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Right to Free Speech in the Internet Era: Avoiding Chilling Effect in India

by
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All over the world people are communicating by doing various things such as indulging in arguments, debating, gossiping, chatting, making movies, communicating through cell phones, internet, teaching and learning and advertising etc. All such communications which are without interference from other persons or agencies may be characterized as free speech. The principle of "freedom of speech" is understood as "the freedom of every human expression intended for public communication. This signifies that speech, even speech that causes some measure of harm to the public, is entitled to a special degree of immunity from government restraint"¹.

I. FREEDOM OF SPEECH: A HUMAN RIGHT

Human rights are the "rights that an individual has, or should have, in society"². International human rights law is combination of all international rules, practices, procedures, and institutions meant to promote respect for human rights all over the world in each of the countries. This body of law can be effective only when every nation of the world must value the human rights of its citizens and must resist and take action whenever there is breach of any human right either a private person or by a State. It is obvious to think that the right to freedom of speech that is applicable to all other form of communication must also apply to online communications. On the contrary, however, restrictions on Internet, in order to curb freedom of speech, are rampant worldwide under all form of government. Many countries have taken several steps to censor and control the contents on Internet, which violates the free speech guarantees enshrined in many democratic constitution as well as international law".



Even though no existing international treaties protect human rights specifically in the context of the Internet, there are many international agreements and conventions dealing with human rights in general. Under such international instruments all governments have a duty to ensure the compliance of human rights standards. The United Nations adopted the Universal Declaration of Human Rights in 1948. "The Declaration came to be a symbol of what was meant by 'human rights' in the international community, reinforcing the notion that all governments have a duty to ensure the enjoyment of the rights the Declaration proclaims"³

II. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Motivation of the Universal Declaration of Human Rights and nearly two decades of negotiations resulted in ICCPR that was agreed upon in 1966. ICCPR became part of International Law in 1976 after being ratified by the thirty-five countries.⁴

The ICCPR mandates all ratifying countries to accept and approve variety of human rights. It stress that human beings should enjoy civil and political rights including freedom of thought⁵, freedom of opinion⁶, and expression⁷. The ICCPR calls for its signatories to adopt laws that ensure protection of rights recognised in the convention and in case of violation of any such rights effective redress should be provided to the

citizen. India acceded to the ICCPR on 10 April 1979. The protection mechanism offered by ICCPR works by obliging the signatories to refrain from interfering in protected personal liberty. Signatories are required to adopt provisions as law so that ICCPR protected rights are given effect and may provide meaningful protection to their citizens when these rights are in peril.

"If liberty means anything at all, it means the right to tell people what they do not want to hear"⁸. Internet is a medium that enables us to indulge in free expression and speech to people throughout the globe. However, the fear, that free expression and speech might be compromised over this modern and revolutionary medium of communication cannot be ruled out. Although the ICCPR, when enacted, had no clues about human rights issues of Internet users; it can still be used by interpreting the provisions to cover



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the protection of freedom of speech and expression pertaining to Internet users.

III. PROTECTION OF FREEDOM OF SPEECH AND EXPRESSION UNDER ICCPR

Article 19 and Article 20 of the ICCPR both protect individual freedom of right to hold opinions and a right to freedom of expression without interference⁹. These rights have been made subject to restriction that the interest of other individuals, or the community as a whole, is implicated¹⁰.

The Human Rights Committee (HRC) is the principal organ that ensures implementation of the ICCPR. This committee consists of elected experts, by the parties to ICCPR. In case of violation of Human Rights by a signatory, the HRC requires the State to ensure a remedy so that victims may be redressed within a fixed timeframe.

In *Grille Motta v. Uruguay*¹¹, the government of Uruguay asserted and also interrogated Motta an account of allegedly holding an important position in the Communist Party. This illustrates a situation where an attempt was made by a government to restrict rights of an individual under Article 19(3) of the ICCPR. The HRC passed the ruling that government of Uruguay is not justified in its action under Article 19(3) if it fails to produce sound evidence regarding the nature of the political activity in which Motta was allegedly involved. HRC finally ruled that legitimate restriction of freedom of speech and expression under Article 19(3) is feasible in a situation where it must be clear that speech or activity in some way extended to political view that would be a threat to the government and public order¹².

The *Grille Motta* holding by HRC is of importance in establishing limits for government infringement on freedom of speech and expression on the Internet as well¹³. It is evident now that for any government, which is trying to place restrictions on Internet based contents, sole dependence on Article 19(3) without explaining the scope and meaning of the alleged attempt to over through a government and the solid factual basis of the alleged offences. Thus, governments are under duty to provide pointed and specific information on how the alleged activities pose a direct and harmful



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threat to political system; simply showing that an individual communicated views contrary to that of the government is not enough. Limitations extend to forms of

propaganda resulting in acts of aggression and advocacy of national, racial or religious hatred or discrimination¹⁴.

Yet another very significant ruling by HRC in *J.R.T. and W.G. Party v. Canada*¹⁵, demonstrates the true scope and content of Article 20 of the ICCPR. Article 20 provides an exception to the rights guaranteed by Articles 19(1) and (2) whereby governments can limit the rights of individuals under specific situations. In *J.R.T. and W.G. Party case* the telephone service of J.R.T. and W.G. party was cut-off by the government under the Canadian Human Rights Act. The allegation was that Party, an unincorporated political party under the leadership of Mr. T., used their phone to spread hate messages that warned of "dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and collapse of world values and principles"¹⁶. The J.R.T. and W.G. Party in defence claimed that they are being victimized by the Canadian authorities in violation of Articles 19(1) and (2) of the ICCPR and it is their right to hold and maintain an opinion. The Canadian government contended that its action is well within the permitted limits of Article 20(2) of the ICCPR. The HRC held that the opinion "which Mr. T seeks to disseminate through the telephonic system, clearly constitute the advocacy of racial or religious hatred, which Canada has an obligation under Article 20(2) of the Covenant to prohibit"¹⁷.

If we extend the ruling of *J.R.T. and W.G. Party* to Internet communications, it becomes aptly clear that in order to invoke Article 20 properly countries must have in place rules, regulations and laws in advance to determine, what is appropriate Internet content and which do not impermissibly restrict free expression¹⁸. Governments are likely to succeed in defending against a claim of abuse of limitation on freedom of speech and expression based on a domestic law, in case respective regulations and guidelines are already in place.

International law and the Indian law relating to freedom of speech and expression have many parallels. In absence of an International law that deals with the Internet, governments have no other option but to use

existing domestic law in conjunction with international laws, such as the ICCPR, which protects freedom of speech and expression. States try to put into place domestic law and policies in accordance with their respective treaty obligations. Hence, one can discover in most of the countries a legal system providing legal protection to freedom of speech and expression as mandated by international law. It is common to accord the status of fundamental constitutional right to freedom of speech in many of the states having written Constitution.

IV. THE INTERNET

The internet has grown worldwide and is growing faster than ever each day. This spurt in growth has resulted in increasing instances of speech and expression by people over the internet. Different states of the world have different freedom of speech laws, these laws intersect during use of internet for communication purposes. The internet "grew at an explosive rate due to the creation of the World Wide Web, which designers intended to be a universal mechanism that could function on any computer."¹⁹ With the public availability of World Wide Web internet use expanded greatly. While it offers opportunities which are unique and never existed earlier, it also poses new challenges. Internet is unique in comparison to other media as often the distinction between speaker and listener is not very distinct during most of the

communication over internet. The constitutional protection accorded to free speech and expression in most of the democratic states modification is required in order to ensure protection of free speech rights of the netizens. "It seems unreasonable, however, to expect every website to comply with the speech laws of each country of the world"²⁰.

The Internet is having global reach and therefore internationally the use of Internet has given rise to problems relating to conflict of laws. Since information on the internet is accessible to every nation, it gives rise to a situation where every nation wants to regulate it. Determination of the issue of jurisdiction over a particular matter can have a significant impact on the outcome of an Internet dispute. For instance, there could be a possibility that nations do not agree on one 'standard' level of free speech; therefore a right protected by United States may be subject to criminal liabilities in certain states of the world. Those doing business transaction over the Internet will always remain tentative and can never be certain about their exposure to legal risk even if they comply with all the conditions put forth



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by domestic laws. "If absolute freedom of speech existed everywhere in the world, problems in regulating speech over the Internet would not exist."²¹ Unfortunately this is not the case. Numerous constitutional implications are bound to emerge with the rapid growth of the Internet. Some of them we may visualise immediately such as right to free speech, right to privacy, right to seek information, protection of various property rights etc. These rights are being debated and many more such debatable legal issues will undoubtedly come up with the continued expansion of the Internet.

V. CONSTITUTIONAL SAFEGUARDS PROTECTING FREEDOM OF SPEECH OVER INTERNET

The Preamble of the Constitution of India itself speaks about 'liberty of thought, expression, belief, faith and worship'²². It is significant because the preamble of the Constitution of India has been considered not only the part but basic structure of the Constitution²³. It is also a key to open the minds of the framers of the Constitution, and shows the general purpose for which Constitutional provisions were made²⁴. The Constitution of India guarantees the right to the freedom of speech and expression.²⁵ The Constitution uses the term 'expression' which has very wide connotation. Thus, it would include both oral as well as written expressions of words; expressions made via various forms of art e.g. sketch, painting, sculpture, acting, singing, dancing, and other modes capable of making communication. "All these varieties of expressions brought into existence and circulated with the help of modern technology, such as telephone, fax, telegraph, radio, television, printing press, motion pictures, tape-recorder, Internet and other things" would be protected as fundamental right"²⁶. Indeed, we are living today in an age of communication technology revolution which has enabled numerous modes of communication dissemination of speech and expression. Fundamental constitutional right to freedom of speech and expression, guaranteed in various constitutions of the world, extends to the internet medium as well. Hence every citizen has a constitutional freedom not only to acquire but also to share information using various means, including Internet and related technology, subject only to reasonable restrictions.

Freedom of speech is a fundamental right in India, though guaranteed in the constitution, is not an absolute right in India. Unlike the Constitution

of the United States, the words used in India's Constitution clearly spell out limitations on free speech. The freedom of speech has been guaranteed under Article 19(1)(a) of the constitution. Laws that are in accordance with Article 19(2), however are permitted by the constitution of India, even if they restrict free speech, as there is presumption of constitutional validity. The freedom of speech thus guaranteed can be subject to state restrictions which are reasonable. The legislature's judgement about reasonableness of a limitation on freedom of speech, however, is subject to judicial scrutiny.

In *Sakal Papers (P) Ltd. v. Union of India*²⁷, the Supreme Court of India held that the Constitutional scheme adapted by India is such that it does not allow the State to curb freedom of speech in order to uphold the interest of general public. The Court further explained, the scheme of Article 19 is to list various freedoms one by one and then to spell out the degree of restrictions to which such freedoms may be subjected. "The State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom"²⁸.

The Supreme Court of India has clarified the meaning of phrase "reasonable restrictions" in several pronouncements. In *Chintaman Rao v. State of M.P.*²⁹, the Court propounded that "reasonable restrictions" implies that the restraint imposed on a citizen in enjoyment of the right "should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public".³⁰ Further in *State of Madras v. V.G. Row*³¹ held-

"the test of reasonableness, where ever 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. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated

by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable"³².

VI. THE CHILLING EFFECT

With rapid growth of information technology and use of internet it is certain that use of Internet will have end number of constitutional implications. Internet without an iota of doubt can be seen as a technological advancement that promotes freedom of speech and expression through the world. "Internet speech has two important characteristics: it *routes around* traditional mass media and it *gloms onto* it. To route around means to avoid the gatekeepers and bottlenecks of the mass media, to do an

end run around them."³³

*Shreya Singhal v. Union of India*³⁴ is a recent case decided by the supreme court of India. In this judgment of the Supreme Court, very significant and extensive questions pertaining to the fundamental right of free speech and expression guaranteed by the constitution of India has been dealt with. The major concern in the matter was section 66A of the Information Technology Act (I.T. Act) of 2000. It is noteworthy here that the section was added by an amendment Act.³⁵ Section 66A of the Information Technology Act provided for punishment for sending offensive messages through communication service, etc. The reason for introduction of section 66A included the presumption that "use of computer and Internet has given rise to new forms of crimes like publishing sexually explicit material in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, phishing, identity theft and offensive messages through communication services".³⁶ The contention of the petitioner was the presumption that computer and Internet has given rise to new forms of crimes is incorrect and there is no need of section 66A of the I.T. Act. Section 66 to 67C of the I.T. Act and various sections of the Indian penal code, according to petitioner, are good enough to deal with all such crimes.



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Section 66(A) of the I.T. Act criminalises the sending of offensive messages through a computer or other communication devices.³⁷ It is noticeable that over the past few years, incidents involving comments, sharing of information, or thoughts expressed by an individual to a larger audience on the Internet was attracting criminal penalties under section 66(A). This led to discussion and debate throughout the country on various forums on the ambit of the Section and its applicability to such actions.

The petitioner challenged the constitutional validity of section 66A on various counts alleging that it infringes the fundamental right to freedom of speech and expression but is not saved by any of the eight subjects covered in article 19(2).³⁸ The court also found out that section 66A of the I.T. Act does not fall within the eight subjects mentioned in article 19(2) as possible exceptions. Furthermore, the chances of section 66A being applied for achieving targets outside those subject-matters is quite clear. The court therefore held that section 66A is unconstitutional. However, Rohinton Fali Nariman J. made it clear that there exists "an intelligible differentia between speech on the Internet and other mediums of communication for which separate offences can certainly be created by legislation."³⁹ The court pointed out that the peace of information that may be grossly offensive or which causes annoyance or inconvenience, are all terms which are undefined and are capable of taking into their ambit a very big chunk of protected and innocent speech as well. "In point of fact section 66A is cast so widely that virtually any opinion on any subject could be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality the chilling effect on free speech would be total."⁴⁰ The Supreme Court struck down section 66A of the I.T. Act, 2000 in its entirety being violative of Article 19(1)(a) of the Constitution and not saved under any provision of Article 19(2) of the Constitution.

VII. CONCLUSION

Freedom of speech and expression is a well recognised human right not only at the international level but also at the national level in many countries including India. The freedom of speech and expression is guaranteed irrespective of the type of media used for the communication. It is clear therefore that the protection guaranteed under international human rights instruments, Constitution and legislations pertaining to free speech and expression extend to the medium of Internet as well. The historic judgement delivered by the supreme court of India in *Shreya Singhal* has proved that any law that attempts to curb freedom of speech and expression and thereby cause chilling effect must conform to the requirements of Article 19 of the Constitution. The judgment has reinforced the freedom of speech over the Internet which is truly the medium of communication of not only information but also ideas and expressions in numerous ways. Meaningless to state that in the quest to build a better society, we need to encourage transparency, free flow of ideas, speech and communication and the verdict of *Shreya Singhal* will go a long way to ensure the same.

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¹ Frederick Schauer, Free Speech: A Philosophical Enquiry 7-8 (1982).

² Antoine L. Collins, Caging The Bird Does Not Cage The Song: How The International Covenant on Civil And Political Rights Fails To Protect Free Expression Over The Internet, 21 J. Marshall J. Computer & Info. L. 371.

³ Manfred Nowak, U.N. Covenant on Civil and Political Rights CCPR Commentary, XVII at 2 (N.P. Engel 1993).

⁴ *Id.*

⁵ United Nations, Intl. Covenant on Civil & Political Rights, 999 U.N.T.S. 171. It entered into force on Mar. 26, 1976.

⁶ *Id.*

⁷ *Id.*

⁸ George Orwell, *The Freedom of the Press*, N.Y. Times Mag., Oct. 08, 1972.

⁹ *Supra* note 5, at Art. 19.

¹⁰ Dominic McGoldrick, *The Human Rights Committee Its Role in the Development of the International Covenant on Civil and Political Rights* 460 (Clarendon Press, 1996).

¹¹ U. of Minn. Human Rights Lib., *Alberto Grille Motta v. Uruguay*, http://www1.umn.edu/humanrts/undocs/html/11_1977.htm (last updated, Sept. 8, 2015).

¹² *Id.*

¹³ Louis B. Sohn, *The New International Law: Protection of The Rights of Individuals Rather Than States*, 32 Am. U.L. Rev. 1, 20 (1982).

¹⁴ Intl. Bill of Rights - The Covenant on Civil and Political Rights 227 (Louis Henkin ed., New York Columbia University Press 1981).

¹⁵ U. of Minn. Human Rights Lib., *J.R.T. & W.G. Party v. Canada*, <http://www1.umn.edu/humanrts/undocs/html/104-1981.htm> (last updated, Sept. 8, 2015).

¹⁶ *Id.* at Para 2.1.

¹⁷ *Id.* at Para 8.

¹⁸ Scott J. Catlin, *A Proposal For Regulatinq Hate Speech in the United States: Balancing Riaghts Under the*

International Covenant on Civil and Political Rights, 69 Notre Dame L. Rev. 771, 772 (1994).

¹⁹ See *Yahoo!, Inc. v. La Ligue Contre Le Racisme*, 169 F Supp 2d 1181 at 1183 (2001). (The Internet, as a decentralised networking system, links computers and computer networks around the world, while the World Wide Web, as a publishing forum, contains millions of websites with varying content).

²⁰ See Margaret Khayat Bratt & Norbert F. Kugele, *Who's In Charge?*, 80 Mich. B.J. 42, 44 (2001).

²¹ U.S. Const. Amend.-I, also see *Yahoo!, Inc. v. La Ligue Contre Le Racisme*, 169 F Supp 2d 1181 at 1189 (2001).

²² CONST. OF INDIA, Preamble.

²³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461.

²⁴ *Berubari Union (1), In re*, AIR 1960 SC 845.

²⁵ *Supra* note 22, Article 19(1)(a): All citizens shall have the right to freedom of speech and expression.

²⁶ U.R. Rai, *fundamental rights and their enforcement*, 35 (2011).

²⁷ AIR 1962 SC 305.

²⁸ *Id.*

²⁹ AIR 1951 SC 118.

³⁰ *Id.*

³¹ AIR 1952 SC 196.

³² *Id.*

³³ Jack M Bakkin, *How Rights Change: Freedom of Speech in the Digital Era*, 26 Sydney L. Rev. 5 (2004).

³⁴ (2015) 5 SCC 1 : AIR 2015 SC 1523.

³⁵ The Information Technology (Amendment) Act, 2008, effective from 27/10/2009.

³⁶ Para 3 of objects and reasons appended to the Information Technology (Amendment) Act, 2008.

³⁷ Under sec. 66 (A) of the I.T. Act, 2000, any person who by means of a computer or communication device sends any information that is:

i) grossly offensive;

ii) false and meant for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will;

iii) meant to deceive or mislead the recipient about the origin of such messages, etc. shall be punishable with imprisonment up to three years and with fine.

³⁸ CONST. OF INDIA, art. 19(2), reasonable restrictions on the exercise of the right to freedom of speech and expression may be imposed by law in the interests of (i) sovereignty and integrity of India, (ii) security of the State, (iii) friendly relations with Foreign States, (iv) public order, (v) decency or morality, or in relation to (vi) contempt of court, (vii) defamation or (viii) incitement to an offence.

³⁹ *Supra* note 34.

⁴⁰ *Id.*

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