How India's Legislation Risks Impunity for Genocidal Speech

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Historically, genocides have been preceded by the gradual yet wide dissemination of speech targeting and demonizing particular communities, such as in the Rwandan genocide. The enormity of such speech is unprecedented in the age of social media, as seen in Myanmar where Facebook's algorithms were exploited in fomenting the genocide of Rohingya Muslims. Given the alarming rise of hate speech in India in recent years, particularly against its Muslim minority, many commentators have been warning that India is on the "brink" of a potential genocide.

Earlier this year in Delhi and the Haridwar district, there were reports of calls for Muslim killings in India by persons including influential religious leaders. Concerned, 76 prominent lawyers wrote to India's Supreme Court ("ISC") seeking judicial intervention (alleging the failure of police to act). India is a State party to the Genocide Convention, 1948 ("Convention") which under Article III(c) criminalizes a "direct and public incitement to commit genocide". Article V also obligates India to enact appropriate

legislation to "give effect" to the treaty's provisions. Yet India lacks legislative provisions concerning "genocide", which is presumably why the 76 lawyers could only cite provisions dealing with hate speech in the Indian Penal Code, 1860 ("IPC").

What managed to escape public scrutiny was the Government's official response to a question posed in the Parliament – which asked whether India was committed to initiate legislative reform. Responding through the minister of Home Affairs, Shri Nityanand Rai, it argued that crimes concerning genocide are "already part of" Indian law since India is a party to the Convention, and as the IPC already has relevant "effective penalties".

Through this post, I contend that India's dearth of legislation against genocide, and genocidal speech in particular, is a combined violation of Articles V, III(c), and I of the Convention. Exploring India's tensions with monism and dualism, as also the distinction between "hate speech" and speech inciting genocide, I refute the above claim that India's existing penal law enables meaningful prosecutions. I discuss how this violates not only India's obligation to punish, but also to *prevent* genocide.

Can Indian Courts Prosecute Genocide?

Under a monist view, to explain briefly, international law and a State's domestic law *together* constitute a unified legal system. In States advancing monism, once the State assumes treaty obligations – such as the Genocide Convention – the treaty law automatically applies in its jurisdiction without the need for a domestic law recognizing its application. In dualism, international and domestic law are considered separate systems, and the application of treaty law requires incorporation by domestic law-making (see here).

There is continuing debate on whether India is monist, dualist, or somewhere in between. There is also disagreement and nuance as to India's difference of approach toward treaty-law and custom in this regard, although this post is limited to treaties. The Parliament and Executive have maintained that although the Indian Executive is empowered to commit India to treaties, their "implementation" is contingent on the Parliament passing a law (p. 9). In this understanding, even though India would be bound by the Genocide Convention in the international sphere, its provisions would be toothless in the domestic sphere.

However, some judgments of the ISC have tilted towards monism by using India's treaty commitments to interpret fundamental rights in its Constitution, such as for women's rights (even absent domestic legislation effectuating the treaties). The ISC is inconsistent in this approach of using domestic sources as proxies to enforce international law. Yet it is also important that thus far, the Court has never recognized that international law could enable an "independent cause of action". Relatedly, the registration of criminal charges, law enforcement action and other criminal procedures are all pursuant to domestic codes in India. Pursuant to the human rights requirement of 'provided by law', law enforcement and courts can only act upon these codes, which require registration of the concerned

"offences" under Indian law. Again, there is no domestic provision on genocide-related offences, nor any authority to suggest that the courts can assume jurisdiction based on the Convention *independently*.

Thus, it is baseless for the Indian Government to suggest that as things stand, prosecution of genocidal crimes is possible in India. At most (and not without controversy), one could argue that the judiciary could interpret India's hate speech crimes in light of the Convention, and perhaps hold for the highest punishment possible under those provisions. Yet such a hair-splitting exercise is hardly satisfactory when measured against Articles I and V of the Convention.

Duty To Prevent and Punish Genocide

Article I of the Convention obligates India to prevent and punish genocide. This preventive duty must be understood to apply also in relation to the act of "incitement" specified in Article III(c) – with the latter giving "context" to the former. Consider, relatedly again, the obligation to provide "effective penalties" against persons committing this act, as per Article V. The use of India's hate speech provisions, which *inter alia* criminalise speech causing "enmity" between social groups, would be *ineffective* against speech that could incite genocide for three reasons.

First, although hate speech is indeed a serious offence, speech inciting genocide may be conceptualised as the "most egregious" form of hate speech, deserving independent recognition. Otherwise, one could be vulnerable to the fallacy of *equivocating* the severity of genocidal speech (for example, encouraging killings of a protected group as in Article II.a) with any other instance of hate speech (such as insulting a religious figure, per Indian law). This matters especially in light of the 'fair labelling' principle, following which it would be unjust not to legally label an act as per its specific enormity (for example, characterising rape as merely an act of battery). Second, the penalties provided for in India's hate speech provisions are a fine, or imprisonment for up to three years (five at most, in limited contexts). It is entirely questionable if the same penalties designed for a lower threshold of hate speech would be "effective" against genocidal speech. Indeed, rather than the Convention, these provisions may be understood as connected to India's obligation to prohibit by law, *inter alia*, "incitement to discrimination" under Article 20 of the Civil and Political Rights Covenant.

This brings me to the obligation to prevent genocides. The International Court of Justice in the Bosnian Genocide case (2007) considered that the preventive obligations under the Convention demand a standard of "due diligence" – where a State must adopt "all measures…within its power" to prevent genocide in its territory (¶430). It is generally accepted that legislative measures are among the most basic means that can be expected of all States in facilitating the fulfilment of due diligence (p. 170). This is important here on three counts.

One, the distinguished classification of an emergent speech as incitement to "genocide" would enable law enforcement to identify its exceptional harm when compared to hate speech generically, and thus respond differentially. Two, a legislative framework could (ideally) elaborate expedited processes for the identification, countering and even restriction of genocidal speech, while carefully respecting the right to free speech. Although India has certain guidelines for coordinated efforts against hate speech (which could implicitly counter genocidal speech), they have little implementation in practice, and more precise effort should in any case be required for genocidal speech. Finally, the very recognition of the offence of inciting genocide and its appropriate penalties, at least theoretically, could entail a deterrent effect, contributing to the prevention of potential genocide. Needless to add, as per Dr Pillai's similar reflections in this context, this would apply equally to the legislative addressal of the crime of the commission of genocide itself, and the other acts mentioned in Article III.

Conclusion

In this piece, I have discussed how India's failure to enact legislative frameworks against genocide, and the act of incitement to genocide in particular, violates the Genocide Convention. The Indian Government is disingenuous in claiming that there is already adequate room to prosecute genocidal speech, especially given India's apparent dualist tradition toward 'incorporation'. In a study of 196 countries in 2020 (including the 193 United Nations member States), it was found that 138 countries had legislations against genocides, while 66 including India did not (see here, p. 86). The arguments of this piece would apply equally to these other 65 States, incontrovertibly for those resembling India's dualist approaches.

To state the obvious, the word 'genocide' has unparalleled moral and political power, especially when carrying the legal legitimacy of a successful conviction before impartial courts. In India particularly, the decisions of courts and their chosen language are known to have significant impact in shaping public discourse. Given the distressing rise of *prima facie* genocidal speech in India, there is an urgent need for legislative intervention empowering law enforcement and courts to act against genocide-related crimes. Considering the present Government's persistent denials of these concerns, a reform appears unlikely in the foreseeable future. This necessitates further efforts from lawyers and writers to highlight the Convention's promise toward vulnerable communities in India.

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