

FREEDOM OF SPEECH AND EXPRESSION, VIS-A-VIS USE OF MOBILE PHONES AND INTERNET IN PUBLIC DOMAIN

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Part III of the Indian Constitution guarantees a person the fundamental rights and liberties by which he can keep up his dignified life. Under Article 19(1)(a) of the Constitution, freedom of speech and expression is given. The article contains two parts: Speech and Expression. Although Speech is also a type of expression, but it was given special importance as that was the most important right to be safeguarded. The framers of the Indian Constitution had kept this Article inexhaustible, as speech is an exhaustible term but the concept of Expression is vast and ever expanding. In the light of inexhaustible nature of the Constitution, the term 'expression' includes many aspects like gestures, acts, dance, use of mobile and internet etc. Article 19(2) has put some restrictions on the freedom as the same is not absolute in nature and can be curtailed. But when the use of mobile phones and internet is concerned, the curtains are even more. If the Constitution has guaranteed only a few aspects by which speech and expression can be curtailed, then why there are other grounds of restrictions for the use of mobile phones and internet? Today when the Social Media and Internet is considered to be the biggest platform of conveyance then why it invites so many restrictions as well? Section 66A of the Information Technology Act, 2000 was recently struck down by the Hon'ble Supreme Court of India in the case of Shreya Singhal v. Union of India¹ stating that it was against the spirit of the Indian Constitution.

Therefore, the questions that arise are that what is the extent of restrictions for use of mobile phones and internet? How far are these restrictions justified? What are the remedies available with user of mobile phones and internet? What is the limit of unguided power to curb the internet with the Government, and whether that is within the restrictions? In this Research Article, with the help of doctrinal research methods and primary and secondary sources of data, the author will try to examine and analyze the justification of having limits on the use of mobile phones and internet.

Keywords: Article 19, Speech & Expression, Social Media, Restricted Internet, Internet Censorship

INTRODUCTION

¹ AIR 2015 SC 1523.

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties”

- John Milton

The freedom of speech and expression signifies the right to speak and express one's thoughts and beliefs freely by way of words, either oral or written, pictures, gestures or any other acts. This freedom is not only guaranteed by the Constitution or various statutes of different nations but also by various international conventions such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights etc. But what will happen if this freedom is restricted beyond reasonable grounds?

Freedom of speech and expression is guaranteed by the Constitution of India under Article 19(1)(a). The problem begins when Section 66A of Information Technology Act along with some other provisions of the Act give an unfettered power to the Government to put restrictions on use of mobile phone and internet. In the recent judgment of *Shreya Singhal v. Union of India*², Hon'ble Supreme Court had struck down Section 66A declaring it against the spirit of the Constitution.

The problem here lies whether the fundamental right can be restricted by the Act of Parliament where in today's world a speech by the podium or a stage is considered a very small platform in the front of social media, social networking websites etc., so if the Fundamental Right is not restricted when general speech is considered, why is it not available for internet and mobile phones which is only a technological substitution for the same.

FREEDOM OF SPEECH AND EXPRESSON

Article 19(1)(a) of the Indian Constitution guarantees freedom of speech and expression to all its citizens. It states that “All citizens shall have the right (a) to freedom of speech and expression;”³ It means a citizen is free to express his outlook and opinion through any communicable medium such as by words of mouth, writing, signs, and even by way of silence.

The freedom of speech and expression not only includes liberty to propagate one's own views but also the right to promulgate or publish the views of others. Thus, it includes freedom of press also within its ambit This freedom therefore serves the purpose of helping persons to attain self-fulfillment, assisting for discovering the truth, strengthening the capacity of persons to participate in decision making and establishing a balance between social change and stability.⁴

² AIR 2015 SC 1523.

³ INDIA CONST. Art. 19 (1) (a).

⁴ Indian Express Newspapers v. Union of India & Ors., [(1985) 1 SCC 641].

This right is considered as one of the essential aspect of a strong democratic government as it permits the citizens to play a vital role in the political and social process of the nation. Moreover, it gives an opportunity to a citizen to have social or political life apart from a basic level of existence. The Preamble to the Indian Constitution states about securing liberty of thought and expression and this is rightly reflected in Article 19(1)(a) where there is right to express opinion, to seek, impart and receive information. The government has a duty to establish such conditions where all the citizens can efficiently and effectively enjoy this right.

But no right is absolute in nature and such is the case with freedom of speech and expression. Article 19(2) lays down reasonable restrictions that can be imposed by the State on the exercise this right in the interest of the public. These include:

- Security of State
- Friendly relations with foreign states
- Public Order
- Decency or morality
- Contempt of Court
- Defamation
- Incitement to an offense Sovereignty and integrity of India.⁵

It can be evidently seen that these restrictions are related with the national interest and interest of the society. The Courts in India have given a broad interpretation to the Article 19(1)(a) which is subject only to the restrictions given under Article 19(2). In *Union of India v/s Association for Democratic Reforms*⁶, the Supreme Court observed “One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a mockery. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions”.⁷ In *Life Insurance Corporation of India v. Prof. Manubhai D. Shah, Doordrashan*⁸, the Court made it clear that “subject to Article 19(2), a citizen has a right to publish, circulate and disseminate his views to mold public opinion on vital issues of national importance. Hence, any attempt to thwart or deny the same would offend Art. 19(1)(a)”.

In the case of *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana*⁹, the SC struck down the injunction which was sought to stop the telecast of a serial HoniAnhoni which was contended not to be in public interest. In the opinion of the Court there was no prima-facie evidence to show that serious injustice was being done to the public.¹⁰ “The

⁵ INDIA CONST. Art. 19 (2).

⁶ (2002) 5 SCC 294.

⁷ *Ibid.*

⁸ AIR 1993 SC 171.

⁹ AIR 1988 SC 1642.

¹⁰ *Ibid.*

State cannot prevent open discussion and open expression, however, hateful to its policies. Everyone has a fundamental right to form his own opinion on any issue or general concern. He can form and inform by any legitimate means”.¹¹ An additional facet of this trend is that irrespective of the effect, there is a constant call for a total ban devoid of investigating any other potential. In *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat*¹², Supreme Court stated that “a total prohibition under Article 19(2) to (6) must also satisfy the test that a lesser alternative would be inadequate”.

RELATIONSHIP BETWEEN FREE SPEECH & INTERNET

The internet can be considered as a powerful medium where anyone can express their thoughts and believes about anything before a worldwide audience. Being a medium of communication, internet allows access to information that exhibits the power and extent of human speech. The Internet is a universal part, a public place like any market or garden, with the exception of being the biggest area that can ever exist. Whatever someone desires to express can be heeded by anyone who has access to the Internet and this global society is as huge and diverse as civilization itself. Thus, practically, it is impossible to apply one area’s standards for governing the sort of speech which is permissible over the Internet. Some people observe free speech on the internet as a restoration of democracy while others find it as frightening or hateful for reasons such as pornography, lurid threats, hate speech etc. This trend has aggravated several efforts to limit the kind of speech which is being used on the internet or to build up methods which can filter such offensive matter.¹³ Internet censorship is the restraint or control of things that can be accessed, published, or viewed over the Internet. Sectors which execute such censorship may include governments, private organizations or individuals having a common goal of controlling what people can read and publish on the internet. Engagement in self-censorship may also be done for ethical, spiritual, or commerce motives, to match to shared norms, due to threats or pressure, or because of fear of legal or other consequences. The limit of Internet censorship differs from one country to another. Wherein the democratic countries may have a moderate Internet censorship, other countries may restrict the access to information such as news and even restrain discussion among people.¹⁴ Internet censorship can also take place in reaction to any events such as protests, riots, or elections.

¹¹ Anand Patwardhan v. The Union of India and others, AIR 1997 Bom 25.

¹² 2005(8) SCC 534.

¹³ William Fisher, *Freedom of Expression on the Internet*, THE BERKMEN CENTER FOR INTERNET AND SOCIETY (Nov. 2, 2017, 02:06 PM) <http://cyber.harvard.edu/ilaw/Speech/#casestudies>

¹⁴ Eric E. Schmidt and Jared Cohen, *The Future of Internet Freedom*, THE NEW YORK TIMES (Nov. 2, 2017, 02:09 PM) <https://www.nytimes.com/2014/03/12/opinion/the-future-of-internet-freedom.html>

The debate on the amount of information to be accessible over the internet and censorship of other information is never ending among the supporters and critics. Following are some advantages and disadvantages of internet censorship.

Advantages of Censorship

1. It helps in strengthening and preserving national security.
2. It keeps children safe against being sufferers of pornography or sex trafficking.
3. It lessens illegal activities by controlling promotions of malicious content.
4. It lessens the cases of identity theft by restricting access to personal information.
5. It maintains that no freedom is absolute and thus, protects people from racist speech or cyber bullying.

Disadvantages of Censorship

1. It can be used by foul government officers to escape from their immoral practices such as corruption or abuse of power.
2. It can damage businesses by limiting its reach to a global market.
3. It infringes the freedom of speech and expression and deprives people from the knowledge of truth, thus leading to ignorance by confining access to essential information.
4. It is difficult to enforce and acts as an added expense to the Government.

The Internet is without a doubt one of the most useful inventions of our time. However, it is a fact that many people have misused it for destructive reasons resulting in victimization of several people in the process. Thus, restrictions on internet are necessary but its execution should be done in a way that is fruitful or valuable and not detrimental or injurious.

FREEDOM OF SPEECH & EXPRESSION AND THE INTERNET: A CRITICAL ANALYSIS

The Information Technology (IT) Act was enforced in 2000 with the objective to provide a legal framework for regulating Internet use. The Act criminalizes publishing of obscene information online and gives power to police to search any premises without a warrant and arrest anyone acting in violation of the provisions of the Act. An amendment to the IT Act in 2008 reinforced the power of the government to block Internet websites and its content and also criminalized sending of messages which are deemed to be offensive.¹⁵

In 2003, a Yahoo group linked to an illegal, minor separatist group from Meghalaya was banned.¹⁶ But difficulties led to all Yahoo! groups being banned for almost two weeks. In

¹⁵ *India, Bureau of Democracy, Human Rights, and Labor*, U.S. DEPARTMENT OF STATE, (Nov. 2, 2017, 02:11 PM) <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154480.htm>

¹⁶ Andrew Orłowski, *India blocks Yahoo! Groups*, THE REGISTER (Nov. 2, 2017, 02:12 PM) http://www.theregister.co.uk/2003/09/24/india_blocks_yahoo_groups/

2007, Indian law enforcement agencies entered into an agreement with the then popular social networking site Orkut to track down what it deems defamatory content which.¹⁷

In 2011, the "Information Technology Rules" were adopted adding on to the IT Act 2000. These rules obliged Internet corporations to delete any content that is deemed objectionable within 36 hours of being informed by the authorities. There is an obligation for the Cybercafé owners to click pictures of customers, follow directions about setting up of cafes so as to keep all computer screens in plain sight, maintain copies of customer IDs and browsing history for at least one year, and forward the collected data to the Government every month.

After the commencement of the rules, in 2011, the Government solicited different social networking sites such as Facebook, Google, and Yahoo! to pre-screen user content before publishing it.¹⁸ Later that year, the website of a cartoonist was blocked by the officials for exhibiting anti-corruption cartoons which were aimed at politicians.¹⁹ In 2012, the Department of Telecommunications instructed to block numerous torrent sites without stating any reasons or giving any prior warnings. The department also ordered ban on around 300 particular URLs because of seditious matter with fabricated facts in regard to the Assam violence and promotion of North East relocation from cities such as Bangalore and Pune.²⁰ In 2013, a set of 39 websites were blocked for containing pornographic content. Similarly in 2015, there have been various complaints on social media where users talked about blocking approximately 857 pornographic websites by the Government agencies.²¹

The authorities in India seem to be intimidated by the sudden outburst of the internet and therefore, these have tripped in their efforts to effectively regulate it. The Information Technology Act has become an easy tool to criminalize speech which often used for safeguarding powerful political figures. We have seen Section 66A of the said Act which has been repeatedly used to criminalize a broad range of speech at different times, to arrest

¹⁷ *Orkut's tell-all pact with cops*, THE ECONOMIC TIMES (Nov. 2, 2017, 02:15 PM) <https://economictimes.indiatimes.com/tech/internet/orkuts-tell-all-pact-with-cops/articleshow/1982584.cms>

¹⁸ Heather Timmons, *India Asks Google, Facebook to Screen User Content*, THE NEW YORK TIMES (Nov. 2, 2017, 02:18 PM) <https://india.blogs.nytimes.com/2011/12/05/india-asks-google-facebook-others-to-screen-user-content/>

¹⁹ Preetika Rana, *Cartoonist Faces Ban on Right to Poke Fun*, THE WALL STREET JOURNAL (Nov. 2, 2017, 02:20 PM) <https://blogs.wsj.com/indiarealtime/2012/01/04/cartoonist-faces-ban-on-right-to-poke-fun/>

²⁰ *Government asks Twitter to block fake 'PMO India' accounts; site fails to respond*, THE ECONOMIC TIMES (Nov. 2, 2017, 02:21 PM) <https://economictimes.indiatimes.com/news/politics-and-nation/government-asks-twitter-to-block-fake-pmo-india-accounts-site-fails-to-respond/articleshow/15610767.cms>

²¹ Javed Anwer, *Govt goes after porn, makes ISPs ban sites*, GADGETS NOW (Nov. 2, 2017, 02:23 PM) <https://www.gadgetsnow.com/tech-news/Govt-goes-after-porn-makes-ISPs-ban-sites/articleshow/20769326.cms?>

such people who gave their fair comments against the authorities and to censor the content available online.

Section 66A of the IT Act was declared unconstitutional by the Supreme Court of India in the case of *Shreya Singhal v. Union of India*²². In response to this judgement the Government of India has expressed its view that it is examining this judgment by the Supreme Court and it may enact a new amended version of Section 66A which shall comply with the Constitutional provisions. This judgment set some important measures of protection with respect to the future of freedom of internet in India.

The problem of censorship of internet in India is complicated; the Constitution permits restrictions but in some specific situations. This problem reaches a larger level because of the global nature of the internet which makes it hard to regulate the matter which is uploaded in other countries and has viewership in India. Moreover, the most debated issue about who decides what content is to be censored and under what situations tend to be seized by arguments which are supported by security safeguards or by need for broad provisions. Thus, most of the efforts at censorship have been messy, unorganized and contradictory. Looking into the rising concerns regarding blocking of internet content, the need of the hour is to enact new laws that are consistent with the protective measures set forth by the Court in the aforesaid judgment and which are also in line with the international human rights standards.²³

THE WAY FORWARD

The limitation on online free speech in India is of immense concern. The main issues include takedown and blocking norms, alongside with the network shutdowns and penalization of online speech.

Regulating content over the internet is the most heated discussion in India due to the series of events which have been taking place from time to time. The issue arises because of absence of any regulatory model which can take into consideration different areas of availability of internet such as at home, schools or in public places. Though there is legal framework regarding print and broadcast media but the same cannot be applicable on an online medium where the content is available on any device, at any time and at anyplace in the world. Imposing such traditional standards to the internet shall be difficult because of the enormous quantity of unstipulated user-generated matter. Laws governing internet can be very complex as it can be extended to include safeguarding minors and human dignity or information safekeeping and privacy. After content is filtered, it may raise the question as to how extensively can new rules be applicable. The solution would be to eliminate any

²² AIR 2015 SC 1523.

²³ Anindito Mukherjee, *Stifling Dissent: The Criminalization of Peaceful Expression in India*, HUMAN RIGHTS WATCH (Nov. 2, 2017, 02:25 PM) <https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india>

vagueness for scope creep. The Department of Telecommunication also needs to think about real world situations as this will guard only regular online connectivity. The reason is that blocking basically obscures only browser-based queries which use HTTP and DNS and not the Darknet, where the greater part of illegal and unlawful activities takes place on the Internet. For any regulation to be efficient the initial step is to build a safe and sound foundation. India can initiate cyber-safe awareness among the people by operating guidelines time and again, and having comprehensible penalty for any violation. It is nearly unfeasible to look after against all exigent online state of affairs. Making youth comprehend suitable and moral behavior in a shared surrounding where they make, manage and share their content cannot be achieved by some set of regulations or administered exclusively by technology.

Transformation in technology is certain; making a protected cyber environment in the home and at the school needs constant guidance and commitment with the entire community to keep up with rising user assurance, new skillfulness and shifting outlooks. The attitude is required to be tactical. All stakeholders must consider about the way to connect every person concerned and construct safe and classified Internet for all India netizens.

CONCLUSION

The censorship orders which are issued by the telecommunication department stipulate what to block but it does not mention how to block it. This has led to circumstances where different ISPs block websites using different methods. Users of a number of ISPs may be capable of dodging the censorship by merely altering their DNS settings, whereas others may configure proxy or install evading software. This implies that censorship can be circumvented by way of standard circumvention tools such as the Tor Browser. An additional alternative can be to make use of a Virtual Private Network (VPN) which is hosted outside the nation. Mobile users can also bring into play Psiphon software.

Internet by its very temperament has no geographical limits and symbolizes that the world is but one single family. Imposing laws applicable to a certain geographical area in a place that recognizes no geographical border is definitely going to be complicated. Freedom of speech and expression is a freedom for the public. The capability to access information lets us to develop into more knowledgeable, open-minded and progressive person. It allows us to comprehend more regarding the humanity and the political pressures that outline our daily decisions; any danger to this comprehension is an intimidation to our freedom. Article 19(1)(a) of the Indian Constitution is a vital provision that aids to give accountability, enlightens public debate and adds to a civil and democratic society.

One can only hope that the Supreme Court will take suitable steps by taking down the controversial provisions of the IT Act and thus compelling the executive and the legislature to establish a more open, equitable and just scheme of censorship that will justly put up with the Constitutional spirit embodied in Article 19(1) (a) and not just strike down a single provision.