lesbian who had suffered physical abuse were also victims of emotional and psychological abuse. Fernandez and Gomathy call such emotional abuse 'foundational violence'. They found that such emotional violence also resulted in suicidal tendencies and other forms of self-inflicted harm.³⁴⁷

The idea of homosexuality has yet not been completely accepted by Indian society and therefore, the LGBT community members have to face hate and abuse in their day-to-day lives. The state of vulnerability for gay and lesbian individuals is never 'static' and is a 'context-dependent form of negotiation'.³⁴⁸ Although an individual may not be solely identified based on their sexual orientation, in a patriarchal society, where sexuality is seen through the lens of

³⁴⁴ Ruth. V and Kidwai. K. (2000) *Same-sex love in India: Readings from Literature and History*. Macmillan: Basingstoke.

³⁴⁵ Ruth. V and Kidwai. S. (2000) *Same-sex love in India: Readings from Literature and History*. Macmillan: Basingstoke.

³⁴⁶ Fernandez. B and Gomathy N.B, (2003) *The Nature of Violence Faced by Lesbian Women in India*, Research Centre on Violence Against Women Tata Institute of Social Sciences, Mumbai.

³⁴⁷ Fernandez. B and Gomathy N.B, (2003) *The Nature of Violence Faced by Lesbian Women in India*, Research Centre on Violence Against Women Tata Institute of Social Sciences, Mumbai.

³⁴⁸ Fernandez, B. and Gomathy N.B. (2005) *Voicing the Invisible: Violence against Lesbians in India*, in Kannabiran, K. (ed), *The Violence of Normal Times: Essays on Women's Lived Realities*. Zed Books/ Kali for Women, New Delhi.

heterosexuality, it is difficult as well as dangerous for a homosexual individual to assert their sexual identity.³⁴⁹

LEGALIZING LGBTQ RIGHTS

Section 377³⁵⁰ of the Indian Penal Code was introduced during the British colonial rule and criminalized ‘carnal intercourse against the order of nature.’³⁵¹ The Naz Foundation Trust (a non- Governmental Organization) led the movement for repealing this Section and filed a lawsuit in the Delhi High Court in 2001. A previous similar attempt was made by the AIDS awareness organizations in 1994, which was refused on grounds of lack of *locus standi*.³⁵² Similarly, the Law Commission Report in the year 2000 made recommendations to repeal Section 377 of the Indian Penal Code that criminalized homosexuality.³⁵³

It was contended that the discrimination and harassment of the homosexual community through Section 377 was adversely affecting the rights to equality, non-discrimination, life and liberty, health and privacy and therefore it violated Articles 14, 15, 19 and 21 of the Constitution of India.³⁵⁴ Legal opinions were put forward by the Ministry of Home Affairs (MHA) and Ministry of Health and Family Welfare (MHFW), where on one hand the MHA emphasized the need for Section 377 for the prosecution of offenders in cases of sexual abuse of minors, they also suggested that Section 377 fills in the gaps relating to the existing rape laws. The repeal of Section 377, as per the MHA meant a considerable rise in delinquent behaviour. It also stated that homosexual behaviour is not much condoned in Indian society and as the laws must reflect the morals of the society, Section 377 is relevant.³⁵⁵ While on the other hand, the MHFW along with the Naz Foundation Trust was more inclined towards the

³⁴⁹ Fernandez, B. and Gomathy N.B. (2005) Voicing the Invisible: Violence against Lesbians in India, in Kannabiran, K. (ed), *The Violence of Normal Times: Essays on Women's Lived Realities*, Zed Books/ Kali for Women, New Delhi, they also state that the discrimination against homosexual females is more life threatening when they are denied any form of legal safeguards against abuse, violence and hate crimes as all other citizens.

³⁵⁰ The Indian Penal Code, 1860, Section 377 - *Unnatural Offences* - *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

³⁵¹ Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC Del 1762., para 3

³⁵² Fernandez. B (Ed.) Humjinsi, (1999) A Resource Book on Lesbian, Gay and Bisexual Rights in India, India Centre for Human Rights and Law, 46

³⁵³ Fernandez. B (Ed.) Humjinsi, (1999) A Resource Book on Lesbian, Gay and Bisexual Rights in India, India Centre for Human Rights and Law, 46

³⁵⁴ Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC Del 1762., para 8, 9

³⁵⁵ Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC Del 1762., para 11

repeal of Section 377 on grounds that it is counterproductive in terms of HIV/ AIDS treatment and prevention, as many individuals remain at high risk but choose not to come forward due to the fear of law enforcement agencies.³⁵⁶

The High Court in 2009, decided that Section 377 of the IPC was violative of Articles 21, 14 and 15 of the Indian Constitution and is therefore unconstitutional. However, the Supreme Court Bench overruled and held Section 377 of the IPC as valid in *Suresh Kumar Koushal and Others v Naz Foundation*.³⁵⁷ The appellants argued against the decriminalization of homosexuality on grounds of protecting cultural, moral and religious values inlaid in the Indian society while the defence stood its grounds on the harm caused by Section 377 to the LGBT and other minority communities.³⁵⁸ The Supreme Court found Section 377 did not violate the Constitutional provisions of equality and non-discrimination. The Supreme Court also mentioned that the LGBT community is only a very small minority in India which does not require to be classified as a protected group stating that approximately 200 persons have been prosecuted in the past 150 years under Section 377 and therefore make up a minor fraction of the population and does not make a valid ground for declaring Section 377 violative of fundamental constitutional rights.³⁵⁹ The Supreme Court also condemned the Delhi High Court for relying too much on other jurisdictions in its attempt to safeguard and protect the LGBT community.³⁶⁰

In a more recent development in the case of *Nav Tej Singh Johar v Union of India, Ministry of Law and Justice*,³⁶¹ the 2014 decision of the Supreme Court was challenged by five individuals from the LGBT community through which is 2018, the Supreme Court, struck down Section 377 of the Indian Penal Code, that criminalized 'sexual relations between same-sex which was seen as a violation to the rights and freedoms of a wider community stating “A person’s sexual orientation is intrinsic to their being. It is connected with their individuality and identity. A classification which discriminates between persons based on their innate nature would be violative of their fundamental rights and cannot withstand the test of constitutional

³⁵⁶ *Naz Foundation v. Govt. (NCT of Delhi)*, 2009 SCC Del 1762., para 14-18

³⁵⁷ *Suresh Kumar Koushal and Others v Naz Foundation*, 1 (2014) 1 SCC 1

³⁵⁸ *Suresh Kumar Koushal and Others v Naz Foundation*, 1 (2014) 1 SCC 1, para 16.1 – 16.16

³⁵⁹ *Suresh Kumar Koushal and Others v Naz Foundation*, 1 (2014) 1 SCC 1, Para 43

³⁶⁰ *Suresh Kumar Koushal and Others v Naz Foundation*, 1 (2014) 1 SCC

³⁶¹ *Nav Tej Singh Johar v Union of India and Ministry of Law and Justice* (2018) 1 SCC 791

morality".³⁶² The Supreme Court maintained that homosexuality is "*not an aberration but a variation of sexuality*".³⁶³ This development in law has given immense hope and a new way to the LGBTQ community across India. Several demonstrations and celebrations took place, with the LGBTQ community members opening up about their sexual identities. The Supreme Court Judgement was clear on the rights and freedoms of the long-term marginalized and discriminated community. However, the current government requested the Court to narrow down its judgement, not extending to marriage rights.³⁶⁴ The Right Winged Hindu government has not been engaged in any violence, particularly against the LGBTQ community, however, it is not in full appreciation of the judgement (the same is suggested by no formulation of new policies or right to marry for the homosexual community members being incorporated under the existing laws after the decriminalization of homosexuality).³⁶⁵

Another Supreme Court judgement in 2022,³⁶⁶ expanded the notion of 'family', demolishing the existing understanding of family which was limited to a single unchanging unit with a mother and a father who remain constant over time and their children. The Court mentioned that '*familial relationships may take the form of domestic, unmarried partnerships or queer relationships*'.³⁶⁷ The Court went on to clarify that these manifestations of love and family may not be typical but are as real as their traditional counterparts and therefore are deserving of protection under the law and are eligible to avail any social welfare available. Although the facts of the case do not directly discuss the issue of sexual orientation and related rights, this judgement paves the way for more reformatory social changes in terms of acknowledgement of persons belonging to the LGBT community.

THE THIRD GENDER

The Indian society comprises a minority transsexual community, with its members known as *hijras* (transgender community members). The '*hijras*' are understood as 'eunuchs',

³⁶² Nav Tej Singh Johar v Union of India and Ministry of Law and Justice (2018) 1 SCC 791, para 14.5

³⁶³ Nav Tej Singh Johar v Union of India and Ministry of Law and Justice (2018) 1 SCC 791, para 13

³⁶⁴ Sircar, O (2017) New Queer Politics in the New India: Notes on Failure and Stuckness in a Negative Moment, Harvard Journal of the Legal Left 11.

³⁶⁵ Sircar, O (2017) New Queer Politics in the New India: Notes on Failure and Stuckness in a Negative Moment, Harvard Journal of the Legal Left 11.

³⁶⁶ Deepika Singh V Central Administrative Tribunal and Others, 2022 (SC)718

³⁶⁷ Deepika Singh V Central Administrative Tribunal and Others, 2022 (SC)718, para 26

transsexual or transgender or queer individuals. Although some members of the community choose to be identified as females, many prefer to obtain the ‘third gender’³⁶⁸ status to avail certain rights as a collective group. The *hijra* community members had a respectable position in Indian society before the British rule, they owned land and were financially independent.³⁶⁹ Also, during the Mughal rule, the *hijras* were a part of the society and had primary duties in the courts as administrators, political advisers, chamberlains, generals in army ranks and guardians of the palace where the females resided.³⁷⁰ *Hijras* were considered loyal, trustworthy, and protective because of their feminine attributes.³⁷¹

The lack of understanding of the cultural and social set-up in a foreign land, the colonial power failed to recognize the social place of the third gender population of the country which in turn secluded the *hijra* population during the British rule. The colonizers, concentrated more on rigidifying the caste, class and sexual identities in line with heterosexuality as the legal moral norm, while the third gender community was put to inspection and its members were considered to be immoral and dissolute.³⁷² The Criminal Tribes Act of 1871,³⁷³ denied the *hijras*, any protection under the Scheduled Caste or Scheduled Tribe category, Britishers in 1860, under Section 377³⁷⁴ of the Indian Penal Code, introduced ‘unnatural offences’, and thus criminalized any homosexual activities between adults.

In the early years of life, the members of the third gender community face oppression and hate at a domestic level, suppressing their identity and attempting to fit into the fixed gender roles, they face long-term depression and lack any feeling of belonging.³⁷⁵ As they become adults, they engage mostly in sex work and/ or earn their living through dance and singing, facing violence at numerous levels. As sex workers, they are harassed and physically abused by their

³⁶⁸ National Legal Services Authority v Union of India, AIR 2014 SC 1863

³⁶⁹ Banerjee. S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5.

³⁷⁰ Reddy. G, (2005) *With Respect to Sex: Negotiating Hijra Identity in South India*, Chicago: University of Chicago Press, 221

³⁷¹ Banerjee. S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5.

³⁷² Banerjee. S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5.

³⁷³ The Criminal Tribes Act, 1871

³⁷⁴ Indian Penal Code, 1860, Section 377

³⁷⁵ Singh. D, (2001) *Myself Mona Ahmed*, New York: Scalo Publishers, 95.

clients, this also makes the *hijra*'s most vulnerable to the infliction of HIV/ AIDS, while at a mental and psychological level, they feel vulnerable and are faced with consistent trauma.³⁷⁶

As stated in the work of Banerjee, the *hijra* community members, are among one of the 'most vulnerable groups' to experience, sexual and physical abuse, police extortion and harassment.³⁷⁷ In the case of one Kokila, a young third-gender person, who went to the police station to report that she has been gang raped, however, was faced with physical and sexual harassment and torture by the police, solely for the reason of her sexual identity.³⁷⁸ In another case, one Seemasri was harassed by the police, in Bangalore, she was verbally abused and was dragged by her hair for a kilometre.³⁷⁹

The government of India recognizes the 'third gender'³⁸⁰ category in legal terms reserving jobs and allowing them to receive education for a better life, however, such measures do not assist in removing the day-to-day hate-based hostilities and violence faced by the *hijra* community in India. The religious shaping of the gender roles according to the traditional definition portrays this group as 'another kind', a different gender class which is outside the general social norm. The 'offensive interoperations' give way to homophobic and transphobic hate and abuse against this community resulting in the *hijra* community members facing hate and discrimination by the family members throughout childhood, by clients as sex workers and also by the police.

The court in the case of National Legal Services Authority v Union of India³⁸¹ recognizing the 'third gender', stated that every human is free to choose their sex/ gender identity which is the essence of their personality and expresses self-determination, freedom and dignity. The Supreme Court also referred to the resolution adopted by the European Parliament against discrimination against transsexuals and the United States Hate Crimes Prevention Act of 2009,

³⁷⁶ Banerjee. S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5

³⁷⁷ Banerjee. S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5

³⁷⁸ IGLHRC, (2004) India: Rape and Police Abuse of Hijra in Bangalore; Call for Action, SANGAMA.

³⁷⁹ Shah. N and Ganguly. M, (2009) Broken System: Dysfunction, Abuse, and Impunity in the Indian Police, Human Rights Watch, 75-77.

³⁸⁰ Banerjee. S, (2014) Police Violence and Social Bigotry Against Hijras in India, LGBTQ Policy Journal at the Harvard Kennedy School, Volume 5

³⁸¹ AIR 2014 SC 1863

which widens the scope of federal hate crime laws by the inclusion of hate crimes against the sexual identity of individuals.³⁸²

TRANSGENDER (PROTECTION OF RIGHTS) ACT, 2019

More recently, the Government of India passed the Transgender (Protection of Rights) Act in 2019 and brought in a new statute specifically guaranteeing the rights of transgender people in India. This piece of legislation is quite comprehensive and attempts to safeguard transgender people from hateful neglect and indirect bias, such as in terms of employment opportunities, place of residence, right to education etc and tries to protect them against any form of discrimination.

Section 2(k) of the Act defines a transgender person as “*a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as Kinner, hijra, aravani and jogta*”.³⁸³ While Section 9 of the Act provides for a grievance redressal mechanism whereby all establishments are required to designate a complaint officer to keep a check on any discriminatory behaviour against transgender people.³⁸⁴ The Act also aspires to form a National Council for Transgender Persons to formulate policies, procedures, and programmes ensuring full participation, monitoring, coordination and grievance redressal.

Significantly, to the hate crime context, Chapter VIII, Section 18 (a, b, c, d) of the Act focuses on Offences and Penalties as provided in the table below.

Offences under the Transgenders (Protection of Rights) Act, 2019

Section 18, Offences (CHAPTER VIII)		Penalties
(a) Compels or entices	Forced labour/ Bonded Labour	

³⁸² The Supreme Court of India also mentioned the South African Sex Status Act of 2003 and the Argentinean law acknowledging individuals with different gender identities in 2012

³⁸³ Transgenders (Protection of Rights) Act, 2019, Section 2(k)

³⁸⁴ Transgenders (Protection of Rights) Act, 2019, Section 9

(b) Denies / Obstructs	Right to Passage to a public place	Punishable with not less than six months – to a maximum of two years with Fine
(c) Forces	Leave place of residence	
(d) Harms, injures, endangers/ Tends to harm, injure, endanger	Life, safety, health, wellbeing- Mental/ Physical Causing – Physical abuse, Sexual abuse, Verbal abuse, Emotional abuse, Economic abuse	

From the Table above it is clear that the law seeks to protect the minority transgender community in India, which has for a long time been subjected to discrimination and has remained vulnerable to hateful social attitudes. Although in the hate crime context, the inclusion of verbal, emotional as well as economic harm caused to transgender people has been taken into account, it does not have much to offer in terms of serious hate crimes against the Indian Transgender population, however, this piece of legislation may be seen as a starting point in terms of protecting and safeguarding the rights of a particular section of the minority Indian population. This new legislation may be seen as a ray of hope and a way forward however, its implementation and spread of awareness and rights among societies remains more crucial to curb hate crimes against the transexual Indian population.

MISOGYNISTIC HATE CRIMES

Misogynistic hate crimes are several times unidentified and may be seen as an ambiguous category,³⁸⁵ as they are moreover seen as crimes against women (missing out the hate element) however, categorizing misogynistic crimes under hate crime legislation would prove significant in developing a futuristic potential and positive impact on additional policies and legislation.³⁸⁶ Many scholars have suggested the inclusion of gender (misogynistic hate crimes specifically) as a protected group considering the heightened impact of hate crimes on women

³⁸⁵ Gagliardi, S., Valverde-Cano, A., Rice, O., (2022) Identifying and understanding Barriers to Investigation of Gender-Based Hate Crimes: Perspectives from Law Enforcement in Ireland and the United Kingdom, *Criminology & Criminal Justice*, 1-17

³⁸⁶ Gagliardi, S., Valverde-Cano, A., Rice, O., (2022) Identifying and understanding Barriers to Investigation of Gender-Based Hate Crimes: Perspectives from Law Enforcement in Ireland and the United Kingdom, *Criminology & Criminal Justice*, 1-17

(and members of the LGBTQ community).³⁸⁷ In general, the support for the inclusion of women as a protected ground under hate crime legislation stands on the view that at the least such inclusion would challenge the existing social stereotypes and inaccurate assumptions, and such would highlight the relevance and seriousness of the issue.³⁸⁸ Through a clear demarcation of the protected groups under the law, the legislations distinctly classify those groups as more deserving of legal protection.³⁸⁹ Several debates on which groups must be protected under hate crime legislation have revolved around the groups that have faced historical oppression.³⁹⁰

One of the concerns of including crimes against women under the hate crime legislative domain relates to the rise in the total number of hate crime cases, overburdening and crippling the justice system, leading to less focus and support for individual victims,³⁹¹ however, Chen³⁹² argues that such issue may not be problematic as hate crime incidents are examined by the authorities on case to case basis, thus filtering only specific incidents of violence against women to qualify as hate crimes and not all, thereby not burdening the system. Also, there have been concerns that crimes against women have a separate set of legislation to effectively look into the concerns and adding misogyny as a hate crime would only amount to excessive legislation. However, more participants in the research conducted by Gill and Bish suggest a higher consensus for the inclusion of gender as a protected ground as it would significantly highlight the wrong inlaid under the dominant gender dynamics and treat hate crimes against women more seriously.³⁹³ Although 84% of the respondents in the research conducted by Gill and Bish,³⁹⁴ supported the addition of gender as a protected hate crime group, they were quite aware of the challenges and practical concerns regarding the implementation of the same.

³⁸⁷ Chen, K. (1997) Including Gender in Bias Crime Statutes, *William and Mary Journal of Women and the Law*, Vol. 3, No. 1: 277–328.

³⁸⁸ Gill, A and Mason-Bish, (2013), Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities, *Feminist Review*, Volume 104, 1- 1-20

³⁸⁹ Haynes, A and Schweppe, J (2019) Protecting Commonly Targeted Groups in the Context of ‘New Politics’: The case of Ireland. *Crime, Law and Social Change* 71(1): 307–324.

³⁹⁰ Chen, K. (1997) Including gender in bias crime statutes, *William and Mary Journal of Women and the Law*, Vol. 3, No. 1: 277–328.

³⁹¹ Gill, A and Mason-Bish, (2013), Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities, *Feminist Review*, Volume 104, 1- 1-20

³⁹² Chen, K. (1997) Including Gender in Bias Crime Statutes, *William and Mary Journal of Women and the Law*, Vol. 3, No. 1: 277–328.

³⁹³ Gill, A and Mason-Bish, (2013), Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities, *Feminist Review*, Volume 104, 1- 1-20

³⁹⁴ Gill, A and Hannah Mason-Bish, (2013), Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities, *Feminist Review*, Volume 104, 1- 1-20

INDIA AND MISOGYNY

A simple understanding of misogyny reflects on the underlying hatred towards women in general, while a less explicit notion of misogyny connotes sorts of prejudices against women, especially for those women who do not qualify within set gender roles in a society (such as being a mother, wife and so on). Such misogynistic hatred converts into objectification, harassment, sexual discrimination and physical and mental violence (including the threat of the same).³⁹⁵ According to Moss, the element of hate against specific groups emphasizes hate as an emotion with a strong attachment to the object in mind.³⁹⁶ In the same light, Narayanan states that the idea of hate is kept alive by means of denying the significance of women, and therefore the recurring loss remains invisible and unnoticed. However according to Rich, at a very core level, misogyny is based on the emotion of envy against the 'reproductive potential, that a woman carries against her giving up the ownership of such potential by means of legal paternity and marriage, in a manner that the male is able to keep track of his rightful offspring's and continue his race.'³⁹⁷ While May submits that misogynistic narratives are inclined to encompass violence, resulting due to the feeling of 'unresolved powerlessness'.³⁹⁸

Interestingly, in her work, while studying the Brahmanical texts (800BC to 400BC), Chakravarti³⁹⁹ looked into establishing a link between caste and gender. Her work focuses on male dominance and control over the 'cycle of production and reproduction, which on the one hand is governed by the ruling king, on the other is the head of the family (male person). Thereby establishing simultaneous control over 'production and reproduction', gradually establishing the secondary position of women in Indian society.

In a social context, an Indian woman is only considered a 'person' for as long as she may be seen in reference to a male member of the society, i.e., being a daughter, wife, sister or mother. As soon as she steps out of all or either of such relationships, by choice or fate, she loses her

³⁹⁵ Nanda, P., et al. (2013), 'Masculinity, Son Preference and Intimate Partner Violence', International Centre for Research on Women, New Delhi, pp. 1

³⁹⁶ Moss, D. (Ed.). (2003). *Hating in the First-Person Plural: The psychoanalytic Essays on Racism, Homophobia, Misogyny and Terror*. New York, NY: Other Press.

³⁹⁷ Rich, A. (1986), *Of Woman Born: Motherhood as Experience and as Institution*. New York, NY: W.W. Norton.

³⁹⁸ May, R. (1972). *Power and Innocence: A Search for the Sources of Violence*, London: W.W. Norton

³⁹⁹ Chakravarti, U. (2003), *Gendering Caste: Through A Feminist Lens*, Mandira Sen for STREE, Bhatkal and Sen, Calcutta 45-46.

right to be a subject and becomes an object in a man's world⁴⁰⁰ (A woman is seen as a property of a male⁴⁰¹). The culture of hate and subjugation of women in India begins to normalize from within the homes and is then transferred into the public domain.⁴⁰² Kakar⁴⁰³ in his work, explains how the misogynistic tendency is passed on within families, from one woman to another. Sexual policing does not only take place between genders but is initiated and exists within gender.⁴⁰⁴ He goes on to elaborate, on how a mother is the primary sexual object in a family, and how she morally trains her daughter, to continue to remain an object of suppression and sexual subjugation, creating a clear link circulating through generations. On the same note, Chodorow states that a girl identifies with her mother in their common feminine inferiority and heterosexual stance.⁴⁰⁵ It reflects upon the idea, that it is not only the male members of society who contribute to the misogynistic patterns but also the females in the society, who take part in perpetuating their own objectification, subjugation and violation at different levels within the society.

Patriarchy - It is significant to understand the social patriarchal hierarchy deeply embedded in Indian society. For the past centuries (Vedic Period 1500 – 1800 BCE), the position of Indian women has been paradoxical. On one hand, she has been given the position of 'goddess' and has been an object of wealth, prosperity, and worship, while on the other, it is expected of her to oblige as a 'submissive wife'.⁴⁰⁶

Although Chaudhuri denies any foreign interference in the ingrained bias against women, stating that the 'roots of such hatred are deeply Indian'.⁴⁰⁷ Livne, indicates the relevance of British colonization, as during the period, the idea of Indian nationalism, separated the material and

⁴⁰⁰Rich, A. (1986). *Of Woman Born: Motherhood as Experience and as Institution*. New York, NY: W.W. Norton, Kakar, S. (2012). *Is the Indian woman a person?* Op-ed., Vol. 1, p. 2

⁴⁰¹ Rich, A. (1986), *Of Woman Born: Motherhood as Experience and as Institution*. New York, NY: W.W. Norton

⁴⁰² Chapman, J. (2014) *Violence Against Women in Democratic India: Let's Talk Misogyny*, *Social Scientist*, Vol. 42, No. 9/10, 49-61

⁴⁰³ Kakar, S. (2012). *Is the Indian woman a person?* Op-ed. Vol. 1, p. 2

⁴⁰⁴ Narayanan, A. (2014) *Ambivalent Subjects: Psychoanalysis, Women's Sexuality in India and the writings of Sudhir Kakar*, *Psychodynamic Practice*, 20:3, 213-227

⁴⁰⁵ Chodorow, N. (1978). *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*. Berkely, CA: University of California Press.

⁴⁰⁶ Basu, S and Ghosh, S. (2018) *Why do Men Rape? Understanding the Determinants of Rapes in India*, *Third World Quarterly*, 39:8, 1435-1457

⁴⁰⁷ Chaudhuri, P. (2013), *Being female in India: A Hate Story*, in Jean Chapman, (2014) *Violence Against Women in Democratic India: Let's Talk Misogyny*, *Social Scientist*, Vol. 42, No. 9/10, 49-a

the spiritual,⁴⁰⁸ due to which, although the Indians, opened up to technological and scientific advancements, the nationalists argued that the eastern world is superior to the west, in terms of cultural spirituality (to uphold, a unique identity in the new world order). As an outcome, a new form of patriarchy emerged, according to which the Indian women, were socially permitted to take up formal education and learn modern means to live, yet the values of ‘self-sacrifice, chastity, submission and devotion’ were still basic to the Indian woman’s life and were socially expected of her. Livne, suggests that such a form of patriarchy is currently present in India, due to which, there exists an ongoing conflict between those who are attempting to alter their status (moving towards an educated, modern outlook) and those who are trying to hold on to the value system basing their arguments on tradition and cultural practices.⁴⁰⁹ In the same light Purewal’s work reflects on the interconnection between ‘Hindutva’ and patriarchy, he indicates the intensification of the ‘market-oriented neoliberal economic agenda’, focusing on a modern and more open capitalistic market structure along with traditional agenda with conservative social values, inlaid within the idea of Hindutva. He draws a connection between modernization entailing aspects of normative traditional patriarchal value system in the name of ‘protection and upliftment’. Such means are leading to the deepening of patriarchal roots, escalating the male control and proprietorship over women.⁴¹⁰

Patriarchy, as per Purewal, is intimately tied to different forms of domination, including male domination and domination based on caste and class.⁴¹¹ One of the most significant predictors in any given society, Levinson suggests is the direct relation between dominance by the male family members regarding decision-making and the violence towards women.⁴¹² Such societies that follow stringent gender roles and associate ‘manhood’ with dominance are more susceptible to the commission of rapes and sexual violence against women.⁴¹³

⁴⁰⁸ Livne, E. (2015) Violence against Women in India: Origins, Perpetuation and Reform, Department of History Global Studies, Carnegie Mellon University.

⁴⁰⁹ Livne, E. (2015) Violence against Women in India: Origins, Perpetuation and Reform, Department of History Global Studies, Carnegie Mellon University.

⁴¹⁰ Purewal. N, (2018) Sex Selective Abortion, Neoliberal Patriarchy and Structural Violence in India, The Feminist Review Collective

⁴¹¹ Purewal. N, (2018) Sex Selective Abortion, Neoliberal Patriarchy and Structural Violence in India, The Feminist Review Collective

⁴¹² Levinson, D. (1989), *Violence in Cross-Cultural Perspective*. Newbury Park, CA: Sage.

⁴¹³ Heise, L. L. (1989) Violence Against Women: An Integrated, Ecological Framework, *Violence Against Women* 4, no. 3, 262–290.

Caste – Plenty of evidence suggests misogynistic violence based on caste (Dalit and tribal communities at the hands of the rich upper caste).⁴¹⁴ Chapman in his work indicates that misogynistic violence is laid on the bricks of Brahmanical patriarchy.⁴¹⁵ He mentions that the higher the caste, the more restrictive it is about the women (One of the theories on rape states that the likelihood of commission of rapes is quite high in places where the social and cultural norms permit stricter male dominance⁴¹⁶).⁴¹⁷ Having control over power, prestige and land along with the monopoly over rites, rituals and religious ideology, the Brahmin communities (Upper caste Hindu Indians- discussed in detail in the 3rd chapter under caste-based hate crimes) were able to obligate other caste members into following caste-based endogamous norms (the non-Brahmin community groups were led into following norms set by Brahmins that were more stringent and subjugate women's social position). For example, the Brahminical rules and norms lauded the sati practice (ritual burning of the woman, on the pyre of her husband as a widow, is considered to be bad luck, they are prohibited from engaging in festivals and celebrations, however, they were faced with sexual harassment and violence from the near relatives and family members⁴¹⁸) seen as essential conduct for a woman.⁴¹⁹

CURRENT SITUATION

In a more general context, the public space in Indian societies is seen to be historically a male sanctuary, therefore any public engagement by women is seen with prejudice and hatred. The Indian women are faced with harassment at many standpoints, they are subjected to, organ removal, acid throwing on body parts, rape, murder, inappropriate touching, sex change of infant unwanted girls, misogynist killings including rape and battery leading to murder, mutilation and so on. A number of women in India are forced to marry, become pregnant, face sterilization (especially in cases of women with disability), forced into prostitution as well as

⁴¹⁴ Human Rights Watch. (2014) UN Rights Council: End Caste-Based Rape, Violence, <https://www.hrw.org/news/2014/06/17/un-rights-council-end-caste-based-rape-violence>.

⁴¹⁵ Chapman, J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, *Social Scientist*, Vol. 42, No. 9/10, 49-61

⁴¹⁶ Baron, L., and A. M. Straus, (1987) Four Theories of Rape: A Macro Sociological Analysis, *Social Problems* 34, 467–489.

⁴¹⁷ Chapman, J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, *Social Scientist*, Vol. 42, No. 9/10, 49-61

⁴¹⁸ Chapman, J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, *Social Scientist*, Vol. 42, No. 9/10, 49-61

⁴¹⁹ Chapman, J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, *Social Scientist*, Vol. 42, No. 9/10, 49-61

pornography.⁴²⁰ The cases involving the kidnapping and abduction of women (primarily), increased by 762.2%,⁴²¹ in the same reference, the trafficking of women remains an enormous industry, the lax legal structure along with discrimination based on gender and patriarchal hatred and bias many a time aids and abets in the commission of crimes relating to sex trafficking.⁴²²

Deeply rooted misogynistic trends may be noted through research that observed around 40% of married women, face sexual and/ or physical violence committed by their husbands (ranging between 15 to 49 years of age).⁴²³ In the year 2012, 25,000 rape cases were reported in India, of which 24,470 had been committed by neighbours and/ or relatives.⁴²⁴ A recent UNICEF report suggests that 57% of young Indian males (between the age of 15 to 19 years) consider wife-beating justified.⁴²⁵ Instances such as a woman being shared among five brothers living in the same house also occur.⁴²⁶ In a research conducted by Gupta, a survey held in 1999 conducted on 348 urban women from the upper and middle class, established that approximately half had faced some form of molestation, with one-third as young as ten years of age when they were subjected to forms of sexual abuse and rape by friends and family members.⁴²⁷

LAWS RELATING TO WOMEN IN INDIA

⁴²⁰ Chapman. J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, Social Scientist, Vol. 42, No. 9/10, 49-61

⁴²¹ Basu. S and Dastidars. S. G (2018) Why do Men Rape? Understanding the Determinants of Rapes in India, Third World Quarterly, 39:8, 1435-1457

⁴²² Gupta, R. (2013), India: Examining the Motivation for Rape, in Jean Chapman, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, Social Scientist, Vol. 42, No. 9/10, 49-61

⁴²³ Chapman. J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, Social Scientist, Vol. 42, No. 9/10, 49-61; Bhat, M. and S.E. Ullman (2014), Examining Marital Violence in India: Review and Recommendations for Future Research and Practice', Trauma, Violence & Abuse, Vol. 15, No. 1, 57 (Marital rape is not included in the list of sexual crimes under the Indian Penal Code, married women are always vulnerable to it and also prone to sexually transmitted diseases leading to sexual, physical, reproductive and psychological adverse consequences)

⁴²⁴ Chapman. J, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, Social Scientist, Vol. 42, No. 9/10, 49-61

⁴²⁵ UNICEF, (2012) Progress for Children: A Report Card on Adolescents. The United Nations Children's Fund, United Nations. https://www.unicef.org/publications/index_62280.html

⁴²⁶ Hundall, S. (2013), Why India is Sitting on a Social Time-Bomb of Violence Against Women in Jean Chapman, (2014) Violence Against Women in Democratic India: Let's Talk Misogyny, Social Scientist, Vol. 42, No. 9/10, 49-61

⁴²⁷ Gupta, A. (1996), Voices from The Silent Zone: Women's Experiences of Incest and Childhood Abuse, Recovering and Healing from Incest (RAHI), New Delhi, 1-40.

The Indian Constitution and several other laws are keen on safeguarding the position of women in Indian society. The statutory provisions in the table below cover different crimes committed against women. The list of crimes and statutes is not comprehensive and only attempts to shed light on the wide range of legal tools available for the protection of women that are yet incompetent to curb the rate of crimes against women, in an implemental as well as symbolic sense.

WOMEN'S RIGHTS UNDER INDIAN CRIMINAL LAW

Women's Rights Under Indian Criminal Law	
Indian Penal Code, 1860	
Section 498A - Husband or relative of the husband of a woman subjecting her to cruelty	
Section 304B - Dowry death.	
Section 306 - Abetment of suicide	
376,	
Section 375 - Rape	
Section 376 – Punishment for Rape	
Section 376AB - Punishment for rape on woman under twelve years of age	
376D. Gang rape	
Section 376DA and 376DB Punishment for gang rape on women under sixteen years of age.	
Section 376E - Punishment for repeat offenders	
Code of Criminal Procedure, 1973	
Section 46 – Arrest; 46(4) - Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report.	
Section 125 - Order for maintenance of wives, children and parents	
Section 198A - Prosecution for offences against marriage	
[198A. Prosecution of offences under section 498A of the Indian Penal Code	
Statutes on the Protection of Women	
Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013)	
Prohibition of Child Marriage Act, 2006	
Protection of Women from Domestic Violence Act, 2005	
Commission of Sati (Prevention) Act, 1987	
Indecent Representation of Women (Prohibition) Act, 1986	
Bonded Labour System (Abolition) Act, 1976	
Dowry Prohibition Act, 1961	
Immoral Traffic (Prevention) Act, 1956	

OTHER LAWS RELATING TO WOMEN

Health, Marriage, and Reproduction	
Article 14 - Equality before the law	Surrogacy (Regulation) Act, 2021
Article 21 - Protection of life and personal liberty	Maternity Benefit Act, (MBA), 1961 and Maternity Benefit (Amendment) Act, 2017
Article 39 - Certain principles of policy to be followed by the State. a) that the citizens, men and women equally, have the right to an adequate means of livelihood.	The Mental Healthcare Act, 2017
	HIV & AIDS (Prevention and Control) Act, 2017
	Medical Termination of Pregnancy (Amendment) Act, 2021,
	Medical Termination of Pregnancy Act, 1971,
	Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection), Act 1994
	The Hindu Woman, Rights to Property Act, 1937; Married Women's Property (Extension) Act, 1959

<p>Article 42- Provision for just and humane conditions of work and maternity relief</p> <p>Article 47- Duty of the State to raise the level of nutrition and the standard of living and to improve public health</p>	<p>Muslim Women (Protection of Rights) on Divorce, 1986 Dissolution of Muslim Marriages Act (1939)</p>
<p>Equal Opportunity, Education, and Employment</p>	
<p>Article 14- Equality before the law</p> <p>Article 15 - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth</p> <p>Article 16 - Equality of opportunity in matters of public employment</p> <p>Article 19 - Protection of certain rights regarding freedom of speech, etc</p> <p>Article 21 - Protection of life and personal liberty</p> <p>Article 39 - Certain principles of policy to be followed by the State. a) that the citizens, men and women equally, have the right to an adequate means of livelihood.</p> <p>Article 42- Provision for just and humane conditions of work and maternity relief</p>	<p>Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 The National Commission for Women Act, 1990 Equal Remuneration Act, 1976</p>

The above provisions and statutes on the rights and protection of women in India, only portray the women's rights infrastructure and comprise many more regional laws, policies and reservations (that are not covered in the chapter). Although no specific legislation discusses misogynistic crimes, in particular, they are quite well embellished within the available law. The issue with hate crimes against women is that such crimes, more often than not are intersectional, and target women based on more than one identity attribute (such as a female lesbian, Muslim woman, disabled woman or a woman belonging to a tribe categorized under the Scheduled Tribe category). Notwithstanding the social prejudices held against the upper higher-class elite women, (who might be subjected to less misogynistic crimes but face day-to-day discrimination). Therefore, a need for legislation based specifically on misogynistic crimes is much needed, which has the potential to collaborate with the existing legal framework on women's rights and more importantly fulfil the symbolic purpose of upholding the equal position of women in society.

CONCLUSION

This section of the chapter covers homophobic, transphobic and misogynistic hate crimes. It dwells on a few historical narratives to enable a reflective comparative discourse on how the position of gay, lesbian and transexual members of the Indian society have come this far from having a respectable position in the past to a stage of fear and vulnerability, becoming targets of hate crimes. In the absence of adequate law in place, these targeted communities remain at the mercy of their perpetrators. The 2018 Supreme Court judgement and the 2019 Transgender (Protection of Rights) Act, supplant the ongoing unregulated state of affairs in this arena. However, these developments in law are only an initial step, and more prominently indicate the need for targeted legal measures ensuring the LGBTQ community members of their rights and equal protection before the law.

The misogynistic crimes in India reflect deep social concerns, that are far from being curbed even in the presence of numerous legislative tools (although such laws are not directly aimed at hate crimes). Gender as a ground for hate crime has been under debate across jurisdictions, however, in the Indian context, misogynistic hate crimes must be covered under the legislative hate crime category, more significantly to fulfil its symbolic purpose. It is noteworthy that hate crimes against women, in a significant number of cases fall under more than one ground and indicate an intersectionality approach in dealing with such crimes. The law, policy and regulations put in place by India, have been effective in uplifting the position of women in Indian society, however, it may be said that the deeply inlaid threads of caste and patriarchy when combined to commit misogynistic crimes, the degree of severity and harm to the victims is much more.

The existing Indian law that relates to minority rights in terms of Constitutional provisions and other specific legislations, more specifically transgender rights, rights for the protection of women, and upcoming legal protections for the LGBTQ community in India, even though are aimed at protecting the minority groups, they do not clearly bring out the hate element underlying crimes against LGBTQ community or women. Such legal means to provide justice merely address the symptoms of the concern and leave out the actual deep-rooted concerns that originate from underlying prejudice within different aspects of society. Such means to justice only remain curative (to some extent) and not preventive and suggest that the introduction of a hate crime legislation (or provisions thereof) that is inclusive of grounds of gender and takes

into account the hate crime concerns relating to the LGBTQ community and women would highlight the gravity of the issue and provide better redressal.

CHAPTER 3

HATE CRIMES BASED ON CASTE AND RACE

INTRODUCTION

This chapter is classified into two broad segments, while one deals with hate crimes based on caste the other relates to racially motivated hate crimes. The first section of the chapter discusses hate crimes based on the grounds of caste, it explains the concept of the caste system prevalent in India and focuses on present-day concerns and then goes on to discuss the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which may be seen as the only piece of federal legislation directly targeting caste-based hate crimes. Hate crime incidents based on caste include harassment, abuse, illegal land encroachment, forced eviction, etc.⁴²⁸ Significant focus has been given to the influence of colonial rule in terms of rigidifying caste identities and significantly aggravating hostilities among different caste groups. This 200-year period of colonization in India vastly impacted the country in terms of transforming the Indian minds.

The second part of the chapter focuses on the aspect of race-based hate crimes. This section begins by reflecting on the idea of racism in the Indian context, which is more often defined in terms of ‘cultural differences or several times remain invisible. This part focuses on the Northeast Indian region which is home to a collective minority group of approximately 200 tribes and comprises mostly indigenous tribal people with racially distinct features. The case study significantly brings out the racial hate embedded in the minds of the mainland Indian population. It reflects on the struggles of the North-eastern populace against hate and bias-motivated crimes and is relevant in understanding the intersectional dynamics of race and caste and the correlation between the two. The significant role of colonial influence has been discussed, which in this case has enormously shaped the current perspective of the Indian population towards the Northeast minority Indian tribal communities.

⁴²⁸ Human Rights Watch, (1999). Broken People: Caste Violence against India’s Untouchables. New York: Human Rights Watch.

The chapter entails a section attempting to understand the correlation between race and caste. Both sections of the chapter are interconnected, as both notions of caste and race have been concretized and influenced by the colonial period. The chapter entails an interesting section on the aspect of dietary and food cultures and their correlation to racism and casteism. It highlights how different food cultures are placed in a hierarchical framework tagging simple food as “*pure and dirty*”.⁴²⁹ Most data used in this chapter are collected from the 2011 Census conducted by the Government of India⁴³⁰ (as the 2021 Government census is postponed due to the COVID crisis and is not available while discoursing this research work).

PART I

HATE CRIMES BASED ON CASTE

INTRODUCTION

The chapter aims to attempt an investigation into the Indian societal setup with the object to establish the prevalence of hate crimes on grounds of caste (which is unique to India) and race to look at the available legislative tools and verify their sufficiency to protect specific communities and minority groups from hate crimes. The Indian discourses and literature, until recent years, have not been familiar with the concept of hate crimes, and in the lack of any hate crime legislation, are prone to use terminology which parallels the essential components of hate crimes. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (discussed under Hate Crimes based on Caste) is one such legislation dedicated solely to protecting the lower caste groups in India and aims to penalize offenders who target members of these groups for the reason of their group membership. Therefore, the terms hate crimes and atrocity have been used interchangeably. India being a vast country witnesses an enormous number and various intersectional forms of targeted crimes, however, this chapter is limited to specific case studies, that do not encompass each and every relevant aspect of the Indian hate

⁴²⁹ Kikon. D, (2022) Dirty food: racism and casteism in India, *Ethnic and Racial Studies*, VOL. 45, NO. 2, 278–297

⁴³⁰ Census 2011, Government of India, <https://censusindia.gov.in/census.website/data/population-finder>

crime discourse, yet it attempts to develop a clear understanding of the extent and amplitude of hate-based crimes in the country.

THE CASTE SYSTEM

The caste system in India is an arrangement of the population based on centuries-old, social hierarchical classification and is claimed to have its origin in the Hindu religion.⁴³¹ Ancient Hindu societies were classified into *Varna* and *Jati*⁴³² based on the caste system. There are a number of categories and sub-categories classifying society. The four primary hierarchical classifications include the priestly caste, the warrior caste, the trading caste and the serving caste. Each caste in order is above the other in social terms—a fifth caste formed with *Ati Sudras (Dalits)* or the ‘*Untouchables*’ at the bottom of the hierarchy.⁴³³

Myers and Radhakrishnan describe Caste discrimination as a notion based on superior and inferior birth status. It is impossible to move from one caste to another, unlike moving up the class ladder. The individuals are born into a family, class, caste, sub-castes and religious groups and are inclined to be interdependent within the group, ensuring them social support, reduced feeling of vulnerability and psychological backing.⁴³⁴ Many businesses and services are managed within the family through generations. These social structures lead to families making individual decisions for their children (line of study, marriage, and other similar choices). As each caste has its own rules and regulations for governing its food culture, dressing style, occupation, and marriage, any behaviour or attempt which may be seen as out of line attracts attention from the senior members of the caste-based community.⁴³⁵

The same setup also gives way to enormous inequalities leaving the lower caste members to face discrimination.⁴³⁶ The Indian caste system was initially based (until before the colonial

⁴³¹ Sharma. S, (2015) Caste-Based Crimes and Economic Status: Evidence from India, 43 Journal of Comparative Economics.

⁴³² Deshpande. A, (2000) Recasting Economic Inequality, 58 Review of Social Economy.

⁴³³ Sharma. S, (2015) Caste-Based Crimes and Economic Status: Evidence from India, 43 Journal of Comparative Economics.

⁴³⁴ Lynch, Owen M. (1992) Stratification, Inequality, Caste System: India. *Asia: Case Studies in the Social Sciences: A Guide for Teaching*. Ed. Myron L. Cohen. Armonk, New York: M.E. Sharpe, 67-80.

⁴³⁵ Sharma. S, (2015) Caste-Based Crimes and Economic Status: Evidence from India, 43 Journal of Comparative Economics.

⁴³⁶ Hussain. S, Usman. A, Habiba. U, Amjad. A, Amjad. U, (2019), Hate Crimes against Muslims and Increasing Islamophobia in India, Journal of Indian Studie, Vol. 5, No. 1, 7 – 15; Sachar, R., Hamid, S., Oommen, T. K.,

rule) on the work culture and defined the ‘kind of work,’ i.e., priest, warrior, trader and other jobs through individual caste. In more general terms, the caste of an individual does not only entitle them to their hereditary occupation but also dissuades them to make efforts to look beyond the occupational barriers.⁴³⁷ Although there is evidence from the sixteenth century that a number of castes have taken part in a variety of different occupational tasks.⁴³⁸ In 1931, the Commission of India revealed that only 50% of the working population was engaged in occupations traditionally associated with their caste,⁴³⁹ and several kings and Indian leaders have noteworthy contributions in standing up against discrimination, by reserving 50% of public sector jobs for individuals belonging to lower castes⁴⁴⁰ and allowing untouchables to enter the temples.⁴⁴¹ However, in the present time, caste does not simply indicate one’s line of work but establishes their position in society, and may be seen as responsible for dividing people within the society to the extent that individuals are willing to commit hate and violence against the members belonging to other castes.⁴⁴²

The lower caste and tribal communities are collectively categorized as *Dalits*. The Dalits are faced with atrocities on a large scale.⁴⁴³ In their work, Myers and Radhakrishnan⁴⁴⁴ have used the term ‘crime of atrocity’ while referring to hate crimes against the *Dalits* in India by the non-Dalit caste community. Such crimes of atrocity are inhumane and violate human rights, they include murder, rape, hurt, grievous hurt and sexual exploitation based on the membership of a particular group (Dalit community in this case).⁴⁴⁵ Hate and conflict based on caste also take the form of land grabbing and destruction of property.⁴⁴⁶

Basith, M. A., Basant, R., Majeed, A., & Shariff, A. (2006). Social, Economic and Educational Status of the Muslim Community of India (No. 22136). East Asian Bureau of Economic Research.

⁴³⁷ Olcott, M. (1994) The Caste System of India, *American Sociological Review*, 9; Edwin D. (1962), Caste and Occupational Structure in Central India, 41 *Soc. F.* 26

⁴³⁸ Ghurye, G. (1950) Caste and Class in India, Bombay: Popular Book Depot, 15-17.

⁴³⁹ Davis, K. (1951) The Population of India and Pakistan, Princeton University Press, 168.

⁴⁴⁰ The Untouchables: Subordination, Poverty, and the State in Modern India, (1998) Cambridge University Press, 129.

⁴⁴¹ Jeffrey, R. (1976) Temple-Entry Movement in Travancore, 1860–1940, *Social Scientist* 8: 3–27.

⁴⁴² Lynch, Owen M. (1992) Stratification, Inequality, Caste System: India. *Asia: Case Studies in the Social Sciences: A Guide for Teaching*. Ed. Myron L. Cohen. Armonk, New York: M.E. Sharpe. 67-80.

⁴⁴³ Ashalatha.P, (2012) Atrocities on Dalits - A Gap Between Law and Practice, 3 *Global Journal for Research Analysis*; Chakraborty. D, Shayam. B, Chakraborty. M, (2006) Atrocities on Dalits- What the district level data can say on Society- State complicity, *EPW*, Vol 4, Nov 24, 2478-81.

⁴⁴⁴ Myers, S, and Radhakrishna. V, (2018) *Hate Crimes, Crimes of Atrocity, And Affirmative Action in India and The United States*, Penguin Random House.

⁴⁴⁵ Myers, S, and Radhakrishna. V, (2018) *Hate Crimes, Crimes of Atrocity, And Affirmative Action in India and The United States*, Penguin Random House.

⁴⁴⁶ Assadi. M and Rajendran. S, (1993) Changing Shape of Caste Conflict, *Economic and Political Weekly*, Vol. 35, 1610-1612

THE SCHEDULED CASTE (SC), THE SCHEDULED TRIBES(ST), AND THE OTHER BACKWARD CLASS(OBC)

This part briefs on the three categories formed under the Constitution of India that aim at protecting, safeguarding and uplifting certain caste and tribe groups, attempting to provide them with an equal opportunity of better education, employment and standard of living, and freedom from all forms of caste-based discrimination. The ‘Scheduled Caste’, Scheduled Tribe’ and the ‘Other Backward Caste’ categories have been formed under the Constitution of India.⁴⁴⁷ Approximately 68% of Indians identify themselves as members of lower caste groups that includes 34% belonging to either SC or ST group membership while 35% fall under the OBC category.⁴⁴⁸ In the same light, Indians with higher education and better employment belong to the general (those who do not fall under SC, ST or OBC categories) category while the less educated fall under the OBC. In a survey conducted by PEW Research Center,⁴⁴⁹ about three-quarters of Indians stated that there is not much discrimination practised against lower caste group members.

The “scheduled caste” includes members who follow Hinduism and are a part of the Indian Caste system and were considered ‘untouchables’, (Dalits). It is relevant to mention the concept of ‘untouchability’, as the roots of discrimination and hate against the Dalit community members are ingrained in it. The ‘untouchables’ have been understood as descendants of Dalits and were the original resident tribes conquered and forced to live in marginal groups outside villages.⁴⁵⁰ The term Dalit means ‘the broken man’ (Marathi Language). As Myers and Radhakrishnan describe, members of the Untouchable groups were restricted in every way possible. They could not be touched or even seen by the members of other castes, and their

⁴⁴⁷ The Constitution (Scheduled Castes) Order, 1950; The Constitution (Scheduled Tribes) Order, 1950.

⁴⁴⁸ Sahgal. N, Evans. J, Salazar. A, Starr. K, Corchi. M, (2021) Attitudes About Caste, Religion in India: Tolerance and Segregation, PEW Research Center, <https://www.pewresearch.org/religion/2021/06/29/attitudes-about-caste/#fnref-35266-12>

⁴⁴⁹ Sahgal. N, Evans. J, Salazar. A, Starr. K, Corchi. M, (2021) Attitudes About Caste, Religion in India: Tolerance and Segregation, PEW Research Center, <https://www.pewresearch.org/religion/2021/06/29/attitudes-about-caste/#fnref-35266-12>

⁴⁵⁰ Jaffrelot. C, (2009) Dr. Ambedkar's Strategies Against Untouchability and the Caste System, IIDS, Working Paper Series Vol III, No 04.

shadow was considered to impurify the upper caste individuals.⁴⁵¹ There is a belief of purity connected to the higher caste individuals and impurity associated with the lower caste members. The Dalits work in petty jobs such as cleaning drains, disposing of wastes, dealing with corpses, etc.⁴⁵² Therefore, until the recent past, the scheduled caste members lived a very secluded life and were denied access to amenities of public utility, including roads, water sources, tanks, temples and other institutions. The women belonging to the category were faced with more hardships and violence.⁴⁵³ They were more prone to sexual abuse, were underpaid or sometimes had to sell their bodies in exchange for food.⁴⁵⁴

The “Scheduled Tribes” include individuals who may or may not follow the Hindu religion, they are indigenous people (Adivasis). According to the Ministry of Tribal Affairs, the Scheduled Tribe is defined as, “*primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and backwardness*”. Such a definition finds its grounds in past colonial discourses.⁴⁵⁵ Considering not much has changed since the colonial rule, the historically dominating perspective on North East Indians (North East India has a higher Tribal population ratio with few States having a majority Tribal populace, discussed in detail in the second part of this chapter) as belonging to a tribe category and being seen as the ‘other’ lacking coeval values and cultural understanding with the rest of the country is still persistent.⁴⁵⁶

The “Other Backward class” (OBC) is another category that includes members of the lower castes who do not fall in the Scheduled Caste or Scheduled Tribe category but are categorically a disadvantaged class. As stated in the table, the OBC category includes those caste group identities that are socially and educationally backward (the Constitution of India categorises the ‘Other Backward Class, as including individuals who due to reason of their identity or

⁴⁵¹ Sharma. S, (2015) Caste-Based Crimes and Economic Status: Evidence from India 43 Journal of Comparative Economics.

⁴⁵² Deshpande. A, (2005) Recasting Economic Inequality 58 Review of Social Economy

⁴⁵³ Myers. S, and Radhakrishna. V, (2018) *Hate Crimes, Crimes of Atrocity, And Affirmative Action in India and The United States*, Penguin Random House.

⁴⁵⁴ Myers. S, and Radhakrishna. V, (2018) *Hate Crimes, Crimes of Atrocity, And Affirmative Action in India and The United States*, Penguin Random House.

⁴⁵⁵ Ministry of Tribal Affairs, <http://tribal.nic.in/Content/DefinitionpRrofiles.aspx>.

⁴⁵⁶ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

economic situation have not been able to receive an equal opportunity as the rest of the population and categorizes them as ‘socially and educationally backward’ class).⁴⁵⁷ The list of OBCs is modified from time to time with the inclusion and removal of groups depending on their social and educational status. The Government of India provides reservations to all three categories in educational institutions and government employment.⁴⁵⁸ The table below corresponds to the Constitutional provisions defining the SC, ST and OBC categories.

CONSTITUTIONAL PROVISIONS DEFINING SC, ST AND OBC CATEGORIES

Definitions	
‘Scheduled’ means the Schedule under the Constitution of India – Article 366 (23)	
Scheduled Caste – Article 341	Include Castes, Races or Tribes or parts of groups within Castes, Races or Tribes as decided by the President
Scheduled Tribes – Article 342	Include Tribes or Tribal Communities or parts of or groups within Tribes or Tribal Communities as decided by the President
Socially and Educationally Backward Classes – Article 342A	Include Socially and Educationally Backward Classes in the Central List

Although the categorization of SC, ST and OBC has been primarily made to protect and provide rights to the Hindu lower caste groups against discrimination and are based on the Indian caste system, they do not specifically connote to the same. The SC, ST and OBC categories formed under the Constitution also include members belonging to other religious groups that primarily include Muslims, Christians, and Buddhists. The chart below is based on the 2011 Census and depicts the percentage population of Indians falling under the SC, ST and OBC categories and are non-Hindus.

⁴⁵⁷ Article 342A, The Constitution of India

⁴⁵⁸ Article 16, The Constitution of India

NON_HINDU INDIVIDUALS PROTECTED AS SC, ST AND OBC CATEGORY⁴⁵⁹

Religion	Scheduled Caste%	Scheduled Tribes%	Other Backward Class%
Buddhists	88	9	1
Christians	21	29	26
Muslims	3	2	55
Sikhs	38	0	19
Jains	3	0	12

The Indian Constitution does not provide any specific reservations or for that matter any protection under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (discussed later) to the Indian Muslim and Christian population (Article 16 and the POA aim at curbing discrimination against lower caste groups specifically and provides no protection to the non- Hindu population belonging to the economically and educationally less developed category). This has been a controversial issue as such laws and policies for raising some of the underdeveloped and disadvantaged groups leave out the other minority groups in turn deepening inequalities on religious lines and simultaneously preserving the caste system. However, there is growing consensus for the protection of the rights of Muslim and Christian group members under the Other Backward Class, Scheduled Caste, and Scheduled Tribe Categories.⁴⁶⁰ There are also anti-poverty programs for religious minority groups run by the Government.⁴⁶¹

CONSTITUTIONAL PROVISIONS RELATING TO SCHEDULED CASTES, SCHEDULED TRIBES AND THE OTHER BACKWARD CLASSES⁴⁶²

Article 15	Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth
Article 16	Equality of Opportunity (Reservation)
Article 17	Abolition of Untouchability
Article 46	Promotion of Educational and Economic Interests of SC, ST and other Weaker Sections
Article 244	Administration of Scheduled Areas and Scheduled Tribes
Article 330	Reservation of Seats for SC, and ST in the House of the People
Article 332	Reservation of Seats for SC, and ST in the Legislative Assemblies of the States
Article 335	Claims of SC and ST to Services and Posts

⁴⁵⁹ Kramer. S, (2021) Religious Composition of India, PEW Research Center, <https://www.pewresearch.org/religion/2021/09/21/religious-composition-of-india/>

⁴⁶⁰ Kramer. S, (2021) Religious Composition of India, PEW Research Center, <https://www.pewresearch.org/religion/2021/09/21/religious-composition-of-india/>

⁴⁶¹ Schemes and Policies for Minority Groups, (2017) Ministry of Minority Affairs, Government of India, <https://www.minorityaffairs.gov.in/sites/default/files/Schemes%20of%20MoMA%20and%20Schemes%20covered%20under%20PM%27s%20New%2015-PP-Final.pdf>

⁴⁶² Schemes and Policies for Minority Groups, (2017) Ministry of Minority Affairs, Government of India, <https://www.minorityaffairs.gov.in/sites/default/files/Schemes%20of%20MoMA%20and%20Schemes%20covered%20under%20PM%27s%20New%2015-PP-Final.pdf>

Article 338	National Commission for SC
Article 338A	National Commission for ST
Article 339	Control of the Union over the administration of Scheduled areas and the Welfare of Scheduled Tribes
Article 338B	National Commission for Other Backward Castes
Article 340	Appointment of Commission to Investigate Conditions of Backward Classes

THE COLONIAL INFLUENCE

India, before the occupation by the British, was quite developed, in social and financial terms, and was governed by a powerful set of kingdoms.⁴⁶³ The colonial powers made an effort to penetrate the social fabric of their colonies to avoid any rebellious conflicts. They manipulated the social divisions and the hierarchical order to avoid resistance from the masses.⁴⁶⁴ In the same reference, the Naxalite leaders have stated that in several cases, the colonizers had a significant part to play in establishing ‘semifeudal’ conditions sufficient to spark revolutions in the Indian sub-continent.⁴⁶⁵ These social divisions through the ‘divide and rule policy’ have encouraged hatred and long-lasting ‘horizontal inequalities’ between groups of different castes and ethnicities and created the basis for enduring confrontations.⁴⁶⁶ Such divide and rule may be seen in the divide between the North and South of India or between the presidency towns and the rest of India or the seclusion of the East etc. Additionally, the British categorized and ranked castes and tribal communities, advancing the social divisions and concretising the upper caste-dominated bureaucracy, establishing distrust towards the legal procedure among the lower caste groups and the tribals in India.⁴⁶⁷

The lives of the colonial subjects were only seen as raw input for the development and research of the Western social sciences.⁴⁶⁸ According to the colonizers' view, the caste system or the varna system, found its origin in the Laws of Manu, a text on laws in Sanskrit which was later

⁴⁶³ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

⁴⁶⁴ Verghese. A & Teitelbaum. E, (2019) Conquest and Conflict: The Colonial Roots of Maoist Violence in India. Politics & Society. 47. 55-86.

⁴⁶⁵ Central Committee, CPI (Maoist), Strategy and Tactics of the Indian Revolution, chap. 2, <http://www.satp.org/document/paper-acts-and-oridnances/strategy-tactics-of-the-indian-revolution-central-committee->

⁴⁶⁶ Verghese. A & Teitelbaum. E, (2019) Conquest and Conflict: The Colonial Roots of Maoist Violence in India. Politics & Society. 47. 55-86.

⁴⁶⁷ Verghese. A & Teitelbaum. E, (2019) Conquest and Conflict: The Colonial Roots of Maoist Violence in India. Politics & Society. 47. 55-86.

⁴⁶⁸ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

translated, and accordingly, the Hindu social hierarchy comprised of the Brahmin priests (including scholars), Kshatriyas (including politicians and warriors), Vaishyas (agriculturalists and businessmen) and the Shudras (the service providers and labourers), with the Dalits below all four classifications and engaged in (polluting jobs) waste disposal, street sweeping, trash collection etc.⁴⁶⁹ This prototype was understood by the Britishers as an ideal endogamous case study on racial differentiation (caste-based classification was seen with a race-based perspective) through which they expected to discover significant biological variations among different Indian caste and tribal groups.⁴⁷⁰

Although the caste system in India existed long before the British colonization, the policies under colonial rule that aimed at simplifying and systematizing a complex foreign society gave much-unneeded emphasis to the caste system that was not known to the Indian society before.⁴⁷¹ A number of 'Jatis' (social categorization within a caste) were classified into four rigid-tiered structures that gave the caste system a new level of inflexibility and prominence in terms of the administrative context.⁴⁷² Such efforts by the colonizers resulted in the ancient system of caste becoming racialized and were then seen as tied to superiority and inferiority in biological terms based on the origin of different groups,⁴⁷³ also suggesting that specific caste groups (including certain tribes) were racially immoral and therefore prone to criminality. Such efforts by the colonizers crystallized the notion of caste into administrative units⁴⁷⁴ losing out the fluidity within the caste groups. In an attempt to understand the Indian population and to situate themselves within the Indian stage, the Britishers typologized caste as race.⁴⁷⁵

In the same light, the British rule solidified caste identities, in terms of providing English education to the Brahmin caste individuals (High Caste group) with secured government

⁴⁶⁹ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

⁴⁷⁰ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

⁴⁷¹ Cohn. B, (1996) *Colonialism and Its Forms of Knowledge: The British in India*, Princeton, NJ: Princeton University Press.

⁴⁷² Bayly. S, (1999) *Caste, Society and Politics in India* Cambridge: Cambridge University Press, chap. 3.

⁴⁷³ Brown M. (2003) Ethnology and colonial administration in nineteenth-century British India: The Question of Native Crime and Criminality. *Br. J. Hist. Sci.* 36(2):201–19

⁴⁷⁴ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

⁴⁷⁵ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

employment⁴⁷⁶ which also made way for the individuals belonging to the Brahmin caste to gain a superior status in social and financial terms, notwithstanding, that they were more educated and played a significant role in deciding the educational curriculum, which in a manner highly assisted in establishing a subordinate status to other caste groups (perpetuating for generations to come). As Philip⁴⁷⁷ in his work mentions that such colonial endeavours resulted in producing high-caste Indian administrators and ethnographers who had attained adequate racialized scientific training with an intent to study and classify their own countrymen according to their caste identities on racial terms.

Through the works of Risley⁴⁷⁸ (a colonial Civil Servant) the 1901 census classified Indian caste groups as race groups and also put forward the assumption that the Indian population may be categorized into racial groups based on behaviour, physical features, languages and temperaments, on which the castes and sub-caste groups may then be easily mapped. This work also hierarchically classified the so-called race groups. Interestingly, such assumptions have never been proved, however, they are being carried forward by the present-day Indian population and form the basis of hate or bias which several times results in severe crimes.⁴⁷⁹ Such analysis of Indian data was then compared against other British colonies and resulted in drawing similarities between, Indian Thugs, Irish Nationalists, European Gypsies, Impoverished Londoners etc,⁴⁸⁰ which indicates similar secluding and tagging of different indigenous minority community groups throughout the British colonies.

The section only contains a few details and examples of how the era of colonization had a great deal of effects on the Indians, society and the law. However, more importantly, it was the minds of the Indian populace that was trained and sensitized in a manner which has led to most of the discriminatory narratives and patterns that we witness in present-day Indian society. The prejudicial and hostile perspectives inlaid in the Indian mindset are very much inherent in the

⁴⁷⁶ Risley HH, (1891) The study of Ethnology in India. J. Anthropology Institute. G. B. Ireland 20:235–63; Dirks NB, (1993) The Hollow Crown: Ethnohistory of an Indian Kingdom. Ann Arbor: Univ. Mich. Press

⁴⁷⁷ Philip K, (2002) Race, Class, and the Imperial Politics of Ethnography in India, Ireland and London, 1850–1910. Irish Stud. Rev. 10(3):289–302.

⁴⁷⁸ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83; Risley HH, (1891) The study of Ethnology in India. J. Anthropology Institute. G. B. Ireland 20:235–63; Dirks NB, (1993) The Hollow Crown: Ethnohistory of an Indian Kingdom. Ann Arbor: Univ. Mich. Press

⁴⁷⁹ Valiani A, (2021) Caste in Translation? Community, Genotyping and Risk in Postgenomic India and its Diasporas. Res. Talk, Wayne Morse Cent. Law Politics, Eugene, OR

⁴⁸⁰ Radhakrishna M, (2008) Laws of Metamorphosis: From Nomad to Offender. In *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India*, in ed. K Kannabiran, R Singh, London: Sage 3–27

current social timeline. The British colonial strategies, (intending to rule and gain power over resources and to situate themselves in the Indian land) and their research-based curiosity (to understand more on subjects of race and human behaviour or to conduct comparative racial and behavioural studies globally) resulted in comprehensive adversities for India. Notwithstanding, in the precolonial era, the country had its own concerns relating to caste, race and religion from time to time, however, the colonial rule (within 200 years) to a high extent enhanced the propensity and the gravity of discrimination and prejudice among different groups and communities which today reflects in all forms of hate-based crimes.

HISTORICAL DEVELOPMENT

As Gandhi stated, ‘if untouchability is a part of Hinduism, it could only be a rotten part’,⁴⁸¹ he went on to say that if such practices are not abolished, Hinduism will diminish and disappear.⁴⁸² Although the law and policies against Untouchability have brought some betterment to the situation in recent times, the Untouchability Offences Act of 1955 was the first step toward fighting this social dishonour in the form of untouchability faced by numerous Indians.⁴⁸³ The law outlines the offences relating to ‘untouchability, and it corresponds to any violence and crimes committed against individuals belonging to the Scheduled Caste members. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989, with its revision in 1995, aims to prevent atrocities against and protect individuals of Scheduled Castes and Scheduled Tribes. In addition, in 1990, a category of the ‘Other Backward Classes, was added to the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.⁴⁸⁴

There are several minority protection laws for minorities based on caste membership. The indigenous people and the lower caste individuals have been reassured of their equal place in the country under the Constitution.⁴⁸⁵ Under Article 15 of the Indian Constitution, the government of India formulates new laws and regulations to tackle targeted crimes committed

⁴⁸¹ Gandhi, M.K: Collected Works, 1958-89, Volume 39: p 33, Government of India, New Delhi

⁴⁸² Heredia. R, (2009) Gandhi's Hinduism and Savarkar's Hindutva, *Economic and Political Weekly*, Vol. 44, No. 29, 62-67

⁴⁸³ Untouchables in India's Civil/Uncivil Democracy: A Review Article, (2001) *Ethnos* 66.2: 259-268.

⁴⁸⁴ Pande. R, (2003) Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory And Evidence from India' 93 *American Economic Review*.

⁴⁸⁵ Sharma. M, (1984) *The Politics of Inequality: Competition and Control in an Indian Village*, 2nd ed. Honolulu: University of Hawaii Press.

against the SC and the ST communities. The Constitution of India⁴⁸⁶ also provides special rights to members of Scheduled Castes and Scheduled Tribes, which have been translated into a policy of ‘reservation’ in the public sector, reserving seats in academic institutions and the employment sector for the individuals from a specific category in an attempt to protect and uplift them from their social and economic status.⁴⁸⁷ However, as argued by some scholars, the reservation policy in India has worsened the discrimination against the low castes and has hiked the rate of crimes.⁴⁸⁸ In times when the rate of unemployment is high among the upper caste or non-Dalit communities, the system of ‘reservation’ for the upliftment of the lower caste communities is put to blame. It results in an increment in the rate of crimes of atrocities.⁴⁸⁹

Gale⁴⁹⁰ uses Becker’s model of envy and altruism, implying that hate crimes may be motivated to leave the ‘victims worst off’ and indicates socioeconomic reasons for crimes and exploitation committed by high-caste communities against lower-caste communities. It states that the rise in the tension between the minority and majority groups may also be based on economic well-being. In the Indian context, as the lower caste members achieve economic progress, the members of the upper caste become aggressive towards the lower caste members (for example, in several Indian States, one of the primary reasons that give way to caste conflict is the issue of unequal distribution of land ownership in favour of the upper caste group members⁴⁹¹ creating economic factors for hostilities). It could be said that hate crimes are used to exclude minority communities and maintain their hierarchal existence within society.⁴⁹²

There are several caste groups and other socially and educationally backward classes (the Constitution of India categorises the ‘Other Backward Class, as including individuals who due to reason of their identity or economic situation have not been able to receive an equal opportunity as the rest of the population and categorizes them as ‘socially and educationally

⁴⁸⁶ The Constitution of India, Article 15

⁴⁸⁷ The Constitution of India Article 15

⁴⁸⁸ Narula. S, (1999) *Broken People: Caste Violence against India’s Untouchables*, New Delhi: Human Rights Watch; Ghanshyam Shah, (2002) *Dalits and the State* (Delhi: Concept Publishing); Steven Ian Wilkinson, (2000) *India, Consociational Theory and Ethnic Violence*, *Asian Survey* 40, no. 5: 767–91

⁴⁸⁹ Myers. S, and Radhakrishna. V, (2018) *Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and The United States*, Penguin Random House.

⁴⁹⁰ Gale, L, Heath, W.C., and Ressler R, (2002) *An Economic Analysis of Hate Crime*, *Eastern Economic Journal*, 28(2), 203-216

⁴⁹¹ Assadi. M and Rajendran. S, (1993) *Changing Shape of Caste Conflict*, *Economic and Political Weekly*, Vol. 35, 1610-1612

⁴⁹² Sharma. S, (2015) *Caste-Based Crimes and Economic Status: Evidence from India* 43 *Journal of Comparative Economics*; Perry B, (2009) *The Sociology of Hate: Theoretical Approaches*. In: Levin B (ed.) *Hate Crimes Volume 1: Understanding and Defining Hate Crime*. Westport, CT: Praeger, 55–76

backward' class),⁴⁹³ that are not protected under any laws. Numerous tribal groups have yet not been registered. While only the castes and tribes registered as SC, ST and OBC avail protection and benefits under the Indian Constitution and other laws, leaving several lower caste and tribal communities without any legal safeguards making them easy targets of hate crimes. Myers and Radhakrishnan attempt to focus on these policy-induced crimes of atrocities, as the unprotected community groups feel more vulnerable and susceptible to hate-based attacks.⁴⁹⁴ Moreover, several indigenous tribes face significant scale exclusion from the main society.⁴⁹⁵ The symbolic role of the law which seeks to provide those protected with courage and freedom remains unfulfilled as these groups remain under a constant apprehension of becoming easy targets of hate crimes.

The metropolitan cities are fast moving away from discriminating based on caste; however, the concerns are serious in the suburbs and villages. A vast population of low-caste individuals in these regions face landlessness, exploitation and unemployment, violence, sexual abuse, harassment, and murder, solely due to their caste identity.⁴⁹⁶ Even though there are existing laws to provide justice in dealing with crimes, law enforcement is not efficient and comprehensive in rural areas.⁴⁹⁷ Social segregation and physical attacks as a 'collective punishment' on the lower caste groups have been quite a norm⁴⁹⁸ and the primary gap between the lower castes and the rest of society has not diminished to a significant extent.

DATA ON HATE CRIMES AGAINST LOWER CASTE GROUP MEMBERS

The collection of data by the National Crime Records Bureau on crimes against the SC, and ST groups is quite comprehensive, it includes a list of offences against women⁴⁹⁹ and

⁴⁹³ Article 342A, The Constitution of India

⁴⁹⁴ Myers, S and Radhakrishna, V, (2018) Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and The United States, Penguin Random House.

⁴⁹⁵ Sharma, S, (2015) Caste-Based Crimes and Economic Status: Evidence from India, 43 Journal of Comparative Economics.

⁴⁹⁶ Sharma, S, (2015) Caste-Based Crimes and Economic Status: Evidence from India, 43 Journal of Comparative Economics.

⁴⁹⁷ Mahar, M and Sharma, M, (1981) The Politics of Inequality: Competition and Control in an Indian Village, 41 The Journal of Asian Studies; Sharma, M, *The Politics of Inequality: Competition and Control in an Indian Village*, 2nd ed. Honolulu: University of Hawaii Press, 1984

⁴⁹⁸ Pande, R, (2003) Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory And Evidence from India, 93 American Economic Review.

⁴⁹⁹ Rape of Women, attempt to commit Rape, Stalking, Intent to the modesty of Woman, Assault on Women, Voyeurism, Acid Attack, Attempt of Acid Attack, Sexual harassment, Assault or Use of criminal Force on Women

children.⁵⁰⁰ It also classifies data based on crimes that are covered under the IPC and those exclusively falling under the POA,⁵⁰¹ with other significant categories.⁵⁰²

The data below reflects the Crime rate against the Scheduled Caste population of India in the year 2017- 2019 along with the status of the cases.⁵⁰³ The data shows that 22.8 % of crimes are committed against the Scheduled Caste members. While the rate of conviction and the pendency of cases remains pretty high,⁵⁰⁴ notwithstanding that there are a number of incidents that go unreported. The data collection in India is conducted firstly at the State level and further compiled at the regional and nationwide levels, which also assists in figuring out a more localized approach to tackle a region-specific rise in the number of crimes, in terms of introduction or implementation of legislative provisions, setting fast track or special Courts, and spreading awareness.

CRIMES COMMITTED AGAINST SCHEDULED CASTE UNDER POA

Y E A R	Data on the Crimes Committed against Scheduled Caste Under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989	
	2017	43203
	2018	42793
	2019	45935

with intent to Disrobe, Kidnapping and Abduction of Women to Compel her for Marriage, (2017) National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207B.2-done.pdf

⁵⁰⁰ Missing Children deemed Kidnapped, Kidnapping and Abduction for the Purpose of Begging, Procurement of Minor Girls, Rape of children, Assault on Children, National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207B.2-done.pdf

⁵⁰¹ Intentionally Insult or Intimidate with Intent to Humiliate, Occupy/ Disposes Land Belongs to SC, Prevent or deny or obstruct usage of public place/passage, Force to leave place of Residence/ Social Boycott, National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207B.2-done.pdf

⁵⁰² Murder, Attempt to Murder, Kidnapping and Abduction in order to Murder, Kidnapping for Ransom, Rioting, Dacoity, Robbery, Dacoity with murder, Arson, Criminal Intimidation, National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207B.2-done.pdf

⁵⁰³

⁵⁰⁴ Court Disposal of Crime/Atrocities against Scheduled Caste(s) (2019), National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207B.2-done.pdf

	Rate of Total Crime against SCs (2019)	22.8%												
<table border="1"> <tr> <th colspan="2">Data on Crimes Against Scheduled Caste in 2017</th> </tr> <tr> <td>Cases in which Trials were Complete</td> <td>278</td> </tr> <tr> <td>Cases Disposed of by Courts</td> <td>280</td> </tr> <tr> <td>Cases Pending Trial at End of the Year</td> <td>4125</td> </tr> <tr> <td>Conviction Rate</td> <td>23.7</td> </tr> <tr> <td>Pendency Percentage</td> <td>93.6</td> </tr> </table>			Data on Crimes Against Scheduled Caste in 2017		Cases in which Trials were Complete	278	Cases Disposed of by Courts	280	Cases Pending Trial at End of the Year	4125	Conviction Rate	23.7	Pendency Percentage	93.6
Data on Crimes Against Scheduled Caste in 2017														
Cases in which Trials were Complete	278													
Cases Disposed of by Courts	280													
Cases Pending Trial at End of the Year	4125													
Conviction Rate	23.7													
Pendency Percentage	93.6													

The data below reflects the Crime rate against the Scheduled Tribes population of India in the year 2017- 2019 along with the status of the cases.⁵⁰⁵ The data suggests that the rate of conviction and the pendency of cases is quite considerable,⁵⁰⁶ here again, the bulk of crimes of atrocity remain relatively underreported.

CRIMES COMMITTED AGAINST SCHEDULED TRIBES UNDER POA

Y E A R	Data on the Crimes Committed against Scheduled Tribes Under the Prevention of Atrocity Act, 1989													
	2017	7125												
	2018	6528												
	2019	8257												
	Rate of Total Crime against SCs (2019)	7.9%												
<table border="1"> <tr> <th colspan="2">Data on Crimes Against Scheduled Tribes in 2017</th> </tr> <tr> <td>Cases in which Trials were Complete</td> <td>39</td> </tr> <tr> <td>Cases Disposed of by Courts</td> <td>40</td> </tr> <tr> <td>Cases Pending Trial at End of the Year</td> <td>569</td> </tr> <tr> <td>Conviction Rate</td> <td>28.2</td> </tr> <tr> <td>Pendency Percentage</td> <td>93.4</td> </tr> </table>			Data on Crimes Against Scheduled Tribes in 2017		Cases in which Trials were Complete	39	Cases Disposed of by Courts	40	Cases Pending Trial at End of the Year	569	Conviction Rate	28.2	Pendency Percentage	93.4
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⁵⁰⁵ Crime/Atrocities against Scheduled Tribes (State/UT-wise) – 2017-2019 National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207D.2-done.pdf

⁵⁰⁶ Court Disposal of Crime/Atrocities against STs Cases (Crime Head-wise) (2019), National Crime Records Bureau, Government of India, Ministry of Home Affairs, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207C.1_2.pdf

HATE CRIMES AGAINST SCHEDULED CASTE: EXAMPLES

Mentioned below are a few incidents centred on caste-based hate and attempts to develop an understanding of the extent and gravity of caste-based hate, bias and related criminality in the country. Such incidents also reflect the need for adequate legal measures and better policy implementation. Although the cited incidents do not mention the term hate crimes at any instance, they qualify as such, as these crimes are directly targeted based on the victims' group membership (lower-caste group in this case).

Chanduru Massacre (1991)

Geographically Chanduru is a village located in the Tenali district of Andhra Pradesh; the members of the Chanduru village are conservative and traditional in their social approach and, to date, practice untouchability. The members of the Dalit community in the village number slightly less than half of the village population. The incident known as the Chanduru massacre had its roots in the disagreement between a young postgraduate Dalit individual and an upper caste individual at a cinema theatre,⁵⁰⁷ which resulted in the incident that took place in August 1991, when a few police officials informed the Dalit community members that they were about to be attacked by the members of the higher caste and suggested that the Dalit members must leave their houses and move towards the canal to arrange for an escape.⁵⁰⁸ With fear for life, the Dalit members acted accordingly and found gangs waiting for them with knives, spears and axes at one end of the canal. Their bodies were put in gunny bags, tied to rocks and stones, and thrown down the water stream. Some others who attempted an escape were killed in the surrounding areas. Later in the week, the gunny bags were found floating with a total of eleven bodies.⁵⁰⁹

Further on, while the Dalit members were negotiating a burial place for the victim bodies (as by practice Dalit members would not be permitted to cremate bodies in the village, as such would be polluting for the high caste group members), a number of haystacks were burned by

⁵⁰⁷ Myers, S, and Radhakrishna, V, (2018) Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and the United States, Penguin Random House.

⁵⁰⁸ Upper Caste Violence: Study of Chunduru Carnage, (1991) Economic and Political Weekly, Vol. 26, 2079-2084

⁵⁰⁹ K. Balagopal, (1991) Post-Chundur and Other Chundurs, Economic and Political Weekly, Vol. 26, 2399-2401

the landlords (the upper caste members), implying that the bodies must not be buried in the village (again due to the victims' membership of the lower caste). This incident is a good example of retaliation.⁵¹⁰ Although in several similar caste-based instances in the same region, the victim group members had never been able to retaliate, they helplessly cremated the victims in a different location to avoid any further confrontations with the higher caste group members (such as the Karanchedu Killings, Neerukonda and Padirikuppam incidents)⁵¹¹ and also moved their residence to a different village, however in the Chanduru incident the victim group took a retaliatory approach while going through an emotional rage, the Dalit members set on fire more haystacks and burnt down a thatched roof. Some looting also took place in the process.⁵¹² The Dalit group members also cremated the victims' bodies in their village and did not move their homes.⁵¹³

In 2007, the Special Court under the Indian Penal Code⁵¹⁴ (34, 148, 302) and Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (discussed later in this chapter) of 219 accused, convicted 50 persons and found 21 guilty of murder and were sentenced for lifetime imprisonment while 35 were sentenced for one-year⁵¹⁵ (33 accused died during the pendency of the case). This was the first significant case from the region (which is prone to caste-based hate crimes) brought under the preview of POA.⁵¹⁶ The Special Court was set up

⁵¹⁰ Upper Caste Violence: Study of Chundurur Carnage, (1991) Economic and Political Weekly, Vol. 26, No. 36, pp. 2079-2084, https://www.jstor.org/stable/pdf/41626971.pdf?refreqid=excelsior%3Adb7f63fc58ee83059e94755a6462e0b0&ab_segments=&origin=&acceptTC=1

⁵¹¹ Breg D. E, (2020) *The Karanchedu Killings and the Struggle to Uncover Untouchability, Dynamics of Caste and Law: Dalit, Oppression and Constitutional Democracy in India*, Cambridge University Press, 103-106; Myers. S, Radhakrishna. V, (2018) *Hate Crimes, Crimes of Atrocity, and Affirmative Action in India and the United States* Penguin Random House

⁵¹² Upper Caste Violence: Study of Chundurur Carnage, (1991) Economic and Political Weekly, Vol. 26, 2079-2084

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⁵¹⁴ The Indian Penal Code, Section 34 - Acts done by several persons in furtherance of common intention. — When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone; Section 148 - Rioting, armed with deadly weapon.—Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; Section 302 - Punishment for murder.—Whoever commits murder shall be punished with death or 1 [imprisonment for life], and shall also be liable to fine.

⁵¹⁵ The Indian Penal Code, Section 201 - Causing disappearance of evidence of offence, or giving false information to screen offender

⁵¹⁶ Chidipudi Srinivasa Reddy and Others vs The State Of Andhra Pradesh, 2014, Andhra Pradesh High Court, <https://indiankanon.org/doc/141302760/>

in the village showing sensitivity towards the victim group (as was desired by the victim group members).⁵¹⁷

The State filed a criminal appeal to the Andhra Pradesh High Court for enhancement of punishment of the accused, appeals were also filed by the defendants for acquittal. Although the position of the victim group seemed strong, in the 2014 judgement, the High Court acquitted all accused on grounds of the victims' failure to exactly specify the time and location of the incident. The identity of the perpetrators was brought into question. The delay on the part of the victim group in reporting the incident to the police was also raised.⁵¹⁸

Kambalapalli Incident (2000)

Kambalapalli has approximately 40% Dalit inhabitants. The region is prone to Dalit atrocities and caste-based conflicts.⁵¹⁹ In the year 2000, aggravated hostilities were noted during a Hindu festival, in the following days, the Dalit group members stabbed and killed a waterman belonging to the dominant caste group (it was in retaliation to a previous Dalit atrocity committed by the dominant caste group). The news spread and the victim group members (dominant caste group) planned to retaliate inhibiting the police officials to disappear due to fear of a violent attack. The dominant caste group members doused kerosene on two Dalit houses (which the attackers believed to belong to those who killed the waterman) and bolted the doors from the outside, setting the houses ablaze, and killing seven.⁵²⁰

This incident is different and unlike in most cases where the upper caste groups target and victimize the lower caste group members, here the issue is that of the dominant caste group (dominant in the local area) and the lower caste group. The position of the upper caste group is taken up by the dominant caste group (in the absence of upper caste members in the region). The Kambalapalli case is significant in the sense that it reflects the changing dynamics of caste

⁵¹⁷ Kannabiran. K, (2007) Chanduru on the Road to Justice, Economic and Political Weekly, Volume 42, Issue 39, <https://www.epw.in/journal/2007/39/commentary/chunduru-road-justice.html>

⁵¹⁸ Chidipudi Srinivasa Reddy and Others vs The State Of Andhra Pradesh, 2014, Andhra Pradesh High Court, <https://indiankanoon.org/doc/141302760/>

⁵¹⁹ Burnt Lives, Burning Issues, (2000) The Kambalapally Carnage Report, People's Democratic Forum, Bangalore

⁵²⁰ Assadi. M and Rajendran. S, (1993) Changing Shape of Caste Conflict, Economic and Political Weekly, Vol. 35, 1610-1612

conflicts at a different structural level.⁵²¹ It also echoes the hierarchy creation and power relations within a caste group (subgroup creating vertical splits within a caste group), in this case, there were Dalit group members, who did not belong to the same subcaste group as those involved in the incident and remained completely indifferent to the incident.⁵²²

The accused were charged under IPC⁵²³, and POA under 3(2)(v) and (xv), however, the Trial Court in the absence of incremental evidence acquitted all the accused. Two appeals were placed questioning the Trial Court Judgment, here again at the Karnataka High Court, although the Court acknowledged the presence of caste-based hostility in the region, the appeals were dismissed on grounds of lack of sufficient evidence.⁵²⁴

The above-mentioned cases portray only a glimpse of how caste-based crimes take place in Indian societies. Such hate crimes occur in all 29 States and victimise many individuals belonging to the Scheduled Caste and Scheduled tribe category. It is also pertinent that the rate of conviction in such cases is very low, and the accused can avoid sentencing on grounds of either lack of evidence, or if not substantive, procedural grounds. Several times the social position of the lower caste group members does not permit them to take strong grounds in the proceedings⁵²⁵ while the accused from a higher caste group, with their power and influence can taint witnesses, bribe officials or threaten the lower caste community members to opt-out of legal proceedings. It also reflects on the laxness of the existing Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, which although aims to specifically protect and safeguard the SC, ST and OBC member groups, seems toothless and inapt in most situations.

⁵²¹ Nair, J, (1993) Badanavalu Killings: Signs for the Dalit Movement of Karnataka, EPW, Vol 28, No 19 p. 912-913

⁵²² Burnt Lives, Burning Issues, (2000) The Kambalapally Carnage Report, People's Democratic Forum, Bangalore; State by Kencharlahalli vs N Narasimhappa, 2014 HC Karnataka, Division Bench, <https://indiankanoon.org/doc/84125491/>

⁵²³ The Indian Penal Code, Sections 143, 147, 148, 324, 326, 353, 436, 427, 302, 307, 149

⁵²⁴ Kencharlahalli vs N Narasimhappa, 2014 HC Karnataka, Division Bench <https://indiankanoon.org/doc/84125491/>

⁵²⁵ Bhatt, M, (2018) The Case for Collecting Hate Crime Data in India, Law and Policy Brief, Vol IV (9); Pande, R, (2003) Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory And Evidence from India, 93 American Economic Review; Prathvi Raj Chauhan vs Union of India, 2020 SCC SC 159; National Human Rights Commission, Report on Prevention of Atrocities Against SCs, New Delhi (2002) 113-114; Report Card, 20 Years Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act; Shah, N and Ganguly, M, (2009) Broken System: Dysfunction, Abuse, and Impunity in the Indian Police, Human Rights Watch, 75-77.

SCHEDULED CASTE AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT (Act 33 of 1989)

The Prevention of Atrocities Act, of 1989 envisages the implementation of the notion of intervention by the State to make necessary provisions to prevent and provide justice in cases of ‘atrocities’ committed against members of lower castes. This part of the chapter details the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, to develop an understanding of the term ‘atrocities’ under the legislation corresponding to hate crimes. The crimes motivated by hate and bias against the members of the lower caste communities in India are referred to as ‘atrocities’ for this Act. The POA may be seen as the only existing piece of federal criminal legislation dedicated to checking hate crimes (atrocities) based on the grounds of caste in India. In his work, Bhatt argues the POA is an acknowledgement that the caste relations in India are defined by violence, both incidental and systemic, which compares to the way Perry argues the role of hate-oriented incidents that assist in maintaining as well as establishing social power.⁵²⁶

The Indian Constitution under Articles 15 (5), 16 (1) and (2) guarantees equal opportunities with a view to uplift and protect specific communities in different spheres, while Articles 16 (3), (4), (4A) and (4B) ensures the scope for the formulation of any laws necessary for strengthening the provisions against discrimination on different grounds stating that ‘*the State can make any provision for reservation in matters of promotion to any class or classes of posts... in favour of the Scheduled Castes or Scheduled Tribes*’. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is based on this principle. The Untouchability Act of 1955 was incorporated under Article 17, read with Article 35(a)(ii) and made the practice of untouchability a cognizable offence. However, the law had several loopholes. It was ambiguous and not comprehensive (concerning private property and the right to the enjoyment of such property). The offences under the Act were solely based on ‘untouchability’ and disregarded other significant atrocities committed against different lower caste communities. The Supreme Court played a significant role in interpreting the law. It stated that the ‘monstrous practice of untouchability, for centuries had dehumanised the

⁵²⁶ Viswanath, R, (2021) Hate Crimes Against Minorities in India, Locating the Value of an International Criminal Law Discourse? *Journal of International Criminal Justice* 19, 611–642

Scheduled Castes’ and that the Act (the POA) was in pursuance to bring one-fifth of the Indian population in line with the mainstream population.⁵²⁷

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was introduced in 1989 not only to bridge the gaps under the Untouchability Act and Protection of Civil Rights Act but was set with the intent to put a check on the commission of atrocities against the Scheduled Castes and the Scheduled Tribes, and to make provisions for the establishment of ‘special Courts’ and ‘Exclusive Special Courts’.⁵²⁸ The Act also includes provisions for victim relief and rehabilitation.

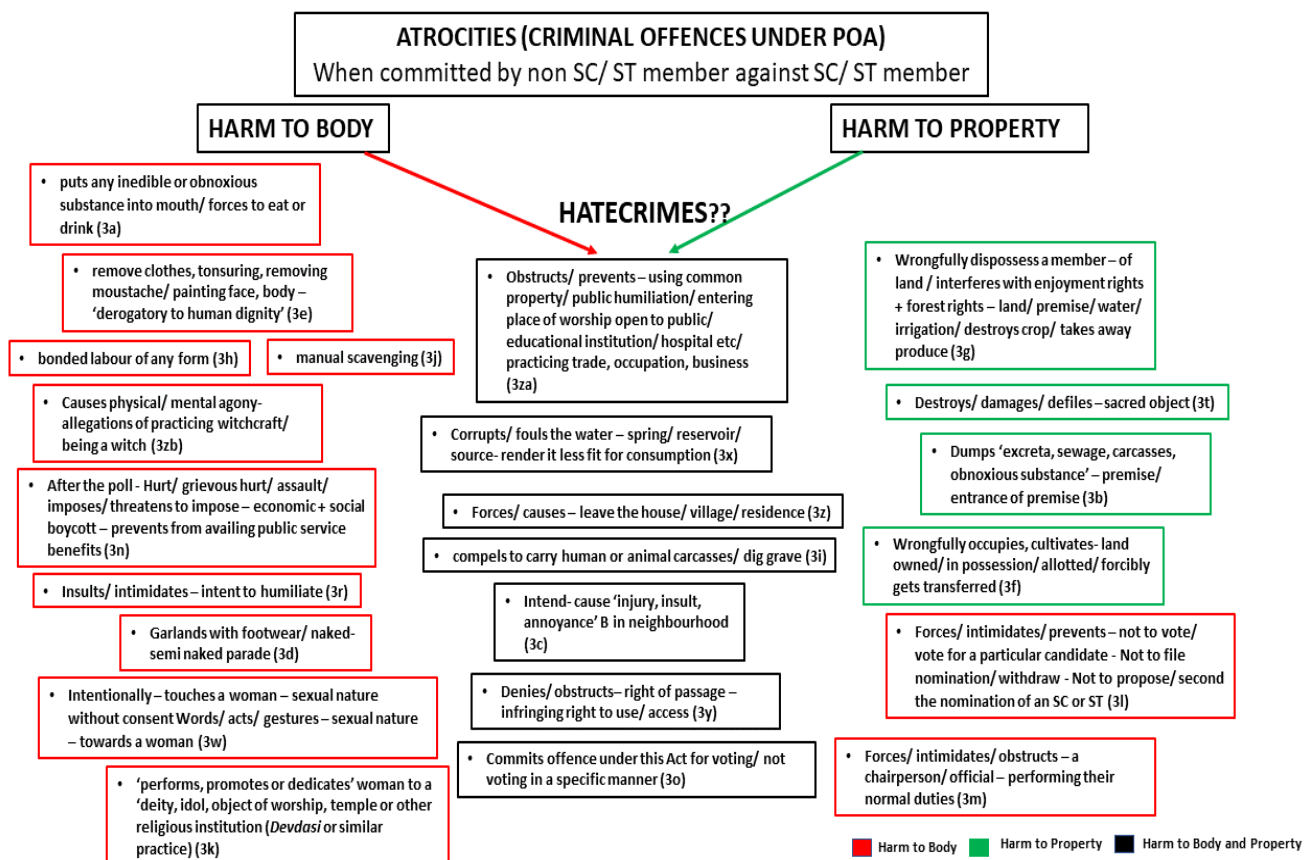
The chart below contains all criminal offences under Section 2 of the POA, categorized as offences to the body, property, and body property. Most of the offences under the Act relate to insulting and humiliating (such as tonsuring, removing clothes and parading in public,⁵²⁹ feeding inedible substances etc.) the lower caste members and focusing on using force and intimidation. The Act is only applicable in cases where non-SC/ST members commit such offences against the SC/ST members.

⁵²⁷ AIR 1993 SC 1126 p 1129-30

⁵²⁸ The Prevention of Atrocities (Scheduled Castes and Scheduled Tribes), Act 1989

⁵²⁹ Sangita Vilas Ingle vs State of Maharashtra & Others, AIR 2017 SC 1423

CLASSIFICATION OF HATE CRIMES UNDER THE POA, 1989



The above chart has been created using the atrocities listed under the Prevention of Atrocities Act 1989. I have attempted to categorise these atrocities as harm to body, harm to property in an attempt to develop a perspective on crimes of atrocities as hate crimes.

Although historically, in a number of societies, criminal conviction and sentencing have been based on the ‘nature of the criminal act’ and not on the impact of such unlawful act on the victims, the ‘victimization’ as defined under POA does not only contain physical bodily harm but includes ‘mental, psychological, emotional and monetary harm and harm to property’.⁵³⁰ Section 15 of the POA obliges the State to protect the victims, witnesses, and dependents,⁵³¹

⁵³⁰ Section 2 (ec) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁵³¹ Section 15, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Special Public Prosecutor and Exclusive Public Prosecutor

while Section 2 (a)⁵³² of the Act is quite comprehensive in defining ‘victim’. Its broad scope does not only include the direct victim but also incorporates their relatives, legal guardians, and legal heirs. Such may be seen as an attempt to comprehensively consider the impacts on the victim’s family, and targeted community groups. This piece of legislation also contains ‘preventive legal measures,⁵³³ where the State deems fit, it may declare any region ‘atrocities prone’ in a case where any non-SC/ ST members are seen frequently visiting a neighbourhood with a majority SC/ ST population suggesting any likelihood of threat or commission of an offence in the area.

It would not be wrong to say that Section 18A⁵³⁴ of the Act offers inherent robustness by denying any provisions of anticipatory bail outweighing Section 438⁵³⁵ of the Criminal Procedure Code. In addition, according to Section 20, the POA, when applied, overrides any other existing law on the matter. Furthermore, under Section 8⁵³⁶ of the Act, the Court presumes the abettor to be the offender unless proven otherwise if such offender knows the victim’s family. The provisions under the POA seem promising and stern, employing adequate legislative means to curb caste-based atrocities (in other words, hate crimes) prevalent in Indian society. However, such strict provisions have been criticized and seen as inconsistent in ensuring justice for the members of other castes that do not avail of protection under the POA. The misuse (in case any SC, or ST group member files a false complaint against those unprotected under the POA, such higher caste members carry the burden to prove their innocence, with no provisions of bail leading to misuse of the law) of the POA has been brought

⁵³² Section 2 (ec), The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Victim - ... who has suffered or experienced physical, mental, psychological, emotional or monetary harm or harm to his property as a result of the commission of any offence under this Act and includes his relatives, legal guardian and legal heirs.

⁵³³ Section 17, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), 1989

⁵³⁴ (a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or (b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act, or the Code shall apply. (2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court

⁵³⁵ Section 438, the Indian Criminal Procedure Code, 1973 - Direction for grant of bail to person apprehending arrest.

⁵³⁶ Section 8, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Presumption as to offences.—In a prosecution for an offence under this Chapter, if it is proved that— (a) the accused rendered 1 [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence; (b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object; 2 [(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]

to light in judicial pronouncements. However, the Courts have upheld the sternness of the law stating that the harm that has already been done to the lower caste communities within the country is tough to repair, and any lax provisions under POA would simply enable the perpetual commission of crimes of atrocities against the members of the Scheduled Castes and Scheduled Tribes.

In the 2018 case of *Subhash Kashinath Mahajan v State of Maharashtra*,⁵³⁷ the provision under Section 18 of the POA was under examination, basing the arguments on the right to freedom of expression (Article 19), contending that the alleged offender may not be presumed guilty solely for the reason of not belonging to the SC/ ST community and that such is ultra-virus and unconstitutional and would lead to misuse of the law. Justice AK Goel and Justice UU Lalit approved the view. Based on the same, the Gujarat High Court, in the case of *Pankaj D Suthar v the state of Gujarat, 1992* and *N. T. Desai v the State of Gujarat*⁵³⁸ 1997, held that the accused is innocent and must be protected from abuse originating from the process of law, unless and until proven guilty beyond a reasonable doubt.⁵³⁹ The judgment attracted protests by the relevant authorities and the non-state actors striving for the rights of the SC/ ST marginalized communities. However, this judgement relaxed the procedural aspect of the law and accordingly obligated some initial investigation before filing the complaint, allowed anticipatory bail, and introduced the requirement of a permit from higher officials in cases of arrest of any public servant under the POA. In 2019, acting on the review petition, the Supreme Court called off the previous ruling and upheld the validity of Section 18A of the POA.⁵⁴⁰

In a more recent significant case,⁵⁴¹ the Supreme Court clarified its approach regarding Section 18 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, elaborating on the provision of no anticipatory bail for the accused in the cases where the alleged crime has been committed by a non- SC/ ST member against an SC/ ST member. The Court was clear in its judgement in stating that the members of SC/ ST communities “...are still making the struggle for equality” and face discrimination in various parts of the country. The centuries-old discrimination is still pertinent, and the SC/ ST members undergo

⁵³⁷ *Subhash Kashinath Mahajan v State of Maharashtra*, AIR 2018 SC 1498

⁵³⁸ *Pankaj D Suthar v. State of Gujarat*, (1992)1 GLR 405; *N. T. Desai v. State of Gujarat*, (1997) 2 GLR 942

⁵³⁹ *N. T. Desai v. State of Gujarat*, (1997) 2 GLR 942

⁵⁴⁰ *Subhash Kashinath Mahajan v State of Maharashtra*, AIR 2018 SC 1498

⁵⁴¹ *Prathvi Raj Chauhan vs Union of India*, 2020 SCC SC 159

humiliation and violent abuse. Emphasizing Article 21, Right to life, the Court referred to the quality of life that needs to be free from abuse and humiliation. In an attempt to reinstate that life with human dignity⁵⁴² is of the essence under Article 21, the Court took the view that it must not be presumed that the protection under Section 18 of the Act is being misused.

Furthermore, it clarified that the SC/ ST community members are unable to muster the courage to report their cases to the authorities. Therefore, the chances of writing a false case against the non-SC/ ST are far from the truth, notwithstanding very few cases. The Court also acknowledged the lacunas in the procedural filing of the report and investigation. However, it was reluctant to alter or dismiss Section 18A of the law, which would render it ‘toothless.’ With the intent to protect and safeguard the targeted community, it held Section 18A valid and in line with the constitutional freedoms.⁵⁴³

Another significant concern with the POA is that the police are less instrumental in playing their part and several times write off cases filed by the SC/ ST as false, which also results in slowing down the prosecution and Court proceedings.⁵⁴⁴ The police officials do not adequately apply penal provisions under the POA and repeatedly register caste-related crimes under less strict legal provisions.⁵⁴⁵ As Jauregui argues that the police in the Indian State of Uttar Pradesh mobilize and manipulate to meet the needs of systemic limitations.⁵⁴⁶ Moreover, most victims belong to marginalized groups. They tend to have the worst relations with the officials and therefore are more likely not to report hate crimes, considering a genuine fear of any animosity by the police.⁵⁴⁷

⁵⁴² Umesh Kumar v. State of Andhra Pradesh, (2013) 10 SCC 591; Subramanian Swamy v. Union of India, (2016) 7 SCC 221

⁵⁴³ Prathvi Raj Chauhan vs Union of India, 2020 SCC SC 159

⁵⁴⁴ S. Khora, (2014) Final Reports under Sec-498A and the SC/ST Atrocities Act, 49 Economic and Political Weekly 17–20; Hitesh Verma v. State of Uttarakhand, CrI. App. No. 707 of 2020 Supreme Court of India; Viswanath, R, (2021) Hate Crimes Against Minorities in India, Locating the Value of an International Criminal Law Discourse? Journal of International Criminal Justice 19, 611–642

⁵⁴⁵ National Human Rights Commission, Report on Prevention of Atrocities Against SCs, New Delhi (2002) 113-114; Report Card, 20 Years Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act; Shah. N and Ganguly. M, (2009) Broken System: Dysfunction, Abuse, and Impunity in the Indian Police, Human Rights Watch, 45.

⁵⁴⁶ Jauregui. B, (2016) Provisional Authority: Police, Order, and Security in India, University of Chicago Press, 64 -71; Bhat. M, Bajaj. V, Kumar. S, (2020), The Crime Vanishes: Mob Lynching, Hate Crime, and Police Discretion in India, Jindal Global Law Review 11(1) 33–59

⁵⁴⁷ Bhatt. M, (2018) The Case for Collecting Hate Crime Data in India, Law and Policy Brief, Vol IV (9)

CONCLUSION

When scrutinised, the criminal acts covered under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, qualify as hate crimes. Most criminal offences under the POA are based on intentional hateful insults and harm to the members of targeted communities. These offences intend to send a clear message to the targeted community regarding the perpetrators' bias and prejudice against them. The crimes listed under the POA have a 'ripple effect' of victimization. They affect the individual victim, intimidate the proximate community members, and have a lasting impact on society. The POA is the only existing criminal legislation at the Federal level that deals with hate crimes based on the grounds of caste. The Indian caste hierarchy and its negative consequences have long been a part of Indian history. They have done much damage to the Indian social fabric, intimidating hate, bias and prejudice from time to time. In this context, The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is brought to use from time to time, however, on several occasions, it has not not been fully effective in dispensing justice, mostly due to lack of effective implementation, in terms of political dynamics in play, police investigation, the pendency of the case, non-reporting. The POA, however, has been much appreciated as an initial legal check against ongoing atrocities. Yet, it is far from comprehensive hate crime legislation in a more holistic view.

The allotment of the social identity that has been based on the caste system for centuries in India requires more than simple legislative tools to combat such a significant concern. The offences committed against the lower castes' members need not be considered merely a crime (for, say, a murder or an assault). they must be understood as a crime against the targeted group simply due to their identity associated with their caste membership. Therefore, more effort is required, and the problem needs to be looked at from a perspective of 'hate and bias being the issue's focus.

PART II

HATE CRIMES BASED ON RACE

INTRODUCTION

This part of the chapter discusses the notion of hate crimes based on race in the Indian context. Primarily it attempts to discover the concept of race as understood by the Indian citizens and the Indian government. Principally, this section discourses on the Northeast Indian population who become the primary targets of racist hate crimes. This section covers varied themes of nationalist Indianism, cultural differences, complexities of caste and race dynamics in a manner suggesting that although race-based hate crimes are prevalent in India, they are quite invisible and buried under different narratives. This section of the chapter also seeks to look into the origin of racism within the country considering the influence of the caste system, long-term militarization of the North Eastern region and colonial influences. The inappropriateness of inclusion of different Indian Tribes (indigenous people) under the Scheduled Tribes classification of the POA (in the absence of a target-based legislative approach) is also discussed. It is interesting to note that the Tribes from Northeast India become targets of racial crimes, however, are protected under a law aimed at providing justice in caste-based crimes, while sometimes their victimization is intersectional and falls somewhere between the grounds of race and caste, making it cumbersome to legally derive justice in such cases. An additional segment, in the end, discusses the correlation between food cultures and hate crimes.

UNDERSTANDING RACE IN INDIA

Race may be seen as a social construct which maintains its continuum, is replicated and undergoes transformation by crossing paths with the prevalent ideologies, existent institutional provisions and expansive developments.⁵⁴⁸ It is significant to note that the notion of racism

⁵⁴⁸ Li, quoted in Z. Baber, “Race”, Religion and Riots: The “Racialization” of Communal Identity and Conflict in India’, in *Sociology*, Vol. 38, no. 4 (2004), p. 712.

within India has been overshadowed by the racist experiences faced by Indians during colonial history. As Chakraborty⁵⁴⁹ states, racism is understood as “*something that white people do to us.*” Also, Indians understand racism as something that exists in other nation-states.⁵⁵⁰ In terms of race, a more generalized definition of ‘Indian’ or for that matter, a Hindu majoritarian state seems to include only the Aryan and Dravidian biological races and often attempts to overlook members of any other racial groups residing in India, such as the Mongoloid groups (Northeast Indian population).⁵⁵¹ Such an outlook and perspective is quite problematic as it leads to the invisibility of hate crimes based on race in India

The Northeast Indian population is understood by the rest of the Country to belong from a distant land. The ethnographic and historical work done during the colonial ages represented East Indians as immigrants from Southeast Asia, developing a contrast in the Indian discourse which sees only Aryan and Dravidian races to be Indian, thereby configuring the Northeast Indian population as the ‘other Mongoloid’.⁵⁵² The tribes in the East of India had their own colonial struggles, other than those faced by the rest of the country (led by the Indian National Congress who were seen as the rightful representatives of India), creating a political rift between the East and the rest of India. The same was facilitated by colonial rule which had a separate administrative division for Eastern India.⁵⁵³

Another significant aspect of the northeast Indian population seen as ‘less Indian’ when compared to the rest of the Indian population might have some roots in the fact that the eight Indian States that form Northeast India are not majorly Hindu majoritarian States. Such as the States of Arunachal Pradesh and Nagaland comprise the majorly of the Christian population. Therefore, although they are categorized as Scheduled tribes, yet are not on the same footing as the tribes from central India (they have been less influenced by Hinduism),⁵⁵⁴ which is all the more reason for them to be seen as different or ‘less Indian’ or ‘the other’. To sum it up,

⁵⁴⁹ Chakrabarty. D, ‘Modernity and Ethnicity in India’, in South Asia: Journal of South Asian Studies, 1994 Vol. XVII, Special Issue p. 145.

⁵⁵⁰ Kikon. D, (2022) Dirty food: racism and casteism in India, Ethnic and Racial Studies, VOL. 45, NO. 2, 278–297

⁵⁵¹ Samson. K, (2017) North-east and Chinky: Countenances of Racism in India, The Journal of Development Practice, Volume 3

⁵⁵² Baruah. S, (2013) India: The Mongolian Fringe, in Himal South Asian, Vol. 26, no. 1, 82–6.

⁵⁵³ Bora. P (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁵⁴ Sharma. A, (2011) Empire’s Garden: Assam and the Making of India, Durham, NC: Duke University Press; JoWeaver. L, (2022), The Laboratory of Scientific Racism: India and the Origins of Anthropology, Annual Review of Anthropology, 67-83

the Northeast Indian population falls in the intersectional ambit of intentional targeting, which is primarily based on, but not limited to racism, and includes caste and sometimes religious criteria.

THE INDIAN NORTH-EAST AND THE COLONIAL INFLUENCE

The work by Verghese and Teitelbaum suggests that the British rulers exacerbated the land inequality by granting land rights to the landlords and taking control over the forest lands that were the primary means of sustenance for the tribal communities.⁵⁵⁵ In the same light, the North-eastern Indian region was administered separately allowing the least interaction with the rest of the country. In 1873, the British introduced the Inner Line Regulation⁵⁵⁶ that dealt primarily with forming stricter commercial regulations on activities in the Eastern region and checking the regulation of ownership of property and land, attempting to encroach on the tea-growing estates in the region.⁵⁵⁷ The same was intended to create a secluded East to extract and exploit regional resources.⁵⁵⁸ It was aimed at weakening the Indian freedom struggle, by keeping the tribal population isolated, while also promoting the Christian faith with an intent to curb the spread of Hinduism in the region.⁵⁵⁹ The Inner Line Regulation still exists in the East Indian region, however, aims at protecting and safeguarding the rights and traditional tribal cultures along with safeguarding the region from economic exploitation.⁵⁶⁰

The colonizers formulated the Criminal Tribes Act, affecting certain tribes with a history of criminal behaviour; the Act penalized each member of specific tribes, although many had never committed any crime. As a result, these tribes were greatly marginalized and stigmatized, restricted from travel and imprisoned if they could not report their movement. As put forward

⁵⁵⁵ Verghese. A and Teitelbaum. E, (2019) Conquest and Conflict: The Colonial Roots of Maoist Violence in India. *Politics & Society*. 47. 55-86.

⁵⁵⁶ J. Zahluna, (2011) Inner Line Regulation and Mizoram, *The Indian Journal of Political Science*, Vol. 72, 221-225

⁵⁵⁷ Chowdhury, J.N. (1989) Two visionaries, Nehru and Elwin, in the context of India's Tribal Policy since Independence, with Special Reference to India's North-East Frontier. In K.S. Singh (Ed.), *Jawaharlal Nehru, Tribes, and Tribal Policy (A Centennial Tribute)*, Calcutta: Anthropological Survey of India, 35.

⁵⁵⁸ Samson. K, (2017) North-East and Chinky: Countenances of Racism in India, *The Journal of Development Practice*, Volume 3 (Annual); Sharma. A, "District Councils in the North- East", *The Indian Journal of Public Administration*, Vol. XLIII, No. 3, 1997, p. 785

⁵⁵⁹ J. Zahluna, (2011) Inner Line Regulation and Mizoram, *The Indian Journal of Political Science*, Vol. 72, 221-225; Sharma. A, (1997) District Councils in the North- East, *The Indian Journal of Public Administration*, Vol. XLIII, No. 3, 785.

⁵⁶⁰ J. Zahluna, (2011) Inner Line Regulation and Mizoram, *The Indian Journal of Political Science*, Vol. 72, 221-225

by the Bombay Depressed Classes and Aboriginal Tribes Committee, a large percentage of members belonging to such tribes were led into criminality as an outcome of the law.⁵⁶¹ The lives of Indian indigenous communities were also affected by replacing the long-practised barter system with the new monetary economic system.⁵⁶²

The ‘Thugs’ who were locally organized guilds committing crimes, were not understood as mere criminal groups but as criminal races i.e., their criminality was thought to be inherent. Although members of Thug groups, belonged to different tribes, castes and religions, they came together due to their commonality in terms of marginalization and poverty.⁵⁶³ Wanger refers to the work of Sleeman (colonial administrator 1788 - 1865) who has misreferred to Muslim group members from the Thug community as followers of specific Hindu Gods.⁵⁶⁴ Such references clarify how the colonizers were adamant to flatten varied religious, cultural and ethnic group identities into distinct classifications of criminal tribes.

Moreover, the idea of criminal tribes is still persistent in the country, even though such 198 tribes carry the ‘denotified tribes’ status. Soon after the Indian independence, the Habitual Offenders Act⁵⁶⁵ came into existence, which yet again required the police officials to keep records of the lifestyles and activities of newly denotified tribes in a way perpetuating the ongoing encroachment on the freedom of the tribe members. The denotified status connotes the freedom for the members of the tribes to no longer require notifying, yet they do carry the ‘denotified tribe’ tag. As a consequence, the caste groups and tribes that were considered to be inherently criminal face a higher level of marginalization and are more prone to hate crimes in comparison to the other disadvantaged group.⁵⁶⁶

⁵⁶¹ Thakkar. A. V, (1949) A member of the Bombay Depressed Classes and Aboriginal Tribes Committee

⁵⁶² Hasnain. N, (2007) *Tribal India*, Lucknow: New Royal Book Co., 237.

⁵⁶³ Wagner KA. (2010) Confessions of a skull: Phrenology and Colonial Knowledge in Early Nineteenth-Century India. *History Workshop Journal*. 69(1):27–51

⁵⁶⁴ Wagner KA. (2010) Confessions of a skull: Phrenology and Colonial Knowledge in Early Nineteenth-Century India. *History Workshop Journal*. 69(1):27–51

⁵⁶⁵ the Habitual Offenders Act, 1952

⁵⁶⁶ JoWeaver. L, (2022) The Laboratory of Scientific Racism: India and the Origins of Anthropology, *Annual Review of Anthropology*, 67-83

CURRENT SITUATION

The ‘Narrow Corridor’, also known as the ‘chickens’ neck’ is only 20 km wide at the least and separates the Eastern region from the rest of India, the resident Northeast Indians, when entering mainland India and interacting with the social experience violence, discrimination and racial abuse.⁵⁶⁷

The people from Northeast India make up less than 4% of the Indian population.⁵⁶⁸ This Indian north-eastern region has been secluded from mainstream India for decades. There is a vast diversity in terms of culture, physical appearance, and linguistics among the Northeast Indians. The region comprises primarily three ethnic groups, Indigenous communities (under Scheduled Tribes), communities that share a Tibeto- Burman ethnic lineage and migrant communities from the rest of India. People belonging to these communities and tribes have a different understanding of culture, morality and spirituality⁵⁶⁹ and do not share any “*historical memory of collective consciousness*” with the rest of the country.⁵⁷⁰

Although the people from the Northeast of India are quite diversified and may be vaguely categorized into about 220 different tribes,⁵⁷¹ they are often seen as a collective identity (East Indians). The phrase ‘Northeast Indians’ has been in consistent use since the colonial rule for administrative ease. Additionally, The North-eastern Indian region has been highly militarized since independence, the Armed Force Special Powers Act⁵⁷² of 1958 gave the officials such power to shoot and kill any suspects and also to enter their homes merely on grounds of

⁵⁶⁷ Hazarika, S. (2011) *Strangers of the Mist: Tales of war and peace from India’s Northeast*. New Delhi: Penguin Books; Samson, K. (2017) North-east and Chinky: Countenances of Racism in India, *The Journal of Development Practice*, Volume 3.

⁵⁶⁸ Bhaumik, S. (2009) *Troubled Periphery: Crisis of India’s Northeast*. New Delhi: Sage Publications

⁵⁶⁹ McDuaie-Ra. D. (2012) Beyond The ‘Exclusionary City’: North-East Migrants in Neo-Liberal Delhi, *Urban Studies*, 50.

⁵⁷⁰ Baruah, S. (2007) *Durable Disorder: Understanding the Politics of Northeast India*, New Delhi, Delhi: Oxford University Press, 4-5.

⁵⁷¹ Goswami, N. (2010) India’s Northeast 2020: Four Alternative Futures, IDSA Occasional Paper No. 13. New Delhi: Institute for Defence Studies and Analyses, 9; Kikon, D. (2015) Fermenting Modernity: Putting Akhuni on the Nation’s Table in India, *South Asia: Journal of South Asian Studies*, Vol. 38, no. 2, 320–35.

⁵⁷² The Armed Forces (Special Powers) Act, 1958 (28 of 1958) - An Act to enable certain special powers to be conferred upon members of the armed forces in disturbed areas in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.

suspicion of being militants and insurgents. The use of this piece of legislation has resulted in immense human rights abuse in terms of detention, extra-judicial killings, forced disappearance and sexual violence. Such harassment in the name of law and security for more than a 50-year tenure has resulted in generating feelings of hate, suspicion and discrimination in the minds of Indians against the East Indian population.⁵⁷³

As the Indian economy liberalized, a large population from the East of India began migrating to the major Indian cities in search of better education and job opportunities between 1990 and 2000. There has been a ‘twelve-fold’ increase in the migration of northeast Indians to major cities between 2005 to 2011. Approximately half a million North Eastern individuals reside in the rest of India.⁵⁷⁴ They do not receive equal treatment and are subjected to harassment, hate speech and hate crimes from time to time. The study conducted by the National Human Rights Commission (NHRC) found that 54% of Northeast Indians did not find the capital New Delhi as a safe place and was quite low on ethnic tolerance.⁵⁷⁵ The social assumptions regarding the East Indian community members in the rest of India consider East Indian women to be oriental and sexually promiscuous while men are mostly seen as drug peddlers and addicts.⁵⁷⁶ Regular incidents of sexual assault, stripping and racial crimes are reported.⁵⁷⁷

There is an ongoing debate on the high levels of racism against the northeast Indians.⁵⁷⁸ Their harassment is in most cases based on their physical attributes, culture and life patterns.⁵⁷⁹ The concerns are unique as they relate to race, unlike caste, class and religion in India. However, it was until recently that the idea of racism within Indian territory was denied in public by Indian officials.⁵⁸⁰

⁵⁷³ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁷⁴ McDuire-Ra. D, (2012) Beyond The ‘Exclusionary City’: North-East Migrants in Neo-Liberal Delhi, Urban Studies, 50.

⁵⁷⁵ McDuire-Ra. D, (2012) Beyond The ‘Exclusionary City’: North-East Migrants in Neo-Liberal Delhi, Urban Studies

⁵⁷⁶ McDuire-Ra. D, (2012) Beyond The ‘Exclusionary City’: North-East Migrants in Neo-Liberal Delhi, Urban Studies, 50; McDuire-Ra. D, (2012) The “North-East” Map of Delhi, Economic & Political Weekly, Vol. 47, 69–77.

⁵⁷⁷ Kikon/ D, (2022) Dirty food: racism and casteism in India, Ethnic and Racial Studies, Vol. 45, No. 2, 278–297

⁵⁷⁸ McDuire-Ra. D, (2012) Beyond The ‘Exclusionary City’: North-East Migrants in Neo-Liberal Delhi, Urban Studies, 50.

⁵⁷⁹ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁸⁰ McDuire-Ra D, (2015) *Debating Race in Contemporary India*, New York: Palgrave Macmillan

Two prominent cases require a mention, in one Loitam Richard⁵⁸¹ died in a hostel in Bengaluru (2012), leaving the police authorities with different versions of the incident, however, it was later found that Richard was a victim of a targeted attack and endured injuries in a hostel fight which led to his demise. As the protests by the North Eastern community grew, the police authorities were forced to lodge the First Information Report (initially the FIR was filed under Section 174 CrPc, as death was caused under mysterious circumstances and later murder charges on two suspects were brought in under Section 302 IPC) which is yet to be decided over.⁵⁸² The activists involved in the protest highly suspect it to be a case of institutional racism. It also incited fear and insecurity among other north-eastern migrants and as a result around thirty thousand east, Indians fled back to their homes.⁵⁸³ In another case in 2013, in New Delhi, the victim (Reingamphi Awungshi) was sexually assaulted and murdered. She was initially thought to have committed suicide, however, following the protests by the East Indian students that emphasised the visible signs of brutality on her body, the police registered the FIR for sexual assault and murder.⁵⁸⁴ The case is still ongoing. The police made claims that Reingamphi was ‘habituated to sex’, suggesting the promiscuous availability of North-eastern women.⁵⁸⁵ Significantly, in both cases, the police officials were stereotypical in their attitude and lax in filing the FIR.

The Delhi High Court on its own, in 2014 summoned the New Delhi police along with the Ministry of Development of the Northern Eastern Region to respond to the rise in crimes against the East Indian population in the Metro cities.⁵⁸⁶ However the Court choose not to codify the issue as racism, it only consequentialized such incidents as an outcome of a lack of tolerance towards cultural differences. Following the severe hate crime incidents against East Indians, the Bezbaruah committee was set up to inquire into the issue in 2014, which found

⁵⁸¹ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁸² McDuie-Ra, D. (2015). ‘Bangalore: An Inconvenient Truth’: Hate Crime and the Exodus. In: Debating Race in Contemporary India. Palgrave Pivot, London, Chapter 3, 32, https://doi.org/10.1057/9781137538987_2

⁵⁸³ Sailo. L, (2012) The Great Exodus: Violence in Assam and its Aftermath, in ISAS Insights, no. 187, p. 1.

⁵⁸⁴ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁸⁵ McDuie-Ra, D. (2015). ‘Bangalore: An Inconvenient Truth’: Hate Crime and the Exodus. In: Debating Race in Contemporary India. Palgrave Pivot, London, Chapter 3, 32, https://doi.org/10.1057/9781137538987_2; McDuie-Ra. D, (2012) *Northeast Migrants in Delhi: Race, Refuge and Retail*, Amsterdam University Press; Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁸⁶ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

that 88% of Northeast Indians who migrated to New Delhi faced harassment and suffered psychological as well as physical impacts.⁵⁸⁷ The six primary concerns laid down under the committee report include the sense of insecurity and vulnerability, cultural conflict and wrong perceptions, discrimination in daily life, verbal abuse, racist comments and violence, discrimination and harassment in the workplace, and discrimination by and apathy of law enforcement agencies.⁵⁸⁸

This Bezbaruah Committee then put forward ‘drastic recommendations’ to be incorporated within the Indian Penal Code, which was highly appreciated but has yet not been integrated. It strongly recommended amendments to the Indian Penal Code and emphasized making such racial offences cognizable and non-bailable. Although the committee recommended the placement of Fast Track Courts that deal specifically with similar crimes of heinous nature committed against women and children from the Eastern region, here again, the committee merely looked at the issue as based on cultural differences and not one of racism.⁵⁸⁹ The committee made recommendations for the inclusion of racial slurs as a punishable offence under the IPC and stated a need for a legal debate to establish a wider set of laws to cover race-based crimes.⁵⁹⁰ The committee although suggested the concerns around racial slurs and abuse, it was not specific in pinpointing racism as a primary concern (The notion of race and culture may not be used interchangeably, as the race of an individual may not be subjected to change, culture may).⁵⁹¹ The perspective which attempts to substitute cultural differences with race, despite the occurrence of several similar incidents of targeted harassment and crimes, is a difficult concern to resolve.

⁵⁸⁷ Report of the Bezbaruah Committee under the Chairmanship of M.P. Bezbaruah to Look into the Concerns of the People of the Northeast Living in Other Parts of the Country, 2014, p. 7 [<https://mha.gov.in/sites/default/files/ReportOfMPBezbaruahCommittee.PDF>]. Report of the Bezbaruah Committee, p. 13 [http://mha.nic.in/sites/upload_files/mha/files/ReportOfMPBezbaruahCommittee.PDF]

⁵⁸⁸ Report of the Bezbaruah Committee under the Chairmanship of M.P. Bezbaruah to Look into the Concerns of the People of the Northeast Living in Other Parts of the Country, 2014, p. 7 [<https://mha.gov.in/sites/default/files/ReportOfMPBezbaruahCommittee.PDF>]. Report of the Bezbaruah Committee, p. 13 [http://mha.nic.in/sites/upload_files/mha/files/ReportOfMPBezbaruahCommittee.PDF]

⁵⁸⁹ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁹⁰ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁵⁹¹ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

CORRELATION BETWEEN CASTE AND RACE

This section highlights the interconnectedness of the aspects of race and caste. It reflects on how the lack of cohesiveness under the POA, which protects minority targeted groups on grounds of caste, leaves out those who are targeted based on their caste and race simultaneously. The POA, although includes provisions for the protection of ‘Scheduled castes and tribes, however, does not include any provisions for the protection on grounds of race specifically and therefore creates a dilemma in cases where individuals are targeted based on their race or based on their race and caste. The framework of race has been utilized by Dalit scholars who understand casteism as a form of racism.⁵⁹² Xaxa in this context notes that the ‘tribe category’ (Race-based) in India is mostly seen in the light of caste identity and not on its own accord.⁵⁹³ However, when Tribe identity is put together with caste identity, the two tend to form a hierarchical structure, making caste identity more relevant to tribal identity (racial identity).⁵⁹⁴

Nido Tanya, a teenage male from the North-Eastern State of Arunachal Pradesh, got into a conflict with a shopkeeper in New Delhi, as the shopkeeper allegedly mocked Nido for his dyed hairstyle and feminine looks (racial), the three shopkeepers brutalized Nido when police mediated the settlement, however, Nido succumbed to his injuries and died the following night. In this case,⁵⁹⁵ the offenders were primarily charged with murder, which later changed to culpable homicide and was then moved under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.⁵⁹⁶ The Court further dropped the charges on grounds of the prosecution's failure to establish a case of ‘racial slur’.⁵⁹⁷

⁵⁹² Thorat. S and Umakant, (2004) Introduction, in Thorat. S and Umakant (eds), *Caste, Race and Discrimination*, New Delhi: Indian Institute of Dalit Studies, xiii–xxxv.

⁵⁹³ Xaxa. V, (1999) Transformation of Tribes in India: Terms of Discourse, in *Economic & Political Weekly*, Vol. 34, no. 24, 1519–24.

⁵⁹⁴ Skaria. A, (1997) Shades of Wildness: Tribe, Caste, and Gender in Western India, in *Journal of Asian Studies*, Vol. 56, no. 3, 726–45.

⁵⁹⁵ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, *South Asia: Journal of South Asian Studies*, 42:5, 845-860

⁵⁹⁶ Wouters. J and Subba. T. B, (2013) The “Indian Face”, India’s Northeast, and “The Idea of India”, in *Asian Anthropology*, Vol. 12, no. 2, 126–40.

⁵⁹⁷ Bora. P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, *South Asia: Journal of South Asian Studies*, 42:5, 845-860

In 2012, the Ministry of Foreign Affairs passed a directive under the POA penalizing the use of any racial slurs victimizing any persons of North Eastern origin. Yet the implementation of this directive was quite cumbersome in the case of Nido Tania.⁵⁹⁸ The prosecution's case that the victim belonged to an East Indian state with physical features quite prominently distinctive did not hold good. In the same light it has been argued by several scholars that in numerous cases the judges let go of the offenders, on grounds of lack of knowledge regarding the victim's identity on the part of the perpetrator,⁵⁹⁹ and for the same reason many a time, the accused are not charged under the POA in the first place, which highly indicates the inherent failure on the part of the law in understanding the nature of caste dynamics and power relations that encompass caste narratives.

The POA is a reasonable piece of legislation to check and prevent atrocities and hate crimes committed against specific marginalized minority groups in India⁶⁰⁰ however, it is the lack of adequate language under the POA to comprehensively include and articulate victimization based on racial grounds. The POA was formulated to substitute the Untouchability Act and targeted atrocities against specific caste groups,⁶⁰¹ henceforth the POA does not take into account racial crimes and only focuses on atrocities against Scheduled Castes and Scheduled Tribes (and Other Backward Castes).⁶⁰²

Specifically, the Scheduled Tribes have been included within the scope of POA, however, it is not very clear as to their standpoint within the POA framework, as the main focus of the law is towards preventing and penalizing caste-based atrocities, which in no conceptual sense takes into account the aspects of Scheduled tribes which are separate from their caste identity (race-based attributes). Therefore, the POA loses the distinctiveness of the tribe category, Even the Indian Constitution does not provide any criteria or grounds for the categorization of Schedule

⁵⁹⁸ Jelle J.P. Wouters and Subba. T. B, (2013) The "Indian Face", India's Northeast, and "The Idea of India", in *Asian Anthropology*, Vol. 12, no. 2, 126–40.

⁵⁹⁹ Irudayam. A., Mangubhai . J and Lee. J (2014) *Dalit Women Speak Out: Caste, Class and Gender Violence in India*, New Delhi: Zubaan.

⁶⁰⁰ Irudayam. A., Mangubhai . J and Lee. J (2014) *Dalit Women Speak Out: Caste, Class and Gender Violence in India*, New Delhi: Zubaan.

⁶⁰¹ Bora. P, (2019) *The Problem Without a Name: Comments on Cultural Difference (Racism) in India*, *South Asia: Journal of South Asian Studies*, 42:5, 845-860

⁶⁰² Rao. A, (2009) *Legislating Caste Atrocity, The Caste Question*, New Delhi: Permanent Black, 163–81; Bora. P, (2019) *The Problem Without a Name: Comments on Cultural Difference (Racism) in India*, *South Asia: Journal of South Asian Studies*, 42:5, 845-860

Tribes, suggesting that the Scheduled Tribe category is only an administrative entity and does not cover the aspects of the race.⁶⁰³

This gap in knowledge and the law leaves out Indian citizens as those belonging to the Northeast. This minority tribal group is protected under the legislation, that deals specifically with caste-based hate crimes and atrocities. It is questionable as to how protective is such law for those whose identity has more to do with their race and less with their caste, notwithstanding they face the culminative targeting that arises from the intersectionality of casteism and racism. especially given that India, time and again, in the international arena as well as through judicial precedents, has been negating the presence of racism in the country, while the cases of race-based crimes against the Northeast Indian population have considerably risen. It is significant that India acknowledges its racist narratives and abstains from wrapping racism in cloaks knitted with cultural differences and a lack of tolerance.

RACISM, CASTISM AND EMBEDDED FOOD CULTURES

This section of the chapter on food cultures shines light upon often less discussed concerns however has a direct correlation to minority targeting. It brings out a more symptomatic concern that may generally be discussed as social ‘likes and dislikes or preferences but implies deep social hostile attitudes in mild forms leading to social hate and targeting. It also reflects on how the hate crimes laws must be dynamic and broad in their scope such that they have the capacity to modify and upgrade from time to time in order to comprehensively include newer aspects that originate as an outcome of social shift and transformation.

In his, work Guru⁶⁰⁴ states that food has a significant role to play in establishing cultural identities, especially in terms of asserting the superiority of cultures. It is the Hindu Societal organization that may be seen as responsible for solidifying the notion of purity in terms of

⁶⁰³ Bora, P, (2019) The Problem Without a Name: Comments on Cultural Difference (Racism) in India, South Asia: Journal of South Asian Studies, 42:5, 845-860

⁶⁰⁴ Guru, G., (2019) Food as a Metaphor for Cultural Hierarchies, In Knowledges Born in the Struggle: Constructing the Epistemologies of the Global South, edited by B. de S. Santos, and M. P. Meneses, London: Routledge, 146–161.

food.⁶⁰⁵ In simplistic terms, the line is drawn between vegetarianism as a part of upper-caste Hindu food cultures and non-vegetarian food cultures corresponding to the lower caste groups.⁶⁰⁶

One of the significant roles that have been played by the Brahmin caste collectively is defining the boundaries of dirty and clean, pure and impure.⁶⁰⁷ Such Brahminical food culture exists in cultural and civic contexts and directly corresponds to emotional, social, and spiritual narratives throughout the country, however such manifestation of purity and impurity around food cultures, as Appadurai,⁶⁰⁸ suggests are only for the benefit of the upper caste in terms of maintaining their supremacy within the social hierarchical structures. For example, there are numerous housing societies and apartment buildings which are exclusively owned by upper caste members who follow, 'pure vegetarian dietary practices.'⁶⁰⁹

In metro cities such as New Delhi, several times the landlords wouldn't lease their property or even evict tenants, solely on grounds of their food consumption practices.⁶¹⁰ Such also highlights the plight of the lower caste and tribal individuals, symbolically connoting the anecdotes on how the Dalits were coerced to consume leftovers of the upper caste Hindus.⁶¹¹ Kikon⁶¹² in her work mentions Uppuleti's testimonial work stating how roasted termites, are one such delicacy from her native place (Northeast India), however, it remains invisible, as the idea of food delicacy derives its legitimacy only from the upper caste food cultures.

⁶⁰⁵ Ambedkar, B. R., (2016) Babasaheb Ambedkar: Writings and Speeches – Volume 5. Mumbai: The Education Department, Government of Maharashtra, 142

⁶⁰⁶ Kikon. D, (2022) Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

⁶⁰⁷ Kikon. D, (2022) Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

⁶⁰⁸ Appadurai, A., (1981) Gastro-politics in Hindu South Asia, *American Ethnologist* 8 (3): 494–511.

⁶⁰⁹ Holwitt, P., (2017) Strange Food, Strange Smells: Vegetarianism and Sensorial Citizenship in Mumbai's Redeveloped Enclaves, *Contemporary South Asia* 25 (4), 333–346; Kikon. D, (2022) Dirty food: racism and casteism in India, *Ethnic and Racial Studies*, VOL. 45, NO. 2, 278–297

⁶¹⁰ Kikon. D, (2022) Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

⁶¹¹ Kikon. D, (2022) Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

⁶¹² Kamei, S. (2017) North-East and Chinky: Countenances of Racism in India, *The Journal of Development Practice* 3: 20–28.; Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

The terms 'dirty and tasteless' are used to derogate the food cultures of East Indian societies.⁶¹³ The youth from East India, that has migrated to the major Indian cities face numerous instances where their food is regarded as 'dirty and stinky' and therefore to maintain the majoritarian upper caste status quo in terms of food culture, either restrain themselves from cooking or eating their desired meals in public spaces⁶¹⁴ or as Debbarma states that the food that is considered a delicacy in Northeast India needs to be 'hidden away from public view' in the Indian metro cities.⁶¹⁵

In 2007, a manual was published by the Delhi police authorities that focused on how the 'smelly' food cooked by the Northeast Indians disturbs the peace and order in the society,⁶¹⁶ one of the outstanding pieces of advice for the North Eastern people was to focus on cooking and eating 'smelly food without creating ruckus in neighbourhood'⁶¹⁷ Such caste-oriented food-based cultural stereotypes reinforce the primitive outlook of the Indian minds against the East Indians presuming them to be inferior in terms of race (and caste).

CONCLUSION

The chapter focuses on the aspects of caste and race-based hate crimes. The concept of caste that was once aimed at the distribution of work within societies has with time through foreign rule and invasions, socio-economic factors, colonization and its leftovers in the minds of the Indian population transformed the present-day perspectives, that parallel caste identity in quite crystalized and solidified terms, giving rise to hate based hostilities in different forms all over the country. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was brought in, to provide preventive and remedial measures to curb hate crimes against the minority lower caste groups. It also includes the Indian tribal or indigenous population within its scope, however only in their caste capacity leaving out the significant race factor, which has resulted in partial justice, as a significant proportion of the tribal population also qualifies as

⁶¹³ Kamei, S. (2017) North-East and Chinky: Countenances of Racism in India, *The Journal of Development Practice* 3: 20–28; Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

⁶¹⁴ Debbarma, R. K., (2016) How Not to Fight Discrimination in India: Desire, Difference and the North-East, *Economic & Political Weekly* 51 (26–27): 25–29.

⁶¹⁵ Debbarma, R. K., (2016) How Not to Fight Discrimination in India: Desire, Difference and the North-East, *Economic & Political Weekly* 51 (26–27): 27

⁶¹⁶ Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297

⁶¹⁷ Dirty food: Racism and Casteism in India, *Ethnic and Racial Studies*, Vol. 45, NO. 2, 278–297; Kamei, S. (2017) North-East and Chinky: Countenances of Racism in India, *The Journal of Development Practice* 3: 20–28.

members of lower caste groups. however, are denied justice in cases of race-based crimes, as the law has nothing to offer in that context. The Constitution of India, under Article 15 provides freedom from discrimination based on race, however, there is no existing legislative piece that covers the issue. To add, India on several occasions has negated the existence of racial issues in the country, with the judiciary reinsuring the same via precedents, where the offenders are let go, due to lack of sufficient grounds or evidence. The interplay of lax legal means, and inadequate implementation in terms of weak investigative, procedural and administrative divisions, especially considering the Indian mindset which is to a greater extent still influenced by colonial memory and strenuous adverse historical circumstances, leaves the system ineffective in terms of tackling caste and race-based hate crimes.

CHAPTER 4

LEGISLATIVE APPROACH TO HATE CRIMES IN INDIA, INTERSECTIONALITY AND RESTORATIVE JUSTICE

INTRODUCTION

The justice response to hate crimes lies within the principles of non-discrimination and equality, this chapter primarily focuses on a comprehensive approach required to tackle hate crimes and to assist in shaping hate crime legislation to be considerate of holistic victim experiences. The chapter primarily attempts to define and understand the concept of intersectionality, which is relevant to hate crime concerns as several times hate crimes are an attack on more than one identity trait of the targeted victim. The development of the notion of intersectionality has its origin in the feminist debates in the late 80s and early 90s where African American women were seeking identification as separate categories (referring to a distinct set of experiences based on the intersection of race and gender). Although the initial work on the conceptualization and scope of intersectionality was placed under narratives and laws relating to discrimination, the chapter with the help of recently developed scholarship attempts to engage the intersectionality theory in addressing hate crimes.

This chapter discusses the current single-strand legislative approach in dispensing justice in hate crimes and compares it to the intersectionality approach, presenting available data on intersecting identities such as race and gender, race and sexual orientation in reference to discriminatory crimes and some recent research materials based on hate crimes. The chapter also entails some references relating to discrimination based on disability. It attempts to establish that the hate crime legislative approach that rests on a single-strand method is inadequate in providing remedy and prevention in a complete sense as it moves away from considering the complete victim experiences which are unique in their own way and may not be simply clubbed within a single category.

In the Indian context, an analogy comparable to that presented by Crenshaw (Race and gender), to adequately understand the significance of the intersectionality approach in legislating hate crimes have been put forward. This chapter also accounts for some available data bringing intersectional hate-based crimes into the limelight, highlighting the interplay of different identity grounds embedded within a single hate attack. It also refers to a recent Indian Supreme Court case, that has put forward significant judicial opinions emphasizing the significance of an intersectional approach while legislating crimes based on more than one identity grounds.

The last section of the chapter attempts to locate the best response to hate crimes in legal terms, it discusses the theories of retribution and deterrence in reference to hate crimes along with a few hybrid versions of the theories. It then seeks to analyze the restorative justice approach to hate crimes. This section aims to see if the legislative fluidity engrained within the restorative justice framework functions well with the intersectional approach (in the Indian context while also containing lessons for all hate crime legislation).

PART 1

INTERSECTIONALITY

Intersectionality denies that an identity of the individual may be dissected.⁶¹⁸ Brah and Phoenix, state that intersectionality is a “*complex, irreducible, varied and variable effect which ensure when multiple axes of differentiation – economic, political, cultural, psychic, subjective and experimental – intersects in historically specific contexts.*”⁶¹⁹ This notion breaks the hegemonic patterns in terms of different theoretical and conceptual studies⁶²⁰ and recognizes that different identities can co-exist and intersect within the same individual creating a

⁶¹⁸ Crenshaw, K., (1989) Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies, University of Chicago Legal Forum, Vol. 4; Smith. B, (2016) Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, The Equal Rights Review, Vol. 16 73-102; Conell. C, (2016) Contesting Racialized Discourses of homophobia, Eastern Sociological Society, Vol 31, 599-618

⁶¹⁹ Brah. A, and Phoenix. A. (2004) Ain't I a woman? Revisiting Intersectionality, Journal of International Women's Studies 5 (3): 75-86.

⁶²⁰ Dhamoon. R, (2011) Considerations of Mainstreaming Intersectionality, Political Research Quarterly, 64(1) 230-243

qualitatively distinct set of characteristics and experiences.⁶²¹ It looks at the relational aspects and power dynamics of victims' day-to-day life bringing to light new legal and policy areas, family law, criminal law and immigration issues.⁶²²

Intersectionality in its discriminatory sense connotes “*intersectional oppression that arises out of the combination of various oppressions which together produce something unique and distinct from any one form of discrimination standing alone...*”⁶²³ More recently, Healy states that intersectionality “*involves the concurrent analyses of multiple, intersecting elements of identity, based on the principle that the impact of one form of subordination may differ depending on its combination with other potential sources.*”⁶²⁴

The significance of an intersectional approach may be seen in terms of primarily acknowledging the complex nature of victim experiences and focusing on the societal response at the juncture of the fusion of different identity grounds or character traits of victims. Another relevant development is that the intersectional approach recognizes those forms of discrimination that are subtler, systematic, or institutionalized⁶²⁵ and several times would go unnoticed.

Intersectional discrimination must not be confused with multiple discrimination which is based on two or more grounds that are visible and can be proven independent of each other, while intersectionality refers to the interlocking of different grounds⁶²⁶ in a manner creating a qualitatively distinct form of crime, which given the current legal approach under most legislations remains invisible.⁶²⁷ Smith calls this additive discrimination⁶²⁸ and states that such

⁶²¹ Smith. B, (2016) Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, *The Equal Rights Review*, Vol. 16 73-102

⁶²² Dhamoon. R, (2011) Considerations of Mainstreaming Intersectionality, *Political Research Quarterly*, 64(1) 230-243

⁶²³ Eaton. M, (1994) Patently Confused, Complex Inequality and *Canada v. Mossop*, *Rev. Cons. Studies*. 203, 229.

⁶²⁴ Healy. J, (2019) Thinking Outside the Box: Intersectionality as a Hate Crime Research Framework, *British Criminology Conference*, ISSN 1759-0043; Vol. 19

⁶²⁵ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

⁶²⁶ McCall, L. (2005) ‘The Complexity of Intersectionality’, *Signs* 30(3): 1771–800.

⁶²⁷ Hate Crime Provisions in EU Member States: The Importance of an Intersectional Approach to Ensure Victims’ Rights, (2020) European Network Against Racism.

⁶²⁸ Smith. B, (2016) Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, *The Equal Rights Review*, Vol. 16 73-102

a form of multiple discrimination only has a quantitative effect, unlike intersectional discrimination which is moreover qualitative, creating an altogether new compound subject matter.⁶²⁹ The Indian Supreme Court also clarified that intersectionality does not suggest that grounds of caste, class, religion, disability or sexual orientation are seen as mere ‘add-ons’ to the oppressions faced by women. Intersectionality connotes to consideration of a distinctive set of experiences of a subset of any targeted group (who fall under more than one category).⁶³⁰

The experiences of intersectional crimes are dynamic as the combination of oppression is never experienced uniformly.⁶³¹ Therefore, the judicial approach in intersectional crimes must focus on giving equal place to different identity grounds under study. Hancock pinpoints the diverse categories within specific groups.⁶³² The intersectionality approach investigates the differences within specific categories, which are often overlooked by the current approach.⁶³³

The research conducted by Healy found that victims of hate crimes are several times targeted for multiple identity-based criteria.⁶³⁴ Only a few research have applied intersectionality in hate crimes.⁶³⁵ An intersectional approach to legislating hate crimes aims at unpacking the extent of victim experience taking into account their situational vulnerabilities.⁶³⁶ Donovan, Macdonald, and Clayton⁶³⁷ suggest that using an intersectionality framework in hate crimes would enable

⁶²⁹ Solanke, I., Infusing the Silos in the Equality Act 2010 with Synergy, *Industrial Law Journal*, Vol. 40, 2011, p. 330.

⁶³⁰ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 15

⁶³¹ Macdonald, S, Donovan, C and Clayton, J (2021): ‘I may be Left with no Choice but to End my Torment’: Disability and Intersectionalities of Hate Crime, *Disability & Society*, <https://doi.org/10.1080/09687599.2021.1928480>

⁶³² Hancock (2007). When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm. *Perspectives on Politics* 5 (1): 63-79.

⁶³³ Smith, B, (2016) Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, *The Equal Rights Review*, Vol. 16 73-102

⁶³⁴ Healy, J, (2019) Thinking Outside the Box: Intersectionality as a Hate Crime Research Framework, *British Criminology Conference*, ISSN 1759-0043; Vol. 19

⁶³⁵ Sherry, M. (2013) Feminist reflections on disability hate crime. *Gendered Perspectives on Conflict and Violence*, Part A. *Advances in Gender Research* 18(A), pp.53-66; Balderston, S. (2013) Victimized Again? Intersectionality and Injustice in Disabled Women’s Lives after Hate Crime and Rape. In Texler Segal, M. & Demos, V. eds. *Gendered Perspectives on Conflict and Violence: Part A (Advances in Gender Research, Volume 18A)* Emerald Group Publishing Limited, pp.17 – 51 Barclay; All Party Parliamentary Group on Hate Crime (2019) *How Do We Build Community Cohesion When Hate Crime Is on The Rise?* London: APPG on Hate Crime; McPhail, B. (2002) ‘Gender-bias Hate Crime: A Review’, *Trauma, Violence and Abuse* 3(2): 125–45.

⁶³⁶ Macdonald, S, Donovan, C and Clayton, J (2021): ‘I may be Left with no Choice but to End my Torment’: Disability and Intersectionalities of Hate Crime, *Disability & Society*, <https://doi.org/10.1080/09687599.2021.1928480>

⁶³⁷ Macdonald, S, Donovan, C and Clayton, J (2021): ‘I may be Left with no Choice but to End my Torment’: Disability and Intersectionalities of Hate Crime, *Disability & Society*, <https://doi.org/10.1080/09687599.2021.1928480>

a multi-agency response, which would be more efficient to consider the wholesome needs of the hate crime victims.

Intersectionality may be witnessed in several hate crime cases as the perpetrator mostly targets the victim based on multiple identities.⁶³⁸ In addition, given the intersectionality of different identities, the impacts of hate crime on different victims may vary.⁶³⁹ Donovan, Macdonald, and Clayton⁶⁴⁰ suggest that hate is directed towards the victim, not considering a single aspect of their identity, instead hate attack attempts to exploit every possible vulnerable aspect of the victim's identity in order to capture the victim within the hierarchical dynamics (an individual victim may be targeted for being an immigrant, their belongingness to the LGBT community or elderly age group is simultaneously targeted in the same hate attack).

Donovan, Macdonald, and Clayton state that a conceptual understanding of hate crimes suggests that they are targeted towards an unknown member of a minority community, however in several cases, there is more than one incident of a hate attack on the victim (which falls below the threshold of hate crime), where the perpetrator knows the victim in some capacity (neighbour, shopkeeper, professional carer etc)⁶⁴¹ suggesting that more than one aspect of victims' identity becomes known to the perpetrator and comes into play during the attack.

SINGLE AXIS LEGISLATIVE APPROACH

A single-axis approach pushes the victims to ignore their own life experiences in order to fit into prescribed categories.⁶⁴² Therefore, According to Crenshaw, who is one of the initial proponents of the intersectionality framework (within the feminist debates), highlights, that

⁶³⁸ Donovan, C., S. J. Macdonald, and J. Clayton. (2018). New Directions in Hate Reporting Research: Agency, Heterogeneity and Relationality, *Sociological Review*: 24 (2): 1360–7804; Balderston, S. (2017), Victimized Again? Intersectionality and Injustice in Disabled Women's Lives after Hate Crime and Rape." *Advances in Gender Research*, 18a pp. 17–51; Chakraborti, N., and J. Garland. (2012), Reconceptualizing Hate Crime Victimization through the Lens of Vulnerability and 'Difference, *Theoretical Criminology* 16 (4): 499–514.

⁶³⁹ Healy, J. (2019) Thinking Outside the Box: Intersectionality as a Hate Crime Research Framework, British Criminology Conference, ISSN 1759-0043; Vol. 19

⁶⁴⁰ Macdonald, S, Donovan, C and Clayton, J (2021): 'I may be Left with no Choice but to End my Torment': Disability and Intersectionalities of Hate Crime, Disability & Society, <https://doi.org/10.1080/09687599.2021.1928480>

⁶⁴¹ Macdonald, S, Donovan, C and Clayton, J (2021): 'I may be Left with no Choice but to End my Torment': Disability and Intersectionalities of Hate Crime, Disability & Society, <https://doi.org/10.1080/09687599.2021.1928480>

⁶⁴² Iyer, N, Categorical Denials: Equality Rights and the Shaping of Social Identity, *Queen's Law Journal*, Vol. 19 (1993–1994) 179.

discrimination at an intersectional level creates a set of different experiences altogether and states that a nonblack woman's experience of discrimination may not be clubbed with that of a black woman even though they both belong to the same gender category, in terms of race, one is at a different standpoint compared to the other, hence the difference in their victim experience.⁶⁴³ This single-axis approach has its origins within the struggles and movements held by the traditionally marginalized groups that focused on a single identity characteristic to gain their political liberation.⁶⁴⁴ Crenshaw finds this exclusive perspective on race and gender as problematic; she states that a 'single axis approach' is quite dominant in looking at discriminatory crimes, however, such an attempt only creates domination of one ground of discrimination and the subjugation of the other and limits the justice process to look into the holistic victim experience.⁶⁴⁵ The law mostly relies on a single-axis approach in discriminatory crimes.⁶⁴⁶

In hate crime cases, the law is underequipped to look into intersectional aspects.⁶⁴⁷ The critics have been particular in pointing out the competition created by hate crime legislation among different protected groups.⁶⁴⁸ As hate crimes are adjudicated within a single-axis framework, they create a hierarchy⁶⁴⁹ of protection and place less value on the experiences of targeted group members⁶⁵⁰ and are seen only in the light of specified protected grounds which pays no

⁶⁴³ Crenshaw. K, (1989) Demarginalizing the Intersection of Race and Sex: A Black feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, University of Chicago Legal Forum Issue 1, 139- 167

⁶⁴⁴ Smith. B, (2016) Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, *The Equal Rights Review*, Vol. 16 73-102; Solanke, I., Infusing the Silos in the Equality Act 2010 with Synergy, *Industrial Law Journal*, Vol. 40, 2011, p. 330; Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 19

⁶⁴⁵ Crenshaw. K, (1989) Demarginalizing the Intersection of Race and Sex: A Black feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, University of Chicago Legal Forum Issue 1, 139- 167; Conell. C, (2016) Contesting Racialized Discourses of homophobia, *Eastern Sociological Society*, Vol 31, 599-618

⁶⁴⁶ Ruwanpura, K., (2008) Multiple Identities, Multiple Discrimination: A Critical Review", *Feminist Economics*, Vol. 14, p. 77.

⁶⁴⁷ Hate Crime Provisions in EU Member States: The Importance of an Intersectional Approach to Ensure Victims' Rights, (2020) European Network Against Racism.

⁶⁴⁸ Mason-Bish, H. (2015) Beyond the Silo: Rethinking Hate Crime and Intersectionality. In Hall, N., Corb, A., Giannasi, P. & Grieve, J.G.D. ed(s) *The Routledge International Handbook on Hate Crime*. Routledge, pp24-33

⁶⁴⁹ Venäläinen. S and Virkki. T, (2019) Struggles for Moral Value and the Reproduction of Gendered and Racialised Hierarchies in Online Discussions of Violence, *The Sociological Review*, Vol. 67(6) 1367– 1382

⁶⁵⁰ Garland, J. (2011) Difficulties in Defining Hate Crime victimization, *International Review of Victimology*; Mason-Bish, H. (2010) Future Challenges for Hate Crime Policy: Lessons from the Past. In Chakraborti, N. ed. *Hate Crime: Concepts, Policy, Future Directions*. Cullompton: Willan, pp.58-77.

attention to the power hierarchies within any specific protected group.⁶⁵¹ This also indicates the inefficiency of the strand approach in the legal arena and holds it responsible for creating competition and rivalries among the protected and the non-protected groups. There have been strong arguments in favour of including groups with less advocacy under the protection of hate crime legislation. Such groups include asylum seekers, homeless people, sex workers, elderly people, drug and alcohol dependents and other similar marginalized groups.⁶⁵² Campbell and others highlight the hate crime concerns of groups that are not recognized as protected groups, they state that due to a limited understanding of hate crimes, the members belonging to the sex worker group are themselves unable to identify hate crimes committed against them.⁶⁵³ It places interrogations as to the future extension of the scope of the law, which would at some point render the law meaningless.⁶⁵⁴ The inclusion of additional groups would (at some point) downplay the primary protected groups in terms of historical oppression and marginalization which, to begin with was the sole purpose of hate crime legislation.⁶⁵⁵ Mason-Bish,⁶⁵⁶ call this additive method as the ‘silo’ approach, which also fails to address the intersectional concerns arising out from the unprotected identity attributes faced by the victims protected on different grounds.

The single-strand approach to hate crime legislation seems to have oversimplified the victim group experiences and fails to account for their diverse intersectional experiences. It signifies that one identity character of a victim is more relevant than the others.⁶⁵⁷ As Sherry states, multiple identities are largely ignored in favour of simplistic, individualistic single-identity protection.⁶⁵⁸ In addition, Perry mentions that a single-strand approach diminishes one's

⁶⁵¹ Hate Crime Provisions in EU Member States: The Importance of an Intersectional Approach to Ensure Victims' Rights, (2020) European Network Against Racism.

⁶⁵² Chakraborti, N. (2016) Mind the Gap! Making Stronger Connections Between Hate Crime Policy and Scholarship, *Criminal Justice Policy Review* 27(6), pp.577-589; Garland, J. (2011) Difficulties in Defining Hate Crime Victimization, *International Review of Victimology*; Perry, B. (2001) *In the name of Hate: Understanding Hate Crime*. New York/London: Routledge.

⁶⁵³ Campbell, R and others, (2020) Not Collateral Damage: Trends in Violence and Hate Crimes Experienced by Sex Workers in Republic of Ireland, *Irish Journal of Sociology*, Vol 28(3) 280- 313

⁶⁵⁴ Mason-Bish, H. (2015) Beyond the Silo: Rethinking Hate Crime and Intersectionality. In Hall, N., Corb, A., Giannasi, P. & Grieve, J.G.D. ed(s) *The Routledge International Handbook on Hate Crime*. Routledge, pp24-33

⁶⁵⁵ Healy, J. (2019) Thinking Outside the Box: Intersectionality as a Hate Crime Research Framework, British Criminology Conference, ISSN 1759-0043; Vol. 19

⁶⁵⁶ Mason-Bish, H. (2015) Beyond the Silo: Rethinking Hate Crime and Intersectionality. In Hall, N., Corb, A., Giannasi, P. & Grieve, J.G.D. ed(s) *The Routledge International Handbook on Hate Crime*, Routledge, pp24-33

⁶⁵⁷ Jane Healy, (2019) Thinking Outside the Box: Intersectionality as a Hate Crime Research Framework, British Criminology Conference, ISSN 1759-0043; Vol. 19

⁶⁵⁸ Sherry, M. (2013) International Perspectives on Disability Hate Crime. In Roulstone, A. & Mason-Bish, H. ed(s) *Disability, Hate Crime and Violence*. London: Routledge, pp.83; Horvath, M.A.H. & Kelly, L. (2007). From

confidence in the criminal justice system as it fails to address victim needs, unable to prevent future crimes.⁶⁵⁹ While an intersectional approach unlike the single-strand perspective takes into account social, political and historical aspects that form a unique victim experience that is based on the intersection of various grounds.⁶⁶⁰

The Indian Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 is a good example of single axis approach where, the use of terms ‘on grounds of’ directly connotes a single-axis model and requires the victim to specifically pull out an experience based on a specific characteristic, however where intersectional identities exist, it becomes difficult to identify accurate victim experience.⁶⁶¹ Due to the same, in the case of Ramdas and others v State of Maharashtra,⁶⁶² where more than one identity factor was involved (gender and caste), the Court held that merely because the victim woman belongs to SC/ ST community, the POA would not be attracted in cases of sexual assault. As under Section 3(2)(v) of the POA, 1989 the offence must be committed only on the grounds of the victim being a member of the Scheduled Caste/ Scheduled Tribes community. More recently the Supreme Court clarified that such an application of the existing law renders it inefficient and confirms a lack of understanding of how societal inequalities cumulatively function. It further stated that a true understanding of Section 3(2)(v) of the POA, 1989 would require caste identity as one of the grounds for the commission of the offence (and not the only ground).⁶⁶³ The 2015 Amendment in the POA, 1989 modified the language ‘*on the ground of*’ to ‘*knowing that such person is a member of Scheduled Caste or Scheduled Tribe*’ has reduced the required threshold to prove that an offence was committed on caste-based identity only, to where mere knowledge of one’s caste identity is sufficient to attract the POA, also Under Section 8, the offender- victim acquaintance is now adequate to establish knowledge of caste identity of the victim on the offender’s part, suggesting a shift towards an intersectional approach.

the Outset: Why Violence Should be a Priority for the Commission for Equality and Human Rights. A Briefing Paper by the End Violence Against Women Campaign and the Roddick Foundation.

⁶⁵⁹ Perry, B. (2009) The Sociology of Hate: Theoretical Approaches. In Levin, B. ed, *Hate Crimes* Volume I: Understanding and Defining Hate Crime. Westport, CT: Praeger, pp.55-76

⁶⁶⁰ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

⁶⁶¹ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 50

⁶⁶² (2007) 2 SCC 170; Ashrafi v State of Uttar Pradesh, (2018) 1 SCC 742; Khuman Singh v. State of MP Criminal Appeal 1283 of 2019 decided on 27 August 2019

⁶⁶³ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

DATA ON INTERSECTIONALITY IN HATE CRIMES

This section of the chapter contains data and instances bringing out aspects of intersectionality in hate crime cases. It highlights the issue, that in numerous cases, where the hate crime victim belongs to more than one category (protected ground), their visibility as a hate target, targeting and the harm caused is amplified by multifarious terms. It reflects on the need for a more multidimensional approach to tackling hate crimes in terms of law and policy with a view to not leave out the multitudinal factors that are in play while dealing with hate crimes in an intersectional context.

Several examples stating the relevance of intersectionality may be found in empirical work undertaken by different academics and Courts, Conell in her research on members of the LGBT community found that in terms of disclosing their sexual identities, identity aspects such as race, along with other factors was a significant predictor (people of colour had more homophobic tendencies compared to white counterparts). African American males who had male partners stated a higher level of family disapproval of homosexuality.⁶⁶⁴ The members of the LGBT working class people of colour, considered not only their LGBT group membership as a vulnerable area, their expectations and fear of being targeted originated from a culmination of their belonging to the LGBT group, race and socio-economic position.⁶⁶⁵ In the Irish context, Campbell and others suggest that the minority communities such as the ethnic minority communities, Traveller community and LGBT groups are targeted for a range of hate crimes cumulatively forming an intersecting work-based victimization framework.⁶⁶⁶

The Canadian Courts in terms of disability opined that it is essential to look at how the victim has been subjected to social handicapping and not just in terms of biological limitations.⁶⁶⁷ A person with a disability who also belongs to a minority racialized group faces higher levels of discrimination and is more vulnerable compared to an individual discriminated against on

⁶⁶⁴ Conell. C, (2016) Contesting Racialized Discourses of Homophobia, Eastern Sociological Society, Vol 31, 599-618

⁶⁶⁵ Meyer. D, (2010) Evaluating the Severity of Hate-motivated Violence: Intersectional Differences among LGBT Hate Crime Victims, Sage Publications

⁶⁶⁶ Campbell. R and others, (2020) Not Collateral damage: trends in Violence and Hate Crimes Experienced by Sex Workers in Republic of Ireland, Irish Journal of Sociology, Vol 28(3) 280- 313

⁶⁶⁷ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

grounds of only race or only disability.⁶⁶⁸ In the same light, Brownridge found, women with disability are more likely to hold a lower socio-economic status compared to men with a disability,⁶⁶⁹ suggesting a higher probability of being targeted. Similarly, Balderston's work highlights that women with disability are up to four times more likely to become victims of sexual violence compared to a woman without disabilities. She states that the victims' race has a significant cultural impact on their victim experience.⁶⁷⁰

The notion of ranking identity criteria was found troubling by the research participants as such endeavour diminished the severity of their experiences.⁶⁷¹ Interesting research conducted by Meyer⁶⁷² looks at the significance of intersectionality from a different angle. The research found that there are significant differences in the manner in which individuals who belonged to the 'middle-class white' and 'low-income people of colour' groups assessed the severity of their victim experiences, suggesting that while considering the severity of crimes based on sexual orientation (or other identity grounds for that matter) it is also relevant to take into account the social positioning of the victims along with the type of experience they underwent.

In the context of race and gender, numerous studies have been conducted, implying that a combined study of separate studies on gender and race does not encapsulate the woman's victim experience.⁶⁷³ In cases of sexual harassment, the grounds of age, sexual orientation, and marital status may play a significant role.⁶⁷⁴ It is more likely for women who are vulnerable due to other grounds to experience sexual harassment.⁶⁷⁵ Similarly, the aspect of the victim's gender may also have an effect on religious discrimination.⁶⁷⁶ Such as the Muslim women are

⁶⁶⁸ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

⁶⁶⁹ Brownridge, D. A. (2006) Partner Violence Against Women with Disabilities: Prevalence, Risk, and Explanations. *Violence Against Women* 12(9), pp.805-822

⁶⁷⁰ Balderston, S. (2017) Victimized Again? Intersectionality and Injustice in Disabled Women's Lives after Hate Crime and Rape." *Advances in Gender Research*. doi:10.1108/S1529-2126(2013)000018A005. 18a pp. 17-51

⁶⁷¹ Meyer, D. (2010) Evaluating the Severity of Hate-motivated Violence: Intersectional Differences among LGBT Hate Crime Victims, Sage Publications

⁶⁷² Meyer, D. (2010) Evaluating the Severity of Hate-motivated Violence: Intersectional Differences among LGBT Hate Crime Victims, Sage Publications

⁶⁷³ Dhamoon, R. (2011) Considerations of Mainstreaming Intersectionality, *Political Research Quarterly*, 64(1) 230-243; Venäläinen, S and Virkki, T. (2019) Struggles for Moral Value and the Reproduction of Gendered and Racialised Hierarchies in Online Discussions of Violence, *The Sociological Review*, Vol. 67(6) 1367- 1382

⁶⁷⁴ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

⁶⁷⁵ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

⁶⁷⁶ An Intersectional Approach to Discrimination, Addressing Multiple Grounds in Human Rights Claims, (2001) Ontario Human Rights Commission, <https://tandis.odihr.pl/bitstream/20.500.12389/20384/1/05177.pdf>

targeted more often for hate crimes compared to Muslim men.⁶⁷⁷ Likewise, transgender people of colour face an exceptional risk of victimization.⁶⁷⁸ Also, members of the sex worker group have reported different kinds of hate crimes that depict an intersectional framework of hate-based crimes committed against them. Such as the homosexual sex worker group members who are targeted as both homosexual persons and sex workers.⁶⁷⁹

INTERSECTIONAL HATE CRIMES IN INDIA

Crenshaw elaborates on an analogy comparing the ongoing road traffic to the life of a black woman, She associates road traffic with discrimination, stating that if an accident occurs at any road intersection, cars coming from any of the roads may be responsible, or even all of them, similarly, where a black woman is stood at the intersection of her identities, she may be a victim to discrimination resulting from any or all such identity grounds (and not just being a woman or being racially different).⁶⁸⁰

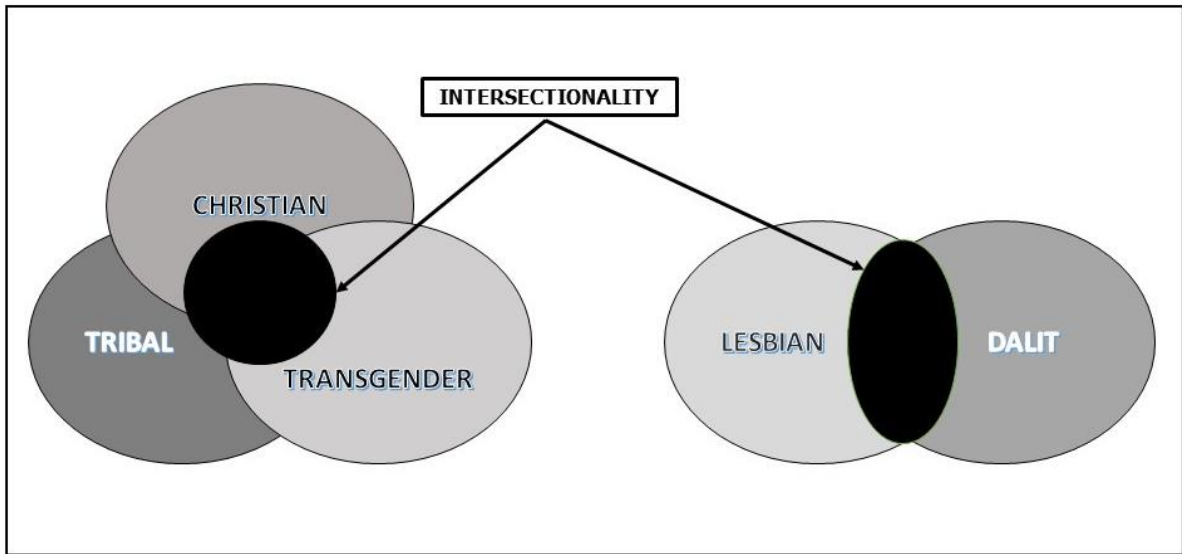
Furthermore, to understand the position of the existing law, the knight holds a sword, which he can use to fend off sword attacks, however, he remains vulnerable to arrows, clubs and grenades, correspondingly, when a hate crime victim is protected based on a single identity ground under a specific law, the victim remains vulnerable to attacks on the combination of their different identity traits. As in the Indian context, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 protects Scheduled Caste and Scheduled Tribe members against hate crimes, the POA, acts as a sword to shield the individual against any attack on them for belonging to the Scheduled Caste or Scheduled Tribe category, however such sword or the law renders the defence (in the battlefield and the criminal justice system) only partially capable, as it is inept to protect the individual against an intersectional attack.

⁶⁷⁷ Hate Crime Provisions in EU Member States: The Importance of an Intersectional Approach to Ensure Victims' Rights, (2020) European Network Against Racism.

⁶⁷⁸ Smith. B, (2016) Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, *The Equal Rights Review*, Vol. 16 73-102; Transgender Europe's "Trans Murder Monitoring Project" reports that 1,701 trans people have been murdered globally between 2008 and 2014, available at: http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/idahot-2015.htm

⁶⁷⁹ Campbell. R and others, (2020) Not Collateral Damage: Trends in Violence and Hate Crimes Experienced by Sex Workers in Republic of Ireland, *Irish Journal of Sociology*, Vol 28(3) 280- 313

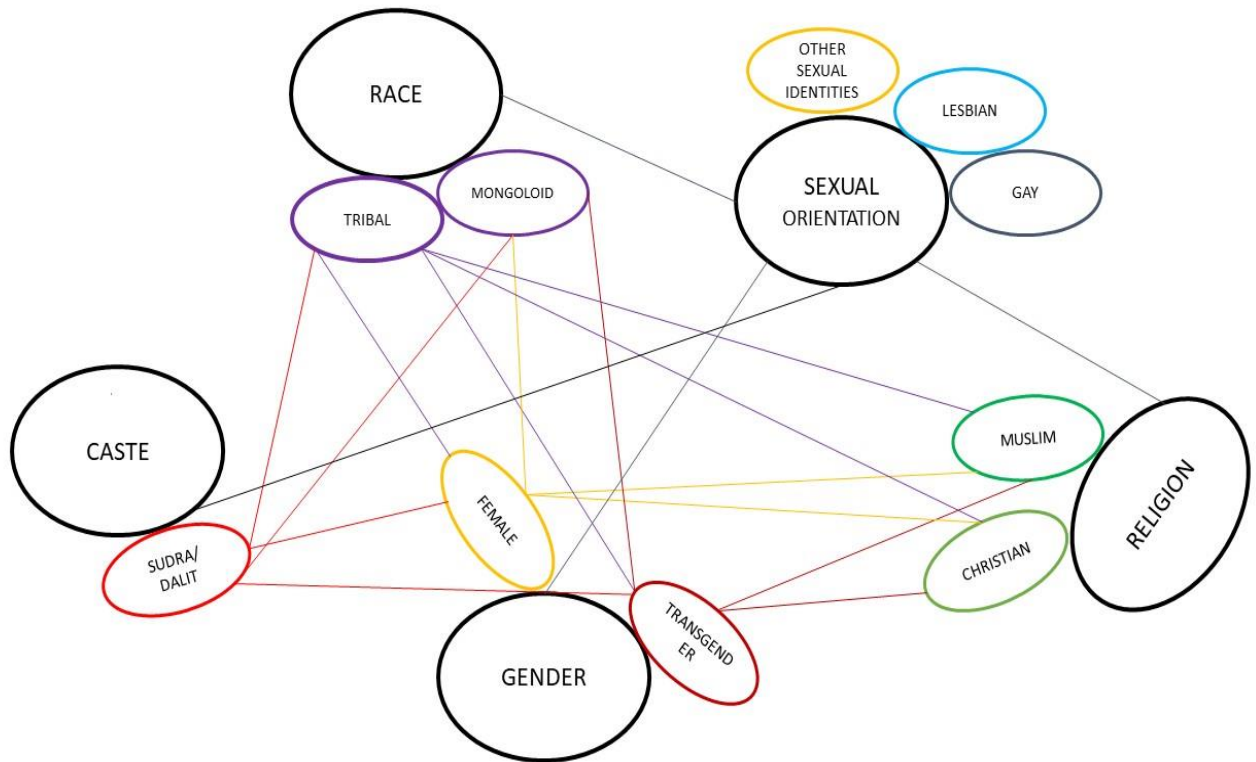
⁶⁸⁰ Crenshaw. K, (1989) Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, *University of Chicago Legal Forum Issue 1*, 139- 167



UNDERSTANDING INTERSECTIONALITY⁶⁸¹

The above diagram shows the intersectionality in hate crime cases in India. The section minority groups that fall under more than one identity group are prone to suffering more severe consequences of hate crimes compared to those that fall only in a single category. This intersectional aspect of hate crimes is quite common within the hate crime domain in India.

⁶⁸¹ Based on Devon C. W. and Gulati. M. (2000), The Fifth Black Woman, Journal of Contemporary Legal Issues 11:705.



PRIMARY INTERSECTIONAL HATE CRIME THEMES IN INDIA

The above representation highlights the intersectionality in hate crime cases in India. I have developed the above image with a view to look at the primary grounds of hate crimes in India, attempting to highlight the interconnectedness among the different grounds. This image is representative of the hate crime intersectionality, its complexity and the necessity of its address while dispensing justice. The five primary grounds of hate crimes that have been covered in this research may be seen in terms of their interconnectedness. Intersectional crimes, well established through literature, are those crimes that create a new degree of severity as the victim is targeted on more than one ground. For say in the case of India, a Dalit homosexual female sees a hate crime differently from a non-Dalit homosexual female or a Dalit heterosexual female or a Dalit male or a non-Dalit. For any community member belonging to two identity groups at the same time, the two grounds may not be separated from each other, as being a Tribal group member highlights their socio-economic position in the society, it is less likely for a Tribal member to belong to an elitist class, and therefore such person is more disposed to a lower standard of living among other Tribal members who are not as open and accepting of transsexual people as the higher class groups. If we look at this from a different point, where a

transsexual community member belonging to a Hindu, higher caste, and class group, would not face the same discrimination and hate as undergone by a Tribal Transsexual individual. Therefore, the hate experience of any tribal transsexual person would be quite distinct from that of a Tribal person or a Transsexual person singularly. The hate experience faced by a Dalit homosexual female is unique in itself and thus a victim who undergoes such trauma and vulnerability may not be clubbed with other hate crime victims on grounds of their membership to only a Dalit group or only homosexual group or female gender group for that matter.

It is quite naive to see one ground separate from the other in intersectional crimes, i.e., if an individual is victimized on grounds of being a transsexual person and also identifies as a Tribal community ensures some sense of security and the enablement of the human rights approach, however, in terms of the dispense of justice in hate crime cases, it is significant that the Courts undertake an intersectional approach to look at the larger picture and consider the dynamics of multiple intertwined threads of hate and prejudice in a single hate incident. The intersections of this nature in hate crimes are of differential nature and have a unique effect on each victim, therefore, require a one-on-one judicial approach. In the representation above, numerous intersectional threads may be drawn reflecting on the deep-rooted effects of hate crimes which would require more than a single-strand (or silo) approach in sentencing.

The intersectionality framework was primarily developed considering the oppression and marginalization of American African women,⁶⁸² more recently there is a growing consensus regarding the recognition and significance of using intersectionality as a tool to address the lived experiences of the victims who face discrimination on more than one ground.⁶⁸³ The Indian Supreme Court has for some time under different precedents⁶⁸⁴ highlighted the significance of an intersectional approach to an atrocious crime involving more than one targeted victim identity.

⁶⁸² Crenshaw. K, (1989) Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, University of Chicago Legal Forum Issue 1, 139- 167; Crenshaw. K, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 Stanford Law Review 1241 (1991), 1246-50.

⁶⁸³ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 14

⁶⁸⁴ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]; State of Karnataka v. Krishnappa (2000) 4 SCC 75; State of Madhya Pradesh v. Basodi (2009) 12 SCC 318; State of Karnataka v. Raju (2007) 11 SCC 490; State of Rajasthan v. Vinod Kumar, (2012) 6 SCC 770; State of Madhya Pradesh v. Santosh Kumar (2006) 6 SCC 1

The facts of the case are that the direct victim was a young girl who was blind and lived with her mother, father and two brothers. The offender was a resident of the same village, worked with the father and the brothers and would often visit their home. On the day of the incident in 2011 early morning, the offender inquired the mother (working outside her home) if her sons were home to which she replied they had gone off to work and that the offender could wait for a while. Soon the mother heard her daughter's voice in distress and rushed to find that the doors were locked from the inside when the offender opened the door and attempted an escape but was held by the family. The victim girl was found in a miserable condition on the floor and later stated that she was gagged and raped by the offender. The charges were framed against the offender under Section 3(2)(v) of the Schedule Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 376 (2) of the Indian Penal Code, 1860.⁶⁸⁵ The Court sentenced the accused to life imprisonment under section 376(2) of the IPC and six months of imprisonment under Section 3(2)(v) under POA with the two sentences running consequently to each other.⁶⁸⁶

As the case reached the Supreme Court in 2021, the Court was of the view that the offence under section 376(2) of the IPC has been proved beyond any doubt. Interestingly the Court moved on to define the intersectionality in cases of crimes where the victim's identity falls under more than one ground such as gender, caste and disability in this case.⁶⁸⁷

The prosecution's argument that the defendant did not notify the police that the offence against the victim was committed on the grounds of caste, the Court using a deductive approach stated that if the victim woman belonged to a high caste, the offender would have not dared to attempt committing the offence (at 9.30 in the morning). Also, given the closely knitted village societies, the Court presumed, being well acquainted with the family, the offender had knowledge of the victim belonging to the SC/ ST category. It remained unclear if it was the victim's caste, disability or gender that led to the commission of an offence against her,

⁶⁸⁵ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

⁶⁸⁶ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 7

⁶⁸⁷ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

reflecting on the limitations of a single-axis approach to crimes of atrocities where more than one identity grounds are involved.⁶⁸⁸

Although the victim girl had identified the offender by his voice (being well acquainted) the prosecution's argument that the victim being blind was not in a capacity to identify the offender, the Supreme Court mentioned precedents in which the victim's testimony was not treated equally based on their disability⁶⁸⁹ stating that such construction of presumptions leads to miscarriage of justice in terms of devaluating testimonies by persons with disabilities. The Court took the view that it is significant to understand how a victim with a disability makes sense of the world and must not be considered inferior.⁶⁹⁰ In this case as the mode of understanding and identifying for the victim was her sense of hearing, the Court considered her identification based on hearing as good as seeing would be for an able-bodied victim.

The Court stated that an experience of rape is traumatizing for any woman for that matter, however, when such a female victim belongs to a Scheduled Caste category and has a disability, the dynamics of her experience are quite different given the "*interlocking of different relationships of power at play, i.e. the victim in such cases face discrimination and related violence on two or more grounds be it her caste, religion, disability, sexual orientation, race or gender.*"⁶⁹¹ The Court was of the view, that in such cases it becomes necessary to view the facts of the case through an intersectional lens, intending to analyze and evaluate the cumulative oppressive experience which is unique to the individual victim.⁶⁹²

The Court mentioned⁶⁹³ commented on the apprehension of using an intersectionality framework that would end up in the creation of numerous discrete identity categories,⁶⁹⁴ in order to mitigate this trap and suggested the use of a system-based conception of intersectionality (and not the identity-based conception), i.e., focus on "*co constituted*

⁶⁸⁸ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 58

⁶⁸⁹ Mange v. State of Haryana (1979) 4 SCC 349

⁶⁹⁰ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

⁶⁹¹ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

⁶⁹² Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190], para 12

⁶⁹³ Patan Jamal Vali Vs. State of Andhra Pradesh [AIR 2021 SC 2190]

⁶⁹⁴ Smith. B (2016), Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, The Equal Rights Review, Vol. 16, 74

*structures of disadvantage that are associated with two or more identity categories at the same time”.*⁶⁹⁵

CONCLUSION

The intersectionality framework is significant in understanding hate crimes and related victim experiences. As in several hate crime cases, more than one identity ground is simultaneously targeted creating a unique and distinct set of victim experiences. The single axis approach to hate crimes that are currently in use under several legislations provides partial justice as it only covers the dominant identity ground leaving out the rest of the significant factors inlaying within the single act of hate, therefore the application of the intersectional approach in hate crime cases where victims’ multiple identity grounds are targeted would provide a more holistic understanding on the victims’ experience and its impact. It would also shed light on the offender's degree of hate towards the victim and the victim group. In the Indian context, given the complex interconnectedness of different grounds, the intersectionality approach has a significant role to play in dispensing justice in hate crime cases. Although the existing Indian law moreover follows a single-strand approach in adjudicating discriminatory crimes, the recent Indian judicial approach seems inclined to use an intersectional lens while deciding over crimes involving more than one identity grounds.

PART II

THEORIES OF PUNISHMENT

This section of the chapter focuses on different theories of punishment to best suit hate crime cases. Under this section, the principles of retribution, deterrence and restorative justice have been analysed keeping in mind the hate crime context. These three significant theories are already being used under different hate crime legislations in different ratios across different nation-states. However, considering the vast range of hate crime impacts, each theory single-

⁶⁹⁵ Boco. G, *Harnessing the Full Potential of Intersectionality Theory in Human Rights Law: Lessons from Disabled Children’s Right to Education in Intersectionality and Human Rights Law*, Hart Publishing 2020

handedly has its shortcomings, therefore the sections below, seek to determine the best-fit principles for sentencing in hate crime cases.

RETRIBUTION AND HATE CRIMES

Retribution, so to say, does not originate from any source of law and has evolved through the conditions and factors that look for a common social and political good in society and has more aspects of human rights, human dignity and respect for all.⁶⁹⁶ As Bradley remarks, punishing crime is all about “*undoing of the criminal's bold and unjust assertion of his own will*”,⁶⁹⁷ the primary focus of retributive punishment, is to restore order, making sure that the undue advantage one has gained over the others is compensated,⁶⁹⁸ by means of depriving the wrongdoer of their freedom and liberty.⁶⁹⁹ Therefore, retributive punishment implies that society does not pay the cost of wrongs committed by the offender. It also highlights the significance of respecting legal boundaries and ensuring fairness and justice.⁷⁰⁰ The application of the retributive approach as a primary means of justice is supported by proponents who understand an express need for the conveyance of social condemnation as the essence of punishment and necessary for adequate justice.⁷⁰¹

The support and acclamation for retributive justice theory in terms of punishing hate crimes has been overwhelming.⁷⁰² The retributive approach when applied in hate crime cases condemns the hateful act committed by the offender and penalizes them intending to restrict them from committing similar acts in the future, in a way restoring social dynamics. In simple

⁶⁹⁶ Bradley. G. (2003), *Retribution: The Central Aim of Punishment*, Harvard Journal of Law and Public Policy 27 19-31.

⁶⁹⁷ Bradley. G. (2003), *Retribution: The Central Aim of Punishment*, Harvard Journal of Law and Public Policy 27 19-31

⁶⁹⁸ Dagger, (2011), *Social Contracts, Fair Play, and the Justification of Punishment*, *Ohio State Journal of Criminal Law*, 8: 341–368.

⁶⁹⁹ Duff, A and Hoskins. Z, (2021) "Legal Punishment", *The Stanford Encyclopaedia of Philosophy* (Summer 2021 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2021/entries/legal-punishment/>.

⁷⁰⁰ Schweppe. J and Walters. M, (2015), *Hate Crimes: Legislating to Enhance Punishment*, Oxford Handbooks Online, Criminology and Criminal Justice.

⁷⁰¹ Tadros, V. (2011), *The Ends of Harm: The Moral Foundations of Criminal Law*. Oxford: Oxford University Press, 103-104; Boonin, D. (2008), *The Problem of Punishment*, Cambridge: Cambridge University Press, 176-179

⁷⁰² Lawrence, F. M. (1999), *Punishing Hate: Bias Crimes Under American Law*. Cambridge MA: Harvard University Press.

terms, the greater the harm, the greater the punishment. Basing the argument on the same, hate crimes cause considerably more severe harm compared to the parallel harm inflicted on the victim and, therefore, amount to greater culpability.⁷⁰³

Adam Smith saw punishment as a backwards-looking approach, "*evil for the evil that has been done*".⁷⁰⁴ The primary proponent of the retributive approach to punishment is Immanuel Kant,⁷⁰⁵ who bases the sole criteria of punishment on the 'offenders' guilt'. Kant, in his 'justice model', emphasises the necessity of guilt of the offender for him to be inflicted with any punishment and focuses on 'rights, justice and desert'. As the hate crimes are deep-rooted and more intense when compared to parallel crimes,⁷⁰⁶ in the sense, that they attack the victim's core identity, the acceptance of the offender's guilt is significant in providing closure and relief to the victim and greatly assists them in restoring and healing from the harm.

A newer account on similar lines has been put forward by Bennett⁷⁰⁷ that concentrates on the intrinsic, deep social narratives on blaming, apology offering, and bringing change. However, he emphasises that such an apology need not be necessarily 'sincere' and merely 'an apology ritual' would suffice and that it is sufficient for the state to require the offender to act as they would have acted if they felt remorse and intended to make amends.⁷⁰⁸ However, in critical terms, the value of an insincere apology is questionable. In hate crime cases, it is questionable if a non-sincere apology holds any value. It is of greater significance that the offender understands the intrinsic wrong underlying their hateful act in terms of achieving the larger goal of more cohesive community relations within societies. Therefore, the acceptance of guilt by the offender in hate crimes is significant, yet a mere non-sincere apology seems less competent in dispensing long-term social justice in hate crime cases.

⁷⁰³ Iganski, P, (2001), Hate Crimes Hurt More, *American Behavioural Scientist* 45 626-38.

⁷⁰⁴ Smith, A, (2002). *The Theory of Moral Sentiments*, (ed). Knud Haakonssen, Cambridge: Cambridge University Press, 2002): 2.1.1.4.[section, chapter, and section numbers]

⁷⁰⁵ Kant, I, (1965), *Metaphysical Elements of Justice*: Hackett Publishing, John Ladd trans., Bobbs-Merrill Co., Inc

⁷⁰⁶ Iganski, P, (2001), Hate Crimes Hurt More, *American Behavioural Scientist* 45 626-38

⁷⁰⁷ Bennett, C. (2008). *The Apology Ritual: A Philosophical Theory of Punishment*. Cambridge: Cambridge University Press 154; Zachary Hoskins, (2017), *Punishment*, Oxford University Press, *Analysis Reviews* Vol 77, Number 3, 619–632

⁷⁰⁸ Bennett, C. (2008). *The Apology Ritual: A Philosophical Theory of Punishment*. Cambridge: Cambridge University Press, 154, 172- 73

A few retributive accounts also discuss the victim's (the direct victims and also society being the indirect victim) resentment, which Duff calls 'retributive hatred', which requires the offender to repent and suffer, and also seek the offender's self-guilt, which gives way to the desire of being punished for the wrongs they committed.⁷⁰⁹ It is moreover understood as making right the emotional satisfaction that one (victim or offender) gains through punishment. However, with deeply ingrained prejudices in hate crime cases, the probability of such being true remains quite low.

The retributive approach does not focus on any social good in the first place but is based on 'just punishment' founded on the act committed by the offender.⁷¹⁰ However, the restraint on offenders through sentencing does entail social good even if seen as a mere by-product. It provides the purpose of freeing the society of wrongdoers (though temporarily, but the idea is to avail the offender an opportunity for remorse and repentance so that they transform and are fit to be integrated back into society). However, in a practical sense, there is no correctional and reformative outcome; as the offenders complete their sentence, they are free to go, not considering if they have undergone any reformation or are more angered than before, resulting in the commission of similar or more grievous crimes.⁷¹¹ In the hate crime context, the social objective that entails a free and equal society, although in theory, is in line with the retributive approach, however, in practice, several times the infliction of sentences on the offenders makes them more hateful and buys them time to contemplate and scale their prejudiced attitudes towards the targeted communities, and completely defeats the purpose of sentencing. Franklin also points out the possibility that penalty enhancement in hate crime cases would more often be used against minority group members when they engage in committing crimes against majority community members, and not the other way round, resulting in social divisions.⁷¹²

⁷⁰⁹ Duff, A and Zachary Z., (2021), "Legal Punishment", *The Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2021/entries/legal-punishment/>.

⁷¹⁰ Bindal. A. (2009), Re-Thinking Theoretical Foundations of Retributive Theory of Punishment, Vol. 51, 3 JILI, 307-339

⁷¹¹ Schweppe. J and Walters. M, (2015), Hate Crimes: Legislating to Enhance Punishment, Oxford Handbooks Online, Criminology and Criminal Justice.

⁷¹² Franklin, K. (2002), Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes, *American Behavioral Scientist*, 46, 154-172.

Hart⁷¹³ notes that the infliction of sentence on the offender amounts to suffering and deprivation; something bad does not have any intrinsic value whatsoever, although it is relieving to see the offender pay for the injustice, he/ she has caused (yet there is no intrinsic value). Brooks's work also suggests that the 'loss' underlying punishment must not necessarily induce pain and suffering and must be more 'goal-oriented' rather 'pain-oriented'.⁷¹⁴ Brooks highlights the idea that punishment must ensure 'loss' and that a punishment lacking such loss may instead be a rewarding experience. Therefore, he justifies punishment as entailing loss of monetary (fine and damages) and personal liberty along with a certain amount of suffering. He adds that such punishment must only be seen as a response to the offender's criminal involvement and must be justifiable in terms of its proportionality to the crime committed.⁷¹⁵ In terms of serious hate crime cases, the goal of alienating the offender from society becomes a more significant goal when compared to the objective of transforming the offender's mindset thereby justifying the notion of retributive sentencing that ensures the offender's loss of liberty along with proportionate suffering against their hateful act.

Furthermore, the theory of positive retribution entails the notion of 'just dessert', i.e., the punishment for a crime must not aim at mere penalisation but must ensure that such penalisation does not cross beyond the 'deserved threshold'. This aspect of punishment forms a positive moral and justified ground for retribution as a theory to resurface during the last three decades of the 21st century.⁷¹⁶ In the same light, Hagel⁷¹⁷ comments on Kant's work, stating that although the principle of retribution works on the 'likeliness of punishment', it does not require exact likeliness in all respects. Further, Kant precisely describes that the punishment must be applicable 'in spirit' and must not be exact, thereby encompassing the notion of proportionality⁷¹⁸ of the punishment in the concept of 'just desert'.⁷¹⁹

⁷¹³ Hart, H. (2014), *Murder and the Principles of Punishment in Punishment and Responsibility*, University of Toronto Law Journal, 19 642-653.

⁷¹⁴ Brooks, T. (2021). *Punishment, A Critical Introduction*, Routledge London, Introduction, 5

⁷¹⁵ Brooks, T. (2021). *Punishment, A Critical Introduction*, Routledge London, Introduction, 5

⁷¹⁶ Murphy, J. G., (1973), *Marxism and Retribution*, *Philosophy and Public Affairs*, 2: 217-43; Duff, A and Hoskins, Z., (2021) *Legal Punishment*, *The Stanford Encyclopaedia of Philosophy*; Edward N. Zalta (ed.) <<https://plato.stanford.edu/archives/sum2021/entries/legal-punishment/>>.

⁷¹⁶ Hagel, (1952), *Philosophy of Right*, 72

⁷¹⁷ Hagel, (1952), *Philosophy of Right*, 72

⁷¹⁸ Smith, A., (2002), *The Theory of Moral Sentiments*, In (ed.) Knud Haakonssen, Cambridge: Cambridge University Press, 2002: 1.1.5.4

⁷¹⁹ Bindal, A., (2009), *Re-Thinking Theoretical Foundations of Retributive Theory of Punishment*, Vol. 51 No. 3 JILI 307-339.

However, Ryberg⁷²⁰ highlights one of the primary concerns rooted in the positive retributive approach on the underlying issue of proportionality constraints, fundamental to punishment. He suggests that even though the notion of 'just dessert' is undeniably significant to the retributive theorists, the issue of setting up and understanding the threshold to sentence proportionality and circumstances as to when and how much such proportionality may differ is significant. In the hate crime context, with a view to counter the symbolic purpose of hate crimes, the hate crime laws need to be proportional and must in spirit justify a deserved threshold. Although substantial research has established that hate crimes hurt more, entailing physical, psychological, emotional and psychosomatic levels of harm encircling the victim's core identity, quantifying such multi-layered harm and achieving proportionality of punishment to undo such harm is a different question altogether. Furthermore, harm caused by hate crimes significantly differs on individual as well as community levels adding more obstacles to compounding punitive proportional claims to be just. Additionally, such leaves no scope to consider the other mitigating factors while deciding over the sentence for any hate crime offender.

DETERRENCE AND HATE CRIMES

To understand the theory of deterrence, the concept of utilitarianism is significant. Utilitarianism, as suggested by Bentham,⁷²¹ bases its argument on the maximum good of society. As punishment is a form of suffering, it is not consistent with happiness or maximum good and must be minimised. Utilitarian theory understands that society cannot be completely free from crime. Therefore, punishment is necessary, but such punishment must be minimal, yet enough to set an example for society to prevent future crimes from happening. According to utilitarianism, punishment affects both the victim and the offender (and the whole society more generally); therefore, the amount of punishment must in no manner exceed the amount of harm caused. Based on the same, the theory of deterrence states that the punishment should be such that it 'deters' the commission of similar crimes in the future for the benefit and good of society.⁷²² Mill elaborates on Bentham's thought stating, that whatever is being judged

⁷²⁰Ryberg, J. (2021), *Retributivism and the Proportionality Dilemma*, John Wiley and Sons Ltd, 34:158–166.

⁷²¹ Bentham, J. (1823). *An introduction to the principles of morals and legislation*. London: Pickering.

⁷²² Schweppe. J and Walters. M, (2015), *Hate Crimes: Legislating to Enhance Punishment* Oxford Handbooks Online, Criminology and Criminal Justice, 13

morally also needs to be judged from the utility point of view.⁷²³ He suggests that nothing is 'intrinsically' good or bad or wrong or correct; it is only the consequences of such acts that amount to pleasure or suffering and assist in deciphering their moral status. Therefore, he suggests that the punishment may only be justified if it brings any positive social outcome and utility to society (fewer crimes in society).⁷²⁴

In Husak's view, the criminalization of an offender may only be justified if their wrongful act is nontrivial, and such penalisation must ensure significant state interest (detering future harm) and must be only as much as is necessary.⁷²⁵ The deterrence theory of punishment relies on the principle that the offender must be punished to set an example for the rest of society, such that similar offences are not repeated.⁷²⁶ The principle of deterrence in hate crime penalization aptly serves the symbolic purpose of establishing hate crime legislation.

Although not much relevant data exists to confirm the role of hate crime laws in deterring crimes,⁷²⁷ hate crime legislation has a significant role in conveying the values and morals of society, and the notion of higher sentencing in hate crime cases seems to reduce the possibility of similar crimes in future.⁷²⁸ The hate crime laws have a deterrent effect on prospective offenders and also on the members of the victim group who might otherwise indulge in retaliatory hate crimes.⁷²⁹ The principle of deterrence has a significant role to play in hate crime cases, as the essence of hate crimes lies in the deeply ingrained social prejudices that individuals reinstate via committing hate crimes, enabling hate crimes and their indirect victimization to spread across different community groups, therefore it is essential for penalization in hate crime cases to entail the principle of deterrence with a view to reduce and prevent hate crime incidents from reoccurring.

⁷²³ Bindal, A. (2009), Re-Thinking Theoretical Foundations of Retributive Theory of Punishment, Vol. 51, 3 JILI, 307-339.

⁷²⁴ Schweppe, J and Walters, M, (2015), Hate Crimes: Legislating to Enhance Punishment, Oxford Handbooks Online, Criminology and Criminal Justice, 5

⁷²⁵ Husak, D. (2008), *Overcriminalization: The Limits of the Criminal Law*. Oxford: Oxford University Press.

⁷²⁶ Schweppe, J and Walters, M, (2015), Hate Crimes: Legislating to Enhance Punishment, Oxford Handbooks Online, Criminology and Criminal Justice.

⁷²⁷ Gerstenfeld, P. B. (2011). *Hate Crimes: Causes, Controls, and Controversies*. Thousand Oaks, CA: Sage.

⁷²⁸ Saucier, D. A., Brown, T. L., Mitchell, R. C., & Cawman, A. J. (2006). Effects of Victims, Characteristics on Attitudes Toward Hate Crimes, *Journal of Interpersonal Violence*, 21, 890-909; Mollimichelle K. Cabeldue, Robert J. Cramer, Andre Kehn, James W. Crosby, and Jeffrey S. Anastasi, (2018), Measuring Attitudes, About Hate: Development of the Hate Crime Beliefs Scale, *Journal of Interpersonal Violence*, Vol. 33(23) 3656– 3685.

⁷²⁹ Franklin, K. (2002), Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes, *American Behavioral Scientist*, 46, 154-172.

A different view on punishment offers a self-defence approach that may lie somewhere between a traditional and contemporary understanding. The self-defence theorists view punishment in the light of deterrence theory as a society's self-defence against the wrongs committed by the offenders.⁷³⁰ Accordingly, it has been well justified that the use of force to avert an attack is reasonable (self-defence). However, critics have referred to the same as an ambiguity in the deterrence approach, which leaves out those offenders who would anyway commit offences regardless of the threat of punishment,⁷³¹ which creates a high unlikelihood that enhanced sentencing would either reduce the levels of reoffending or impact the number of hate crimes committed more generally.⁷³² Likewise, Gerstenfeld⁷³³ highlights that the punishment awarded under hate crime legislation would only assist in concretizing the offender's belief in their prejudiced attitude and no manner acts as a means to deterrence. She bases her argument on the cognitive dissonance theory, that the confusion between the punishment for the hate crime and the offender's belief of himself/ herself to not be a hate criminal (say a homophobic or bigot) in the offender's mind only makes them more ardent to their prejudiced beliefs. However, Gerstenfeld has not provided any work on the relation between the cognitive dissonance theory and the offender's violent behaviour and only focuses on adjusting the offender's attitude, which may or may not result in future crimes or violence.⁷³⁴

The deterrence theory has its limits, and several academics have put forward their arguments against the use of deterrence theory. As Dixon and Gadd contend that hate crime laws enhance the punishment for the offences already laid down under criminal law. Therefore, such a deterrent effect might only be of peripheral value.⁷³⁵ Firstly, the theory is prone to be least practical as it does not look into who is being deterred and to what extent, i.e. if the threat of 'punishment inhibits criminality'. If yes, then to what extent? Cavadino⁷³⁶ suggests that there is the least evidence that the punishment has any educational outcomes for the public at large as

⁷³⁰ Hoskins. Z., (2017), *Punishment*, Oxford University Press, *Analysis Reviews* Vol 77, Number 3, 619–632

⁷³¹ Boonin, D. (2008), *The Problem of Punishment*, Cambridge: Cambridge University Press, 195- 200

⁷³² Jacobs. J and Potter. K, (1997), *Hate Crimes: A Critical Perspective*, *Crime and Justice*, Vol. 22,1-50.

⁷³³ Gerstenfeld, P. B. (1992). *Smile When you Call me That! The Problems with Punishing Hate Motivated Behavior*, *Behavioral Sciences and the Law*, 10, 280

⁷³⁴ Sullaway. M, (2004), *Psychological Perspectives on Hate Crime Laws*, *Psychology, Public Policy, and Law*, Vol. 10, No. 3, 250–292

⁷³⁵ Gadd. D and Dixon. B, (2011) *Losing the Race: Thinking Psychosocially About Racially Motivated Crime*, Routledge, 1st Edition, 97

⁷³⁶ Cavadino, M., (2014), *Should Hate Crime be Sentenced More Severely?* *Contemporary Issues in Law* 13(1) 1-18.

to the wrongs and the rights in moral terms. It remains quite unclear as to if the deterrence theory essentially deters individuals or is more general. To a large extent, it is left to the assumption that the society at large is deterred considering the offender's sentence but does not substantially portray to what extent such assumptions are accurate.

Secondly, the theory works on the general assumption that the individuals in a society are sufficiently aware of criminal law and procedure, which often is not the case. Moreover, hate crimes may be reactive but also instrumental,⁷³⁷ therefore several times, the offender is in an angered state of mind (before the commission of the offence) where he/ she is not in a capacity to calculate the costs and benefits of his/ her actions. In such a situation, the use of deterrence theory may not substantially be justified in penalising the offender. Thirdly, deterrence theory supposes that the members of a society are deterred from committing a crime only if the perceived threat of being punished or the cost of such punishment exceeds the benefits gained by the commission of the offence.⁷³⁸

Lastly, the theory lacks an accurate 'formula' to deter those from committing crimes who are comparatively resistant to the idea of punishment. Therefore, it is significant to understand how deterrence may be made effective and functional as a tool for dispensing justice.⁷³⁹ The purpose of deterrence has narrower scope in the legislative hate crime context,⁷⁴⁰ however, the principle of deterrence holds significance to a certain extent.⁷⁴¹ Hate crime legislation, as per Sullaway, has the potential to inhibit at least some individuals from the actualisation of their beliefs into violent actions. For say thrill offenders are more likely to amend their attitudes through legal and social responses⁷⁴² and may be deterred from repeating their criminal behaviour.

⁷³⁷ Sullaway, M. (2004), Psychological Perspectives on Hate Crime Laws, *Psychology, Public Policy, and Law*, Vol. 10, No. 3, 250–292

⁷³⁸ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press, 13

⁷³⁹ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press, 11

⁷⁴⁰ Sullaway. M. (2004), Psychological Perspectives on Hate Crime Laws, *Psychology, Public Policy, and Law*, Vol. 10, No. 3, 250–292

⁷⁴¹ Saucier, D. A., Brown, T. L., Mitchell, R. C., & Cawman, A. J. (2006). Effects of Victims, Characteristics on Attitudes Toward Hate Crimes, *Journal of Interpersonal Violence*, 21, 890-909

⁷⁴² McDevitt, J., Levin, J., & Bennett, S. (2002). Hate Crime Offenders: An Expanded Typology, *Journal of Social Issues*, 58, 303–318.

The deterrent approach in the hate crimes context might not be the best-fit theory on its own. However, deterrence has a supportive role to play when considered, along with the other theories of punishment.

RESTORATIVE JUSTICE AND HATE CRIMES

The restorative justice approach, in its overarching paradigm, not only has application in hate crime cases but has been found effective in resolving diversified categories of crimes, serious and less serious. The notion of restorative justice encompasses the upcoming best practices based on the principle of mediation between the victim and the offender and the newly developed theories that focus on building up the damaged relationship between the offender, victims and the wider community.⁷⁴³ Restorative justice practices are diverse in their approach and cover minor incidents, one-to-one hate crimes and complex conflicts within different communities.

Hate crimes are not simple crimes as they are not merely confined to causing physical and psychological harm, but are moreover symptomatic in their approach, and portray deep-rooted social or cultural prejudices held in the minds of specific community members against the ‘others’.⁷⁴⁴ The approach to tackling hate crimes needs to be holistic and requires not merely doing away with the symptoms but also eradicating the underlying cause, which requires a breakdown of the complex societal mindsets and embedded social prejudices. The restorative approach works by providing a means to restore and repair the interpersonal harm caused by the offender.⁷⁴⁵ RJ provides an opportunity for dialogue to break down the stereotypes that are not merely the symptoms but also the causes of hate crimes.⁷⁴⁶ The open dialogues, apology and harm repairing, under the restorative justice approach provide the victim with significant

⁷⁴³ Walters, M., & Hoyle, C, (2010), Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime., in Chakraborti. N (Ed.) Hate Crime: Concepts, Policy, Future Directions 228-248.

⁷⁴⁴ Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). CRIMSOC Report 4: Gender, Victimology Restorative Justice Edited by Walter DeKeseredy & Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice For Hate Crimes– 197 – 224; Perry. B, (2001) *In the Name of Hate: Understanding Hate Crimes*, 1st Edition, Routledge, 1- 30

⁷⁴⁵ Morris. A. and Young. W, (2000) Reforming Criminal Justice: The Potential of Restorative Justice, in Strang. H and Braithwaite. J (eds.) Restorative Justice: Philosophy to Practice, Dartmouth: Ashgate Publishing; Hall. N. (2005), *Hate Crimes*, Second Edition, Routledge.

⁷⁴⁶ Gavrielides, T. (2012). Contextualising Restorative Justice for Hate Crime, *Journal of Interpersonal Violence* Vol 27, Issue 18, 3624- 3643.

emotional relief and assist in rebuilding them from the damage.⁷⁴⁷ The community plays a significant role in making the offender understand the suffering endured by the victim.⁷⁴⁸

Different academics have defined restorative justice in different ways; while some understand restorative justice as a set of practices, others consider it as an 'overarching theory of justice'.⁷⁴⁹ Eglash focused on repairing harm by using restorative justice, which is not dependent on the law and involves active participation by all parties interested in restoration.⁷⁵⁰ RJ in the hate crime context has been blamed for suffering from 'definitional ambiguities', presenting concerns for the advocates, policymakers and researchers.⁷⁵¹ The variation in the definition of hate crimes and the applicability of RJ to hate crimes creates confusion and inconsistency in formulating public policy and dispensing justice.⁷⁵² Furthermore, due to the lack of a universally accepted definition of restorative justice, it has failed to achieve a prominent political will under a number of jurisdictions, notwithstanding that several attributes of the theory are in use and are frequently articulated while dispensing justice.⁷⁵³

Daly suggests that restorative justice may be defined as, “*a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process – prearrest, diversion from Court, pre-sentence, and post-sentence – as well as for offending or conflicts not reported to the police*”.⁷⁵⁴ Indirect

⁷⁴⁷ Walters. M and Hoyle. C, (2012) Exploring the Everyday World of Hate Victimization Through Community Mediation, University of Oxford, UK; Volpe. M and, Strobl. S, (2005) Restorative Justice Responses to Post-September 11, Hate Crimes: Potential and Challenges, Conflict Resolution Quarterly, Vol22, Issue 4, 527-535; Braithwaite, J. (2003) Principles of Restorative Justice, In A. Von Hirsch, J. V. Roberts, and A. Bottoms (eds.), *Restorative Justice and Criminal Justice: Competing or Reconciling Paradigms?* Oxford, UK: Hart.

⁷⁴⁸ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press.

⁷⁴⁹ Iganski, P, (2002), *Hate Crimes Hurt More, But Should They be More Harshly Punished? The Hate Debate* London.

⁷⁵⁰ Eglash, A. (1977), Beyond Restitution: Creative Restitution, in J. Hudson & B. Galaway (Eds.), *Restitution in Criminal Justice*, Lexington, MA: D. C. Heath, 91-129

⁷⁵¹ Gavrielides. T, (2012), Contextualizing Restorative Justice for Hate Crimes, 27 (18) 3624- 3643

⁷⁵² Gavrielides, T. (2007), Restoring Relationships: Addressing Hate Crime Through Restorative Justice, Commission for Racial Equality.

⁷⁵³ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press.

⁷⁵⁴ Kathleen Daly (2016) What is Restorative Justice? Fresh Answers to a Vexed Question, Victims & Offenders, Special Issue

communications are also facilitated to leave the victim less angered and less afraid.⁷⁵⁵ Restorative justice means working well only when the meetings are well facilitated.⁷⁵⁶ The primary means used in achieving the same include written or spoken apology, correcting the property damage, if any, compensating in monetary terms, along with an assurance that the wrong shall not be repeated.⁷⁵⁷ There are a number of ways to conduct restorative justice proceedings and may be applied at any stage of the criminal procedure.⁷⁵⁸

In a multicultural society, it is essential to investigate the social and cultural factors underlying the prevalent unacceptable behaviours.⁷⁵⁹ The restorative justice approach is quite potent as it takes into consideration the victim's and the offender's past relationship through the mediation dialogue and aids in deciphering the actual concern and simply does not take into account the crime at its face value,⁷⁶⁰ therefore it may not be wrong to say that RJ has transformative potential in terms of the dynamic evolution of our justice system, making it more victim-centric and restorative and not simply based on retributive punitive means.⁷⁶¹ According to Shenk,⁷⁶² the primary reason why the restorative justice system is efficient in dealing with cases of hate crime is that the victim and the offender come face to face with each other, and the dehumanisation of the victim by the offender is reposed, such that the offender does not (anymore) see the victim as a mere subject belonging to the hated group.

⁷⁵⁵ Hoyle. C. (2002), Securing Restorative Justice for the non- participating Victim, in C Hoyle and R Young (eds) *New Version of Crime Victims*: Oxford Hart Publishing, 115

⁷⁵⁶ Walters, M., & Hoyle, C, (2010), Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime, in Chakraborti. N (Ed.) *Hate Crime: Concepts, Policy, Future Directions* 228-248.

⁷⁵⁷Walters, M., & Hoyle, C, (2010), Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime, in Chakraborti. N (Ed.) *Hate Crime: Concepts, Policy, Future Directions* 228-248.

⁷⁵⁸ Van Ness, D.W. (1990), Restoring the Balance: Tipping the Scales of Justice, *Corrections Today* 52: 62–66; Walters M, (2014) *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press; Braithwaite. J, (2002), *Restoration Justice and Responsive Regulation*, New York, Oxford University Press

⁷⁵⁹ Smith. K, (2006), Dissolving the Divide: Cross-Racial Communication in the Restorative Justice Process, *Dalhousie Journal of Legal Studies*, 15: 168 – 203; Gavrielides, T. (2008), Restorative Justice: The Perplexing Concept, *Conceptual Fault Lines and Power Battles within the Restorative Justice Movement*, *Criminology & Criminal Justice*, 8, 165-183.

⁷⁶⁰ Walters. M and Hoyle. C, (2012) *Exploring the Everyday World of Hate Victimization Through Community Mediation*, University of Oxford, UK

⁷⁶¹ Umbreit. M and Armour M. P, (2011) *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 *Wash. U. J. L. & Policy* 65.

⁷⁶² Shenk. A, (2001), *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, *Ohio State Journal on Dispute Resolution* 185-217.

Arguably, the idea of a genuine apology from a hate crime offender who has deep-rooted prejudices against a specific minority group has been questioned. Significantly, the apology put forward by the offender needs to be genuine, or else it would fail to assist in elevating the victim from the feeling of frustration and anger against the offender.⁷⁶³ Hate crime perpetrators with deeply ingrained racist beliefs might not be easily inclined to agree to restorative means, which might lead to further exposure of victims, notwithstanding how deeply remorseful the offender might seem to be.⁷⁶⁴ The restorative justice system misses out on promoting the symbolic essence of public trials, which is a means for society to contemplate deep-rooted values and ethics.⁷⁶⁵ The long-lasting effects of the restorative justice process are doubtful as Delgado⁷⁶⁶ indicates the lack of moral reflections in the long term, although it may improve the thought process of a given offender.

Furthermore, RJ might give way to secondary victimisation where one party is in a dominant position.⁷⁶⁷ The re-victimisation of the victim group is a significant concern that the victim advocate groups and the feminist groups have. The apprehension of future victimization may make victims feel compelled to accept the apology made by the offender. Such does in no way heals the damage.⁷⁶⁸ The application of RJ in hate crime cases (also generally), requires a dynamic and evolving understanding of community, as RJ aims to restore the *status quo* within the society, however as Theo states the plausibility of a revengeful victim ganging up with a mediator against the offender, in order to negotiate on terms well suited for all, is high. Such application of RJ is of the least value in terms of achieving the social status quo or in terms of the application of RJ under a preventive approach.⁷⁶⁹

⁷⁶³ Walters, M., & Hoyle, C. (2010), Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime, in N. Chakraborti (Ed.), *Hate Crime: Concepts, Policy, Future Directions*, Cullompton, UK: Willan, 228-249; Strand, 2002, 56

⁷⁶⁴ Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). CRIMSOC Report 4: Gender, Victimology Restorative Justice Edited by Walter DeKeseredy and Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice For Hate Crimes– 197 – 224;

⁷⁶⁵ Gavrielides, T. (2007), Restoring Relationships: Addressing Hate Crime Through Restorative Justice, Commission for racial Equality.

⁷⁶⁶ Delgado, R (2000), Goodbye to Hammurabi: Analysing the Atavistic Appeal of Restorative Justice, Stanford Law Review, Vol. 52, No. 4, 751-775.

⁷⁶⁷ Stubbs, J. (2007), Domestic Violence and Critical Questions for Restorative Justice, *criminology and Criminal Justice*, 7: 169-87; Gavrielides, T. (2007), Restoring Relationships: Addressing Hate Crime Through Restorative Justice, Commission for racial Equality.

⁷⁶⁸ Walters, M., & Hoyle, C. (2010), Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime, in N. Chakraborti (Ed.), *Hate Crime: Concepts, Policy, Future Directions*, Cullompton, UK: Willan, 228-249

⁷⁶⁹ Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). CRIMSOC Report 4: Gender, Victimology Restorative Justice Edited by

Although the restorative means of justice have a healing effect on the victims, unlike the other theories of punishment, the harm of victimisation is not fully recovered.⁷⁷⁰ Mainly, through years of abuse and deeply embedded emotional and psychological trauma,⁷⁷¹ the victims are unable to come out of their state of vulnerability and fear. There is no doubt that the restorative process provides the victims with a platform to let their voices be heard and to take part in the decision-making regarding the offender; the abuse that underwent over time is not entirely recovered.⁷⁷² Hall, in his work, suggests that there may be several cases where the hatred of the offender for the targeted group may be so intense that the complete process of restorative justice or mediation, for that matter, goes to waste.⁷⁷³

LESS SERIOUS HATE CRIMES AND A RESTORATIVE JUSTICE APPROACH

It is noteworthy that the concept of hate crimes, suffers from its ambiguities, i.e. while hate crimes such as physical assault or murder may well fit into the legal definition of hate crimes and result in a conviction, less serious hate crimes such as graffiti, name calling or intimidation, even though may be a part of legal definition are hard to prove and therefore go unreported or if reported do not result into convictions (mostly due to a lack of evidence for the same), even though the outcome of both offences on the victim are likely to be similar. This makes the application of RJ practices in hate crime cases a more complex consideration.⁷⁷⁴ Although restorative means may be seen as a ray of hope in such less serious hate crimes per se, it requires much further research on the subject.⁷⁷⁵

Walter DeKeseredy and Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice for Hate Crimes– 197 – 224; Perry. B, (2001) *In the Name of Hate: Understanding Hate Crimes*, 1st Edition, Routledge, 1- 30

⁷⁷⁰ Walters, M., & Hoyle, C, (2010), Healing harms and engendering tolerance: The promise of restorative justice for hate crime, in Chakraborti. N (Ed.) *Hate Crime: Concepts, Policy, Future Directions* 228-248.

⁷⁷¹ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press, 17.

⁷⁷² Perry. B, *In the Name of Hate: Understanding Hate Crimes*, 1st Edition, Routledge, Chapter 3, 31 - 56

⁷⁷³ Hall. N, (2005), *Hate Crimes*, Second Edition, Routledge.

⁷⁷⁴ Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). CRIMSOC Report 4: Gender, Victimology Restorative Justice Edited by Walter DeKeseredy and Liam Leonard CHAPTER 6 - Conceptualizing and Contextualizing Restorative Justice for Hate Crimes– 197 – 224

⁷⁷⁵ Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). CRIMSOC Report 4: Gender, Victimology Restorative Justice Edited by

The research conducted by Walter and Hoyle included hate crimes of lesser degrees such as verbal abuse, acts of intimidation, and purposely causing noise and disturbance. Such hate crimes may be more aptly seen as hate disputes, which exist between co-existing individuals, where hate is not the sole motive for the crime, but such hate is fuelled by petty day-to-day disputes and thereby result in a lower level of tolerance towards the other.⁷⁷⁶ Garland and Chakraborti in their research based in the rural parts noted that ‘rural racism’ is pretty common and milder forms of harassment such as throwing eggs, verbal abuse and racist harassment were a part of minority community life.⁷⁷⁷ Such hate crimes are largely committed by parties that are usually known to each other and include work colleagues, neighbours and other acquaintances and not so much by strangers.⁷⁷⁸ Mason’s work on homophobic harassment also suggests that 90 per cent of such incidents took place near the victim’s place of residents while 82 per cent of them were committed by the neighbours.⁷⁷⁹

Such incidents may be seen as outside the purview of the authorities and may be classified more as anti-social than hate crimes specifically.⁷⁸⁰ Walter and Hoyle also focus on hate crimes relating to property damage, assault and harassment, that only sufficiently touch on the definitional scope of hate crimes and are most times left out of criminal prosecution due to lack of evidence.⁷⁸¹ The introduction of restorative justice in the hate crime stream seems to be better equipped to deal with this underlying issue.⁷⁸²

Walter DeKeseredy and Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice for Hate Crimes– 197 – 224

⁷⁷⁶ Walters. M and Hoyle. C, (2012) Exploring the Everyday World of Hate Victimization Through Community Mediation, University of Oxford, UK

⁷⁷⁷ Garland J and Chakraborti N (2006) Recognising and responding to victims of rural racism. *International Review of Victimology* 13(1): 49–69.

⁷⁷⁸ Walters. M and Hoyle. C, (2012) Exploring the Everyday World of Hate Victimization Through Community Mediation, University of Oxford, UK.

⁷⁷⁹ Mason G (2005) Hate crime and the Image of the Stranger, *British Journal of Criminology* (45)6: 837–859

⁷⁸⁰ Walters. M and Hoyle. C, (2012) Exploring the Everyday World of Hate Victimization Through Community Mediation, University of Oxford, UK.

⁷⁸¹ Walters. M and Hoyle. C, (2012) Exploring the Everyday World of Hate Victimization Through Community Mediation, University of Oxford, UK

⁷⁸² Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). *CRIMSOC Report 4: Gender, Victimology Restorative Justice* Edited by Walter DeKeseredy and Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice for Hate Crimes– 197 – 224

The restorative justice system faces numerous challenges in terms of acquiring credibility, acceptance and legitimacy, and are mostly community-based small programs.⁷⁸³ Restorative justice practices are not yet in systematic use.⁷⁸⁴ A few debates revolve around the notion that the restorative justice system might not be the best-fit remedy for very serious cases of hate crimes.⁷⁸⁵ However, there is a growing trend of utilizing restorative means in violent and more serious crimes. Especially in cases of hate crimes where an interaction between the two parties is of more value in terms of coexisting and healing within the communities.⁷⁸⁶ Restorative justice means are also cost-effective and time-saving.⁷⁸⁷

The means to restorative justice might bring about community cohesion, side-line and alienate the victim and the offender.⁷⁸⁸ It might not be wrong to state that the restorative justice approach has the potential to break down social stereotypes and evolve social attitudes. The same has been evidenced through the research conducted by Theo, where case studies were considered.⁷⁸⁹

RJ means as well as legal procedural means were both provided to the victimized community, where the victim group choose to proceed with restorative dialogue, leading to an open conversation between the offender and the victim along with the affected community members, the proceedings included the details of the full impact of the hate crime and also included the

⁷⁸³ Umbreit, M. S, *The Restorative Justice and Mediation Collection*, Office for Victims of Crime Bulletin, Office of Justice Programs, U.S. Department of Justice, 2000; Volpe. M and, Strobl. S, (2005) *Restorative Justice Responses to Post–September 11, Hate Crimes: Potential and Challenges*, *Conflict Resolution Quarterly*, Vol22, Issue 4, 527-535.

⁷⁸⁴ Gavrielides, T (2007), *The Commission for Equality and Human Rights: Regional Presence and Priorities*, London: ROTA, BIHR, LVSC, LCF.

⁷⁸⁵ Gavrielides. T, (2010), *Restoring Relationships: Addressing Hate Crime Through Restorative Justice*, *European Best Practices of Restorative Justice and Criminal Procedure*, 187-203

⁷⁸⁶ Volpe. M and, Strobl. S, (2005) *Restorative Justice Responses to Post–September 11, Hate Crimes: Potential and Challenges*, *Conflict Resolution Quarterly*, Vol22, Issue 4, 527-535.

⁷⁸⁷ Volpe. M and, Strobl. S, (2005) *Restorative Justice Responses to Post–September 11, Hate Crimes: Potential and Challenges*, *Conflict Resolution Quarterly*, Vol22, Issue 4, 527-535; Braithwaite, J. “Principles of Restorative Justice.” In A. Von Hirsch, J. V. Roberts, and A. Bottoms (eds.), *Restorative Justice and Criminal Justice: Competing or Reconciling Paradigms?* Oxford, UK: Hart, 2003.

⁷⁸⁸ Gavrielides. T, (2010), *Restoring Relationships: Addressing Hate Crime Through Restorative Justice*, *European Best Practices of Restorative Justice and Criminal Procedure*, 187-203.

⁷⁸⁹ Gavrielides, T. (2015), *Conceptualising and Contextualising Restorative Justice for Hate Crime*, in DeKeseredy, W. and Leonard, L. (Eds). *CRIMSOC Report 4: Gender, Victimology Restorative Justice* Edited by Walter DeKeseredy and Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice for Hate Crimes– 197 – 224

development of a plan to repair the harm caused, leading to the promotion of better social tolerance.⁷⁹⁰

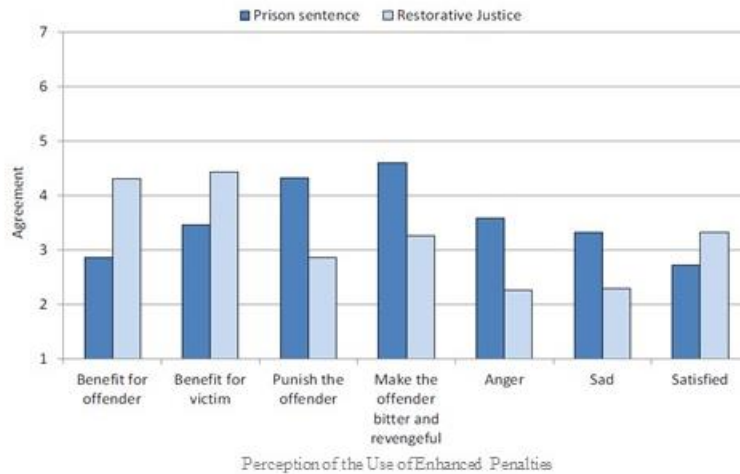
Many times, the restorative justice procedures include offering specific communities to undertake their own traditional or cultural restorative approach to resolving hate among individuals and groups. For example, in the Canadian case, a circle sentencing format is being used by Aboriginals in creating peaceful dialogues and thereby addressing numerous offences within the community.⁷⁹¹

In 2018, the Sussex Hate Crime Project research⁷⁹² was conducted on the victim sample that included members of the LGBT and Muslim communities. Based on the facts of a case, where a victim suffered assault and ended up with a black eye, the participants were asked if they would prefer that the offender would suffer a short-term prison sentence or if the offender must participate in the restorative justice meeting, confess and apologise for their crimes and also agree to engage in local community work. The participants in the research mostly agreed that restorative justice is a better means to deal with hate crime cases in terms of repairing harm, empowering victims and targeted community groups, making aware and educating the perpetrators of the harm they have caused and reducing the chances of reoffending (represented in the graph below).

⁷⁹⁰ Umbreit. M and Armour M. P., Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community, 36 Wash. U. J. L. & Policy 65 (2011).

⁷⁹¹ Lajeunesse. T, (1996) Community Holistic Circle Healing in Umbreit. M and Armour M. P., Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community, 36 Wash. U. J. L. & Policy 65 (2011).

⁷⁹² Paterson. J., Walters M, Rupert B., and Fearn, H., (2018) *The Sussex Hate Crime Project: Final Report*. Project Report. University of Sussex.



THE SUSSEX HATE CRIME PROJECT ⁷⁹³

The case of the Rwandan genocide in 1994, maybe a good standpoint to see the potential of restorative justice means in action. Rwanda witnessed a mass slaughter of 800, 000 Rwandan population belonging to the Tutsi race, which also led to the creation of the International Criminal Tribunal for Rwanda. The ICTR despite attempting to prosecute the perpetrators, was only successful to a certain extent as prosecuting approximately 200, 000 suspects (who were on remand for 7 years tenure) and detaining them was an unachievable task. The complete fabric of the society was destroyed, and most perpetrators and victims were neighbours and cohabiting. In an attempt to apply a restorative approach, the local indigenous system ‘Gacaca’ was adopted and aimed at progressing a communal judicial system by providing reconciliation support and speeding up the trial proceedings. As the four phased Gacaca focused on healing the victims and the perpetrators, by means of plea bargains, confessions and reintegration of the offenders into society.⁷⁹⁴

The preventive functioning of RJ in hate crime cases may be seen through the UK case study where the established Muslim and Sikh population in Slough, underwent fragmentation and interracial conflicts that resulted in community tensions. The youth from both communities were called in for dialogue and through mediation were encouraged to coexist. Face-to-face

⁷⁹³ Paterson, J., Walters M, Rupert B., and Fearn, H., (2018) *The Sussex Hate Crime Project: Final Report. Project Report. University of Sussex*, 39

⁷⁹⁴ Tiemessen, A., (2004) *After Arusha: Gacaca Justice in Post- Genocide Rwanda*, African Studies Quarterly, (8)1, p. 58; Gavrielides, T. (2015), *Conceptualising and Contextualising Restorative Justice for Hate Crime*, in DeKeseredy, W. and Leonard, L. (Eds). *CRIMSOC Report 4: Gender, Victimology Restorative Justice* Edited by Walter DeKeseredy and Liam Leonard Chapter 6 – *Conceptualizing and Contextualizing Restorative Justice for Hate Crimes*– 197 – 224

mediation brought social cohesion without needing any interference from the criminal justice process.⁷⁹⁵

The restorative system promotes the acknowledgement of the responsibility and understanding on the part of the offender to make amendments instead of tagging, secluding, and punishing the offender,⁷⁹⁶ however, means of restorative justice are solely dependent on the fact that the offender has been caught and convicted⁷⁹⁷ and the victim has agreed to meet with the offender (there exist cooperation and understanding established between the offender and victim). It is of high relevance that the cases of hate crimes that are considered for mediation and restorative justice must be selected with due diligence and utmost care. Much attention needs to be paid to avoid any misunderstanding and miscommunication.⁷⁹⁸

In the present-day world, more and more legislations are considering the inclusion of restorative justice values in their domestic as well as international criminal justice system. The restorative justice system may have strong philosophical potential to deal with the complexities of hate crimes.⁷⁹⁹ The primary reason why restorative justice means are being brought to effect while dealing with hate crimes is the inadequacies of other criminal justice theories⁸⁰⁰ to adequately address the consequences as well as the causes of hate crimes. However, restorative justice means in themselves are not sufficient⁸⁰¹ moreover, it is yet unsure if restorative justice is well equipped in changing the prejudiced attitudes of the offender (in the long term), and numerous possibilities need to be explored.⁸⁰²

⁷⁹⁵ Gavrielides, T. (2015), Conceptualising and Contextualising Restorative Justice for Hate Crime, in DeKeseredy, W. and Leonard, L. (Eds). CRIMSOC Report 4: Gender, Victimology Restorative Justice Edited by Walter DeKeseredy and Liam Leonard Chapter 6 – Conceptualizing and Contextualizing Restorative Justice for Hate Crimes– 197 – 224

⁷⁹⁶ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press, 11

⁷⁹⁷ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press, 156.

⁷⁹⁸ Umbreit, M., and Ritter, R. (2006), Arab Offenders Meet Jewish Victim: Restorative Family Dialogue in Israel, *Conflict Resolution Quarterly*, Vol. 24, No. 1, 99-109.

⁷⁹⁹ Gavrielides. T, (2010), Restoring Relationships: Addressing Hate Crime Through Restorative Justice, *European Best Practices of Restorative Justice and Criminal Procedure*, 187-203.

⁸⁰⁰ Walters M, (2014), *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Oxford University Press, 142.

⁸⁰¹ McDevitt, J., Levin, J., & Bennett, S. (2002), Hate Crimes Offenders: An Expanded Typology, *Journal of Social Issues*, 58, 303-317; Gavrielides. T, (2010), Restoring Relationships: Addressing Hate Crime Through Restorative Justice, *European Best Practices of Restorative Justice and Criminal Procedure*, 187-203.

⁸⁰² Walters, M., & Hoyle, C. (2010), Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime, in N. Chakraborti (Ed.), *Hate crime: Concepts, policy, Future Directions*, Cullompton, UK: Willan, 228-249

LOOKING FOR THE BEST FIT THEORY IN HATE CRIMES

The expressive and communicative account of punishment in terms of morality has gained significance in more recent years.⁸⁰³ Undoubtedly, any of the theories discussed above do not seem self-sufficient in tackling hate crimes: retribution in its narrower sense, focuses mainly on doing write the wrong, therefore a pure retributive approach seems quite brutal as it does not refer to any sustainable and futuristic dimensions in terms of the consequential benefits that punishment must aim.⁸⁰⁴ Deterrence, on the other hand, seems only partially adept in achieving the symbolic purpose of any hate crime legislation. The restorative justice approach seems to suit many hate crime cases; however, it may not serve the purpose, in very serious hate crimes. In more recent times, the debate between retributivists and consequentialists has moved forward to more multi-dimensional and broader issues underlying these theories; they focus more on why and how questions relating to punishment,⁸⁰⁵ suggesting that the punishment must not only be proportionate and deserved but must also aid the offender to reflect and rehabilitate and provide the public with an example.⁸⁰⁶ The same notion is significant in hate crime cases, as the ‘why’ underlying a hate crime is more significant compared to ‘how’.

Brook's pluralistic outlook towards punishment sustains an amalgamation or a hybridisation of elements from a retributive, deterrent and restorative approach.⁸⁰⁷ Brooks in his work remarks, that the theory of retribution must not be seen plainly as a means to proportionally penalize the offenders. Reflecting on Adam Smith’s work, Brook states that although the retributive approach focuses on punishment and alienation of the offender from the rest of the society, it holds deterrent values, which inspire other potential offenders and societies to abstain from undertaking a similar criminal approach (setting up an example for the rest). Further on, retributive sentencing allows significant time for the offender, to reflect on their wrongful acts and to repent for the same, indicating underlying rehabilitative narratives. Thus, a mixed or unified approach to punishment is not as contemporary as it might seem and highlights the

⁸⁰³ Duff, A. and Hoskins. Z, (2021), Legal Punishment, *The Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2021/entries/legal-punishment/>>.

⁸⁰⁴ Hoskins. Z. (2017), Punishment, Oxford University Press, *Analysis Reviews* Vol 77, Number 3, 619–632

⁸⁰⁵ Hoskins. Z (2017), Punishment, Oxford University Press, *Analysis Reviews* Vol 77, Number 3, 619–632

⁸⁰⁶ Brooks. T, (2012), The Review of Metaphysics, Vol. 66, No. 281-293, Philosophy Education Society Inc; Smith. A, (2002) *The Theory of Moral Sentiments*, ed. Knud Haakonssen, Cambridge: Cambridge University Press, 2.1.1.6

⁸⁰⁷ Brooks, T. (2012), *Punishment*. New York: Routledge, Introduction

essence of different theories on retribution, deterrence and correctional or rehabilitation.⁸⁰⁸ Therefore considering the vast impacts of hate crimes, a mixed approach would suit best while penalizing hate crime cases.

However, does this comprehensive mixed approach, bringing together certain aspects from different theories of punishment hold good in hate crime cases is doubtful. The significant question here relates to the ratio in which retribution, deterrence and restorative justice need to combine to achieve a best-fit sentencing framework in hate crime cases. i.e. what proportions of the elements from retribution, deterrence and restorative justice would result in a justified punishment aiming to achieve firstly, undoing the wrong committed by the offender (considering the in-terrorem effect of hate crimes), secondly, setting up an example for the rest of the society to not partake in similar crimes, aiming to comply with the symbolic purpose of hate crime legislation (assuming such does not develop retaliatory outlook within the offender's community), and thirdly, to make offenders reflect and feel remorseful and discourage them from engaging in the commission of similar crimes after the completion of their sentence (considering that the offender is apologetic and remorseful and has a reduced level of prejudice, sufficient enough to not repeat wrongful acts in future). It is difficult to accurately quantify such proportions however considering the rising hate crime concerns it becomes significant as to which of the three above-mentioned aims of hate crime legislation is more significant.

Firstly, the retributive component which focuses on undoing the offender's wrong and regaining the social equilibrium is significant. However as discussed earlier, hate crimes have a wide-ranging adverse effect on the victim, victim community and society at large, therefore penalizing hate crime offenders with a goal to only undo the harm caused at several levels not considering different mitigating factors and analogies, does not seem to sufficiently connote to justice.

Secondly, aiding the symbolic purpose of hate crime legislation by way of understanding punishment as a means to set up an example for society at large. Although theoretically, deterrence may hold good, in practice, there is no account as to who all may be deterred and to

⁸⁰⁸ Brooks. T, (2012), *The Review of Metaphysics*, Vol. 66, No. 281-293, Philosophy Education Society Inc; Smith. A, (2002) *The Theory of Moral Sentiments*, ed. Knud Haakonssen, Cambridge: Cambridge University Press, 2.1.1.6

what extent. Also, several times instead of setting an example to prevent hate crimes, the offender community becomes revengeful and becomes more prone to committing hate crimes.

And thirdly, the restorative or rehabilitative approach that connotes an attitudinal change in the offender such that they do not carry the hateful or prejudiced attitudes anymore seems to focus more on the ‘WHY’ of the crime than the ‘HOW’. As significantly portrayed through academic and empirical work hate crimes are based on deep-rooted biases in the mindset of the offenders, a more significant purpose of hate crime legislation and policies needs to be in line with addressing the issue at the core and must not merely touch on the symptoms or must not rely more on theories that are different when actuated.

An approach to sentencing in hate crime cases must be holistic and needs to focus more on the restorative means of justice. It must be victim-centric, attempting to develop an understanding of the differences between the offender and the victim, thereby simultaneously resolving the offender’s prejudiced mindset and providing relief to the victims. Such an approach must also take into account the deterrent factor to ensure setting up the right examples in society and prevent future crimes. While retributive tenets too must be considered in serious hate crime cases, where it becomes essential to keep society free from serious hate crime offenders.

CONCLUSION AND A WAY FORWARD

This research confirms with the larger academic understanding that hate crimes hurt more than parallel crimes, firstly in physical, emotional, and psychological terms and secondly in reference to causing harm to the direct individual victims and indirect victim community and society in general. This research also indicates that hate crimes have another dimension of harm in terms of intersectionality. In hate crime cases where the victimization is based on multiple grounds, the harm caused to the victim is aggravated. Therefore, it would not be wrong to say that hate crimes cause multidimensional levels of harm and require robust comprehensive legislation to address hate crime concerns.

A comprehensive legislation at the central as well as the State level would be needed to fulfil the symbolic purpose of hate crime legislation and is necessary to tackle hate crimes and needs to include at least the five grounds discussed under this work, i.e., grounds of religion, sexual orientation, gender, race and caste. As stated in this work, while some regions may be affected by a multitude of religious hate crimes, other places might witness a higher number of racial hate crimes, this localized nature of hate crimes must be accurately incorporated within the State level legislations, while a more general and unified set of laws and policies are required at the central (or Federal) level.

Looking at different societal aspects in terms of race, caste, religion, sexual orientation and gender, this research establishes the prevalence of hate crimes in India, be they in the name of communal violence, mob lynching, vigilantism or atrocities. It is interesting to note that hate crimes may be diverse in nature and as in the case of India may take the form of atrocities, mob lynching, vigilantism and so on, therefore the nature, scope and definition of hate crimes must be wider and inclusive keeping in view to accommodate any forms of hate crimes. The Indian criminal law only touches upon 'incitement of hate' under Section 153A and contains a few provisions on religious crimes. Although this provision on incitement of hate does not conform with the ODIHR definition of hate crimes, it is a good starting point for the development of hate crime laws in India. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989 is the only piece of federal legislation that focuses on hate crimes based on caste and may be seen as a prototype while formulating laws relating to religious, gender-based or race-based hate crimes.

Although Indian criminal law is silent on defining and sentencing hate crimes, the current judicial approach is gradually shifting towards recognizing and acknowledging hate crimes in India. Such endeavours have resulted in the formation of a few State level hate crime laws. However, the existing legal protection against hate crimes in India is quite insignificant and indicates the need for new criminal legal provisions. The hate crime legislative approach must consider the intersectional aspects of hate crimes and must not simply be based on a single-strand approach as a large number of hate crime cases in India are intersectional in nature given that the large Indian population falls under more than one identity ground. Considering that hate crimes hurt more, it is significant that the criminal justice system understands the hate crime victim experience in its holistic sense and does not simply adjudicate based on a single identity ground where multiple grounds are involved.

The penalization of hate crimes, considering the overall harm caused, must in its essence, have elements from retributive, deterrent and rehabilitative principles. While retributive sentencing might seem fit for serious hate crime cases, and a deterrent approach is required to set out the significant symbolic purpose of hate crime legislation, a restorative justice approach has much to offer, mostly in less serious hate crimes and in hate crimes where perpetrator and victim have a relationship. As hate crimes originate from deep-rooted hatred against the victim community, targeting the mindset of the wrongdoer is of the essence. A restorative justice approach has the potential to address the underlying hate and bias between the offender and the victim and to accommodate diverse interconnected aspects of the victim's experience, thereby facilitating holistic justice through dialogue. Especially in the Indian case, where several times, the hate crimes are based on more than one identity ground, a restorative justice approach has much to offer. As the restorative approach focuses more on the reformation and resolution of deep-rooted bias or hatred in the offender's mind. In India, where hate-based hostilities have for a long time been a part of Indian history, a restorative justice approach seems more apt, notwithstanding the application of retributive and deterrent penal measures where necessary in serious hate crime cases.

The Indian case study also brings to light the dynamic nature of hate crimes. It brings out that hate crimes are not merely limited to the grounds that have been discussed in this work, but evolve over time with variations in regional demographics, politics, climate change, refugee crisis, and economic upheavals. The discussion on hate crimes based on dietary food cultures is one such example and indicates that the hate crime legislation must have sufficient scope to not leave the law lax in hate crime cases that are not covered under specified protected grounds.

In the presence of most of the hate crime literature and research that has been developed considering more Western nation-states, this research work may be seen as a step towards the de-colonization of the field of hate crimes. It brings out numerous social and cultural aspects that may be unique to India, however, must be seen as a significant example considering a global future for an international understanding of hate crimes and related policies and legislations. With the fast-paced advancement, globalization and enhanced cross-cultural migration, being a developing country, the Indian case study is also potent in leading the way for other developing and less developed countries in terms of foreseeing the oncoming need for hate crime legislation.

In terms of research, both qualitative and quantitative, much work needs to be done. As India is at a starting point in terms of the development of hate crime laws, this research has found that the existing Indian literature on hate crimes is quite scant and requires much development in order to skillfully formulate an Indian understanding of hate crimes, their nature, scope and definition. It is up to the forthcoming scholarly work to also establish comparative analysis with reference to those nation-states where the hate crime law is quite developed, which would assist in creating a unified and more comprehensive understanding of hate crimes and shall render the global justice mechanism more efficient.

This research suggests that along with the formation of the legal framework, there is a need for spreading awareness and understanding of hate crimes in India. The primary cause of the invisibility of hate crimes in the country is due to the reason of the Indian population being unaware that they are being wronged and that they are being targeted merely due to their identity. This also leads to non-reporting of hate incidents at a primary stage and results in more aggravated forms. Therefore a major role needs to be played by civil societies, and non-governmental organizations in promoting awareness on the issue. It is also due on the part of the state, to provide government officials and the police with proper understanding and training on hate crimes, more importantly in the lack of adequate legal tools, so as to enable some degree of justice on a case-to-case basis.

Any new law, which is formulated does not require to merely fulfil the present-day legislative needs but requires to be dynamic and futuristic. It needs to foresee and take into account any and all future developments and complexities that might become prominent in tomorrow's present. This research work brings to light different aspects of hate crimes and hate categories that are unique to India, however, provides an insight into how any national, regional or international hate crime legislative framework must be wide in scope, dynamic in nature and comprehensive in terms of providing protection to all beings.

