

MOB, MURDER, MOTIVATION: THE EMERGENCE OF HATE CRIME DISCOURSE IN INDIA

—M. Mohsin Alam Bhat*

Since 2015, various legal and civil society actors started highlighting the visible rise in media-recorded incidents of anti-Dalit and anti-Muslim violence in the country. These conversations were marked by diverse and competing ways of describing and legally addressing such events. One of the categories that the various actors came to deploy was hate crime. The hate crime concept is distinct from other alternatives like lynching, communal riots, and vigilantism due to its simultaneous focus on motivation and social hierarchy. In response to a set of petitions in 2018, the Supreme Court of India through a series of guidelines in Tehseen Poonawalla v Union of India, sought to introduce greater official accountability, procedural protection to victims and witnesses, and more stringent punishment for perpetrators. This article argues that the Court's intervention is best interpreted in the light of the hate crime concept. This is evident when we situate the case in the longer trajectory of the media and public discourse, the framing of the legal arguments, and finally the Court's order. Nevertheless, the article argues that while there is a definite emergence of the hate crime framework in the Indian legal and policy discourse, it continues to be inconsistently and contradictorily applied to the detriment of coherence and effectiveness. The article concludes that the most effective way to address these limitations is to foreground the conceptual and institutional resources of the hate crime concept.

* Associate Professor, Jindal Global Law School. The author would like to thank Harsh Mander, Samar Halarnkar, Sajjad Hassan, Joanna Perry, Mangla Verma, Vipul Kumar, Devika Prasad, and the student participants of the 'Hate Crimes and Criminal Justice System' Legal Clinic (2018-19) at the Jindal Global Law School. He would also like to thank the student and peer-review editors at the Socio-Legal Review for their comments and suggestions for improving the article.

Introduction	77	The framing of violence.....	91
Situating Hate Crime	82	Media-driven hate crime data	96
Defining hate crime	82	Filtering into legal arguments	100
Hate crime and the allied concepts	86	Resolving the Problem of Paradigm in	
Hate Crime Framing in Media and Public		Tehseen Poonawalla	102
Campaigns	91	Conclusion	107

I. INTRODUCTION

On April 1, 2017, Pehlu Khan – a 55-year old dairy farmer from Nuh district of Haryana– was violently accosted by men claiming to be *gau rakshaks* or cow-protectors in Alwar district of Rajasthan, while he and his associates were on their way home from Jaipur. The group of men tore Pehlu’s legal papers that had permitted him to transport cows and let one of his associates leave after discovering that he was Hindu.¹ They started violently beating and humiliating Pehlu in the middle of the highway, as some of them captured the gruesome incident on a mobile phone. By the time the police took him to a hospital, Pehlu succumbed to his injuries. As the video started circulating over the internet, an outpouring of outrage saturated national and international media.

Pehlu Khan’s was not the only story of this kind. Since 2015, anti-minority violence has become an important and visible theme in India’s public discourse. This has been mediated through a focus on discrete incidents of crime, with one incident dominating the media discourse as the next replaces it. Among these incidents, cow-related violence has received the most attention. *Gau rakshak* groups have been involved in numerous acts of violence against persons ferrying cattle. These groups and their defenders often claim that the victims are involved in slaughtering cows, which are considered sacred in Hinduism.² Amnesty International has recorded 113 incidents involving cow protection between September 2015 and June 2019, of which 89 had Muslim victims.³

¹ Abhishek Dey, “‘He Said He Was Hindu, They Let Him Go’: How One Man Escaped an Attack by Cow Vigilantes in Alwar” (*Scroll.in*, 6 April 2017) <<https://scroll.in/article/833800/he-said-he-was-hindu-they-let-him-go-how-one-man-escaped-an-attack-by-cow-vigilantes-in-alwar>> accessed 5 April 2020.

² ‘Violent Cow Protection in India: Vigilante Groups Attack Minorities’ (*Human Rights Watch*, 18 February 2019) <https://www.hrw.org/sites/default/files/report_pdf/india0219_web3.pdf> accessed 5 April 2020.

³ ‘Halt the Hate: Key Findings till June, 2019’ (*Amnesty International*, 4 October 2019) <<https://amnesty.org.in/wp-content/uploads/2019/10/Halt-The-Hate-Key-Findings-Amnesty-International-India-1.pdf>> accessed 5 April 2020.

Thus, unsurprisingly, a large portion of public discourse has used the epithet of cow vigilantism or cow lynching for this violence.⁴

Among the range of violent incidents that have drawn both public outrage and institutional responses, cow-related incidents are only a subset. Numerous other crimes against minorities outside the context of cow, including inter-faith relationships, anti-*Dalit* violence, or even cases with no apparent immediate context, have also come to constitute how violence in contemporary India is imagined. Take the case of Mohammad Afrazul, a Bengali migrant in Rajasthan, who died in December 2017. His murderer, Shambhulal Regar, recorded a video while he hacked and burnt Afrazul. Regar raged against ‘love jihad’, a phrase commonly used by right wing extremists to describe Hindu-Muslim relationships.⁵ Another similar incident occurred in June 2017, when some passengers on a train stabbed the 16-year-old Junaid while he was on his way home to celebrate Eid. Accounts of the event suggest that the alleged perpetrators had identified him as a Muslim, perhaps because of his appearance, and explicitly used Islamophobic slurs while attacking him.⁶ Neither of these incidents, which have since gained notoriety and constitute the conversation around violence in contemporary India, are cases of cow vigilantism or necessarily violence perpetrated by mobs.

The question of how to characterize and address these incidents has been contentious. Many, including prominent Central Government (‘the Government’) spokespersons, have insisted that these incidents are wanton,

⁴ The evolving media discourse is a useful resource to assess this. While there is no systematic study of the Indian or international media, a quick survey of the media’s coverage on contemporary anti-minority violence in India indicates the centrality of cow vigilantism as the key framing of violence since 2018. For a selection of prominent media coverage, see AAK, ‘“Cow Vigilantism” in India’ *The Economist* (Mumbai, 15 February 2018) <<https://www.economist.com/the-economist-explains/2018/02/15/cow-vigilantism-in-india>> accessed 5 April 2020; Zeba Siddiqui and others, ‘Emboldened by Modi’s Ascent, India’s Cow Vigilantes Deny Muslims their Livelihood’ *Reuters* (6 November 2017) <<http://www.reuters.com/investigates/special-report/india-politics-religion-cows/>> accessed 5 April 2020; Johnny Harris and Christina Thornell, ‘The Violent Rise of India’s Cow Vigilantes’ (*Vox*, 24 July 2019) <<https://www.vox.com/2019/7/24/20708435/cow-violence-india-muslims>> accessed 5 April 2020; Benita Fernando, ‘“The Hour of Lynching”: New Documentary on Cow Vigilantism in India’ *Livemint* (24 May 2019) <<https://www.livemint.com/mint-lounge/features/-the-hour-of-lynching-new-documentary-on-cow-vigilantism-in-india-1558674626824.html>> accessed 5 April 2020.

⁵ ‘Muslim Labourer’s Murder in Rajasthan Was Recorded by 14-Year-Old Nephew of the Killer’ *Outlook* (8 December 2017) <<https://www.outlookindia.com/website/story/muslim-labourers-murder-in-rajasthan-was-recorded-by-14-year-old-nephew-of-the-k/305309>> accessed 5 April 2020.

⁶ Sagar, ‘“Mulleh, Kattale Saaley. Maro Sabko. Maaro. Maaro.”: How Passengers on a Train Compartment Discarded Their Humanity’ (*The Caravan*, 27 June 2017) <<http://www.caravan-magazine.in/vantage/how-passengers-on-train-discarded-humanity>> accessed 24 April 2020.

yet disparate acts of violence.⁷ According to them, beyond ordinary instrumentalities of criminal law, they do not require any additional legal strategies for addressing them. In contrast, numerous media, human rights, and advocacy groups have insisted that these incidents reflect a systematic pattern of violence directed at socially vulnerable communities.⁸ They have classified these incidents together under labels like lynching, vigilantism, and hate crime. In July 2018, the Supreme Court of India ('the Court') in *Tehseen S Poonawalla v Union of India* ('*Tehseen Poonawalla*') responded to a set of petitions seeking its intervention in these cases.⁹ The Court rejected the Government's position, and accepted that these incidents required focused institutional mechanisms. It laid down a set of guidelines strengthening victim rights, procedural mechanisms for preserving the integrity of investigation and prosecution, heightened punishment for the perpetrators, and more robust official accountability.

Very evidently, the Court recognized that the incidents invoked by the petitioners were not disparate, but systematic and widespread.¹⁰ The text of *Tehseen Poonawalla*, though, is ambiguous about the Court's assessment of the nature of violence that it sought to address. The Court appeared to interpret the incidents as damaging law and order, rule of law, and social cohesion and harmony. But it did not specifically define the appropriate framework for the enforcement of the guidelines. The question of ambiguity is not merely theoretical. It has come in the way of a proper legal implementation of the order. For instance, the guidelines are meant to apply to cases of lynching. The Court also recommended the enactment of an anti-lynching legislation. Nevertheless, it did not specifically define the category of lynching. The absence of a fully articulated framework within the text of the Court's order hinders determining the precise set of crimes under the guidelines. Consequently, it impairs their institutional implementation and monitoring.¹¹

Addressing these ambiguities, this article argues that *Tehseen Poonawalla* is best interpreted as an expression of the hate crime framework. Hate crimes are most commonly defined as crimes that are motivated by hostility towards the identity of the victim. As I will show,¹² the hate crime concept is distinct from the historical category of communal riots. It is also different from contemporary categories like mob violence and vigilantism, which many commentators, activists, and media actors have commonly deployed in India. The hate crime concept does not focus on the mode of violence, like the category of mob

⁷ See n 74-76 and accompanying text.

⁸ See n 65-67, n 77, n 94 and accompanying text.

⁹ *Tehseen S Poonawalla v Union of India* (2018) 9 SCC 501 (Supreme Court of India) ('*Tehseen Poonawalla*').

¹⁰ See n 110-14 and accompanying text.

¹¹ See n 113.

¹² See n 40-47 and accompanying text.

violence, or interpret incidents essentially as a violation of law and order, like vigilantism. Rather, the concept seeks to isolate the incident by interpreting the motivations at play in the specific crime. In this sense, it is more attuned to the individualization of the incident. At the same time, the concept links the stakes of labelling and classifying a crime to the existing social fissures, prejudices, and hostility. Thus, the hate crime concept simultaneously individualizes incidents of violence *and* places it in a social context, by illuminating the incident's harm on the victims as well as the wider social harm. This emphasis in the hate crime framework directs institutional energies on identifying bias motivation in the individual legal case. At the same time, it also focuses on addressing the wider cleavages of inter-community hostility at a policy level. This article argues that *Tehseen Poonawalla* – read as part of a longer conversation among civil society advocates, human rights lawyers, media, and the Court – endorsed the hate crime framework. The framework provides the best justification for the Court's intervention. It is also normatively the most attractive interpretation of the key components of the Court's order, and the most appropriate institutional model for its implementation. The hate crime concept has emerged in a definite fashion in India's legal and policy discourse. But its institutional potential remains marred by the imprecision in the judicial articulation and the inconsistencies in the subsequent policy developments. Appreciating the endorsement of the hate crime framework in *Tehseen Poonawalla* can address these limitations in the ongoing implementation of the Court's order and legislative process.

In mapping the emergence and jurisprudential potential of the hate crime concept, this article also seeks to engage with the debates on criminal justice in India, particularly on violence, social stratification, and reform. Scholars have studied how the Indian criminal justice system has dealt with sectarian violence in India through the category of communal violence.¹³ This article highlights the potential of hate crime as a unique concept of interpreting, framing, and addressing violence, which may offer resources distinct from the other alternatives. The article also engages with the more established transnational

¹³ For some recent studies, see Surabhi Chopra and Prita Jha, *On Their Watch: Mass Violence and State Apathy in India: Examining the Record* (Three Essays Collective 2014); Surabhi Chopra and others, 'Accountability for Mass Violence: Examining the State's Record' (Centre for Equity Studies, May 2012) <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/49277/IDL-49277.pdf?sequence=1>> accessed 24 April 2020; Harsh Mander, 'Broken Lives and Compromise: Shadow Play in Gujarat' [2012] *Economic & Political Weekly* 90; Pratiksha Baxi, 'Adjudicating the Riot: Communal Violence, Crowds and Public Tranquility in India' (2007) 3 *Domains: Spec Issue Riot Discourses* 66; Praveen Kumar, *Communal Crimes and National Integration: A Socio-Legal Study* (Readworthy Publications 2010). For literature on the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011, see Harsh Mander, 'Resisting State Complicity in Communal Crimes: Missed Opportunities in UPA Bill' [2005] *Economic & Political Weekly* 5527; Mihir Desai, 'The Communal and Targeted Violence Bill' [2011] *Economic & Political Weekly* 12; ST Ramesh, 'A Critique of the Communal Violence Bill 2005' [2010] *Economic & Political Weekly* 17.

hate crime scholarship. There has been a perceptible expansion of the literature on hate crime.¹⁴ But despite some recent attempts of comparative study,¹⁵ this literature has completely overlooked Third World jurisdictions like India. This is a serious limitation, considering that identity-related crimes – particularly related to caste – have had a long presence in the Indian legal system. The recent emergence of the hate crime concept offers a unique case study for the transnational study of the concept. This article attempts to start a process of remedying this, by striking a conversation between Indian and non-Indian experiences with the hate crime category.

The article starts with conceptually locating the category of hate crime through the relatively advanced legal and theoretical transnational debates. In Part II, I will argue that the transnational hate crime discourse emerged from a need to fully appreciate both, the individual and social harm of violence directed at persons because of their identity. This twin appreciation is the key to the category, and its most attractive feature. This is also the crucial distinction between hate crime, and the other competing categories of mob violence and vigilantism. These categories tend to focus on the mode of violence. They also interpret the harm of violence primarily as the violation of the rule of law, and the disruption of the state's monopoly over force. In contrast, the category of hate crime focuses on the harm to the individual victim, as well as the costs for inter-community solidarity.

In the remainder of the article, I will follow the emergence of hate crime – as an interpretive term and a substantive approach to anti-minority violence – and its culmination in *Tehseen Poonawalla*. Part III will argue that the legal arguments made by advocates in *Tehseen Poonawalla* are best understood as a reflection of the framing of violence as hate crime in the larger public discourse. I will follow how the phrase was and continues to be used in the media, particularly in its most focused manner for data collection. This framing by the media has had an impact on how legal and institutional actors have come to – at least partially – characterize violence. The initial legal interventions often adopted categories ranging from lynching to mob violence. I will note that this evolved with time. The media-driven hate crime data collection

¹⁴ For some recent noteworthy work and collections, see Phyllis B Gerstenfeld, 'Hate Crime' in Peter Sturmey (ed), *The Wiley Handbook of Violence and Aggression* (Wiley-Blackwell 2017); Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Psychology Press 2001); Barbara Perry, *Hate and Bias Crime: A Reader* (Routledge 2003); Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013).

¹⁵ See Margaret Shaw and Olivier Barchachat, *Preventing Hate Crimes: International Strategies and Practice* (International Centre for the Prevention of Crime 2002); Barbara Perry, 'Exploring the Community Impacts of Hate Crime' in Nathan Hall and others (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2014); Jennifer Schwegge and Mark Austin Walters (eds), *The Globalization of Hate: Internationalizing Hate Crime?* (1st edn, Oxford University Press 2016).

and the adoption by civil society advocates of the hate crime concept filtered into the language of legal actors.

Part IV will use this background to situate *Tehseen Poonawalla* and the Court's guidelines. While the Court did not coherently articulate the applicable framework, I will argue that the framing in terms of the hate crime concept filtered into its order. The guidelines and the subsequent institutional developments are best interpreted in the light of this framework. I conclude by suggesting that despite this, the legal incorporation of the hate crime framework continues to be tentative. There is a need to institutionally recognize all the resources of the framework.

II. SITUATING HATE CRIME

A. Defining hate crime

The hate crime concept is not uniformly defined across time and space, either in all legal jurisdictions or scholarly literature. Despite the variance, the key to its contemporary usage is bias motivation. The Office for Democratic Institutions and Human Rights ('ODIHR') provides a useful definition of the concept in its guidance for OSCE (Organization for Security and Co-operation in Europe) member states. According to ODIHR, hate crimes are "criminal acts committed with a bias motive".¹⁶ Bias motive indicates a prejudicial motivation or hostility towards certain specified characteristics of the victim that she shares with others. These may include her race, religion, ethnicity, language, or any other similar trait. Bias does not need to be the primary motive. For an act to qualify as a hate crime, it is enough to show that the victim was deliberately targeted because of a particular "protected characteristic . . . shared by a group, such as 'race', language, religion, ethnicity, nationality, or any other similar common factor."¹⁷ The concept is not necessarily directed at any specific protected characteristic. While race, language, ethnicity, religion, or nationality can be the factors, any aspects of identity "fundamental to a person's sense of self" can be the protected characteristics.¹⁸ Thus, contrary to what the semantics of 'hate' crime may suggest, as Nathan Hall reminds us, the concept "is not really about hate, but about criminal behavior motivated by prejudice, of which hate is just one small and extreme part." The hate crime concept is meant to capture identity-based hostility, 'on the part of the offender', in the specific criminal act.

¹⁶ 'Hate Crime Laws: A Practical Guide' (Office for Democratic Institutions and Human Rights 2009) 16 <<https://www.osce.org/odihr/36426?download=true>> accessed 24 April 2020.

¹⁷ *ibid.*

¹⁸ *ibid* 38.

The scholars of the hate crime concept have consistently noted that there is no shared way in which the concept is used in policy or legal discussions. I would suggest that the variance in the deployment of the concept, in fact, is the attraction of the concept rather than its weakness. It has permitted countries to attune documentation and prosecution to address their specific social contexts. Different countries have adopted the concept to address different institutional and social urgencies, leading to the internationalization of the hate crime concept in a variety of ways.¹⁹ In Europe, countries like Germany, Austria, and Italy have adopted the concept in light of the historical concerns regarding right-wing extremism and anti-Semitism. The United Kingdom has done so to address institutional racism in the context of mass immigration from the Caribbean and South Asia.²⁰ In the United Kingdom, this concern has been the basis for the police to also document a wider category of hate incidents, which may not amount to crimes, to better evaluate policing culture. Moreover, the country has adopted the concept for both, data monitoring by the police as well as for prosecution, specifically for aggravated sentencing.²¹ In the United States, the federal government and state governments enforce various anti-hate crime legislations.²² At the federal level, the main legislation has empowered federal agencies to investigate and prosecute certain hate crimes, along with the power to enforce enhanced punishments.²³ Unlike the United Kingdom that has a centralized hate crime monitoring strategy led by the police department, the United States has mandated its Attorney General to collect hate crime data,²⁴ which are published by the US Federal Bureau of Investigation.²⁵

From a definitional perspective, the hate crime concept verges towards individualization. It allows for a better appreciation of the specific harm to the

¹⁹ Scheppe and Walters (n 15) 4. For a discussion of how the concept has been recognized in various Western jurisdictions, see Perry, 'Exploring the Community Impacts of Hate Crime' (n 15) 95–185.

²⁰ In the context of the United Kingdom, the key moment was the Sir William Macpherson Report on the murder of Stephen Lawrence in London in April 1993. The Report found evidence of 'institutional racism' in the criminal justice system in the country. For more discussion, see John Lea, 'The Macpherson Report and the Question of Institutional Racism' (2000) 39 *How J Crim Just* 219.

²¹ Criminal Justice Act 2003, s 145 and 146.

²² For a general discussion on hate crime law and policy in the United States, see Frederick M Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 2002); 'Laws and Policies' (*The United States Department of Justice*, 22 August 2018) <<https://www.justice.gov/hatecrimes/laws-and-policies>> accessed 6 April 2020.

²³ See The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, s 249.

²⁴ The Hate Crime Statistics Act 1990, s 534.

²⁵ Some policy experts and scholars have noted that the definitional variation across the states in the United States and the non-compliance by many police departments continues to mar the comprehensiveness of the data. See Michael Shively, 'Study of Literature and Legislation on Hate Crime in America' (National Criminal Justice Reference Service March 2005) 3 <<https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf>> accessed 24 April 2020.

victim. Increasing evidence, admittedly in the Western context, shows that crimes motivated by hostility towards the victim's identity hurt the victim more than crime based on other motivations. Scholars have noted that incidents of hate crime have a higher tendency to be violent compared to otherwise motivated crimes.²⁶ This perhaps suggests that the perpetrators 'channel' their hatred through their actions.²⁷ There is also evidence that hate crimes tend to have a deeper psychological impact on victims compared to otherwise motivated crimes.²⁸ For example, victims of hate crimes are more likely to avoid accessing certain city spaces.²⁹ The vocabulary of hate crime illuminates these personal harms to the victim that may remain obscure otherwise.

Contrast this with the categories like vigilantism or mob violence that have been used in the contemporary conversations in India. Both these categories are preoccupied with the law and order implications of violence, either by focusing on the mode of violence ('mob') or the disruption of the state's monopoly over violence ('vigilantism'). Vigilantism in particular approaches violence in markedly different terms than hate crime, by framing it as a response against objectionable behavior on part of the victims. It suggests that the perpetrators had to take law into their own hands because of the state's inefficiency or disinterest in addressing such behaviour.³⁰ Unlike both these usages, the hate crime concept is considerably more victim-centric by individualizing crimes and focusing on their specific harms for the victims.

Moreover, what makes the concept considerably more attractive than many competing categories is that it simultaneously allows us to *see* the social context and social costs of such crimes. It illuminates the fact that crimes motivated by bias cause non-personal harms beyond their direct victims, particularly on the victim's community at large. Hate crimes are 'message

²⁶ Jack Levin and Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* (Da Capo Press 1993) 11. See also Neil Chakraborti, 'Framing the Boundaries of Hate Crime' in Nathan Hall and others (eds), *The Routledge International Handbook on Hate Crime* (1st edn, Routledge 2014) 40.

²⁷ Levin and McDevitt (n 26) 11–12:

The *hatred* in such crimes gets expressed when force is exercised beyond what may be necessary to subdue victims, make them comply, disarm them, or take their worldly goods... Clearly, the brutality... alerts us to the possibility that extreme hatred was being channeled into vicious behavior.

²⁸ Paul Giannasi, 'Academia from a Practitioner's Perspective: A Reflection on the Changes in the Relationship between Academia, Policing and Government in a Hate Crime Context' in Neil Chakraborti and Jon Garland (eds), *Responding to Hate Crime: The Case for Connecting Policy and Research* (Policy Press 2014).

²⁹ Paul Iganski and Spiridoula Lagou, 'The Personal Injuries of Hate Crime' in Nathan Hall and others (eds), *The Routledge International Handbook on Hate Crime* (1st edn, Routledge 2014). See also Paul Iganski, 'Hate Crimes Hurt More' (2001) 45 *American Behavioral Scientist* 626.

³⁰ See Ray Abrahams, *Vigilant Citizens: Vigilantism and the State* (1st edn, Polity 1998).

crimes',³¹ where the perpetrators choose the victim because of their community and intend their actions to threaten the community. Consequently, hate crimes often lead to polarization and escalation of inter-group violence. The global harms of hate crime beyond the personal harms to the victims may include the deterioration of inter-community trust, deepening of stigmatization among members of the victim's community, and disruption of social solidarity.³² Significantly, as Barbara Perry has argued in her influential account, the hate crime concept allows us to capture systemic victimization of socially vulnerable groups. Perry argues that hate-motivated crimes reflect everyday social configurations of power and identity-formation. Hate crimes are ways in which the dominant social culture punishes persons if they "step out of line, cross sacred boundaries, or forget [their] 'place'"³³ Her account treats hate-motivated crimes as an episodic expression of embedded subordination of groups and a more pervasive phenomenon of the othering of vulnerable and marginalized identity groups.³⁴ As she puts it, hate crime,

...provides a context in which the perpetrator can reassert his/her hegemonic identity and, at the same time, punish the victim(s) for their individual or collective performance of identity. In other words, hate-motivated violence is used to sustain the privilege of the dominant group, and to police the boundaries between groups by reminding the Other of his/her 'place'. Perpetrators thus re-create their own masculinity, or whiteness, for example, while punishing the victims for their deviant identity performance.³⁵

This perspective enriches the value of the hate crime concept because apart from the individualized focus of its definition, it also places the crimes it classifies within the thicker context of social power. Obviously, not adopting any schema to classify such crimes for documentation would completely miss out on these dimensions of the crimes. Likewise, categories like mob violence and vigilantism also do not have resources within them to recognize this dimension of social power.

³¹ Iganski and Lagou, 'The Personal Injuries of Hate Crimes' (n 29).

³² Perry, 'Exploring the Community Impacts of Hate Crimes' (n 15) 65–76.

³³ Perry, *In the Name of Hate: Understanding Hate Crimes* (n 14) 54–55.

³⁴ See *ibid* 10:

...hate crime is a crime like no other. Its dynamics both constitute and are constitutive of actors beyond the immediate victims and offenders. It is implicated not merely in the relationship between the direct 'participants', but also in the relationship between the different communities to which they belong. The damage involved goes far beyond physical or financial damages. It reaches into the community to create fear, hostility and suspicion. Consequently, the intent of ethnviolence is not only to subordinate the victim, but also to subdue his or her community...

³⁵ *ibid* 55.

B. Hate crime and the allied concepts

The two complementary qualities of the hate crime concept also offer considerable advantage over other similar categories of description. Take the comparison with the oft-used categories of communal riots or communal violence, which have regularly been used to denote and document hate-motivated crimes, particularly based on religious identity. While scholarship has often focused on the role played by ideologically driven groups, scholars have consistently pointed out that most documented hate crimes are committed by ordinary people in ordinary circumstances.³⁶ Such crimes are often low in intensity like verbal abuse, and perpetrated in everyday scenarios by persons known to the victim. For instance, criminologists Walter and Hoyle have studied instances of homophobic and racist harassment that have occurred in the context of ordinary neighbourhood issues like noise and rubbish.³⁷ Such incidents do not correspond with the stereotypical hate crime that involves heightened violence among strangers. They occur due to strained interpersonal relationships not exclusively related to prejudice, though the alleged perpetrators deploy prejudiced language. In such instances, they suggest that drawing dichotomies of victim and offender may oversimplify the context of such crimes, acerbate animosity, and hamper conflict resolution. Hate crime, as Perry argues, is an expression of social power. But it cannot be reduced merely to an inter-community conflict. Because of its ability to register and appreciate these complexities, the hate crime concept eschews interpreting the violence it classifies as violence of one group against the other. As Chakraborti notes, the concept,

...reminds us of the capacity for members of minority groups to be perpetrators as well as victims of hate crime. The kinds of biases, prejudices and stereotypes that form the basis of hate crime are not the exclusive domain of any particular group, and yet the foundations of much hate crime policy and scholarship have been built on the assumption that these are exclusively 'majority versus minority' crimes.³⁸

³⁶ See Chakraborti, 'Framing the Boundaries of Hate Crime' (n 26) 18:

While hate crime are undeniably linked to the underlying structural and cultural processes that leave minorities susceptible to systemic violence, conceiving of these offences exclusively as a mechanism of subordination overplays what for some perpetrators will be an act arising from more banal motivations, be it boredom, jealousy or unfamiliarity with 'difference'.

Paul Iganski, *'Hate Crime' and the City* (Policy Press 2008); Gail Mason, 'Hate Crime and the Image of the Stranger' (2005) 45 *British Journal of Criminology* 837; Larry Ray, David Smith and Liz Wastell, 'Shame, Rage and Racist Violence' (2004) 44 *British Journal of Criminology* 350.

³⁷ Mark Walters and Carolyn Hoyle, 'Exploring the Everyday World of Hate Victimization Through Community Mediation' (2012) 18 *International Review of Victimology* 7.

³⁸ Chakraborti, 'Framing the Boundaries of Hate Crime' (n 26) 19.

In contrast, the phraseology of communal riot or communal violence conjures the image of unruly mobs violating law and order, and attacking each other.³⁹ In her study of how the appellate judgments interpret communal riots, Pratiksha Baxi notes that courts locate “the crowd as the site of irrational passion where ordinary citizens who uphold everyday notions of public sociability are transformed into satanic beasts”.⁴⁰ The judicial phraseology treats violence as extraordinary,⁴¹ and invites – even necessitates – the state’s role as

³⁹ This understanding of communal riots is embedded in most of the literature on it. Take the example of NC Saxena’s account of the ‘origin of communal riots in India’, who operates with the conception of communal riots or violence as relatively large scale inter-community civic unrest. India’s penal law and official data also maintains this conceptualization. See NC Saxena, ‘The Nature and Origin of Communal Riots in India’ in Asghar Ali Engineer (ed), *Communal Riots in Post-Independence India* (Sangam Books Limited 1984). In much of the literature, communal riots or communal violence is essentially approached as civic or ethnic conflict of a certain egregious scale. See Steven I Wilkinson, ‘Riots’ (2009) 12 Annual Review of Political Science 329, 330:

Most people, though, including most social scientists, generally think of riots as involving crowds of 30, 40, 50, or more. Bohstedt, in his work on English riots in the eighteenth century, argued that most contemporaries understood a riot to be ‘an incident in which a crowd of fifty or more people damaged or seized property, assaulted someone or forced a victim to perform some action’. Olzak & Shanahan define a race riot as an event involving ‘racial grievances against discrimination or perceived racial justice and in which 30 or more persons engaged in violent activity that lasted several hours’, although elsewhere they define a riot as a minimum of 50 people and allow the inclusion of ‘bystanders, and police’ as well as ‘instigators’ in this total. (references removed).

Under Section 146 of the Indian Penal Code 1860, an ‘unlawful assembly’ (defined as a group of five or more persons with the common criminal object) using force or violence amounts to rioting. In its data, the National Crime Records Bureau (‘NCRB’) adopts this classification. A ‘communal riot’ is when the use of force or violence by an unlawful assembly is communally motivated.

⁴⁰ Baxi (n 13) 69.

⁴¹ Gyanendra Pandey has insightfully noted that mainstream social and official narratives in India characterize sectarian strife or communalism ‘as a secondary story’. As he puts it, despite a long history of violence, dominant historiography portrays India to have stayed firmly—and ‘naturally’—on its secular, democratic, nonviolent, and tolerant path. See Gyanendra Pandey, ‘In Defense of the Fragment: Writing about Hindu-Muslim Riots in India Today’ (1992) 37 *Representations* 27-55. See also Baxi (n 13) 100:

The judicial archive is then oriented to a notion of a future that derives from thinking of riots as temporal aberrations that heal with the passage of time. Certain forms of remembrance are constituted as a threat to public tranquility and, documents such as enquiry committee reports and even judgments, which are oriented to the future, are seen as being invested with the power of inciting further violence.

This portrayal has interpreted communal violence as unnatural and an aberration, and elevated the role of the state as neutral and above social cleavages, despite tremendous evidence of state complicity and partisanship. For the literature on the role of the state in communal and anti-minority violence, see Asghar Ali Engineer (ed), *Communal Riots in Post-Independence India* (Sangam Books 1991); Gopal Krishna, ‘Communal Violence in India: A Study of Communal Disturbance in Delhi’ [1985] *Economic & Political Weekly* 61; Steven I Wilkinson, *Votes and Violence: Electoral Competition and Ethnic Riots in India* (Cambridge University Press 2006).

peacekeeper.⁴² Moreover, the communal violence framework reduces violence to an inter-community conflict.⁴³ This obscures the experience of the individual victim, which is lost in the larger frame of extraordinary civic violence. Ironically, it also obscures the social complexity of the perpetrator's actions. It interprets violence as irrational acts of the mob, without recognizing the role of social power and hierarchy. The weakness of this framework is visible in the manner in which Section 153A of the Indian Penal Code, which is the core penal provision relevant to communal violence in India, is framed and applied. The provision punishes any speech or writing that promotes "disharmony or feelings of enmity, hatred or ill-will" on grounds of identity like religion, caste, and community. It also punishes actions that prejudice "the maintenance of harmony" and disturb "public tranquility". The Indian state has widely used Section 153A to criminalize hate speech. While hate speech refers to speech that promotes hatred or hostility on the basis of identity,⁴⁴ the text of Section 153A clearly exceeds this understanding. Rather, the provision is framed in terms of maintaining social order. The provision focuses on social stability rather than the harms associated with hate crime. Thus, despite being often described as India's hate speech provision, Section 153A is very much within the communal riot understanding of violence and harm. It does not come within the hate crime framework. This is reflected in the historical record. Through the provision, the colonial British government sought to control violations of disturbance and law and order. The provision was a means of managing the relationship among the various communities "mediated by the state".⁴⁵ The broad framing of the provision has permitted the state and citizens to use it to censor critical voices.⁴⁶

⁴² See Gyanendra Pandey, 'The Colonial Construction of "Communalism": British Writings on Banaras in the Nineteenth Century' in Veena Das (ed), *Mirrors of Violence: Communities, Riots and Survivors in South Asia* (Oxford University Press 1991).

⁴³ For example, in her study of appellate judgments on communal violence, Baxi finds that courts tend to introduce a false equivalence between Hindus and Muslims in the context of violence. She notes that, 'blame is apportioned [sic] on both the [Hindu and Muslim] communities making an extraordinary equivalence between crowd violence and the sanctioned illegal violence of the state as a consequence of the crowd violence'. Baxi (n 13) 99. Implicit in this assessment is that the courts – through the framework of communal violence – interpret violence as essentially an inter-community civic conflict.

⁴⁴ See Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 *Cardozo Law Review* 1523.

⁴⁵ Siddharth Narrain, 'The Harm in Hate Speech Laws: Examining the Origins of Hate Speech Legislation in India' in Rina Ramdev, Sandhya Devesan Nambiar and Debaditya Bhattacharya (eds), *Sentiment, Politics, Censorship: The State of Hurt* (SAGE 2015) 45.

⁴⁶ For an elaboration of the use of these laws to censor speech and victimize dissenters, see Ratna Kapur, 'Who Draws the Line? Feminist Reflections on Speech and Censorship' [1996] *Economic & Political Weekly* WS15; Brian K Pennington, 'The Unseen Hand of an Underappreciated Law: The Doniger Affair and Its Aftermath' (2016) 84 *Journal of the American Academy of Religion* 323-336 (discussing the case involving Wendy Doniger's 2009 book, *The Hindus: An Alternative History*); Vinay Lal, 'State, Civil Society, and the Right to Dissent: Some Thoughts on Censorship in Contemporary India' (2014) 13 *India Review*

This does not mean that the Indian legal discourse does not have concepts that share a family resemblance with the hate crimes concept. The concept's underlying features are common with at least two other categories in the Indian legal discourse. The category of hate crime, at the level of the definition, resonates the most with the category of caste atrocity under Indian law. Caste atrocities have a very particular meaning and purpose in India's legal history. After Independence, Indian policy makers sought to encapsulate caste violence against *Dalits* in the language of individualized caste hostility. Consequently, the Untouchability (Offences) Act 1955 and the Protection of Civil Rights Act 1955 defined offences as committed "on the ground of untouchability".⁴⁷ The law's framing gestured towards the motivation of the perpetrator of the crimes, but with the difficulty that untouchability was left undefined.⁴⁸ The Prevention of Atrocities (Against Scheduled Castes and Scheduled Tribes) Act 1989 ('the Atrocities Act'), brought about a change in the law. It shifted the primary focus from criminal motivation to specified acts and speech. The law deemed that discrete acts and words amounted to caste-based violence. They reflected and produced *Dalit* caste subordination.⁴⁹ The legislation used the category of "atrocities" as the legal recognition of anti-*Dalit* violence, as specific acts directed towards *Dalits* that were deemed to express caste hierarchy and untouchability.⁵⁰ Behind this legalistic veneer, the Atrocities Act was an acknowledgment, in Anand Teltumbde's words, that "caste relations are defined by violence, both incidental and systematic."⁵¹ This would remind us of Perry's argument regarding the role of hate violence in maintaining and entrenching social power. The category of caste atrocities was an impressive interpretation of the hate crime category in the Indian context, thickly interpreted.

277. (discussing the use of Section 153A among other penal provisions to victimize prominent social scientist Ashis Nandy).

⁴⁷ See The Untouchability (Offences) Act 1955, s 3-6; The Protection of Civil Rights Act 1955, s 3-8.

⁴⁸ See Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press 2009) 173–174. For the larger difficulties of defining untouchability, see Marc Galanter, 'Untouchability and the Law' (1969) 4 *Economic & Political Weekly* 131; Simon Charsley, "'Untouchable': What Is in a Name?" (1996) 2 *Journal of the Royal Anthropological Institute* 1.

⁴⁹ See The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, s 3(1). For a discussion on the implementation of the legislation, see Gopika Solanki, 'Invoking Human Rights' in Ashwani Peetush and Jay Drydyk (eds), *Human Rights: India and the West* (1st edn, Oxford University Press 2015); Smita Narula, *Broken People: Caste Violence Against India's 'Untouchables'* (Human Rights Watch 1999).

⁵⁰ As Anupama Rao puts it, the 'Acts from the everyday to the extraordinary, from the structural to the spectacular, from spatial segregation to ritual humiliation to political terror, became legible as practices of untouchability because the victim was an untouchable'. See Rao (n 48) 178.

⁵¹ Anand Teltumbde, *The Persistence of Caste: The Khairlanji Murders and India's Hidden Apartheid* (Zed Books Ltd 2010) 77, 79.

Besides caste atrocity, another category that captures the essence of the hate crime concept in India – and thus shares a family resemblance to both hate crime and atrocities – is targeted violence. Targeted violence has only recently started emerging within the Indian legal discourse,⁵² with its most significant legal use in the Delhi High Court’s recent case of *Zulfikar Nasir v State of Uttar Pradesh* (*Hashimpura massacre*).⁵³ The case dealt with the criminal culpability of 16 police personnel from the Provincial Armed Constabulary (‘PAC’) who were accused of rounding up around 45 Muslim men during the 1987 communal riots in the North Indian city of Meerut, and shooting them in cold blood. In a remarkable judgment, Justice Muralidhar, among other aspects, developed the concept of targeted violence and its relation with India’s criminal law jurisprudence. Justice Muralidhar addressed the argument of the defence that the accused police personnel did not have any motive to kill the deceased. He noted that “all the victims belonged to a minority community”, which indicated that this was “a case of a targeted killing revealing an institutional bias within the law enforcement agents in this case.”⁵⁴ Relying on empirical evidence,⁵⁵ he held that the defence’s argument had to be rejected based on the background of institutional bias and the evidence that there was “disproportionate reaction by the PAC in targeting the members of the minority community.”⁵⁶ Justice Muralidhar’s judgment was significant in drawing from social scientific evidence of systemic bias and for articulating the notion of targeted violence in line with the hate crime concept.⁵⁷ Like the definition of

⁵² In 2011, a draft bill titled the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011 (‘the Bill’), was circulated. The Bill defined communal and targeted violence as:

means and includes any act or series of acts, whether spontaneous or planned, resulting in injury or harm to the person and or property, knowingly directed against any person by virtue of his or her membership of any group, which destroys the secular fabric of the nation.

The Bill, however, was never passed. For the text of the bill, see ‘Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011’ <<https://www.prsindia.org/uploads/media/draft/NAC%20Draft%20Communal%20Violence%20Bill%202011.pdf>> accessed 24 April 2020.

⁵³ *Zulfikar Nasir v State of Uttar Pradesh* 2016 SCC OnLine Del 4608 (High Court of Delhi) (*Hashimpura massacre*).

⁵⁴ *ibid* [102].

⁵⁵ The judgment quoted the Centre for Study of Developing Societies and a Common Cause report that noted severe under-representation of Muslims in the police force, high levels of mistrust of the police among Muslims, and a history of police atrocities. See *ibid* [103]. For the report, see ‘Status of Policing in India Report 2018: A Study of Performance and Perceptions’ (Common Cause & Lokniti - Centre for the Study of Developing Societies 2018) <<https://www.commoncause.in/pdf/SPIR2018.pdf>> accessed 6 April 2020.

⁵⁶ *Hashimpura massacre* [104].

⁵⁷ The ill-fated Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011, which was not passed by the Parliament, had defined and criminalized ‘communal and targeted violence’ on similar lines. The Bill defined it as ‘any act or series of acts, whether spontaneous or planned, resulting in injury or harm to the person and or property, knowingly directed against any person by virtue of his or her membership of any group,

atrocities, he defined targeted violence as deliberate violence against persons on the basis of their group membership.

While caste atrocity and targeted violence share a family resemblance with the hate crime concept, there are some obvious distinctions. Caste atrocity of course focuses exclusively on violence on the ground of untouchability. It is still early days for targeted violence, and at least the *Hasimpura massacre* case invoked it in the context of state officials perpetrating mass violence. From this perspective, the hate crime concept is wider than both atrocity and targeted violence. At the same time, the hate crime concept is more focused on the motivations at play in the individual crime than either of the other categories. As a juristic concept, atrocities dispenses with the need to provide evidence of motivation altogether. Rather, it deems certain acts and words as amounting to hate crime. Similarly, at least in Justice Muralidhar's treatment in *Hashimpura massacre*, targeted violence *assumes* motivation. It does not require establishing bias motivation through evidence. Moreover, the legal consequences of this assumption of motivation are unclear. At present, targeted violence does not make any additional juristic or institutional responses contingent on this determination of motivation. For instance, bias motivation is an ingredient of hate crime. Consequently, the determination of motivation results in higher penalties and greater recognition of victims' needs. In comparison, motivation does not play any clear legal role in targeted violence.

III. HATE CRIME FRAMING IN MEDIA AND PUBLIC CAMPAIGNS

In Part IV, I will argue that the hate crime concept has also witnessed legal incorporation – similar to categories like atrocities and targeted violence – by the Supreme Court in *Tehseen Poonawalla*, and other institutions. To support this interpretation, I intend to situate the Court's order in the longer trajectory of the debate on contemporary anti-minority violence. This part will argue that the hate crime concept increasingly emerged as the frame for various social actors – starting from the media, to civil society advocates, and eventually the legal actors – to interpret violence and demand judicial redress.

A. The framing of violence

Despite the long history of identity-motivated crimes in India, the deployment of the hate crime concept to describe them in the public discourse owes

which destroys the secular fabric of the nation'. See Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011, s 9.

its origins to a series of high profile incidents since 2015. Perhaps the first of such incidents that captured public imagination was the case of Mohammad Akhlaq. On September 28, 2015, a mob in Dadri town in the periphery of Delhi killed the 50-year old Mohammad Akhlaq to death, beating and stabbing him and his 22-year old son Danish. From the facts that emerged subsequently, there had been an announcement from a nearby Hindu temple that Akhlaq had slaughtered a calf.⁵⁸ The incident took a pronounced political complexion with the involvement of local Bhartiya Janata Party ('BJP') workers, who expressed support for the accused. Next year in July 2016, another incident related to cow protection – this time involving *Dalits* – led to significant furore. A video surfaced in which a mob was seen flogging *Dalits* for transporting dead cattle.⁵⁹ The video led to an outcry, especially among *Dalits*, leading to massive protests across the country.⁶⁰

These incidents, and those involving Pehlu Khan and Junaid, brought the problem of violence at the centre of public discourse. But what was the character of this violence and hence the precise nature of this problem? Were these incidents best interpreted as just violations of law and order, or as a reflection of more pernicious and pervasive social cleavages, including religious and caste prejudice? Different social and political actors came to differ amongst themselves on these questions.

During this debate, civil society advocates adopted different categories to describe these incidents, including lynching, vigilantism, mob violence, and eventually hate crime. Description, of course, is far from being a neutral activity. The terms we use to describe acts of violence offer – often implicitly – concrete understandings of the social harm of violence, the boundaries of political action, and the strategies of legal redress. Are these incidents, which continue to dominate the conversation around violence in contemporary India, disconnected or random? Is there a pattern, and if so, what? Do these incidents indicate a failure of legal control, or are they a reflection of deeper social fissures in the country? The answers to these questions are contingent on the categories we use to interpret and organize these incidents.

An instructive lens to study how these divergent categories and interpretations were expressed and eventually channelled into the law is the literature on frame alignment. Scholars have noted that social movement formations are

⁵⁸ See Human Rights Watch (n 2).

⁵⁹ See 'Una Dalit Flogging: CID Says Cops Turned Skinning of Dead Cow into Case of "Beef Being Found"' *India Today* (New Delhi, 8 September 2016) <<https://www.indiatoday.in/india/story/una-dalit-flogging-chargesheet-339930-2016-09-08>> accessed 6 April 2020.

⁶⁰ See 'Protests Continue in Gujarat over Thrashing of Dalits Near Una' *The Hindu* (Ahmedabad, 21 July 2016) <<https://www.thehindu.com/news/national/Protests-continue-in-Gujarat-over-thrashing-of-Dalits-near-Una/article14501552.ece>> accessed 6 April 2020.

not only agents battling for certain interests and ideas. They are equally “signifying agents actively engaged in the production and maintenance of meaning for constituents, antagonists, and bystanders or observers”.⁶¹ Social movements engage in interpreting and constructing reality. They do so for a variety of purposes, like mobilizing participants, legitimizing their goals, and persuading critics. Social movement scholars call this process *framing*. Framing processes are contentious activities. Social movements try to advance the construction of meaning most favourable to it, often by competing with opposing frame alignments. This process is also internally contentious, because participants in a social movement often disagree about the best – most appropriate, advantageous, or accurate – shared meaning of reality. Framing by political mobilizations – called collective action frames in the literature – serve a number of important purposes. They serve a diagnostic function of identifying the problem and attributing responsibility.⁶² This diagnostic function is intimately connected with the second function of prognosis, which involves proposing a solution to the problem.⁶³ Social movement and other political mobilizations also adopt frame alignments for motivational purposes to conjure vocabularies that articulate and strengthen movement solidarities.

This perspective is well suited to understand how social and political actors frame descriptions – interpret their social reality – as they proceed to advocate policies to respond to the state of affairs. This applies to the evolving hate crime discourse in India. One set of actors, especially the increasing number of media outlets and activists, insisted that the incidents of violence reflected a clear pattern. They argued that the violence was directed towards religious and caste minorities.⁶⁴ In June and July 2017, activists organized notable protests in numerous cities in the country under the banner of ‘Not in My Name’.⁶⁵

⁶¹ Robert D Benford and David A Snow, ‘Framing Processes and Social Movements: An Overview and Assessment’ (2000) 26 *Annual Review of Sociology* 611, 613.

⁶² See Robert D Benford, ‘Frame Disputes Within the Nuclear Disarmament Movement’ [1993] *Social Forces* 677.

⁶³ See Sharon Erickson Nepstad, ‘The Process of Cognitive Liberation: Cultural Synapses, Links, and Frame Contradictions in the US-Central America Peace Movement’ (1997) 67 *Sociological Inquiry* 470.

⁶⁴ See Apoorvanand, ‘What Is Behind India’s Epidemic of “Mob Lynching”?’ *Al Jazeera* (6 July 2017) <<https://www.aljazeera.com/indepth/opinion/2017/07/india-epidemic-mob-lynching-170706113733914.html>> accessed 6 April 2020; Soutik Biswas, ‘Is India Descending into Mob Rule?’ *BBC News* (26 June 2017) <<https://www.bbc.com/news/world-asia-india-40402021>> accessed 6 April 2020; Nilanjana Bhowmick, ‘Opinion | As India’s Muslims Are Lynched, Modi Keeps Silent’ *Washington Post* (29 June 2017) <<https://www.washingtonpost.com/news/global-opinions/wp/2017/06/28/as-indias-muslims-are-killed-modi-keeps-silent/>> accessed 6 April 2020.

⁶⁵ See ‘#NotInMyName Protests: Thousands Hit the Streets Against Mob Lynchings’ *The Indian Express* (New Delhi, 28 June 2017) <<https://indianexpress.com/article/india/not-in-my-name-mob-lynching-junaid-khan-protests-jantar-mantar-4726636/>> accessed 6 April 2020; Sowmiya Ashok, ‘At Jantar Mantar: Not in My Name, I Came Here to Break the Silence’ *The Indian Express* (New Delhi, 29 June 2017) <<https://indianexpress.com/article/india/>>

The participants actively framed their protests as responding to the “pattern of the attacks on the minorities in the country and the silence of the government over the killings and cases of lynching of Muslims and *Dalits*.”⁶⁶ These actors framed the descriptive reality – the catena of incidents of violence – as anti-minority violence.

By 2017, media and activists operating with this framing primarily adopted the category of lynching. The category, often defined the public extrajudicial killing of an alleged criminal,⁶⁷ owes its origins to the post-reconstruction racist violence against African Americans in the United States.⁶⁸ Thus, lynching has historically always been associated with extrajudicial action by mobs against racial minorities. By mid-2017, Indian newspapers and politicians started deploying it to characterize the perceptible spike in the discrete media-reported violent incidents.⁶⁹ While much of this happened without any clear sense of the antecedents and implications of the description, it had a significant symbolic impact by linking contemporary violence in India to the spectre of racial violence in the United States. Some lawyers and activists circulated a draft of an anti-lynching bill. It defined lynching as spontaneous or premeditated violent acts for meting out “extra judicial punishment” or a mob’s

jantar-mantar-not-in-my-name-i-came-here-to-break-the-silence-4726965/> accessed 6 April 2020.

⁶⁶ ‘What Is the “Not In My Name” Protest?’ *The Indian Express* (New Delhi, 28 June 2017) <<https://indianexpress.com/article/what-is/what-is-the-not-in-my-name-protest-lynching-junaid-khan-4725668/>> accessed 6 April 2020.

⁶⁷ The United States Congress has never passed any federal law against lynching, though some notable attempts were made. A prominent example was the 1922 Dyer Anti-Lynching Bill, which provided aggravated punishment for lynching defined as ‘three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense’. See ‘NAACP History: Dyer Anti-Lynching Bill’ (*NAACP*) <<https://www.naacp.org/naACP-history-dyer-anti-lynching-bill/>> accessed 6 April 2020.

⁶⁸ A rich scholarship across disciplines has focused on violence against African Americans and the category of lynching. See Jacqueline Goldsby, *A Spectacular Secret: Lynching in American Life and Literature* (1st edn, University of Chicago Press 2006); Ashraf HA Rushdy, *The End of American Lynching* (Rutgers University Press 2012).

⁶⁹ See ‘Activists Demand Law to Stop Lynching by Mobs’ *The Times of India* (6 June 2017) <<https://timesofindia.indiatimes.com/city/delhi/activists-demand-law-to-stop-lynching-by-mobs/articleshow/59010441.cms>> accessed 6 April 2020; ‘Public Lynching: Chilling Acts of Violence That Shook India’ (*Times Now News*, 26 June 2017) <<https://www.timesnownews.com/india/article/public-lynchings-that-shook-india-a-timeline/64250>> accessed 6 April 2020; ‘Mob Lynching Debate Reaches Parliament, Minister Says Don’t Blame BJP, Will Take Action’ *Outlook* (19 July 2017) <<https://www.outlookindia.com/website/story/mob-lynching-debate-reaches-parliament-minister-says-dont-blame-bjp-will-take-ac/299640>> accessed 6 April 2020. One of the first reports documenting numerous cases of anti-minority violence in the context of cow vigilantism also characterized the violence as lynching. See ‘Lynching Without End: Report of Fact Finding into Religiously Motivated Vigilante Violence in India’ (Citizens Against Hate 2017) <<http://citizensagainsthate.org/reports/>> accessed 24 April 2020.

enforcement of “any form of perceived legal, societal or cultural norms or biases”.⁷⁰

While this was an important development in sharpening the public discourse, the invocation of this category had some serious limitations. Its usage was devoid of the thick historical context or memory associated with the category of lynching. The definition linked violence to an alleged legal violation on the part of the victim despite increasing evidence that the perpetrators involved in such crimes were not merely reacting to illegality.⁷¹ This was especially problematic because it perhaps unintentionally reinforced the view that the victims of violence had committed crimes, in the context where the police was more inclined to file cases against the victims rather than the perpetrators.⁷²

Many other actors – principally the Central Government and its partisans – framed the incidents of violence in oppositional terms. They insisted that these incidents did not reflect any pattern of prejudice, and were violations of law and order at best.⁷³ This has remained a sustained position of the Government.⁷⁴ As late as July 24, 2019, the Ministry of Home Affairs (‘the

⁷⁰ ‘The Protection from Lynching Act, 2017’ <<https://www.legal-tools.org/doc/f0b548/pdf>> accessed 24 April 2020. Many activists echoed the demand for an anti-lynching legislation. See Sreeraj TK, ‘India Has No Specific Law Against Mob-Lynching, These Activists Have Come Together To Demand One’ (*ScoopWhoop*, 7 June 2017) <<https://www.scoopwhoop.com/shehla-rashid-kanhiya-kumar-other-social-activists-due-to-rising-incidents-of-vigilantism-activists-demand-a-strong-law-against-mob-lynching/>> accessed 6 April 2020.

⁷¹ For a detailed reportage on the calibrated nature of violence, see Ishan Marvel, ‘In the Name of the Mother: How the State Nurtures the Gau Rakshaks of Haryana’ (*The Caravan*, 1 September 2016) <<https://caravanmagazine.in/reportage/in-the-name-of-the-mother>> accessed 6 April 2020.

⁷² See Citizens Against Hate (n 69); Human Rights Watch (n 2).

⁷³ This has been the position of self-identified ‘right wing’ commentators and politicians. See R Jagannathan, ‘Roots of Mob Violence Lie In Lack Of Police Reform, Not In BJP’s Rise To Power’ (*Swarajya*, 28 June 2017) <<https://swarajyamag.com/politics/roots-of-mob-violence-lie-in-lack-of-police-reform-not-in-bjps-rise-to-power>> accessed 6 April 2020 (arguing that the problem of mob lynching is not connected with state or political ideology, but with problems of policing.); ‘Mob Lynchings Due to Economic Disparity: BJP MP Meenakshi Lekhi’ *The New Indian Express* (18 July 2018) <<https://www.newindianexpress.com/nation/2018/jul/18/mob-lynchings-due-to-economic-disparity-bjp-mp-meenakshi-lekhi-1845112.html>> accessed 6 April 2020; Vidya, ‘Term Mob Lynching Comes from Bible, Says Mohan Bhagwat’ *India Today* (Mumbai, 8 October 2019) <<https://www.indiatoday.in/india/story/lynchings-being-used-to-defame-india-hindus-rss-chief-mohan-bhagwat-1607257-2019-10-08>> accessed 6 April 2020; Mayuresh Didolkar, ‘Communalising Jharkhand Lynchings: Wrong Questions, Wrong Time, Wrong Intentions’ (*Swarajya*, 24 May 2017) <<https://swarajyamag.com/ideas/communalising-jharkhand-lynchings-wrong-questions-wrong-time-wrong-intentions>> accessed 6 April 2020 (arguing that ‘viewing every law-and-order-related incident through the red-tinged lens of identity politics has become all too common since the 2014 general elections’).

⁷⁴ Prime Minister Narendra Modi did not comment on the incidents of mob violence until August 2016. In his statement, he described the perpetrators as ‘anti-social elements’, suggesting that the violence was fundamentally a law and order problem. See ‘Angry Modi Says Most Cow Vigilantes “Anti-Social” Elements’ *The Telegraph* (New Delhi, 6 August 2016)

Home Ministry⁷⁵) insisted that there was no common pattern of mob lynching in the country.⁷⁵ This was a bizarre position. Not only was the category of mob lynching completely undefined, but there had been no concerted effort to collect official data on it.

B. Media-driven hate crime data

During these contentious debates, the role of data emerged as a crucial resource for all sides. Civil society advocates needed data to make credible claims for state or judicial intervention. They also needed data to reach out to a wider audience to generate awareness and public pressure. Data would also permit them to assess the precise nature of the problem that contemporary violence posed, and thus propose more pertinent legal and institutional tools to counter it.⁷⁶

The problem was the complete absence of pertinent official data. In India, crimes records are collected and maintained by the National Crimes Record Bureau ('NCRB'). The NCRB maintains data on some categories correlated with hostility towards identity. It collects data on the crimes against Scheduled Castes and Scheduled Tribes under the Atrocities Act, which are available across the various states, Union Territories, and classes of crimes. It also maintains data on crimes against religion as classified under the Indian Penal Code. These include provisions of defiling of religious places with the intention of insulting religion, outraging religious feelings, disturbing religious assemblies and trespassing burial sites,⁷⁷ and promoting enmity between

<<https://www.telegraphindia.com/india/angry-modi-says-most-cow-vigilantes-39-anti-social-39-elements/cid/1493894>> accessed 6 April 2020.

⁷⁵ 'No Common Pattern of Mob Lynching in Country: Govt in Rajya Sabha' *The Times of India* (New Delhi, 24 July 2019) <<https://timesofindia.indiatimes.com/india/no-common-pattern-of-mob-lynching-in-country-govt-in-rajya-sabha/articleshow/70362398.cms>> accessed 6 April 2020.

⁷⁶ In October 2017, prominent human rights activist Harsh Mander voiced these concerns. Writing about his campaign Karwan-e-Mohabbat (Caravan of Love) against anti-minority violence, he noted that he found:

literally hundreds of hate crimes unfolding, of which only a small fraction are reported even in the local press... Even among these, only very few...register in any enduring way in the national consciousness... The ruling establishment... [attempts] to obscure the massive scale and recurring patterns of hate violence against minorities and Dalits... They cling to their official claim that these are random, stray incidents of statistically inconsequential numbers... the National Crime Records Bureau and the mainstream media are unlikely to inform the country about the nature, scale and spread of hate crimes in India...

See Harsh Mander, 'The "Karwan-E-Mohabbat" Must Continue Its Journey' (*The Wire*, 7 October 2017) <<https://thewire.in/caste/karwan-e-mohabbat-must-continue-journey>> accessed 6 April 2020.

⁷⁷ These provisions are included as Sections 295, 295A, 296 and 297 of the Indian Penal Code 1860.

groups.⁷⁸ It also collects data on motivations, including riots and murders with “religious” or “communal” motivations. Despite these inclusions, the NCRB data suffer from severe limitations. The NCRB relies on police personnel at the local level to supply data, making their reliability suspect. This is particularly so for data on motivation, since this assessment requires sensitivity, objectivity, and training. The NCRB data draws from the primary penal provision that the police mention in the First Information Reports, which can eclipse the full complexity of a criminal act for the purposes of data.⁷⁹ This is apart from the fact that the penal provisions themselves are both over and under inclusive. All these limitations made the NCRB’s data inadequate.

The limitations of the NCRB data became obvious as the issue of violent lynching was increasingly raised in the public discourse. In response to a parliamentary question on the data on ‘lynching’ – a category left completely undefined during the proceedings – the Home Ministry referred to NCRB’s data on “promoting enmity between groups” with absurdly low numbers.⁸⁰ In states like Bihar and Jharkhand, where the media had recorded a number of instances of mob violence, lynching, and cow vigilantism, NCRB reported zero instances between 2014 and 2016.⁸¹ On numerous occasions, the Government had to concede that it had no data that spoke to lynching incidents.⁸² In March 2018, the Home Ministry furnished data from nine states on “mob lynching”, which indicated 40 cases of mob lynching. The Home Ministry neither clarified the precise meaning of mob lynching nor the details of the motives of the crimes. The numbers themselves appeared to be off the mark, with unofficial numbers based on media reportage exceeding the states’ numbers.⁸³

⁷⁸ Indian Penal Code 1860, s 153A and 153B.

⁷⁹ For a full discussion of these problems, see M Mohsin Alam Bhat, ‘The Case for Collecting Hate Crimes Data in India’ (2018) 4 Law & Policy Brief. See also M Mohsin Alam Bhat, ‘How to Count Lynchings’ *The Indian Express* (27 July 2018) <<https://indianexpress.com/article/opinion/columns/mob-lynching-cases-in-india-vigilantism-incidents-supreme-court-narendra-modi-govt-national-crime-records-bureau-5278269/>> accessed 6 April 2020.

⁸⁰ In the 16th Lok Sabha (2014-2019), the Parliament website lists 16 occasions when the Government was asked about the data on ‘lynching’.

⁸¹ See Lok Sabha, ‘Lok Sabha Starred Question No 130 Dated July 25, 2017’ <<http://164.100.24.220/loksabhaquestions/annex/12/AS130.pdf>> accessed 6 April 2020.

⁸² See Lok Sabha, ‘Lok Sabha Starred Question No 242 Dated March 13, 2018’ <<http://164.100.24.220/loksabhaquestions/annex/14/AS242.pdf>> accessed 6 April 2020; Lok Sabha, ‘Lok Sabha Starred Question No 299 Dated August 7, 2017’ <<http://164.100.24.220/loksabhaquestions/annex/15/AS299.pdf>> accessed 6 April 2020; Lok Sabha, ‘Lok Sabha Unstarred Question No 21 Dated December 11, 2018’ <<http://164.100.24.220/loksabhaquestions/annex/16/AU21.pdf>> accessed 6 April 2020; Lok Sabha, ‘Lok Sabha Unstarred Question No 132 Dated December 11, 2018’ <<http://164.100.24.220/loksabhaquestions/annex/16/AU132.pdf>> accessed 6 April 2020.

⁸³ See Alison Saldanha, ‘Minister To Parliament: No Data On Lynching. Here They Are (Including Government’s Own)’ (*Factchecker*, 19 July 2018) <<http://factchecker.in/minister-to-parliament-no-data-on-lynching-here-they-are-including-governments-own/>> accessed 6 April 2020.

This absence of numbers was not merely a problem of data, but reflected a serious problem for civil society intervention. Some sections of the news media stepped in to address this vacuum. The first steps towards the introduction of the hate crime paradigm in India were taken by news media in their effort to document incidents of violence. In July 2017, the national daily Hindustan Times announced its online portal the ‘HT Hate Tracker’. Hate Tracker defined itself as a “crowd-sourced” initiative of documenting violence based on various identities like religion, caste, and sexual orientation since 2015.⁸⁴ This effort, though, was short-lived, when it was abruptly closed down in October 2017, right after the sudden removal of the newspaper’s editor-in-chief.⁸⁵ Soon after in March 2018, Amnesty International launched its own initiative, ‘Halt the Hate’, and like Hate Tracker, Halt the Hate also drew from the international hate crime framework.⁸⁶ Halt the Hate relied on English and Hindi news sources to collate hate crimes motivated by gender, caste, and religion. Amnesty International had its own share of run-ins with the Government, when the organization’s bank accounts were frozen due to non-compliance with Indian law.⁸⁷ While the organization continues to maintain data and its analysis, the database itself does not appear to be live on the internet.⁸⁸ Finally, the latest sets of efforts were conducted by the data-driven journalism website, IndiaSpend, which launched online databases on religious hate crime, the ‘Hate Crime Watch’, and cow-related violence.⁸⁹ Despite becoming a well-regarded religious hate crime documentation system with regular on-ground verification

⁸⁴ See Niha Masih, ‘HT Hate Tracker: A National Database on Crimes in the Name of Religion, Caste, Race’ *Hindustan Times* (28 July 2017) <<https://www.hindustantimes.com/india-news/ht-hate-tracker-a-national-database-on-crimes-in-the-name-of-religion-caste-race/story-xj2o03dKF9PsW4IYIEvdgI.html>> accessed 6 April 2020.

⁸⁵ ‘After Editor’s Exit, Hindustan Times Pulls Down Controversial “Hate Tracker”’ (*The Wire*, 25 October 2017) <<https://thewire.in/media/hindustan-times-hate-tracker>> accessed 6 April 2020.

⁸⁶ In March 2018, Likhita Banerji of Amnesty International India described the definitions and methodology of the database by relying on the hate crime framework. See Likhita Banerji, ‘With Politics of Demonisation on the Rise, India Must Keep a Data Record of Hate Crimes’ (*Scroll.in*, 22 March 2018) <<https://scroll.in/article/871764/with-politics-of-demonisation-on-the-rise-india-must-keep-a-data-record-of-hate-crimes>> accessed 6 April 2020:

The term hate crime is generally applied to criminal acts that have an underlying discriminatory motive and are targeted at people based on their real or perceived membership of a particular group, such as caste, religion, gender, or ethnicity. Hate crimes do not occur randomly. They are a violent manifestation of the deep-seated prejudices that exist in societies.

⁸⁷ See ‘Amnesty India Says Raid, Frozen Accounts Aimed at Silencing Government Critics’ *Reuters* (26 October 2018) <<https://www.reuters.com/article/us-india-amnesty-idUSKCN1N00IK>> accessed 7 April 2020.

⁸⁸ ‘Halt the Hate’ (*Amnesty International*) <<http://haltthehate.amnesty.org.in/map.html>> accessed 24 April 2020.

⁸⁹ In full disclosure, the author has been associated with the IndiaSpend hate crime monitoring efforts as an advisor on research.

and journalistic reportage,⁹⁰ the databases were abruptly terminated alongside the resignation of its leading editor.⁹¹

Despite these disruptions, the various media-driven attempts of hate crime documentation have played a crucial role in the emerging discourse around hate crime. Most notably, these efforts offered both coherence and focus to the public conversation about the interpretation of violence in contemporary India. They offered resources that permitted various social and legal actors to treat the media reported cases of violence not merely as random violations of law but as reflecting a pattern of violence. Subsequent efforts of in-depth documentation, either by journalists or human rights organizations, had the benefit of being more attuned to the magnitude of the problem.⁹² And they crucially contributed to the future legal developments.

⁹⁰ IndiaSpend data was consistently quoted by international newspapers. See Kai Schultz and others, 'In India, Release of Hate Crime Data Depends on Who the Haters Are' *The New York Times* (24 October 2019) <<https://www.nytimes.com/2019/10/24/world/asia/india-modi-hindu-violence.html>> accessed 6 April 2020; Annie Gowen and Manas Sharma, 'Rising Hate in India' *Washington Post* (31 October 2018) <<https://www.washingtonpost.com/>> accessed 6 April 2020.

⁹¹ 'FactChecker Pulls Down Hate Crime Database, IndiaSpend Editor Samar Halarnkar Resigns' (*Scroll.in*, 12 September 2019) <<https://scroll.in/latest/937076/factchecker-pulls-down-hate-crime-watch-database-sister-websites-editor-resigns>> accessed 6 April 2020.

⁹² See Citizens Against Hate (n 69) 40–42. A compelling example is the evolving role of the hate crime framing and data in the campaign Karwan-e-Mohabbat led by Harsh Mander. See 'About: Karwan e Mohabbat' (*Karwan-e-Mohabbat*) <<https://karwanemohabbat.in/about/>> accessed 6 April 2020. The public outreach of the campaign, principally through the writings of Mander, increasingly adopted hate crime as a descriptive category. In October 2017, noting the absence of adequate data to study and monitor hate crimes, Mander on behalf of the campaign announced a hate crime documentation effort. See Mander, 'The "Karwan-E-Mohabbat" Must Continue Its Journey' (n 76). By next year in November 2018, Mander relied on the IndiaSpend data on religious hate crimes to critique the role of the state and strengthen the hate crime frame. Commenting on *Tehseen Poonawalla*, Mander in July 2018 invoked the data to note that most of the victims of violence were Muslims and *Dalits*. He argued that these incidents were 'command hate crimes'. According to him, '...these are hate crimes, not ordinary mob violence, as these mostly target identified minority communities and disadvantaged castes. And second, that these crimes are tacitly or openly encouraged by senior leaders of the political establishment'. Harsh Mander, 'The Mob That Hates' *The Indian Express* (19 July 2018) <<https://indianexpress.com/article/opinion/columns/supreme-court-on-mob-lynching-law-against-lynching-case-social-media-whatsapp-rumours-5265173/>> accessed 18 April 2020. See also Harsh Mander, 'New Hate Crime Tracker in India Finds Victims Are Predominantly Muslims, Perpetrators Hindus' (*Scroll.in*, 13 November 2018) <<https://scroll.in/article/901206/new-hate-crime-tracker-in-india-finds-victims-are-predominantly-muslims-perpetrators-hindus>> accessed 6 April 2020.

Another example is the initiative of Citizens for Justice and Peace, led by the prominent activist Teesta Setalvad, which launched a hate crime monitoring and recording mobile application for documenting, studying, remedying, and preventing violence. See 'Hate Hatao: CJP's New App to Fight Hate' (*CJP*, 30 January 2019) <<https://cjp.org.in/hate-hatao-cjps-new-app-to-fight-hate/>> accessed 7 April 2020.

C. Filtering into legal arguments

The conflicting frames were visible in the early legal conversations. By the end of 2016, various petitioners approached the Supreme Court ('the Court') to lay down guidelines for the enforcement of the general penal laws against the alleged perpetrators across the country. They argued that while policing was a subject reserved for state governments under India's federalism scheme, the Court should intervene and direct both the Central and state governments to respond to their failure to ensure justice in the cases of violence.⁹³ One of the petitions argued that the cases of violence were directed at Muslims and *Dalits*, and were part of a systematic pattern of hate speech, political patronage, and state complicity.⁹⁴ The Supreme Court's interim order, despite the ambition of these arguments, remained focused on the mode of violence. The Court clubbed all the petitions together in the case of *Tehseen Poonawalla*. It directed the state governments to appoint nodal police officers to focus on vigilantes and maintain patrolling on highways that witnessed most of the cases of violence.⁹⁵ This indicated that the judiciary did not adopt the frames that interpreted violence as ingrained in social stratification. The Court appeared to strike a balance. The very fact that the Court responded to the petitions showed that it recognized the systematic nature of violence. But the substance of its interim relief indicated its distancing from the framing of violence as anti-minority.

The continuing submissions of the petitioners in *Tehseen Poonawalla*, though, saw a distinct evolution in the adopted categories. For example, Senior Advocate Indira Jaising, representing one of the petitioners in the subsequent hearing in the case argued that the problem of violence in the incidents before the Court was that the "citizens belonging to the minority community (Muslims/*Dalits*) have been victims of targeted violence."⁹⁶ She submitted that,

⁹³ See 'Justice Against Cow Vigilantism: SC Directs Centre & States to Act' (*SabrangIndia*, 6 September 2017) <<https://sabrangindia.in/article/justice-against-cow-vigilantism-sc-directs-centre-states-act>> accessed 7 April 2020.

⁹⁴ *Khudai Khidmatgaar v Union of India* Writ Petition (Criminal) No 122 of 2017 (Supreme Court of India) [4] (on file with author):

The incidents that have happened are not isolated or unconnected, rather, are part of a well thought out plan by vested interests. The conspiracy invariably begins at the top where politically senior persons and senior religious leaders have instigated their followers to attack and kill Muslims, dalits [sic] and alleged beef eaters. In most cases the allegation of beef eating was fabricated. In any case, no person has the right to take the law into his own hands and dispense extra-judicial justice to any other citizen of India.

⁹⁵ *Tehseen S Poonawalla v Union of India* (2019) 15 SCC 649 (Supreme Court of India) ('*Tehseen Poonawalla*').

⁹⁶ *Tushar Gandhi v Union of India*, Writ Petition (Civil) No 732 of 2017 (Supreme Court of India) [2] ('*Tushar Gandhi*'); 'Read: Senior Advocate Indira Jaising's Written Submission to Supreme Court in the Lynching Case' (*The Leaflet*, 11 July 2018) <<http://theleaflet.in/>

...Article 15 [of the Indian Constitution] forbids discrimination based on sex, caste, religion, and race. The said categories are considered vulnerable communities and it is submitted that in all societies minorities are in danger of being dominated by majorities and this is the very reason why all constitution's [sic] guarantee the rights of minorities. The Indian Constitution also protects all the said categories and in fact provided affirmative action for them recognizing to serve their unequal position. The right to freedom of religion and the right to preserve one's own culture are provided by Article 25 and Article 29 of the Constitution of India... Articles 14 and 21 of the Constitution of India make the right to life and equality salient. However, in the recent past, self-proclaimed cow protectors have taken law unto themselves and have targeted the citizens of the minority community on the false pretext of possessing cows for slaughter/eating beef/dressing in a particular manner.⁹⁷

Jaising drew from IndiaSpend's hate crime data that explicitly showed the pattern of violence against minorities, revealing that the most pertinent issue may not really be the mode of violence or its extrajudicial nature, but its prejudicial motivations. The reliance on hate crime data allowed the petitioners to broaden the debate to argue that the Court should intervene to address hate crime in all its forms, whether perpetrated by mobs or not, as a form of vigilantism or otherwise.⁹⁸

These competing, overlapping, and evolving frame alignments eventually filtered into the judicial discourse. As I show below, the Supreme Court in *Tehseen Poonawalla* strongly gestured towards the frames that interpreted violence as systematic and prejudicial, even if not in the most unequivocal manner. The most pertinent reason for this was the success of various social and political actors – articulating the discursive frames – in making their frames

[wp-content/uploads/2018/07/Written-submissions-by-Indira-Jaising-in-Lynching.pdf](#)> accessed 7 April 2020.

⁹⁷ *ibid* [4-5]. Article 25 provides the right to freedom of religion; Article 29 the right to culture; Article 14 the equal protection of law and the right to equality; and Article 21 the right to life and personal liberty, and due process of law.

⁹⁸ *ibid* [6]:

There is no doubt that these lynchings are targeted as is evidenced by the data provided in reliable reports as well as research based articles, several of which have been appended to the Writ Petition. More specifically, Muslims were the target of 51% of violence centred on cow vigilantism over nearly eight years (2010 to 2017) and comprised 86% of 28 Indians killed in 63 incidents. 97% of the attacks targeted on Muslims/Dalits centering on cow vigilantism were reported in the last 3-4 years. These attacks include mob violence, attacks by vigilantes, murder and attempt to murder, harassment, assault and even rape.

the most credible way of interpreting reality. In doing so, social and political actors also generated new legal categories and reasons that the Court would have perceived as more germane to the problem at hand. As Jack Balkin notes, “one of the key achievements of successful social movements is to use social suasion and political influence to move ‘off-the-wall’ arguments about the meaning of the Constitution into the realm of the reasonable and plausible.”⁹⁹ This point applies as much to a constitution as it does to other areas of law. Social movements, or for that matter any political mobilization, can generate legal plausibility for its discursive frame, and by extension create corresponding legal categories, by successfully advocating it. In the case of the hate crime discourse in India, this advocacy was in the form of protest and campaign, as it was by nature of rigorous and effective media-led data collection. Finally, it was also the result of successful legal mobilization leading up to the Court.¹⁰⁰

IV. RESOLVING THE PROBLEM OF PARADIGM IN *TEHSEEN POONAWALLA*

This narration of the evolving frame alignment in the public discourse on contemporary anti-minority violence is crucial to situate, interpret, and critique the Supreme Court’s intervention in *Tehseen Poonawalla*. The Court was in conversation with this context. It was borrowing social meaning from it, and responding to it. The framing made the Court’s intervention urgent. Through it, the petitioners in the case were able to establish that various incidents of violence were not disparate, but systematic and widespread. Equally importantly, the framing also indicated the nature of social harm at stake in the violence, and thus the structure and substance of legal redressal.

On July 17, 2018, the Supreme Court gave its most detailed order mandating 23 guidelines directed at the Central Government, state governments, and the police.¹⁰¹ The Court reiterated and elaborated its previous guidelines to prevent violence, by mandating, among other things, the appointment of senior police personnel as nodal officers, a detailed standard operating procedure for the police, and co-ordination among the Central Government and state governments. Significantly, the guidelines mandated protection for victims and

⁹⁹ Jack M Balkin, ‘How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure’ (2005) 39 Suffolk UL Rev 27, 38.

¹⁰⁰ *ibid* 54:

Many things affect what makes a legal argument plausible or ‘off-the-wall’ but one particularly important factor is who is willing to stand up for the argument and make it consistently and persistently. It matters a great deal if social movements can find respected advocates in the legal profession, in the political branches, or within the federal judiciary. Institutional recognition and authority matter a lot in law...

¹⁰¹ See *Tehseen Poonawalla* [41].

witnesses, compensation and rehabilitation for victims, the duty of the state officials to keep them informed of the trials, fast-tracking of cases, and stricter punishment for convicts. One of the most important guidelines was on dereliction of duty, according to which the state was mandated to proceed against negligent officials in departmental and non-departmental proceedings. This was an interim order, permitting the Court to continue supervising the implementation of its guidelines and leaving open the possibility of further orders.

Tehseen Poonawalla gestured to various potential frameworks, some more explicitly than the others, which could qualify as the source of interpretation and implementation of the guidelines. The first paradigm the Court seemed to refer to was the thin rule of law paradigm that interpreted the character of violence as ‘vigilantism’ and lack of respect for law. This framing was based on interpreting the problem of violence in the repertoire of cases before it as the problem of the enforcement of legal procedure,¹⁰² interpreting violence as extra-legal and extrajudicial.¹⁰³ Under this paradigm, the judgment can be seen to approach the harm of violence as the disruption of the state’s monopoly over violence.¹⁰⁴ But this paradigm is weak and normatively unattractive because all

¹⁰² *ibid* [1]:

It is the seminal requirement of law that an accused is booked under law and is dealt with in accordance with the procedure without any obstruction so that substantive justice is done. No individual in his own capacity or as a part of a group, which within no time assumes the character of a mob, can take law into his/their hands and deal with a person treating him as guilty.

The Court linked its intervention through the invocation of the *Shakti Vahini* case on *Khap panchayats* (caste or community groups, which often perform quasi-judicial functions) (*Shakti Vahini v Union of India* (2018) 7 SCC 192 (Supreme Court of India)), and the American jurisprudence of extrajudicial lynchings of the African Americans. Noticeably, while invoking the latter, the Court did not mention the strongly racial character of this violence in the history of the United States.

¹⁰³ *Tehseen Poonawalla* [18] (‘These extrajudicial attempts under the guise of protection of the law have to be nipped in the bud; lest it would lead to rise of anarchy and lawlessness which would plague and corrode the nation like an epidemic’).

¹⁰⁴ *ibid* [1] (‘...every citizen is...obligated to remain obeisant to the command of law’);

[15]:

There cannot be an investigation, trial and punishment of any nature on the streets. The process of adjudication takes place within the hallowed precincts of the courts of justice and not on the streets. No one has the right to become the guardian of law claiming that he has to protect the law by any means.

[17]:

...suffice it to say that it is the law enforcing agencies which have to survey, prevent and prosecute. No one has the authority to enter into the said field and harbour the feeling that he is the law and the punisher himself. A country where the rule of law prevails does not allow any such thought.

[1]:

They forget that the administration of law is conferred on the law enforcing agencies and no one is allowed to take law into his own hands on the fancy of his ‘shallow spirit of judgment’. Just as one is entitled to fight for his rights in law, the other is entitled to be treated as innocent till he is found guilty after a fair trial. No act of a citizen is to be adjudged by any kind of community under the guise of protectors of law.

the incidents before the Court were not extra-judicial in the sense of involving an alleged violation of law on the part of the victim.¹⁰⁵ Consequently, this approach would be under-inclusive. The other weakness of this thin rule of law framing is the way in which it tends to obscure the complicity, and indeed, the active involvement of state actors in the perpetration of violence. There was nothing in the Court's guidelines that excluded state officials from their ambit. The second possible paradigm in *Tehseen Poonawalla* was treating the problem of violence in the repertoire of cases before the Court as a failure of law's disciplining power. The spectre of the threat to law and order was reflected in the judgment through the visceral imagery of gruesome violence: the "Typhon-like monster" of "frenzied mobs",¹⁰⁶ and the "unruly mobs" committing "barbaric violence" that culminates in "horrendous acts of mobocracy".¹⁰⁷ The violence under this paradigm is dramatic and exceptional, and the result of the failure of legal regulation. The conceptual limitations of this paradigm should also be clear from our previous discussion. While it is true that *Tehseen Poonawalla* was precipitated by acts of extreme violence, hate violence is most often neither exceptional nor overtly extraordinary, so as to mark it outside the everyday. Such violence is challenging precisely because it is embedded in everyday interaction and perpetrated by normal people.

While gesturing to both these paradigms, *Tehseen Poonawalla* also gestured towards a third distinct paradigm through references to hate crime and targeted violence, and the role of motives, prejudice, and the attendant social costs. The judgment appreciated the social stakes – and hence the social costs – of the violence before the Court. It invoked various interests, including "the values of tolerance to sustain a diverse culture", addressing "communal violence" to protect "the unified social fabric", preserving the country's "secular ethos and pluralistic social fabric", the need to check the "rising intolerance and growing polarization", and protecting "pluralism".¹⁰⁸ This was significant because it recognized that the social costs of this violence included the disruption of social and inter-group solidarity. The judgment also recognized that the violence before the Court was intricately linked with hostility based on religious and other identities. Specifically, the Court noted that the violence was the product of "ideological dominance and prejudice".¹⁰⁹

This third paradigm is a more nuanced appreciation of the context of the litigation. It recognizes the grounds of why the various social actors – inside and outside the courtroom – interpreted the incidents before the Court as connected

¹⁰⁵ See n 71 and accompanying text.

¹⁰⁶ *Tehseen Poonawalla* [24].

¹⁰⁷ *ibid* [42].

¹⁰⁸ *ibid* [19], [21], [24], [42].

¹⁰⁹ *ibid* [2], [20] ('Hate crime as a product of intolerance, ideological dominance and prejudice ought not to be tolerated...').

and as presenting a shared challenge for the law. The emergent hate crime framing in the public discourse that I have described above characterized these incidents as posing a collective problem of violence. It indicated that the perpetrators targeted individuals for belonging to subordinated communities, while engendering further marginalization of those communities, vulnerability of its members, and damaging inter-community solidarity. The third paradigm recognizes this. It consequently offers the strongest normative grounding to the guidelines. The compelling case for the Supreme Court's involvement was not the need to address criminality per se, for which there were already sufficient penal provisions under law.¹¹⁰ Rather, the Court's involvement was required because of the special nature of violence that had distinct performative, symbolic, and expressive components. The perpetrators targeted the victims in public places, and often in full view of other people, turning them into audiences of the violence. Many of them recorded these incidents on their phones and circulated the videos. This dramatization of violence established them as the torchbearers of their justified cause. Moreover, this violence was implicated in political party politics, with elected officials expressing partisan support in the wake of the incidents. These aspects not only threatened to normalize extreme violence, but also exposed investigation and prosecution in an already susceptible criminal justice system, to political and social pressure. These conditions threatened to deepen the vulnerability of marginalized communities, compromise the legal system, and rupture social cohesion in the long run. Each of these considerations made the Court's detailed guidelines justified and vital. This is why the guidelines recognized the need for heightened official accountability, to improve the control and prosecution of hate speech, and to enforce provisions like Section 153A that focus on community targeting. Thus, among these paradigms, the third one based on hate crime is the most fitting. It makes the best case for the Court's involvement, and grounds the comprehensive guidelines by sharply identifying the personal and social harms.

The appreciation of the hate crime paradigm in *Tehseen Poonawalla* offers to resolve the ambiguities in the Court's order that remained unresolved in the text. The order did not adequately define the category of lynching, which it made the condition precedent for the application of the guidelines. The guidelines required the state to collect and maintain rigorous data on lynching. The Court also recommended the enactment of anti-lynching legislation.

¹¹⁰ See Sarim Naved, 'Lynchings Highlight a Systemic Crisis. A Bureaucratic Solution Won't Fix It' (*The Wire*, 26 July 2019) <<https://thewire.in/government/lynching-india-mob-violence-solution>> accessed 7 April 2020:

...the current laws are enough to take care of mob lynching. The need for a special law has arisen precisely because political patronage has resulted in little action being taken against the 'activists' indulging in cow-related violence. Otherwise, the laws as they stand make every person who has participated in a lynching liable for the offence of murder.

The silences have hindered effective implementation of the guidelines,¹¹¹ and come in the way of maintaining pertinent data.¹¹² These ambiguities are best addressed by situating the order and the guidelines within the hate crime paradigm, where lynching is understood to include crimes with bias motivations that target victims on the ground of their identity.

This seems to reflect in the legislative activity following *Tehseen Poonawalla*. Until now, three states – Manipur, Rajasthan, and West Bengal – have enacted Bills,¹¹³ which still await the assent of the President required for their notification.¹¹⁴ Each of these laws defines lynching as violence on the grounds of the victim's identity, like religion, caste, race, dietary practices, or sexual orientation, and committed by a mob of two or more persons. This definition makes these laws a watershed in India's legislative history, because they extend the recognition of hate crime to identities beyond caste. By adopting this definition, the states have rightly appreciated that the identity of the victims is not incidental, but central to the recent slew of violence. Despite this, the laws have introduced the qualification that the violence must be perpetrated by a mob of two or more persons. This hybrid definition dilutes the identification of harm at stake. If the personal and social harms of violence that these laws address lie in the constellation of interests – victims' dignity, social cohesion, pluralism, among others – that the hate crime framework identifies, the number of perpetrators is irrelevant. And as argued before, this numeric threshold is under-inclusive of a range of cases where violence has been perpetrated not by mobs, but by individuals. This confusion over the character of violence and nature of harm evidently follows from the ambiguities in *Tehseen*

¹¹¹ This is suggested by the early findings of the 'Hate Crimes and Criminal Justice System' Legal Clinic, Centre for Public Interest Law at Jindal Global Law School. See M Mohsin Alam Bhat, Vidisha Bajaj and Sanjana A Kumar, 'The Crime Vanishes: Police Discretion and Hate Crime in India' (2020) 11 Jindal Global Law Review (forthcoming).

¹¹² In October 2019, NCRB decided to leave out data on lynching despite having indicated to the contrary. In December 2019, the Home Ministry continued to insist that no data, including NCRB data, was available on violence. It is plausible that a sharper set of definitions in *Tehseen Poonawalla* would have made it considerably more difficult for the state and the NCRB to sideline the issue. See 'MHA Says Lynching Deaths Excluded from NCRB Report as Data Was "Unreliable"' (*The News Minute*, 23 October 2019) <<https://www.thenewsminute.com/article/mha-says-lynching-deaths-excluded-ncrb-report-data-was-unreliable-111042>> accessed 7 April 2020; 'No NCRB Data on Mob Lynchings: Minister Tells LS' *Hindustan Times* (New Delhi, 25 June 2019) <<https://www.hindustantimes.com/india-news/no-ncrb-data-on-mob-lynchings-minister-tells-ls/story-14VtjNAsDzWaGMZUCi0YN.html>> accessed 7 April 2020.

¹¹³ See The Manipur Protection from Mob Violence Ordinance (Manipur Ordinance No 3 of 2018) <<https://manipur.gov.in/wp-content/uploads/2016/05/mobviolence.pdf>> accessed 5 April 2020; The Rajasthan Protection from Lynching Bill (Bill No 22 of 2019) <<https://realitycheck.files.wordpress.com/2019/07/bill22-2019.pdf>> accessed 5 April 2020; The West Bengal (Prevention of Lynching) Bill 2019, on file with author.

¹¹⁴ Mohammed Iqbal, 'Anti-Violence Bills Still Await Presidential Nod' *The Hindu* (Jaipur, 1 September 2019) <<https://www.thehindu.com/news/national/other-states/anti-violence-bills-still-await-presidential-nod/article29311151.ece>> accessed 7 April 2020.

Poonawalla. Once read within the hate crime paradigm, it would be clear that the guidelines mandate defining lynching as bias crimes.

V. CONCLUSION

The Court's July 2018 order was an important moment in addressing contemporary violence in India. It provided much-needed legal and institutional legitimacy to civil society claims that the incidents of violence – particularly against religious and caste minorities – were not disparate acts of illegality, but systematic in scale and significant in depth. It became far more difficult for the state to treat these incidents as marginal. But to what extent the guidelines were and have been taken seriously by the state is not fully clear. The Court undoubtedly intended them to have teeth and bite. It directed the Central and state governments to file compliance reports. But until now, all the states have not done so. It is also clear that despite the Court's direction that the state collects pertinent data on violence, no such measure has been taken. Disturbingly, the Court itself has not systematically followed the implementation of its guidelines, and has not heard detailed arguments on the issue since passing them.

Tehseen Poonawalla and the subsequent institutional developments have marked the incorporation of the hate crime concept in India's legal system. This holds considerable promise. It is best placed to address forms of violence that the dominant understanding under Indian penal law fails to recognize. The concept also contributes in linking important legal categories of caste atrocity and targeted violence, by giving them stronger theoretical foundations. Nevertheless, the incorporation in *Tehseen Poonawalla* is mediated by the category of lynching. This has contributed to the judgment's irregular implementation. This indicates that the journey of the hate crime concept is still early and tentative. The Indian legal system is yet to gain fully from its conceptual and institutional resources.

This story would interest socio-legal scholars as much as the larger legal scholarly community, because it recognizes how legal formulations within institutional contexts are intricately interwoven with social movements and civil society. In the case of the hate crime discourse, various actors including the media, civil society, legal activists, legislators, and the Supreme Court were in dialogue, in crafting the best tools for addressing violence. This story also reveals something significant for the lawyers: the plausibility of how well legal categories fit the social world is a contested process. This is most palpable in the emergence of hate crime, since the various actors in the public sphere not only disagreed about the best methods of addressing violence, but also the most pertinent framing and interpretation of events. This was and continues

to be a deeply political process, because at stake in our choice of categories is our ability or inability to *see* personal and social harm. This should invite us to invest compelling resources into evolving languages of law that are most attuned to the experience of violence.