

# **INTERNET CENSORSHIP IN INDIA: IS IT ACTING AGAINST FREEDOM OR IS IT SERVING FOR THE BETTERMENT OF THE COMMUNITY?**

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## **INTRODUCTION**

To study the nature of internet censorship one has to understand the meaning of the word censorship<sup>192</sup> which can be defined as the restrictions on publication and the presentation of books, plays, films etc to the public. Now when it is clubbed with the term “internet censorship”<sup>193</sup> it is regarded as an act of control or suppression of the publishing or accessing of information on the Internet. It may be carried out by governments or by private organizations either at the behest of government or on their own initiative.

The past few years have seen an explosion in Internet usage in India with approximately a tenth of the country’s population now considered active internet users.<sup>194</sup> While the increased access to and use of online resources is undoubtedly beneficial to the country as a whole, there continue to remain numerous shortcomings ranging from lack of access in rural areas, skewed sex ratios of those accessing the Internet, and lack of adequate infrastructure, etc. There are also problems with the legal framework governing the Internet ecosystem in India that have captured public attention over the last two years, with the media focusing particularly on censorship.

Indian law dealing with internet censorship is contained in various statutes of which the most important are the Information Technology Act, 2000 (IT Act) and the Indian Penal Code, 1860 (IPC).

The IPC contains broad penal provisions that apply across media platforms while the IT Act applies specifically to computer systems. While some of the provisions contained in the IT Act have been declared unconstitutional the rest remain for the betterment of the society.

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<sup>192</sup> Bryan .A. Garner & Jeff Newman, Black law dictionary(Ingram International Corporation,2011)

<sup>193</sup> The Future of Internet Freedom: New York Times dated 11/3/2014

<sup>194</sup> . IMRB I-Cube 2012, All India Estimates based on Census 2011. See <http://www.dazeinfo.com/2013/01/12/impact-of-poor-english-knowledge-on-internet-penetration-in-india/>

Since the past couple of years, the instances of Internet censorship in India has increased manifold. In 2011, India adopted the new 'IT Rules 2011' that supplemented the IT Act 2000. These rules made it mandatory for Internet intermediaries to remove objectionable content within 36 hours of receiving complaint<sup>195</sup>. But the terms included were vague and open to interpretations. These rules received sharp criticism, but they have prevailed. In 2011, government also drew flak as it asked major sites like Google, Facebook and Yahoo to 'pre-screen' content and remove any objectionable, defamatory content from going live. It was alleged that the government urged the Internet companies to use human beings and not machines to do the needful.

Later in 2012, these companies were dragged to court of law over the same. The Internet companies on their part stood their ground and refused to comply with these terms. However, the increased request from government to take down objectionable content and even seek information pertaining to users account<sup>196</sup>. We witnessed numerous instances of attempts to censor Internet right from arrest of cartoonist *Aseem Trivedi* and blocking of this site to blocking of sites by ISP over concerns of privacy, suspension of Twitter accounts allegedly for fanning rumours during the Assam violence and even arrests over posts on social networking.

Moreover in the case of *Mohammed v. State of Gujarat*<sup>197</sup> it was held that of "information which is obscene in electronic form.- Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees."

India has some very broad laws that could apply to a wide range of online speech, comment and criticism. These laws have been so far rather randomly applied. But the cases that have arisen from individuals criticising politicians by email, Facebook or Twitter to some of the big web companies such as Google and Facebook, show just why India needs to look at limiting both the range of some of its net laws, and to stop these laws criminalising a range of speech.

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<sup>195</sup> Section 67 of the IT Act, 2000

<sup>196</sup> Google Transparency Report.

<sup>197</sup> *Mohammed v. State of Gujarat*, 2009 SCR 1832 3

In 2012, there was widespread outcry in India when two women were arrested for complaining on Facebook about the disruption caused by the funeral of Bal Thackeray, leader of the right wing Hindu party, Shiv Sena. They were arrested under the infamous India's IT Act (2008) which criminalises 'grossly offensive and menacing messages sent by electronic means, but also false messages sent to cheat, deceive, mislead or annoy, taking online censorship beyond offline laws'.<sup>198</sup>

While India falls under 'partially free' category, when it comes to Internet freedom, the increasing attempts of surveillance and censorship have raised concerns amongst the Internet watchdog agencies around the world.

Thus we can see with all the above cases that Internet Censorship has become an important issue when it comes to freedom of a person i.e. whether it is acting for the betterment of the community or acting against the freedom of a person.

## **RELATIONSHIP BETWEEN INTERNET CENSORSHIP AND FREEDOM**

Indian law regarding censorship in traditional media is fairly developed and relatively liberal. Article 19(1) (a) of the Constitution protects the *Right to free speech and expression* irrespective of the medium of communication. While the Courts have interpreted this right in a broad manner, the Constitution permits reasonable restrictions to be placed on the right in view of public policy concerns. Such as 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.<sup>199</sup> In accordance with Article 19(2), the IT Act contains numerous provisions that can be used to censor online content – notably in Sections 66A, 69A and 79. Most tellingly almost all these instances involve executive action with no system of judicial oversight; the law actively encourages private censorship.<sup>200</sup>

The section of the Information Technology Act which has probably received the most media attention over the last year or so is Section 66A of the Information Technology Act, 2000<sup>201</sup>. Namely due to the many arrests made

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<sup>198</sup> Section 66A of the Information Technology Act, 2000

<sup>199</sup> Article 19(2) of the Constitution of India

<sup>200</sup> Section 79 of the Information Technology Act, 2000.

<sup>201</sup> 66A. Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication,—

- (a) any information that is grossly offensive or has menacing character; or
- (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
- (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

under this section, notably the arrest of two teenage girls in Palghar, Maharashtra in November 2012. They were arrested on the grounds that one of the girls posted a comment on Facebook critical of Mumbai being shut down following the death of a political leader. Her friend 'liked' the post. Both were arrested under Section 66A, IT Act and Section 295A<sup>202</sup> of the IPC.

This provision criminalizes the practice of sending an offensive message using a computer resource. The biggest concern in this regard is the extremely wide and ambiguous scope of the provision which could include anything that is considered offensive, menacing, that causes annoyance or inconvenience, that insults, that causes enmity, hatred or ill-will, etc. The punishment for such an offence is three years imprisonment.

The wide phrasing of the provision has ensured that it can be used to criminalize almost any behaviour on the Internet (including that which would not constitute a crime in the physical world and this has been seen in practice as various activists and other have been arrested for posting comments critical of political parties or persons (usually, as illustrated by the aforementioned Palghar case, for posting completely innocuous comments).

The widespread public uproar following the numerous instances of misuse of this provision lead to a Public Interest petition being filed in India's Supreme Court, which read down the provision holding that the powers under the section (of arrest) were to be used only upon instructions from a senior police official. The provision however continues to remain on the statute books.

Two other sections of the Information Technology Act - Section 69A and 79<sup>203</sup> have received far less attention from the public, possibly as these are substantive provisions of law and not punitive provisions (as S 66A is). These provisions however set up a system of censorship that is arguably unconstitutional.

Section 69A<sup>204</sup> of the IT Act authorizes the government to block any content from being accessed by the public on various grounds (In end November 2013, a fresh PIL was filed in the Supreme Court by the PUCL

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<sup>202</sup> 295A. Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.—Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of India], [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to 4[three years], or with fine, or with both.

<sup>203</sup> 79. INTERMEDIARIES NOT TO BE LIABLE IN CERTAIN CASES

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him.

<sup>204</sup> 69 POWER TO ISSUE DIRECTIONS FOR INTERCEPTION OR MONITORING OR DECRYPTION OF ANY INFORMATION THROUGH ANY COMPUTER RESOURCE. -

(1) Where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject

challenging *inter alia* all these provisions of the IT Act as well as rules framed there under). The Supreme Court has issued notice to the government and is presently seized of the matter. An intermediary who fails to comply with directions to block content is liable to be imprisoned for up to seven years.

This provision ensures that the government can block any content it deems to fall within the fairly broad conditions and has been used with mixed results while no doubt there are instances where content does need to be censored (for instance one of the sparks for the recent communal violence in Uttar Pradesh was the distribution through Facebook of a fake video showing violence committed against the majority community), practice shows that directions issued by the government lack precision (leading to whole domains and websites being blocked), lack appropriate oversight and accountability mechanisms, etc. The broad and ambiguous nature of the conditions to be satisfied before invoking this power are also cause for concern.

Section 79 of the IT Act requires an Intermediary to observe certain guidelines in order to avail of exemption from liability. These guidelines (issued in 2011) mandate that the Intermediary must take down any information that is *inter alia* grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, harm minors in any way or otherwise unlawful in any manner whatever, acting upon private complaint or if they discover such content on their own.

**August 2015:** The social media has been flooded with user complaints about the government of India blocking as many as 857 pornographic websites in an apparent bid to lower abuse against women. The Ministry of Communications and Information and Technology, in its order of July 31 under section 79(3)(b) of the IT Act 2000, banned these 857 websites terming their content "immoral and indecent".<sup>205</sup>

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to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

(2) The procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.

(3) The subscriber or intermediary or any person in-charge of the computer resource shall, when called upon by any agency referred to in sub-section (1), extend all facilities and technical assistance to-

(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or

(b) intercept, monitor, or decrypt the information, as the case may be; or

(c) provide information stored in computer resource.

(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.]

<sup>205</sup> Porn ban: Leaked order lists 857 websites blocked on grounds of 'morality and decency', IBN Live, August 3 2015.

Many Indians had accused the government of moral policing and infringing on personal freedom. "Don't ban porn. Ban men ogling, leering, brushing past, groping, molesting, abusing, humiliating and raping women. Ban non-consent. Not sex," author Chetan Bhagat said on Twitter. "Porn ban is anti-freedom, impractical, not enforceable. Politically not very smart too. avoidable. Let's not manage people's private lives," he added. In the past India has tried to control social media sites like Facebook and Twitter and ask them to take down offensive material. It had briefly blocked several Twitter accounts in 2012 citing security and law and order fears. It also blocked access to a homegrown soft-porn website in 2009.<sup>206</sup>

Various organizations have been campaigning for an amendment to this provision and in fact the Parliament's Subordinate Committee on Legislation has recommended revisiting these guidelines in order to make them compliant to the Constitution. Further steps are yet to be taken by the Government, which has, however, assured the country that it is not interested in censoring content.

Finally in **Shreya Singhal v. Union of India**<sup>207</sup> it was held that Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1) (a) and not saved under Article 19(2). Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

Section 79 is valid subject to Section 79(3) (b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relating to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

## **EFFECT OF INTERNET CENSORSHIP ON THE SOCIETY**

The status of internet censorship in and around India becomes very clear when we go through certain reports published. Which are as follows:-

The India country report that is included in Freedom House's: *Freedom on the Net 2012* report<sup>208</sup>

- India's overall Internet Freedom Status is "Partly Free", unchanged from 2009.

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<sup>206</sup> Porn ban to be lifted partially, says government, India Today, August 4 2015.

<sup>207</sup> Shreya Singhal v. Union of India, (2015) 12 SCC 73

<sup>208</sup> Freedom on the Net 2012: Freedom House

- India has a score of 39 on a scale from 0 (most free) to 100 (least free), which places India 20 out of the 47 countries worldwide that were included in the 2012 report. This is considered, by Freedom House, to be a "notable" decrease from the previous year's rank of 14 out of the 37 countries worldwide that were included in the 2011 report.
- India ranks third out of the eleven countries in Asia included in the 2012 report.
- Prior to 2008, censorship of Internet content by the Indian government was relatively rare and sporadic.
- Following the November 2008 terrorist attacks in Mumbai, which killed 171 people, the Indian Parliament passed amendments to the Information Technology Act (ITA) that expanded the government's censorship and monitoring capabilities.
- While there is no sustained government policy or strategy to block access to Internet content on a large scale, measures for removing certain content from the web, sometimes for fear they could incite violence, have become more common.

Whereas in the 2011 the scenario of the world was as follows<sup>209</sup>:-

Of the 37 countries surveyed:-

- 8 were rated as "free" (22%),
- 18 as "partly free" (49%),
- 11 as "not free" (30%).

In their 2009 report:-<sup>210</sup>,

Of the 15 countries surveyed,

- 4 were rated as "free" (27%),
- 7 as "partly free" (47%),
- 4 as "not free" (27%).
- And of the 15 countries surveyed in both 2009 and 2011, 5 were seen to be moving in the direction of more network freedom (33%), 9 moved toward less freedom (60%), and one was unchanged (7%).

Furthermore in a poll of 27,973 adults in 26 countries, including 14,306 Internet users was conducted for the BBC World Service by the international polling firm GlobeScan using telephone and in-person interviews between 30 November 2009 and 7 February 2010. GlobeScan Chairman Doug Miller felt, overall, that the poll showed that:

<sup>209</sup> Freedom on the Net 2011: Freedom House

<sup>210</sup> Freedom on the net 2009:Freedom House

Despite worries about privacy and fraud, people around the world see access to the internet as their fundamental right. They think the web is a force for good, and most don't want governments to regulate it.

Findings from the poll include:<sup>211</sup>

- Nearly four in five (78%) Internet users felt that the Internet had brought them greater freedom.
- Most Internet users (53%) felt that "the internet should never be regulated by any level of government anywhere".
- Opinion was evenly split between Internet users who felt that "the internet is a safe place to express my opinions" (48%) and those who disagreed (49%). Somewhat surprisingly users in Germany and France agreed the least, followed by users in highly filtered countries such as the People's Republic of China and South Korea, while users in Egypt, India and Kenya agreed more strongly.
- The aspects of the Internet that cause the most concern include: fraud (32%), violent and explicit content (27%), threats to privacy (20%), state censorship of content (6%), and the extent of corporate presence (3%).
- Almost four in five Internet users and non-users around the world felt that access to the Internet was a fundamental right (50% strongly agreed, 29% somewhat agreed, 9% somewhat disagreed, 6% strongly disagreed, and 6% gave no opinion). And while there is strong support for this right in all of the countries surveyed, it is surprising that the United States and Canada were among the top five countries where people most strongly disagreed that access to the Internet was a fundamental right of all people (13% in Japan, 11% in the U.S., 11% in Kenya, 11% in Pakistan, and 10% in Canada strongly disagree).

## RECOMMENDATIONS

The restrictions on digital free speech in India are of great concern. The main issues are takedown and blocking policies, along with the network shutdowns and criminalisation of online speech. Amending notice and takedown procedures are key reforms necessary to provide greater clarity and certainty to intermediaries. Intermediaries should be required to alert authors and provide them a means of appeal when their content is flagged for takedown, a process that can often take longer than 36 hours. The time frame for intermediaries to respond should be extended. Codifying these reforms into law and implementing them swiftly and effectively would reduce the associated threat to freedom of expression.

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<sup>211</sup> BBC Internet Poll: Detailed Findings 2010



## CONCLUSION

The issue of censorship of online content in India is a tricky one; the Constitution permits censorship in certain limited circumstances. This is a problem as due to the global nature of the Internet, it is very difficult to control content being uploaded in foreign countries and being viewed in India. Further, the thorny issue of who gets to decide to censor content and under what circumstances is a nuanced debate which unfortunately tends to be hijacked by arguments based on security concerns / need for broad emergency provisions. Most attempts at censorship have therefore been haphazard and inconsistent.

Further, issues raised by communal, defamatory and violent content (particularly towards women) continue to receive very little attention. Particularly worrying is the lack of accountability, transparency and oversight in the system.

One hopes that the Supreme Court will take appropriate action by striking down the relevant provisions in the IT Act thereby forcing the legislature and executive to put in place a more open, equitable and just systems of censorship that truly abides by the Constitutional spirit embodied in A 19(1) (a) and just not take down a single provision.



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