

# **TOLERATING HATE SPEECH**

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**DEPARTMENT OF HUMANITIES AND SOCIAL SCIENCES**

**INDIAN INSTITUTE OF TECHNOLOGY DELHI**

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# **TOLERATING HATE SPEECH**

**by**

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**DEPARTMENT OF HUMANITIES AND SOCIAL SCIENCES**

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**to the**



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## CERTIFICATE

This is to certify that the thesis entitled, '**Tolerating Hate Speech**' submitted by **Lalita** to the Department of Humanities and Social Sciences, **Indian Institute of Technology Delhi**, for the award of the degree of **Doctor of Philosophy**, is a record of the bona fide research work carried out by her. She has worked under my supervision and the accompanying thesis is her genuine and original work. She has completed the necessary courses to the requisite standard.

This thesis has not been submitted, in part or full, to any other university or institute for the award of any degree or diploma.



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What I say here is as much about the PhD life as it is about the life apart from it. Though, neither of the two will be complete without the other.

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## ABSTRACT

“Hate speech” is generally understood as any act of expression that targets a group or community on the basis of caste, religion, race, gender, ethnicity, or any other feature identified with a group. The debate about how to deal with this category of problematic acts of expression, which are harmful, offensive, insulting or hurtful, is faced with the dilemma of protecting freedom of speech on the one hand, and protecting the marginalised groups that are often the target of such speech on the other. I propose that understanding the boundaries of this category of hate speech can clarify the question of what responses are more appropriate for different kinds of problematic speech.

I argue that the appropriate response to a sub-class of such problematic speech, “offensive speech,” is *toleration*. Toleration is the appropriate response because of the need to maintain a “discursive space” in which everyone can freely express their views on different beliefs and practices. “Discursive space” refers to a public sphere in which people express their opinions on matters important to society, and share thoughts with each other without coercion or fear. The conception of toleration that I argue for requires non-interference with offensive speech but it does not require engaging with the speech or speaker.

As an application of this thesis, I consider one current controversy governing the moral status of “no-platforming” speakers who have indulged in offensive speech. I argue that no-platforming is illegitimate for reasons of academic freedom as well as the duty to preserve the discursive space of academia. Given the rules of participation set within the academy by its members, the principle of freedom of speech should apply to academic spaces as much as it is valued in general discursive space. However, the decision to open academic platforms must remain with the academy, protected from external or internal interference.

## सार

सामान्यतः "हेट स्पीच" को ऐसे अभिव्यक्ति के कृत्यों के रूप में समझा जाता है, जिनमें किसी समूह या समुदाय को उसके जाति, धर्म, नस्ल, लिंग, एथनिसिटी, या ऐसी किसी और विशेषता के आधार पर, निशाना बनाया जाता हो। अभिव्यक्ति के ऐसे समस्यात्मक कृत्यों की श्रेणी- जो हानिकारक, आपत्तिजनक, अपमानजनक, या आहत करने वाले हैं- के बारे में जो बहस है, उसमें एक दुविधा है: एक ओर अभिव्यक्ति की स्वतंत्रता का संरक्षण करना और दूसरी ओर उन समुदायों की रक्षा करना जो इन कृत्यों का निशाना हैं। मेरा प्रस्ताव है कि "हेट स्पीच" की इस श्रेणी की सीमा को समझने से उन पर सही प्रतिक्रियाओं के सवाल को स्पष्ट किया जा सकता है।

मेरा तर्क है कि इस तरह के समस्यात्मक अभिव्यक्ति के एक उप-वर्ग, "ऑफेंसिव स्पीच", के लिए उपयुक्त प्रतिक्रिया है "सहिष्णुता" (टोलरेशन)। सहिष्णुता उपयुक्त प्रतिक्रिया "डिस्कर्सिव स्पेस" को बनाए रखने की आवश्यकता की वजह से है, जिसमें हर कोई स्वतन्त्र रूप से विभिन्न मान्यताओं और आचरणों पर अपने विचार व्यक्त कर सके। "डिस्कर्सिव स्पेस" एक सार्वजनिक क्षेत्र को संदर्भित करता है जिसमें लोग उन मुद्दों पर अपनी राय व्यक्त करते हैं जो समाज के लिए महत्वपूर्ण हैं, और एक दूसरे से, बिना किसी भय या दबाव के, विचार साझा करते हैं। सहिष्णुता की जिस अवधारणा के लिए मैंने तर्क दिया है, उसमें "ऑफेंसिव स्पीच" के साथ गैर-हस्तक्षेप की माँग है, पर अभिव्यक्ति के कृत्य या वक्ता के साथ संलग्न होने की आवश्यकता नहीं है।

इस थीसिस के एक प्रयोग के रूप में, मैंने ऐसे वक्ताओं, जिन्होंने आपत्तिजनक विचार व्यक्त किये हों, की "नो-प्लैटफ़ॉर्मिंग" के मौजूदा विवाद पर विचार किया है। मेरा तर्क है कि अकादमिक स्वतंत्रता और अकादमिक डिस्कर्सिव स्पेस का संरक्षण, दोनों ही वजहों से नो-प्लैटफ़ॉर्मिंग अवैध है। अकादमी के भीतर अकादमी के सदस्यों द्वारा तय किए गए भागीदारी के नियम होते हैं, तब अभिव्यक्ति की स्वतंत्रता का सिद्धांत

अकादमिक स्थानों में उतना ही लागू होना चाहिए जितना सामान्य डिसकर्सिव स्पेस में। हालांकि, अकादमिक स्थानों को किसी व्यक्ति या चर्चा के लिए खोलने का निर्णय अकादमी के पास ही रहना चाहिए, बिना किसी भीतरी या बाहरी हस्तक्षेप के।



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## INTRODUCTION

In the times of post-truth and ‘fake news’, it is becoming more and more difficult as well as crucial to think about questions of freedom of speech.<sup>1</sup> Freedom of speech and expression is a value and a right that has a long history of struggles. And the struggles continue. We live in the times of such struggles, from individuals to collectives, as societies and nations, on questions trivial and radical, in spaces private and public, social and political. We live in times where freedom of speech and expression is not a claim and a guarantee, rather a privilege which many of us have to constantly think about ‘whether to and how’ of exercising. The courage to speak truth to power and a disregard for truth to gain power run alongside each other.

To say that this is a concern specific to our times is to misunderstand the nature of the conflict which is fundamental to this struggle. The presence of differences and conflicts that emerge has been and will always be a part of the society, whether it is an apparently homogenous or a plural society. The nature of the questions and the relevance of the responses, however, do change with changing times and context. For example, J S Mill considers the question through the perspective, primarily, of the individuals, and not the state. In considering the value of freedom of speech, the search for truth by the individuals matters the most for him, which he argues should provide more protection to speech.<sup>2</sup> John Milton and John Locke, however, consider the question

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<sup>1</sup> Some people argue that the term ‘fake news’ is unhelpful and we should rather use “disinformation” or “information chaos” wherever required. Claire Wardle. “Fake News. It’s Complicated.” *First Draft*. Feb 17, 2017. [medium.com/1st-draft/fake-news-its-complicated-d0f773766c79](https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79) . It should also be noted that ‘fake news’ or “disinformation” is often connected with spreading propaganda. See, “Joint Declaration on Freedom of Expression and “ Fake News”, Disinformation and Propaganda”, by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe, et al. FOM.GAL/3/17. pp1-5. March 3, 2017. [www.osce.org/files/f/documents/6/8/302796.pdf](http://www.osce.org/files/f/documents/6/8/302796.pdf)

<sup>2</sup> Mill’s harm principle (named so by Joel Feinberg) plays a key role still, in thinking about the harm in hate speech and other kinds of acts of expression. John Stuart Mill. *On Liberty*. First published in 1859. Imprint: Bantam (USA). Penguin. 1999.

in light of what the state can and should do with respect to the freedom of speech, justifying some coercive power to the state but broadening the scope of freedom of speech in times when it wasn't considered a right.<sup>3</sup>

There is a dark side to free speech, in the way that it can be used to marginalize, threaten, demean, by attacking other individuals and groups either through direct remarks or by creating an environment in which fear and mistrust grows. For example, speech “designed to promote hatred on the basis of race, religion, ethnicity, or national origin.”<sup>4</sup> A part of this dissertation involves thinking about the appropriate definition of such “hate speech”. Given this concern, I am proposing a new argument in favour of defending free speech, rooted in the idea and value of toleration.

Such debates around protecting and regulating freedom of speech have been an important part of the public sphere in the past decade, even though the meaning and extent of this freedom started taking shape in the early twentieth century.<sup>5</sup> These debates include the law of sedition, pornography, blasphemy, press freedom, defamation, contempt of court, whistleblowing, among others. These issues are often connected with each other, in more than one way. However, they have problems specific to them which become relevant if we have to understand the ways to respond to or deal with them. For example, concerns of pornography involve question of consent

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<sup>3</sup> While Milton considers this question from the perspective of freedom of the press, Locke's concern is primarily freedom of religion and the implications of the separation of state and the church on that freedom. John Milton. *Areopagitica: a speech of Mr. John Milton for the liberty of unlicenc'd printing, to the Parliament of England*. London. 1644. John Locke. “A Letter about Toleration”. Ed. Jonathan Bennett. 2010. 1689. John Coffey. “Milton, Locke, and the New History of Toleration.” *Modern Intellectual History* 5, No. 03 (November 2008): 619.

<sup>4</sup> Michel Rosenfeld. “Hate Speech in Constitutional Jurisprudence: a Comparative Analysis.” in *The Content and Context of Hate Speech*. 242.

<sup>5</sup> In the United States, some landmark judgments and opinions emerged in the first half of the twentieth century, beginning from the communist speech which was deemed problematic for the state. See Alexander Meiklejohn. *Free Speech and Its Relation to Self-Government*. (Harper & Brothers Publishers. New York. 1948). In the colonial Indian jurisdiction, the questions of freedom of speech were raised, which revolved around the law of sedition, laws on speech which hurt the sentiments of a group or community or promoted enmity between groups. Siddharth Narrain. “The Harm in Hate Speech Laws: Examining the Origins of Hate Speech Legislation in India.” In *Sentiment, Politics, Censorship: The State of Hurt*, edited by Rina Ramadev, Sandhya Nambiar, & Debadutta Bhattacharya. (New Delhi, California, London, Singapore, Sage Publications. 2016).

and sexual morality of a society,<sup>6</sup> while contempt of court is related with the legitimacy and dignity of the court which is essential to maintain for the courts to have an authority on deciding the legitimacy of the law of the land.<sup>7</sup> Similarly the concerns of sedition law are tied with the citizens' freedom to demand secession or to question the functioning of the state as one unified entity.<sup>8</sup> Whistleblowing raises the question of legitimate secrecy demanded by organisations and the right of the public to know what affects them, the conflicting values of speaking the truth and maintaining silence as an insider to the organisation.<sup>9</sup>

These debates can be traced back to the emergence of freedom of speech as a right in democracies, and the covenants and conventions of the United Nations, beginning from the United Nations Declaration of Human Rights, and the two most important covenants which followed, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>10</sup> Although the question of freedom of speech, and hate speech in particular has been dealt with in legal provisions and case laws throughout the world, United States case law has played an important role in the development of the doctrine of free speech, as protected under the First Amendment of the US constitution.

From here on the introduction presents the following: section one provides a context within which the debate of hate speech becomes important. It includes examples which point out the

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<sup>6</sup> Nettie Pollard. "The Modern Pornography Debates." *Libertarian Alliance*, 1994. Michael C. Rea. "What is Pornography?" *NOÛS*. Vol. 35:1. (2001): 118–145. Richard Vernon. "John Stuart Mill and Pornography: Beyond the Harm Principle". *Ethics*, Vol. 106, No. 3 (Apr., 1996): 621-632. An essential reading in the debate around pornography, Catharine MacKinnon. *Only Words*. (Harvard University Press. Cambridge. 1993). I will talk about Mackinnon's argument in chapter two.

<sup>7</sup> The central aspects of the problem are discussed in the edited volume by C J Miller & David Perry QC. *Miller on Contempt of Court*. (Oxford University Press; 4th edition, 2018).

<sup>8</sup> Anushka Singh. *Sedition in Liberal Democracies*. (Oxford University Press, New Delhi. 2018).

<sup>9</sup> Daniele Santoro & Manohar Kumar. *Speaking Truth to Power: A Theory of Whistleblowing*. (Springer. 2018).

<sup>10</sup> Article 19 of the International Covenant on Civil and Political Rights (ICCPR) [www.ohchr.org/en/professionalinterest/pages/ccpr.aspx](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) . International Covenant on Economic Social and Cultural Rights (ICESCR). [www.ohchr.org/en/professionalinterest/pages/cescr.aspx](http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx)

current state of affairs vis a vis free speech. Section two lays out the problem of hate speech which points out the (un)usefulness of the term “hate speech”. Section three introduces the category of offensive speech as a sub-category of this broader informal category of hate speech. Section four presents the central argument of the thesis, where the concepts of discursive space and toleration are introduced. Section five points out the main literature engaged with while section six outlines the structure of this dissertation.

### **§ 1 The current context: freedom of speech vs hate speech**

In the socio-political environment that we live in today, we could find suppression and intolerance, almost everywhere, of the “thought that we hate.” Here is a list of instances which paint a rough picture of the free speech situation around the world.

- 1) Journalists walking to Islamabad’s D-Chowk to protest restrictions on media, were allegedly manhandled by Islamabad police, on World Press Freedom Day.<sup>11</sup> The state also had imposed Section 144 which bans gatherings of more than three in the restricted zones. The protesters had also allegedly responded with force later on.
- 2) April 16, 2018, a court Eastern Russia, sentenced Ms. Oksana Pokhudon to two years in prison for publishing allegedly xenophobic pictures in her private album on VKontakte, Russia’s social media network. While she argued that the images were not publicly disseminated and kept in a private folder, the court found her guilty of inciting hatred on the grounds of nationality, origins and religious opinions (punishable under article 282 of the Russian Criminal Code). Ms. Pokhudon’s prosecution might be related to her activism

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<sup>11</sup> “Islamabad police only ‘stopped’ journalists’ press freedom rally, officials tell sessions judge.” *Pakistan Press Foundation*. May 16, 2018. [www.pakistanpressfoundation.org/islamabad-police-only-stopped-journalists-press-freedom-rally-officials-tell-sessions-judge/](http://www.pakistanpressfoundation.org/islamabad-police-only-stopped-journalists-press-freedom-rally-officials-tell-sessions-judge/)

as a member of *Artpodgotovka*, an opposition political group in Russia that had organized mass protests in 2017. The Russian authorities did not sanction the protests and arrested hundreds of the group's members.<sup>12</sup> In *Butkevich vs Russia*, the European Court of Human Rights held that the Russian courts had violated a newspaper publisher's right to freedom of expression by ordering it to publish an apology and pay symbolic damages following the publication of two articles criticizing the professional activities of a local politician.<sup>13</sup>

- 3) An Israeli-Arab poet Daren Tatour was convicted for incitement to terrorism when she published a YouTube video reading her poem "Resist my people, resist", with photos of Palestinian boys throwing stones and firebombs at Israeli soldiers.<sup>14</sup>
- 4) A case filed in the European Court of Human Rights by a German blogger was rejected by the court. Hans Nix had posted a picture of Heinrich Himmler with a swastika armband, allegedly to protest and to contribute to the debate on discrimination and institutional racism. The German courts argued that the blogger had not sufficiently distanced himself from Nazi ideology in the post. The ECHR held that the national courts had sufficient reasons to interfere with freedom of speech in this case, given the weight of German history.<sup>15</sup>
- 5) In June 2018, Andrew Veprek, the United States deputy assistant secretary for refugees and migration, disputed the idea that leaders have a "duty" to condemn hate speech and incitement, and repeatedly rejected use of the words nationalism, populism (as dirty

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<sup>12</sup> Global Freedom of Expression Network News Archive. May 8, 2018. [mailchi.mp/b8686ba23b63/germany-expands-on-google-spain-decisions-this-week-2726893](mailto:mailchi.mp/b8686ba23b63/germany-expands-on-google-spain-decisions-this-week-2726893)

<sup>13</sup> *Butkevich v. Russia*. Case 5865/07. [globalfreedomofexpression.columbia.edu/cases/butkevich-v-russia/](http://globalfreedomofexpression.columbia.edu/cases/butkevich-v-russia/)

<sup>14</sup> Maayan Lubell. "Israeli court convicts Arab poet of incitement." *Reuters*. May 3, 2018. 7.30 PM. [www.reuters.com/article/us-israel-palestinians-poet/israeli-court-convicts-arab-poet-of-incitement/](http://www.reuters.com/article/us-israel-palestinians-poet/israeli-court-convicts-arab-poet-of-incitement/)

<sup>15</sup> *Hans Burkhard Nix v. Germany*. Case 5285/16. [globalfreedomofexpression.columbia.edu/cases/hans-burkhard-nix-v-germany/](http://globalfreedomofexpression.columbia.edu/cases/hans-burkhard-nix-v-germany/)

words), and xenophobia. He has questioned the value of multiculturalism in various comments on the United Nations Human Rights Council's resolution, titled "The incompatibility between democracy and racism".<sup>16</sup>

- 6) In India, the events around protests over an amendment to the Indian Constitution present a disturbing free speech situation. "Permissions for peaceful protests had been denied, protestors have been arrested, the state police have used excessive force and state officials openly threaten and intimidate protestors," Avinash Kumar (Amnesty International India Executive director) claimed, while urging the PM and Uttar Pradesh CM to allow protestors to protest peacefully, and demanding independent investigation on police brutalities.<sup>17</sup> Instances of violence followed after the repetitive use of the slogan "Shoot the Anti-nationals" for the protestors at public gatherings, election campaigns, which became a motivator during the anti-Muslim riots that broke out in a part of Delhi.<sup>18</sup> A song in the election campaign of the Bhartiya Janata Party for Delhi elections, 2020, also had similar words, with religious overtones. It had parts which threatened dissenters, those who did not praise Rama- those who were being called traitors at that time (dissenters opposing incumbent government's laws and policies).<sup>19</sup>

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<sup>16</sup> "Trump appointee guts UN document on racism, says leaders don't have duty to condemn hate speech." *CNN Wire*. June 29, 2018. 8:15 PM. [www.wtvr.com/2018/06/29/trump-appointee-guts-un-document-on-racism-says-leaders-dont-have-duty-to-condemn-hate-speech/](http://www.wtvr.com/2018/06/29/trump-appointee-guts-un-document-on-racism-says-leaders-dont-have-duty-to-condemn-hate-speech/)

<sup>17</sup> "Allow right to peaceful protests in Varanasi, Amnesty urges PM Modi, Yogi Adityanath." *The Economic Times*. Jan 16, 2020. 6:08. PM. [economictimes.indiatimes.com/news/politics-and-nation/allow-right-to-peaceful-protests-in-varanasi-amnesty-urges-pm-modi-yogi-adityanath/](http://economictimes.indiatimes.com/news/politics-and-nation/allow-right-to-peaceful-protests-in-varanasi-amnesty-urges-pm-modi-yogi-adityanath/)

<sup>18</sup> Jeevan Prakash Sharma. "Delhi Riots 2020: Who Fanned The Flames of Hatred? Is Kapil Mishra Only To Blame?" *Outlook India*. March 9, 2020. [www.outlookindia.com/magazine/story/india-news-delhi-riots-2020-who-fanned-the-flames-of-hatred-is-kapil-mishra-only-to-blame/302875](http://www.outlookindia.com/magazine/story/india-news-delhi-riots-2020-who-fanned-the-flames-of-hatred-is-kapil-mishra-only-to-blame/302875)

<sup>19</sup> Similar expression can be found reported here: "Hate Speech: Time to evict protestors in Delhi." *Scroll.in*. Feb, 1, 2020. 9.30. PM. [scroll.in/video/951856/hate-speech-time-to-evict-protestors-in-delhi-says-bjps-new-campaign-song](http://scroll.in/video/951856/hate-speech-time-to-evict-protestors-in-delhi-says-bjps-new-campaign-song)

These instances show that there is an attack on freedom of speech by governments in some parts of the world. If we notice more such cases, we would see that free speech has also been used to justify speech that attacks individuals and groups which are vulnerable in some contexts. For example, refuting multiculturalism at a time when there is an international crisis which would require governments to help the refugees. Studying such instances widely, we can also find the role that the evolution of a society plays in this development of a freedom which always comes with some costs attached to it.<sup>20</sup> The freedom of speech in the US has reached a level, in principle, where most ‘hate speech’ is protected. The reliance on ‘more speech’ to counter hate speech is advocated to the extent that it is often called “American Exceptionalism” in the literature on free speech.<sup>21</sup> This means that the speech which is likely to be regulated or criminalised even in other liberal democracies, will be protected under the US first amendment.

In India, on the other hand, this debate has been reignited in the past one decade with a renewed fervor, when two phenomena can be seen. On one hand the rise of speech which maligns the image of the minorities, speech which targets those who oppose the governments, often goes unpunished, even though the law of the land justifies such punishment. On the other hand, self-censorship, censorship and regulation by the state saw an increase in labelling speech as hate speech or inflammatory. Regulations and other ways are found to curtail the acts of expression which appear to threaten those in power or the majority. But, what is also to be noted is that there is a rise in the ways and platforms through which the speech from groups and interests hitherto

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<sup>20</sup> Some of the accounts which trace the development are the following. Frederick Schauer. “The Exceptional First Amendment”. *Faculty Research Working Paper Series*. Harvard University. RWP05-021. 2005. Vincent Blasi. “Holmes and the Marketplace of Ideas”. *The Supreme Court Review*. Vol. 2004. 1-46. Dheerendra Patanjali. “Freedom of Speech and Expression. India v America: A study”. *India Law Journal*. [www.indialawjournal.org/archives/volume3/issue\\_4/article\\_by\\_dheerajendra.html](http://www.indialawjournal.org/archives/volume3/issue_4/article_by_dheerajendra.html)

<sup>21</sup> Although different but interestingly related with the idea articulated in the book by the same name. Seymour Martin Lipset. *American Exceptionalism: A Double-edged Sword*. (W. W. Norton & Company. 1996).

marginalised has been on the rise too, creating more and more space in the wider public discourse than ever.<sup>22</sup> Much of this corresponds with the rising identity politics which has been an important part of the Indian polity for some time now.

Indian courts have been highly progressive in some of the judgments related with freedom of speech, protecting the Millian value of the truth, or the marketplace of ideas suggested by Justice Holmes, borrowing from the tests devised by the US supreme court and applying them wisely and carefully to the Indian context.<sup>23</sup> There is, however, much confusion as to what a right law or right definition should be as to what extent speech should be regulated and brought under the coercive power of the state.<sup>24</sup> In 2015, the Law commission of India was asked to prepare a report on hate speech, which also failed to provide a definition of the term, but proposed some new guidelines to the existing legal provisions.<sup>25</sup> The report of the Law Commission, however, suggested incitement to hatred and provocation to violence to be incorporated in the Indian Penal Code, carefully laying out the hazards of the confusion created due to the usage of the term ‘hate speech’.

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<sup>22</sup> The term “platform” in this dissertation means any discursive space where opinions are expressed. Discursive space can be realised in and through different platforms. They can be physical spaces like an auditorium or rallies, traditional media spaces, or online media or social media spaces. Platform is an institutional realisation or vehicle within which discursive space is realised.

<sup>23</sup> For a detailed analysis of the issues in law, specially in Indian jurisprudence, see Gautam Bhatia. *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution*. (Oxford University Press. New Delhi. 2015). For the evolution of hate speech jurisprudence in the USA, see Geoffrey R Stone. “Hate Speech and the US Constitution.” 3 *East European Constitutional Review*. (1994): 78-82.

[chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3246&context=journal\\_articles](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3246&context=journal_articles)

<sup>24</sup> The parallel with the rise of right wing participants in the political sphere is important to note too. From among the myriad ways in which this affects the public sphere, one is the effect on the status of the value of freedom of speech. This gives some very interesting insights into the problem of hate speech. The right wing, for example, has been largely pro-free speech, but also that the most restrictive regimes have also been the right leaning ones. The difference clearly lies, not in the law, but its arbitrary implementation. Recent examples in the Indian free speech regime can be accessed here : Devjyot Ghoshal. “Police arrest protest organiser Sharjeel Imam on sedition charges.” *Reuters*. Jan. 28, 2020. 7:06 PM [in.reuters.com/article/india-citizenship-protests-student/police-arrest-protest-organiser-sharjeel-imam-on-sedition-charges-idINKBN1ZR1N1](https://www.reuters.com/article/india-citizenship-protests-student/police-arrest-protest-organiser-sharjeel-imam-on-sedition-charges-idINKBN1ZR1N1) . “Citizenship Act protests: Sedition charges filed against more than 3,000 people in Dhanbad”. *Scroll.in*. Jan 08, 2020 · 05:53 pm. [scroll.in/latest/949203/jharkhand-sedition-charges-filed-against-over-3000-anti-citizenship-act-protestors-in-dhanbad](https://scroll.in/latest/949203/jharkhand-sedition-charges-filed-against-over-3000-anti-citizenship-act-protestors-in-dhanbad)

<sup>25</sup> “Hate Speech”. Report no. 267. Law Commission of India. March 2017. [lawcommissionofindia.nic.in/reports/Report267.pdf](http://lawcommissionofindia.nic.in/reports/Report267.pdf)

When the circumstances change, it might be plausible to argue, the regulation of speech could change. Some speech might be more protected or more regulated at some point of time while not so regulated or protected at other times.<sup>26</sup> So, some societies where the structure for protecting people against discrimination is well set up, and less likelihood of speech actually causing any harm, there we can have more protection while others less developed in this sense would need speech regulations to protect their citizens.<sup>27</sup> We should strive to create a space where such fundamental freedom to think and express is valued.<sup>28</sup> With such an understanding, one looks at a specific problem of freedom of speech, that is “hate speech”, addressed in this dissertation.

### § 1.1 Protecting freedom of speech vs protecting targets of hate speech

Among the problems related with the meaning and scope of this freedom of speech,<sup>29</sup> the problem of hate speech has been an important one during some intervals in the last century.<sup>30</sup> The

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<sup>26</sup> Maitra and McGowan agree, among others. Ishani Maitra & Mary Kate McGowan. *Speech and Harm: Controversies Over Free Speech*. (Oxford University Press. 2012).

<sup>27</sup> Heinze argues this in his latest book. Eric Heinze. *Hate Speech and Democratic Citizenship*. (London, Oxford University Press. 2016).

<sup>28</sup> Freedom to think is connected with ‘Freedom of Opinion’ protected by international and regional laws on freedom of speech and expression, and protected also as ‘freedom of thought’. For instance, Article 19(1) of ICCPR “...right to hold opinions without interference.”, Article 18 (1) of ICCPR, “...right to freedom of thought, conscience, and religion...”, and the Preamble of the Indian Constitution include “liberty of thought, expression, belief, faith, and worship..”, which is interestingly absent from Article 19 itself.

<sup>29</sup> C. Edwin Baker. *Human Liberty and Freedom of Speech*. (Oxford University Press. New York. Oxford. 1989). Eric Barendt. *Freedom of Speech*. (Oxford University Press. 1985).

<sup>30</sup> Note that there are many other problems for freedom of speech, which raise different concerns than that of hate speech. These include blasphemous speech, which is a problem within the group and not between different groups, but I will consider some examples of blasphemy under the definition of hate speech that I use. Second is sedition, which raises a question of limits of freedom of speech, but the target of the speech is the state or government and not the groups. Similarly, the concerns raised in the regulation of pornography are often thought to be similar to hate speech (i.e. protecting the targeted or marginalised groups). But the harms in pornography require us to deal with other concerns which are not so relevant in case of hate speech, for example, consent.

For an inquiry around blasphemy and bias in allowing critique of one practice while restricting others as problematic or ‘religious’ as opposed to ‘secular’, see Talal Asad et al. *Is Critique Secular: Blasphemy, Injury, and Free Speech*. Townsend Centre for the Humanities. (University of California, Berkeley. London. 2009).

One of the most interesting debates around pornography and censorship is found in the arguments of Catharine MacKinnon and Ronald Dworkin. Ronald Dworkin. “Is There a Right to Pornography?” *Oxford Journal of Legal*

conflict between freedom of speech and protecting vulnerable minorities on the basis of equality has been a central concern in the current literature on hate speech.<sup>31</sup> Does protecting hate speech mean that liberty is valued more than equality?<sup>32</sup> Does regulating hate speech mean that equality is valued more than liberty? Does hate speech harm only minorities?<sup>33</sup>

From academic writing to legal provisions and court judgments, hate speech finds a big enough space in contemporary politics. It is the class of problematic acts of expression which promote hatred or enmity against a group or a community targeted on the basis of some features of their identity. The question of the limits of freedom of speech often lies at the centre of the debate about what speech should be protected, where the answers are hardly homogenous. In fact, they differ widely based on the socio-historical context in which the question presents itself. For example, the law banning Holocaust denial in Germany considers the historical reality of the crime of Holocaust which governs the sensibilities of the people there.<sup>34</sup> Similar laws in other countries

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*Studies*, Vol. 1, No. 2 (Summer, 1981): 177-212. Ronald Dworkin, "Women and Pornography." *The New York Review of Books*. (October 21, 1993). Catherine Mackinnon, reply by Ronald Dworkin. "Pornography: An Exchange." *The New York Review of Books*. (March 3, 1994).

Other relevant works are: Alisa L Carse. "Pornography: An Uncivil Liberty?" *Hypatia*. Vol. 10. No 1. (Winter 1995). 155-182. David Dyzenhaus. "John Stuart Mill, and the Harm of Pornography." *Ethics*, Vol. 102, No. 3 (Apr., 1992): 534-551. Caroline West. "The Free Speech Argument against Pornography". *Canadian Journal of Philosophy*, Vol. 33, No. 3 (Sep., 2003): 391-422.

<sup>31</sup> On different aspects of what harm does hate speech have, including the concerns of the public discourse, counter speech, and the problems of illocutionary speech act, highlighted through the speech act theory, see Maitra & Mary Kate McGowan. *Speech and Harm: Controversies Over Free Speech*. (Oxford University Press. 2012).

<sup>32</sup> John W. Tate analyzes this conflict within liberal democracies which is due to the conflict internal to liberalism given that the two values of free speech and equal respect are foundational to it but are also, in some cases, in conflict with each other. However, he argues, it is the democratic tradition which decides which liberal value will have more weight. If left only to the liberal tradition, its plurality of foundational values yields different yet equally acceptable results. John W. Tate. "Free speech or equal respect?: Liberalism's competing values," *Philosophy and Social Criticism*. Vol. 34, No. 9. (Nov. 2008): 987-1020.

<sup>33</sup> This set of questions are addressed through various arguments in Michael Herz & Peter Molnar. *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. (Cambridge, New York, Cape Town, Cambridge University Press. 2012).

<sup>34</sup> German law protecting freedom of speech, Article 5 of the Basic Law. Section 130(3) of German Penal Code criminalises Holocaust denial, while 130(4) & (5) punish other acts of expression which "glorify" or "justify" the crimes committed by the National Socialist Party. Michael J. Bazylar. "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism." Published by Vad Vashem, The World Holocaust Remembrance Centre. [www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html](http://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html)

derive from the German law, and are sometimes modified given the respective socio-cultural framework of the countries, like the United Kingdom.<sup>35</sup> In India, there is a specific law which bans casteist remarks,<sup>36</sup> caste being a reality here, which finds parallel in the racist speech law in some other countries while caste is not addressed in their laws against morally problematic acts of expression.<sup>37</sup>

Consider some recent instances of hate speech, which show, arguably, that there is a balance needed to protect freedom of speech and the targeted communities. The French magazine, Charlie Hebdo, published cartoons of Prophet Muhammad, which were perceived as obscene by some but also as “hateful” towards Muslims by targeting their beliefs.<sup>38</sup> Another instance is of Wendy Doniger’s book *Hindus: an Alternative History*, which was perceived as portraying Hindu

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<sup>35</sup> There is no legal sanction against Holocaust denial in particular, but the crown court upheld the charges in one case, last year. Jeremy Sharon, “‘Landmark decision’ in UK upholds conviction for Holocaust denial.” February 13, 2019 [www.jpost.com/diaspora/landmark-decision-in-uk-upholds-conviction-for-holocaust-denial-580589](http://www.jpost.com/diaspora/landmark-decision-in-uk-upholds-conviction-for-holocaust-denial-580589). Section 4 of the Public Order Act, 1986, punishes speech that promotes racial and religious hatred. The UK Law Commission is underway in working on the hate speech and hate crime provisions. “Hate Speech Versus Free Speech: the UK Laws.” *The Week*. February 12, 2020. [www.theweek.co.uk/97552/hate-speech-vs-free-speech-the-uk-laws](http://www.theweek.co.uk/97552/hate-speech-vs-free-speech-the-uk-laws) General Comment No.34 of the Human Rights Committee of the United Nations on Article 19 of the ICCPR, points out that laws that penalise “erroneous opinion” on or “incorrect interpretation of” historical facts are incompatible with the covenant. Human Rights Committee. “General Comment No.34.” *The United Nations*. pp1-13. Sep. 12, 2011. [www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf). Similarly Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda outlines in section 2(a) that general prohibitions on “...vague and ambiguous ideas, including “false news” or “non-objective information” are incompatible with international standards...” See supra note 1.

<sup>36</sup> The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Chapter II, Section 3, lists several acts of expression which are criminalised, specifically the caste-based insults. [legislative.gov.in/sites/default/files/A1989-33\\_2.pdf](http://legislative.gov.in/sites/default/files/A1989-33_2.pdf). Section 153 A of the Indian Penal Code criminalises “promoting enmity” and includes caste as one of the grounds. Section 295 A, on the other hand, is limited to religious sentiment. *Indian Penal Code, 1860*. Sections, 153 A & 295 A.

<sup>37</sup> For a comparative hate speech law across several countries, see “Comparative Hate Speech Law: Annexure.” Research prepared for the *Legal Resources Centre*, South Africa. March 2012. [www.law.ox.ac.uk/sites/files/oxlaw/1a\\_comparative\\_hate\\_speech\\_annex.pdf](http://www.law.ox.ac.uk/sites/files/oxlaw/1a_comparative_hate_speech_annex.pdf)

For a list of legal provisions and international covenants and conventions, refer to Ivan Hare & James Weinstein, *Extreme Speech and Democracy*. (Oxford University Press. 2010). xxvii-li.

<sup>38</sup> Catherine Taibi, “These Are The Charlie Hebdo Cartoons That Terrorists Thought Were Worth Killing Over,” *Huffington Post*. July 1, 2015. 9:47 PM IST [www.huffingtonpost.in/entry/charlie-hebdo-cartoons-paris-french-newspaper-shooting\\_n\\_6429552?ri18n=true](http://www.huffingtonpost.in/entry/charlie-hebdo-cartoons-paris-french-newspaper-shooting_n_6429552?ri18n=true)

Gods in bad light.<sup>39</sup> While the former triggered violent attacks, and protests that followed in several parts of the world against the violence and intolerance, the latter became a case of self-censorship when the Indian publishers withdrew the books due to fear of violence. Even though different responses emerged for these “hate speeches”, one thing which is common in both is that the cartoons as well as the book offended some groups (religious groups; Muslims and Hindus, respectively), because they apparently targeted the identity of the offended groups.<sup>40</sup> Such instances in the twenty-first century appear to have reignited the debate on this category of speech, where the conflict between the freedom of speech and the protection of the rights of group and community makes it both philosophically challenging as well as practically urgent.

There are two main questions which are taken up and responded to in this dissertation. First is how we should understand the category of hate speech and whether we should continue using the term. By proposing one answer to this question, I limit the scope of the second question in the thesis, by focusing on the category of offensive speech. The second question addressed in this dissertation is: what is the appropriate response to offensive speech?

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<sup>39</sup> Anita Joshua. “Penguin withdraws book on Hinduism”. *The Hindu*. February 11, 2014. New Delhi. [www.thehindu.com/books/books-authors/Penguin-withdraws-book-on-Hinduism/article11535057.ece](http://www.thehindu.com/books/books-authors/Penguin-withdraws-book-on-Hinduism/article11535057.ece)

Note that the cartoon controversy triggered by the Charlie Hebdo cartoons is only a reemergence of the issue first emerged with the case of similar Danish Cartoons in 2005. Erik Bleich, “Free Speech or Hate Speech? The Danish Cartoon Controversy in the European Legal Context”. In *Global Migration: Challenges in the Twenty First Century*, edited by Kavita R Khory. (Palgrave Macmillan. New York. 2012): 114-130. Bleich focuses on the continuity of the cartoon controversy from the Danish cartoon to Charlie Hebdo. Also see, Robert A Kahn, “Flemming Rose, The Danish Cartoon Controversy, and the New European Freedom of Speech.” *Legal Studies Research Paper Series*. Paper 09-24. (2009): 1-41.

<sup>40</sup> “Freedom of expression should end at and not cross the limits of offending others over their colour, race or religion,” wrote Idris al-Dris, a journalist with Saudi newspaper Al-Watan. As cited (among other responses) in “Charlie Hebdo: Muslim media anger at new cartoon.” *BBC News*. January 14, 2015. [www.bbc.com/news/world-europe-30812155](http://www.bbc.com/news/world-europe-30812155). There were some voices who supported the staff of Charlie Hebdo, while at the same time questioning the need to keep publishing the offensive material.

The legal notice sent by Dinanath Batra, an RSS ideologue and founder of *Shiksha Bachao Andolan Samiti* (an organisation for education activism), for withdrawing *The Hindus: An Alternative History*, accused Doniger’s book of denigrating Hindus, showing Hinduism in poor light, written with biased Christian missionary zeal, of obscene depictions of Hindu Gods, calling Doniger ‘a woman hungry of sex.’ As quoted in “Penguin To Withdraw 'The Hindus: An Alternative History'.” *Outlook*. February 11, 2014. [www.outlookindia.com/website/story/penguin-to-withdraw-the-hindus-an-alternative-history/289467](http://www.outlookindia.com/website/story/penguin-to-withdraw-the-hindus-an-alternative-history/289467).

## § 2 The Problem of “hate speech”

So, what does this term “hate speech” mean?<sup>41</sup> Michel Rosenfeld defines hate speech as “speech designed to promote hatred on the basis of race, religion, ethnicity, or national origin.”<sup>42</sup> Most of the literature, however, does not have a definition of “hate speech.” But, as Robert Post argues, any definition should consider the harms caused by the speech in order to highlight the “distinctive legal treatment” it will receive.<sup>43</sup> Another attempt to delineate “hate speech” is made by Bhikhu Parekh. Although agreeing that the term “hate speech” is unsatisfactory, he points out three features of what this category entails. It is directed against “easily identifiable individuals or a group of individuals based on an arbitrary and normatively irrelevant feature”, stigmatizes by ascribing undesirable qualities, and as a consequence the group is viewed as undesirable.<sup>44</sup> Despite the efforts to delineate a category in some such accounts, the debate about the usefulness of the term “hate speech” does not find an important place in the larger debate about hate speech.

Here is a list of examples which show that the term “hate speech” is sometimes used in a rather elastic way. Several of them have made their way into court cases. I will not, however, talk about the law in this dissertation.

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<sup>41</sup> The definitional aspect is dealt with at length in chapter one.

<sup>42</sup> Michel Rosenfeld. “Hate Speech in Constitutional Jurisprudence: a Comparative Analysis.” in *The Content and Context of Hate Speech*. 242.

<sup>43</sup> Robert Post. “Interview with Robert Post,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, edited by Michael Herz & Peter Molnar. (Cambridge, New York, Cape Town, Cambridge University Press. 2012): 31.

<sup>44</sup> Bhikhu Parekh. “Is There a Case for Banning Hate Speech?” in *The Content and Context of Hate Speech*. 40.

- 1) A member of the Ku Klux Klan burnt a cross in the lawns of an African American family. Cross-burning is an act of expression (which is not a case of speech), seen as “an attempt to arouse anger or alarm on the basis of race, color, creed, or religion.”<sup>45</sup>
- 2) A Jehovah’s Witness, while distributing pamphlets denouncing all religions as a ‘racket,’ provoked the City Marshal, “You are a God damned racketeer...damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”<sup>46</sup>
- 3) A pamphlet by Henry Ford “The International Jew: The World’s Problem” accused Jews of an international conspiracy, associating them with all ills in the world.<sup>47</sup>
- 4) A speaker in a public gathering said “Muslims are terrorists.”<sup>48</sup>

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<sup>45</sup> The First amendment of the United State of America is invoked against the banning of cross-burning. *R.A.V. v. St. Paul* (1992) and *Virginia v. Black* (2003) are the two landmark cases in the US Supreme Court. While *R.A.V.* protected all instances of cross-burning on the basis of viewpoint-neutrality, *Virginia* allowed the states to make a law which regulated cross burning on the basis of the distinction of intimidation function and expressive function. Robert A Kahn. “Cross Burning.” *The First Amendment Encyclopedia*. [mtsu.edu/first-amendment/article/1105/cross-burning](https://mtsu.edu/first-amendment/article/1105/cross-burning)

In arguing for the “derived authority” of the speaker, Maitra notes that cross-burning “marks its target as undesirables”, ranks them “inferior to the non-targets.” Ishani Maitra. “Subordinating Speech,” in *Speech and Harm*. 109.

<sup>46</sup> The doctrine of “Fighting words” came into place with this case, which incite immediate “breach of peace,” also putting epithets and insults outside the protection granted by the First amendment of the US Constitution. The words which inflict injury by their mere expression and an immediate breach of peace (by the person to whom the words are addressed). *Chaplinsky v. State of Hampshire* (1942). No. 255. Weinstein argues that even though the individuals’ right to participate in the public discourse cannot be outweighed by any other concern, speech outside of public discourse can be justifiably restricted to protect people from insult. James Weinstein. “Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*,” in *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein. (New York, Oxford University Press. 2010): 35-38.

<sup>47</sup> An interesting thing to note is that while Ford, later on, apologised for his anti-Semitic views, Hitler had apparently taken up his theory, “You can tell Herr Ford that I am a great admirer of his...I shall do my best to put his theories into practice in Germany.” Recently the US president Donald Trump expressed his admiration for Ford, although indirectly connecting Trump calling Democrats supporters as disloyal Jews. See Chiu, Allyson. “Trump, amid claims of anti-Semitism, invoked Henry Ford. Hitler called the automaker his ‘inspiration.’” *The Washington Post*. August 22, 2019. 4:55 p.m. [www.washingtonpost.com/nation/2019/08/22/trump-henry-ford-antisemitism-jews/](https://www.washingtonpost.com/nation/2019/08/22/trump-henry-ford-antisemitism-jews/)

“Ford’s Anti-Semitism”, published by the American Public Broadcasting Service, presents a conversation with Hasia Diner, professor of Hebrew and Judaic Studies, on Ford’s Book and the evolving image of the Jews in the 19th and 20th century. [www.pbs.org/wgbh/americanexperience/features/henryford-antisemitism/](https://www.pbs.org/wgbh/americanexperience/features/henryford-antisemitism/)

<sup>48</sup> For similar statements against Muslims, see the example in Weinstein, “Extreme Speech,” in 55. There are other ways too in which remarks against the community are made which are based on conscious and unconscious bias. See a detailed analysis of the question of unconscious bias in the media representations. Caroline Mala Corbin.

- 5) In an article in a French magazine, Robert Faurisson, a Holocaust denier, wrote that “the myth of the gas chambers is a dishonest fabrication.”<sup>49</sup>
- 6) During the 2020 state government election campaign in Delhi, slogans inciting violence were raised in public gatherings, “*Desh ke gaddaron ko, goli maaro saalon ko*” (“Shoot the anti-nationals”).<sup>50</sup>
- 7) Hostility expressed towards the far right by the organs of the Council of Europe, through the expression “National Socialism is a totalitarian doctrine incompatible with democracy and human rights.”<sup>51</sup>
- 8) Wendy Doniger’s book “outraged religious feelings” because it presented Hindu Gods in a bad light.<sup>52</sup>

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“Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda.” *Fordham Law Review*. (Vol. 86. No.2. 2017): 455-85.

For reports on the hate crime against Muslims, which result from the hate speech, OSCE-ODIHR website can be accessed here: “Bias against Muslims”: [hatecrime.osce.org/what-hate-crime/bias-against-muslims](https://hatecrime.osce.org/what-hate-crime/bias-against-muslims)

<sup>49</sup>As cited in Julie C. Suk, “Denying Experience: Holocaust Denial and the Free-Speech Theory of the State.” in *The Content and Context of Hate Speech*. 151. An account of the challenges of Holocaust denial can be found in Deborah E Lipstadt. *Denying the Holocaust: The Growing Assault on Truth and Memory*, (Penguin. 1993). *Irving v. Lipstadt* is a case in British High Court, wherein David Irving lost the defamation suit filed against Lipstadt who called him “Holocaust denier” in her book. For a recent account of the case and the problem of Holocaust denial, see Ewelina Ochab’s “Why Challenging Holocaust Denial And Distortion Matters”. *Forbes*. Jan 27, 2020. [www.forbes.com/sites/ewelinaochab/2020/01/27/why-challenging-holocaust-denial-and-distortion-matters/#50efcd737388](https://www.forbes.com/sites/ewelinaochab/2020/01/27/why-challenging-holocaust-denial-and-distortion-matters/#50efcd737388)

<sup>50</sup> Such slogans started since the protest gatherings in New Delhi, about the recent Citizenship Amendment Act. A song in the election campaign of the Bhartiya Janata Party for Delhi elections, 2020, also had similar words, with religious overtone, and parts which threatened dissenters, those who did not praise Rama, those who were being called traitors at that time (dissenters opposing incumbent government’s laws and policies). Similar expression can be found reported here: “Hate Speech: Time to evict protestors in Delhi.” *Scroll.in*. Feb, 1, 2020. 9.30. PM. [scroll.in/video/951856/hate-speech-time-to-evict-protestors-in-delhi-says-bjps-new-campaign-song](https://scroll.in/video/951856/hate-speech-time-to-evict-protestors-in-delhi-says-bjps-new-campaign-song)

<sup>51</sup> As cited in Ivan Hare. “Extreme Speech Under International and Regional Human Rights Standards,” in *Extreme Speech*. 76.

<sup>52</sup>Not all outrages of religious feeling are seen as hate speech though.

See the story of Wendy Doniger’s book withdrawn on the charges of outraging religious feelings. Anita Joshua. “Penguin withdraws book on Hinduism”. *The Hindu*. February 11, 2014. New Delhi. [www.thehindu.com/books/books-authors/Penguin-withdraws-book-on-Hinduism/article11535057.ece](https://www.thehindu.com/books/books-authors/Penguin-withdraws-book-on-Hinduism/article11535057.ece)

- 9) Germaine Greer’s “homophobic remarks,” that transwomen are not women, evoked demands of no-platforming her in some academic events.<sup>53</sup>
- 10) A Cartoon of Ambedkar and Nehru hurt the sentiments of a class of Dalits by depicting Ambedkar (a Dalit) being whipped by Nehru (an upper caste man).<sup>54</sup>

From among the examples I have listed, some expressions are more likely to be tolerated while others are very difficult to tolerate.<sup>55</sup> Most of these examples have one thing in common though. There was no fear that the speech in question would lead to violence as a consequence. However, example 6 stands out since the slogan was used in places of mass gathering, to an aggressive audience, against the targets who were being demonized and delegitimised for months.<sup>56</sup> The distance between the speech and action is almost nil in this case.<sup>57</sup> Most of the responses to the

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<sup>53</sup> People in academia responded against such a move in both cases, on the basis of academic freedom as well as freedom of speech. In Greer’s case people in academia, including students, expressed their criticisms of Greer’s views. Germaine Greer: “Transgender women are 'not women'.” *BBC News*. Oct 24, 2015. [www.bbc.com/news/av/uk-34625512/germaine-greer-transgender-women-are-not-women](http://www.bbc.com/news/av/uk-34625512/germaine-greer-transgender-women-are-not-women)

<sup>54</sup> “NCERT asked to remove Ambedkar cartoon from textbooks.” *The Hindu*. New Delhi. May 11, 2012. [www.thehindu.com/news/national/ncert-asked-to-remove-ambedkar-cartoon-from-textbooks-sibal/article3408163.ece](http://www.thehindu.com/news/national/ncert-asked-to-remove-ambedkar-cartoon-from-textbooks-sibal/article3408163.ece)

<sup>55</sup> This is an empirical claim as well as philosophical. I will discuss different acts of expression in detail in chapter one while the question of toleration is addressed in chapter four.

<sup>56</sup> Instances of violence followed after the repetitive use of the slogan at public gatherings, election campaigns, and the slogan also became a motivator during the anti-Muslim riots that broke out in a part of Delhi. See supra note 16.

<sup>57</sup> The expression passed the ‘clear and present danger’ and ‘spark in the powder keg’ test, and was a case of incitement to violence. These doctrines have emerged and are most relevant in cases of sedition, though hate speech law can also be scrutinised under this light. “Clear and present danger” test was put forth by the American Supreme Court, in *Schenck vs. United States*, bringing in ‘proximity and degree’ to which speech might bring about harm that the state must prevent. Although restricting speech during war times was justified on the basis of this test, the culmination is found in *Brandenburg vs. Ohio*, where speech produces “imminent lawless action.” *Schenck v. United States*, 249 U.S. 47 (1919). *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

“Spark in the powder keg,” given as a test for restricting the speech which immediately affects the public order, creating a situation of violence or unrest anticipated not distant from the delivered speech. The test was first brought up in Indian Supreme Court case, where the regulation of a film critical of the reservation policy was put aside by the court, upholding the free speech rights of the film makers. *S. Rangarajan Etc vs P. Jagjivan Ram*. 1989 SCR (2) 204, 1989 SCC (2) 574.

Although the Indian courts did not apply the American judgment to the cases they dealt with, this saw a shift in later judgments. For example, in *Arup Bhuyan vs State Of Assam* on 3 February, 2011, the Supreme Court dropped the charges against the appellant, saying that the Indian and American free speech rights are the same, and so the

remaining set of examples are based on a sense of hurt or offense, considered problematic or harmful in some way. Physical harm, emotional harm, psychological harm, are the main kinds of harm often associated with hate speech. Such speech sometimes forms the social world where harm is made possible, by giving the “justification and dehumanising myths” that could lead to harm. We cannot, however, reasonably believe either that everyone could be saved from every kind of harm, or that no kind of harm can be prevented. The question one asks then, is what is the way in which we should understand this category of speech, in relation to the harm. This question started from the definitional aspect of hate speech which is addressed in chapter one.

Should we continue to use the term “hate speech” for all the aforementioned cases? Different philosophical accounts of hate speech and legal documents understand the category of hate speech differently.<sup>58</sup> Although these differences remain, one finds a common understanding that is shared by all, on the basis of which hate speech can be preliminarily defined in the following way: any act of expression which targets a group or members of a group, on the basis of their religion, caste, race, gender, language, national origin, and ethnicity, is hate speech. Targeting means that some kind of harm (physical or psychological) is inflicted upon the groups and

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Brandenburg test would be upheld here too. For this relationship of the tests in the context of sedition in Indian jurisprudence, see, Lawrence Liang. “Sedition and the Status of Subversive Speech in India.” *The Wire*. February 14, 2016. [thewire.in/law/sedition-and-the-status-of-subversive-speech-in-india](http://thewire.in/law/sedition-and-the-status-of-subversive-speech-in-india)

<sup>58</sup> For instance, Robert Post points out that hate speech laws restrict speech not on the basis of content but on the basis of “style” of presentation” which insults, offends, or degrades, and not just speech which expresses “extreme dislike and extreme hatred”. Robert Post, “Hate Speech,” in *Extreme Speech and Democracy*. 124-138. “Hate speech” as expression which expresses “hatred for another individual or group” based on a characteristic, with a further aim of inciting hatred or discrimination. James Weinstein and Ivan Hare, “General Introduction” in *Extreme Speech and Democracy*. 4.

Some of the legal provisions concerning hate speech in India are, Sections 295, 153A, 298 of the *Indian Penal Code*, 1860. See Siddharth Narrain, “Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech”. *Economic and Political Weekly*. Vol. LI, No. 17, (April 23, 2016): 119-126.

communities offended or attacked in or through the speech.<sup>59</sup> This definition, however, is the common skeleton on which the examples I mentioned above fit in, and called hate speech.

By looking at what is the target of the speech, we should also ask whether it is appropriate to look at this category of “hate speech” to function as an umbrella term for different kinds of acts of expression which are offensive and/or harmful? To what extent is it helpful to identify sub-categories of the broader category?<sup>60</sup> How should we respond to different kinds of “hate speech”? The continual usage of hate speech as a category which means different things for different people, confuses us more than it conveys.<sup>61</sup> That is, even if it conveys the basic idea of something wrong said against something or someone (primarily against groups and communities of a particular faith or ideology), it does not tell us anything about the nature of the wrong. Therefore, our everyday use of the term as well as the academic usage must change in order for us to think clearly about several issues that are present in this one category.

What the debate around hate speech focuses on is the harm that the hate speech inflicts, (either as a consequential harm or in being intrinsically harmful), why we should care about those harms, in what ways we should respond to it, and in turn how should we balance the value in free

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<sup>59</sup> Targeting leads to subordination in several ways, for example, through psychological distress; causing the hearers to ill-treat the target group. See, Maitra, “Subordinating Speech.” 97. Tirrell argues that the derogatory terms used as insults, “must create and enforce hierarchy,” in social contexts of oppression and discrimination. Lynne Tirrell, “Genocidal Language Games,” in *Speech and Harm*. 191, 195. Racist hate speech threatens the targets and harms their self-esteem, which might lead them to withdraw from public discourse. See, Caroline West. “Words that Silence,” in *Speech and Harm*. 235. There is often a harm to the socio-political environment, which is not so much a part of the main concern of my dissertation. A similar concern is echoed in Waldron, *The Harm in Hate Speech*. 4, 87.

<sup>60</sup> A prior approach in the categorising of problematic speech is seen through segregating “speech which says” and “speech which does”, where the protected category of speech might leave out some instances of hate speech. An analysis of different methods of delineating the speech which should be legally protected if found in Simpson’s account wherein he argues that the protected category of speech does not protect the “sayings” but also the “actions” which are associated with different expressive interests. Robert M Simpson. “Defining ‘Speech’: Subtraction, Addition, and Division.” *Canadian Journal of Law and Jurisprudence*. Vol. 29, No. 2, (2016): 457-494.

<sup>61</sup> In making this point I agree with Waldron in his analysis of the term “hate speech” wherein hatred as a motive or as an effect is assumed to be playing the central role, which leaves out a lot of problematic expressions. Waldron. *The Harm in Hate Speech*. 34-36. Waldron uses the term “group libel” or group defamation” instead of hate speech.

speech with the harms that hate speech brings about. The arguments in support of regulating or restricting hate speech are essentially of two kinds, one which invoke the intrinsic wrong or harm of the speech,<sup>62</sup> and the other based on the harmful consequences<sup>63</sup> that follow.

Jeremy Waldron's work on hate speech has been inspirational for my dissertation. Waldron's key idea is that people are owed an assurance that what he calls their "recognition-respect" is upheld, and that the common good of the environment that we share and live in is worth protecting. These ideas guide my argument for tolerating offensive speech. However, my argument differs from Waldron's, even though the concerns are similar. This difference is primarily due to the segregation of offensive speech with hate speech. But there are some instances of offensive speech which I propose to be allowed while Waldron might not.

### § 3 Offensive speech

In chapter one I make the distinction between offensive speech and hate speech which is based on the object which is targeted in speech. I will adopt the following convention in this dissertation: "offensive speech" *is speech which targets the beliefs and practices of a group and community*. I will reserve the term "hate speech" for speech which targets individuals or groups

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<sup>62</sup> Delgado, Richard. "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling". *Harvard Civil Rights-Civil Liberties Law Review*. 133, 135 (1982). Catharine MacKinnon is the forerunner among the intrinsic harm theorists primarily in case of pornography, but also extend it to hate speech. MacKinnon. *Only Words*. (Harvard University Press. Cambridge. 1993).

<sup>63</sup> There is also a category of mentally mediated harms: where the hearers are persuaded to do something or shaping their desires- incitement and pornography are two kinds within this category. Further, unconscious conditioning of pornography to make the audience feel aroused by degrading images of women. And finally, imitating what we see in pornography. Mckinnon. *Ibid*. Also see Susan Hurley. "Imitation, Media Violence, and Freedom of Speech". *Philosophical Studies*. Vol. 117, No. 1/2. (Jan., 2004):165-218.

who are associated with some features of identity.<sup>64</sup> For example, to say that some belief or practice of community X is vile or disgusting is an instance of offensive speech. To say that community X is vile or disgusting because it follows this practice is to enact an instance of hate speech.

My primary focus in this dissertation is on offensive speech as defined above. The everyday use of the term ‘hate speech’ does not distinguish between offense and other kinds of harm, putting everything in the category if it appears to attack the groups on the basis of features of their identity. In this sense, I argue, it is too broad. On the other hand, traditional definitions see only historically marginalised groups and communities as ‘targets’ of hate speech. This ignores the possibility of any individual or group being the target, whether or not they have been historically marginalised. It is narrow in this other sense. I argue that both these aspects must be kept in mind when understanding and clearly defining problematic acts of expression.

The rationale for dividing the everyday category of hate speech in this manner lies in the concept of equal respect or recognition-respect. In *The Harm in Hate Speech*, Jeremy Waldron uses the concept of recognition-respect, which he argues is owed to each individual in a society.<sup>65</sup> This concept of respect, which he says can also be called human dignity, is different from the “appraisal respect” which people earn on the basis of their acts in the society. Recognition respect, as I understand it, is respect owed due to their status as a human being, regardless of what they *do*, something which all the members of a society are owed equally. This means that one does not need to grant appraisal respect to the beliefs and practices one disapproves of, even to the followers of those beliefs and practices, but must uphold the recognition respect due to those one does not like.

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<sup>64</sup> Some attacks on beliefs and practices might sound like or might be intended to target the groups that follow them. Ford’s book, (example 3.), is one such instance. The content of the speech is offensive speech if it says Jewish practice of X is bad. If a further claim is made, that due to X, Jews are to be despised, it is hate speech. This is the distinction I maintain.

<sup>65</sup> Waldron. *The Harm in Hate Speech*. 87.

This concept plays an important role in understanding the response of non-speaker participants to offensive speech. While offensive speech (as I define it) does not violate recognition-respect of individuals, hate speech does so, regardless of whether it offends, insults, demonizes. In this dissertation, I will use the idea of recognition respect as the principle of equal respect which is a fundamental requirement in a socio-political environment.

While hate speech can be any expression of opinion in private conversations as well as in public platforms and gatherings, this dissertation focuses on the expressions that are public, or are part of the general public sphere.<sup>66</sup> Private conversations involving hate speech, although important in the larger context of differences, conflicts, hatred, and enmity, are not my concern here. This is because of different problems which come into the picture as soon as we start understanding private conversations, for example, concerns of privacy, the ethics of private communications, etc.<sup>67</sup>

#### **§ 4 Central argument: toleration as a response to offensive speech**

The central argument of the thesis is the following: a subclass of the usually broad category of hate speech, called offensive speech, should be tolerated. We need to tolerate offensive speech in order to maintain the public discursive sphere. Offensive speech may criticize and oppose, however forcefully, the beliefs and practices of the group, while upholding the equal respect

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<sup>66</sup> An interesting study of M F Hussain's paintings which were projected as hate speech by the right wing, members of which tried to destroy the paintings in 1996, and how the relationship between an artist's private acts of expression which later are displayed in the public, affects the problem of private versus public in hate speech laws, see Rajeev Dhavan. *Publish and Be Damned*. 180-83.

<sup>67</sup> One must note, however, that social media, specifically the WhatsApp communications form a part of the private conversations which can turn into public platforms when the audience is wider, such as in WhatsApp groups. Weinstein focuses on the speech in public discourse too, but for reasons different than mine. The harm that is caused in private communications, such as in the classroom, as epithets, is more distinct. James Weinstein. *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*. (Westview Press: USA. 1999): 127-28.

principle. Tolerating this class of acts of expression means that such expression is not interfered with by non-speaker participants.

The non-speaker participants I focus on are individuals and groups (which are the tolerating agents), but not the State.<sup>68</sup> On my view, everyone has a duty of non-interference towards offensive speech. We may draw a further distinction between those groups and individuals whose beliefs and practices are the targets of the offensive speech, and other non-speaker participants. The groups and individuals whose beliefs and practices are ‘targeted’, do not have any duties beyond non-interference. However, non-targeted individuals and groups have a further duty beyond non-interferences. They have an affirmative duty to respond to the offensive speech, as a way of countering it.

Toleration of offensive speech in this manner, is essential to maintain discursive spaces which are important for any society wherein people respect each other’s right to dissent, and share with each other on matters of social, political, economic, and also personal-individual concerns. A discursive space is any open public space of discourse, where people can freely express their beliefs and opinions, and form public opinion on the issues that affect the society at large. A discursive space, then, is not a physical space, but is more of a platform, which can come into effect as soon as opinions are expressed, on matters which concern socio-political reality.<sup>69</sup>

The matters that affect how a society runs itself fall under a wide range of issues, including moral, political, economic, aesthetic.<sup>70</sup> A discursive space is essential for people to realise the full potential of their freedom of expression. One such reason to value discursive space is purely because of the expressive interests that human beings have. The other two central arguments for

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<sup>68</sup> This is why I am not concerned with the question of whether hate speech should be criminalized.

<sup>69</sup> Supra note 22.

<sup>70</sup> Discourse in the discursive space, if construed in a very broad sense, can be very day-to-day mundane conversations that have nothing to do with issues of great significance to the society at large.

valuing the discursive space are based on its role in self-governance and the other for maintaining the democratic legitimacy of laws and policies. The expressive interest that people have in maintaining the discursive space connects these socio-political aspects with the more personal individualistic aspect of a person's life.

With this interest in mind, I argue that maintaining the discursive space serves the purposes of self-governance, and for justifying the legitimacy of the laws in the democracies, but also the expressive interests that people have, wherein communication with each other on matters no so relevant for the purposes of democratic legitimacy and participatory democracy is also vital.

If these are the reasons to value discursive space, what kind of discursive space allows for such functions to be fulfilled? The discursive space would have to allow speech that contributes to it, but speech that does not contribute to it too, primarily due to the expressive interests people have. However, the speech that disrupts the discursive space, should not be allowed. For example, presence of prejudices, stereotypes and their public expression to an audience, is something that doesn't contribute to discursive space, but toleration as a response to it maintains the discursive space, by, for example, countering the speech.<sup>71</sup>

The goal of deliberation in a discursive space is not to reach consensus but to maintain public communication and egalitarian social relations, which toleration makes possible. An inclusive discursive space, where more than the rational deliberation is allowed, is a space which

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<sup>71</sup> It might be an odd thing to say but also true that a lot of discussions (even academic ones) open up the questions of prejudices, confirmation bias, unconscious bias, only after the prejudices and stereotypes are expressed or observed. This allows the understanding of those views and their correction, which seems to me to be a contribution to the discursive space if only because it opens up responses, or modes of thinking hitherto taken for granted, however rightly or wrongly.

I argue for. This understanding is developed through the accounts of Chantal Mouffe and Hannah Arendt.<sup>72</sup> These concerns about the nature of discursive space are addressed in chapter three.

If offensive speech is to be tolerated in discursive spaces, what does it mean to tolerate? The definition of toleration closest to the context of freedom of speech and expression, and especially regarding offensive speech is this: allowing the existence, occurrence, or practice of something that one dislikes, disagrees with, or disapproves of, without interference.<sup>73</sup> The two questions that we must ask in the context of responses to offensive speech are the following. What is special about the concept of toleration that makes it an appropriate response to offensive speech? Which conception of toleration is best suited as a response to offensive speech?

The presence of the two elements of objection or disapproval and non-interference is central to the concept of toleration, regardless of what conception we talk about and whatever might be the object and subject of toleration. I argue that the conception of toleration that is needed and possible as a response to offensive speech is the one which puts minimal demands on the tolerating agents. The demands, however, are not the same for everyone. I divide the tolerating agents into two classes, those whose beliefs and practices are the target of offensive speech, and the rest. Since these two groups will have different burdens, the demand to affirmatively respond to offensive speech is only on those whose beliefs are not targeted. This conception of toleration

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<sup>72</sup> Seyla Benhabib, "The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond," *Theoria: A Journal of Social and Political Theory*. No. 90. (Dec. 1997): 1-24. Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" *Social Research*. Vol.66, No.3, (1999): 745-758.

<sup>73</sup> Thomas Scanlon, "The Difficulty of Tolerance." In Scanlon, Thomas. *The Difficulty of Tolerance*. (Cambridge. Cambridge University Press. 2003). Andrew Jason Cohen, "What Toleration Is." *Ethics* 115, no. 1 (Oct. 1, 2004): 68-95. David Heyd. *Toleration: An Elusive Virtue*. (Princeton, NJ: Princeton University Press, 1996). Susan Mendus. *Justifying Toleration Conceptual and Historical Perspectives*. (Cambridge & New York, Cambridge University Press. 1988).

demands of all a *behaviour* of non-interference with others' expression which one disapproves of, but does not make the attitude of tolerance mandatory.<sup>74</sup>

This distinction between behaviour of toleration as distinct from attitude of tolerance is important in my account in the following way.<sup>75</sup> While non-interference with offensive speech is a matter which concerns the discursive space, the attitude one has towards it does not, since it is a matter private to individuals. Here, we can see the distinct domains of freedom of thought as opposed to one's speech and actions in the socio-political domain.<sup>76</sup>

If a discursive space is a public space where people interact with each other on issues of common concerns, are academic spaces also a part of that larger public sphere? Even if the answer to this is in the negative, should the principle of freedom of speech be applicable in academic space or the principle of academic freedom? The last part of this dissertation approaches the problem of “no-platforming” in the academic spaces from the perspective of the aforesaid questions. No-platforming is a response to hate speech (understood in the broader sense) in academia which is a response mainly from the student community, but also in some cases by faculty members.<sup>77</sup> It can

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<sup>74</sup> The requirement to change the attitude towards the speaker is present in other conceptions of toleration, such as David Heyd and Katharine Abrams, as discussed in chapter four.

<sup>75</sup> Toleration is traditionally understood as behaviour and tolerance as an attitude. See the distinction between the two in Andrew R Murphy, “Tolerance, Toleration, and the Liberal Tradition.” *Polity*. Vol. 29, No. 4 (Summer, 1997): 593-623.

There is another way these two have been distinguished. On the latter, toleration is a response from the state while tolerance from the individuals. See Jakob De Roover and S. N. Balagangadhara. “John Locke, Christian Liberty, and the Predicament of Liberal Toleration.” *Political Theory* 36, no. 4 (August 1, 2008): 523–49. Michael Walzer. *On Toleration*. (New Haven, London, Yale University Press. 1999).

<sup>76</sup> This distinction also helps us understand better and resolve the paradox of toleration which has concerned many philosophers for a long time. I discuss this at some length in chapter four. For an interesting analysis of the two paradoxes in the toleration debate, see Samuel Scheffler, “The Good of Toleration” in *Equality and Tradition*. (London, Oxford University Press, 2010): 312-336.

<sup>77</sup> I would like to note that no-platforming is generally a term popular in, and applied to, the context of academic expression. The specificity of the problem of no-platforming in academic spaces and the presentation of academic space as ideal discursive space has limited the issue to hate speech and no-platforming in academic space. I think that the term no-platforming could be used to describe responses in other spaces as well. For example, refusing to show a film in a movie theatre could be termed no-platforming, just as refusal to allow artists to exhibit or perform their work is. Not allowing a protest to take place in a private cafe, etc., would be other such examples. The problem

be understood as the “practice of blocking, or attempting to block, an individual from speaking at a university because of her expressed moral or political views.”<sup>78</sup> It also includes the demands to disinvite speakers, protests against their appointment to academic or administrative positions, demands to share or not share the platform with the speaker targeted.<sup>79</sup>

The demands of tolerating and engaging with the problematic acts of expression in the academic space seem to be equal to, and sometimes greater than, the minimal demands in the discursive space. In cases where no-platforming is done to express moral opposition to the speaker, due to their previous speech or actions, the principle of academic freedom must prevail. The part of the principle of academic freedom which justifies this is institutional autonomy, which makes the academy in charge of who it wants to invite in the first place.<sup>80</sup> So, even though the entry to the academic space is governed by the norms of academic freedom, the speech of the insiders should not be restricted by no-platforming. The principle of academic autonomy is a line which

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is a bit different however, and requires a study of the laws that govern the private property use which is also open to the public, and so on. I think, though, that any space which is open to the public for the purposes of participating in discussion, or watching/listening to a performance, becomes a part of discursive space for that time being, and the laws of private property should be limited to the concerns other than the subject matter of discussion. Also, see Rodney A Smolla, “Academic Freedom, Hate Speech, and the Idea of a University.” *Law and Contemporary Problems*. Vol.53. No. 3, (1990): 217.

<sup>78</sup>Amia Srinivasan & Robert M Simpson. “No Platforming.” In *Academic Freedom* edited by Jennifer Lackey. (Oxford, Oxford University Press. 2018): 186-209. But unlike Srinivasan and Simpson’s definition, I also include cases of protest as no-platforming despite the degree to which they stop the speaker or make it difficult for them to be heard.

<sup>79</sup> The meaning of the term “platform” in no-platforming overlaps with the meaning of platform (infra-note 22). Denying or restricting participation in an academic platforms, or any other platform, is no-platforming. Here, the specificity of a platform might bring in other concerns, such as academic freedom. In chapter five, I talk about all kinds of academic speech, not offensive speech in particular. Speech which does not fit a framework or way of thinking might not be offensive, but nonetheless appear to be problematic on other grounds to some.

<sup>80</sup> In some cases, the moral opposition to a speaker’s presence can be expressed in ways other than no-platforming too. These more tolerant responses include demonstrations against the invitation, public display of resistance towards the speaker’s presence, without necessarily interfering with the event or the speech. This, however, requires an active academia willing to express the opposition and its basis, which in turn is connected with the protection of their right to dissent within the academic space, and protection of their academic freedom too. The latter becomes more important in case the opposition is towards the (members of) government, the funding agencies, the administration. So, the academics and their academic freedoms should be protected from external threats of crackdown by the government and funding agencies, as well as from internal threats of crackdown by the administration and other members of academy.

separates the general discursive space from the academic space. However, once the academy provides an entry pass, the principle of freedom of speech should apply in the academic space too.

On the question of how thick this division is, I argue that the two concerns must be taken care of. One is the duty of the academic to engage with the larger society. Second is the duty to respond to offensive speech, which is also a function of the role that academics have in the society. I arrive at a conclusion that no-platforming harms academic freedom instead of being justified by academic freedom principle. The values of critical and open enquiry, pursuit of knowledge and truth, underline a strong argument for listening to the problematic expressions of insiders as well as outsiders. From this perspective, academic spaces are the ideal discursive space.

Being a part of academia, the academic space interests one primarily due to the boundary that exists between the discursive space and academic setting. Apart from this, the current political context motivates one to question the relationship of the larger society and the role of academic institutions in it.

## **§ 5 Main literature**

The main literature with which I engage in this thesis is the tradition of analytic philosophy. There is, however, a huge interchange of ideas among several disciplines, including moral and political philosophy, philosophy of language, critical theory, political theory, sociology, psychology, which is reflected in the overall debate around hate speech in particular and freedom of speech in general.

Jeremy Waldron's *The Harm in Hate Speech*, has been fundamental in laying out the problem of hate speech for me, in which he argues for regulation of group defamation (as opposed to calling it hate speech), for protecting the visible social environment which the speech in question

pollutes.<sup>81</sup> A response to Waldron's argument given by Robert Simpson, where he points out that the real problem behind the hate speech is the contempt which people have against those who are the targets of their hatred, has given one an important perspective. He argues that till the contempt remains, the hate speech regulations will be of not much use.<sup>82</sup> Ronald Dworkin and Thomas Scanlon are two other philosophers, those who argue for more protection of free speech than less, who have presented a challenge in the way hate speech regulations are thought about. The defense of freedom of speech by Alexander Meiklejohn forms another major part of the foundations of the arguments in this dissertation.

The other set of arguments come from the speech act theory perspective, which highlight the harm in hate speech.<sup>83</sup> First put forth by Catharine MacKinnon, and developed by Rae Langton, the arguments take on the victim's perspective, and focus on the 'subordination and silencing' that is the result of hate speech. The silencing argument, specifically, is important for understanding the harm in hate speech and I observe that tolerating offensive speech empowers the targets of the speech, who assert their status as equal participants in the discursive space, 'speaking over' the silencing intended in the offensive speech.

In thinking about the nature and value of discursive space, I explore the classic accounts of public sphere. The main thinkers I engage with are Jürgen Habermas and Chantal Mouffe whose conceptions of public sphere have been central in formulating the notion of discursive space. While

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<sup>81</sup> I discuss his view at some length in chapter one.

<sup>82</sup> I find Simpson's account to be fascinating and precise, however I don't talk about it much in the thesis at length. Robert M. Simpson. "Dignity, Harm, and Hate Speech". *Law and Philosophy*. Vol. 32, No. 6 (November 2013): 701-728. I think, though, that the concerns of hate speech have to be understood as lying in different domains which guide us towards different responses at different levels. Even if the contempt remains, the absence of the expression of contempt is the only thing we can be concerned with in responding to hate speech, and not about the attitude of contempt. I discuss this more in chapter four.

<sup>83</sup> This literature was explored while I tried to understand the relationship of pornography and hate speech and the harms that they caused. I have dropped the question of pornography, as separate from hate speech, since there were other concerns involved which I think are absent in case of hate speech. For example, consent.

Seyla Benhabib's analysis of structure of public sphere has been helpful to critically evaluate Habermasian public sphere, Hannah Arendt's remarks have added to building a notion of discursive space that is more inclusive.

The main philosophical accounts which have helped one understand the concept of toleration are David Heyd's and Kathryn Abrams's. In opposition to these two accounts, I propose a political conception of toleration which is less demanding for the tolerating agents than the one suggested by Heyd and Abrams. One has explored many accounts of toleration in general, as well as in the context of freedom of speech, which have led one to propose a conception of toleration in this dissertation. These accounts include Preston King's, Catriona McKinnon's, Susan Mendus's, among others.<sup>84</sup>

### **§ 5.1 Remarks concerning methodology**

As Bhargava notes, "We live in several contexts at once which are not insulated from one another, it should be acknowledged here that despite there being different contexts within which the free speech debate emerge, all of them are tightly connected with each other."<sup>85</sup>

One of the contributions of this dissertation is that we are moving away from the question of legality. Much of the primary and secondary literature in the area focuses on the question of legality or constitutional protections of freedom of speech and hate speech in particular. The questions in the dissertation, although important in the legal domain, have been approached here largely from a normative, philosophical perspective. I am engaging with the literature around legality because it is the primary home for these debates and discussions.

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<sup>84</sup> My understanding of the concept began from the analysis by Mendus and Horton. Susan Mendus & John Horton. *Aspects of Toleration*. (Methuen Publication. London. 1985).

<sup>85</sup> Rajeev Bhargava. "Why Do We Need Political Theory?", in Bhargava, Rajeev. *What is Political Theory and Why Do We Need it?*. Oxford University Press. 2011. p51.

Secondly, these debates, as will be clear through the chapters, emerge primarily in the western context and discourse, even though one finds examples and contexts across the board, including India. As can be seen in the following chapters, that even though the discussion around free speech is becoming vibrant in India too, the literature is rare in the analytical political philosophy tradition. The underlying assumptions and foundations also appear to be based on western values. There are two things we should note here. One is the question of the extent to which the western ideals or free speech tradition can be applied to non-western societies. Or should they be applied at all? In other words, whether universalisation is possible or desirable. However, this is a question which can be dealt with at greater length in a comparative study, which is not a crucial concern for me. This is because the values in the non-western societies, for example India, are not necessarily so different from western democracies. In any case, I think there is a proximity in the meaning of liberal values which are an important part of the fabric of a democracy like India. The importance of the debates around tolerance and secularism can be found in Indian philosophical discourse, which is connected with some of the concerns of this dissertation. However, I have not directly engaged with it in order to tighten the thesis. Whether or not the traditional values specific to east are important and to what extent, is a study which can provide a related but different perspective to the concerns raised in this dissertation.

The third concern is regarding the application of the argument to the traditional discursive spaces and online spaces. The primary institutional context which is central in this dissertation does not involve issues which are specific for the online context, for example virality. The UN report on online hate speech published in 2019, highlights the importance of counter speech, and emphasises ways to counter online hate speech through education, promotion of plurality, which

involve both state and non-state actors.<sup>86</sup> However, due to the role played by the virality of online content, the concern of minimising the harmful effects seems to play an important role in the recommendations given in the general assembly. Here are a few recommendations, which are not unquestionable: “restricting its virality, labelling its origin, suspending the relevant user, suspending the organization sponsoring the content, developing ratings to highlight a person's use of prohibited content, temporarily restricting content while a team is reviewing, demonetizing, minimizing its amplification, interfering with bots and coordinated online mob behavior, adopting geolocated restrictions, and even promote counter-messaging.”<sup>87</sup> The Rabat Plan of Action also presents guidelines for the special measures that are required to handle social media content as opposed to the traditional media. Noting the two extremes in the ways the cases of incitement to hatred are dealt with in national and international courts, a “high threshold for defining restrictions on freedom of expression” is suggested.<sup>88</sup>

“Hate speech, disinformation, and conspiracy theories” are argued to be the best way to engage people, by critics like McNamee.<sup>89</sup> He points out the difference in social media speech from that which is on traditional media. For economic gains and advertisers’ benefit, the voices are amplified on Facebook. McNamee argues that even though Facebook would like to get rid of hate speech, it would also get rid of other characteristics, like advertising, which they would not want. How much of this is the case in traditional media? I think not much. Another critic, Shoshana

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<sup>86</sup> “Report on Online Hate Speech.” United Nations Human Rights Office of the High Commissioner. 9 Oct. 2019. [www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ReportOnlineHateSpeech.aspx](http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ReportOnlineHateSpeech.aspx)

<sup>87</sup> Ibid.

<sup>88</sup> The Rabat Plan of Action (2012) and Rabat Threshold Test (2020). The Threshold test requires that six criteria should be considered while judging the hateful content: Context, Speaker, Intent, Content and Form, Extent of the Speech Act, Likelihood, including imminence. [www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_threshold\\_test.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_threshold_test.pdf)

<sup>89</sup> Suzanne Smalley. “Facebook thrives off 'hate speech, disinformation and conspiracy theories,' says early investor Roger McNamee.” *Yahoo News*. July 9, 2020. [news.yahoo.com/facebook-thrives-off-of-hate-speech-disinformation-and-conspiracy-theories-says-early-investor-roger-mc-namee-202638591.html](http://news.yahoo.com/facebook-thrives-off-of-hate-speech-disinformation-and-conspiracy-theories-says-early-investor-roger-mc-namee-202638591.html)

Zuboff, looks at the social media through the perspective of “surveillance capitalism” which she argues to be against the thriving of a democracy.<sup>90</sup>

Given that the concerns that emerge with respect to social media or online media have been highlighted recently, the distinction between traditional media and social media becomes an important one. Even though those concerns are not considered in detail, one acknowledges that more needs to be studied, empirically and philosophically, regarding how online media changes the traditional dynamics involved in free speech debates.<sup>91</sup> I think, however, that the overall argument of the thesis might apply to the online media too, if only broadly. This means that the definitional aspect remains same for online media, response to offensive speech should not be restriction, but might require more and different ways of counter-speech, and that the value in having those online discursive spaces be upheld. One hopes that what has been highlighted here will be reflected in the following chapters wherever required.

## § 6 Structure of this dissertation

The dissertation is divided into five chapters.

- 1) **Hate speech and offensive speech:** In this chapter I analyse the definition of hate speech as used in informal usage, as well as in formal legal and philosophical accounts. The other question addressed here is: what is wrong with hate speech. The main axis of analysis is the intrinsic vs consequential harms, with some input from the speech act theory. On the basis of this analysis I propose a category of *offensive speech* which targets beliefs and

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<sup>90</sup> Jonathan Chang & Meghna Chakrabarti. “The Perilous Power of Social Media Platforms.” Panelists: Shoshana Zuboff, Guillaume Chaslot, Ramesh Srinivasan. *On Point*. Feb 4, 2021. [www.wbur.org/onpoint/2021/02/04/the-perilous-power-of-social-media-platforms](http://www.wbur.org/onpoint/2021/02/04/the-perilous-power-of-social-media-platforms)

<sup>91</sup> I am thankful to one of the anonymous examiners of this dissertation to point out the relevance of the distinction between online and traditional media for the application of the arguments of this thesis and the methodological concerns regarding the western and non-western contexts.

practices and *hate speech proper* which targets individuals and groups. The arguments in this dissertation apply to this conception of offensive speech.

**2) Should offensive speech be allowed?: pro-regulation and anti-regulation arguments:**

The chapter outlines the arguments in support of regulating hate speech and protecting hate speech. Through this debate I analyse to what extent these arguments would apply to offensive speech. Pro-regulation arguments focus on the consequential and/or intrinsic harm in hate speech, justifying regulation on the basis of avoiding such harms. Anti-regulation arguments are of two kinds: those which value upholding broad free speech principle and the negative arguments which oppose restricting problematic acts of expression.

**3) Discursive space: what it is and why we should value it:** The chapter is about the concept of public discursive space and the argument in favour of protecting offensive speech in order to maintain the discursive space. I present three arguments to value discursive space, on which I have built my overall argument for discursive space. What this discursive space is and its relationship with other major accounts of the public sphere is highlighted in the second part of the chapter.

**4) Tolerating offensive speech: behaviour of non-interference:** Chapter four concerns the concept of toleration which is proposed as an appropriate response to offensive speech. The conception of toleration defended in the thesis is one which has minimal demands on the tolerating agents who express non-interfering behaviour while not being asked to change their attitude of disapproval towards the offensive speech.

**5) Toleration in academic spaces: is no-platforming justified?:** Chapter five explores the problem of no-platforming in light of the overall argument of the thesis applied to academic

spaces. The distinction between and the relationship of discursive space and academic space is explored in the chapter, which guides how the argument should apply to the academic space. The related concern of whether to apply the free speech principle or the academic freedom principle to the academic space is one axis around which the no-platforming debate exists and is explored here.

### **Concluding remarks**

This dissertation is an attempt to build an argument which agrees with the common concerns of pro and anti-regulation perspectives. The common concern of the socio-political environment, or the public discursive space provides us a value which makes it possible to allow a class of usually broad category of hate speech, which I call offensive speech, while different responses might be needed for the other kind.<sup>92</sup> The other class of speech which attacks not the beliefs and practices, but those who hold them, is outside the domain of toleration in the discursive space and would require responses other than just counter-speech by the individual participants in the discursive space. This category can be further divided in terms of what responses would be meaningful from the state and non-state actors. The responses to this class need not be criminal sanctions, but may include other responses from the state. For example, launching a counter-speech response through the state machinery, regulating the speech, educational sessions as a part of reform, but also punitive measures including, but not restricted to, imprisonment and fines.

Looking at the problem of offensive speech through the value of discursive space, and toleration as an appropriate response to it, is an attempt to picture a society which is more vibrant and inclusive. The culture of tolerating the views we disapprove of, enhances not just the

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<sup>92</sup> For example, strategic interventions (especially in the context of social media) to monitor the dissemination of hate speech and mob mobilisation, among others.

participation from all sections of the society but also makes coexistence easier. The principle of equal respect demands that even though offensive speech is tolerated, the speakers and the tolerating agents agree to the equal status as human beings for all the participants in the discursive space.

The concerns of hate speech and the concern of the public sphere with which I am writing this dissertation are so abstract that they do not seem to find an anchor in reality. The argument of this thesis appears to be completely devoid of the ground reality, at least in India. The assumptions which were in the background for any society which values freedom of speech and expression, are shaking in this society. A liberal democratic society which values its constitution, where people respect the right to freedom of speech, understand the value of public discursive spaces, is all being compromised. Yet at times like these, it is most important to assert the importance of these values and freedom of speech and expression in particular. This is the right which is protected by exercising it.