



## REGULATION OF FREE SPEECH IN THE PHYSICAL AND CYBER WORLD

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### Abstract:

The right to freedom of speech, like many other individual freedoms, has some inherent restrictions. The Constitution of India guarantees the fundamental right to freedom of speech and expression and also provides for the grounds on which this right can be curtailed. Various legislations and regulatory mechanisms have been used to give effect to these restrictions. These mechanisms took shape to cater to the forms of speech and the media of mass dissemination that developed during the 20th Century. This paper examines the traditional legislations governing free speech and their development over the decades. As the nature of personal and mass communication is evolving in the internet age, these traditional mechanisms are proving unsuitable. This paper discusses some of the new trends emerging in the cyber world and the challenges in adopting these regulatory mechanisms to the cyber world. Two of the policies employed by governments to curtail speech on the internet - internet shutdown and intermediary liability - are analysed. Finally, some suggestions are presented which may be useful in responding to these emergent challenges of the cyber world.

**Key Words:** Free speech, Reasonable restrictions, Cyber law, Hate Speech, Right to internet.

**Introduction: Human Rights in the Cyber World**

The number of internet users in 2023 is estimated at over 5 billion people and is only projected to grow. Internet use has moved on from being for only professional, business and academic purposes to now also include personal, social and even the political aspects of one's life. For many, the primary and most prominent mode of interaction in personal life is over the internet. As for the political life, the prominence of online communication can be gauged by the scandal involving Cambridge Analytica during the 2016 US Presidential elections<sup>1</sup>. As more and more of human lives are lived online, the rights, liabilities and other legal aspects of the traditional physical world need to be located in the cyber world. It is in this context that we endeavour to study the rights and liabilities, and the legislations and the restrictions of the rights in the cyber world. It is an enormous undertaking to determine whether every one of the human rights are also available in the cyber world. If not all, then which of these rights are available and to what extent. And what are the criteria to determine all this. And finally, whether the nature and methods of restrictions imposed online are similar to those offline.

For the purposes of this paper, the parameters of these questions are limited to the following:

1. This paper is limited only to the human right of free speech.
2. Two of the emergent issues concerning speech in the cyber world are considered: fake news and hate speech.
3. Two of the State's policies aimed at regulation of speech in the cyber world are considered: access to internet and intermediary liability.

**Part 1: Free Speech - Foundations and Practice**

The right to freedom of speech, like many other individual freedoms, has some inherent restrictions. It is well established that one person's right or freedom shall not infringe on any right of another person. In some cases, these may be explicitly stated in the text of the Constitutions and statutes. Even without any such express provision, it is accepted that freedom of speech is not absolute. The global movement for the right of freedom of speech took giant strides in the 20th Century, particularly post-World War 2. The challenges to colonial rule around the world and eventually the attainment of independence of the colonies gave rise to new democracies. Freedom of speech was seen as essential for a democratic society. This recognition was reflected in the Constitutions of these new democracies as well as in the treaties

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1 <<https://www.npr.org/2018/03/20/595338116/what-did-cambridge-analytica-do-during-the-2016-election>> (last visited on: March 15, 2023).

and charters of the international organisations. The Universal Declaration of Human Rights (1948) provides that “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”<sup>2</sup>

The *International Covenant on Civil and Political Rights* (ICCPR) provides for the freedom of expression. The ICCPR expressly provides that “*the exercise of the rights (to freedom of speech and expression) carries with it special duties and responsibilities.*”<sup>3</sup> Presently there are 173 parties to this covenant. India ratified this Covenant in 1979.

### **India and ‘Reasonable Restrictions’**

The right to freedom of speech and expression is guaranteed by the Constitution of India as a Fundamental Right under Article 19(1)(a), which provides that “*All citizens shall have the right—(a) to freedom of speech and expression;*”. The Constitution also, under Article 19(2) provides that the State may impose reasonable restrictions on the exercise of this right “*in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence*”. On violation of this right, the aggrieved can directly approach the Supreme Court of India seeking relief. This is in itself a right guaranteed by Article 32.

To give effect to this principle of reasonable restrictions, various regulatory mechanisms and agencies have been created. The Indian Penal Code provides for certain specific offences involving restriction on speech such as Defamation (Sections 499, 500), Sedition (124A), Decency and morality (Sections 292 to 294). Other statutory sources for reasonable restrictions are the Contempt of Courts Act. The Supreme Court being a court of record, can take action for its contempt and also for contempt of any other court. The Unlawful Activities (Prevention) Act, 1967 and The Protection of Civil Rights Act, 1955 contain stringent provisions considering the gravity of the offences. Various other regulatory agencies and statutes have been created for specific forms of speech, like movies, television, etc. Some of these are: The Cable Television Network Regulation Act, to regulate the operation of cable television networks in the country and for matters connected therewith; The Cinematograph Act, 1952.

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<sup>2</sup> Article 19 of the Universal Declaration of Human Rights (1948).

<sup>3</sup> Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The Central Board of Film Certification (CBFC), a governmental regulating body for the Indian filmmaking industry was set up under the Cinematograph Act. Besides these, avenues also exist for self regulation, such as: The Press Council of India was set up by the Parliament on the recommendations of the First Press Commission with the object of preserving the freedom of the press and of maintaining and improving the standards of press in India; As per the Cable TV Networks (Regulation) Act, all complaints related to advertisements shall be regulated by Advertising Standards Council of India (ASCI); News Broadcasting Standards Authority is an independent body set up by the News Broadcasters Association. Its task is to consider and adjudicate upon complaints about broadcasts.

### Judgments

The Supreme Court has played a balancing act in expanding the scope of freedom of speech and also determining the legitimacy of specific restrictions imposed by the Executive or the Legislature. Some of the important judgments of the Supreme Court of India are discussed here.

#### *Hamdard Dawakhana v. Union of India*<sup>4</sup>

The Supreme Court made a distinction of speech made for commercial or business purposes: *“An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Art. 19(1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas-social, political or economic or furtherance of literature or human thought ; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business...and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution.”*

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<sup>4</sup> AIR 1960 SC 554

*People's Union for Civil Liberties (PUCL) v. Union of India*<sup>5</sup>

On the Constitutionality of telephone-tapping the Court held: “*Right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution.*”

**Freedom of the Press:** Even though the Constitution does not use the expression 'freedom of the press', it has been held by the Supreme Court that it is included in Article 19(1)(a) which guarantees freedom of speech and expression. Further, there could not be any kind of restriction on the freedom of speech and expression other than those mentioned in Article 19(2) and thereby made it clear that there could not be any interference with that freedom in the name of public interest. [*Indian Express Newspapers v. Union of India*<sup>6</sup>, *Brij Bhushan v. State of Delhi*<sup>7</sup>, *Bennet Coleman & Co and others v. Union of India*<sup>8</sup>].

*Bennet Coleman and Co. v. Union of India*<sup>9</sup>

Held that the newsprint policy for 1972-73 violates Articles 19(1)(a) and 14 of the Constitution. The policy had sought to impose certain restrictions on a newspaper including the number of pages and circulation. The Court held that “*In the garb of distribution of newsprint the Government has tended to control the growth and circulation of newspapers. Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content. The newsprint policy which permits newspapers to increase circulation by reducing the number of pages, page area and periodicity, prohibits them to increase the number of pages, page area and periodicity by reducing circulation. These restrictions constrict the newspapers in adjusting their page number and circulation.*”

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<sup>5</sup> AIR 1997 SC 568

<sup>6</sup> 1985 2 SCC 434, 1986 AIR 515, 1985 SCR (2) 287

<sup>7</sup> 1950 AIR 129, 1950 SCR 605

<sup>8</sup> 1973 AIR 106, 1973 SCR (2) 757

<sup>9</sup> 1973 AIR 106, 1973 SCR (2) 757

*K. A. Abbas v. Union of India*<sup>10</sup> held that pre-censorship under the Cinematograph Act was within the scope of reasonable restrictions of Article 19(2).

## Part 2: Speech and Communication Technology

Modern communication technology has transformed communication by its two features: speed of dissemination and scale of audience. This has affected our private conversations as well as other spheres such as advertising & marketing, political messaging & campaigning and news broadcast. The recipient is also empowered to choose the source of information, and when & where to receive it. Smartphones and social media have enhanced the impact of internet exponentially. Social media is increasingly encroaching into the domain of public information broadcasting. Traditional sources such as print and television news media are running out of business and have been forced to migrate to social media platforms to remain relevant in the present world. Law needs to keep up with these changes. In particular the legislations concerning news media, political messaging and advertising need to be updated as the impact of any laxity can have immense impact on the political stability of a State. Also needing attention is the citizens right to receive information. Traditionally this was achieved through mandatory public broadcast on television, radio and print newspapers. This model worked when there were a limited number of television, radio and print sources. New solutions need to be devised for the cyber world with potentially limitless sources of information<sup>11</sup>.

Another novel factor in online speech is the emergence of new *types* of speech and the entities involved. Traditionally, speech was understood, for the most part, with the entities who were identified with terms such as speaker, publisher and audience. Now, in addition to these, newer terms such as originator, transmitter, intermediary, host, account holder have emerged. Some of the newer issues that are a cause for concern are hate speech and fake news. Although these concepts are not new in their substance, they are certainly much more impactful than ever before in history due to the nature of modern communication technology, with its speed and scale, and the relatively unregulated cyber world. These two issues are discussed here.

### 2.1 Fake news

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<sup>10</sup> AIR 1971 SC 481, 1971 AIR 481, 1971 SCR (2) 446

<sup>11</sup> Jeff West, "Communication Technology in the 21st Century", 22 Oct 2016, <<https://studymoose.com/communication-technology-in-the-21st-century-essay>> (last visited on: March 15, 2023)

The Canadian Centre for Cyber Security describes “fake news” as any type of news story created to intentionally mislead audiences, often for political or financial gain<sup>12</sup>. The effects of fake news have reached such enormous proportions that it is increasingly being considered as a threat to democratic institutions including the government and the State itself. Some of the elements of fake news are misinformation, disinformation, and malinformation (MDM). These three can be distinguished as: “Misinformation refers to false information that is not intended to cause harm. Disinformation refers to false information that is intended to manipulate, cause damage, or guide people, organizations, and countries in the wrong direction. Malinformation refers to information that stems from the truth but is often exaggerated in a way that misleads and causes potential harm.”<sup>13</sup> These have caused damage to not only State institutions, but also to businesses and consumers. Due to the speed of dissemination of these false information as news, and the time required to fact check and ascertain the veracity, the damage is already done before the truth is finally known. In such a situation, it is left to the individual consumer of news, the citizen, to perform his own due diligence to guard against this threat.

## 2.2 Hate Speech

In recent times, the term 'hate speech' has been increasingly used in public discourse, be it in politics, legislature, news media, nationalism, migration, conflict between communities or human rights. The term does not have a globally recognized and uniform definition. The Oxford dictionary defines 'hate speech' as “speech or writing that attacks or threatens a particular group of people, especially on the basis of race, religion or sexual orientation”. The United Nations, in its paper titled 'Strategy and Plan of Action on Hate Speech' says

*“...the term hate speech is understood as any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. This is often rooted in, and generates intolerance and hatred and, in certain contexts, can be demeaning and divisive.”*

Hate speech is not identified by exact words, but by the features like intent, medium, impact, identities of the author and the target. Over the last few years, the scourge of hate speech has

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<sup>12</sup> <<https://www.cyber.gc.ca/en/guidance/fact-or-fiction-quick-tips-help-identify-fake-news>> (last visited on: March 15, 2023).

<sup>13</sup> <<https://www.cyber.gc.ca/en/guidance/how-identify-misinformation-disinformation-and-malinformation-itsap00300>> (last visited on: March 15, 2023).

threatened to erode the Constitutional values of many countries. In India, the Constitutional values are drawn from various sources, written and unwritten, and find reflection in numerous ways. For example,

- The Constitution of India has explicitly stated the values of secularism, equality, justice, fraternity, freedom of speech, freedom of religion, among others, in the Preamble, the Fundamental Rights and Fundamental Duties;

- The judicial pronouncements have given the Basic Structure doctrine, and expanded the scope of the Right to Life; and

- India has a long history of multiculturalism, tolerance and peaceful coexistence. In recent years, some of these Constitutional values have come under threat from various fronts, one of which is hate speech. The targets have usually been religious minorities, migrants and people from the northeastern states of India. The values of secularism, religious freedom and fraternity are discussed here.

Religion:

*"We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic..."<sup>14</sup>*

*"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and free profession, practice and propagation of religion."<sup>15</sup>*

Consider these incidents from December 2021. The choices of words and phrases are instructive<sup>16</sup>:

- At a congregation in Haridwar, speeches were made calling for the genocide of religious minorities. Diabolically, speakers were presented a copy of the Constitution on stage.

- In Delhi, one speaker, a journalist, led a crowd in pledging to give or take lives in pursuit of a Hindu Rashtra.

- In Ghaziabad, a speaker said, "If Islam is there, it is like fast poison. Christianity is like slow poison." - Some other terms used in the past years are 'UPSC Jihad', 'Corona Jihad', 'Go to Pakistan'.

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<sup>14</sup> The Preamble to the Constitution of India.

<sup>15</sup> Article 25(1), the Constitution of India.

<sup>16</sup> Ziya Us Salam, "Hate Conclave", Frontline Magazine, January 28, 2022.



The Supreme Court is examining this issue of hate speech in Shaheen Abdullah versus Union of India<sup>17</sup>. The Court observed that the "there cannot be fraternity unless different religious communities are available to live in harmony".

Race:

*"...to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation..."<sup>18</sup>*

*"It shall be the duty of every citizen of India...to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;"<sup>19</sup>*

The people from the North Eastern (NE) states of India have been frequently subject to racial abuse by casual use of derogatory slurs.

- In 2014 the Bezbaruah Committee<sup>20</sup> (Ministry of Home Affairs) was mandated to identify the issues faced by the people of this region.

- Since 2018, the Indian Council of Social Science Research and the Centre for Criminology and Victimology at the National Law University, Delhi are conducting a research project titled "Hate Crimes – Prejudices and Violence faced by People from North Eastern States and Measures to Counter – A Empirical Study".

The last few years have been seen an uptick in such incidents in light of the COVID pandemic. The reason being, that the citizens from these states are somewhat similar in physical features to the Chinese and other East Asian ethnicities – the region where this disease originated.

Migrants:

*"The State shall promote with special care the educational and economic interests of the weaker sections of the people..."<sup>21</sup>*

The political leaders, particularly during election campaigning, find the poor migrants an easy target to explain away the issues of economic stagnation, crime in the cities and inadequate infrastructure. As these migrants usually do not have voting rights in the constituencies where they are working, they are left voiceless.

<sup>17</sup> W.P.(C) No. 940/2022

<sup>18</sup> The Preamble to the Constitution of India.

<sup>19</sup> Article 51A(e), the Constitution of India.

<sup>20</sup> [https://www.mha.gov.in/sites/default/files/ReportOfMPBezbaruah\\_6\\_09052018.pdf](https://www.mha.gov.in/sites/default/files/ReportOfMPBezbaruah_6_09052018.pdf)

<sup>21</sup> Article 46, the Constitution of India.

## Challenges in Countering Hate Speech in India

The police have initiated investigations into many of these aforementioned events. But the results of these investigations, and potentially judicial proceedings, are far from certain. The three major reasons for this are the present statutory limitations, the challenges in legislating for the internet and the general opposition to any new State regulation which aims to curb speech.

### Statutory limitations:

There is no law or provision which specifically defines hate speech or provides for countering it. As a result, a number of different laws are applied in such cases with no uniformity across the country. Some of these have been listed earlier in this paper. The Supreme Court, in *Pravasi Bhalai Sangathan v. Union of India (2014)*<sup>22</sup> directed the Law Commission of India "...to consider, if it deems proper, defining the expression 'hate speech' and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of 'hate speeches' irrespective of whenever made."

Following this the Law Commission of India, in its 267th report titled "*Hate Speech*" in 2017, opined that two new provisions in IPC are required to be incorporated to address the issue:

- Section 153C (Prohibiting incitement to hatred); and
- Section 505A (Causing fear, alarm, or provocation of violence in certain cases).

**Role of the Judiciary in the absence of explicit and specific legislation:**  
The values enshrined in Articles 14 and 19 are particularly difficult to interpret when it comes to the issues of free speech and hate speech. This is reflected in the inconsistencies in application of principles by the courts.

In *Amish Devgan v Union of India*<sup>23</sup>, the Supreme Court observed: "*The 'context', as indicated above, has a certain key variable, namely, 'who' and 'what' is involved and 'where' and the 'occasion, time and under what circumstances' the case arises. The 'who' is always plural for it encompasses the speaker who utters the statement that constitutes 'hate speech' and also the audience to whom the statement is addressed which includes both the target and the others. Variable context review recognizes that all speeches are not alike.*" The implementation of these principles in subsequent cases has not been consistent, as seen from the following cases.

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<sup>22</sup> AIR 2014 SC 1591

<sup>23</sup> WP (Criminal) No. 160 Of 2020, In the Supreme Court Of India.

The Madras High Court, in *Maridhas v. State and another*<sup>24</sup> in 2021), quashed an FIR alleging hate speech involving targeting of a community by holding that: *"The petitioner as a YouTuber actively commenting on current issues is entitled to the protection of Article 19(1)(a) of the Constitution. Criticism of an organization cannot be taken as a criticism of a community."* In January, 2023 the Supreme Court set aside this order of the Madurai Bench of the Madras High Court, observing that the High Court shouldn't have quashed the FIR without giving any time to investigate the matter and further said that this was against the law laid down by the Supreme Court<sup>25</sup>.

The Madras High Court, in the case of *George Ponnaiah v. Inspector of Police*<sup>26</sup> (2022), gave no relief to the petitioner: *"When stand-up comedians Munnawar Faruqui or Alexander Babu perform on stage, they are exercising their fundamental right to poke fun at others. Again, their religious identity is irrelevant... The persons concerned voice their opinions or give vent to their expressions in their capacity as satirists. On the other hand, an evangelist like the petitioner cannot claim a similar privilege. He cannot insult or outrage others' religion or their religious beliefs and still claim immunity from the application of Section 295A/153A/505(2) of IPC."*

However, in *Munnawar v. State of Madhya Pradesh*<sup>27</sup> (2021), the aforementioned comedian Munnawar Faruqui was initially denied bail by the High Court of Madhya Pradesh holding: *"The evidence/material collected so far, suggest that in an organized public show under the garb of standup comedy at a public place on commercial lines, prima facie; scurrilous, disparaging utterances, outraging religious feelings of a class of citizens of India with deliberate intendment, were made by the applicant"*.

He was eventually granted bail by the Supreme Court<sup>28</sup>.

#### Challenges in legislating for the Internet:

The obvious challenges in legislating online behaviour are jurisdiction, anonymity, privacy, variable scale of audience, intent, context etc. Also, distinguishing between the 'creator' of content/speech and 'forwarding' of such material/speech is problematic. Previous attempts have been met with opposition from the civil society as well as from the Courts. The Supreme Court

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<sup>24</sup> CrI.O.P.(MD) No. 20560 of 2021 and CRL.MP(MD) No.11714 of 2021 in the Madras High Court.

<sup>25</sup> Criminal Appeal No. 67/2023 [Special Leave to Appeal (CrI.) No(s). 8371/2022]

<sup>26</sup> CrI OP(MD)No.11021 of 2021, Dated: 07.01.2022.

<sup>27</sup> Mis. Cr. Case No.2206/2021, Dated: 28.01.2021.

<sup>28</sup> Writ Petition(Criminal) No. 62/2021. Dated: 05.02.2021

Section 66-A of the IT Act as violative of Article 19 of the Constitution and hence struck it down<sup>29</sup>.

The Parliamentary Standing Committee on Home Affairs, in its 189th report, called for new legislation specifically to counter hate speech in the online medium. In distinguishing online speech, the report said: *"...because of fast and wider spread of the online material, the impact caused may be more severe and damaging. Thus, stricter penalties may be prescribed for the same as against similar sections mentioned in IPC."*

*"It (will) also cover persons who just forward such content online which will also serve as deterrent from spreading such material."*

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (2021): These rules impose significant responsibilities on the social media platforms. The guidelines mandate that 'Significant social media intermediaries' undertake 'due diligence' including appointment of dedicated personnel such as: (i) a chief compliance officer for ensuring compliance with the Rules and the Act, (ii) a nodal person for coordination with law enforcement agencies, and (iii) a grievance officer, all of whom should reside in India.

Public opposition to any new curbs on free speech:

Any attempt to curb speech is opposed by the proponents of free speech. These are not meant as a support of hate speech. These oppositions stem from the fear that such a legislation will be a slippery slope and will be misused by the authorities. Such fears are well founded in India. Past experiences have shown how the laws on sedition have been used to curb dissent and criticism of the government. In *Shreya Singhal v. Union of India* (2013)<sup>30</sup>, the Supreme Court struck down Section 66A of the Information Technology Act 2000 as unconstitutional on grounds of violating the freedom of speech. While making a distinction in different forms of speech, the Court observed: *"There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause*

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<sup>29</sup> AIR 2015 SC 1523

<sup>30</sup> AIR 2015 SC 1523

*public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression public order.”*

### **Part 3: Recent policies aimed at Restricting on Speech in the Cyber World**

The right to freedom of speech is ineffectual without ensuring access to the medium through which that right can be exercised. As we are moving towards a world where the primary mode of communication is over the internet, the access to internet is inseparable from the right to freedom of speech as guaranteed/envisaged by Article 19(1)(a) of the Constitution. However, if this right is seen as a fundamental right, then the most an individual is entitled to is that this right is not infringed upon. There is no entitlement to enforce the State to proactively provide access to the internet to all citizens so that the right to speech can be exercised and enjoyed to the fullest. Hence, if there is any right to access the internet, it is only to the extent that the restrictions imposed on this right are within the bounds as provided for in Article 19(2). The two most controversial policies used by the government agencies around the world to impose restrictions on online speech are restricting access to the internet through blanket shutdown of internet services within specific geographical boundaries and using the agency of the social media platforms themselves and targeting the specific offending speech or speaker. These two policies are discussed in detail here.

#### **3.1 Right to Internet**

The International Telecommunications Union (ITU) has affirmed the principle of the right to freedom of opinion an expression “as an essential foundation of the Information Society” since 2003. The ITU declared, among its other principles, that:<sup>31</sup>

*“We reaffirm, as an essential foundation of the Information Society, and as outlined in Article 19 of the Universal Declaration of Human Rights, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone,*

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<sup>31</sup> <<https://www.itu.int/net/wsis/docs/geneva/official/dop.html>> (last visited on: March 15, 2023).

*everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.” - World Summit on the Information Society: Declaration of Principles: Building the Information Society: a global challenge in the new Millennium.*

In September 2011, the UN Human Rights Committee, a treaty monitoring for the ICCPR, also admitted that Article 19 of the ICCPR protects all forms of electronic and internet based models of expression<sup>32</sup>.

In *Anuradha Bhasin v. Union of India*<sup>33</sup>, the Supreme Court of India considered, among others, the question:

*“Whether the freedom of speech and expression and freedom to practise any profession, or to carry on any occupation, trade or business over the Internet is a part of the fundamental rights under Part III of the Constitution?”*

Holding in the affirmative, the Court concluded:

*“We declare that the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) and (6) of the Constitution, inclusive of the test of proportionality.”*

### **3.2 Intermediary**

The second policy of imposing restrictions through intermediaries has been implemented either as discrete and specific directions to social media platforms to remove/block those posts or user accounts which have been deemed to violate the law or through statutory provisions that mandate that intermediaries monitor all information that flows through their platform, determine if any of that information violates the law and then take action on that determination that includes remove/ block those posts or user accounts. Failure to comply with these directions may make the intermediary criminally liable. This has opened a Pandora's box of legal and ethical and technological issues:

1. The private enterprises risk being used as an executing agency of the State/ Government.
2. The constant monitoring of personal communication poses a threat of invasion of privacy.

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<sup>32</sup> <[https://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf)> (last visited on: March 15, 2023).

<sup>33</sup> Writ Petition (CIVIL) NO. 1031 OF 2019 in the Supreme Court of India.

3. Private corporations have been assigned the duty to determine, through summary adjudication, which speech should be allowed and which restricted. This is a State function and this policy risks being an abdication of its responsibility by the State.
4. Even the biggest social media platforms have expressed their inability to monitor data on such a large scale<sup>34</sup>.

Internet intermediaries<sup>35</sup>, such as internet service providers (ISPs), search engines, web hosting providers and social media platforms, provide the infrastructure and technological capability to enable people around the world to communicate with each other. Because of their technical capabilities, knowhow and control these intermediaries are in a unique position to be able to monitor and regulate online communication. And as a result they are looked at and expected to perform a regulatory function by not just the State entities such as the governments and the opposition political parties, but also other entities such as corporations, citizen groups. Increasingly, the Judiciary, too, is expressing its expectations from the intermediaries to play a part in ensuring that the individual's rights are secure.

In the absence of comprehensive legal provisions, these regulations by the intermediaries are taking place outside the scope of legally recognised standards governing the permissible limitations on freedom of speech and expression. The issues with this regulation by a non-State agency is exacerbated by the lack of transparency and the absence of set mechanisms for individuals to appeal against decisions by these intermediaries. As these are essentially private corporations the result is that that online content, and in effect online speech, is increasingly being regulated and censored via private agencies that offer limited transparency and accountability.

### **Types of intermediary liability<sup>36</sup>**

Over the last few years, increasingly liability is being placed on the intermediaries through legislations, executive policies and even judicial pronouncements. There are three distinct models of liability for intermediaries:

- The strict liability model under which internet intermediaries are liable for any third party

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<sup>34</sup> <<https://www.reuters.com/article/us-facebook-languages-insight-idUSKCN1RZ0DW>>, (last visited on March 15, 2023).

<sup>35</sup> <[article19.org/data/files/Intermediaries\\_ENGLISH.pdf](https://article19.org/data/files/Intermediaries_ENGLISH.pdf)>, (last visited on March 15, 2023).

<sup>36</sup> <<https://www.article19.org/resources/internet-intermediaries-dilemma-liability/>>, (last visited on March 15, 2023).

content. Intermediaries are effectively required to monitor content in order to comply with the law; if they fail to do so, they face a variety of sanctions, including the withdrawal of their business licence and/or criminal penalties.

– The safe harbour model grants intermediaries immunity, provided they undertake certain ‘due diligence’, ‘reasonable safeguards’ and comply with certain requirements. This model includes the ‘notice and take down’ mechanism. Here, the government or even other non-government agencies act as a broker by flagging potentially illegal content. The intermediaries are required to act expeditiously to verify the claims and then to remove any content which is adjudged to be illegal.

– The broad immunity model grants internet intermediaries broad or conditional immunity from liability for third-party content and exempts them from any general requirement to monitor content. The intermediaries are treated as ‘messengers’, who are not responsible for the content they carry, rather than as ‘publishers’, who are responsible for the content that they disseminate although it is produced by others.

### **Conclusion:**

1. The development of the laws that ensure and regulate free speech, built on the historical understanding of the forms of speech, has served us well over the 20th Century. In giving statutory effect to this universally accepted human right, it was recognised that this right is not absolute and reasonable restrictions need to be placed to ensure. The legal provisions which protect these rights from unlawful infringement and place reasonable restrictions on their exercise have developed over the decades with occasional amendments in statutes and judicial interventions. With the advent and meteoric development of the internet, there is a need to reexamine these ideas. Newer forms of speech and have to be recognised as discrete forms of human expression each with their own unique nature and attributes. And with that recognition, the restrictions on these forms have to be reimagined. All these innovations need to contribute toward shaping legal provisions that address the needs and issues of each unique form.

2. As the cyber world has become an integral part of human life and even the primary mode of communication, and as social media has come to be recognised as the new town square, the regulation of speech by these social platforms need to be perused as one would a public entity. Regulation of speech by the intermediaries according to their own terms and policies and ‘community guidelines’ need to be guarded against as this is a de facto abdication of the State’s legislative function. The platforms can no longer be seen as purely private establishments



operating with profit motive. They need to be seen through the lens of the *public trust doctrine* and of the *global commons*.

