

# **FREEDOM OF SPEECH AND EXPRESSION *vis-à-vis* DIGITAL MEDIA**

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## **ABSTRACT**

The essence of fundamental right lays in the word 'fundamental' itself. Fundamental constitutes the foundation of anything, upon which the whole concrete set up could be done. In our constituent assembly, every maker agreed on one thing and that was safeguarding people's rights. In pursuance of it they adopted the fundamental rights from the bill of rights of US constitution. The makers were aware of not only the responsibility it carried but also the power of it. And as the saying goes "with great power comes great responsibility", it was aware of consequences it carried if not restricted. Our "fundamental rights" is not unlimited liberty given to us on platter but yes it is served in a restricted sense. There cannot be a liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraint, the rights and freedom, may become synonymous with anarchy and disorder. According to Justice Sanjay Kishan Kaul, "Freedom of Speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends."

## **INTRODUCTION**

The 21<sup>st</sup> century has been called the 'Internet Age', rightly so as most of the work today is done with the help of the Internet. Especially with the COVID-19 pandemic, the Internet has provided a quick and efficient platform to all people for expressing their thoughts, beliefs, words, etc.

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Since the 17<sup>th</sup> century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognize these rights and freedoms and allow them a free play.<sup>i</sup>

Fundamental Rights are rights having a noble pedigree. They are natural rights which are in the nature of external conditions necessary for the greatest possible unfolding of the capacities of a human being. These secured and guaranteed conditions are called 'fundamental rights'. Such rights command a higher sanctity than other rights e.g. rights based on contract because they exist independent of any Act.

Thus, Fundamental Rights were deemed essential to protect the rights and liberties of the people against the encroachment of the power delegated by them to their government. They are limitations upon all the powers of the Government. In *Maneka Gandhi vs. Union of India*<sup>ii</sup>, Bhagwati J. observed:

*"These fundamental rights represent the basic values enshrined by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantee' on the basic structure of human beings, and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."*

In the backdrop of widespread internet shutdowns in Jammu & Kashmir, the courts were faced with the question of Whether Right to Internet Access is a Fundamental Right? This question is based on the argument that Internet allows people to express themselves and hence has a close connection with Freedom of Speech and Expression. However, again a question arises is: Whether the Freedom of Speech and Expression as provided prior to Internet would be applicable to the Internet age or the limits of the same shall be extended or reduced?

In this backdrop, the present paper analyzes the concept of the fundamental right of free speech and expression, its restrictions, the freedom of speech and expression as provided under the international regime and the Indian Constitution. It also studies the applicability of free speech and expression in the digital age. Finally, the paper suggests some recommendations.

## WHAT ARE ‘FUNDAMENTAL RIGHTS’?

In England, it was regarded that the Parliament suffers no limitations. There are no restraints on its legislative powers. The law made by the Parliament cannot be annulled on the ground that it violates a liberty, it does not take away a liberty not because it does not have any power to do so but because of its long tradition of being a champion of liberty. But things have considerably changed after the UK has entered the European Community and submitted to the jurisdiction of European Human Rights Commission. In the year 1988 the Parliament of UK enacted the Human Rights Act.

The treatment meted out by the British to the Indians was no different from that received by the Americans. The American people fought against the British Parliament when they themselves a constitution they built some restraints in it so that the legislature may not become tyrannical. They made the Constitution paramount. The Declaration of American Independence drafted by Jefferson proclaimed:

*“We hold these truths to be self-evident, that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness...”*

The Constitution of USA as originally framed in 1787 and brought into force in 1789 did not contain the Bill of Rights and thus lacked the guarantee of inalienable rights. But soon thereafter in 1791, two years after the Constitution came into force, the first ten amendments to the Constitution were adopted. These are called ‘The Bill of Rights’.

In modern times, the concept of people’s basic rights has been given a more concrete and universal texture by the Charter of Human Rights enacted by the United Nations Organization (U.N.O.), and the European Convention on Human Rights. The Preamble to the Universal Declaration of Human Rights *inter alia* declares:

*“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”*

The Australian Constitution, flowing the traditions of Britain, does not have a Bill of Rights but guarantees only a few rights, e.g. freedom of religion.

In India, there exist quite a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. The Congress Party, from its experience of the British rule, demanded for such rights. Also, the Indian society is fragmented into many religions, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence.

Thus, the incorporation of Fundamental Rights is a necessary consequence of the declaration in the Preamble to the Constitution that the people have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic, and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity.

Part III of the Constitution protects substantive as well as procedural rights.<sup>iii</sup> Articles 12 to 35 of the Constitution pertains to Fundamental Rights of the people. These Rights are reminiscent of some of the provisions of the Bill of Rights in the US Constitution but the former cover a much wider ground than the latter. Also, the US Constitution declares the Fundamental Rights in broad and general rights. But as no right is absolute, the courts have, in course of time, spelled out some restrictions and limitations on these Rights. The Indian Constitution, however, adopts a different approach in so far as some Rights are worded generally; in respect of some Fundamental Rights; the exceptions and qualifications have been formulated and expressed in a compendium form in the Constitution itself, while in respect of some other Rights, the Constitution confers power on the Legislature to impose limitations.

The Fundamental Rights in the Indian Constitution have been grouped under six heads as follows:

- (i) *Right to Equality* (Articles 14 to 18)
- (ii) *Right to Freedom* (Articles 19 to 22)
- (iii) *Right Against Exploitation* (Articles 23 and 24)
- (iv) *Right to Freedom of Religion* (Articles 25 to 28)
- (v) *Cultural and Educational Rights* (Articles 29 and 30)
- (vi) *Right to Constitutional Remedies* (Articles 32 to 35).

Out of all the rights, the present paper would be limited to the ‘Right to Freedom of Speech and Expression’ and its interpretation in the digital technological age.

Speech and expression play a vital role in guaranteeing a person the liberty to do or not do certain things they desire. It in development of nation from being a deficient democracy to a competent and accountable one. Almost the whole world has accepted it as basic right of human beings. Freedom of speech and expression is not only a basic human right, but in most of the countries it is considered as the fundamental right of a person, without which the development of any person is not possible and if one is not able to develop oneself, one can’t give their contribution in the development of the country and world. With this in mind, Freedom of Speech and Expression was recognized in the Universal Declaration of Human Rights (‘UDHR’) and International Covenant on Civil and political Rights (‘ICCPR’). It has also been given the status of a ‘Fundamental Right’ under Article 19 of the Constitution of India.

The UDHR holds 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.”*

Similarly, the ICCPR holds that:

*“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*

Under the Constitution of India, Article 19 (1)(a) guarantees all citizens the right to ‘freedom of speech and expression’. Under Article 19(2), reasonable restrictions can be imposed on the exercise of this right for certain purposes. However, any limitation on the exercise of the right provided under Article 19 (1)(a) not covered within the scope of Article 19(2) is not valid.

## **RESTRICTIONS OF FREEDOM OF SPEECH AND EXPRESSION**

The Right to Freedom of Speech and Expression is not absolute and is subject to reasonable restrictions. Such restrictions are necessary to maintain social order. No freedom can be

absolute or completely unrestricted. Accordingly, under Article 19 (2), the State may make a law imposing ‘reasonable restrictions’ on the exercise of the right of freedom of speech and expression ‘in the interests of’ the security of the State, friendly relations with foreign States, public order, decency, morality, sovereignty and integrity of India, or ‘in relation to contempt of Court, defamation or incitement to an offence’.

However, the expression ‘reasonable’ is not defined. In such absence, each case has to be determined considering the facts and other circumstances. Further, the Supreme Court has held that *“It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases.”*

However, the Courts in India have laid down a few propositions in this regard.

Thus, the standard of reasonableness is to be ascertained with due reference to the subject-matter of the legislation in question, economic and social conditions in India and the surrounding circumstances. Also, the concept and scope of what is reasonable changes with time and absorb the current socio-economic values.

Thus, Article 19 (2) explains the circumstances in which the Right to Freedom of Speech and Expression can be suspended. In *Peoples’ Union for Civil Liberties (PUCL) v. Union of India*,<sup>iv</sup> the Hon’ble Supreme Court held that the reasonable restrictions can be imposed on the freedom of speech and expression, in *the interest of the security of the State*. The term ‘security of State’ has to be distinguished from public order. For security of the State refers to serious and aggravated forms of public disorder, such as rebellion or waging war against the Government, insurrection. Another situation is where it hampers the friendly relations of India with other State or States or public order.

In *Romesh Thapar v. State of Madras*,<sup>v</sup> it was held that ‘public order’ is different from law and order and security of the State. The expression ‘public order’ connotes a sense of public peace, safety and tranquility, and anything that disturbs public peace disturbs public order. But mere criticism of the Government does not necessarily disturb public order. A law which punishes the deliberate utterances hurting the religious feelings of any class, has been held to be valid and reasonable restriction aimed to maintaining the public order.

Further, Sections 292 to 294, I.P.C, 1860 provide instances of restrictions on the freedom of speech and expression on the grounds of *decency and morality*.

Section 292 of I.P.C, 1860 reads as follows:<sup>vi</sup>

**Section 292. Sale, etc., of obscene books, etc.-**

*[(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, 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.]*

(2) *Whoever-*

- (a) sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or*
- (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or*
- (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or*
- (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or*
- (e) offers or attempts to do any act which is an offence under this section,*

*shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the*

*event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].*

*[Exception.-This section does not extend to-*

*(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—*

*(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or*

*(ii) which is kept or used bona fide for religious purposes;*

*(b) any representation sculptured, engraved, painted or otherwise represented on or in—*

*(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or*

*(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]]*

Also, Section 293 of I.P.C., 1860 reads as follows:<sup>vii</sup>

**Section 293. Sale, etc., of obscene objects to young person-**

*Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished [on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees]*

Lastly, Section 294 reads as follows:<sup>viii</sup>

**Section 294. Obscene acts and songs-**

Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or



(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

However, the standard of morality changes with changing times. What was considered as 'obscene' or against morality a few decades or years back would not necessarily be considered same in today's times. Further, the standards of morality is not same for each person or group of persons.

In *Ranjit D. Udeshi v. State of Maharashtra*<sup>ix</sup>, the Hon'ble Supreme Court upheld the conviction of a book-seller who was prosecuted under Section 292 of I.P.C. for selling and keeping the book *Lady Chatterley's Lover*.

Another ground for restriction is *Contempt of Court*. This restriction does not allow any person to indulge in contempt of court by claiming Article 19 as a protective shield. In *E.M.S. Namboodripad v. T.N. Nambiar*<sup>x</sup>, the Supreme Court confirmed the decision of the High Court, holding Mr. Namboodripad guilty of contempt of court. In *M.R. Parashar v. Farooq Abdullah*<sup>xi</sup>, contempt proceedings were initiated against the Chief Minister of Jammu and Kashmir. But the Court dismissed the petition for want of proof. In both the cases, Hon'ble Court did not allow Article 19(10)(a) as a defense against the charges of contempt of court. Again *In Re. Prashant Bhushan & Another*<sup>xii</sup>, the Court found Senior Advocate Prashant Bhushan guilty of criminal contempt and the court observed:

*"The scurrilous allegations, which are malicious in nature and have the tendency to scandalize the Court are not expected from a person, who is a lawyer of 30 years standing. In our considered view, it cannot be said that the above tweets can be said to be a fair criticism of the functioning of the judiciary, made bona fide in the public interest."* It was further held, *"In our considered view, the said tweet undermines the dignity and authority of the institution of the Supreme Court of India and the CJI and directly affronts the majesty of law...the tweets which are based on distorted facts, in our considered view, amount to committing of 'criminal contempt'."*

The Bench added, *"If such attack is not dealt with, with requisite degree of fairness, it may affect the national honour and prestige in the comity of nations. Fearless and impartial courts*

*of justice are the bulwark of a healthy democracy and the confidence in them cannot be permitted to be impaired by malicious attacks upon them.”*

Other reasonable restrictions on the Freedom are those that of defamation, Incitement to an Offence, Sovereignty and Integrity of India. Clause (2) of Article 19 prevents any person from making any statement that defames the reputation of another person. Such other person may either be living or dead. Sections 499 and 500 of I.P.C. cover defamation. Although ‘truth’ is considered as a defense against defamation, but the defense would be helpful only if the statement is made in public interest.

Article 19(2) also prohibits a person from making any statement that incites people to commit offense.

Another restriction ‘sovereignty and integrity of India’ is aimed to prohibit anyone from making the statements that challenge the integrity and sovereignty of India. Accordingly, Section 2 of the Criminal Law Amendment Act, 1961 makes penal the questioning of the “territorial integrity or frontiers of India” in a manner which is, or is likely to be, prejudicial to the interests of the safety or security of India.

## **WHAT IS ‘SOCIAL MEDIA’?**

Today, technology has become a boon for those who require to share information in bulk. It primarily comprises of internet, mobile phone-based tools for sharing and discussing information. Rather than the physical environment, today communication is possible through Internet with a combination of internet, technology and interactive tools. Such combination enables the wireless dissemination of information quickly and seamlessly.

As such, social media can be defined “as any web or mobile-based platform that enables an individual or agency to communicate interactively and enables exchange of user-generated content.”<sup>xiii</sup> Andreas Kaplan and Michael Haenlein define social media as “a group of internetbased applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user- generated content.”<sup>xiv</sup> “Web 2.0” refers to Internet platforms that allow for interactive participation by users.<sup>xv</sup> “User generated content” is the name for all of the ways in which people may use social media.<sup>xvi</sup> The

Organization for Economic Cooperation and Development (OECD) specifies three criteria for content to be classified as “user generated:” (1) it should be available on a publicly accessible website or on a social networking site that is available to a select group, (2) it entails a minimum amount of creative effort, and (3) it is “created outside of professional routines and practices.”<sup>xvii</sup>

### ***Types of social media***

Social media can be broadly classified in the following categories:<sup>xviii</sup>

#### **1. Social networking**

Social networking is an online service that enables its users to create virtual networks with likeminded people. It offers facilities such as chat, instant messaging, photo sharing, video sharing, updates etc. The most popular are Facebook and LinkedIn.

#### **2. Blogs**

Blogs are descriptive content created and maintained by individual users and may contain text, photos and links to other websites. The interactive feature of blogs is the ability of readers to leave comments and the comment trail can be followed.

#### **3. Micro blogs**

Micro blogs are similar to blogs with a typical restriction of 140 characters or less, which allows users to write and share content. Twitter is a micro blogging site that enables its users to send and read ‘tweets’.

#### **4. Vlogs and Video Sharing sites**

Video blogs (Vlogs) are blogging sites that mainly use video as the main form of content supported by text. You Tube is the world’s largest video sharing site. You Tube is a video live casting and video sharing site where users can view, upload, share videos and even leave comments.

#### **5. Wikis**

Wiki is a collaborative website that allows multiple users to create and update pages on particular or interlinked subjects. While a single page is referred to as ‘wiki page’, the entire

related content on that topic is called a 'Wiki'. These multiple pages are linked through hyperlinks and allow users to interact in a complex and non-linear manner.

### **6. Social Bookmarking**

These services allow one to save, organize and manage links to various websites and resources around the internet. Interaction is by tagging websites and searching through websites bookmarked by other people. The most popular are Delicious and Stumble Upon.

### **7. Social News**

These services allow one to post various news items or links to outside articles. Interaction takes place by voting for the items and commenting on them. Voting is the core aspect as the items that get the most votes are prominently displayed. The most popular are Digg, Reddit and Propeller.

### **8. Media Sharing**

These services allow one to upload and share photos or videos. Interaction is by sharing and commenting on user submissions. The most popular are YouTube and Flickr.

There can be overlap among the above-mentioned types of social media. For instance, Facebook has micro blogging features with their 'status update'. Also, Flickr and YouTube have comment systems similar to that of blogs.

## **FREEDOM OF SPEECH AND EXPRESSION AND SOCIAL/DIGITAL MEDIA**

The technological age has brought with it certain challenges particularly for the enforcement of Fundamental Rights and Crimes. New types of crimes are being committed with the help of technology and the application of rights over Internet often arises. One particular point which has become a matter of great discussion and regulation is the liability of content providers over Internet and fundamental rights.

Technologies have made it now possible for people to be on the go, while they communicate, exchange thought processes, send and receive e-mails and do a host of other functions that

were earlier perceived to be only done with stationary devices like computers and computer systems. Consequently, the increased usage of electronic devices has now changed the way people perceive, think, govern, as well as do commerce. Today, increasingly electronic ecosystem and digital devices are being used not only for accessing Internet, sending and receiving e-mail but also for information, education and entertainment purposes, whether it be for watching a movie, listening to music, making short films and taking photographs with cameras on mobiles and for a host of new applications that are hitting the market with each passing week.<sup>xix</sup>

While electronic devices have increased the convenience of the users, they have also underlined the importance and significance of Intermediaries. Intermediaries are increasingly becoming important repositories of data. These Intermediaries have data pertaining to almost all activities done, using electronic ecosystems as also electronic platforms. It seems that almost suddenly, while the electronic revolution has been penetrating different parts of the world, the Intermediaries have become important players in terms of third-party data that is either resident in or processed or transmitted using the said service providers' computers, computer systems, computer networks, computer resources and communication devices. It is in this context that Intermediaries are becoming increasingly relevant not only in the context of dispute resolution but also in the context of tracking and investigating various kinds of cyber crimes and other unwarranted criminal activities. Given the way things are going, the importance of intermediary in terms of them being data repositories will continue to increase with the passage of time. Therefore, these intermediaries are recognised as important stakeholders in the electronic ecosystem. Further, the law seeks to stipulate the specific limits of the duties, obligations and responsibilities of these intermediaries. In India, the law pertaining to Intermediaries is well defined. The Indian Information Technology Act, 2000 (hereinafter referred as 'IT Act') as amended has not only given a legal definition to the term "Intermediary" but has also stipulated the rights, duties and obligations of intermediaries.

Section 2(1)(w) of the amended IT Act, 2000 defines the term "intermediary" in the widest possible terms in the following manner:- "Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service

providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.” The term “intermediary” has been defined in very wide terms by Section 2(1)(w) of the Indian IT Act, 2000 which includes any legal entity who on behalf of another person, receives, stores or transmit any particular electronic record or provides any service with respect to that record. It is pertinent to note that all network service providers, websites and online marketplaces have been brought within the ambit of the term “intermediary” under Section 2(1)(w) of the amended IT Act, 2000. The law relating to Intermediaries is elaborated in Section 79 of the IT Act 2000. Section 79 of the IT Act 2000 is possibly one of the most important and significant provisions under the Indian Cyberlaw. This Section’s importance can further be noticed when one examines that this is the only solitary Section which comes in Chapter XII entitled “Intermediaries Not To Be Liable In Certain Cases”.

Section 79 of the IT Act, 2000 detailed the liability of network service providers. The very tenor of the language categorically showed that the law presumed that the network service providers shall be liable in a majority of cases and only in certain specified cases would the network service providers not be liable. This interpretation found further credence from the usage of the words “for the removal of doubts” in Section 79. Section 79 was thus in the nature of a clarificatory section. Also, it was in a declaratory mode as it used the words “it is hereby declared”.

This Section gave a definition of "network service provider". Explanation (a) to Section 79 provided that network service provider means an intermediary.

The term "intermediary" had been defined under Section 2(1)(w). A perusal of the then Section 2(1)(w) demonstrated that the term "intermediary" had only been defined with reference and with respect to any particular electronic message to mean any person, who, on behalf of another person, receives, stores or transmits that message or provides any service with respect to that message. Section 79 did not talk merely about any particular electronic message. It went on to mention about third-party information or data.

However, after the coming into effect of the IT Act, 2000, for couple of years, people were not even aware about the existence of Section 79. However, it was some high-profile cases which brought the attention of the relevant stakeholders to the importance and significance of Section 79 of the IT Act, 2000. One of the first cases pertaining to the liability of network service

providers was the **Bank NSP case**<sup>xx</sup>. In the said case, a bank employee had used the bank's network, for the purposes of sending defamatory and derogatory email. The Bank was sued in its capacity as a network service provider and intermediary. In the said case for the first time the Delhi High Court had passed orders against the bank in its capacity as the intermediary relying upon the requirements of Section 79 of the IT Act, 2000.

Section 79 of the IT Act, 2000 came into sharp focus in the mid-2000s when the Baazee.com case took place. Baazee.com case<sup>xxi</sup> originated from the famous DPS MMS which showed a schoolgirl giving oral sex to her classmate. The said MMS was recorded on a phone and was initially meant for private circulation. However, it leaked out in the public domain. A student at IIT Kharagpur tried to monetize the said DPS MMS by posting a post on the online auction portal Baazee.com. The said post offered to sell the said DPS MMS for consideration. Due to the said post, a number of downloads were made by people. In that case, the CEO of Baazee.com was arrested on the grounds that Baazee.com was an intermediary and network service provider. The CEO of Baazee.com was subsequently released and charge sheet filed. The charge sheet was sought to be quashed by filing a petition before the Delhi High Court. The Delhi High Court dismissed the petition by a detailed judgment.

Thus, Baazee.com/Avnish Bajaj case is one of the most significant cases in the history of Indian Cyberlaw jurisprudence. In the said case, the law-enforcement initiated action against Mr. Avinish Bajaj, CEO, Baazee.com given the role of Baazee.com as a network service provider in enabling the publication and transmission of obscene DPS MMS related content. The arrest of the CEO of Baazee.com and his subsequent release on bail after few days shocked the Indian corporate industry. The entire public sector was up in arms against Section 79 of the IT Act, 2000. Their argument was that there was no legal rationale or basis for arresting or initiating criminal action against a service provider company's CEO. While summarizing its judgment, Delhi high court highlighted that the Baazee.com case reveals, the law in our country is not adequate to meet the challenge of regulating the use of the internet to prevent dissemination of pornographic material and that it may be useful to look at the legislative response in other common law jurisdictions.

Following a huge uproar from various stakeholders, the Indian Parliament proposed some amendments to Section 79. Subsequently with the 26/11 Mumbai attacks, the Indian Government proposed the Information Technology (Amendment) Act, 2008.

The first remarkable feature about the amended Section 79 of the IT Act, 2000 is that it has increased the ambit of its applicability. From the mere context of the earlier Section 79 of the IT Act, 2000 being applicable only to network service providers, the scope and ambit of applicability of the amended Section 79 of the IT Act, 2000 has been dramatically increased. Now, the amended Section 79 of the IT Act, 2000 is applicable to intermediaries.

Section 79 of the amended IT Act, 2000 is also applicable to all kinds of service providers given the specific definition of the term “intermediary”. Section 2(1)(w) of the amended IT Act, 2000 has defined the term “intermediary”, with respect to any particular electronic records to mean any person, who on behalf of another person, receives, stores or transmits that record or provides any service with respect to that record. The term “intermediary” includes specifically telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes. Thus, all kinds of service providers would clearly qualify within the ambit of the definition of the term “intermediary”. Thus, any service provider of any service of any kind whatsoever, whether direct or indirect, which is provided on a computer platform or which is available using computer network, would also qualify to be an “intermediary” within the meaning of Section 2(1)(w) of the amended IT Act, 2000. Today, in the context of electronic ecosystem, a large number of value-added services are being provided by various service providers as also by content service providers.

Thus, by and large, the intermediaries shall not be liable for any third-party information, data or communication link made available or hosted by them. However, this proposition is subject to the provisions of Section 79(2) & (3). The said intermediary will not be liable if the three conditions stipulated under Section 79(2) of the amended IT Act, 2000 are fulfilled, that is:

- The intermediary’s function is limited to providing access to electronic ecosystems and communication system over which information made available by third-parties is transmitted or temporarily stored or hosted;
- The intermediary must satisfy that it does not:



- i) initiate the transmission;
  - ii) select the receiver of the transmission; and
  - iii) select or modify the information contained in the transmission
- The intermediary does not select or modify the information contained in the transmission

In short, the intermediaries must show that they have observed all requirements of ‘due diligence’ while discharging their obligations under the IT Act, 2000. However, the word ‘due diligence’ has neither been defined under the Information Technology Act, 2000 nor under the Information Technology (Amendment) Act, 2008. There exists no well developed universally recognised standards of due diligence in the electronic environments. Another issue is how and in what particular way, would due diligence be judged? Would due diligence be judged in terms of money? Or is due diligence going to be judged from standards of technology? Or is due diligence going to be measured in terms of the test of a reasonable man? In the actual world, the test of a reasonable man with reasonable intelligence is a good deciding factor for establishing due diligence. However, should the same test be made the touchstone for deciding due diligence of an intermediary?

In a case, the Hon’ble Supreme Court laid down a principle stating Section 79 will not grant immunity to an accused who has violated the provisions of the Act as the provision gives immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Technology Act itself.

Section 79(3) further stipulates the conditions in which the exemption from liability for any third party information, data or communication link made available or hosted by an intermediary would not be applicable. Section 79(3) states that the provision of the Section 79(1) shall not apply if any of the two conditions stipulated therein are met. An intermediary shall continue to be liable for third party information, data or communication link made available or hosted by him if the intermediary has conspired, abetted, aided, induced, whether by threats or promise or otherwise, in the commission of unlawful act. Thus, the moment the intermediary has participated directly or indirectly in the commission of unlawful act, whether actively or passively, the exemption from liability for third party information, data or communication link made available or hosted by the intermediary shall not be

applicable. Further, if upon receiving actual knowledge or being notified by the appropriate Government or its agencies that any information, data or communication link residing in or connected to computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to either expeditiously remove or disable access to that material on that the computer resource without vitiating the evidence in any manner, the intermediary shall continue to be liable for all third party data or information made available by them.

The actual knowledge can be received by the intermediary either from any concerned user, subscriber or other person by their communication in writing or by a legal notice indicating that any information, data or communication link residing in or connected to computer resource controlled by intermediary, is being used to commit the unlawful act. Further, the intermediary can also be notified by the appropriate Governments, Central Government or State Governments or any of its agencies including law enforcement agencies of committing of any unlawful act using the information, data or communication link residing in or connected to computer resource controlled by the intermediary. Once, the intermediary has received actual knowledge or has been notified of any provision of an unlawful act using any data, information or communication link residing in or connected to computer resource controlled by the intermediary, the intermediary has been mandated to expeditiously act and remove or disable access to the said material on its computer resource. Further, the intermediary has been cast with the mandatory duty of ensuring that while it removes or disables access expeditiously to the offending material on its computer resources, it does not vitiate the evidence in any manner. In case, the intermediary is not able to do these mandatory duties, it shall continue to be liable for all third-party information, data or communication link made available or hosted by him.

Another issue which needs to be understood in the context of freedom of speech and expression and social media is censoring the online content, as done in case of films and television.

Information is a buzz word today. It is essential to march along with the progressive trends in today's world. Technology savvy world with an increasing capacity for communicating, simplifying and storing information with amazing speed has put information at the core of development.<sup>xxii</sup> There can be no democratic participation in decision making without

transparency and sharing information. Social media has the power to reach the masses and distribute information, which in turn has resulted in everyone acting as a watchdog, scrutinizing the powerful and exposing mismanagement and corruption.<sup>xxiii</sup> Till recently, governments across the globe have tried to withhold information from the common man on one pretext or another. And, now with the advent of social media with immense power of delivering information to the masses, is perceived as a threat by Governments who are carefully trying to regulate it. Internet has become the basis of modern civilization due to its limitless possibilities and widespread reach. As it is quite instrumental in the storage and dissemination of information and opinion, it has acquired a unique role in the functioning of democracies all over the world. Through social media and internet, the citizens can unite despite territorial limitations. Although everyone is not physically present, the force of the protest is not diminished in any way. Thus, it is evident as to why Governments across the world seek to censor the internet. Again, apart from its beneficial role, Internet is open to misuse as well, which gives the State a justification to regulate online content in the interests of the public at large. Several cyber-crimes, defamation, invasion of privacy, incitement of offences, racist remarks, stalking, abuse, hacking, harassment and many more can be easily committed through social media and once such objectionable content is uploaded, it becomes viral and consequently, very difficult to contain. Hence, the importance of the State regulating social media also cannot be denied. As long as the interests of people, either individually or collectively are taken care of, there can be no objection to government regulation but the problem arises when, in the name of regulation, it starts censoring i.e. encroaching upon the civil rights of the people viz. freedom of speech and expression etc. Although there are safeguards in this regard, every State tends to surpass them in some way though its magnitude may vary from State to State. China is the leader in Internet censorship. It has an elaborate mechanism in place to effect censorship known as “Great Firewall of China” and officially as “Golden Shield Project”. Blocking web- pages with objectionable content is the regular mode of internet censorship.<sup>xxiv</sup>

In India, the first step towards regulating and censoring online content was done way back in 2011, where the Indian Government asked the internet companies like Google, Facebook, Microsoft, etc. to create a framework to pre-screen the data before it goes up on the website.

This step was instructed to prevent uploading of offensive materials on social media platforms and not to censor freedom of speech and expression online.<sup>xxv</sup>

Further, the Supreme Court of India, in *Secretary, Ministry of Information and Broadcasting, Government of India and Ors. Vs. Cricket Association of Bengal and Ors.*<sup>xxvi</sup> held that “for ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an aware citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly- whether the monopoly is of the State or any other individual, group or organization.”

## CONCLUSION

Social Media as powerful tool to exercise one’s right to freedom of speech and expression, but has also been increasingly used for illegal acts. This has led to make the Government, just like films and television, to censor social media. While censoring social media content, the possibility of violating civil rights cannot be avoided. Thus, the proper regulation of the social media which does not violates the fundamental rights guaranteed under the Constitution of India is desirable. From the analysis of the IT laws of India, unprecedented power has been given to the Government to control the cyberspace. However, even then the agencies are not able to check the misuse of social media.

To achieve this balance, the Parliament of India has notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The Act provides for the regulation of electronic transactions and cybercrime. The 2021 Rules replace the Information Technology (Intermediaries Guidelines) Rules, 2011.

Some of the important features covered in the Rules are as follows:

- Due diligence by Intermediaries
- Identification of Significant Social Media Intermediaries
- Mandatory identification of first originator of a message for intermediaries which provide messaging as a primary service

- Code of Ethics for Digital Media Publishers
- Grievance Redressal Mechanism

Thus, the regulation of social media is desirable, rather than its censorship. However, the regulation should be in such a way which maintains the rights of users and also protects that of the victims simultaneously.

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